



**FOREST STEWARDSHIP COUNCIL
UNITED STATES**

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December 10, 2010

Donald S. Clark
Secretary
Federal Trade Commission
Room H-135 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Proposed, Revised Green Guides, 16 CFR Part 260, Project No. P954501

Dear Mr. Clark,

I submit the attached comments on behalf of the Forest Stewardship Council – United States, in response to the invitation of the Federal Trade Commission for comments on the proposed revisions to the Guides for the Use of Environmental Marketing Claims (the “Green Guides”), 75 Fed. Reg. 63551 (Oct. 15, 2010).

We appreciate the opportunity to provide these comments and welcome any questions that the Commission or staff have as the Commission finalizes its Green Guides.

Sincerely,

Corey Brinkema, President

cc: David C. Vladeck, Director, Bureau of Consumer Protection
James A. Kohm, Associate Director, Division of Enforcement

Forest Stewardship Council Response to Invitation for Comments on Proposed Green Guides

These comments are submitted on behalf of the Forest Stewardship Council – United States (“FSC-US”), a not-for-profit organization established to promote responsible forest management, to provide comments in response to the invitation of the Federal Trade Commission (“FTC” or “Commission”) for comments on the proposed revisions to the Commission’s Guides for the Use of Environmental Marketing Claims (the “Green Guides” or “Guides”), 16 C.F.R. Part 260, published in the Federal Register, 75 Fed. Reg. 63551, 63597-98 (Oct. 15, 2010) (the “Notice”). FSC-US commends the Commission for its comprehensive effort to review the Green Guides to respond to changes in the marketplace to help marketers avoid making unfair or deceptive environmental marketing claims.

These comments address those aspects of the proposed Guides in which FSC-US has expertise: “Certifications and Seals of Approval,” “Sustainable Claims,” “Recycled Content Claims,” and “Changes in Technology or Economic Conditions.”

I. Background on the Forest Stewardship Council

FSC-US coordinates the development of forest management standards, and works with certification organizations, non-governmental organizations, and businesses to promote responsible forest management and the certification of forests and forest products. Over the last 15 years, FSC-US, FSC national initiatives around the world, and the Forest Stewardship Council International Center (collectively “FSC”), has devoted substantial efforts to developing objective standards for forest management and chain of custody tracking to promote wood and paper products originating “from well-managed forests,” “made from recycled material,” and as a “mix from responsible sources.”¹

Products carrying the FSC label are independently certified to assure consumers that they come from forests that are managed to meet the social, economic, and ecological needs of present and future generations. There are currently more than 132 million acres of FSC-certified forestland in the United States and Canada and more than 330 million acres globally. More than 19,000 manufacturers and distributors are certified to buy and sell FSC products, representing more than \$20 billion in FSC-labeled product annually.²

II. Certifications and Seals of Approval

Recognizing that marketers increasingly use certifications and seals of approval to communicate environmental claims, and that given such widespread use there is potential for consumer deception, the Commission’s proposed revised Green Guides include a new section, § 260.6, that addresses certifications and seals of approval.³

We applaud the Commission’s recognition of the importance of certifications and seals of approval and decision to address them directly in the Green Guides. We urge the Commission to revise its final Guides to provide clearly that the independence of certifying programs be judged on underlying reality and to clarify the Guides’ disclosure requirements to avoid inconsistent application.

¹ See generally http://www.fscus.org/about_us/ and <http://www.fsc.org/about-fsc.html>.

² Forest Stewardship Council, *Global FSC certificates: type and distribution*, 3-4, 9 (Nov. 2010), available at <http://www.fsc.org/facts-figures.html>.

³ 75 Fed. Reg. 63551, 63566 (Oct. 15, 2010).

A. Independence of Certification Programs Must Be Judged Based on Underlying Realities of the Standard-Setting Organization's Structure

We agree that it is deceptive to misrepresent, directly or by implication, that a product has been certified by an "independent third-party" where there are "connections . . . which might materially affect the weight or credibility" of the certification that is not reasonably expected by consumers.⁴

There is ample evidence that environmental certifications based on objective standards play an important role in assisting consumers to select products and services. Academic research has demonstrated that the main concern of consumers when evaluating a certification label is whether they can trust the independence and unbiased nature of the certification program, since most consumers are not familiar with the criteria for certification. If consumers do trust the certification program, they are willing to pay a premium for certified products.⁵

To provide a concrete example, at least two studies have found that among potential certifiers, the wood products industry is the entity consumers trust the least to certify forest products. One study specifically noted that focus group "participants were most suspicious of test label sets that feature endorsement from the American Forest and Paper Association or the Society of American Foresters."⁶ Another concluded that "the wood products industry is the least trusted" while non-governmental organizations are most trusted to certify products.⁷ This evidence supports the Commission's intuition that "[c]onsumers likely place different weight on a certification from an industry association than from an independent, third-party."⁸ Based on this evidence, it is appropriate for the Commission to require, as proposed Example 3 suggests, that manufacturers disclose when products are certified by an "industry group" or "industry trade association."

Independence must be real and not a fig leaf, and hence the Commission must look past form to the substance of a certification program.⁹ For example, timber companies could avoid having a "material connection" via funding or membership by setting up a certification program as a non-member

⁴ 16 C.F.R. § 260.6(a) (proposed), 16 C.F.R. § 255.5.

⁵ See, e.g. Mario F. Teisl, et al., *Consumer Reactions to Environmental Labels for Forest Products: A Preliminary Look*, 52 Forest Prod. J. 44, 48-49 (2002) ("Credibility of the endorsing entity was, by and large, a central issue in each focus group"); Lucie K. Ozanne & Richard P. Vlosky, *Certification from the U.S. Consumer Perspective: A Comparison from 1995 and 2000*, 53 Forest Prods. J. 13, 16, 18 (2003) ("the wood products industry is still not trusted to certify itself"); Kimberly L. Jensen, et al., *Consumers' Willingness to Pay for Eco-Certified Wood Products*, J. of Agricultural and App. Econ. 617, 622 (2004) (finding about 30% of consumers are willing to pay a premium for eco-certified products); Roy C. Anderson & Eric N. Hansen, *The Impact of Environmental Certification on Preferences for Wood Furniture: A Conjoint Analysis Approach*, 54 Forest Prod. J. 42, 49 (2004) (stating that a target group of consumers was willing to pay at least a five percent premium for certified forest products); Francisco X. Aguilar & Richard P. Vlosky, *Consumer Willingness to Pay Price Premiums for Environmentally Certified Wood Products in the U.S.*, 9 Forest Policy & Econ. 1100, 1110-1111 (2007) (consumers with incomes greater than \$39,999 per year were willing to pay at least a 10% premium for certified products).

⁶ Teisl, et. al., *supra* note 5, at 48.

⁷ Ozanne & Vlosky, *supra* note 5, at 16, 18.

⁸ 75 Fed. Reg. at 63,567.

⁹ See, e.g., ForestEthics, SFI: Certified Greenwash, Inside the Sustainable Forestry Initiative's Deceptive Eco-Label, November 2010, available at http://www.forestethics.org/downloads/SFI-Certified-Greenwash_Report_ForestEthics.pdf (explaining and attacking the paper and timber industry's control over the Sustainable Forestry Initiative).

organization and providing substantial funding early in its existence. Then, after a few years, the certification program could be spun off and considered “independent” because the companies that started it are no longer providing funding and are not members. Such companies could ensure continuing control by setting up a governance structure where new board members are appointed by the existing board members after putting in place the original board. In such a situation, despite the lack of a financial or membership relationship, the marketer should be required to “avoid deception by using clear and prominent qualifying language to alert consumers that it created the certifying program.”¹⁰

By contrast, membership organizations whose members represent a balance of interests and are actively involved in decision making would be far more likely to come to an independent conclusion in the standard-setting process. Even though some of the members of such an organization would eventually also be certified, the standard-setting process would reflect the diverse and balanced membership of stakeholders that represent environmental, social, and economic values. This sort of collaborative process, where all stakeholders are involved, will produce an independent and viable standard that is of value to consumers in making purchasing decisions.

B. FSC Urges Further Clarification of Disclosure Requirements to Avoid Inconsistent Interpretations

We suggest some further clarification to avoid inconsistent interpretations of the proposed Green Guides, given typical certification practices.

First, we note possible confusion where a firm is a member of an association that sets standards and authorizes use of labels and logos which the association has copyrighted and trademarked, but where certification is provided by an independent third-party.

Example 2 suggests that where a marketer is a “dues-paying member” of an association which bestows a seal regarding environmental benefits, the marketer must disclose the connection to avoid deception.

The Commission’s Notice explains:

Proposed Example 2 involves a marketer who displays a seal of approval bestowed by a trade association in which the marketer is a member. In this case, the trade association evaluated the environmental attributes of the marketer’s product. Because the seal of approval implies that a third-party evaluated and certified the product, consumers likely expect that the endorsing party is truly independent from the marketer. In this case, however, the certifier is not a truly independent entity because the marketer pays membership dues to the association.¹¹

This example leaves some ambiguity as to whether disclosure is required where (1) the marketer is a member or financial supporter of the association that developed the seal but (2) a third party independent of the marketer has tested and certified the product.¹² Example 3 uses the terminology of a “certifying organization” which may add further ambiguity, since for at least some environmental certification processes, the organization that actually audits compliance with a standard is not the same as the organization that sets the standard and manages the seal or certification label.

As an example, consider FSC’s structure. FSC is a membership organization that develops and sets standards based on a collaborative multi-stakeholder process. FSC does not issue certificates

¹⁰ 16 C.F.R. § 260.6 (Example 1).

¹¹ 75 Fed. Reg. at 63567 (emphasis added).

¹² Of course, a manufacturer or marketer may pay a fee to the third party for the cost of testing, but consumers should reasonably expect such fees to be paid and so they should not have to be disclosed.

(certifications). Independent certification bodies audit applicant firms' practices against FSC standards. Applicant firms include land owners, forest managers, sawmills, lumber yards, furniture and paper manufacturers, brokers, wholesalers, printers, and retailers.¹³ Firms that want to be certified must work with such an independent certification body, which will conduct a certification audit, and make a certification decision based on FSC requirements.¹⁴ If a firm passes the third-party certification process and meets the trademark eligibility requirements, it is able to use the FSC logo.¹⁵

Disclosure of membership in a standard setting body seems unnecessary where an independent third party has evaluated and certified the product. Requiring such disclosure would not further the ultimate goal of avoiding deception, because "a third-party evaluated and certified the product" and that organization is "truly independent from the marketer."¹⁶

Second, where certification is based on a product passing through a supply chain, there may be some ambiguity as to what relationships must be disclosed.

It is not uncommon for wood and paper products to be sold as certified by FSC where the wood was grown and harvested by one firm and processed and ultimately sold by others. FSC's chain of custody tracking requires that certified material be tracked through the production processes all the way from the stump to the store.¹⁷

If all of the dues-paying members of FSC in the distribution chain must disclose their membership on the ultimate consumer label, then chain of custody tracking could be effectively regulated out of existence by the FTC Green Guides.

As the Commission finalizes its rules, FSC urges it to consider the fact that if disclosure requirements become too onerous (e.g., requiring disclosure of every company in the chain-of-custody), businesses that would otherwise use a certification or seal of approval may be dissuaded from doing so, both because of the cost and limited "real estate" available on the package. Requiring additional disclosure on the label may make it impossible to communicate information that consumers consider relevant.

On the other hand, a timber company that gives millions of dollars to an industry-controlled certifying program, which certifies lumber from deforestation, and then sells it to a lumber yard, which re-sells it under a private label as from "sustainable forestry," should at minimum be required to disclose its relationship.

Applying the rules at the retail level may also be unclear. Must a retailer that promotes the fact it sells FSC certified products manufactured by others disclose that the retailer itself is a member of FSC? What if the retailer merely resells products that bear the FSC label? If disclosure were required by the retailer, would that disclosure have to take place in its own promotion, or on the label of the products it sells, which are typically already labeled when received by the retailer?

These questions demonstrate our concerns about confusion with respect to the disclosure requirements.

¹³ See *Accreditation Program*, Forest Stewardship Council, <http://www.fsc.org/accreditation.html>.

¹⁴ See, e.g., *5 Steps towards FSC certification*, Forest Stewardship Council, <http://www.fsc.org/5-steps-certification.html> ("The data collected at the audit is the basis of the audit report based on which the certification body makes the certification decision.").

¹⁵ See, e.g., *Forest Management*, Forest Stewardship Council, <http://www.fsc.org/fmcertification.html>.

¹⁶ 75 Fed. Reg. at 63567.

¹⁷ See FSC Standard for Chain of Custody Certification, FSC-STD-40-004 (Version 2-0), at 20-21 (2004), available at http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_40_004_V2_0_EN_Standard_for_CoC_Certification_2008_01.pdf.

III. The Commission Should Address Sustainable Claims in its Green Guides

FSC urges the Commission to reconsider its decision not to address “sustainable claims” in the Green Guides. Even if the Commission does not adopt a definition of “sustainability,” we urge some clarification in the Guides of use of the term with environmental terms and images, which the Commission recognizes in its analysis may convey environmental claims. We also urge clarification of the Guides regarding when the term “sustainable” is used to convey general environmental superiority.

A. “Sustainable” Claims Have Meaning to a Significant Number of Consumers and Should Be Defined to Minimize Deception

The sustainable claims analysis in the Notice starts with the recognition that the term “sustainable” has become “part of the national vernacular.”¹⁸ The Commission reports that it received initial comments ranging from a suggestion that “the term ‘sustainable’ simply should not be used as a marketing claim” to advice that “there is no clear understanding of the term” and the Commission should “avoid tackling the onerous and possibly unachievable task of defining the specific attributes of sustainability.”¹⁹

The Commission’s consumer perception study found that respondents had widely varying understandings of the term “sustainable” standing alone, ranging from “strong/durable” to “made from sustainable resources” to “good for” or “benefits” the environment. The Commission concluded “the [sustainable] claim has no single environmental meaning to a significant number of consumers” or “it conveys non-environmental characteristics,” noting the term “contains no cue alerting consumers that it refers to the environment.”²⁰

In fact, the Commission’s Notice recognized that “if used in combination with environmental terms and images,” consumers may “perceive ‘sustainable’ as an environmental claim.” The Commission said, however, that it did not test such claims in context.²¹

We believe that the Commission would be well founded if it built upon definitions of “sustainability” adopted by the United Nations Report of the World Commission on Environment and Development, in 1987, that “sustainable development is development that meets the needs of the present without compromising the ability of further generations to meet their own needs,”²² as well as the World Business Council on Sustainable Development definition that considers sustainable development to be “forms of progress that meet the needs of the present without compromising the ability of future generations to meet their needs.”²³ At the United Nations 2005 World Summit, it was further noted that sustainability requires the reconciliation of environmental, social, and economic demands.²⁴ With those definitions in mind, FSC recommends:

¹⁸ 75 Fed. Reg. at 63581.

¹⁹ 75 Fed. Reg. at 63581-82.

²⁰ 75 Fed. Reg. at 63583.

²¹ 75 Fed. Reg. at 63583.

²² Report of the World Commission on Environment and Development: Our Common Future, G.A. Res. 42/187, U.N. Doc. A/42/427 (December 11, 1987), available at <http://www.un-documents.net/wced-ocf.htm> (commonly known as the Bruntland Commission).

²³ *FAQs about the WBCSD*, World Business Council for Sustainable Development, available at <http://www.wbcd.org/templates/TemplateWBCSD1/layout.asp?type=p&MenuId=Mjk0> (last visited Nov. 18, 2010).

²⁴ 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>.

Sustainability (when accompanied by cues indicating it is used as an environmental claim): It is deceptive to misrepresent, directly or by implication, that a product or product attribute is sustainable or supports the sustainability of a biological system or is renewable, unless the system (e.g., forests, wetlands) has the capacity to maintain or support itself and endure, remaining biologically diverse and productive over time, without compromising future generations considering environmental, social, and economic demands.

At minimum, the Commission should make clear in the Guides, as it has in the Notice that “[m]arketers ... are responsible for substantiating consumers’ understanding of [any sustainable] claim in the context of their advertisements.”²⁵ For example, sustainability claims that obviously violate this definition, such as large-scale deforestation and reduction of biological diversity, will almost certainly deceive consumers.

B. At Minimum, Using the Term “Sustainable” Is a Claim of Environmental Superiority

We urge that the Green Guides also recognize that, at least when accompanied by environmental terms and images, such as an image of a tree or of a green globe, a claim of “sustainability” is a claim of environmental “superiority,” and such a claim must be substantiated, even if the consumer does not understand *how* the product is superior. An accreditation system defining performance measures and indicators which require nothing more than compliance with federal and state law should not substantiate an environmental superiority claim.

While consumers may be confused as to the nature of the benefit when an environmental “sustainability” claim is made, the Commission’s own survey revealed that consumers do attach meaning to the term, with 32% of all respondents recognizing a general or specific environmental benefit.²⁶ Since 35% of respondents in that survey attributed a “strong/durable” or “long-lasting” claim to the term “sustainable,” the number attributing an environmental benefit claim would likely be even higher if environmental cues were part of the claim. These consumers, who understand sustainability claims as environmental claims, are the most at risk of purchasing a product or paying a premium based on an unsupported sustainability claim. The Commission should be concerned with deceptive claims aimed at those consumers who would change their behavior based on a misleading claim of “sustainability.”

Consumer research reveals that where “sustainable” is used in the context of environmental cues, consumers do indeed understand “sustainable” to mean a positive environmental impact. For example, a 2009 TerraChoice Environmental Marketing survey of professional purchasers found 80% of those surveyed responded that a factor that motivated their organization to implement “green” purchasing guides was “[o]ur organization’s commitment to sustainability.”²⁷ The same study found “sustainability” to be tied for third most important environmental issue with water pollution and recyclability.²⁸ “Sustainability” increased the most in relative importance from 2008 to 2009 of the terms tested.²⁹

In its “Policy Statement on Deception,” the Commission quotes the Supreme Court’s statement, “[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a

²⁵ 75 Fed. Reg. at 63583.

²⁶ 75 Fed. Reg. at 63583 and n. 377.

²⁷ TerraChoice Environmental Marketing, Ecomarkets Summary Report 2009, at 8 (Sept. 2009).

²⁸ *Id.* at 12.

²⁹ *Id.*

business to promote its products reflects a belief that consumers are interested in the advertising.”³⁰ Following this logic, it is self evident that the profusion of the word “sustainable” in advertising indicates that those who the market rewards for understanding consumer preferences recognize sustainability is important to consumers.

We are particularly concerned that language in the Commission’s Notice might be interpreted as saying the Commission thinks the term “sustainable” is meaningless, insofar as consumer perception evidence indicates that the claim has “no single environmental meaning to a significant number of consumers.”³¹ Unscrupulous marketers may even go so far as to use the term to describe practices that do not provide any environmental benefits that exceed what is required by law, or certain obviously “unsustainable” practices, such as deforestation. The Commission should make clear, if it decides not to define the term “sustainable,” that its action is not a “safe haven” for marketers to deceive consumers.

IV. Recycled Content Claims

FSC urges the Commission, with respect to recycled content claims in proposed §260.12, to (1) prevent unqualified recycled content claims for products made from material that never reaches a consumer, and (2) clarify its guidance with respect to calculating recycled content to allow any method that is not deceptive, including properly administered credit systems.

Before discussing the specifics of the proposed Guides with respect to recycled content claims, we provide some background on recycling in the pulp and paper industry. We note that the Commission focused much of its analysis on the textile industry,³² and believe that the Commission should keep wood and paper products in mind, in addition to textiles, in deciding how to address recycled content claims.³³

A. Background on the Pulp and Paper Industry

In the United States in recent years, wood pulp, the most economical and practical fiber used to make paper, accounted for approximately 60 percent of total fiber consumption and waste paper supplied most of the rest.³⁴ The two sources for virgin wood fiber are pulpwood and residual chips. Pulpwood is harvested and transported either tree-length or after being cut into short lengths (bolts). Residual chips are recovered by sawmills from the portions of a sawlog that are not suitable for lumber.³⁵ The material is then chipped, collected, and transported to the pulp mill to be made into market pulp.³⁶ In 1999, pulpwood accounted for 78 percent of all virgin fiber used for pulp in the United States; residual chips

³⁰ FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) (quoting *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1980)).

³¹ 75 Fed. Reg. at 63583.

³² 75 Fed. Reg. at 63574-76 & n. 290 (recognizing difficulty in determining whether waste qualifies as pre-consumer recycled content is not exclusive the textile industry).

³³ We focus only on the paper and pulp industry, which has a long history of recycling. In timber, the majority of recycled product is reprocessed into chip boards, mulch, and animal bedding. Georgina Magin, Wood Waste Project Manager, Fauna & Flora International, “Introduction to Wood Waste in the UK,” in *Timber Recycling Opportunities in the UK: A summary of presentations given at four workshops in Cambridge, Manchester, Birmingham and Bristol*, at 5-6 (2003), available at <http://www.globaltrees.org/downloads/WoodWasteIntro.pdf>.

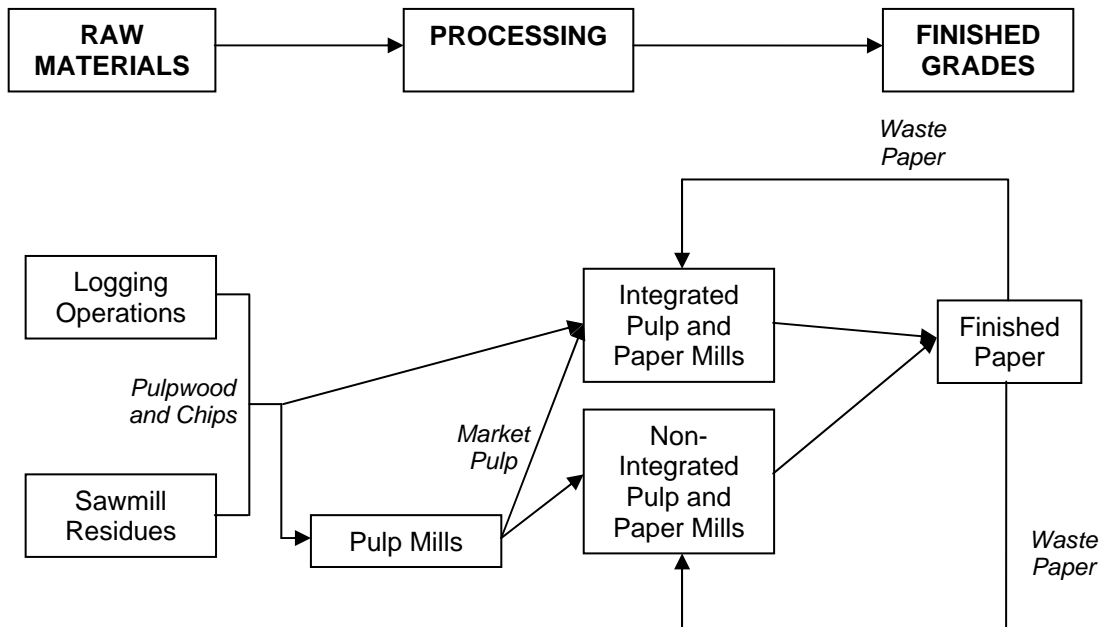
³⁴ U.S. International Trade Commission, “Industry & Trade Summary: Wood Pulp and Waste Paper,” USITC Publication 3490, at 4 (Feb. 2002).

³⁵ *Id.*

³⁶ *Id.*

supplied the other 22 percent.³⁷ Waste paper is collected in large volumes from newspaper and magazine “overruns” as well as from post-consumer recycling facilities. The following flowchart shows the basic pulp and paper industry product flow.

PULP AND PAPER INDUSTRY BASIC PRODUCT FLOW



Source: U.S. International Trade Commission 2002

Neither the current nor the proposed Guides clearly delineate what “waste,” if recycled, may be labeled pre-consumer recycled content in the pulp and paper industry. The Guides themselves focus on “diversion from the solid waste stream”³⁸ but examples to the Guides identify two additional factors relevant to determining if content is recycled: (a) the amount of reprocessing needed before reuse, and (b) whether the material is normally reused in “the original manufacturing process.”³⁹ Unfortunately, as the Commission recognized in its Notice, there is ambiguity in the current guidance, where there is significant reprocessing for use in a manufacturing process different from the original process, but where such practices are standard in an industry.⁴⁰

The pulp and paper industry provides a prime example. As the Commission will note from our brief description of the industry above, sawmill chips are a significant input for the paper and pulp industry and have been for decades. It is true that: (a) the amount of processing required to turn a sawmill chip into paper is substantial, and (b) the chips are not being reused in the “original” manufacturing process because instead of being used to make planks they are used to make pulp. FSC urges the Commission to clarify this point to help standardize recycled content claims across the industry and bring those claims

³⁷ *Id.*

³⁸ See 16 CFR 260.7(e).

³⁹ 16 C.F.R. 260.7(e) (Examples 1-3); proposed §260.12(b); 75 Fed. Reg. at 63576.

⁴⁰ 75 Fed. Reg. at 63576 (“These innovations, therefore, reveal some ambiguity in the Commission’s current guidance.”)

closer in line with consumer perception. Unfortunately, we believe that paper made from saw mill chips is now labeled as recycled by some producers, though FSC rules would prohibit such claims.⁴¹

B. The Commission Should Prevent Unqualified Recycled Content Claims for Material that Never Reaches a Consumer

The Commission received a number of comments requesting advice specifically for the textile industry regarding pre-consumer recycled content claims.⁴² In responding to these comments, the Commission referred members of the textile industry to the general guidance of the existing Guides, discussed above, which explain that to be recycled content (pre- or post-consumer) it must have been “recovered or otherwise diverted from the solid waste stream.”⁴³

Currently, markets making recycled content claims have the option to disclose whether the content is pre-consumer or post-consumer. The Commission, at least preliminarily, has declined to advise marketers that it is deceptive to make claims distinguishing between the amount of pre-consumer and post-consumer materials used in an item because there is no evidence such claims mislead consumers.⁴⁴ FSC supports this position, and in fact believes consumers generally assume all “recycled” material is post-consumer, so that FSC would support requiring that “pre-consumer recycled” material be specifically identified, to avoid consumer confusion.

The Commission specifically rejected incorporating the ISO 14021 definition of “post-consumer” material into the Guides, explaining that material returned from the distribution chain (e.g., overstock magazines) qualifies as ‘post-consumer’ recycled material under ISO 14021. We agree that “[i]t is unlikely . . . that consumers would interpret such material as ‘post-consumer’ recycled content because the material never actually reaches consumers.”⁴⁵ While some might consider the publisher to be the consumer with respect to overruns, FSC rules consider overstock magazines to be pre-consumer waste.

Based on these comments and analysis, the FTC requested comment on pre- and post-consumer recycled content claims. It asked two basic questions: (1) “What changes, if any, should the Commission make to its guidance on pre-consumer recycled content claims?” and (2) “Do consumers understand the difference between pre-consumer and post-consumer recycled content?”⁴⁶

FSC’s current practices reflect what our members and certificate holders perceive to be pre- and post-consumer recycled content. In the context of wood, FSC accepts damaged stock, rejected products, overstock, and discontinued items not used for their intended purpose as pre-consumer recycled material.⁴⁷ On the other hand, co-products from virgin parent materials and forestry waste (e.g. branches,

⁴¹ Forest Stewardship Council, FSC Standard for Sourcing Reclaimed Material for Use in FSC Product Groups or FSC-certified Projects, FSC-STD-40-007 (Version 1-0), at 7 (2007) (“Examples of reclaimed WOOD material”), available at http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_40_007_V1_0_EN_Sourcing_reclaimed_materials.pdf.

⁴² See 75 Fed. Reg. at 63574-75.

⁴³ 16 C.F.R. 260.7(e); see also 75 Fed. Reg. at 63576.

⁴⁴ 75 Fed. Reg. at 63576.

⁴⁵ 75 Fed. Reg. at 63576.

⁴⁶ 75 Fed. Reg. at 63598.

⁴⁷ Forest Stewardship Council, FSC Standard for Sourcing Reclaimed Material for Use in FSC Product Groups or FSC-certified Projects, FSC-STD-40-007 (Version 1-0), at 7 (2007) (“Examples of reclaimed WOOD material”), available at [http://www.fsc.org/fileadmin/web-](http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_40_007_V1_0_EN_Sourcing_reclaimed_materials.pdf)

small or rotten pieces of wood, trunks of old trees and palms) are not considered pre-consumer recycled wood material for the purposes of FSC certification.⁴⁸ FSC differentiates between wood products that can be considered pre-consumer recycled material and those that cannot based on (a) what point in the distribution chain the product has reached and if it requires returning the product to a prior step;⁴⁹ (b) whether the practice seems to be driven solely by economic motivations; and (c) the vitality of other markets for the “waste” under consideration.

FSC treats paper similarly. Scrap generated during the intermediate steps in producing an end product following primary manufacturing (*i.e.*, post-mill) is accepted as pre-consumer recycled material.⁵⁰ This includes bindery trim and scrap, forms conversion scrap, merchant return scrap, obsolete inventories, over-issue publications, printers’ scraps, make-ready, overruns, errors, rejections, and publisher overruns and returns. At the mill, however, materials generated from, and commonly reused within, an original manufacturing process are not considered pre-consumer recycled material.⁵¹ Post-consumer fiber is limited to magazines and newspapers from residential and office collections, reclaimed office waste paper, reclaimed household scrap paper, and the like.⁵²

As reflected in our treatment of material returned from the distribution chain, such as overstock magazines, FSC agrees with the Commission’s analysis that consumers are unlikely to interpret such material as post-consumer recycled.⁵³ We urge the Commission not only to make clear that such materials are not post-consumer, but to consider requiring that marketers make clear when materials are “recycled” from pre-consumer materials.

Finally, FSC is concerned about the number of unsubstantiated recycled claims currently being made to consumers. In order to ensure the FSC label is not used to support such claims, we require yearly audits to confirm that our certificate holders are actually using the inputs that the FSC label claims.⁵⁴ Other certification programs and marketers are not as rigorous in ensuring the claims that they make reflect recycled inputs. We urge the Commission step up its enforcement efforts to prevent unsubstantiated recycled claims.

[data/public/document_center/international_FSC_policies/standards/FSC_STD_40_007_V1_0_EN_Sourcing_reclaimed_materials.pdf](http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_40_007_V1_0_EN_Sourcing_reclaimed_materials.pdf).

⁴⁸ *Id.*

⁴⁹ For example, mill residuals (*e.g.* wood off-cuts produced from virgin parent materials that are discarded by a primary or secondary production process but can be reused on site by being incorporated back into the same manufacturing process that generated it) are not eligible to be classified as reclaimed under the FSC standard.

⁵⁰ FSC Standard for Sourcing Reclaimed Material for Use in FSC Product Groups or FSC-certified Projects, at 8 (“Examples of reclaimed FIBER material”).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Forest Stewardship Council, Forest management evaluations, FSC-STD-20007, at 15, *available at* http://www.fsc.org/fileadmin/web-data/public/document_center/accreditation_documents/certification_bodies/FSC-STD-20-007_V3-0_EN_FM_Evaluations.pdf; Forest Stewardship Council, Accreditation Standard for Chain of Custody Evaluations, FSC-STD-20-011 (Version 1-1), at 20, *available at* http://www.fsc.org/fileadmin/web-data/public/document_center/accreditation_documents/certification_bodies/FSC_STD_20_011_V1_1_EN_Chain_of_Custody_Evaluations.pdf.

C. The Commission Should Not Mandate Use of a Specific Methodology to Calculate Recycled Content

The current Guides, in Example 9, which is retained in the proposed Guides as Example 8, expressly advise marketers that recycled content claims may be based on the annual weighted average of recycled content.⁵⁵ The Guides do not address other methods of calculating recycled content, but the Commission's Notice casts a dark shadow over other approaches.

The Commission advised in its Notice that use of alternative methods, "such as the average amount of recycled content within a product line or across all product lines, or an offset-based approach," to calculate recycled content, "could mislead consumers by implying that products contain more recycled content than they actually do."⁵⁶ The same, however, could be said of the annual weighted average approach. The actual product coming off a production line could have less recycled content than the annual average. Indeed, even if a daily average were used, some product could have less recycled content than the stated average.

Even so, in the proposed Guides the Commission chose to retain use of an annual weighted average as an appropriate method to calculate recycled content.⁵⁷ The Commission has, however, requested comment on whether those claims are misleading, and if they should be qualified.⁵⁸ FSC urges the Commission to focus on the claim made, not the calculation method used, and in doing so recognize that a credit system can provide substantiation for claims.

1. The Commission Should Focus on the Claim Made, Not the Calculation Method Used

FSC is concerned that the Commission's approach may interfere with the dissemination of valuable information to consumers.⁵⁹ In requesting comment on whether the annual weighted average method of calculation is misleading, the Commission acknowledges that even with the weighted average method, recycled content claims might be made "even though ... consumers would never receive products with such content."⁶⁰ However, instead of then focusing on whether a claim itself is deceptive, the Commission puts a thumb on the scale, favoring the "annual weighted average" approach by suggesting that commenters prove that the method *is* deceptive, while all other calculation methods have to be proven *not* deceptive.

FSC believes this approach to methods of calculating recycled content misses the point. The Commission should not condemn or sanction a "proper" calculation of the content of a product, but rather should ensure that the method's results are accurately and not deceptively expressed. The two examples the Commission uses in the Notice are illustrative.

First, the Commission's Notice rejected alternative calculation methods because they could be used deceptively, giving an example of a marketer selling residential carpeting that contains no recycled

⁵⁵ 16 C.F.R. 260.9(e) (Example 9); 16 C.F.R. 260.12 (Example 8).

⁵⁶ 75 Fed. Reg. at 63576.

⁵⁷ 75 Fed. Reg. at 63577.

⁵⁸ 75 Fed. Reg. at 63577, 63598 (Question 10).

⁵⁹ See *also* Environmental Protection Agency's Sustainable Products Network, Comment 536013-00062 at 1 (urging the Commission "to ensure that efforts to prevent greenwashing do not diminish the market for legitimate environmentally preferred products").

⁶⁰ See 75 Fed. Reg. at 63577.

content and commercial carpeting that contains 50 percent.⁶¹ The Commission reasoned that if the marketer believed individuals are more interested than businesses in recycled content, it could choose to average the amount of recycled content in both products and make a 25% recycled content claim for its residential carpeting.⁶²

Second, the Commission cautioned that the annual weighted average calculation method may be deceptive because “a company could use two manufacturing sites to make the same product – one using recycled content but selling to local consumers who give little weight to this fact, and another using no recycled content but selling to local consumers who place a premium on products containing recycled materials.”⁶³

These examples demonstrate that the annual weighted average approach, just like the offset-based approach, has the potential to be deceptive; but both can also be used in a manner that is not. The key, therefore, is not in the underlying calculation method, but (1) whether products or plants are combined, and (2) whether the claim on the label or in the advertisement distorts what the test measures.

2. The Credit System, if Applied Correctly, Can Provide Substantiation for Claims

In particular, we are troubled that the Commission’s statements could have a negative impact on “credit systems” that measure the inputs used to make a product, even those that are not deceptive.

To give a concrete example, FSC authorizes certified organizations to use either a percentage system or a credit system to determine if they can display the FSC logo on wood and paper.⁶⁴ The percentage system works very similarly to the annual weighted average contemplated in the Guidelines.⁶⁵

To use the credit system, an organization must determine the FSC-certified and post-consumer inputs in a product group, defined as “a product or group of products specified by the organization [and audited by the certification body], *which share basic input and output characteristics* and thus can be combined for the purpose of FSC Chain of Custody control, percentage calculations and labeling”⁶⁶ The organization then establishes an account that is increased based upon the converted quantity (volume or weight) of FSC-certified inputs into each product group. Each input that is “pure,” e.g., 100% from FSC certified forests, counts fully, but for any mixed or post-consumer recycled inputs, the organization must reduce the inputs it claims by the percentage claim or credit claim from the supplier organization. The organization can then use the credits to sell products labeled as “FSC Mixed: Product group from well-managed forests, controlled sources and recycled wood or fiber,” but is limited to labeling no more output than there was certified input as converted by a conversion factor. A marketer can use its credits to label product for up to twelve months.⁶⁷

⁶¹ 75 Fed. Reg. at 63576-77.

⁶² 75 Fed. Reg. at 63577.

⁶³ 75 Fed. Reg. at 63577.

⁶⁴ See FSC Standard for Chain of Custody Certification, FSC-STD-40-004 (Version 2-0), at 20-21 (2004), *available at* http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_40_004_V2_0_EN_Standard_for_CoC_Certification_2008_01.pdf.

⁶⁵ *Id.* at 20.

⁶⁶ *Id.* at 11, 21 (emphasis added).

⁶⁷ *Id.* Though similar, there are significant differences between the FSC and Sustainable Forestry Initiative (“SFI”) credit systems. SFI, for instance allows credits to be shared among manufacturing facilities. Section 3.1.2.4, SFI Chain of Custody Standard, at 6 (noting that an entity for the purposes of defining the

FSC's credit system is more restrictive than the Commission's approach to recycled content claims. Take Proposed Example 8, for instance. In that example a paper greeting card labeled "50% recycled fiber," even though the fiber in the stock provided by each source varies, is not deceptive so long as it is based on the annual weighted average.⁶⁸ So, if in Months 1-6 the fiber stock was 75% recycled fiber and in Months 7-12 the fiber stock had 25% recycled fiber, the company could still claim for all products sold that the recycled fiber content is 50%. In FSC's credit system, the fiber stock could also vary by source and would be measured over a year. However, only 50% of the entire output over the year could be labeled at all and the label would indicate that the sources in that product are "FSC Mixed: Product group from well-managed forests, controlled sources and recycled wood or fiber."

The critical question from a consumer perception standpoint is the label or message that the product bears as a result of the credit system, or any other system that measures the content of a product. The claim made by a FSC logo affixed to a product based on FSC's credit system is true – the product group the item came from was a mix of FSC-certified products, (e.g., from well-managed forests) other controlled sources and reclaimed fiber.⁶⁹

While FSC understands the Commission's hesitation to endorse a credit system as an appropriate way to measure recycled content, FSC urges the Commission to revisit the language in its Notice. As the Commission recognized in its analysis of third-party certification programs, "[e]xperts in the field are in the best position in a dynamic marketplace to determine how to establish certification programs to assess the environmental attributes of a product. There may be multiple ways to develop standards that would constitute adequate substantiation, i.e., substantiation that constitutes competent and reliable scientific evidence."⁷⁰ The same reasoning should apply to developing methods to calculate the content of a labeled item.

We urge the Commission to make clear that so long as the claim made as a result of a calculation method is accurate and not deceptive, use of a particular calculation method is not inherently deceptive.

V. Changes in the Use of Technology Warrant Recognition of the Importance of Websites and the Internet

The Commission's approach to the Internet and websites deserves brief comment. The Commission rejected comments suggesting the use of websites be addressed in the Guides.⁷¹ In its analysis, the Commission focused solely on the use of websites to qualify claims made at the point of sale: "websites cannot be used to qualify otherwise misleading claims that appear on labels or in other advertisements because consumers likely would not see that information before their purchase. Any disclosures needed

production batch used to for a credit a count "may be a standalone manufacturing facility . . . or a centralized sales department within an organization with responsibility for multiple manufacturing units.") Organizations can thus use the SFI label to engage in the deception that the Commission warned against in its example regarding multiple manufacturing facilities.

⁶⁸ 75 Fed. Reg. at 63606.

⁶⁹ By contrast, the Sustainable Forestry Initiative ("SFI"), which uses a credit system similar to FSC's, labels products as coming from a "Certified Chain of Custody." See Section 3.4.2.1, SFI Chain of Custody Standard, at 8 (2010), *available at* http://www.sfiprogram.org/files/pdf/Section3_sfi_requirements_2010-2014.pdf. A consumer is likely to believe that the chain of custody of all materials included in the product is certified.

⁷⁰ 75 Fed. Reg. at 63568.

⁷¹ 75 Fed. Reg. at 63557.

to prevent an advertisement from being misleading must be clear and prominent and in close proximity to the claim the marketer is qualifying.”⁷²

FSC agrees that a marketer should not be able to make a deceptive claim on a product label and qualify it on its website.⁷³ We believe that the Commission’s language, however, undervalues, and understates the importance of, Internet and website communication. Environmental certifications are often based on extremely complex standards, which cannot be fully communicated on a label. Without Internet communication, FSC would not be able to communicate how rigorous its standard is, and convey the environmental value that our label signifies. In dismissing the importance of websites, the Commission also ignores the danger of consumer deception before the consumer enters the store.

Consumer data buttresses this point. A study the FSC-Belgium office commissioned to determine brand awareness found that of the people who knew the FSC label, 37% percent of the consumers recognized the label from labeled wood products, and 18% recognized it from the Internet.⁷⁴ Further, a 2009 study conducted by TerraChoice Environmental Marketing found that consumers first look to the Internet to determine whether a company is socially or environmentally responsible.⁷⁵ The Internet and websites are vital to developing consumer perception and awareness; and conversely, if used unscrupulously present a danger for consumer deception.

It is important to recognize that the “real estate” on some products is limited, and consumers often become familiar with logos and tag lines. We believe that widely recognized seals and certificates should be able to use “short forms” of their logos in such circumstances. Indeed, FSC has produced labeling guides for use “in exceptional circumstances, due to the size of the product” where the application of an FSC label at normal size is not possible on the packaging or product.⁷⁶

We therefore urge the Commission to revisit its approach to the Internet and websites to emphasize their importance in educating consumers and the Commission’s awareness of the potential for deception.

Conclusion

FSC applauds the Commission’s efforts in drafting the proposed revised Guidelines to respond to changes in the marketplace and to help marketers avoid making unfair or deceptive environmental marketing claims. FSC appreciates the opportunity to comment and hopes that the Commission will find our comments helpful as it drafts the final Guidelines. We welcome any questions that the Commission or its staff may have during this process.

⁷² 75 Fed. Reg. at 63557.

⁷³ For example, FSC believes that it is deceptive to label a product claiming “Certified Fiber Sourcing,” but contradict that claim on a website by stating that the “fiber sourcing label does not make a claim about certified forest content.” SFI Labels and Claims, http://www.sfiprogram.org/SFI_labels_and_claims.php.

⁷⁴ Listen Research & Intelligence, “Omnibus: Awareness – Image Tracker 2009,” at 14.

⁷⁵ BBMG, “2009 BBMG Conscious Consumer Report, Redefining Value in a New Economy,” at 21.

⁷⁶ FSC Product Labeling Guide: Exception Circumstances Below Minimum Size, at 1, *available at* <http://www.fscus.org/images/documents/logo%20use/FSC%20Label%20Guide%20Min.pdf>.