

Made in the U.S.A.?

With President Trump and Joe Biden squaring off in the upcoming Presidential election, the topic of job creation in America has become a focal point of both campaigns, and as usual, the candidates have been showering praise on those companies who have chosen to manufacture and produce their merchandise in America while shaming those companies who have outsourced their manufacturing and production operations to other countries. If you are one of the companies being praised for keeping manufacturing operations in America and simultaneously keeping Americans employed, congratulations! Now, it's time to prepare for the regulatory scrutiny that comes with a "Made in the U.S.A." claims ("MUSA claims").

This article will take a high-level look at the Federal Trade Commission's ("FTC") "all or virtually all" standard for determining if a companies' MUSA claim is false or misleading, and compare and contrast it with the California standard, which is the most burdensome for companies to comply with. Importantly, the goal of this article is not to Make America Great Again or Restore the Soul of America, but rather, to provide companies with a refresher on how to wrap themselves in the red, white, and blue this election season without inviting unwanted regulatory scrutiny.

The Federal Trade Commission ("FTC") Standard

The FTC has been given the power to bring law enforcement actions against false or misleading claims that a product is of U.S. origin. Generally speaking, there are two categories of MUSA claims – Unqualified and Qualified. MUSA claims can be implied. When analyzing implied claims, the FTC typically focuses on the overall impression of the advertising, label, or promotional material. Depending on the context, U.S. symbols or geographic references (e.g., U.S. flag on the label, outline of a U.S. map on the label, or references to U.S. locations of headquarters or factories) may convey a claim of U.S. origin, either by themselves or in conjunction with other phrases or images on the product label. Whether your company is making unqualified or qualified MUSA claims, the golden rule is that the claims must be truthful and substantiated.

A. Unqualified Claims and the "All or Virtually All" Standard

Unqualified claims are the gold standard and will earn a company the most patriotic points because they represent a guarantee from the company that "all or virtually all" of the product was manufactured or processed in the U.S.A. In other words, the company is certifying to consumers that "all or virtually all" of the significant parts and processing that went into the product are of U.S. origin and contain no (or negligible) foreign components. Factors that the FTC considers when a product is "all or virtually all" made in the U.S.A. include: (a) whether the product's final assembly or processing take place in the U.S.A.; (b) how much of the product's total manufacturing costs can be assigned to U.S. parts and processing; and (c) how far removed the foreign content is from the finished product.

1. Site of Final Assembly or Processing

The FTC identified “site of final assembly or processing” as an important factor in its analysis based on consumer perception evidence that suggests the country in which a product is put together or completed is material to consumers when they are evaluating where the product is made. Thus, it has become a prerequisite for the FTC that a product have been “substantially transformed” in the U.S.A. However, substantial transformation is not the end of the analysis. If a product is substantially transformed in the U.S.A. and thereafter assembled or processed outside of the U.S.A., it is unlikely that the FTC will consider the product to be “all or virtually all” made in the U.S.A.

2. Proportion of U.S. Manufacturing Costs

Assuming the product is assembled or processed in the U.S.A., the FTC will next examine the percentage of the total cost of manufacturing the product that is attributable to U.S. costs and to foreign costs. Where the percentage of foreign content is very low, the FTC will likely consider the product “all or virtually all” made in the U.S.A. It is important to note however, there is no fixed point at which a product is deemed to be “all or virtually all” made in the U.S.A., and the FTC typically conducts this inquiry on a case-by-case basis.

For example, the FTC recently brought an enforcement action against home products and kitchen wares company Williams-Sonoma, Inc. (“Williams-Sonoma”) for alleged unsubstantiated claims that some of its products were all or virtually all made in the U.S.A. In its complaint, the FTC alleged that unqualified Made in the U.S.A. claims made on the company’s website, in emails to consumers, and in company videos that could be accessed via the internet, were false and misleading because the products were wholly imported, or contained significant imported materials or components. Under the terms of the settlement between the FTC and Williams-Sonoma, Williams Sonoma is now prohibited from making unqualified claims for any product, unless it can show that the product’s final assembly or processing – and all significant processing – takes place in the U.S.A., and that all or virtually all components of the product are made or sourced in the U.S.A.

3. Remoteness of Foreign Content

Finally, the FTC will consider how far removed from the finished product the foreign content is. As a general rule, in the determining the percentage of U.S. content in its product, a company should look far enough back in the manufacturing process to account for any significant foreign content. In other words, a manufacturer who buys a component from a U.S. supplier cannot assume that the component is 100% made in the U.S.A., and is required to ask the supplier about the percentage of U.S. content in the component.

The FTC has historically used the examples of a computer and a wrench, two products that are likely to contain imported steel, to compare and contrast the foreign content analysis. With respect to a computer, steel is probably a small portion of the total cost of the computer and consumers are likely not as concerned about the steel inputs on the computer as they are about the CPU, keyboard and other components that impact a computer’s functionality. A wrench, on the other hand, relies on steel as a direct and significant input, and the fact that the steel is imported would likely be a significant factor in evaluating whether the finished product is all or virtually all made in the U.S.A.

B. Qualified Claims

If you are unable to certify that “all or virtually all” of your product was assembled or processed in the U.S.A. or simply do not want to go through the hassle of certifying that “all or virtually all” of your product was assembled or processed in the U.S.A., you still have the ability to make a qualified claim about the patriotic nature of your product. Qualified claims will not make you as popular with politicians because they typically involve disclaimers like “Made in the U.S.A. with foreign parts,” but they still tend to boost a company’s patriotic

credentials. It is important to note however, that qualified claims are not a license to waive the American flag in advertisements and on product labels without consequence.

Qualified claims must be clear, prominent, and understandable to prevent deception of consumers. Clarity of language, prominence of type size and style, proximity to the claim being qualified, and an absence of contrary claims that could undercut the effectiveness of the qualification are ways to maximize the likelihood that the qualifications are appropriately clear and prominent to the consumer. For example, qualified claims can be general in nature, indicating the existence of unspecified foreign content (e.g., “Made in the U.S.A. of U.S. and imported parts”) or they can be more specific (e.g., “Made in the U.S.A. from imported leather). Regardless of whether the qualified claim is general or specific, the company will need to be able to prove that the claim is truthful and substantiated.

The William-Sonoma settlement also put limits on qualified claims, by requiring Williams-Sonoma to ensure that claims of product assembly in the U.S.A. are substantiated with proof that the product was last substantially transformed in the U.S.A., its principal assembly took place in the U.S.A., and the U.S.A. assembly operations were substantial.

The California Standard

Cal. Bus. & Prof. Code § 17533.7 prohibits the sell or offer for sale in California “any merchandise on which . . . there appears the words ‘Made in the U.S.A.’ . . . or similar . . . when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside the United States.” This standard differs from the FTC standard in that the California standard evaluates each “article, unit, or part thereof” under a different analysis and the FTC standard looks at the proportion or role of the foreign material within the product as a whole.

Another difference between the FTC standard and the California statute is the treatment of qualified “Made in U.S.A.” claims - “Made in U.S.A. from imported parts.” Under the FTC standard, qualified Made in U.S.A. claims are appropriate so long as they are truthful and can be substantiated. The California statute, however, is silent on the issue of qualified claims. One California court however, has held that the lack of guidance on qualified claims does not preclude the court from using its common sense. *Paz v. AG Goldschmeid, Inc.*, 2014 U.S. Dist. LEXIS 156413, *15 (S.D. Cal. Oct. 27, 2014). “If a product is made in the U.S.A. with imported fabric and components, and the label accurately reflects that, then there is no falsity or misrepresentation.” *Paz v. AG Goldschmeid, Inc.*, *supra* at *15.

It is important to note that § 17533.7 (c)(1)(A) and (B) creates an exemption for manufacturers that can show (A) they cannot produce or obtain a part of the merchandise from a domestic source and (B) all parts of the merchandise that were obtained outside the United States constitute not more than 10% of the final wholesale value of the manufactured product. This exemption took effect on January 1, 2016 and applies prospectively, which means this exemption would apply to all products manufactured before the statute took effect, if a company is able to meet the two requirements under the exemption. *Fitzpatrick v. Tyson Foods, Inc.*, 2016 U.S. Dist. LEXIS 132797, *3-12 (E.D. Cal. Sept. 26, 2016) (holding that amendment to § 17533.7 that created the exemption under section(c)(1)(A) and (B) extinguished plaintiff’s claim under the pre-amendment version of § 17533.7 because the claim was statutory in nature, the amendment went into effect before final judgment in the case, and the plaintiff’s rights had not vested); see also *Rossetti v. Stearn’s Prods.*, 2016 U.S. Dist. LEXIS 74163, *9-14 (C.D. Cal. June 6, 2016) (holding same). Because the exemption is so new, no court has analyzed what is required to meet the exemption.

Best Practices for Compliance

When promoting the patriotic credentials of your company, you should adhere to the following principles to

remain compliant with both the FTC and California standards:

- **Unqualified Claims Require Final Assembly or Processing in the U.S.A.** The “all or virtually all” analysis is irrelevant if you cannot prove that final assembly or processing of the product occurred in the U.S.A.
- **Scrutinize Your Manufacturing Process.** Assuming the product is put together or otherwise completed in the U.S., companies should pay close attention to (1) the portion of a product’s total manufacturing costs that are attributable to U.S. parts or processing; and (2) how far removed from the finished product any foreign content is.
 - Companies should look back far enough in their manufacturing process to be reasonably sure that any significant foreign content has been included in their assessment of foreign costs.
- **Earlier Is Better.** Foreign content incorporated early in the manufacturing process often will be less significant to consumers than content that is a direct part of the finished product or the parts or components produced by the immediate supplier.
- **Ask Questions of Your Suppliers.** Companies should ask their suppliers for specific information about the percentage of U.S. content before they make a U.S.A. origin claim. If given in good faith, companies can rely on information provided by their suppliers about the domestic content in the parts or components that they produce.
- **Qualified Claims Still Require Significant U.S. Content.** Avoid qualified claims unless the product has a significant amount of U.S. content or U.S. processing.
- **Beware of Implied Claims.** U.S. symbols (e.g., a map of the U.S. or an American flag) or geographic references (e.g., U.S. factory locations or headquarters) on a product label could potentially create the impression that your product was assembled or produced in the U.S.A.

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