Tiffany Ferris and Joseph Lawlor in Law360: ‘3 Tips For Compliance With FTC's New Made In USA Rule’

By Tiffany Ferris, Joseph Lawlor | July 8, 2021

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On July 1, the Federal Trade Commission voted to adopt a final Made in USA Rule, codifying long-standing guidance on product labels with unqualified claims that goods are produced in the country.

Specifically, the new rule prohibits entities from labeling products with such claims unless:

- The final assembly or processing of the product occurs in the U.S.
- All significant processing that goes into the product occurs in the U.S.
- All or virtually all ingredients or components of the product are made and sourced in the U.S.

In addition to codifying the FTC's existing policy, the new rule also provides the commission with the ability to seek additional redress from violators.

While it may seem at first glance that not much has changed, adoption of the rule in a 3-2 vote may signal an FTC eager to embrace enforcement authority. Although the rulemaking process has been underway for a year, the vote represents some of the first action from new FTC Chair Lina Khan, who was sworn in on June 15 of this year.

Khan voted in favor of the rule, with two other Commissioners in the 3-2 tally. Along with Commissioner Rebecca Kelly Slaughter, she joined a statement by Commissioner Rohit Chopra criticizing what he categorized as "a highly permissive Made in USA fraud policy, where violators faced essentially no consequences whatsoever" from the FTC's pattern of settling cases without monetary penalties or admissions or findings of liability.

According to Chopra and his joining colleagues, the FTC "must do more to use the authorities explicitly authorized by Congress to protect market participants from fraud and abuse," including that perpetuated by unsubstantiated claims.

While the rule does not apply to all advertising, it does apply to all labeling, including physical and digital labels and mail order materials. Importantly, the FTC's definition of mail order materials is quite expansive and includes, among other things, all electronic promotional materials that solicit a purchase without allowing the consumer to physically inspect the product — i.e., online sales and promotions.

In her dissenting statement, Commissioner Christine Wilson noted that the broad definition could encompass "stylized marks in online advertising or paper catalogs and potentially other advertising marks, such as hashtags."

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