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Locke Lord QuickStudy: FTC's New Rule on Made in USA Labels Precludes Advertisers from False and Misleading Statements About Products' Origin

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On July 1st, the Federal Trade Commission (FTC) issued a new rule to deter what the Commission characterized as “rampant fraud” in the use of Made in USA labels. The effective date of the new rule will be thirty days from the issuance of the July 1st publication date. The new rule codifies the FTC’s longstanding enforcement policy that requires unqualified “Made in USA” label claims and other U.S. origin claims in advertising and labeling be supported by proof that all or virtually all of the product is made in the United States with materials that are also sourced from U.S. manufacturers. (See, [FTC Enforcement Policy Statement on U.S. Origin Claims](#)).

By enacting new Regulation 323.3 the Commission is authorized to seek a broader range of remedies from violators than it had under the previous line of cases under Section 5 of the Federal Trade Commission Act (the “FTC Act”). Under the new Regulation, the FTC is authorized to seek redress, damages, penalties and other relief from those who lie about or fail to substantiate the Made in USA label. It will enable the Commission for the first time to seek civil penalties of up to \$43,280 per violation of the rule.

For clarification, the Commission has expressly noted that Section 323.1 covers “Made in U.S.A.” claims “any unqualified label representation, express or implied, that a product or service, or a specified component thereof, is of the 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 label claim whether made by word or symbol.” This would include, among other things, statements highlighted by the Commission in its release that might state, for example, “Our products are American-made.”

In a separate statement issued by Commissioner Chopra which was joined by the Commission’s chair and Commissioner Slaughter, Commissioner Chopra noted that displaying the Made in USA label is a right reserved for companies that manufacture their products in the United States. The Made in USA label signals a sense of national pride and can help a brand communicate quality, durability, authenticity and high standards. Only companies that invest, hire, and produce in this country should receive the competitive advantage that the Made in USA label can confer. Commissioner Chopra noted that small firms that rely on the Made in USA label have been significantly disadvantaged in online marketplaces flooded with counterfeits and that by adopting this rule the Commission can now deter wrongful conduct through civil penalties for the first offense which can expose

violators to \$42,530 in fines per violation.

The issuance of the new rule was preceded by a Notice of proposed rulemaking to review the Commission's longstanding program to prevent consumer deception arising from Made in USA claims. The new rule will provide to the extent any person introduces, delivers for introduction, sells, advertises or offers for sale in commerce a product with a 'Made in the U.S.A.' or 'Made in America' label, or the visual equivalent thereof as for example the display of the American flag, requires that the marketer has proof that the whole or substantially all product, except for minor non-essential parts of the product, be of domestic origin, consistent with decisions and orders of the FTC which prohibited marketers from including unqualified U.S.-origin claims on labels unless:

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;
3. and all, or virtually all, of the product's ingredients or components are made and sourced in the United States.

In response to the Notice of Proposed Rule Making the Commission received over 700 comments arguing that consumer perception on Made in USA labels has changed since the Commission adopted its policy on use of Made in USA labels and, therefore, the requirements imposed for use of the Made in USA label or similar claims should change. Other comments addressed the need for bright line quantification of the USA content and for exceptions for lack of availability of use materials, as provided in the California Made in the USA statute (Cal. Bus. & Prof. Code § 17533.7) which may also apply to a product.

Other comments sought further clarification of the FTC rule on substantial transformation rule and when the processing of foreign-sourced material can qualify for being considered to be of the U.S. origin and not foreign because of its total transformation in the U.S.¹ The People's Republic of China ("China") also argued that to avoid uncertainties and bias, the FTC should incorporate Custom and Border Protection's "change in Tariff Classification" analysis as suggested in Article 9 of the World Trade Organization's ("WTO") Agreement on Rules of Origin.

In the July 1st Federal Register Notice, the Commission made it clear that the final rule covers labels that appear in advertising and on packaging. Section 323.3 clearly identifies the rule as being applicable to product labels that appear in all contexts whether, for example, they appear on product packaging or online or in product advertising. As to general Made in USA advertising claims which are not part of a label, these will be addressed under Section 5 of the FTC Act and will be subject to the Agency's policies on whether such claims will be deemed false and misleading under Section 5 of the FTC Act.

There are other Federal statutes including those enforced by the FDA and the USDA which have the primary jurisdiction over Made in USA labeling claims that are subject to such other agency jurisdiction. The USDA permits foreign beef products that are processed in the U.S. to carry labels that state "Product of the USA," which clearly imply the product is of complete U.S. origin. The USDA in light of the Commission's issuance of its new rule on unqualified Made in USA claims and labels, is reviewing its labeling regulations.

While the USDA may review and decide to change its product of the USA label requirements, it is clear that the USDA and the FDA both have primary jurisdiction over mandatory and specifically permitted label claims for their

regulated products which will not be affected or superseded by the new FTC rule on labels. However, as to non-mandatory or specifically permitted claims such as the USDA's "Product of the USA" claim, Made in USA claims made in labeling or advertising for these regulated products will be subject to the FTC's existing policy on unqualified Made in USA claims.

On the question of state law preemption, the Commission intends to preempt state statutes or regulations that are inconsistent with the Commission's rules to the extent of the inconsistency when enacted. To address comments received on the proposed rule and specifically commenters' concerns about the applicability of the "all or virtually all" standard across product categories, the Commission will permit marketers and other covered persons to seek full or partial exemptions if they can demonstrate that application of the rule's requirements to a particular product or class of product is not necessary to prevent the acts or practices to which the rule relates. Parties wishing to make such arguments may use the Commission's rules of practice governing submissions of petitions to submit consumer perception evidence and data. If the Commission deems the petition sufficient to warrant further consideration, it will follow the procedures outlined in Section 1.25 of its rules.

In the July 1st notice, the Commission also stated that while the courts have long held good faith is not a defense for a violation of Section 5 of the FTC Act on Made in USA origin claims, however, the FTC clarifies that it will continue to 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. The inference here being that the Commission will also accept this type of information when considering violations of Regulation Section 323.3.

Again, while Regulation Section 323.3 specifically addresses Made in USA labels, advertising statements that make false and misleading statements about a product's origin while not covered by the new proposed rule, are still covered under Section 5 of the FTC Act.

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1 "substantial transformation" as a manufacturing process that results in a new and different product with a new name, character, and use that is different from that which existed before. This standard does not take into account the origin of materials or parts. See 19 CFR Part 134; Energizer Battery, Inc. v. United States, 190 F. Supp. 3d 1308

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