MORRISON FOERSTER

Staking a Climate Claim

By Bill Tarantino

Companies are under more pressure than ever from investors, customers, partners, and the public to reduce their carbon footprint. At the same time, the consequences for making flimsy, vague, or unjustified claims have never been higher.

Unsupported claims can give rise to allegations of greenwashing or climate-washing—disclosures or commitments that give a misleading or false impression of the company's commitment to sustainability and the environment. Because those claims can result in significant litigation, reputational damage, and regulatory risk, companies need to apply a heightened level of rigor to what they measure, how they measure it, and how they report it.

Net zero and carbon neutral

Among the most popular sustainability claims today are carbon neutral and net zero carbon. Those terms are sometimes mistakenly treated interchangeably, but they are fundamentally different. Carbon neutral refers to a company that balances its CO2 emissions with CO2 removal. The term emphasizes purchasing enough offsets or credits on voluntary carbon markets to balance out the emissions that a company or a product line produces.

So, for example, if a company were to emit 100 metric tons of CO2 per year, it would have to purchase that amount in offsets to make a carbon-neutral claim. While companies can achieve carbon neutrality quickly, it can also lead to allegations of greenwashing, especially if the offsets are considered weak and the company has not taken any significant steps to reduce its emissions.

Net zero is a more ambitious claim. It assesses a company's CO2 emissions and the energy it uses in the form of electricity, heat, and cooling—known as Scope 1 and Scope 2 emissions, respectively—in the same way as carbon neutrality. But net zero also requires companies to calculate the emissions it bears responsibility for outside its walls, including in its supply chain and how customers use its products, known as Scope 3 emissions.

Another feature of net zero is its emphasis on reducing emissions rather than simply buying offsets. Under limited circumstances, companies may purchase credits to offset residual emissions, but only after they have taken steps to reduce their emissions.

Guidance and frameworks

Over the last two decades, a number of standard-setting organizations has helped bring about industry benchmarks, frameworks, and standards around climate-related claims.

The Greenhouse Gas Protocol, for example, is considered the dominant standard for measuring carbon emissions and the benefits of climate change mitigation projects. Crucially, it identifies the 15 categories of Scope 3 emissions to calculate, which include “business travel,” “employee commuting,” “upstream transportation and distribution,” and “customer use of products.” When primary data is unavailable for Scope 3 emissions, it also provides examples of acceptable secondary data.

The Science Based Targets initiative (SBTi), established to help meet the Paris Agreement’s goals, is another important framework. Its stated objective is to “provide a standardized and robust approach for corporates to set net zero targets that are aligned with climate science.” Aimed at companies with over 500 employees, it gives detailed guidance on setting short-term and long-term targets and publishes tailored guidance for several sectors.

The Sustainability Accounting Standards Board (SASB) is the main entity that establishes reporting standards. The SASB was modeled after the Financial Accounting Standards Board (FASB), which the Securities and Exchange Commission designated to set Generally Accepted Accounting Principles for public companies in the United States. It sets standards for measuring and reporting a company’s carbon footprint and other sustainability issues and societal factors likely to affect the financial condition or operating performance within a specific sector. In September 2021, the SASB and four other leading framework and standard-setting organizations announced an agreement to work on a comprehensive global baseline of high-quality sustainability disclosure standards to meet investors’ information needs.

Common principles

Every company is on a different journey to reach its climate goals. And there are plenty of paths to take. But a few principles should guide all companies.

1. *Involve lawyers early in the process.* Before companies make a claim involving sustainability, it’s helpful to think about what evidence would be needed to show a judge, jury, or arbitrator to back up that claim. Because lawyers are trained at judging evidence—whether it’s an expert opinion or a body of scientific literature—they can help evaluate the strength of claims. In today’s environment, it’s easy to lose credibility. Relying on a Google search or a manufacturer’s representations likely won’t cut it.

2. *Have clear goals with responsible timelines.* The pressure on companies to address their roles in the climate crisis is real. But making overly aggressive claims can be irresponsible and expose a company to unnecessary risks. It will take considerable time to measure Scope 3 emissions and identify high-quality credits to offset any residual emissions. Take that into account when setting timelines.

3. *Communicate progress on a discrete basis.* Best practices require companies to report company-wide emissions and progress toward targets on a regular basis. These disclosures need to follow the core tenets of any sustainability claim. They are qualification—making it limited and specific—and substantiation—ensuring each claim is supported by competent and reliable evidence.

© 2022 Morrison & Foerster LLP