

“Made in USA” Legal Series

A Discussion with Julia Solomon Ensor, Esq. of the
Federal Trade Commission



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Arent Fox

March 15, 2017

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Scott A. Cohn, Esq., *Arent Fox LLP*



Welcome

- › Kickoff of Arent Fox **“Made in USA” Legal Series**
- › Over 230 attendees from over 150 companies in a wide variety of industry sectors
- › Next “Made in USA” Legal Series Webinar: May 17, 2017



Today's Speakers

- ▶ **Julia Solomon Ensor, Esq.**, is an Attorney in the Enforcement Division of the Federal Trade Commission's Bureau of Consumer Protection. Ms. Ensor coordinates the Division's "Made in USA" program and works on a variety of compliance and enforcement matters.
- ▶ **Georgia C. Ravitz, Esq.** has extensive experience in American-made claims for many product categories and across numerous industry sectors. She works closely with companies to conduct pre-emptive due diligence analyses as to whether products manufactured in the US are eligible for unqualified "Made in USA" claims.
- ▶ **Scott A. Cohn, Esq.** has a degree in Accounting and has extensive experience in evaluating Made in USA claims and Customs substantial transformation issues. Scott's accounting and auditing background enables him to perform detailed GAAP cost accounting analyses that are the underpinnings of "Made in USA" claims. Scott also has broad experience in Textile and Apparel labeling, as well as global labeling compliance.



Today's Topic

- › Discussion with FTC concerning “Made in USA” Policy
- › Discussion of Recent Enforcement Examples
- › Demand for American-Made Products
 - Consumers
 - New Administration
 - Buy American Act



Proudly Made in the USA
of US and imported parts



Before we get started

- › *This webinar is being recorded.*
- › *Answers to any questions during this webinar do not constitute legal advice.*
- › *Due to the number of attendees on the call, we have muted the participant lines to avoid any background noise. Additional questions may be submitted through the chat box feature on the right-hand side bar of the WebEx screen.*



The Federal Trade Commission's Enforcement Policy Statement On U.S. Origin Claims



Julia Solomon Ensor
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Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission

March 15, 2017

Overview

- FTC and Advertising Law.
- The FTC's Enforcement Policy Statement on U.S. Origin Claims.
- Views expressed today are my own.

The FTC's Statutory Authority

“Unfair or deceptive acts or practices . . . are hereby declared unlawful.”



FTC Act, Section 5
(15 USC § 45)

FTC Act (15 USC §§ 41-58)

Tell the truth.

Substantiation for all express and implied claims.

Reasonable basis.



The Enforcement Policy Statement on U.S. Origin Claims helps marketers comply.

Enforcement Policy Statement

Applies to:

- ◎ All forms of marketing (including product labels, ads, emails, etc.).
- ◎ All products advertised or sold in the U.S. (unless subject to other laws).
 - Excepted → certain textiles, wool, fur, automobiles, food products, government procurement.

Enforcement Policy Statement

- ◎ Covers express and implied U.S.-origin claims (unqualified and qualified).
 - Net impression test.
 - U.S. symbols or geographic references (flags, maps, references to location of factories, etc.) may convey a U.S. origin claim in context.
- ◎ American brand name, trademark, or company address by itself likely does not convey a U.S.-origin claim.

Unqualified Claims

- ◉ Made in the USA/America
- ◉ Built in . . .
- ◉ Produced in . . .
- ◉ Manufactured in . . .
- ◉ Created in . . .
- ◉ *Net impression.*



Unqualified Claims

- ◎ Product must be “**all or virtually all**” made in the USA.
- ◎ **FIRST**: Final assembly/substantial transformation must take place in USA.
 - Product should not be required to be marked “made in [foreign country].” 19 USC § 1304
- ◎ **THEN**: Flexible factors analysis.

Unqualified Claims

© Commission may consider a variety of factors depending on context. Examples:

1. Proportion of U.S. manufacturing costs.

→ Cost of goods sold or inventory costs: manufacturing materials, direct manufacturing labor, manufacturing overhead.

2. Remoteness of foreign content.

→ Look far enough back that a reasonable marketer would expect it accounted for any significant foreign content.

→ Petroleum in plastic clock radio vs. gold in ring.

3. Importance of foreign content.

Qualified Claims

- ◎ Qualifications describe extent, amount, or type of domestic content or processing; indicate that the product is not entirely of U.S.-origin.
- ◎ BUT last substantial transformation, assembly, processing, or finishing must occur in the United States.

Qualifications Should Be:

CLEAR.

Prominent.

Understandable.

Plain language.

Sufficiently large type.

Close to qualified claim.



Assembled in USA

- ◎ Substantial transformation in USA.
- ◎ Principal assembly in USA, that assembly is substantial.
 - More than a screwdriver assembly.



Enforcement

- ◎ Informal staff counseling: help companies develop truthful claims that promote U.S.-manufacturing and do not deceive consumers.
- ◎ Monitor complaints.
- ◎ Staff closing letters and warning letters.
- ◎ Litigation.

Closing Letters

- ◎ August, 2010 to present.
- ◎ 99 letters as of 3/9/2017.
- ◎ <https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/staff-closing-letters>

Litigation

- **Block Division, Inc., No. 1723052 (3/8/17) – unqualified “Made in USA” claims for pulleys incorporating significant imported parts**
- **iSpring Water Systems, LLC, No. 1723033 (2/1/17) – unqualified “Built in USA” claims for imported water filtration systems and systems incorporating significant imported parts**



Litigation

Injunctive Relief in iSpring and Block Division:

1. No U.S.-origin claims unless:

- ❖ Final assembly or processing of the product occurs in the USA;
- ❖ All significant processing occurs in the USA; **and**
- ❖ All or virtually all ingredients or components are made and sourced in the United States;

OR

- ❖ A Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing.

2. No misleading/unsubstantiated country-of-origin claims.

Litigation

- ◎ **FTC v. Chemence, Inc., No. 1:16-cv-228 (N.D. Ohio, Oct. 13, 2016) – unqualified “Made in USA” claims for superglue made using approximately 55% imported chemicals.**
 - ❖ No U.S.-origin claims unless:
 - ❖ Final assembly or processing occurs in the USA, all significant processing occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the USA; or
 - ❖ Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing.
 - ❖ Means and instrumentalities to third-party retailers.
 - ❖ \$220,000 monetary judgment.



Litigation

◎ **Made in the USA Brand, LLC, Docket No. C-4497 (11/10/2014) – Awarded certification mark to anyone that self-certified compliance with standard.**

- ❖ Cannot represent that a product meets the standard unless independent and objective evaluation of product OR disclose self-certification.
- ❖ No misleading/unsubstantiated country of origin claims.
- ❖ Means and instrumentalities to third-party retailers.



◎ **E.K. Ekcessories, Inc., Docket No. C-4419 (12/4/13) – Overly broad claims that all products were made in the USA.**

- ❖ No U.S.-origin claims unless the product is all or virtually all made in USA.
- ❖ No misleading/unsubstantiated country of origin claims.
- ❖ Means and instrumentalities to third-party retailers.



Questions?

<https://www.ftc.gov/tips-advice/business-center/advertising-and-marketing/made-in-usa>

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Attendee Questions for Discussion



Thank you

- › Julia Solomon Ensor of the FTC
- › Scott Cohn and colleagues at Arent Fox
- › Audience



Stay tuned for our next “Made in USA” Legal Series Webinar: May 17, 2017

- Special Rules – Textiles, Automobiles, Food, Government Procurement (“Buy American” Programs)
- FTC v. California Standards
- Cost Accounting Analyses for Components

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