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Federal Trade Commission
Office of the Secretary, Room H-135 (Annex J)
600 Pennsylvania Avenue, NW
Washington, DC 20580

These comments are being submitted by Bryan Cave LLP on behalf of Shaw Industries Group, Inc., (“Shaw”) in response to a proposed rule of the Federal Trade Commission set forth in *Guides for the Use of Environmental Marketing Claims*, 75 Fed. Reg. 63552 (October 15, 2010)(the “New Guides”). The *Guides* solicited comments from interested parties to be submitted on or before December 10, 2010.

1. Introduction: Shaw and the Market for Recycled Carpet Products

Shaw is the world's largest carpet manufacturer and a leading provider of floor coverings. Shaw has played a major role in leading the industry in the pursuit of environmental stewardship and the move toward sustainability. In particular, Shaw made a significant investment in a facility that recycles nylon 6 fiber from post-consumer carpet waste to produce new nylon 6 which is indistinguishable from “virgin” nylon 6. As a result of Shaw’s recycling efforts it has reclaimed more than 400 million pounds of carpeting over the past four years.

As will be explained in further detail below, the process by which recycled nylon 6 is incorporated into final nylon carpet fiber and products involves a complex internal supply chain making it virtually impossible for Shaw either to insert directly recycled nylon 6 into specific products or to calculate precisely the amount of nylon 6 in a particular product. Additionally, Shaw has product lines of carpeting where a recycled content claim would have no value to the consumer

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even though some recycled nylon 6 will be in those lines. As a result, Shaw allocates recycled content to specific carpet product lines where recycled content is claimed. The percentage claimed is based on the allocated content as a percentage of the weight of the fiber to which it is allocated. The percentage claimed is qualified to indicate that it is an allocated percentage and to describe accurately the method of allocation.

2. The Discussion in the New Guides of Alternative Methods of Calculating Recycled Content Needs to Be Clarified.

The original Green Guides, 16 C.F.R. § 260.1 *et seq.* provided an example that permitted unqualified claims of exact percentages of recycled content in a product in a situation where the precise amount of recycled content in a particular product was unknown. In Example 9 set forth in 16 C.F.R. § 260.6(e), the Commission stated:

A paper greeting card is labeled as containing 50% recycled fiber. The seller purchases paper stock from several sources and the amount of recycled fiber in the stock provided by each source varies. Because the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the production process, the claim is permissible.

Under Example 9, the representation that the greeting card contained 50 percent recycled fiber was permitted without further qualification even though there would be cards about which this claim was made that would contain less than 50 percent recycled fiber.

In the *Guides* the Commission discussed alternative methods of calculating the percentage of recycled content other than the annual weighted average permitted under Example 9. It rejected each of those alternative methods. For example, the Commission stated:

For example, a marketer may sell residential carpeting that contains no recycled content and commercial carpeting that contains 50 percent. If the marketer believes that individuals are more interested than businesses in recycled content, it could choose to average the amount of recycled content in both products and then make a 25 percent recycled content claim for its residential carpeting (even though this carpeting contains no recycled content). Such a claim appears to be deceptive; therefore, without consumer perception evidence to the contrary, the Commission declines to sanction it.

75 Fed. Reg 63576-63577 (citations omitted).

We believe that this example is itself unclear because it appears to state that making the 25 percent recycled content claim is itself misleading without regard to the context of the claim or any qualifications made to the claim. The Commission has always made clear, however, that “[i]n evaluating advertising representations, we are required to look at the complete advertisement and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated excerpts.” *Standard Oil of Calif*, 84 F.T.C. 1401, 1471 (1974), *aff’d as modified*, 577 F.2d 653 (9th Cir. 1978), *reissued*, 96 F.T.C. 380 (1980). Accordingly, the Commission should make clear that the use of a 25 percent recycled content claim here is only impermissible where that claim is not conspicuously and adequately qualified to make clear that the 25 percent content claim is based on an average of recycled content in all of the marketers carpet.

The example above is, moreover, not a typical or likely example where a marketer might use an alternative method of calculation because in this instance the claim is made with respect to carpet that contains *no* recycled content. In a more typical example, the percentage claim might be made for carpet which does contain some recycled content but in an amount that can’t be precisely measured and which may be lower than the actual (but not measurable) recycled content. We will discuss such an example in more detail in sections 3 and 4 below discussing the alternative calculation methods used by Shaw with respect to its recycled nylon 6 carpet fiber.

3. The Alternate Calculation Method Used by Shaw Is Reasonable and, If Adequately Qualified, Not Deceptive

The problem posed for many manufacturers in measuring and claiming recycled content is a result of an internal supply chain where the recycled input material is moved through a chain of vertically-integrated but discrete processing steps. It is further complicated in many instances in situations where the manufacturer produces related but diverse versions of the product varying in style, color, material, branding and the like.

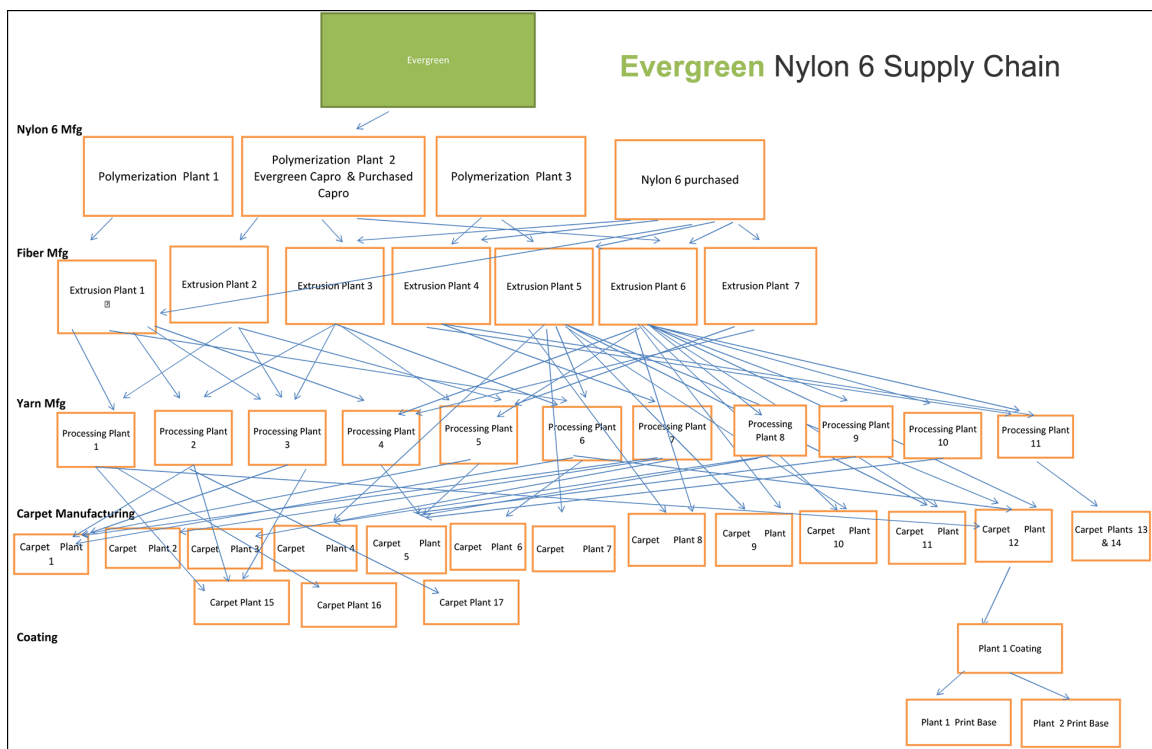
This is certainly the case for Shaw. There are five discrete steps involved in the recycling of post-consumer carpet materials, it’s transformation into new nylon 6, and the incorporation of that nylon 6 into new carpet fibers used to manufacture carpet.

Step 1: Take Back and Collection; Take back and collect carpet to enable a material supply stream that can support a recycling process to break carpeting down into its component parts to be able to be used as ingredients in new products.

Step 2: Sort by Material Types; Sort carpet by fiber material type to feed the appropriate recycling process. Carpeting is sorted into nylon 6 and other fiber material streams.

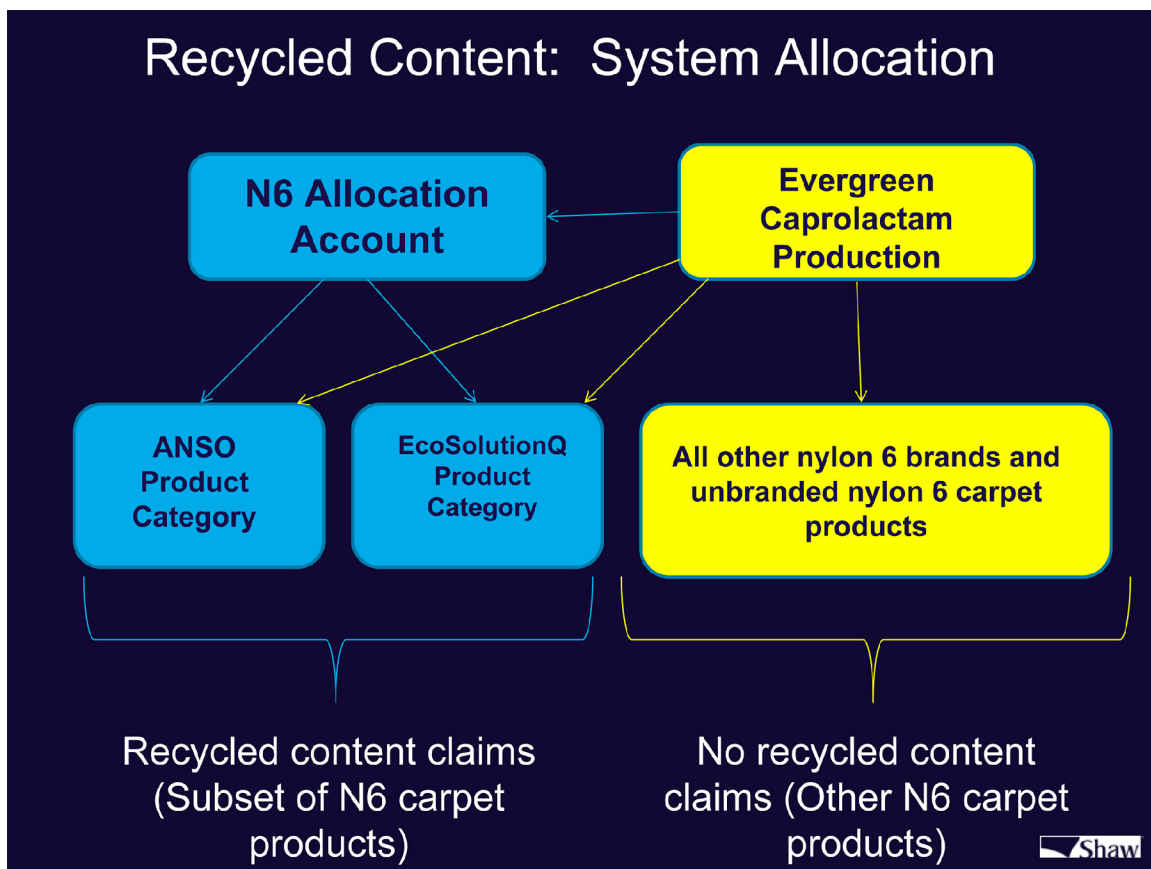
Step 3: Nylon 6 Carpet Breakdown; Carpets containing nylon 6 are ground and fed to the Evergreen process. The Evergreen nylon 6 depolymerization process involves the chemical transformation of nylon 6 fiber into its original chemical state called Caprolactam. This is the reverse chemical process of making nylon 6 fiber.

Step 4: Manufacture Carpet Using Nylon 6 Recycled Content; The Caprolactam from the recycling (depolymerization) process is then fed into a complex supply chain to manufacture new nylon 6 fiber, nylon 6 yarn, and eventually, nylon 6 carpet. The recycled nylon 6 is chemically indistinguishable from virgin nylon 6 so once it enters into the supply chain there is no way to test manufactured products to determine how much nylon 6 is in that particular product. And the complexity of the supply chain, as illustrated below, makes it virtually impossible to otherwise track recycled nylon 6 as it makes its way from the reprocessing plant to finished carpet products:



Step 5: System Allocation Account Management; Based on the amount of nylon 6 output produced by the recycling center (Evergreen), those pounds of nylon 6 are

entered into a tracking account (labeled in the below diagram as the N6 Allocation Account) for the purpose of future allocation. A given amount is taken from the N6 allocation account monthly based on monthly sales of those poundages of fibers for which claims are being made. For Shaw, these select product lines/categories represent, in pounds, approximately one-quarter of our overall nylon 6 carpet portfolio. The below diagram illustrates how the nylon 6 pounds are applied to select Shaw branded nylon 6 carpet product lines/categories:



Because recycled materials are introduced at the top of the production process, recycled nylon 6 is present in some quantity in most nylon 6 carpet produced by Shaw. Shaw applies pounds of nylon 6 from its nylon 6 Allocation Account to two select product lines/categories of nylon 6 carpeting. The pounds from the nylon 6 Allocation escrow account are substantiated through a third party audit and certification process. The post consumer recycled content claim is based on 25 percent of the carpet fiber poundages sold for those product lines claiming 25 percent

post consumer content. Additionally, no recycled content claims are made for the other nylon 6 brands even though they do contain recycled content.

Under such a system it would be misleading if an unqualified claim were made that the two product lines contained 25 percent recycled content. In order for such a claim to be accurate it would need to be adequately qualified to explain the allocation method and to disclose that the amount of actual recycled material in the particular product purchased by the consumer varies from the 25 percent recycled content allocated to the product. The qualification would also need to comply with Commission requirements that qualifying language must be understandable, conspicuous, timely and in a context that is reasonably intended to guarantee that the consumer is made aware of and understands the qualification. See *FTC Policy Statement on Deception*, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

4. Proposed Example of a Permissible Alternate Method of Calculating Recycled Content.

At present the only example of a permissible alternate method of calculating recycled content is the greeting card example given in Example 9 in the Original Green Guides. The Commission proposes to carry Example 9 over into the *New Guides*. That example, however, is constrained to a relatively simple manufacturing process where input material all flow directly to the finished product and the recycled content of the input material varies. As discussed above, that bears little similarity to a more complex manufacturing process such as that utilized by Shaw.

To reflect the variety of manufacturing process utilizing recycled materials, Shaw believes that the FTC should provide another example which shows a permissible alternative method of calculating recycled content along with an example disclaimer. We would propose the following example of something similar:

A carpet manufacturer wants to add recycled content to one of its product components and make a component claim. However, the manufacturer is vertically integrated and the recycled content needs to be added to the component on the front end of a complex product supply chain where it is mixed with indistinguishable non-recycled content. Due to this complexity it is commercially impracticable for the manufacturer to track the actual recycled content of the component through the process. However, utilizing an allocation account the manufacturer can account for the total weight of recycled content added to the process and allocate it solely to some but not all of the products made with the component. Using an alternative calculation method that is based on an allocation a percentage is derived. The

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manufacturer can make a recycled content claim for the component using an alternative calculation method as long as it is adequately qualified. In this case, a brief statement explaining the process along with a disclaimer that the consumer's product component contains an amount of actual recycled content that will vary from the stated percentage would be acceptable.

Any questions regarding these comments should be directed to undersigned counsel at (202) 508-6067 or clif.burns@bryancave.com.

Sincerely,

Robert Clifton Burns
Counsel for Shaw Industries
Group, Inc.