

# Is Your Product “Born in the USA”? The FTC is Cracking Down on False “Made in the USA” Claims

The FTC has a new rule to crack down on false "Made in the USA" claims. The "Made in USA Labeling Rule" - which became effective on August 13, 2021 - gives the FTC the authority to seek substantial monetary penalties from manufacturers who falsely label products as made in the USA.

## The Rule Allows the FTC to Crack Down on Made in USA Fraud

With its new Made in USA Labeling Rule, the FTC aims to crack down on false unqualified "Made in USA" labels. The Rule does not create new requirements but allows the FTC to impose substantial penalties on a manufacturer who labels its product as being made in the USA when it cannot show that "all or virtually all" of the product's components are actually from or made in the United States.<sup>[1]</sup>

For example, previous policy did not authorize the FTC to seek monetary penalties when suppliers did not comply with the standards for "Made in the USA" labels. Under the new Rule, the FTC may now seek redress, damages and other forms of relief including civil penalties of up to \$43,280 per violation. In a press release, the FTC stated that while not every violation warrants such strict penalties, the possibility of harsh consequences signals to marketers that they ignore the rule "at their peril."<sup>[2]</sup>

While the FTC will focus on egregious, repeat offenders, there is no explicit exception for those who violate the rule for the first time or even inadvertently. The FTC indicated that by activating more potential penalties, it will increase deterrence and benefit businesses that are harmed by competitors' false claims. The FTC will also enforce other forms of false or deceptive “Made in the USA” marketing, which fall outside of the new rule, under Section 5 of the FTC Act. But the enhanced penalties of the Made in USA Labeling Rule apply only to physical or electronic labels.

The bottom line is that with the FTC's new focus and enforcement options, it is a good time for product suppliers to take a close look at their “Made in the USA” labeling or advertising and make sure their products really are made in the USA as the FTC defines it.

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## The Rule Affirms the FTC’s Longstanding Guidance About When Suppliers May Label and Promote Products as “Made in the USA”

The Made in USA Labeling Rule codifies the FTC’s longstanding guidance about labeling or marketing products as being made in the USA. Specifically, suppliers may only use such claims when:

1. All or virtually all of the product's components are from the United States;
2. All or virtually all of the manufacturing, processing, packaging or assembly occurs in the United States; and
3. The final processing or assembly happens in the United States.

The Rule applies not only to express claims (i.e., packaging or advertisements that include phrases such as "Made in the USA" or "Proud American Manufacturing"), but also to “implied” claims (i.e., using context and combination of images and phrases to suggest to consumers that the products are made in the United States, such as prominent display of the U.S. flag or a U.S. map).

The Rule is not limited to the exact phrase "Made in the USA." General terms like "built" "manufactured" "created" or "produced," as well as imagery implying U.S. origin, can be misleading without qualification, and also violates the Rule.

In addition, while suppliers may use U.S. origin claims only when all or virtually all of the product's components are from the United States, there is no bright line rule for what constitutes "all" or "virtually all." Instead, the FTC considers factors such as the proportion of the U.S. manufacturing costs to the total manufacturing costs and the remoteness of foreign content. To defend their U.S. origin claims, businesses should have evidence to support the claim before it is incorporated into their labels and advertising.

### Case Illustrations

The following example cases illustrate the FTC's decisions regarding U.S. origin claims, and the consequences for companies that cannot substantiate their claims:

- *In re Genex Media LLC and Akil Kurji* (2021). Since at least as early as 2012, Genex Media LLC's website included express "Made in the USA" claims, as well as implied claims, such as "Support USA Jobs. We Do!" But according to the FTC, the company actually imported most of its products from China. The company

and its owner reached a settlement with the FTC, which included a payment of nearly \$150,000 and an order to stop making "Made in the USA" claims.

- *In re Williams-Sonoma, Inc.* (2020), concerned Williams-Sonoma, Inc.'s marketing of home good products with phrases such as "Made in the USA," "Made Right in America" and "Crafted in America," when the FTC alleged that the products in fact contained significant imported components. Under a consent agreement, Williams-Sonoma, Inc. cannot make unqualified U.S. origin claims unless the company can provide evidence that: (1) the product's final assembly or processing takes place in the United States; (2) all significant processing takes place in the United States; and (3) all or virtually all of the components are made and sourced in the United States.

## **Takeaways**

### **Does the rule apply to you?**

The rule applies if you expressly or impliedly label your products as being made in the USA. The term "label" applies not just to physical labels affixed to products, but also seals, stamps or marks in print or electronic promotional materials. Claims of U.S. origin that are not part of a label may still be addressed under Section 5 of the FTC Act.

### **Do your products meet the requirements?**

The "all or virtually all" standard applies to the assembly and processing of a final product, and also to the origin of your products' component parts or ingredients. Manufacturers should look at their production—as far back in the process as possible—and review their supply chains to ensure that there are not a substantial number of materials sourced from outside the United States. Although the rule does not define precisely what "virtually all" means, products labeled "Made in the USA" should have no more than a negligible amount of foreign content. The new rule does not make an exception for imported materials that are unavailable in the United States.

### **Should you use qualified claims instead?**

The Made in USA Labeling Rule applies only to unqualified claims. Qualified claims are those that specify what part of the production occurred in the United States or recognize that some materials are from foreign countries. Marketers who cannot meet the "all or virtually all" standard may instead rely on phrases like "60% U.S. content," "made of imported parts" or "assembled in the U.S." which



more accurately describes the production.<sup>[3]</sup> Qualified claims are still subject to Section 5 of the FTC Act, so they must be clear and non-deceptive.

### **Can you get an exemption?**

Businesses can petition the FTC for a full or partial exemption if they can show that applying the requirements to a certain product or class of product is not necessary to prevent the practices that the rule seeks to deter.<sup>[4]</sup> Petitions should be submitted according to the FTC's rules of practice governing petitions for rulemaking.<sup>[5]</sup>

### **Other lawsuits**

Remember that plaintiffs can also assert similar claims against product suppliers who falsely advertise their products as being "Made in the USA" under state false advertising and deceptive trade practice laws.

Reinhart's Commercial & Competition Law and Intellectual Property teams have a great deal of experience with "Made in the USA" questions and would be glad to help you prepare for the changes brought on by this new Rule. Please feel free to contact [Laura Brenner](#), [Dan Kattman](#) or any member of these teams if you have a question about your labeling or advertising, or if you think your competitors are not complying with the FTC's Made in USA Labeling Rule.

<sup>[1]</sup> 16 C.F.R. § 323; 86 Fed. Reg. 37022 (July 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-14610.pdf>.

<sup>[2]</sup> *FTC issues rule to deter rampant made in USA fraud* (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud>.

<sup>[3]</sup> *Complying with the made in the USA standard* (Dec. 1998), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard>.

<sup>[4]</sup> 16 C.F.R. § 323.6.

<sup>[5]</sup> 16 C.F.R. § 1.25.

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