

Federal Trade Commission Announces New Rulemaking on “Made in the USA” Claims

June 30, 2020

Last week, the Federal Trade Commission (FTC) announced that it will be conducting a rulemaking on “Made in the USA” (MUSA) labeling requirements—a development that potentially will allow the agency to impose even stiffer monetary penalties on companies that it finds in violation. A key issue in the rulemaking will be the degree to which the final rule covers product advertising or marketing claims in addition to product labeling. In any event, the rulemaking points to more aggressive enforcement when it comes to U.S.-origin claims.

FTC’s Authority Over “Made in the USA” Claims

Although U.S. Customs and Border Protection is generally responsible for enforcing rules relating to the marking of imported goods with their country of origin, the FTC is in charge of policing claims about whether a product is “Made in the USA.” The agency requires that “all or virtually all” of the product must be made in the United States if a company makes an unqualified MUSA claim. It has released detailed guidance on this standard and an Enforcement Policy Statement. The FTC has long brought MUSA enforcement actions under the FTC Act, which prohibits deceptive acts and practices, and recently—as we highlighted here—has begun seeking monetary awards against companies in violation.

The FTC has increasingly focused on the issue of MUSA claims and held a workshop last year to determine whether it should alter the existing standards for such claims, or the agency’s approach to enforcement. Last week, it released both a staff report summarizing the findings of the workshop and a Notice of Proposed Rulemaking (NPRM). The staff report concludes that the agency will continue to enforce the same legal standard for evaluating MUSA claims, noting

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“no stakeholder presented consumer perception evidence that would support updating the Policy Statement.”

However, while the staff did not find evidence to support changing the existing standard, the majority of workshop participants and public submissions were in favor of the FTC strengthening enforcement of the MUSA standard, including significant support for issuing a MUSA rule.

The Proposed Rulemaking

The FTC’s NPRM seeks comment on a MUSA labeling rule that would apply to unqualified MUSA claims. The rule would impose the same requirements that the FTC enforces under existing law. The primary purpose of the rulemaking appears to be to give the FTC the ability to impose civil penalties on first-time offenders.

The FTC Act provides that the FTC can pursue civil penalties for violations of cease and desist orders, or for violation of rules issued pursuant to the agency’s authority to address MUSA labeling, as codified in 15 U.S.C. § 45a. The proposed rulemaking is the first time the FTC has chosen to use its rulemaking authority pursuant to 15 U.S.C. § 45a with respect to MUSA claims.

The key issue in the rulemaking likely will be the extent of the rule. The NPRM indicates that the rule would cover unqualified MUSA labels, as well as unqualified MUSA claims appearing in “any mail order catalog or mail order promotional material.” Depending on how “mail order catalogs” and “mail order promotion material” are defined, the rule could potentially apply to online advertising or marketing. Commissioners Noah Joshua Philips and Christine S. Wilson issued statements indicating that they would not support extending the rule to advertising and marketing, while Commissioner Rohit Chopra issued a statement supporting that extension. It is unclear where the Commission majority will land.

In any event, the proposed rule is likely to be used to target what the FTC considers to be “egregious offenders,” those companies engaged in “intentional deception.” The staff report notes that staff has received “only a small handful of reports of egregious MUSA deception per year – perhaps one per quarter – and almost every verified report has led to administrative or federal court action.” At the same time, depending on the scope of the rule, it could also give staff additional leverage when dealing with the more common MUSA complaints it investigates, which (according to the report) primarily involve broad website and social marketing claims and unqualified claims for products that incorporate imported content though they are substantially transformed in the U.S.

Comments will be due 60 days after the NPRM is published in the Federal Register, which should be sometime the week of June 29, 2020.