Morgan Lewis

REACHING NET ZERO TOGETHER

Current Trends in Corporate Sustainability

© 2021 Morgan, Lewis & Bockius LLP

Why Are We Here?

- Significant Growth in Corporate Sustainability Commitments
  - 300+ companies committed to 100% renewable energy (RE100)
  - 408 businesses ($4T revenue) urging Biden-Harris Administration to set goal of cutting greenhouse gas (GHG) emissions at least 50% below 2005 levels by 2030 (wemeanbusinesscoalition.org)
  - 1000+ companies set (or committing to set) science-based targets to reduce emissions (sciencebasedtargets.org)
- Alignment of policies, implementation, opportunities, and accountability
- Today's participants: Corporates with commitments, asset managers, investors, utilities, wide range of energy companies and developers, regulators, and others

Presenters


Ken Kulak


Elizabeth Hanigan


Willard Tom


Ayesha Waheed


Baird Fogel


Ella Foley Gannon

Morgan Lewis

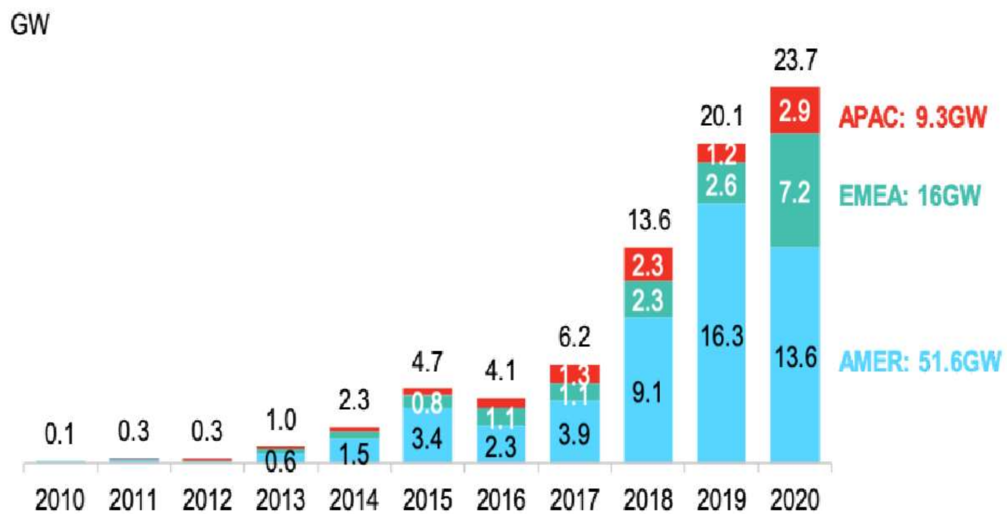
Agenda

- Virtual Power Purchase Agreements (VPPAs)
- Distributed Generation
- Renewable Energy Investments and Claims Regarding Responsible Manufacturing
- Environmental, Social, and Governance Criteria
- Sustainability-Linked Financing

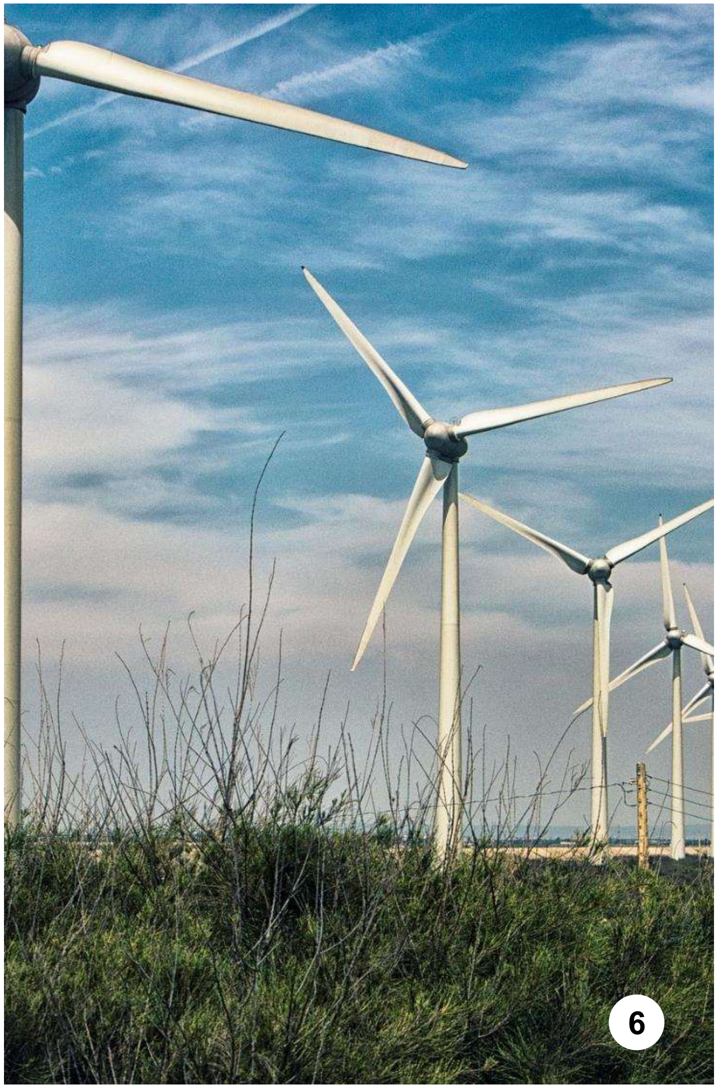
Virtual Power Purchase Agreements

US Market Continues to Lead but Other Regions are Growing

Global Corporate Offsite Deals by Region



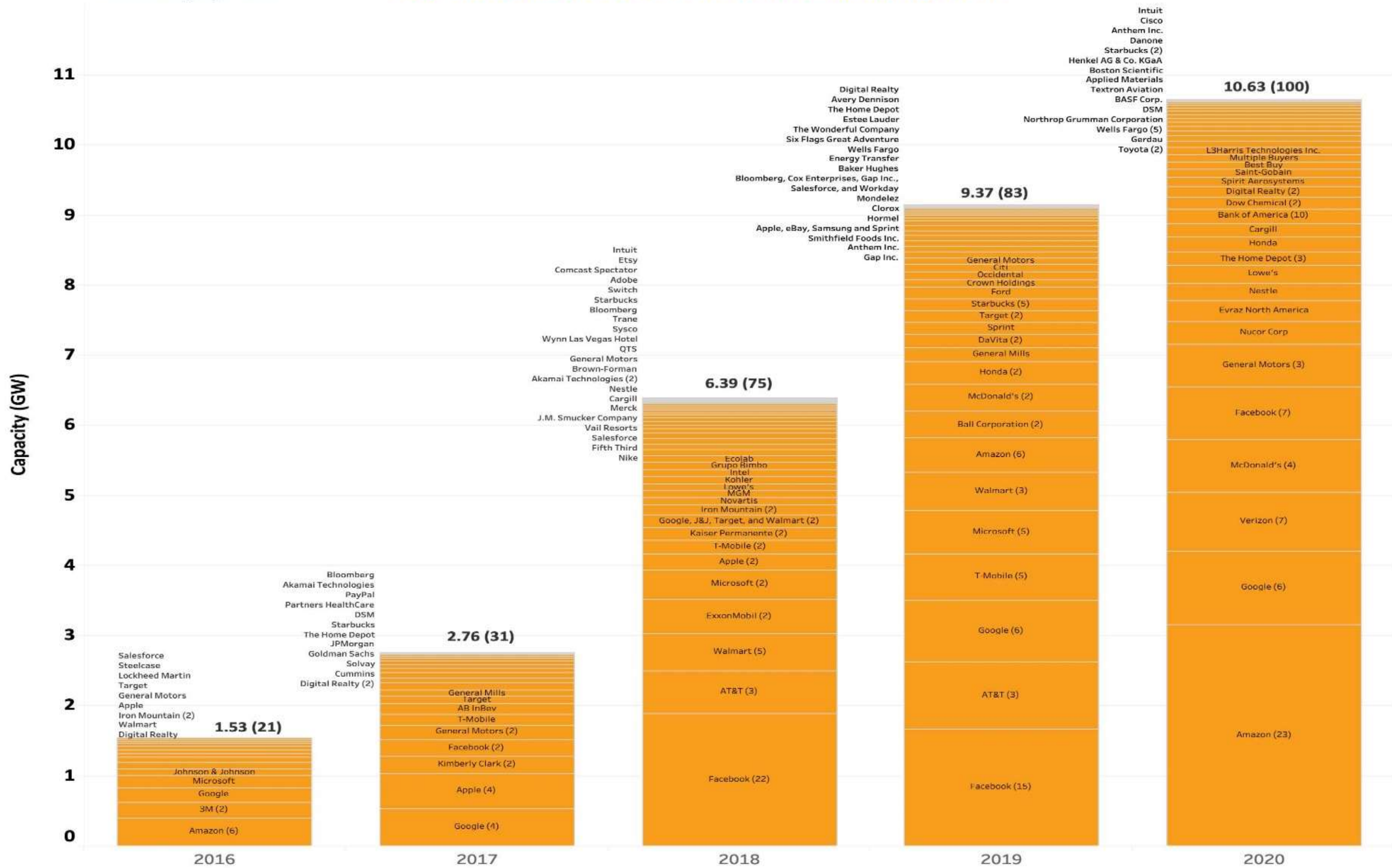
Source: Renewable Energy World



REBA
Renewable Energy Buyers Alliance

REBA Deal Tracker

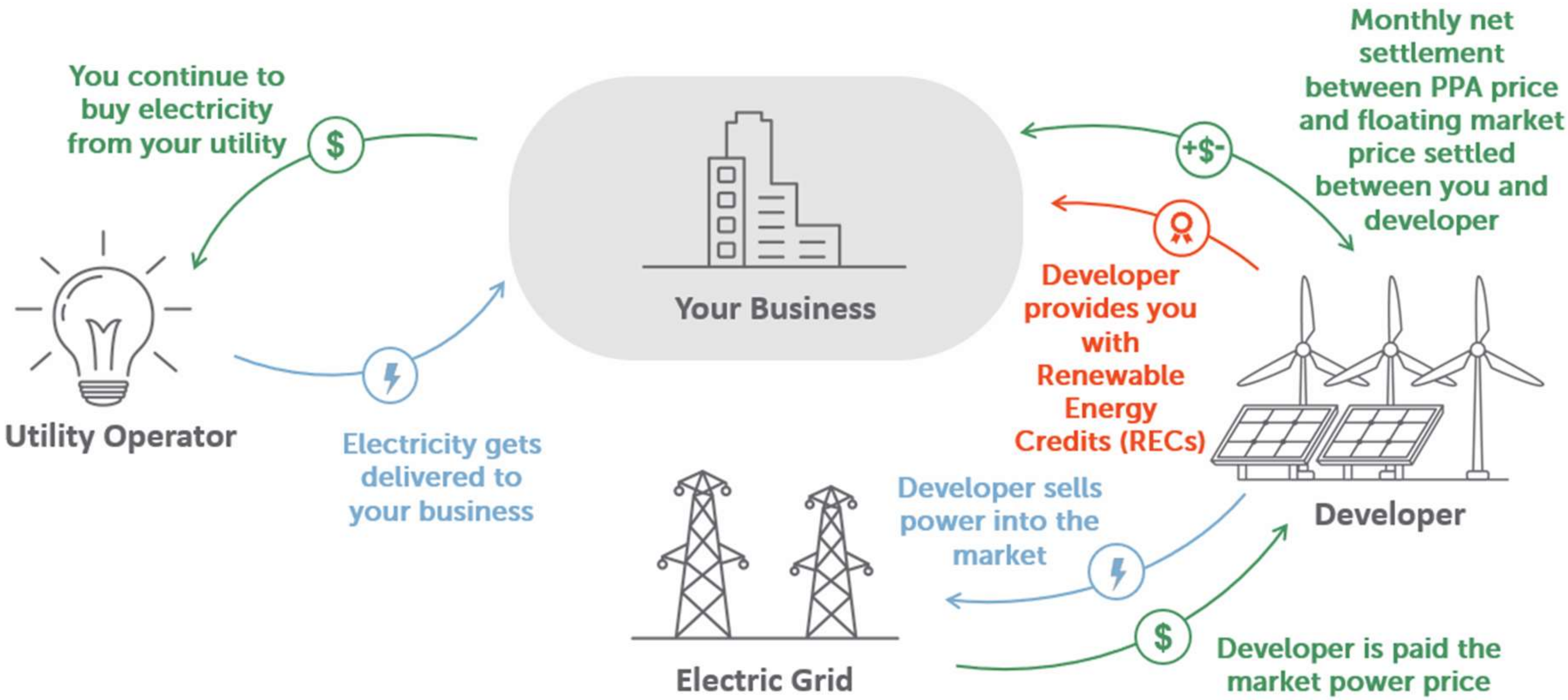
Large Energy Buyers Accelerate Renewable Energy Deals



As of December 31, 2020. Publicly announced contracted capacity of corporate Power Purchase Agreements, Green Power Purchases, Green Tariffs, and Outright Project Ownership in the US, 2015 – 2020. Excludes off-site generation (e.g., rooftop solar PV), deals with operating plants and deals meant to meet RPS requirements. (#) indicates number of deals each year by individual companies.

Copyright 2021 Renewable Energy Buyers Alliance

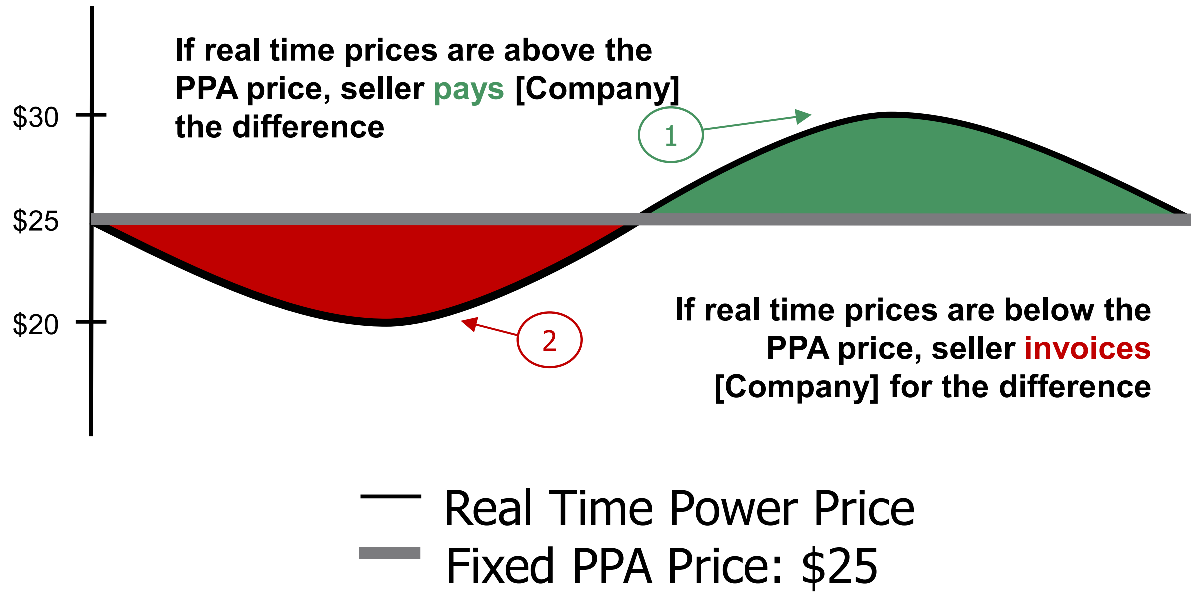
Virtual Power Purchase Agreement (vPPA): How it Works



Source: Edison Energy

vPPA Settlements

- Buyer pays fixed price per unit of energy generated ($/MWh)
- Developer provides Buyer with the value of the energy sold on the market + RECs
- As energy is generated by the asset, Developer sells physical energy to the grid at market price, which fluctuates
- The vPPA is settled as a unit-contingent contract-for-differences
- The contract settlements are netted & invoiced monthly



Source: Edison Energy

VPPA Structure and Legal Provisions

- Project Development Provisions
  - Commercial Operation
  - Project Description and Construction Requirements
  - Milestone Design and Early Termination
  - Delay Damages
  - Capacity Adjustment
  - Complexities of Pro Rata Projects
- Environmental Attributes
  - Alignment with REC tracking systems and sustainability goals
  - Planning for evolving environmental attributes and allocating costs

VPPA Structure and Legal Provisions

- Seller and Buyer Covenants
- Limitations and Warranties
- Confidentiality and Publicity
- Dodd-Frank Reporting and Compliance
- Assignment
- Collateral Assignment for Financing Purposes
- Change in Law

Emerging Issues

- “Seller’s Market” Dynamics
- Hub v. Node Settlement
- COVID and Force Majeure
- Minimum Offer Price Rule (“MOPR”)
- Biden-Harris Administration Initiatives
  - “Whole of Government” Procurement
  - Clean Energy Standard
  - Tax Incentives
  - Market Enhancements

Distributed Generation

Distributed Generation

- Continued cost declines across sector, particularly in solar and storage
  - NREL Projection: $0.03 per kWh for utility systems in 2030
  - EIA: Storage costs decreased nearly 70% from 2015 to 2018
  - NREL: Storage costs projected to decrease between 26%-63% by 2030

- Supportive policies emerging to facilitate aggregated resources
  - FERC Order 2222 support for aggregated distributed energy resources

- Continued support and interest in distributed generation for resiliency

RESULTS: Power Purchase Agreement

POWER

Featured Categories

Feb 1, 2020
by Darrell Proctor

FOLLOW US

We are first in your inbox with the most important news in the industry—keeping you smarter and one-step ahead in this ever-changing and competitive market.

Start your free subscription

News

Raiders Will Roll With Renewables at New Vegas Stadium

The Raiders, a franchise that has called both Oakland and Los Angeles, California, home since the team began play in 1960, is moving to Las Vegas for the 2020 National Football League season. And this "new" team will take advantage of renewable resources to power both its new stadium, as well as its administrative offices and practice facility in nearby Henderson, Nevada.

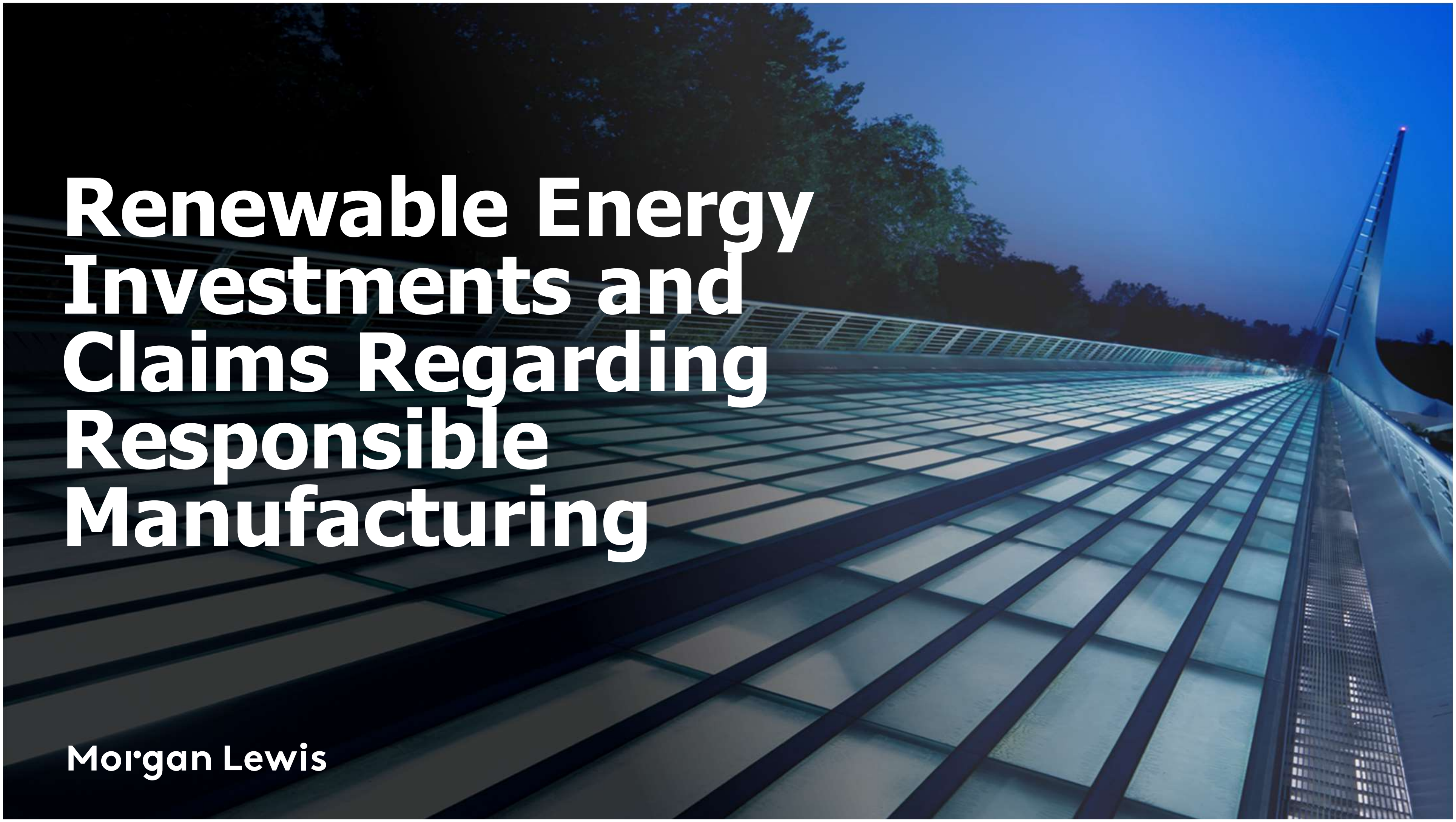
Nevada's Public Utilities Commission (PUC) in a 2-0 vote on Jan. 29 approved a 25-year deal between Allegiant Stadium, the Raiders' new $1.9 billion, 1.75-million-square-foot home, and local utility NV Energy. Stadium construction is expected to be completed in July. Allegiant Travel Co., the Las Vegas-based parent of Allegiant

- Raiders-friendly Power Purchase Agreement
- Allegiant Stadium is the first stadium in Nevada to have earned the right to procure energy from the public or private entity
- Allegiant Stadium will be the first US stadium to achieve 100% renewable energy use for all electric energy needs
- Long Term
- Energy Partnership

Contact Information

- Baird Fogel
  - San Francisco
  - +1.415.442.1170
  - baird.fogel@morganlewis.com

Slides have been edited for sharing. Please contact Baird Fogel with questions about the Allegiant Stadium case study.



Renewable Energy Investments and Claims Regarding Responsible Manufacturing

Morgan Lewis

Why Is This Tricky?

- Seems like common sense: want to get credit from customers and from the public for investments made in clean energy generation and usage.
- If truthful and non-deceptive, what's the problem?

Principles, Not Rules

- Sec. 5 (a) of the FTC Act: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."
- Sec. 5 (n) of the FTC Act: "The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. . . ."
- Dual enforcement, but state laws not much clearer.

Non-intuitive Sticks in the Bundle of Rights

- The generation of electricity and the right to make claims about the nature of that electricity have been disaggregated.
- When you produce electricity from, say, a solar facility, you can sell two different things separately to two different customers (or keep one or both for yourself):
  - The electricity
  - The right to claim that a certain quantity of electricity was generated by a solar facility
- The right to make claims travels with the Renewable Energy Certificates (RECs).
  - Once you sell the REC, you can't claim that you produced or used the solar power associated with that REC.
  - If you make a claim, you can't sell the REC, but should "retire" it.

Example 1

- You are the manufacturer of a consumer product. All of the manufacturing processes involved in making the product are powered with renewable or non-renewable energy matched by retired RECs.
- You can make an unqualified “made with renewable energy” statement.

Example 2

- You are the manufacturer of a consumer product. All of the manufacturing processes involved in making the product are powered with renewable energy, but you sell the RECs.
- A “made with renewable energy” statement is an unfair or deceptive act or practice (“UDAP”).

Example 3: REC Arbitrage, Part 1

- In REC arbitrage, RECs from one renewable electricity project are sold and replaced by less expensive RECs from another renewable electricity project.
- RECs vary in price because while all RECs represent one megawatt-hour of renewable electricity, each REC embodies where, when, and what renewable resource produced that particular REC. For some marketers, a solar REC might be more valuable than a wind REC, depending on the preferences of the type of consumer to whom the product is typically sold.
- Variations are also driven by state renewable portfolio standard policies. A state might specify that only RECs sourced in-state or from particular project types "count" toward meeting the goal.

Example 3: REC Arbitrage, Part 2

- Suppose you have an onsite solar array at your facility. You sell those RECs and simultaneously buy cheaper wind RECs. But you actually use the electricity from the solar array to manufacture your product. You want to make the statement: "Our facility is home to an onsite solar array. We are using renewable electricity."
- Even though both sentences are literally true, the claim is a UDAP because it gives the impression that you are using solar electricity, when you have given up the right to make that claim by selling the solar RECs. You can only make a claim of using wind electricity, as a result of buying wind RECs.
- The bottom line: no double-counting, and the specific characteristics of the REC matter.

FTC Guidance

- Federal Trade Commission (FTC) Guides on the Use of Environmental Marketing Claims, 16 CFR § 260.1, et seq., commonly referred to as the "Green Guides." https://www.govinfo.gov/content/pkg/CFR-2020-title16-vol1/pdf/CFR-2020-title16-vol1-chapI.pdf, at 204.

Pt. 260 16 CFR Ch. I (1–1–20 Edition)

conveys that this 110-mile driving range figure is comparable to an EPA driving range estimate for the vehicle. The advertisement is deceptive because it does not clearly state that the test is a non-EPA test; it does not provide the EPA estimated driving range; and it does not explain how conditions referred to in the advertisement differed from those under the EPA tests. Without this information, consumers are likely to confuse the claims with range estimates derived from the official EPA test procedures.

PART 260—GUIDES FOR THE USE OF ENVIRONMENTAL MARKETING CLAIMS

AUTHORITY: 15 U.S.C. 41–58.

SOURCE: 77 FR 62124, Oct. 11, 2012, unless otherwise noted.

§ 260.1 Purpose, scope, and structure of the guides.

(a) These guides set forth the Federal Trade Commission's current views about environmental claims. The guides help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. 45. They do not confer any rights on any person and do not operate to bind the FTC or the public. The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides. In any such enforcement action, the Commission must prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act.

(b) These guides do not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act.

(c) These guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing, offering for sale, or sale of such item or service to individuals. These guides also apply to business-to-business transactions. The guides apply to environmental claims in labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means.

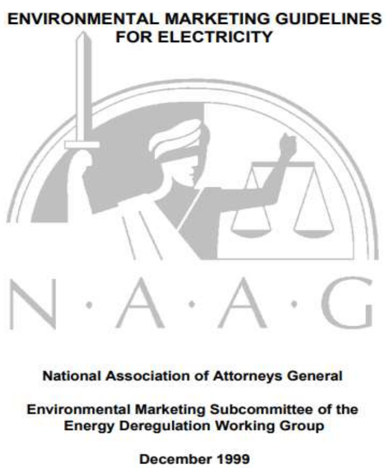
(d) The guides consist of general principles, specific guidance on the use of particular environmental claims, and examples. Claims may raise issues that are addressed by more than one example and in more than one section of the guides. The examples provide the Commission's views on how reasonable consumers likely interpret certain claims. The guides are based on marketing to a general audience. However, when a marketer targets a particular segment of consumers, the Commission will examine how reasonable members of that group interpret the advertisement. Whether a particular claim is deceptive will depend on the net impression of the advertisement, label, or other promotional material at issue. In addition, although many examples present specific claims and options for qualifying claims, the examples do not illustrate all permissible claims or qualifications under Section 5 of the FTC Act. Nor do they illustrate the only ways to comply with the guides. Marketers can use an alternative approach if the approach satisfies the requirements of Section 5 of the FTC Act. All examples assume that the described claims otherwise comply with Section 5. Where particularly useful, the Guides incorporate a reminder to this effect.

§ 260.2 Interpretation and substantiation of environmental marketing claims.

Section 5 of the FTC Act prohibits deceptive acts and practices in or affecting commerce. A representation, omission, or practice is deceptive if it

204

State Guidance


ENVIRONMENTAL MARKETING GUIDELINES
FOR ELECTRICITY

N·A·A·G

National Association of Attorneys General

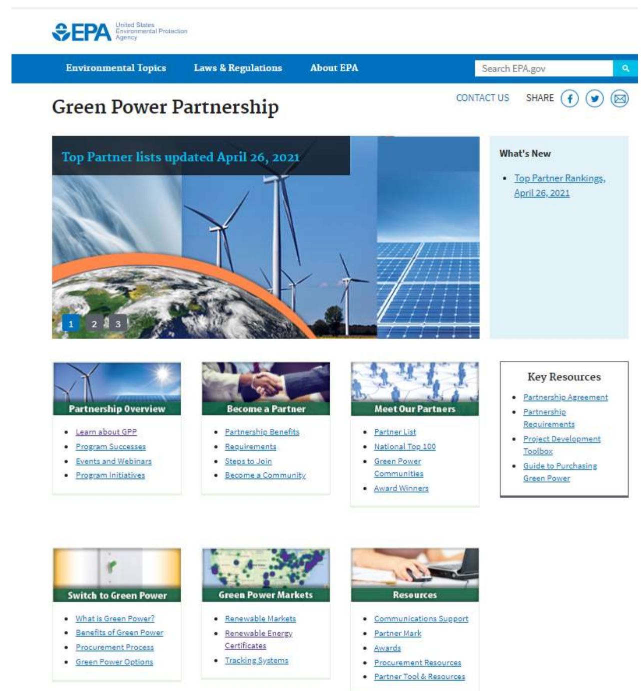
Environmental Marketing Subcommittee of the
Energy Deregulation Working Group

December 1999

- National Association of Attorneys General, Environmental Marketing Guidelines for Electricity, https://www.epa.gov/sites/production/files/201805/documents/naag_0100.pdf

EPA Guidance

- EPA
  - Guide to Making Claims About Your Solar Power Use, https://www.epa.gov/sites/production/files/2017-09/documents/gpp-guidelines-for-making-solar-claims.pdf
  - Green Power Partnership, https://www.epa.gov/greenpower



A Sampler of Third-Party Guidance

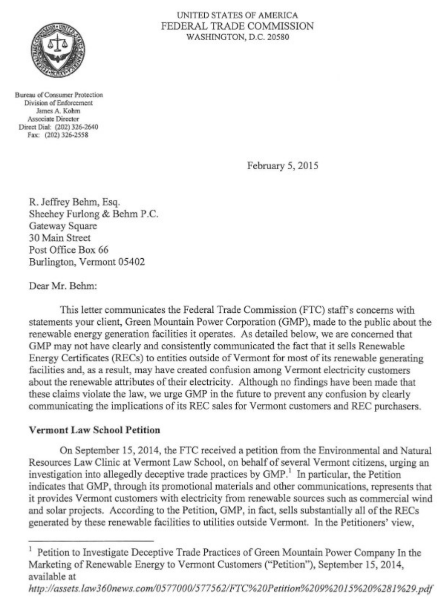
- Environmental Law Institute, Corporate Statements About the Use of Renewable Energy, https://www.eli.org/sites/default/files/eli-pubs/corporate-renewables.pdf
- Center for Resource Solutions, The Legal Basis for Renewable Energy Certificates, http://resource-solutions.org/wp-content/uploads/2015/07/The-Legal-Basis-for-RECs.pdf

Enforcement

- Mainly FTC & the states
- Although EPA runs the Green Power Partnership and puts out a lot of useful guidance in this area, in identifying the legal risks, it points to: "Possible scrutiny by the Federal Trade Commission (FTC) and/or your state's attorney general's office for false or deceptive marketing claims."

Enforcement

- FTC is clearly interested, but so far has relied mainly on guidance and warnings rather than enforcement actions.
- Letter from Division of Enforcement to Green Mountain Power:
  - "some of these unqualified claims raise concerns"
  - "we urge that GMP carefully review its current and future communications"
  - "without prejudice to the right of the Commission later . . . to commence an enforcement proceeding"



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Enforcement
James A. Kohm
Associate Director
Direct Dial: (202) 326-2640
Fax: (202) 326-2558

February 5, 2015

R. Jeffrey Behm, Esq.
Sheehey Furlong & Behm P.C.
Gateway Square
30 Main Street
Post Office Box 66
Burlington, Vermont 05402

Dear Mr. Behm:

This letter communicates the Federal Trade Commission (FTC) staff's concerns with statements your client, Green Mountain Power Corporation (GMP), made to the public about the renewable energy generation facilities it operates. As detailed below, we are concerned that GMP may not have clearly and consistently communicated the fact that it sells Renewable Energy Certificates (RECs) to entities outside of Vermont for most of its renewable generating facilities and, as a result, may have created confusion among Vermont electricity customers about the renewable attributes of their electricity. Although no findings have been made that these claims violate the law, we urge GMP in the future to prevent any confusion by clearly communicating the implications of its REC sales for Vermont customers and REC purchasers.

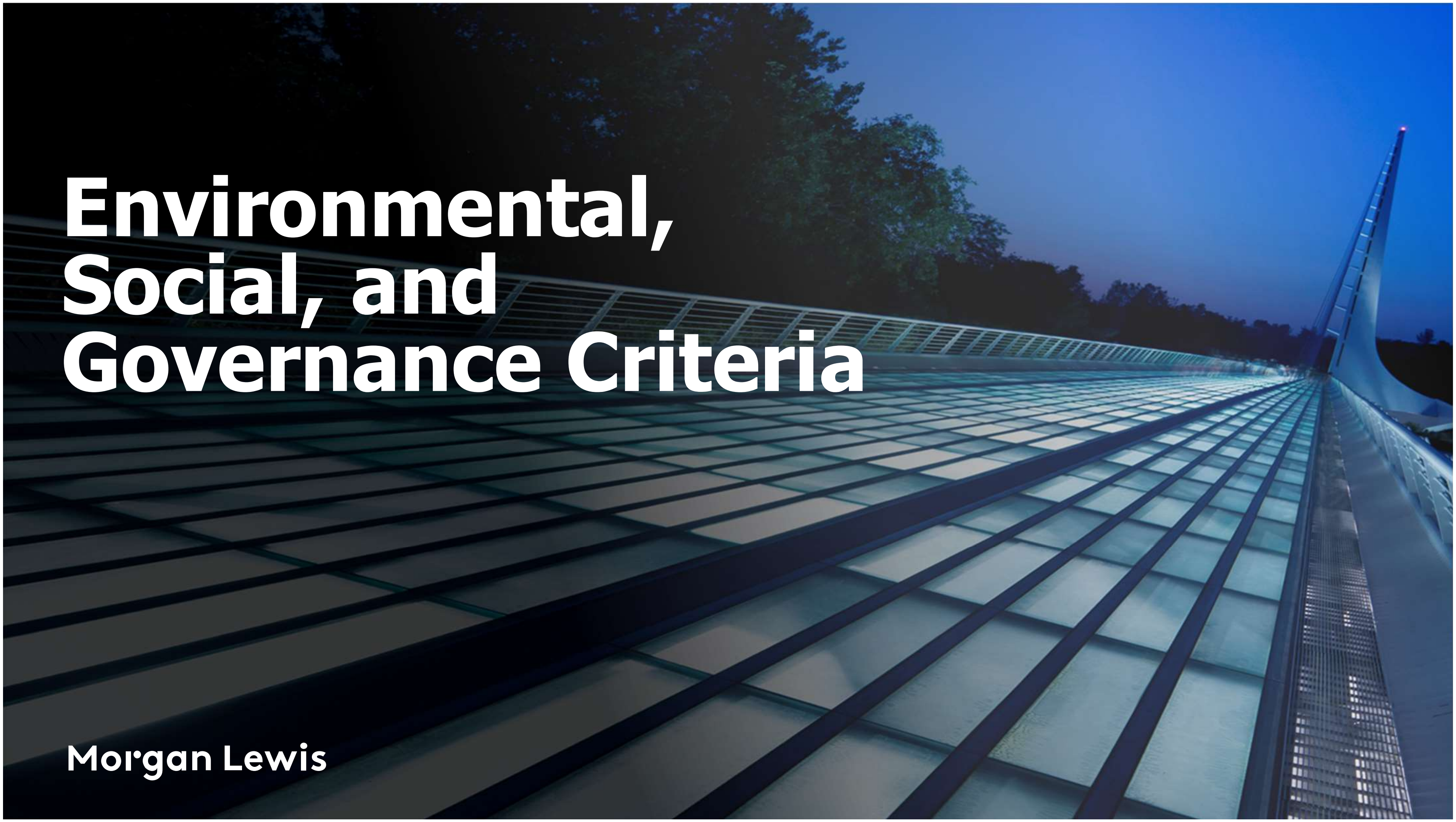
Vermont Law School Petition

On September 15, 2014, the FTC received a petition from the Environmental and Natural Resources Law Clinic at Vermont Law School, on behalf of several Vermont citizens, urging an investigation into allegedly deceptive trade practices by GMP.[1] In particular, the Petition indicates that GMP, through its promotional materials and other communications, represents that it provides Vermont customers with electricity from renewable sources such as commercial wind and solar projects. According to the Petition, GMP, in fact, sells substantially all of the RECs generated by these renewable facilities to utilities outside Vermont. In the Petitioners' view,

[1] Petition to Investigate Deceptive Trade Practices of Green Mountain Power Company In the Marketing of Renewable Energy to Vermont Customers ("Petition"), September 15, 2014, available at *http://assets.law360news.com/0577000/577562/FTC%20Petition%209%2015%20%281%29.pdf*

The Future of Enforcement

- Thus far, resource constraints have meant much more guidance than enforcement. That could change.
- For example, Feb. 4, Senator Klobuchar introduced a bill that would nearly double the FTC's annual budget from $351 million to $651 million for 2022.
- Watch this space.



Environmental, Social, and Governance Criteria

Morgan Lewis

Regulatory Background

- EU Approach – Top-Down Regulations
  - 2018 Action Plan
  - Regulations on sustainability-related disclosures in financial services (defining "sustainable investment", "sustainability factors" and "sustainability risk"– focusing on self-defined metrics
- US and UK Approaches – Bottom Up
  - SEC Guidance
  - Recent Developments Under Biden Administration

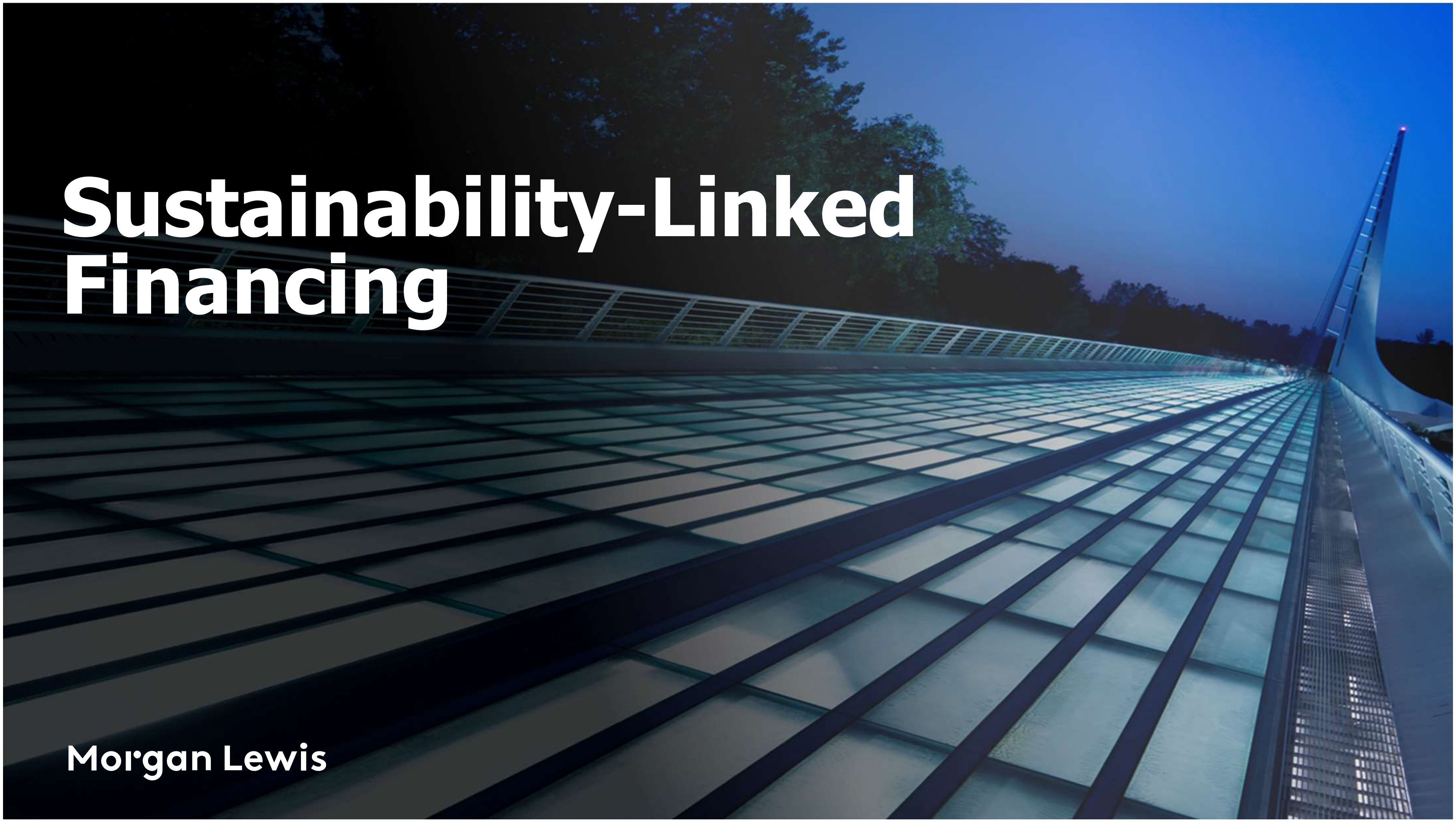
Defining Standards

- Gathering/utilizing data
- Looking to standard setters
- Defining “compliance” with ESG standards

Looking Forward

- Drivers – Investor Demand
- Focus on Enforcement – Protecting Investors from Fraud/Greenwashing
- Issues Related to Cross Border Conflicts

Sustainability-Linked Financing



Morgan Lewis

New Trends in Sustainability Financing

"Morgan Stanley aims to support $750 bln in low-carbon investments by 2030"

"Australia's Top Banks Step Up Hiring in Green Finance Push"

"JP Morgan pledges $2.5 trillion over the next decade towards climate change"

"Bank of America ups environmental commitment to $1 trillion by 2030"

New Trends in Sustainability Financing – Contd.

"Alabama's plans for new turnkey build-to-suit men's correctional facilities have hit a roadblock as 2 banks have pulled out of a municipal-bond sale following mounting pressure from social justice activists"

"Social Bonds Propel ESG Issuance to Record $732 Billion in 2020"

"Bank of America Issues $2 Billion Equality Progress Sustainability Bond"

"Britain's Boohoo may link executive bonuses to improved worker rights"

New Trends in Sustainability Financing – Contd.

- LMA/LSTA/APLMA "Social Loan Principles" Guide published in April
- Similar to the "Green Loan Principles" Guide
- Purpose is to ensure consistency of approach across the different loan markets
- Provides a framework of voluntary guidelines for lenders and borrowers if they want to categorise a loan as a "social" loan
- Aim of the social loan market is to facilitate economic activity which supports and addresses social issues

New Trends in Sustainability Financing – Contd.

The financing should satisfy 4 key characteristics:

- [x] Use of Proceeds
- [x] Project Evaluation and Selection
- [x] Management of Proceeds
- [x] Reporting/Monitoring

New Trends in Sustainability Financing – Contd.

❑ Use of Proceeds

- Purpose should be clearly set out in the loan agreement and marketing materials
- Social Loan Principles guide provides illustrative list only
- Examples include affordable housing, sanitation and transportation, food security and sustainable food systems, alleviation of unemployment, and socioeconomic advancement

New Trends in Sustainability Financing – Contd.

❑ Project Evaluation and Selection

Borrower must demonstrate:

- How was the specific project selected?
- What are the social objectives of the project?
- What process was followed to determine that the project fits within the social loan parameters?

New Trends in Sustainability Financing – Contd.

❑ Management of Proceeds

Borrower must ensure use of proceeds is in accordance with the stated purpose:

- deposit proceeds in separate account earmarked for use for the project for which loan was made
- put in place internal procedures to track application of proceeds

New Trends in Sustainability Financing – Contd.

❑ Reporting/Monitoring

Borrower must provide regular reporting on:

- how the loan proceeds were used
- the projects to which they were applied
- the social impact that those projects are expected to have

Questions

Morgan Lewis

Biography

Ken Kulak
Philadelphia, PA
+1.215.963.5384
ken.kulak@morganlewis.com

Ken Kulak is a co-leader of the firm's power and renewables sector team and a member of the firm's climate change and sustainability working group. He counsels energy companies in regulatory proceedings, including ratemaking proceedings, before public utility commissions and in transactional matters. Ken also advises public utilities, project developers, investors, and corporate energy users on retail and wholesale electricity markets, renewable portfolio standards, distributed generation (including microgrids), demand response, and energy efficiency.

Biography

Elizabeth P. Hanigan
Chicago, IL
+1.312.324.1155
elizabeth.hanigan@morganlewis.co
m

Elizabeth P. Hanigan focuses her practice on business and financial matters concerning renewable energy and infrastructure development, project finance, mergers and acquisitions, and joint ventures. She advises developers, private equity, and financial investors in connection with the acquisition, construction, development, sale, and financing of renewable energy generation projects, with an emphasis on wind, solar, and energy storage facilities. Elizabeth also advises clients working toward their sustainability goals, for example, in connection with negotiation of virtual power purchase agreements and other investments in clean energy technologies.

Biography

Willard K. Tom
Washington, D.C.
+1.202.739.5389
willard.tom@morganlewis.com

Willard K. Tom brings more than 35 years of public and private sector antitrust experience to our clients. He was the General Counsel of the US Federal Trade Commission (FTC) during the first part of the Obama administration and has held several other high-level government positions. Will represents clients before federal and state agencies and in the courts in mergers and acquisitions, cartel investigations and litigation, intellectual property (IP) matters, monopolization, and other antitrust matters. While at the Department of Justice (DOJ), he was one of the two principal authors of the DOJ/FTC IP Licensing Guidelines.

Biography

Ayesha K. Waheed
London
+44 203 201 5556
ayesha.waheed@morganlewis.com

Ayesha Waheed practices principally in the project finance, infrastructure, and natural resources practice and brings over 25 years of experience. She represents developers and lenders in natural resource, power generation, and infrastructure projects, and has experience in all aspects of structuring, negotiating, and drafting finance and commercial documents in connection with international project financings and privatizations. Ayesha is a member of the firm's global ESG working group and counsels companies that are developing and deploying new energy resources, including renewable energy.

Biography

Baird Fogel
San Francisco
+1.415.442.1170
baird.fogel@morganlewis.com

Baird Fogel counsels clients on mergers and acquisitions, interest and stock sales, supply agreements, contract negotiations, international project finance, project development, project construction, commercial law and settlements, compliance, corporate governance, and other general corporate matters. Focusing on the global renewable energy industry, he handles matters involving energy storage, microgrids, transmission, net metering, solar, wind, manufacturing, supply chain, distribution, construction, residential, commercial, small- and large-scale utility, government relations, and investment and finance. Baird's transactions and energy projects practice is global in scope, with clients in the United States and throughout Europe, China and India, South America, and Africa.

Biography

Ella Foley Gannon
San Francisco
+1.415.442.1171
ella.gannon@morganlewis.com

Ella Foley Gannon represents clients before a myriad of state and federal regulatory agencies, focusing her practice on federal and state environmental laws, natural resource permitting, and land use entitlements. Recognized as one of the leading permitting and siting lawyers in California and an authority in endangered species, wetland, water quality, and water rights issues, she assists developers and landowners who undertake complex development projects, including renewable and traditional energy and transmission projects, as well as residential, commercial, industrial, and mixed-use projects. Ella currently serves as a deputy chair of Morgan Lewis's global litigation practice.

Our Global Reach

Africa	Latin America
Asia Pacific	Middle East
Europe	North America

Our Locations

Abu Dhabi	Moscow
Almaty	New York
Beijing*	Nur-Sultan
Boston	Orange County
Brussels	Paris
Century City	Philadelphia
Chicago	Pittsburgh
Dallas	Princeton
Dubai	San Francisco
Frankfurt	Shanghai*
Hartford	Silicon Valley
Hong Kong*	Singapore*
Houston	Tokyo
London	Washington, DC
Los Angeles	Wilmington
Miami	

Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2021 Morgan, Lewis & Bockius LLP
© 2021 Morgan Lewis Stamford LLC
© 2021 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.