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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 Sierra Club, ForestEthics, and the Dogwood Alliance 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 (October 15, 2010).

We appreciate the opportunity to provide these comments and welcome any questions that the Commission or staff has as the Green Guides are finalized.

Sincerely,

Peter Goldman
Director
Washington Forest Law Center
615 Second Ave., Suite 360
Seattle, WA 98104
206.223.4088
www.wflc.org

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

Submitted by:¹

Sierra Club
ForestEthics
Dogwood Alliance

I. Introduction

These comments are being submitted by the Sierra Club, ForestEthics, and Dogwood Alliance, three environmental non-governmental organizations (collectively “ENGOs”) active in forest conservation, in response to the Federal Trade Commission (“Commission”)’s draft “Green Guides” dated October 15, 2010 and published at 16 C.F.R. Part 260. We submit these joint comments because the Green Guides will directly affect the management of hundreds of million of acres of public and private forests in the U.S. and Canada and the marketing of products that come from these forests. These forests are vitally critical habitat for fish and wildlife resources, particularly in light of climate change. The public has a strong interest in not being misled by the environmental advertising of so called “independent certification” entities that set vague, self-serving, and unenforceable “certification standards,” “standards” that frequently allow environmentally-harmful industrial forest practices. Commission action is crucial because almost 250 million acres of public and private forests in the U.S. and Canada are “certified” and the number of certified acres is growing rapidly each year.

We thank the Commission for its commitment to improve the Green Guides and for inviting comment.

Prompted by the growing public demand for socially responsible and environmentally responsible business practices and for action on climate change, the marketing of status-quo products as “green,” “sustainable,” and/or “certified” (“greenwashing”) is an extremely important consumer, environmental, and economic issue. Greenwashing is particularly, but not exclusively, prevalent in the forest product sector. We have seen a

¹ The Seattle-based Washington Forest Law Center worked on and coordinated these comments on behalf of the commenters. WFLC’s address is 615 Second Ave., Suite 360, Seattle, WA 98104. <http://wflc.org/>. We request all email communications pertinent to these comments be directed to ftcgreenguides@wflc.org and we will forward copies of these communications to our partners.

proliferation of entities in the forest certification arena that organize and market themselves as “independent” or “charitable” certification systems but which are, in fact, substantially financed and governed by the companies and individuals who own, invest in, or manage forests or who manufacture, distribute and market “certified” forest products.

The “green” market for lumber and paper in the U.S. is growing rapidly. Consumers and business purchasers today are more frequently willing to prefer or do business with wood products and paper companies that claim exemplary environmental and social responsibility. Certified “green” products may fetch more money in the marketplace; in fact, though they have competing concerns, consumers often appear willing to prefer a brand based on its commitment to environmentally or socially responsible practices.

Our Comments are summarized as follows:

- The term “sustainable” is widely prevalent in the consumer marketplace (particularly but not exclusively in forest products marketing), and is a continuing source of countless misleading product claims. This is particularly problematic because many consumers equate the terms “sustainable” and “sustainability” with high levels of performance. Therefore, it is essential that the Green Guides squarely address product “sustainability” claims.
- The simplest and perhaps most widely known definition of sustainability is “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”² Although fairly generic, this and most other “sustainability” definitions clearly imply the following: in order for a product – or more precisely, a practice that produces a product – to be truly sustainable, *then one must be able to perpetuate it indefinitely with no serious adverse environmental or social consequences*. Few, if any, products or certification systems on the market could meet such a high level of performance, much less be verified as doing so. Furthermore, there is nothing approaching a consensus on a standard for verifying the achievement of “sustainability” or “sustainable” practices (particularly in regards to the management of complex ecological systems like forests).
- Therefore, to prevent the continued proliferation of misleading claims, and to best protect American consumers and producers, the Commission should **prohibit** the use of the terms “sustainable” and “sustainability” in the marketing of products (certified or not) *unless* the term is strictly limited to describing the *general goals or aspirations* of a product, practice, process or certification system, as opposed to direct assertions or claims about the state of current environmental practices or product characteristics.

² From the “Report of the World Commission on Environment and Development,” also known as the Brundtland report, available at <http://www.un-documents.net/wced-ocf.htm>.

- If the Commission is unwilling to prohibit use of the terms “sustainable” and “sustainability” except in reference to general goals and aspirations, then the Commission should require marketers and others who use these terms to describe a current product, practice or certification system to affirmatively establish that they in fact adhere to the most rigorous sustainability tests – tests which have yet to be designed.³
- The Commission should reconsider its decision not to “propose guidance on the development of third-party certification programs.”⁴ The Green Guides are an important proactive opportunity for the Commission to clearly identify the criteria by which marketers can make “certification” claims and the standards by which the Commission will judge and enforce the veracity of such environmental and social marketing claims. Specifically, the Commission should **prohibit** so-called “independent” certification in the following illustrative circumstances:
 - When an industry founded and governed “certification” entity portrays itself as “independent,” “charitable,” or “third-party” but, in fact, the entity is substantially dependent on industry group or participant financing and has strong ties to industry trade associations.
 - When a “certification” entity adopts vague, ambiguous, heavily-qualified and patently unenforceable environmental “standards” that, in fact, allow practices that can result in short or long-term environmental injury or degradation as measured by best available science.
 - When the certification entity’s standards-setting process is convened, substantially financed, and dominated by industry interests.

II. Preliminary Comments

A. Limited scope of comments: Forest product “certifications and seals of approval.”

As conservationists, we care deeply about all potentially deceptive or misleading “green” claims. Phony green marketing or “greenwashing” undermines the stability and growth of truly “green” business models, models we strongly support because they embrace both economic, social and environmental values. However, the bulk of our Comments are directed at those sections of the draft Green Guides that could potentially apply to the

³ If it can be conclusively demonstrated and independently verified that such practices can be continued indefinitely without harm to people or the environment, some basis for sustainability claims might be established. However, the Commission would then need to require those who employ such claims to demonstrate that their product, practices, or certification system is based on a (yet-to-be-developed) standard of sustainability that covers a full range of environmental and social performance measures that far surpasses the requirements of existing state and federal laws as well as current forest certification systems, that are solidly grounded on well-accepted science-based definitions, and that have achieved broad consensus among all relevant stakeholder groups.

⁴ 75 Fed. Reg. at 63568.

growing, harvesting, manufacturing, the wholesale and retail distribution, and/or the marketing of forest products that are “certified” and marketed as “certified” by a purportedly “third-party, independent, charitable, or non-profit organization.”⁵

Because they concentrate on forest certification and associated eco-labeling, our Comments may be more specific than the Commission prefers at this stage. But forest product certification has a long track record and is an excellent real-world example of what takes place today in the growing marketplace for “certified” products.

B. Statement of our expertise and familiarity with the forest products industry and forest practices regulatory systems.

The Commenters include non-governmental organizations with many decades of collective experience in forest conservation, forest management, and the various ecological issues related to forestry practices. Our programs include:

- Participating in administrative and political advocacy and, when necessary, litigation to enforce and improve the federal and state environmental laws and regulations governing forestry practices on federal, state, and private land.⁶
- Working with government agencies, private and state timber interests, Indian tribes, and other non-governmental organizations to develop policies and practices that promote environmentally sound and sustainable forest practices and forest products industries.
- Working with independent, non-profit organizations that develop standards for the certification and marketing of products that come from forests that are managed to exemplary environmental and social standards.
- When appropriate, using advocacy, public awareness campaigns, and other initiatives to challenge industrial timber interests that falsely or deceptively represent their forest products as “certified,” “green,” or “sustainable.”

The Commenters also include professionals, like architects, commercial purchasers, and consultants, who have direct personal and professional experience working with “certified” forest products.⁷

⁵ The terms “independent,” “third-party,” non-profit,” and such are used interchangeably in industry-supported “certification” programs. Our Comments apply to the various combinations of these terms.

⁶ We use the well-established terms “forest practices,” “forestry,” or “forestry practices” interchangeably to refer to all aspects of forest and tree plantation management. We intend these terms to include all aspects of timber production, including forest planning, the actual harvesting of trees, forest road construction and maintenance, application of pesticides, herbicides, and fertilizer, bio-fuel collection, replanting, and salvage operations.

⁷ One of the Commenters, ForestEthics, took an additional step and challenged the forest certification system called the “Sustainable Forestry Initiative,” or SFI. On September 10, 2009, ForestEthics filed a complaint with the Commission reporting SFI, an American Forest and Paper Association-founded forest certification system and label that “certifies” 160 million acres of forest in the U.S. and Canada. The

III. General Comments

A. The Green Guides should not be limited to “marketers” but should apply to all persons or entities that directly or indirectly promote a certified product in an unfair or deceptive manner.

The Green Guides repeatedly use the term “marketers,” but the “certified” product marketplace involves many more players than just the “marketers” of certified products. **We recommend that the Green Guides clearly state up-front that they apply to all persons and entities that grow, harvest, extract, process, manufacture, distribute and market “certified” products, such as certified forest products.**

In the “certified” forest products marketplace, **multiple parties** have a marketing role: the parties include:

- **The Certifier:** An entity is formed and funded that develops forest certification standards, maintains those standards, and markets its “green”-certified label.
- **Forest Landowner:** Today, several hundreds of millions of acres of American and Canadian forests are “certified” under one of four forest certification schemes, the Forest Stewardship Council (“FSC”), the Sustainable Forestry Initiative (“SFI”), the Canadian Standard Association (“CSA”) and American Tree Farm. Forest landowners often advertise the fact of their certification through a variety of means.
- **Auditor:** A forest landowner pays an auditor to assess and certify their forests and/or plantations to the certifier’s standards. Regular audits continue in subsequent years to confirm ongoing compliance with certification standards.
- **Manufacturers and Wholesale and Retail Sellers:** Certified products are promoted by manufacturers at both the wholesale and retail levels on product

ForestEthics complaint argued that SFI violated the Commission’s established “deception” guidelines because:

- SFI deceptively markets itself as a “non-profit independent public organization” because it fails to inform the public that it is principally funded and governed by private timber interests who use its certification label.
- The SFI forest practices certification system deceptively relies on vague, ambiguous, heavily-qualified, unenforceable, and unmeasurable environmental standards.
- SFI forest certification “standards” essentially allow landowners to write their own forest plans and these plans are not available for public inspection.
- Contrary to SFI’s claims, numerous aspects of SFI forest certification lack transparency.
- SFI’s “Certified Fiber Sourcing” label is deceptive and misleading because it constitutes the majority of SFI-labeled product lumber or fiber from “Fiber Sourced” forests is not certified to SFI’s general environmental “standards.”
- SFI’s forest practices certification system deceptively represents that it maintains a transparent and consumer enforceable complaint and audit procedure.

packaging, through merchandising, and through all the various forms of marketing communications.

Because so many participate in the marketing of “certified” products and because each has the capacity to influence consumer choice decisions, the Green Guides should clearly state that they broadly apply to all participants in the production and marketing of a “certified” product.

B. The ISO 14021 standard does not replace the Green Guides.

We **agree** with the Commission⁸ that the International Standards Organization (“ISO”) standard No. 14021 does not, and cannot, substitute for the Commission’s adoption of its Green Guides. The Commission has an independent legal duty to enforce the FTC Act, ISO standards are consensus-derived by a non-governmental agency, and we have found them to be inconsistent and often industry-written and biased.

C. The Green Guides should apply to “business-to-business” transactions.

We agree with the Commission’s conclusion that the Green Guides should be written to clearly apply to “business-to-business” transactions.⁹ Much of the certified forest products market involves business-to-business transactions, for example a “certified” timber company that sells its “certified” products to mills, distributors, or exporters. While they can sometimes be more sophisticated purchasers than individual consumers, promoters of forest certification systems heavily invest their marketing resources in communicating with corporate purchasing professionals and these professionals can be easily misled by claimed compliance with complex forestry standards.

D. In the context of “certified” products, the term “sustainable” clearly implies environmental values, yet it has no widely accepted definition except at the most general level. The Commission should establish in the Green Guides an express prohibition on the use of the term “sustainable” in the marketing of forest products, practices, or certification systems. Alternatively, the Guides could require that such claims be substantiated with irrefutable evidence of levels of environmental performance far superior to that required by existing state and federal laws and current forest certification systems.

We strongly **agree** with the Commission that “sustainable” and “sustainability” claims can and do imply environmental attributes in certain marketing contexts.¹⁰ This acknowledges that claims of product “sustainability” often are made in conjunction with marketing tactics that imply environmental quality.

⁸ 75 Fed. Reg. at 63557-58.

⁹ 75 Fed. Reg. at 63556.

¹⁰ 75 Fed. Reg. at 63583.

Despite the growing popularity of such claims, the Commission has tentatively decided it would be difficult or impossible for it to extend its Green Guides to product claims of “sustainability.”¹¹ The Commission reasons that its own “consumer perception” study showed that this term is meaningless to the average consumer.¹² Industry groups that rely heavily on the term “sustainable” make the same argument.¹³ The Commission noted its study found that only 7% of study respondents “stated that the term [“sustainable”] suggested a product is “good for,” “helps,” or “benefits” the environment¹⁴ and that only 17% of consumers find that claims of product “sustainability” implies environmental attributes.¹⁵

We respectfully but strongly **disagree** with the Commission’s conclusion that claims of product “sustainability” are not amenable to and should not be subject to the Green Guides.

As a preliminary matter, we believe the Commission’s decision whether to adopt guidelines governing the use of an exceedingly popular “green” marketing term, such as “sustainable,” should **not** depend on whether it concludes there is strong evidence of deception *today*. While we recognize that the Commission must set its enforcement priorities, we believe that carefully written Green Guides addressing “sustainability” claims will be an ounce of prevention that could prevent the pound of cure, which generally means expensive enforcement lawsuits that compete with other Commission priorities. Indeed, agencies regularly adopt and enforce health and safety regulations *before* a consumer has been injured and, similarly, they adopt environmental regulations *before* there is environmental injury.

It is our experience that those who already employ the term “sustainable” in their forest product marketing claims do so with the full *intent* of making a strong environmental performance assertion. Therefore, the Commission should act proactively to protect consumers and not wait until it deems that appreciable segments of the public are being deceived or confused by a marketing practice the Green Guides could and should prevent from the outset. Proactive Green Guides governing the permissible uses of the terms “sustainable” and “sustainability” will also promote a “level playing field that benefits both consumers and compliant companies.”¹⁶

The Green Guides will establish a baseline by which businesses set “green” standards, structure their operations, and market “green” products. The Commission’s proactive participation in this process will promote a marketplace that has uniform, predictable, and fair consumer standards. These interests will not be promoted if the Commission declines to address “sustainability” claims simply for lack of evidence that the term has a **precise meaning** to a given sample of consumers today. The Commission is in a position

¹¹ 75 Fed. Reg. at 63581-82.

¹² 75 Fed. Reg. at 63582-83.

¹³ *See, e.g.,* Weyerhaeuser comment letter to FTC, dated May 19, 2008.

¹⁴ 75 Fed. Reg. at 63583.

¹⁵ *Id.*

¹⁶ 75 Fed. Reg. at 63556.

to, and should, lead and **not** defer consideration of “sustainable,” an enormously important marketing term, simply because it may mean different things to different people.

The Commission’s tentative decision not to provide guidelines for “sustainability” claims is also inconsistent with the Green Guides’ product “substantiation” requirement. The draft Green Guides clearly state that environmental claims must be substantiated and certifications or seals state the **basis** for their certification.¹⁷ The Green Guides also propose that such claims be supported by “competent and reliable scientific evidence” and that they be based on “tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area.”¹⁸ Substantiation procedures must be conducted and evaluated in an “objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”¹⁹ If the Green Guides do not apply to “sustainability” claims, it will relieve green marketers of their responsibility to provide objective scientific evidence of their “sustainability” claim.

In reality, the terms “sustainable” and “sustainability” are **already** heavily used.²⁰ Even the Green Guides admit the popularity of these marketing terms.²¹ Especially when used in conjunction with a “certified” product scheme, the term “sustainable” clearly implies consideration of environmental values; for example, many forest products today are marketed as “sustainable” in conjunction with other terms or photographs implying exemplary environmental performance, or at least performance that is greater than some status quo baseline.

The term “sustainable” is also regularly used as a surrogate for claims of environmental performance.²² For example, the SFI forest certification system relies heavily on the term “sustainability” and even mixes it in with claims to environmental superiority:

Today, SFI Inc. is an independent, non-profit organization responsible for maintaining, overseeing and improving a sustainable forestry certification program that is internationally recognized and is the largest single forest standard in the world.²³ The SFI 2010-2014 Standard is based on principles and measures that promote sustainable forest management and consider all forest values. (emphasis added)

In summary, we believe the Commission should base its Green Guides priorities on the fact that the term “sustainable” *already* plays a very large role in environmental marketing today, *is* used with the express intent of conveying environmental

¹⁷ 75 Fed. Reg. at 63552.

¹⁸ 75 Fed. Reg. at 63553.

¹⁹ *Id.*

²⁰ See <http://www.sfiprogram.org>.

²¹ 75 Fed. Reg. at 63581.

²² The Green Guides cite comments making this point. 75 Fed. Reg. at 63581 n. 347.

²³ <http://www.sfiprogram.org/sustainable-forestry-initiative/basics-of-sfi.php>.

performance, and, particularly in the case of “certified” products, consumers reasonably may infer environmental benefits or lack of harm in that term.

Consequently, we believe the Commission should expressly **prohibit** the use of the terms “sustainable” and “sustainability” in the marketing of products (certified or not) *unless* these terms are strictly limited to describing the *general goals or aspirations* of a product, practice, process or certification system, as opposed to a direct assertion or claim about the state of current practices or product characteristics.

Promoting and working to achieve “sustainability” in the future is one thing, but claiming in the marketplace that one has achieved it or certified it today is another. Attainment of true sustainability – “meeting the needs of the present without compromising the ability of future generations to meet their needs” – is very difficult, particularly when dealing with complex ecological systems like forests, and thus very few who claim it currently attain it. Nevertheless, “sustainable” has become one of the mostly widely misused and abused terms in the environmental lexicon, and hence one of the most favored claims in “greenwash” marketing – where unscrupulous companies and governments assert that their products or practices (including forest management operations) are more environmentally benign than they actually are.

In the field of forest management alone, there are a variety of conflicting perspectives on both the practical and scientific meanings of the term “sustainable forest management.” Because “sustainability” incorporates substantial environmental attributes, conservation organizations like ours reject any definition of the term that does not incorporate a large number of stringent environmental and social performance measures. In contrast, many in the forest products industry still do not accept such measures as essential components of sustainability. In practice, definitions of the word “sustainable” are starkly dissimilar in terms of their actual on-the-ground applications; there is nothing approaching consensus on the meaning of “sustainable forestry” anywhere in the world. We have seen countless efforts to co-opt and pervert the term so that *any* form of forest management can be described as “sustainable.”

If a word, such as “sustainable,” is used as a marketing claim, and that word deals with a very complex set of variables, and there is widespread *disagreement* on the definition of that word, then all claims using the word are automatically suspect, presumptively misleading, and potentially deceptive or, worse, fraudulent. The Commission has a responsibility to consumers to prohibit such environmental deception. The term “sustainable” simply cannot be permitted to become a vague and unenforceable surrogate for environmental protection. The only alternative to outright prohibition of the term “sustainable” in environmentally-advertised products would be for the Commission itself to take on the task of establishing sustainability definitions and guidelines requiring that such claims be substantiated with irrefutable evidence of exceptional environmental performance far superior to that required by existing state and federal laws and current forest certification systems. However, we are not sure that the Commission is equipped to develop, or views its mission as being to referee, the development of such specific guidelines. For example, “sustainability” guidelines would need to incorporate specific

indicators to determine whether a “certification” process verifiably ensures that its claimed “sustainable” practices do not lead to environmental degradation. This would have to be measured against a substantial set of stringent, scientifically established, ecological baselines – to say nothing of social considerations. The Commission would also need to identify one or more reputable scientific institutions whose authority is accepted by a broad range of stakeholder groups, and that could provide such baselines. It is much better policy for the Commission to simply prohibit the use of the term “sustainable” in contexts where environmental qualities are clearly implied in the marketing of a product.

As examples of some of the components of what might credibly be called “sustainable forest management,” we offer the Commission the following questions that would need to be answered in the context of “certified” forestry:

- Does the forest management operation reduce the ability of future generations to engage in similar forestry practices at similar rates and scales without causing an overall depletion of any species, without impairing soil quality or quantity and without producing cumulative build-up of chemical and other pollutants, and without reducing biological diversity (at genetic, species and ecosystem levels)?
- Does the forest management operation allow mono-culture, short-rotation, clear-cut, even-age forestry when the best available science indicates that such forestry can, in many locations and scales, deplete the long-term health of forest and aquatic resources and ecosystems and impair their ability to adapt to or survive external threats (storms, drought, insects, fire)?
- Does the forest management operation adversely impact water quality and/or adjacent or downstream ecosystems?
- What assures consumers that a marketer using the term “sustainable” does not simply mean that the marketer *believes* it can conduct the same activities at the same rate and scale forever, but has no evidence to support such belief?
- Were the forest management standards developed by a representative group of stakeholders so that the “sustainability” claim is based on broad stakeholder agreement?
- Do forest products marketed as “sustainable” originate in forests that are slated for conversion by the landowner to *non*-forest uses, such as residential development?
- Do the forest practices marketed as “sustainable” comply with best available science known to protect and restore fish and wildlife resources and forest soils in both the short and long-term?

We recognize that the Commission is a consumer protection agency and may hesitate to referee the technical details of product certification systems. Nevertheless, based on our experience, the answers to the questions posed in the above bullets *are* measurable. The alternative is for the Commission to do nothing and to allow companies and industry-oriented “certification” bodies free reign in claiming that their current products, practices, or certification systems are “sustainable” without any accountability or scientific proof. That would be an untenable outcome. In our view, if marketers can use the term “sustainable” without qualification, the term will become increasingly used as a **surrogate** for listing specific environmental attributes. This will undermine the Commission’s efforts to require “substantiation” and will accelerate “greenwashing” and consumer confusion. Sustainability claims are not, and never should become, a substitute for verifiable environmental performance.

In conclusion, while there is consumer confusion today surrounding the use of the term “sustainable,” the Commission should not ignore this term because the rapidly developing “green” marketplace relies heavily on its use. We agree with the commenters²⁴ who wrote that claims of “sustainability” should be either prohibited or required to be backed-up by verifiable scientific evidence relating to the product’s direct and indirect environmental attributes. Moreover, product “sustainability” claims must be analyzed in their context. If such claims create or imply a nexus to environmental attributes in the context of their advertising, product “sustainability” claims should be subject to all aspects of the Green Guides.

E. General environmental benefit claims.

We agree with the Commission that “general environmental claims are pervasive” and that the Green Guides should advise marketers not to use **unqualified** general environmental benefit claims because they are impossible to substantiate.²⁵ As to **qualified** general environmental benefit claims, we also agree with the Commission that any “qualification” must use “clear and prominent language” and not be inconsistent with environmental-appeals made in the context of the advertisement itself.

We strongly agree with the Commission that certifications and seals of approval imply environmental superiority.²⁶

IV. Specific Comments Pertaining to Product Certification Schemes and Seals

The Commission commendably found that product certification systems make general environmental benefit claims and need to be substantiated. But the Commission decided, for the time-being, not to issue guidelines on third-party certification systems.²⁷ We believe that, in not setting forth the attributes of a third-party certification system, the

²⁴ 75 Fed. Reg. at 63581-82 n. 356-60.

²⁵ 75 Fed. Reg. at 63562.

²⁶ 75 Fed. Reg. at 63564.

²⁷ 75 Fed. Reg. at 63567-68.

Commission is missing an important opportunity to provide guidance on phony third-party certification entities, a pressing consumer and environmental issue.

A. Marketers selling products – particularly forest products – as “certified” by independent, third-party, non-profit organizations, must be able to demonstrate certain attributes about the independence of the certification entity.

1. Background: What is third-party certification of forest products?

“Certification” of forests and forest products (generally lumber and pulp for paper), generally means that these products were grown and harvested in a responsible manner according to specified environmental and social standards established by an independent and neutral entity. “Third-party” means that audits to determine a company’s conformance with standards are performed by qualified and independent organizations, not by the company itself (“first-party”) or by a party with a direct relationship with and interest in the company (“second- party,” e.g., a trading partner or a trade association).

2. Background: Importance of certified wood and fiber in today’s marketplace.

As noted by the Commission, almost everyone today agrees that the use of third-party certification is a “significant marketing trend.”²⁸ The “green building” market, which represented just 2% of the construction market in 2005, could grow to as much as a quarter of all commercial and institutional building and 20% of the residential starts by 2013. By 2013, the green building sector may grow to a \$93 to \$140 billion market.

Because the “green building” market in part relies on “certified” forest products and lumber, “forest certification” has become a major factor in the green building economy. Certified fiber is also rapidly gaining market share in the U.S.’s \$150 billion paper and print industry. Approximately 250 million acres of private and state forests are today “certified” by some type of certification entity in the U.S.

Forest certification originated in 1993 with the creation of the Forest Stewardship Council (“FSC”) by international assemblage of forest companies, environmental groups, and human rights organizations that came together to design a global framework of performance standards for responsible forest management. Today, FSC-certified forests cover 281 million acres in 82 countries, including 31 million acres in the U.S. and 69 million acres in Canada.

In contrast, SFI-certified forests span 60 million acres in the U.S. and 101 million acres in Canada. Certified lumber and panel products are expected to be the fastest growing segment of the “green building” materials market, which is expected to reach \$80 billion

²⁸ 75 Fed. Reg. at 63564 n. 132.

by 2013.²⁹ Certified fiber is also rapidly gaining market share in the U.S.'s \$150 billion paper and print industry.

Wood and paper certification is extremely popular in the marketplace for several reasons. Certification often gives a seller a price premium or preferential access to “green” customers. Forest owners and lumber and paper sellers use forest certification to demonstrate their environmental and social responsibility. *See, e.g.,* <http://www.sfiprogram.org/miscPDFs/SFI%20key%20facts1.pdf> (SFI-produced document listing nine representative large American companies that have adopted the SFI certification label). Certification is also sometimes a prerequisite for “green building” credits or points or to qualify for federal or state green construction projects. For example, only FSC certification makes wood eligible for recognition in the LEED (Leadership in Energy and Environmental Design) green building system developed and maintained by the U.S. Green Building Council (*see* <http://www.usgbc.org/>).

The “green building” market is literally exploding: According to McGraw Hill Construction’s Green Outlook 2009, green building represented just 2% of the construction market in 2005 but could grow to as much as a quarter of all commercial and institutional building starts and 20% of the value of residential starts by 2013. By 2013, the green building sector could grow to \$93 billion to \$140 billion.

Consumers and purchasing divisions of major U.S. corporations are increasingly relying on green claims and labels for forest products—and such claims mean big money today. For example, in a July 2008 GfK Roper Yale University study of consumer attitudes towards environmental issues,³⁰ researchers concluded that “[m]ost Americans are willing to purchase environmentally-friendly products but other considerations such as price and quality often take priority.” This study also found that:

- Americans are not familiar with “eco-labels” and are confused by them.
- Americans want additional information about “eco-labels.”
- Americans show a clear preference for “eco-labels” sponsored by independent environmental organizations, as opposed to government or industry labels.

The growing demand for and supply of “certified” forest products makes it imperative that the Commission take steps to protect the public from deceptive “green” wood and paper labels. Indeed, numerous periodicals have written on the growing trade war over what “green” forest products. *See* “What Do Labels Really Tell You?” (*Wall St. Journal*, April 2, 2009), “Green or Greenwashed?” (*Architecture Weekly*, April 22, 2009), “Two Timber Firms Pretending to be ‘Green,’ Groups Allege” (*Washington Post*, December 24, 2006), and “The Fight Over What “Green” Means” (*Seattle Times*, March 12, 2008).

²⁹ Green Building Materials, U.S. Industry Study with Forecasts for 2013 & 2018, The Freedonia Group, 2009.

³⁰ <http://environment.research.yale.edu/documents/downloads/a-g/GfK-Roper-Yale-Survey.pdf>.

Even SFI recognizes that consumers and corporate purchasers are increasingly demanding “green certified” products. In a May 2009 SFI webinar on labels and claims, SFI cited the GfK Roper Yale survey of consumer attitudes for this proposition:

Consumers believe it is important or essential to have eco-labels that describe the environmental impacts caused by the manufacture, use and disposal of products.

Finally, simply put, the existence of a private certification system reduces the quest for additional regulations. By way of example, we attach a document prepared by Harris Interactive on behalf of its client, the American Forest and Paper Association (AF&PA). Attachment 1. In this document at page 2, Harris candidly admits that the AF&PA was prompted to create the SFI forest certification system in part to prevent additional governmental regulation of forestry.

3. Background: Competition between certification systems.

Today, there are two primary forest certification systems competing with one-another in the U.S.: SFI and FSC.

SFI was launched in 1994 by the AF&PA. AF&PA is the largest forest-industry trade association in the U.S., representing 90% of U.S. industrial timberlands. AF&PA developed SFI in response to public concern about the U.S. forest products industry’s environmental performance. SFI uses 14 principles, 20 objectives, and 20 performance measures to provide a framework for assessing forest management. SFI-certified timber companies frequently cite their SFI certification as evidence of their commitment to environmentally-protective forestry. In 2007 and 2008, SFI received \$5 million and \$6.3 million respectively, from its timber industry “participants,” and SFI has used that money to launch a massive public relations campaign.

FSC is an international, non-profit organization whose goal is to support the environmentally appropriate, socially-beneficial, and economically viable management of the world’s remaining forests. FSC was created in 1993 by an international assemblage of forest companies, environmental groups, and human rights organization to design a global framework of performance standards for responsible forest management. In general, FSC-certified logging standards are metrically-based and attempt to accomplish the following objectives: protect endangered species habitat, protect riparian forests, limit use of chemicals, protect endangered forests, maintain and restore natural forest conditions, and protect the rights of indigenous peoples and forest dependent communities. FSC is administered in the U.S. by FSC-US, based in Minneapolis, MN.

The SFI certification system competes with FSC in the marketplace for certified forest products and SFI aggressively markets itself as if it were a co-equal legitimate alternative to FSC, analogous to the competition between Coke and Pepsi. However, there is a large body of objective literature reflecting that FSC is a more rigorous form of certification than SFI and requires more on-the-ground protection than SFI including: Forest

Certification Audit Results in Potential Changes in Forest Management in Canada, *The Forestry Chronicle*, Vol. 86, No. 4 (July/Aug. 2010); Yale Program on Forest Policy and Governance, *Key Controversies Matrix*, 2008); *Public Procurement and Forest Certification: Assessment of the Implications for Policy, Law, and International Trade; Comparison of Major Certification Schemes: FSC, PEFC, CSA, MTCC, and SFI*, 2006); *Parallel Field Testing of Forest Certification Standards*, UPM 2005); *Chain of Custody and Eco-Labeling of Forest Products: A Review of the Requirements of the Major Forest Certification Schemes*, *International Forestry Review*, 2005); *Journal of Forestry: Certification on Public and University Lands: Evaluations of FSC and SFI by the Forest Managers*, 2003); and *A Land Manager's Guide to FSC & SFI*, Dovetail Partners Inc., 2004.

The competition between SFI and FSC was described in recent articles in the Vancouver, BC newspaper *The Tyee*, entitled “The War over Eco-Certified Wood,” June 3, 2009³¹ and in *Architecture Week*, entitled “FSC Versus SFI,” August 12, 2009.³²

B. The Green Guides should clearly set forth the prerequisites for marketing claims that a product is “third-party certified” by an “independent, non-profit organization.”

At the outset, we strongly **agree** with the existing Green Guides that when there is a “connection” between the product certifier and the entity whose product is being certified, that “connection” or a “material connection” must be disclosed.³³ We also agree the Commission’s conclusion that product certification or seals “may imply that a product is environmentally superior to other products”³⁴ and that “consumers likely place different weight on a certification from an industry association than from an independent, third-party.”³⁵ That the public holds third-party certification in presumptively higher regard than industry-operated certification systems is a compelling reason for the Commission to develop guidelines for “certification” systems advertised as “third-party,” “independent,” “non-profit,” or “charitable.”

We **agree** with past Green Guides comments urging the Commission to require third-party certification schemes to contain certain fundamental features, including financial and governance independence, expertise, objectivity, transparency, openness, and balance.³⁶ We also **support** the Commission’s tentative decision to “provide additional guidance” on the qualifications of certifying entities in a new Green Guides section³⁷ and its conclusion that it is deceptive to misrepresent, directly or by implication, that a product has been endorsed or certified by an independent third-party organization when it has not.³⁸ We **applaud** the Commission for committing to “[provide] additional

³¹ Available at <http://thetyee.ca/News/2009/06/03/EcoWood/>.

³² Available at http://www.architectureweek.com/2009/0812/environment_1-1.html.

³³ 16 C.F.R. 255.5

³⁴ 75 Fed. Reg. at 63564.

³⁵ 75 Fed. Reg. at 63567.

³⁶ 75 Fed. Reg. at 63565-66.

³⁷ 75 Fed. Reg. at 63566.

³⁸ *Id.*

guidance, especially in a new Guide section devoted to the subject” of third-party seals and endorsements.³⁹

Again, however, we are **disappointed** with the Commission’s decision not to propose more specific guidelines governing the development and operation of third-party certification programs.⁴⁰ As demonstrated below, to avoid rampant consumer deception and confusion, the draft Green Guides need specific criteria with which the Commission, consumers, and competing businesses can evaluate the financial and governance relationship between a third-party certifier and the entity that grows, processes, or markets a “certified” product. The Commission should adopt general guidelines for such “third-party” certification systems up-front and should not, as it is considering, leave it to enforcement actions on a “case-by-case” basis.⁴¹

We believe the relationship between the certifier and the certified is the **cornerstone** of a deception-free “certified” product marketing scheme. Simply put, consumers expect and have a legitimate right to expect there is independence and separation between the certifier and the certified. We think the Commission is in a unique leadership role to create a deception-free “certified” marketplace. As FSC recognized in its comments, “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 certifying organization, since most consumers are not familiar with the criteria for certification. If consumers do trust the certifying organization, they are willing to pay a premium for certified products.”⁴²

Below, we propose **specific guidelines** that will help give consumers critical up-front information when they evaluate the credibility of products marketed as “certified.” These criteria will not only benefit consumers who wish to engage in “green purchasing” but will also benefit and promote “green businesses” since such businesses have a strong interest in ensuring that their competitors are governed by uniform and unambiguous certification standards.

³⁹ *Id.*

⁴⁰ 75 Fed. Reg. at 63568.

⁴¹ *Id.* (“[T]he Commission will continue to evaluate the adequacy of a third-party certification as substantiation on a case-by-case basis.”)

⁴² FSC Comment, at 5 n. 2. 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).

C. Literature outlining pre-requisites for credible third-party certification entities.

We first point the Commission to the body of literature on the key attributes of third-party forest certification. Much of this literature applies to the marketing of any type of “certified” product.

For example, in a July 2006 publication, the World Wildlife Fund and the World Bank Global Forest Alliance published a “Forest Certification Assessment Guide.” (FCAG).⁴³ The FCAG sets forth specific features that every credible certification program must have:

- Compliance with all relevant laws.
- Respect for tenure and use rights.
- Respect for indigenous people’s rights.
- Respect for community relations.
- Respect for workers’ rights.
- Delivery of multiple benefits from the forest.
- Assessment and mitigation of environmental impact.
- Maintenance of critical forest areas.
- Specific provisions for plantations.
- Implementation of a management plan.
- Effective monitoring and assessment.

FCAG also states that “forest certification systems or schemes for independent verification of improved forest management should be based on the following criteria:

- Compatibility with international frameworks for certification accreditation and standard setting.
- Compatibility with globally applicable principles that balance economic, ecological, and equity dimensions of forest management and meet Global Forest Alliance requirements.

⁴³ Available at <http://assets.panda.org/downloads/fcagfinal.pdf>.

- The meaningful and equitable participation of all major stakeholder groups in governance and standard setting.
- Avoidance of unnecessary obstacles to trade.
- Objective and measurable performance standards that are adapted to local conditions.
- Certification decisions free of conflicts of interest from parties with vested interests.
- Transparency in decision making and public reporting.
- Reliable and independent assessment of forest management performance and chain of custody.
- Delivery of continual improvement in forest management.
- Accessibility to and cost-effectiveness for all parties.
- Voluntary participation.

Similarly, a 2004 report by FERN⁴⁴ lists the criteria that should be applied to determine whether a third-party forest certification scheme is credible. FERN (at pp. 9-14) sets forth the criteria as follows:

1. Specific performance standards that define the level of quality of forest management to be achieved; these standards should prescribe specific performance levels and not merely set forth minimum or vague performance standards.
2. Who is involved in the standard-setting and maintenance process? Is there independence, balance, and separation?
3. What does the certification process involve? What are the avenues for stakeholder input?
4. Is the scheme sufficiently transparent and enforced?⁴⁵
5. Is there a chain of custody?

We understand that the Commission's role is to prevent deceptive and misleading marketing practices and not draft certification system criteria. We are not suggesting the Commission adopt specific certification criteria for each industry that uses certification

⁴⁴ Available at http://www.fern.org/sites/fern.org/files/media/documents/document_1890_1900.pdf.

⁴⁵ FERN at 10.

and seals. But the following are general principles regarding third-party certification that apply to all types of product certification schemes. The Commission’s adoption of such guidelines will promote a robust but deception-free “certified” product marketplace.

D. Independence of certification entity.

While we applaud the Commission for recognizing that third-party seals and endorsements “may imply an environmental benefit claim”⁴⁶ we believe the proposed Green Guides fall well-short on providing guidance on the necessary *independence* of the certifying entity.

The draft Green Guides depend heavily on the notion that science and “tests, analysis, and research” will ensure that product certifiers will be held responsible for “substantiating” their claims. But this assumption fails to account for the fact that many certification systems use “management systems,” not actual numeric standards. Management system standards are not practically amenable to measurement or quantification by “experts.” The Commission’s reliance on science and tests also ignores that, under some certification systems, the experts conducting the “tests, analysis, and research” are employed by companies that have a strong financial interest in maintenance of the certification standard.

In addition to requiring product “substantiation” via science-based objective testing, the Commission will add immeasurably to a robust, deception-free, green marketplace if it proactively develops guidelines governing third-party certification marketing. As they are currently written, however, the Green Guides fail to specifically define the fundamental ways in which a “third-party” certification entity needs to be “independent” of the entities that either produce or market its products as “certified.”

In the following, we recommend several simple criteria to evaluate “independence” between the certifier and the certified. The factors include: (1) financial independence; (2) independence in governance structure; (3) the transparency of product management plans adopted pursuant to the standards process; and (4) transparency of its audit and audit “complaint” process.

1. Financial independence between certifier and certified.

As set forth above, the Commission already requires product certifiers to disclose a “connection” or a “material connection,” or a “connection ...that might materially affect the weight or credibility of the endorsement.”⁴⁷

When there is a **connection** between the endorser and the seller of the advertised product that might materially affect the weight or credibility of

⁴⁶ 75 Fed. Reg. at 63566.

⁴⁷ 16 C.F.R. 255.5.

the endorsement, such connection must be fully disclosed.⁴⁸ (emphasis added)

The Commission's financial disclosure requirement even extends to a "dues paying member."⁴⁹ Even the AF&PA evidently does not disagree.⁵⁰

We strongly agree with the Commission's commitment to examine the "connection" between the product certifier and the entities whose products it "certifies" as we believe that a certification entity's degree of **financial independence** from the private industry whose practices and products it "certifies" is likely **the single most important factor** in assessing the objectivity and lack of bias of the certification system.

The SFI forest certification scheme is an excellent example of a certification entity whose "independence" is questionable in light of its financial dependence and connection to industry trade associations and its industry "participants."

SFI heavily emphasizes its so-called "independence" in its marketing:

- SFI. Live By the Standard. Larry Selzer, President & CEO, The Conservation Fund. "The Sustainable Forestry Initiative program is a **fully independent** leader in forest certification." (SFI ad, Attachment 2) [Emphasis added.]
- SFI Inc. is an **independent**, 501(c)(3) non-profit charitable organization. (SFI Progress Report 2008 (issued June 2009), p. 3, Attachment 3) [Emphasis added.]
- The SFI Program. A Single North American Assurance. 1 Standard for all of North America. **Fully Independent** Non-Profit Charitable 501c3. 3 Chamber Board: Social – Environmental – Economic. (SFI webinar, April 24, 2009, Attachment 4) [Emphasis added.]
- America's Largest Forest Certification program. **Now Fully Independent**. The Sustainable Forestry Initiative Program. ... A **fully independent** Board of Directors, including environmentalists and conservation organizations, governs and operates the SFI forest certification standard. (SFI ad, Attachment 5) [Emphasis added.]
- "2007 was quite a year. It began with the creation of SFI Inc., a **fully independent** non-profit 501c(3) charitable organization. Its Board of Directors has had authority over the SFI Standard, certification procedures and complaints since 2002, and **now** is the sole governing body of all aspects of the program with equal representation from its environmental, social and economic chambers." (SFI Progress Report 2007, p. 2, Attachment 6) [Emphasis added.]⁵¹

⁴⁸ 75 Fed. Reg. at 63567 n. 171 (quoting 16 C.F.R. 255.5).

⁴⁹ 75 Fed. Reg. at 63567.

⁵⁰ 75 Fed. Reg. at 63566 n. 158.

While it boasts its independence, by its own admission the “vast majority” of SFI’s annual financial support comes from companies whose products it “certifies,” entities SFI refer to as its “participants.”⁵² To make matters even more suspicious, SFI does not even disclose its specific donors and the amounts each has “donated.”⁵³

The Green Guides should require additional disclosure and scrutiny of a certification entity’s “independence” when the entity was **incorporated** by an industry trade association. Again, SFI is an excellent example of this situation. SFI was founded in 1994 by AF&PA, an industry trade association which, presumably, exists to serve the private interests of its timber and paper company members. SFI was funded by AF&PA until recently. Virtually all SFI revenue comes from its “Program Participants” (certified timber companies). SFI has little or no dependence on 501(c)(3) entities for funding.

In the political sphere, state and federal governments have enacted campaign disclosure laws to daylight financial donations between donors and candidates and elected officials. But this kind of transparency does not exist in the SFI forest certification scheme. Contrary to SFI’s claims that it is “open and transparent” about its “operations as a public charity” (SFI Transparency Policy, Attachment 8), SFI has refused to disclose the *amounts* donated by its donors, so a consumer cannot determine whether SFI is operating more like a trade association than a public charity; these amounts would permit someone to evaluate whether SFI failed the “public support” test the IRS applies to revenues raised by public charities.⁵⁴

We think a **bright line** governing the source of a certifying body’s financial support is necessary to ensure that third-party certification does not deceive, mislead, or confuse consumers. **We therefore strongly recommend that the Green Guides clearly provide that a certification entity cannot claim it is “independent” if it is either heavily reliant on or receives substantial financial support from the persons or companies whose products it certifies.** Defining “substantial” financial support may not be easy but with stakeholder input, we are confident the Commission can develop

⁵¹ These are samples of SFI communications Complainant ForestEthics included in its complaint to the Commission. We encourage the Commission to visit <http://www.sfiprogram.org/> to obtain more current examples of SFI’s heavy reliance on the term “independent.” We are confident that many other product certification systems similarly advertise their “independence” from the regulated industry as evidence of the certification entity’s scientific and legal credibility.

⁵² Letter from SFI to Washington Forest Law Center dated April 23, 2009. Attachment 7.

⁵³ *Id.*

⁵⁴ SFI has refused to disclose its donors even though until June 2009 SFI’s bylaws provided that SFI “shall provide to the public all information related to the Corporation’s funding, budget, and expenses” and that, according to SFI’s 2003-2004 Annual Report (*available at* <http://www.sfiprogram.org/miscPDFs/H-SFB%20Annual%20Report%2003-04.pdf>), SFI stated that its “independently audited financial statement and IRS Form 990 are available upon request.” The June 5, 2009 amended bylaws (*available at* <http://www.sfiprogram.org/files/pdf/SFI%20Inc%20%20Bylaws%20-%20Final%20June%205th%202009.pdf>) now more narrowly provide that SFI “shall disclose to the public all information that the Internal Revenue Code requires the Corporation to disclose.” But SFI continues to refuse to reveal the *amount* donated by each “Participant” each year. The Green Guides should require complete financial transparency for certification entities which claim to be “independent” or “third-party.”

guidelines that proactively address the financial independence issue. The guidelines could address issues such as the following:

- What percentage of the certifier’s overall budget may come from the companies and forest landowner’s whose products it certifies?⁵⁵
- Can the certification entity demonstrate any public support in the form of foundation grants or general charitable donations?
- Does the certification entity receive a disproportionate amount of money from its industry board members as opposed to its non-industry board members?

The Green Guides suggest that a certifier who is reliant on funding from the maker of a product it certifies can eliminate that potential conflict of interest with “clear and prominent **qualifying** language.”⁵⁶ We oppose a “disclosure” approach. We do **not** think that off-product disclosures or qualifications ameliorate the deception inherent in an industry-financed and maintained certification scheme. Would the SFI forest certification program, for example, be legitimate merely because it contains a disclosure on its website that, “SFI is principally funded by the timber and paper industries whose forests and products it certifies.” We do not believe that such qualifying language would prevent consumer deception because most consumers would simply not bother to go to SFI’s website. Instead, the average consumer will rely heavily on the “feeling” and context of the on-product certification seal. We think that, with respect to certified products, consumers will regard the certification seal as an assurance of exemplary environmental performance regardless of limitations or qualifications on a website. We have no problem when a certification scheme **explains** itself on its website, but we think it is very different when the system uses its internet communication to put “qualifying” or “limiting” language on its website.

2. Independent governance structure.

Virtually all literature on “independent” and “third-party” certification schemes agree that, to be credible, certification entities must be independently governed and operated.⁵⁷ Such schemes must also be balanced among industry “stakeholders.” Even industry groups pay lip-service to this principle.⁵⁸

But simply creating a certification entity that **appears** on paper to be “independent” is not enough to guarantee the independence that average consumers reasonably expect. Nor should a certification entity be able to claim independence and balance because its

⁵⁵ One important issue the Commission should consider is whether a certification entity deceptively markets itself as financially “independent” of an industry when it does not solicit or receive ordinary charitable donations from the general public (e.g., to The National Zoo) but, instead, all of its financial support comes in the form of charitable gifts from **individuals** who are employed or financially invested in the industry.

⁵⁶ 75 Fed. Reg. at 63567.

⁵⁷ FCAG at 12.

⁵⁸ 75 Fed. Reg. at 63566 n. 158.

directors come from and are assigned to different “chambers,” such as economic, social, and environmental.

The Commission should, instead, take a proactive approach that makes clear to consumers whether or not a third-party certifier is genuinely “independent” and substance should prevail over form in this approach. The Commission should require that a certification entity that holds itself out as “independent,” “third-party,” or “balanced” must be able to affirmatively demonstrate that its governance structure is genuinely independent, including that it holds membership-wide open elections, no economic interest dominates its policy or standards-setting process, and maintains open successorship.

The SFI forest certification system is an excellent example of a certification entity that portrays itself as having an open, balanced and democratic governance structure when, in fact, the opposite appears to exist.

As set forth above, virtually **all of SFI’s funding** comes from the “economic” sector of its Board of Directors and SFI holds no open elections for its Board members. Its Board is self-selecting. The representation of environmental and social interests in SFI, e.g., on the SFI Inc. Board of Directors, is very limited.

SFI does **not** hold open Board of Director elections among its members; all of its Board members are vetted and appointed by the existing Board, presumably with staff input. Not surprisingly, SFI’s Board of Directors is heavily dominated by the companies it certifies.

For example, SFI’s initial Board of Directors in 2002 consisted of 13 individuals. Of these 13, nine were affiliated with major industrial timber companies or forestry consultant organizations⁵⁹ and SFI’s president was Rick Holley, the CEO of Plum Creek Timber Co. In 2004, SFI’s Board expanded to 15; seven of these 15 Board members were affiliated with major timber or paper companies, including its vice-chair John A. Luke, the chairman and CEO of MeadWestvaco⁶⁰ but all of the new Board members were selected and approved by the then existing Board members. In 2005, SFI’s 15 member board included seven members affiliated with industry, including its co-chair Colin Moseley.⁶¹ In 2006, SFI’s 15 member Board changed in composition but included seven industry members, including its co-chair John A. Luke of MeadWestvaco.⁶² In 2007, SFI’s 15 Board members remained the same, including its co-chair John A. Luke. While

⁵⁹ Specifically, William Banzhaf (Society of American Foresters, Banzhaf Consulting); Allen Bedell (Circle B Logging, Arkansas); “Skeet” Burris (Cypress Bay Plantation); John Cashwell (Pacific Lumber); John Dillion (International Paper); Rick Holley (Plum Creek Timber Co.); Duane McDougall (Willamette Industries); Colin Moseley (Simpson Timber Co.).

⁶⁰ Specifically, John Luke, Jr. (MeadWestvaco); “Skeet” Burris; John H. Cashwell (Seven Islands Land Co.); John Faraci (International Paper); Colin Moseley; Steven R. Rogel (Weyerhaeuser Co.); Joe Young (Low Country Forest Products).

⁶¹ Specifically, Moseley, Luke, Burris, Faraci, Rogel, and Young.

⁶² Specifically, Luke, Young, Faraci, Patrick Moore (Smurfit-Stone Container Corp., Mary Motlow (Cumberland Springs Land. Co.), Marvin Brown (Oregon Dept. of Forestry), and Rogel.

SFI's Board may appear not to be industry-controlled from a numerical standpoint, SFI's admission that "virtually all" of its donated funds come from SFI-certified timber and paper companies creates the appearance that SFI's industry directors may bear disproportionate influence over SFI's standards and strategic direction. Indeed, throughout its existence, a major timber or paper industry executive has **always** been chair or vice-chair of SFI.⁶³

SFI has other features that undermine its claim of "independence." For example:

- **No Members.** An "independent" non-profit certification organization implies arms-length separation and transparency of governance structure. Yet, SFI has **no membership**—in fact, Article II of the SFI bylaws states that "The Corporation shall not have members." In other words, SFI has **no mechanism for organizations or individuals to join, vote, or elect the Board of Directors.** Instead, SFI has program participants that are all forest products companies and committees that are dominated by companies. Far from equally representing environmental, social, and economic stakeholders from a participation standpoint, SFI is heavily weighted to only one leg of the 3-legged sustainability stool.
- **Deceptively Labeled "Social Members."** On its website, SFI's definition of "social" interests is "[b]oard members representing the social sector, which includes community or social interest groups such as universities, labor, professional loggers, family forest owners or government agencies." But state foresters, forestry professors, and people affiliated with the logging industry are hardly representative of indigenous peoples associations, labor unions, and other genuine social interests.
- **Relationship with Trade Associations.** To be a third-party "independent" certification entity, a reasonable consumer would assume that the entity does not have an on-going administrative relationship with an industry trade association that has its members' bottom lines in mind. Yet, SFI's recent tax returns reflect that SFI has an **"continuing" administrative relationship with the AF& PA**, the timber industry trade association that created SFI in 1994 and spun it off in 2002 (as an industry-based, industry-controlled response to FSC).⁶⁴

⁶³ Banzhaf; Holley (2002); Luke (Vice-chair, 2003); Luke (Vice-chair, 2004, 2005, 2006, 2007); Holley (2008, 2009).

⁶⁴ SFI's most recent tax return identifies AF&PA as an affiliated or related entity, performing "contracted services" (2007 amended IRS Form 990, Schedule A, line 52a), and the prior year's tax return describes the SFI-AF&PA relationship as an "historic and continuing relationship" (2006 IRS Form 990, Schedule A, line 52a). The 2006 Form 990 also states that SFI's corporate books are in care of AF&PA (line 91a); that "SFI reimburses AF&PA for salary, payroll taxes and benefit expenses of their employees" (line 51 b (iv)); and that AF&PA performed "accounting services and membership solicitations" for SFI (line 51 b (vi)). In 2002, SFI's Application for Recognition of Exemption (IRS Form 1023) stated that "SFI was initially developed by the AF&PA" and that the SFI "may use facilities, such as office space donated by the AF&PA."

In summary, SFI's claim that it is an "independent public charity" is integral to its "green" marketing and public image, but that claim is deceptive. In its funding, governance structure, and standards-setting, SFI operates more like an industry trade association than the "independent public charity" it claims to be.

We suggest that the Commission adopt bright-line guidance, such as the following, in evaluating the claimed "independence" of a certification entity's governance structure. The Commission should adopt Green Guides providing that no certification entity may claim it is "independent" or is a "third-party" **unless** it can establish that the entity:

- Maintains open board of director elections.
- Permits all relevant stakeholders to have meaningful opportunities to participate in its governance structure.
- Maintains policies and procedures assuring that no major interest group can dominate or be dominated in the standards-setting process.
- It is not reliant on its industry board members for fundraising.
- It contains a voting system that prevents major environmental, social, or economic interests from being overruled.
- It contains a mechanism that prevents board decisionmaking in the absence of any representative of one of the major interest groups.

E. To avoid deception, third-party certification standards cannot rely on "systems-based" standards; instead, their standards should specify minimum performance levels.

The Commission commendably recognizes that "certification" schemes have the potential to highlight environmentally-oriented practices in one geographic area while downplaying environmentally-harmful practices in others:

A general environmental benefit claim, in combination with a particular attribute, may imply that the particular attribute provides the market with a net environmental benefit. If a particular attribute represents an environmental improvement in one area, but causes a negative impact elsewhere that makes the product less environmentally beneficial than the product otherwise would be, consumers may be misled. (emphasis added)⁶⁵

⁶⁵ 75 Fed. Reg. at 63564.

We therefore strongly agree with the FTC that all environmental claims in the realm of “certifications” or “seals” need to be “substantiated.”⁶⁶

But, to our disappointment, the Commission has tentatively decided to leave the evaluation of certification standards “to the experts” and not to promulgate any guidelines governing the **adequacy** and **transparency** of these standards.⁶⁷ We urge the Commission to reconsider this position and provide product certifiers a set of general criteria to which their standards must comply.

There are two basic types of standards for certification systems: “system” and “performance” standards. “System standards” “specify the management systems that must be in place within an organization to ensure it is managing quality and environmental and social performance consistently” but “they do not specify any minimum level of performance that must be achieved. Instead, they require forest management organizations “to set their own performance targets and to use the management system to ensure they are reached.”⁶⁸ In contrast, “performance standards” “specify the level of performance or results that must be achieved in a forest.”⁶⁹ The former “do not offer clear assurances to consumers about the level of performance delivered under the standard. Therefore, they cannot, and should not, be linked to a product label for consumers.” A “systems standard” simply does not “give[] information to the consumer on what standard it is able to deliver.”

1. The Green Guides should prohibit certification schemes that rely on “systems-based standards” that consist of vague, ambiguous, heavily-qualified, or unenforceable environmental commitments because such standards are impossible for consumers to quantify, measure, or verify.

Green Guides that allow product certification schemes to adopt certification “standards” that are vague, ambiguous, riddled with loopholes, and unenforceable paves the way for a product certification system that is fraught with potential consumer deception and confusion. We urge the Commission to adopt guidelines governing certification standards so that, at any time, a reasonable consumer or oversight entity can know precisely what the certified entity is doing and not doing relative to its product or practices to earn the “certification” label.

SFI generally claims that its forestry standards include “measures to protect water quality, biodiversity, wildlife habitat, species at risk and forests with exceptional conservation value.” However, many of the environmental and social measures in the SFI standard are vaguely worded, suggesting a central purpose to defend and legitimize status quo industrial forestry as environmentally and socially responsible, without requiring SFI participants to do more that they did before.

⁶⁶ 75 Fed. Reg. at 63567.

⁶⁷ 75 Fed. Reg. at 63568.

⁶⁸ FERN at 10.

⁶⁹ *Id.*

Unless the text of a certification standard requires specific actions and results, it is highly unlikely to ever achieve concrete results in the forest. Also, while many certification systems may require forest landowners to have plans and procedures in place, they may not require actual *performance* or execution of those plans in a way that produces specific, verifiable results in the forest (or the landowner plans may not require such results, even if the plans are “executed”).

Standard prescriptions should be explicitly designed to produce tangible results, requiring that specific actions be carried out or prohibited, or that specific conditions shall be maintained or established. In contrast, the requirements of the SFI standard contain an abundance of unmeasurable or unverifiable terms, weak or vague verbs, and numerous qualifiers (e.g., “where practical”) that permit a much greater degree of flexibility and discretion in their interpretation and implementation by forest managers, certifiers and auditors. Thus, the results on the ground are likely to be highly variable and unpredictable and not achieve the environmental outcomes implied by the SFI standards.

The fundamental flaw of “systems-based” certification systems like SFI is that the certification applicant (e.g., the SFI-certified landowner) has, by virtue of the “systems-based approach,” an impermissibly strong influence over all aspects of the landowner’s certification process. For example, most SFI Indicators measure only whether some form of “system... program... plan [or] documentation” is present, rather than whether a specific, verifiable condition or result is being achieved *in the forest*. And rather than require forest managers to actually *do* something specific, the SFI standard often simply requires them to vaguely “address... support... promote... encourage... [or] contribute to” something. If the language of the standard itself fails to explicitly require tangible and measurable results *in the forest*, then specific forest management outcomes can never be assured.

SFI’s standard regarding “biodiversity” is an excellent example of why a certification system should not be permitted to rely on a vague “systems-based” certification system. The SFI biodiversity standard requires only that certified landowners vaguely “manage” wildlife habitats and “contribute to” or “promote” (rather than “protect” or “maintain”) the conservation of biodiversity, and most of the associated indicators require only programs, plans, methodologies, or information collection rather than measurable results in the forest. Apart from requirements for “measures” and “plans” to protect riparian zones, water bodies, and undefined “special sites,” the SFI standard does not actually require the establishment or set-aside of protected areas. Nor does it preclude management activities that put specified high conservation values or features at risk, or require the protection of such values or features throughout certified forest units. Rather, SFI simply allows forest landowners to have in place proprietary non-public plans, policies, and systems to “address” these critical environmental features.

SFI also interprets the meaning of some of its standards quite loosely, with numerous opportunities for a landowner to adopt alternative approaches. For example, a key SFI “Interpretations” document contains the following qualification regarding the conservation of critically imperiled or imperiled species and communities:

In the rare case where the protection of an individual species or community carries exceptionally high costs or disproportionate impact and where the [certified landowner] is unable to implement any of the conservation strategies in a reasonable period of time (perhaps 3-5 years), and where laws or regulations do not apply, the [landowner] is free to implement other management or operational alternatives.

SFI's "systems-based" standards are neither strong nor quantifiable because they generally lack clear, enforceable criteria, and SFI gives forest landowners considerable discretion in their interpretation. The vast majority of SFI performance measures (PMs) and indicators require only the development of a "plan" or "policy" without specific environmental, social, or economic outcomes to make Program Participants accountable for their practices. SFI's 2005-2009 and 2010-2014 standards are riddled with loopholes, qualifiers, and vague language. For example, its 2005-2009 standards provided:⁷⁰

- "Protection of Special Sites and Biological Diversity: To manage forests and lands of special significance (biologically, geologically, historically or culturally important) in a manner that **takes into account** [as opposed to protects] their unique qualities and to promote a diversity of wildlife habitats, forest types, and ecological or natural community types" (Principle 7).

⁷⁰ SFI's 2010-2014 standards contain slightly different language but still suffer from the same vagueness. For example, SFI recently changed its "standards" (available at http://www.sfiprogram.org/files/pdf/sfi_requirements_2010-2014.pdf) but the new "standards" remain similarly ambiguous, vague, and ridden with landowner loopholes. For example, consider the following italicized words from SFI's 2010-14 standards:

- Objective 1, Forest Management Planning: Performance Measure (PM) 1.1 requires only that harvest plans be "*sustainable and consistent with* appropriate growth-and yield models.
- Objective 2, Forest Productivity: PM 2.1, Indicator 6 and 7 require that forest land owners to "*consider* potential ecological impacts."
- Objective 2, Forest Productivity: PM 2.2, Indicator 1: requires "*minimization*" of chemical use to "*achieve management objectives.*"
- Objective 2, Forest Productivity: PM 2.3: requires program participants to "protect and maintain soil productivity" that "*minimize*" loss of soil and site productivity, maintenance of post-harvest conditions that are "*conducive*" to maintaining site productivity, using erosion control measures that "*minimize*" the loss of soil or and site productivity, methods to avoid excessive soil disturbance, adoption of "*criteria*" that "*address* harvesting and site preparation to protect soil productivity," and using road construction techniques that "*minimize*" impacts to soil productivity and water quality.
- Objective 3, Protection and Maintenance of Water Resources: PM 3.1: "*program* to implement "*best management practices*;" "*plans*" that "*address*" wet weather events; "*program*" to "*address*" management and protection of rivers, streams, lakes, and other water bodies and riparian zones," implementation of "*plans*" to protect rivers, streams, lakes, or other water bodies."
- Objective 4, Conservation of Biological Diversity including forests with exceptional conservation value, PM 4.1: "*program*" to "*promote conservation*;" "*program*" to protect threatened or endangered species; "*program*" to locate and protect known sites of threatened or endangered species; "*development and implementation of* "*criteria*" to retain "*wildlife elements.*"

- “Artificial reforestation programs that **consider** [as opposed to minimize] potential ecological impacts of a different species or species mix from that which was harvested” (PM 2.1, Indicator 5).
- “Program **addressing** [as opposed to requiring] management and protection of streams, lakes, and other water bodies and riparian zones” (PM 3.2, Indicator 1).
- “Support of and participation in plans or programs for the conservation of old-growth forests in the **region** of ownership” [as opposed to their own lands](PM 4.1, Indicator 6).
- “Trees in clearcut harvest areas are at least 3 years old or 5 feet high at the desired level of stocking before adjacent areas are clearcut, **or as appropriate to address operational and economic considerations**, alternative methods to reach the performance measure are utilized by the Program Participant”(PM 5.3, Indicator 3).

The vagueness of and qualifiers attached to these terms make it impossible for SFI to “substantiate” (or a consumer to verify) that it is complying with its purported environmental claims; this not only completely undercuts the Green Guides’ “substantiation” requirement,⁷¹ but it also prevents a member of the public or a sophisticated corporate purchaser from determining what specifically an SFI-certified landowner is doing (or not doing) in its forests, and gives SFI managers leeway to manage their way around the standard. Ultimately, consumers need some way to know whether SFI is certifying forest practices that reflect ecologically-exemplary forestry.

In conclusion, the Commission should disallow product certification systems that rely on vague, ambiguous, loophole-laden, and unenforceable “systems standards.” Instead, the Commission should require product certifiers to adopt performance-based certification systems that include measurable and quantifiable performance standards.⁷²

2. Transparency of standards and audits.

It is well-accepted that, to be credible, a certification scheme must be transparent.⁷³ Transparency is necessary to assure objectivity in the standards setting and enforcement process and to promote meaningful public understanding and participation. Transparency is critical at multiple stages in the certification process, including (a) at the certification assessment stage; (b) at the development of the forest management plan stage; and (c) in the conformance complaint procedure stage. By “transparency” we mean complete **public access** to all landowner environmental commitments and social commitments under the forest certification system that directly affect how the landowner will physically conduct forest practices on the landowner’s property.

⁷¹ 75 Fed. Reg. at 63567-68.

⁷² The FERN report cites official United Nations documents for the conclusion that certifications schemes need to be based on performance requirements. FERN at 15 (citing the 1997 U.N. Inter-governmental Panel on Forests document).

⁷³ FERN at 15 (citing the 1997 U.N. Inter-governmental Panel on Forests document).

We are disappointed that the Commission has tentatively concluded not to require marketers “to make their substantiation [of a product certification scheme] publicly available.”⁷⁴ Without meaningful public access, there is no way for the public or organizations concerned with phony green marketing to ensure certified product claims are and can be substantiated.

In multiple ways, SFI is illustrative of a certification system that lacks transparency and which renders a “certification” inherently impossible to verify. For example, SFI does not require a certified private landowner or SFI to **make publically available the customized forest management plan the landowner and its SFI assessor/auditor have agreed upon** for the landowner’s certified forests, or even summaries of them. As a result, the public has no way of knowing what the private landowner is doing (or not doing) on the ground to “comply” with the SFI standard. In combination with SFI’s vague and heavily qualified environmental “standards,” this lack of transparency makes the SFI certification system meaningless relative to a specific landscape.⁷⁵ Consumers or consumer watch-dog organizations will never be able to police the marketplace under these circumstances.

Another fundamental aspect of a transparent certification scheme is a comprehensive stakeholder consultation program.⁷⁶ Such consultation with Indian tribes or First Nation people, governments, or anyone else who may be affected by the landowner’s forest operations – is important not only for the development of forest management plans, but also for the evaluation of social impacts, and identification and management of high conservation value forests. Yet, typical of other of certification schemes, SFI does not require such consultation for **private** landowners.⁷⁷

Transparency is also an essential ingredient to assure the integrity of a certification system’s complaint and audit procedures. Under SFI, an interested party can challenge an SFI landowner’s compliance with its SFI-auditor-approved forest management plan. The “non-conformance” complaint procedure requires the party to file a “complaint” with the forest landowner’s auditor and gives the forest company 45 days to respond to this complaint. Similar to a court of law, the auditor subsequently determines whether the landowner complied with its SFI forest commitments based on the complaint, the landowner’s response, and a field audit.

⁷⁴ 75 Fed. Reg. at 63568.

⁷⁵ SFI posts vague and general regular “audit reports” on its website but these are post-audit reports, not landowner management plans; they do not inform what the landowner is doing or not doing. (*See* <http://www.sfioprogram.org/auditreports.cfm>). Moreover, these audit reports are too general to inform the public of what forest practices are taking place or not taking place on the ground. The available SFI summaries vary widely in length, substance and detail, with most being only a few pages in length and containing information insufficient to determine with any confidence the adherence of the certified forest management operation to the SFI standard. Significantly, SFI not only permits but requires that the audit summaries be **written by the forest owner/manager** who is being audited.

⁷⁶ *See* FERN at 13-14.

⁷⁷ SFI Objective 18 *et seq.*

This might sound thorough but the experience of some conservation challengers is that the SFI non-conformance complaint procedure is a sham. First, the complaining party lacks any right to obtain access to the forest landowner's SFI forest plan in the first place so it is impossible for the complainant to know what the landowner is required to do or not do in its forests by its SFI environmental commitments. Second, neither the SFI complaint rules (nor its ad hoc unwritten policies) require the landowner's SFI-approved and landowner-paid auditor to share with the Complainant any of the studies or landowner-submitted documents the auditor uses to assess the complaint. To make matters worse, the SFI process contains no timeline under which the auditor must issue a report nor does it require any type of hearing procedure or other due process-oriented rules that guarantee transparency. All of this essentially renders the SFI non-conformance complaint procedure a meaningless paper exercise.⁷⁸

V. Conclusion

We urge the Commission to use the Green Guides to announce proactive guidelines for the marketing of products "certified" by claimed independent, third-party, charitable entities. The Commission should prohibit or severely limit, as set forth above, claims of product "sustainability." In requiring green marketing claims to be substantiated, a product certifier should be required to demonstrate that its environmental standards are measurable and quantifiable and not heavily qualified with ambiguous landowner-biased loopholes."

Forest certification should be required to provide environmental protection or benefits over and above that which would be afforded by applicable default state or federal law. An accurate and complete comparison between the management standards required by default state and federal law and that required by a certification system will give consumers extremely valuable information about the products they are purchasing and allow the green market to prosper under certification systems that are truly additive.⁷⁹

⁷⁸ A Sierra Club non-conformance complaint against the Weyerhaeuser Company is illustrative. On October 1, 2009, the Sierra Club filed a complaint under the SFI "non-conformance" complaint procedures alleging that Weyerhaeuser conducted thousands of acres of clear-cut logging on very steep and unstable mountainsides in S.W. Washington. A storm in December 2007 triggered massive landslides and erosion of these mountainsides, causing millions of dollars in damage to downstream private and public property. It not only took over a year for Weyerhaeuser's auditor to evaluate the complaint in a formal document but the auditor would not even share with the Complainant any of the documentation Weyerhaeuser had provided its auditor in its defense. This reflects that the SFI "non-conformance" complaint procedure is a closed inside process that ultimately amounts to no more than a meaningless paper exercise.

⁷⁹ An example where "certified" forestry offered no more protection for endangered species than is required by state forest practice regulations is illustrated by a lawsuit against a large SFI forest landowner in Washington State. In 2006, a conservation organization sued the Weyerhaeuser Company for logging occupied northern spotted owl habitat in S.W. Washington State contrary to Section 9 (the "no take" provision) of the Endangered Species Act. This logging was authorized by Washington State law and, evidently, by the landowner's SFI certification plan. Weyerhaeuser disputed its logging was harming the endangered owls but a federal court disagreed; the court granted an injunction against the logging. The case was eventually settled and the landowner agreed to protect the owl but this case illustrates that some forest certification systems provide no more environmental protection than default state law yet marketers imply that their certification system provides for additional protection.