“Made in the USA” Claims: A Marketer’s Guide

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Preliminary Word

This presentation provides information about the law. Legal information is not the same as legal advice, which involves the application of law to an individual's specific circumstances and depends on many factors. This presentation is not intended to provide, and should not be relied upon as, legal advice.

The information provided in this presentation is drawn entirely from public information. The views expressed in this presentation are the authors’ alone and not necessarily those of the authors’ clients.
Presenters

Alissa D. Jijon practices in the area of food and drug law. She advises food, dietary supplement, medical device, consumer product, and pharmaceutical clients regarding compliance with U.S. state and federal regulations, as well as international requirements.

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The Essentials
What is a “Made in the USA” Claim?

- A voluntary statement intended to emphasize a product’s American content*
- A marketing claim, not a regulatory requirement
- Distinct from Country of Origin Marking

* Exception: Federal law requires the disclosure of U.S. content on automobiles and textile, wool, and fur products.
Not to be confused with...

Textile Fiber Products Identification Act

- Mandatory labeling of textile fiber products with the name of the country where the product was processed/manufactured.

- Textile fiber products made completely in the United States must be labeled as “Made in USA” or equivalent.
Claim Examples

- “Product of USA”
- “American-Made”
- “USA”
- “True American Quality”
Country of Origin Marking

- In general, U.S. Customs and Border Protection requires every article of foreign origin to be marked with its country of origin.

- Marking is not required under Customs rules for:
  - Articles made in the U.S. exclusively from U.S.-origin components; or
  - Articles where the foreign content is “substantially transformed” by processing in the U.S.
Substantial Transformation?

- “Substantial transformation” is a concept associated only with Country of Origin Marking requirements.

- “Substantial transformation” does not convert a product into a “Product of the USA” for the purpose of a “Made in the USA” claim.
U.S. Origin = “Made in U.S.A.”, right?

- Not necessarily!
  
  - “[W]hether an article may be marked with the phrase ‘Made in the USA’ or similar words denoting U.S. origin, is an issue under the authority of the Federal Trade Commission (FTC). We suggest that you contact the FTC Division of Enforcement . . . on the propriety of proposed markings indicating that an article is made in the U.S.” (emphasis added) Customs Ruling N257814, October 21, 2014.
Regulators and Regimes
Federal Trade Commission (FTC)

- Key federal guidance is the FTC’s “Complying with the Made in USA Standard,” available at: https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard

- Bottom line: “All or virtually all” product content must be of U.S. origin and final processing/assembling must occur in U.S.
“All or Virtually All”

- “All or virtually all” means that all significant parts and processing that go into the product must be of U.S. origin.

- “[T]he product should contain no – or negligible – foreign content.”
Claim Substantiation

- Substantiation for “Made in USA” claim requires a “reasonable basis” to support the claim at the time that it is made.

- A manufacturer or marketer must have “competent and reliable evidence” to back up its claim.

- Note: FTC does not pre-approve claims.
Weak Links in the Supply Chain?

- Manufacturers and marketers should not assume components purchased in the U.S. are 100% U.S.-made.

- But manufacturers can rely on information provided by suppliers regarding origin of components.

  - Know your suppliers and know your market.
FTC Policy Basics

- FTC policy applies to all products advertised or sold in the U.S. (with the exception of those subject to specific U.S. content labeling requirements, e.g., automobiles, clothing, furs)

- FTC policy applies to all claims, whether express or implied:
  - Express: “Made in USA”; “American-Made”
  - Implied: Romance copy emphasizing the “true American quality” of the company’s work
California

- Under CA law, a product may not bear a “Made in USA” claim or “similar words” – when the “merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.” *Cal. Bus. & Prof. Code § 17533.7*

- Bottom line: Zero tolerance for foreign content or processing.
## Claim Requirements

<table>
<thead>
<tr>
<th>Country of Origin Marking</th>
<th>“Made in the USA” Claims</th>
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<tr>
<td>Not required where product is:</td>
<td></td>
</tr>
<tr>
<td>(1) made in the U.S. exclusively from U.S.-origin components;</td>
<td>“Made in the USA” claim permitted only if product is “all or virtually all” made in the U.S.</td>
</tr>
<tr>
<td>(2) “substantially transformed” by processing in the U.S.</td>
<td>“Made in the USA” claim permitted only if no article, unit, or part of the product has been entirely or substantially made, manufactured, or produced outside of the U.S.</td>
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FTC                                                                 California
The Claim Game
The Risks – FTC Enforcement

- Investigation and closing letter citing potentially violative claims and practices
  
  • See, e.g., Letter to A. Gao, Global Syn-Turf, Inc. (March 30, 2015).
  
  • FTC alleged “Made in USA” claims in marketing materials implied that all products advertised in the materials were “all or virtually all” made in the U.S.

The Risks – FTC Enforcement

- Consent agreement restricting ability to make similar claims in future
  - See, *e.g.*, E.K. Ekcessories, Inc. (2013).
  - FTC alleged company deceived consumers and online retailers by claiming products that contained substantial foreign content were “Made in the U.S.A.”

https://www.ftc.gov/sites/default/files/documents/cases/131021ekcessoriesagree_1.pdf
Pending lawsuits in California courts highlight the risks attendant to making “Made in USA” claims on product with any foreign content.
2014: A manufacturer and a major retailer settled a class action lawsuit → net and some bolts of basketball hoop were allegedly not U.S. origin.

California Litigation – Claims Unravel

- 2014: Plaintiffs sued clothing manufacturers and major retailers → fabric, thread, rivets, buttons, and zipper parts of jeans allegedly manufactured outside of the U.S.


2015: Plaintiffs sued a major beer producer → beverages allegedly produced using imported hops.

Tricks

- Qualified Claims
  
  - FTC Guidelines expressly permit appropriately qualified “Made in USA” claims, *e.g.*, “Made in USA of U.S. and imported parts”; “Couch assembled in USA from Italian Leather and Mexican Frame.”

  - California statute provides no clear guidance on qualified claims, but pending apparel cases suggest such claims are permissible.
Traps

- Use of terms such as “produced,” “created,” or “manufactured” to limit “Made in USA” claim to a specific process
  - Such terms likely convey the idea that the claim is more general in scope.

- Representations about entire product lines
  - Making a general line claim (“Our products are made in the USA”) when only some products meet the “all or virtually all” standard for the claim.
Traps (cont’d)

- Third-party certification
  - 2014: Made in the USA Brand, LLC entered into settlement with FTC related to company’s issuance of a “Made in USA” certification seal without either verifying the country of origin of customers’ products bearing the seal or clearly disclosing that customers were self-certifying.
The Road Ahead
The Future of “Made in USA” Claims

- Resolution of the pending California cases
  - Will courts uphold truly “zero tolerance” under CA law?
  - Will qualified claims be the subject of future challenges?

- How does CA’s standard apply to products that are manufactured with the aid of foreign content, but in which foreign content is removed or undetectable post-production?
  - Processing aids, enzymes, catalysts, and other “components” that do not necessarily end up in finished products.
Thank you

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