

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

Today the Commission announces a Notice of Proposed Rulemaking (NPRM) with respect to “Made in USA” (MUSA) labels. It has been more than two decades since the FTC last solicited feedback from the public about the Commission’s Enforcement Policy Statement that addresses U.S.-origin claims in advertising and labeling. I see value in revisiting our MUSA program to ensure that our enforcement approach reflects the realities of doing business in the rapidly evolving global marketplace. I support seeking comment on this proposed rule, but write separately to emphasize that the decision to issue an NPRM seeking comment does not prejudice the outcome of the process, which must observe the boundaries of our statutory authority.

Companies that falsely claim their products are American-made deceive consumers who prefer to buy American-made products, and who may be willing to pay more for these goods. False MUSA claims also may divert business from companies that have invested heavily in American labor and American materials, frequently with the specific goal of differentiating their companies and products through “Made in the USA” claims.¹ Recognizing both strong consumer preference and differentiated business strategies, bipartisan Commissions for more than 40 years have built a comprehensive program to ensure that consumers can trust “Made in the USA” claims.²

The importance to consumers of “Made in the USA” claims, and the desire of businesses to highlight investments in American labor and infrastructure, may become stronger due to the Covid-19 pandemic. As countries took measures to contain the spread of the novel coronavirus by imposing quarantine orders and shuttering factories around the world, we saw in stark terms the fragility of global supply chains. As our policy makers and businesses consider options to strengthen supply chains, including the repatriation of manufacturing capabilities, it is even more important to ensure that companies making MUSA claims are doing so truthfully. For these reasons, I support both the FTC’s prosecution of MUSA fraud and its consideration of a rule that addresses deceptive MUSA claims on labels, consistent with the authority granted to the FTC by Congress in Section 45a.

¹ Nearly 8 in 10 American consumers say they would rather buy an American-made product than an imported one, and more than 60% say they would pay a price premium for a product made in the USA. Consumer reports, special report (2015), <https://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm>

² The FTC has issued over 150 closing letters to companies making misleading U.S.-origin claims. Made in USA Workshop Report at 3 (June 2020). Companies only receive closing letters if they demonstrate to staff that they will come into compliance with the FTC’s Enforcement Policy Statement on “Made in the USA.” The staff’s workshop report explains that “companies often produce substantiation for updated claims to the FTC staff, and then present a plan that includes training staff, updating online marketing materials (*e.g.*, company websites and social media platforms), updating hardcopy marketing materials (*e.g.*, product packaging, advertisements, tradeshow materials), and working with dealers, distributors, and third-party retailers to ensure downstream claims are in compliance.” *Id.* at 3 n.7. The FTC has also settled over 25 enforcement actions against companies that refused to come into compliance or engaged in outright fraud.

While the goal of ensuring truth in labeling is important, this agency should only expand its regulatory footprint after thoughtful deliberation and in a manner that falls squarely within the jurisdiction granted to the FTC by Congress. Staff upheld its end of the bargain with respect to thoughtful deliberation by holding a workshop to solicit stakeholder input on the wisdom of a rulemaking prior to embarking on this initiative. At that workshop, stakeholders overwhelmingly voiced support for a MUSA rulemaking so as to promote clarity and certainty.³ Whether the Commission will fulfill its role of acting within its jurisdictional confines, however, remains to be seen.

Section 45a of the FTC Act – the provision pursuant to which we advance this NPRM today – authorizes the Commission to issue rules governing MUSA claims on products “with a ‘Made in the U.S.A.’ or ‘Made in America’ label, or the equivalent thereof.” The provision is titled “Labels on products” and repeatedly references “labels.” The Commission nonetheless has been urged to promulgate a rule that covers all advertising, not just labeling. Certain stakeholders, most notably TINA.org, argue that the statute’s “equivalent thereof” should be read to extend rulemaking authority over “the equivalent” of labels, *e.g.*, advertising materials.⁴

This analysis is not supported by the plain language of 45a. It is clear that Congress intended to extend rulemaking authority over the many potential variations (or “equivalents”) of “Made in the U.S.A.” or “Made in America” claims that may be found on labels. The legislative history for Section 45a supports this interpretation. Specifically, the Conference Report on H.R. 3355 discusses any label characterizing “a product as ‘Made in the U.S.A.’ or the equivalent thereof,” signaling Congress’ intent that the statute should cover not just literal invocations of “Made in the U.S.A.,” but also equivalents to that claim (*i.e.*, Made in America, American Made, and so on).⁵

In addition, guidance on the definition of “label” can be found in analogous FTC rules and guides in a variety of contexts. There, “labels” repeatedly have been defined as a distinct subcategory of advertising (in other words, not coterminous with advertising)⁶ and have been described as objects attached to a product or its packaging.⁷ Given both the statutory guidance Congress provided when it drafted this statute, and precedent concerning the term “label” in FTC

³ Made in USA Workshop Report at 17.

⁴ See TINA.org Comment, “The FTC Should Promulgate a Made in the USA Rule” (Oct. 11, 2019), *available at* <https://www.regulations.gov/document?D=FTC-2019-0063-0020>

⁵ Conf. Rep. on H.R. 3355 (filed in House (8/21/1994)).

⁶ See, *e.g.*, Jewelry Guides, 16 C.F.R. § 23.0(c); Leather Guides, 16 C.F.R. § 24.2(g); Fur Rules, 16 C.F.R. § 303.1(5); Energy Labeling Rule, 16 C.F.R. §§ 305.1, 305.7.

⁷ See, *e.g.*, Wool Rules 16 C.F.R. §300.1(i); Textile Rules, 16 C.F.F. §303.15(a); Automotive Fuel Ratings, Certification and Posting, 16 C.F.R. § 306.10; Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles, 16 C.F.R. § 309.1(v); Test Procedures and Labeling Standards for Recycled Oil, 16 C.F.R. § 423.1(a); R-Value Rule, 16 C.F.R. § 460; Regulations Under Section 4 of the Fair Packaging and Labeling Act, 16 C.F.R. § 500.2(e).

rules and guides, the Commission has ample landmarks to draft a proposed rule that falls within its jurisdictional boundaries.

Unfortunately, the NPRM defines the term far more broadly than any FTC precedent, and in a way that appears to exceed our statutory grant of rulemaking authority. The NPRM that we issue for comment today will cover not just labels, but all:

“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” that include “a seal, mark, tag, or stamp labeling a product Made in the United States.”⁸

This language could bring within the scope of the rule stylized marks in online advertising or paper catalogs and potentially other advertising marks, such as hashtags, that contain MUSA claims. I would appreciate input from stakeholders on whether (and, if so, the extent to which) defining labeling in this manner exceeds our Section 45a grant of rulemaking authority.

But Commissioner Chopra would have us go even further, stating that he “would have preferred a broader prohibition on Made in USA fraud.” Of course, the Commission’s authority to prosecute unfair and deceptive acts or practices under Section 5 of the FTC Act accomplishes this goal while respecting the limits placed on us by the elected branches of government. We as a Commission may wish to pursue civil penalties for deceptive MUSA advertising claims in contexts beyond traditional labeling. And, were Congress drafting this statute now, it might choose language to encompass those broader contexts, like online advertising. But there is no plausible argument to be made that the ordinary meaning of the text when enacted in 1994 encompassed online advertising – a period when online shopping was largely unfamiliar to most consumers.⁹

I write today not to “offer a legal blueprint to those seeking to challenge the rule,” as Commissioner Chopra asserts, but to emphasize the importance of limiting our jurisdictional reach to the boundaries that Congress has established. Unlike Commissioner Chopra, I have voted to support every MUSA enforcement action recommended to the Commission by staff.¹⁰ Although I believe that administrative consents can be an appropriate remedy to address deceptive MUSA claims, consistent with the views of bipartisan Commissions during the last 25

⁸ See proposed § 323.3 and proposed § 323.1(b).

⁹ Report: Americans Going Online . . . Explosive Growth, Uncertain Destinations, PEW RESEARCH CENTER (Oct. 16, 1995) (noting that “most consumers are still feeling their way through cyberspace . . . [and] have yet to begin purchasing goods and services online”), available at: <https://www.people-press.org/1995/10/16/americans-going-online-explosive-growth-uncertain-destinations/>

¹⁰ See In the Matter of Sandpiper Gear of California, Inc. et al., No. 182-3095, <https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter>; Underground Sports d/b/a Patriot Puck, et al., No. 182-3113 (April 2019), <https://www.ftc.gov/enforcement/cases-proceedings/182-3113/underground-sports-inc-doing-business-patriot-puck-et-al>; In the Matter of Nectar Sleep, LLC, No.182-3038 (Sept. 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3038/nectar-brand-llc>.

years, I also support seeking monetary relief where appropriate (including the case against Williams-Sonoma cited by Commissioner Chopra). I supported the Made in U.S.A workshop that staff organized in September 2019 and today support consideration of a MUSA labeling rule that aligns with our statutory authority.

To the extent that the proposed rule exceeds the scope of authority granted by Congress to the FTC, however, I dissent. As each member of this Commission well knows, previous FTC forays into areas outside its jurisdictional authority have resulted in swift condemnation from the courts and Congress.¹¹ I am wary of creatively and expansively interpreting the agency's jurisdiction with respect to rulemaking authority. I disagree with leaving it to the courts to tell us when we have overstepped our bounds. I particularly take issue with this strategy at a time when Congress is considering federal privacy legislation that would grant additional rulemaking authority to the FTC. Surgical rulemaking authority under the Administrative Procedure Act would enable the FTC to implement, and to update as necessary, federal privacy legislation. Expansive interpretations of our rulemaking authority will not engender confidence among members of Congress who have already expressed qualms about the FTC's history of frolics and detours.¹² Prudence dictates caution, which I fear we have thrown to the wind. But I look forward to feedback on this topic from our stakeholders.

¹¹ See Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (reforming the ability of the FTC to promulgate rules by requiring a multi-step process with public comment and subject to Congressional review). This Act also authorized \$255 million in funding for the Commission and was the first time since 1977 the agency was funded through the traditional funding process after the backlash from Congress over its rulemaking activities. See Kinter, Earl, et al., "The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC's Rulemaking and Enforcement Authority" 58 Wash. U. Law Rev. 847 (1980); see also J. Howard Beales III & Timothy J. Muris, FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?, 83 Geo. Wash. L. Rev. 2157 (2015) (describing the "disastrous failures" of the FTC in the 1970s and the 1980s from enforcement and regulatory overreach and quoting Jean Carper, The Backlash at the FTC, WASH. POST, C1 (Feb. 6, 1977) (describing the backlash from Congress at the FTC, after a period of intense rulemaking activity culminating in the agency's being dubbed the "National Nanny")); see also Alex Propes, Privacy and FTC Rulemaking: A Historical Context, IAB (Nov. 6, 2018) (discussing how the FTC's rulemaking history could be influencing Congressional comfort with vesting the FTC with additional privacy authority), <https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context/>

¹² See Transcript: Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security (May 8, 2019), available at: <https://docs.house.gov/meetings/IF/IF17/20190508/109415/HHRG-116-IF17-Transcript-20190508.pdf>. At this Hearing, Rep. McMorris Rogers stated: "In various proposals, some groups have called for the FTC to have additional resources and authorities. I remain skeptical of Congress delegating broad authority to the FTC or any agency. However, we must be mindful of the complexities of this issue as well as the lessons learned from previous grants of rulemaking authority to the Commission." Transcript at 8-9. Rep. Walden similarly stated: "it has been a few decades, but there was a time when the FTC, as we heard, was given broad rulemaking authority but stepped past the bounds of what Congress and the public supported. This required further congressional action and new restrictions on the Commission." Transcript at 62.