

## CLIENT ALERT

### "Made in America" Claims: the Landscape, FTC Guidance, and Tips for Manufacturers and Marketers

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The choices facing American consumers are no longer just "paper or plastic" or "do you want fries with that?" Today, when strolling the aisles of a grocery store, customers have the option to buy local, organic, gluten-free, low-carb, or any other of a dozen choices. The local coffee shop offers a selection of responsibly-sourced coffees, shade grown coffees, and beans from Ethiopia, Yemen, or Guatemala. What savvy companies and marketers have realized is that American consumers like choice *and* they like to feel good about the products they buy.

And global trends— like safety concerns about foreign-made products, interest in supporting a flagging U.S. economy, or just plain patriotism—may encourage consumers to change their buying patterns—in favor of American goods. Smart manufacturers and marketers understand this and know that customers may be willing to pay a premium for American quality goods. And so, unsurprisingly, smart companies are doing what they can to make and market products as "Made in America."

But figuring out which products are genuinely made in America is not easy in today's interconnected, globally-sourced world of manufacturing. And getting it wrong may come at a high price for companies. And it isn't just consumers and competitors who will be double-checking your claims, the Federal Trade Commission (FTC) and states may question these types of claims. And the FTC's recent enforcement actions in this area indicate that it is not willing to let manufacturers and marketers make "Made in America" claims without adequate substantiation and evidence. So, then, understanding the FTC's guidance and analysis with respect to "Made in America" claims is essential.

### Basic FTC Advertising Principles

Under the FTC Act, all advertising must be truthful and non-deceptive, advertisers must have a reasonable basis to support their claims, and advertisements cannot be unfair. These advertising principles apply to the labels affixed to products, the claims made on a website, the advertisements and brochures run, and the claims that sales representatives make.

In evaluating whether an advertisement is *deceptive*, the FTC evaluates whether there is a statement or omission that is likely to mislead consumers acting reasonably under the circumstances, and whether that statement or omission is "material"—that is, whether it would impact the consumer's decision to purchase or use the product. In making these decisions, the deception is viewed through the eyes of the "reasonable consumer," the ad is viewed in context, and both "express" and "implied" claims are evaluated.

In evaluating whether an advertisement is *unfair*, the FTC evaluates whether it causes or is likely to cause substantial consumer injury which is not reasonably avoidable, balanced against whether the ad or practice is outweighed by the benefit to consumers.

Of course, much has been said and written about each of these elements but, for the purposes of this guidance, the high-level understanding should be a sufficient groundwork for understanding some of the more specific guidance related to "Made in America" claims.

## "Made in America" and Country-of-Origin Claims

When contemplating whether a "Made in America" claim is appropriate, the first step is determining whether your product has any country-of-origin labeling requirements. The U.S. Customs and Border Protection (Customs) requires that all products of foreign origin imported into the U.S. be marked with the name of the foreign country of origin. Likewise, U.S. products exported to another country may be subject to foreign laws governing country-of-origin labels.

As a basic principle, if Customs requires that your product be labeled "Made in [foreign country]" then that product cannot be labeled as "Made in America." However, the fact that a product is *not* required to be marked with a foreign country of origin does not necessarily mean that it is permissible to promote that product as "Made in America." Further, even if a foreign entity requires that your product be labeled with America as the country-of-origin, the product may still not meet FTC standards for "Made in America" labeling.

### Express and Implied Claims

In contemplating whether you can make a "Made in America" claim, you should evaluate whether you are already unintentionally making that type of claim. While, of course, some claims explicitly proclaim their American-made status by, for example, stating that they are "Made in the U.S.A," or "American Made," other products may wittingly or unwittingly lead consumers to think that they are American-made, even without stating it. For example, a label that says "Support our Nation," "Buy American," "True American Quality," or has a U.S. flag or map may give reasonable consumers the impression that these products are, in fact, made in America. As stated above, the FTC will look at the entire context of the ad and will look to the images, the language, and the messages conveyed. So it may be important to double-check existing products to make sure that no inaccurate claims are unintentionally conveyed.

### Specific FTC Guidance on "Made in America" Labeling

Assuming that you think there's a reasonable basis for a "Made in America" claim, you can then proceed with determining whether, in fact, there is adequate substantiation. The FTC requires that "all or virtually all" of a product must be of U.S. origin in order to qualify as "Made in America." The FTC explains that this means that all significant parts and processing that go into the product must be of U.S. origin and that the product should contain no—or negligible—foreign content.

This standard may be easy to state, but it is quite difficult to interpret. And, it is important to note that this standard differs from other labeling requirements that might appear to overlap. As stated above, the FTC standard differs from U.S. Customs' country-of-origin labeling. The standard also differs from other federal standards, such as the Buy American Act requirements and the Trade Agreements Act. This means that, just because your product meets these or other domestic preference requirements applicable to federal, state, and local government procurements, does not mean that it meets the FTC's "Made in America" standards.

It is also important to note that a California statute lays out a different standard for determining whether a product can be labeled "Made in America." Under California's Unfair Competition Law, it is unlawful to sell or offer for sale in California "any merchandise on which...there appears the words 'Made in the U.S.A.' ...or similar...when the merchandise *or any article, unit, or part thereof*, has been entirely or substantially made, manufactured, or produced outside the United States." Cal. Bus.

Prof. Code § 17533.7 (emphasis added). What this means is that the California standard, which evaluates each "article, unit, or part thereof" is a different analysis than the FTC's which looks at the proportion or role of the foreign material within the product as a whole.

Unfortunately, these multiple standards mean that advertisers and markets do not have a great deal of clarity as to how their claims may be evaluated. Any analysis of claim substantiation must then include a thorough analysis of FTC guidance, the potential market, and California state law.

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Under the FTC guidance, as a threshold matter, to be properly labeled "Made in America," the product's final assembly or processing must take place in the U.S. This means that the product's last "substantial transformation" took place in the U.S. According to the FTC, "a substantial transformation is a manufacturing or other process that results in a new and different article of commerce, having a new name, character and use that is different from that which existed prior to the processing."<sup>1</sup> Further guidance and interpretation is provided by the U.S. Customs Service, which provides an official definition and interpretations.

Assuming that the "substantial transformation" threshold is met, the FTC will then look to other factors to determine whether a product is properly labeled as "Made in America." These factors include, for example, the proportion of U.S. content and the remoteness of foreign content.

In determining the proportion of U.S. content, the FTC will examine, on a case-by-case basis, the percentage of the total cost of manufacturing that is attributable to U.S. costs (including parts and processing) as compared to the portion that is attributable to foreign costs. Thus, even if only a small portion of product's parts or processes are manufactured overseas, if these parts or processes represent a significant portion of costs or key elements of the finished product, then the product may not be labeled "made in America." For example, while the microchip itself is small and one of thousands of components comprising a computer device, it represents an expensive and important portion of the larger finished product. Accordingly, if the microchip is made outside the U.S., the finished product will not meet the "Made in America" standards. In contrast, a gas grill in which the grill and all of its major components are made in the U.S., but the knobs and tubing are imported, may accurately be labeled as "Made in America" (at least in the minds of the FTC; in California, the analysis may be different).

With respect to the analysis regarding the remoteness of foreign content, the FTC will, again, look at the product as a whole and determine the role that foreign materials play in the finished product. In the case of raw materials, if a product incorporates raw materials at an early stage—and only as a component of the larger finished product—then a "Made in America" claim is more likely to be acceptable. However, if foreign raw materials that make up a large percentage of the finished product and the raw materials are substantially the same (e.g., a gold ring or a ceramic tile made from foreign gold or ceramic, respectively) then a "Made in America" claim likely won't pass muster with the FTC.

#### Products with Partial U.S. Content or Processing

Given the standards laid out by the FTC and California, it is unsurprising that many products might have some difficulty in meeting the necessary "Made in America" standard. If this is the case, marketers may still be able to make qualified U.S.

origin claims, assuming, of course, that those claims are adequately qualified and any qualifications are clear, prominent, and understandable to consumers. Qualified claims could include language such as "70 percent U.S. content," "Made in the U.S. from imported metals," or "Made in the US from Swiss components." Alternatively manufacturers and marketers could include language such as "Designed in the U.S." or "Painted in America" so long as the qualified terms do not take the form of a general U.S. origin claim. Words like "assembled," "produced," or "created" might give the impression that the product was actually "made" in the US and should therefore have the adequate level of qualification and, according to FTC guidance, for these terms, the last substantial transformation must have occurred in the U.S.

Finally, the FTC provides guidance that a marketer can make the competitive claim "more U.S. content than our competitor" so long as the claim is true, supported by reliable evidence, and the basis of comparison is not exaggerated (i.e., if your competitor's product has 1 percent American content and your product has 1.5 percent American content).

### Best Practices

Any determination about the adequacy of a "Made in America" claim must be done on a case-by-case basis and re-evaluated regularly. When making such claims, companies should keep in mind the following:

- Document manufacturing processes, costs, and components. Manufacturers must understand their supply chains and the relative role that each element that is input into the product plays in the finished product. Keep this documentation handy and available for review should the FTC guidance change, should you need to replace a supplier, or should an inquiry begin.
- Regularly review FTC "Made in America" enforcement actions and the analyses used to determine whether a product meets the claim.
- Keep abreast of California "Made in America" enforcement and guidance; ensure that there are no other state laws which may impact your "Made in America" labeling.
- Communicate the "Made in America" guidelines to employees and make sure they understand the internal processes for reviewing and vetting the claims.
- Establish or publicize the process for employees to report mislabeled products or inquire about the labeling substantiation.
- If you learn of a mislabeled product, investigate how the mislabeling occurred and how widespread the issue is, implement remedial measures, and consider reporting the issue to the FTC.
- Remember that non-compliance can be costly. Repeat offenders can be fined as much as \$16,000 per offense.

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<sup>1</sup> Federal Trade Commission, *Enforcement Policy Statement on U.S. Origin Claims*, 1997.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Christopher A. Cole**

Partner – Washington, D.C.

Phone: +1.202.624.2701

Email: [ccole@crowell.com](mailto:ccole@crowell.com)

**Cheryl A. Falvey**

Partner – Washington, D.C.

Phone: +1.202.624.2675

Email: [cfalvey@crowell.com](mailto:cfalvey@crowell.com)