



## Supplemental Materials in Support of LD 295: An Act to Ensure Accurate Recyclability Labeling of Plastic Containers and Plastic Packaging Material.

In support of our testimony on LD 295, Just Zero is also submitting the comments we drafted and filed with the Federal Trade Commission regarding the proposed updates to the federal guidelines on the Use of Environmental Marketing Claims (commonly known as the “Green Guides”). These comments contain information that will be helpful to the Environment and Natural Resources Committee as you discuss LD 295 because they touch on the same need for stronger and more accurate product recyclability labeling.

- Pages 8 – 14: Describe the environmental, social, and economic harm caused by false, deceptive, and misleading product recyclability labels.
- Pages 14 – 18: Provide examples of misleading product labels that are causing significant consumer confusion and contamination in the recycling stream.
- Pages 26-27: Outline several high-profile lawsuits against consumer goods companies for false and deceptive product recyclability labeling.

April 24, 2023

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**RE: Guides for the Use of Environmental Marketing Claims – Green Guides Review,  
Matter No. P954501 (Docket FTC-2022-0077)**

Dear Secretary Tabor:

Thank you for the opportunity to provide comments on the Federal Trade Commission’s (“FTC” or the “Commission”) solicitation of public comment on the Guides for the Use of Environmental Marketing Claims (hereinafter referred to as “Green Guides”). These comments are submitted on behalf of The Last Beach Cleanup, Just Zero, Plastic Pollution Coalition, Beyond Plastic, Center for Biological Diversity, and Greenpeace USA.

Our organizations are extremely concerned about the growing environmental and human health impacts associated with plastic production and pollution. Despite rising public backlash about the prevalence of unrecyclable and single-use plastic products, companies are continuing to use these materials when designing and packaging their products. Worse, many companies are engaged in robust and deceptive greenwashing campaigns designed to convince consumers that unrecyclable materials such as flexible plastic packaging are recyclable.

The Commission has a critical role in protecting the public from misleading, deceptive, and false marketing claims regarding the recyclability of products and packaging. The Green Guides play a vital role in preventing misinformation from companies regarding the recyclability of their products. Therefore, we urge the Commission to maintain and strengthen the Green Guides. More specifically, we urge the Commission to:

- (1) Expand the scope of what is considered harm arising from deceptive, misleading, and false claims about recyclability;
- (2) Prohibit companies from marketing products and packaging as recyclable through store drop off programs unless the company can demonstrate that the program is proven to capture and recycle at least 75% of the covered materials;
- (3) Initiate a formal rulemaking process to codify the Green Guides, as well as the requirements of California’s Truth in Labeling Law into federal regulation; and
- (4) Strengthen the Green Guides’ recyclability provisions such that only products and packaging that are collected, sorted, and processed into new materials in accordance with objective criteria may be labeled as recyclable.

In addition to the evidence included in these comments, we have also submitted two supplemental attachments providing evidence of the pervasiveness of false recycling labels on plastic products and packaging.

- Attachment 1: Provides numerous examples of false and misleading recycling labels used on plastic products and packaging between 2021 and 2023.
- Attachment 2: An appendix of 80 plastic product examples with false recycling labels from the California Statewide Commission on Recycling Markets and Curbside Recycling.<sup>1</sup> In 2021, the California Statewide Commission on Recycling Markets and Curbside Recycling called on state authorities for the elimination of false recycling symbols and labels on flexible plastic bags and films sold in California. As detailed in the Commission’s letter, plastic bags and films cannot legally be claimed as “recyclable” under existing California law which codified the 2012 Green Guides.

Given the breadth of information the Commission has requested public comment on, as well as the scope of the problem regarding misleading, deceptive, and false product labeling we have divided our comments into three parts.

[Contents](#)

**PART A: Why the Commission Should Expand the Green Guides and Codify Them into Law Through a Formal Rulemaking Process.....3**

I. There is a Continuing Need for the Green Guides ..... 3

    A. Plastic Production and Pollution Is Increasing While Plastic Recycling Is Failing ..... 3

    B. Despite Abysmal Plastic Recycling Rates Companies Are Falsely Claiming Many Plastic Products and Packaging Are Recyclable..... 5

II. The Commission Should Remove Ambiguities and Expand the Scope of the Green Guides ..... 6

    A. Remove Ambiguities ..... 6

    B. Broadening the Scope of What Constitutes Harm as a Result of Unfair or Deceptive Marketing Practices..... 7

    C. The Commission Should Prohibit Claims of Recyclability That Depend on Store Drop Off Programs Unless the Company Can Prove the Program is Collecting and Recycling At Least 75% of Covered Materials..... 14

III. The Commission Should Initiate a Formal Rulemaking Process to Codify the Green Guides into Enforceable Federal Regulations ..... 18

    A. There is Sufficient Evidence to Indicate a Widespread Pattern of Unfair or Deceptive Marketing Claims Regarding Recyclability and Recycled Content for Plastic Products and Packaging ..... 19

    B. The Widespread Harm and Lack of Federal Regulation Has Forced State Action ..... 20

    C. The Commission Should Codify the Requirements of California’s Truth in Labeling Law Through a Formal Rulemaking Process ..... 21

**PART B: Answers to General Questions Raised by the Commission in the Notice of Public Comment..23**

**PART C: Responses to the Specific Questions Regarding Recyclable and Recycled Content. ....35**

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<sup>1</sup> California Statewide Commission on Recycling Markets and Curbside Recycling, “Request for Enforcement of California Laws on Recyclable Labels on Plastic Bags and Films – [Appendix 1,](#)” December 3, 2021.

## PART A: Why the Commission Should Expand the Green Guides and Codify Them into Law Through a Formal Rulemaking Process

### I. There is a Continuing Need for the Green Guides

As a threshold matter, we strongly believe there is a continuing need for the Green Guides. There is an urgent need for strong federal regulation to protect people and the planet from the harms associated with plastic production, improper waste management, and pollution. This can only be accomplished with accurate, reliable, and substantiated claims about the environmental attributes of products and packaging.

In fact, accurate recyclable claims and labels serve many valuable functions, including:

- Assisting consumers when making purchasing decisions;
- Ensuring fair competition in the marketplace between companies;
- Promoting the manufacture and use of truly recyclable packaging and products;
- Protecting human health and the environment from the proliferation of plastics that are falsely labeled as recyclable;
- Preventing costly and dangerous contamination in America's recycling system; and
- Preventing harm to domestic and foreign communities that process much of our recyclables.

Companies, retailers, and the plastic industry are currently making false and unsubstantiated claims about the recyclability of their products to avoid product bans and negative consumer perception on wasteful products and packaging.<sup>2</sup> Many are using labels that convey their products are recyclable when they are in fact not.

The current situation where producers feel free to make unsubstantiated claims about the environmental attributes of their products or packaging is akin to “the wild, wild, west of product claims and labels with no sheriff in town.”<sup>3</sup> The lack of strong federal regulation is forcing states to enact their own laws to hold companies accountable for false claims and to protect consumers and the environment from the harm associated with misinformation regarding recyclability.<sup>4</sup>

#### A. Plastic Production and Pollution Is Increasing While Plastic Recycling Is Failing

Plastic pollution is a blight in our cities and landscapes and is harming our rivers and oceans. Experts estimate that in 2016, the United States generated the largest amount of plastic waste of any country in the world (42.0 million tonnes - Mt). Between 0.14 and 0.41 Mt of this waste was

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<sup>2</sup> Greenpeace USA, “[Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability](#),” February 2020.

<sup>3</sup> New York Times, “[California Aims to Ban Recycling Symbols on Things That Aren't Recyclable](#),” September 9, 2021.

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

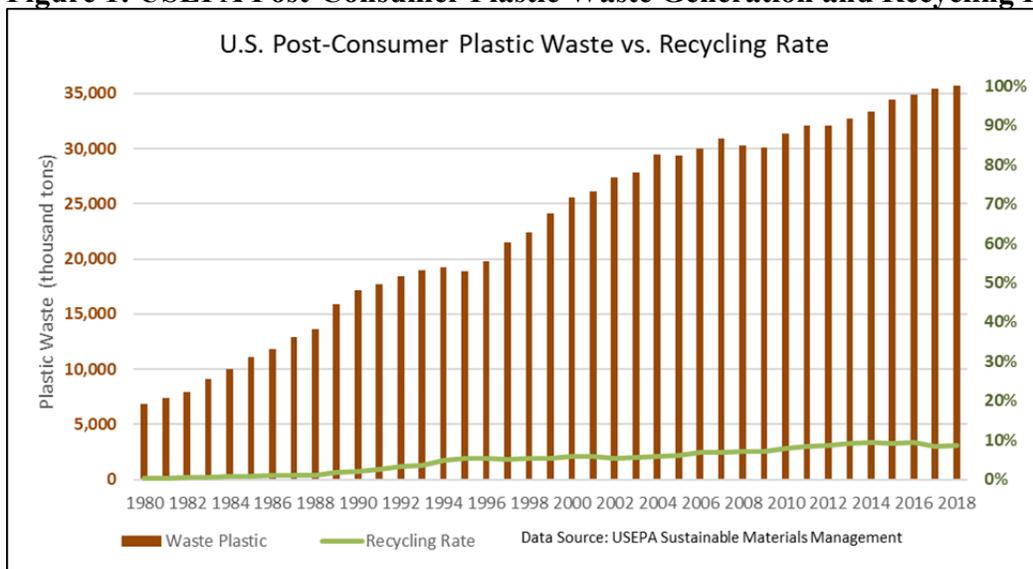
illegally dumped in the United States, and 0.15 to 0.99 Mt was inadequately managed in countries that imported materials collected in the United States for recycling.<sup>5</sup>

Using the midpoints of these estimates, that means about 845,000 metric tonnes of plastic waste from the United States (U.S.) pollute the ocean every year, which is about 182 dump trucks of plastic waste per day. News of plastic pollution in the U.S. continues to make headlines:

- Tennessee River is among the most polluted in the world. “Plastic bags, litter seem to be the main culprits.”<sup>6</sup>
- ‘First Flush’ Shows the Reality of Plastic Pollution in Los Angeles, CA<sup>7</sup>
- Chattanooga Creek still full of trash despite volunteer efforts<sup>8</sup>

As described in “The Real Truth About the U.S. Plastic Recycling Rate,” plastic recycling has been a dismal failure for the past 40 years.<sup>9</sup> As shown in Figure 1 for 1980 through 2018, plastic waste generation has increased five-fold in the U.S. from 7.4 to 35.7 million tons/yr while the plastic recycling rate never reached 10%. The U.S. plastic recycling rate peaked at a dismal 9.5% (including massive plastic waste exports to China) and is now in an irreversible decline to insignificance.

**Figure 1: USEPA Post-Consumer Plastic Waste Generation and Recycling Rate**



<sup>5</sup> Law, et. al. “[The United States’ contribution of plastic waste to land and ocean.](#)” Science Advances, October 20, 2020.

<sup>6</sup> Knox News, “[Microplastics hit home: Tennessee River among the most plastic polluted in the world.](#)” February 8, 2019.

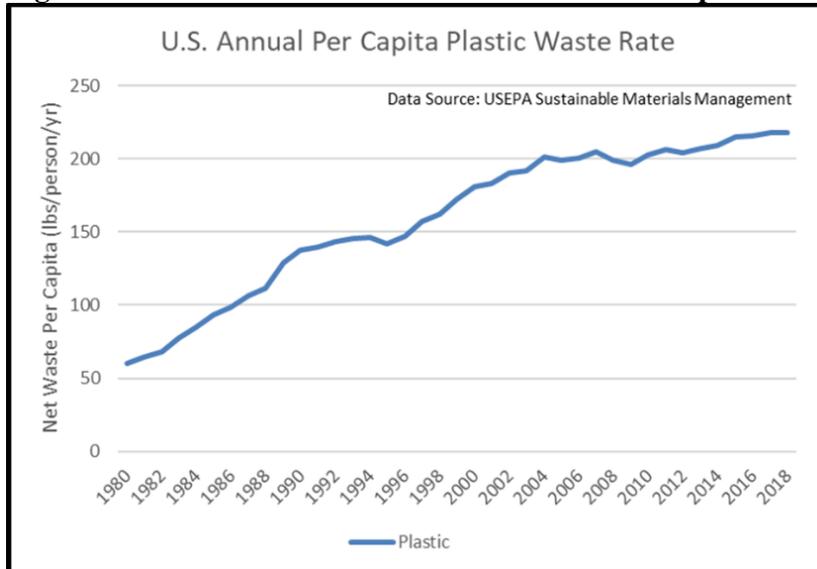
<sup>7</sup> Plastic Pollution Coalition, “[‘First Flush’ Shows the Reality of Plastic Pollution in Los Angeles, CA.](#)” October 15, 2018.

<sup>8</sup> Chattanooga Times Free Press, “[Chattanooga Creek still full of trash despite volunteer efforts; cleanup taking place next weekend.](#)” February 13, 2019.

<sup>9</sup> Beyond Plastics and The Last Beach Cleanup, “[The Real Truth About the U.S. Plastic Recycling Rate.](#)” May 2022.

Figure 2 shows the increase in per capita plastic waste generation over the same timeframe, from about 60 lbs/person/yr in 1980 to 218 lbs/person/yr in 2018. Plastic waste generation per person has grown in the U.S. because many new types of single use plastics are served to consumers.

**Figure 2: USEPA Plastic Waste Generation Per Capita**



#### B. Despite Abysmal Plastic Recycling Rates Companies Are Falsely Claiming Many Plastic Products and Packaging Are Recyclable

During this time, the plastics industry has falsely promoted recycling as the solution to plastic waste and pollution in the U.S., as documented by NPR Frontline’s Plastic Wars.<sup>10</sup> False recyclable labels on plastic products have spurred deceptive advertising lawsuits won against major brands including Keurig<sup>11</sup> and eight major product companies.<sup>12</sup> Unfortunately, plastic has replaced other packaging materials (paper, metal, glass) that are truthfully recyclable, giving consumers no choice but to buy products packaged in plastic waste.<sup>13</sup>

In response to growing public concern about plastic pollution and excessive plastic waste generation, many companies are now making high profile, global commitments to make their products recyclable, reusable, or compostable.<sup>14</sup> Unfortunately, rather than actually strive to meet these voluntary commitments, many companies are instead “greenwashing” their products to give them the appearance of being more environmentally friendly. This is especially true when it comes to plastic packaging.

Corporate commitments and concern for brand reputation are driving companies to widespread use of false recyclable labels on plastic products and packaging. Product and packaging

<sup>10</sup> NPR, [Plastic Wars: Industry Spent Millions Selling Recycling — To Sell More Plastic](#), March 31, 2020.

<sup>11</sup> Top Class Actions, [“Keurig Class Action Settled For \\$10M, Ending Recyclability Claims,”](#) March 3, 2022.

<sup>12</sup> Wall Street Journal, [“TerraCycle Partners Including Coca-Cola, P&G to Change Recycling Labels After Settling Lawsuit,”](#) November 15, 2021.

<sup>13</sup> Resource Recycling, [“Data Corner: The evolving ton over 25 years,”](#) January 27, 2019.

<sup>14</sup> [New Plastics Economy, Global Commitment.](#)

manufacturers are also pressuring material recovery facilities (MRFs) to accept plastic waste to make the products and packaging appear redeemable and avoid plastic bans, even though there is no end market demand for the plastic waste. As the nation’s largest waste collection and sortation company, Waste Management, stated in their 2018 Annual Report, “bans have increased pressure by manufacturers on our recycling facilities to accept a broader array of materials in curbside recycling programs to alleviate public pressures to ban the sale of those materials. However, with no viable end markets for recycling these materials, we and other recyclers are working to educate and remind customers of the need for end market demand and economic viability to support sustainable recycling programs.”<sup>15</sup>

The relentless focus on the future path for recycling plastic products and packaging flies in the face of the hard facts: plastic recycling has never worked and will never work.<sup>16</sup> According to a 2021 published by the Canadian Government, toxicity risks in recycled plastic prohibit “the vast majority of plastic products and packaging produced” from being recycled into food grade packaging.<sup>17</sup> Even post-consumer plastic downcycling into the other products is generally economically impractical.<sup>18</sup>

## II. The Commission Should Remove Ambiguities and Expand the Scope of the Green Guides

The Commission should not simply retain the Green Guides but should strengthen them by removing ambiguities and expanding the scope to cover all environmental, social, and economic harms. The Commission should prohibit claims of recyclability that depend on store drop off programs unless the company can prove the program is collecting and recycling at least 75% of covered materials.

### A. Remove Ambiguities

The Green Guides already require that all three stages of recycling must be present (access to collection systems, sortability, and end markets/processors). Acceptance of a specific product by a MRF is not proof of recycling and therefore cannot be used as criteria for determining whether a product is recyclable or not. In the Green Guides Statement of Basis and Purpose section titled “Packages Collected for Public Policy Reasons but Not Recycled,” the Commission states that it “agrees that unqualified recyclable claims for categories of products that municipal recycling programs collect, but do not actually recycle, may be deceptive. To make a non-deceptive unqualified claim, a marketer should substantiate that a substantial majority of consumers or communities have access to facilities that will actually recycle, not accept and ultimately discard, the product. As part of this analysis, a marketer should not assume that consumers or communities have access to a particular recycling program merely because the program will accept a product.”<sup>19</sup>

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<sup>15</sup> Seeking Alpha, [Waste Management 10-K for the Year 2018](#), filed on 2/14/2019.

<sup>16</sup> The Atlantic, [“Plastic Recycling Doesn’t Work and Will Never Work.”](#) May 30, 2022.

<sup>17</sup> Stina, [“Assessing the state of food grade recycled resin in Canada and the United States.”](#) November 2021.

<sup>18</sup> Greenpeace USA, [“Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability.”](#) February 2020.

<sup>19</sup> [FTC Green Guides Statement of Basis and Purpose \(pg. 174\)](#)

But companies exploit ambiguities in the Green Guides to argue that access to collection alone is enough. **Therefore, FTC should clarify that all three stages of recycling (access to collection systems, sortability, and end markets/processors) must be present.**

B. Broadening the Scope of What Constitutes Harm as a Result of Unfair or Deceptive Marketing Practices.

Federal law prohibits the use of unfair or deceptive acts or practices that affect commerce.<sup>20</sup> Unfair or deceptive acts are defined as those that “cause or are likely to cause reasonably foreseeable injury.”<sup>21</sup> Despite this broad statutory language, the Commission currently utilizes a narrow test when evaluating the harm associated with false recyclable labels. Specifically, the Commission only considers (1) the economic harm to consumers who purchased one product over another based on recyclable labels, and (2) economic harm to product manufacturers from the competitors’ false recyclable labels.<sup>22</sup>

While these are important considerations when determining who was harmed, and to what extent, they do not cover the wide array of additional harms associated with false recyclable labels. False recyclable labels contribute to widespread confusion about what materials are actually recyclable. This significantly increases contamination in the recycling system which limits the ability for actually recyclable materials to be processed. Increased contamination also increases the costs associated with recycling, as well as the risk of harm to workers at recycling facilities who are responsible for removing unrecyclable products from the recycling system.

Therefore, we urge the Commission to expand the scope of harm to consider all harms:

Existing harms:

- (1) Economic harm to consumers who relied on a recyclable label when making a purchase;
- (2) Economic harm to product manufacturers from the competitors’ false recyclable labels;

Expanded harms:

- (3) Harms to legitimate recycling efforts and facilities;
- (4) Worker safety harms arising from contamination of recycling bins;
- (5) Economic harm to communities, local governments, and recycling service providers from increased curbside recycling costs resulting from increased contamination levels;
- (6) Economic harm from loss of end markets and increased processing costs due to increased contamination in the recycling system; and
- (7) Environmental, health, social, and economic harms in the communities where contaminated materials are processed.

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<sup>20</sup> 15 U.S.C. § 45(1).

<sup>21</sup> *Id.* at § 45(4)(A).

<sup>22</sup> See, USA Federal Trade Commission, Prepared Remarks of Chairman Joseph Simons, Keynote Address, 2019 ANA Advertising Law & Public Policy Conference, March 20, 2019.

### *1. Economic Harm to Consumers Who Relied on Recyclable Label When Making a Purchase*

While it may be difficult to prove that false labels affect a consumer's decision to purchase a specific product, there is strong evidence that consumers care about recycling and want to purchase products that are actually recyclable. Several recent surveys show that consumers increasingly care about the environmental impacts of the products they buy, and more specifically, whether the product and its packaging are recyclable.

- Amcor's global survey, including the U.S., showed 76% of consumers across the globe want to recycle more and find recyclability is the most important sustainability attribute for packaging – above other aspects including reusability and the materials used.<sup>23</sup>
- A 2020 Survey performed by the Shelton Group found that:
  - 80% of U.S. consumers agree that recycling is the bare minimum we can do for the environment;
  - 76% of U.S. consumers agree that recycling makes us feel better about purchases; and
  - 67% of U.S. consumers look at the recycling label before making a decision on how to manage an item after use.<sup>24</sup>
- A recent survey from PDI Technologies found that:
  - 75% of Americans are concerned about the environmental impact of the products they buy;
  - 69% of Americans view a product's environmental friendliness as an important factor when making purchasing decisions;
  - 68% of Americans use labels or third-party certification on product packaging to determine if a product is environmentally friendly, with that number jumping to 79% for younger Americans; and,
  - 66% of Americans say they will be willing to pay more for a product that is environmentally friendly.<sup>25</sup>

### *2. Economic Harm to Product Manufacturers from Competitors' False Recyclable Labels*

Despite U.S. consumers' clear preference for recyclable products and packaging, many companies are still manufacturing and marketing products that are not, and likely never will be, recyclable. Worse, as explained below, many of these companies are falsely and deceptively marketing their products are recyclable despite no indication that those claims are true. This inherently has an impact on the companies that are actually redesigning their products and packaging to be recyclable.

### *3. Harms to Legitimate Recycling Efforts and Facilities*

The combination of a consumer base that increasingly cares about the environment and recycling, coupled with a lack of enforcement of false recycling labels has resulted in increased

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<sup>23</sup> Amcor, "[Amcor research shows consumers worldwide want to recycle more](#)," November 18, 2021.

<sup>24</sup> Shelton Group, "[Engaging Middle America in Recycling Solutions](#)," August 27, 2020.

<sup>25</sup> PDI Technologies, Business of Sustainability Index. (June 2022). Available at <https://pditechnologies.com/resources/report/business-sustainability-index/>

contamination in the U.S. recycling system. This contamination has environmental, economic, and public health implications.

According to the U.S. Environmental Protection Agency, as much as 25% of all recycling is contaminated.<sup>26</sup> A significant source of contamination is when unrecyclable items are placed into the recycling stream. Contamination can prevent large batches of material from being recycled.

There is ample evidence indicating that false recycling labels are causing consumer confusion about what is and is not recyclable, which is creating increased contamination. This is particularly true for flexible plastic packaging, which is not rigid and does not hold its own shape when empty. Flexible plastic packaging includes plastic bags, plastic pouches, and plastic wraps.

- NBC Video: “How Misleading Labels Are Overwhelming Recycling Facilities.”<sup>27</sup> The video shows an Amazon plastic mailing pouch with a large recycle symbol creating contamination in a material recovery facility (MRF). As the MRF operator states, consumers see the recycle symbol and mistakenly put the plastic pouch in their curbside recycling bin.
- CBS Morning Video: The video shows flexible plastic packaging, including Amazon plastic pouches, that were mistakenly put in curbside recycling bins by consumers. The MRF worker explains the harms caused by the plastic pouches. Contaminated store drop off bins are also shown.<sup>28</sup>
- Oregon Truth in Labeling Task Force:<sup>29</sup> The Truth in Labeling Task Force was created by Senate Bill 582 in the 2021 Legislature to study and evaluate misleading or confusing claims regarding the recyclability of products made on a product or product packaging.<sup>30</sup>

Public confusion about what and how to recycle has been one of several root drivers of instability in Oregon’s recycling system. That confusion stems in part from misleading and confusing labels. The report states the existing “patchwork of labels and lack of standards leads to confusing and misleading recycling labels that confuse consumers and lead to contamination in the recycling system.”<sup>31</sup>

Moreover, the final report relied on survey evidence, as well as an abundance of anecdotal evidence that labels are a significant source of confusion, leading to contamination. A 2018 survey in the Portland Metro region found that most community

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<sup>26</sup> U.S. Environmental Protection Agency, [National Overview: Facts and Figures on Materials, Wastes and Recycling](#). (December 3, 2022).

<sup>27</sup> NBC News Video: “[How Misleading Labels Are Overwhelming Recycling Facilities](#),” 2022.

<sup>28</sup> CBS Morning News, “[Program aims to help consumers recycle plastic film correctly](#),” July 19, 2022.

<sup>29</sup> Oregon Truth in Labeling Task Force Report, “[Truth In Labeling Final Report and Recommendations](#),” June 1, 2022.

<sup>30</sup> 2021 Oregon Laws Ch. 681 (S.B. 582)

<sup>31</sup> Oregon Truth in Labeling Task Force Report, “[Truth In Labeling Final Report and Recommendations](#),” pg. 8. June 1, 2022.

members believed they could recycle materials that the collection program actually does not accept. Eighty-nine percent of people surveyed were somewhat or very confident that a frozen food box could be recycled, and 62% were confident that a paper coffee cup could be recycled. Both items, however, are not accepted for recycling anywhere in Oregon. Both are frequently labeled with the chasing arrows symbol. Likewise, the majority of people surveyed were confident that square plastic tubs, plastic berry containers, lids, and plastic to-go containers could be recycled. Again, these items are considered a contaminant to the recycling system across the entire state; these items are also typically labeled with the RIC (resin identification code) with the chasing arrows symbol.

- The majority of Americans (61%) mistakenly believe that flexible plastic packaging, bags, and pouches are recyclable through curbside recycling bins.<sup>32</sup> The use of large recycling symbols on plastic packaging, bags, and pouches are confusing consumers into believing that the flexible plastics are recyclable through curbside bins.<sup>33</sup>

#### *4. Worker Safety Harms Arising from Contamination of Recycling Bins*

When consumers rely on false labels when making decisions about whether a product is recyclable or not, this has significant economic, environmental, and public health impacts. The Commission must consider these impacts when evaluating recyclability claims.

One of the most serious impacts associated with this increased contamination is the threat to worker safety in the waste and recycling sector. In 2021, refuse and recyclable material collectors was the seventh deadliest job in the country.<sup>34</sup> According to data collected by the U.S. Department of Labor’s Bureau of Labor Statistics in the Census of Fatal Occupational Injuries, refuse and recyclable material collectors had a fatal injury rate of 27.9 per 100,000 full-time equivalent workers.<sup>35</sup> Risks of injury and harm are increased when workers need to sort through increasingly contaminated loads and remove contaminants from machinery.

According to an investigation by Waste Dive, “With fluctuating injury rates, and ongoing fatalities, Material Recovery Facilities (“MRFs”) remain a key safety challenge.”<sup>36</sup> In fact “MRFs have been singled out by the Bureau of Labor and Standards for having some of the highest rates of days away, restricted or transferred (DART) among all occupations in the U.S.”<sup>37</sup> This unfortunately, isn’t surprising. “Any time someone puts an item in the recycling stream that’s not accepted, it’s usually someone else’s job to take it out. Any time you touch material you have an opportunity to have an injury. And so, the number of opportunities in these facilities is great.”<sup>38</sup>

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<sup>32</sup> King5.com, “[61% believe flexible plastics are recyclable in curbside bins. They're not.](#),” November 25, 2022.

<sup>33</sup> Treehugger, “[Don't Believe the 'Store Drop-Off' Label When It Comes to Plastic Packaging.](#)” June 15, 2021.

<sup>34</sup> Resource Recycling, “[Waste industry fatalities dropped in 2021.](#)” January 2, 2023.

<sup>35</sup> U.S. Department of Labor, “[Census of Fatal Occupational Injuries Summary, 2021.](#)” December 16, 2022.

<sup>36</sup> Waste Dive, “[High risk, hidden workforce.](#)” December 11, 2019.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

A recent CBS Morning News segment also illustrates the dangers recycling works face, as well as the increased risk of danger when unrecyclable products are placed in the recycling stream.<sup>39</sup> In the video, a MRF worker explains the multiple harms caused by flexible plastic packaging contamination.<sup>40</sup> He states that MRF operations must be shut down for 2 hours every day to clean plastic waste from the equipment.<sup>41</sup> The MRF worker states that flexible plastic film packaging can cause fires in MRFs.<sup>42</sup> Fires are a common occurrence at MRFs and plastic recycling facilities, as shown on the map posted on The Last Beach Cleanup website.<sup>43</sup> The massive fire at a plastic recycling and storage facility in Indiana in April 2023 proves the significant health, social, and economic harms to communities that can result from fires fueled by plastic waste.<sup>44</sup>

Additionally, the Oregon Truth in Labeling Task Force Final Report also concluded that contamination in the recycling stream creates safety risks for workers in commingled recycling facilities, who may have to remove contaminants by hand.<sup>45</sup>

##### *5. Economic Harm to Communities, Local Governments, and Recycling Service Providers from Increased Curbside Recycling Costs Resulting from Increased Contamination Levels*

Incorrect recyclable labels cause consumers to mistakenly place an item in a recycle bin and cause contamination in MRFs. The contamination harms the ability of the MRFs to cost-effectively collect and sort other materials such as cardboard and paper that are easily ruined by contact with food-soiled packaging.<sup>46</sup> Energy, carbon emissions, labor, and costs are wasted from collecting and sorting unwanted, worthless items through municipal sortation systems.<sup>47</sup>

Economic harm from contaminated recycling systems is borne not only by purchasers of products, but also by non-purchasers who live in the community. Approximately 59% of U.S. households have access to curbside recycling bins and they currently pay about \$4.2 to \$5.9 billion/year for the collection of recycling materials from curbside bins, with these services chiefly financed through local taxation.<sup>48</sup> While there does not appear to be an existing estimate for the total national cost of contamination in the curbside recycling system, it can be estimated through existing data. According to the U.S. EPA, the national contamination rate for the recycling system is 25%. Given the overall cost of recycling services, it isn't a stretch to estimate that the cost of this contamination could amount to hundreds of millions of dollars annually.<sup>49</sup> Using data from a recycling cost study by the town of Corpus Christi (see below), the national

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<sup>39</sup> CBS Morning News, "[Program aims to help consumers recycle plastic film correctly.](#)" July 19, 2022.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> The Last Beach Cleanup, [Fires at Plastic Recycling Facilities](#)

<sup>44</sup> Colma, "[The massive recycling warehouse fire is a stark reminder: plastics are a pollution nightmare.](#)" The Verge, April 14, 2023.

<sup>45</sup> Oregon Truth in Labeling Task Force Report, "[Truth In Labeling Final Report and Recommendations](#)," June 1, 2022

<sup>46</sup> Recycling Today, "[The heavy toll of contamination.](#)" April 19, 2017.

<sup>47</sup> Rubicon, "[What is Recycling Contamination, And Why Does it Matter?.](#)" December 4, 2017.

<sup>48</sup> The Recycling Partnership, "[2020 State of Curbside Recycling Report.](#)" 2020.

<sup>49</sup> Recyclops, "[Understanding Recycling Contamination](#)"

costs of contamination for the 59% of households that have access to curbside recycling programs would be roughly \$306 million per year.

Given the impact this has on local communities, municipal budgets, and the viability of some recycling services, there is ample evidence that increased contamination has directly impacted the cost and availability of recycling services. Additionally, plastic waste is often called out as a top form of contamination in recycling bins.

- Waste Dive tracks where curbside recycling programs have stopped and started in the U.S.<sup>50</sup> “Waste Dive first launched this tracker in December 2019 following significant market disruptions spurred most notably by scrap import policy changes in China. Cost, contamination and low participation were all common reasons communities gave for pulling the plug on curbside programs.” 113 community recycling programs have been terminated since 2019 with most of them citing cost and contamination as the reason for closure.
- Oregon Truth in Labeling Task Force: Contamination has an impact on the economics of processing facilities. “Removing contamination makes the processing of mixed recyclables more expensive, sometimes so expensive that communities choose to drop materials from their recycling collection service.”<sup>51</sup>
- The City of Corpus Christi (population 320,000) reported that contamination in curbside recycling bins cost the city \$500,000 per year.<sup>52</sup> Plastic bags were highlighted as a top contaminant. Note that the cost of contamination is about \$1.56/person/yr.
- CBS Morning Video: The MRF worker explains the multiple harms caused by flexible plastic packaging. He states that MRF operations must be shut down for 2 hours every day to clean plastic waste from the equipment.<sup>53</sup>

#### *6. Economic Harm from Loss of End Markets and Increased Processing Costs due to Increased Contamination in the Recycling System*

In addition to increased costs, contamination also impacts the ability for recyclers to sell commodities in the market. Recycling is, first and foremost, a commodities market. The cleaner the material is the more likely it is to be sold for use in manufacturing a new product. Conversely, when contaminated materials are not removed, they hinder the ability to sell bales of materials.

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<sup>50</sup> Waste Dive, “[Where curbside recycling programs have stopped and started in the US](#),” Updated January 9, 2023.

<sup>51</sup> Oregon Truth in Labeling Task Force Report, “[Truth In Labeling Final Report and Recommendations](#),” June 1, 2022.

<sup>52</sup> KIITV.com, “[‘Recycle Right’ program has saved the city of Corpus Christi \\$500K](#),” January 5, 2023.

<sup>53</sup> CBS Morning News, “[Program aims to help consumers recycle plastic film correctly](#),” July 19, 2022.

The Oregon Truth in Labeling Task Force found that contamination can cause “a complete loss of end markets to consumer recycled materials.”<sup>54</sup> This is what occurred in January 2018 via China’s National Sword policy, whereby China closed its doors to its market - the largest recycling market in the world - due to excess contamination. At a minimum, when end markets receive contamination, it increases their costs.

A recent example of this is the experience of a paper mill in Longview, Washington. The mill is a major end market for mixed paper collected from Oregon’s recycling programs.<sup>55</sup> During a recent Recycling Steering Committee meeting, representative from the mill testified that they are spending millions of dollars annually paying for overly contaminated feedstocks and then spending millions more removing and disposing of those contaminants.<sup>56</sup> This added expense has made the use of recycled feedstock increasingly unfavorable from an economic perspective and led the mill to call for much stronger action to reduce contamination.”<sup>57</sup>

The experience of this mill is by no means an isolated occurrence. In order to process contaminated paper bales, a paper recycler in the U.S. Northwest had to invest \$50 million for new equipment including screening equipment to remove significant plastic film contamination.<sup>58</sup>

#### *7. Environmental, Health, Social, and Economic Harms in the Communities where Contaminated Materials are Processed*

Due to the widespread use of large recycling symbols on flexible plastic packaging, the majority of U.S. consumers are being deceived into believing that these materials are recyclable. With reliance on these symbols, these consumers then placed flexible plastic packaging into their curbside recycling bins. This results in two related forms of harm. First, the flexible plastic packaging has now been collected, transported, and sorted through the recycling system. As explained above, this is costly and creates an increased risk of worker injury. Once removed from the system this material will once again need to be collected and transported for disposal in either a landfill or incinerator – both of which result in widespread environmental harm. Second, if the unrecyclable flexible plastic packaging is not removed, then it is often exported in paper bales which causes significant health and environmental harm in the communities where the material was sent. These communities are often in foreign countries.

- A 2022 Bloomberg investigation illustrates the horrific environmental and public health impacts in India caused by plastic film contamination in paper bales exported from the United States.<sup>59</sup> Flexible plastic packaging that starts off in Americans’ recycling bins ends up at illegal dumpsites and in industrial furnaces in regions of India.<sup>60</sup> The report notes that more than 500,000 tons of plastic waste hidden within recycled paper

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<sup>54</sup> Oregon Truth in Labeling Task Force Report, “[Truth In Labeling Final Report and Recommendations](#),” June 1, 2022.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Resource Recycling, “[Editor’s Perspective: First look at a retooled paper mill](#),” October 25, 2022.

<sup>59</sup> Bloomberg, “[Amazon Packages Burn in India, Final Stop in Broken Recycling System](#),” December 27, 2022.

<sup>60</sup> *Id.*

shipments has entered India in the last two years alone.<sup>61</sup> The manufacturers that imported this waste with the intention of using the recycled paper to manufacture new products are now stuck paying to find disposal options for all this flexible plastic.<sup>62</sup> As a result, much of it is illegally dumped.<sup>63</sup> What isn't buried is burned, thereby creating toxic ash and air pollution.<sup>64</sup> Notably, the investigation includes remarks from a retired U.S. environmental scientist who was fooled into thinking that plastic film could be recycled because of the symbol on the packaging.<sup>65</sup>

- The Oregon Truth in Labeling Task Force also found that a “significant consequence of contamination is the negative impact of mismanaged materials on the environment and people downstream of our recycling processing system. The potential for mismanagement of materials when exported is noteworthy. While domestic end markets such as a local mill will screen out contamination and manage it safely and appropriately, the same is not necessarily true in other countries.”<sup>66</sup>

In summary, given the well-documented, widespread, and diverse range of impacts associated with companies using misleading, deceptive, and false recycling claims, the Commission should expand the scope of harm required for demonstrating injury from the use of these claims. It is clear the FTC Act gives the Commission broad authority to determine how it assesses and evaluates whether a marketing claim, including labels, are unfair or deceptive. To better protect consumers, the public, and the environment, a more robust analysis is required.

#### C. The Commission Should Prohibit Claims of Recyclability That Depend on Store Drop Off Programs Unless the Company Can Prove the Program is Collecting and Recycling At Least 75% of Covered Materials

Amazon plastic mailer pouches and airbags, shown in Figure 3, are prime examples of false recyclable labels that are causing significant harm after the point of purchase. Amazon plastic mailer pouches and Amazon-supplied airbags (such as those made by Sealed Air) are commonly labeled with large recycle symbols and small qualifying text instructing consumers to drop the pouches at takeback bins at stores. This is not a trivial amount of plastic waste. According to Oceana, Amazon's U.S. plastic footprint, including plastic mailer pouches and airbags, created 287,461,251 pounds of waste in 2021 alone.<sup>67</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Oregon Truth in Labeling Task Force Report, “[Truth In Labeling Final Report and Recommendations](#),” June 1, 2022.

<sup>67</sup> Oceana, “[The Cost of Amazon's Plastic Denial on the World's Oceans](#),” December 2022.

**Figure 3: Amazon Plastic Pouch (left) and Sealed Air Airbag with Recycle Symbol (right) (Photo Credit: The Last Beach Cleanup)**



**Figure 4: Amazon Plastic Pouch & Airbag Causing Contamination in Curbside Recycling Bin in Texas (left) and Cart in California (right) (Photo credit: The Last Beach Cleanup)**



When consumers make purchasing decisions on Amazon.com they do not see pouches and airbags with the recycling symbols advertised. Under the Commission’s existing Green Guides and evaluation of the scope of harm, a company may argue that consumers cannot be deceived about the recyclability of these mailers and pouches because they did not rely on the misleading label when making the purchase. Therefore, in situations like this, companies may argue that they cannot be held accountable for the false recyclable labels on these plastic products and packaging. However, as explained above, these clearly amount to unfair or deceptive marketing tactics, which are undoubtedly going to cause reasonably foreseeable injury.<sup>68</sup>

After consumers receive products in Amazon’s plastic pouches and boxes with Sealed Air airbags, many read the label on the plastic pouches and airbags. Some consumers are confused

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<sup>68</sup> 15 U.S.C. 45(4)(A).

by the Amazon and Sealed Air recycle labels and mistakenly put them in curbside recycling bins. Figure 4 shows an example of an Amazon plastic pouch mistakenly put in a recycling bin in Texas and an Amazon-supplied airbag put in a recycling cart in California. As a result, Amazon plastic pouches and Sealed Air airbags are frequent contaminants in curbside recycling systems and material recovery facilities (MRFs).

A CBS Morning News Report shows flexible plastic packaging, including Amazon plastic pouches, that were mistakenly put in curbside recycling bins by consumers.<sup>69</sup> The MRF worker explains the multiple harms caused by flexible plastics, including plastic pouches and airbags.<sup>70</sup>

As explained above, these plastic pouches and airbags that are not removed from the recycling system are often inadvertently included in paper bales. This creates contamination which increases the cost for paper recycling and causes significant human health impacts in India, Indonesia, and other countries that are primary end markets from exported U.S. post-consumer paper. The levels of contamination are significant. The recycling industry cites up to 30% contamination in U.S. paper bales.<sup>71</sup> Bloomberg's 2022 investigation shows horrific plastic pollution harms in India caused by plastic film contamination in paper bales exported from US to India. Figure 5 shows a U.S. Amazon plastic pouch with a recycle symbol that was found polluting a riverbank next to a paper pulp mill in East Java, Indonesia.

**Figure 5: U.S. Amazon Plastic Pouch with Recycle Symbol found Polluting River in East Java, Indonesia (photo credit: Ecoton)**



Therefore, the false recyclable labels used on Amazon plastic pouches and Sealed Air airbags are causing significant and widespread harm, both domestically and abroad. However, based on the Commission's existing limited definition of harm, despite these examples of clearly misleading labels, Amazon continues to falsely claim their pouches and Sealed Air airbags are recyclable. This is just one example of why the Commission must expand the scope of harm associated with evaluating deceptive, misleading, and false claims under the Green Guides. Such an expansion

<sup>69</sup> CBS Morning News, "[Program aims to help consumers recycle plastic film correctly,](#)" July 19, 2022.

<sup>70</sup> *Id.*

<sup>71</sup> Resource Recycling, "[Editor's Perspective: First look at a retooled paper mill,](#)" October 25, 2022.

would empower the Commission to hold companies accountable and explicitly prohibit deceptive labels such as those used by Amazon and Sealed Air.

The Commission should refuse to allow marketers to qualify that products and packaging, including flexible plastic packaging is recyclable through store drop off programs unless they can demonstrate that the program is working and capable of recycling 75% of the products sold. There is ample evidence that disproves the credibility of claims that flexible plastic waste is recycled through store drop off programs:

- Amazon itself has admitted that it does not have substantiation (facts) to prove that their pouches are recycled through drop off in store takeback bins. In October 2020, the California Recycling Committee of the Statewide Commission on Recycling Markets and Curbside Recycling requested that Amazon and Sealed Air testify to the Commission and provide proof, as required by state law, that their plastic pouches and airbags were being recycled through store drop off as claimed on their labels. On November 13, 2020, an Amazon representative testified to the Committee and stated that Amazon had “no facts” to prove that store drop off systems were recycling their plastic pouches.<sup>72</sup> A Sealed Air representative also stated that they did not have proof that their airbags were being recycled through store drop off. A recording of Amazon and Sealed Air’s testimony can be requested through CalRecycle.<sup>73</sup>
- California State Attorney General Investigation: On November 2, 2022, California State Attorney General Rob Bonta launched an investigation into recyclability claims made by plastic bag companies stating “despite the manufacturers' claims and widespread consumer belief in recycling, plastic bags do not, in fact, appear to generally be recyclable, let alone ‘recyclable in the state,’ as required for such bags sold in California.”<sup>74</sup> In December 2022, the California State Attorney General commented that he believes that plastic bags cannot claim to be recyclable through store drop off in California. “As of now, makers of the bags get to self-certify to the state that their bags can be recycled. But Bonta said that requires a comprehensive system to collect, process and sell the used bags, none of which exist. Putting the bags in most curbside recycling bins interferes with recycling other products by clogging equipment and increasing the risk of worker injury, he said.”<sup>75</sup> The lack of comprehensive system to recycle plastic bags in California also applies to Amazon’s plastic film pouches. Figure 6 shows a comparison of a recyclable label used on a plastic Walmart bag in California and on an Amazon pouch. They are the same labels. In effect, Bonta’s statement also applies to the labels on Amazon pouches.

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<sup>72</sup> CalRecycle, [Public Meeting Notice: November 13, 2020 - Recycling Committee of the Statewide Commission on Recycling Markets and Curbside Recycling](#)

<sup>73</sup> CalRecycle, [California Public Records Act Requests](#)

<sup>74</sup> State of California Department of Justice, “[Attorney General Bonta Demands Manufacturers of Plastic Bags Substantiate Recyclability Claims](#),” November 2, 2022.

<sup>75</sup> CBS News, “[Think those plastic bags are recyclable? AG Bonta launches investigation](#),” December 29, 2022.

**Figure 6: Comparison of California Walmart Plastic Bag Label (left) and Amazon Plastic Pouch Label (right)**



- California Lawsuits: Three lawsuits contesting the sale of plastic bags due to lack of recyclability and false labeling were filed in California in 2022.<sup>76</sup> The lawsuits alleged that no evidence has been found of post-consumer household plastic film waste being recycled into new products via store drop-off programs.<sup>77,78,79</sup>

### III. The Commission Should Initiate a Formal Rulemaking Process to Codify the Green Guides into Enforceable Federal Regulations

We strongly urge the Commission to initiate a formal rulemaking process to establish independently enforceable requirements related to unfair and deceptive environmental claims. Specifically, the Commission should adopt standards for claims about recyclability which reflect the recently enacted requirements of California’s Truth in Labeling for Recyclable Materials.<sup>80</sup>

In terms of environmental marketing claims, the Commission has not enacted any enforceable regulations to carry out this important legislative mandate. As a policy guidance, the Green Guides do not do enough to inform companies about what practices are considered unfair or deceptive, and therefore illegal under federal law. Nor do they provide the Commission with the adequate regulatory authority to penalize companies for violations of the law.

Federal law empowers the Commission to prevent the use of unfair or deceptive marketing practices.<sup>81</sup> To accomplish this, the Commission is authorized to promulgate rules with respect to

<sup>76</sup> Volcovici, “[Lawsuits target illegal plastic bag sales in California](#),” Reuters, June 6, 2022.

<sup>77</sup> [Bargetto vs. Walgreens](#), United States District Court, Northern District of California, 2022.

<sup>78</sup> [Last Beach Cleanup vs. Gelson’s Markets](#), Superior Court of the State of California, County of Los Angeles, 2022.

<sup>79</sup> [Last Beach Cleanup vs. Stater Bros. Markets](#), Superior Court of the State of California, County of Los Angeles, 2022.

<sup>80</sup> In Sept. 2021, California passed SB 343, also known as the Truth in Labeling for Recyclable Materials Law.

<sup>81</sup> 15 U.S.C.A. § 45(a)(2).

unfair or deceptive marketing practices.<sup>82</sup> The Commission may establish rules which define, with specificity, acts or practices which are categorically unfair or deceptive.<sup>83</sup> Prior to commencing a rulemaking process, the Commission must have reason to believe that the unfair for deceptive marketing practices to be addressed by the rulemaking, are “prevalent.”<sup>84</sup> An unfair or deceptive marketing practice is considered “prevalent if the Commission has issued cease and desist orders regarding such acts or practices or has other information which indicates a widespread pattern of unfair or deceptive practices.”<sup>85</sup>

A. There is Sufficient Evidence to Indicate a Widespread Pattern of Unfair or Deceptive Marketing Claims Regarding Recyclability and Recycled Content for Plastic Products and Packaging

Recent reports indicate that plastic recycling in the United States is extremely ineffective. According to a report from Greenpeace USA, plastic recycling is estimated to have declined to roughly 5-6% in 2021, down from a high of 9.5% in 2014.<sup>86</sup> At that time, the U.S. was exporting most of its plastic waste to China, which heavily inflated the recycling rate.<sup>87</sup> Even the two most commonly recycled forms of plastic in the United States – PET #1 and HDPE #2 – have extremely low recycling rates. According to the latest data from the USEPA, in 2018 PET only achieved a reprocessing rate of 17.2%, while HDPE was only reprocessed at a rate of 8.9%.<sup>88</sup>

Despite the clear lack of plastic recycling in the country, many companies are continuing to market plastic products and plastic packaging as recyclable. These companies are making these claims even though the majority of plastic is not recyclable.<sup>89</sup> The plastic manufacturers noted as early as 1974 that “there is serious doubt that plastic recycling can ever be made viable on an economic basis.”<sup>90</sup> Despite this knowledge, plastic manufacturers and producers of consumer goods spent, and continue to spend, millions of dollars annually touting the benefits and possibilities of plastic recycling, because this sways public perception and make consumers more comfortable with single-use and disposable plastic products and packaging.<sup>91</sup>

A 2022 Greenpeace USA report surveyed 375 MRFs in the United States.<sup>92</sup> The results found that, according to the requirements of the Green Guides, only PET #1 and HDPE #2 plastic bottles and jugs may legitimately be labeled as recyclable by consumer goods companies and retailers.<sup>93</sup> However, these products could only be labeled recyclable if they were free of body shrink sleeves which render them non-recyclable.<sup>94</sup> All other plastic products, including plastic tubs, cups, lids, plates, trays, clamshells, and flexible plastic packaging therefore, cannot be

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<sup>82</sup> 15 U.S.C.A. § 57a(a)(1)(A).

<sup>83</sup> 15 U.S.C.A. § 57a(a)(1)(B).

<sup>84</sup> 15 U.S.C.A. § 57a(B)(3).

<sup>85</sup> *Id.*

<sup>86</sup> Greenpeace USA, *Circular Claims Fall Flat Again – 2022 Update*, pg. 3. (Oct. 24, 2022).

<sup>87</sup> *Id.*

<sup>88</sup> [USEPA 2018 Facts and Figures about Material, Waste and Recycling](#)

<sup>89</sup> NPR, [How Big Oil Misled the Public Into Believing Plastic Would be Recycled](#). (Sept. 11, 2020).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Greenpeace USA, [Circular Claims Fall Flat Again](#), 2022.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

labeled as recyclable pursuant to the Green Guides.<sup>95</sup> Despite these products being unrecyclable, a number of companies were falsely labeling the products as recyclable.<sup>96</sup>

#### B. The Widespread Harm and Lack of Federal Regulation Has Forced State Action

As explained throughout these comments, deceptive, misleading, and false marketing claims and labels on plastic products create significant harm from an economic, environmental, and public health perspective. The failure of the Commission to adequately protect against this harm has resulted in many states developing laws and regulations to try and address false claims about plastic recycling and the use of post-consumer recycled content in products and packaging.

Currently, California<sup>97</sup>, Maine<sup>98</sup>, Rhode Island<sup>99</sup>, and Michigan<sup>100</sup> have adopted the Green Guides into state law. This was necessary given the unenforceability of the Green Guides at the state level, and the lack of enforcement action at the federal level.<sup>101</sup>

The lack of federal action resulted in California passing a sweeping labeling reform law. In October 2021, the California Legislature passed SB 343, the “Truth in Labeling for Recyclable Materials” bill. This bill, which passed with an overwhelming majority, prohibits the use of the chasing-arrows symbol and the term “recyclable” on products that are not recyclable.<sup>102</sup> Similar legislation is being considered in several other states, including New York and New Jersey.

Under California’s Truth in Labeling Law, a product or its packaging can only be labeled as recyclable, which includes using the chasing arrows symbol if:

- (1) It is designed to be recyclable and therefore does not include any components, inks, adhesives, or labels that prevent recyclability;
- (2) It does not contain perfluoroalkyl or polyfluoroalkyl substances (“PFAS”);
- (3) It is collected and sorted into defined streams for recycling by curbside recycling programs that collectively encompass at least 60% of the state; and
- (4) It routinely becomes feedstock used in the production of new products or packaging.<sup>103</sup>

Alternatively, a product or its packaging can be labeled as recyclable through a store drop off program if the company can demonstrate that the program has a demonstrated recycling rate of at least 75%, meaning not less than 75% of the product or packaging that is part of the program is sold in the state is actually reprocessed into new products or packaging.<sup>104</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> CA BUS & PROF § 17580.5

<sup>98</sup> 28 M.R.S.A. § 2142

<sup>99</sup> Rhode Island General Laws Title 6, Section 6-13.3-1.

<sup>100</sup> Michigan Compiled Laws Section 445.903.

<sup>101</sup> Rhode Island’s Environmental Marketing Act empowers the State Attorney General to bring a suit for violations of the Green Guides.

<sup>102</sup> Cal.Pub.Res.Code § 42355.51

<sup>103</sup> *Id.* at § 42355.51(d)(3)

<sup>104</sup> *Id.* at § 42355.51(d)(5)

C. The Commission Should Codify the Requirements of California’s Truth in Labeling Law Through a Formal Rulemaking Process

Given the lack of federal action on deceptive, misleading, and false recycling labels it is not enough for the Commission to simply update and strengthen the Green Guides. The Commission must also codify key components of the Green Guides, as well as new, more progressive requirements, into federal regulation to make them enforceable and binding. Specifically, we urge the Commission to adopt the central components of California’s Truth in Labeling Law into federal regulation.

California’s Truth in Labeling Law includes several components of the existing Green Guides while adding necessary additional components to ensure that products are accurately labeled to reflect existing conditions impacting the recyclability of products and packaging. For instance, the Green Guides only allow companies to market products or packaging as recyclable if it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.<sup>105</sup> This is important because collection does not equate to recycling. The product must also be sorted and reclaimed at a responsible reclaiming (reprocessing) facility. California’s law clarifies the existing requirements of the Green Guides by mandating that products must be eligible for sorting into defined streams for purchase by reprocessing facilities in a manner that is consistent with the requirements of the Basel Convention.<sup>106</sup>

California’s Truth in Labeling Law also contains other necessary components to ensure that only products and packaging that are actually eligible for recycling are labeled as recyclable. This includes the prohibition of components, inks, adhesives, or labels that prevent the recyclability of the product or packaging. This is a central component that must be clarified in federal regulation because the recycling process accelerates the release of additives into the environment through emissions, releases, and leaching.<sup>107</sup> This is especially true for plastics. As plastics are heated for recycling to be reformed into small pellets and new products the toxic additives can leach out into the environment.<sup>108</sup> Additionally, materials that are not leached are carried over to the new product.<sup>109</sup>

Incorporating California’s Truth in Labeling Law into federal regulation will also remove any gray area used by companies to justify false and deceptive labels. California’s law is clear: companies are prohibited from using the Chasing Arrows symbol unless the product meets the requirements for recyclability. **Qualified claims are not permitted**, including vague instructions like “check locally” that put the onus of determining recyclability on the consumer. Additionally, companies will not be able to use contradictory recycling labels from other jurisdictions on

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<sup>105</sup> 16 CFR § 260.12(a).

<sup>106</sup> Cal.Pub.Res.Code § 42355.51(d)(3).

<sup>107</sup> Hideshige Takada and Lee Bell, International Pollutants Elimination Network (IPEN), [“Plastic Waste Management Hazards.”](#) June 2021.

<sup>108</sup> Niyitanga Evode et al., [“Plastic waste and its management strategies for environmental sustainability.”](#) Case Studies in Chemical and Environmental Engineering 4 (2021).

<sup>109</sup> *Id.*

products and packaging sold in the United States. This will significantly cut down on consumer confusion.

These new federal regulations should also prohibit companies from claiming products or packaging are recyclable through a store drop off program unless the company can demonstrate that the program is recovering and recycling at least 75 percent of the product or packaging in the program.

Codifying the central components of California's Truth in Labeling law will ensure that only products that are truly recyclable are labeled as such. It will also give the Commission the necessary authority to hold companies that falsely label products and packaging accountable for the wide array of harms associated with greenwashing. Additionally, since California has the largest state population, with 13% of the U.S. population, and products are typically labeled for nationwide sales, it is likely that most product companies will design their product labels to comply with California's law. Therefore, it is unlikely that new regulations codifying SB343 would unduly burden businesses.

## PART B: Answers to General Questions Raised by the Commission in the Notice of Public Comment

### **Question 2: What benefits have the Green Guides provided to consumers? What evidence supports the asserted benefits?**

While the 2012 Green Guides were intended to protect consumers, the 2012 Green Guides have not protected consumers from false recycling claims on plastic products and packaging. Refer to detailed comments on Recyclable Labels in Part A, examples of false recyclable labels in Attachment 1, and the California Statewide Commission on Recycling Markets and Curbside Recycling appendix of photos of 80 plastic products examples with false recyclable labels in Attachment 2.<sup>110</sup>

### **Question 3: What modifications, if any, should be made to the Guides to increase their benefits to consumers?**

As explained above:

- (1) The Green Guides should be expanded to look at indirect harms. Currently, the Commission only considers direct harm to consumers and competitors when evaluating the impact of deceptive, misleading, false environmental claims.
- (2) The Commission should prohibit companies from making any claims about the recyclability of flexible plastic packaging or plastic film through store drop off programs.
- (3) The Commission should codify the Green Guides into enforceable law through rulemaking to provide increased protection from deceptive, misleading, and false environmental marketing claims including, for claims regarding recyclability and use of recycled content.
- (4) The Commission should clarify and strengthen the Green Guides' provisions regarding recyclable claims by adopting the requirements in California's SB 343.

#### Question 3(a) – Supporting Evidence

- The overwhelming evidence for these modifications is included in the above sections of these comments, as well as in the attachments.

#### Question 3(b) – Impact to Businesses

- We do not believe these modifications would have an adverse impact on businesses, especially small businesses. The modifications will provide a clearer picture of what is permissible and what is not, along with the penalties for violations. This will provide a more level playing field for companies that are competing in a market where consumer desire for environmentally friendly products is increasing. It is not a financial burden for companies to have an accurate, fact-based understanding of what types of products and packaging is actually collected, sorted, and reprocessed into new products in the US.

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<sup>110</sup> California Statewide Commission on Recycling Markets and Curbside Recycling, "Request for Enforcement of California Laws on Recyclable Labels on Plastic Bags and Films – [Appendix 1](#)," December 3, 2021.

Additionally, businesses, small and large, suffer economic harm from high contamination rates in America's recycling system as discussed above.

#### Question 3(c) – Impact to Consumers

- As detailed above, there are numerous human health, social, environmental, and economic harms that result from false recyclable labels on plastic products and packaging. The revision of the 2012 Green Guides to include explicit labeling requirements and rulemaking into law would stop the widespread use of false labeling on plastic products and packaging and prevent human health, social, environmental, and economic harms in the U.S. and foreign countries.

#### **Question 4: What impact have the Green Guides had on the flow of truthful information to consumers and on the flow of deceptive information to consumers?**

The 2012 Green Guides have not prevented deceptive (false) information on plastic products and packaging recyclability and recycled content. Refer to detailed comments on Recyclable Labels in Part A, examples of deceptive labels in Attachment 1, and the California Statewide Commission on Recycling Markets and Curbside Recycling appendix of photos of 80 plastic products examples with false recyclable labels in Attachment 2.<sup>111</sup>

However, due to the weakness of the Green Guides on truthfulness of recyclability labels at the national level, several states have passed laws and have to invest state taxpayer funds to create stronger “Truth in Labeling” laws for product packaging.

- California - “In 2021, the California legislature passed Senate Bill 343 to address the labeling of products and packaging, and it was signed into law. California’s SB 343 declares the use of the chasing arrows symbol, the chasing arrows symbol surrounding a resin identification code, or any other mark or statement indicating recyclability to be deceptive or misleading unless the product or packaging is recyclable according to statewide recyclability criteria.”<sup>112</sup> The California statewide recycling criteria are detailed in the response to Question 17.
- Oregon - Oregon’s Plastic Pollution and Recycling Modernization Act (SB 582, 2021), or RMA: “Public confusion about what and how to recycle has been one of several root drivers of instability in Oregon’s recycling system. That confusion stems in part from misleading and confusing labels. The RMA established the Truth in Labeling Task Force and directed its members to study this topic and make recommendations for legislation to the Legislature.”<sup>113</sup>

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<sup>111</sup> California Statewide Commission on Recycling Markets and Curbside Recycling, “Request for Enforcement of California Laws on Recyclable Labels on Plastic Bags and Films – [Appendix 1.](#)” December 3, 2021.

<sup>112</sup> Oregon Truth in Labeling Task Force Report, “[Truth In Labeling Final Report and Recommendations.](#)” June 1, 2022.

<sup>113</sup> *Id.*

- Maine - “In 2021, Maine passed and signed an extended producer responsibility or EPR bill that will incentivize labeling of packaging material to reduce consumer confusion and creates other incentives consistent with generally accepted industry standards.”<sup>114</sup>

**Question 5: What significant costs have the Guides imposed on consumers and/or consumer and environmental organizations? What evidence supports the asserted costs?**

As explained in Part A, there are numerous harms and costs that result from false recyclable labels on plastic products and packaging. Due to the weakness and ineffectiveness of the 2012 Green Guides on stopping false recyclable labels and claims on plastic products and packaging, harms and costs have been imposed on consumers, communities, environmental and health nongovernmental organizations (NGOs), and workers.

These harms include:

- Economic harm to consumers who purchase one product over another based on recyclable labels (material to consumer purchasing decisions).
- Economic harm to product manufacturers from competitors’ false recyclable labels.
- Dangerous working conditions in the waste and recycling sector caused by contamination.
- Economic harm to communities from increased curbside recycling costs due to high levels of contamination.
- Economic harm from loss of markets and increased processing costs due to contamination.
- Human health, environmental, social, and economic harms in communities where contaminated materials collected for recycling are processed.
- Environmental impacts of production and disposal of plastics that are produced due to consumer demand driven by false and misleading recyclable claims and due to reduced pressure on companies to develop truly sustainable products and packaging.
- Environmental impacts caused by unnecessary disposal of legitimately recyclable products and packaging that are contaminated by materials from items falsely labeled as recyclable.

In addition to these harms, there are also additional harms and economic costs to the public. Due to the weakness and lack of enforcement of the Green Guides regarding the truthfulness of recycling labels, several states have had to invest taxpayer funds to create stronger laws and programs to crack down on false labeling with product and product packaging. Additionally, Environmental and Health NGOs have had to invest significant labor and material costs in performing comprehensive surveys and publishing detailed reports with traceable research to prove the deceptive recyclable labels on plastic products and packaging. Several Consumers, NGOs and their public interest attorneys have had to file lawsuits to try to force product companies to correct deceptive labels on plastic products and packaging. The lawsuits require

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<sup>114</sup> *Id.*

significant labor cost investments by Environmental and Health NGOs, public interest attorneys, and public Court resources.

#### Question 5(a) – Evidence

- Greenpeace USA Comprehensive Reports on Plastic Recycling and Recyclability Claims. In 2020 and 2022 Greenpeace USA performed and published comprehensive surveys of plastic product waste collection, sortation, and reprocessing in the U.S. to determine the legitimacy of “recyclable” claims and labels on consumer plastic products.<sup>115,116</sup> The comprehensive surveys proved that only some types of PET#1 and HDPE#2 bottles and jugs can legally be labeled and claimed in the U.S. The surveys provided proof of widespread false recyclable labeling on plastic products and packaging. The surveys also disprove the myth that there are multiple local markets for different types of plastic waste. There is only U.S. national market demand and domestic reprocessing capacity a limited amount of PET#1 and HDPE#2 bottles and jugs. Acceptance of additional types of plastic waste in the past, not wanted by U.S. reprocessors, was driven by proximity to ports for export and desire of cities to appear environmentally friendly to residents. Many of the comments provided in this document are excerpts from those reports. The reports themselves should be considered as part of this submittal to the FTC.
- Beyond Plastic and The Last Beach Cleanup Report. In 2022, Beyond Plastics and The Last Beach Cleanup published a report showing the that the real U.S. plastic recycling rate was only 5 to 6% to correct the false impression that most plastics are being recycled if deceptive labels were believed.<sup>117</sup>
- Keurig Lawsuit - In 2018, a California resident filed a consumer class action against Keurig Green Mountain, Inc. alleging that the labels of Keurig’s single serve plastic K Cup<sup>®</sup> coffee pods were falsely labeled as recyclable. In 2021, the case settled, with the settlement requiring Keurig to improve the labeling of the products and to create a \$10 million fund for the benefit of consumers who purchased the products.<sup>118</sup>
- TerraCycle Lawsuit. In 2021, TerraCycle and eight major companies settled a lawsuit by The Last Beach Cleanup that requires the companies to correct recycling advertising claims and labels on packaging.<sup>119</sup> Companies included Procter and Gamble, Coca-Cola, Campbell Soup Co.-owned Late July Snacks, Clorox, Colgate-Palmolive -owned Tom’s of Maine, Groupe Mom-owned Materne North America, L’Oréal North America, and Nestlé-owned Gerber Products Co.

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<sup>115</sup> Greenpeace USA, “[Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability](#),” February 2020.

<sup>116</sup> Greenpeace USA, [Circular Claims Fall Flat Again](#), 2022.

<sup>117</sup> Beyond Plastics and The Last Beach Cleanup, “[The Real Truth About the U.S. Plastics Recycling Rate](#),” May, 2022.

<sup>118</sup> Top Class Actions, “[Keurig Class Action Settled For \\$10M, Ending Recyclability Claims](#),” March 3, 2022.

<sup>119</sup> Wall Street Journal, “[TerraCycle Partners Including Coca-Cola, P&G to Change Recycling Labels After Settling Lawsuit](#),” November 15, 2021.

- *Bargetto vs. Walgreens*: Consumer class action filed in 2021 against Walgreen’s for selling reusable plastic grocery bags that are falsely labeled as recyclable.<sup>120</sup>
- *Greenpeace USA vs. Walmart*. This case was dismissed due to alleged lack of standing. The truthfulness of the recyclable labels and claims were never viewed by the Court. It is another example of why the scope of harm in the Green Guides should be expanded to include economic, health, social, and environmental harms after the point of purchase.<sup>121</sup>
- *The Last Beach Cleanup vs. Gelson’s and Stater Bros.*: Cases against two California grocery chains and plastic bag producers for illegally selling plastic reusable grocery bags that are not recyclable as required by California state law (SB 270).<sup>122,123</sup>
- *Curtis vs. 7-Eleven*. This case is another prime example of why the FTC must codify the Green Guides into law and clarify its requirements. As reported by Resource Recycling, a Chicago resident filed a lawsuit against 7-Eleven on a range of single use plastic packaging arguing “that the recyclability claims are deceptive because those products have limited acceptance in municipal recycling programs and very low recycling rates. Judge Steven C. Seeger in September 2022 tossed out several of her claims, broadly deciding that, to reasonable consumers, the word ‘recyclable’ strictly means capable of being recycled, not that it’s likely those products will actually be recycled through Chicago’s recycling program.”<sup>124</sup> In effect, the Judge ruled that effectively almost all types of plastic products and packaging could be labeled as recyclable because almost all types of plastic packaging and products could theoretically be recycled in a laboratory. However, as proven in the 2020 and 2022 comprehensive surveys of plastic recycling, only PET#1 and HDPE#2 bottles and jugs are actually capable of being recycled in the U.S.<sup>125,126</sup>

**Question 6: What modifications, if any, should the Commission make to the Guides to reduce the costs imposed on consumers?**

Per responses to other questions, there are numerous harms and costs that result from false recyclable labels on plastic products and packaging. Strong federal regulations and enforcement

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<sup>120</sup> [Bargetto vs. Walgreens](#), United States District Court, Northern District of California, 2022.

<sup>121</sup> [Greenpeace USA, Inc. v. Walmart, Inc.](#), United States District Court, Northern District of California, May 10, 2022.

<sup>122</sup> [Last Beach Cleanup vs. Gelson’s Markets](#), Superior Court of the State of California, County of Los Angeles, 2022.

<sup>123</sup> [Last Beach Cleanup vs. Stater Bros. Markets](#), Superior Court of the State of California, County of Los Angeles, 2022.

<sup>124</sup> Resource Recycling, “[Narrower recyclability lawsuit brought against 7-Eleven](#),” January 18, 2023.

<sup>125</sup> Greenpeace USA, “[Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability](#),” February 2020.

<sup>126</sup> Greenpeace USA, [Circular Claims Fall Flat Again](#), 2022.

to reduce direct costs and protect people and the planet from the harms and indirect costs of due to false recyclable labels on plastic products and packaging are needed.

It is critical that the Green Guides be codified into enforceable laws to require honest business practices and not just provide optional “guidance” to business. Explicit requirements are needed to end loopholes that are currently in the 2012 Green Guides. The definition of “standing” for harm of false recyclable and recycled content labels must be expanded to include Americans who did not purchase the products but have suffered economic and health harms due to the false labels. Penalties should be included to disincentivize marketers from employing false labels.

Explicit requirements are detailed in responses to other questions. As detailed in response to Question 17, we recommend that the FTC revise the Green Guides to be equivalent to CA SB343 at the national level. Additional explicit requirements and evidence are provided for Recyclable Labels and Recycled Content in responses to Part C.

**Question 7: Please provide any evidence that has become available since 2012 concerning consumer perception of environmental claims, including claims not currently covered by the Guides. Does this new information indicate the Guides should be modified? If so, why, and how? If not, why not?**

Since the mid-1990s, U.S. states and cities have sought to increase recycling of municipal solid waste to avoid disposal by landfill or incineration.<sup>127</sup> Due to low-cost of shipping and foreign labor, the U.S. became reliant on China to accept plastic waste collected by U.S. municipal systems. Figure 7 shows how the U.S. significantly increased the export of plastic waste to China starting in the mid-2000s. Over time, the types of plastics accepted in municipal systems and labeled as “recyclable” grew from domestically recyclable PET #1 and HDPE #2 bottles and jugs to other types of plastics as cities and states emphasized “diversion” and companies sought to brand more of their plastic products as environmentally redeemable.

Changes in the global trade of plastics waste started in 2013 when China’s Green Fence policy began restricting imports of contaminated materials. As shown on Resource Recycling’s detailed timeline, China’s National Sword policy followed in 2018 and the decline in exports of plastic waste and other post-consumer materials has significantly impacted America’s municipal recycling collection systems.<sup>128,129</sup>

Waste and recycling experts state that even before China’s policy changes, “a lot of areas fooled themselves into thinking they were recycling when they were really not.”<sup>130</sup> Export of plastic waste has declined sharply due to China’s policies, import restrictions placed by other countries, and concerns that many alternative receiving countries cannot provide assurance that the imported plastic waste will be safely and responsibly recycled into new products. Since the documentary “Plastic China” debuted in China in 2014,<sup>131</sup> there has been significant media

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<sup>127</sup> Waste Dive, “[Which U.S. cities are recycling champions?](#)”, August 4, 2015.

<sup>128</sup> Resource Recycling, “[From Green Fence to red alert. A China timeline.](#)” February 13, 2018.

<sup>129</sup> Waste Dive, “[How recycling has changed in all 50 states.](#)”

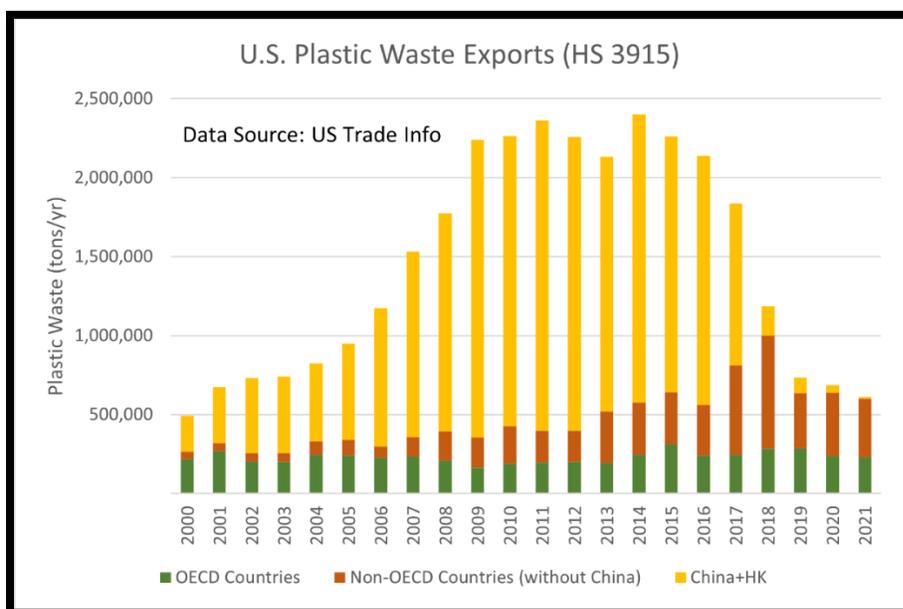
<sup>130</sup> Scrap, “[What’s Recyclable](#)”, March/April 2019.

<sup>131</sup> Wang Jiulang, “[Plastic China](#),” 2014.

attention on the export of plastic waste. Since 2018, there have been more than 100 investigations and articles published showing that millions of tons of exported plastic wastes have been dumped or burned rather than recycled.<sup>132</sup>

Since 2018, it has become widely understood that massive amounts of plastic waste were collected under the guise of “recycling” in the U.S. but were actually exported to China and not recycled. Instead, the plastic waste was burned and polluted the environment. Since the implementation of China Sword prohibiting U.S. plastic waste exports to China, U.S. consumers have learned that much of the plastic waste that was labeled as recyclable was actually exported and destroyed. It is now understood that California’s state waste diversion goals have also driven exports of non-recyclable plastic waste to Asia.<sup>133</sup>

**Figure 7: Historical Exports of U.S. Plastic Waste**



As presented in Greenpeace USA’s 2020 Circular Claims Fall Flat report:<sup>134</sup>

Since China enacted policies limiting plastic waste imports, there have been significant changes in plastics acceptance policies of U.S. material recovery facilities due to declines in the demand for and value of collected plastic material. Post-consumer “mixed” plastics (plastics #3-7 and non-bottle plastics #1 and #2) have been most affected because China was the primary destination for those types of collected plastic wastes and there is minimal demand, value, or reprocessing capacity for them in the U.S. Some material recovery facilities (MRFs) still accept mixed plastics but dispose of it or continue to export it outside of North America.

<sup>132</sup> The Last Beach Cleanup, [Listing of 100+ Investigations and Articles on Plastic Waste Exports.](#)

<sup>133</sup> Greenpeace USA, [“Acceptance of Unrecyclable Plastic Products and California’s Continued Exports of Plastic Waste Exports to Non-OECD Countries,”](#) May 18, 2021.

<sup>134</sup> Greenpeace USA, [“Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability,”](#) February 2020.

**Since collected mixed plastics are disposed of, incinerated, or exported without verified recycling, acceptance of such a plastic item at a MRF alone is not sufficient and reasonable assurance to a customer that it will be manufactured into another item, as required by the FTC.**<sup>135</sup>

Therefore, it is fair to assume that the standard for reasonable likelihood of a plastic item being recycled requires acceptance by municipal collection and U.S. domestic recycling/reprocessing capacity. Companies cannot legitimately place recycle symbols or “Check Locally” text on products made from plastics #3-7 because MRFs nationwide cannot assure consumers that valueless plastics #3-7 bales will actually be bought and recycled into a new product.

**Question 8: Please provide any evidence that has become available since 2012 concerning consumer interest in particular environmental issues. Does this new information indicate the Guides should be modified? If so, why, and how? If not, why not?**

See response to Question 7. Public surveys show that a growing number of Americans do not believe that items they put in curbside recycling bins are actually recycled. In 2021, 30% of Americans lacked confidence in America’s recycling system, growing from 14% in 2019 and 23% in 2020.<sup>136</sup>

To restore trust in America’s recycling system to collect, sort, and reprocess all types of valuable consumer products and packaging, the widespread use of false recyclable labels on plastic products and packaging must be stopped.

**Question 13: What evidence is available concerning the degree of industry compliance with the Guides?**

The evidence provided in Part A, several of our responses to questions in Part B, and our responses to the specific questions in Part C proves that there is widespread use of false recyclable labels on plastic products and packaging. The Green Guides must be codified into enforceable law with explicit requirements and penalties for non-compliance.

Product companies, retailers, and the plastics industry are currently using many false recyclable labels on their plastic products and packaging to avoid product bans and negative consumer perception on wasteful products and packaging.<sup>137</sup> Attachment 1 provides numerous examples of deceptive recyclable labels used on plastic products and packaging in 2021-2023 based on current 2012 FTC Green Guides. In 2021, the California Statewide Commission on Recycling Markets and Curbside Recycling called on state authorities for the elimination of false recycling symbols and labels on plastic bags and films sold in California.<sup>138</sup> As detailed in the

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<sup>135</sup> [FTC Green Guides 16 CFR 260](#)

<sup>136</sup> Shelton Group, “[Americans love recycling, they have no idea how it works, and they think it might be broken.](#)” March 23, 2022.

<sup>137</sup> Greenpeace USA, “[Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability.](#)” February 2020.

<sup>138</sup> California Statewide Commission on Recycling Markets and Curbside Recycling, “[Request for Enforcement of California Laws on Recyclable Labels on Plastic Bags and Films.](#)” December 3, 2021.

Commission’s letter, plastic bags and films cannot legally be claimed as “recyclable” under existing California law which codified the 2012 Green Guides. The Commission provided an appendix of photos of 80 plastic products examples with false recyclable labels.<sup>139</sup> The Commission’s appendix is Attachment 2 of this submittal.

As discussed in response to questions in Part C, product and packaging claims on recycled content lack clarity and substantiation on the source of the plastic employed and the actual physical amount of recycled plastic, thereby misleading consumers. The 2012 FTC Green Guides allow product companies to claim recycled content through use of industrial scrap and off-spec resin that has never been made into a useful product. Furthermore, the definition of “post-consumer plastic waste” allows product companies to claim that plastic waste from commercial operations that has never been touched by consumers.

**Question 13(a) To what extent have the Guides reduced marketers’ uncertainty about which claims might lead to FTC law enforcement actions? Please provide any supporting evidence. Does this evidence indicate the Guides should be modified? If so, why, and how? If not, why not?**

- The weakness of the Green Guides on recyclable labels on plastic products and packaging and the lack of enforcement by the FTC has enabled the widespread false labeling of plastic products and packaging as recyclable in the U.S today. Attachment 1 provides numerous examples of deceptive recyclable labels used on plastic products and packaging in 2021-2023 based on current 2012 FTC Green Guides. In 2021, the California Statewide Commission on Recycling Markets and Curbside Recycling called on state authorities for the elimination of false recycling symbols and labels on plastic bags and films sold in California. As detailed in the Commission’s letter, plastic bags and films cannot legally be claimed as “recyclable” under existing California law which codified the 2012 Green Guides. The Commission provided an appendix of photos of 80 plastic products examples with false recyclable labels. The Commission’s appendix is Attachment 2 of this submittal.
- Based on broad use of false “check locally” and “store drop off” labels with large recycle symbols on plastic products and packaging, it appears that product companies and retailers do not fear enforcement by the FTC. As the U.S. Federal Agency responsible for truthfulness on product labeling, the FTC must codify laws on product recyclability and recycled content claims with explicit requirements and then enforce the law.

**Question 16: What modifications, if any, should be made to the Guides to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?**

The definition of “recyclable” and “recycled content” must be based on real world conditions today. For over three decades, the plastics industry has falsely promised that a future plastic

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<sup>139</sup> California Statewide Commission on Recycling Markets and Curbside Recycling, “Request for Enforcement of California Laws on Recyclable Labels on Plastic Bags and Films – [Appendix 1,](#)” December 3, 2021.

solution was on the horizon. The plastics industry promotes “moonshot” technologies called chemical recycling that are always 10 years away from commercial use.<sup>140,141</sup> A representative of Chevron Phillips Chemicals likened the commercialization of chemical recycling to “going to Mars.”<sup>142</sup>

But “advanced” or “chemical recycling” is not technically, environmentally, or economically viable either. It has and will continue to fail for the same down-to-earth, real-world reasons that mechanical recycling of plastics has failed. Even worse, it could cause new environmental and health harms from toxic emissions.

The plastics and products industries have argued that many types of unrecyclable, worthless plastics should be labeled as recyclable and even put in curbside bins in order to collect enough material to warrant building a reprocessing facility. In essence, they brainwashed the public to believe that if we put enough plastic waste in curbside recycling bins, then it would be worth recycling. Three decades of failure have shown that the “if the public collects enough, we will build a recycling plant” sales pitch to be a false promise. We must learn from thirty years of failure and demand that the plastics and products industry invest in sufficient sortation and reprocessing facilities with operating capacity to serve the entire country for a particular product BEFORE a product can be labeled as recyclable and a consumer is instructed to put the product in curbside recycling bins. Based on the 60% access to recycling requirement in CA SB343, this means that there must be operating capacity in the U.S. for sortation and reprocessing of 60% of all U.S. sales of a particular product.

**Question 17: Do the Guides overlap or conflict with other federal, state, or local laws or regulations? If so, how?**

- (a) What evidence supports the asserted conflicts?**
- (b) With reference to the asserted conflicts, should the Guides be modified? If so, why, and how? If not, why not?**
- (c) Is there evidence concerning whether the Guides have assisted in promoting national consistency with respect to the regulation of environmental claims? If so, please provide that evidence.**

Due to the ambiguity of the 2012 Green Guides on truthfulness of recyclability labels at the national level, several states have had to invest taxpayer funds to create stronger “Truth in Labeling” laws for product packaging.

California’s SB343 Environmental advertising: recycling symbol: recyclability: products and packaging was signed into law on October 6, 2021.<sup>143</sup> We recommend that the Commission revise the Green Guides to be equivalent to California’s law. Since California has the largest state population, with 13% of the U.S. population, and products are typically labeled for

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<sup>140</sup> Greenbiz, “[Inside Eastman’s moonshot goal for endlessly circular plastics.](#)” May 11, 2020.

<sup>141</sup> LetsRecycle.com, “[Chemical recycling of plastics ‘10 years away’.](#)” October 21, 2019.

<sup>142</sup> Plastics Recycling Update, “[In My Opinion: Plastics-to-fuel is launchpad for innovation.](#)” February 21, 2018.

<sup>143</sup> California Legislative Information, “[SB-343 Environmental advertising: recycling symbol: recyclability: products and packaging.](#)”

nationwide sales, it is likely that most product companies will design their product labels to comply with California's law.

California's Truth in Labeling Law contains several key and necessary requirements for a product to be claimed as recyclable or to use a recycling symbol. These requirements should be explicitly incorporated into the Green Guides.

1. Collection: Products must be collected by curbside recycling programs that collectively encompass at least 60 percent of the population of the state.
2. Sortation: Products must be sorted into defined streams for purchase by reprocessing facilities. Mixed plastics #3-7 bales do not qualify as a sorted material. Contamination of PET thermoforms in PET bottles bales does not qualify PET thermoforms as a sorted material. Sending mixed plastic waste to a secondary plastic sorting facility does not qualify as sending it to an end market reprocessor/recycler.
3. Reprocessing: The sorted products must be bought by and reclaimed at a reprocessing facility consistent with the requirements of the Basel Convention.
4. Design for Recycling: For plastic products and non-plastic products and packaging, the product or packaging is designed to ensure recyclability and does not include any components, inks, adhesives, or labels that prevent the recyclability of the product or packaging.
5. No PFAS: The product or packaging is not made from plastic or fiber that contains perfluoroalkyl or polyfluoroalkyl substances or PFAS.

Additionally, the following explicit prohibitions and requirements should be incorporated into the Green Guides.

1. Collection, Sortation, and Processing: It is insufficient for a product to be merely collected by MRFs covering 60% of the population. The product must also be sorted and reclaimed at a responsible reclaiming (reprocessing) facility.
2. Chasing Arrows Recycle Symbol: The law prohibits the resin identification code from being placed inside a chasing arrows symbol, unless the rigid plastic bottle or rigid plastic container meets the requirements for statewide recyclability. This requirement prohibits use of contradictory recyclable labels for other countries on packaging sold to U.S. consumers.
3. No Qualified Labels Can Be Employed: The law requires that only products that meet the statewide requirements can be labeled as recyclable. This explicitly prohibits the use of the deceptive "Check Locally" label that is currently widely used on non-recyclable plastic products and packaging.
4. Store Dropoff: Prohibits use of the recycling label on a product or packaging not collected in curbside collection programs unless the program recovers and recycles at least 60 percent (prior to 2030) of the product or packaging in the program. After 2030, the non-curbside collection program must recover and recycled at least 75 percent of the product or packaging in the program. For the national program, we recommend a 75 percent recovery capacity to start with.
5. Non-recyclable shrink sleeves are not permitted.

**Question 18: Are there international laws, regulations, or standards with respect to environmental marketing claims the Commission should consider as it reviews the Guides? If so, what are they? Should the Guides be modified to harmonize with these international laws, regulations, or standards? If so, why, and how? If not, why not?**

While there is growing interest in Post-Consumer Recycled Content requirements, there are no credible international laws, regulations, or standards that should be adopted by the Commission. As detailed in Part C, the plastic industry-supported standard for mass balance for recycled content is blatantly deceptive to consumers. Additionally, the ISO approaches are system-based, not performance based, and therefore are not suitable for inclusion in the Green Guides.

The United Kingdom wisely prohibited recycled plastic made from chemically recycled plastic to count in their program that taxes new plastic resin use.<sup>144</sup>

Notably, agencies in other countries are actively enforcing truth in labeling requirements on plastic products. This is in contrast with the lack of enforcement by the Commission.

Evidence of Enforcement Actions in Other Jurisdictions:

1. In the United Kingdom (U.K.), Pepsi received an adverse ruling from the Advertising Standards Authority (ASA) against its Lipton Ice Tea for a poster which said, “deliciously refreshing, 100% recycled.” The ASA banned the advert on the basis that an asterisk with qualification in small print stating “bottle made from recycled plastic, excludes cap and label,” did not adequately counter the overall impression given that the bottle was made from 100% recycled material.<sup>145</sup>
2. In Canada, the Competition Bureau negotiated a \$3.8 million (Canadian dollars) consent agreement with Keurig Canada over false or misleading recyclability claims on its website, social media platforms, texts and logos for its single-use coffee pods (K-Cup pods).<sup>146</sup>

**FTC 19. Should the Commission initiate a proceeding to consider a rulemaking under the FTC Act related to deceptive or unfair environmental claims?**

- (a) If so, which principles set out in the Green Guides should be incorporated into a rule? For each suggested provision, explain why and provide any evidence that supports your proposal.**
- (b) Are there additional principles related to environmental claims not currently covered by the Guides that should be incorporated into a rule? For each suggested provision, explain why and provide any evidence that supports your proposal.**

We strongly support rulemaking by the FTC. We have responded to this question in detail, above in Part A.

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<sup>144</sup> The Grocer, “[The plastic tax isn’t working... is it?](#),” July 4, 2022

<sup>145</sup> Speechlys, “[Nowhere to hide for greenwashing brand.](#),” April 11, 2022.

<sup>146</sup> Canadian Advertising and Marketing Law, “[Keurig To Pay \\$3.8 Million Settlement In Misleading Advertising K-Cup Recyclability Case.](#),” January 7, 2022.

## PART C: Responses to the Specific Questions Regarding Recyclable and Recycled Content.

### **Specific Question 5: Recyclable, 16 CFR 260.12. Should the Commission revise the Guides to include updated guidance on “recyclable” claims? If so, why, and what guidance should be provided? If not, why not? a. What evidence supports your proposed revision(s)?**

Both rulemaking and explicit requirements are needed to protect consumers, communities, and the planet from deceptive recyclable and recycled content claims on plastic products and packaging.

In 2020 and 2022 Greenpeace USA performed and published comprehensive surveys of plastic product waste collection, sortation, and reprocessing in the U.S. to determine the legitimacy of “recyclable” claims and labels on consumer plastic products.<sup>147,148</sup> The comprehensive surveys proved that only PET#1 and HDPE#2 bottles and jugs, without harmful shrink sleeve labels, can legally be labeled and claimed in the U.S. The surveys provided proof of widespread false recyclable labeling on plastic products and packaging. The surveys also disproved the myth that there are multiple local markets for different types of plastic waste. There is only U.S. national market demand and domestic reprocessing capacity for some PET#1 and HDPE#2 bottles and jugs. Acceptance of additional types of plastic waste in the past, not wanted by U.S. plastic reprocessors, was driven by proximity to ports for export and desire of cities to appear environmentally friendly to residents.

The 2021 California State Recycling Commission’s survey of product and packaging recyclability in California also showed the widespread use of deceptive recyclable labels in California and was a driver for the passage of California’s SB343 truth in labeling law.

The provisions of California’s SB343 truth in labeling law, which took effect on January 1, 2022, should become the national standard for labeling products and packaging as recyclable. The key criteria that must be met are described in the response to Question 17 in Part B.

In addition to codifying the requirements California’s Truth in Labeling Law, the Commission should also incorporate the following:

#### 1. Prohibit Qualified Recycled Labels and Claims

According to a 1993 survey conducted by the FTC, there is no statistical difference” between a consumer’s perception of an unqualified recyclable claim and a “check locally” disclaimer.<sup>149</sup> The FTC concluded that a “check locally” disclaimer is deceptive because it does not “adequately disclose the limited availability of recycling programs.”<sup>150</sup> While the FTC survey is

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<sup>147</sup> Greenpeace USA, “[Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability](#),” February 2020.

<sup>148</sup> Greenpeace USA, [Circular Claims Fall Flat Again](#), 2022.

<sup>149</sup> 63 Fed. Reg. 84, 24244 (May 1, 1998).

<sup>150</sup> 16 C.F.R. § 260.12, Example 4; 63 Fed. Reg. 84, 24244 (May 1, 1998).

somewhat dated, there is no reason to believe that consumer perception of a “check locally” qualification has changed since then.

The “check locally” qualified recyclable label has been widely exploited by product companies in two ways:

- It is impossible for consumers to “check locally” to determine if a plastic product will actually be recycled because many MRFs accept non-recyclable plastic products and packaging in curbside bins, but then landfill or incinerate it.
- As shown in Attachment 1, many product companies are egregiously using qualified “check locally” recyclable labels on plastic products and packaging that have minimal to zero acceptance rates and negligible U.S. domestic reprocessing demand or capacity.

In the 2020 and 2022 Comprehensive U.S. Surveys of Plastics Recyclability researched by Greenpeace USA, evidence was found that some MRFs still accept plastics #3-7 and non-bottle #1-2 but dispose of it or continue to export it outside of North America due to the lack of domestic buyers and reprocessing capacity.<sup>151,152</sup> In some cases, cities that have long term contracts with MRFs are forcing them to continue to collect plastics that have negligible domestic market demand and will be landfilled.<sup>153,154</sup> As contracts are reviewed for renewal and the public understands the true fate and negative costs of collecting unrecyclable materials, MRF acceptance policies continue to consolidate to PET #1 and HDPE #2 bottles and jugs only. California’s state waste diversion goals have also driven exports of non-recyclable plastic waste to Asia.<sup>155</sup> The comprehensive surveys proved that only PET#1 and HDPE# bottles and jugs, without harmful shrink sleeve labels, can legally be labeled and claimed in the U.S. The surveys provided proof of widespread false recyclable labeling on plastic products and packaging. There is only U.S. national market demand and domestic reprocessing capacity for PET#1 and HDPE#2 bottles and jugs. Acceptance of additional types of plastic waste in the past, not wanted by U.S. recyclers, was driven by proximity to ports for export and desire of some cities to appear environmentally friendly to residents.

ReThink Waste, a public agency that operates the Shoreway MRF in San Carlos, California, sums up the reality of plastics markets: “Plastics #1 & 2 are readily recyclable and are usually recycled in the U.S. Plastics #3-7 are all versions of hard plastic that are very difficult to recycle. There is currently no market for the material when it is deconstructed.”<sup>156</sup> The Shoreway MRF continues to accept plastics #3-7 but clearly states that the collected material is sent to landfill.

The Shoreway MRF’s disposal of plastics to landfill is not unique. In January 2019, Washington State’s Department of Ecology advised citizens that “Commodities such as paper and plastic are

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<sup>151</sup> Greenpeace USA, [“Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability,”](#) February 2020.

<sup>152</sup> Greenpeace USA, [Circular Claims Fall Flat Again,](#) 2022.

<sup>153</sup> The Rivard Report, [“San Antonio Recycling Still Works, But Big Changes Are Looming,”](#) December 2, 2019.

<sup>154</sup> [City of Manhattan Beach, CA, Recycling Information.](#)

<sup>155</sup> Greenpeace USA, [“Acceptance of Unrecyclable Plastic Products and California’s Continued Exports of Plastic Waste Exports to Non-OECD Countries,”](#) May 18, 2021.

<sup>156</sup> ReThink Waste – Shoreway MRF, [The Hard Facts About Plastic.](#)

piling up or being sent to landfills.”<sup>157</sup> In June 2019, an in-depth Guardian investigation revealed that “cities around the country are no longer recycling many types of plastic dropped into recycling bins. Instead, they are being landfilled, burned or stockpiled.”<sup>158</sup> In Blaine County, Idaho residents are told to recycle plastics items Nos. 1-5, but only #1 and 2 bottles are actually being recycled, with the rest being dumped in a landfill south of Salt Lake City.<sup>159</sup> Section 8 of the 2020 Greenpeace USA report provides extensive evidence found across the country of collected plastics being sent to landfill, incineration or stockpiled, but not recycled. Figure 8 is Table 8 from the 2020 Greenpeace USA report showing approximately 50 examples of collected plastic waste in curbside recycling systems that was disposed to landfill or incineration.

**Figure 8: Evidence that Collected Plastic Waste is Not Recycled: Disposed, Incinerated or Stored<sup>160</sup>**

**Table 8: Evidence that Collected Plastic Waste is Not Recycled: Disposed, Incinerated or Stored**

State	Material Recovery Facility (MRF)	Evidence of Collected Plastic Material Not Recycled (Sent to Landfill, Incinerated or Stored)
Nationwide	Waste Management MRFs	The nation's largest waste hauler and MRF operator, Waste Management, states that collected plastics that have no market demand will be responsibly disposed. <sup>127</sup>
Arizona	Tucson MRFs	Most Nogales recyclables end up in landfills. <sup>128</sup>
Arizona	Arizona MRFs	MRFs in Arizona are sending some collected materials to landfills. <sup>129</sup>
California	California MRFs	Collected plastic #3-7 is being sent to landfill. <sup>130</sup>
California	San Diego MRFs	City of San Diego does not tell citizens the destination of plastics #3-7. <sup>131</sup>
California	Los Angeles MRFs	Waste haulers in the RecycLA program are required to collect plastics that have no market value and cannot be recycled. <sup>132</sup>
California	ReThink Waste Shoreway MRF	MRF states that plastics #3-7 are collected and sent to landfills. <sup>133</sup>
California	Manhattan Beach	Per the City's current Franchise Agreement, the City's hauler is required to accept plastics #1-7 in the recycling container. However, actual market value of certain plastics and recycling feasibility is subject to change. <sup>134</sup>
California	California MRFs	Recyclables are being dumped to landfill. <sup>135</sup>
Colorado	Colorado MRFs	Waste Management is stockpiling plastics #3-7 because there are no buyers. <sup>136</sup>
Connecticut	Willimantic MRF	Recyclables that are not bought or are contaminated are sent to an incinerator. <sup>137</sup>
Florida	City of Clearwater MRF	Collected recyclables were trucked to nearby incinerator instead of being recycled. <sup>138</sup>
Florida	MARPAN MRF	Marpan states that they send non-recyclable items to landfill. <sup>139</sup>
Florida	Florida MRFs	Materials collected for recycling that have no markets are landfilled. <sup>140</sup>
Florida	Lee County MRF	MRF is co-located with an incinerator. <sup>141</sup>
Florida	Palm Beach MRF	MRF is co-located with an incinerator. MRF sent collected plastics to incinerator. <sup>142</sup>
Georgia	Athens Clarke County MRF	Atlanta MRF expert says a lot of plastic cannot be recycled in U.S. and is landfilled. <sup>143</sup>
Georgia	Athens-Clarke County	Plastics #3-7 is sold to Greenmine Inc who has declared bankruptcy. <sup>144,145</sup>
Georgia, South Carolina, Tennessee, Texas	Pratt MRFs	Pratt Industries operates its own waste-to-energy plant. Unrecyclable residues are sent to the plant. <sup>146</sup>
Idaho & Utah	Idaho & Utah MRFs	Plastics #3-5 landfilled due to lack of buyers. <sup>147</sup>
Iowa	Cedar Rapids MRF	Mixed rigid plastics are now landfilled. <sup>148</sup>
Illinois	Keep North Illinois Beautiful Collection	Stockpiled over 400,000 tons of plastics due to lack of buyers. <sup>149</sup>

<sup>157</sup> Washington State Department of Ecology, [Legislative Priorities](#), January 2019.

<sup>158</sup> The Guardian, “[Americans' plastic recycling is dumped in landfills, investigation shows.](#)” June 21, 2019.

<sup>159</sup> Idaho Mountain Express, “[County plastic recycling is limited.](#)” February 5, 2020.

<sup>160</sup> Greenpeace USA, “[Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability.](#)” February 2020.

State	Material Recovery Facility (MRF)	Evidence of Collected Plastic Material Not Recycled (Sent to Landfill, Incinerated or Stored)
Indiana	Tri-State MRF	Plastics #3-7 have had to be sent to landfill due to lack of buyers. <sup>100</sup>
Maryland	Maryland MRFs	The bulk of collected plastic waste is sent to incineration. <sup>211</sup>
Massachusetts	Massachusetts MRFs	Some of Massachusetts collected recyclables are landfilled. <sup>212</sup>
Massachusetts	Zero Waste Solutions MRF	Low value plastic waste is planned to be burned. <sup>213</sup> Facility is storing collected material. <sup>214</sup>
Michigan	American Waste Traverse City	"Inferior plastics" are shredded and burned as a coal additive. <sup>105</sup>
Minnesota	Polk County MRF	Polk County MRF is co-located with an incinerator. <sup>106</sup>
Missouri	City of Columbia MRF	Plastics #3-7 are often sold at zero or negative values. "Even so, it's hard to find a buyer for these materials. Right now, there are about 30 tons of plastics outside of the facility waiting to be shipped". <sup>107</sup>
Nebraska	FirstStar Recycling MRF	FirstStar participates in the Hefty Energy Bag program that collects and burns plastic waste. <sup>108</sup>
Nevada	Republic Services	Collected plastics #3,4,6 & 7 are sent to landfill. <sup>109</sup>
New Jersey	Atlantic Coast Recycling	Recycled material is headed to landfills because there is no place willing to take it. Atlantic Coast Recycling stated that 10 to 25% of its collected material is now being recycled. <sup>110</sup>
New Mexico	Friedman Recycling	More collected material is deemed unrecyclable and disposed to landfill. <sup>111</sup>
New York	New York State MRFs	Mixed plastics #3-7 reportedly heading for landfill in state due to lack of buyers. <sup>112</sup>
North Carolina	North Carolina MRFs	In violation of contract, materials collected for recycling were shipped to Portsmouth, VA instead of being recycled. <sup>113</sup>
Ohio	Athens-Hocking MRF	AHRC is sending unwanted plastics to landfill. <sup>114</sup>
Ohio	Cleveland MRF	Cleveland recyclables have been sent to landfill. <sup>115</sup>
Ohio	Ohio MRFs	Recycler is sending collected plastic to landfill. <sup>116</sup>
Pennsylvania	Pennsylvania MRFs	Plastics with no local buyers are sent to landfill. <sup>117</sup>
South Carolina	North Augusta MRF	Collected materials that are not bought for recycling are sent to landfill. <sup>118</sup>
South Carolina	Pratt MRF	Collected plastics #3-7 being sent to landfill. <sup>119</sup>
Tennessee	Memphis MRF	"Tons of Memphis recyclables being sent to the dump." <sup>120</sup>
Texas	Texas MRFs	Collected materials without local markets going to landfill. <sup>121</sup>
Texas	Pratt Industries Denton MRF	MRF told city officials that plastics #3-7 have always been hard to ship to recycling companies. They called the city in March 2019 to say items like spray bottles, condiment squeeze bottles, yogurt tubs, reusable plastic keepers and plastic cups and plates were going to the landfill instead of being recycled. <sup>122</sup>
Utah	Salt Lake City MRF	Plastic waste collected through recycling systems is being burned in cement kilns and is not recycled. <sup>123</sup>
Utah	Utah MRFs	As much as 50 percent of what Draper residents think is being recycled actually ends up in the dump. <sup>124</sup>
Utah	Utah MRFs	Plastic scrap stockpiles reportedly growing in Utah. <sup>125</sup>
Utah	Utah MRFs	50% of collected materials going to landfill. Recommendation to collect plastic bottles & jugs only. <sup>126</sup>
Vermont	Vermont MRFs	Portion of plastics #3-7 cannot be recycled. <sup>127</sup>
Virginia	Portsmouth MRF	Plastic waste collected for recycling sent to incineration. <sup>128</sup>
Washington	Washington MRF	WA State Department of Ecology stated that plastics are piling up or being sent to landfill. <sup>129</sup>
Wisconsin	Wisconsin MRFs	The Wisconsin DNR has confirmed to stakeholders that mixed plastics (#3-7) can legally be disposed, even if the material has been sorted and baled. <sup>130</sup>
Wisconsin	Green Circle Recycling MRF	Unsellable plastic waste is sent to waste-to-energy plant. <sup>131</sup>
Wyoming	Wyoming Residents	Waste Management is stockpiling plastics #3-7 because there are no buyers. <sup>132</sup>

Since a substantial portion of plastic waste collected under the guise of recycling is landfilled, incinerated, or exported without verification of recycling, acceptance of a plastic item at a MRF alone is not sufficient and “reasonable” assurance to a customer that it will be manufactured into another item, as required by the FTC in 16 CFR 260. Sufficient market demand, sortation, and U.S. domestic recycling/reprocessing capacity must exist for a plastic product to be considered “recyclable.” Without market demand, sortation, and U.S. domestic recycling/reprocessing

capacity, the plastic waste material collected by the MRFs will not be bought by manufacturers and will not be recycled into another product.

2. Prohibit Instructions to Cut Off Labels or Otherwise Deconstruct Products to Make Them Suitable for Recycling.

A 2020 survey found that 69% of Americans mistakenly placed plastic bottles with unrecyclable shrink sleeves in curbside recycling bins.<sup>161</sup> This practice causes costly contamination and is likely due to false labels widely employed by the products industry as shown in Attachment 1.

As detailed in the 2020 Greenpeace USA Circular Claims Fall Flat report:<sup>162</sup>

“Many product companies are increasingly using full body shrink sleeve labels on plastic bottles to improve shelf appeal and increase sales. Commonly used polyethylene terephthalate glycol (PETG) and polyvinyl chloride (PVC) shrink sleeves are known to prevent proper sortation of the bottles in MRFs and harm operations of PET bottle recyclers/reprocessors.<sup>163</sup> Yet product companies continue to employ these types of shrink sleeves. The product companies are evidently aware that the shrink sleeves they use prohibit proper sortation and harm recycling of the plastic bottles because they place instructions on the bottles telling consumers to remove the shrink sleeves. One example is provided in Figure 8.

**Figure 8: Expanded Image of Full Body Shrink Sleeve Label on HDPE #2 Bottle**



This labeling practice is not compliant with the FTC Green Guides and is deceptive in two ways: (1) **The FTC requires that components of a product cannot limit the recyclability of the product.** FTC Green Guides 16 CFR 260.12d states: “If any component significantly limits the ability to recycle the item, any recyclable claim would be deceptive. An item that is made from recyclable material, but, because of its shape, size, or some other attribute, is not accepted in recycling programs, should not be marketed as recyclable.” (2) **The FTC Green Guides does not allow for a company to instruct a consumer to remove an integral component to make a product recyclable.”**

<sup>161</sup> Shelton Group, “[Engaging Middle America in Recycling Solutions.](#)” August 27, 2020.

<sup>162</sup> Greenpeace USA, “[Circular Claims Fall Flat: Comprehensive U.S. Survey of Plastics Recyclability.](#)” February 2020.

<sup>163</sup> Plastics Recycling Update, “[Commercialization conundrum.](#)”, March 6, 2018.

3. Restrict Store Drop off Recyclable Label to Requirements in California’s Truth in Labeling Law (SB 343)

As explained above in Part A and Part B (Question 17) – companies should be prohibited from providing labels that indicate that their product or its packaging is recyclable through a store drop off program unless they can provide specific information that proves that the drop off program can achieve a minimum of 75% collection, sortation, and reprocessing rate. Only once that has been demonstrated may a company use a label indicating the product or its packaging is recyclable through store drop off.

4. Prohibit Contradictory Labels from Other Countries

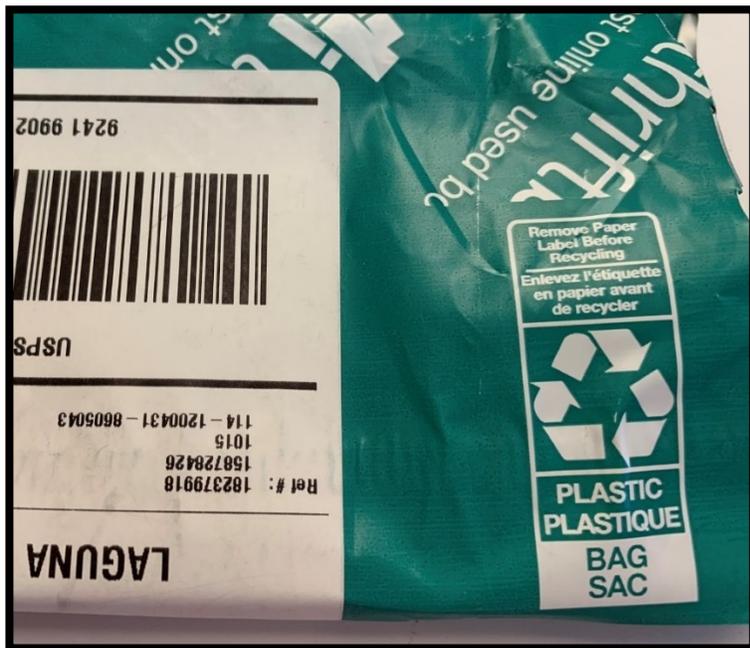
The majority of Americans (61%) mistakenly believe that flexible plastic packaging, bags, and pouches are recyclable through curbside recycling bins.<sup>164</sup> Dual labeling of plastic packaging for multiple countries contributes to the U.S. consumer confusion. Figure 9 shows an Ecommerce airbag made by Airplus (Storopack) and distributed to Americans by Amazon in packaging shipments. The dual labeling of the product for U.S. and Canadian consumers adds to the U.S. consumer confusion. The unqualified recyclable label meant for Canadian consumers is false for U.S. consumers. A reasonable, typical consumer could easily see both recyclable symbols and assume that the plastic airbag could be put in U.S. curbside recycling bins. Evidence proving U.S. consumer confusion on Ecommerce plastic packaging is detailed in response to Question 1. Figure 10 shows a plastic Ecommerce bag labeled for only Canadian consumers that was received by The Last Beach Cleanup in California.

**Figure 9: Contradictory Recyclable Label Employed by Airplus (Storopack) on Plastic Airbag (Photo credit: The Last Beach Cleanup)**



<sup>164</sup> King5.com, [“61% believe flexible plastics are recyclable in curbside bins. They're not.”](#) November 25, 2022.

**Figure 10: False Recyclable Label Intended for Canadian Consumer Received by U.S. Consumer (Photo credit: The Last Beach Cleanup)**



**Specific Question 5(b). What evidence is available concerning consumer understanding of the term “recyclable”?**

There is widespread public confusion of the term “recyclable” and what can be recycled. Plastic waste is a major cause of the confusion. A Consumer Brands Association survey found that “92% of respondents are unsure or believe anything with a plastic resin label could be recycled curbside, although only two of the seven codes are consistently recyclable.”<sup>165</sup>

**Specific Question 5(c). What evidence constitutes a reasonable basis to support a “recyclable” claim?**

Refer to response to Question 17 in Part B which details California SB343 definition of recyclable.

**Specific Question 6: Recyclable, 16 CFR 260.12. – The Guides provide that marketers can make an unqualified “recyclable” claim when recycling facilities are available to a substantial majority of consumers or communities where the item is sold. “Substantial majority” is defined as 60%.**

**Specific Question 6(a). Should the Guides be revised to update the 60% threshold? If so, why, and what guidance should be provided? If not, why not? What evidence supports your proposed revision? Is there any recent consumer perception research relevant to the 60% threshold?**

<sup>165</sup> Consumer Brands Association, “[Americans Baffled by Broken Recycling System](#),” April 2019.

Per responses to other questions, only unqualified recyclable labels should be allowed. Regarding the minimum threshold required for an unrecyclable claim, we support CA SB343's requirements of 60% access to collection, sortation, and reprocessing of specific products and packaging. To be clear, 60% access of American population to collection of a specific item is insufficient. There also must be operating capacity in the U.S. for sortation and reprocessing of 60% of all U.S. sales of a particular type of plastic product and packaging.

**Specific Question 6(b). Should the Guides be revised to include guidance related to unqualified “recyclable” claims for items collected by recycling programs for a substantial majority of consumers or communities but not ultimately recycled due to market demand, budgetary constraints, or other factors? If so, why, and what guidance should be provided? If not, why not? What evidence supports your proposed revision?**

Acceptance of a specific product by a MRF is not proof of recycling and therefore cannot be used as criteria for determining whether a product is recyclable or not. In the Green Guides Statement of Basis and Purpose section titled “Packages Collected for Public Policy Reasons but Not Recycled,” the Commission states that it “agrees that unqualified recyclable claims for categories of products that municipal recycling programs collect, but do not actually recycle, may be deceptive. To make a non-deceptive unqualified claim, a marketer should substantiate that a substantial majority of consumers or communities have access to facilities that will actually recycle, not accept and ultimately discard, the product. As part of this analysis, a marketer should not assume that consumers or communities have access to a particular recycling program merely because the program will accept a product.”<sup>166</sup>

To date, it does not appear that the Commission has enforced their stated position on “actual recycling” of collected products. The examples provided in Attachment 1 prove that many product companies are now falsely labeling products and packaging with unqualified and qualified recyclable labels on items that have no or very low acceptance rates and negligible U.S. reprocessing capacity. The egregious use of “check locally” on non-recyclable products and packaging such as polystyrene plates and flat plastic blister packages must be stopped.

Moving forward, we urge the Commission to adopt the three-part recyclable products test as codified in California's Truth in Labeling Law. This three-part test requires that a product may only be marketed as recyclable and use a recycle symbol if:

1. Collection: Products must be collected by curbside recycling programs that collectively encompass at least 60 percent of the population of the state.
2. Sortation: Products must be sorted into defined streams purchase by reprocessing facilities. Mixed plastics #3-7 bales do not qualify as a sorted material. Sending mixed plastic waste to a secondary plastic sorting facility does not qualify as sending it to a reprocessor/recycler.

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<sup>166</sup> [FTC Green Guides Statement of Basis and Purpose \(pg. 174\)](#)

3. Reprocessing: The sorted products must be reclaimed at a reprocessing facility consistent with the requirements of the Basel Convention. There must be U.S. reprocessing capacity for 60% of all U.S. sales of a particular type of plastic product and packaging.

If a product does not meet all three requirements, it cannot be labeled or claimed as recyclable. Qualified labels should not be allowed.

**FTC 7. Recycled Content, 16 CFR 260.13. The Guides state marketers may make “recycled content” claims only for materials recovered or otherwise diverted from the solid waste stream, either during the manufacturing process or after consumer use. Do the current Guides provide sufficient guidance for “recycled content” claims? If so, why? If not, why not, and what guidance should be provided? What evidence supports your proposed revision(s)?**

The 2012 Green Guides do not provide sufficient guidance for recycled plastics content claims. In order to protect consumers and ensure fair competition, the recycled content guidance must be codified into law with explicit requirements and definitions. In this response, examples of deceptive recycled content claims are given.

The purported aim of recycled content is to reduce specific product pollution and waste by incentivizing collection of the product after use and recycling it back into the same type of product. However, the facts show that recycled content from consumer plastic products and packaging in a specific geographical area is rarely, if ever, collected and recycled back into consumer products and packaging in that area. No evidence can be found that regulations requiring recycled content actually result in the reduction of plastic waste or pollution in the regulated geographical area. In January 2022, David Allaway, Senior Policy Analyst at the Oregon Department of Environmental Quality (DEQ), stated that recycled content mandates don't necessarily support local supply of recycled material.<sup>167</sup> In other words, recycled content mandates don't reduce plastic waste or pollution in the local area of the mandate.

A critical reason that recycled content is a false solution to the plastic waste and pollution crisis is because toxicity of recycled plastic prevents use in most food, beverage, and other consumer uses.<sup>168</sup> While a limited amount of consumer packaging may be downcycled into other products, recycled plastic cannot be used for the vast majority of consumer products due to insurmountable toxicity barriers.<sup>169</sup>

Summary of Recycled Content Deceptions: Beyond the major barrier of toxicity, recycled content is a false solution because:

1. Recycled content is typically not made from actual post-consumer household plastic waste, but is made from industrial scrap, commercial or agricultural plastic waste, or “wide-spec” new plastic and does nothing to reduce the many millions of tons of U.S. household plastic waste going to landfill and incineration each year.
2. Recycled plastic is often employed to give a false positive environmental halo to non-recyclable single use plastics.

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<sup>167</sup> Resource Recycling, “[Experts discuss tradeoffs of recycled content mandates](#),” January 25, 2022.

<sup>168</sup> Stina, “[Assessing the state of food grade recycled resin in Canada and the United States](#),” November 2021.

<sup>169</sup> Stina, “[Assessing the state of food grade recycled resin in Canada and the United States](#),” November 2021.

3. Imported recycled content doesn't reduce plastic waste or pollution in the country with the mandated content law.
4. Verification schemes are optional and misleading.
5. Chemical recycling (free attribution mass balance) certification schemes create mystery amounts of mystery oil.
6. Recycled content generates significant plastic waste.
7. Recycled content can require more plastic to produce a product.
8. Recycled content actually promotes new plastic production.

The plastics and products industries deceive consumers by claiming to use recycled plastic in single-use plastic consumer products and give consumers the false impression that the product is reclaimable in a “closed loop.”

Evidence of the deception is that there are numerous consumer plastic products on the market that claim to contain recycled content but the products themselves are not recyclable into new products. Recycling industrial and commercial plastic waste via mechanical or chemical recycling into unrecyclable plastic consumer products doesn't reduce the 48.6 million tons/year of U.S. consumer household plastic waste (over 3.2 million trash trucks/year) going from fast food and households to landfills, incinerators, or ending up as plastic pollution.<sup>170</sup>

**Evidence 1. Recycled content made from industrial, commercial, agricultural, or “wide-spec” new plastic deceives consumers.**

Consumers' overriding concerns are to reduce **their** household plastic waste to **their** local landfills and incinerators and stop plastic pollution to the environment. Unfortunately, the commonly used definition of “post-consumer” waste includes many types of waste that consumers never touch. The USEPA defines post-consumer material as “waste material generated by households or by commercial, industrial, and institutional facilities in their role as end-users of the product, which can no longer be used for its intended purpose.”

During a webinar on “Post Consumer Resin Standards” on March 23, 2022, plastics recycling experts voiced concern that there are inadequate controls on verification and due diligence assurance on claims made on “post-consumer plastic material.”<sup>171</sup> A mechanical recycler stated that plastic manufacturers were pushing the use of “wide-spec” resin that has never been made into a product as “recycled content” and it is “very damaging to the system.”

Recycling mixed plastics household waste is highly challenging, either by mechanical or chemical recycling processes. However, the broad definition of “post-consumer plastic material” and lack of verification means that product companies can employ new “wide-spec” resin or recycled industrial scrap or commercial or agricultural plastic waste that consumers have never touched and give consumers the false impression that **their** household plastic waste has been recycled.

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<sup>170</sup> Beyond Plastics and The Last Beach Cleanup, “[The Real Truth About the U.S. Plastics Recycling Rate.](#)” May, 2022.

<sup>171</sup> Compliance and Risks, “[Post Consumer Resin Standards.](#)” shown on March 23, 2022 and available online.

Evidence of the deception is that there are numerous consumer products on the market containing commercial and agricultural plastic waste recycled content but are not recyclable into new products.

Figure 11 shows an example of a plastic shopping bag sold in California that is made from agricultural plastic film material. The plastic bag itself is not recyclable after a consumer uses it because there is no demand by plastic film processors for recycling contaminated post-consumer household plastic film waste. In 2021, the California Statewide Commission on Recycling Markets and Curbside Recycling called on state authorities for the elimination of false recycling symbols and labels on plastic bags and films sold in California.<sup>172</sup> As detailed in the Commission’s letter, plastic bags and films cannot legally be claimed as “recyclable” under existing California law which codified the 2012 Green Guides. The Commission provided an appendix of photos of 80 plastic products examples with false recyclable labels, including the Revolution plastic bag.<sup>173</sup>

On November 2, 2022, California State Attorney General Rob Bonta launched an investigation into recyclability claims made by plastic bag companies stating “despite the manufacturers’ claims and widespread consumer belief in recycling, plastic bags do not, in fact, appear to generally be recyclable, let alone “recyclable in the state,” as required for such bags sold in California.”<sup>174</sup> In December 2022, the CA State Attorney General commented that he believes that plastic bags cannot claim to be recyclable through store drop off in California. “As of now, makers of the bags get to self-certify to the state that their bags can be recycled. But Bonta said that requires a comprehensive system to collect, process and sell the used plastic bags, none of which exist. Putting the bags in most curbside recycling bins interferes with recycling other products by clogging equipment and increasing the risk of worker injury, he said.”<sup>175</sup>

**Figure 11 – Plastic Shopping Bag Made from Agricultural Plastic Material**



<sup>172</sup> California Statewide Commission on Recycling Markets and Curbside Recycling, “[Request for Enforcement of California Laws on Recyclable Labels on Plastic Bags and Films](#),” December 3, 2021.

<sup>173</sup> California Statewide Commission on Recycling Markets and Curbside Recycling, “Request for Enforcement of California Laws on Recyclable Labels on Plastic Bags and Films – [Appendix 1](#),” December 3, 2021.

<sup>174</sup> State of California Department of Justice, “[Attorney General Bonta Demands Manufacturers of Plastic Bags Substantiate Recyclability Claims](#),” November 2, 2022.

<sup>175</sup> CBS News, “[Think those plastic bags are recyclable? AG Bonta launches investigation](#),” December 29, 2022

## **Evidence 2. Recycled plastic is often employed to give a false positive environmental halo to non-recyclable single use plastics.**

In the 2020 U.S. Plastic Pact Baseline Report, a plastic beverage ring carrier is highlighted as a success because it contains some recycled content.<sup>176</sup> The plastic ring carrier maker (Hi-Cone) partnered with a plastic recycler (Avangard Innovative) to use 50% recycled content instead of new plastic. However, plastic ring carriers are known to be one of the most harmful sources of plastic pollution with fatal impacts to sea turtles and other marine life. Incorporating some recycled plastic content into the plastic rings does not reduce the fatal impacts of the products on wildlife. In December 2020, a team of marine biologists at Stanford University announced that they'd discovered approximately 4,000 dead sea turtles with plastic six-pack rings around their necks decomposing in a lagoon off the U.S. Virgin Islands.<sup>177</sup> In 2018, a volunteer beach cleanup on three miles of Elmer's Island, Florida gathered more than 170 plastic six-pack rings. In June 2022, Canada banned these harmful plastic products.<sup>178</sup>

## **Evidence 3. Imported recycled plastic doesn't reduce plastic waste in the country with the mandated content law.**

The cost to collect and recycle plastic waste in the U.S. is high. Labor and recycling costs are typically lower in other countries, particularly countries with insufficient environmental, health, and safety laws. This economic differential creates an incentive for consumer goods companies to import cheap recycled plastic from other countries to meet recycled content mandates and corporate pledges in the U.S.

Recycled plastic imported to the U.S. from other countries does not reduce plastic waste generated in the U.S. While the consumer is given the false impression that purchase of that product with "recycled content" reduces **their** plastic waste to **their** local landfill or their incinerator, the truth is that the imported recycled plastic becomes new waste in **their** community.

State laws requiring recycled content in plastic products cannot stop the imported plastic loophole because states cannot pass international trade restrictions.

## **Evidence 4. Illustrating deception in non-recyclable consumer products on the U.S. market containing imported recycled content instead of domestically-sourced plastic waste.**

A high-profile example of a recycled content law that has done nothing to reduce consumer household plastic waste is California's plastic bag law which requires 40% recycled content. Many major retail stores are importing bags to California with recycled content from other countries: CVS (Germany), Aldi (Germany), Target (France), and others. Instead of collecting and recycling the plastic bags that they sell to California consumers, the stores purchase bags made in other countries and import the foreign plastic waste to California. As described in response to Question 1, California's State Attorney General is now investigating the false claim of plastic bag recyclability.

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<sup>176</sup> U.S. Plastics Pact, [The 2020 U.S. Plastics Pact Baseline Report](#)

<sup>177</sup> Clickhole, "[Yikes, This One's On Them: Thousands Of Endangered Turtles Have Been Found Dead After Auto-Erotically Asphyxiating On Plastic Six-Pack Rings](#)," December 7, 2020

<sup>178</sup> Barauck, "[Florida brewery unveils six-pack rings that feed sea turtles rather than kill them](#)," April 23, 2019

Another example is provided in a 2022 New York Times article about a California manufacturer who makes PET#1 plastic clamshells for the berry industry.<sup>179</sup> The California manufacturer imports allegedly “recycled” plastic from Thailand to make the clamshells and the clamshells are sold in the U.S. with the words “recycled content.” If the PET#1 clamshells are sold in New Jersey to meet the state’s recycled content requirements, this would give a false impression to New Jersey consumers that **their** plastic waste to **their** landfills and incinerators has been reduced. U.S. Export data shows that PET#1 waste from New Jersey is not exported to Thailand, so the recycled PET#1 imports were not originally from New Jersey PET#1 waste.<sup>180</sup>

In both the plastic bag and clamshell examples, while the products contain some recycled content from imported material, the products themselves are still not recyclable in the U.S. because the plastic packaging products are not collected or in demand by U.S. domestic plastic reprocessors.

#### **Evidence 5. Verification schemes are optional and misleading.**

There currently is no commercially available physical test that can differentiate recycled plastic from new plastic.<sup>181</sup> As governments begin to consider and enact recycled content laws, a range of programs are being developed by industry and stakeholders to “certify” recycled content. Eunomia’s 2021 review of recycled content standards and certifications schemes for the Canadian Government shows a long list of potential schemes.<sup>182</sup> But certification programs are optional and none require use of post-consumer household plastic waste (PHR), which creates the possibility that plastic claimed as recycled may actually be new “wide-spec” plastic or industrial, commercial, or agricultural plastic waste that can be passed off as “recycled content” in consumer products.

Regarding the potential fraudulent use of new plastic instead of recycled plastic, the U.S. imported 259 million pounds of allegedly recycled PET from reclaimers in countries including Peru, Ecuador, Mexico, Indonesia, Thailand, Honduras, and others in 2017.<sup>183</sup> However, certifications proving that the plastic was actually recycled plastic are not required by law and cannot be found in the public domain.

#### **Evidence 6. Chemical recycling (free attribution mass balance) certification schemes create mystery amounts of mystery oil.**

See Response to Question 8 below. Plastics and products companies are now starting a new recycled content deception by employing “chemical” or “advanced” recycling and claiming nonphysical recycled plastic content through free attribution mass balance schemes. In effect, they are starting to make single use consumer plastic products containing a mystery morsel of recycled oil made from commercial plastic waste to fight against single use plastic product bans. The single use plastic products made are not recyclable because the companies are not buying the product waste back to be made into feedstock, they are using mystery amounts of commercial plastic waste. The Nexus pyrolysis plant in Georgia admitted that they can’t process much mixed household plastic waste and primarily use “post-industrial and commercial” plastic film waste to

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<sup>179</sup> Goodman, “[How High Oil Prices Threaten a California Plastic Container Business](#),” March 14, 2022.

<sup>180</sup> US Census Bureau, [US Trade Online](#)

<sup>181</sup> ACS Sustainable Chemistry & Engineering, “[Recycled Plastic Content Quantified through Aggregation-Induced Emission](#),” 2022.

<sup>182</sup> Eunomia, “[A Comparative Assessment of Standards and Certification Schemes for Verifying Recycled Content in Plastic Products](#),” October 19, 2021.

<sup>183</sup> NAPCOR, [2017 PET Recycling Report](#), November 15, 2018.

create pyrolysis oil.<sup>184</sup> But recycling industrial and commercial plastic film doesn't reduce the 48.6 million tons/year of U.S. consumer plastic waste (over 3.2 million trash trucks/year) going from fast food and households to landfills, incinerators or ending up as plastic pollution.<sup>185</sup>

The petrochemical industry is promoting the International Sustainability and Carbon Certification (ISCC) "ISCC Plus" certification that allows a product company to claim 100% recycled plastic content in a product while there could actually be zero physical recycled content in the product. It is advantageous to the petrochemical industry because it does not require the feedstock to be post-consumer household plastic waste and because it allows for free attribution of recycled content across products at a company level with no public view of the accounting schemes employed. "Free attribution" means that a chemical company could recycle Texas industrial plastic scrap in its Texas plastic production facility, but then claim that entirely new plastic produced in its New Jersey facility contains recycled content and that new plastic could be sold in New Jersey to meet their recycled content law.<sup>186</sup>

As critics have noted, "Free attribution approach does not provide sufficient rigor in terms of being able to accurately attribute recycled content to specific outputs, which are important considerations both for recycled content targets and taxes, and for supply chain and consumer confidence."<sup>187</sup>

Plastics companies are pushing for free attribution to get even worse by allowing the hypothetical recycled plastic to cross country borders.<sup>188</sup> The United Kingdom wisely prohibited recycled plastic made from chemically recycled plastic to count in their program that taxes new plastic resin use.<sup>189</sup> The plastics industry fought against this ruling but lost.<sup>190</sup>

### It's a three-part hoax.

Hoax #1: The ISCC scheme cited by the plastics and products companies does not dictate or regulate the source of the plastic waste feedstock to the pyrolysis plant.<sup>191</sup> The feedstock can come from clean industrial scrap, "wide-spec resin," or used cooking oil. The mystery oil produced by a pyrolysis plant may have not contained any actual post-consumer household plastic waste (PHR).

Hoax #2: To heat the process to at least 500C, pyrolysis plants typically destroy a significant amount of the plastic waste via combusting the hydrocarbon gas created from the plastic waste. According to a study by the U.S. Department of Energy, pyrolysis plants destroy 86% to 99% of

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<sup>184</sup> Paben, "[How a chemical recycling firm handles EnergyBag plastics](#)," February 2, 2021

<sup>185</sup> Estimation basis: 48.6 million tons/yr of plastic waste not recycled per The Last Beach Cleanup and Beyond Plastics, "[The Real Truth About the U.S. Plastic Recycling Rate](#)," May 4, 2022. [Capacity of side-loader residential trash truck is 15 tons](#).

<sup>186</sup> Quinn, "[New Jersey governor signs ambitious recycled content bill into law](#)," Waste Dive, January 11, 2022

<sup>187</sup> Qureshi, "[Paul Davidson | Measuring recycled content: why mass balance accounting matters for plastics](#)," June 30, 2022

<sup>188</sup> Ecos, "[Message on a bottle: the little-known decision that will make or break EU recycling goals](#)," January 19, 2023

<sup>189</sup> The Grocer, "[The plastic tax isn't working... is it?](#)," July 4, 2022

<sup>190</sup> The Grocer, "[The plastic tax isn't working... is it?](#)," July 4, 2022

<sup>191</sup> ISCC, [The Mass Balance Approach](#)

plastic waste in processing.<sup>192</sup> This means that while the plastics industry may claim that they recycled 100 kg of plastic waste, only 1 to 14 kg of pyrolysis oil was made. The document filed with the USEPA by Brightmark Energy for their planned pyrolysis plant in Ashley, Indiana stated that 70% of the feedstock would be combusted and 10% would be waste char, meaning that only 20% of the feedstock material would be reclaimed as pyrolysis oil (which still requires further refinement).<sup>193</sup>

Hoax #3: The ISCC scheme allows a convoluted “mass balance” accounting of polymer molecules by the plastics companies themselves without transparency or verification by the public. As described in response to Question 8, the ISCC scheme employs “free attribution” that allows plastics plants that receive zero mystery recycled oil to claim that the new plastic produced at a different plant has recycled content.<sup>194</sup>

There are many harms from the hoax. The single-use plastic products they are making are often the top forms of plastic pollution, including plastic fast food cups. By claiming to add a mystery morsel of “recycled” plastic to the plastic cup, the plastics and product companies try to give the impression that the plastic cup is “circular,” not harmful and should not be replaced by reusable or truly recyclable or compostable cups made of other materials. This hoax halts progress to real solutions.

Examples of unrecyclable single-use plastic products being made with a mystery morsel of mystery pyrolysis oil include:

#### 1. Wendy’s Fast Food Plastic Cups:

Wendy’s claims to be creating a PP#5 fast food cup with “20% ISCC-certified” recycled plastic.<sup>195</sup> Wendy’s reportedly buys the cups from Berry Global who buys the polypropylene with “20% ISCC-certified” recycled plastic from LyondellBasell. In the figure shown on their website (captured in Figure 12 below), Berry Global indicates that plastic fast food cup waste sold in Wendy’s restaurants is being recycled back into Wendy’s cups via collection in curbside recycling bins. However, the actual source of the plastic waste fed into LyondellBasell’s new polypropylene production plant is not stated in company press releases. The plastic waste could be industrial scrap and not post-consumer plastic waste. LyondellBasell reportedly has no commercial operations in the U.S. that produce pyrolysis oil.<sup>196</sup> The only LyondellBasell facilities reportedly producing pyrolysis oil are in Wesseling, Germany, and Italy.<sup>197,198</sup>

Therefore, it is highly unlikely that Wendy’s fast food plastic cup waste is collected in U.S. curbside bins after being sold in Wendy’s stores, shipped to Europe, turned into pyrolysis oil, shipped back to the U.S., and then used to make Wendy’s fast food cups. As detailed in

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<sup>192</sup> Uekert, et. al, “[Technical, Economic, and Environmental Comparison of Closed-Loop Recycling Technologies for Common Plastics](#),” ACS Sustainable Chem. Eng. 2023, 11, 3, 965–978.

<sup>193</sup> Break Free From Plastic, “[EPA: Regulate “chemical recycling” for what it is – incineration](#),” March 9, 2022

<sup>194</sup> Qureshi, “[Paul Davidson | Measuring recycled content: why mass balance accounting matters for plastics](#),” June 30, 2022

<sup>195</sup> Wendy’s Press Release, “[Wendy's, Berry Global, LyondellBasell Collaborate to Improve Cup Recyclability; Introduce New, Industry-Leading Clear Drink Cup](#),” October 20, 2021.

<sup>196</sup> Greenwood, “[LyondellBasell mulls chem recycling among options for US refinery](#),” April 29, 2022

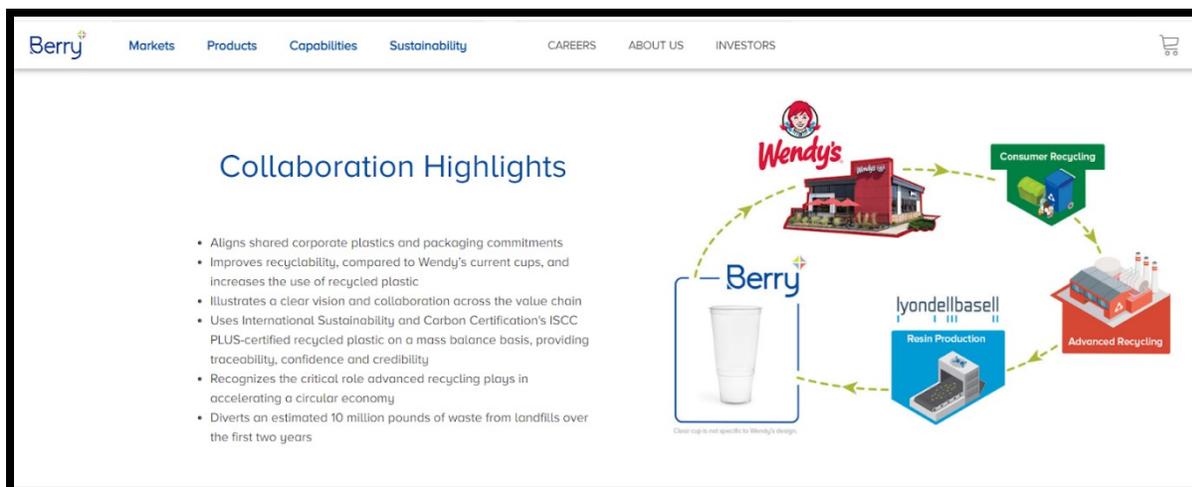
<sup>197</sup> LyondellBasell, “[LyondellBasell starts commercial production of polymers using raw material derived from plastic waste](#),” May 6, 2021

<sup>198</sup> Chang, “[LyondellBasell to take plastics recycling global with new investments – CEO](#),” May 11, 2021

Greenpeace USA’s 2022 Circular Claims Fall Flat Again report, no type of plastic fast food cup can be legally claimed as “recyclable” in the U.S. since less than 5% of Americans have access to recycling plastic cups and the USEPA reports that a “negligible” amount of plastic cups are recycled each year.<sup>199,200</sup>

If LyondellBasell sources pyrolysis oil from Nexus in Atlanta, the plastic waste would be primarily from “post-industrial and commercial” plastic film waste, not plastic cups from Wendy’s restaurants as indicated in Figure 12.<sup>201</sup>

**Figure 12: Berry Global Schematic Telling the Public that Plastic Cup Waste from Wendy’s Stores is Recycled Back into Plastic Cups Sold at Wendy’s<sup>202</sup>**



## 2. McDonald’s Fast Food Plastic Cups

In March 2022, McDonald’s announced: “circular clear cups sourced from equal parts recycled and biobased materials – available now in 28 select restaurants in Savannah, Georgia.”<sup>203</sup>

McDonald’s tells consumers “**Luckily for all of us, it’s simple: In Savannah, just rinse and recycle the cup after use at home or in any recycling bin. Look at you doing your part!**”<sup>204</sup>

McDonald’s is using a mass balance method to measure and track recycled inputs. The polypropylene cups are made by Pactiv Evergreen who reportedly sources polypropylene from LyondellBasell who reportedly sources pyrolysis oil from INEOS.<sup>205, 206</sup> The source of the plastic scrap processed by Ineos is not stated, it could be industrial scrap and not post-consumer plastic waste.<sup>207</sup>

<sup>199</sup> Greenpeace USA, “[Circular Claims Fall Flat Again: 2022 Update](#),” October 2022.

<sup>200</sup> [USEPA 2018 Facts and Figures about Material, Waste and Recycling](#)

<sup>201</sup> Paben, “[How a chemical recycling firm handles EnergyBag plastics](#),” February 2, 2021

<sup>202</sup> Wendy’s Press Release, “[Wendy’s, Berry Global, LyondellBasell Collaborate to Improve Cup Recyclability; Introduce New, Industry-Leading Clear Drink Cup](#),” October 20, 2021.

<sup>203</sup> McDonalds, “[McDonald’s Tests Circular Clear Cups Sourced From Recycled and Biobased Materials, Including Used Cooking Oil](#),” March 20, 2022.

<sup>204</sup> McDonalds, “[McDonald’s Tests Circular Clear Cups Sourced From Recycled and Biobased Materials, Including Used Cooking Oil](#),” March 20, 2022.

<sup>205</sup> Sherman, “[McDonalds is Testing 50/50 PCR/Biobased Clear PP Cups](#),” *Plastics Technology*, April 22, 2022.

<sup>206</sup> Lingle, “[McDonald’s Plastic Cups Use Advanced Recycling, Bioplastics](#),” *Plastics Today*, April 26, 2022.

<sup>207</sup> Ineos, “[McDonalds tests clear cups sourced from recycled and biobased materials](#),” April 20, 2022.

McDonald's claim that consumers in Savannah, Georgia can recycle the PP#5 cups through their curbside bin appears to be a false promise. **The City of Savannah, Georgia states that only plastic bottles and jugs should be put in curbside recycling bins and that "Trash or non-recyclables placed in the recycling cart may result in a \$25 contamination fee per occurrence."**<sup>208</sup> Greenpeace USA's 2022 comprehensive survey of U.S. Material Recovery Facilities (MRFs) shows that none of the ten MRFs in Georgia accept plastic cups in curbside recycling bins.<sup>209</sup>

#### **Evidence 7. Recycled content generates significant plastic waste.**

Recycling plastics generates significant waste. While product companies try to deceive consumers to think of recycling as the same as reuse, the facts show that creating a product made of recycled plastic also creates significant waste.

**Mechanical recycling:** In their announcement about a new PET#1 bottle recycling facility in Mexico, Coca-Cola and ALPLA admit that 30% of plastic PET#1 bottles received will be wasted.<sup>210</sup> The 2018 NAPCOR report on PET#1 beverage bottle recycling stated that due to contamination and process losses about a third of the collected bottle material is disposed of.<sup>211</sup> This means that to make 100 PET bottles from recycled plastic, 143 bottles would have to be collected and recycled and the material of 43 bottles would be wasted.

**Chemical recycling:** As described above, pyrolysis of plastic wastes at least 80% of the plastic waste material. This means that to make 100 pounds of recycled plastic, 500 pounds of plastic waste would have to be collected and processed. The pyrolysis process would burn 350 pounds of the material (spewing carbon emissions and pollutants to the atmosphere) and 50 pounds of material would be char ash destined for disposal.

#### **Evidence 8. Recycled content can require more plastic to produce a product.**

David Allaway, Senior Policy Analyst at the Oregon Department of Environmental Quality (DEQ) stated that using recycled content doesn't always mean offsetting an equivalent amount of virgin resin.<sup>212</sup> Because of differences in engineering qualities, some products may require more recycled plastic be used compared to new plastic. In those cases, the greater use of materials erodes the environmental benefits of recycled resin usage.

#### **Evidence 9. Recycled content actually promotes new plastic production.**

The new PP#5 plastic cup announced by Taco Bell employs only 10% recycled, high-density polyethylene (HDPE) from milk jugs.<sup>213</sup> This means that 90% of the plastic polypropylene cup is made from new plastic polypropylene production. The cup itself is still not recyclable and is not the source of material to make the cup.

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<sup>208</sup> City of Savannah, Georgia – [Recycling Guide](#)

<sup>209</sup> Greenpeace USA, "[Circular Claims Fall Flat Again: 2022 Update](#)," October 2022.

<sup>210</sup> Smalley, "[Alpla, Coca-Cola FEMSA invest \\$60M in Mexican PET recycling plant](#)," January 31, 2022.

<sup>211</sup> NAPCOR, "[Postconsumer PET Recycling Activity in 2018](#)," December 16, 2019.

<sup>212</sup> Paben, "[Experts discuss trade-offs of recycled-content mandates](#)," January 25, 2022.

<sup>213</sup> Berry Global Press Release, "[Berry Global Develops Innovative, New Cup with Post-Consumer Recycled Plastic in Partnership with Taco Bell®](#)", May 4, 2022.

**Specific Question 9. Recycled Content, 16 CFR 260.13. What changes, if any, should the Commission make to its guidance on pre-consumer or post-industrial recycled content claims? How do consumers interpret such claims? Please provide any relevant consumer perception evidence.**

### **Summary of Recommendations for Explicit Recycled Content Labels**

1. Only verified physical recycled content in products can be claimed. Mass balance and “free attribution” certification schemes should not be allowed.
2. A new category of recycled content should be defined: Household plastic waste from consumer products that have been actually touched by individual consumers. (Post-Household Resin – PHR).
3. Only household plastic waste should be claimed for recycled content in consumer household products.
4. Commercial and agricultural plastic waste that individual consumers do not touch cannot be claimed as recycled content in consumer products. Commercial and agricultural plastic waste should be recycled back into their original products to eliminate the need to produce new plastic for commercial and agricultural purposes. Recycled content made from commercial and agricultural plastic waste may be claimed in only those types of products themselves.
5. Post-industrial and wide spec plastic scrap cannot be claimed as recycled plastic in any form because the plastic has never had a useful product life.
6. The country of origin of the recycled content must be shown on the label of the product if the recycled content was not sourced from the U.S.

The evidence supporting these recommendations is provided in the response to Question 7.

### Non-Physical Mass Balance Must Be Prohibited

Environmental NGOs in Europe have published detailed reports and articles explaining why “mass balance with free attribution – a model which could lead to massive greenwashing” should be prohibited.<sup>214</sup> We support these findings that recommend that free attribution mass balance should be prohibited.

Ecos, January 19, 2023<sup>215</sup>

There are three main chain-of-custody models that the European Commission can choose from when setting EU-wide accounting rules. Two of those models can help ensure high traceability of recycled plastic by coupling the material with its actual recycled content. They are the ‘segregation’ model, and the ‘controlled blending’ model (also known as the mass balance approach ‘at batch level’).

<sup>214</sup> Ecos, [“Message on a bottle: the little-known decision that will make or break EU recycling goals,”](#) January 19, 2023

<sup>215</sup> Ecos, [“Message on a bottle: the little-known decision that will make or break EU recycling goals,”](#) January 19, 2023

The third option is applying mass balance at the level of a site (e.g., a recycling plant) or several sites. This model usually opens the door to massive greenwashing as it gives manufacturers too much freedom to allocate recycled plastic content to products of their convenience.

**Mass balance with free attribution – a model which could lead to massive greenwashing.**

Unfortunately, the mass balance traceability system becomes much less accurate when using chain-of-custody models allowing for the allocation of recycled content without reflecting the reality. This is the case, for example, when the system accepts that a facility which uses 1 tonne of recycled plastics issues a certificate so that this amount is claimed by another facility, which has not used any recycled materials. This can be done between multiple production sites, countries, or even continents. This model even allows aggregating plastics from factories producing different types of products made of polymers ranging from textiles to packaging.

**If manufacturers are allowed to freely attribute the percentage of recycled content to products of their choice, there is a risk of massive greenwashing – and this is why the EU should not even consider this option.**

Ecos, October 29, 2021<sup>216</sup>

Recycled plastic calculation, and associated claims, should be based on proportional allocations, discount process efficiency losses and consider only recycled materials that have passed through the hands of consumers.

Joint NGO Paper, February 2021<sup>217</sup>

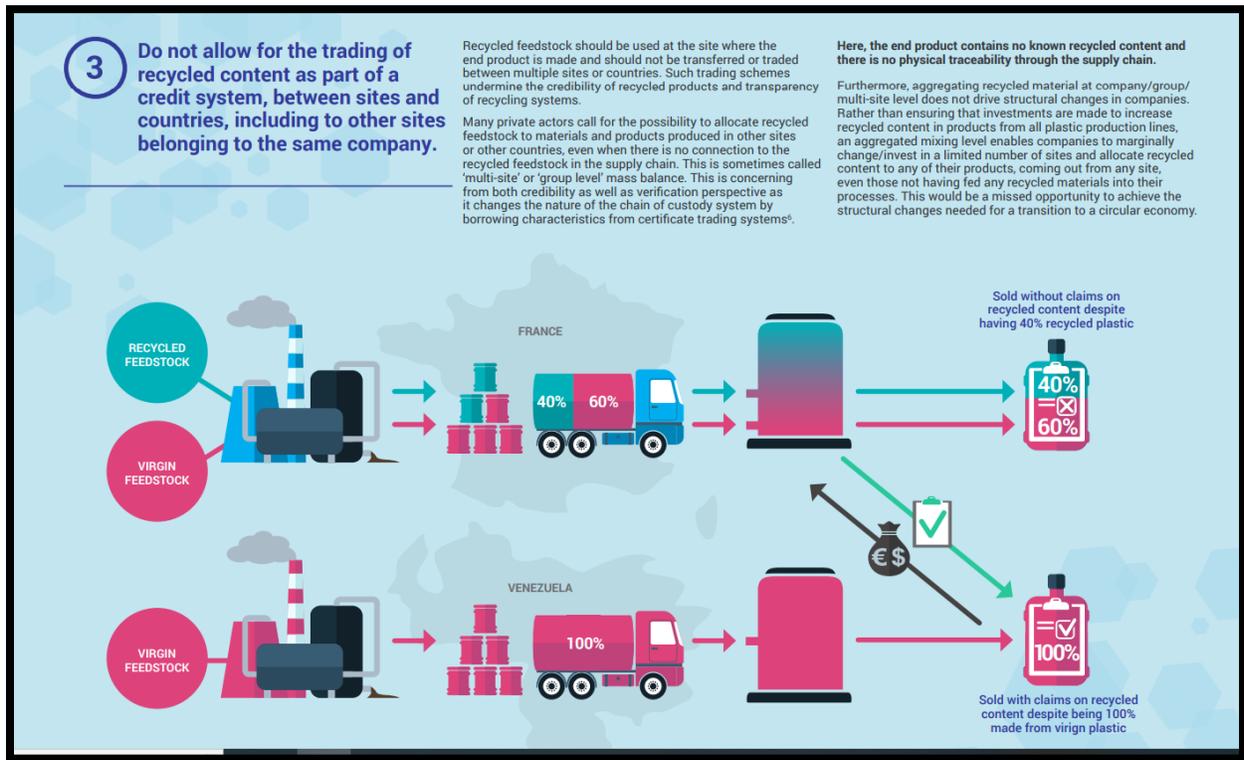
**If the rules for mass balance are developed too loosely, this method could become a major tool for greenwashing and would allow companies to claim and market products as made from recycled materials regardless of their true content.**

A mass balance approach must be strictly regulated and not allow for unreliable ‘creative accounting’. It is crucial that, if the mass balance approach is used in the context of calculating recycled content in plastic packaging and other materials, limited flexibility is allowed to ensure that the targets for circularity in the EU (and globally) are not undermined. Key industry players, including those from the ‘chemical recycling’ industry, are now calling for a mass balance method which allows for very flexible rules - such as a liberal allocation of recycled feedstock to the final product of their choosing, regardless of its true content. **This would mean that a plastic product could be sold as fully recycled while containing only very small fractions of actual recycled content. This is a simplistic and meaningless bookkeeping exercise.**

<sup>216</sup> Ecos, [“Cooking the plastic books: EU must avoid opening the door to widespread use of creative accounting in recycled plastic content.”](#) October 29, 2021

<sup>217</sup> Joint NGO Paper, [“Determining recycled content with the ‘mass balance approach.’”](#) February 2021

**Figure 13: Graphic Showing Why Free Allocation Mass Balance Should be Prohibited.**



<sup>218</sup> Ecos-ZWE, [“Recycled content in plastics The mass balance approach,”](#) 2021