

**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<sup>1</sup> 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).<sup>2</sup>

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.<sup>3</sup> The Rule that we issue today will cover not just labels, but all:

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<sup>1</sup> 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](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\\_isingring\\_water\\_systems\\_-\\_stipulated\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/172_3033_isingring_water_systems_-_stipulated_order.pdf); In the Matter of Sandpiper Gear of California, Inc. et al., No. 182-3095, <https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter>; *Underground Sports d/b/a Patriot Puck, et al.*, No. 182-3113 (April 2019), <https://www.ftc.gov/enforcement/cases-proceedings/182-3113/underground-sports-inc-doing-business-patriot-puck-et-al>; In the Matter of Nectar Sleep, LLC, No.182-3038 (Sept. 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3038/nectar-brand-llc>.

<sup>2</sup> Conf. Rep. on H.R. 3355 (filed in House (8/21/1994).

<sup>3</sup> Several commenters echoed the concerns I raised in my statement when the Commission sought comment on this proposed Rule and those raised by Commissioner Phillips. *See* Council for Responsible Nutrition Comment; Personal Care Products Council Comment; National Association of Manufacturers Comment; Anonymous Comment 592.

“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”<sup>4</sup> that include “a seal, mark, tag, or stamp labeling a product Made in the United States.”<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> 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 parts or processing are of United States origin in any labeling, advertising, or other promotional materials, or any other form of marketing, including marketing through digital or electronic means in the United States.<sup>9</sup>

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<sup>4</sup> See Part 323.1(b).

<sup>5</sup> See Part 323.3.

<sup>6</sup> Guidance on the definition of “label” can be found in analogous FTC rules and guides in a variety of contexts. There, “labels” repeatedly have been defined as a distinct subcategory of advertising (in other words, not coterminous with advertising)<sup>6</sup> and have been described as objects attached to a product or its packaging.<sup>6</sup> Given both the statutory guidance Congress provided when it drafted this statute, and precedent concerning the term “label” in FTC rules and guides, the Commission has ample landmarks to draft a Rule that falls within its jurisdictional boundaries.

<sup>7</sup> Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, Notice of Proposed Rulemaking related to Made in U.S.A claims (June 22, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577099/p074204musawilsonstatementrev.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577099/p074204musawilsonstatementrev.pdf)

<sup>8</sup> Report: Americans Going Online . . . Explosive Growth, Uncertain Destinations, PEW RESEARCH CENTER (Oct. 16, 1995) (noting that “most consumers are still feeling their way through cyberspace . . . [and] have yet to begin purchasing goods and services online”), available at: <https://www.people-press.org/1995/10/16/americans-going-online-explosive-growth-uncertain-destinations/>

<sup>9</sup> U.S. Innovation and Competition Act, S. 1260, Section 2510, 117th Cong. (June 8, 2021), <https://www.democrats.senate.gov/imo/media/doc/DAV21A48.pdf>

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.<sup>10</sup> 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 Rule exceeds the scope of authority granted by Congress to the FTC, I dissent. I do not support creatively and expansively interpreting the agency’s jurisdiction with respect to rulemaking authority.

The Commission, for more than 80 years, built a comprehensive program to ensure that consumers can trust “Made in the USA” claims.<sup>11</sup> My colleagues believe that the Commission’s 80 year MUSA enforcement program was a failure and only a rule and the imposition of penalties will deter false MUSA claims. I believe that administrative consents, which were an integral part of this program, can be an appropriate remedy to address deceptive MUSA claims, consistent with the views of bipartisan Commissions during the last 25 years. I support seeking monetary relief where appropriate but cannot support acting outside the constraints of our legislative authority.<sup>12</sup>

I fear as well that this Commission’s desire to promulgate or utilize our regulatory authority in ways that exceed the boundaries of underlying statutes and corresponding Congressional intent will continue. The Supreme Court’s recent decision in *AMG*<sup>13</sup> has eliminated the FTC’s ability to

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<sup>10</sup> See UIUC Accounting Group Comment; Shirley Boyd Comment; UIUC – BADM Comment; Senators Comment; United Steelworkers Comment; Women Involved in Farm Economics/ Pam Potthoff Beef Chairman Comment.

<sup>11</sup> The FTC has issued over 150 closing letters to companies making misleading U.S.-origin claims. Made in USA Workshop Report at 3 (June 2020). Companies only receive closing letters if they demonstrate to staff that they will come into compliance with the FTC’s Enforcement Policy Statement on “Made in the USA.” The staff’s workshop report explains that “companies often produce substantiation for updated claims to the FTC staff, and then present a plan that includes training staff, updating online marketing materials (*e.g.*, company websites and social media platforms), updating hardcopy marketing materials (*e.g.*, product packaging, advertisements, tradeshow materials), and working with dealers, distributors, and third-party retailers to ensure downstream claims are in compliance.” *Id.* at 3 n.7. The FTC has also settled over 25 enforcement actions, charging that companies refused to come into compliance or engaged in outright fraud. *Id.*

<sup>12</sup> I would note as well that seeking civil penalties for deceptive MUSA claims, as defined under the Commission’s Rule, could have adverse market effects. Excessive penalties, divorced from harm, can result in over deterrence. Importantly, the costs associated with that over deterrence are likely to increase with the expansiveness of the definition of labelling.

<sup>13</sup> *AMG v. FTC*, slip op No. 19-508 (Apr. 22, 2021), [https://www.supremecourt.gov/opinions/20pdf/19-508\\_l6gn.pdf](https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf)

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.<sup>14</sup> 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.<sup>15</sup>

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<sup>14</sup> See 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/>

<sup>15</sup> 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. Rep. Walden similarly stated: "it has been a few decades, but there was a time when the FTC, as we heard, was given broad rulemaking authority but stepped past the bounds of what Congress and the public supported. This required further congressional action and new restrictions on the Commission." Transcript at 62.