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Ground Rules for Made in USA Claims and Foreign Origin Markings

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Manufacturers regularly ask us for guidance on the ground rules for “Made in USA” claims. The phrase has a certain cachet in today’s market, which makes the value of confirming availability for its use, and the correct manner of use, entirely understandable. On the other hand, if an item is not of USA origin, then the country of origin marking requirements for entry and sale into the United States are impactful for both customer perception as well as legal compliance. At the heart of this issue lies the often confusing intersection of advertising and customs laws.

1. The FTC and U.S. Origin Items

The Federal Trade Commission (FTC) has principal jurisdiction over what tend to be understood as Made in USA claims. Those claims are regulated under Section 5 of the Federal Trade Commission Act (the FTC Act), which is found at 15 USC § 45 and prohibits unfair or deceptive acts or practices. The Commission is free to exercise its jurisdiction by enforcing the FTC Act against unlawful uses of Made in USA or similar claims, and even deceptive claims of foreign origin to the extent not otherwise regulated by U.S. Customs and Border Protection.

Manufacturers looking to understand the permissibility of Made in USA claims must begin with the premise that any advertisement, label, or other claim must be truthful. The key from a risk perspective is to understand how to maximize the potential of a claim while staying within the boundaries of what the FTC, a consumer, or a competitor would find to be truthful. The FTC will find an advertisement or label deceptive and therefore unlawful if it contains a material representation or omission of fact that is likely to mislead reasonable consumers. At its most basic level, a claim is considered deceptive unless the manufacturer has a reasonable basis to substantiate the claim at the time the claim is made. In sum, the use of a Made in USA or similar claim requires that it is both truthful and that there is tangible substantiation in support of that truth.

a) The All or Virtually All Standard

Saying that an item is Made in USA, American Made, or merely marking it with USA amounts to an express unqualified claim of U,S, origin. Claims can also be implied, where the FTC will review the net impression of all advertisements, labels, markings, and materials to determine what a reasonable consumer would believe when considering the product. Classic examples published by the FTC include simple "American Quality" references or photographs of Americans in a domestic factory with an image of an American flag. All of these circumstances amount to unqualified claims of U,S, origin and are intended, rightfully or wrongfully, to convey to consumers that the respective products are Made in USA.

FTC's published Enforcement Policy provides that any product using unqualified Made in USA claims must be "all or virtually all" made in the United States from inputs of United States origin. A product that is all or virtually all made in the United States will ordinarily be one in which all significant parts and processing that go into the product are of U.S. origin. In other words, where a product is labeled or otherwise advertised with an unqualified "Made in USA" claim, it should contain only a *de minimis*, or negligible, amount of foreign content. Although there is no bright-line test to establish when a product is or is not "all or virtually all" made in the United States, there are a number of factors that the FTC looks to in making this determination. At a minimum, the final assembly or processing of the product must take place in the United States. Additional factors may include the portion of the product's total manufacturing costs that are attributable to U.S. parts and processing (total cost of manufacturing materials, manufacturing labor, and overhead) and how far removed from the finished product any foreign content may be.

b) Using Qualified Claims

All is not lost if a product does not meet the "all or virtually all" standard, although any U.S. origin claims must include sufficient qualifying language to communicate that the product's origin is not entirely domestic. Some common examples of qualified U.S. origin claims include "Made in USA with domestic and imported parts" or "Assembled in America with Chinese parts." Qualifying language is sufficient if it describes the amount or extent of a product's U.S. versus foreign content or processing in a way that is understandable to the reasonable consumer. Manufacturers are fee to craft qualifications to best describe various production circumstances at varying levels of specificity. There is a great deal of flexibility in determining the precise language of a qualified claim, provided that it is truthful.

c) Care with “Assembly” Claims

There is often confusion over whether use of “Assembly” and similar claims is a shortcut to avoiding the need for qualification. It is not. If the product’s last substantial transformation occurred in the U.S. then an “Assembled in USA” claim could be appropriate without qualification. Yet, because “assembly” potentially describes a wide range of processes-from simple “screwdriver” operations at the very end of the manufacturing process to the construction of a complex, finished item from basic materials-the use of an unqualified “assembled” claim may in some circumstances be confusing or misleading. To avoid risk of alleged deception, Assembled in USA claims should be limited to those instances where the product has undergone its principal assembly in the United States, and that assembly is substantial. This approach also guards against potentially contradictory claims, such as suggesting that a product was Assembled in USA while also marking the product as “Made in [foreign country].”

d) Substantiating Claims

All claims of origin, whether unqualified Made in USA claims or some form of qualified claims, should be reasonably substantiated at the time of use. In the event that the truthfulness of an origin claim is challenged, then the quality of substantiation will determine the path forward and the range of potential outcomes. At the most basic level, substantiation will include documentary evidence for the sourcing of inputs and the manufacturing processes occurring in the United States. The sourcing records will involve part-level origins and values. The manufacturing records will include the range of domestic value added, including labor costs, and the complexity of those domestic operations. Ultimately the value added within the United States will need to significantly outweigh the *de minimis* foreign value, such as 95% domestic value, in order for there to be a reasonable basis to assert that the product is indeed all or virtually all made in the United States.

2. CBP and Foreign Origin Items

Origin claims necessarily intersect with the country of origin analysis and origin markings required under customs laws. U.S. Customs and Border Protection (CBP) has jurisdiction over the entry of foreign products into the commerce of the United States. All products of foreign origin that are imported into the United States must be marked with the name of the foreign country of origin as required under Section 304 of the Tariff Act, found at 19 USC § 1304. The purpose of markings is to place the consumer on notice of the foreign origin, which is conceptually similar to the rationale of the FTC’s “Made in USA” rules, since both seek to ensure that reasonable consumers receive truthful information in support of their buying decisions.

The most common difficulty that arises when dealing with country of origin markings is the correct determination of the appropriate country when multiple foreign countries contributed materials or processing to the product. The rule of origin for these determination is that the country of origin in is the last country where a “substantial transformation” took place (although different tests have been applied under some free trade agreements). The U.S. Court of International Trade (CIT) recently ruled on what constitutes a substantial transformation in a “key decision of first impression.” [*Energizer Battery, Inc. v. United States*, 190 F.Supp.3d 1308, 38 ITRD 2029 (Ct. Int'l Trade 2016).] In *Energizer Battery*

, the CIT decided that a manufacturer's post-importation process, which took place in Vermont, did not result in a substantial transformation of Energizer's product. The CIT held that a substantial transformation is a manufacturing or other process that results in a new and different article of commerce, having a new name, character, and use that is different from that which existed prior to the processing. In contrast, the "simple assembly" of a limited number of components does not constitute a substantial transformation.

CBP approaches country of origin issues on a case-by-case basis. If CBP determines that a good is not of foreign origin despite foreign inputs (i.e., the good undergoes its last substantial transformation in the United States) then there is generally no requirement that the finished product must be marked with a country of origin. As one would expect, neither CBP nor the FTC require goods partially or wholly made in the United States to be labeled with "Made in USA" or any other indication of domestic origin.

3. In All Events BE TRUTHFUL

The risk associated with "Made in USA" claims and foreign origin markings is in part one of inadvertence. All legal and regulatory compliance activities with some degree of complexity, particularly as here where there are few bright-lines, carry the risk of unknowingly erring in markings and thereby technically violating the applicable rules. The greater risk, both in terms of financial exposure and reputational harm, is the possibility that an activity could arise from gross negligence or even fraud. The fact of the matter is that domestic parties desire to mark items as being "Made in USA" because it does carry a premium in the minds of reasonable consumers. Likewise, domestic parties desire to mark items with certain countries of origin (such as Vietnam) and not others (such as China) to avoid paying lawful duties and any stigma in the minds of reasonable consumers. Under either legal regime, the appropriate course of action in all events-as simple as it seems-is to BE TRUTHFUL in claims and markings. The team at Benesch are always ready and able to assist in steering to that truth as these manufacturing and import issues arise during front-end compliance or enforcement defense activities.

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