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Avoiding “Made in America” Claims

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Businesses that advertise their products as made in the United States can face costly challenges from government agencies, consumers, and competitors unless their products meet strict standards. This article will summarize the basic requirements that manufacturers and marketers must meet to make country-of-origin-related statements on their products; overview how claims, grounded in these standards, arise from various sources; and provide some practical recommendations on how to avoid litigation and investigation over those statements.

The “Made in America” Standards

Statements of domestic origin on product labels and in advertising are not governed by a single, uniform standard. Pertinent standards include the Federal Trade Commission’s (FTC) Made in USA Labeling Rule and prior policy guidance, industry-specific rules, and the California rule.

> **The FTC affirms its “all or virtually all” standard.** The FTC’s Made in USA Labeling Rule and prior policy guidance occupy a prominent role in what it means to be “Made in America” in a wide variety of contexts.
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> For years, the FTC regulated statements of domestic origin, such as “Made in America,” through a handful of policy statements, decisions, and orders. *See* Fed. Trade Comm’n, Complying with the Made in USA Standard (Dec. 1998); FTC Policy Statement on Deception (Oct. 14, 1983), *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).
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> This changed in 2021, when the FTC used its rulemaking powers to enact a federal regulation on the subject—the Made in USA Labeling Rule. Made in USA Labeling Rule, 86 Fed. Reg. 37022-01 (July 14, 2021) (codified at 16 C.F.R. pt. 323). This new rule, designed to codify the FTC’s existing guidance, does not set a bright-line standard but instead continues the “all or virtually all” approach that the FTC has used for decades. Specifically, the rule prohibits the use of any unqualified statement that a product is “Made in the United States” or other express or implied

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statement of U.S. origin "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." 16 C.F.R. §§ 323.1, 323.2 (2021).

As with prior guidance, the new rule allows for the use of *qualified* "Made in America" statements. Therefore, manufacturers and marketers may make more limited statements of domestic origin if they are not misleading. In a list of examples published with the rule, the FTC noted that it would be permissible to make statements such as "Assembled in the USA," statements regarding the amount of domestic content (e.g., "60% U.S. Content"), and statements about the parts of materials that are imported (e.g., "Made in USA from imported leather"). Made in USA Labeling Rule, 86 Fed. Reg. 37022-01, 37030–31.

The rule filled a gap in the FTC's enforcement toolbox following the Supreme Court's decision in *AMG Capital Management, LLC v. Federal Trade Commission*, in which the Court held that the FTC Act does not grant the agency the right to seek equitable monetary relief such as disgorgement or restitution. 593 U.S. 67, 75–78 (2021). Violation of the new rule is deemed a violation of § 18 of the FTC Act, allowing the FTC to seek civil penalties of $50,120 per violation.

Many federal agencies have their own industry-specific rules. Other federal agencies, many of which share jurisdiction with the FTC to regulate product labeling, have their own rules governing the use of statements about product origin. For example, the U.S. Department of Agriculture's comprehensive Country of Origin Labeling (COOL) standards provide details on the circumstances under which certain products may be labeled as domestic and foreign. *See, e.g.*, Country of Origin Labeling for Fish and Shellfish, 7 C.F.R. pt. 60 (2009).

California's rule contains a bright-line standard. California has long had its own statute that prohibits deceptive "Made in America"–related labeling and advertising. Originally very strict, the California legislature amended it in 2016 to more closely align it with the FTC's standard. Unlike the FTC rule, however, the California rule does contain a bright-line standard.

Section 17533.7 of the California Business and Professions Code prohibits the use of a label that states "Made in USA" or has other, similar language if more than "5 percent of the final wholesale value of the manufactured product" is obtained from outside the United States. Cal. Bus. & Prof. Code § 17533.7 (a)–(b) (2016). In

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addition, when the manufacturer can show that it cannot produce or obtain a particular article, unit, or part in the United States, the produce may contain non-U.S. materials that "constitute not more than 10 percent of the final wholesale value of the manufactured product." *Id.* § 17533.7(c).

How Claims Arise

Claims can arise from the government, competitors, and consumers.

The government brings enforcement claims under the "all or virtually all" standard. Upon issuing the Made in USA Labeling Rule, FTC Commissioner Rohit Chopra issued a statement that the final rule "provides substantial benefits to the public by protecting businesses from losing sales to dishonest competitors, and protecting families seeking to purchase American-made goods." Public FTC Statement, Prepared Remarks of Commissioner Rohit Chopra on a Motion to Adopt the Final Made in USA Rule (July 1, 2021). To this end, the FTC has continued to bring enforcement actions against violators of the "all or virtually all" standard, including at least 10 cases since the rule was issued.

On January 26, 2024, the FTC announced its largest-ever enforcement action for a "Made in America" violation. In a stipulated order issued in federal court the day before, Kubota North America Corporation and several of its subsidiaries were ordered to pay a penalty of $2 million. The order also enjoined Kubota from making false or misleading "Made in America"–related statements and required the company to engage in several compliance procedures for the next 20 years. *United States v. Kubota North America Corp.*, No. 3:24-cv-159 (N.D. Tex. Jan. 25, 2024).

While the FTC will continue to pursue violators of the Made in USA Labeling Rule, it is likely that the agency will direct its limited resources to redress clear violations and repeat offenders. For example, Kubota had previously been the subject of an enforcement proceeding involving false "Made in America" statements that had subjected the company to another 20-year order, which expired only shortly before the most recent action. Most cases end with orders under which the violators agree to pay penalties that, while significant, do not approach the civil penalty in the *Kubota* action.

Competitors bring enforcement claims under unfair competition laws. Businesses have successfully targeted their competitors' false or misleading "Made in America" labeling using various state and federal statutes prohibiting

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unfair competition. One common claim in this context arises under § 43(a) of the Lanham Act, which prohibits the use of any "false designation of origin" and provides a private right of action "by any person who believes that he or she is likely to be damaged by such act." 15 U.S.C. § 1125(a)(1)(B) (2012).

The FTC's guidance has previously been used by plaintiffs in such cases to explain the standard for labeling a product as "Made in America." *See, e.g.*, *Rocky Brands, Inc. v. Red Wing Shoe Co., Inc.*, No. 2:06-CV-00275, 2009 WL 10679619, at *7 (S.D. Ohio Dec. 9, 2009) (denying motion *in limine* and ruling that the FTC's "all or virtually all" standard is relevant to the plaintiff's Lanham Act claims). It is likely that the implementation of a regulation that carries the force of law will further establish the "all or virtually all" standard as the primary measurement in domestic false-designation-of-origin labeling claims.

Consumers file class actions targeting product labels. The most dangerous category is likely consumer-originated claims. It is hardly news that class actions targeting product labels, particularly food labels, have exploded in recent years. Given the lawyer-driven nature of most class actions, attacks from this angle are more likely to push the envelope and challenge subtle aspects of a product label. Due to the dynamics of class action, these cases are not only costly to defend but also can be complex and difficult to resolve in a way that offers protection for a business.

Recommendations for Avoiding Claims

Regularly review your labeling and advertising. Businesses occasionally change their production model to rely more heavily on foreign materials and labor. Therefore, a label that at one time accurately described a product as "Made in America" may now be a liability. This is particularly true for businesses manufacturing complex, multi-component products, or those forced to expand production to meet increased demand.

The FTC's enforcement action against Instant Brands, the manufacturer of Pyrex-brand kitchen and home products, illustrates this issue. According to the FTC's complaint, Instant Brands faced increased demand for its glass measuring cups in the early days of the COVID-19 pandemic, when consumer interest in home baking spiked. While Pyrex had long used the U.S. origin of its products as a selling point, from March 2021 to May 2022, Instant Brands produced some Pyrex cups in China. When the production shifted to China, the company continued to market the

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Chinese-made products on Amazon as "Made in USA," despite the cups themselves being marked "Made in China." The consent order that Instant Brands entered into required it to pay a $129,416 judgment and enjoined the company from making unqualified and qualified "Made in America" claims. *In re Instant Brands, LLC*, FTC Docket No. C-4788 (Mar. 2023) (decision and order).

As illustrated by the *Instant Brands* case, the review should not be limited to the physical product label alone but should encompass other advertising, such as the company's website and social media.

Be prepared to back up your claims. It is critical for businesses to maintain documentation substantiating the domestic sourcing and production of their products. While the particulars will vary, there are two areas that businesses should reexamine and consider improving.

First, manufacturers and marketers that purchase components or raw materials from suppliers may generally rely on good faith information that the supplier provides about the domestic content of those items. However, FTC guidance suggests that manufacturers and marketers are under a duty to make basic inquiries of the supplier about the percentage of U.S. content of the goods that they supply. Made in USA Labeling Rule, 86 Fed. Reg. 37022-01, 37027 (July 14, 2021).

The FTC suggests using the following language on a purchase order: "Our company requires that suppliers certify the percentage of U.S. content in products supplied to us. If you are unable or unwilling to make such certification, we will not purchase from you." Then, under that statement, place the following sentence, leaving space for the supplier to fill in the relevant information: "We certify that our ___ have at least ___% U.S. content." The FTC notes that a "company generally could rely on a certification like this to determine the appropriate country-of-origin designation for its product." Fed. Trade Comm'n, Complying with the Made in USA Standard, *supra*, at 6–7.

In addition to certifications such as these, distributing written policies to suppliers and performing periodic inquiries memorialized in writing all provide useful evidence that a business can use to substantiate its "Made in America" claims during an investigation or litigation.

Second, when a company sells some brands that do make "Made in America" claims and others that do not, it is imperative to keep records that show a clear separation of the inputs for each product line. In this scenario, discovery and investigations

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may easily reveal evidence of foreign sourcing and manufacturing that relate to the non-American product. If the company does not have adequate controls and documentation to track which materials went into which products and where each was manufactured, such evidence can taint perfectly legitimate “Made in America” statements.

Don’t overpromise. It is important for businesses to determine *whether* “Made in America” labeling is important to their purchasers and, if so, *why* it is important. Depending on the answers to these questions, a qualified claim regarding product origin or no claim at all may be advisable.

When defending a product labeling class action or Lanham Act claim, defendants commonly retain experts to perform surveys explaining which aspects of a product’s labeling and advertising are material to consumers. For many businesses, particularly small businesses, these surveys may be their first market research directed to the perceived import of “Made in America” statements. Such surveys often reveal that while “Made in America” representations are important to some consumers, they may not be among the chief factors motivating the majority of purchasers.

Even when a “Made in America” claim is important to the purchasing decision, consumers may be motivated by one aspect of the product’s American-ness over others. In depositions, plaintiffs frequently testify that particular issues, such as American jobs or supporting certain American industries, are important to them, and they may discount the importance of where the company sourced the product’s materials. For other products, the domestic source of the materials may be the critical issue.

The “Made in America” standard imposes a compliance cost on a business, and deviation from the standard exposes it to potential liability. Therefore, in situations where the business’s ability to comply with the “all or virtually all” standard is borderline or frequently changing, the company should consider making a *qualified* claim rather than an *unqualified* claim. It may well be the case that for the vast majority of consumers, the statement “Made in the USA with global materials” is not meaningfully different from “Made in the USA.”

Limit the ability of plaintiffs’ attorneys to fish for potential claims. Companies must balance the desire to be trustworthy and transparent with revealing unnecessary information that could make them targets. In the context of “Made in America” claims, one starting point for attorneys seeking to construct a class action

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is the import information from vessel manifests, which they can use to identify companies that import products into the United States. If the same company is making unqualified "Made in America" claims even for some of its products, a class action lawsuit may be born.

A member of the public may request information from vessel manifests from the U.S. Customs and Border Protection (Customs). Anticipating this type of request, "an importer or consignee may request confidential treatment of its name and address contained in inward manifests . . . [and] of the name and address of the shipper or shippers to such importer or consignee[.]" 19 C.F.R. § 103.31(d)(1) (1981). Businesses making "Made in America" claims that import products for any purpose should make such a request with Customs to maintain the confidentiality of the vessel manifests for their imports. This is simple and can be done on the Customs website.

Retain outside counsel promptly. When in-house counsel receives a letter regarding alleged noncompliance with "Made in America" standards, it is important to consult outside counsel promptly. Initial communications from the government and attorneys normally warrant a review of existing labeling and advertising, implementation of a litigation hold, and a need to marshal evidence in support of the business's compliance with the "Made in America" standard.

A timely and credible response to such communications will sometimes end the inquiry. Even if it does not, the proper response and investigation will certainly be critical to limiting a business's exposure in any ensuing investigation or litigation.

Conclusion

The potential benefits of "Made in America" marketing will continue to entice bad actors to falsely label their products, inevitably leading to enforcement actions and lawsuits. But due to the complexities in the law and the constantly changing nature of business, even well-meaning companies must remain vigilant to ensure that their labeling and advertising do not result in unwanted investigations and litigation that divert resources away from their true mission.

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