FTC Toughens Enforcement of "Made in America" Labels

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In 1994, shortly after the U.S. entered into the North American Free Trade Agreement, Congress sought to regulate misuse of the "Made in U.S.A." or "Made in America" label on goods. In the words of current Federal Trade Commissioner Rohit Chopra, the legislation was written to "protect the integrity of our national brand by explicitly authorizing the Federal Trade Commission (FTC) to trigger penalties and other relief for 'Made in U.S.A.' fraud, but only after formally codifying a rule."

The problem, however, is that in the time since the legislation was passed, the FTC has never issued a rule on the matter due to ongoing debate as to whether the misuse of the "Made in U.S.A." label should be subject to monetary penalties. Even without a specific rule, the FTC has still enforced standards and regulated the use of "Made in U.S.A." labels. Historically, the FTC has entered into consent orders with companies that it charged with misusing the "Made in U.S.A." label. However, absent a rule, the FTC has been unable to seek monetary penalties.

After 27 years, however, the situation has changed. On 14 July 2021, the FTC published a rule aiming to "crack down" on misuse of "Made in U.S.A." and "Made in America" labels. As a result, the FTC is now empowered to seek redress, damages and other relief for those who misuse the "Made in U.S.A." label, including civil penalties of up to US$43,280. The rule went into effect on 13 August 2021.

The text of the rule itself essentially codifies the language of the FTC's 1997 Enforcement Policy Statement on U.S. Origin Claims. It defines the term "Made in the United States" as meaning express or implied unqualified representations that the product, service, or component was made, manufactured, built, produced, created or crafted in the U.S. The rule also regulates representations other than words, such as the use of the U.S. flag on labels. It is also significant that the representation must be unqualified to be subject to the rule.[1]

The rule characterizes the use of a "Made in U.S.A." label as an unfair or deceptive act or practice unless the good or service can fulfill three requirements:

- The final assembly or processing of the product occurs in the U.S.
- All significant processing that goes into the product occurs in the U.S.
- All or virtually all ingredients or components of the product are made and sourced in the U.S.

The use of the word "and" in the text of the rule means that a product or service must fulfill all three requirements in order to properly carry the "Made in U.S.A." label. In deciding on this standard, the FTC rejected other proposed standards, including one which suggested that the FTC implement a bright-line rule based on the percentage of American-made components or ingredients in relation to the whole product. The FTC also rejected a proposed standard which would allow companies to use an unqualified label if the imported components are not available in the U.S. Ultimately, the FTC determined that the "all or substantially all" standard, meaning the product contains only a "*de minimis,* or

negligible, amount of foreign content," accurately represented consumer expectations.

Every industry where unqualified "Made in the U.S.A." labels are used will be affected by this new rule. In its press release, the FTC referred expressly to the agricultural sector. The Commission noted cooperation with the Department of Agriculture in combatting the misuse of the "Made in U.S.A." label in the beef and shrimp industries. One industry that has expressed concern is the jewelry industry, which may struggle with the rule given the fact that the most components of jewelry are imported into the United States.[2]

There are, however, two important things to keep in mind regarding the scope of the rule. Firstly, the rule only applies to unqualified representations that the product is "Made in U.S.A." Secondly, the rule only applies to labels on products or packaging (including labels used in mail-order catalog or mail-order promotional materials), and not to other advertising (although even on this issue there is some debate).

Unqualified Representations

An unqualified representation is exactly that: "Made in the U.S.A." with no limitations or qualifications. During the notice and comment period, United Steelworkers commented that the FTC should also "ensure that qualified claims accurately represent the level of value creation in the United States." The FTC concluded, however, that the new rule should be limited to unqualified claims. Thus, misuse of a qualified "Made in U.S.A." label will continue to be regulated by the FTC under its general authority, without the damages and penalties available under the new rule.

Labels vs. Advertisements

The underlying legislation for the new rule applies only to labels on goods or in mail-order materials, and not to other advertisements. The FTC can and does take enforcement action where inaccurate U.S. origin claims are included in advertising, but the language of the rule exclusively refers to "labels." The FTC confirmed this in its press release, meaning the civil damages and penalty provisions of the new rule will not be available in advertising enforcement.

FTC Commissioner Christine S. Wilson dissented to the proposed rule on the basis that the rule exceeds FTC authority. In Commissioner Wilson's opinion, the label-only language of the rule is not enough to prevent the FTC from exceeding the scope of its statutory authority. She contends that it would allow the FTC to regulate online advertising, paper catalogs and other advertising marks, such as hashtags, which is not provided for in the legislation.

Regardless, given the language of the rule and the press release, it seems the FTC is committed to only utilizing the new rule against the misuse of labels, not against advertisements or other marketing materials. Attempts to extend the scope of the rule beyond labels, to include advertisements and other materials, will likely lead to litigation regarding whether the FTC is exceeding its statutory authority.

Conclusion

The new rule does not impose any new requirements on businesses, but does add the risk that violations can now also lead to civil damages and penalties. The intent of the rule is twofold: to give buyers confidence that the "Made in America" labels on the goods they purchase are truthful; and to protect American manufacturers from being harmed by the sale of falsely labeled goods that do not meet the "Made in America" requirements. In practice, however, some domestic businesses may not always be in a position to know — and prove — that all ingredients, assembly and processing throughout the entire supply chain are domestic. So, strategies and controls to prove the country of origin should be adopted by any company using "unqualified" labels. Where full compliance cannot be confirmed, companies can consider "qualifying" their representations.

References

1. Federal Trade Commission, "FTC Issues Rule to Deter Rampant Made in USA Fraud," 1 July 2021, http://www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud.
2. R. Bates, "Most Jewelry Can't Be Called "Made in USA" Under FTC Rule," 8 July 2021, https://www.jckonline.com/editorial-article/jewelry-made-in-usa-ftc-rule. ✦