

# Made in USA Claims

CHRISTIE GRYMES THOMPSON, KELLEY DRYE & WARREN LLP, WITH PRACTICAL LAW COMMERCIAL

**A Practice Note discussing how to make legal US origin claims in advertisements and product labels, including when and how claims must be qualified and how US origin claims are affected by foreign origin labeling regulations.**

US manufacturing has recently shown signs of renewed strength after years of losing ground to countries such as China and South Korea, prompting US companies to begin exploring opportunities to advertise domestic production. However, businesses should not rush to wave the American flag before understanding the law governing US origin claims.

The Federal Trade Commission (FTC) has authority to regulate US origin claims under Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits unfair or deceptive acts or practices (15 U.S.C. § 45). Under the FTC Act, objective advertising claims, including US origin claims, must be truthful and substantiated.

For more information on the FTC Act and advertising regulations, see *Practice Note, Advertising: Overview* (<http://us.p02edi.practicallaw.com/2-501-2799>).

The FTC's *Enforcement Policy Statement on U.S. Origin Claims* (Policy) sets out guidelines for making lawful US origin claims in:

- Advertisements.
- Product labels.
- Promotional and marketing materials, including social media.

## COVERED CLAIMS

The FTC's Policy on US origin claims applies to:

- All products sold in the US, except for those specifically subject to country-of-origin labeling requirements under other laws (for example the Wool Products Labeling Act).
- Both express and implied advertising claims.

Express claims include, for example:

- "Made in USA."
- "Proud American Manufacturing."
- "USA."

Implied claims are subtler and depend on the context and net impression of an advertisement or label. The Policy applies if the claim is likely to convey to consumers an overall impression that a product is of US origin. The context of an ad or label includes the juxtaposition of phrases and images and the nature of the transaction. Depending on the context, a US flag, map or reference to a US factory could communicate a Made in USA message. However, use of a US brand name or trademark alone is typically not considered a Made in USA claim.

## UNQUALIFIED US ORIGIN CLAIMS: THE ALL OR VIRTUALLY ALL STANDARD

A company may only make an unqualified US origin claim when all or virtually all of the product's components are from the US and all or virtually all of the manufacturing, processing, packaging or assembly took place in the US. Unqualified Made in USA claims are permitted only if the product contains a negligible amount of foreign content or processing.



THOMSON REUTERS™

However, there is no bright line test for what constitutes all or virtually all. Instead, the FTC considers the following factors when determining if a product is all or virtually all made in the US:

- **Site of final assembly or processing.** The final assembly or processing must be in the US.
- **Proportion of US manufacturing costs.** The amount of US parts and processing that account for a product's total manufacturing cost. For example, the product does not meet the all or virtually all standard if the cost of a foreign component constitutes a disproportionate percentage of the total cost. To calculate the total manufacturing cost, businesses should use the cost of goods sold or inventory costs of finished goods, which are generally limited to:
  - the total cost of all manufacturing materials;
  - direct manufacturing labor; and
  - manufacturing overhead.
- **Remoteness of foreign content.** If the only foreign content is from an initial input that is transformed later in the manufacturing process and is not a significant component, the product may still meet the all or virtually all standard.

For example, a table lamp assembled in the US from US-made brass, a US-made lampshade and an imported base that accounts for a small percentage of the lamp's total cost would be ineligible for an unqualified Made in USA claim because the imported base is:

- Not far enough removed in the manufacturing process from the finished product.
- A significant part of the final product.

To avoid unintentionally making an illegal US origin claim due to foreign component parts, businesses should:

- Not assume that a component purchased from a US supplier is 100% US-made.
- Engage in reasonable due diligence before relying on information from suppliers.
- Look back far enough in the manufacturing process to be reasonably sure that any significant foreign content has been included.

## QUALIFIED US ORIGIN CLAIMS

US origin claims must be adequately qualified if the product does not meet the all or virtually all standard. A qualified claim communicates that the product is not entirely of domestic origin by describing the extent, amount or type of a product's domestic content or processing.

Companies have more flexibility with qualified Made in USA claims, although qualified claims should only be used if the product has a significant amount of US content or processing. Qualified claims often refer to the specific process or part, not to the general manufacture of the product, to avoid implying more US content than exists. For example, to indicate that all of the processing has taken place in the US with unspecified foreign content, the appropriate claim might be "Made in USA of US and imported parts" or "Made

in USA from imported fabric." Qualified claims can also be more specific, such as "80% US content" or "Manufactured in US with Japanese materials."

"Assembled in USA" may be appropriate without qualification when:

- Principal assembly occurs in the US.
- The assembly is substantial.

The product's last substantial transformation, however, should also have occurred in the US. For example, if all of the major components of a computer, including the motherboard and hard drive are imported and then assembled in the US in a simple process, but are not substantially transformed under the standards set out by the US Customs Service, they must be marked with a foreign country of origin. In this case an "Assembled in US" claim without further qualification would be deceptive.

A product last processed or packaged in a foreign country must be labeled with a foreign country of origin. An additional qualified US origin claim would likely be viewed as deceptive.

## INTERPLAY WITH US CUSTOMS SERVICE REGULATIONS

The US Customs Service also plays a role in country-of-origin claims. Under the Tariff Act of 1930, Customs requires:

- All products of foreign origin imported into the US to be marked with the name of the foreign country of origin.
- Products that incorporate materials or processing from more than one country to have an origin claim that reflects the country where the last substantial transformation took place.

(19 U.S.C. § 1304.)

Customs defines substantial transformation as a process that results in a product with a name, character and use that is different from that which existed before the process. A product that has been substantially transformed outside of the US must be marked with a foreign country of origin that is preceded by "Made in," "Product of" or words of similar meaning. Substantial transformation determinations are made on a case by case basis.

In some circumstances, businesses may make a qualified US origin claim for a product that also requires a foreign country of origin label because it was last substantially transformed abroad. In these cases, businesses must ensure that:

- The product complies with the requirements set out by Customs.
- The claim is not deceptive under the FTC Act by overstating the amount of US parts or processing in the product.

The Tariff Act requires foreign origin labels on products and their containers, but not in advertisements or promotional materials. Therefore, on a product label requiring a foreign country of origin, a US origin claim is permitted only if it is:

- In close proximity to the foreign country of origin mark.
- Of at least a comparable size to the foreign country of origin mark.

(19 C.F.R. § 134.46.)

For example, a product that is of foreign origin may be marked "Made in Switzerland, finished in US," or "Made in France with US parts," but not simply "Finished in US" or "Made with US parts."

The Tariff Act does not require foreign origin marks in advertisements. However, businesses should be aware that a Made in USA claim in an advertisement may still be considered deceptive under the Policy if Customs requires a foreign origin mark on the product itself. The Policy encourages marketers making these claims to make a clear, conspicuous disclosure of foreign origin.

## RECENT FTC INVESTIGATIONS

The FTC has recently investigated several US origin claims. For example, the FTC announced a settlement agreement with E.K. Ekcessories, Inc. regarding claims on EK's website that it had been producing accessories in Logan, Utah, for 28 years that were a "true 'Made in the USA' product." However, EK imported many of its products and components from outside the US. The settlement agreement prohibits EK from:

- Claiming that any product is made in the US unless the claim is verifiable and true.
- Providing deceptive promotional material to third-party retailers.

In 2013, the FTC staff issued several closing letters announcing investigations in which no enforcement was pursued, although the US Origin claims violated the Policy and Section 5 of the FTC Act. Closing letters generally state that the close of the investigation does not necessarily signify that no violation has occurred. While closing letters do not articulate all of the FTC's reasons for closing, cited reasons often include:

- The implementation of a compliance program.
- Inadvertent error by the target company.
- Quick correction of the problem.
- Limited scope.

## RECENTLY CLOSED FTC CASES

Recently closed FTC cases include:

- **A company that made US Origin claims for certain motors.** Although the motors were assembled in the US, many of the component parts were imported. In its decision not to pursue an enforcement action, the FTC staff noted that the company implemented a remedial action plan to correct its representations. The plan included:
  - removing all "Made in USA" labels from the company's production area;
  - instructing manufacturing personnel to discontinue use and application of Made in USA labels for affected products; and
  - updating and correcting the company's website.
- **A company that claimed on its website that it makes some, but not all, of its products in the US.** The FTC staff was concerned that consumers could be misled into thinking that all of the products are made in the US. The company agreed to a plan that included:
  - adding more specific country-of-origin statements to its website;
  - communicating with customers and retailers about its domestic and foreign manufacturing activity;
  - revising brochures to clarify US-origin claims; and
  - scheduling periodic reviews of retailer websites to monitor the accuracy of US-origin claim for its products.
- **A company that represented that its products were made in USA when they were sourced from a factory in Pakistan.** The company implemented a remedial action plan to clarify and update its representations, including:
  - informing distributors and customers that all further orders of the product would be made in Pakistan; and
  - updating product packaging to reflect that the product is now made in Pakistan, and is packaged and inspected in the US.

### ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at [practicallaw.com](http://us.practicallaw.com). For more information or to schedule training, call **888.529.6397** or e-mail [ustraining@practicallaw.com](mailto:ustraining@practicallaw.com).