

**Environmental Commodity Repurchase Agreements, Carbon
Products and Renewable Energy Certificates:
Recent Market Developments and Regulatory Considerations**

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Panel “OTC Trading Legal and Regulatory Developments”, including the
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Transactional Considerations for Environmental Commodity Repurchase Agreements

By Dickson Chin, Partner, Jones Day

Recent market interest in repurchase (or “repo”) agreements for environmental commodities such as California Carbon Allowances (CCAs) and Renewable Identification Numbers (RINs) builds on technology that was developed decades ago for securities and somewhat more recently for physical commodities.

Just as with other market-sensitive instruments, it is important for market participants to have certainty as to the ability to liquidate environmental commodity repo transactions promptly upon the commencement of a bankruptcy or other insolvency case for their counterparties and to liquidate collateral and otherwise exercise remedies free from the automatic stay and other impairments of creditor rights. Repo originally began as an attempt (not always successful) to remove the collateral from the “seller’s” bankruptcy estate by means of a “true sale”. Should a court deem the transaction to be a disguised loan, the buyer’s putative “title” converts to a mere security interest subject to the Bankruptcy Code’s automatic stay and the perfection, priority, and “commercially reasonable” disposition requirements under Article 9 of the Uniform Commercial Code. Market participants commonly protect themselves to a degree by using a “back-up” security interest grant in the repo documentation that becomes operative upon a re-characterization, but the consequences of such a re-characterization remain unpalatable.

Congress has since granted “safe harbor” status to commodity repo under the Bankruptcy Code and analogous insolvency regimes as “forward contracts” and probably “swap agreements” under Sections 556 (safe harbor for forward contracts), 560 (safe harbor for swap agreements), 101(25) (explicitly defining “forward contract” to include a [commodity] “repurchase or reverse repurchase transaction”) and 101(53B) (defining “swap agreement” to include an “emissions . . . forward agreement,” a “spot . . . forward . . . or other commodity agreement” and any “similar” agreement that is or becomes “the subject of recurrent dealings in the swap or other derivatives markets”). Although there are no reported decisions on commodity repo, the safe harbors would appear to offer significant protection to environmental commodity repo to the extent environmental commodities are “commodities” under the Bankruptcy Code.

There are excellent reasons to believe environmental commodities fall within the Bankruptcy Code’s definition of “commodity,” which cross-references the

definition under the Commodity Exchange Act. These include the reference to “emissions” in the definition of “swap agreement,” the existence of exchange-traded futures contracts on CCAs and RINs and the CFTC’s periodic claims to jurisdiction over environmental attributes as “commodities.” On the other hand, a recent district court decision in an enforcement proceeding interpreted “commodity” under the CEA to apply only to the agricultural goods enumerated in the statutory definition and to “similar” goods. Moreover, there are a number of difficult issues under the safe harbors even for agreements that indisputably involve “commodities,” such as who qualifies as a “forward contract merchant” for purposes of exercising the forward contract safe harbor and the requirement in some courts of a “relationship” between the agreement at issue and the “financial markets.”

The Bankruptcy Code is notably agnostic on the sale or financing characterization question and simply permits protected counterparties to exercise remedies. The distinction nevertheless retains importance, for example, with respect to whether the exercise of remedies permitted under the safe harbor must be conducted in a “commercially reasonable manner” under Article 9 of the Uniform Commercial Code. Another open question is the outcome for safe-harbored repo transactions where the “back-up” security interest is unperfected. Commodity repo does not appear to have been the topic of re-characterization litigation but there has been recent litigation over analogous products such as commodity leases.

Perfection and other commercial law complexities exist when the underlier is an environmental attribute rather than a security or a fungible physical good or certificated security. First, intangible rights such as environmental attributes may require filing to perfect under the UCC, rather than taking delivery of a security or taking actual or constructive possession of a commodity by means, for example, of a warehouse receipt. These complexities potentially multiply when environmental commodities are purely a creature of state (CCAs) or federal (RINs) statute. California law, for example, states that CCAs are not “property” but merely rights to emit carbon, which may give rise to additional considerations. Also, RINs are created by federal law, which might or might not give rise to other considerations surrounding federal property.

Regulatory and Market Developments for Carbon Products & Renewable Energy Certificates

By Megan O’Flynn, Special Counsel, Wilmer Cutler Pickering Hale & Dorr LLP

There have been a number of recent developments in carbon credit and renewable energy certificate (REC) markets, including related to the CFTC's evolving regulatory approach to voluntary carbon credit (VCC) derivatives and the agency's major enforcement actions related to carbon credit and REC-related fraud.

It is estimated that the global carbon credit market remained flat in 2024 at \$1.4 billion USD, though projections suggest significant growth potential reaching \$45-250 billion by 2050, driven by corporate climate commitments and the expansion of over-the-counter trading. Against the backdrop of the potential continued maturation of the environmental commodity markets, regulatory challenges and market opportunities will continue to be an area of focus for the industry.

Overview of Carbon Credits, VCC Derivatives and Renewable Energy Certificates

A carbon credit is a tradable certificate representing one metric ton of carbon dioxide equivalent (CO₂e) that has been reduced, avoided, or removed from the atmosphere. These credits are generated by projects that demonstrably decrease greenhouse gas emissions or enhance carbon removal, such as renewable energy installations, forest conservation, or direct air capture technologies.

VCC derivative contracts represent a new category of climate-focused financial instruments traded on designated contract markets (DCMs) registered with the Commodity Futures Trading Commission (CFTC), with voluntary carbon credits serving as the underlying asset. When retired, these carbon credits verify documented greenhouse gas reductions or atmospheric removals. Participants in voluntary carbon markets buy these credits to supplement their own greenhouse gas emissions reduction or removal efforts.

RECs are tradable certificates that represent the environmental attributes associated with the generation of renewable energy. RECs are intended to promote the production of renewable energy by providing a financial incentive to renewable energy generators, who can sell the environmental benefits of their renewable energy in the form of RECs separately from the actual power.

Regulatory Status of Voluntary Carbon Credits under the CFTC

On September 19, 2024, the CFTC, under the leadership of Commissioner Rostin Benham, approved final guidance regarding the listing of VCC derivative contracts.¹ The final guidance outlined how registered DCMs could comply with the CFTC’s DCM Core Principle 3 (requiring that DCMs only list derivative contracts for trading that are not readily susceptible to manipulation)² and DCM Core Principle 4 (requiring a DCM to prevent manipulation, price distortion and disruptions of the physical delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures).³

With respect to Core Principle 3, the final guidance outlined that a DCM should consider certain characteristics of VCCs in designing a VCC derivative contract and in determining the characteristics or attributes of the underlying VCCs that the contract’s terms and conditions should describe: quality standards, delivery points and facilities, and inspection provisions. Regarding Core Principle 4, the final guidance recommended that a DCM’s monitoring of the terms and conditions of a physically settled VCC derivative contract include ongoing monitoring of the appropriateness of the contract’s terms and conditions that includes, among other things, monitoring to ensure that the underlying VCC conforms or, where appropriate, updates to reflect the latest certification standards applicable for that VCC.

Importantly, the final guidance was solely guidance, and not in the form of a binding rule that implemented new obligations on DCMs. While then-Commissioner Caroline Pham concurred in the vote to approve the guidance,⁴ in her capacity as Acting Chair, she recently led the agency in its withdrawal of the final guidance.⁵ In issuing the withdrawal, the Commission stated that existing regulations already established the framework for listing derivatives contracts, including VCCs, and that “the guidance resulted in placing a disproportionate focus on VCC derivative contracts, which could lead to

¹ Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts, 89 FR 83378 (Oct. 15, 2024). See also WilmerHale, CFTC Approves Final Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts, (Oct. 2, 2024) <https://www.wilmerhale.com/en/insights/client-alerts/20241002-cftc-approves-final-guidance-regarding-the-listing-of-voluntary-carbon-credit-derivative-contracts>.

² 7 U.S.C. 7(d)(3).

³ 7 U.S.C. 7(d)(4).

⁴ 89 FR 83378, at 83405.

⁵ 90 FR 44322 (Sept. 15, 2025). Acting Chair Pham voted in the affirmative to withdraw the guidance. Following Commissioner Kristin Johnson’s departure from the Commission on Sept. 3, 2025, Acting Chair Pham is the sole Commissioner; accordingly, no Commissioners voted in the negative.

confusion and inconsistencies in implementing the CFTC’s existing, well-established product listing regulatory framework.”⁶

CFTC Regulatory Enforcement Related to Carbon Credits and RECs

Significant regulatory actions related to carbon and RECs demonstrate the CFTC’s focus on fraud in these markets in recent years and potential refocus of the agency going forward under Acting Chair Pham.

In June 2023, the CFTC Division of Enforcement announced it was launching an Environmental Fraud Task Force to “combat environmental fraud and misconduct in derivatives and relevant spot markets.”⁷ In the same month, the CFTC Whistleblower Office issued an alert soliciting the public for tips related to purported carbon markets misconduct.⁸ Specifically, the CFTC noted its interest in (i) misconduct related to manipulative and wash trading; (ii) fraud in the underlying spot markets related to ghost (a/k/a illusory) credits listed on carbon market registries; (iii) double counting or other fraud related to carbon credits; (iv); fraudulent statements relating to material terms of the carbon credit, including, but not limited to: quality, quantity, additionality, project type, methodology substantiating the emissions claim, environmental benefits, the permanence or duration, or the buffer pool; and (v) manipulation of tokenized carbon markets.⁹

In line with this emphasis of the CFTC’s Division of Enforcement and Whistleblower Office, 2024 saw two major environmental related fraud actions. In *CFTC v. Ikkurty*, the U.S. District Court for the Northern District of Illinois awarded summary judgment, determining that the defendants breached the Commodity Exchange Act (CEA) through fraudulent activities involving a VCC program and cryptocurrency investment scheme. The court imposed penalties exceeding \$83 million in restitution and approximately \$37 million in disgorgement.¹⁰ The July 2024 judgment was the first time the CFTC

⁶ CFTC Release 9119-25 (Sept. 10, 2025), <https://www.cftc.gov/PressRoom/PressReleases/9119-25/>

⁷ CFTC Release 8736-23 (June 29, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8736-23>.

⁸ CFTC Release 8723-23 (June 20, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8723-23>; CFTC Whistleblower Alert: Blow the Whistle on Fraud or Market Manipulation in the Carbon Markets (June 20, 2023), <https://www.whistleblower.gov/sites/whistleblower/files/2023-06/06.20.23%20Carbon%20Markets%20WBO%20Alert.pdf>.

⁹ *Id.*

¹⁰ *Order: Jafia LLC, Sam Ikkurty A/K/A Sreenivas I Rao, And Ravishankar Avadhanam*, N.D. Ill. (July 22, 2024), <https://www.cftc.gov/media/11181/enfikkurtyjafiarosecityincomefundsenecajudgment072224/download>

successfully prosecuted fraud related to trading carbon credits. Importantly, the court agreed with the CFTC’s position that specific carbon credits constitute “commodities” under the CEA, and that Ikkurty had illegally diverted client money via a so-called “carbon offset program”, leaving participants with a \$20 million USD deficit.

Environmental fraud enforcement expanded further in October 2024 with cases against CQC Impact Investors LLC (CQC)—a carbon credit project developer— and two of its executives, Jason Steele and Kenneth Newcombe.¹¹ The CFTC alleged that between 2019 and 2023, CQC, Steele, and Newcombe reported false information regarding CQC’s emissions-reduction projects in order to obtain carbon offsets beyond those that the company was entitled to receive. Specifically, CQC was charged with engaging in fraud across twenty-seven of its projects related to installing cleaner cooking technologies and energy-efficient LED lighting in millions of homes throughout sub-Saharan Africa, Asia, and Central America. As part of the settlement with the CFTC, CQC paid a \$1 million fine and agreed to a number of compliance undertakings and to invalidate all fraudulent carbon offsets. Steele entered into a formal cooperation agreement with the CFTC and entered into certain undertakings, including extensive ongoing cooperation with the CFTC related to the matter (and also pled guilty to related criminal charges in the Southern District of New York (SDNY)); charges brought by SDNY against Newcombe remain pending.¹²

In February 2025, Acting Chair Pham announced a “reorganization of the Division of Enforcement’s task forces to combat fraud and help victims while ending the practice of regulation by enforcement.” The reorganization represented a “simplified structure” to replace the previous task forces, including the Environmental Fraud Task Force, with two new task forces. The Complex Fraud Task Force, responsible for “all preliminary inquiries, investigations, and litigations relating to complex fraud and manipulation across all asset classes”, and the Retail Fraud and General Enforcement Task Force, focused on “retail fraud and handl[ing] general enforcement matters involving other violations” of the CEA.

Carbon Market Growth Estimates and Projections

¹¹ See *Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties Under the [CEA] and Commission Regulations*, CFTC v. Kenneth Newcombe, No. 24-cv-7477 (S.D.N.Y. Oct. 2, 2024); *CQC Impact Investors LLC*, CFTC No. 24-37 (Sept. 30, 2024); *In re Jason Steele*, CFTC No. 24-36 (Sept. 30, 2024). Another employee, Tridip Goswami, also faced charges, and as of August 2025 was facing extradition to India.

¹² *United States v. Newcombe*, No. 1:24-cr-00567 (S.D.N.Y. Oct. 2, 2024).

Alongside these regulatory shifts, and in the context of the broader global carbon landscape, the markets continue to evolve. Morgan Stanley Capital International (MSCI) found that the size of the global carbon credit market remained flat from 2023 to 2024, at around 1.4 billion U.S. dollars (USD), still below 2022's peak of 1.7 billion USD.¹³ MSCI projected, however, that the global carbon credit market will continue to grow, with modeling suggesting that by 2030, the market could be as large as 7 to 35 billion USD, and by 2050, between 45 and 250 billion USD. The projections are based on the assumptions that corporate and governmental climate commitments already announced are achieved, and that voluntary corporate action and the use of carbon credits in compliance markets and by governments will continue to play a significant role with respect to demand.

In addition, the over-the-counter (OTC) carbon removal market has continued to mature, with bespoke bilateral transactions growing 27-fold since 2022.¹⁴ It remains to be seen if this pace of growth will continue in the OTC space, or if centralized venues for trade will begin to emerge as larger portions of the overall market.¹⁵ As noted by the Taskforce on Scaling Voluntary Carbon Markets in its 2021 roadmap to scaling VCC markets, transparency and standardization in over-the-counter markets, the establishment of carbon spot and futures contracts, and the presence of active secondary markets will all play a role in the volume of growth of VCCs globally.¹⁶

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¹³ MSCI, *Frozen Carbon Credit Market May Thaw as 2030 Gets Closer* (Jan. 6, 2025), <https://www.msci.com/research-and-insights/blog-post/frozen-carbon-credit-market-may-thaw-as-2030-gets-closer>.

¹⁴ BloombergNEF, *Long-Term Carbon Credit Supply Outlook 2025* (Aug. 26, 2025), <https://about.bnef.com/insights/commodities/long-term-carbon-credit-supply-outlook-2025/>.

¹⁵ Centralized exchanges have existed in the market for many years (the Chicago Carbon Exchange was active from 2003 until 2010 as a structured carbon market paired with a voluntary greenhouse gas (GHG) emissions reduction program operating on a cap-and-trade model).

¹⁶ Taskforce on Scaling Voluntary Carbon Markets, *Final Report* (Jan 2021), https://www.iif.com/Portals/1/Files/TSVCM_Report.pdf. The Taskforce was initiated by Mark Carney, UN Special Envoy for Climate Action and Finance, was chaired by Bill Winters, Group Chief Executive, Standard Chartered; and was sponsored by the Institute of International Finance (IIF) under the leadership of IIF President and CEO.