



September 10, 2020

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Re: MUSA Rulemaking, Matter No. P074204

Truth in Advertising, Inc. (“TINA.org”) welcomes the opportunity to submit comments on the Federal Trade Commission’s (“Commission” or “FTC”) Notice of Proposed Rulemaking related to Made in the U.S.A. and other unqualified U.S.-origin claims (“MUSA”) regarding product labels.¹ TINA.org supports the proposed rule for the reasons originally articulated in TINA.org’s petition for rulemaking.²

Although TINA.org would have preferred a broader rule, the proposed rule, formed by compromise, provides important consumer protections. Further narrowing of the rule is not only unwarranted, but would serve only to undermine the efficacy of a regulatory scheme policing MUSA labels. Accordingly, these comments support, and emphasize the need for, the proposed rule’s applicability to all labels, both physical and digital.

Legally, such an interpretation is sound. Neither the plain language of the statute at issue – 15 U.S.C. § 45a – nor the canons of statutory interpretation command a narrower interpretation. Practically, such an interpretation is justified as both physical and digital labels are functional equivalents, and regulating both provide necessary consumer protections in an e-commerce economy.

A. The Text of the Statute Applies to All Labels

The proposed rule does not exceed the Commission’s statutory authority. The statute enabling the FTC to promulgate a rule regulating MUSA labels, 15 U.S.C. § 45a, provides, in pertinent part:

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 equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission issued pursuant

to section 45 of this title. This section only applies to such labels. Nothing in this section shall preclude the application of other provisions of law relating to labeling.

Black’s Law Dictionary defines label as “an informative display of written or graphic matter, such as a logo, title, or similar marking, affixed to goods or services to identify their source.”³ Similarly, Merriam-Webster defines a “label” as, among other things, “written or printed matter accompanying an article to furnish identification or other information,” or “a descriptive or identifying word or phrase.”⁴ These definitions plainly encompass digital labels.

Further, the statute does not contain any language limiting the term to physical labels. When Congress seeks to limit “labels” to the physical, it knows how. For instance, the Federal Food, Drug and Cosmetic Act limits the term “label” to apply only when “upon the immediate container of any article.”⁵ Congress also knows how to distinguish “electronic” labels.⁶ Here, however, the statute makes no attempt to restrict the definition or distinguish physical labels from digital labels.

Moreover, the canons of statutory interpretation do not affect the interpretation as they ought not apply. “When the meaning of the statute’s terms is plain, [the] job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”⁷

The possibility that Congress may not have anticipated the application of the term label to apply online does not change this outcome. “Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision.”⁸ “[T]he fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command.”⁹

Indeed, courts regularly interpret laws expansively in the face of technological innovation.¹⁰ For instance, the Supreme Court recently overturned decades of precedent related to the Commerce Clause when it struck down a rule prohibiting states from taxing sales made by companies without a physical presence in the taxing jurisdiction. In overturning this physical-presence rule, the Court relied heavily on how “[t]he Internet’s prevalence and power have changed the dynamics of the national economy.”¹¹ The Court explained:

The “dramatic technological and social changes” of our “increasingly interconnected economy” mean that buyers are “closer to most major retailers” than ever before—“regardless of how close or far the nearest storefront.” Between targeted advertising and instant access to most consumers via any internet-enabled device, “a business may be present in a State in a meaningful way without” that presence “being physical in the traditional sense of the term.” A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores.¹²

Importantly – and furthering this interpretative trend – other courts have read traditionally physical and tangible terms to apply to their online counterparts. For example, in 2019 the

Nevada Supreme Court applied the Nevada news shield statute, which protects journalists associated with newspapers from disclosing confidential sources, to digital media.¹³ That court reasoned that “[w]hile the drafters of [the news shield statute] knew what a newspaper was, they likely did not contemplate it taking digital form. But just because a newspaper can exist online, it does not mean it ceases to be a newspaper. To hold otherwise would be to create an absurd result in direct contradiction to the rules of statutory interpretation.”¹⁴ Other examples abound.¹⁵

These rationales directly apply here. As the Supreme Court recognized, and as explained in more detail below, since 15 U.S.C § 45a was passed in 1994, the country has undergone “dramatic technological and social changes”¹⁶ as the internet re-shaped commerce in the United States. As the physical marketplace is replaced with a virtual one, consumers may never see a physical label with their product when making purchasing decisions. Thus, they have only the online label to rely on. But just because a label exists online does not mean it ceases to be a label. To restrict the definition of “label” to the physical would lead to a nonsensical outcome: The rule would apply when consumers shop at a store’s brick-and-mortar locations, but consumers would lose those protections when shopping on that same store’s website.

Ultimately, the plain language of the statute supports the Notice’s interpretation. Nothing in the text of the statute changes the plain meaning or narrows the interpretation. To impose a narrow definition of label would contravene interpretative precedent, turn a blind eye to present realities, and create absurd results.

B. Applying the Proposed Rule to Digital Labels is Important

As a matter of statutory interpretation, the Commission *can* regulate digital MUSA labels. As a matter of consumer protection, the Commission *ought* to regulate digital MUSA labels.

The vast majority of American consumers prefer American-made products.¹⁷ Consumers buy American-made products out of a sense of patriotism¹⁸ and out of a belief that the products are of a higher quality.¹⁹ Because of this clear preference, manufacturers can charge, and consumers will pay, a premium for MUSA products.²⁰ This dynamic affords an advantage to businesses that make their products in the United States and boosts American manufacturing. Unfortunately, this dynamic also entices some businesses to deceptively claim their products are made in the United States.²¹ Such fraudulent labeling harms consumers and law-abiding businesses, as well as tarnished the reputation of MUSA products.

This harm is not limited to goods promoted with physical labels – it is equally present whether a deceptively labeled MUSA product is sold in-person or online. In the modern, e-commerce economy, physical labels and digital labels are functional equivalents, serving the same purpose of informing consumers of a product’s country of origin. Moreover, many consumers purchase products online without ever having the opportunity to see a physical label, a trend that will only continue to grow. By covering both physical and digital labels, the proposed rule appropriately offers protections in all contexts.

i. *Physical and Digital Labels Are Functionally Equivalent*

Both forms of labels are used in the same way to serve the same purpose: to provide product information to consumers. By way of example, the images below show three different types of MUSA labels.

Physical “Manufactured in the USA” label



According to a federal class-action lawsuit, the tea in the product was not grown or processed in the U.S. and thus the label is false.²²

Online image of a physical “Made in USA” label



TINA.org determined this label to be false or, at best, inconsistent with information on Scotch.com. According to the Scotch website, this product was made in the United States “with globally sourced materials.”²³

Digital “Made in the USA” label



TINA.org determined this label to be false. According to the physical label on the package, this product was made in China.²⁴

In each photo, an indicator is used to claim that the product is American-made. That indicator serves no other purpose beyond claiming the product’s source of origin.

Comparing the first image with the second image only highlights the indefensibility of a distinction between the two. A physical tag in person and a photo of the very same tag posted online should be subject to the same regulation. Accepting that there is no difference between the first and second images, what then, is the difference between a photo of a physical label, and a digital representation of the label? There is none.

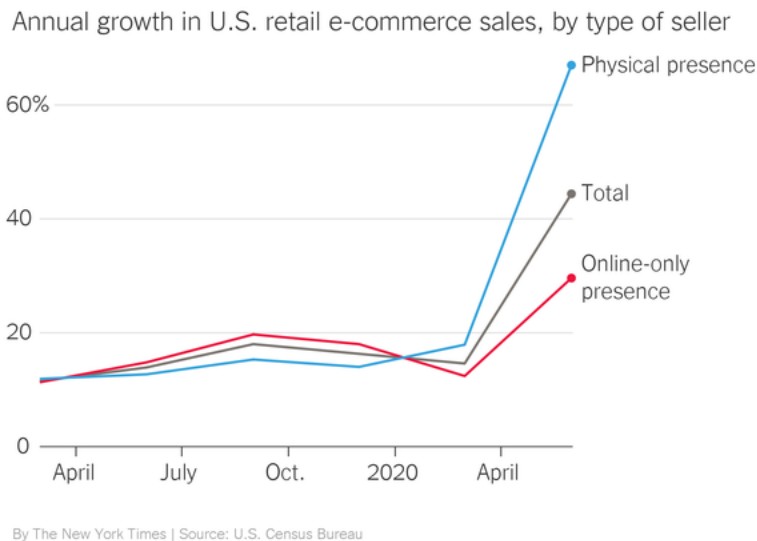
Ultimately, both country of origin digital labels and physical labels serve the same purpose and are used the same way. Regulating one without the other creates a meaningless distinction and undermines the efficacy of the rule.

- ii. *Many consumers purchase products online, without ever seeing the physical product until it is delivered*

A rule limited to physical labels will leave American consumers unprotected. As the Supreme Court recognized, the country has undergone “dramatic technological and social changes” since 15 U.S.C § 45a was passed in 1994.²⁵ That year just under five percent of Americans were using the internet.²⁶ In fact, the enabling statute was passed only a month after Phil Brandenberger made the first e-commerce purchase in the United States by purchasing a Sting album from his computer in Philadelphia.²⁷ Six years later, in 2000, the Census Bureau first began tracking e-commerce and reported \$5.3 billion in e-commerce retail sales.²⁸ By 2019, more than 90 percent

of American adults were using the internet,²⁹ and e-commerce retail sales were more than \$600 billion.³⁰

This trend reflects a marked shift in consumer shopping preferences from in-store to online. The vast majority of shoppers – 87 percent – begin product searches on digital channels.³¹ More than half of shoppers prefer buying online, with 35 percent buying on their computers and 18 percent buying on their mobile phones.³² Only slightly more than half of consumers “occasionally” visit stores to inspect products before buying them online.³³



Importantly, these data reflect consumer shopping habits *before* the COVID-19 global pandemic. Amidst stay-at-home orders and social distancing, it is unsurprising that in-store foot traffic is down³⁴ while e-commerce has experienced rapid growth.³⁵ As reflected in the chart above, a large portion of this growth is due to traditional retailers expanding their online presence.³⁶ For the second quarter of 2020, Target reported its strongest sales growth in history,³⁷ and Wal-Mart reported strong earnings buoyed by a doubling of its U.S. online sales.³⁸ These companies are growing faster than online-only retailers, like Amazon.³⁹ While impossible to predict the future, it seems plausible that the pandemic will only increase the trend toward online retail.

As such, for a significant portion of retail sales in the United States, consumers will not view a physical label prior to making a purchase. Consumers instead will rely on digital labels to determine country of origin information about products. Adopting a narrow interpretation of the term “label” is not just needless, it would also leave consumers unnecessarily exposed to deceptive practices of retailers making fraudulent MUSA claims.

* * *

A rule that regulates both physical and digital labels is consistent with the enabling statute, and offers substantial protections to consumers operating in an e-commerce economy. If the rule is limited to physical labels, it will create an exception that swallows the rule – physical and online MUSA marketing will face inconsistent regulations, companies who want to deceive will find a

way around the narrow rule, and American consumers will be left vulnerable. Accordingly, the proposed rule should be promulgated without revision.

Very truly yours,



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¹ Made in USA Labeling Rule, 85 Fed. Reg. 137, at 43162 (July 16, 2020) [hereinafter, “Notice”].

² See Petition for Rulemaking To Promulgate Regulations for Made in the USA Claims, Aug. 22, 2019, https://www.truthinadvertising.org/wp-content/uploads/2019/08/TINA_org-Petition-for-Rulemaking-to-Promulgate-Regulations-for-Made-in-the-USA-Claims.pdf.

³ *Black’s Law Dictionary* (11th ed. 2019).

⁴ *Merriam Webster Dictionary* (11th ed. 2011).

⁵ 21 U.S.C. § 321(k); see, e.g., 21 U.S.C. § 453(s) (defining “label” as “a display of written, printed, or graphic matter upon any article or the immediate container (not including packaged liners) of any article”); 7 U.S.C. § 1561(17) (defining “label” as “the display or displays of written, printed, or graphic matter upon or attached to the container of seed”); 21 U.S.C. § 601(o) (defining “label” as “a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article”).

⁶ See 47 U.S.C. § 622(b) (“[T]he Commission shall promulgate regulations or take other appropriate action, as necessary, to allow manufacturers of radiofrequency devices with display the option to use electronic labeling for the equipment in place of affixing physical labels to the equipment.”).

⁷ *Bostock v. Clayton City*, 140 S. Ct. 1731, 1749 (2020).

⁸ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 86 (2012).

⁹ *Bostock*, 140 S. Ct. at 1749 (citing *Sedima, S. P. R. L. v. Imrex Co.*, 473 U. S. 479, 499 (1985) (internal quotation marks omitted); see also *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, at 212 (1998) (Scalia, J.) (“[I]n the context of an unambiguous statutory text,” whether a specific application was anticipated by Congress “is irrelevant.”).

¹⁰ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (overruling the rule requiring business to have “physical presence” in state for state to collect sales tax in light of “pervasive virtual presence of retailers today” and implementing “substantial nexus” rule instead); *Reno v. ACLU*, 521 U.S. 844 (1997) (applying First Amendment protections to the internet); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (taking “the long view, from the original meaning of the Fourth Amendment forward,” to decide that warrantless thermal imaging of a home constituted an impermissible “search”); *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (Scalia, J.) (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., *Reno* . . . , and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo* . . . , the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

¹¹ *Wayfair*, 138 S. Ct. at 2097 (“In 1992, less than 2 percent of Americans had Internet access. [In 2018,] that number [was] about 89 percent. . . . In 1992, mail-order sales in the United States totaled \$180 billion. [In 2018,] e-commerce retail sales alone were estimated at \$453.5 billion.”) (citations omitted).

¹² *Wayfair*, 138 S. Ct. at 2095 (quoting *Direct Marketing Assn. v. Brohl*, 575 U. S. 1, 18 (2015) (Kennedy, J., concurring)).

¹³ *Toll v. Wilson*, 453 P.3d 1215 (Nev. 2019).

¹⁴ *Toll*, 453 P.3d at 1219.

¹⁵ See, e.g., *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 20 (1st Cir. 1994) (overturning district court decision requiring “public accommodations” to have physical structures and noting that “many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services”); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (Posner, J.) (rejecting the argument that “public accommodation[s]” are limited to “physical sites[s]”); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 739 (N.D. Ill. 2016) (rejecting notion that gambling devices must be “tangible” and noting that “[n]o doubt the internet was not on the minds of the Illinois state legislature (or anyone else’s minds, for that matter) when it passed the Illinois Loss Recovery Act (the predecessor statute was passed in 1895), but the words used in the statute are broad enough to cover Double Down’s app”); *c.f. Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (comparing “a street or a park” as “a quintessential forum for the exercise of First Amendment rights” to cyberspace, which has become “the most important place[] . . . for the exchange of views”).

¹⁶ *Direct Marketing Assn. v. Brohl*, 575 U. S. 1, 18 (2015) (Kennedy, J., concurring).

¹⁷ See “Made in America,” Consumer Reports (May 21, 2015), <https://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm> (noting that eight out of ten American consumers would rather buy American-made products than imported ones and two-thirds of consumers are more likely to shop in stores that sell American products).

¹⁸ *Id.* (finding that 88 percent want to keep manufacturing jobs on shore, 87 percent want to help the U.S. economy, 84 percent want to keep the U.S. economy strong vis-à-vis foreign economies, and 62 percent buy out of a sense of patriotism); see also Letter from Alliance for American Manufacturing re Patriot Puck 2 (Oct. 12, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/10/00005-155951.pdf (finding that 92 percent indicated a favorable view of goods made in America and 91 percent of American factory workers).

¹⁹ See “Made in America,” Consumer Reports, *supra* note 17 (finding 84 percent of Americans believe that American-made products are reliable, and 80 percent of American consumers believe that such goods are produced under better working conditions).

²⁰ *Id.* (finding that over 60 percent of Americans willing to pay 10 percent premium for American-made products); see also “Price of patriotism: How much extra are you willing to pay for a product that’s made in America?,” Reuters (July 18, 2017), <https://www.reuters.com/article/us-usa-buyamerican-poll-idUSKBN1A3210> (reporting on a national survey finding that more than 60 percent of Americans would pay a premium of 5 percent or more to buy American-made products); Shurenberg, Eric, “What is ‘Made in America’ Worth,” Nov. 12, 2012, Inc.com, <https://www.inc.com/eric-schurenberg/what-is-made-in-america-worth.html> (“[B]uyers have proven that they’ll pay considerably more for some kinds of American-made goods—simply because they expect them to be a better value.”); Alliance for American Manufacturing, *supra* note 18, at 2, (referencing anecdotal evidence that “American consumers are willing to shoulder a price premium for products manufactured in the United States by American workers”); Concurring Statements of Commissioner Roscoe B. Starek, III, *Regarding Enforcement Policy Statement on U.S. Origin Claims*, 62 Fed. Reg. 63771 (Dec. 2, 1997) (“[C]onsumers who believe that ‘Made in USA means all or virtually all made in the United States are highly motivated to act on their belief.’”).

²¹ See e.g., Almay Simply American, Summary of Action, TINA.org, <https://www.truthinadvertising.org/almay-simply-american/>; Walmart Made in the USA, Summary of Action, TINA.org, <https://www.truthinadvertising.org/walmart-made-in-usa/>; Target, Summary of Action, TINA.org, <https://www.truthinadvertising.org/target-summary-action/>; Gillette, Summary of Action, TINA.org, <https://www.truthinadvertising.org/gillette-summary-action/>; Williams-Sonoma, Summary of Action, TINA.org, <https://www.truthinadvertising.org/williams-sonoma-summary-of-action/>; Step2, Summary of Action, TINA.org, <https://www.truthinadvertising.org/step2-summary-action/>.

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- ²² Complaint, *Banks, et al., v. R.C. Bigelow, Inc.*, 20-CV-6208, Dkt. No 1 (C.D. Cal. Jul 13, 2020), <https://www.truthinadvertising.org/wp-content/uploads/2020/07/Banks-v-RC-Bigelow-Tea-complaint.pdf>; see also Made in USA Claims on Bigelow Teas, TINA.org, <https://www.truthinadvertising.org/made-in-usa-claims-on-bigelow-teas/>.
- ²³ 2016 Walmart Error Database, TINA.org, <https://www.truthinadvertising.org/wp-content/uploads/2020/08/Walmart-Scotch-Tape-example.pdf>.
- ²⁴ 2015 Walmart Errors, TINA.org, <https://www.truthinadvertising.org/wp-content/uploads/2020/08/Walmart-Clear-Cutlery-example.pdf>.
- ²⁵ *Brohl*, 575 U. S. at 18 (2015) (Kennedy, J., concurring).
- ²⁶ See Individuals Using the Internet (% of population) – United States, The World Bank, <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US>.
- ²⁷ “From Storefronts to Search Engines: A History of E-Commerce,” Concordia St. Paul, Blogs & News Updates (July 28, 2016), <https://online.csp.edu/blog/business/history-of-ecommerce>.
- ²⁸ See Tuttle, Brad, “8 Amazing Things People Said When Online Shopping Was Born 20 Years Ago,” CNN (Aug. 15, 2014), <http://money.com/money/3108995/online-shopping-history-anniversary/>.
- ²⁹ See Internet/Broadband Fact Sheet, Pew Research Center (June 12, 2019), <https://www.pewinternet.org/fact-sheet/internet-broadband/>.
- ³⁰ “Quarterly Retail E-Commerce Sales 4th Quarter 2019,” U.S. Census Bureau (Feb 19, 2020), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.
- ³¹ Shopper-First Retailing Report, Salesforce & Publicis.Sapient 3 (2018).
- ³² Shopper-First Retailing Report, *supra* note 31, at 9.
- ³³ Sandy, Skrovan, “Why Many Shoppers Go To Stores Before Buying Online,” RetailDive (Apr. 26, 2017), <https://www.retaildive.com/news/why-many-shoppers-go-to-stores-before-buying-online/441112/>.
- ³⁴ Valentino-DeVries, Jennifer, *et al.*, “Virus Alters Where People Open Their Wallets, Hinting at Halting Recovery,” The New York Times (Aug. 19, 2020), <https://www.nytimes.com/interactive/2020/08/18/business/economy/coronavirus-economic-recovery-states.html>.
- ³⁵ Popper, Nathaniel, “Americans Keep Clicking to Buy, Minting New Online Shopping Winners.” The New York Times (May 13, 2020), <https://www.nytimes.com/interactive/2020/05/13/technology/online-shopping-buying-sales-coronavirus.html>.
- ³⁶ Dealbook Newsletter, The New York Times (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/business/dealbook/stock-market-record-high.html>.
- ³⁷ “A Closer Look at Target’s Q2 2020,” A Bullseye View, Target.com, (Aug. 19, 2020), <https://corporate.target.com/article/2020/08/q2-2020-earnings>.
- ³⁸ Repko, Melissa, “Walmart Second-Quarter Results Crush Estimates, as E-commerce Sales Jump 97%,” CNBC (Aug. 18, 2020), <https://www.cnbc.com/2020/08/18/walmart-wmt-q2-2021-earnings.html>.
- ³⁹ Dealbook Newsletter, *supra* note 36.