FTC Maintains Its Focus on "Made in the USA" Claims

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During the myriad legal challenges presented by doing business during a global pandemic, it would be easy for marketing departments to lose sight of Federal Trade Commission (FTC) regulations governing such seemingly mundane claims as "Made in the USA" (MUSA); however, given recent FTC activity, companies that market products as MUSA would be well advised to remain vigilant and ensure that "all or virtually all" of their products' components are domestically sourced before making such claims.

Standard for Claiming a Product Is "Made in the USA"

Numerous consumer studies reveal that customers have high expectations—and are willing to pay more—for products that are made in the United States. Studies submitted to FTC reveal that almost three in five Americans agree that "Made in America" means that all parts of a product originated in the U.S., and other studies note that consumers are willing to pay as much as 28 percent more for such products. The premium placed on MUSA products has led FTC to scrutinize these claims as it seeks to protect consumers against false and misleading advertisements.

Section 5 of the FTC Act provides that "unfair or deceptive acts or practices in or affecting commerce…are…declared illegal."[1] FTC defines "deception" as an act that involves a material representation, omission or practice that is likely to mislead a consumer acting reasonably under the circumstances. An act is "unfair" if it causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers.

FTC has been scrutinizing MUSA claims for more than 70 years and, in 1997, issued an Enforcement Policy Statement on U.S.-Origin Claims ("Policy Statement"), which provides that in order to make an unqualified "Made in the USA" claim, marketers should have a reasonable basis for asserting that "all or virtually all" of the product is made in the United States.[2] All of the significant parts and processing that go into the product must also be of U.S. origin. In determining whether "all or substantially all" of a product is made in the USA, FTC primarily analyzes three factors:

1. Where the site of final assembly or processing takes place;
2. How much of the product's total manufacturing costs can be assigned to U.S. parts and processing; and
3. How far removed any foreign content is from the finished product.[3]

Notably, these rules apply equally to retailers selling products and manufacturers that produce the product packaging.

The Policy Statement also provides guidance on how to make qualified claims for products that, although substantially transformed and assembled in the U.S., contain more than small amounts of imported elements. Such claims can properly be qualified as "Assembled in the U.S." or "Made in the USA with imported parts."

In addition to explicit MUSA claims, FTC also regulates implied, or non-explicit, marketing claims relating to product origin. Thus, even if the words "Made in America" or MUSA do not appear on product labeling, consumers may reasonably infer a product has domestic origin if, for example, it includes the statement "American Quality" or the image of an American flag. These complex rules often require significant consideration by companies about component sourcing, manufacturing, logistics, and advertising strategy.[4]

In September 2019, as part of its periodic

review of the Policy Statement, FTC held a public workshop, and, in June 2020, released a report addressing, among other things, whether consumer perceptions of MUSA claims had changed, thereby warranting a shift in regulatory enforcement. FTC concluded there was no reason to change its enforcement practices because consumers continue to expect products "Made in the USA" to be "all or virtually all" made in the United States.

In June 2020, FTC also announced a Notice of Proposed Rulemaking for a Made in the USA Labeling Rule ("Proposed Rule") that would apply to unqualified MUSA claims.[5] If enacted, the Proposed Rule would codify the standards for unqualified claims set forth in the Policy Statement and prohibit marketers from making unqualified MUSA claims on product labels unless:

- 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 of the ingredients or components of the product are made and sourced in the United States.

The Proposed Rule would also apply to unqualified MUSA claims appearing in mail order catalogues and mail order advertising, which are defined as "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." The rule is not intended to supersede any other federal law or state laws, which FTC recognizes may provide greater consumer protection than the Proposed Rule contemplates. Significantly, the Proposed Rule also contemplates the imposition of civil penalties, even for first-time offenders. The period for public comment on the Proposed Rule is set to end on Sept.14, 2020.

Violations of MUSA Can Prove Costly

Over the years, FTC has brought enforcement actions against a water system company for falsely claiming its filtration systems were "Proudly Built in the USA;" a hockey-puck company that advertised its pucks as "The only American Made Hockey Puck!," "100% Made in the USA!," and "#AmericanMade," when in numerous instances the pucks were imported from China; an outdoor gear company that advertised its products as "American Made products developed and manufactured by our [U.S.-based] sister company" and "#madeinusa," when more than 95 percent of the finished products were imported as finished goods from countries outside the U.S.; and a mattress company that falsely advertised its Chinese-made and fully assembled mattresses as "Designed and Assembled in the USA." These matters were resolved through administrative actions that resulted in consent orders prohibiting the companies from making unqualified MUSA claims unless they can show that all or virtually all of the components are sourced in the U.S. For example, if a company is going to describe a product as "Assembled in the USA," it must ensure that the product is last substantially transformed in the U.S., its principal assembly took place here, and that its U.S. assembly operations are substantial. Any qualified claims must include a clear and conspicuous disclosure about the extent to which the product contains foreign parts, ingredients, and/or processing. When a consent order is entered on a final basis, it carries with it the force of law, and future violations can result in a civil penalty of up to $43,280.

FTC's settlement earlier this year with Williams-Sonoma Inc. (W-S) illustrates just how costly it can be to make unsubstantiated MUSA claims. In that case, the company agreed to stop making false, misleading or unsubstantiated MUSA claims for its Goldtouch Bakeware products, its Rejuvenenated-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products, all of which were advertised as all or virtually all made in the United States. The case originated in 2018, when FTC received reports that the company advertised its Pottery Barn teen organic mattress pads as "Crafted in America from local and imported materials" when, in fact, the mattress pads were made in China. W-S agreed to remove the claim from the product advertisements and, after also agreeing to undertake a larger review of its country-of-origin verification process, FTC closed its investigation in 2018. After the investigation was closed, W-S continued to advertise certain products as made in America or the USA when the products were wholly imported or contained significant imported materials or components. In a settlement announced in March 2020, W-S agreed to pay $1 million to FTC and entry of an order that prohibits the company, its officers and any other company representatives from making untrue, misleading or unsubstantiated country-of-origin claims in their marketing materials about any product or service.[6]

Best Practices for Making MUSA Claims

Recent activity, including the Proposed Rule, confirm that notwithstanding all of the other demands on its time and enforcement priorities, FTC will continue to regulate MUSA claims. Companies that currently make such claims and sell such goods, and those that are considering advertising country-of-origin claims, would be well advised to closely analyze the source of all of their product components, including packaging, labeling and ingredients. Instead of relying on verbal assurances from product manufacturers or component vendors, marketers—including retailers—should secure documentation certifying the country of origin. Ideally, these certifications should be backed up by contracts in which the certifying party agrees to indemnify and defend any claims challenging the country of origin. Last, it is important to remain vigilant; changes in product manufacturing, including components and ingredients, should trigger renewed due diligence to ensure that the "modified" product is still "Made in America." **NIE**

References:

1 15 U.S.C. Sec. 45(a)(1).

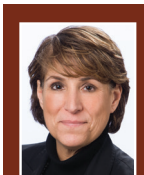
2 See www.ftc.gov/sites/default/files/documents/federal_register_notices/made-usa-and-other-u.s.origin-claims/971202madeinusa.pdf.

3 FTC has prepared a guidance that helps determine when it is appropriate to make an unqualified Made in the USA claim, which is available here: www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.

4 FTC has published guidance to assist companies in analyzing whether products meet regulatory standards for MUSA claims, available at www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.

5 The FTC Notice of the Proposed Rule is available at www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-13902.pdf.

6 Although beyond the scope of this article, it is important to note that, in addition to regulatory oversight over MUSA claims, consumer advocates also have standing to enforce MUSA rules through consumer class actions. Unlike regulatory actions, which typically focus on rectifying the challenged practice, these class actions focus on false advertising under state law and typically seek to impose substantial penalties in the form of damages and significant attorneys' fee awards.



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