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So you're about to miss your ESG goal — here's what to do now

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Happy New Year, but let's talk about those ESG goals.

Going into 2024, the 2025 and 2030 deadlines for voluntarily adopted climate and other ESG goals are getting ever closer, and for some companies, perhaps uncomfortably close. A 2022 Accenture report (https://accntu.re/47mMDQc) found that nearly all (93%) of the world's largest companies that had then committed to net zero by 2030 would fail to achieve their goals if they did not at least double the pace of emissions reductions over the remaining time.

Now a year later and a year closer to 2025 and 2030 deadlines, hope is not an acceptable strategy. And for companies with 2025 ESG goals, the time for understanding the pathway to success has arguably passed, and the time for communicating clearly on whether, and if so how, the commitment will be revisited is nigh.

Mandatory ESG disclosure requirements are on the rise, and many existing and proposed requirements could require disclosure regarding companies' incremental progress towards their voluntarily established goals.

Here we outline our five practical recommendations for navigating ESG goal realities.

First, increasingly, disclosure regimes support transparency on pathway progress. Assess your exposure to those rules. Mandatory ESG disclosure requirements are on the rise, and many existing and proposed requirements could require disclosure regarding companies' incremental progress towards their voluntarily established goals. For example, California's AB 1305, which may be triggered for 2024, requires certain companies to publicly disclose their interim progress towards net zero, carbon neutrality or other greenhouse gas emission reduction goals.

The EU's Corporate Sustainability Reporting Directive ("CSRD") reporting requirements, which can be extraterritorial in nature and will require action from a significant number of US-based corporations, also mandate certain disclosures regarding voluntary goals. In addition, the US Securities and Exchange Commission's ("SEC") final climate disclosure regulation may require companies to provide information on these voluntary climate goals.

For companies staring down their 2025 and even 2030 goals, understanding how much existing disclosures pertain to progress towards these goals is critical to understanding how to navigate future disclosures regarding whether, and if so how, the company will seek to meet its commitment.

Second, be realistic about whether your goal may be "material" under the federal securities laws. Voluntarily adopted ESG goals may be viewed as immaterial under federal securities laws — and these goals are generally subject to the safe harbor for forward-looking statements, as well — but caution is key here. The SEC is keenly focused on how companies are determining materiality in ESG contexts, including on both a qualitative and a quantitative basis. For that reason, a conservative approach to materiality when assessing ESG goals is likely best.

Fundamental questions to ask include: Are your investors asking about your progress towards your goal? Do your executives regularly speak publicly about your goal to investors and market participants? Have you included your commitment in your securities filings, including in your annual or quarterly reporting and/or in investor quarterly presentations? Is the goal's achievement expected to have a material impact on financials? These considerations may factor into whether commitments may (in hindsight) be treated as material.

Third, assess what has been communicated internally and when. Be mindful of what has been communicated internally about whether a company's commitment is likely to be met, and evaluate whether updates are appropriate in light of public disclosures, including voluntary disclosures and disclosures responsive to mandatory requirements.

If the board and/or senior leadership has already been informed that a goal is unlikely to be met, looping in your securities counsel sooner rather than later is recommended. During a quiet period, consider whether to close the trading window for individuals who know about the status of achieving the goal, as well as how to

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address any investor questions regarding progress towards the goal.

Fourth, consider all your communications regarding the goal. As discussed, when companies have adopted an ESG goal, often it has been communicated widely, including through platforms to which the legal department may not have daily visibility. Understanding the full range of ways in which the goal has been disseminated is key to assessing how to course correct if the goal may or will not be met on time. Once all communications regarding the goal have been identified, a pathway for addressing the challenges with meeting the goal or appropriately pivoting can be addressed.

Fifth, use "strategic transparency" to course correct on your goal. "Strategic transparency" is the concept of using corporate disclosure as an opportunity to show the right mix of vulnerability and optimism to communicate a core difficult truth about the corporation's journey.

In the context of a missed or potentially missed ESG goal, strategic transparency may include any or all of the following:

- **Disclosure regarding the complexity or difficulty of achieving the goal**. This language highlights the degree to which a goal has been challenging, and articulates the complexities associated with achieving it. These complexities might be operational or strategic issues within the scope of the company's control, but not necessarily within its eyesight when it established the goal, such as newly purchased entities or strategic changes to the company's value chain. Other difficulties might be outside of the company's control, as discussed below. Either way, being clear about the challenges associated with achieving the goal while still taking ownership of the commitment is a key principle of strategic transparency.
- **Details regarding what has changed since the goal was established**. Understanding and communicating what has changed since the goal was established is a key element of strategic transparency. Elements outside of the company's control — including the pace of technological change, emerging regulatory requirements, unforeseeable geopolitical conflicts and risks and other market developments — are worth noting if they relate to why the company may miss its goal.
- **Honesty regarding methodological nuances**. For many companies with established climate-related commitments, the reality of meeting those goals will involve adopting mechanisms or changing methodologies in a way that may be viewed by some as outsourcing their climate impact or climate risks. For example, a company may have established a net zero goal that now will only be met for its operational emissions and not for its Scope 3 emissions, or a carbon neutrality goal that now can only be met through significant purchases of carbon offsets. Being clear about any significant shift in methodology and whether the company plans to continue to refine its approach in the future beyond its original deadline is critical.
- **Risk disclosure regarding potentially not, or not, achieving the goal**. Companies' ESG-related risk disclosure has significantly expanded over the past few years, with companies increasingly identifying a number of ESG risks in their annual and quarterly reporting. Visiting and revisiting risk disclosure as a company's understanding of its ability to meet its commitments evolves is key. Risk disclosure can act as a form of insurance or can provide regulators with a pathway for proving a failure to appropriately inform investors. Which role it plays is ultimately up to the company's internal and external counsel.

Many ESG goals that were established with optimism and passion years ago should be revisited with realism and practicality in light of changed circumstances and the passage of time. Companies that have appropriately communicated the realities and challenges associated with their goals are more likely to steer clear of these choppy waters.

About the authors

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