



October 11, 2019

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

Re: The FTC Should Promulgate a Made in the USA Rule

Truth in Advertising (TINA.org) welcomes the opportunity to submit these comments in conjunction with the September 26, 2019 public workshop hosted by the Federal Trade Commission ("Commission" or "FTC"). These comments are in addition to, and in support of, TINA.org's Petition for Rulemaking to Promulgate Regulations for Made in the USA Claims, which was submitted to the Commission on August 22, 2019.¹ In particular, these comments address concerns that 15 U.S.C. § 45a limits the FTC's authority to promulgate a rule solely for unqualified Made in the USA labels affixed to a product or any of its containers or wrappers.

As noted in our petition, the FTC remains hamstrung in its ability to effectively enforce Made in the USA claims because Section 5 of the FTC Act does not allow the Commission to seek civil penalties against first-time offenders. However, the Commission does not have to settle for this suboptimal outcome, which hinders its ability to promote fair competition and prevent consumer deception. By establishing a rule, the FTC can turn on the penalty switch and have the option to seek penalties against first-time offenders when it deems appropriate. In fact, Congress has provided for just such a solution.

In 1994, Congress authorized the Commission to issue rules related to Made in the USA claims under the Administrative Procedures Act. *See* 15 U.S.C. § 45a. Nevertheless, in the 25 years since the amendment was passed, the FTC 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.

¹ A copy of TINA.org's Petition can be viewed at https://www.truthinadvertising.org/wp-content/uploads/2019/08/TINA_org-Petition-for-Rulemaking-to-Promulgate-Regulations-for-Made-in-the-USA-Claims.pdf.

Specifically, 15 U.S.C. § 45a states, in pertinent part:

To the extent any person . . . advertises . . . 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 5 of the Federal Trade Commission Act. This section only applies to such labels. Nothing in this section shall preclude the application of other provisions of law relating to labeling. . . . Nothing in this section shall preclude use of such labels for products that contain imported components under the label when the label also discloses such information in a clear and conspicuous manner.

Section 45a should not be read as limiting the rule to only those goods with unqualified labels affixed to them. The plain language of 45a makes clear that the rule will apply to both qualified (“Nothing in this section shall preclude use of such labels for products that contain imported components under the label when the label also discloses such information in a clear and conspicuous manner”) and unqualified (“to represent that such product was in whole or substantial part of domestic origin”) made in the USA claims. Further, the plain language also states that the rule applies to a “label, or the equivalent thereof.” Thus, a broad interpretation of label (or its equivalent) is consistent with public policy and common sense, while a narrower and unjustified reading of the statute would most certainly mean that a subset of deceptive made in the USA cases would not be covered by the rule.

Indeed, a restrictive interpretation of 45a reads an entire clause out of the law, contrary to the presumption against superfluity. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every work Congress used.”). And such an interpretation results in precisely the kind of strained analysis that the Supreme Court has cautioned against. As the Supreme Court noted, “[t]he problem is a practical one of consumer protection, not dialectics.” *United States v. Urbuteit*, 335 U.S. 355, 358 (1948); *see Kordel v. United States*, 335 U.S. 345, 349 (1948) (“[T]here is no canon against using common sense in a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it.”); *United States v. Baker*, 932 F.2d 813, 814-15 (9th Cir. 1991) (following “the Supreme Court’s admonitions . . . that courts generally beware the creation of ‘loopholes’ that have no basis in statutory language.”). Adopting a construction of “label, or the equivalent thereof” that would categorically exclude all marketing material, no matter how it is disseminated and no matter what it says about a product’s origin, would create an unnecessary loophole in an FTC Made in the USA rule.

Moreover, the legislative history supports the view that Congress was intent on stopping false made in the USA claims broadly. As one Congressman stated:

Now, it is bad enough that some of these imports coming in here actually are made by slave laborers in prison camps in places like China and other spots

around the world, but then they come in here and they get a fake ‘Made in American’ label put on them, and the American consumer believes, ‘My God, these products are actually made by our neighbors and the citizens in our country,’ and they are even sold many times under the guise of being American-made. That is absolutely unbelievable to me, intolerable. Something has to be done. This is the place to do it.

See 140 Cong. Rec. H3355 (July 26, 1994)(statement of Rep. Traficant).² Another Congressman who rose in support stated:

[A]s a Republican, in order to show there is bipartisan support for this, I urge my colleagues . . . to accept a Buy American provision and impose criminal penalties for anybody who tampers with items made overseas that would lead one to believe that they were made in America when they are not.

Id. (statement of Rep. Burton). It will further no public policy and instead serve merely as a shield against potential liability for merchants who falsely market their goods as Made in America if the FTC chooses to adopt a definition of “label, or the equivalent thereof” that is so narrow that any savvy marketer can bypass the rule simply by omitting a label from its good and falsely claim the product was made in the USA.

The promulgation of a broadly interpreted made in the USA rule would have no downside. While a rule would provide an additional arrow in the Commission’s enforcement quiver that does not mean the FTC must always use it. In appropriate circumstances, the FTC can continue its practice of issuing closing letters to companies. But a rule will serve as a valuable deterrent³ against deliberate violators and allow the FTC to pursue a financial penalty against egregious violators.

Very truly yours,



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² The transcript can be found at <https://www.govinfo.gov/content/pkg/CREC-1994-07-26/html/CREC-1994-07-26-pt1-PgH23.htm>.

³ In 2008, the Commission, testifying before Congress, remarked that “civil penalties could enable the Commission to better achieve the law enforcement goal of deterrence.” *Federal Trade Commission Reauthorization: Hearing on the Federal Trade Commission Reauthorization Act of 2008 Before the S. Comm. On Commerce, Science, and Transp.*, 110th Cong. 10-11 (2008).