FTC Examines Carbon Offset & Renewable Energy Certificate Markets in Conjunction with Green Guides Review

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INTRODUCTION

On January 8, 2008, the Federal Trade Commission ("FTC") held a workshop, "Eco in the Market," to examine the markets for carbon offsets and renewable energy certificates ("RECs"). This workshop is one in a series of events to assist the FTC in its review of the "Guides for the Use of Environmental Marketing Claims," or "Green Guides."[1] The Green Guides were promulgated in 1992 and most recently revised in 1998. They are currently in an accelerated review process as a result of the recent and rapid rise of carbon offset and REC markets and associated green marketing.

With increasing attention to the issue of global warming, individuals and businesses increasingly are looking for ways to reduce emissions of greenhouse gases ("GHGs") from their activities. Businesses also increasingly make advertising and marketing claims related to their GHG emissions or their products' contributions to GHG emissions, whether to improve their corporate image or to market their products to environmentally conscious consumers. One way to achieve a net reduction in GHG emissions is to purchase carbon offsets in order to cause a reduction in emissions elsewhere commensurate with the purchaser's own emissions. Offsets involve investing in an activity to reduce GHG emissions by an amount equal to the amount sought to be offset. RECs involve subsidizing electricity production from renewable energy sources, thereby reducing the GHG emissions associated with the purchaser's consumption of electricity. A REC represents proof that one megawatt-hour of electricity was generated from an eligible renewable energy source.

Participation in the existing, substantial markets for carbon offsets and RECs is largely voluntary in the United States, and these markets look to grow exponentially in coming years, especially with anticipated regulatory requirements. FTC Chairwoman Deborah Platt Majoras noted that the US market for carbon offsets alone could be as high as $100 million. She also noted that the number of offsets sold by online retailers grew by more than 42% from 2005 to 2006 and continued to grow at a torrid pace in 2007. Panelists participating in the FTC workshop noted that the REC market is expected to quadruple

1 16 C.F.R. pt. 260. The FTC has also published a booklet to assist advertisers in complying with the Green Guides. FTC, Complying with the Environmental Marketing Guides, available at http://www.ftc.gov/bcp/conline/pubs/buspubs/greenguides.pdf.

in size. With such market growth and hopes of tangible gains in GHG emission reductions, workshop panelists repeatedly called for federal intervention to deal with possible threats to sound consumer decision-making.

James Kohm, the Associate Director of the Enforcement Division of the FTC's Bureau of Consumer Protection, stated that the FTC's revision of the Green Guides will look at the claims made by marketers, how consumers perceive those claims, whether the claims are truthful and substantiated, and the advice the FTC can provide to sellers and purchasers of carbon offsets and RECs to avoid making deceptive claims. The workshop on carbon offsets and RECs highlighted critical concerns for both marketers and consumers, and the FTC will incorporate those insights into its review of the Green Guides.

ISSUES ASSOCIATED WITH MARKETING CARBON OFFSET AND REC PRODUCTS

The workshop highlighted several issues related to marketing carbon offsets and RECs:

- Additionality. Additionality looks at whether the project underlying the offset or REC would have occurred in the absence of emissions mitigation considerations and was cited as a key problem with carbon offsets and RECs. For example, if a project to reduce emissions to create an offset saves money (such as by a business program to replace incandescent light bulbs with compact fluorescent bulbs), it would presumably occur without a payment for the offset. Likewise, if a State requires a project by law, it would have occurred within the firm's regular course of business and is thus not additional. Further, it was noted that RECs may not meet buyers' carbon reduction expectations because their purpose is to certify that electricity was generated from a renewable source, not that the electricity generation was additional.
- Double Counting. A related problem, double counting, was also a key concern. Double counting occurs when an offset or REC is claimed by more than one owner or in more than one transaction. Double counting is a serious problem for firms marketing emissions allowances. Indeed, Chairwoman Majoras noted that inadequate tracking and verification could lead even those sellers acting in good faith inadvertently to sell the same offset or REC more than once.
- Buyer Confusion and Uncertainty. Because carbon offsets and RECs are not yet commonly understood concepts, and because related terminology such as "carbon negative" lacks established meaning, buyers may have expectations that exceed what is actually being offered. Compounding this problem, it is difficult to standardize emissions metrics across projects because of each project's uniqueness. For example, calculating the carbon emissions benefit of preserving a forest, where trees capture carbon dioxide from the air to form plant matter, can be very complex. Similarly, what is "renewable" energy can be complex, as ethanol derived from corn may require substantial use of traditional fossil fuels (with carbon emissions) to create, such as through farm tractors, transportation, and manufacturing operations. Moreover, different methodologies may produce widely varying emissions estimates. The offsets industry will need to address this issue, for Chairwoman Majoras indicated that the FTC expected that an offset product should actually offset the amount of emissions claimed to avoid running afoul of Section 5 of the FTC Act.

  Furthermore, offset and REC sellers have more information than buyers about the provenance and accuracy of the offset or REC, and buyers likely would not be able to verify a particular offset or REC product's quality or accuracy even if presented with an opportunity to do so. Chairwoman Majoras stressed this difficulty, noting that many projects funded by the sale of RECs or carbon offsets occur in remote places; for example, planting trees in another country or subsidizing wind energy across the United States. She observed that buyers would not be able to confirm that their purchases funded particular projects, that the projects would not have occurred absent their purchases, or that the projects reduce emissions in the amounts claimed. She noted that this buyer uncertainty increases the potential for deception.

These same issues may arise when companies promote products, services, or themselves with emissions-related claims that are based on offset or REC purchases. Because these companies would have difficulty verifying the quality and accuracy of the offsets or RECs purchased, as discussed above, it will be interesting to see whether the FTC will impose a lesser substantiation standard when companies purchase offsets or RECs from third parties and rely on such purchases (and the representations of the sellers) for promotional claims.

Panelists emphasized efforts made by the EPA and nonprofit organizations to solve the challenges presented by carbon offset and REC products. These efforts include Carbon Offset Accounting, GHG emissions management programs, and product certification programs. In addition, emerging regulatory requirements to reduce GHG emissions through "cap-and-trade" programs will require regulated businesses to reduce their own emissions or acquire offsets for purposes of regulatory compliance, and those regulatory programs must themselves include protocols to address the quantification, additionality, and veracity of such offsets. In the meantime and despite these efforts, carbon claims from carbon product marketers continue to present challenges.

THE ROLE OF THE REVISED GREEN GUIDES

Hampton Newsome, counsel in the Division of Enforcement of the FTC's Bureau of Consumer Protection, led a discussion in which workshop panelists weighed in on the role the revised Green Guides should play in the carbon offset and REC markets. A common thread throughout the discussion was the need for standardization, although proposals for the scope of standardization varied. Suggestions included defining key terms such as "carbon neutral" and "reduction," establishing additionality rules, requiring information disclosures like those in food labeling, and endorsing a standard measurement for offset claims. Panelist also suggested that the FTC require certification of offsets and RECs. Some third-party organizations already offer certification programs and others , such as the Center for Resource Solutions' ("CRS") Green-e Climate program, which will certify GHG offsets, are expected to offer programs in the near future. Green-e Climate will complement CRS's currently available Green-e Energy program, which certifies renewable energy products. Other panelists stressed the need for precision, noting that industry, especially small firms, values notice and clarity because of the risks involved in carbon offset and REC projects.

Comments on carbon offsets and RECs closed on Friday, but the FTC will be accepting comments on green claims generally until February 11.

What does this mean for marketers seeking to promote their green efforts? The good news is that it appears from the workshop that the FTC is moving in the direction of providing greater clarity in this area and plans to do so sooner rather than later. For those who do not want to wait for the expected revised Green Guides, the current guides provide some advice that can be applied in this area. Based on the current Green Guides, it is wise to avoid general green or similar claims. Claims related to reduction in carbon or use of RECs should be specific, with clear and conspicuous disclaimers as needed to provide clarification, but not to contradict, any claim.

For more discussion of the consumer protection issues related to carbon offsets and similar products, see Randal Shaheen and Amy Ralph Mudge, Carbon Neutral: The New Green—Substantiation Issues for the Next Generation of Environmental Claims, The Antitrust Source, Dec. 2007, available at http://www.arnoldporter.com/public_document.cfm?id=9659&key=12J3.

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