UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

April 12, 2018

Rick Helfenbein
American Apparel & Footwear Association

RE: *In the Matter of Bollman Hat Company and SaveAnAmericanJob, LLC, jointly doing business as American Made Matters,* Matter No. 172 3197

Dear Mr. Helfenbein:

Thank you for commenting on the Federal Trade Commission's proposed consent agreement in the above-referenced proceeding. The Commission has considered your comment and placed it on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii).

As you acknowledge, your comment does not raise concerns about or recommend changes to the proposed order in this matter. Instead, your comment requests that the Commission clarify how manufacturers can make "Made in USA" claims consistent with Section 5 of the FTC Act, 15 U.S.C. § 45(a). Specifically, you propose that the FTC state that marketers may make unqualified "Made in USA" claims if they can substantiate that products are substantially transformed and undergo a 51% value-add in the United States.

The Commission's *Enforcement Policy Statement on U.S. Origin Claims* (the "Policy Statement") is based on Section 5 of the FTC Act.[1] Section 5 prohibits unfair or deceptive acts or practices in or affecting commerce. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material; that is, likely to affect a consumer's decision to purchase or use the advertised product or service.[2] A claim need not mislead all – or even most – consumers to be deceptive under the FTC Act. Rather, the claim need only deceive some consumers acting reasonably.[3]

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[1] *Federal Trade Commission, Issuance of Enforcement Policy Statement on "Made in USA" and Other U.S. Origin Claims*, 62 Fed. Reg. 63756, 63766 (Dec. 2, 1997), *available at* http://www.ftc.gov/os/fedreg/1997/december/971202madeinusa.pdf.

[2] *In re Novartis Corp.*, 127 F.T.C. 580, 679 (1999), *aff'd and enforced*, 223 F.3d 783 (D.C. Cir. 2000); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *In re Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd and enforced*, 970 F.2d 311 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 1254 (1993).

[3] *See FTC Policy Statement on Deception,* 103 F.T.C. 174 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 177 n.20 (1984) ("A material practice that misleads a significant minority of reasonable consumers is deceptive.")); *see also FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) ("[T]he FTC need not prove that every consumer was injured.").

The Policy Statement provides guidance on how the Commission applies Section 5 to the use of "Made in USA" and other U.S.-origin claims in advertising and labeling. In particular, the Policy Statement provides that when a marketer makes an unqualified "Made in USA" claim, the marketer should – at the time of the representation – possess and rely upon a reasonable basis establishing that the product is in fact "all or virtually all" made in the United States. A representation may be either express (*e.g.*, "Made in USA" or "our products are American-made") or implied.

The Policy Statement further explains that, for a product to be considered "all or virtually all" made in the United States, the final assembly or processing of the item must take place in the U.S. Beyond this minimum threshold, the Commission may consider other factors, such as "the portion of the product's total manufacturing costs attributable to U.S. parts and processing; and how far removed from the finished product any foreign content is."[4] Because, as you note, the Policy Statement is tied to consumer perception, it does not specify a particular percentage of costs that must be attributable to U.S. parts or processing to substantiate an unqualified claim. Specifically, as the Commission has noted, even when only a small portion of total manufacturing costs is attributable to foreign processing or foreign parts, if that processing or those parts are significant to the overall product, "foreign content is more than negligible, and, as a result, unqualified claims are inappropriate."[5]

The Commission based the Policy Statement on thousands of comments it received in 1997, as well as a survey conducted in 1995. The 1995 survey found that roughly 30% of consumers would find an unqualified "Made in USA" claim for a product with 70% domestic origin misleading. For a product with 50% domestic origin, 46% of consumers disagreed with an unqualified claim. Recent nonpublic testing confirms these results.

Your comment does not include consumer perception evidence demonstrating that a substantial transformation plus 51% U.S.-value added standard would not be deceptive. Indeed, based on the record before us, it appears that many consumers would not consider a product substantially transformed plus 51% U.S.-value added to be "Made in USA." However, if additional testing were to show a change in perception, we would reevaluate.

Nonetheless, the FTC understands the importance of advertising domestic content and processes. Therefore, FTC staff is available to work with businesses to discuss claims that serve

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[4] *Id.* at § IV. Regarding remoteness of foreign content, a recent study produced to the FTC by members of the jewelry industry seeking to make unqualified U.S.-origin claims examined consumer perception of such claims for products containing imported raw materials. That study found that more than half of consumers may be deceived by U.S.-origin claims for products containing components or natural resources that originate outside the United States. *See* Letter to C. Gardner (Sept. 9, 2014), *available at*: https://www.ftc.gov/system/files/documents/closing_letters/made-usa/140909madeisusajvc.pdf.

[5] FTC, Complying with the Made in USA Standard (Dec. 1998), *available at* https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard.

the dual purposes of conveying non-deceptive information to consumers and highlighting work done in the U.S.

In your comment, you do not propose any revisions to the draft complaint or the consent agreement. Therefore, after considering your comment, the Commission has determined that the relief set forth in the consent agreement is appropriate and sufficient to remedy the violations alleged in the complaint. At this time, the Commission has determined that the public interest would best be served by issuing the Decision and Order in final form without modification. The final Decision and Order and other relevant materials are available on the Commission's website at http://www.ftc.gov. It helps the Commission's analysis to hear from a variety of sources in its work, and we thank you again for your comment.

By direction of the Commission.

Donald S. Clark
Secretary