Dissenting Statement of Commissioner Christine S. Wilson
Final Rule related to Made in U.S.A. Claims

July 1, 2021

Today the Commission announces a Final Rule with respect to "Made in USA" (MUSA) labels. I support the FTC's prosecution of MUSA fraud[1] and supported its consideration of a rule that addresses deceptive MUSA claims on labels, consistent with the authority granted to the FTC by Congress in Section 45a. The Rule announced today, however, exceeds that authority.

Section 45a of the FTC Act – the provision pursuant to which we advance this Rule – authorizes the Commission to issue rules governing MUSA claims on products "with a 'Made in the U.S.A.' or 'Made in America' label, or the equivalent thereof." The provision is titled "Labels on products" and repeatedly references "labels." The Commission nonetheless has chosen to promulgate a rule that could be read to cover all advertising, not just labeling.

This Rule is not supported by the plain language of 45a. It is clear that Congress intended to extend rulemaking authority over the many potential variations (or "equivalents") of "Made in the U.S.A." or "Made in America" claims that may be found on labels, not labels and claims made in advertising or marketing. The legislative history for Section 45a supports this interpretation. Specifically, the Conference Report on H.R. 3355 discusses any label characterizing "a product as 'Made in the U.S.A.' or the equivalent thereof," signaling Congress' intent that the statute should cover not just literal invocations of "Made in the U.S.A.," but also equivalents to that claim (*i.e.*, Made in America, American Made, and so on).[2]

The Commission's Rule defines the term far more broadly than any FTC precedent, and in a way that, in my view, exceeds our statutory grant of rulemaking authority.[3] The Rule that we issue today will cover not just labels, but all:

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[1] I have voted to support every MUSA enforcement action recommended to the Commission by staff since joining the Commission. *See* In the Matter of Gennex Media, LLC No. C-4741 (Apr. 2021), https://www.ftc.gov/system/files/documents/cases/2023122gennexmediafinalorder.pdf; In the Matter of Chemence, Inc., et al., No. 4738 (Feb. 2021), https://www.ftc.gov/system/files/documents/cases/2021-02-10_chemence_admin_order.pdf; In the Matter of Williams-Sonoma, Inc., No. C-4724 (July 2020), https://www.ftc.gov/system/files/documents/cases/2023025c4724williamssonomaorder.pdf; U.S. v. iSpring Water Systems, LLC, et al., No. 1:16-cv-1620-AT (N.D. Ga. 2019); https://www.ftc.gov/system/files/documents/cases/172_3033_isprisp327.12 BT0 0 1 rg-0.001 Tc 0.001 Tw 9.96 -0 0 9.96 149.88 189.3

> "materials, 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 product or service by mail, telephone, electronic mail, or some other method without examining the actual product purchased"[4] that include "a seal, mark, tag, or stamp labeling a product Made in the United States."[5]

This language could bring within the scope of the Rule stylized marks in online advertising or paper catalogs and potentially other advertising marks, such as hashtags, that contain MUSA claims.[6]

In the statement I issued when the Commission sought comment on this proposed Rule, I noted that were Congress drafting this statute now, it might choose language to encompass those broader contexts, including online advertising.[7] But there was no plausible argument to be made that the ordinary meaning of the text when enacted in 1994 encompassed online advertising – a period when online shopping was largely unfamiliar to most consumers.[8] As it happens, the Senate recently passed the Country of Origin Labeling Online Act (COOL Act), which prohibits deceptive country-of-origin representations. There Congress did, in fact, specify its application to labeling as well as other forms of online advertising:

> it shall be unlawful to make any false or deceptive representation that a product or its

This language, in contrast to Section 45a, leaves no doubt that it applies to labeling ***and*** advertising and confirms that Congress views "labeling" as distinct from "advertising or other promotional materials," including in an online context.

To the extent the Commission seeks to issue a broader prohibition on Made in USA fraud, as Commissioner Chopra asserted when the Commission sought comment on this Rule, it has other options. The Commission can institute a rulemaking proceeding pursuant to Section 18 of the FTC Act. Several commenters suggested that rather than promulgate a limited rule for labeling claims, the Commission should conduct a full proceeding to address all advertising claims.[10] The Commission has not taken this action. The Commission alternatively could work with Congress to effectuate the passage of the COOL Act, which would appear to moot this Rule if enacted.

Accordingly, because this

seek equitable monetary relief under Section 13(b) of the FTC Act to compensate consumers. Thus, the temptation to test the limits of our remaining sources of authority is strong. I urge my colleagues to pause. Previous FTC forays into areas outside its jurisdictional authority have resulted in swift condemnation from the courts and Congress.[14] Expansive interpretations of our rulemaking authority will not engender confidence among members of Congress who have in the past expressed qualms about the FTC's history of frolics and detours.[15]

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[14] S*ee* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (reforming the ability of the FTC to promulgate rules by requiring a multi-step process with public comment and subject to Congressional review). This Act also authorized $255 million in funding for the Commission and was the first time since 1977 the agency was funded through the traditional funding process after the backlash from Congress over its rulemaking activities. *See* Kintner, Earl, et al., "The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC's Rulemaking and Enforcement Authority" 58 Wash. U. Law Rev. 847 (1980); *see also* J. Howard Beales III & Timothy J. Muris, FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?, 83 Geo. Wash. L. Rev. 2157 (2015) (describing the "disastrous failures" of the FTC in the 1970s and the 1980s from enforcement and regulatory overreach and quoting Jean Carper, The Backlash at the FTC, WASH. POST, C1 (Feb. 6, 1977) (describing the backlash from Congress at the FTC, after a period of intense rulemaking activity culminating in the agency's being dubbed the "National Nanny")); *see also* Alex Propes, Privacy and FTC Rulemaking: A Historical Context, IAB (Nov. 6, 2018) (discussing how the FTC's rulemaking history could be influencing Congressional comfort with vesting the FTC with additional privacy authority), https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context/

[15] *See* Transcript: Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security (May 8, 2019), *available at*: https://docs.house.gov/meetings/IF/IF17/20190508/109415/HHRG-116-IF17-Transcript-20190508.pdf. At this Hearing, Rep. McMorris Rogers stated: "In various proposals, some groups have called for the FTC to have additional resources and authorities. I remain skeptical of Congress delegating broad authority to the FTC or any agency. However, we must be mindful of the complexities of this issue as well as the lessons learned from previous grants of rulemaking authority to the Commission." Transcript at 8-9.