Carbon Markets Update – Q2 2023

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Voluntary carbon markets present opportunity, but also create financial, regulatory, and litigation risks. Because the voluntary markets are often fragmented, suffer from a lack of transparency and, above all, are not subject to any statutory common standards, there is a lack of trust in the credits issued under these system, which also limits the tradability of the credits.

This quarterly newsletter aggregates the knowledge and experience of Gibson Dunn attorneys around the globe as we help our clients across all sectors navigate the ever-changing landscape of voluntary carbon markets.

United States

Washington State Cap and Trade Update

Washington State implemented its new carbon cap-and-trade market earlier this year for businesses that generate over 25,000 metric tons of carbon dioxide annually. Auctions happen quarterly, and the first two auctions have already raised over $850 million. Lawmakers budgeted around $2 billion in auction revenues over the first two years.

In the most recent May 31 auction, a metric ton of carbon dioxide sold for $56.01, nearly double that of California's or Quebec's most recent cap-and-trade prices ($30.33). This high price was enough to trigger one of the program's price-softening mechanisms called the Allowable Price Containment Reserve. As a result, additional carbon credits will be released by the state and sold on August 9 (in addition to the regular auction happening on August 30). Washington's Department of Ecology is also weighing whether to link its carbon market with California and Quebec to create a larger pool that will help stabilize prices. A formal decision on linking is expected later this summer.[1]

In the past few weeks, Washington State has also seen the nation's highest average gas prices at the pump. Some experts and some state lawmakers blame the new cap-and-trade law.[2]

Verra Update

One of the main goals of voluntary carbon credit certifiers is ensuring the integrity and environmental value of the carbon credits they issue. Verra is the global leader in carbon credit certifications. But Verra has come under a string of attacks in 2023.

In January, the Guardian published a scathing report on Verra's Reducing Emissions from Deforestation and Forest Degradation, the conservation and sustainable management of forests, and the enhancement of forest carbon stocks ("**REDD+**) credits. According to this study, more than 90% of rainforest REDD+ credits were worthless; little more than greenwashing. Pricing has since slumped for nature-based credit offsets.[3] Shortly thereafter, another report alleged that Verra's carbon

Michael Cannon, Matt Donnelly, Adam Lapidus, Jonathan Cockfield, Arthur Halliday, Natalie Harris, Yannis Ioannidis, Alexandra Jones, Mark Tomaier, Richie Vaughan, and Alwyn Chan also contributed to this update.

Susy Bullock

Susy Bullock ranked for **Global-wide Environmental, Social & Governance Risk.**

Brad Roach

Best Lawyers

Lawyer of the Year

2023

Energy Law

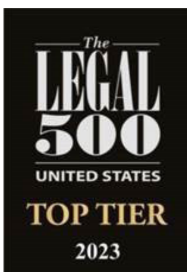
Singapore

Gibson, Dunn & Crutcher LLP

Gibson Dunn ranked for **Energy & Natural Resources: Oil & Gas – UK-wide.**

Gibson, Dunn & Crutcher LLP

Band 1 Energy & Natural Resources: **Singapore Project & Energy Indonesia**



Gibson Dunn ranked Top Tier and Abbey Hudson named Next Generation Lawyer for **Industry Focus – Environment – Litigation.**

offset credits linked to Chinese rice paddies were riddled with accounting loopholes and questionable integrity claims.[4]

Verra has since shut down use of the carbon accounting methodology used for those rice paddies,[5] initiated a review of its forest management methodologies, and admitted that REDD+ crediting is "complicated," while maintaining that its REDD+ projects are credible.[6]

In April, Verra made significant revisions to its REDD+ methodology.[7]

In May, a group of indigenous organizations published an open letter backing REDD+ projects and admonishing its critics for failing to include voices from the communities directly impacted by REDD+ projects.[8]

In June, the founding CEO of Verra, David Antonioli, voluntarily stepped down. Judith Simon is temporarily replacing him as interim CEO.[9]

Verra's current challenges are reminiscent of the struggles faced by the U.N.'s Clean Development Mechanism a decade ago. Whether these issues lead to institutional changes that are good for the voluntary carbon market or ultimately undermine the industry remains to be seen.

Potential US Federal Regulations and Guidance

FTC Green Guides

Every ten years, the Federal Trade Commission ("**FTC**") issues updated "Green Guides" – a document to help companies avoid making misleading environmental claims. Last December, the FTC requested comments on a number of topics, including whether the guide should cover net-zero and other carbon footprint claims that rely on offsets.[10] Commenters, including environmental NGOs and State Attorneys General, have chimed in, making suggestions such as requiring companies to discuss why their offsets demonstrate "additionality" (representations of emissions reductions that would not otherwise have happened) or even prohibiting companies from relying on offsets to claim neutrality at all.[11]

CFTC Enforcement Alert

Under the Whistleblower Program of the Commodity Futures Trading Commission (CFTC), individuals can become eligible for both financial awards and certain protections by identifying potential Commodity Exchange Act (CEA) violations connected to fraud or manipulation in the carbon markets.

On June 20, 2023, the CFTC's Whistleblower Office in the Division of Enforcement issued an alert notifying the public on how to identify and report potential CEA violations connected to fraud or manipulation in the carbon markets. Although voluntary carbon markets may support the transition to a low-carbon economy through the trading of carbon credits (also known as carbon offsets) bilaterally or on spot exchanges, the CFTC noted that – as with any market – there exists the potential for fraud and manipulation.

As described in the alert, the CFTC's Whistleblower Office will work with market participants that report information related to potential fraud in the carbon markets, including, but not limited to, manipulative and wash trading, "ghost" credits, double counting, fraudulent statements relating to material terms of the carbon credits, and potential

manipulation of tokenized carbon markets. Individuals who submit such information through the CFTC's Whistleblower Program may be eligible for certain confidentiality and anti-retaliation protections, as well as monetary awards if that information leads to the success of a CFTC enforcement action.[12]

CFTC Holds Second Voluntary Carbon Markets Convening on July 19; Announces Workstream for CFTC Guidance Addressing Voluntary Carbon Market Standards

The CFTC held its Second Voluntary Carbon Markets Convening at the CFTC's headquarters in Washington, D.C. on July 19. The convening served as the public launch of a CFTC workstream led by the agency's Climate Risk Unit aimed at drafting, for Commission consideration, agency guidance addressing standards in the voluntary carbon markets. In connection with those efforts, CFTC Chairman Rostin Behnam announced that he expects a public consultation to be forthcoming. CFTC Chairman Behnam also noted the CFTC's critical role in policing fraud and manipulation in the voluntary carbon markets, as well as the agency's "policy responsibility to promote product innovation, price discovery, and liquidity for high-quality carbon credits that are the underlying commodity for derivatives products that are listed on CFTC-registered exchanges."[13]

The convening also brought together various speakers and moderators over more than half a day to discuss a range of topics related to the voluntary carbon markets, including: views from government officials; private sector standards, initiatives and credit ratings; spot markets and marketplace; derivatives exchanges; and a discussion of certain market participants.[14]

California Climate Corporate Data Accountability Act (CCDA)

California is taking a second crack at passing a bill to mandate corporate emissions reporting, after a nearly identical bill failed in 2022.[16] Starting in 2026 (for 2025 emissions), the proposed bill would require companies with annual revenue of at least $1 billion and do business in California to report and verify their emissions. Covered companies would be required to publicly report their scope 1 emissions (direct emissions by the company), scope 2 emissions (indirect emissions from the energy the company buys), and scope 3 emissions (indirect emissions produced by customers using the company's products or by suppliers making products for the company).[17] Companies will have to get their disclosures verified by a third party – either the emissions registry or an approved auditor.

The bill would have far-reaching effects, including on how companies use voluntary carbon credits. Covered companies that use credits to support a carbon-neutral or similar claim across some or all of their businesses will be making public one half of their neutrality equation – the emissions that their credits compensate for. And covered companies will have more incentive to be public about their use of carbon credits, and to explain how the reported emissions figure is offset to maintain public understanding of their sustainability efforts.

Anti-ESG Backlash

The rise in company ESG-framework decision making has led to a significant political backlash. Most notably, state lawmakers have proposed a growing number of laws

opposing the use of ESG factors in making investment and business decisions.[18] Companies making decisions using ESG frameworks look beyond strict return on investment to factors such as climate change and worker safety.[19] Proponents assert that companies should consider a wide range of stakeholders in making their decisions, while opponents counter that companies should focus only on returns for investors.[20] This disagreement has culminated in 99 "anti-ESG" bills being filed as of Spring 2023, as compared to 39 filed in 2022. [21] In Florida, for example, a newly passed bill requires state pension funds to prioritize returns without considering ESG factors in investment decisions.

Aside from anti-ESG bills, companies have also developed funds marketing themselves as opposed to ESG concerns. Although these funds met initial success, they have significantly declined in new investor deposits.[22] The backlash to ESG-practices has also spurred companies to leave climate alliances; these companies fear threatened antitrust litigation in the United States.[23] As a result, governments are beginning to provide guidance on proposed environmental cooperation between companies.

New Rules for Selling or Receiving Direct Payments for Federal Tax Credits

In addition to these developments related to voluntary carbon markets, during the past quarter, the U.S. government took steps to make it easier for market participants to avail themselves of available clean energy tax credits that will support de-carbonization. Historically, federal income tax incentives associated with the investment in and production of clean energy and carbon capture technologies have been non-refundable, and using non-refundable tax credits has required current tax liability against which the credits could be applied. Because developers of clean energy (*e.g.*, wind, solar) and carbon capture projects often earn credits in excess of their tax liability, these developers frequently enter into complex arrangements with third-party investors that have consistent and significant federal income tax liabilities (referred to as tax equity investors), such as banks, to shift entitlement to the project's tax attributes (typically, credits and accelerated tax depreciation) to the tax equity investor. The Inflation Reduction Act included two new regimes—direct pay (authorizing direct cash payments) and transferability (allowing tax credits to be bought and sold)—designed to make it easier to monetize these tax credits. And in June, Treasury and the Internal Revenue Service issued proposed and temporary regulations providing substantial new guidance on these new regimes. Please see our recent client alerts, which describe these rules: "IRS and Treasury Issue Proposed and Temporary Regulations Providing Initial Guidance on Transferability of Clean Energy Credits" and "IRS and Treasury Issue Proposed Regulations Providing Initial Guidance on Direct Payments for Clean Energy Credits."

Asia/Australia

Rise of Greenwashing Enforcement in Asia-Pacific

Australia

The global crackdown on greenwashing is being felt in the Asia-Pacific region. Companies are facing closer scrutiny over their environmental claims. In response to the rising urgency to reduce global greenhouse gas emissions, public appetite for environmentally friendly products has increased and authorities have to assess claims by companies.

In Australia, the Australian Competition & Consumer Commission ("**ACCC**") has listed consumer and fair trading issues in relation to environmental claims and sustainability as its top compliance and enforcement priority for 2022–2023.[24] Following a recent internet sweep by the ACCC that found that 57% of 247 businesses reviewed made "concerning claims about their environmental credentials", the ACCC commenced investigations into a number of businesses for potential 'greenwashing'. The ACCC report highlighted that the sectors with the highest proportions of potentially misleading claims were cosmetics and personal care; clothing and shoes; and food and beverages. ACCC deputy chairs Catriona Lowe and Louise Sylvan have said that consumers are "more than ever, making purchasing decisions on environmental grounds"[25] and regulators are acting to address the "fast-emerging risk of consumers being exploited by unsubstantiated green claims"[26]. As a result of the ACCC report, a Senate Inquiry into greenwashing is currently being

run by the Senate Standing Committee On Environment and Communications and is due to report back to Parliament by December 5, 2023.

Due to increased regulatory scrutiny, businesses are seeking guidance from the ACCC on the appropriate standards to use to cross-reference their marketing.[27] The ACCC is expected to release guidance for consumers and businesses on carbon offsetting, which will address issues that businesses offering offsets should consider, such as where offsets are coming from, how long they take to achieve, and the way they are calculated.[28] Please refer to our Q1 2023 Carbon Markets Update for a discussion of the international standards for the verification and certification of carbon credits.

The ACCC is not the only Australian regulator taking enforcement actions against greenwashing. On February 28, 2023, the Australian Securities & Investments Commission ("**ASIC**") launched its first court action alleging 'greenwashing' against pension fund Mercer Superannuation (Australia) Limited ("**Mercer**"), accusing it of misleading members about the sustainability of some of its investment options.[29]

From July 1, 2022, to March 31, 2023, ASIC's enforcement record of 35 interventions in response to its greenwashing surveillance activities includes the issue of 23 corrective disclosure outcomes, 11 infringement notices, and civil proceedings against Mercer.[30] On October 25, 2022, the first fine for greenwashing was paid to ASIC – a A$53,280 (approximately $36,500) fine paid by Australian Securities Exchange (ASX)-listed Tlou Energy Limited for false or misleading sustainability-related statements.[31] ASIC Chair Joe Longo said in a speech in June 2023 that May's Federal Budget allocated further funding to support the integrity of sustainable finance markets, including investigations and enforcement actions by ASIC against greenwashing.[32] ASIC published a report on May 10, 2023, which noted that it has intervened with reference to:

- net-zero statements and targets;
- use of terms such as 'carbon neutral', 'clean' or 'green';
- fund labels; and
- the scope and application of investment exclusions and screens. [33]

On June 6, 2023, the Environmental Defenders Office (EDO), a legal body acting for the Conservation Council of South Australia, asked ASIC to investigate whether the urea fertilizer company NeuRizer had made "misleading or deceptive" carbon-neutral claims.[34] NeuRizer describes itself as Australia's first carbon neutral producer of urea fertilizer.[35]

South Korea

South Korea is leading the charge against greenwashing in Asia, being the first nation in East Asia to draft a law to fine

companies (up to 3 million won (approximately $2,270)) for misleading the public about their green credentials. Market observers expect this draft law to be passed this year.[36] This legislative development followed a landmark lawsuit in 2021 against South Korean energy giant SK E&S, which resulted in Korea's environment ministry warning SK E&S in March 2022 that it needed to change the wording on its website regarding the Barossa gas project in Australia, which previously stated that it would produce "CO_2-free" liquefied natural gas.[37] South Korea currently penalizes greenwashing under the Development and Support for Environmental Technology Act, but in practice, no fines have been issued under the law as implementation requires a complex calculation around the profits garnered from the violation.[38]

Development of Carbon Trading Markets in Asia

Indonesia's Emissions Trading System

Indonesia, one of the world's biggest carbon emitters, is taking strides towards a greener economy and its net-zero target of 2060. There is tremendous potential for Indonesia's carbon economy, as it houses the third-largest tropical forests in the world that are critically important carbon sinks[39], but it does not yet have a market mechanism. Indonesia has started to implement carbon pricing instruments that were authorized by legislative developments in October 2021 – an emissions trading system ("**ETS**") and a carbon tax.

Carbon trading is a market-based mechanism to reduce greenhouse gas emissions through the trading of company carbon units/credits, thereby allowing emitters to reduce their own emissions. The mandatory ETS will be implemented in phases in Indonesia, with the first phase running from 2023 to 2024 and only covering coal-fired power plants, while the second (2025 to 2027) and third (2028 to 2030) phases are expected to include oil and gas-fired power plants and other coal-fired power plants not connected to the grid of state utility, Perusahaan Listrik Negara ("**PLN**"). The first phase of the ETS was launched by the Indonesian Government in February 2023 for nearly a hundred coal power plants with at least 100 MW of generation capacity which supply electricity to PLN.[40] The Ministry of Energy and Mineral Resources of Indonesia reportedly expects a reduction of 500,000 tons of CO_2 equivalent in the sector through the ETS in the first year.[41] This is an estimate of the excess emissions over a total emissions quota of 20 million tons CO_2 equivalent given to the power plants.[42]

Coal makes up more than half of the power generation in Indonesia, so the Indonesian Government is focused on incentivizing coal-fired power plants to reduce carbon emissions, although the framework allows continued operation through the purchase of offset credits from emission reduction projects, including nature-based solutions like reforestation, afforestation and forest conservation.

In Indonesia, carbon trading has so far been carried out privately or between coal-fired power generation companies, and not yet through a carbon exchange.[43] The Indonesian Financial Services Authority ("**OJK**") is working towards launching a carbon exchange in September this year. The OJK board of commissioners chairperson, Mahendra Siregar, has said that OJK is expected to issue a regulation on carbon exchanges in June 2023, and OJK will connect the national registration system of carbon (i.e. the Sistem Registry Nasional ("**SRN**"), which is responsible for the registration and issuance of Indonesian carbon credits and carbon projects) with the required information system at the carbon exchange.[44] Domestic carbon trading in Indonesia is recorded in SRN, and foreign trading is recorded by the relevant carbon authority when transactions involve international buyers.[45]

The carbon exchange will have a "cap-and-trade system," under which pollution is limited and emitters may sell emission allowances to less efficient peers.[46] To secure the traceability of the carbon allowances and credits traded on the exchange, Indonesia will reportedly base its digital infrastructure on blockchain technology.[47] The new ETS and carbon exchange are expected to work in combination with a carbon tax as a hybrid "cap-tax-and-trade" system. Indonesia had planned to tax carbon emissions that were not offset by carbon credits, but the rollout of a carbon tax (planned at approximately $2.10 per ton) has been postponed from April 1, 2022 (potentially until 2025), due to the high inflationary environment.[48] However, the Minister of Finance, Sri Mulyani

Indrawati, recently stated in June 2023 that the Indonesian Government is currently preparing instruments to realize a carbon tax, so developments in this area are anticipated.[49] Indonesia has faced criticism that its carbon tax is too low to effectively encourage the phasing out of coal-fired power plants or a transition to a lower-carbon economy. Indonesia's proposed carbon tax is one of the lowest among countries with carbon taxes.[50] It is far lower than its neighbor by geography, Singapore, whose carbon tax will rise five-fold from its current level of SGD 5 (approximately $3.70) per ton of emissions up to SGD 25 (approximately $18.70) in 2024 and 2025 before rising to SGD 45 (approximately $33.60) in 2026 and 2027, and then hitting SGD 50 (approximately $37.30) by 2030.

As Indonesia paves the way for a domestic carbon market, a new regulation has been issued by the Ministry of Environment and Forestry (Ministerial Regulation No. 7 of 2023 regarding Procedures for Carbon Trading in the Forestry Sector) ("**KLHK Reg 7/2023**") focused on carbon trading in the forestry sector, which includes the forestry sub-sector and peatland and mangrove management sub-sector. KLHK Reg 7/2023 implements carbon trading in the forestry sector through emission trading (cap and trade) and greenhouse gas emission offset (carbon offset) schemes, subject to certain conditions, including different certification and partnership requirements for forest permit owners in the Forest Utilization Permit (PBPH) scheme and social forestry managers (Perhutsos). KLHK Reg 7/2023 also provides guidance on the determination of the maximum allowable quota for international carbon trading, which is based on the surplus in achieving Indonesia's Nationally Determined Contribution (NDC) goal.

Singapore Voluntary Exchange Platforms

Singapore is looking at developing a carbon trading market for high-integrity carbon credits, and the Singapore Government is progressing the environmental integrity criteria for International Carbon Credits ("**ICCs**") that are eligible for carbon tax offset from 2024, with plans to publish a whitelist of acceptable ICCs later this year. By accepting ICCs that meet a certain prescribed standard, Singapore is enabling investors to participate in green financing of regional offset projects, such as the protection of forests in neighboring countries like Indonesia.

Singapore has facilitated trading on global voluntary exchange platforms, such as "**ACX**" (formerly known as AirCarbon Exchange) and Climate Impact X ("**CIX**") since 2019 and 2022, respectively. Blockchain-based carbon exchange platform ACX largely works like a commodity trading exchange to create price transparency by providing market participants with pricing benchmarks based on ACX's standardized carbon contracts. ACX was initially launched as a digital exchange platform with a focus on CORSIA (Carbon Offset Reduction Scheme for International Aviation) to enable airlines to trade carbon credits. ACX then expanded to provide a broader carbon market offering and currently has seven classes of tradable carbon assets, including carbon and other environmental credits as tradable assets such CORSIA eligible tons (CET), and global nature tons (GNT) series, which represents a carbon credit generated by a nature-based project.[51] Over 62% of ACX's client volumes are from Southeast Asia (including Singapore), while over 55% of ACX's carbon exchange projects are from Australia.[52]

CIX was jointly established by DBS Bank, Singapore Exchange, Standard Chartered, and Temasek to bolster Singapore's position as a hub for carbon-related services and nature-based solutions.[53] On June 8, 2023, CIX formally launched its global spot trading platform, CIX Exchange, with the aim to improve carbon market liquidity and price transparency. The CIX Exchange has a daily on-exchange liquidity window with firm bids and offers to serve as a pricing session to pool all-day liquidity from Asia, Europe, and the Middle East to help sharpen benchmark prices. By close of trading on June 7, 2023, seven transactions totaling 12,000 tons of carbon credits had traded and cleared on CIX's first standardized contract in the spot trading platform, CIX Nature X ("**Nature X**").[54] Nature X represents a curated delivery basket of 11 large, well-established, and globally accepted carbon credit projects from across the Americas, Africa, and Asia that support REDD+, which combined account for close to two-thirds of global REDD+ market volumes.[55]

Missing Ingredient in Malaysia's Carbon Market

The carbon credit market in Malaysia, the Bursa Carbon Exchange ("**BCX**"), is a subsidiary of Bursa Malaysia, the stock exchange of Malaysia, and has been pronounced as the first Shariah-compliant carbon exchange in the world.[56] While at a nascent stage, the BCX provides three modes of carbon trading: (i) auctions of carbon credits from time to time, such as when a new category of standardized contract is introduced, to facilitate price discovery; (ii) spot trading for standardized contracts of carbon credits; and (iii) off-market transactions.[57] The BCX held its inaugural carbon credit auction on March 16, 2023, in which 15 domestic buyers from different industries, including government-linked companies and financial institutions, purchased 150,000 Verra-registered carbon credits.[58] The auction involved carbon credits from two new products offered by the BCX – the Global Technology-Based Carbon Contract ("**GTC**") and the Global Nature-Based Plus Carbon Contract ("**GNC+**"). The GTC Contracts featured carbon credits from the Linshu Biogas Recovery and Power Generation Project in China, which were oversubscribed and cleared at RM18.50 (approximately $3.95) per Contract, while the GNC+ Contracts featured carbon credits from the Southern Cardamom Project, a REDD+ project from Cambodia, which cleared at RM68.00 (approximately $14.53) per Contract.[59]

While the BCX is expected to encourage local project owners to develop carbon credit projects that can help Malaysia achieve its national climate goals, there seems to have been limited participation in the inaugural auction. This may be attributed to a lack of incentives for businesses to reduce their carbon emissions and participate in the carbon market, given the absence of a carbon tax in Malaysia. The Malaysian Government has been considering introducing a carbon tax, but no firm plans have been announced. PETRONAS President and Group CEO, Tan Sri Tengku Muhamamd Taufik, recognized at a press conference on June 26, 2023, that a missing ingredient in Malaysia's energy transition is a carbon tax, which would enable "wholesale shifts" in energy systems.[60] Further, limited participation in the auction may be attributed to the limited range of eligible carbon credits that can be traded on the BCX. The BCX currently only recognizes Verra credits for trading[61], to the exclusion of credits verified by other leading voluntary certification organizations, such as Gold Standard, although it plans to expand its product offerings in the voluntary carbon credit market.[62]

United Kingdom

Advertising Standards Authority ("ASA") Guidance and Recent Decisions

New Advertising Guidance

In December 2021, the Committee of Advertising Practice ("**CAP**") and the Broadcast Committee of Advertising Practice ("**BCAP**") published guidance on the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the "**CAP Code**") and the UK Code of Broadcast Advertising (the "**BCAP Code**"), which sought to assist with interpretation of the CAP and BCAP Codes in the context of environmental claims made by broadcasters and advertisers.[63]

On June 26, 2023, the ASA published its updated guidance (the "**Advertising Guidance**") to include a new section 3.1: "Claims about initiatives designed to reduce environmental impact".[64]

This new section identifies factors which the ASA considers important in deciding whether environmental claims comply with the Codes laid down by the CAP and the BCAP. Specifically, it identifies the following factors as indicative of breaches of those Codes:[65]

1. Environmental claims where the basis of the claim is unclear;
2. Unqualified environmental claims omitting significant countervailing information;
3. Environmental claims highlighting a particular sustainability benefit but omitting:
    a. the significant negative impacts from the product or overall business; or
    b. the benefit coming at a significant environmental cost;

4. Environmental claims relating narrowly to specific products but can be read as representative of the entire business;

5. Environmental claims exaggerating the significance of a business' lower carbon activities; and

6. Environmental claims referring to a business' negative environmental impact as being in the past where it still has a significant negative impact.

Latest ASA Rulings under the BCAP and CAP Codes

The new Advertising Guidance has incorporated principles established by recent ASA rulings. Between June 7 and June 14, 2023, the ASA published rulings against four different energy companies and water suppliers after complaints were brought against them alleging that the following advertisements were misleading:

1. An advertisement by PETRONAS allegedly exaggerating the total environmental benefit of its business, omitting material information about its current activities (BCAP Code rules 3.1, 3.2 (misleading advertising), and 9.2 (environmental claims));[66]

2. An advertisement by Repsol SA allegedly highlighting non-operationally ready biofuel and synthetic fuel initiatives, but failing to qualify the initiatives with reference to its current oil and gas production (CAP Code (Edition 12) rules 3.1, 3.11 (misleading advertising), and 11.1 (environmental claims));[67]

3. YouTube advertisements by Shell UK allegedly creating an impression that its business mainly comprised lower-carbon energy products, omitting information about its overall environmental impact (CAP Code (Edition 12) rules 3.1, 3.3 (misleading advertising) and 11.1 (environmental claims); BCAP Code rules 3.1, 3.2 (misleading advertising) and 9.2 (environmental claims));[68] and

4. An advertisement by Anglian Water about how its activities allegedly sought to improve the future environmental situation yet omitted its history of releasing sewage into the environment (BCAP Code rules 3.1, 3.2 (misleading advertising), 3.9 (substantiation), 9.2 (environmental claims); CAP Code (Edition 12) rules 3.1, 3.3 (misleading advertising), 3.7 (substantiation) and 11.1 (environmental claims)).[69]

The ASA made clear that it considered in each of these cases that the advertisements provided a misleading overall impression and each entity's omission of contextual, material information when making environmental claims resulted in breaches of the CAP or BCAP Codes. As a result, the advertisements were deemed misleading by the ASA and banned from being broadcasted or appearing in the misleading form.

Notably, a fifth ruling was published on June 14, 2023, involving Severn Trent Water, but in this case, the ASA did not uphold the complaints of alleged misleading environmental claims. Although Severn Trent Water had a history of releasing sewage into the environment, the advertisement was not deemed misleading, because the business' overall environmental performance did not contradict the overall impression of the advertisement. The historical release of sewage into the environment by Severn Trent Water was not considered sufficiently material information to be required to be included in the advertisement so as to prevent consumers from being misled.[70]

Voluntary Carbon Markets Integrity Initiative ("VCMI") – Claims Code of Practice

On June 28, 2023, the VCMI, an international non-profit organization co-funded by the UK government, issued its Claims Code of Practice (the "**VCMI Claims Code**").[71] The VCMI Claims Code is intended to assist investors and other stakeholders in assessing the credibility of corporate carbon-credit purchases. It seeks to do this by providing (i) requirements to be followed by companies wishing to make use of carbon credits as part of their emission-reduction strategies, and (ii) guidance on the associated claims that companies can make regarding the use of carbon credits.

In summary, the VCMI Claims Code requires companies to meet four 'Foundational Criteria' before making any voluntary use of carbon credits. They must:[72]

1. Maintain and publicly disclose an annual greenhouse gas emissions inventory;
2. Set and publicly disclose validated science-based near-term emissions reduction targets, and publicly commit to reaching net-zero emissions no later than 2050;
3. Demonstrate that the company is on-track towards meeting a near-term emissions reduction target and minimizing cumulative emissions over the target period; and
4. Demonstrate that the company's public policy advocacy supports the goals of the Paris Agreement and does not represent a barrier to ambitious climate regulation.

Once a company has met these 'Foundational Criteria', it can then consider making a public statement asserting that it has met one of three tiers of VCMI 'claim'. These are:[73]

- A **'Silver Claim'**: that the company has met the 'Foundational Criteria' and has purchased and retired high-quality carbon credits of an amount equivalent to or greater than 20% and less than 60% of its remaining emissions in the most recent reporting year, with credits only used to finance additional climate mitigation beyond these targets.
- A **'Gold Claim'**: that the company has met the 'Foundational Criteria' and has purchased and retired high-quality carbon credits of an amount equivalent to or greater than 60% and less than 100% of its remaining emissions in the most recent reporting year, with credits only used to finance additional climate mitigation beyond these targets.
- A **'Platinum Claim'**: that the company has met the 'Foundational Criteria' and has purchased and retired high-quality carbon credits of an amount equivalent to or greater than 100% of its remaining emissions in the most recent reporting year, with credits only used to finance additional climate mitigation beyond these targets.

While the VCMI Claims Code is non-binding and VCMI claims are limited to voluntary action, the Code is intended to be a contribution to an emerging policy infrastructure that seeks clarity, transparency, and consistency on carbon credit commitments, with the intention of giving confidence to market players and paving the way for potential comprehensive future regulation.

Endnotes

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