

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 390 (Limón)
Version: April 10, 2023
Hearing Date: April 25, 2023
Fiscal: Yes
Urgency: No
CK

SUBJECT

Voluntary carbon offsets: business regulation

DIGEST

This bill makes it unlawful to engage in certain conduct related to voluntary carbon offsets.

EXECUTIVE SUMMARY

Carbon offsetting is an activity that compensates for, or balances out, greenhouse gas emissions generated by an organization through its activities and operations. Essentially, an entity that wants to mitigate its greenhouse gas emissions can pay another entity or person to eliminate, reduce, or refrain from greenhouse gas emissions, *offsetting* the first party's emissions.

Verifying that these emissions are actually being offset is core to voluntary carbon offsets. Unlike the state's cap and trade program, the voluntary carbon offset market is largely unregulated. This has driven concerns that there is rampant fraud in the industry and that many of these offsets are essentially worthless.

This bill seeks to use existing deceptive practices law to explicitly outlaw fraudulent claims and other misconduct in this industry and subject it to the civil enforcement mechanisms that already exist. The bill also painstakingly defines key terms related to voluntary offset markets. The ultimate aim of the bill is to incentivize greater self-regulation within the offsets markets and improve the overall quality of offsets being offered to Californians.

This bill is author sponsored. There is no known support or opposition. The bill passed out of the Senate Environmental Quality Committee on a 5 to 0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Unfair Competition Law (UCL), which provides a statutory cause of action for any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising, including over the internet. (Bus. & Prof. Code § 17200 et seq.)
- 2) Defines unfair competition for purposes of the UCL to mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code. (Bus. & Prof. Code § 17200.)
- 3) Establishes the False Advertising Law (FAL), which proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.)
- 4) Provides remedies for individuals who have suffered damages as a result of fraud or deceit, including situations involving fraudulent misrepresentations. (See Civil Code §§ 1709-1710, 1572-1573.)
- 5) Makes it unlawful for a person to make an untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied. (Bus. & Prof. Code § 17580.5.)
- 6) Defines “greenhouse gas” to include the following gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and nitrogen trifluoride. (Health & Saf. Code § 38505.)
- 7) Defines terms related to the cap-and-trade program, including CARB’s Compliance Offsets Program. (Title 17 CCR, Section 95802)

This bill:

- 1) Makes it unlawful for a person to do the following:
 - a) verify an offset project for the purposes of issuing a voluntary carbon offset if the person knows or should know that the GHG reductions or GHG removal enhancements of the offset project are unlikely to be quantifiable, real, and additional;
 - b) certify or issue a voluntary carbon offset if the person knows or should know that the GHG reductions or GHG removal enhancements of the

- offset project related to the voluntary carbon offset are unlikely to be quantifiable, real, and additional;
- c) maintain on a registry a voluntary carbon offset if the person knows or should know that the GHG reductions or GHG removal enhancements of the offset project related to the voluntary carbon offset are unlikely to be quantifiable, real, and additional;
 - d) market, make available or offer for sale, or sell a voluntary carbon offset if the person knows or should know that the GHG reductions or GHG removal enhancements of the offset project related to the voluntary carbon offset are unlikely to be quantifiable, real, and additional;
 - e) market, make available or offer for sale, or sell a voluntary carbon offset if the person knows or should know that the durability of the voluntary carbon offset's GHG reductions or GHG removal enhancements is less than the atmospheric lifetime of carbon dioxide emissions, unless the person explicitly markets the voluntary carbon offset as not being physically equivalent to the climate impact of carbon dioxide emissions;
or
 - f) market, make available or offer for sale, or sell a voluntary carbon offset if the person knows or should know that the atmospheric lifetime of the GHGs associated with the voluntary carbon offset's GHG reductions or GHG removal enhancements is less than the atmospheric lifetime of carbon dioxide emissions, unless the person explicitly markets the voluntary carbon offset as not being physically equivalent to the climate impact of carbon dioxide emissions.
- 2) Specifies that violations are not a crime but are subject to all available civil remedies applicable to a violation of the article in which it is found within the Business and Professions Code.
- 3) Defines the relevant terms.

COMMENTS

1. California's consumer protection laws

The Legislature has long considered consumer protection to be a matter of high importance. State law is replete with statutes aimed at protecting California consumers from unfair, dishonest, or harmful market practices. These consumer-protection laws authorize consumers to enforce their own rights and seek remedies to make them whole.

The UCL (Bus. & Prof. Code § 17200) provides remedies for "anything that can properly be called a business practice and that at the same time is forbidden by law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180)

[citations omitted].) The UCL provides that a court “may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.” (Bus. & Prof. Code § 17203; *see also Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146 [“An order for restitution, then, is authorized by the clear language of the [UCL.”].) The law also permits courts to award injunctive relief and, in certain cases, to assess civil penalties against the violator. (Bus. & Prof. Code §§ 17203, 17206.)

The FAL proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.) Violators are subject to a civil penalty not to exceed \$2,500 for each violation in an action brought by the Attorney General or by any district attorney, county counsel, or city attorney. (Bus. & Prof. Code § 17536.) Similar to the UCL, the FAL provides that a person may bring an action for an injunction or restitution if the person has suffered injury in fact and has lost money or property as a result of a violation of the FAL. (Bus. & Prof. Code § 17535.)

2. Cleaning up the voluntary carbon offset market

Carbon offsets operate where a certain entity absolutely must emit carbon dioxide and so provides for the same amount of the greenhouse gas to be removed from the atmosphere by other means to compensate. Offsets were historically centered on the planting or protection of trees, which absorb carbon dioxide, however, the term has since been applied to a variety of environmental efforts globally:

The vast majority of offsets available fall into a category called “avoided emissions.” These are projects that either protect forests, provide people with alternatives to using fossil fuels, or avert emissions from waste. If done right, such projects can reduce the volume of greenhouse gases being added to the atmosphere while providing other benefits to local communities and promoting biodiversity. Beyond planting or protecting trees, offsets can also be generated by preventing the release of greenhouse gases other than CO₂, like methane or nitrous oxide. Typically, more expensive offsets involve removing carbon dioxide that’s already in the atmosphere and storing it away. That may involve projects like growing a forest or installing machines that vacuum carbon dioxide out of the air. Just 4% of off sets actually remove CO₂ from the atmosphere. . . .¹

¹ Ashkat Rathi & Ben Elgin, *What Are Carbon Offsets and How Many Really Work?* (June 14, 2022) Bloomberg, <https://www.bloomberg.com/news/articles/2022-06-14/what-are-carbon-offsets-and-how-many-really-work-quicktake?leadSource=uverify%20wall>. All internet citations are current as of April 18, 2023.

The voluntary carbon offsets targeted by this bill are distinct from carbon offsets involved in the state's cap-and-trade program. Under the cap-and-trade program, industry polluters are legally required to either reduce their emissions by specified amounts over time, or otherwise surrender compliance instruments to cover those emissions. The two available compliance instruments are allowances (which originate from the state providing a set amount each year) and offsets (which originate from entities outside of cap-and-trade offering to reduce or avoid equivalent volumes of emissions). Offsets purchased to comply with cap-and-trade are "compliance offsets"; their use is to comply with mandatory legal obligations.

Voluntary carbon markets are just that, voluntary. Voluntary carbon offsets allow companies, governments, and other organizations to offset their carbon emissions on a voluntary basis, either to meet their own sustainability goals or to demonstrate their commitment to reducing their carbon footprint.

The Federal Trade Commission has issued guidance on appropriate marketing of these products:

- Given the complexities of carbon offsets, sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure that they do not sell the same reduction more than one time.
- 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 if the carbon offset represents emission reductions that will not occur for two years or longer.
- It is deceptive to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.²

Despite this guidance, this market is largely unregulated and there are concerns about the legitimacy of these offsets.

According to the author:

Junk carbon offsets undermine our climate goals, defraud purchasers of offsets, and contribute to the greenwashing of corporate operations. These voluntary offsets are purchased by consumers and businesses to counterbalance their carbon footprints. But unfortunately, some offsets are created by projects that fail to provide quantifiable and additional carbon

² *Green Guides*, FTC, <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>.

benefits, which completely undermines their purported purpose. While California has a regulatory framework for compliance offsets as part of our cap-and-trade program, there are no state or federal laws that provide clarity or establish standards for voluntary carbon offsets. SB 390 will establish baseline standards that participants in voluntary carbon offset markets must meet in order to offer their products for sale in our state. If a California consumer or business purchases a carbon offset, that offset must represent the real carbon benefits claimed by the issuer or seller of the offset.

The concerns highlighted by the author are well-documented and widespread.

The brisk sales of meaningless offsets is leading to widespread claims of climate progress that isn't actually happening. As Bloomberg Green previously reported, environmental groups such as the Nature Conservancy and the National Audubon Society have sold credits for protecting trees that weren't in danger of being harvested, leading to misleading claims of emissions reductions by Walt Disney Co., JPMorgan Chase & Co., and other companies. Meanwhile, North America's largest carbon reforestation project, Green Trees, has sold credits for trees that were already planted through government programs, sometimes more than a decade earlier, resulting in inflated carbon reduction claims by Bank of America Corp. and many others. (The Nature Conservancy, Audubon, and Green Trees all said their projects followed the market's rules, while Disney, JPMorgan, and Bank of America each declined to comment.) "There's a distinct possibility that a great deal of existing carbon offsets are effectively fake," says Robert Mendelsohn, professor of forest policy and economics at Yale.³

As the author points out, these "junk offsets" inflict two major harms. First, buyers of offsets who sincerely believe that purchasing an offset will finance projects that generate carbon benefits are defrauded when they are sold a junk offset that fails to deliver such benefits. Second, corporate buyers of junk offsets may greenwash their activities (intentionally or unintentionally) if they use the offsets in their accounting of the corporation's carbon footprint, which may result in claims to customers, employees, and investors that are inaccurate and can constitute a form of unfair competition.

This bill defines all the relevant terms involved in these markets. It then makes it unlawful, within the Business and Professions Code, to engage in unfair, deceptive, or fraudulent practices in the market. For instance, the bill makes it unlawful for a person

³ Ben Elgin, *This Timber Company Sold Millions of Dollars of Useless Carbon Offsets* (Mar. 17, 2022) Bloomberg, <https://www.bloomberg.com/news/articles/2022-03-17/timber-ceo-wants-to-reform-flawed-carbon-offset-market>.

(1) “to verify an offset project for the purposes of issuing a voluntary carbon offset,” (2) “to certify or issue a voluntary carbon offset,” (3) “to market, make available or offer for sale, or sell a voluntary carbon offset,” or (4) “to maintain on a registry a voluntary carbon offset” if the person “knows or should know that the GHG reductions or GHG removal enhancements of the offset project are unlikely to be quantifiable, real, and additional.”

These are key characteristics of a legitimate carbon offset, quantifiable, real, and additional. “Quantifiable” means the ability to accurately measure and calculate GHG reductions or GHG removal enhancements relative to a project baseline in a reliable and replicable manner for all GHG emission sources, GHG sinks, or GHG reservoirs included within the offset project boundary, while accounting for uncertainty and activity-shifting leakage and market-shifting leakage. “Real” means that GHG reductions or enhancements result from a demonstrable action or set of actions, are quantified using appropriate, accurate, and conservative methodologies that account for all GHG emissions sources, GHG sinks, and GHG reservoirs within the offset project boundary, and account for uncertainty and the potential for activity-shifting leakage and market-shifting leakage. “Additional” means GHG emission reductions or removals that exceed any GHG reduction or removals otherwise required by law, regulation, or legally binding mandate, and that exceed any GHG reductions or removals that would otherwise occur in a conservative business-as-usual scenario.

The goal of the bill is make regulation of these offsets more efficient and therefore more likely. It clearly defines the key terms and then provides the bases for enforcement action. While many of these targeted practices can already be enforced under existing UCL and FAL law, this makes their prohibition explicit. Public prosecutors are then able to more adequately enforce the corruption in this industry.

A group of academic researchers submitted a letter in support:

Although extensive academic research and investigative reporting⁵ have identified serious problems with carbon offsets, many market participants continue to sell carbon offset credits that are based on flawed technical methodologies or questionable project claims. These false and misleading claims make their way to consumers, who might be offered an opportunity to offset their own greenhouse gas emissions or pay more for a “climate-friendly” product or service. This unfortunate outcome is possible because voluntary carbon market credit quality standards are largely unregulated, with limited accountability for false or misleading statements.

SB 390 would clarify that it is a violation of the state’s false advertising laws to transact in carbon credits if the person “knows or should know” that standard marketing claims made about those credits are unlikely to

be true. SB 390 would make violations subject to civil penalties, which would create an important yet measured incentive to encourage voluntary carbon markets to follow the best available science – one that is missing in today’s under-regulated system.

SUPPORT

23 individuals

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 1305 (Gabriel, 2023) requires a business entity that is selling voluntary carbon offsets to disclose specified information about the applicable carbon offset project and details regarding accountability if a project is not completed or does not meet the projected emission reductions or removal benefits. AB 1305 is currently in the Assembly Judiciary Committee.

Prior Legislation: SB 343 (Allen, Ch. 507, Stats. 2022) tightened the requirements around the permissible use of the “chasing arrows” recycling symbol to avoid deceptive uses in marketing and otherwise.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 5, Noes 0)
