

FTC Finalizes “Made in USA” Rule in Partisan Split

Article By:

Phyllis H. Marcus

Emma J. Hutchison

At the Federal Trade Commission’s (FTC) July 1 meeting, it finalized a new [“Made in USA” Rule](#) that was almost two decades in the making. The FTC [issued a notice of proposed rulemaking in June 2020](#) and received 700 comments from stakeholders. During that time, the FTC has aggressively policed Made in USA claims (through an enforcement policy statement), settling a [historic, million dollar follow-on Made in USA enforcement action](#) and [obtaining a six-figure settlement with an online retailer](#).

The Commission approved the Rule in a partisan 3-2 vote, with Democrat Chair Lina Khan and Democrat Commissioners Rohit Chopra and Rebecca Kelly Slaughter voting in favor, and Republican Commissioners Christine Wilson and Noah Joshua Phillips voting against the Rule.

Commissioner Chopra’s [statement in support](#) explains, “this is a ‘restatement rule,’ which affirms longstanding guidance and legal precedent.” According to Chopra, the final Rule does not significantly deviate from the one proposed nor from the FTC’s [1997 Enforcement Policy on U.S. Origin Claims](#), and, more importantly, the Rule does not appear to impose any additional requirements on advertisers.

The final Rule dictates that labels may not contain *unqualified* Made in USA claims unless: “(1) Final assembly or processing of the product occurs in the United States, (2) all significant processing that goes into the product occurs in the United States, and (3) all or virtually all ingredients or components of the product are made and sourced in the United States.” The Rule does not cover qualified claims, which will remain subject to the FTC’s general authority to police deceptive and unfair claims under Section 5 of the FTC Act. The Rule outlines a procedure for partial or full exemption where an advertiser can sufficiently demonstrate that their Made in USA claims are not deceptive. Importantly for FTC’s enforcement powers, the Rule enables the agency to seek civil penalties of up to \$43,280 per violation and expands the FTC’s remedial options.

The Democratic Commissioners [championed the new Rule](#) as “long overdue” to counter “rampant Made in USA fraud” and reinforce Congressional intent to “protect the integrity of our national brand.” Commissioner Chopra explains that the Rule will “especially benefit small businesses that rely on the Made in USA label, but lack the resources to defend themselves from imitators.”

In a [dissenting statement](#), Commissioner Wilson lamented that the new Rule exceeds the authority delegated by Congress to the FTC. In her view, the Rule impermissibly could be read to cover all advertising, not just labeling, including “stylized marks in online advertising or paper catalogs and potentially other advertising marks, such as hashtags that contain [Made in USA] claims.” The dissenting statement goes on to explain that, while the statute delegating rulemaking authority to the FTC on Made in USA claims gives the FTC authority to issue rules related to product labels, the legislative history and plain language of the statute were not intended to expand to advertisements other than “labels.”

The rigid dichotomy between the statements in support of and against the Made in USA Rule likely preview arguments we will see again and again as the FTC finds its footing under its new Chair, Lina Khan, and in working with the Biden administration.

This new Rule will require companies to be hyper-vigilant about Made in USA claims, lest they trigger substantial civil penalties.

Note: Following the issuance of FTC’s finalized the Made in USA Rule, U.S. Department of Agriculture Secretary Tom Vilsack will begin a review of the USDA’s Made in USA labeling standards. This comes at the behest of the farmers, ranchers, and agriculture industry workers.

Copyright © 2024, Hunton Andrews Kurth LLP. All Rights Reserved.

National Law Review, Volumess XI, Number 201

Source URL: <https://www.natlawreview.com/article/ftc-finalizes-made-usa-rule-partisan-split>