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October 20, 2009

Via OVERNIGHT DELIVERY

Federal Trade Commission  
Consumer Response Center  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Re: **Forestry Certification Law and Standards**

Dear Consumer Response Center Staff:

We write on behalf of a group of forest product companies, family forest and other landowners, businesses affected by forestry certification, and trade and landowner associations that promote sustainably produced fiber and wood products (collectively, the Coalition for Fair Forest Certification (“Coalition”)).<sup>1</sup> This letter outlines the Coalition’s concerns and asks for action by the Federal Trade Commission (“FTC”) related to the Forest Stewardship Council (“FSC”) certification system as well as the preferential promotion of the FSC certification system by standard setting bodies, including the U.S. Green Building Council (“USGBC”). The Coalition offers this submission after reviewing the September 9, 2009 submission to the FTC by the Washington Forest Law Center on behalf of ForestEthics (the “ForestEthics Submission”). The ForestEthics Submission alleges a series of claims against the Sustainable Forestry Initiative®, Inc. (“SFI”).

The allegations contained in the ForestEthics Submission are unsupported and without merit. The ForestEthics Submission goes to great lengths to encourage a detailed review of SFI’s certification system, but fails to acknowledge features of ForestEthics’ preferred system – the Forest Stewardship Council (“FSC”) certification system – that raise issues identical to those complained of in the ForestEthics Submission, as well as some that are even more problematic. The Coalition submits this

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<sup>1</sup> The Coalition members are identified in an attachment to this letter. (Attachment 1).

Federal Trade Commission  
October 20, 2009  
Page 2

letter to bring this significant omission to the attention of the FTC. The unsupported assertions of the ForestEthics Submission make it appear singularly aimed at suppressing any competition between FSC and SFI. If the ForestEthics Submission is successful in this regard, the result would be a FSC monopoly in the U.S., furthering concerns about illegal, anticompetitive activity arising out of USGBC's exclusive endorsement of FSC-certified products.

The Coalition requests that the Bureau of Consumer Protection investigate whether FSC's certification system violates the Federal Trade Commission Act's prohibition against "unfair or deceptive acts or practices in or affecting commerce."<sup>2</sup> This inquiry might be handled most efficiently as part of the ongoing review of the FTC's Guides for the Use of Environmental Marketing Claims ("Green Guides"). The Coalition believes that various aspects of FSC's certification system raise concerns under this statute: (1) the regional and national variances among FSC's certification standards, which limit the ability of consumers to confirm the standards to which FSC-certified products are subject; (2) the inability to substantiate FSC's claims that wood sold under its "Mixed Sources" label does not originate from prohibited sources; and (3) FSC's auditors and certification bodies may not be ensuring adherence to FSC certification standards.

Further, the preference shown for FSC-certified products by the USGBC raises concerns about the viability of fair competition with other domestic certification programs. The Coalition submits that USGBC and FSC operate in tandem to disadvantage wood products certified by SFI and other certification systems. Thus, to the extent an investigation is warranted, the Bureau of Competition should look closely at the conduct of USGBC and its favoring of FSC certification. In fact, the Coalition believes that it would be useful for the FTC to issue guidance to standard-setting organizations concerning appropriate behaviors that comply with antitrust law.

## **I. FSC's Certification Standards and Other Practices Raise Significant Concerns About the Reliability of Label Claims**

If there is to be any FTC review of forest certification standards, the Coalition suggests that FSC's certification standards be evaluated for unfair and/or deceptive practices. FSC's standards and their enforcement by FSC certification bodies and auditors raise significant concerns that designating wood products as "FSC-certified" does not meet the mandates of the Federal Trade Commission Act. The changing nature of FSC's certification standards and the inconsistencies between the practices of FSC-approved auditors who confirm whether forest product companies are following these standards raise concerns that FSC's certification standards are vague, heavily-qualified, ambiguous, and ultimately confusing and misleading to the public.

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<sup>2</sup> 15 U.S.C. § 45(a)(1) (2006). (Attachment 2)

Federal Trade Commission  
October 20, 2009  
Page 3

### **A. The Variability of FSC Standards**

The variance of national and regional standards promulgated by FSC, coupled with the fact that FSC labels *do not* disclose under which FSC standard a wood product may have been certified, makes it extremely difficult to substantiate any meaningful FSC-related product claims. FSC operates under a system of dozens of varying regional and national standards across the United States and around the world. In North America alone there are 13 different regional standards, with nine of those in the United States.<sup>3</sup> Indeed, as one report has noted, “FSC has evolved into a highly complex, centrally led forest certification system whose provisions are scattered among a large number of standards and other normative documents.”<sup>4</sup> Moreover, in countries without an accepted national standard, FSC permits certification bodies to certify according to their own “interim” standards, which do not meet either International Organization of Standardization (ISO) or International Social and Environmental Accreditation and Labelling (ISEAL) Alliance requirements.<sup>5</sup>

The reality is that depending on geographic location, FSC standards may be stringent or lenient, and can differ significantly in form and content. In comparing some of the most costly management limitations across certain FSC regional and national standards, wide disparities exist. For example, the FSC mandatory land set aside in Sweden is 5 percent, while in the United Kingdom, it is 15 percent.<sup>6</sup> At the same time, in the U.S. Pacific Coast region there is a 50 percent requirement for plantations.<sup>7</sup> Significant variances exist on other issues such as limitations on size of harvest openings and in-stand retention requirements, among others.<sup>8</sup> This complicated web of ever-changing standards makes it

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<sup>3</sup> See [www.fscus.org/standards\\_criteria/regional\\_standards.php](http://www.fscus.org/standards_criteria/regional_standards.php); [www.fsccanada.org/ForestManagementStd.htm](http://www.fsccanada.org/ForestManagementStd.htm). (Attachment 3).

<sup>4</sup> Alan Purbawinyatna and Markku Simula, *Developing Forest Certification: Towards Increasing the Comparability and Acceptance of Forest Certification Systems Worldwide*, International Tropical Timber Organization, May 2008, at 11. (Attachment 4). Browsing [www.fsc.org](http://www.fsc.org) for current standards reveals that FSC has made it no easy task for consumers to identify the applicable standards for a nation or region. Rather, at a link for “All FSC policies and standards,” (see [www.fsc.org/36.html?&no\\_cache=1](http://www.fsc.org/36.html?&no_cache=1)), site visitors are offered a list of 186 documents spread across 13 pages that visitors can review or word search to find applicable standards.

<sup>5</sup> See Comparison of Forest Certification Systems: Summary of Results of UK Government Assessment. (Attachment 5).

<sup>6</sup> See Appendix I: Comparison of Most Costly Management Limitations in SFI and Selected FSC Regional and National Standards for an Enterprise > 10,000 Acres.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Federal Trade Commission  
October 20, 2009  
Page 4

extremely difficult for consumers to understand under what conditions FSC-certified products are grown.

As if those factors did not cause enough confusion, application of FSC's widely-varying system of standards means that timber grown in one of FSC's nine U.S. regions may meet FSC standards in the region in which it is grown, but would not do so if grown under the very same conditions in a neighboring region. Likewise, some timber grown internationally may meet a FSC standard offshore, but not if grown in the U.S. Nevertheless, all timber meeting the applicable local FSC standard is marketed under the *same* label – a label that does not disclose that the products were certified under widely varying standards or in what country or region the timber used to make the wood product was grown. For example, wood grown in the Southeast U.S. and wood grown in Sweden using the same level of environmental protection would qualify as FSC-certified in Sweden, but not in the U.S.

The result is that while consumers are informed that a product bearing a FSC label is FSC-certified, consumers have no way of knowing under what conditions the wood may have been grown or harvested. Thus, while FSC would claim that a product holding itself out as FSC-certified means that the grower of the timber from which the product was made is “following the highest social and environmental *criteria* there are,”<sup>9</sup> the reality is that under a widely varying scheme of standards, products *may or may not* in fact be sourced from timber grown under such stringent standards. Indeed, the very fact that FSC standards are not uniform means that it is impossible for FSC to substantiate this claim. Despite what message FSC's label may imply, a close analysis of FSC's system reveals that FSC certification can be as much a function of geography and local politics as it is a function of strictly adhering to a set of environmental standards.<sup>10</sup>

## **B. FSC's “Controlled Wood” Standard**

A second marketing problem for FSC arises out of its “Controlled Wood” standard. This standard is integral to FSC's “Mixed Sources” label, which allows manufacturers to mix FSC certified material with non-certified material. The non-certified portion of any “Mixed Sources” product must

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<sup>9</sup> See FSC Frequently Asked Questions, *What is the problem and what solutions does FSC offer?*, at <http://www.fsc.org/fsc-rules.html> (emphasis added). (Attachment 6).

<sup>10</sup> As more fully discussed below, this system of varying standards, which is often far more lenient in international markets, also works to the detriment of domestic economic interests. Domestic timber growers adhering to standards that are typically more restrictive than those for foreign growers will face higher compliance costs and be forced to market their forest products at higher prices, thereby making them less competitive.

Federal Trade Commission  
October 20, 2009  
Page 5

comply with FSC's "Controlled Wood" standard,<sup>11</sup> necessary to support the claim that suppliers of products bearing the "Mixed Sources" label have "avoided"<sup>12</sup> wood from any of the following sources:

- illegally harvested wood;
- wood harvested in violation of traditional and civil rights;
- wood harvested in forests in which high conservation values are threatened by management activities;
- wood harvested from areas being converted from forests and other wooded ecosystems to plantations or non-forest uses; and
- wood from forest management units in which genetically modified trees are planted.

It is clear, however, that this claim is inflated and that wood from some of the "prohibited" categories can and does enter the "Mixed Source" supply chain. This is illustrated by an October 2008 study, "Assessment of Lawful Harvesting & Sustainability of US Hardwood Exports" prepared for the American Hardwood Export Council ("AHEC Study"), indicating that FSC-certified products are not meeting the standard.<sup>13</sup> The AHEC Study conducted a comprehensive review of the hardwood producing areas in the United States, which are concentrated in states along and east of the Mississippi River with some additional production in the Pacific Northwest. Among the issues reviewed, the AHEC Study addressed each of the five risk categories of wood that must be avoided under the FSC "Controlled Wood" Standard.

While the AHEC Study does indicate that "[t]he conclusions from the FSC Controlled Wood analysis is that wood procured from the study area could be considered *Low Risk* in all five risk categories of the standard,"<sup>14</sup> the fact remains that the FSC claim is unqualified, and thus overstated.

<sup>11</sup> See FSC Standard for Company Evaluation of FSC Controlled Wood, FSC-STD-40-005 (Version 2-1) EN. (Attachment 7).

<sup>12</sup> *Id.* at 6 (emphasis added). See also *id.* at 7 (requiring that complying companies have a written policy commitment to implement best efforts to avoid trading and sourcing wood or wood fiber from non-controlled sources). While the policy asks for "best efforts" to be made in implementing the standard, the label claim is not "best efforts." Thus, FSC's claim is confusing unless this qualification is made clear.

<sup>13</sup> Available at [http://www.ahec.org/publications/AHEC%20publications/AHEC\\_RISK\\_ASSESSMENT.pdf](http://www.ahec.org/publications/AHEC%20publications/AHEC_RISK_ASSESSMENT.pdf). (Attachment 8).

<sup>14</sup> Attachment 8 at 12 (emphasis added).

Federal Trade Commission  
October 20, 2009  
Page 6

The AHEC Study goes on to say, “[t]he Controlled Wood standard is a global standard and the risk determinations made in this study are made with a global perspective.”<sup>15</sup> While this report can assure the reader that, relative to global averages, the risk of FSC-certified products violating the label claims is low, there very well may be occurrences of non-compliance with the Controlled Wood standard in parts of the study area (as noted in the ecoregion assessments).<sup>16</sup> While the AHEC Study also notes that the risk of FSC certified U.S. hardwood products violating the label claims is low, these findings likewise suggest that FSC’s “Controlled Wood” standard is not being met, as a “low risk” of procuring prohibited-source wood is not the same as finding that FSC-certified products “avoid” wood from the five prohibited categories. Accordingly, FSC cannot rightly substantiate “Controlled Wood” claims about forest products bearing its certification.

Moreover, the Coalition believes that wood from at least one prohibited source under the “Controlled Wood” standard – land converted to another use (e.g. real estate development, oil and gas exploration, public highway projects) – is commonplace in FSC-certified supplies.<sup>17</sup> As such, FSC should revise its claims so that it is not holding out its certified products as being free from wood sourced from these prohibited sources.<sup>18</sup>

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<sup>15</sup> *Id.* at 13.

<sup>16</sup> *Id.*

<sup>17</sup> For example, audit reports for Alberta Pacific Forest Industries (“Al-Pac”), the largest FSC certified area in the world, suggest that Al-Pac’s FSC-certified pulp mill may have sourced up to 25 percent of its fiber from forests converted by the Fort McMurray, Alberta oil sands operations. *See* SmartWood Forest Management Public Summary for Alberta Pacific Forest Industries, Inc., Certification Code: SW-FM/COC-1626 (September 2005) at 12 (“Al-Pac’s current processing capacity in their pulp mill is approximately 3,000,000 m3 of fibre a year of which 2,244,495 m3 (approx 75%) is expected to come from the certified land base within the FMA. The remainder of the raw material comes from a variety of sources, *including oil exploration and development in the FMA, operations outside the FMA* and coniferous chips from quota holders.”) (emphasis added). (Attachment 9).

<sup>18</sup> In raising this critique, the Coalition does not criticize FSC’s effort to allow wood sourced from some of its “prohibited” categories. The Coalition agrees with prohibiting the sourcing of wood from some of the categories identified, e.g., wood from illegal sources. Another – genetically modified trees – is misleading because all wood sold in the U.S. is free of genetically modified trees. The issue is that if FSC’s “Mixed Sources” label claim is that the prohibited sources are avoided – i.e. there is no FSC-certified wood coming from such sources – then FSC-certified wood must either be held to that standard or the claims must be modified.

Federal Trade Commission  
October 20, 2009  
Page 7

### C. Certification and Auditing Concerns

Additional issues regarding the veracity of claims arise when considering whether FSC's auditing practices actually ensure that forests are being properly certified. There is evidence demonstrating that FSC's auditors and certifying bodies may not be holding certified sources to FSC's standards.<sup>19</sup>

One such example involves a complaint filed with FSC concerning the 2005 certification of the Michigan Department of Natural Resources ("MI DNR") by Scientific Certification Systems ("SCS"), one of FSC's certifying bodies. Accreditation Services International ("ASI"), an accreditation body created by FSC, undertook a second look at the certification of the Michigan DNR as part of its audit of SCS.<sup>20</sup> ASI's audit includes several statements that raise alerts concerning how closely FSC's certification standards are being followed. For example:

- In reviewing SCS's certification of MI DNR, ASI apparently acquiesced to an incomplete standard of compliance for the MI DNR, stating, "[t]his management is not completely ideal from an environmental perspective, but given the social and economic pressures associated with managing such a large public forest, the trend seems positive rather than negative, and *generally consistent* with FSC direction."<sup>21</sup>
- ASI raised further questions as to whether the MI DNR has actually met FSC certification standards, stating, "MI DNR appears to recognize the intent of the FSC standards and has gone to some length to adjust its management to conform to the standards."<sup>22</sup> This statement implies that that the MI DNR had not complied with the standards to date, and, further, that its management could be certified without achieving actual compliance with the standards.<sup>23</sup>

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<sup>19</sup> See Matilda Lee, *Can we trust the FSC?* The Ecologist, Sept. 23, 2009, available at [www.theecologist.org/trial\\_investigations/325243/can\\_we\\_trust\\_the\\_fsc.html](http://www.theecologist.org/trial_investigations/325243/can_we_trust_the_fsc.html). (Attachment 10).

<sup>20</sup> See ASI Forest Management Audit to Michigan Department of Natural Resources, USA (2006) ("MI DNR Audit"), available at [http://www.fsc-watch.org/docs/ASI\\_2006\\_MI\\_SCS\\_audit\\_public\\_summary.pdf](http://www.fsc-watch.org/docs/ASI_2006_MI_SCS_audit_public_summary.pdf). (Attachment 11).

<sup>21</sup> *Id.* at 9 (emphasis added).

<sup>22</sup> *Id.* at 10.

<sup>23</sup> Elsewhere in the report, ASI implies that MI DNR may need some latitude in managing its forest as it has suffered budget cuts and is under pressure from stakeholder groups, essentially making an excuse for  
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Federal Trade Commission  
October 20, 2009  
Page 8

This report suggests that FSC will not control the quality of the certificates issued in its name or ensure that the auditor mandate compliance.

A November 2008 Greenpeace report, “Holding the Line with FSC”<sup>24</sup> (“Greenpeace Report”) also raises red flags about how closely FSC’s certification standards are being enforced. The report indicates that “[p]roblems have been suspected and observed by stakeholders and FSC members including in the rigour of the audit processes of certification bodies ... and of [ASI’s] ... ability to monitor and correct any such failures.”<sup>25</sup> Reporting on FSC’s progress concerning more than 80 recommendations that Greenpeace made in 2007 relating to FSC’s performance and credibility, among other issues, the Greenpeace Report notes that ASI continues to have undercapacity problems even after receiving a recommendation a year earlier that continued strict auditing by ASI and taking action in the face of continued non-compliance by certification bodies concerning auditing practices needed to be maintained and improved.<sup>26</sup>

Further, FSC’s certification and auditing practices raise serious conflict of interest concerns with parties that have significant economic interests at stake. For example, a 2002 Rainforest Foundation report indicates that more than 70 percent of FSC’s actual forest management certifications (329 certificates) had been completed by the certification body SmartWood, the Rainforest Alliance’s audit arm, and one other entity (Société Générale de Surveillance).<sup>27</sup> The Rainforest Alliance is one of FSC’s founding members. The Rainforest Alliance also endorses FSC-certified products sold by the

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noncompliance. *See id.* At the same time, ASI recommends that stakeholders like the Sierra Club and others who can raise concerns about the environmental impacts of the management of MI DNR’s forests, continue to pressure MI DNR. *Id.* Further discussion concerning the MI DNR audit can be found at FSC-Watch, *available at* [http://www.fsc-watch.org/archives/2008/03/10/FSC\\_certification\\_of\\_US\\_public\\_forest\\_lands](http://www.fsc-watch.org/archives/2008/03/10/FSC_certification_of_US_public_forest_lands) (Mar. 10, 2008, 16:29). (Attachment 12). This effectively indicates that in some cases, “aspiring” to the goals of FSC while making some progress towards them may be sufficient for certification.

<sup>24</sup> Grant Rosoman et al., *Holding the Line with FSC*, Greenpeace International Summary Report (vol. 1) (Nov. 2008), *available at* <http://www.greenpeace.org/raw/content/belgium/fr/press/reports/holdingtheline.pdf>. (Attachment 13).

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *See* Simon Counsell and Kim Terje Lorass, *Trading in Credibility: The Myth and Reality of the Forest Stewardship Council*, The Rainforest Foundation (2002), *available at* <http://www.rainforestfoundationuk.org/files/trading.pdf>. (Attachment 14).



Federal Trade Commission  
October 20, 2009  
Page 9

companies audited by its subsidiary, SmartWood.<sup>28</sup> Thus, SmartWood cannot be perceived as a disinterested party that focuses solely on whether entities seeking certification are adhering closely to FSC's standards.

This collection of facts calls into question whether FSC-certified products are being strictly held to the standards they claim to meet and whether the auditors are uninterested, independent third parties. There is considerable evidence that FSC's certification and auditing processes are being lightly enforced, and that those tasked with ensuring FSC's certification requirements are met are not sufficiently disinterested to ensure full compliance.

## **II. The Bureau of Competition Should Investigate the Competitive Implications of FSC's Certification System and the USGBC's Relation to It and Provide Guidance to Standard Setting Organizations Concerning Appropriate Behaviors that Comply with Antitrust Law**

The Coalition also believes that the exclusionary actions of USGBC and its exclusive endorsement of FSC-certified products, as well as the operation of FSC's bylaws, warrants investigation by the Bureau of Competition concerning issues of possible monopolization, attempt to monopolize and conspiracy to monopolize the fast-growing forest certification marketplace. In examining this issue, the Coalition invites the FTC to use USGBC as a case in point to provide specific guidance to USGBC and other standard setting organizations.<sup>29</sup>

### **A. USGBC's Endorsement of FSC Certified Products**

The USGBC's Leadership in Energy and Environmental Design (LEED) Green Building Rating System is a prime example of how FSC-certified products have been favored to the detriment of other certification systems. FSC-certified products are the only wood products that earn points under the

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<sup>28</sup> See <http://www.domtar.com/en/paper-earthchoice/partners-and-alliances.asp> ("The Rainforest Alliance publicly endorses Domtar EarthChoice® based on Domtar's commitment to have all of the forests it manages, directly or indirectly, FSC certified."). (Attachment 15). The Rainforest Alliance apparently does not require a disclosure when its subsidiary SmartWood is the advertiser's auditor. This may contravene FTC's policies on endorsements. See 16 C.F.R. Part 255 (2009).

<sup>29</sup> Such guidance would be useful to entities such as the Business and Institutional Furniture Manufacturer's Association (BIFMA) and NSF International, which propose to adopt a sustainable furniture standard that unfairly favors FSC-certified wood to the detriment of wood certified to standards of the SFI, CSA, or American Tree Farm System. If adopted, the BIFMA standard would favor imported wood produced under lower environmental standards than those in the U.S., to the competitive disadvantage of domestically produced wood products, raising similar legal concerns as those presented by USGBC's actions.

Federal Trade Commission  
October 20, 2009  
Page 10

LEED System.<sup>30</sup> On the other hand, the three standards most widely adopted by forest owners in the U.S. and Canada – SFI, the Canadian Standards Association (“CSA”) Sustainable Forest Management Standard, and the American Tree Farm System – receive no points under LEED, creating a substantial disadvantage for American-sourced wood products. This results in a lose-lose for American consumers and the environment, because this system hinders competition and, as demonstrated above, favors a certification system that subjects internationally-grown timber certified by FSC to less stringent standards than timber grown in the U.S.<sup>31</sup>

USGBC’s behavior raises significant concerns, as it consistently demonstrates its unwillingness to even put forth a legitimate effort to incorporate competing forest certification systems into the LEED System. For example, after announcing in 2004 that it was reviewing forest certification, first through a closed-door “wood summit” and then through a technical advisory committee, it was not until August 2008 that USGBC published a draft approach.<sup>32</sup> It is incongruous that USGBC would claim that “[t]he focus of the proposed LEED credit language changes is on transparency,”<sup>33</sup> when throughout the process, USGBC has: failed to use a consensus process in developing its approach; operated in closed meetings; declined to include producers competing with those benefited by the existing point system; and acted in a conspiracy-like fashion with FSC members and supporters to the disadvantage of other certification systems.

The favoritism shown FSC-certified products by USGBC is inconsistent with the American National Standards Institute’s (“ANSI”) due process requirements and OMB Circular No. A-119, which establishes the principles that voluntary, private sector standards must meet if federal agencies wish to use them, including openness, balance, due process, an appeals process, and consensus. Congress has found that these principles provide for: “(A) notice to all parties known to be affected by the particular standards development activity, (B) the opportunity to participate in standards development or modification, (C) balancing interests so that standards development activities are not dominated by any single group of interested persons, (D) readily available access to essential information regarding proposed and final standards, (E) the requirement that substantial agreement be reached on all material

<sup>30</sup> See LEED Credit Revisions for Certified Wood, *available at* <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1866>. (Attachment 16).

<sup>31</sup> Wood certified under SFI, CSA, American Tree Farm System and other standards endorsed under the competing international system, the Programme for Endorsement of Forest Certification (“PEFC”), are treated as if it were uncertified and awarded no points under LEED.

<sup>32</sup> See Introduction and Executive Summary: Recognition of Certified Wood Products in LEED Green Building Rating Systems, found at <http://www.usgbc.org/ShowFile.aspx?DocumentID=4373>. (Attachment 17).

<sup>33</sup> See LEED Credit Revisions for Certified Wood, *supra* note 30.

Federal Trade Commission  
October 20, 2009  
Page 11

points after the consideration of all views and objections, and (F) the right to express a position, to have it considered, and to appeal an adverse decision.”<sup>34</sup>

By excluding *de facto* – if not explicitly – competing third party programs such as SFI, CSA, and PEFC, USGBC’s benchmarks for forest certification programs only entrench the current system of single-sourcing FSC as its designated system. The potential anticompetitive effects of this exclusionary action are plain – and occur at multiple levels. If other certification systems are excluded from the LEED standard, this tends to exclude those same certification systems from the third-party forest products certification marketplace. This effect, in turn, puts upward price pressure on this economic arena. Further, it impairs forest products producers and lumber yards certified to these other systems from competing for the growing demand for “green” building construction throughout the United States.

Whether completely exclusionary or simply through exertion of great pressure on producers and distributors to switch to FSC-certified products, the anticompetitive effect on price and output is unabated. In fact, the advantage afforded FSC doubtless puts upward price pressure on transactions at levels throughout the marketplace – third party certification program fees; auditors’ fees; “green” certified forest products; and ultimately, the “green” building segment itself.<sup>35</sup> The Coalition believes that such consequences cannot be justified as the USGBC can substantiate no meaningful distinctions between FSC-labeled products and those from competing systems. The USGBC system is a closed and biased approach to this significant social and economic issue, with no legitimate purpose to justify its exclusionary and anticompetitive character.

Long-standing legal authority prohibits disadvantaging SFI and other third-party certification systems in this fashion. It is well established antitrust doctrine that standards that are unfairly biased or not objective may well violate the Sherman Act.<sup>36</sup> Indeed, the actions of USGBC and FSC may not only run afoul of Section 1 of the Sherman Act, but may also violate both Section 2 of the Sherman Act and

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<sup>34</sup> Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, §102(5). (Attachment 18).

<sup>35</sup> Indeed, it was reported within the last year that FSC is doubling its accreditation administration fees for chain of custody certification. See Craig Webb, *FSC Hikes a Fee, Goes After Competitors*, ProSales Online, Dec. 17, 2008, at <http://www.prosalesmagazine.com/industry-news.asp?sectionID=427&articleID=825176>. (Attachment 19).

<sup>36</sup> See e.g. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961). (Attachment 20).

Federal Trade Commission  
October 20, 2009  
Page 12

Section 5 of the FTC Act under liability theories of monopolization, attempt to monopolize, and conspiracy to monopolize.<sup>37</sup>

## **B. FSC's "Variability" Problem Unfairly Disadvantages Domestic Interests**

In addition to the lack of disclosure as set forth above, the widely varying nature of FSC's certification standards also raises substantial policy concerns as its design encourages the importation of wood products generated from timber grown under more lenient standards, to the competitive injury of domestic producers who must contend with more stringent FSC standards. This problem is readily demonstrated upon examining, for example, how much land must be reserved from economically viable timber production to comply with the competing codes. FSC requires that set-asides in regions in Russia and Sweden equal 5 percent, and sets a 10 percent optional set-aside standard in New Zealand. By contrast, the FSC U.S. Southeast standard requires a 25 percent set-aside and the FSC U.S. Pacific Coast standard a 50 percent set-aside, both from plantation management.<sup>38</sup>

These withholds and other standards that domestic timber sources must meet are completely unreasonable for commercial operations when compared with the standards to which foreign sources are held. Accordingly, forest product companies in those U.S. regions, while certainly capable of complying with the FSC standards applicable elsewhere, are essentially cut out of the FSC-certified products market because FSC has set unreasonable standards for their geographic locations. In setting these unreasonably high standards for U.S. wood products, FSC makes way for the establishment of an anticompetitive regime that works to the significant detriment of the U.S. wood products industry, and its ability to compete in the rapidly growing U.S. "green" building market.

## **C. FSC's Bylaws and Efforts to Silence Concerns of Competing Market Interests Raise Additional Antitrust Concerns**

The Coalition further submits that one of the primary obstacles to leveling the playing field of FSC standards for domestic wood product interests is the FSC bylaws and organizational structure,<sup>39</sup>

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<sup>37</sup> See e.g., *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Lorain Journal v. United States*, 342 U.S. 143 (1951); and *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (*en banc*). See also "Vigorous Antitrust Enforcement in This Challenging Era," Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice (May 12, 2009) at 5-14; and "The Common Law of Section 2: Is It Still Alive and Well?," J. Thomas Rosch, Commissioner, Federal Trade Commission (October 31, 2007). (Attachment 21).

<sup>38</sup> See Appendix I.

<sup>39</sup> The FSC's General Assembly three-chamber voting structure that requires for passage of any measure an overall two-thirds majority vote and simple majority vote from each chamber, see FSC Bylaws ¶¶ 12,15,28 and 31. (Attachment 22). This voting structure ensures that current certification standards  
(Continued...)

Federal Trade Commission  
October 20, 2009  
Page 13

which by design, effectively suppress the concerns of forest owners and industry interests. The FSC bylaws expressly quiet critical analysis of the FSC standards by explicitly mandating that the organization not be criticized by its members. These measures limit opportunities for change and corrective action within the organization by suppressing free speech and critical analysis of FSC's positions and actions. FSC's bylaws mandate that "[p]rospective members must not be currently promulgating statements opposing FSC or certification."<sup>40</sup> Likewise "[p]rospective FSC members must provide written evidence that they support FSC as an organization, its aims and activities, and its Principles and Criteria."<sup>41</sup> Current members are threatened by "destitution," *i.e.* expulsion, for opposing FSC positions under a broad and vague standard.<sup>42</sup> The bylaws provide that "[i]f a member engages in activities contrary to the interests of FSC or no longer meets the membership criteria, a destitution process may be initiated by the Board or an individual member (supported by two other members)."<sup>43</sup> In addition, FSC board members may be removed from their positions for acting against the interests of FSC.<sup>44</sup>

In adhering to this sort of implicit and explicit threats to potential critics, FSC effectively suppresses internal or industry efforts that would challenge it to reassess positions, policies, and standards that may work to the benefit of interests other than those that now control the organization. This structure only further strengthens the grip that FSC now maintains in the "green" building industry given its present exclusive endorsement by USGBC for wood products, and reinforces the Coalition's concerns about anticompetitive activity.

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previously adopted by FSC under less equitable voting policies, which competitively disadvantage forest products companies, will not change. *See* Chris Tollefson, et al., *Setting the Standard: Certification, Governance and the Forest Stewardship Council* (2008) (chronicling the development of the FSC-British Columbia regional standard).

<sup>40</sup> *See* Attachment 22 at ¶26. Indeed a number of forest product companies would not join the Coalition or participate in any public criticism of FSC standards due to a strong perception that allies of FSC would instigate market campaigns, FSC-favored auditors would audit these companies much more harshly, or as expressly noted in the FSC bylaws, such companies would not even be permitted to seek FSC membership or existing members would be forced into a "destitution" proceeding.

<sup>41</sup> *Id.* ¶25.

<sup>42</sup> While beyond the scope of this letter, the bylaws raise interesting questions about whether FSC's "refusal to deal" with critics of FSC violates the Sherman Act, 15 U.S.C. §§ 1-7.

<sup>43</sup> Attachment 22 at ¶41. *See also* FSC Statutes, cl. 13th (providing that a "destitution" process can be initiated if an Associate participates in activities contrary to the interests of FSC). (Attachment 23).

<sup>44</sup> Attachment 22 at ¶55; Attachment 23 at cl. 19th.

Federal Trade Commission  
October 20, 2009  
Page 14

### III. Conclusion

American consumers benefit from a robust, competitive marketplace. With only about 10 percent of total forest land currently certified under any system of sustainable forestry, it is indisputable that the environment will benefit when more of our forests are certified. While claiming to don the mantle of protecting the marketplace and environment, ForestEthics does neither. Instead of enhancing competition and increasing the options available to promote certification, ForestEthics seeks to protect the rights of one player in that marketplace by working to discredit other equally credible systems. All the while, FSC's certification system and the favoritism it is afforded raises significant concerns about unfair or deceptive trade practices that violate the Federal Trade Commission Act as well as anticompetitive behavior clearly prohibited by that statute as well as the Sherman Act.

For the reasons discussed in this letter, the Coalition asks that the FTC investigate through the Bureau of Consumer Protection the deceptive and unfair trade practices arising out of FSC's forest certification standards; investigate through the Bureau of Competition concerns about anticompetitive activities and monopolization arising out of USGBC's LEED System and preference for FSC-certified products; and provide guidance to standard-setting organizations concerning behavioral standards for compliance with antitrust law.

Respectfully submitted,

STEPTOE & JOHNSON LLP



Tom Collier

Enclosures

cc: U.S. Green Building Council (w/o attachments)  
Richard A. Feinstein, Director, FTC Bureau of Competition (w/o attachments)  
David Vladeck, Director, FTC Bureau of Consumer Protection (w/o attachments)

Appendix I: Comparison of Most Costly Management Limitations in SFI and Selected FSC Regional and National Standards for an Enterprise > 10,000 acres<sup>1</sup>

	FSC Canada Boreal	FSC Russia <sup>2</sup>	FSC Sweden	FSC Canada Great Lakes	FSC US Lake States	FSC US Northeast	FSC US Southeast	FSC United Kingdom	FSC British Columbia	FSC New Zealand <sup>3</sup>	FSC US Pacific Coast	FSC US Rocky Mtn.	SFI US, Canada
Area certified (2008) (x 1,000 acres)	45,350	42,297	24,057	20,314	15,743	5,695	4,443	3,715	2,462	2,319	1,928	840	163,330
Harvest at sustainable rates?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Streams protected?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Width of streamside management zones (SMZs) specified?	66', additional 148' as needed Specific table for Yukon	References Russian law	References Swedish law	No	No	No	References state law and guidelines (BMPs)	References UK law and guidelines	230' (fish bearing) 132' (non-fish perennial) 50' (intermittent)	References NZ laws and BMPs, 15' setback for planting	150' (fish bearing) 100' (non-fish perennial) 75' (intermittent)	50', may be extended on steep slopes or erosive soils	References state and provincial laws and BMPs
"Clearcut size": limits on size of harvest openings?	No	No	No	No	No (natural forest) <sup>4</sup>	No (natural forest)	No (natural forest) 40 acres <sup>5</sup> (plantation)	No	No	No	6 acres (natural forest) 40 acres average, 60 or 80 acres max. (plantations)	No (natural forest)	120 acres average
"Green-up": harvest limited until adjacent stand reaches a given height?	No	No	No	No (natural forest)	No (natural forest)	No (natural forest)	10' (hardwood plantations)	No	No	No	7' (plantation)	No (natural forest)	5' or 3 years
Retention requirements within harvest openings?	10% min. (5% if small harvest)	20 trees per acre (seed trees) or approx. 1% in clumps	4 trees/acre	10-12 trees per acre	No	No	No	No	5-10 trees per acre	No	30% (natural forest)	No	No <sup>6</sup>
Mandatory set-aside of land? <sup>7</sup>	No	Representative ecosystem network; 5% (regional standards)	5%	No	No	No	25% (plantation)	15% <sup>8</sup>	No	10% encouraged but not mandatory	50% <sup>9</sup> (plantation)	No	No <sup>10</sup>

<sup>1</sup> Sources: National Council for Air and Stream Improvement, SFI, FSC. Compiled by Coalition for Fair Forest Certification (2009).

<sup>2</sup> Regional standards in Russia may contain more detailed standards.

<sup>3</sup> Based on Smartwood's interim standard for New Zealand.

<sup>4</sup> The Lake States and some other US FSC standards include a 40-acre limit on clearcut size and a 10' green-up requirement in plantations, but certifications outside the US South and Pacific Northwest are unlikely to be classified by FSC as plantations.

<sup>5</sup> Unless a larger opening can be justified by scientifically credible analysis.

<sup>6</sup> SFI requires tree retention for wildlife but the number is unspecified. Some state rules and guidelines specify numbers, e.g., 2-5 trees per acre in WA and OR.

<sup>7</sup> May include land reserved under other provisions. Other FSC US standards besides the US Southeast and Pacific Coast have set-asides under the plantation standard, but forests outside these two regions are unlikely to be classified as plantations. For comparison, FSC reported the average set-aside under its plantation standard globally as 12%.

<sup>8</sup> At least 1% in plantations and 5% in semi-natural woodlands must be in reserves. This is similar to the 5% under the Swedish standard, which counts only productive forest toward the 5% and not land for which the landowner was compensated.

<sup>9</sup> 20% must be set aside permanently and 30% for 30-40 years beyond financial targets.

<sup>10</sup> The Coalition's experience under SFI in the US West and South is that an average of 14% of land is set aside for water quality, wildlife habitat and biodiversity rather than timber production.