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CARBON OFFSETS & THE VOLUNTARY CARBON MARKET

GIBSON DUNN

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Agenda

THE COMPLIANCE MARKET

01

Compliance Markets

- Compliance markets are **mandatory systems** that require emission sources to meet emission targets.
- These markets exist at varying levels of government, including **statewide** (California's cap-and-trade system), **regionally** (Regional Greenhouse Gas Initiative).
- Most compliance markets are **cap-and-trade** or similar systems, wherein an upper limit is set on a business's emissions and further capacity may be bought from other organizations that have not used their full allowance or, in some systems, through carbon offsets.
- **Regulated Industries Vary Based on System**

- **California:** power plants, large industrial plants, and fuel distributors (e.g., natural gas and petroleum) emitting ≥ 25,000 metric tons of CO_2. (also includes any opt-ins with mandatory compliance obligations).
- **RGGI:** Fossil-fuel-fired electric power generators with a capacity of 25 megawatts or greater.
- **Washington:** mandatory compliance market covers most businesses that generate more than 25,000 metric tons of CO2 equivalent per year, including fuel suppliers, natural gas and electric utilities, and, eventually, waste-to-energy facilities and railroads.
- **Oregon**: imposes a cap on GhG emissions attributable to fuel suppliers, with the cap decreasing annually.

Offsets in Compliance Markets

- Offsets serve as an alternative means of compliance to direct emission reduction or obtaining allowances.
- Generally, offsets only account for a limited percentage of compliance and must meet varying requirements depending on the system.

California Cap-and-Trade

- Offset must cover verified GHG reductions or removal enhancements that are "real, additional, quantifiable, permanent, verifiable, and enforceable."
- Six offset protocols: livestock projects, mine methane capture projects, ozone depleting substances projects, rice cultivation projects, U.S. forest projects, and urban forest projects.
- Offsets may cover 4% of compliance obligations for 2021-2025, and 6% from 2026-2030.

RGGI

- Certain states, but not every state, issues carbon offset credits through one of five approved projects.
- Carbon offsets may cover only 3.3% of a power plant's compliance obligations.

Washington: Covered business may meet a small and declining proportion of their compliance obligations through receiving credits from investing in offset projects.

Oregon: Covered suppliers can meet 10% of their compliance obligations in their first year with credits earned by contributing funds to state-approved non-profit entities which implement community projects that reduce GHG emissions in Oregon.

THE VOLUNTARY CARBON MARKET

02

Some of the Key Differences Between the Voluntary & Compliance Markets

Compliance

- Regulated by national, regional or international regimes. Participants are required to reduce their emissions.
- Operate under a cap-and-trade system where only a certain amount of “allowances” are created.
- Companies that surpass emission targets can sell their surplus to those looking to offset emissions. There are regulated markets by region in the US.

Voluntary

- Functions outside the compliance market. Participants are not required to reduce their emissions.
- Instead of a cap-and-trade system, uses a project-based system where there is no finite supply of allowances.
- No centralized voluntary carbon market. Carbon credits are sold to buyers directly, through a broker or an exchange.

Voluntary Carbon Markets: Overview

- Companies that wish to voluntarily offset their GHG emissions can purchase avoidance credits (for projects that avoid or reduce emissions) or removal credits (for projects that lower existing emissions) in the voluntary carbon markets.
- The voluntary carbon market allows companies, non-profits, governments and individuals the ability to buy and sell carbon credits. Companies that are unable to reach their GHG emission targets can purchase carbon offset credits by investing in environmental projects.

Regulatory Treatment of Voluntary Carbon Markets:

No Primary Federal Regulatory Regime

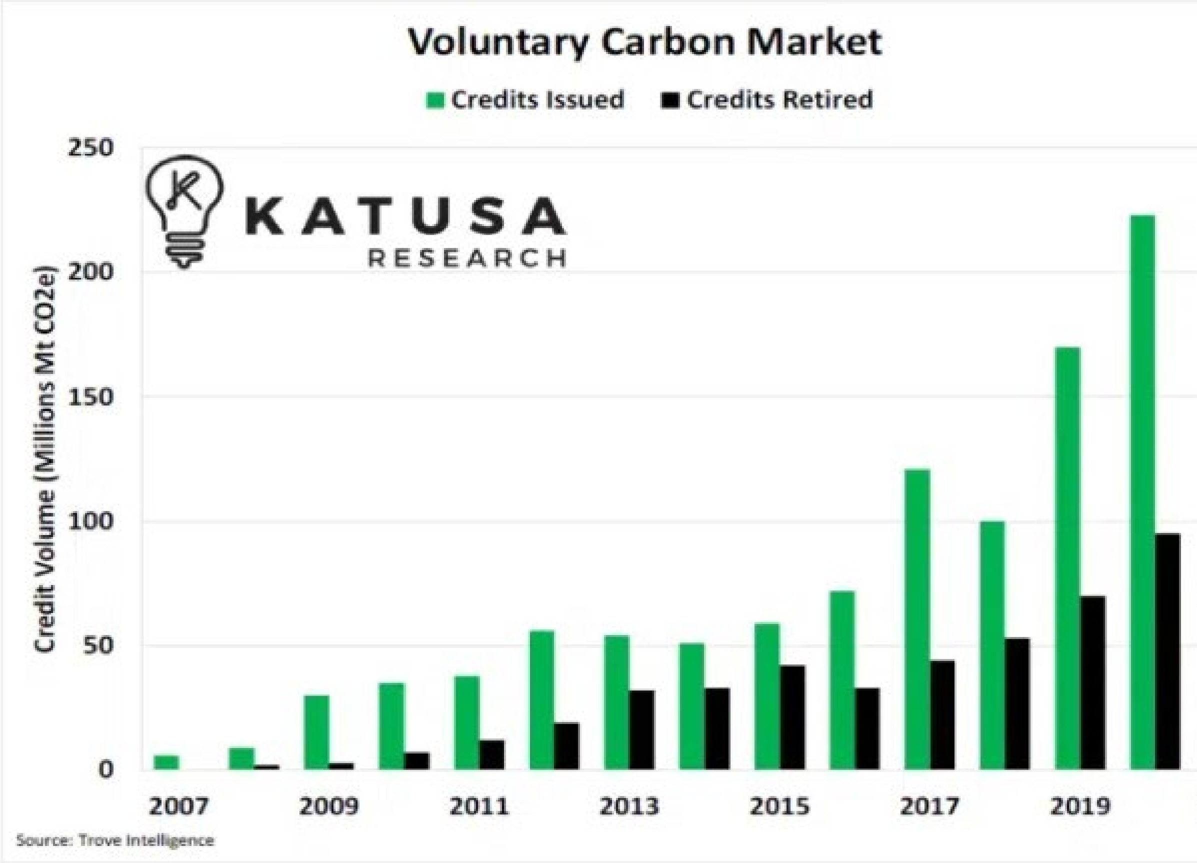
- While federal regulators such as the CFTC, SEC and EPA are interested in the voluntary carbon markets, there is no primary federal regulatory regime.
- The CFTC and the SEC have said that carbon credits are "environmental commodities" which means that they are not derivatives and they are not securities. As a result, neither the CFTC nor the SEC has issued rules around the trading of carbon credits in the voluntary markets.
- The CFTC has enforcement authority over fraud and manipulation in the voluntary carbon markets, but no rulemaking authority. However, derivatives on carbon credits would be regulated by the CFTC and subject to the CFTC's rules.
- So generally, trading in the voluntary carbon markets is largely unregulated, though there may be certain state regulation for brokers and other participants in the voluntary markets.
- Accordingly, certain industry groups have been working to come up with consistent standards and codes of conduct across the voluntary markets.

Voluntary Carbon Markets: Participants

The Voluntary Carbon Markets include the following key participants:

- Project Developers (Upstream Market)
    - They set up the projects issuing the carbon credits, which can be large-scale such as a hydro plant or smaller projects like tech carbon capture.
    - Each credit has a specific vintage (the year in which it was issued) and a specific delivery date (when the credit will be available in the market).
- End Buyers (Downstream Market)
    - Companies (or individual consumers) that have committed to offset part or all of the GHG emissions.
- Retail Traders (Downstream Market)
    - Traders that purchase large amounts of credits directly from the supplier, bundle those credits into portfolios and then sell those bundles to end buyers with some commission. This happens both over-the-counter as well as on exchanges.
- Brokers (Downstream Market)
    - Buy credits from a Retail Trader and market them to an End Buyer with a commission.

Exponential Growth in the Voluntary Carbon Markets



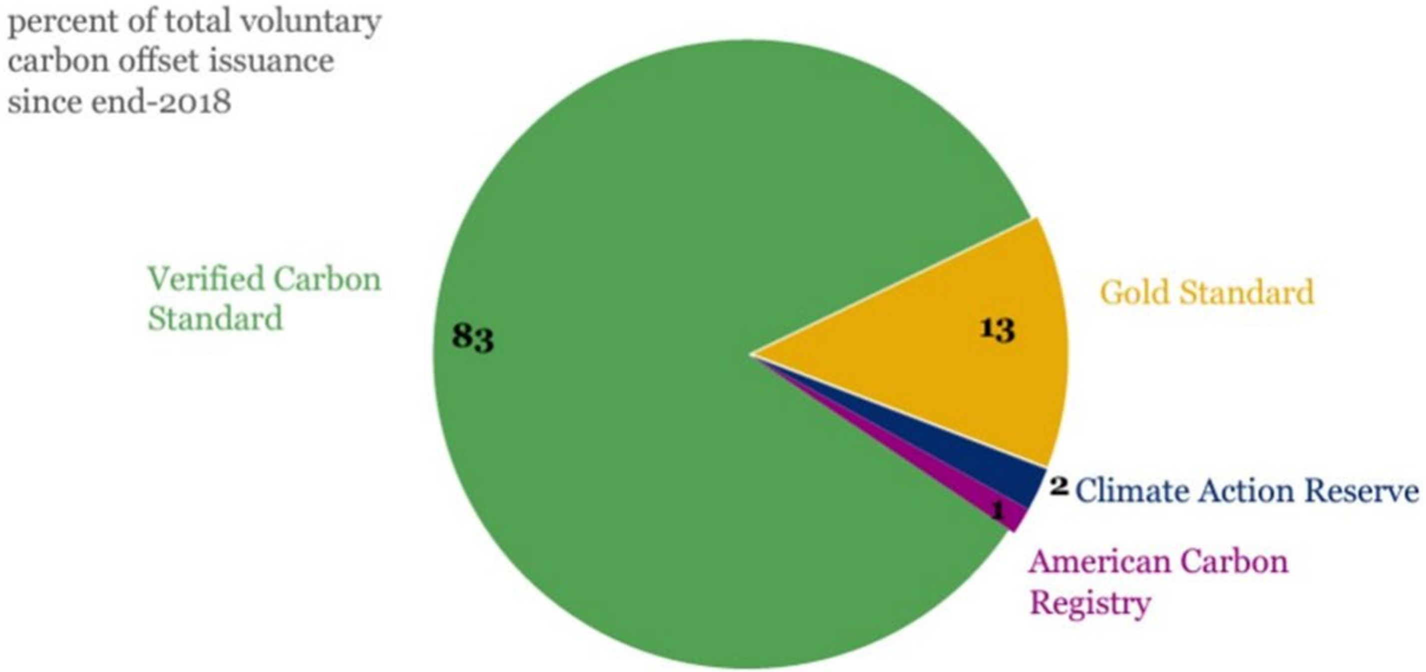
Source: Katusa Research and Trove Intelligence

Estimates from Boston Consulting Group:

- 2020: $500 million
- 2021: $2 billion
- 2030 : $10-40 billion

Top Carbon Certifiers/Registries

Carbon **certification** and **registration**



Source: July 14, 2022 Institute of International Finance

Verified Carbon Standard:
International NGO called Verra

Clean Development Mechanism:
United Nations

Gold Standard:
Verified Emission Reduction: World Wildlife Fund

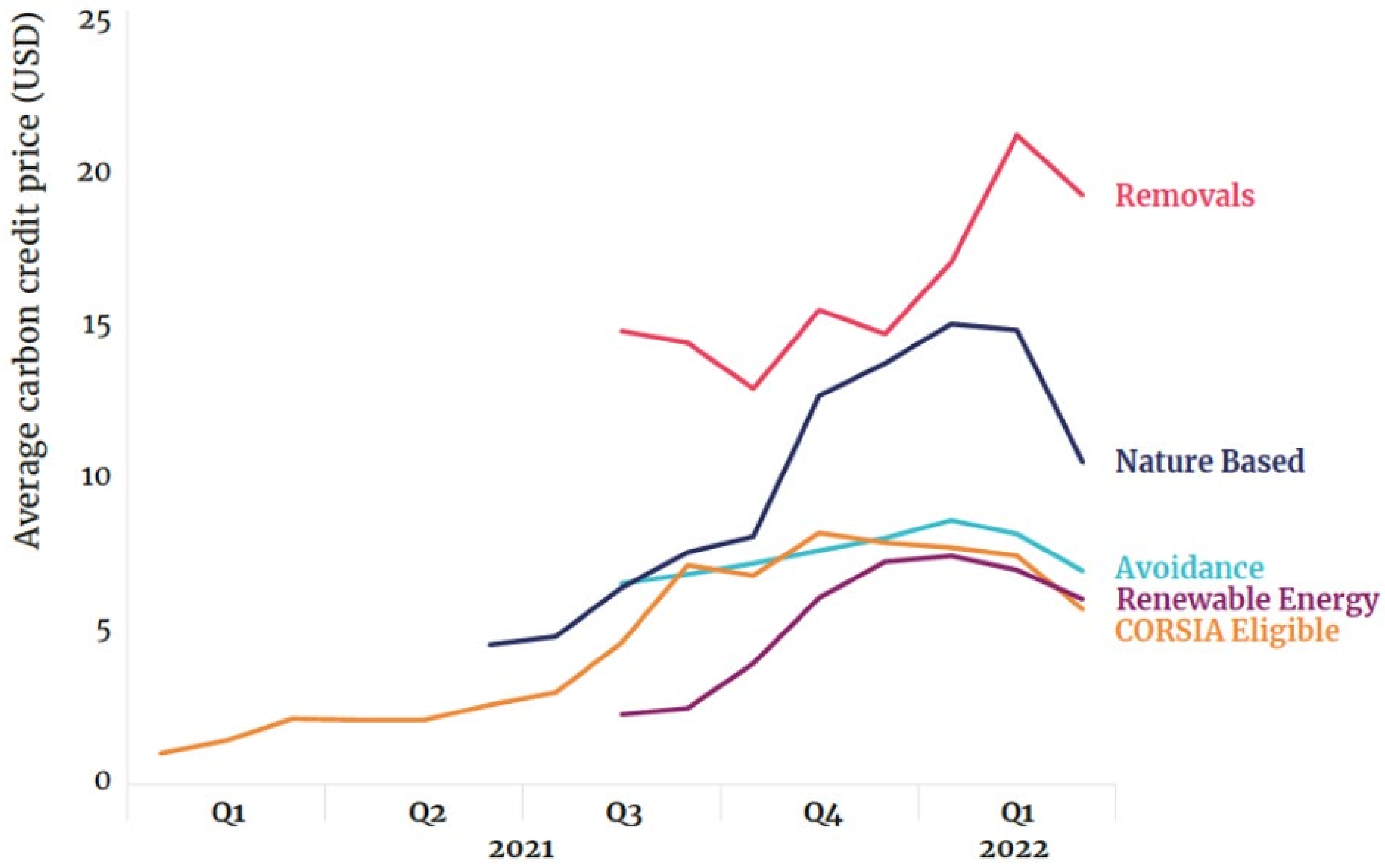
American Carbon Registry:
US-based NGO

Climate Action Reserve:
North American NGO

Types of Voluntary Carbon Credits

Types of Voluntary Carbon Credits to Consider: Companies that wish to voluntarily offset their GHG emissions can purchase avoidance credits (for projects that avoid or reduce emissions) or removal credits (for projects that lower existing emissions) in the voluntary carbon markets.

Price Trend by Type of Carbon credit, 1Q21 – 1Q22



Source: S&P Global via The World Bank (Report: State and Trends of Carbon Pricing, published May 2022)

Standards:
A Key Element to the Carbon Markets

Standards – What are they?

Standards are organizations which certify that a particular project meets its stated objectives and its stated volume of emissions.

They have methodologies for each type of carbon project and therefore a specific type of renewable project will have specific rules to follow when calculating the benefit in terms of avoided CO2 emissions and carbon credits generated over time.

Standard Certifications Ensure Certain Core Principals

Additionality – Project should not be legally required, common practice or financially attractive in the absence of credit revenues.

Permanence – Impact of the GHG emission reduction should not be at risk of reversal and should result in a permanent drop in emissions.

No Overestimation/Measurable – GHG emissions reduction should match the number of offset credits issued for the project and should take into account unintended GHG emissions. GHG emissions should be robustly quantified, based on conservative approaches, completeness and scientific methods.

Exclusive Claim/No Double-Counting – GHG emission reductions or removals should not be double counted (including double issuance, double claiming and double use). Each metric ton of CO2 can only be claimed once and must include proof of the credit retirement upon project maturation. The credit becomes an offset at retirement.

Provide Additional Social and Environmental Benefits – Must comply with all legal requirements of its jurisdiction and should provide additional co-benefits in line with the UN's Sustainable Development Goals.

LITIGATION & THE VOLUNTARY CARBON MARKET

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Considerations When Using Voluntary Carbon Credits

Companies planning to engage in the voluntary carbon market should keep in mind **a number of condsiderations,** including:

- **Disclosures**
- **Best Practices and Market Standards**
- **Regulatory Developments**
- **Development of Policies and Procedures**
- **Reputational Risks**
- **Private Litigation Risks**

Dorris v. Danone (Evian) (SDNY, filed Oct. 2022)

- *Dorris v. Danone (Evian)* (SDNY, filed Oct. 2022)
- About this label, making this claim:

Evian markets its water as "carbon neutral" on its label, and **relies on carbon credits** to do so.

Plaintiffs allege they bought Evian because they throught that the label meant the entire life cycle of the bottled water was "carbon free"—not just "carbon neutral."

- And they allege that even if a reasonable consumer would understand what "carbon neutral" means, this is a misleading claim because the offsets Evian relies on to achieve neutrality are not adequately verified and do not fully offset Evian's emissions.
- Plaintiffs frequently cite the FTC's Green Guides for standards to judge Evian's claims.

State of the case: Danone **moved to dismiss** the complaint on the basis that it did not misrepresent anything and that reasonable consumers would not conflate "carbon neutral" and "carbon free."

- Danone explains the way Evian's website qualifies and discusses what it means for Evian to be carbon neutral—and how Evian's bottle directs consumers to that website.
- And the FTC's Green Guides do not create legally binding standards or any private right of action.

This is essentially a twist on a classic consumer confusion claim.

Rapidly Evolving Market

The Guardian

Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows

Verra makes major changes to methodology of forest-based carbon offsets

S&P Global Commodity Insights

Forbes

Overall, the demand for forestry-related carbon credits is down, add Trove Research and AlliedOffsets — from 380 million in 2021 to 359 million in 2022. As a result, carbon prices continue to drop.

Verra boss steps down after criticism of its carbon credits

CLIMATE HOME NEWS

Öko-Institut e.V.
Institut für angewandte Ökologie
Institute for Applied Ecology

2016 study on the UN's clean development mechanism: 85% of projects had a low likelihood of emissions reductions

REGULATION OF THE VOLUNTARY CARBON MARKET

04

The Path to Standardization: Emerging Industry Groups

Voluntary Carbon Markets Integrity Initiative

- The Voluntary Carbon Markets Integrity Initiative is developing a Claims Code of Practice to guide credible, voluntary use of carbon credits and associated claims. Multiple stakeholders are participating in this initiative.

Science Based Targets Initiative

- Developing guidance to support companies to go beyond their science-based targets by channeling additional climate finance towards mitigation activities outside their value chains. It shows organizations how much and how quickly they need to reduce their GHG emissions to prevent the worst effects of climate change.

International Swaps and Derivatives Association, Inc.

- Trade organization of participants in the market for over-the-counter derivatives. Conistent with its mission to foster “safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products” it has published standardized documentation for the trading of carbon derivatives as well as several white papers on the legal and regulatory considerations for carbon markets.

Integrity Counsel for Voluntary Carbon Markets

- The Integrity Counsel is the governance body taked with taking forward the work of the Taskforce on Scaling Voluntary Carbon Markets. The goal is to work to bring high-quality, transparent and consistent meta-standards – Core Carbon Principles – to the supply of carbon credits. The Core Carbon Principles will identify carbon credits that deliver additional, high-quality emissions reductions with real environmental and social impact and will allow the market to scale with integrity.

Regulator Interest: Commodity Futures Trading Commission

Managing Climate Risk in the US (Sept. 2020 report)

- The CFTC was the first US regulator to issue such a report. The report concludes that climate change poses a major risk to the stability of the US financial system and provided 53 recommendations to mitigate the risks that climate change poses to the US financial markets.

CFTC's Climate Risk Unit

- CFTC Chairman Behnam established the Climate Risk Unit in March 2021 to focus "on the role of derivatives in understanding, pricing, and addressing climate-related risk and transitioning to a low-carbon economy."

CFTC's RFI on Climate-Related Financial Risk

- CFTC issued the RFI in June 2022 and asked questions regarding data, scenario analysis and stress testing, risk management, disclosure, voluntary carbon markets, digital assets, greenwashing, etc.
- One of the takeaways from the comments on the RFI is whether the CFTC should establish a broader regulatory framework for the voluntary carbon markets.
- Chairman Rostin Behnam addressed facilitating carbon credit quality and transparency in the voluntary carbon markets in the fireside chat, *What's the Federal Role in Improving Carbon Credits?* at the Bipartisan Policy Center.

Regulator Interest: Securities and Exchange Commission (SEC)

SEC Enforcement Task Force Focused on Climate and ESG Issues

- In March 2021, the SEC established a Climate and ESG Task Force in the Division of Enforcement. The Task Force's focus is to identify any material gaps or misstatements in issuers' disclosure under existing rules. It also will analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies.
- There have been SEC enforcement actions related to greenwashing.

SEC Climate Disclosures Proposal (March 2022)

- The SEC proposed a very broad climate disclosure rule that has received considerable pushback from the industry. The types of disclosures proposed range from disclosure for anyone who "maintains an internal carbon price" regarding the price per metric ton of CO2, the total price of how it is estimated to change, the rationale for the internal price and how it uses the internal price to evaluate and mange climate-related risks. The finalization of the rule has been delayed, but is expected to come this year.

SEC Anti-Greenwashing Proposals (May 2022)

- The SEC proposed two anti-greenwashing rules under the Investment Company Act of 1940 and the Investment Advisers Act of 1940.

Congressional Interest: Inflation Reduction Act of 2022

The Inflation Reduction Act (IRA):

  - Substantially increases the availability of the federal income tax credits available for domestic carbon capture, utilization and sequestration (“CCUS”) projects (often referred to as “45Q credits”);
  - Makes it easier for CCUS projects to qualify for 45Q credits; and
  - Provides significant new avenues for monetizing 45Q credits.

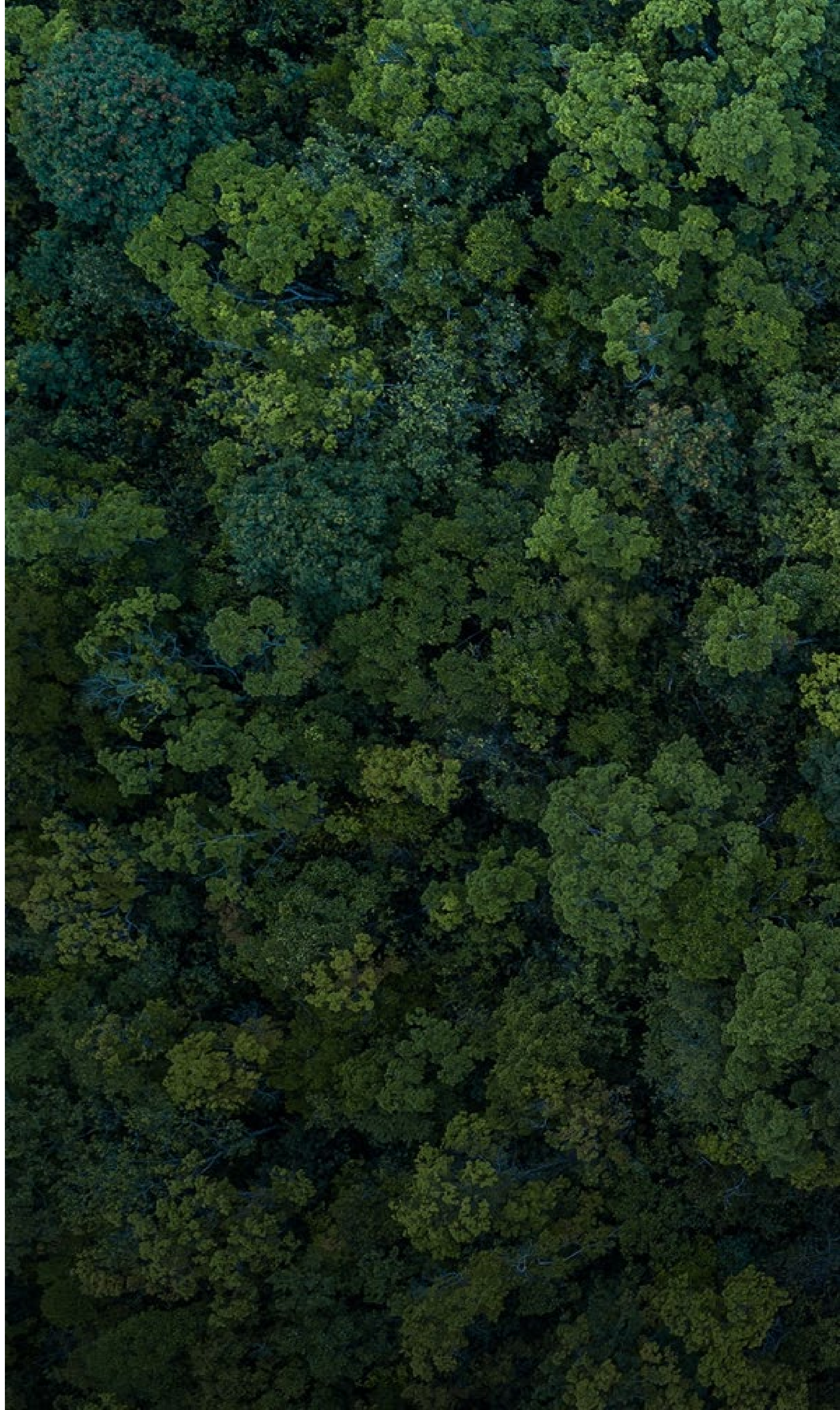
- The IRA is intended to reduce US carbon emissions by approximately 40% by 2030 and to reach a net-zero economy by 2050.
- Given the incentives, there is potential for the IRA to advance the voluntary carbon markets. If more business adopt CCUS technology as a result of the favorable tax treatment, it could lead to an increase in carbon credits and therefore more trading in the voluntary carbon markets.

TRADING IN THE CARBON MARKET

05

Carbon Markets: Spot Trading

- Trading of emisisions allowances with immediate payment delivery.
- Use of brokers or exchanges to facilitate trade execution.
- Third-party pricing assessments or, in the case of an exchange-traded instrument, the market price.
- Nature of underlying project influences pricing.
    - Exchanges pool similar projects in an effort to increase liquidity.



Carbon Markets: Derivatives Overview

- Trading of emission allowances and derivatives based on emissions allowances, such as forwards, futures, and options.
- Secondary trading can be occur on an exchange or bilaterally.
- Several US derivatives exchanges, such as ICE, CME, and the Nodal Exchange offer standardized futures and options derivative contracts on GHG emission allowances and offsets.
    - By definition, exchange-traded products are standardized.
- 2022 ISDA Verified Carbon Credit Transactions Definitions and template confirmations (for bilateral trading) for “Verified Carbon Credits”:
    - “…designed to allow parties to accept a wide pool of VCCs for delivery or to specify particular attributes the VCCs must satisfy (for example, being linked to a particular registry or project).”

Carbon Markets: Standardizing Bilateral Derivatives

- The International Swaps and Derivatives Association, Inc. (“ISDA”) is an industry group whose mission is to foster safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products.
    - ISDA is the publisher of the ISDA Master Agreement, along with several product-specific definitional booklets, which form the contractual backbone of the OTC derivatives market.
    - 2022 ISDA Verified Carbon Credit Transactions Definitions are compatible with existing ISDA documentation architecture.
- “**Verified Carbon Credit**” or “**VCC**” means a unit with a unique serial number, measured in tCO2e, representing an Emission Reduction and quantified, verified and Issued into a Registry Account.
    - Absent a regulatory framework for voluntary carbon trading, ISDA’s initiative aims to bring standardization and clarity to this market.
- Like other ISDA physical commodity definitional booklets, the 2022 ISDA Verified Carbon Credit Transactions Definitions provide: (i) detailed delivery and transfer provisions; (ii) product-specific representations and warranties; and (iii) disruption events and remedies (the mechanics of which differ from the Termination Event and Event of Default mechanics under the ISDA Master Agreement).

What is Next?

- Continued expansion of the compliance market.
  - Will create new ways that offsets are used, but also a patchwork throughout the country.
- Continued innovation and standardization within the voluntary market.
  - New offsets and technologies will be created to help companies meet low carbon goals.
- Likely that more litigation is on the way.
  - Will be looking to the courts for rulings soon which may impact the flow of litigation.
- Continued interest of regulatory agencies and industry groups.
  - Expect more guidance, even if not a formal legal requirement.

THANK YOU!

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Abbey Hudson is a partner in Gibson Dunn's Los Angeles office. Her practice focuses on environmental matters and complex trial litigation. She devotes a significant portion of her time to helping clients navigate environmental and emerging regulations and related governmental investigations. *The Legal 500 United States* named Ms. Hudson a Next Generation Lawyer in the category of Industry Focus – Environment – Litigation.

Environmental and Mass Tort Litigation and Regulatory Compliance. Ms. Hudson has handled all aspects of environmental and mass tort litigation and regulatory compliance. She has provided counseling and advice on environmental and regulatory compliance to clients on a wide range of issues, including supply chain transparency requirements, comments on pending regulatory developments, and enforcement counseling. She has experience handling California environmental matters that involve the California Air Resources Board, the South Coast Air Quality Management District, the California Geologic Energy Management Division, and the Regional Water Quality Control Board - Los Angeles Region. Ms. Hudson also regularly advises clients regarding Environmental Social Governance ("ESG") issues, including sustainability, in connection with corporate and real estate transactions.

Ms. Hudson also has experience with climate change focused regulations such as the California Air Resources Board's ("CARB") Low Carbon Fuel Standard (LCFS), the Zero-Emission Vehicle Program, and the Cap-and-Trade Program. As part of her climate focused work, she helps guide clients to monetize the environmental and low-carbon attributes of their products or services under both voluntary and compliance based regimes.

Litigation. Over the past decade, Ms. Hudson has litigated several of the firm's most high-profile complex cases. She specializes in helping clients navigate incident response including crafting big picture media and litigation strategies. Ms. Hudson also has an expertise in post-incident e-discovery and evidence preservation.

Ms. Hudson's full biography can be viewed here.

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Jeffrey L. Steiner is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. He is Chair of the firm's Derivatives practice group and Co-Chair of the firm's Global Financial Regulatory practice group. Mr. Steiner is also Co-Chair of the firm's FinTech and Digital Assets practice group. Mr. Steiner advises a range of clients on regulatory, legislative and transactional matters related to OTC and listed derivatives, commodities and securities. He frequently assists clients with registration, compliance and implementation issues relating to the Dodd-Frank Act and the rules of the CFTC, the SEC, the NFA and the prudential banking regulators. He also helps clients to navigate through cross-border issues resulting from global derivatives requirements, including those resulting from the Dodd-Frank Act, EMIR, MiFID II and the rules of other jurisdictions. *Chambers Global: The World's Leading Lawyers for Business* 2023 has again ranked Mr. Steiner as an international leading lawyer for his work in derivatives. *Chambers and Partners* has also ranked Mr. Steiner as a leading derivatives lawyer in its *Chambers USA: America's Leading Lawyers for Business Guide*.

Mr. Steiner also advises clients on issues related to digital assets, cryptocurrencies and distributed ledger technology, including analyzing regulatory and enforcement matters relating to their application and use. He regularly works with clients on structuring products involving the use of blockchain technology and digital assets, including digital asset issuances, custody and cryptocurrency trading. He also analyzes the cross-border impacts relating to clients' use of digital currencies and blockchain technology. He has been named a Cryptocurrency, Blockchain and Fintech Trailblazer by *The National Law Journal*.

Prior to joining Gibson Dunn, Mr. Steiner was special counsel in the Division of Market Oversight at the CFTC. Mr. Steiner holds a J.D. from Tulane Law School and a B.B.A. from Emory University's Goizueta Business School.

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Adam Lapidus is Of Counsel in the New York office of Gibson Dunn & Crutcher. He is a member of the firm's Derivatives practice group.

Mr. Lapidus advises clients on derivatives and capital markets transactions. Representative products include equity derivatives, interest rate hedges, commodity derivatives, repurchase agreements, and privately negotiated FX and currency option transactions.

Mr. Lapidus focuses on structuring, documenting, and negotiating OTC derivatives transactions with complex credit support arrangements. He works with clients on insolvency issues relating to close-out netting. He has considerable experience navigating the Dodd-Frank Act and the rules of the Commodity Futures Trading Commission, the Securities and Exchange Commission, the National Futures Association, and bank regulators.

Mr. Lapidus is a regular speaker and author on derivatives matters. He graduated from Fordham University School of Law in 2009 and from The University of Pennsylvania, *magna cum laude*, in 2005.

Mr. Lapidus is admitted to practice in the State of New York.

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Mark Tomaier is an associate in the Orange County office of Gibson, Dunn & Crutcher where he currently practices in the firm's Litigation Department and is a member of the Environmental Litigation and Mass Tort Practice Group. He represents clients in complex litigation, government investigations, and compliance matters primarily relating to environmental law. He was named by the Environmental Law Institute as a 2022 "Emerging Leader" in environmental law and policy.

His substantive experience includes:

- Representing aerospace company in matter involving alleged trichloroethylene ("TCE") contamination.
- Representing chemical manufacturing client in government investigation focused on environmental issues.
- Providing compliance and enforcement counseling addressing Clean Air Act, Clean Water Act, and CEQA in oil and gas operations.
- Providing environmental due diligence in complex transactions.
- Successfully arguing before the Ninth Circuit to obtain reversal of a Board of Immigration Appeals decision that had ordered removal of a United States permanent resident who had been deemed not mentally competent to represent himself.

Mr. Tomaier earned his law degree, *cum laude*, in 2017 from Harvard Law School, where he was an Articles Editor on the *Harvard Environmental Law Review*. In 2012, he graduated with highest honors from the University of California, Berkeley with a Bachelor of Arts Degree, double majoring in English and in Rhetoric. He holds a 2022 Certificate in Sustainable Capitalism and ESG from the University of California, Berkeley. Prior to joining the firm, Mr. Tomaier served as a law clerk to the Honorable Marilyn L. Huff in the United States District Court for the Southern District of California and as a law clerk to the Honorable Michael D. Wilson in the Supreme Court of Hawaii.

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Ritchie Vaughan is an associate in the Los Angeles office of Gibson, Dunn & Crutcher LLP. They currently practice with the firm's real estate group, focusing on land use and zoning.

Msr. Vaughan received their J.D. from The University of Virginia School of Law in 2022. They graduated *summa cum laude* from Virginia Polytechnic and State University in 2009, receiving their Bachelor of Science in Forestry. They also received their Master of Science in Forest Resources and Environmental Conservation from Virginia Tech. They are a licensed real estate broker in the Commonwealth of Virginia, where they practiced real estate prior to law school.

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Arthur Halliday is a litigation associate in the Los Angeles office of Gibson, Dunn & Crutcher.

Mr. Halliday earned his law degree in 2022 from Columbia Law School, where he was named a James Kent Scholar and awarded the Ruth Bader Ginsburg Prize. At Columbia, he worked as an Articles Editor on the *Columbia Journal of Law & Social Problems*. Mr. Halliday also served as co-president of the California Society, as a research assistant for Professor Elizabeth Emens, and as a teaching assistant for Professor Jane Ginsburg and Professor Michael Gerrard.

Mr. Halliday graduated from Wesleyan University in 2016, earning a bachelor's degree with High Honors in the College of Social Studies.

Mr. Halliday is a member of the State Bar of California and is admitted to practice before the United States District Court for the Central District of California.

Mr. Halliday"s full biography can be viewed here.


GIBSON DUNN