

## 'Made In America' — What You Need To Know Now

By **Daniel Herling and Richard Maidman**

Law360, New York (August 10, 2017, 9:34 AM EDT) -- During the White House's "Made in America Week" this past month, President Trump hosted companies from across the country, and businesses from all 50 states displayed products that were produced in the United States.[1] Media outlets reported that the President is looking for ways to defend American-made products by certifying legitimate U.S. goods, and aggressively going after imported products that unfairly sport the "Made in America" label.[2]

The President announced that his administration would crack down on "predatory online sales of foreign goods" that are hurting U.S. retailers.[3] According to a senior White House official, the United States loses about \$300 billion a year to intellectual property theft, from semiconductors to jeans.[4] In March of this year, the President signed an executive order giving customs officials increased authority to stop pirated and counterfeit items.[5]

In light of the increased focus on "Made in America" labeling and United States domestic product, it seemed like the perfect time to highlight some of the important issues concerning "Made in America" labeling.

### **Who Decides Whether a "Made in the United States" Claim Is Permissible?**

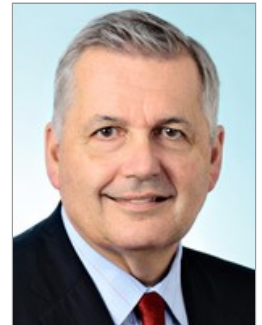
Traditionally, the arbiter of whether a "Made in the United States" claim is permissible has been the Federal Trade Commission. Under FTC regulations, "for a product to be called Made in USA, or claimed to be of domestic origin without qualifications or limits on the claim, the product must be 'all or virtually all' made in the U.S. The term 'United States,' as referred to in the [FTC's] Enforcement Policy Statement, includes the 50 states, the District of Columbia, and the U.S. territories and possessions." [6]

A business making a "Made in the United States" claim should have a "reasonable basis" for the claim, which must be backed up by competent and reliable evidence.[7] Certain goods are actually required to bear "Made in USA" labeling. These include certain clothing if the final product is manufactured in the U.S. of fabric that was manufactured in the U.S.[8] Unfortunately, the FTC does not pre-approve advertisements or labels, so businesses need to be cautious before including a designation of product origin on a product.

The FTC's regulations are not just for show. For example, the FTC recently filed a complaint against a Georgia-based distributor of water filtration systems alleging that the company's unqualified claims that its products were built in the United States deceived consumers.

The FTC filed another complaint against a Texas-based distributor of pulley block systems, alleging that pulleys featured imported steel plates stamped "Made in USA" before they even entered the United States, and that the company's products included significant imported parts that are essential to their function. Both actions were settled by consent order.[9]

States also regulate "Made in United States" advertising and labeling. For example, in 2015, California passed SB 633, which enacted legislation that largely tracks the FTC enforcement



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standard. SB 633 allows merchandise made, manufactured or produced in the United States to carry a "Made in U.S.A." label if the merchandise contains one or more articles, units or parts from outside the United States if they do not constitute more than five percent of the final wholesale value of the product, or if the manufacturer makes a specified showing regarding the articles, units or parts from outside the United States and they do not constitute more than ten percent of the final wholesale value of the product.

The bill does not apply to merchandise sold for resale to consumers outside of the state. Merchandise offered or sold outside the state would not be deemed mislabeled if the label conforms to the law of that state or country.

Specifically, provisions of Section 17533.7 of the California Business and Professions Code were amended to state:

- (a) It is unlawful for any person, firm, corporation, or association to sell or offer for sale in this state any merchandise on which merchandise or on its container there appears the words "Made in U.S.A.," "Made in America," "U.S.A.," or similar words if the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.
- (b) This section shall not apply to merchandise made, manufactured, or produced in the United States that has one or more articles, units, or parts from outside of the United States, if all of the articles, units, or parts of the merchandise obtained from outside the United States constitute not more than 5 percent of the final wholesale value of the manufactured product.
- (c) (1) This section shall not apply to merchandise made, manufactured, or produced in the United States that has one or more articles, units, or parts from outside of the United States, if both of the following apply:
  - (A) The manufacturer of the merchandise shows that it can neither produce the article, unit, or part within the United States nor obtain the article, unit, or part of the merchandise from a domestic source.
  - (B) All of the articles, units, or parts of the merchandise obtained from outside the United States constitute not more than 10 percent of the final wholesale value of the manufactured product.
- (2) The determination that the article, unit, or part of the merchandise cannot be made, manufactured, produced, or obtained within the United States from a domestic source shall not be based on the cost of the article, unit, or part.
- (d) This section shall not apply to merchandise sold for resale to consumers outside of California.
- (e) For purposes of this section, merchandise sold or offered for sale outside of California shall not be deemed mislabeled if the label conforms to the law of the forum state or country within which they are sold or offered for sale.

Companies should also know that they can face private actions under the Lanham Act if their labeling is false or misleading.

## **Factors Impacting Enforcement**

The Trump administration has announced a commitment to crack down on products that are improperly labeled "Made in America". One official recently stated, "There's just too many examples of foreigners slapping on 'Made in America' labels to products and the worst insult is when they do it after they have actually stolen the product design." [10]

It remains to be seen how stringently the administration can carry out its policy goals if the FTC is underfunded and overburdened. As is the case for nearly all other federal agencies, the FTC is in line to have its budget cut.

Under President Trump's proposed spending plan for fiscal 2018, the FTC is to lose approximately \$6 million of funding. Additionally, the Chairman of the Federal Communications Commission (FCC), Ajit Pai, reportedly wants to cede to the FTC enforcement of internet service paid prioritization and net neutral practices.

If the FTC is indeed left under-resourced, enforcement could fall on the states. However, political considerations abound, especially in states like California, with significant Democratic leadership that has been at odds with the Trump administration on numerous issues. Perhaps the plaintiffs bar will fill in the potential enforcement void with private (likely, class-action) lawsuits.

## **Express vs. Implied Claims**

One area we believe is important to highlight is a distinction made by the FTC between express and implied "Made in USA" claims. An express claim is exactly what it sounds like: for example, a label stating "Made in USA," "Our products are American-made," or "USA" contains an express claim. In contrast, an implied claim is one where the "net" impression is likely to convey to consumers that the product is of U.S. origin.

The FTC cites as an example, "A company promotes its product in an ad that features a manager describing the 'true American quality' of the work produced at the company's American factory."<sup>[11]</sup> The FTC focuses on context in identifying implied claims:

In identifying implied claims, the Commission focuses on the overall impression of the advertising, label, or promotional material. Depending on the context, U.S. symbols or geographic references (for example, U.S. flags, outlines of U.S. maps, 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.<sup>[12]</sup>

## **Conclusion**

Given the Trump administration's emphasis on promoting products that are made in the U.S.A., companies should think about whether their products qualify. To avoid pitfalls, businesses need to be aware of who is scrutinizing their advertising and labels and the standards that apply.

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[1] <https://www.whitehouse.gov/blog/2017/07/24/made-america-week-recap> (last accessed Aug. 7, 2017).

[2] <https://www.whitehouse.gov/the-press-office/2017/07/19/remarks-president-trump-made-america-roundtable> (last accessed August 7, 2017); <https://www.reuters.com/article/us-usa-trade-counterfeit-idUSKBN1A32LF> (last accessed August 7, 2017).

[3] See <http://www.reuters.com/article/usa-trade-manufacturing-idUSL1N1K81L3> (last accessed Aug. 7, 2017).

[4] <https://www.reuters.com/article/us-usa-trade-counterfeit-idUSKBN1A32LF> (last accessed Aug. 7, 2017).

[5] Id.

[6] <https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard> (last accessed Aug. 7, 2017).

[7] Id.

[8] <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>, at 15-16 (last accessed Aug. 7, 2017).

[9] <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-approves-final-consents-settling-charges-two-companies-made> (last accessed Aug. 7, 2017).

[10] <https://www.reuters.com/article/us-usa-trade-counterfeit-idUSKBN1A32LF> (last accessed Aug. 7, 2017).

[11] <https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard> (last accessed Aug. 7, 2017).

[12] <https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard> (last accessed Aug. 7, 2017).