

Country of Origin and Buy America Requirements

Session 5: Customs and “Made in the USA” Labeling

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May 16, 2024

Introductions



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Overview of the Series

- January 18: Buy American Act
- February 15: Trade Agreements Act
- March 21: Buy America Requirements under Federally-Funded Transportation Contracts and Programs
- April 18: Build America, Buy America (BABA) and Other Federal Grant Programs
- May 16: Customs and “Made in the USA” Labeling
- June 20: DOD: The Berry Amendment
- July 18: DOD: Specialty Metals Restrictions
- August 15: “Buy America” Round-Up: Additional Country of Origin Requirements
- September 19: Sanctions and Other Prohibited Sources

The “Country of Origin” Maze



The Buy American Act

The Trade Agreements Act

**Executive Orders –
Products + Pharmaceuticals**

**Buy America Act
(Infrastructure/
Transportation)**

DoD Specialty Metals

**The 2009
Recovery Act**

DHS Kissell Amendment

DoD Berry Amendment

DoD Photovoltaic Devices

**Build America,
Buy America**

And Many, Many More...

What's The Difference...?



[Marketing]

VS. [Production]



What's The Difference...? (cont'd)



[Consumer]

VS. **[Process]**



Today's Agenda: Customs and "Made in the USA" Labeling

1. FTC Rules
2. CBP Rules
3. USMCA Updates



1. FEDERAL TRADE COMMISSION (FTC) RULES

FTC Labeling Rules



- 15 U.S.C. § 45 prohibits **unfair methods of competition**
 - Overseen by the Federal Trade Commission (FTC)
 - Requires accuracy in labeling and advertising to consumers
 - FTC has the power to bring law enforcement actions against false or misleading claims regarding country of origin claims
 - FTC rules apply to all products advertised or sold in the U.S., except those specifically subject to country-of-origin labeling by other laws

FTC Labeling Rules (cont'd)

- Most labeling requires **only** the country of final manufacture (without regard to content), BUT...
- Per 19 C.F.R. Part 11, U.S. content must be disclosed on:
 - ✓ Automobiles
 - ✓ Textiles
 - ✓ Wool products
 - ✓ Fur products



See also 16 C.F.R. Parts 300, 301, 303;
49 C.F.R. Part 583

FTC Labeling Rules (cont'd)

- 16 C.F.R. Part 323 (effective 2021) sets out requirements for “Made in the USA” labeling
 - “Final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and **all or virtually all** ingredients or components of the product are made and sourced in the United States.”
 - Labeling claims must be **truthful and substantiated**
 - There must be a **reasonable basis** for the label
- FTC rules “preempt” State laws
 - But 16 C.F.R. § 323.5(b) allows **greater** requirements under State law
 - **Prior to September 2015**, California Business and Professions Code § 17533.7 = **100%** U.S. components and subcomponents
- FTC Compliance Guide (1998) [still helpful]



Express vs. Implied Claims

- What's the difference?
 - ✓ Made in the USA
 - ✓ Manufactured in the USA
 - ✓ Built in the USA
 - ✓ Produced in the USA
 - ✓ Created in the USA
 - ✓ Crafted in the USA
 - ✓ American-made



Express vs. Implied Claims (cont'd)

- Implied Claims:
 - FTC focuses on the overall **impression to the consumer** of the advertising, label, or promotional material
 - U.S. **symbols** or **geographic** references
 - Descriptions of work performed at an American factory
 - **What is the overall or “net” impression?**
 - ~~American brand name or trademark~~
 - ~~Listing of company’s U.S. address~~



Qualified vs. Unqualified Claims



“All or Virtually All”

A product can only be labeled “**Made in the USA**” if:

1. **Final assembly or processing** of the product occurs in the U.S.;
2. **All significant processing** that goes into the product occurs in the U.S.; and
3. **All or virtually all** ingredients or components of the product are made and sourced in the U.S.

“All or Virtually All” (cont’d)

“All or virtually all”



- All significant parts and processing that go into the product are of U.S. origin
- Product contains no (or negligible) foreign content

“All or Virtually All” (cont’d)



- *De minimis* foreign content allowed
- No “bright line” rule or percentage
- Factors:
 - **Minimum/mandatory factor:** Final assembly or processing of the product must take place in the U.S.
 - **Subsidiary Factors:**
 - Portion of the product’s total manufacturing costs attributable to U.S. parts and processing?
 - How far removed from the finished product any foreign content is?
 - Importance of the foreign content to the form or function of the product?

But Are These Claims Inherently Ambiguous?

- *I Dig Texas LLC v. Kerry Creager*, 98 F.4th 998 (10th Cir. 2024)
 - Court of Appeals ruled that an “American-made” claim was potentially ambiguous and did not create legal liability for the company
 - Considered liability under the Lanham Act (trademark), not the FTC regulations
 - Lanham Act requires a false or misleading description of fact in an advertisement
 - Claim must be **literally** false
 - Court conclusion: “[T]he boast itself is ambiguous.”
 - “Even if some components had come from China or Canada, I Dig Texas assembled some of its products in the United States. I Dig Texas’s advertisements are thus ambiguous when they say that the products are made in the United States or in America.”
- **Does this decision potentially undermine the FTC’s stricter standards?**



Subsidiary Factor: Manufacturing Costs

- Cost of goods sold or inventory costs of furnished goods
- Costs = total cost of all:
 - Manufacturing materials
 - Direct manufacturing labor
 - Manufacturing overhead



Example: Propane Barbecue

- Produced at a plant in Nevada
- U.S. Components: gas valve, burner and aluminum housing
- Imported Components: knobs and tubing
- “Made in the USA”?



Example: Table Lamp



- Assembled in California
- U.S. Components: Brass and lampshade
- Imported Components: Base
- “Made in the USA”?

Qualified “Made in the USA” Claims

- Products that include U.S. content or processing, but do not meet the criteria for making an unqualified “Made in the USA” claim may be qualified
 - Manufacturers and marketers must still exercise caution, avoiding claims unless the product has a “significant” amount of U.S. content
 - Qualified claim must be **truthful and substantiated**
- “Assembled in USA”
 - **Principal assembly** takes place in the U.S. and assembly is **substantial**
 - The product’s last “substantial transformation” should occur in the U.S.

Example: Treadmill



- Assembled in the U.S.
 - *Significant assembly processes*
- U.S. Components: handle bar covers, plastic on/of power key, treadmill mat
 - *Constitute 3% total cost of all component parts*
- Imported Components: motor, frame, electronic display
- Is “Made in USA of U.S. and Imported Parts” deceptive?
- What about “Made in USA from Imported Parts” or “Assembled in USA”?

Qualified Claims for Processes/Parts

- Claims that a particular manufacturing or other process was performed in the U.S. or that a particular part was manufactured in the U.S. must be **truthful, substantiated**, and clearly refer to the specific process or part, not to the general manufacture of the product, to avoid implying more U.S. content than exists
- For example:
 - ✓ “Designed in USA – Assembled in China”
 - ✓ “Hand carved in U.S. — Wood from Philippines”

Suppliers & Certifications

- Manufacturers and marketers making unqualified “Made in the USA” claims should have a “reasonable basis” to support the claim at the time it was made
- **Competent and reliable evidence** to back up claims:
 - Good faith reliance on information from suppliers about domestic content in parts, components, and other elements
 - Companies should ask for specific information about the percentage of U.S. content before making a “Made in the USA” claim

Suppliers & Certifications (cont'd)

- How far back in the supply chain must we look?
 - Far enough in the manufacturing process to be reasonably sure that any significant foreign content has been included in the assessment of foreign costs
- Are raw materials included in the evaluation?
 - It depends on how much of the product's cost the raw materials make up and how far removed from the finished product they are



FTC Enforcement



- There is no “good faith” defense”
 - Claims made in good faith may still be deceptive to consumers
- But...
 - ✓ Companies can rely on information from suppliers provided in good faith
 - ✓ Enforces typically focuses on intentional, repeated, or egregious offenders
 - ✓ FTC is willing to provide informal staff counseling where appropriate
- Penalties/Remedies:
 - Up to 3 years in jail (intentional/criminal)
 - Fines/penalties = \$50,120 per violation
 - Injunctions
 - Consent orders
 - Internal compliance plans/remediation



1997 Enforcement Policy Statement

FTC Enforcement (cont'd)

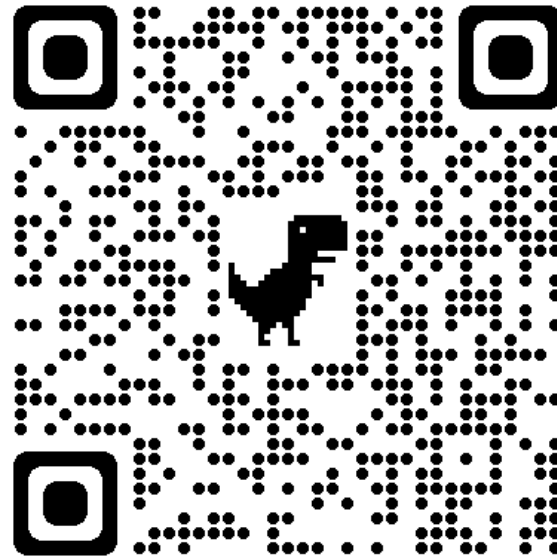
- **Williams-Sonoma** (April 2024)
 - \$3.17M settlement with FTC
 - Required ongoing certifications to FTC regarding compliance
 - Record setting fine was due to Williams-Sonoma failing to live up to a prior consent agreement from 2020
- **Kubota** (January 2024)
 - \$2M settlement with FTC
 - Moved manufacturing overseas for replacement parts, but never updated labeling
 - Settlement required increased documentation for country of origin claims

WILLIAMS
SONOMA



FTC Enforcement (cont'd)

- Want to tattle on a competitor?



2. U.S. CUSTOMS & BORDER CONTROL (CBP) RULES

FTC Made in the USA v. Customs Markings



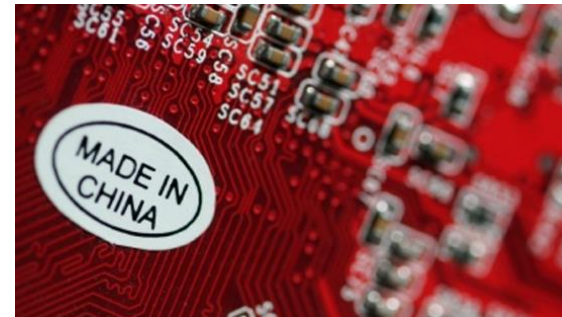
[Production]

FTC “Made In the USA”



Customs “Substantially Transformed”

[Marketing]



U.S. Customs and Country of Origin Markings

- 19 U.S.C. § 1304; 19 C.F.R. Part 134
- Tariff Act of 1930 gives U.S. Customs and the Secretary of the Treasury the power to administer the requirement that imported goods be marked with a foreign country of origin
- Two standards:
 - “Wholly the product of...”
 - “Substantially transformed”



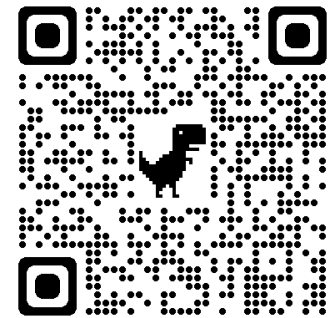
“Substantial Transformation”

- A manufacturing process that results in a new and different product with a new name, character, and use that is different from that which existed before the change
- Case-by-case, fact-intensive analysis
- Advisory opinions are available
- Database of Customs-related decision in Customs Rulings Online Search System (CROSS)



U.S. Customs and
Border Protection

CUSTOMS RULINGS ONLINE SEARCH SYSTEM (CROSS)



Comparing Processing Standards

TAA = “Substantially Transformed” \neq Buy American Act = “Manufactured”

TAA = “Substantially Transformed” $?$ Customs = “Substantially Transformed”

Standards

Packaging

Mere Assembly

Complex Assembly?

Manufactured

Substantially Transformed

Wholly a Product Of...

BAA (and TAA?) certification

U.S. Customs Marking

“Made in the USA” Marking



Labels May Not Tell The Whole Story...

 **DANGER**

 **WARNING**

 **CAUTION**



- Remember *Acetris Health LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020)...

Customs = Product of India

Marking ? “Packaged in the U.S. from Foreign Content”



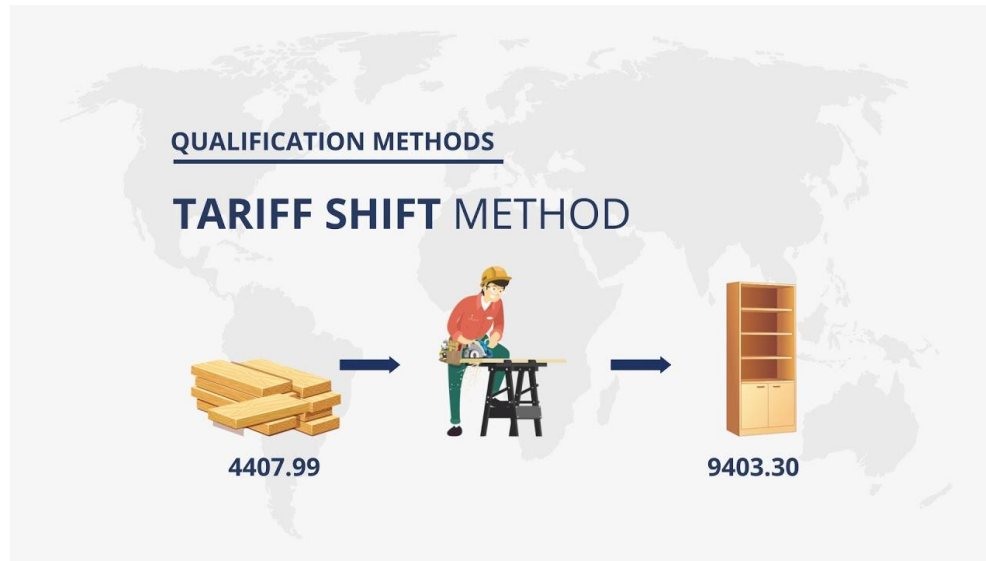
TAA = U.S.-Made End Product

BAA = Domestic End Product

3. USMCA UPDATES

USMCA vs. NAFTA

- NAFTA applied **Tariff Shift** test to determine product change
 - Requires a change in tariff classification to be considered “substantially transformed”



- USMCA continues to endorse this concept
- But Tariff Shift **does not look at actual manufacturing processes**

USMCA vs. NAFTA (cont'd)

- NAFTA used to require a specific certificate of origin for preferential tariff treatment
 - CBP Form 434 no longer used
- USMCA does not require any certificate
 - USMCA allows for preferred entry (without tariff/tax) for qualified products between U.S./Mexico/Canada
 - Does not concern itself with independent country of origin determination



CONCLUSION

Comparing Country of Origin Labels

“Made in the USA”	>	Buy American Act = “Manufactured”
“Made in the USA”	>	Buy America = “Manufactured”
“Made in the USA”	>	BABA = “Manufactured”
“Made in the USA”	>	Customs = “Substantially Transformed”
“Made in the USA”	>	Trade Agreements Act = “Substantially Transformed”

Comparing Country of Origin Labels (cont'd)

U.S. Customs = “Substantially Transformed”	≠	Buy American Act = “Manufactured”
U.S. Customs = “Substantially Transformed”	≠	Buy America = “Manufactured”
U.S. Customs = “Substantially Transformed”	≠	BABA = “Manufactured”
U.S. Customs = “Substantially Transformed”	≠	FTC “Made in the USA”
U.S. Customs = “Substantially Transformed”	?	Trade Agreements Act = “Substantially Transformed”

BORN IN THE U.S.A./BRUCE SPRINGSTEEN

Truthful

Accurate

Substantiated

Not Misleading

Certification and Labeling Reminders...

- Be careful when you certify/label your products...



Questions?



Next Session on June 20, 2024

- Session 6: The Berry Amendment

