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FTC Signals More Rigorous Enforcement on “Made in USA” Labelling

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A series of guidance letters issued in recent months suggest that the Federal Trade Commission (“FTC”) is more closely scrutinizing whether products claiming to be “Made in USA” comply with deceptive marketing regulations. According to the FTC’s recent enforcement statements, marketing campaigns featuring unqualified origin claims may be unlawfully misleading if foreign components are “essential” to the “overall function” of the product being promoted. Companies using such claims in their advertising, labelling, or social media materials should carefully consider whether their products comply with the FTC’s latest “Made in USA” guidance.

The FTC’s “Made in USA” Standard

The FTC is charged with preventing deceptive or unfair marketing practices under Section 5 of the Federal Trade Commission Act, which covers product origin claims.¹ Under Section 5, a “Made in USA” advertisement or label is unlawfully deceptive if it contains a material representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances.²

The FTC has traditionally used an “all-or-virtually-all” legal standard to determine whether consumers are likely to be misled by products advertised or labeled as “Made in USA.”³ Under this standard, a product qualifies as U.S.-made when “all significant parts and processing that go into the product are of U.S. origin.”⁴ A product fails to meet this standard if it contains more than “a *de minimis*, or negligible, amount of foreign content.”⁵ The FTC has historically declined to impose a bright-line rule to enforce the all-or-virtually-all standard, instead relying on a non-exhaustive list of factors, including: (a) site of final assembly or processing, (b) proportion of U.S. manufacturing costs, and (c) remoteness of foreign content.⁶ Although final assembly in the United States is a prerequisite for all U.S. origin claims, other factors are considered on a case-by-case, fact-specific basis.⁷

A New Wrinkle

In a recent closing letter to Kansas City-based Niall Luxury Goods (“Niall”), the FTC applied the all-or-virtually-all standard more stringently than it has on previous occasions.⁸ Niall is a manufacturer of high-end watches assembled in the United States, with bezels and dials featuring “USA Made” engravings. The FTC’s new letter notes that Niall’s watches, which contain watch movements made in Switzerland, fail the all-or-virtually all standard because “though the cost of a Swiss movement may be small relative to Niall’s overall U.S. manufacturing costs, without a movement, a watch cannot tell time. Therefore, movements are essential to the function of a watch.”⁹ To forestall any immediate FTC sanctions, Niall entered into a remedial action plan, which includes updating labeling and advertising to indicate that Niall’s watches contain Swiss parts—a qualified rather than unqualified “Made in USA” origin claim.¹⁰

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The Niall letter aligns with a recent trend in the FTC’s “Made in USA” enforcement, where it has repeatedly signaled its plans to consider a product’s overall function in applying the all-or-virtually-all standard. The FTC took the same approach in another recent closing letter to the makers of Spray Pal, a device for cleaning reusable baby diapers. It found that “although the cost of the imported content may be small relative to overall manufacturing costs, the clip is essential to the function” of the Spray Pal.¹¹ The FTC confirmed this point of emphasis in a November 2015 blog post, stating: “We’ll also consider factors like how much of the product’s total manufacturing costs can be assigned to U.S. parts and processing, how far removed any foreign content is from the finished product, and *the importance of the foreign content or processing to the overall function of the product.*”¹²

Potentially Far-Reaching Implications

The FTC’s shift in emphasis has significant implications for many brands and products claiming U.S. origin. For example, many U.S. wristwatch companies, like Niall, source their timepiece movements and other components from overseas. Popular U.S.-based watch brand Shinola uses Swiss quartz movements in its watches, which are labeled as “Built in Detroit.”¹³ In statements to the *Detroit Free Press*, FTC spokeswoman Elizabeth Lorden suggested that such city-specific origin claims are legally equivalent to an unqualified “Made in USA” claim:

It seems likely—without consumer perception evidence showing otherwise—that consumers would interpret a “Built in” claim as equivalent to a “Made in” claim, and a “Built in [insert name of U.S. city]” as equivalent to a “Made in USA” claim. . . . Therefore, the same “all or virtually all” standard . . . would apply.¹⁴

As of this writing, at least one other U.S.-based watch brand has received a closing letter applying the more rigorous overall function test.¹⁵ The logic behind this test is not limited to the watch industry. The FTC’s continued application of the overall function test as part of the all-or-virtually-all standard may call into question origin claims made in connection with any product containing essential components from overseas. Companies that use foreign-made parts and claim American origin in their advertising should carefully evaluate their compliance with current FTC guidelines.

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¹ 15 U.S.C. § 45.

² FED. TRADE COMM’N, COMPLYING WITH THE MADE IN USA STANDARD, 22 (1998), <https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>.

³ 62 Fed. Reg. 231, 63756 (Dec. 2, 1997).

⁴ FED. TRADE COMM’N, ENFORCEMENT POLICY STATEMENT ON U.S. ORIGIN CLAIMS (Dec. 1, 1997), <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>.

⁵ *Id.*

⁶ *Id.* at 24–27; see also FTC, COMPLYING WITH THE MADE IN USA STANDARD at 24.

⁷ See *id.* at 5, 24.

⁸ Letter from Julia Solomon Ensor, Attorney, Federal Trade Commission, to Braden Perry, Esq., Counsel for Niall Luxury Goods, LLC (Nov. 20, 2015),

https://www.ftc.gov/system/files/documents/closing_letters/nid/151120niall_letter.pdf.

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ See Letter from Julia Solomon Ensor, Attorney, Federal Trade Commission, to Andrew C. Aitken, Esq., IP Law Leaders PLLC (Oct. 1, 2015),

https://www.ftc.gov/system/files/documents/closing_letters/nid/151001spraypalletter.pdf.

¹² Julia Solomon Ensor and Lesley Fair, *Made in USA claims: Three cheers for the said right and true*, FEDERAL TRADE COMMISSION BUSINESS BLOG (Nov. 2, 2015, 10:11 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2015/11/made-usa-claims-three-cheers-said-right-true> (emphasis added).

¹³ JC Reindl, *Shinola to Keep 'Built in Detroit' Slogan Despite Flak*, DETROIT FREE PRESS (Dec. 2, 2015, 2:44 PM), <http://www.freep.com/story/money/business/michigan/2015/12/02/shinola-watches-built-in-detroit-slogan-ftc/76564976/>.

¹⁴ *Id.*

¹⁵ See Letter from Julia Solomon Ensor, Attorney, Federal Trade Commission, to Cameron Weiss, CEO Weiss Watch Company, Inc. (Dec. 7, 2015), https://www.ftc.gov/system/files/documents/closing_letters/nid/151207weissletter.pdf (stating that “though the cost of the Swiss parts may be small relative to Weiss’s overall U.S. manufacturing costs, the imported parts constitute the key parts of the movement, and are essential to the watches’ function”).