KEEPING LABELS GREAT: HOW THE FTC CAN IMPROVE ITS ORIGIN LABELING STANDARDS AND ENFORCEMENT

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I. INTRODUCTION

On January 25, 2021, President Biden issued Executive Order 14005 (EO 14005) as part of the "Build Back Better" economic recovery agenda.[1] EO 14005 aims to increase government procurement of domestically manufactured goods by closing waiver loopholes and changing the valuation of minimum content threshold required under the Buy American Act (BAA).[2] The BAA is a Depression-era piece of legislation designed to

1. *See* Jasmin Lim et al., *Buy American, Again,* CTR. FOR STRATEGIC & INT'L STUD. (Jan. 28, 2021), https://www.csis.org/analysis/buy-american-again.
2. Exec. Order No. 14005, 86 Fed. Reg. 7475, (Jan. 25, 2021).

protect domestic industry from foreign competition.[3] The new administration's focus on domestic procurement and manufacturing is not a new phenomenon.[4] But strikingly, it also parallels one of the key messages of the former administration.[5] In his 2017 inaugural address, President Trump announced his administration's commitment to the "Buy American and Hire American" agenda, which resolved to use federal procurements and assistance to stimulate domestic economic growth in the manufacturing sector.[6] The appeal of American-made products and support for domestic manufacturing transcends the political arena; it is also a powerful marketing tool for manufacturers and retailers who want to communicate to consumers that their products are high quality, ethically sourced, and promoting American job growth.

The importance of "Buy American" messaging is underscored by a recent Reuters-Ipsos poll which reveals that "63% of Americans want U.S. agencies to buy American-made products in general, even if they cost significantly more."[7] However, this poll also highlights a stark contradiction in the way that Americans approach government procurement policies and their own shopping habits.[8] "The poll found that while 69% percent believe an item being U.S.-made is at least somewhat important, 37% said they would not pay a penny extra for it.

3. John A. Howell, *The Trade Agreements Act of 1979 Versus the Buy American Act: The Irresistible Force Meets the Immovable Object*, 35 PUB. CONT. L.J. 495, 497 (2006).

4. *See generally* DANA FRANK, BUY AMERICAN: THE UNTOLD STORY OF ECONOMIC NATIONALISM (1999) (tracing the long history of the Buy American agenda through its political importance in the nonimportation movement, which swept through the colonies as a reaction to British rule, to the legislation of the Buy American Act following the Great Depression).

5. *See*, *e.g.*, Exec. Order 13881, 84 Fed. Reg. 34257 (Jul. 15, 2019) (raising the minimum content threshold under the BAA 5%).

6. *See* President Donald J. Trump, Remarks Prepared for Delivery of the Inaugural Address (Jan. 20, 2017) (transcript available at https://trumpwhitehouse.archives.gov/briefings-statements/the-inaugural-address); Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017).

7. Timothy Aeppel & Chris Kahn, *Americans want the government to buy U.S.-made goods, even if they cost more*, REUTERS (Mar. 30, 2021), https://www.reuters.com/article/us-usa-economy-madeinusa-poll-idUSKBN2BM1DA.

8. *Id.*

Twenty-six percent would only pay 5% more, while 21% percent capped it at a 10% premium."[9] This survey is supported by similar research presented at the 2019 Federal Trade Commission (FTC) Workshop which focused on reevaluating federal guidelines for domestic origin claims. The FTC's Bureau of Economics found "70% to 75% of US adults said that it was important or very important to buy American for a range of products, such as appliances and furniture. However, compared to the survey setting, research has demonstrated that country of origin is less important when looking at actual purchasing data."[10] Other independent studies presented at the FTC workshop showed a smaller disparity between the percentage of Americans who preferred to purchase American-made products and the percentage of Americans willing to pay more for American-made products but still reflected a strong preference for domestic goods.[11]

These studies also highlighted some of the motivating factors influencing consumer decision making in selecting a preference for domestic products. The Consumer Reports survey found that of the consumers who prefer domestic products:

> 84% say it's important because they think products are going to be more reliable. 80% say it's important because they think

9. *Id.*

10. Shiva Koohi, Economist, Bureau of Econ., Fed. Trade Comm'n, Report at Made in the USA: An FTC Workshop (Sept. 26, 2019) (transcript available at https://www.ftc.gov/system/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf); *see also,* Marc Florian Herz & Adamantios Diamantopoulos, *Country-Specific Associations Made by Consumers: A Dual-Coding Theory Perspective*, 21 J. OF INT'L MKTG. 95, 96 (2013).

11. *See* Justin Brookman, Consumer Reports, Fed. Trade Comm'n, Report at Made in the USA: An FTC Workshop (Sept. 26, 2019) (transcript available at https://www.ftc.gov/systems/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf) (Consumer Report survey finding 80% of American consumers prefer to buy American-made products but 60% would be willing to pay 10% more); Scott Paul, All. for Am. Mfg., Fed. Trade Comm'n, Report at Made in the USA: An FTC Workshop (Sept. 26, 2019) (transcript available at https://www.ftc.gov/systems/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf) (Alliance Manufacturing survey finding 92% of consumers had a very favorable or somewhat favorable view of manufactured goods made in America).

> there are better working conditions in the United States. 88% . . . say it is important because it keeps jobs in America. 87% say it's important because it helps the US economy. And actually, surprisingly, a little bit lower, 62% said because it's patriotic.[12]

These qualitative reports illustrate the important marketing power of country of origin claims and what they signify about quality, supply chain ethics, and investment in domestic job growth.[13]

However, for American manufacturers, the marketing power of a domestic origin label comes at a price. That price reflects more than the increased cost of manufacturing products and obtaining raw goods domestically; it also reflects the cost of monitoring compliance standards for country of origin claims and the risk associated with non-compliance.[14] Retailers, who are several steps removed from the manufacturing process, face the additional burden of verifying compliance at numerous stages in the supply chain with little control over claims that are made along the way.[15] Thus, the issue for American manufacturers and retailers is that they must balance these increasing costs of compliance against the marketing benefits of domestic origin labels in a market where consumers may not be willing to pay more and competitors may not be forced to play fair.

Part II of this Article provides an overview of the FTC's policy on domestic origin claims. Part III highlights the disconnect between the FTC's rigorous "all or virtually all" standard and an enforcement program targeting only the most egregious offenders. Part IV explores alternative approaches to the "all or virtually all" standard. Part V proposes an alternative to the current FTC standards in which the all-or-nothing approach is replaced with a standardized tiered system based on a modernized valuation of the minimum content threshold. This alternative would simplify enforcement by eliminating the need

12. Brookman, *supra* note 11.

13. *See generally id.*

14. Time Schade, Fed. Trade Comm'n, Report at Made in the USA: An FTC Workshop (Sept. 26, 2019) (transcript available at https://www.ftc.gov/system/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf).

15. *Id.*

for a factor analysis on a case-by-case basis and would ensure that companies could benefit from domestic origin labels without misleading consumers.

II. FTC DOMESTIC ORIGIN CLAIMS POLICY OVERVIEW

The FTC regulates "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce[.]"[16] "False and misleading representations as to origin of a commodity and as to its nature or quality constitute an unfair method of competition."[17] American content must be disclosed on automobiles, fur, textiles, and wool products, but there is no law requiring most other products to include origin labels.[18] However, manufacturers choosing to make claims about the amount of domestic content in their products must comply with FTC guidelines.[19] Title 15 of the U.S. Code provides:

> To the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a "Made in the U.S.A." or "Made in America" label, or the equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission[.][20]

An unqualified claim is a "representation, express or implied, that a product or service, or a specified component thereof, is of U.S. origin, including, but not limited to, a representation that such product or service is 'made,' 'manufactured,' 'built,' 'produced,' 'created,' or 'crafted' in the United States or in America[.]"[21] For unqualified claims, the FTC requires the

16. 15 U.S.C. § 45(a)(1) (2006).
17. F.T.C. v. Army & Navy Trading Co., 88 F.2d 776, 778–79 (D.C. Cir. 1937) (citing F.T.C. v. Royal Milling Co., 288 U.S. 212 (1933)).
18. FED. TRADE COMM'N, COMPLYING WITH THE MADE IN USA STANDARD 2 (1998), https://ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.
19. *Id.*
20. 15 U.S.C. § 45a (2006).
21. 16 C.F.R. § 323.1.

product be "all or virtually all" made in the United States.[22] The "all or virtually all" standard means that all significant product parts and all of the processing should originate in the United States.[23] The product should contain no, or *de minimis*, foreign content.[24] A manufacturer making an unqualified origin claim must have a reasonable belief, based on reliable evidence, that the product is wholly made in the United States.[25] "If given in good faith, manufacturers and marketers can rely on information from suppliers about the domestic content in the parts, components, and other elements they produce."[26]

Factors the FTC considers when evaluating whether a product meets the "all or virtually all" standard include: (1) whether the product underwent its last substantial transformation domestically; (2) the percentage of the product's total manufacturing costs which can be assigned to domestic parts and processing; and (3) how far removed any foreign content is from the finished product.[27] The factors relevant to the FTC guidelines focus solely on the materials, labor, and overhead of the manufacturing process.[28] "Non-manufacturing costs,

22. Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756, 63,756 (Dec. 2, 1997); *see id.* at 63,756 n.2 (discussing the modification of U.S. Origin complaints in light of the new "all or virtually all" standard).

23. FED. TRADE COMM'N, COMPLYING WITH THE MADE IN USA STANDARD 4 (1998), https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.

24. *Id.*

25. *Id.* at 5.

26. *Id.* at 6.

27. *Id.* at 5.

28. *Id.* at 6-7. *See id.* at 5 ("Example: A company produces propane barbecue grills at a plant in Nevada. The product's major components include the gas valve, burner, and aluminum housing, each of which is made in the U.S. The grill's knobs and tubing are imported from Mexico. An unqualified *Made in USA* claim is not likely to be deceptive because the knobs and tubing make up a negligible portion of the product's total manufacturing costs and are insignificant parts of the final product."); *id.* at 6 ("Example: A table lamp is assembled in the U.S. from American-made brass, an American-made Tiffany-style lampshade, and an imported base. The base accounts for a small percent of the total cost of making the lamp. An unqualified *Made in USA* claim is deceptive for two reasons: The base is not far enough removed in the manufacturing process from the finished product to be of little consequence and it is a significant part of the final product.").

including labor costs such as research and development, product design, marketing, and other services related to the creation and sale of the product are not considered even if all those activities took place in the United States by U.S. workers."[29]

The focus on manufacturing in the analysis of whether a product meets the "all or virtually all" standard is grounded in the FTC's goal of protecting consumer perception about what it means for a product to be made in America.[30] In 1997, the FTC proposed guideline changes to its policy and as part of this process it conducted consumer testing, held workshops, and reviewed thousands of public comments.[31] The FTC ultimately rejected the proposed changes because the comments revealed that "consumer commenters overwhelmingly opposed the Proposed Guides and generally supported an 'all or virtually all' standard or advocated a specific percentage, usually 90% or, more often, 100%."[32] The FTC concluded from the comments that consumers would feel deceived by anything less than the current standard and would be confused about whether the products they purchased actually supported American workers and jobs.[33]

Some individual commenters also rejected the proposed

29. The Trade P'ship., *Rethinking "Made in America" in the 21st Century*, TRADE P'SHIP WORLDWIDE (May 5, 2014), https://www.tradepartnership.com/wp-content/uploads/2014/09/rethinking-made-in-america.pdf.

30. *See* Julia Solomon Ensor, Staff Att'y, Bureau of Consumer Prot., Enf't Div., Fed. Trade Comm'n, Report at Made in the USA: An FTC Workshop (Sept. 26, 2019) (transcript available at https://www.ftc.gov/system/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf).

31. Andrew Smith, Dir. of Bureau of Consumer Prot., Fed. Trade Comm'n, Report at Made in the USA: An FTC Workshop (Sept 26, 2019) (transcript available at https://www.ftc.gov/system/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf).

32. Enforcement Policy Statements on U.S. Origin Claims, 62 Fed. Reg. 63,756, 63,760 n.53 (Dec. 2, 1997).

33. *Id.* at 63,758 n.28 (citing public comment AISI, #636, at 1 ("It is highly likely that the vast majority of U.S. consumers would be unaware of a change in the standard, and would continue to believe that items labeled 'Made in USA' were held to the current standard.")); *see also id.* (citing public comment UNITE, #696, at 3 ("no credible evidence that American consumers expect the 'Made in USA' label to mean that products were produced somewhere else.")); *see also id.* (citing public comment Plumbers & Steamfitters Local 565, #209, at 1, ("purchasing products displaying the 'Made in U.S.A.' label is the first line of defense for American workers to protect their jobs.")).

guidelines based on the availability of qualified claims as an alternative for manufacturers who could not meet the standard for an unqualified domestic origin claim.[34] "A qualified *Made in USA* claim describes the extent, amount or type of a product's domestic content or processing; it indicates that the product isn't entirely of domestic origin."[35] A qualified origin claim is appropriate when a significant portion of the product parts or processing originated domestically, but the product does not meet the criteria for an unqualified "Made in America" claim.[36] Because qualified claims may lead consumers to believe the product contains more domestic content than it does, these claims should be reserved for products with substantial parts or processing originating in the United States.[37] Qualified claims can convey that a particular process occurred domestically, but "[m]anufacturers and marketers should be cautious about using general terms, such as 'produced,' 'created' or 'manufactured' in the U.S. because words like these are unlikely to convey a message limited to a particular process."[38] Although the FTC does not address factors for analyzing qualifying claims, examples illustrate that greater specificity reduces the likelihood that consumers will misunderstand the claim.[39]

34. *Id.* at 63,759 n.31 (citing public comment Debra Newman ("Debra Newman"), #123 ("supports qualified claims such as 'Made in USA of imported parts' or 'Assembled in [name of country] from US parts.'")); *see also id.* (citing public comment Matthew Fogarty ("Fogarty") #997 ("for products with less than 100% U.S. content, should specify percentage of U.S. content, such as 'Materials 50% Made in USA, Assembled in Guam.'")).

35. FED. TRADE COMM'N, COMPLYING WITH THE MADE IN USA STANDARD 8 (1998), https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.

36. *Id.*

37. *Id.*

38. *Id.* at 10.

39. *See, e.g.*, *id.* at 9 (stating that sufficient examples of a "qualified *Made in USA* claim" include: "'60% of U.S. content.' 'Made in USA of U.S. and imported parts.' 'Couch assembled in USA from Italian Leather and Mexican Frame.'"); *see also id.* at 9-10 (providing an example an appropriate "qualified *Made in USA* claim" where "[a]n exercise treadmill is assembled in the U.S. The assembly represents significant work and constitutes a 'substantial transformation' . . . . All of the treadmill's major parts, . . . are imported. A few of its incidental parts, . . . are manufactured in the U.S. Together, these parts account for approximately three percent of the total cost of all the parts.

III. ISSUES WITH THE FTC'S UNQUALIFIED CLAIM STANDARD AND ENFORCEMENT PRACTICES

A. The "All or Virtually All" Standard

The primary problem with the current FTC standard is that it imposes a high minimum content threshold that focuses solely on the manufacturing process and associated costs. Based on the factor analysis set forth by the FTC, "Made in America" is synonymous with "Manufactured in America."[40] Traditionally, this focus on domestic manufacturing may have made sense.[41] However, increasing reliance on global supply chains and the steady decline of the American manufacturing sector may make these standards unworkable for manufacturers and retailers today.[42] When the FTC issued its proposed guidelines in 1997, the manufacturing sector accounted for 16.09% of GDP.[43] By 2019, manufacturing constituted only 11.39% of GDP.[44] While it may be an oversimplification to state that manufacturing has declined in the United States,[45] the increasing share of the economy occupied by other sectors underscores the limitations of the current factor analysis.[46]

Because the value of the U.S.-made parts is negligible compared to the value of all the parts, a claim on the treadmill that is 'Made in the USA of U.S. and Imported Parts' is deceptive. A claim like 'Made in U.S. from Imported Parts' or 'Assembled in U.S.A.' . . . would not be deceptive.").

40. *See generally* The Trade P'ship., *supra* note 29.

41. *Id.* at 7 (noting that historically, manufacturing made up large shares of the U.S. economy: 29% of output in the 1960s and 27% of employment).

42. *Id.*

43. *See U.S. Manufacturing Output 1997-2021*, MACROTRENDS, https://www.macrotrends.net/countries/USA/united-states/manufacturing-output (last visited Apr. 24, 2021).

44. *See 2019 United States Manufacturing Facts*, NAT'L ASS'N OF MFRS., https://www.nam.org/state-manufacturing-data/2019-united-states-manufacturing-facts (last visited Apr. 24, 2021).

45. *See* YiLi Chen & Paul Morris, *Is U.S. Manufacturing Really Declining?* FED. RES. BANK OF ST. LOUIS (Apr. 11, 2017), https://www.stlouisfed.org/on-the-economy/2017/april/us-manufacturing-really-declining (comparing real GDP to nominal GDP it seems likely that manufacturing's roughly constant share of real GDP and declining employment share indicate an increase in productivity of the manufacturing sector relative to the overall economy).

46. *See* Daniel Bachman & Rumki Majumdar, *Changing the lens: GDP from the industry viewpoint*, DELOITTE INSIGHTS (July 24, 2019),

Another issue that arises with the "all or virtually all" standard is that it lacks a specific percentage content threshold or valuation system that suffices to designate a product as American-made.[47] The initial threshold requires a product be last "substantially transformed" in the United States.[48] This threshold relies on the Customs and Border Protection (CBP) standard which defines substantial transformation as the creation of an article with a new name, character, and use.[49] If the FTC determines a product underwent its last substantial transformation domestically, it then evaluates the factors listed above on a case by case basis. The factor analysis is retrospective and uncertain which leaves manufacturers "to play a guessing game as they market their goods and advertise towards American consumers. As a result, costs will inevitably rise, as more time and money [are] put toward this determination." [50]

One major concern with this stringency and uncertainty surrounding the "all or virtually all" standard is that it could inadvertently increase outsourcing.[51] The issue is that the all or nothing approach is maladapted to the realities of the global supply chain. In certain industries, like consumer electronics, it is impractical or impossible to source all of its raw components in the United States.[52] Even if a smartphone manufacturer wanted to assemble the final product and its components in the United

https://www2.deloitte.com/us/en/insights/economy/spotlight/economics-insights-analysis-07-2019.html (finding the manufacturing sector has been declining in terms of nominal GDP, while one of the top five growing service industry sectors is in wholesale/retail trade, warehousing, and transportation).

47. *See* Enforcement Policy Statements on U.S. Origin Claims, 62 Fed. Reg. 63,756, 63,768 (Dec. 2, 1997) ("[T]here is no single 'bright line' to establish when a product is or is not 'all or virtually all' made in the United States[.]").

48. *Id.*

49. U.S. CUSTOMS AND BORDER PROTECTION, PUB. NO. 1150-0620, MARKING OF COUNTRY OF ORIGIN ON U.S. IMPORTS (2020).

50 Stuart Smith, *"Made in America": A Comparative Perspective on Country of Origin Labels for Manufactured Products in the United States and Canada*, 45 CAL. W. INT'L L.J. 261, 287 (2015).

51 *Id.*

52 *See*, *e.g.*, Konstantin Kakes, *The All-American iPhone*, MIT TECH. REV. (June 9, 2016), https://www.technologyreview.com/2016/06/09/159456/the-all-american-iphone (Even just the outside of an iPhone relies heavily on materials that aren't commercially available in the U.S. Aluminum comes from bauxite, and there are no major bauxite mines in the U.S.").

States, many of the rare earths that make up these components are mined exclusively in China.[53] Thus, there is little incentive to incur the increased manufacturing costs associated with domestic production when manufacturers conclude that they cannot meet the "all or virtually all" standard.[54] Manufacturers who cannot benefit from marketing their products as "Made in America" will be more likely to increase outsourcing to lower the price of their products in an effort to attract consumers.[55]

During the 1997 public commentary period, a number of commenters argued that the strictness of the "all or virtually all" standard was counterproductive to the goal of preserving American jobs because it deprived manufacturers and retailers of a significant marketing tool that discouraged outsourcing.[56] Many commenters expressed concerns that American manufacturers face a competitive disadvantage compared to manufacturers in countries where labor rates and other production costs are low.[57] "Although being able to promote their products as 'Made in USA' would help to even out this disadvantage, they argued, many manufacturers' products cannot meet the current standard, either because of cost reasons or because some materials and components are no longer available from domestic sources."[58]

Gold jewelry is an example of a product that often cannot satisfy the "all or virtually all" standard from a sourcing perspective even when it was produced or manufactured in America.[59] The origin of most gold in the world is no longer

53. *Id.*

54. Smith, *supra* note 50, at 288.

55. *Id.*

56. *See generally* Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (Dec. 2, 1997). *See also id.* at 63,760 n.53 ("('To impose a standard which [numerous manufacturers] cannot meet is one more encouragement for businesses to abandon U.S. manufacturing for cheap overseas labor.'); ('If the FTC continues to impose unrealistic country of origin marking requirements, the decline of the U.S. luggage and leather goods industry and its migration off shore will be hastened.'); ('If the standard is so high that it cannot be met, manufacturers will have no incentive to even try.')") (citations omitted).

57. *Id.* at 63,670.

58. *Id.*

59. *See* Mark Hanna, Richline Group, Berkshire Hathaway, Fed. Trade

traceable to its original source because it has been recycled many times.[60] The Dodd-Frank Act, which addressed the sourcing of conflict minerals like gold, considers the initial origin of gold to be the recycler or refiner.[61] However, the FTC has not adopted this approach, so the amount of foreign raw material in the finished jewelry and the manufacturing costs relative to the overall value of the jewelry remain obstacles to unqualified domestic origin claims for this industry.[62] A jewelry manufacturer that sources its gold from American recyclers and employs American workers to produce the jewelry will still likely be excluded from the benefits of origin marketing.[63]

B. Enforcement of FTC Standard

The Federal Trade Commission Act (FTCA) authorizes the FTC to treat product label violations as a violation of its unfair or deceptive acts or practices governed by § 57(a) of the Act.[64] The Act does not provide a private right of action for such violations.[65] "Some states allow the FTCA to serve as a predicate statute for private unfair competition law claims. Others, including California, do not."[66] There is no bright line rule that fixes the point at which products satisfy the "all or virtually all" standard. In an enforcement action, the FTC conducts its inquiry on a case-by-case basis by balancing the aforementioned factors. However, due to limited resources, the FTC focuses its enforcement goals on educating manufacturers, retailers, and advertisers on the requirements for unqualified and qualified claims.[67] Where the

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Comm'n, Report at Made in the USA: An FTC Workshop (Sept. 26, 2019) (transcript available at https://www.ftc.gov/systems/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf).

60. *Id.*

61. *Id.*; *see also* Conflict Minerals, 17 C.F.R. § 240, 249b (Aug. 22, 2012).

62. *See* Hanna, *supra* note 59.

63. *Id.*

64. 15 U.S.C. § 45a (2006).

65. James R. Robie et al., *American Made Courts and the Federal Trade Commission have both found that a bright-line rule defining "Made in USA" remains elusive*, L.A. LAW., Dec. 2008, at 25, 26.

66. *Id.*

67. *See generally*, Fed. Trade Comm'n, Made in the USA: An FTC

FTC identifies potentially misleading claims, it first works with the company to initiate compliance measures and then sends closing letters, without resorting to litigation.[68] Closing letters inform companies the FTC is dropping formal investigations but should not be construed as a determination that there was no violation of the law.[69] These letters are not binding, and the FTC reserves the right to reopen investigations if companies fail to comply with the guidance issued in the letter.[70]

A review of the FTC's Made in USA enforcement actions provides:

> The FTC has brought more than 200 made in the USA actions since 1996. The vast majority (i.e., more than 190) of the actions were in the form of closing letters that did not lead to further action. Thirty were administrative actions, all but five of which resulted in no-money, no-fault settlements. And five were federal court cases, two of which were filed because the companies violated settlement agreements entered in administrative actions.[71]

Overall enforcement of unqualified claims increased steadily from 2012 to 2015 and reached its highest point in 2016 when the FTC issued 28 closing letters and settled a case with Chemence, Inc.[72]

Chemence advertises, sells, and distributes cyanoacrylate glue products, commonly known as "superglues," to consumers.[73] Beginning in 2014, the FTC launched investigations into

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Workshop (Sept. 26, 2019) (transcript available at https://www.ftc.gov/system/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf).

68. FED. TRADE COMM'N, MADE IN THE USA: AN FTC WORKSHOP, STAFF REPORT OF THE BUREAU OF CONSUMER PROTECTION (2020), https://www.ftc.gov/system/files/documents/reports/made-usa-ftc-workshops/p074204_-_musa_workshop_report_-_final.pdf.

69. Lesley Fair, *An open statement about BCP closing letters*, FED. TRADE COMM'N BUS. BLOG (May 24, 2021), https://www.ftc.gov/business-guidance/blog/2021/05/open-statement-about-bcp-closing-letters.

70. *Id.*

71. *FTC Made in USA Actions Since 1996,* TRUTH IN ADVERTISING (June 30, 2022), https://www.truthinadvertising.org/ftc-made-usa-actions.

72. *Id.*

73. Fed. Trade Comm'n v. Chemence, Inc., 209 F. Supp. 3d 981, 983 (N.D. Ohio 2016).

Chemence and other competitors in the superglue industry but only brought charges against Chemence for violation of the FTCA for "engaging in 'unfair or deceptive acts or practices affecting commerce' with respect to its 'Made in the USA' labels."[74] The complaint alleged that Chemence made these unqualified claims despite knowing approximately 55% of the cost of the chemical ingredients in its cyanoacrylates were attributable to imported chemicals that are essential to the function of the product.[75] The complaint further alleged that Chemence provided the means and instrumentalities to third-party retailers to commit deceptive acts and practices by providing such retailers with deceptive marketing materials for use in the marketing and sale of private-labeled products.[76]

During litigation, Chemence requested that the FTC produce documents it collected from other superglue competitors over the course of its investigation.[77] According to Chemence, the requested documents would show the FTC applied inconsistent standards in pursuing "Made in the USA" claims against different companies by giving its competitors a "free pass" and pursing a more stringent standard in their case.[78] Chemence also contended that the inconsistent enforcement practices were relevant because the FTC never promulgated rules or issued clear standards about the use of "Made in the USA" claims on products.[79] The district court held the discovery request was immaterial and rejected the "why me" or "everybody else is doing it" defense as baseless in light of the FTC's discretion and allocation of agency time and resources.[80]

The 2016 settlement agreement permanently enjoined Chemence, its officers, agents, or employees from making claims that its cyanoacrylate glues were made in America unless final

74. *Id.*

75. Complaint for Permanent Injunction and Other Equitable Relief at ¶ 13, Fed. Trade Comm'n v. Chemence, Inc., 209 F. Supp. 3d 981 (N.D. Ohio 2016) (No. 1:16-cv-228).

76. *Id.* ¶¶ 10, 20-21.

77. *Chemence, Inc.*, 209 F. Supp. 3d 981.

78. *Id.* at 985.

79. *Id.*

80. *Id.* at 986.

assembly occurred domestically, all significant processing occurred domestically, and all or virtually all of the ingredients in the product were sourced from the United States.[81] It also enjoined Chemence from providing third parties with "advertising, labeling, promotional, sales training, or purported substantiation materials, for use by trade customers in its marketing of any Product or Service."[82] Additionally, Chemence was ordered to pay $220,000 in equitable relief to the FTC, implement compliance reporting measures for twenty years, and provide the FTC with all of its marketing materials and any evidence of complaints or communications that contradict, qualify, or call into question the veracity of its marketing materials.[83]

Further investigation revealed that after issuance of the 2016 Order, Chemence continued to manufacture private label superglue products and provided retail customers with labeling and promotional materials that made unqualified "Made in the USA" claims.[84] Chemence failed to disclose to its retailers and consumers that "[i]n numerous instances, foreign materials accounted for more than 80% of materials costs and more than 50% of overall manufacturing costs for these products."[85] In 2020, the FTC settled with Chemence for $1,200,000 and reinstated compliance provisions similar to the original order.[86] Additionally, Chemence was ordered to notify all of its third party retailers who purchased pre-packaged or pre-labeled superglue to inform them that it had been sued for violating the FTCA's provisions on false and deceptive advertising.[87] The enforcement action against Chemence is the largest settlement

81. *See* Stipulated Order for Permanent Injunction and Monetary Judgment at 4, Fed. Trade Comm'n v. Chemence, Inc., 209 F. Supp. 3d 981 (N.D. Ohio 2016) (No. 1:16-cv-228-PAG).

82. *Id.* at 5.

83. *Id.* at 5, 9.

84. Complaint at *2, Chemence, Inc., 2021 WL 615322 (F.T.C. Feb. 9, 2021) (No. C-4738).

85. *Id.* at *3.

86. Decision and Order at 4, Chemence, Inc., 2021 WL 615322 (F.T.C. Feb. 9, 2021) (No. C-4738).

87. *Id.* at 11.

the agency has reached concerning domestic origin labeling,[88] and it came shortly after the FTC settled with Williams Sonoma for $1 million in early 2020.[89]

In 2018, the FTC received complaints that Williams Sonoma was advertising its Pottery Barn Teen brand mattresses, which were wholly imported from China, as being "crafted in America from local and imported materials."[90] Williams Sonoma immediately removed the advertising and agreed to conduct a larger review of its country-of-origin labeling standards and processes.[91] Despite these assurances, Williams Sonoma continued to make "misleading claims that all Goldtouch Bakeware, Rejuvenation-branded products, and Pottery Barn Teen and Pottery Barn Kids-branded upholstered furniture products, including raw materials and subcomponents, were all or virtually all made in the United States."[92] One such advertisement in a Rejuvenation catalog featured a picture of a leather chair and ottoman above a bold typeface that read "Made in America," followed by a smaller print claiming "our sofas and chairs are benchmade in North Carolina by a family-owned company, using sustainable practices and materials made to last."[93] The FTC found these Rejuvenation-branded furniture products were either wholly imported or contained significant imported materials or components.[94] Notably, as of the date of this Article, the Rejuvenation website describes itself as "a classic American lighting and house parts general store" that prides itself on "partnering with American craftspeople and vendors whenever possible."[95]

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88. *FTC Made in USA Actions Since 1996*, *supra* note 71.

89. *See* Williams-Sonoma, Inc., No. 202-3025, 2020 WL 1549682 (F.T.C. Mar. 30, 2020).

90. Press Release, Fed. Trade Comm'n, Williams-Sonoma, Inc. Settles with FTC, Agrees to Stop Making Overly Broad and Misleading 'Made in USA' Claims about Houseware and Furniture Products (Mar. 30, 2020), https://www.ftc.gov/news-events/press-releases/2020/03/williams-sonoma-inc-settles-ftc-agrees-stop-making-overly-broad.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See, e.g.,* REJUVENATION, www.rejuvenation.com (last visited May 30,

Despite the FTC's recent push to enforce higher penalties against the most egregious offenders, there is still concern that the primary enforcement measures in the form of closing letters is not adequate deterrence.[96] The Truth in Advertising Organization found that after the FTC issued a closing letter to Williams Sonoma in 2018, the company made over eight hundred deceptive advertising claims.[97] In light of Williams Sonoma's blatant disregard for the FTC's initial compliance measures, it is questionable whether a one million dollar penalty will be sufficient to deter a company that brought in over six billion dollars in revenue the same year.[98] Although the FTC continues to monitor every company that has received a closing letter and has only received reports of backsliding among approximately two percent of closing letter recipients,[99] it relies heavily on the company's self-reported compliance measures.[100] Therefore, it is

2021).

96. *See*, *e.g.*, Bonnie Patten, Truth In Advertising, Fed. Trade Comm'n, Report at Made in the USA: An FTC Workshop (Sept. 26, 2019) (transcript available at https://www.ftc.gov/system/files/documents/videos/made-usa-ftc-workshop/ftc_made_in_usa_workshop_transcript_9-26-19.pdf) ("[W]hen companies are allowed to get away with this, it has a tremendous impact on the marketplace, and perhaps even an impact in how other states define how they make their Made in the USA claims. With regard to closing letters, Tina.org has brought many examples to FTCs attention where they don't work."); *see*, *e.g.*, Brookman, *supra* note 11 ("I would say I would rather see five meaningful settlements/cases per year instead of twenty no fault, don't do it again, tisk, tisk.").

97. Patten, *supra* note 96.

98. *See Williams-Sonoma Inc. Report*, BLOOMBERG L. (Jan. 2021), https://www.bloomberglaw.com/company/financials.

99. FED. TRADE COMM'N, *supra* note 68.

100. *See, e.g*. Staff Closing Letter to Christine Skoczylas, Counsel for Dude Products (Nov. 12, 2020) ("During our review, we discussed concerns that marketing materials may have overstated the extent to which certain hygienic products including, but not limited to, Dude Wipes, are made in the United States. Specifically, although the Company's wipes undergo significant manufacturing or processing in the United States, in some instances they incorporate significant imported components . . . . To avoid deceiving consumers, Dude Products implemented a remedial action plan to update and qualify its representations where needed. This plan included: (1) updating affected packaging and marketing materials to qualify claims; (2) updating potentially confusing or conflicting marketing copy on Company websites; and (3) submitting updated photographs and marketing copy to third-party platforms, including Amazon and Walmart.").

doubtful the FTC is receiving fully accurate reports concerning violations of initial compliance measures.

IV. ALTERNATIVE STANDARDS TO THE "ALL OR VIRTUALLY ALL" STANDARD

A. FTC 1997 Proposed Guidelines

The key features of the 1997 proposed guidelines were two safe harbor provisions which allowed unqualified claims if the product underwent its last transformation in the United States and domestic manufacturing costs constituted 75% of its total manufacturing costs, or the product underwent two substantial transformations in the United States.[101] Historically, the FTC interpreted unqualified origin claims to mean the product was "wholly of U.S. origin."[102] However, prior to its actions against Hyde Athletic Industries[103] and New Balance Shoes, Inc.,[104] the FTC had not aggressively pursued complaints that manufacturers were assembling products domestically with imported components.[105] These cases alarmed manufacturers and suggested the FTC would increase enforcement against those who assembled products domestically from foreign components.[106]

At the 1995 FTC public workshop, "[m]any commenters objected to the 'all or virtually all' standard as being too

101. Enforcement Policy Statement on U.S Origin Claims, 62 Fed. Reg. 63,756, 63,756 (Dec. 2 1997).

102. Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. 53,923, 53,923 (Oct. 18, 1995).

103. In re Hyde Athletic Industries, No. 922-3236, 1994 WL 528252 (F.T.C. Sept. 1994) (consent agreement prohibiting the company from misrepresenting that footwear made of foreign materials is made in the United States).

104. In re New Balance Athletic Shoes, Inc., No. 921-0050, 1994 WL 509868 (F.T.C. Sept. 1994) (complaint stated New Balance falsely represented that its footwear was made in the U.S. and that it falsely represented that it annually exports hundreds of thousands of pairs of athletic shoes that are American made).

105. Request for Public Comment in Preparation for Public Workshop Regarding "Made in USA" Claims in Product Advertising and Labeling, 60 Fed. Reg. at 53,923.

106. *Id.*

stringent. Commenters argued that, with increased globalization of production, most consumers today do not assume that 'Made in USA' products contain 'all or virtually all' U.S. parts and labor."[107] Other commenters contended that the FTC standard was inconsistent with customs standards, could not be met by manufacturers in a global supply chain, and would make it difficult for sellers to promote the use of domestic labor.[108] Ultimately, the FTC rejected the proposed guidelines because of concerns surrounding consumer perception of what a "Made in America" label means.[109] However, almost twenty-five years later, it would be useful for the FTC to reevaluate modern consumer perception and the assumptions that accompany a domestic origin label.

The 2019 FTC Workshop highlighted some marked changes in consumer preferences and attitudes toward domestic manufacturing. One of the top three concerns for millennial consumers is ethical sourcing and production.[110] For this group, "one of the most overlooked important aspects of making something in the US and being able to communicate that to the consumer is that it's going to be socially correct."[111] The modern marketing power of origin labels lies in the ability to communicate that there were no human rights abuses, child labor, or armed groups benefitting from the product.[112] While patriotism, product reliability, and supporting the American economy remain motivating factors for consumer purchases, a valuation system reflecting these attitudes may no longer adequately represent the consumer perception about what it means for a product to be "Made in America." Because the FTCA aims to protect consumer perception, it is important for the FTC to stay abreast of consumer purchasing data and modify existing standards to reflect these changes.

107. *Id.*

108. *Id.*

109. Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756, 63,760 (Dec. 2, 1997).

110. *See* Hanna, *supra* note 59.

111. *Id.*

112. *Id.*

B. California's Origin Labeling Law

"California has enacted a distinct statute covering deceptive advertising and U.S. country of origin labels."[113] Specifically, the California Business and Profession Code (California's Origin Law) makes it unlawful to attach a "Made in America" label to a product "if the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States."[114] To meet this requirement, foreign components of the manufactured product cannot comprise more than five percent of the final wholesale value of the manufactured product.[115] California's Origin Law also provides a safe harbor provision that allows manufacturers to use a domestic origin label on a product if the value of foreign components do not exceed ten percent of the wholesale value of the final product, and the manufacturer cannot source the component domestically.[116] In making a determination about sourcing capabilities, the cost of a component will not suffice as a reason it could not be sourced domestically.[117]

In practice, California's Origin Law is more stringent than the "all or virtually all" standard because it does not view the manufactured product in its totality but instead focuses on the origin of each component of the finished product.[118] Proponents of the law urge that the stricter standards ensure domestic origin labels carry real weight.[119] However, manufacturers and retailers with operations in California face the additional burden of complying with separate state and federal standards.[120] Manufacturers with nationwide distribution may choose not to include an origin label despite compliance with FTC standards,

113. *See* Smith, *supra* note 50, at 270
114. CAL. BUS. & PROF. Code § 17533.7.
115. *Id.*
116. *Id.*
117. *Id.*
118. *See Proposed Legislation to Create a Uniform Standard for "Made in America" Labeling*, CROWELL & MORING (June 2015), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Proposed-Legislation-to-Create-a-Uniform-Standard-for-Made-in-America-Labeling/pdf.
119. *Id.* at 2.
120. *Id.*

or they may opt to incur the costs of creating separate labels that conform to the different federal and state standards.[121] In either case, the inconsistent standards limit access to domestic origin labeling and further disincentivize domestic production.

In 2015, there was a push for a bipartisan bill designed to unify these standards by giving the federal government control over country-of-origin labels and preemption over conflicting state standards.[122] That bill was ultimately unsuccessful; however in 2020, Senator Mike Lee introduced a similar bill that would allow the federal guidelines to preempt California's Origin Law.[123] When that bill died in the House of Representatives later that year, Senator Lee (UT) and Senator King (ME) reintroduced an identical bill.[124] The purpose of this revived bill is to "provide clarity for consumers who want to support American workers and manufacturers" by eliminating confusing state laws and expanding access to straightforward origin labels.[125] The push toward unifying federal and state standards reflect a need for consistency to ensure that manufacturers and retailers can benefit from the marketing advantages of domestic origin labels.

C. Canadian Approach

In 2010, the Canadian Competition Bureau introduced guidelines describing its approach to assessing "Made in Canada" and "Product of Canada" claims under the false or misleading representations provisions of the Consumer Packaging and Labeling Act.[126] Like the FTC standard, these guidelines promote a case-by-case analysis but additionally provide a specific content

121. *See* Smith, *supra* note 50, at 281-82.

122. *Id.* at 272.

123. Reinforcing American-Made Products Act of 2020, S. 4065, 116th Cong. (2020).

124. Press Release, Sens. Lee, King Introduce Bill to Strengthen American Manufacturing (Feb. 10, 2021), https://www.lee.senate.gov/public/index.cfm/2021/2/sens-lee-king-introduce-bill-to-strengthen-american-manufacturing.

125. *Id.*

126. *"Product of Canada" and "Made in Canada" Claims*, COMPETITION BUREAU OF CAN. 1 (Dec. 22, 2019), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03169.html.

threshold to govern this approach.[127] "The Guidelines are used to assist in interpreting whether a representation, either implicit or explicit, that a product is a 'Product of Canada' or 'Made in Canada' may be false or misleading to prospective purchasers of the product."[128] The Bureau will not challenge a representation that states a good is a "Product of Canada" if "the last substantial transformation of the good occurred in Canada", and "all or virtually all (at least 98%) of the total direct costs of producing or manufacturing the good have been incurred in Canada."[129] Likewise, the Bureau will not challenge a representation that a good is "Made in Canada" if the product was last substantially transformed in Canada, at least 51% of the total direct costs of producing or manufacturing the good have been incurred in Canada, and the representation is accompanied by any appropriate qualifying statement. [130]

Canada's two-tier system provides "definitive origin standards that present advantages to both consumers and manufacturers" by allowing consumers to easily discern the specific domestic content found in products.[131] This two-tiered system would allow manufacturers and retailers who could not satisfy the "all or virtually all" to still retain the advantages of domestic origin labeling and offset the higher costs incurred by producing and sourcing products domestically. The issue with the Canadian system is that the second tier still requires manufacturers to make qualifications to any "Made in Canada" claim regarding the amount of foreign content or processing. From a marketing perspective, qualifiers may undermine the simplicity of the message that a domestic origin label conveys and may lead consumers to undervalue the claim.

D. European Countries and the Use of Geographical Indicators

Geographical Indicators (GIs) are a form of intellectual property denoting a product's geographical origin which are

127. *Id.* at 15.
128. *Id.*
129. *Id.* at 16.
130. *Id.* at 16-17.
131. *See* Smith, *supra* note 50, at 289.

predominately used in advertising and labeling in the European Union (EU).[132] GIs allow consumers to identify the source of a product and denotes a regionally distinct level of quality and reputation.[133] The marketing value of GIs is apparent in the wine industry where a simple indicator helps a consumer choose between a Chianti, Bordeaux, or Champagne.[134] "'It denotes a guarantee of quality and distinctiveness derived from a combination of unique regional, environmental, and human influences, such as climate, soil, subsoil, plants and special methods of production'—all in just one word."[135] Communicating the quality of products on the markets becomes particularly important if quality is not visible for the buyer as in the case of geographical origin of products. [136] "The indication of geographical origin of food products can be a collective intellectual property right . . . to protect producers [and industries] against dishonest competition and to guarantee the product's origin to consumers."[137]

Unlike the United States, which has been critical of the use of GIs, the EU has recognized the tremendous economic value in their ability to promote distinct regional identities and protect national industries.[138] One of the primary advantages of GIs is an industry's ability to protect itself against falsely labeled products and unfair competition without having to wait for government intervention. The FTCA does not confer standing on private litigants and some states do not allow it to serve as a basis for unfair competition claims under state law.[139] This deters

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132. *See* Eva Gutierrez, *Geographical Indicators: A Unique European Perspective on Intellectual Property*, 29 HASTINGS INT'L & COMP. L. REV. 29, 30 (2005).

133. *Id.* at 31.

134. *Id.*

135. *Id.* at 31-32.

136. *See* Margherita Corrado, *Italian Perspective on the Importance of Geographical Indications and Protected Designation of Origin Status for Parmigiano-Reggiano Cheese*, 16 CHI.-KENT J. INTELL. PROP. 353, 357 (2017).

137. Mechthild Donner et al., *Chapter 7 from Geographical Indications to Collective Place Branding in France and Morocco,* 58 IUS GENTIUM 173, 173-74 (2017).

138. *See* Gutierrez, *supra* note 132, at 31.

139. *See* Robie, *supra* note 65.

industry enforcement of falsely labeled products and requires the FTC, an agency with increasingly limited resources,[140] to police an unmanageable number of claims. Intellectual property laws have long been recognized as a means of protecting industries by ensuring that innovative businesses are insulated from unfair competition.[141] While it is unlikely the United States will adopt the use of GIs, it would be similarly beneficial to adopt a private right of action under the FTCA. This would allow businesses and industries to protect themselves more adequately from competitors who misuse domestic origin labels to gain an unfair marketing advantage.

V. PROPOSED SOLUTIONS

None of these alternatives provide a perfect solution for the issues surrounding the FTC's standard and enforcement policy. However, each provide insight into potential benefits that could rectify particular problems the FTC faces with its standards and enforcement policies. A comparison of the comments from the 1995 and 2019 FTC workshops highlights the need for a new content valuation system that accounts for more than just the cost of raw goods and manufacturing processes. For example, the design process, assembly, packaging, and transportation of products could all account for additional value that represents a modern consumers perception on what American products stand for. As the manufacturing sector shrinks in size, it would be useful for the FTC to reevaluate whether a "Made in America" label is still perceived as synonymous with "Manufactured in America."

The recent push for a unifying standard also underscores the disadvantages currently faced by large-scale manufacturers who want to incorporate "Made in America" labels on their products but choose not to because of additional marketing or packaging costs. By creating one uniform standard, the FTC could eliminate additional compliance costs for these companies and ensure that

140. *See generally* Fed. Trade Comm'n, *supra* note 67.

141. *See* Colonel Reggie Ash, *Protecting Intellectual Property and the Nation's Economic Security*, A.B.A. LANDSLIDE 5 (June 2014).

companies promoting American production can fairly access the marketing benefits of domestic origin labeling. In addition to creating a uniform standard, the FTC should adopt a tiered system similar to the Canadian model that gives manufacturers a specific content threshold to work with. This will allow manufacturers to convey a simple message which eliminates the risk that too many qualifiers will confuse or deter consumers. As previously mentioned, the assigned minimum content threshold must account for the changes in consumer perception.

Lastly, the FTC should consider the benefits of industry protection that the EU has encouraged through the use of GIs as a potential remedy for its enforcement problems. The overview of recent actions highlights how companies often ignore the initial compliance measures instituted by the FTC and take advantage of the agency's limited resources. Although the FTC has recently taken more aggressive measures against non-compliant companies, it can only pursue the most egregious offenders. A private right of action would encourage industries to police their competitors and would supplement the FTC's enforcement measures. Additionally, private litigation may be more likely to result in financial penalties that would serve as adequate deterrence to competitors who refuse to play fair.

VI. CONCLUSION

Domestic origin labels remain a powerful marketing tool for manufacturers and retailers who want to convey a variety of messages about ethical sourcing, product quality, and fair working conditions. In an increasingly globalized market, it is vitally important that companies that support domestic job growth at the expense of higher production costs have the ability to easily convey these messages to consumers. It is time for the FTC to take a closer look at its standards and enforcement to adjust these policies to fit the modern perception about what it really means for a product to be "Made in America."