

What To Know About FTC's 'Made In USA' Ad Policy

By Paul M. Laurenza

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The Federal Trade Commission's recently announced settlement with EK Ekcessories over the company's claims that its products were made in the United States highlights the agency's continuing enforcement of its longstanding but often misunderstood policy on advertising products with U.S.-origin claims.

Given the confusion in the business community, public and media regarding the substance of the FTC's "Made in USA" enforcement policy, advertisers and marketers should have a clearer understanding of the policy to avoid the risks of a deceptive advertising enforcement action.

FTC 'Made in USA' Policy

The FTC includes U.S.-origin claims under its broad jurisdiction to regulate deceptive advertising, which applies to claims in labeling, advertisements and other promotional materials and includes digital and other electronic formats. A claim that a product is made in the U.S. is an objective claim that must be supportable — i.e., it must be truthful and substantiated. There are two types of U.S.-origin claims: unqualified and qualified.

Under the FTC's 1997 enforcement policy statement on U.S.-origin claims, a marketer or advertiser making an unqualified claim of U.S. origin (e.g., "Made in USA," "Produced in USA" or "Manufactured in USA") must be able to show that "all or virtually all" of the product has been made in the U.S.

To meet this standard, the marketer must satisfy three criteria: The last significant manufacturing or processing must have been done in the U.S. (i.e., the product must have been last "substantially transformed" in the U.S., which means that the article that emerges from the manufacturing process in the U.S. has a name, character or use that differs from the original material subjected to the process); the product must have a very high proportion of U.S. versus foreign content (i.e., no more than a "negligible amount" of foreign content); and the article must not have foreign components that consumers reasonably would view as significant to the final product.

No quantitative test is applied to judge when the extent of foreign content (parts or labor) is enough to preclude use of an unqualified U.S.-origin claim, and the extent of foreign content, even if small, must be measured along with the significance of the foreign content to the final product. For example, the FTC has held that a product made in the U.S. with parts that comprised 18 percent of the total cost of the final product could not be labeled with an unqualified U.S.-origin claim.

A company that cannot make an unqualified U.S.-origin claim may make a qualified claim, which may be far less desirable from a marketing standpoint. Qualified U.S.-origin claims may cover a broad spectrum of possible terminology. The marketer may state that its product is made in the U.S. with foreign parts, without specifying the country of origin, the specific parts or percentage of foreign parts.

Alternatively, if the manufacturer wants to draw attention to particular foreign content (e.g., African teak wood), he may do so. Percentage-content claims (e.g., "70 percent U.S. content") are also allowed, as long as the methodology used to calculate the cost percentages is a generally accepted one. (In this context, "costs" refers to the total cost of all manufacturing materials, direct manufacturing labor and manufacturing overhead.)^[1]

If the qualified U.S.-origin claim denotes or implies manufacture in the U.S., however, the FTC will require that the product have been last substantially transformed in the U.S. Therefore, labels such as "Made in USA with foreign parts," "Produced in USA with imported raw materials" or "Manufactured in USA with subassemblies from Taiwan," would be allowed only if the product underwent its final "substantial transformation" in the U.S. (This test is the same test applied by U.S. Customs in most of its determinations of country of origin for the marking of imported products.)

"Assembled in USA" is a common type of qualified U.S.-origin claim. The distinction between this particular claim and other qualified U.S.-origin claims is that the "Assembled in USA" claim allows the marketer to link its product with the U.S. without making any reference to foreign content, even when the product components may be sourced from abroad.

To use this claim, however, the FTC requires that the product undergo its last substantial transformation and its principal assembly in the U.S. Thus, to be able to use an "Assembled in USA" claim, the product must have undergone substantial and final assembly in the U.S.

The EK Ekcessories Settlement Agreement

EK Ekcessories Inc., based in Utah, sold online and through various retailers a wide array of products, including cell phone accessories, bottle holders, dog collars, leashes and various outdoor accessories. According to the FTC's complaint and proposed consent order, the company represented that products were made in the U.S. (e.g., "Truly Made in the USA") or produced in its Utah facilities when in numerous instances, the products were either made outside the U.S., or the company lacked a reasonable basis for substantiation of its U.S.-origin claims.[2]

The proposed consent order would enjoin the company from making any claims that a product is made in the U.S. unless it is all or virtually all made in the U.S. Among other measures, the company is also required to notify its distributors of the settlement and to provide relabeling for certain existing products that display inaccurate U.S.-made claims.

As has been the case generally with other FTC "Made in USA" enforcement actions, the alleged violations in EK Ekcessories appear clear-cut, and it may therefore be reasonable to assume that the FTC would pursue enforcements only in similar cases.

However, many in the business community — particularly among new or emerging companies or sectors — may well have little understanding of the stringent requirements of the FTC's "Made in USA" policy, a misperception fueled by a bewildering array of conflicting information.

For example, some "name" companies have made broad claims of U.S. manufacture but have expressly referenced them to third-party rankings based on comparisons among competitors' products in that field. While these claims, strictly speaking, may not offend the FTC's policy, the observer may view the claims as entirely unqualified U.S.-origin claims.

Confusion and misinterpretation undoubtedly have also resulted from media publicity at local, regional and national levels, touting U.S. companies for their "Made in USA" products. These media stories, however, implicitly equate manufacture or assembly in the U.S. with "Made in USA" when, as discussed above, a product manufactured or assembled in the U.S. cannot bear an unqualified U.S.-origin claim if it contains any significant foreign content.

Manufacturers and importers may also be confused because U.S.-origin requirements for product advertising under the FTC's deceptive advertising authority differ from mandatory country-of-origin marking requirements for imported products under laws enforced by U.S. Customs. Under Customs requirements, an imported product that is substantially transformed in the U.S. into a different product may qualify for treatment as a U.S.-origin product for purposes of Buy American or other U.S. origin-related laws. Substantial transformation of an imported product, however, will not allow it to carry an unqualified "Made in USA" advertising claim if the product does not also meet the FTC requirement of minimal foreign content.³

Conclusion

Whether the FTC's "Made in USA" enforcement policy is sound public policy in today's increasingly globalized economy may be a worthwhile inquiry for policymakers. The confusion and common misperceptions regarding the policy may provide further reasons to question its efficacy.

Nonetheless, for now at least, companies advertising and selling their products in the U.S. who wish to take marketing advantage of U.S.-origin claims must be aware of the FTC's enforcement policy and the risks of failure to comply with it.

To learn more, contact Paul M. Laurenza, Office Managing Member of Dykema's Washington, D.C. Office and member in the Firm's Government Policy & Practice group, at 202-906-8646.

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