

The Carbon Claims Pincer Movement

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In response to litigation about carbon neutrality claims, many corporations and asset managers have been inclined to go silent, that is, to engage in "greenhushing" by not publicly mentioning any carbon reduction goals. Although greenhushing may seem the course of least resistance, it is increasingly under fire by regulators, potentially causing whiplash.

Bills Mandating Disclosure

A trio of California bills awaiting the Governor's signature would compel various disclosures from entities doing business in the state.

As we have written before, SB 253 and SB 261 will mandate disclosure of carbon footprint and climate risk information from covered entities doing business in California.

A third new law, AB 1305 covers **“net zero,” “carbon neutral” or similar claims** (regardless of whether they rely on offsets). Those that rely on offsets will have an additional burden of disclosing how their “carbon neutral,” “net zero emission,” or other similar claim was determined to be

accurate or actually accomplished, how interim progress toward that goal is being measured, and whether there is independent third-party verification of the company data and claims listed. Sellers of offsets will also have to disclose their accounting methodologies.

While these laws will affect entities doing business in California, other requirements may sweep more broadly.

EU Disclosure Requirements

In a [recent interview with Bloomberg](#), Europe's markets watchdog said that fund managers are as likely to be penalized for deliberately understating their ESG efforts as they are for overstating them. As the author surmises, "[i]n other words, 'greenhushing,' as the phenomenon has come to be known, can be as bad as 'greenwashing.'"

A new EU law adopted at the end of 2022, called the Corporate Sustainability Reporting Directive (CSRD), will require comprehensive, detailed disclosures covering a broad spectrum of sustainability topics. It will require disclosures not only about how ESG issues impact a company's business but also about the business's impact on a range of sustainability matters — referred to as "double materiality." The CSRD also requires third-party audits for all reported sustainability information. This law will initially cover companies incorporated in the EU but broaden to cover large entities doing business in the EU as of 2028. Thus, it could become a de facto global disclosure standard.

Implications

Even if one wants to engage in greenhushing, a variety of requirements increasingly compel disclosure. One can expect that activists will scrutinize

disclosures for inconsistencies with prior public statements. If any are found, litigation will ensue.

Backsliding on carbon emissions, which might be possible with expanding businesses, will also be scrutinized and compared with prior, public commitments to carbon neutrality or net zero.

Any scrutiny that results in downgrading existing carbon offsets from "high quality" to "lower quality" will also be examined in relation to prior carbon claims that a company has made.

In sum, the litigation risk around carbon disclosure is increasing no matter what you say (or not).