

CLIENT ALERT

Rulemaking on the Way? The FTC is Seeking Input by October 11 on its "Made in USA" Claims Policy

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The Federal Trade Commission (FTC) is [soliciting comments](#) on its [1997 Enforcement Policy Statement on U.S. Origin Claims](#) and its ongoing enforcement of that policy. On September 26, 2019, the FTC held a workshop with [key stakeholders](#) to discuss how consumers perceive "Made in USA" claims, how advertisers and marketers comply with the standard, and whether the FTC's current enforcement strategy is effective.

At the outset of the Workshop, the FTC raised the possibility of engaging in formal rulemaking, noting that [15 USC §45a](#) gives it limited authority to promulgate rules for "Made in USA" claims that is less cumbersome than the typical rulemaking procedure, including the appropriate percentage of important components that would still be consistent with such a claim. However, the FTC's primary focus throughout the workshop was to understand how consumers perceive Made in USA claims—both what it means for a product to be "Made in USA" and what messages a "Made in USA" claim communicates to consumers. The FTC was particularly interested in understanding whether consumers' perceptions regarding the accuracy of a "Made in USA" claim might differ depending on the unavailability of materials in the United States, the specific product at issue, the sales platform, the identity of the competitors, and whether the competitors are using more or less foreign content or are bringing or removing jobs from the United States. In addition the FTC was interested in learning why stakeholders were generally reluctant to use qualifications (*e.g.* "Made in USA with fabric imported from Mexico.")

The Current "Made in USA" Policy: How Well Does it Work?

Under the current FTC policy, to make an unqualified Made in USA claim, the product must be "all or virtually all" made in the United States. This includes both labor and raw materials. In enforcing this policy, the FTC has not articulated any particular percentage of content that is sufficient to satisfy the "all or virtually all" standard. Instead, the FTC has given guidance primarily through public closing letters as well as informal counseling. The FTC noted that it has issued 154 closing letters from 2010 to date. While there have been 27 court actions in the last two decades, enforcement activity is reserved for the worst offenders.

Stakeholders participating in the workshop expressed frustration with the vagueness of the FTC's standards as well as the difficulty in complying with that standard. They advocated for bright line rules that they can easily apply to determine whether they can make an unqualified Made in USA claim.

In addition, the stakeholders also expressed frustration with conflicting frameworks within the United States such as the [Made in USA standard in California](#), the Buy America Act and the implementation of that Act by federal agencies, and U.S. Customs laws. As one workshop participant pointed out, for some products, a product is considered to be made in the United States for Customs purposes, requiring the company to pay all applicable VAT and duties when exporting because the last substantial transformation occurred in the United States. However, that same product cannot be marked as "Made in USA" in the United

States because the FTC's standard is so strict. In the case of the jewelry industry, for example, it is often impossible to identify the original source of the raw materials.

How Can the FTC Improve its "Made in USA" Policy?

The FTC made clear that any rules it adopts must comport with consumer expectations as to what "Made in USA" means and how consumers interpret those claims. The FTC was skeptical of the feasibility of implementing a bright line rule that would apply across the board, noting that a claim can be false or misleading if a substantial minority of consumers are misled (which the FTC identified as low as approximately 10.5% net of control). Citing consumer research, the FTC found that there are two distinct views among consumers as to when a product can be considered made in the United States: (1) nearly all of the costs or parts must be from the United States for the product to qualify as made in the United States and (2) a high percentage of costs or parts must be made in the United States. The second group constitutes the majority of consumers, but the first group still constitutes a substantial minority.

The FTC also queried whether perceptions of Made in USA claims have changed in the past several years. The FTC noted that the impact of globalization and current political sentiments is unclear and requested that stakeholders submit recent consumer survey evidence in their written comments.

The FTC raised the possibility that different standards may apply to different products. The FTC noted that this was possible even under the current framework. For example, if a product is designed and produced in the United States but where the raw materials are sourced abroad, the FTC recommended that the stakeholder submit a survey showing that an unqualified "Made in USA" claim was consistent with consumer expectations. However, in developing updated Rules, the FTC was interested in learning whether factors such as the unavailability of resources in the United States and efforts to repatriate jobs to the United States may impact how consumers perceive a "Made in USA" claim for a particular product or in a particular category.

How is the FTC's Current Enforcement Strategy Working?

Finally, the FTC asked the participants whether they felt that the FTC's current approach to enforcing the Made in USA policy was effective. While the stakeholders felt that the Policy was difficult to apply, the stakeholders also almost universally stated that the FTC's current enforcement efforts sent mixed messages to bad actors. The panelists felt that harsher penalties should be imposed on bad actors, citing the [Patriot Puck case](#) as an example of a "slap on the wrist" that does little to deter bad behavior.

While the FTC praised the low recidivism rate of companies that have received closing letters, some of the panelists disagreed with this assessment, observing that some recipients of closing letters have continued to make mistakes years later. In addition, some panelists expressed frustration with well-known companies that claim that their products are "Made in USA" when it is well known that the products contain a high percentage of foreign sources.

Closing Thoughts

"Made in USA" claims are popular among marketers. American consumers want products made in America for a wide variety of reasons, transcending political divides. For many consumers, buying "Made in USA" products signifies attributes such as higher

quality, no human rights abuses, no child labor, responsible sourcing, as well as protecting US jobs. Given the importance of these claims, the FTC has been under increased pressure to increase enforcement of deceptive “Made in USA” claims. However, marketers struggle to interpret the FTC’s abstract “all or virtually all” standard while also reconciling it with competing standards that paradoxically render a product of US origin when exported, but not within the United States. The time is ripe for the FTC to take another look at its “Made in USA” policy.

Marketers making “Made in USA” claims should consider submitting comments before October 11, 2019. The FTC’s list of questions is [available here](#).

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

Lauren Aronson

Counsel – Washington, D.C.

Phone: +1 202.624.2541

Email: laronson@crowell.com