

U.S. Federal Trade Commission
Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501
Comments of *NativeEnergy*, Inc.

Thank you for the opportunity to provide our views on the Revised Green Guides posed by the Federal Trade Commission (“FTC”). We greatly appreciate the work of the FTC in preparing the proposed Revised Green Guides, and we expect that upon completion they will be a valuable tool to marketers to promote clear and accurate environmental claims. A trustworthy marketplace generally will help build the overall market for carbon offsets and renewable energy credits (“RECs”), which is our particular interest.

NativeEnergy is a leading marketer of carbon offsets and RECs. We develop carbon reduction projects and offer carbon offsets validated and verified to the leading standards. We offer offsets in single vintages and under multi-year contracts, with payment following verification and delivery, and also using our Help Build™ business model. With our Help Build model, our customers purchase and pay up front for shares of a project’s long-term carbon offset production, in order to bring on line a project that lacks access to sufficient investment capital or faces other barriers requiring up front carbon funding to proceed with implementation. To date, *NativeEnergy* has supported the development and operations of 90 carbon reduction projects, including methane, hydro, wind turbine, biomass, avoided deforestation, solar, and biogas projects. Of those 90 projects, 47 have been developed using our innovative Help Build model. We have been in the carbon offset business for 10 years, and have developed extensive knowledge of the preferences and concerns of people who buy from us as well as those who decline to.

NativeEnergy’s reputation has been paramount to its leading position in the marketplace. In three major industry surveys the Company has been rated first or in the top-tier based on carbon offset quality, leadership and experience:

- #1 Ranking – Carbon Offset Provider Evaluation Matrix
 - Conducted by Bainbridge Graduate Institute, Social Venture Network and CarbonConcierge.
- Top US Company and Top 4 Overall - Study of Worldwide Carbon Offset Providers
 - Conducted by Tufts Climate Initiative.
- Top 3 in US - Consumer’s Guide to Retail Carbon Offset Providers
 - Conducted by Clean Air/ Cool Planet.

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In addition to the quality of our carbon offsets, we are highly regarded for transparency and our efforts to educate people about carbon offsetting issues, some of which can be viewed at the following links:

http://www.nativeenergy.com/pages/your_choices/35.php

http://www.nativeenergy.com/pages/risks_and_benefits/95.php

http://www.nativeenergy.com/pages/faq_s/15.php

<http://www.nativeenergy.com/pages/additionality/38.php>

In light of the popularity of our Help Build™ business model, our primary interest is in helping the FTC articulate the best guidance for carbon offset claims with respect to the issue of timing of the underlying emissions reductions. To put our comments in context, however, we would like to point out that it is abundantly clear from the public comments, the transcripts of three public workshops, and the results of the FTC’s own research, that there is a wide variety of opinions regarding what constitutes a valid carbon offset. On every issue – additionality, the proper means of testing additionality, RECs as offsets, eligible project types and calculation methods – any position taken will face disagreement. In fact, based on our extensive experience in this market, we know that there is a significant percentage of the population that firmly believes that any claim that purchasing offsets will “neutralize the carbon emissions from your flight” is inherently misleading. These people are likely well represented in the 20% of respondents identified in the FTC’s own research who “disagreed with the airline’s statement that it offsets the emissions from their flight ... [w]hen the methane was to be captured within the next few months.”

In light of this wide variety of opinions, we strongly urge the FTC take the position, consistently, that it is the responsibility of marketers to give people sufficient information to decide for themselves whether the purchase of a given offset, or any offset, *in their opinion*, is a valid means to offset their own emissions.

We have two principal comments:

1. The FTC did not go far enough in requiring disclosure of the timing of the emissions reductions.

From our long experience, we know that the timing of the reduction is generally a material and often dispositive issue in the customer’s purchase decision. We offer our customers a portfolio of offsets to choose from, which includes both previously generated offsets and offsets to be generated, at comparable pricing and from comparable projects. Our own sales records, therefore, are statistical evidence that given the opportunity to make an informed choice, a substantial majority of people choose offsets to be generated over offsets already generated, at

least when coupled with the opportunity for the purchase to help build the project that will generate the future offsets. The reason is simple: most people want a causal relationship between their offset purchase and the underlying reduction. You can help cause a project to be built and reduce emissions, but you can't cause a reduction that has already occurred.

The significance of this is that the timing of the underlying reductions is a two way street. In our experience, many people who purchase offsets based on the claim that their purchased offset will offset their emissions would be sorely disappointed to learn after the fact that the offset they bought had already occurred, regardless of their purchase. Those people need to be protected as well. Just as the percentage who disagreed with the merit of the flight offset claim rose from “when the methane was to be captured in a few months,” to “when the methane was not to be captured for several years,” the percentage who disagree with a claim would also rise from “when the methane was captured a few months ago” to “when the methane was captured several years ago,” or even just “a year ago.” Therefore, to the degree that it is deceptive not to disclose the timing of future reductions, it is equally deceptive not to disclose the timing of historic reductions. *There is nothing to constrain a marketer from fulfilling a 2010 purchase with a carbon offset generated in 2001, other than buyer disapproval, which cannot be expressed without knowledge.*

As such, we strongly urge the FTC to restate §260.5(b) to prevent deception in both cases. We suggest modifying §260.5(b) as follows:

“(b) It is deceptive to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the ~~immediate~~ future. To avoid deception, marketers should clearly and prominently disclose the time frame within which the emissions reductions occurred or will occur~~if the carbon offset represents emission reductions that will not occur for two years or longer.~~”

If the FTC chooses to conduct additional research on this issue, we urge the FTC to consider the fact that the issue of the timing of emissions reductions does not exist in a vacuum. It is deeply and inextricably entwined with the issue of causation. In our experience, when people understand *why* the reductions will not be generated “within the next few months,” many find the reason a good one, and are inclined to embrace the offsets because of the reason for the delay.¹

¹ We also believe that the wording change from “**was to be** captured ‘within the next few months,’” to “**was not to be** captured ‘for several years,’” if embedded in the original research questions, may have inflated the number who disagreed. Isolating the effect of only the time difference would require maintaining the original phrasing, and stating for the longer time period that the methane “**was to be** captured over several years.”

We would test the relative percentages who disagree with the airline's statement that it offsets the emissions from their flight:

- (i) when the methane was captured several years ago;
- (ii) when the methane was captured a few months ago;
- (iii) when the methane was to be captured within the next few months;
- (iv) when the methane was to be captured over the ten year life of a project that is being built in reliance on up front purchases of its long-term methane capture.

Our prediction, based on our experience, is that far more people will disagree with (i) than with (iv).

2. §260.5, Example 1, should expressly permit clear and prominent qualification.

§260.5, Example 1, fails to make clear that the marketer could avoid deception in the context of the claim that the offsets “neutralize the carbon emissions from your flight,” where the reductions occur after two years, by clearly and prominently disclosing when the reductions will occur. Instead, by stating that the claim would not be deceptive if it were restated with the timing disclosure occurring within the original claim, the Example creates ambiguity whether the deception can be avoided only by modifying the original claim, or whether it can be avoided by a clear and prominent qualification of the original claim consistent with the requirements of §260.3(a).

The disclosure of the timing of the reduction is a clarification of the claim, not a contradiction. The issue is when the reduction occurs, not whether it occurs. As noted above, the validity of funding emissions reductions as a means to offset emissions is a matter of varied opinion. The FTC's own research shows that fully 1 in 5 persons disagrees with the airline's claim when it is disclosed that the methane is captured within the next few months. The difference between that and the number who disagreed when the methane was not to be captured for several years is a difference only of degree, not kind. As long as a person has possession of accurate information regarding when the reduction occurred or will occur, he or she has sufficient information to judge for himself or herself whether the reduction is a valid offset, in his or her opinion, regardless whether that information is embedded in the original claim or clearly and prominently disclosed elsewhere in the advertisement consistently with §260.3(a).

In all but a very few of the Examples in the proposed Revised Green Guides in which the FTC posited a deceptive claim that was capable of being made non-deceptive in analogous circumstances, the FTC permitted the cure to be made through clear and prominent disclosure.

For example: §260.7, Example 3, where “[a]n electronics manufacturer makes an unqualified claim that its package is compostable. Although municipal or institutional composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost pile or device.” In this Example, the FTC did not state that “it would not be deceptive if the manufacturer claimed ‘that its package is compostable except in the case of home composting,’” as would be analogous to §260.5, Example 1’s statement that “it would not be deceptive if the airline’s web site stated ‘Offset the carbon emissions from your flight by funding new projects that will begin reducing emissions in two years.’” Instead, in §260.7, Example 3, the FTC permitted the manufacturer to “clearly and prominently disclose that the package is not suitable for home composting,” elsewhere in the advertisement, consistently with §260.3(a). Further, between §260.7, Example 3 and §260.5, Example 1, the former is arguably more suitably treated as a circumstance in which the disclosure is a contradiction rather than a clarification, and therefore requires modification of the initial claim. In §260.7, Example 3, the issue is whether, in some circumstances, the package is compostable at all, not how long it takes to happen. In §260.5, Example 1, the issue is merely how long the reduction takes to happen, not whether it happens.

The distinction between being permitted to qualify the claim with clear and prominent disclosure versus being required to include the disclosure in the original claim is significant, as the latter would unnecessarily impose a large burden on marketers, and would often have the effect of preventing sales of offsets that if not sold, will cause a valuable carbon reduction project not to be built. In *NativeEnergy*’s case at least, and we believe for a number of marketers who sell offsets in advance of generation as a means to fund new projects, the time frame over which the reductions will occur varies by project based on both that project’s unique circumstances and the terms of the funding agreement between the marketer and the project, and is often subject to change based on project performance. Requiring the time frame to be disclosed in the original claim would make for seriously ungainly claims and would have the effect of inappropriately favoring offsets that are not inherently better. In effect, the FTC would be setting an offset standard, which is beyond its role, rather than protecting consumers from deception.

In light of the foregoing, we urge the FTC to modify §260.5, Example 1, as follows:

Example 1: On its website, an airline invites consumers to purchase offsets to “neutralize the carbon emissions from your flight.” The proceeds from the offset sales fund future projects that will not reduce greenhouse gas emissions for two years. The claim likely conveys that the emission reductions either ~~already~~ have recently occurred or will occur in the near future. To

avoid deception, the marketer should clearly and prominently disclose the time frame within which the reductions will occur. Therefore, the advertisement is deceptive. It would not be deceptive if the airline's website stated "Offset the carbon emissions from your flight by funding new projects that will begin reducing emissions in two years."

In addition, we urge the FTC to include a new Example 2 (and re-number the existing Example 2 as 3), reading as follows:

Example 2: On its website, an airline invites consumers to purchase offsets to “neutralize the carbon emissions from your flight.” The proceeds from the offset sales fund the retirement of 5 year old carbon offsets that remain in the marketer’s inventory. The claim likely conveys that the emission reductions either have recently occurred or will occur in the near future. To avoid deception, the marketer should clearly and prominently disclose the time frame within which the reductions occurred.

Thank you for your kind consideration of these comments.

Very truly yours,

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Thomas E. Stoddard