

FTC proposal codifying "Made in USA" standard extends enforcement to online advertising, and enhances enforcement capabilities

2 July 2020

The Federal Trade Commission (FTC) on 22 June 2020 voted to adopt regulations codifying its long-standing Enforcement Policy Statement on U.S. Origin Claims (Policy Statement).¹ The proposed regulations come after the FTC staff held a workshop in September 2019 to discuss "Made in USA" (MUSA) claims and whether there was a need to update the policy or enforcement approach for such claims.² While the proposed regulations make no substantive changes to the "all or virtually all" standard articulated in the Policy Statement, they significantly expand enforcement of MUSA claims to include both offline and online MUSA claims and authorize the use of civil penalties, which could lead to more frequent and enhanced enforcement by the FTC. Comments to the Proposed Rule are due 60 days after publication of the proposed regulations in the *Federal Register*.³

Background

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, prohibits "unfair or deceptive acts or practices" in advertising, which include labeling claims, and requires advertisers to substantiate all reasonable interpretations of their advertising. In 1997 the FTC published its Policy Statement, a nonbinding document which states that to support an unqualified MUSA claim, the product should (1) undergo final assembly or processing in the United States and (2) the product's contents should be "all or virtually all" U.S. origin. Under this standard, only "negligible" or de minimis amounts of foreign content are permitted. If a product contains more than minimal foreign content, it may still be eligible for a qualified claim, such as "made in USA from U.S. and foreign ingredients." The Policy Statement is not binding as it was not issued via

¹ Press Release, "FTC wants your feedback about proposed Made in USA Rule" (22 June 2020), <https://bit.ly/3eK41nu>. See also, Enforcement Policy Statement on U.S. Origin Claims (1997), <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>.

² "Staff Report of the Bureau of Consumer Protection: Made in the USA, An FTC Workshop" (19 June 2020), <https://bit.ly/3eLh4F1>.

³ Comments can be submitted to the online docket for Commission Matter No. P074204.

notice-and-comment rule-making. It does, however, outline the FTC's approach to enforcement and over the years, the FTC has taken numerous enforcement actions over MUSA claims.⁴

In September, the FTC staff hosted a half-day workshop structured as a roundtable discussion with eight participants representing interested stakeholders, including members of industry, a nonprofit watchdog, and moderated by FTC staff members. The workshop addressed issues such as consumer perception, compliance and policy challenges, and the FTC's enforcement approach. In particular, FTC staff sought feedback on the potential codification of the existing Policy Statement.

Codifying the "all or substantially all" standard

The FTC has determined not to alter the long-standing "all or substantially all" standard first adopted in 1997. Having received no contrary evidence in the comments received during and after the workshop, the FTC staff found the Policy Statement's "all or virtually all" standard continues to represent the most current advice to marketers on how to comply with Section 5 of the FTC Act and the Proposed Rule applies that standard. Under the proposed § 323.2 advertisers cannot "label any product as Made in the United States unless the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States."

This strict standard prohibits an unqualified Made in USA claim if there is more than de minimis foreign content in an article. Where a product is manufactured or assembled in the United States using foreign materials or ingredients, any claim concerning U.S. manufacturing or content must qualify the origin statement by disclosing the existence of foreign materials or processing.

Extending enforcement to online advertising

Section 323.3 of the Proposed Rule would extend the MUSA labeling standard beyond on-product labeling to other media as well, such as online advertising. Specifically, § 323.3 would apply the standard to "any mail order catalog or mail order promotional material." These terms are further defined to mean "any materials, used in the direct sale or direct offering for sale of any product or service, that are disseminated in print or by electronic means, and that solicit the purchase of such product or service by mail, telephone, electronic mail, or some other method without examining the actual product purchased."⁵

Because the term "label" is not defined in the FTC Act, there is significant debate, among Commissioners and the public alike, over the FTC's legal authority to regulate MUSA claims in online advertising. Some argue extending the standard to "mail order catalogs" and "mail order promotional material" goes too far. Others suggest it is consistent with FTC precedent related to label disclosures for other products, such as wool and textiles.

Enhancing enforcement

A perceived laxity of enforcement of the FTC policy was a frequent subject for comment during the recent panel exercise. In response, the FTC notes that the codification of its policy will itself support more vigorous enforcement of the rule. Because the Policy Statement is nonbinding, to date the FTC's ability to enforce the "all or virtually all" standard has been limited to litigation, which is costly and time-consuming. Therefore, the FTC tends to reserve litigating for particularly

⁴ The FTC's staff report on the MUSA workshop notes that the FTC has issued 150 closing letters and 24 administrative Decisions and Orders, and entered into four federal court settlements related to MUSA claims in the 23 years since the Policy Statement was published in 1997.

⁵ Proposed § 323.1(b) Definitions.

egregious or persistent violators. More typically, as the Staff Report explains, FTC staff counsels advertisers into compliance through less formal channels.

During the workshop, some panelists suggested that the FTC's enforcement strategy has failed to deter bad actors because there have been so few newsworthy enforcement actions related to MUSA claims. The FTC sees the Proposed Rule as a partial remedy to this issue. According to the FTC, codified regulations would allow the staff to pursue administrative enforcement measures, and could also enhance deterrence by authorizing civil penalties of up to US\$43,000 per violation against those making unlawful MUSA claims on product labels.

Commissioner comments

Several of the Commissioners have issued statements regarding the Proposed Rule, providing stakeholders with some direction as to the issues in-play that might be addressed in comments.⁶ A primary point of contention involves the scope of the Commission's statutory authority as it relates to what constitutes a "label." Commissioners Wilson and Phillips suggest that expanding the "all or virtually all" standard to online content exceeds the bounds of the FTC's authority, setting the FTC up for a rebuke from Congress, the Courts, or both. In response, Commissioner Chopra's statement argues that the scope of the Proposed Rule is consistent with the Commission's statutory authority and definition of a "label" found in other statutes enforced by the FTC. Commissioner Chopra also expressed concern that Commissioners Wilson and Phillips legal positions are "regrettable" because they provide a roadmap for those seeking to challenge the Proposed Rule.

Conclusion

Stakeholders and other interested parties should view the rule-making as a valuable opportunity to weigh-in on how the FTC uses its authority to address alleged deceptive "Made in USA" and like claims. Please contact us if we can be of assistance in preparing comments or to otherwise assess the implications of this rule-making.

⁶ Statement of Commissioner Christine S. Wilson Concurring in Part and Dissenting in Part (22 June 2020), <https://bit.ly/2VoBKv5>; Dissenting Statement of Commissioner Noah Joshua Phillips (22 June 2020), <https://bit.ly/2Vv5SVv>; Statement of Commissioner Rohit Chopra (22 June 2020), <https://bit.ly/3i7xhXr>.

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