CLIENT ALERT

Proposed Legislation to Create a Uniform Standard for 'Made in America' Labeling

June 2015

In early June, a bipartisan bill was introduced in the U.S. Senate aiming to unify the "Made in America" labeling standard. Sponsored by Senators Angus King (I-Maine), Susan Collins (R-Maine), Mike Lee (R-Utah), and Deb Fischer (R-Neb), the Reinforcing American-Made Products Act of 2015 would give the federal government control over country-of-origin labels and preempt conflicting state standards.

The "Made in America" label has long been a valuable tool for differentiating consumer products. According to a May 2015 Consumer Reports article, "Almost 8 in 10 American consumers say they would rather buy an American-made product than an imported one, according to a recent Consumer Reports survey. And more than 60 percent say they're even willing to pay 10 percent more for it. For some, the decision might stem from a belief in American quality and safety. Others might think it's the best way to support the American economy and workers."

In her press release, Sen. Collins explained her motivation for the bill: "It is critical to do everything that we can to protect the intent of this standard, which allows for products to be labeled ‘Made in the USA' even if a small piece, such as a screw or a shoelace, is sourced from a foreign country. This common sense legislation will ensure a uniform standard across the nation and avoid unnecessary and costly hardships for companies who choose to support American jobs rather than ship them overseas."

The Current State of Labeling

The push to standardize the "Made in America" labeling requirements came from U.S. manufacturers who were hamstrung by the current regulatory landscape, in which companies face the difficult task of figuring out how to comply with two different "Made in America" frameworks: one under federal law enforced by the Federal Trade Commission (FTC) and the other under California law.

Currently, products may be labeled "Made in America" under federal FTC standards if "all or virtually all" of the product was made in the U.S. But California's False Advertising Law, which generally prohibits false and misleading advertising statements, includes a specific "Made in America" provision, California Business and Professions Code § 17533.7, that imposes a much stricter standard:

*It is unlawful for any person, firm, corporation or association to sell or offer for sale in this state any merchandise on which merchandise or on its container there appears the words "Made in the USA," "Made in America," "USA," or similar words when the merchandise or any article, unit or part thereof, has been entirely or substantially made, manufactured or produced outside of the United States.*

The difference between the federal and California labeling standard can result in dramatically different labeling requirements for the same product. For example, under the FTC's "all or virtually all" standard, a product is viewed in its totality and each
component part is evaluated for its role within the finished product. This means that a product may qualify for a "Made in America" label even if some of the component pieces are imported. However, under the more stringent California law that label could not be used because the "Made in America" label is prohibited "if any article, unit, or part thereof" is imported.

Proponents of the California law argue that requiring a high threshold promotes domestic manufacturing and guarantees that the label "Made in America" carries real weight. Those who favor the federal standard note that the California threshold is so high as to make compliance virtually impossible in a global marketplace and that, in any event, the risk of California lawsuits arising from using a few threads or buttons or other foreign components in the production process far outweigh any benefits from using a "Made in America" label. There is, however, agreement that the different labeling standards create confusion and compliance hurdles.

The Reality for U.S. Manufacturers Selling in California

Two recent court cases highlight this confusion and try to identify practical solutions.

In *Paz v. AG Adriano Goldschmied, Inc.*, plaintiffs brought a putative class action in the District Court for the Southern District of California against the manufacturers and sellers of jeans labeled "Made in the U.S.A." even though the "fabric, thread, buttons, rivets, and/or certain subcomponents of the zipper assembly are [allegedly] manufactured outside the United States." The defendants in *Paz* filed a motion to dismiss, arguing that the federal standards set out by the FTC preempted the California law. The court denied defendants' motion to dismiss on the grounds that Congress' delegation to the FTC of authority over "Made in America" labeling "is not the same as depriving other agencies or states from exercising that same authority." The court also explained that the labeling requirements of the federal Textile Fiber Product Identification Act (TFPIA), which requires that textiles processed or manufactured in the U.S. be so identified, also do not conflict with the more stringent California law. The court then suggested that manufacturers could comply with both regulatory frameworks by "simply indicat[ing] on the label that their products were 'Made in U.S.A. of imported fabric and components,' or something similar that accurately describes where the parts of the product and the product as a whole were sourced and made."

In April 2015, the same court expanded its labeling guidance in *Clark v. Citizens of Humanity, LLC*, which was also brought against manufacturers and sellers of jeans. In that case, the court echoed much of the language of *Paz* in holding that the California law does not impermissibly regulate interstate commerce and thereby violate the dormant commerce clause:

*Manufacturers and retailers can comply with California and federal law by using a qualified label on their products. It would not be impossible, or even difficult, to comply with the two laws at the same time. Manufacturers who choose, on their own, not to use one qualified label throughout the country must use a different label for products sold in California. § 17533.7 permits the use of qualified labels and, accordingly, § 17533.7 does not violate the dormant commerce clause.*

The court in *Clark*, as in *Paz*, suggested that companies can label their products with qualified "Made in America" labels such as "Made in America of globally sourced components." Although this guidance is helpful, there is nothing to suggest that California has interpreted its state law in that fashion. Prior to the *Paz* and *Clark* rulings, there was no guidance from the California Attorney General or from case law enforcing California's 52-year-old provision to suggest that use of a qualified claim such as "Made in America from Imported Parts" or "75 percent Made in America," would comply. The few recorded decisions did not
address qualified claims but merely recited what California law makes clear: merchandise containing even insignificant foreign parts cannot be labeled "Made in America."

It remains to be seen whether the federal district court's suggested use of qualified claims will be supported by California state courts, and until that answer is clear, risks remain for manufacturers as a result of the inconsistencies between the federal and California "Made in America" labeling regulations.

Proposed Bill(s) Would Address Inconsistencies

The recently introduced Senate bill would provide labeling certainty. According to Sen. Lee's press release for the proposed federal legislation, the bill seeks to "make use of the label less complicated, thus supporting American manufacturing jobs, limiting frivolous lawsuits, and strengthening the U.S. economy." The legislation would do this by "maintain[ing] a clear national standard" explaining that "[o]ne state has complicated our country standard, setting a rigid 100 percent threshold and exposing manufacturers to unnecessary litigation. The Reinforcing American-Made Products Act would fix that by creating one national standard."

A bill introduced in February in the California legislature would also align state and federal "Made in America" labeling regulations, but from the starting point of state law rather than federal preemption. The proposed California legislation would modify the existing California statute to mirror the FTC "all or virtually all" standard and ensure uniformity and consistency of enforcement by explicitly stating that the term "all or virtually all" would have "the same meaning as in the Enforcement Policy Statement" issued by the FTC. If this legislation passes it would resolve the issue, at least with respect to California, but the door would still be open for other states to create their own standards and new conflicting laws.

The fate of the proposed Senate and California legislative initiatives is not yet clear. Currently, the federal bill has been referred to the Senate Committee on Commerce, Science, and Transportation, and is in the early stages necessary to pass out of committee for a full vote. But until there is legislative or judicial clarity harmonizing these inconsistent standards, manufacturers should continue to track this issue and tread carefully when crafting and substantiating their "Made in America" claims.

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