

Advertising & Media Alert

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FTC Proposes Broader 'Made in the USA' Rule, Includes Civil Penalties

Now, more than ever, American consumers are looking to support local businesses by purchasing products that are "Made in the USA." The Federal Trade Commission (FTC) recently announced a Notice of Proposed Rulemaking for a "Made in the USA" Labeling Rule that would apply to product labels, mail-order catalogs and mail-order promotional materials that make unqualified "Made in the USA" claims.

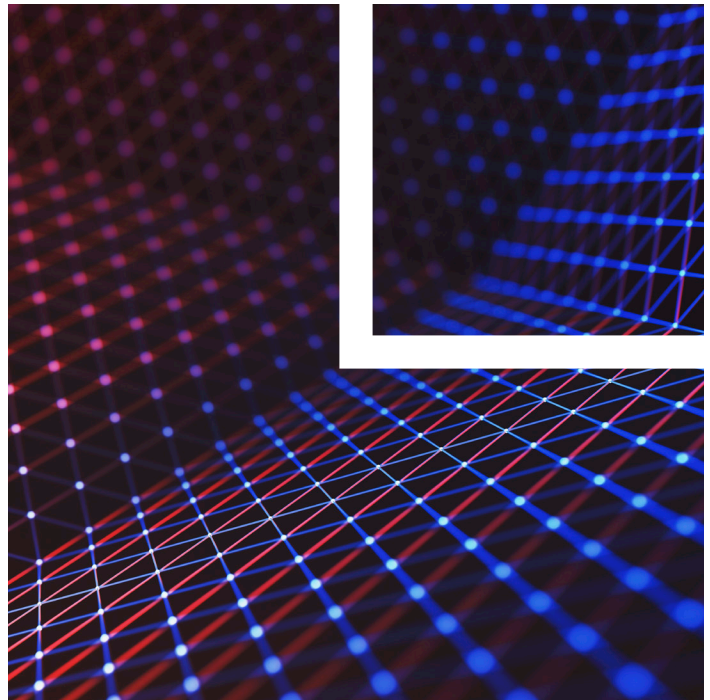
Key Takeaways:

- The proposed rule lists three conditions that must be met for unqualified "Made in the USA" claims.
- Under the proposed rule, the FTC could seek civil penalties for violations.
- Unqualified "Made in the USA" claims would include those that substitute terms like "built" and "produced" for "made" or that suggest a U.S. origin.

The proposed rule solidifies the FTC's current position prohibiting the use of unqualified "Made in the USA" claims on the above promotional materials unless the product meets three conditions:

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.
3. All or virtually all ingredients or components of the product are made and sourced in the United States.

An unqualified claim would be something like "Made in the USA" absent any language or caveats set forth to narrow the meaning of the claim (e.g., "Made in the USA with foreign-sourced ingredients"). The proposed rule follows guidance previously set forth by existing FTC decisions, orders and policy statements.



Perhaps the most notable and new is that the proposed rule would allow the agency to seek civil penalties for violations of the rule under 15 U.S.C. § 57(a) ("acts or practices which are unfair or deceptive acts or practices in or affecting commerce").

In the past, the FTC's enforcement around "Made in the USA" claims has been limited in large part to "closing letters" through which the Commission agrees to not pursue investigations into allegedly deceptive "Made in the USA" claims, based on companies' implementation of remedial and compliance measures aimed at preventing further misleading claims. In a little more than a decade, the FTC issued more than 170 closing letters to companies for deceptive "Made in the USA" claims, and initiated 30 enforcement actions. Only four of those actions resulted in cash settlements—netting a little more than \$1.5 million in aggregate penalties. The ability of the FTC to seek substantial monetary penalties under the proposed rule is a significant regulatory "stick" that might cause some companies that previously were assuming a certain level of risk to rethink their approach.

The proposed rule's definition of "Made in the USA" claims would also encompass claims that use substitute terms

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such as “manufactured,” “built,” “produced,” “created” or “crafted,” as well as “any other unqualified U.S.-origin claim.” In the past, companies have used these terms or other alternatives for “made” in an attempt to modify “Made in the USA” claims to avoid the explicit language while continuing to convey that the product had some relation to the United States.

While the proposed rule is not intended to supersede state regulations around country of origin labeling requirements, except to the extent that they are inconsistent with the proposed rule, companies should also be aware of California’s “Made in the USA” law, which provides its own set of nuanced requirements and exceptions (Cal. Bus. & Prof. Code § 17533.7).

The FTC has requested feedback on the proposed rule. Comments must be submitted no later than 60 days from the day the proposed rule published—an Aug. 21 deadline.

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