



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER ROHIT CHOPRA

In the Matter of Chemence, Inc.
Commission File No. X160032
December 21, 2020

Summary

- Made in USA fraud harms both consumers and honest competitors. Yet for decades, FTC Commissioners pursued a no-money, no-fault settlement strategy to tackle this problem, ignoring Congressional authority to penalize bad actors.
- Over the last two years, the Commission has begun to turn the page on its checkered record, obtaining significant judgments for Made in USA fraud and initiating a rulemaking to trigger damages and penalties.
- Today's action against Chemence and a top executive is another step forward in protecting the Made in USA brand and restoring the Commission's law enforcement credibility.

For markets to function fairly, the Federal Trade Commission must be a credible watchdog, ensuring that companies have an incentive to follow the law and adhere to the agency's rules and orders. Corporate defendants that blatantly lie about their products have been able to convince Commissioners that their conduct caused no harm, allowing them to extract settlements with virtually no consequences whatsoever. Robert Pitofsky, who served as a Commissioner and later as the agency's Chairman, described these no-money, no-fault orders as "scandalously weak."¹

Longstanding FTC policies recognize that blatant deception harms consumers and diverts sales from honest competitors.² But, over the years, Commissioners quietly adopted a permissive approach toward corporate fraud, while bringing down the hammer on small, fly-by-night operations. Going hard on small businesses can give the appearance of active enforcement, even as more established companies face few consequences for their wrongdoing.

However, there are promising signs that this is changing. One of the best examples of our moving away from lax enforcement is our Made in USA fraud program. Today, the Commission is announcing another action against an established corporate actor, showing we are turning the page on our permissive policy of the past.

¹ See Irving Scher et al., *Part II – FTC Improvement Act*, 45 ANTITRUST L.J. 96, 117 (1976).

² For example, the Commission's Policy Statement on Deception notes that "[t]he prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers." FTC Policy Statement on Deception, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

FTC's Flawed Made in USA Enforcement Strategy

Consumers prefer goods that are produced domestically, and they are even willing to pay more for them.³ This gives bad actors an incentive to unlawfully parade their products with the “Made in USA” brand. Government enforcement can ensure that this strategy does not pay off.

However, for decades, there was bipartisan consensus at the Federal Trade Commission that Made in USA fraud should not be penalized. Even in egregious cases, most matters were resolved with no-money, no-fault settlements, and many violators received nothing more than closing letters. In 1994, Congress authorized the Commission to do more – granting the agency new authority to trigger penalties and damages for Made in USA fraud – but past Commissioners declined to even propose implementing this new authority, allowing it to languish for a quarter century.⁴

This lack of deterrence contributed to brazen Made in USA fraud, as seen in some of the Commission's recent cases. In 2018, for example, the FTC sued Patriot Puck, which branded its product as “The Only American Made Hockey Puck.” In fact, according to the Commission's lawsuit, these pucks were made in China.⁵ That same year, the FTC sued a seller of military bags and other gear, charging the firm with inserting fraudulent Made in USA labels into imported products, and marketing these products on military bases.⁶ These practices harmed both consumers and honest competitors.⁷

Even firms that the FTC warned were seemingly undeterred. In 2017, the FTC required iSpring Water Systems to stop mislabeling its products. Last year, iSpring violated this order.⁸ In 2018,

³ See, e.g., Kong, Xinyao and Rao, Anita (June 8, 2020). “Do Made in USA Claims Matter?,” University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2019-138, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468543.

⁴ See generally Statement of Commissioner Rohit Chopra Regarding Activating Civil Penalties for Made in USA Fraud (Apr. 17, 2019), <https://www.ftc.gov/public-statements/2019/04/statement-commissioner-rohit-chopra-regarding-activating-civil-penalties>. In fact, under pressure from interest groups in the 1990s, Commissioners tried to weaken the Made in USA standard in light of globalized supply chains. Request for Public Comment on Proposed Guides for the use of U.S. Origin Claims, 62 Fed. Reg. 25020 (May 7, 1997), <https://www.govinfo.gov/content/pkg/FR-1997-05-07/pdf/97-11814.pdf>. See also Bruce Ingersoll, *FTC May Ease Its Guidelines For the ‘Made in USA’ Label*, WALL STREET J. (May 6, 1997), <https://www.wsj.com/articles/SB862863598530948000>. This effort was widely opposed, and it failed. See Matthew Bales, Jr., *Implications and Effects of the FTC's Decision to Retain the “All or Virtually All” Standard*, 30 U. MIAMI INTER-AM. L. REV. 727 (1999).

⁵ Press Release, Fed. Trade Comm'n, *FTC Approves Final Consents Settling Charges that Hockey Puck Seller, Companies Selling Recreational and Outdoor Equipment Made False ‘Made in USA’ Claims* (Apr. 17, 2020), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-approves-final-consents-settling-charges-hockey-puck-seller>; Statement of Commissioner Rohit Chopra In the Matter of Nectar Sleep, Sandpiper/PiperGear USA, and Patriot Puck (Sep. 12, 2018), <https://www.ftc.gov/public-statements/2018/09/statement-commissioner-chopra> (hereinafter Dissenting Statement on No-Consequences Made in USA Settlements).

⁶ *Id.*

⁷ In fact, one competitor formally complained to the FTC that it lost out on a valuable Army and Air Force exchange listing based on Sandpiper's deception. See Advantus, Corp. (Comment #5) at 3–4, https://www.ftc.gov/system/files/documents/public_comments/2018/10/00005-155955.pdf.

⁸ Press Release, Fed. Trade Comm'n, *Marketer of Water Filtration Systems to Pay \$110,000 Civil Penalty for Deceptive Made-in-USA Advertisements in Violation of 2017 Order* (Apr. 12, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/marketer-water-filtration-systems-pay-110000-civil-penalty>.

the FTC warned Williams-Sonoma to stop falsely marketing products as Made in USA;⁹ earlier this year, they were charged with doing it anyway.¹⁰ The fact that these repeat offenders were caught is a testament to our staff's vigilance, but offenders' willingness to break the law twice demonstrates the flaws of the strategy pursued by past Commissions.

Recently, we have seen how that strategy is changing. iSpring was ordered to pay a civil penalty, and the company admitted that it broke the law. Williams-Sonoma was required to pay \$1 million to resolve the Commission's allegations – a small sum, perhaps, for Williams-Sonoma, but a record for the FTC's Made in USA enforcement program. And in July, the Commission *finally* proposed codifying the Made in USA standard into a rule.¹¹ This rule would help to end the agency's reliance on no-money settlements, allowing the Commission to seek civil penalties, damages, and other sanctions for Made in USA violations.¹²

Turning the Page

Today's action against Chemence and its top executive marks another turning point for the FTC's enforcement strategy. Chemence is an established player in the adhesives and sealants business. The order announced today imposes real consequences – a major difference from the Commission's past Made in USA settlements.

First, the proposed order requires Chemence to forfeit \$1.2 million in revenue stemming from the company's failures. This is another record judgment for the FTC's Made in USA enforcement program, and it represents a sea change from the era of no-money settlements. It is encouraging to see the FTC reducing its reliance on no-money orders, both here and in other program areas.

Second, this order reminds businesses that FTC orders are not suggestions.¹³ The FTC's complaint highlights false compliance reports filed by Chemence, and charges the company's president personally for his involvement in the alleged violations.¹⁴ This stands in stark contrast to other actions against repeat offenders, where the FTC granted broad releases to executives who oversaw egregious violations. The approach in this matter is far more effective.¹⁵

⁹ Closing letter to Danielle M. Hohos, Esq., Deputy General Counsel for Williams-Sonoma, Inc. (June 13, 2018), https://www.ftc.gov/system/files/documents/closing_letters/nid/musa_williams-sonoma_closing_letter.pdf.

¹⁰ 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>.

¹¹ Press Release, Fed. Trade Comm'n, FTC Issues Staff Report on Made in USA Workshop, Seeks Comment on Related Proposed Rulemaking for Labeling Rule (June 22, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-issues-staff-report-on-made-in-usa-workshop>.

¹² Of course, not every Made in USA violation requires a lawsuit, or justifies a large judgment. But seeking and accepting no money and no meaningful consequences undermines our credibility.

¹³ Memorandum from Commissioner Chopra to FTC Staff Regarding Repeat Offenders (May 14, 2018), <https://www.ftc.gov/public-statements/2018/05/commissioners-memorandum-2018-01-repeat-offenders>.

¹⁴ Compl. ¶¶ 13-16, *In the Matter of Chemence, Inc. et al.*, Docket No. X160032.

¹⁵ In addition, by filing this case administratively, the Commission has triggered civil penalties for future violations, even if in the absence of a final Made in USA fraud rule.

Third, the proposed order requires Chemence to notify consumers of this action. Notice confers benefits in cases like this. It helps to erase any competitive advantage a firm realized through deception, and it accords consumers the dignity of knowing what happened. I have long argued we should seek notice in Made in USA and other matters,¹⁶ and I am pleased to see this provision incorporated into this enforcement action.

Our new approach is a critical step forward for protecting the Made in USA brand, and it is a model for other FTC enforcement areas. There is more work to do, including finalizing a Made in USA fraud rule, but we are clearly moving in the right direction.

While it is tempting for any government agency to think that the status quo is working well, we do our best work when we engage in self-critical analysis and strive for continuous improvement. I congratulate all of the agency's staff who fought for this outcome, as well as the many stakeholders who have worked with us to turn the page on the policy inherited from our predecessor Commissioners.¹⁷ These efforts to reboot the Made in USA enforcement program represent real progress.

¹⁶ Dissenting Statement on No-Consequences Made in USA Settlements, *supra* note 4, https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf.

¹⁷ See, e.g., Press Release, Truth in Advertising, Inc. (TINA.org), Ad Watchdog TINA.org Petitions FTC for Made in USA Rule (Aug. 22, 2019), <https://www.truthinadvertising.org/made-in-usa-press-release/>; Consumer Reports (Comment #6), <https://www.ftc.gov/policy/public-comments/2018/10/12/comment-00006-0>; Alliance for American Manufacturing (Comment #5), <https://www.ftc.gov/policy/public-comments/2018/10/12/comment-00005-0>.