

MEMORANDUM

From: Steve B. Steinborn
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Re: **FTC Hosts Public Workshop on “Made in USA” Claims**

On September 26, 2019 the Federal Trade Commission’s (“FTC’s” or “the Commission’s”) Bureau of Consumer Protection (“BCP”) held a public workshop on “Made in USA” and similar U.S.-origin claims for consumer goods sold in the United States. This is the first time the Commission has sought public input on its approach to such claims since issuing its 1997 Enforcement Policy Statement. The FTC is considering revising the Policy Statement or issuing formal rulemaking, and is seeking comments on consumer perception of “Made in USA” claims, the workability of the current standard, the value of a bright-line rule for the amount of permissible foreign content (e.g., a specific percentage), and its approach to enforcement, which currently emphasizes counseling compliance over prosecuting violations.

The workshop featured panelists representing members of industry, consumer advocacy groups, and FTC attorneys who are principally responsible for enforcing the Commission’s policy on “made in USA” claims. ^{1/} There were three discussion segments: (1) Consumer Perception – How Do Consumers Interpret Made in USA Claims; (2) Doing Business Under the Current Policy – What Are the Compliance or Policy Challenges Under the Current Framework; and (3) Enforcement Approaches – Should the Commission Reexamine Its Current Approach to Addressing Deceptive Made in USA Claims. Members of the public were not invited to speak during the workshop, but are encouraged to submit comments to the FTC docket. ^{2/} The FTC is requesting comments on 15 specific questions, attached at Appendix A.

Background

In 1997, the FTC published its Enforcement Policy Statement on U.S. Origin Claims (“Policy Statement”), which states that in order to support an unqualified “Made in USA” claim, the product should (1) undergo final assembly or processing in the U.S. and (2) the product’s contents should be

^{1/} A full list of the panelists is available on the event website, <https://www.ftc.gov/news-events/events-calendar/made-usa-ftc-workshop>.

^{2/} Comments can be submitted to the regulations.gov docket number FTC-2019-0063.

“all or virtually all” U.S. origin.^{3/} Under this standard only “negligible” or de minimis amounts of foreign content are permitted. Where foreign content is present, FTC considers (1) the proportion of manufacturing costs represented by foreign content, and (2) the remoteness of the foreign content. Foreign content that is expensive or integral to a product’s function is not likely to be considered de minimis. If a product contains more than minimal foreign content, it may still be eligible for a qualified claim, such as “made in the USA from U.S. and foreign ingredients.”

The Policy Statement was issued under the FTC’s authority under Sections 5 and 45a of the Federal Trade Commission Act (“FTC Act”), which prohibit “unfair or deceptive acts or practices” and require advertisers to substantiate all reasonable interpretations of any advertising claims. Importantly, a claim may be considered deceptive if it is likely to deceive a “significant minority” of reasonable consumers, which has been found to be as low as roughly 10 percent of consumers.^{4/}

The Policy Statement is not binding as it was not issued via notice-and-comment rulemaking. It does, however, outline the FTC’s approach to enforcement and over the years the FTC has taken numerous enforcement actions over “made in the USA” claims.^{5/} There have also been class action lawsuits involving “made in the USA” claims, particularly in the state of California, which has issued its own definition of U.S. origin claims that differs slightly from the FTC standard.^{6/}

Discussion 1 – Consumer Perception – How Do Consumers Interpret Made in USA Claims

The first discussion panel focused on consumer perception, its role in the “made in USA” standard, and how best to measure it. FTC staff explained that the Commission’s obligation is to enforce consumer perception and asked panelists to discuss data and other evidence on how consumers perceive U.S. origin claims. Some noteworthy comments include:

- Voter survey responses and other consumer perception data show that “made in USA” manufactured goods are “overwhelmingly popular” among all voting groups, with over 90% of consumers expressing a favorable or somewhat favorable view of “made in USA” products.
- “Made in USA” claims evoke a wide variety of sentiments including support for American jobs, workers, and the economy, as well as support for broader ethical manufacturing considerations such as elevated working conditions and pay, and prohibitions on child labor.

^{3/} *Enforcement Policy Statement on U.S. Origin Claims*, 62 Fed. Reg. 63756 (Dec. 2, 1997), available at <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>. See also, *Complying with the Made in USA Standard*, available at <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>.

^{4/} *FTC Policy Statement on Deception*, appended to *Cliffdale Assoc. Inc.*, 103 FTC 110, 174 (1984); *Telebrands Corp.*, 140 F.T.C. 278, 325 (2005) (10.5%-17.3%); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 249 (6th Cir. 1973) (15% (or 10%) of the buying public); *FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1070 n.88 (C.D. Cal. 2012) (10.5% to 17.3% . . . is sufficient).

^{5/} FTC Closing Letters related to U.S. origin claims can be searched here: https://www.ftc.gov/taxonomy/term/234/type/closing_letter; FTC cases related to U.S. origin claims can be searched here: <https://www.ftc.gov/taxonomy/term/234/type/case>.

^{6/} California Bus. & Prof. Code § 17533.7.

- While “made in USA” claims are very popular with consumers, consumers seem reluctant to pay more than incrementally higher prices to buy qualifying goods.

The FTC staff requested but did not receive much information on consumer perception related to qualified versus unqualified U.S. origin claims (e.g., how consumers value a “made in USA” claim compared to a “made in USA with foreign ingredients” claim.). Industry and consumer advocacy groups alike expressed concern about qualified claims. For example, consumer groups suggested that qualified claims may be deceptively executed and fail to clearly communicate the qualifying message. Members of industry suggested that qualified claims can detract from a product’s appeal because they draw attention to the foreign aspects of the product rather than the American contributions.

Discussion 2 – Doing Business Under the Current Policy – What Are the Compliance or Policy Challenges Under the Current Framework

FTC staff asked panelists to discuss whether and how they implement “Made in USA” claims at the business level. The majority of industry and consumer panelists suggested that the current standard is difficult to understand and apply.

- A retailer noted that despite its concerted effort to promote U.S. origin products, suppliers often struggled to justify the significant time and monetary investment needed to investigate the supply chain and determine whether a product is eligible for a U.S. origin claim, especially when the process concludes in a gray area where it is unclear whether the “all of virtually all” standard is met. In such cases, manufacturers may opt not to run the risk of using the claim, reap no benefit for their supply chain investigation, and become reluctant to consider pursuing the claim for other products.
- Representatives of both the jewelry and textile industries in particular expressed frustration with perceived inconsistencies between the FTC’s U.S. origin claim standard, and other standards that commonly apply to their products. For example, under the Textile Products Identification Act, products must bear a country of origin label and the analysis is conducted differently than the voluntary “Made in USA” claim analysis. The jewelry industry noted that at the global level, country of origin standards follow a simple substantial transformation rule. Meaning, jewelry produced in the United States could, outside of the United States, be considered “Made in USA” because it was substantially transformed there. However, because it is often difficult to trace the true origins of precious metals like gold, the same products could not bear a “Made in USA” claim for domestic advertising purposes, because FTC’s Policy prohibits unqualified claims when integral raw material, like the gold in a gold ring, is not domestically sourced.
- It can be difficult to educate consumers on complicated topics like supply chains. This makes it challenging to overcome consumer perceptions that qualified “made in USA” claims are of significantly less value than unqualified claims.

FTC staff also asked panelists to describe their experience complying with the State of California’s statute on U.S. origin claims. Generally, members of industry voiced confusion and frustration with the California standard, which does not assess the same factors as the FTC standard, and suggested that a national standard would provide greater certainty.

Discussion 3 – Enforcement Approaches – Should the Commission Reexamine Its Current Approach to Addressing Deceptive Made in USA Claims

FTC staff suggested there are two primary potential routes forward: (1) revising the existing Policy Statement, or (2) issuing rulemaking under § 45a, which would be limited to unqualified “made in USA” claims on product labels and would not address qualified claims or claims made outside of the product label. FTC staff asked panelists about preferences between a policy statement and a rulemaking, and whether FTC’s current enforcement activity was effective. Notable responses include:

- Revising the rule in general could threaten companies that have staked a claim on the existing all or virtually all standard. Weakening the standard would diminish the efforts by those companies.
- Industry and consumer advocates perceived a lack of consequences for companies violating the FTC’s policy, claiming FTC enforcement or lack thereof inadequately deters future offenses. Money damages such as restitution and disgorgement could have a stronger deterrent effect.
- One panelist suggested that binding pre-market determinations on proposed advertising could give companies a level of certainty in promoting their products as “made in USA.”
- If the FTC goes forward with rulemaking, it should adopt in whole or in part the Food and Drug Administration’s (“FDA’s”) definition of “labeling,” which is relatively expansive and would give the FTC jurisdiction over more than merely the label affixed to the physical product.

FTC staff pushed back on criticisms that its efforts to enforce the standard inadequately deterred future offenders. The staff advised that the FTC seeks to primarily counsel companies into compliance, rather than enforcing the policy through filing lawsuits or pursuing more formal enforcement action. Staff attorneys asked for input on how FTC resources could be most efficiently used and whether industry and consumers would find multiple closing letters per year or one big prosecution every two years to be more effective in enforcing and deterring violations.

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Please contact us if have any questions or would like to otherwise discuss the FTC’s Made in USA policy. We will continue to monitor developments related to Made in USA marketing claims, including FTC enforcement and policy making.

APPENDIX A

FTC Questions on U.S. Origin Claims

1. How do consumers interpret “Made in USA” claims? Does this interpretation vary depending on the product advertised (e.g., do consumers interpret a claim made with respect to a shovel in the same way they do a claim made with respect to a smartphone)? Please provide any supporting studies, data, or other evidence.
2. What rationales underlie consumer preferences for products made in USA? Does this vary by product? How? Please provide any supporting studies, data, or other evidence.
3. What consumer perception testing of “Made in USA” claims has been done? Please provide any supporting studies, data, or other evidence.
4. When consumers see product advertisements or labels stating or implying that products are “Made in USA” or the equivalent, what amount of U.S. parts and labor do they assume are in the products? Does this vary by product? Please provide any supporting studies, data, or other evidence.
5. What are the costs and benefits of strictly enforcing an “all or virtually all” threshold for unqualified “Made in USA” claims? Please provide any supporting studies, data, or other evidence.
6. What are the costs and benefits of enforcing a bright-line, costs-based standard (e.g., 85% of costs must be attributable to U.S. costs in order to make an unqualified claim)? Please provide any supporting studies, data, or other evidence.
7. What are the costs and benefits of enforcing a flexible standard requiring case-by-case analysis? Please provide any supporting studies, data, or other evidence.
8. How do consumers interpret qualified “Made in USA” claims (e.g., “Made in USA with Imported Content,” “Assembled in USA,” “50% Made in USA”)? Do they believe that “Assembled in the USA” means something different than “Made in USA?” How would they interpret a claim that a portion of the product is “Made in USA,” for example, that a product is “80 Percent Made in USA?” Please provide any supporting studies, data, or other evidence.
9. Do consumers interpret “Made in USA” claims for similar products differently based on changes to manufacturing processes to increase or decrease the proportion of manufacturing costs attributable to U.S. costs? For example, consider Product A and Product B. For each, 20% of manufacturing costs are attributable to U.S. costs. However, until last year, 50% of Product A’s manufacturing costs were attributable to U.S. costs. On the other hand, until last year, 5% of Product B’s manufacturing costs were attributable to U.S. costs. How would this affect consumer perception of “Made in USA” claims? Please provide any supporting studies, data, or other evidence.
10. Do consumers interpret “Made in USA” claims differently based on whether a firm’s product’s U.S. content is higher than that of its competitors’ products? For example, for a given industry, if a firm uses a higher percentage of U.S. content in its products relative to the rest of the industry, would this affect consumer perception of a “Made in USA” claim? Please provide any supporting studies, data, or other evidence.
11. Do firms that advertise their products as “Made in USA” charge higher prices than their competitors whose products are not advertised in this way? Please provide any supporting studies, data, or other evidence.
12. If a firm advertises its product as “Made in USA,” how does this affect the quantity of sales it makes? Specifically, does a “Made in USA” claim: (1) cause consumers to shift away from competitors’ products that are not advertised in this way, or (2) cause new consumers to

purchase the product? If so, by how much does the quantity sold increase through each of these channels? Please provide any supporting studies, data, or other evidence.

13. What remedies should the FTC seek against companies that make deceptive “Made in USA” claims?
14. If the FTC issues a rule regarding “Made in USA” claims, violators could face civil penalties in addition to equitable relief. In awarding civil penalties, courts consider the defendant’s degree of culpability, any history of prior misconduct, ability to pay, effect on ability to continue doing business, and such other matters as justice may require. Given these factors, if the FTC should seek civil penalties against companies that make deceptive “Made in USA” claims in violation of a rule, how should the FTC calculate the penalty amount it seeks to impose?
15. The FTC has addressed deceptive U.S.- origin claims by U.S. firms through its ongoing enforcement program. However, overseas firms selling directly to U.S. consumers through online sales platforms may also make deceptive U.S.-origin claims. Given the limits imposed by the Communications Decency Act, 47 U.S.C. 230(c)(1), as well as the limits on the FTC’s jurisdiction and resources, what steps should the agency take to address deceptive U.S.-origin claims made to U.S. consumers on third-party platforms by firms with no U.S. presence?