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## Federal Trade Commission Issues New “Made In USA” Regulations

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Creates New Enforcement Tools And Applies The Rule To Labels “Appearing In All Contexts” (*i.e.*, On Product Packaging Or Online)

On July 1, 2021, the Federal Trade Commission (“FTC”) approved a final rule to implement new regulations governing unqualified “Made in USA” claims on labels (the “FTC MUSA Rule” or the “Rule”). Consistent with longstanding FTC practice, the Rule recognizes that an unqualified U.S.-origin claim represents to “consumers [that] no more than a *de minimis* amount of the product is foreign origin.”<sup>1</sup> The Rule, however, codifies that penalties can be assessed for erroneous unqualified claims on labels, and the FTC confirms that labels mean more than the immediate product packaging. This announcement follows an extensive rulemaking process in which the FTC received more than 700 public comments. The Rule will take effect on August 13, 2021.

This development is not without controversy. The FTC approved the Rule by a 3-2 vote. The majority, consisting of Commissioners Rohit Chopra, Lina Khan, and Rebecca Kelly Slaughter issued a statement in support of the Rule’s approval. Commissioner Christine Wilson issued a dissenting statement that could portend potential legal challenges to the Rule in the future by affected companies.

In the public notice, the FTC posits that the Rule does not impose any new requirements on businesses. Instead, “it codifies the FTC’s longstanding enforcement policy statement regarding U.S.-origin claims. By codifying this guidance into a formal rule, the Commission can increase deterrence of Made in USA fraud and seek restitution for victims.”<sup>2</sup> Importantly, however, even the majority of Commissioner’s approving the Rule acknowledge that, under the Rule, the new “definition of label does extend beyond labels that are physically affixed to a product.”<sup>3</sup>



The Rule will be codified under a new Part in the Code of Federal Regulations (“C.F.R.”), 16 C.F.R. Part 323. While the Rule purportedly does not impose any new requirements on businesses, it remains important because the FTC now will be able to impose civil penalties of up to \$43,280 for first-time violations of the Rule while also seeking redress, damages, and other relief from those who make false, unqualified Made in USA claims on a label related to a product.

Although some public comments argued the FTC should delay the effective date to allow businesses to bring themselves into compliance with the Rule, the FTC declined to do so because “the Rule merely codifies the[ ] longstanding enforcement principles and imposes no new requirements on marketers.”<sup>4</sup> As discussed below, this Client Alert summarizes the FTC’s historic approach to Made in USA claims and provides details on key aspects of the Rule.

### THE FTC’S HISTORIC APPROACH TO “MADE IN USA” ENFORCEMENT

Since the 1940s, the FTC has undertaken enforcement actions against false, unqualified Made in USA claims under a provision of the Federal Trade Commission Act (“FTC Act”) that prohibits unfair and deceptive practices in or affecting commerce.<sup>5</sup> When pursuing such action, the FTC has held that a product must be wholly domestic, meaning the product must be “all or virtually all” made in the United States, in order to support a Made in USA claim.<sup>6</sup>

In 1994, as part of the Violent Crime Control and Law Enforcement Act of 1994, Congress granted the FTC authority to promulgate rules governing Made in USA claims under the Administrative Procedure Act (“APA”).<sup>7</sup> Congress also legislated that violations of the FTC’s rules issued under the APA would be considered violations of 15 U.S.C. § 57a, meaning the FTC could impose civil penalties for first-time violations of its rules rather than issuing such penalties only after first sending a cease and desist order.<sup>8</sup> To implement the penalties for first-time violations, however, the FTC needed to issue a rule governing Made in USA claims. Until now, although the FTC has implemented a “longstanding program to prevent deceptive MUSA claims,” the FTC had not proposed or implemented a final rule.<sup>9</sup>

The FTC majority that supported promulgation of the Rule addressed this issue head on by writing that “[f]or decades, there has been a bipartisan consensus among Commissioners that Made in USA fraud should not be penalized . . . In adopting this rule, the Commission acknowledges that this longstanding policy was misguided and agrees that the codification of today’s final rule is long overdue.”<sup>10</sup>

### KEY ASPECTS OF THE FTC MUSA RULE

- The Rule only applies to unqualified claims that a product or service is Made in USA, *i.e.*, “1) final assembly or processing of the product occurs in the United States; 2) all significant processing for the product occurs in the United States; and 3) all or virtually all of the products ingredients or components are made and sourced in the United States.”<sup>11</sup>
- The FTC’s authority to publish the rule is derived from 15 U.S.C. § 45a, which (in relevant part) focuses the FTC’s enforcement authority on representations made on product labels. Importantly, the FTC MUSA Rule broadly construes the term “label” to include “mail order catalog” and “mail order promotional material,” which the Rule defines 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.”<sup>12</sup> In doing so, the FTC MUSA Rule states that “Congress’s removal of a definition of ‘label’ from Section 45a before its passage strongly suggests Congress deliberately chose to defer to the FTC’s interpretation of the term in the context of MUSA claims.”<sup>13</sup> Accordingly, the FTC MUSA Rule “covers *labels* appearing in all contexts, whether, for example, they appear on product packaging or online.”<sup>14</sup>
- The Rule empowers the FTC to seek civil penalties of up to \$43,280 per violation (*i.e.*, each day of non-compliance with the Rule).<sup>15</sup> The FTC MUSA Rule also authorizes the FTC to seek “such relief as the court finds necessary to



redress injury to consumers or other persons” such as “rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice.”<sup>16</sup>

- The Rule does not supersede or alter any other federal labeling law or regulations relating to country of origin (including certain textile and automotive labeling rules, among others). Notably, the Rule also explicitly clarifies that it has no effect on the Buy American Act.
- With respect to the intersection between the FTC MUSA Rule and state laws, the Rule does not preempt state laws and regulations so long as those laws and regulations provide a level of protection that is the same or greater than the Rule. This highlights the need for affected companies to exercise diligence in complying with multiple legal requirements around the country (e.g., California).
- The Rule also contemplates a new process for “marketers and other covered persons to seek full or partial exemptions” from the Rule “to a particular product or class of product[.]” The FTC maintains discretion to determine whether the exemption request “warrant[s] further consideration,” so the impact of this new provision will not be clear for some time.<sup>17</sup>

## THE FTC DECLINED TO ADOPT SEVERAL PROPOSED ALTERNATIVES TO THE “ALL OR VIRTUALLY ALL” STANDARD

During the comment period, members of the public requested the FTC to modify the longstanding “all or virtually all” standard that governs unqualified claims. In promulgating the Rule, the FTC specifically addressed and rejected the following requested alternatives: (1) a percentage-of-costs standard; (2) a standard that makes allowances for imported parts or materials not available in the United States; (3) using Customs and Border Protection’s (“CBP”) “substantial transformation” test; and (4) implementation of a safe harbor for “good faith” efforts to comply.<sup>18</sup>

### 1. The FTC Declined To Adopt A Bright-Line “Percentage-Of-Costs” Standard

Some commenters argued that the FTC should issue a bright-line rule under which the FTC would use “a specific percentage of manufacturing costs that must be attributable to U.S. costs to substantiate an unqualified claim.”<sup>19</sup> The FTC declined to adopt this proposal, because it “could allow deceptive unqualified claims in circumstances where the low cost of the foreign input does not correlate to the importance of that input to consumers.”<sup>20</sup> As one example, the FTC described how a movement may constitute a low percentage of a watch’s total value, but “consumers may place a premium on the origin and quality of a watch movement and consider the failure to disclose the foreign origin of this component to be material to their purchasing decision.”<sup>21</sup>

### 2. The FTC Declined To Implement An Exemption For Imported Parts Or Materials “Not Available In The United States”

Some commenters argued that the Rule “should allow marketers to make unqualified [Made in USA] claims for products that include imported content only if the imported components are not available in the United States.”<sup>22</sup> The FTC also declined to adopt this revision, because “consumers expect products labeled as [Made in USA] to contain no more than a *de minimis* amount of foreign content”<sup>23</sup> regardless of whether the inputs are available in the United States. Importantly, the FTC MUSA Rule contemplates the potential for limited situations where “a marketer could substantiate an unqualified claim for a product containing nonindigenous raw materials if the manufacturer has evidence demonstrating the specific claim in context does not deceive consumers.”<sup>24</sup>



### 3. The FTC Declined To Use U.S. Customs And Border Protection’s “Substantial Transformation” Test

Some commenters suggested that the FTC adopt CBP’s “substantial transformation” test for unqualified claims. The FTC declined to “adopt[] government standards developed for other purposes,” because they “are not an appropriate fit for the Commission’s regulation of [Made in USA] claims on product labels for purposes of consumer disclosure.”<sup>25</sup> Of particular note, the FTC declined to adopt the Government of China’s argument that the FTC should emphasize whether the tariff classification of inputs changed in the production process in order to assess Made In USA claims.<sup>26</sup> This aspect of the FTC’s MUSA Rule is critically important to companies with global supply chains, since the complex interplay between various countries’ origin rules creates different standards in different countries.

### 4. The FTC Declined To Create A Safe Harbor For “Good Faith” Efforts To Comply With The Rule

Commenters also recommended that the FTC provide safe harbors for two types of good faith efforts to comply with the Rule. The first request would have provided a safe harbor for “good actors who are trying to overcome the difficulties in sourcing domestic components and materials.” The second request would have allowed “retailers and marketplaces that have exercised reasonable due diligence to rely on documented supplier and vendor certifications to substantiate [Made in USA] labeling claims.”<sup>27</sup> The FTC declined to create any safe harbors because “[c]ourts have long held good faith is not a defense for a violation of Section 5 of the FTC Act, and the Commission intends to enforce the Rule consistent with this precedent.”<sup>28</sup> Importantly, however, the FTC stated that it will continue to: “(1) advise marketers that, if provided in good faith, marketers can rely on information from suppliers about the domestic content in the parts, components, and other elements they produce; (2) generally conserve enforcement resources for intentional, repeated, or egregious offenders; and (3) provide informal staff counseling where appropriate.”<sup>29</sup>

### DISSENTING COMMISSIONER STATEMENTS AND THE POTENTIAL FOR COURT CHALLENGES TO THE FTC MUSA RULE

When voting no on the motion to adopt the rule, FTC Commissioners Christine S. Wilson and Noah Joshua Phillips expressed concerns that the Rule’s definition of “label” exceeds the FTC’s rulemaking authority.<sup>30</sup> In contrast, Commissioner Rohit Chopra stated that “the FTC has discretion to interpret the term ‘label,’” and “[t]he Commission is on strong legal ground” to, “prevail against any challenge” to the FTC MUSA Rule.<sup>31</sup> The existence of dissenting views suggests that there could be a judicial challenge to determine whether the FTC properly exercised its discretion by not narrowly defining the labels to which the penalty provisions will apply.

### TAKEAWAYS

The FTC MUSA Rule has loomed over participants in the U.S. economy for generations. By a 3-2 vote, the FTC has now completed action on a final rule that will provide the agency with additional tools to target marketers that make false, unqualified claims that their products are made in the United States. The FTC’s action occurs against the backdrop of intensive “whole of government” actions being taken by the Biden Administration to increase domestic manufacturing operations and to take aggressive actions to strengthen key supply chains.<sup>32</sup> Although it is possible that the FTC MUSA Rule could be challenged in court, the outcome of such challenges are uncertain and affected companies should begin to assess the impact of this legal development now.



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<sup>1</sup> 86 Fed Reg. 37022 (July 14, 2021) (hereinafter "FTC MUSA Rule").

<sup>2</sup> Press Release, FTC Issues Rule to Deter Rampant Made in USA Fraud, FEDERAL TRADE COMMISSION (JULY 1, 2021), [HTTPS://WWW.FTC.GOV/NEWS-EVENTS/PRESS-RELEASES/2021/07/FTC-ISSUES-RULE-DETER-RAMPANT-MADE-USA-FRAUD](https://www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud).

<sup>3</sup> Statement of Commissioner Rohit Chopra Regarding the Adoption of the Final Made in USA Rule (July 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591518/final\\_chopra\\_statement\\_regarding\\_the\\_adoption\\_of\\_the\\_final\\_made\\_in\\_usa\\_rule.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591518/final_chopra_statement_regarding_the_adoption_of_the_final_made_in_usa_rule.pdf).

<sup>4</sup> FTC MUSA Rule at 37028.

<sup>5</sup> See 85 Fed. Reg. 43162 (Sept. 14, 2020).

<sup>6</sup> See FEDERAL TRADE COMMISSION, *U.S. Origin Claims: Enforcement and Compliance Activities Since December 1997*, 1 (1999), <https://www.ftc.gov/reports/us-origin-claims-enforcement-compliance-activities-december-1997>.

<sup>7</sup> See Public Law 103-322, Sec. 320933 (codified as 15 U.S.C. § 45a).

<sup>8</sup> The statute provides that violations of any rule promulgated pursuant to the Section "shall be treated by the Commission as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices." For violations of rules issued pursuant to 15 U.S.C. 57a, the FTC may commence civil actions to recover civil penalties. See 15 U.S.C. 45(m)(1)(A).

<sup>9</sup> Statement of Commissioner Rohit Chopra Regarding the Adoption of the Final Made in USA Rule (July 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591518/final\\_chopra\\_statement\\_regarding\\_the\\_adoption\\_of\\_the\\_final\\_made\\_in\\_usa\\_rule.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591518/final_chopra_statement_regarding_the_adoption_of_the_final_made_in_usa_rule.pdf).

<sup>10</sup> Statement of Commissioner Rohit Chopra Regarding the Adoption of the Final Made in USA Rule (July 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591518/final\\_chopra\\_statement\\_regarding\\_the\\_adoption\\_of\\_the\\_final\\_made\\_in\\_usa\\_rule.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591518/final_chopra_statement_regarding_the_adoption_of_the_final_made_in_usa_rule.pdf).

<sup>11</sup> FTC MUSA Rule at 37023.

<sup>12</sup> *Id.* at 37032.

<sup>13</sup> *Id.* at 37024.

<sup>14</sup> *Id.* (emphasis in original).

<sup>15</sup> See 15 U.S.C. § 45(m)(1)(C).

<sup>16</sup> See 15 U.S.C. § 57b(b).

<sup>17</sup> FTC MUSA Rule at 37031.

<sup>18</sup> See *Id.* at 37025.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 37026.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 37025.

<sup>23</sup> *Id.* at 37026.

<sup>24</sup> *Id.* at 37027.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 37026.

<sup>28</sup> *Id.* at 37027.



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<sup>29</sup> *Id.*

<sup>30</sup> See Dissenting Statement of Commissioner Christine S. Wilson Final Rule related to Made in U.S.A. Claims (July 1, 2021), <https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioner-christine-s-wilson-regarding-final-rule>; see also Dissenting Statement of Commissioner Noah Joshua Phillips Made in the USA Labeling Rule – Notice of Proposed Rulemaking (June 22, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577103/p074204musaphillipsstatementrev.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577103/p074204musaphillipsstatementrev.pdf); Statement of Commissioner Christine S. Wilson Concurring in Part and Dissenting in Part Notice of Proposed Rulemaking related to Made in U.S.A. Claims (June 22, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577099/p074204musawilsonstatementrev.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577099/p074204musawilsonstatementrev.pdf).

<sup>31</sup> See Statement of Commissioner Rohit Chopra Regarding the Notice of Proposed Rulemaking on Made in USA (June 22, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577107/p074204musachoprastatementrev.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577107/p074204musachoprastatementrev.pdf).

<sup>32</sup> For summaries of recent U.S. government reports required under a Biden Administration Executive Order about securing certain critical U.S. supply chains, please see our previous client alerts on batteries, critical minerals, pharmaceuticals, and semiconductors [here](#), [here](#), [here](#), and [here](#).