International Trade Update

July 2021

Federal Trade Commission Issues Final Rule on "Made in USA" Claims

On July 14, 2021, the Federal Trade Commission ("FTC") published in the *Federal Register* (86 Fed. Reg. 37022-35) its final rule for "Made in USA" and other unqualified U.S.-origin claims ("unqualified U.S.-origin claims") on product labels. The final rule is effective on August 13, 2021.

The final rule codifies a longstanding FTC policy and practice that a product or service with an unqualified U.S.-origin claim, whether express or implied, on its label cannot contain more than a *de minimis* amount of foreign origin. The final rule also addresses mail order catalogs or mail order promotional material that include a seal, mark, tag, or stamp that identify a product with an unqualified U.S.-origin claim.

Background

The term "Made in USA" means any unqualified representation, express or implied, that a product or service, or a specified component thereof, is of U.S. origin, including, but not limited to, a representation that such product or service is "made," "manufactured," "built," "produced," "created," or "crafted" in the United States or in America, or any other unqualified U.S.-origin claim.

This final rule evolved from the FTC's practice of preventing deceptive unqualified U.S.-origin claims under its general authority under Section 5 of the FTC Act. Section 5 prohibits unfair or deceptive acts or practices in or affecting commerce. Under this provision, the FTC has deemed an act or practice as deceptive if "it is likely to mislead consumers acting reasonably under the circumstances and is material – that is, likely to affect a consumer's decision to purchase or use the advertised product or service." According to the FTC, a claim "need not mislead all – or even most – consumers to be deceptive under the FTC Act. Rather, it need only be likely to deceive some consumers acting reasonably."

The July 14, 2021 final rule resulted from an FTC-sponsored public workshop and a public comment period, where there was "nearly universal support" for a rule on "Made in USA" labeling. The final rule is also viewed as consistent with more than 70 years of FTC "Made in USA" decision and orders.

Based on its final rule, the FTC will determine that promoting or offering for sale a product or service with an unqualified U.S.-origin claim, whether express or implied, is an unfair or deceptive act unless:

- The final assembly or processing of the product occurs in the United States,
- All significant processing for 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.

What Does the Rule Cover?

The FTC declined to adopt a definition that includes a list of specific examples but made clear that the definition of label extends beyond labels physically affixed to a product.

The final rule does not cover all "Made in USA" claims in advertising; it only covers "labels" appearing in "all contexts, whether, for example, they appear on product packaging or online." In a July 1, 2021 press release announcing the final rule, however, the FTC stated that it "will continue to bring enforcement action against marketers that make deceptive U.S.-origin claims falling outside the rule under Section 5 of the Federal Trade Commission Act," which addresses unfair or deceptive acts or practices. *See* https://www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud.

While alternative standards were considered to the longstanding "all or virtually all" standard, the FTC declined to: (1) adopt a bright-line, percentage-based standard; (2) include a broad carve-out for inputs not available in the United States; (3) incorporate the ''substantial transformation'' standard used by the U.S. Customs and Border Protection in certain instances; or (4) provide a safe harbor for good-faith efforts to comply. Marketers and other covered persons under this final rule, however, are allowed to petition the FTC and seek full or partial exemptions if they can demonstrate that the application of the rule's requirements to a particular product or class of product is not required to prevent the deceptive labeling acts or practices addressed by the final rule.

The final rule does not supersede or alter other federal or state statutes, regulations, orders, or interpretations regarding labeling of products, provided they are not inconsistent with this final rule. For example, if a state's statute, regulation, order, or interpretation provides a consumer with a greater degree of protection against deceptive claims, then such a state-level mandate is permitted. The final rule makes clear that it does not supersede or alter any U.S. Department of Agriculture or U.S. Food and Drug Administration statute or regulation affecting country-of-origin claims for agricultural products.

Penalties

In adopting and formally codifying the rule, the FTC has "activated a broader range of remedies, including the ability to seek redress, damages, penalties, and other relief from those who lie about a Made in USA label." The FTC will now be able to seek civil penalties of up to $43,280 for each violation of the final rule. This final rule, the FTC explains, is a "restatement rule," which affirms its longstanding guidance and legal precedent with respect to Made in USA labels – "thereby imposing no new obligations on manufacturers and sellers." Because of the enhanced penalties, this final rule "will increase fraud deterrence and ensure that victims can be made whole."

Summary

This final rule suggests that the FTC is ready to ramp up enforcement of its longstanding "Made in USA" policies and practices and raise its profile as the agency responsible for protecting consumers from deceptive and fraudulent U.S.-origin product claims.

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