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PERSPECTIVE

Springsteen may have been 'Born in the USA,' but what about his Levi's?

By Amy Lally and Collin Wedel

The answer has long been "Dancing in the Dark." In a new proposed rule, though, the Federal Trade Commission is aiming to clear up lingering confusion — with the threat of hefty fines for companies that get the answer wrong. On July 16, the FTC issued a notice of proposed rulemaking providing that a product can be represented as being "made" in the USA *only* where all three of the following conditions are true:

(i) "the final assembly or processing of the product occurs in the United States," *and*

(ii) "all significant processing of the product occurs in the United States," *and*

(iii) "all or virtually all ingredients or components of the product are made and sourced in the United States."

85 FR 43162, 43163 (July 16, 2020). The proposed rule would deem any representation of U.S. origin falling outside that definition to be a per se "unfair or deceptive act or practice" within the meaning of Section 5 of the FTC Act. Before the reader considers crafty workarounds, moreover, the rule also expressly covers euphemisms like "manufactured," "built," "produced," "created" or "crafted." And the rule expressly extends to "any mail order catalog or mail order promotional material include[ing] a seal, mark, tag, or stamp labeling a product Made in the United States," *id.*, which is defined expansively to include mediums far removed from a typical "mail order catalog," such as anything "used in the direct sale or direct offering for sale of any product or service, that are disseminated in print or by electronic means, and that solicit the purchase" of such products — i.e., the internet. The proposed rule is also "Tougher than the Rest," authorizing the FTC to seek civil penalties of up to $43,280 per violation. The comment period for the rule closed on Sept. 14, and, barring any unexpected revisions, the proposed rule is expected to become final soon.

While this test at first appears to be more restrictive than a colloquial understanding of what it means to be "made" somewhere, it actually tracks the position the FTC has been taking over the past few years in its enforcement actions, which, until now, have been based on the FTC's interpretation of a never-codified enforcement policy from the "Glory Days" of the 1990s. In 2013, for instance, the FTC obtained a consent order against a company that made and marketed various cellphone and pet accessories as "Made in the USA," on the ground that the products were not "virtually all made in the United States." In 2019, the FTC pursued enforcement actions against a hockey puck company and a backpack company for similar claims, and entered consent orders barring both "from making unqualified U.S.-origin claims for their products, unless they can show that the products' final assembly or processing — and all significant processing — takes place in the United States, and that all or virtually all ingredients or components of the product are made and sourced in the United States." And in 2020, the FTC brought an action against a prominent retailer for similar representations and imposed the same requirement, albeit with a $1 million fine.

Notwithstanding the FTC's past forays into this arena, the clarity of the new proposed rule will no doubt strengthen the FTC's statutory enforcement authority — particularly for manufacturers and advertisers who had previously taken refuge in the ambiguity of the agency's informal guidance to claim "American Skin" — and the clear availability of civil monetary penalties will up the ante in any such activities.

In addition to enforcement actions, the new rule is also likely to fuel further litigation under California's consumer protection statutes. Again, while the FTC's rule largely harmonizes with prevailing judicial interpretations of California's analogous statute, Business and Professions Code Section 17533.7 (which makes it unlawful to represent that a product is "Made in the USA" if "any article, unity, or part thereof has been ... substantially made ... outside of the United States"), the rule's specificity will make it easier for plaintiffs to bring civil suits for misrepresentations of origin under the Unfair Competition Law's "unlawful" prong. In other words, because the FTC has provided a stark, three-pronged test for what can and cannot qualify for the "Made in the USA" label, plaintiffs will likely be emboldened to go after origin claims that might previously have seemed too squishy to warrant a lawsuit, and to argue that the product violates California law because of its failure to comply with the FTC's proposed definition for what constitutes a product made in "American Land."

Consequently, manufacturers, retailers and advertisers should err on the side of the caution when making origin claims. In particular, they should claim that something is "Made in the USA" only when absolutely certain that the product in question is as American- born as the Boss himself. ■

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