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ACTIVATING CIVIL PENALTIES FOR MADE IN USA FRAUD

Summary

To better protect the integrity of the Made in USA label that honest American businesses rely on, the Federal Trade Commission (FTC) should codify elements of its longstanding policy into a rule that activates civil penalties against first-time violators.

Made in USA Matters

Displaying a 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.

The Made in USA label is especially important to small businesses, who can tout it to set them apart from more established competitors, even if their products may be more expensive. A 2012 survey by the Boston Consulting Group shows that more than 80 percent of Americans express a willingness to pay more for American-made products compared to those made in China,¹ which is a boon to producers of high-quality American goods. Small businesses that invest in the United States may not be able to challenge big players on brand recognition, but they have earned the right to compete on country of origin.

But their ability to compete is now being undermined by a scourge of counterfeiting and fraud. The growing proportion of consumer goods purchased online has made it easier for foreign counterfeiters to trick consumers and steal sales from companies that tell the truth. According to a Government Accountability Office investigation, 40% of brand-name goods purchased from third-party sellers on popular consumer websites were found to be counterfeit.² Meanwhile, nearly a quarter of Americans no longer trust that “Made in USA” means “Made in USA.”³ In this environment, large incumbent corporations can spend significant resources to defend their brands from imitators,⁴ but small businesses that rely on the Made in USA brand cannot. That makes the FTC’s role more vital than ever.

If enforcers are unable to defend our national brand, this puts small firms that rely on the Made in USA label at a disadvantage in online marketplaces flooded with counterfeits. Twenty-five years ago, Congress gave the FTC a strong tool to defend the Made in USA brand, but the agency has never deployed it. It is time to do so.

Background on FTC Penalty Authority

While the Federal Trade Commission Act broadly prohibits unfair or deceptive acts or practices, the agency's ability to seek civil penalties paid to the Treasury for first-time offenders is limited. Even when the agency repeatedly finds a practice to be unlawful, violators, regardless of their size or sophistication, can still get a free pass for their wrongdoing – and only if they are caught.

To *deter* wrongful conduct in the first instance, the FTC must activate a legal switch to “turn on” civil penalties for the first offense, which can expose violators to \$42,530 in fines per violation. This activation can be achieved by codifying the unlawful practice in a rule.

The FTC can codify a rule by initiating procedures under Section 18 of the FTC Act. However, in some cases, Congress has explicitly provided the Commission with the authority to use procedures under the Administrative Procedure Act (APA) – which are more efficient compared to Section 18 procedures – to give notice of practices where violations can lead to civil penalties.

Dormant Authority to Combat Made in USA Fraud

Since at least the 1940s, the Commission has held that under Section 5 of the FTC Act, a product must be wholly domestic or all or virtually all made in the United States to support a Made in USA claim.⁵ As global trade has accelerated, attention to country-of-origin claims has only grown.

In 1994, shortly after the North American Free Trade Agreement (NAFTA) took effect, Congress gave the FTC authority to codify Made in USA rules pursuant to streamlined APA procedures. Following that legislation, the Commission undertook a comprehensive review of its Made in USA program – a review so expansive that one Commissioner at the time compared it to a rulemaking.⁶ What emerged from that review, however, was a statement that reiterated the decades-old “all or virtually all” standard for unqualified Made in USA claims. That statement and the accompanying guidance remain in force today.

But “statements” do not trigger the Commission's civil penalty authority and resulting deterrent effect unless codified into a rule. This means that if firms choose to make false Made in USA claims in spite of 80 years of FTC guidance and warnings, they are unlikely to face any penalties on their first offense.

The Commission can change these incentives by codifying its existing “all or virtually all” standard as a rule, thereby subjecting all violators to civil penalties. Importantly, by restating the FTC's existing view of the law, such a rule would lead to no additional substantive requirements for market participants. The Commission would maintain flexibility to calibrate its approach based on the facts and circumstances of violations.

All businesses stand to benefit from clear rules of the road that protect the integrity of the Made in USA label and punish those who abuse it.

¹ THE BOSTON CONSULTING GROUP, MADE IN AMERICA, AGAIN: UNDERSTANDING THE VALUE OF ‘MADE IN THE USA’ (2012) (finding that ~80% of Americans prefer goods made in America to those made in China). *See also Made in America: Most Americans Love the Idea of Buying a U.S.-made Product Instead of an Import. But Sometimes It’s Hard to Tell What’s Real and What’s Not*, CONSUMER REPORTS (May 21, 2015, 10:00 AM), <https://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm> [hereinafter *Made in America*] (reporting on a national survey finding that 60%+ of Americans would pay a 10% premium for Made in USA goods); *Price of patriotism: How much extra are you willing to pay for a product that’s made in America?*, REUTERS (July 18, 2017), <http://fingfx.thomsonreuters.com/gfx/rngs/USA-BUYAMERICAN-POLL/01005017035/index.html> (reporting on a national survey finding that 60%+ of Americans would pay a premium of 5% or more).

² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-216, INTELLECTUAL PROPERTY: AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEITS MARKET (2018), <https://www.gao.gov/assets/690/689713.pdf>.

³ *Made in America*, *supra* note 1 (reporting on a national survey finding that 23% of Americans lack trust in “Made in America” labels).

⁴ *See, e.g.*, James Vincent, *Apple Lawsuit Says 90 Percent of ‘Official’ Chargers Sold on Amazon Are Fake*, THE VERGE (Oct. 20, 2016, 3:59 AM), <https://www.theverge.com/2016/10/20/13343682/fake-apple-chargers-amazon-lawsuit>.

⁵ FED. TRADE. COMM’N, U.S. ORIGIN CLAIMS: ENFORCEMENT AND COMPLIANCE ACTIVITIES SINCE DECEMBER 1997 1 (1999), <https://www.ftc.gov/sites/default/files/documents/reports/u.s.origin-claims-enforcement-and-compliance-activities-december-1997/musareport.pdf>.

⁶ “Made in USA” and Other U.S. Origin Claims, 62 Fed. Reg. 63755, 63771 (Dec. 2, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/made-usa-and-other-u.s.origin-claims/971202madeinusa.pdf (reprinting Commissioner Starek’s statement that the Commission’s “expansive review” was “similar to a rulemaking”). In the course of that review, the Commission considered modifying the “all or virtually all” standard around unqualified Made in USA claims, but backed down in the face of “overwhelming” consumer interest in maintaining the historic standard. *Id.* at 63764.