

December 10, 2010

Ms. Laura Koss
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex J)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

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

Dear Ms. Koss:

Crown Holdings, Inc. ("Crown") is pleased to provide the following comments to the Federal Trade Commission ("FTC" or the "Commission") in response to the recently proposed revisions to its Guides for the Use of Environmental Marketing Claims; Proposed Rule, published October 20, 2010.¹ Crown is a leading manufacturer of packaging products for consumer marketing companies around the world, manufacturing a wide range of metal packaging for food, beverage, household and personal care and industrial products and metal vacuum closures and caps. Crown is committed to continuous improvement in product design and manufacturing practices and has been a leader in reducing the amount of metal necessary to manufacture consumer packaging, improving productivity, developing new manufacturing processes, raising packaging performance standards, increasing functionality, and improving safety throughout our operations. Crown is also a strong supporter of efforts to increase and improve the national infrastructure and public support for metals collection and recycling.

While Crown supports the general purpose of FTC's Green Guide effort, we are concerned that the Commission appears to be adopting an overly narrow interpretation of acceptable claim language in the case of recycling and recycled-content claims, and is disregarding the potential and need for industry-wide or company-wide recycled content credit programs. FTC's position is particularly perplexing since the Commission takes a contrary approach with respect to the renewable energy industry and the wide-spread adoption of renewable energy certificates, or Green Tags, as a tool to promote investment in renewable energy capacity at the national level. Given the unusually narrow standard adopted in the recycled content guidance and illustrative examples, and the contradictory position the Commission takes with respect to other environmental claims and attributes, we believe that the Commission's stated position on recycled-content standards, if applied narrowly in its current form, would be unjustifiably discriminatory, and constitute arbitrary and capricious action that is an abuse of discretion under federal law.

¹ FTC, *Guides for the Use of Environmental Marketing Claims; Proposed Revisions to Guidelines*, 75 Fed. Reg. 63522 (Oct. 15, 2010).

With this concern in mind, we offer the following comments and clarifications:

1. FTC's Green Guides are Advisory Rather than Prescriptive in Nature

The Commission rightly acknowledges that “industry guides . . . are administrative interpretations of the law.”² As such, “they do not have the force and effect of law and are not independently enforceable.”³ Consistent with this limited function, the Commission’s Guides have historically provided generally-applicable principles and various illustrative examples, but have not addressed the full range of factual, legal, and policy scenarios that might arise. Moreover, even when the Guides do “provide guidance for marketers who want assurance about how to make nondeceptive environmental claims, the illustrative qualifications do not represent the only permissible approaches to qualifying a claim.”⁴

This acknowledgement of the guide’s limitation is particularly important where, as with the draft preamble and proposed guidance language, FTC has dismissed or disregarded certain commenter suggestions without establishing any clear policy recommendation or alternative. Numerous third-party commenters have emphasized the need for greater flexibility in calculating and communicating information on the recycled content of products and product lines, beyond the limited advice that “that recycled content claims may be based on the annual weighted average of recycled content in an item.”⁵ This flexibility is needed because in many manufacturing processes and/or industries, especially those operating in national commodity markets, it is economically, if not technically, impossible to track the specific molecules of recycled material from their initial form as post-consumer waste to their recycled and reprocessed form in a new product.

This structural limitation is particularly true for recycled aluminum and steel, both of which operate in national commodity markets. Due to the structural limitations of current recycled metal supply chains and the commodity markets for metal and aluminum, manufacturers have no way to track or calculate the recycled content of any given can or metal-containing product. Aluminum and steel recycling constitute one of the true success-stories in the recycling arena, and the industry believes it could achieve even greater recycling rates if it could harness consumer interest in recycled goods and packaging.⁶

² 75 Fed. Reg. 63552, 63553 (Oct. 15, 2010).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 63575-63577 (citing AF&PA, Comment 533431-00083 at 2-3; Georgia-Pacific, Comment 533431-00007 at 9; MBDC, Comment 533431-00022 at 1-3; MeadWestvaco, Comment 533431-00013 at 2; Weyerhaeuser, Comment 533431-00084 at 6; Shaw Industries Group, Inc., Comment 533431-00050 at 1-3; Sappi, Comment 534743-00023 at 3-5).

⁶ While the cost savings from recycling metal over processing virgin metal from extracted ore provide an important market incentive for manufacturers to use recycled metal, the US Government estimates that even with that incentive, between 2004 and 2008, annual recycling rates ranged between 33 and 48 percent for aluminum and

2. FTC's Failure to Address Recycling-Content Certificate Programs is Inconsistent with Its Acceptance of Renewable Energy Certificates and other "Green Tag" Systems

In the Proposed Rule, the Commission declined to sanction alternative methodologies for calculating the recycled content of products, suggesting that the methods and approaches proposed might "mislead consumers by implying that products contain more recycled content than they actually do."⁷ The Commission's position appears to reflect a lack of understanding of the value recycling content claims provide to the public, and the well-established options available for communicating that value.

The Commission appears to misperceive the benefit of recycled-content claims, particularly as applied to recycled aluminum and metal. When aluminum and steel are recycled, the post-consumer metal in the product becomes indistinguishable at the elemental level from the virgin metal. Consumers do not seek products with recycled metal or aluminum to obtain a discrete performance benefit - they value the environmental attributes that recycled metal provides to the overall manufacturing process, in terms of waste, reduce energy use, and reduced reliance on extractive technologies.⁸ As the U.S. Environmental Protection Agency ("EPA") has documented, "[r]ecovering steel not only saves money, but also dramatically reduces energy consumption, compared to making steel from virgin materials. In turn, this reduces the amount of greenhouse gases released in to the air during processing and manufacturing steel from virgin ore."⁹ Similarly, [r]ecovering aluminum for recycling saves money and dramatically reduces energy consumption. The aluminum can recycling process saves 92 percent of the energy needed to produce aluminum from bauxite ore.¹⁰

In this and in many other ways, the arguments for a metal recycling credit scheme are identical to those the Commission has already adopted in support of renewable energy credit programs and related claims:

Renewable energy generally refers to electricity derived from constantly replenished sources (*e.g.*, wind power). Once renewable electricity is introduced into the grid, it is *physically*

between 48 and 60 percent for steel, suggesting that there is considerable room for further progress. *See* U.S. Geological Survey, *Recycling Metals 2008 [Advance Release](Sep. 2010)*, at 61.2, available at <http://minerals.usgs.gov/minerals/pubs/commodity/recycle/myb1-2008-recyc.pdf>.

⁷ *Id.* at 63576.

⁸ In this respect, metal recycling is distinguishable from paper and plastic recycling, where the value of the recycled material may degrade over time and reuse, making the item-by-item recycled content relevant to assessing the integrity of the product.

⁹ EPA, *Fact Sheet: Wastes - Resource Conservation - Common Wastes & Materials: Steel*, available at <http://www.epa.gov/osw/conserves/materials/steel.htm> (last updated Dec. 1, 2010).

¹⁰ EPA, *Fact Sheet: Wastes - Resource Conservation - Common Wastes & Materials: Aluminum*, available at <http://www.epa.gov/osw/conserves/materials/alum.htm> (last updated Dec. 1, 2010).

indistinguishable from electricity generated from conventional sources. Consumers, therefore, cannot determine for themselves the source of the electricity flowing into their homes. Because electricity transactions can be tracked, however, retail customers can “buy” renewable power by either:

- (1) purchasing renewable energy certificates (RECs); or
- (2) purchasing renewable power through contracts with their utility.¹¹

Under the REC method, a renewable electricity generator splits its output into two components: (1) the electricity itself; and (2) certificates representing the renewable attributes of that electricity. Specifically, generators that produce renewable electricity sell their electricity at market prices for conventionally produced power and then sell the renewable attributes of that electricity through separate certificates. Organizations purchase RECs to characterize all or a portion of their electricity usage as “renewable” by matching the certificates with the conventionally produced electricity they normally purchase.¹²

Just as the REC system allows consumers or manufacturers in areas not serviced by renewable power¹³ to “buy renewable power,” a well-designed RCC system would allow consumers and manufacturers interested in promoting the use of recycled content to do so without having to smelt and process their own scrap metal to confirm its origin. Perhaps the simplest way to illustrate the workable approach for an analogous recycled content certification (“RCC”) process for metals is to use the Commission’s own words.

Under the [RCC] method, a [metals recycler] splits its output into two components: (1) the [metal] itself; and (2) certificates representing the [recycled] attributes of that [metal]. Specifically, [recyclers] that produce [recycled metal] sell their [recycled metal] at market prices for conventionally produced [metal] and then sell the renewable attributes of that [recycled metal] through separate certificates. Organizations purchase [RCCs] to characterize all or a portion of their [metal] usage as [‘recycled-content’] by matching

¹¹ *Id.* at 63589 (footnotes omitted).

¹² *Id.* (footnotes omitted).

¹³ Indeed, the Commission acknowledges that “[r]egardless of whether the marketer purchases renewable energy through RECs or contracts, the energy may have been generated in a distant geographic location.” *Id.* at 63592. Thus, the benefit to the consumer from purchasing RECs is in supporting renewable energy as a whole, not in ensuring that one will receive power directly from a renewable generation source.

the certificates with the conventionally produced [metal] they normally purchase.¹⁴

The Commission's acceptance of renewable energy claims based on the creation and sale of RECs argues strongly for the Commissions to revisit the potential for a well-designed recycled-content credit (RCC) system. As the Commission explained in the REC context "Many businesses tout their renewable energy purchases to market their products or services. For example, a clothing company may claim that its garments are "made with renewable energy," or a snack food manufacturer may claim that it "buys green energy credits to match 100% of the electricity needed to produce" its snacks. By purchasing such products, consumers can indirectly support renewable energy." *Id.* at 63589. If the Commission believes that consumers are sophisticated enough to understand and value marketing claim based on a renewable energy credit system, there is no reason that same consumer would not have the sophistication needed to understand and apply an equally well-designed recycled-content credit system in support of a proven form of recycling.

Thank you for the opportunity to comment on the proposed Green Guides, and we look forward to working with you further on these issues. If you would like to discuss these comments, please contact me at John.Rost@CrownCork.com.

Sincerely,

Dr. John M. Rost
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¹⁴ *Id.* 63589 (footnotes omitted and bracketed content reflects adjustment from discussing renewable energy to recycled content).