

**PETITION FOR RULEMAKING
TO PROMULGATE REGULATIONS FOR
MADE IN THE USA CLAIMS**

SUBMITTED TO THE
FEDERAL TRADE COMMISSION
AUGUST 22, 2019

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Truthinadvertising.org (“TINA.org”) submits this petition pursuant to the Administrative Procedure Act and the Federal Trade Commission Act to request that the Federal Trade Commission (the “FTC” or the “Commission”) initiate a rulemaking proceeding to promulgate a regulation to prohibit the use of a “Made in the USA” or “Made in America” claim, or the equivalent thereof, including but not limited to, express or implied, and qualified or unqualified “Made in the USA” claims (collectively, a “Made in the USA Claim” or “Claim”), where such product fails to meet the legal Made in the USA standard.

SUMMARY OF ARGUMENT

Businesses that can legitimately claim their products are Made in the USA have a distinct advantage over competitors selling foreign-made goods. Such Claims add value to products because consumers perceive American-made goods to be of a higher quality and purchasing them makes consumers feel patriotic. Unsurprisingly then, many companies want to affix an American-made designation to their products. Those who do so deceptively not only reduce the value of Made in the USA Claims, impeding the ability of American-made businesses to compete, but also negatively impact consumers.

To guard against abuse of the Claim, the FTC has issued consistent guidance over the past 80 years: Products sold with an unqualified Made in the USA Claim must be all or virtually all made in the United States. Although Congress amended the Federal Trade Commission Act to specifically authorize the Commission to issue rules related to Made in the USA Claims under the less onerous Administrative Procedures Act, in the 25 years since the amendment was passed, the Commission has yet to utilize this rulemaking authority. As a result, the FTC’s ability to enforce this guidance is limited. First, the FTC has limited resources to police a multi-trillion-dollar marketplace. Second, without a formal rule in place, the Commission cannot seek

civil penalties for a first-time offense. As a result, even if an abuser of the FTC's Made in the USA guidance is caught, it typically gets a free pass, regardless of how egregious the violation may be.

Under the current regulatory regime, the Commission employs two enforcement mechanisms, neither of which is effective. The overwhelming majority of cases end with a closing letter whereby the company promises to correct violations and the FTC appears to take the company at its word and closes the file. This lenient approach may be appropriate for companies that do not know better, but not with respect to the large, sophisticated companies to which the Commission frequently issues closing letters. Alternatively, in limited scenarios, the FTC will pursue an enforcement action that almost always results in a no-fault, no-money settlement. This approach is utterly indefensible in the face of egregious violations, such as the shameless abuse of the Claim demonstrated in the matter of Sandpiper/Piper Gear USA. Importantly, neither approach provides *any* deterrent effect—marketers know they can reap the benefits of deceptively marketing products as Made in the USA and face only the prospect of a slap on the wrist if they are caught.

The Commission can remedy these issues by initiating a rulemaking to promulgate a formal rule governing the use of Made in the USA Claims. Issuing a formal rule will turn on the FTC's penalty switch, allowing the Commission the option to seek a penalty against first-time offenders. Such a rule would provide a deterrent effect by changing the risk-benefit analysis of deceptive marketers, thereby increasing the Commission's positive impact on the marketplace. A rule would also command the respect of violators who flout the FTC's admonishments. Furthermore, it would allow the Commission to actually punish flagrant offenders.

What is more, promulgating a rule has no downside. A Made in the USA rule would not require harsh enforcement. It only grants the FTC the *ability* to pursue a penalty, providing an additional enforcement mechanism. The imposition of a penalty can be reserved for brazen offenders. For oblivious offenders, the FTC can, and should, continue to utilize its closing letter approach, which serves the purpose of educating the uneducated.

Accordingly, the Commission should initiate a proceeding to codify nearly 80 years of consistent guidance and turn on the penalty switch, allowing the Commission—in its discretion—to issue civil penalties against blatant offenders.

LEGAL AUTHORITY FOR RULEMAKING

The Commission has explicit statutory authority to issue rules relating to the use of Made in the USA Claims under the Administrative Procedure Act. *See* 15 U.S.C. § 45a.¹ The Administrative Procedure Act provides any “interested person the right to petition [an agency] for the issuance . . . of a rule.” 5 U.S.C. § 553(e).

STATEMENT OF INTEREST

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat the systemic and individual harms caused by deceptive marketing. At the center of TINA.org’s efforts is its website, www.tina.org, which aims to reboot the consumer movement for the twenty-first century. The website provides consumers with information about common deceptive advertising techniques and applicable consumer protection laws, and it broadcasts alerts about specific marketing campaigns, such as nationally-advertised “Simply American” products manufactured abroad and razor blades that last “up to a month”—provided a man shaves only three days per week. TINA.org is an interactive online community where members

¹ The FTC also has rulemaking authority under the FTC Act, 15 U.S.C. § 57a.

can share information and register complaints about particular practices, which TINA.org investigates. When these complaints are substantiated, TINA.org communicates concerns to the business itself and regulatory authorities when necessary; TINA.org posts these complaints and responses received on its website, along with reports on results achieved.

Another focus of TINA.org's work is ensuring that laws protecting consumers from deceptive advertising are effectively enforced. TINA.org monitors the activities (and inactions) of government regulators and litigation brought by consumers acting as private attorneys general. Its website maintains an extensive database of pending and completed false advertising class actions, with relevant litigation and settlement documents posted.

Drawing on its accumulated expertise, TINA.org participates as amicus curiae in consumer class actions, commonly at the settlement approval stage. These submissions alert courts to proposed settlements that are not "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), with particular attention to injunctive relief provisions, which— notwithstanding their importance—often receive cursory consideration from parties, objectors, and courts more focused on monetary relief and fees.

These efforts, which highlight the value of effective equitable relief and identifying glaring deficiencies in proposed settlements, have prevented outcomes that would have harmed consumer "members" of putative settlement classes and improved the results obtained for them. In *Quinn v. Walgreen Co.* No. 12-cv-8187 (S.D.N.Y.), the parties, responding to TINA.org's concerns, renegotiated their settlement agreement to make injunctive relief broader and perpetual, rather than limited to 24 months; and in *Lerma v. Schiff Nutrition Int'l*, No. 3:11-CV-01056 (S.D. Cal.), plaintiffs, prompted by TINA.org's submission, sought to withdraw (and ultimately renegotiated) a settlement. *Id.* Dkt. 120, 141.

With respect to false Made in the USA Claims, over the past four years TINA.org has pursued more than a dozen companies that were marketing their products with deceptive U.S.-origin claims. On TINA.org there are databases collectively cataloguing hundreds of examples of deceptive Made in the USA Claims. Moreover, TINA.org has notified at least a dozen companies that they were in violation of FTC law, and filed several complaints with the FTC against companies falsely marketing their products as Made in the U.S. As a result of TINA.org's efforts in this area, hundreds of false origin claims have been removed from the internet, companies have revamped their product labeling, national advertising campaigns have been halted and other marketing materials have been modified. See, e.g., TINA.org's Made in USA Actions <https://www.truthinadvertising.org/tina-orgs-made-in-usa-actions/>.

As a consumer advocacy organization working to eradicate false and deceptive advertising, TINA.org has an important interest and a valuable perspective on the issues presented in this petition. Accordingly, TINA.org is an interested party concerning the proposed regulation set forth in this petition. *See* 5 U.S.C. § 533(e).

ARGUMENT

I. Protecting the Integrity of Made in the USA Claims is Important

Preserving the integrity of a Made in the USA Claim must be a priority. The value implicit in a Made in the USA Claim affords American businesses the ability to compete with competitors selling foreign-made products. The merit in the Claim is based on the perceived quality of American-made products and a sense of patriotism. However, if not protected, the value of the Claim is easily eroded.

a. A Made in the USA Designation Is Valuable

“Simply stated: labels matter. . . . To some consumers, processes and places of origin matter. . . . In particular, to some consumers, the ‘Made in U.S.A.’ label matters.” *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 328–29 (Cal. 2011). Consumers want to buy American-made products and are willing to pay a premium for them. Indeed, as early as 1997, the National Consumers League recognized that “the fact that the economy is increasingly globalized may cause consumers to place even a greater value on unqualified ‘Made in USA’ claims.” “Made in USA” and Other U.S. Origin Claims; Notice, 62 Fed. Reg. 63771, 63758 (Dec. 2, 1997) (citing comment from National Consumers League). Since then, the rate of globalization has increased and the desire to buy American-made is as strong as ever. According to a 2015 Consumer Reports survey, 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. *See* “Made in America,” Consumer Reports (May 21, 2015), <https://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm> [hereinafter, “Consumer Reports Survey”]. Importantly, over 60 percent of Americans are willing to pay a 10 percent premium for American-made products. *Id.*; *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), <http://fingfx.thomsonreuters.com/gfx/rngs/USABUYAMERICANPOLL/01005017035/index.html> (reporting on a national survey finding that over 60 percent of Americans would pay a premium of 5 percent or more); 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> [hereinafter, “Shurenberg”] (“[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.”); Letter from Alliance for American Manufacturing, Oct. 12, 2018, at 2, https://www.ftc.gov/system/files/documents/public_comments/2018/10/00005-155951.pdf [hereinafter, “AAM”] (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.”).

The rationale for this established consumer preference is multifaceted: The “motivations [that] fuel th[e] preference [for products Made in the USA range], from the desire to support domestic jobs, to beliefs about quality, to concerns about overseas environmental or labor conditions, to simple patriotism.” *Kwikset*, 51 Cal. 4th at 328–29.

On one hand, consumers view American-made products as being of higher quality and made pursuant to superior labor practices. *See* Statement of Commissioner Rohit Chopra, *In the Matters of Nectar Sleep, Sandpiper/PiperGear USA, and Patriot Puck*, Sept. 12, 2018, at 2, https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf [hereinafter, “Chopra 2018”] (“A Made-in-USA claim can serve as a key element of a product’s brand that communicates quality, durability, authenticity, and safety, among other attributes.”). In fact, 84 percent of Americans believe that American-made products are reliable, *see* Consumer Reports Survey, and 80 percent of American consumers believe that such goods are produced under better working conditions, *see* Consumer Reports Survey; Chopra 2018, at 2 (“A Made-in-USA claim . . . connotes a set of values, such as fair labor practice.”). A poll conducted by the Alliance for American Manufacturing confirms these

findings. In that poll, “92 percent indicated a favorable view of goods made in America and 91 percent of American factory workers.” AAM, at 2.

On the other hand, many consumers purchase American-made goods out of a sense of national pride. Of the proffered reasons for buying American-made goods, the Consumer Reports Survey found 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* Consumer Reports Survey; Statement of Commissioner Rohit Chopra, *In the Matter of Sandpiper/PiperGear USA*, Apr. 17, 2019, at attch.1, https://www.ftc.gov/system/files/documents/public_statements/1514787/sandpiper_chopra_dissenting_statement_4-17-19.pdf [hereinafter, Chopra 2019] (“The Made in USA label signals a sense of national pride and can help a brand communicate quality, durability, authenticity, and high standards.”). Likewise, in the Alliance for American Manufacturing poll, “the top reasons to have manufacturing in the United States include American jobs, it’s [sic] contribution to the economy, and the sector’s importance to national security.” AAM, at 2.

b. Made in the USA Claims Help American Businesses

For the reasons discussed above, a Made in the USA Claim is a value proposition that allows businesses to compete with other companies on factors other than price. “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.” Chopra 2019, at attch.1. The Claim is especially important to those businesses “who can tout it to set them apart from more established competitors, even if their products may be more expensive.” *Id.*; Shurenberg, at 2 (“Since companies that manufacture in America often can’t compete on price,

they have to compete on quality, service, or speed—and they have a reputation for doing all they can to defend that brand edge.”).

Although a Made in the USA Claim can carry many benefits for companies producing American-made goods, the trust and value such a designation commands will be eroded if the standards concerning Made in the USA Claims are not adequately protected and enforced. “The value of the ‘Made in the USA’ label is dependent on its integrity” and “[l]ackluster enforcement creates an atmosphere in which consumers are misled and domestic producers are at a disadvantage.” Letter from Senators Sherrod Brown, Tammy Baldwin, and Christopher Murphy, Oct. 12, 2018, at 1 https://www.ftc.gov/system/files/documents/public_comments/2018/10/00008-156012.pdf [hereinafter “Senate Letter”]. As it stands, 23 percent of Americans lack trust in Made in the USA Claims. *See* Consumer Reports Survey. Each time new “deceptive claims are brought to light, it challenges consumer confidence in ‘Made in USA’ labels and incrementally diminishes the value of such a mark in the eyes of those consumers.” AAM, at 2. Continued underenforcement will further “sow[] doubt about the veracity of Made-in-USA claims.” Chopra 2018, at 2.

II. **Underenforcement Has Direct Consequences for Businesses and Consumers**

Deceptively marketing products as American-made does more than reduce the value of the claim. *See supra* § I. Such marketing also directly harms the businesses against which the violators compete and robs consumers of their money.

a. **Underenforcement Harms Businesses**

The failure to adequately police companies’ use of the Made in the USA Claims harms law-abiding businesses who truthfully market their goods as American made. *See* Chopra 2018, at 2 (noting that companies who fraudulently market goods as American-made “punish[] firms

that may bear higher costs to produce goods here.”). Undeniably, “[s]ellers gain a competitive advantage when they falsely market a product as Made in USA.” Chopra 2018, at 1. A prime example was displayed in the recent matter of Sandpiper of California and PiperGear USA (collectively, “Sandpiper”), File No. 1823095. There, both Sandpiper and one of its competitors, Advantus, Corp., manufactured backpacks, tactical gear, and other similar products and “market[ed] these products to the Army, Air Force Exchange Service, Navy Exchange Service Command, Marine Corps Exchange, and Coast Guard Exchange for resale to active and retired military servicemembers.” Advantus Letter, at 1. Although neither competitor made their backpacks in the United States, Sandpiper marketed its products as American made while Advantus did not. Sandpiper’s deceptive marketing “caused a very real unfair competitive disadvantage to Advantus whose compliance with the law caused it to lose sales when competing head to head against Sandpiper’s fraudulent [claims].” *Id.* Specifically,

in December 2016, Advantus was competing head-to-head with Sandpiper to place six SKUs of . . . wallets into the Army and Air Force Exchange system and the Exchange wallet buyer selected Sandpiper’s product for all six of the available SKUs because Sandpiper had represented that it was going “to continue making its wallets in the USA”. The Exchange buyer represented to Advantus that the only reason he selected Sandpiper over the Mercury Luggage product is that he preferred domestic production and Advantus had honestly and lawfully disclosed that its wallets were not domestically manufactured. The same Exchange buyer had indicated that he was also going to recommend switching from Advantus’s neck ID holder to the Sandpiper version because Sandpiper represented that its version was domestically manufactured and he preferred to buy domestically manufactured products for the Army and Air Force Exchange.

Id. at 3. Such real-world examples abound: The purpose of employing deceptive techniques is, above all, to steal sales from competitors. *See, e.g.,* Statement of Commissioner Rohit Chopra, *In the Matters of Patriot Puck*, Apr. 17, 2019, at 1, https://www.ftc.gov/system/files/documents/public_statements/1514801/patriot_puck_chopra_dissenting_statement_4-17-19.pdf (“George Statler III and his companies doing business as Patriot Puck imported approximately

400,000 hockey pucks from China and subsequently marketed them as Made in America, stealing sales from his competitors who were truthful with their customers.”).

In addition to exploiting the value of a Made in the USA Claim, some sellers want to avoid the devaluation of their product’s true country of origin. Many consumers view foreign-made goods from certain countries as being of lesser quality. *See* Chopra 2018, at 2 (noting that consumers are especially likely to pay a premium for American-made goods when compared to goods from China). For that reason, some companies deceptively use Made in the USA Claims to mask the true country of origin. *See Id.* The Nectar Sleep matter highlights the point: “Nectar [Sleep’s] mattresses are made in China, which may be a negative attribute for consumers who have health or safety concerns about Chinese-made mattresses. Perhaps for this reason, the company falsely represented to consumers that its mattresses were assembled in the US.” *Id.* at 4.

b. Underenforcement Harms Consumers

Underenforcement of deceptive Made in the USA Claims also harms the consumers the FTC is tasked to protect. As the California Supreme Court explained:

For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she *paid more for* than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm—the loss of real dollars from a consumer’s pocket—is the same whether or not a court might objectively view the products as functionally equivalent. A counterfeit Rolex might be proven to tell the time as accurately as a genuine Rolex and in other ways be functionally equivalent, but we do not doubt the consumer (as well as the company that was deprived of a sale) has been economically harmed by the substitution in a manner sufficient to create standing to sue. Two wines might to almost any palate taste indistinguishable—but to serious oenophiles, the difference between one year and the next, between grapes from one valley and another nearby, might be sufficient to carry with it real economic differences in how much they would pay. Nonkosher meat might taste and in every respect be nutritionally identical to kosher meat, but to an observant Jew who keeps kosher, the former would be worthless.

Kwikset, 51 Cal. 4th at 330. Under the current approach, American consumers must suffer this harm at least once before there is even a prospect of punishment. In reality, consumers suffer this harm repeatedly with no prospect of punishment or restitution.

III. The Current Enforcement Model Offers Insufficient Deterrence

The FTC regulates claims of U.S. origin, *e.g.* “Made in the USA,” pursuant to its statutory authority under Section 5 of the Federal Trade Commission Act of 1914 (the “FTC Act”), which prohibits “unfair or deceptive acts or practices.” *See* “Made in USA” and Other U.S. Origin Claims, 62 Fed. Reg. 231, at 63756 (Dec. 2, 1997). Beginning as early as the 1940s, the FTC “established the principle that it was deceptive for a marketer to promote a product with an unqualified ‘Made in USA’ claim unless that product was wholly of domestic origin.” *Id.* In 1994, the FTC made a superficial change to the standard to require that products advertised as Made in the USA be “all or virtually all” made in the United States. Although the wording was different, the substance remained the same: unqualified claims of domestic origin are treated as claims that “the product was in all but *de minimis* amounts made in the United States.” *Id.*²

Under Section 5 the FTC Act, the FTC can seek civil penalties for unfair or deceptive acts or practice in only two scenarios: (1) a knowing violation of a rule (other than an interpretive rule), or (2) a knowing violation of a final cease and desist order. *See* 15 U.S.C. § 45(l) and (m). Because there is no rule for Made in the USA Claims, the FTC can proceed only under the second scenario. Under that course of action, the FTC may seek a penalty from the party against whom an order was issued, 15 U.S.C. § 45(l), as well as against a third party who

² In July 1995, the FTC announced that it would undertake a comprehensive review and examine whether the traditional “all or virtually all” standard was consistent with consumer perceptions and appropriate in the global economy. The review was extensive, with one Commissioner commenting that the review was so comprehensive that he compared it to a rulemaking. *See* Concurring Statement of Commissioner Roscoe B. Starek, at 63771. The review concluded in 1997 and the FTC decided to retain the “all or virtually all” standard. *See id.*

was not itself subject to the order, 15 U.S.C. § 45(m)(1)(B)(1). However, the FTC may only proceed against a third party if the third party had “actual knowledge” that its conduct violated an order and if the order was not a “consent order.” 15 U.S.C. § 45(m)(1)(B)(1); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 583 (2010) (noting that with the FTC Act “Congress [] intended to provide a mistake-of-law defense to civil liability”).

Without a formal rule, this regulatory scheme “does not allow the Commission to seek civil penalties for the first offense” of a Made in the USA Claim. Prepared Statement of the Federal Trade Commission: Oversight of the Federal Trade Commission, Before the Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce, United States House of Representatives, May 8, 2019, at 5. In practice, this means that an abuser of a Made in the USA Claim initially gets a free pass, regardless of how blatant the violation is.³ Frequently:

the FTC can do little more than give a slap on the wrist to companies the first time they violate the law. That’s because it lacks the authority to impose a monetary penalty for initial violations. Currently, the FTC can only order a company to stop the bad practices and promise not to do it again. If we really want to deter companies from breaking the law, the FTC needs to be able to impose substantial fines on companies the first time.

Prepared Statement of Representative Frank Pallone, Hearing on “Oversight of the Federal Trade Commission: Strengthening Protections for Americans’ Privacy and Data Security,” House Committee on Energy and Commerce, May 8, 2019, at 2, <https://energycommerce.house.gov>

³ Though not a civil penalty, in certain circumstances, the FTC can seek monetary relief in the form of disgorgement. However, “[t]he FTC historically has opted against expending large resources to pursue disgorgement remedies with first-time ‘Made in U.S.A.’ violators.” Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *Regarding the Matters of Sandpiper/PiperGear and Patriot Puck*, Apr. 17, 2019, at 2, https://www.ftc.gov/system/files/documents/public_statements/1514780/sandpiper_patriot_puck_slaughter_dissenting_statement-4-17-19.pdf. Civil penalties, by contrast, “hold the promise of maximizing general deterrence while minimizing resource expenditures.” *Id.*

/sites/democrats.energycommerce.house.gov/files/documents/0508%20FP%20FTC%20Oversight%20Hrg%20Opening%20Remarks.pdf [hereinafter “Rep. Pallone 2019”].

So limited, the FTC’s approach to enforcement tends to follow one of two paths when it comes to deceptive Made in the USA claims. In the first, the Commission will pursue a settlement with the offender, routinely in the form of a “no-fault, no money” consent order, threatening penalties only if the offender is caught a second time. *See, e.g., In re Sandpiper of Cal., Inc.*, 2019 FTC LEXIS 29, *1 (F.T.C. April 16, 2019). Alternatively, as the Commission does in most cases, the FTC will inform suspected violators of their transgressions, permit an opportunity for explanation and/or self-correction, take the companies’ word that the violation(s) has been remedied, and issue a closing letter. *See, e.g., Gillette Company, LLC Closing Letter*, Oct. 1, 2018, https://www.ftc.gov/system/files/documents/closing_letters/nid/2018-10-01_gillette_closing_letter.pdf; *Walmart Closing Letter*, Oct, 20, 2015, https://www.ftc.gov/system/files/documents/closing_letters/nid/151020walmartletter.pdf.

Neither approach has proven effective over time.

a. No-Fault, No-Money Settlements Do Not Protect Consumers or Law-Abiding Companies

With certain, more serious violations, the FTC pursues legal settlements, which typically result in a no-fault, no-money consent order. This approach has recently come under fire, and for good reason. *See, e.g.,* Senate Letter at 1; Chopra 2018 (“Going forward . . . I believe there should be a strong presumption against simple cease-and-desist orders.”); Chopra 2019; Question by Representative Tony Cardenas, Hearing on “Oversight of the Federal Trade Commission: Strengthening Protections for Americans’ Privacy and Data Security,” House Committee on Energy and Commerce, May 8, 2019, at 2:48:28, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-oversight-of-the-federal-trade-commission-strengthening>

[hereinafter, “May 2019 Hearing”] (“I’m concerned that the FTC settled on some cases for no money without so much as an admission of liability and some defendants effectively cheated consumers and got away with little more than lying about products being Made in America.”). The no-fault, no-money settlement utterly fails to deter deceptive use of a Made in the USA Claim in the first instance, a result that becomes entirely unjustifiable in the face of egregious violations.

No-fault, no-money settlements “do not . . . adequately penalize companies that have taken advantage of American consumers, nor do they adequately deter other companies from committing future violations.” Senate Letter, at 1. “Because civil penalties authorized under the [FTC Act] are, moreover, typically only sought after a violation of such an order, the toothless bite of this enforcement scheme is rendered ineffective at discouraging deceptive behavior in the initial instance.” AAM, at 1.

The flaws of this approach are readily exposed in the face of brazen violators who profit on deceptive country of origin marketing. Nectar Sleep, Patriot Puck, and Sandpiper/Piper Gear USA “clearly violated the law” and relied heavily on the deceptive use of Made in the USA Claims to sell their foreign-made products, *see supra* §II.a, “enrich[ing] themselves and harm[ing] customers and competitors,” Chopra 2018, at 5. However, after being caught, each company entered no-fault, no-money settlements. This “send[s] an ambiguous message about [the FTC’s] commitment to protecting consumers and domestic manufacturers from Made-in-USA fraud.” *Id.*

The FTC’s case against iSpring Water Systems proves the point. After being caught falsely advertising its products as Made in the USA, the FTC filed an administrative action and entered into a no-fault, no-money settlement with the company in 2017. *In the Matter of iSpring*

Water Systems, LLC, Docket No. C-4611, Decision and Order, dated Apr. 6, 2017. But this did not put an end to the company’s false U.S.-origin marketing. One year later, the FTC discovered the company was once again using the same deceptive marketing tactic to promote its products. *See* FTC, Violating Made in USA order lands filtration seller in hot water, Apr. 17, 2019, available at <https://www.ftc.gov/news-events/blogs/business-blog/2019/04/violating-made-usa-order-lands-filtration-seller-hot-water>. Finally, in 2019, the FTC obtained a monetary judgment from the company for its violation of the previous agreement. *U.S. v. iSpring Water Systems, LLC*, No. 16-cv-1620, N.D. Ga., Stipulated Order for Civil Penalties, Permanent Injunction, and Other Relief, dated Apr. 19, 2019. Nevertheless, for at least one year, the company brazenly ignored the Commission’s consent order and continued to deceive consumers and unfairly disadvantage its competitors.⁴

b. Closing Letter Approach Is Routinely Disregarded by Offenders

The overwhelming majority of Made in the USA violations identified by an FTC investigation are resolved by closing letters. Unfortunately, the closing letter approach fares no better than the no-fault, no-money consent orders in effectively deterring companies from violating the law. The FTC’s ability to discourage violations in the first instance is similarly negligible—essentially allowing wily companies a free, first-time violation.

The FTC’s use of closing letters is justifiable in certain situations. Chairman Simon noted that sometimes “the company doesn’t even realize that [its conduct is] a violation. So we explain to them it’s a violation and they stop it.” *See* Statements of Chairman Joseph Simon,

⁴ A similar string of events occurred in the FTC’s case against The Stanley Works. In that case, the FTC filed an administrative action against the company in 1999 for false Made in the USA marketing, which initially resulted in a no-fault, no-money settlement that same year. Then, in 2006, the FTC found that the company was violating the 1999 agreement and only then did the Commission obtain a monetary judgment from the company. *U.S. v. The Stanley Works*, No. 06-cv-00883, D. Conn., Consent Decree, dated June 13, 2006.

Oversight of the Federal Trade Commission, Senate Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, Nov. 27, 2018, at 1:36:09, <https://www.c-span.org/video/?455021-1/federal-trade-commission-oversight&start=5768>. This approach is entirely appropriate with small companies or mom-and-pop shops that genuinely do not know the law.

However, the closing letter approach is much harder to justify when faced with large, sophisticated companies violating the law. In 2018, the FTC issued closing letters to large corporations such as Hallmark, Williams-Sonoma, Electrolux, and Gillette. These types of companies, equipped with sophisticated in-house legal teams, cannot credibly claim they did not know better. Moreover, it is no secret that the resource-constrained FTC rarely pursues penalties with even flagrant violators. This is not to say that these companies purposefully violate the law, but rather that there is little incentive for companies to self-regulate when they know it is to their benefit not to and that nothing of consequence will happen if they do not comply with the law. Against this backdrop, it should come as no surprise that companies regularly ignore closing letters and continue to commit the same or similar violations after the FTC letter is issued and the investigation is closed.

A recent matter involving Walmart—then the world’s largest retailer—illustrates the point. In 2013, Walmart sought the goodwill of American consumers by pledging to source \$250 billion in American-made products by 2023. *See* “Half way through Walmart’s 10-year commitment to U.S. job growth,” <https://engage.walmart-jump.com/ci/documents/view/1/AvME~wodDv8S~xb~Gv8Y~yLLCP8q7fX74fKObT7~Pv9H>. Walmart claimed the initiative would create one million new, U.S. jobs. *See* Heller, Laura, “Walmart’s Made in the U.S.A. Claim: Fact or Fiction,” June 28, 2016, <https://www.forbes.com/sites/lauraheller/2016>

/06/28/walmart-made-in-the-usa-products-fact-or-fiction/#7ed8ba3b3a2b. However, a 2015

TINA.org investigation revealed that many products sold on Walmart's website claimed to be American-made when they were not, including some products that were Walmart's own brand.

TINA.org compiled more than 100 examples in which Walmart used Made in the USA Claims on products that did not meet the legal definition, including instances in which Walmart's flashy red, white, and blue Made in the U.S. labels conflicted with information contained in the specifications for the very same product, and informed the company. *See* "Walmart Made in USA Summary of Action," <https://www.truthinadvertising.org/walmart-made-in-usa/>. Walmart assured TINA.org that the misrepresentations, which the company called "coding errors," would be corrected and that the company was in the process of revamping the way online products were labeled, as well as editing the design of the labels themselves, all of which would be completed within two weeks. *Id.* Walmart, however, did not live up to its promise and one month later, TINA.org found more than 100 *additional* violations.



Example of the type of false Made in USA claims TINA.org found on Walmart.com

As a result, TINA.org filed a complaint with the FTC, requesting that the Commission take action. *Id.* Walmart made similar false assurances to the FTC and claimed it had removed all country-of-origin designations from its website.⁵ *Id.* The company also touted a legal disclaimer—placed at the bottom of every product page on its website—that its products may not, in fact, be American-made, despite claims to the contrary, thereby attempting to shift the burden to consumers to verify origin claims directly with product manufacturers. *Id.* Notwithstanding the legal deficiencies of the disclaimer, the FTC took the company at its word and issued a closing letter on October 20, 2015. Walmart Closing Letter, Oct. 20, 2015, https://www.ftc.gov/system/files/documents/closing_letters/nid/151020walmartletter.pdf. Less than a year later, a follow-up investigation by TINA.org found that the retailer never came into

⁵ Walmart's solution to its deceptive marketing problem was not to ensure that its website accurately identified the country of origin for its product but to delete all country of origin information so that consumers would be left in the dark as to where any Walmart product was actually made.

compliance, logging even more evidence – *another* 100 examples – of the very same violations on Walmart’s website. Not only did Walmart benefit from selling foreign products as Made in the USA on its website to unsuspecting consumers, but it did so as it continued to publicly flaunt its commitment to American-made products.

Another example involved one of Walmart’s competitors: Target. The FTC investigated Target for marketing pillows as being “Made in the USA,” when the product packages clearly revealed a Chinese origin. *See* Mar. 1, 2017 Letter to Target, https://www.ftc.gov/system/files/documents/closing_letters/nid/musa_target_corp_closing_letter.pdf. Target assured the Commission that a system was in place to identify, correct, and prohibit false claims of U.S.-origin, prompting the Commission to issue a closing letter in March 2017. *Id.* However, Target’s assurances apparently did not extend to its website, which generates more than a billion views each month. Only a few months after the closing letter, a TINA.org investigation revealed deceptive Made in the USA Claims to be widespread on Target’s website, cataloguing more than 100 such examples. *See* TINA.org’s Complaint Letter to FTC re Target Corporation’s False and Deceptive Made in USA Representations, dated June 26, 2017, https://www.truthinadvertising.org/wp-content/uploads/2017/06/6_26_17-ltr-from-TINA-to-FTC-re-Target_Redacted.pdf. Products from the sampling included toys, cosmetics, trail mix, and shampoo, some of which were Target’s own brand. *Id.*

Target.com



Product Packaging



Example of the type of false Made in USA claims TINA.org found on Target.com

Similarly, in response to an FTC investigation of Williams-Sonoma for potential deceptive marketing of Chinese-made mattress pads, the company claimed it corrected the “inadvertent” errors and retrained personnel on the “appropriate processes and policies” for verifying country-of-origin information. *See* June 13, 2018 Letter to Williams-Sonoma, https://www.ftc.gov/system/files/documents/closing_letters/nid/musa_williams-sonoma_closing_letter.pdf. As a result of these assurances, the Commission issued a closing letter in June 2018, dropping its inquiry into the retailer. However, less than a year later, a TINA.org investigation revealed more than 800 products deceptively marketed as American-made on e-commerce websites for various Williams-Sonoma Inc. brands, including Williams-Sonoma, Pottery Barn, West Elm, Rejuvenation, and more. *See* TINA.org’s Complaint Letter to FTC re Williams-Sonoma’s Continuing Use of False Made in the USA Marketing, dated May 21, 2019, https://www.truthinadvertising.org/wp-content/uploads/2019/05/5_21_19-ltr-to-FTC-re-

Williams-Sonoma-Made-in-USA-marketing_Redacted.pdf. Products from the sampling ran the gamut, including furniture, lighting, kitchenware, jewelry, and bedding products. *Id.*

Clearly, the closing letter approach is not working.

c. Neither Approach Offers Sufficient Deterrence

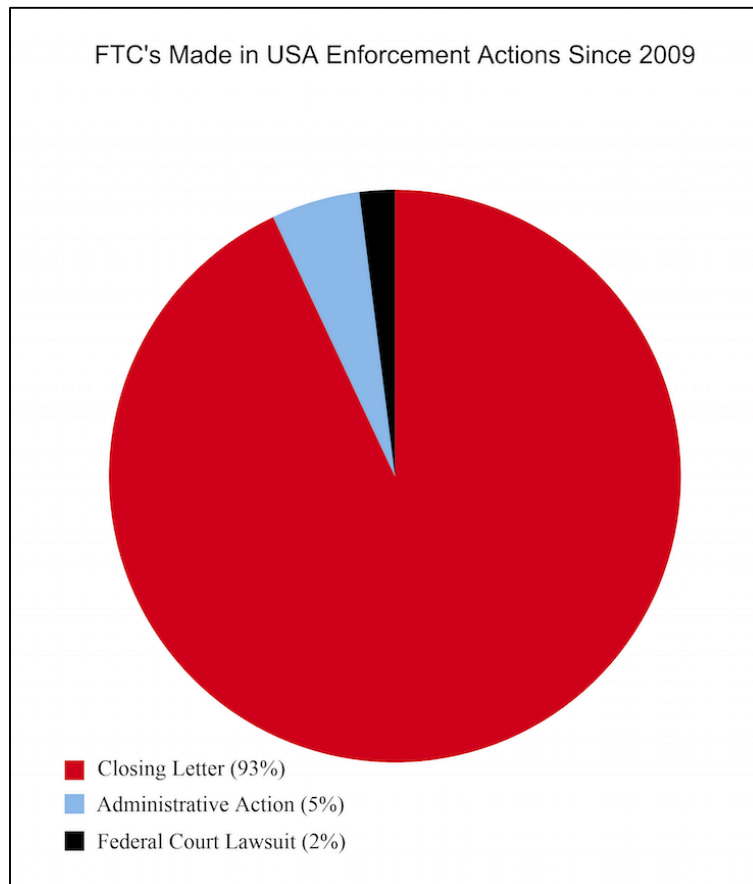
The FTC's current approach to enforcement of Made in the USA Claims does little to curb abuse. "Allowing companies to engage in and profit from egregious behaviors with merely a prospect of penalties if caught a second time . . . will hardly strike fear in the heart of potential fraudsters." Letter from Consumers Union, at 2, https://www.ftc.gov/system/files/documents/public_comments/2018/10/00006-155952.pdf [hereinafter, "Consumers Union"].

Given the Commission's limited resources "to police an \$18 trillion economy, unscrupulous actors know there is a relatively low chance of getting caught by the FTC." *Id.* Indeed, Chairman Simons acknowledged that "[Made in the USA fraud] is fairly prevalent. [The FTC] get[s] hundreds of these, hundreds of complaints a year, that people are improperly using the Made in the USA label." *See* Statements of Chairman Joseph Simon, Oversight of the Federal Trade Commission, Senate Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, Nov. 27, 2018, at 1:36:09, <https://www.c-span.org/video/?455021-1/federal-trade-commission-oversight&start=5768>. Nevertheless, the FTC is only able to address a fraction of these complaints.

In 2018, the Commission completed just 24 investigations concerning Made in the USA Claims (settling 3 actions and issuing 21 closing letters). *See* FTC Staff Closing Letters, available at <https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/staff-closing-letters>; Why the FTC Needs a Made in USA Rule,

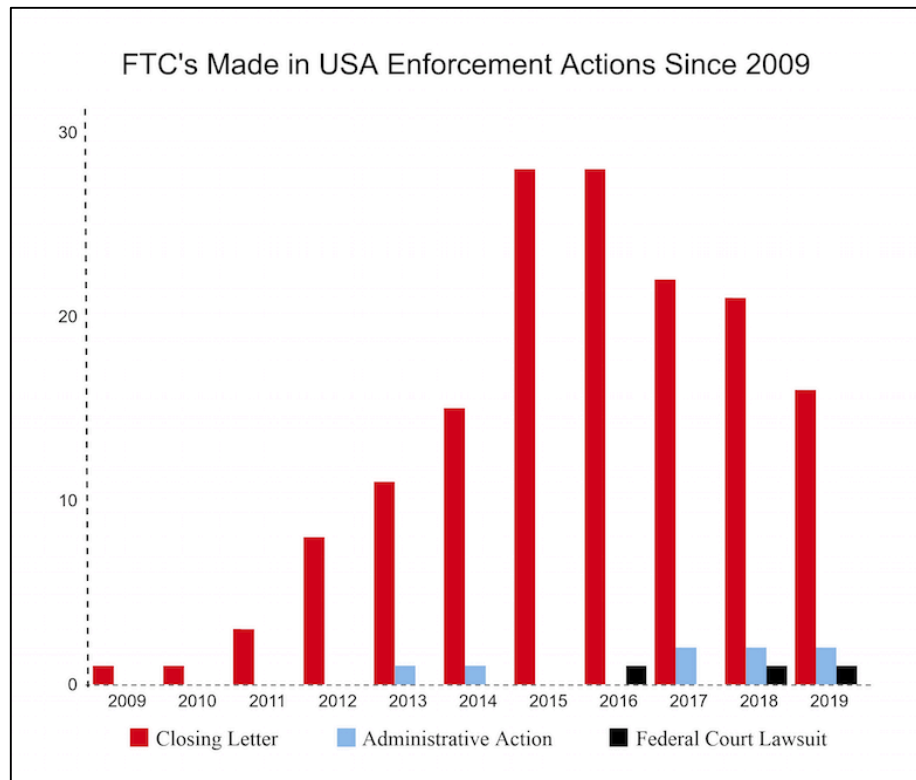
<https://www.truthinadvertising.org/ftc-made-usa-actions/>. And when the FTC does open an investigation, the current tools do not allow the Commission to effectively eradicate the deception.

A review of the FTC's Made in USA enforcement actions since 2009 to date reveals that the vast majority of cases – an astounding 93 percent – ended with a closing letter. *Id.*



And as to the remaining seven percent of FTC Made in USA enforcement actions, all but two of the concluded cases (one is still pending) resulted in a no-fault, no-money settlement. *Id.* In other words, only *two* of the FTC's Made in USA enforcement actions since 2009 – a shocking and disheartening *one percent* – have resulted in monetary settlements. And in one of these cases, the FTC initially entered into a no-fault, no-money settlement, which the company violated, prompting a subsequent monetary judgment only after it was established that the

company initially ignored the FTC’s order. *U.S. v. iSpring Water Systems, LLC*, No. 16-cv-1620, N.D. Ga., Stipulated Order for Civil Penalties, Permanent Injunction, and Other Relief, dated Apr. 19, 2019; *FTC v. Chemence, Inc.*, Stipulated Order for Permanent Injunction and Monetary Judgment, dated Oct. 13, 2016, https://www.ftc.gov/system/files/documents/cases/161014_chemenceinc_final_order.pdf.



These data “arguably invites unfair and deceptive product origin claims from the most unscrupulous markets most likely to conduct it. These marketers know that they can reap great benefits from misleading consumers and face only the prospect of a slap on the wrist and a stern admonishment if they get caught.” AAM, at 1. The benefits include more than just the one-time, direct benefit of the deceptive marketing campaign at issue, they also include the lasting effects of consumers associating the company with American-made goods. *See* Letter from Advantus, Oct. 12, 2019, at 5, https://www.ftc.gov/system/files/documents/public_comments/2018/10/

[00005-155955.pdf](#) [hereinafter, “Advantus Letter”] (“[M]erely requiring Sandpiper to comply with the law going forward . . . will not undo the false public perception that it has already created.”).

IV. The FTC Should Promulgate a Rule for Made in the USA Claims

The FTC remains hamstrung in its ability to effectively enforce Made in the USA Claims because Section 5 does not allow the Commission to seek civil penalties against first-time offenders. But the Commission does not have to settle for this suboptimal outcome. By establishing a rule, the FTC can turn on the penalty switch, and have the option to seek penalties against select first-time offenders. In fact, Congress has provided for just such a solution.

In 1994, Congress amended the FTC Act to, among other things, authorize the Commission to issue rules related to Made in the USA claims under the Administrative Procedures Act (the “APA”). *See* 15 U.S.C. § 45a. The APA provides a more streamlined process than the typical rulemaking procedures found in Section 18 of the FTC Act. *Compare* 5 U.S.C. § 553 *with* 5 U.S.C. § 57a. Nevertheless, in the 25 years since the amendment was passed, the Commission has yet to utilize this rulemaking authority.

The time is now ripe for the Commission to establish a formal rule prohibiting the unlawful use of Made in the USA Claims. “[T]he FTC needs more authority (including civil penalty authority) to sufficiently disincentivize corporate misbehavior.” Consumers Union, at 4. The current approach is akin to bailing water out of a sinking ship: only a small percentage of violators are caught and the ones who are caught get thrown out to violate again. This is an inefficient use of the FTC’s limited resources. “[I]t would be far more effective to levy stiff civil penalties against flagrant violators.” Chopra 2019, at 2. “[T]o deter companies from breaking the law, the FTC needs to be able to impose substantial fines on companies the first time.”

Pallone 2019, at 2; *see also* Chopra 2019, at 1 (“The FTC should activate legal switches granted by Congress decades ago that will allow [the Commission] to seek substantial fines against companies that abuse and cheapen the Made in USA brand.”).

Recognizing this need, members of both the House and the Senate have called on the FTC to adopt a more aggressive approach to the abuse of Made in the USA Claims. *See, e.g.*, Senate Letter, at 1 (“We urge the Commission to take all steps necessary to protect the integrity of the [Made in the USA] label by fully utilizing all available tools and authorities granted by Congress.”); May 2019 Hearing, at 2:49:30 (“Hopefully the FTC will come out with a more appropriately aggressive stance when it comes to people lying about Made in America.”). Chairman Simons has also recognized the need to “beef[] up [the FTC’s] remedies,” May 2019 Hearing, at 2:49:11, and will hold a workshop to consider whether to “undertake a rulemaking to codify a rule permitting the FTC to pursue civil penalties against companies and individuals that disseminate deceptive U.S.-origin claims, and whether to require defendants to admit liability in settlements.” Concurring Statement of Chairman Joe Simons, *Regarding the Matters of Sandpiper/PiperGear and Patriot Puck*, Apr. 17, 2019, https://www.ftc.gov/system/files/documents/public_statements/1514773/sandpiper_patriot_puck_simons_concurring_statement_4-17-19.pdf.

The promulgation of a formal rule would have no downside. First, unsophisticated or oblivious violators would not have to suffer draconian punishment. While a rulemaking would provide an additional arrow in the Commission’s enforcement quiver that does not mean the FTC must always use it. The FTC Act sets only a maximum penalty that the Commission may levy for rule violations, not a minimum. *See* 15 U.S.C. 45(m)(1)(a). The Commission may, in its discretion, issue a lower penalty, or no penalty at all. Alternatively, the Commission could

continue its use of closing letters. As noted above, closing letters are a valuable tool, particularly when they are used to inform and educate unknowing violators. But a rulemaking will serve as a valuable deterrent against knowing violators (*e.g.* Walmart, Target, Williams Sonoma) and allow the FTC to pursue a financial penalty against egregious violators (*e.g.* Sandpiper/Piper Gear USA, Nectar Sleep, and Patriot Puck).

Moreover, the FTC need not be concerned about an overly rigid standard. Consumer perception of what constitutes an American-made good has remained constant: The “all, or virtually all” standard has been in effect for over 80 years. *See* “Made in USA” and Other U.S. Origin Claims, 62 Fed. Reg. 231, at 63756 (Dec. 2, 1997). Moreover, changing such a well-established standard would likely be as burdensome as a rule change. The last time the FTC evaluated the Made in the USA standard, the review was described as being as rigorous as a rulemaking procedure. *See* Concurring Statement of Commissioner Roscoe B. Starek, at 63771.

Ultimately, “[f]ailure to take decisive action risks weakening the significance of the ‘Made in the USA’ label and undermining American manufacturers.” Senate Letter, at 2. The FTC should act now and initiate a rulemaking proceeding.

CONCLUSION

For the foregoing reasons, the Commission should institute a rulemaking procedure to activate the penalty switch for deceptive use of Made in the USA Claims.

Respectfully submitted,

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