Made in U.S.A: Time for a Change?

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The Federal Trade Commission's enforcement of Made in USA (MIU) claims has a long and somewhat tumultuous history. This may be in part because unlike many other aspects of the FTC's consumer protection mission, how the FTC interprets and enforces MIU claims is thought by many to have significant economic ripple effects. So long as advertisers believe the claim is important to consumers' purchase decisions, so the theory goes, they will make manufacturing and sourcing choices that favor the maintenance and creation of U.S. jobs and decrease reliance on "job-killing" imports.

But the effects of MIU policy are far from clear, and there are many questions that could be asked. Has the MIU policy encouraged manufacturers to source more inputs domestically or has it, in fact, discouraged them? And does the current policy reflect consumers' perceptions in an increasingly international economy? If not, and if it is potentially operating to discourage use of the claim and sourcing of inputs domestically, is it time for the FTC to reevaluate its existing MIU policy?

History of the Policy

FTC enforcement against MIU claims goes back at least seventy-two years. In *Vulcan Lamp Works, Inc.*, an advertiser entered into a consent decree arising from claims on cartons and cards that its incandescent lamps were "Made in USA" when the bulbs were imported from Japan.[1]

A 1964 consent order found an MIU claim to be misleading because the products contained substantial Japanese inputs and were not "wholly of domestic origin."[2] However, the consent order prohibited the use of the claim only when any "substantial" item or part was made in any foreign country. Four years later, several FTC advisory opinions, issued in response to questions about what percentage of foreign-made components an MIU product could contain, affirmed that the standard for such claims was that they "must be made in [their] entirety in the United States" and must not contain "foreign made components of a substantial nature."[3]

In 1994, Congress amended the FTC Act to address MIU label claims. The amendment, which is still currently in place, states in part:

> To the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a "Made in the U.S.A." or "Made in America" label, or the equivalent thereof, in

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[1] Vulcan Lamp Works, Inc., 32 F.T.C. 7 (1940).

[2] Windsor Pen Corp., 64 F.T.C. 454 ¶¶ 5–6 (1964).

[3] 74 Op. Fed. Trade Comm'n 1673 (1968); *see also* 73 Op. Fed. Trade Comm'n 1321 (1968) (when presented with the question as to what percentage of foreign-made components a product could contain without additional disclosures as to the origin of the content, the FTC issued advisory opinions indicating that a product labeled Made in U.S.A. "would constitute an affirmative representation that the product was made in its entirety in the United States").

> order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission issued pursuant to section 45 of this title. This section only applies to such labels. Nothing in this section shall preclude the application of other provisions of law relating to labeling. The Commission may periodically consider an appropriate percentage of imported components which may be included in the product and still be reasonably consistent with such decisions and orders.[4]

A pair of complaints issued in the same year against two running shoe companies[5] prompted a two-year review of the FTC's MIU standard, including a public workshop and the collection of consumer survey evidence. The purpose of the review was to analyze the standard in light of changing global economic realities and consumer understanding of the claims.[6]

In May 1997, the Commission proposed a significant revision to its MIU standard. Products claiming "Made in USA" under the proposal would have to be "substantially" made in the United States. To meet this standard, the Commission proposed two safe harbors. The most relevant one required that the product's last substantial transformation take place in the United States and at least 75 percent of manufacturing costs be of domestic origin.[7]

The proposed revisions to the MIU standard were greeted by opposition from consumers, consumer groups, trade associations, unions, and politicians. They asserted that a weakened MIU standard would lead manufacturers to reduce their U.S. inputs to the minimum necessary to claim MIU.[8] In response to this opposition, some commenters suggested modifying the proposed revisions to the MIU standard to raise the threshold percentage of manufacturing costs required to be incurred domestically.

The Commission's proposed revisions and other reform efforts fell flat. In December 1997, the Commission decided, in response to the overwhelming number of comments submitted in opposition to the change, to abandon its proposed modification to the MIU standard and to retain the "all, or virtually all" standard. At the same time, the Commission issued an Enforcement Policy Statement (Policy Statement), which provided additional guidance on how the FTC would evaluate MIU claims.[9] The Policy Statement, which is still in effect, states:

> [W]hen a marketer makes an unqualified claim that a product is "Made in USA," it should, at the time the representation is made, possess and rely upon a reasonable basis that the product is in fact all or virtually all made in the United States. 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.[10]

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[4] 15 U.S.C. § 45a.

[5] New Balance Athletic Shoe, Inc., FTC Dkt. No. 9268, 1996 WL 532845 (Sept. 3, 1996); Hyde Athletic Indus., Inc., 122 F.T.C. 427 (1996). Both orders were finalized in December 1996.

[6] Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. 53,922–02 (proposed Oct. 18, 1995).

[7] The other safe harbor would have required that the last substantial transformation of the product and each of its significant inputs take place in the United States. Request for Public Comment on Proposed Guides for the use of U.S. Origin Claims, 62 Fed. Reg. 25,020–01 (proposed May 7, 1997).

[8] Alan Kline, *Groups Want No Slack on 'USA' Label*, WASH. TIMES, June 19, 1997, at B10.

[9] Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756–01 (Dec. 2, 1997).

[10] *Id.* at 63,768.

In addition, the final assembly or processing (i.e., the last substantial transformation) of a product must occur domestically for a manufacturer to use an unqualified "Made in U.S.A." statement. Unlike the revisions the Commission had proposed, there is no bright-line safe harbor for domestic content. Case-by-case considerations include the proportion of U.S. manufacturing costs in relation to foreign costs and how far removed the foreign content is from the finished product. Reasonable consumer expectations and the nature of the product are the primary guiding principles for the Commission when evaluating whether enforcement action is warranted.[11] In our experience, the Commission has permitted the claim when domestic content has been as low as approximately 90 percent.

This suggests that the companies failed to understand how the Commission interprets "Made in USA" claims and thought, for example, that the product only had to be produced at a U.S. manufacturing facility.

The Policy Statement also provides standards for making qualified claims of U.S. origin. Qualified claims are permitted for the product as a whole and with respect to specific components or processes. These can include "Made in USA of U.S. and Imported Parts" or "__% U.S. Parts."

Application of the Current Standard

Commission enforcement activity has been intermittent but ongoing. The Commission has obtained consent orders from a number of manufacturers settling allegations of MIU violations, including The Stanley Works, a U.S. toolmaker;[12] USDrives Corporation, a manufacturer and seller of CD ROM drives;[13] American Honda Motor Company, Inc., a lawn tractor manufacturer;[14] Jore Corporation, a manufacturer of power tool accessories;[15] and Enhanced Vision Systems, a maker of magnification devices.[16] A number of closing letters have also been issued, indicating possible violations for which the Commission declined to bring an enforcement action.[17]

In most, if not all, of these cases, the violation was clear cut and not simply one where the parties might have disagreed, for example, over how to calculate domestic costs. This suggests that the companies failed to understand how the Commission interprets "Made in USA" claims and thought, for example, that the product only had to be produced at a U.S. manufacturing facility.

Other companies are aware of the FTC's standard but find it increasingly difficult to meet. In some cases, domestic components are available but at a much higher price than imports, and manufacturers have to weigh whether consumers will pay more for a product labeled "Made in

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[11] *Id.* at 63,768–69.

[12] Stanley Works, No. FTC File No. 982-3570, 1998 WL 951191 (Jan. 1998) (respondent's advertising campaigns promoted its line of wrenches and wrench sets as being American-made; respondent also manufactured these products for other large tool companies, and in both instances a significant portion of the wrench components were of foreign origin).

[13] USDrives Corp., FTC File No. 982-3587, 1999 WL 21298 (1999) (respondent's CD ROM drive packaging prominently displayed national symbols (i.e., bald eagle, American flag, Statue of Liberty), as well as red, white, and blue lettering of the company name. "Made in China" appeared in small print, inconspicuously located on side panels on two of its products, although all of the drives identified in the complaint were made in China, of primarily non-U.S. components.).

[14] American Honda Motor Co. Inc., FTC File No. 982-3600, 1999 WL 21295 (Jan. 1999) (respondent's advertising made the unqualified assertion that certain of its lawn tractors were "Made in America by Honda," when in fact a substantial portion of its product inputs were made in foreign countries).

[15] Jore Corp., 131 F.T.C. 585 (2001) (respondent's packaging and labeling of certain power tool accessories both explicitly and implicitly [through prominent use of the American flag] represented that products were Made in U.S.A. A fine print disclaimer indicated that "global components" were used in the making of the items).

[16] Enhanced Vision Sys., Inc., FTC No. C-4265, 2009 WL 2979771 (Sept. 3, 2009) (respondent's advertisements for its magnification products represented that two of its lines were "Made in the U.S.A." when a significant portion of the components were of foreign origin).

[17] Closing Letters from Elaine D. Kolish, Associate Director of the FTC Bureau of Consumer Protection Enforcement Division, to Armaly Sponge Company, The Ducane Corporation, Enderes Tool Company, and In The Swim (June 24, 2011), *available at* http://www.ftc.gov/os/statutes/madeusa/closing.shtm.

USA" and, if so, how much more. In other cases, manufacturers cannot source sufficient U.S. components to meet the FTC's standard because domestic component suppliers no longer exist. The Policy Statement permits an exemption, in some cases, for raw materials like vanilla that cannot be sourced domestically, but fails to provide a similar exemption for components that are not manufactured in the United States. Given the rapid pace with which manufacturing operations are moving overseas,[18] the lack of a component exemption is likely becoming increasingly problematic for domestic producers.

This problem is exacerbated by a California law, in existence since 1945, which prohibits Made in U.S.A. claims "when the merchandise *or any article, unit, or part thereof*, has been entirely or substantially made, manufactured, or produced outside of the United States."[19] The statute lay relatively unnoticed until two fairly recent class actions were filed.[20] In *Kwikset*, which went to the California Supreme Court on a class certification issue that related to standing rather than the underlying MIU standard, the lower court found the defendants to have violated the MIU standard because the products in question, locks, were touted as American-made but contained screws and pins made in Taiwan.[21] As a result of the attention focused on the California statute, and the difficulty of labeling and advertising differently in California, companies may be reluctant to make MIU claims when virtually any inputs are from outside the United States.

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Viability of the Standard in Today's Marketplace

As noted above, it is increasingly impractical or impossible for U.S.-based companies to meet the current MIU domestic content standard. Companies that would like to make an MIU claim but find that it is impossible or economically impractical to do so can either make the claim and risk an enforcement action by the FTC or a public or private action in California state court; not make any MIU claim; or make a qualified claim such as "Made in USA of U.S. and Imported Parts."

A qualified MIU claim may be the least attractive of these options. Under federal fair labeling laws, a U.S. manufacturer must list its place of business[22] so consumers, regardless of any MIU or qualified MIU claim, will see a U.S. address on the label. The FTC permits such labeling without triggering MIU scrutiny so long as it is not overly prominent.[23] Thus, U.S. manufacturers may be better off just including their address,[24] rather than including a disclaimer that only serves to focus attention on the product's use of some imported parts.[25]

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[18] Stacy Curtin, *Sen. Sanders Spurs Return to 'Made in America': Says U.S. Future Depends on It*, Daily Ticker, June 16, 2011, http://finance.yahoo.com/blogs/daily-ticker/sen-sanders-spurs-return-made-america-says-u-125105935.html ("'In the last 10 years, 50,000 factories in America have shut down' due to free trade policies like the North American Free Trade Agreement" (quoting Senator Bernie Sanders)).

[19] Cal. Bus. & Prof. Code § 17533.7 (2012) (emphasis added).

[20] Colgan v. Leatherman Tool Group, Inc., 38 Cal. Rptr. 3d 36 (Cal. Ct. App. 2006); Benson v. Kwikset Corp., 62 Cal. Rptr. 3d 284 (Cal. Ct. App. 2007).

[21] *Kwikset*, 62 Cal. Rptr. 3d at 297.

[22] 16 C.F.R. § 500.5 (2012).

[23] Fed. Trade Comm'n, Bureau of Consumer Protection, Complying with the Made in USA Standard (Dec. 1998), *available at* http://business.ftc.gov/documents/bus03-complying-made-usa-standard.

[24] Up until 1997 the FTC took the position that there was a rebuttable position that consumers would understand a product to be MIU if it was not otherwise labeled with a country of origin. 62 Fed. Reg. 25,020–01, 25,047.

[25] There is a "gap" between the FTC's MIU standard and Customs' country of origin requirements. Under country of origin standards, a product does not have to be labeled as imported from another country so long as the "last substantial transformation" of the product took place in the United States. 19 U.S.C. § 1304. Thus, a product might not qualify as MIU because it contains significant imported components but it does not have to be labeled as originating from outside the U.S. because it was manufactured (i.e., "substantially transformed") in the United States.

Once a manufacturer decides it will not or cannot label its product as "Made in USA" and, if a qualified claim is not an attractive marketing option, there is little reason for the manufacturer not to source imported components whenever they are cheaper than their domestic counterparts. This not only costs U.S. jobs, it potentially accelerates the flight of manufacturing overseas, thus making it harder for others to meet the MIU standard as well. If the MIU standard were less difficult to meet, more manufacturers might find it practical to meet and continue sourcing domestically.

Consider this hypothetical: a company recognizes that it is too costly or not possible to maintain the de minimis amount of foreign content required by the FTC to substantiate an MIU claim. Its marketing department decides that a qualified MIU claim is not a likely selling point. Under this scenario, the company might then decide to source overseas any content that is cheaper (and perhaps of comparable quality) to its domestic counterpart. If the FTC's MIU standard, however, required only 50 percent or 75 percent domestic content, then that same company might find it possible to make an MIU claim and source less content overseas than it might have under the stricter standard. At the same time, of course, companies that were able to meet the de minimis standard might now source more content overseas. Which of these two alternatives is the most likely? Although no studies appear to address this issue, it seems likely to be the former. Given the economic significance of this question, it may well be, as we suggest, an issue that the FTC may wish to examine.

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Of course, the FTC is not charged with creating U.S. jobs or stimulating the economy but with preventing consumer deception. However, the consumer perception rationale for the FTC's current standard was not particularly strong to begin with and has likely only weakened further given the increasing globalization of the economy. Back in 1995, the FTC commissioned a survey asking a series of questions related to "Made in USA" claims.[26] When asked whether they agreed with a MIU claim for a product that had 70 percent U.S. cost, 67 percent of respondents strongly or somewhat agreed (versus 75 percent when the U.S. cost was at 90 percent). When asked "What Does a 'Made in the USA' Label Mean?" only 6.3 percent of consumers responded "All Made in US." Finally, and perhaps most significantly, when asked whether an MIU statement "suggests or implies anything about where the parts that went into the product were manufactured?" only 11 percent of respondents agreed that it suggested or implied "anything about how much of the parts that went into the product were manufactured in the United States." Even assuming that the survey was well-designed, such a percentage is well below what would typically be considered relevant.[27]

There is little reason to believe that the consumer perception evidence in support of the current standard has strengthened in the sixteen years since the survey was done. Consumers are likely even more cognizant of the fact that commerce is increasingly global in nature and that more and more components are manufactured overseas. Even if consumers were not predisposed to adopt a more "liberal" interpretation of MIU, they are frequently exposed to statements by opinion leaders and the media that MIU means that the product comes from a U.S. manufacturing facility. This likely serves to further influence consumers' understanding of the phrase.

For example, President Obama in a recent speech said that it was not enough to invent products here; we should also be "building" them here so that they can be stamped "Made in

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[26] Fed. Trade Comm'n, Made in USA Study Summary of Results (Jan. 25, 1997) (on file with authors).

[27] *See, e.g.*, Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 466–67 & n.15 (4th Cir. 1996) (finding 15–20 percent consumer confusion sufficient to constitute deception).

America."[28] In other widely publicized remarks, including a story in *USA Today*, U.S. Senator Bernie Sanders expressed similar concerns, lamenting the closing of U.S. factories and the prevalence of goods available at the Smithsonian that were labeled as "Made in China" and pushed the museum to sell products "Made in USA."[29] The media also routinely publishes stories that interpret "Made in USA" to mean that the product was manufactured at a U.S. factory, not that its component parts were necessarily produced within the United States.[30]

If the President and many businessmen and reporters do not interpret "Made in USA" to mean that "all or virtually all" of the costs are domestic, most consumers may not either, particularly given the influential role of the media on consumer perceptions.[31]

Reevaluation of the Current MIU Policy

It has been fifteen years since the FTC last reviewed its MIU policy. The passage of time and the increasing movement of manufacturing overseas have only strengthened the case for the FTC to reevaluate its standards for making an MIU claim. In doing so, it may be useful for the FTC to consider the difficulty of finding domestic sources for components, the cost "surcharge" typically associated with an MIU claim, how widely qualified claims are used by manufacturers, how "Made in USA" claims are understood by consumers, and the role of MIU claims in supporting U.S. competitiveness in the global economy. In the meantime, companies need to be mindful of the FTC and California MIU requirements and make only substantiated (or appropriately qualified) MIU claims. ●

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[28] President Barack Obama, Remarks by the President at Signing of the America Invents Act at the Thomas Jefferson High School, Alexandria, Va. (Sept. 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-president-signing-america-invents-act ("We need to continue to provide incentives and support to make sure the next generation of manufacturing takes root not in China or in Europe, but right here in the United States—because it's not enough to invent things here; our workers should also be building the products that are stamped with three proud words: Made in America.").

[29] Nicole Gaudiano, *Smithsonian Shop Sells U.S.-Made Gifts*, USA TODAY, June 9 2011, http://www.usatoday.com/money/industries/retail/2011-06-08-smithsonian-buy-american-products-gifts_n.htm. At least one Smithsonian museum opened up a gift shop that carried 100 percent American-made goods, a claim that is likely the equivalent of MIU under the FTC's Enforcement Policy. In the Senator's remarks there is no discussion about where the components come from, and it is clear from both the Senator's remarks and the article that accompanied them that the entire focus is on whether the manufacturing facilities that make the finished goods are located in the United States. *See* Curtin, *supra* note 17.

[30] For example, ABC ran an extensive series on "Made in America" in October 2011, with one of the stories featuring a "Made in USA" clothing line. This manufacturer of this clothing line was distinguished from another clothing manufacturer that has "factories outside the U.S." *See* Susanna Kim, *Club Monaco Launches 'Made in the USA' Men's Collection*, ABC NEWS, Oct. 28, 2011, http://abcnews.go.com/Business/MadeInAmerica/club-monaco-high-end-retailers-market-made-usa/story?id=14829784. The feature article for the series is entitled "Made in America: A Brief History of U.S. Manufacturing" and is rife with discussions of factories, manufacturing, and assembly lines but does not discuss the origin of component parts processed on the U.S. based assembly lines. Bradley Blackburn & Eric Noll, *Made in America: A Brief History of U.S. Manufacturing*, ABC NEWS, Feb. 17, 2011, http://abcnews.go.com/Business/made-america-middle-class-built-manufacturing-jobs/story?id=12916118.

[31] For an illustration of further confusion in this area, see ALAN UKE, BUYING AMERICA BACK (2012). According to an article in *BloombergBusinessweek*, Uke argues that Made in USA means that the product was "assembled" or "substantially transformed" in this country but some or all of the components could have originated elsewhere. Nick Leiber, *Could Better Labels Shrink the Trade Deficit*, BLOOMBERGBUSINESSWEEK, Apr. 19, 2012, http://www.businessweek.com/articles/2012-04-19/could-better-labels-shrink-the-trade-deficit. This sounds similar to the Country of Origin test used by the Customs Department for imported products (but not those labeled "Made in USA") and also suspiciously similar to what we argue is the most likely consumer understanding of MIU—that products so labeled came from U.S. factories. However, this is not the current FTC standard.