

FTC to Host Public Workshop on “Made in USA” Enforcement Program and Requests Public Comments from Interested Parties

September 25, 2019

Key Points

- Tomorrow, September 26, 2019, the Federal Trade Commission (FTC) will host a public workshop in Washington, D.C. concerning its “Made in USA” enforcement program. A webcast will be available at this [link](#).
- The FTC is inviting public comments from interested parties by October 11, 2019, on a range of topics concerning “Made in USA,” including understanding consumer perceptions of “Made in USA” claims, both unqualified and qualified.
- Interested parties, particularly retailers, manufacturers, importers or any company that advertises or sells products that may be marketed and/or sold with a “Made in USA” claim in the United States, should consider filing comments on regulations.gov [here](#).

Introduction and Overview of the FTC’s “Made in USA” Standard

Tomorrow, September 26, 2019, the FTC will hold a public workshop “to enhance its understanding of consumer perception of ‘Made in USA’ and other U.S.-origin claims, and to consider whether it can improve its ‘Made in USA’ enforcement program.” An agenda for the workshop can be found [here](#).

According to the FTC’s 1997 Enforcement Policy Statement on U.S. Origin Claims (Policy Statement)¹ for a product to be called “Made in USA” without any qualifications, the product must be “all or virtually all” made in the United States. This standard applies to both express (“Made in USA”) and implied (e.g., displaying U.S. flags, stating “true American quality”) claims. “All or virtually all” means that all significant parts and processing that go into the product are of U.S. origin. In other words, the product should contain no, or negligible, foreign content. In addition, the FTC also assesses the appropriateness of “qualified” “Made in USA” claims, such as “60% U.S. content” and “Made in USA of U.S. and imported parts.” Both qualified and unqualified claims must be truthful and substantiated.

Although there is not a bright line test for establishing whether a product is “all or virtually all” made in the United States, the FTC primarily looks at three factors:

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1. Where the site of final assembly or processing occurs.
2. The percentage of the total cost of manufacturing that is attributable to U.S. costs (i.e., U.S. parts and processing) versus foreign costs.
3. The remoteness of the foreign content (which impacts the content's significance).

The FTC has provided “practical guidance” to industry on “Made in USA” claims [here](#). Notably, the FTC’s “Made in USA” policy applies to all products advertised or sold in the U.S., so retailers are at risk even if they did not manufacture the item. As an example, FTC closing letters to [Target](#), [Williams Sonoma](#) and [Hallmark Cards](#) indicate that the FTC believes that retailers (a) have an obligation to ensure the products they sell (and advertise) comply with the FTC’s “Made in USA” policy and (b) need to have a process to ensure accuracy of country of origin claims regarding items they advertise in their stores and websites.

FTC “Made in USA” Enforcement Versus Customs and Border Protection (“CBP”) Country of Origin Rules

Importantly, the test of whether or not an item is “Made in USA” under FTC law (specifically, Section 5 of the FTC Act, 15 U.S.C. § 45(a)) is a more stringent test than whether an item has a U.S. or foreign origin under U.S. customs laws, such as the customs marking rules under 19 U.S.C. § 1304.² In CBP administrative rulings relating to country of origin, CBP will often advise the requesting party that whether an article may be marked with Made in USA or similar words connoting U.S. origin is under the authority of the Federal Trade Commission. And in fact, under FTC law, the product undergoing its last “substantial transformation” in the United States is a prerequisite. However, substantial transformation alone does not guarantee that a product is “Made in USA” under the FTC standard.

Recent FTC “Made in USA” Enforcement and Potential Need to Expand Penalties for Deceptive “Made in USA” Claims

This year, the FTC has brought four enforcement actions against companies making allegedly false “Made in USA” claims on their websites. This includes, for example, New York-based Patriot Puck, who the FTC alleged made false claims in its advertising, packaging and promotional materials that its hockey pucks were “Made in America,” “Proudly Made in the USA,” “100% American Made!” and “The only American Made Hockey Puck!”³ The FTC alleged that the hockey pucks were actually wholly imported from China. The company has agreed to a 20-year administrative consent order prohibiting it from making deceptive “Made in USA” claims, and if the company violates the order in the future, the FTC can pursue civil penalties of up to \$42,530 per violation. Notably, the FTC Commissioners split their vote to approve the final order on party lines (3-2) as to whether to assess penalties on Patriot Puck versus keeping it under an order prohibiting them from making further deceptive “Made in USA” claims.⁴

Some FTC Commissioners, as well as certain industry stakeholders, have argued that the FTC should consider expanding its authority to enforce and penalize false “Made in USA” claims beyond the current limitations of the Policy Statement. Commissioner Rohit Chopra has advocated for codifying the “Made in USA” Policy Statement and imposing civil penalties on first-time violators.⁵ Given the differing views of the Commissioners, FTC Chairman Joe Simons has stated that a public workshop is now

needed to analyze whether the FTC “should undertake a rulemaking to codify a rule permitting the FTC to pursue civil penalties against companies and individuals that disseminate deceptive U.S.-origin claims, and whether to require defendants to admit liability in settlements.”⁶ Along these lines, consumer advocacy organization Truthinadvertising.org recently filed a petition for rulemaking with the FTC to promulgate regulations for “Made in USA” claims, including the option for seeking penalties against first-time offenders.⁷

Specific Questions for Industry Comment

FTC staff has asked interested parties to submit comments on the following questions:

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 as 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?

Implications

“Made in USA” has become a hot-button issue in recent years given the political emphasis on reviving American manufacturing and jobs, as well as congressional pressure on the FTC to increase enforcement against companies making deceptive “Made in USA” claims. The workshop and request for public comments are the first efforts by the FTC to update its “Made in USA” program in over 20 years. The FTC’s “all or virtually all” standard is high and abstract, and companies, including those who advertise or sell products in the United States, may seek to advocate for a bright line rule from the FTC through this process. Retailers should carefully review the above questions and consider submitting comments on the “Made in USA” regulations by October 11, particularly given that any new “Made in USA” standard will likely be in place for many years and violators of this new standard could face civil penalties in addition to equitable relief.

¹ Enforcement Policy Statement on U.S. Origin Claims, Federal Trade Comm’n, (Dec. 1, 1997), <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>.

² The FTC's "Made in USA" enforcement program should also be distinguished from state "Made in USA" laws such as California's, See Cal. Bus & Prof. Code § 17533.7, https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=BPC§ionNum=17533.7.

³ Press Release, Federal Trade Comm'n, Hockey Puck Seller, Companies Selling Recreational and Outdoor Equipment Agree To Stop Making False 'Made in USA' Claims in Separate Actions (Sept. 12, 2018), <https://www.ftc.gov/news-events/press-releases/2018/09/hockey-puck-seller-companies-selling-recreational-outdoor>.

⁴ Annie Karni, On 'Made in America,' Trump's F.T.C. Appointees May Be Out of Step With Him, The New York Times (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/us/politics/made-in-america-ftc-trump.html>.

⁵ Activating Civil Penalties for "Made in USA" Fraud, Office of Commissioner Rohit Chopra (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514808/chopra_-_activating_civil_penalties_for_made_in_usa_fraud_4-17-19.pdf.

⁶ Concurring Statement of Chairman Joe Simons, Regarding the Matters of Sandpiper/PiperGear and Patriot Puck, (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514773/sandpiper_patriot_puck_simons_concurring_statement_4-17-19.pdf.

⁷ Petition for Rulemaking to Promulgate Regulations for Made in the USA Claims, Truth in Advertising, Inc. (Aug. 22, 2019), https://www.truthinadvertising.org/wp-content/uploads/2019/08/TINA_org-Petition-for-Rulemaking-to-Promulgate-Regulations-for-Made-in-the-USA-Claims.pdf.

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