

ALERT

FTC “Made in the USA” Workshop Explores Future of Enforcement and Potential Rulemaking

October 3, 2019

On September 26, 2019, the Federal Trade Commission (FTC) convened a half-day workshop to discuss the agency’s enforcement regarding “Made in the USA” claims and to solicit stakeholder views. The workshop explored compliance challenges under the current enforcement framework and what drives consumer perception of the truth or falsity of Made in the USA claims. The FTC is also currently considering whether to update its enforcement policy regarding such claims, first issued in 1997, and also how to respond to a petition for a formal rulemaking submitted by TruthInAdvertising.org. The petition argues that the Commission should exercise its rulemaking authority to make its current Made in the USA guidance more directly enforceable and to empower it to seek fines for first-time offenders.

The panel consisted of representatives from industry (The Homer Laughlin China Company, Lifetime Products, Walmart, and Richline Group, Inc.), trade associations (the Alliance for American Manufacturing and the American Apparel & Footwear Association), and consumer watchdog groups (Consumer Reports and TruthInAdvertising.org). It was moderated by FTC representatives Julia Ensor, Laura Koss, and Hampton Newsome.

There was general agreement on the panel that the FTC’s enforcement efforts regarding Made in the USA claims could be more robust and that the current program does not provide substantial deterrence for market participants who make such claims without adequate support. In the past 20 years, the FTC has issued more than 150 “closing letters” to companies – in which the FTC describes the alleged violation and accepts the company’s commitment to correct

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it – and has brought more than 20 administrative and court actions. However, proponents of heightened enforcement, such as TruthInAdvertising.org, complain that these closing letters and enforcement actions, which often result in no-fault, no-money settlements, have little deterrent effect. This view has gained some traction with the current group of Commissioners. In April of this year, Commissioners Chopra and Slaughter voted against two negotiated settlements concerning Made in the USA claims, in part due to the lack of monetary penalties. In response, the Chairman has indicated a willingness to consider potential monetary remedies going forward.

There was also general agreement that the FTC’s long-standing guidance that a product must be “wholly domestic” or “all or virtually all” made in the USA to make a Made in the USA claim could be refined. Panelists questioned whether the standard makes sense in an economy with increasingly globalized supply chains, and in particular with respect to products that are manufactured in the U.S. using recycled materials of indeterminate origin. That said, the FTC moderators stressed throughout the program that prior research has indicated that a “significant minority” of consumers – approximately 25% – perceive a “Made in USA” claim to indicate that a product contains no, or negligible, foreign content.

The FTC participants in the workshop stressed that the agency wants to understand subjective consumer perception better so that, if warranted, it might issue revised guidance with more objective criteria that would take special situations into account. For instance, the FTC pressed the panelists to do more studies regarding how consumer perception differs between product categories, based on the identity of the company making the claim, and based on the origin of the foreign component(s) in the product. The workshop featured remarks from FTC economist Shiva Koochi on what the FTC would be looking for in submitted studies. Suffice to say, whenever a representative from a particular company or industry suggested that the guidance should be altered in some specific way, the FTC was quick to ask whether there was consumer perception data to substantiate the request.

Companies should consider submitting comments in connection with the workshop, which are being accepted until October 11, 2019, or in connection with any rulemaking that the FTC may choose to initiate in response to the petition. As the panelists agreed, the competitive landscape is much different today than it was in 1997 when the guidance was initially issued – most notably in terms of the globalization of supply chains and the rise of direct-to-consumer sales. The FTC has signaled a willingness to consider alterations to its guidance in view of these changes and the other enforcement challenges described above – particularly where consumer perception research is available to back up the request.