

MADE 
in the 
USA 
An FTC Workshop

**Staff Report of the
Bureau of Consumer Protection**

Federal Trade Commission
June 19, 2020





Staff Report of the Bureau of Consumer Protection

Table of Contents

Table of Contents 1

I. Summary..... 2

II. Background 2

III. MUSA Policy and Enforcement: Workshop and Public Comments..... 5

 A. Description of Workshop and Call for Comments 5

 B. Analysis of Workshop and Public Comments 6

 1. Consumer Perception of U.S.-Origin Claims 6

 a. There is No Evidence to Support Changing the Policy Statement 7

 b. Potential Further Research 9

 2. Views on the FTC’s Current Enforcement Priorities 10

 a. Potential Impact on U.S. Job Creation or Innovation, and Chilling of Legitimate Claims 10

 b. Balancing Compliance with the FTC Act and Other Labeling Laws 12

 c. Strategies to Overcome Concerns..... 13

 3. Potential Changes to the FTC’s Policy and Enforcement Approaches 14

 a. Seeking Additional Relief in Section 5 Cases 15

 b. Rulemaking..... 17

 4. Unscrupulous Marketers Overseas 18

IV. Conclusion 19

I. Summary

Under the Federal Trade Commission’s (“FTC” or “Commission”) 1997 Enforcement Policy Statement on U.S.-Origin Claims, marketers making unqualified “Made in USA” or other unqualified U.S.-origin claims (collectively, “MUSA claims”) should possess and rely upon a reasonable basis that the product is “all or virtually all” made in the United States.¹ As part of its periodic reconsideration of this Policy Statement as well as its ongoing enforcement program, the FTC staff held a public workshop and collected public comments covering three general topics: (1) consumer perception of MUSA claims; (2) concerns about the FTC’s current enforcement approach; and (3) potential changes to the FTC’s enforcement strategy. At the workshop and in written submissions, commenters raised important issues for the FTC to weigh.

II. Background

The FTC enforces Section 5 of the FTC Act, 15 U.S.C. § 45(a), which 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. A claim need not mislead all—or even most—consumers to be deceptive under the FTC Act. Rather, the claim need only be likely to deceive some consumers acting reasonably.²

Currently, Section 5 of the FTC Act is the primary agency law that applies to most MUSA claims.³ In order to provide marketers with guideposts for navigating MUSA claims under this broad standard, in 1997 the Commission published an Enforcement Policy Statement on U.S.-Origin Claims (the “Policy Statement”). Based on Commission precedent, consumer research, and thousands of public comments, the Policy Statement advises marketers to make an unqualified MUSA claim only when they have a reasonable basis for asserting that “all or virtually all” of the product is made in the United States.⁴ The Commission may analyze several different factors to determine whether a product is “all or virtually all” made in the United States, including the proportion of the product’s total manufacturing costs attributable to U.S. parts and processing, how far removed any foreign content is from the finished product, and the

¹ See <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims>.

² 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.”).

³ The FTC also administers the Textile Fiber Products Identification Act, 15 U.S.C. §§ 70-70k, Wool Products Labeling Act, 15 U.S.C. §§ 68-68j, and Fur Products Labeling Act, 15 U.S.C. §§ 69-69j, which impose different country-of-origin labeling requirements on covered products.

⁴ FTC, *Issuance of Enforcement Policy Statement on “Made in USA” and Other U.S. Origin Claims*, 62 FR 63756, 63766 (Dec. 2, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/made-usa-and-other-u.s.origin-claims/971202madeinusa.pdf.

importance of the foreign content or processing to the overall function of the product.⁵

The Policy Statement also provides guidance on how to make appropriately qualified claims for products that, though substantially transformed in the United States, contain more than *de minimis* imported inputs. Such claims may include “Assembled in the United States” or “Made in the United States with Imported Parts.”⁶

Currently, the Commission’s MUSA enforcement program consists of compliance monitoring, counseling, and targeted enforcement. The staff reviews all MUSA complaints the FTC receives, amounting to several hundred each year. Where the staff identifies potentially—but unintentionally—misleading MUSA claims, it typically works with companies to bring them into compliance and then sends closing letters, without the need for litigation.⁷ To date, the staff has closed more than 150 matters using this process. Staff continues to monitor every company that has received a closing letter and to date compliance has been very good (the Commission has received reports of backsliding among approximately 2% of closing letter recipients). In contrast, in cases where the evidence indicates a marketer has engaged in intentional deception, refuses to comply with its obligations under the FTC Act, or reverts to making deceptive claims after receiving a staff closing letter, the Commission has taken formal enforcement action.⁸

⁵ *Id.* For additional information, see <http://business.ftc.gov/advertising-and-marketing/made-usa>.

⁶ 62 FR at 63769 (“Where a product is not all or virtually all made in the United States, any claim of U.S. origin should be adequately qualified to avoid consumer deception about the presence or amount of foreign content. In order to be effective, any qualifications or disclosures should be sufficiently clear, prominent, and understandable to prevent deception.”). To avoid conflicts with U.S. Customs and Border Protection (“CBP”), the Policy Statement provides that, unless a marketer can substantiate that a product was last substantially transformed in the United States, a marketer should not use any U.S.-origin claim. “Substantial transformation” is a legal principle CBP uses to determine country-of-origin for import marking purposes. In most instances, CBP requires imported products to be labeled with the last country of substantial transformation, which is where the product last underwent a fundamental change in form, appearance, nature, or character.

⁷ Corrective action plans typically include the steps a company proposes to come into complete compliance with the Policy Statement. For example, 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.

⁸ *See, e.g., Williams-Sonoma, Inc.*, No. 202 3025 (accepted for public comment Mar. 30, 2020); *Underground Sports Inc., et al.*, No. C-4674 (Apr. 17, 2019); *Sandpiper of California, Inc., et al.*, No. C-4675 (Apr. 17, 2019); *Nectar Brand LLC*, No. C-4656 (Aug. 28, 2018); *Bollman Hat Company*, No. C-4643 (Apr. 12, 2018); *Block Division, Inc.*, No. C-4613 (Apr. 12, 2017); *iSpring Water Systems, LLC*, No. C-4611 (Apr. 6, 2017); *FTC v. Chemence, Inc.*, No. 1:16-cv-228-PAG (N.D. Ohio Oct. 13, 2016); *E.K. Ekcessories*, No. C-4419 (Dec. 4, 2013).

Because the Commission’s primary goal in these cases is to stop deceptive advertising, and because administrative orders provide for civil penalties in the event of violations, the vast majority of the Commission’s previous enforcement actions consist of administrative orders containing injunctive relief buttressed by the threat of significant civil penalties for violators. These orders have been largely successful in keeping companies under order from making deceptive MUSA claims. Of the 24 MUSA administrative orders entered in the past 20 years, the FTC has only had cause to initiate two civil penalty order enforcement proceedings.⁹ However, recent settlements have generated questions about whether it is time to consider new remedies or a different approach to enforcement in this area.¹⁰

To date, the FTC has looked to the Policy Statement to guide its enforcement program. However, 15 U.S.C. § 45a authorizes the issuance of rules to prevent unfair or deceptive acts or practices relating to “product[s] with a ‘Made in the U.S.A.’ or ‘Made in America’ label, or the

⁹ See <https://www.ftc.gov/news-events/press-releases/2019/04/marketer-water-filtration-systems-pay-110000-civil-penalty> (announcing settlement with iSpring that imposed a \$110,000 civil penalty for violating prior order regarding U.S.-origin claims); <https://www.ftc.gov/news-events/press-releases/2006/06/ftc-alleges-stanley-made-false-made-usa-claims-about-its-tools> (announcing settlement with Stanley Works that imposed a \$205,000 civil penalty for violating prior order regarding U.S.-origin claims).

¹⁰ See Concurring Statement of Chairman Simons in *In re Sandpiper/PiperGear and Patriot Puck*, Apr. 17, 2019, <https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter>. The settlements in these matters generated significant public comment about the FTC’s enforcement approach. See, e.g., Comment of Consumers Union in *In re Sandpiper of California/Piper Gear and Patriot Puck* (Oct. 12, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter>; Comment of Concerned Citizens in *In re Sandpiper of California/Piper Gear and Patriot Puck* (Oct. 11, 2018), <https://www.ftc.gov/policy/public-comments/2018/10/11/comment-00004>; see also Dissenting Statements of Commissioners Chopra and Slaughter in *In re Sandpiper/PiperGear and Patriot Puck*, Apr. 17, 2019, <https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter>. Members of Congress and the President also have encouraged new approaches to Made in USA. See, e.g., Comment of Senators Sherrod Brown, Tammy Baldwin, and Christopher S. Murphy in *In re Sandpiper of California/Piper Gear and Patriot Puck* (Oct. 12, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/10/00008-156012.pdf (urging the Commission to use “its full authority under Section 5 of the Federal Trade Commission Act” to incorporate additional remedies into the settlements, including monetary damages and admissions of liability); The Reinforcing American-Made Products Act of 2017, <https://www.lee.senate.gov/public/index.cfm/2018/7/made-in-usa> (proposed legislation from the 115th Congress that would have preempted state law to the extent that it is inconsistent with the FTC’s analysis of Made in USA claims); The Promoting Responsibility In Markets and E-Retailers Act of 2019, <https://www.rickscott.senate.gov/sen-rick-scott-introduces-prime-act-promote-transparency-online-retailers> (proposed legislation requiring online retailers to list the country of origin for each product they sell); Presidential Executive Order on Buy American and Hire American, <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/>.

equivalent thereof.”¹¹ Contemporaneously with this report, the Commission is announcing a notice of proposed rulemaking on “Made in USA” and other unqualified MUSA claims on labels pursuant to this provision.

III. MUSA Policy and Enforcement: Workshop and Public Comments

To seek input on the current Policy Statement and enforcement program, the FTC held a public workshop on September 26, 2019, and opened a parallel public comment period. Although no stakeholder presented consumer perception evidence that would support updating the Policy Statement, commenters outlined several policy concerns for the Commission to consider when exercising its enforcement discretion, such as impact on American jobs. While stakeholders agreed the FTC should maintain its practice of informal staff counseling and issuing closing letters to companies that unintentionally violate the law, most also argued that the FTC should consider expending additional resources to impose stricter penalties on egregious violators.

A. Description of Workshop and Call for Comments

The FTC’s half-day workshop consisted of a roundtable of eight participants representing interested stakeholders.¹² FTC staff¹³ moderated the sessions, which addressed three topics: consumer perception, compliance and policy challenges, and the FTC’s enforcement approach.

In conjunction with the workshop, the FTC called for public comments on whether and how the FTC should change its MUSA program. In particular, the FTC sought updated testing on how consumers understand MUSA claims, and asked a series of questions to determine, for example, whether consumer perception varies for any particular products or market segments.¹⁴ In response, the FTC received 24 comments, including submissions from manufacturing groups,¹⁵ several U.S. senators,¹⁶ trade groups,¹⁷ a consumer group,¹⁸ businesses,¹⁹ consumers

¹¹ 15 U.S.C. § 45a. This provision allows the Commission to “from time to time issue rules pursuant to section 553 of title 5 [the Administrative Procedure Act]” It further states that violations of such rules “shall be treated by the Commission as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices.” *Id.*

¹² Justin Brookman, Consumer Reports; Mark Hanna, Richline Group, Inc. (“Richline”); Kristen Kern, American Apparel & Footwear Association (“AAFA”); Clint Morris and Tim Schade, Lifetime Products; Annemarie O’Shea, Walmart Inc. (“Walmart”); Bonnie Patten, TruthInAdvertising.org (“TINA.org”); Scott Paul, Alliance for American Manufacturing (“AAM”); Pete Wicks, The Homer Laughlin China Company (“Homer Laughlin”).

¹³ Julia Solomon Ensor, Laura Koss, and Hampton Newsome of the FTC’s Bureau of Consumer Protection, Enforcement Division.

¹⁴ See full list of questions for public comment: <https://www.ftc.gov/news-events/events-calendar/made-usa-ftc-workshop>.

¹⁵ Alliance for American Manufacturing, FTC-2019-0063-0017; National Association of Manufacturers, FTC-2019-063-0021.

(including an industry group petition signed by over 6,000 consumers),²⁰ and University of Chicago researchers.²¹

B. Analysis of Workshop and Public Comments

The workshop participants and public commenters addressed three general topics: (1) current consumer perception of MUSA claims; (2) factors the FTC should consider when exercising its enforcement discretion; and (3) possible changes the FTC should make to its enforcement program. The Commission also requested—but did not receive—comments on how to deal with the problem of unscrupulous overseas marketers that make deceptive claims to U.S. consumers on third-party platforms.

1. Consumer Perception of U.S.-Origin Claims

The “all or virtually all” guidance for substantiating unqualified MUSA claims stems from a consistent line of cases dating back to the 1940s,²² and was incorporated into the Policy Statement in the 1990s following consumer perception testing and a review process with extensive public input.²³ Because the FTC has not conducted comprehensive testing since the 1990s, we requested updated consumer perception evidence to assess whether the Policy Statement generally, and the “all or virtually all” guidance particularly, continue to track consumer understanding of unqualified MUSA claims. Although some workshop panelists and public commenters presented research or anecdotal evidence about how and why consumers *value* MUSA claims, only one panelist, as discussed below, provided survey evidence on how consumers *understand* MUSA claims. This limited survey evidence supported the conclusion in the Policy Statement that at least a significant minority of consumers are likely to be deceived by an unqualified MUSA claim for a product incorporating more than a *de minimis* amount of

¹⁶ Sens. Sherrod Brown, Tammy Baldwin, Christopher Murphy, and Richard Blumenthal, FTC-2019-0063-0025.

¹⁷ Consumer Technology Association, FTC-2019-0063-0018; International Precious Metals Institute, FTC-2019-0063-0019; American Apparel and Footwear Association, FTC-2019-0063-0022.

¹⁸ Truth In Advertising, Inc. (TINA.org), FTC-2019-0063-0003, FTC-2019-0063-0020.

¹⁹ Adriana Silva, FTC-2019-0063-0002; Gary Girdvainis, FTC-2019-0063-0005, FTC-2019-0063-0007, FTC-2019-0063-0013; Santosh Nalk, FTC-2019-0063-0009; Atelier Precision Manufacture, FTC-2019-0063-0008; Homer Laughlin China Company, FTC-2019-0063-0012; Acuity Brands, 2019-0063-0015.

²⁰ Jan Darvas, FTC-2019-0063-0006; Sandra E., FTC-2019-0063-0010; Bob Moses, FTC-2019-0063-0011. Petition Submitted by Alliance for American Manufacturing, FTC-2019-0063-0024.

²¹ Xinyao Kong, FTC-2019-0063-0014, FTC-2019-0063-0023.

²² See, e.g., *In re Vulcan Lamp Works, Inc.*, 32 F.T.C. 7 (1940).

²³ FTC, Request for public comment on proposed Guides for Use of U.S. Origin Claims, 62 FR 25020 (May 7, 1997).

foreign content. Accordingly, neither workshop participants nor commenters offered any evidence to support changing the “all or virtually all” guidance.

a. There is No Evidence to Support Changing the Policy Statement

As noted above, only one workshop panelist, Mark Hanna of Richline, provided survey evidence on how consumers understand U.S.-origin claims. The results of this test were generally consistent with the guidance in the Policy Statement. Specifically, the Richline survey, conducted in 2013, found almost 3 in 5 Americans (57%) agree that “Made in America” means that all parts of a product, including any natural resources it contains, originated in the United States.²⁴ Additionally, the survey found that 33 percent of consumers think 100 percent of a product must originate in a country for that product to be called “Made” in that country.²⁵ These findings are consistent with the FTC’s 1995 survey, which found roughly 30 percent of consumers would be deceived by an unqualified MUSA claim for a product where 70 percent of the cost was incurred in the United States.²⁶ As Hanna explained during the workshop, “overall, the consumer was skeptical. You know, at least 25% of the consumers were skeptical that if there’s something introduced to that finished product other than something that originated in the US now, they didn’t think it should be made in the USA.”²⁷

Other panelists and commenters referenced studies examining consumer preferences for MUSA products,²⁸ including surveyed reasons for these preferences, such as quality of goods, promotion of U.S. jobs, social responsibility, and, to a lesser extent, general patriotism.²⁹

²⁴ Commission staff considered this study previously as part of a request for a staff advisory opinion on unqualified MUSA claims for recycled gold jewelry products. *See* Response to Request for FTC Staff Advisory Opinion (Sept. 9, 2014), https://www.ftc.gov/system/files/documents/closing_letters/made-usa/140909madeisusajvc.pdf (declining to provide an opinion stating that MUSA claims for recycled jewelry do not deceive consumers based on perception evidence provided by Richline Group).

²⁵ *See also* Hanna, Transcript of Made in USA: An FTC Workshop (Sept. 26, 2019) (hereinafter, “MUSA Tr.”) at 14 (study showed that “25% or 30% of [American consumers] really did feel that everything, including the natural resource, including the gold, had to be part of the final product in order to say it was made in the USA”).

²⁶ 62 F.R. 25020, 25036.

²⁷ Hanna, MUSA Tr. at 15.

²⁸ Brookman, MUSA Tr. at 12 (describing Consumer Reports testing finding that 80% of consumers prefer to buy American products and 2/3 are more likely to shop in stores offering MUSA products); Paul, MUSA Tr. at 13 (describing 2018 AAM testing finding that 92% of survey respondents had a very favorable or somewhat favorable view of manufactured goods made in America compared with 27% who had a favorable outlook on manufactured goods made in China); *see also* Alliance for American Manufacturing, FTC-2019-0063-0017 (polling of 1,200 likely 2018 general election voters found that 92% had a “favorable view” of goods made in the United States).

²⁹ Brookman, MUSA Tr. at 12 (describing Consumer Reports testing finding that “84% [of

Different stakeholders provided anecdotal discussion of the reasons consumers prefer MUSA products, which generally supported the survey evidence.³⁰ Additionally, three stakeholders described testing showing that consumers might be willing to pay a price premium for MUSA products.³¹ Two of these studies involved consumer surveys, which may not reflect consumers' actual purchasing behavior.³² However, a University of Chicago study observed actual purchasing behavior by running over 900 eBay auctions, and found that consumers were willing to pay as much as 28 percent more for U.S.-made products.³³

Although they contain interesting findings about consumer attitudes and preferences, these studies and discussions do not form a basis to update the Policy Statement. Specifically, they do not provide any evidence to challenge the past findings that at least a significant minority of consumers expect a MUSA-advertised product to be “all or virtually all” made in the United

consumers] say [MUSA is] important because they think products are going to be more reliable. 80% say it's important because they think there are better working conditions in the United States. 88%—again, these numbers are all pretty high—say it's 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.”); Paul, MUSA Tr. at 13 (describing AAM testing findings on MUSA claims that “80% think that it supports American jobs. 66% thinks that Made in America supports a strong US economy. 63% thinks it is important to our national security. 59% said we can trust the quality of products more in America than those elsewhere. 45% support the Made in America label because they think that it represents better wages and benefits than many other kinds of other jobs in the United States as well.”).

³⁰ Hanna, MUSA Tr. at 16 (MUSA claims convey social responsibility and regulated working conditions to consumers); Morris, MUSA Tr. at 17 (Lifetime Products' experience is that consumers equate MUSA with higher quality, supporting U.S. jobs, and, to a lesser extent, patriotism; consumers are willing to “pay a little more, but not much more” for MUSA products); O'Shea, MUSA Tr. at 19 (stating that when Walmart “hear[s] anecdotally from customers about [the] idea of Made in the US, it really means the value is supporting American jobs, desire to support the economy, helping the economy, the desire to improve the local economy for families. And those are the reasons why Walmart got engaged in this initiative, is to be able to help those communities where we all live. And Walmart certainly has a presence. So the perception is really this is a way to grow communities and to support American jobs.”).

³¹ See Brookman, MUSA Tr. at 12 (60% of consumers say they would pay 10% more for MUSA products; 25% say they would pay 20% more); Paul, MUSA Tr. at 15 (stating that a 2012 Boston Consulting Group survey found that over 80% of Americans were willing to pay more for American made or assembled products); *see also* Xinyao Kong, FTC-2019-0063-0014, FTC-2019-0063-0023 (finding that consumers will pay a premium for U.S. origin products).

³² See O'Shea, MUSA Tr. at 20 (“customers have this expectation that they would pay more for products that are made in the US. But . . . in fact that the other things like the efficiency, the quickness, the making the shopping easier, and the value of a good deal, that those are things which may override the desire to buy something that's made in the US or labeled as such.”).

³³ See Xinyao Kong, FTC-2019-0063-0014, FTC-2019-0063-0023.

States. Accordingly, without evidence that consumer perception has changed, the staff finds that the Policy Statement continues to represent the most current advice to marketers on how to comply with Section 5 of the FTC Act.

Furthermore, some stakeholders warned that modifying the “all or virtually all” guidance could produce unintended consequences for both consumers and manufacturers. For example, the Alliance for American Manufacturing (“AAM”) pointed out that consumers have come to rely on the current standard, and that most do not wish “to grade companies on the curve[.]”³⁴ As to manufacturers, AAM explained, there are entrepreneurs who have “staked a claim on all or virtually all,” rigorously ensuring that their products are 100 percent made in America. Weakening the standard, AAM argued, would undermine the settled expectations of both consumers and manufacturers.³⁵

b. Potential Further Research

Although the current record does not support updating the Policy Statement, several issues may be worthy of additional study.³⁶ In particular, we welcome research on whether consumer perception varies depending on: 1) the nature of the product advertised;³⁷ 2) the manufacturing processes and proportion of imported content used by competitors; 3) the platform on which a product is advertised; 4) the unavailability of particular materials or components within the United States; and 5) the specific country of origin of the imported content.³⁸

³⁴ Paul, MUSA Tr. at 34.

³⁵ Id. at 40. *See also* Sandra E., FTC-2019-0063-0010 (arguing that watering down the “all or virtually” standard could promote outsourcing).

³⁶ *See also* Consumer Technology Association, FTC-2019-0063-0018 (stating that the Commission should undertake additional consumer perception testing before making changes to its enforcement approach); National Association of Manufacturers, FTC-2019-063-0021 (stating that “all or virtually all” is not in line with the economic realities of manufacturing and that consumer perception has likely changed).

³⁷ Some workshop participants argued that standards for unqualified claims should not differ depending on product type. *See* Brookman and Paul, MUSA Tr. at 21-25. However, the Commission reminds stakeholders that the Policy Statement reflects consumer perception. Therefore, if evidence showed that consumers perceived claims differently for different categories of products, the Commission would have to enforce in accordance with consumer perception, even if that resulted in different substantiation standards for different products. *See* MUSA Tr. at 27.

³⁸ AAFA additionally identified a potential concern relating to foreign country-of-origin claims, which may not alert consumers to U.S. value contributing to the product’s completion. For example, AAFA explained that global value chain studies have found that 70% of the retail value of imported apparel may be attributable to U.S.-based activity, such as design, advertising, etc. *See* Kern, MUSA Tr. at 23.

2. *Views on the FTC's Current Enforcement Priorities*

Although available consumer perception evidence is consistent with the current “all or virtually all” guidance for making unqualified MUSA claims, several stakeholders urged the FTC to consider other policy factors when exercising its enforcement discretion. First, there was broad consensus that the Commission should continue to focus its enforcement efforts on egregious offenders, while aggressively working to prevent misrepresentations through guidance and informal feedback to companies seeking to comply. Specifically, this distinction was important because some commenters suggested that aggressive enforcement efforts against legitimate U.S.-based manufacturers that must source unavailable materials overseas or use materials of unverifiable origin could reduce U.S. job creation or innovation, cause competitive harm, and chill legitimate claims. Second, some commenters suggested that the FTC consider leniency for companies that unintentionally violate the FTC Act when appropriately labeling products for export, government procurement, or sale in California. Finally, stakeholders discussed several ways the FTC could balance these concerns, including allowing certain marketers to make unqualified claims based on standards other than “all or virtually all,” increasing consumer education efforts, or pushing manufacturers to make qualified claims.

a. Potential Impact on U.S. Job Creation or Innovation, and Chilling of Legitimate Claims

When the Commission last reviewed its MUSA policy in the 1990s, and again during this proceeding, the FTC received comment from manufacturers arguing that rigorously enforcing an “all or virtually all” standard could have unintended consequences. Specifically, though no commenter provided evidence demonstrating that the “all or virtually all” guidance is inconsistent with consumer perception, and only two argued that consumer perception has changed since 1997,³⁹ some stakeholders argued that aggressively enforcing the “all or virtually all” guidance against legitimate businesses that produce goods in the United States could reduce the incentive for those businesses to maintain operations in the United States.⁴⁰ Specifically, the guidance effectively bans unqualified MUSA claims for products that require parts or materials that are only available overseas, or for industries such as the precious metals industry, where the source of raw materials can be impossible to verify. The commenters warned that FTC enforcement action against these industries might discourage manufacturers from touting

³⁹ See Consumer Technology Association, FTC-2019-0063-0018; National Association of Manufacturers, FTC-2019-063-0021. Neither commenter provided specific information on how perception has changed or supporting evidence.

⁴⁰ Gary Girdvainis, FTC-2019-0063-0005, FTC-2019-0063-0007, FTC-2019-0063-0013; Santosh Nalk, FTC-2019-0063-0009; Atelier Precision Manufacture, FTC-2019-0063-0008; International Precious Metals Institute, FTC-2019-0063-0019. This is similar to the argument made by manufacturers opposing the “all or virtually all” standard in 1997. See 62 FR 25020, 25025 (stating that the strictness of the “all or virtually all” standard deprives manufacturers of a selling tool that could help preserve American jobs, and “[m]anufacturers who assemble products here of foreign and domestic components . . . cannot sufficiently distinguish themselves from manufacturers with lower (or zero) domestic content unless they are permitted to use ‘Made in USA’ claims.”).

domestic investments, and thus deter them from investing in U.S. facilities or re-shoring jobs.⁴¹ Although the FTC’s mandate is to prevent consumer deception, the commenters argued that FTC action against companies in this category might damage efforts to promote what they perceive as a larger policy goal behind the program, promoting domestic manufacturing.

Additionally, stakeholders explained that in some instances, exercise of the FTC’s enforcement discretion to enforce the “all or virtually all” guidance against companies that utilize U.S. labor and parts to the extent possible might chill legitimate claims by companies that incorporate truly *de minimis* amounts of imported content. As a panelist from Walmart explained, “the electric fence of getting it wrong stops [companies] from actually making the claim.”⁴² A representative from Lifetime Products agreed, explaining that for a vast majority of products, his company declines to make unqualified claims “not because we don’t think our stuff’s made in the US, because frankly we do. But the all or virtually all standard[] is there. There are state standards that are there. And based on the risk of running afoul of some of those things, we decide to play safe in some cases.”⁴³ Speaking on behalf of the apparel and footwear industry, AAFA echoed these statements, explaining that “knowing that all it takes is a 10% misunderstanding on the part of consumers to create an issue around that claim can cause a chilling effect for our members in choosing what type of labeling to put on the product, even though from their perspective the country of origin of their products is the USA.”⁴⁴

There is also potential for competitive harm to law-abiding companies that choose not to risk making claims that are probably nondeceptive under the MUSA policy but not clearly so. As Lifetime Products explained, the company’s choice to make qualified claims and thus avoid litigation risk has “put ourselves in the same boat as other people who aren’t doing the same things that we are . . . who are importing 30%, 40%, 50% of their things and saying it’s made in the US [and] has imported parts. We play on the same field as those people play on, despite the

⁴¹ In particular, Hanna and commenter International Precious Metals Institute highlighted the fact that under the current policy, certain jewelry manufacturers are essentially barred from making unqualified MUSA claims because precious metals are endlessly recycled, making the original origin impossible to determine. *See, e.g.*, Hanna, MUSA Tr. at 40 (arguing that emphasizing the origin of raw materials puts the jewelry industry at a competitive disadvantage and that the “all or virtually all” guidance has been a “penalty” on the industry); International Precious Metals Institute, FTC-2019-0063-0019. Similarly, commenters from the watch industry state that the intricate nature of watchmaking makes it nearly impossible for watchmakers to produce watches that are “all or virtually all” made in the United States. These commenters explained that this hurts U.S.-based manufacturers’ ability to compete with international brands. *See* Gary Girdvainis, FTC-2019-0063-0005, FTC-2019-0063-0007, FTC-2019-0063-0013; Santosh Nalk, FTC-2019-0063-0009; Atelier Precision Manufacture, FTC-2019-0063-0008 (reporting that, for example, “Swiss-made” watches may incorporate up to 40% non-Swiss content).

⁴² O’Shea, MUSA Tr. at 39 (explaining that some Walmart suppliers have stated that the costs and time involved in determining whether they meet the “all or virtually all” standard is not worth it).

⁴³ *See* Schade, MUSA Tr. at 36.

⁴⁴ Kern, MUSA Tr. at 39.

fact that we have 2,000 people here that take things from steel coil, plastic pellets, and make a product.”⁴⁵

FTC staff is sensitive to the possibility that its enforcement decisions could affect U.S. job creation and firms’ perceived ability to make non-misleading claims that nevertheless promote their U.S. production. Striking the right balance is an ongoing challenge. However, by focusing litigation efforts on egregious offenders and aggressively working to prevent misrepresentations through guidance and informal feedback to any company that seeks it, the staff has attempted to mitigate these concerns and provide a means for companies to promote the work they do in the United States without deceiving consumers.

b. Balancing Compliance with the FTC Act and Other Labeling Laws

Commenters and panelists also encouraged the FTC to consider challenges arising from efforts to comply simultaneously with the FTC Act and other origin labeling standards. Specifically, stakeholders explained that, in certain situations, complying with the Buy American Act (“BAA”) (50% standard for U.S. government purchases),⁴⁶ marking products appropriately for export (substantial transformation standard), or complying with California state labeling requirements (5% or 10% value-based standard),⁴⁷ could lead to violations of the FTC Act.⁴⁸

FTC staff has considered these issues, but has yet to identify direct conflicts between the Policy Statement and BAA or export marking regulations. Both of those regulatory regimes apply to products not intended for typical U.S. consumers. Sellers of products intended for sale

⁴⁵ *Id.* See also Kern, MUSA Tr. at 38-39 (“In some cases . . . ambiguity pushes [companies] toward making a qualified claim, because that’s a safer alternative for them. Even if they . . . look at their supply chain and feel very strongly that any consumer looking at this would see . . . Made in America, they still feel that to avoid [the] issue that qualified claim is the better route for them. And in some cases, it prevents a claim entirely.”)

⁴⁶ 41 U.S.C. §§ 8301-8305. BAA establishes price preferences for domestic end products and construction materials in government acquisitions, and defines those terms as they are used in that limited context. See 48 CFR § 25.003 (stating that for purposes of BAA, “domestic end product[s]” and “domestic construction material[s]” include, among other things, certain manufactured products or materials where either the cost of the components mined, produced, or manufactured in the United States exceeds 50% of the cost of all components, or the product or material is a commercially available off-the-shelf item).

⁴⁷ Cal. Bus. & Prof. Code § 17533.7. This provision makes it unlawful to make unqualified “Made in USA” claims unless no more than 5% (or, in certain defined cases, 10%) of the final wholesale value of the manufactured product is attributable to foreign articles, units, or parts.

⁴⁸ See Schade, MUSA Tr. at 42 (explaining that in some instances companies can comply with the California standard and not comply with the “all or virtually all” guidance because FTC analysis takes into account the importance of the foreign input, which is not necessarily correlated to cost); Hanna, MUSA Tr. at 14 (because Customs applies a “substantial transformation,” jewelry products are of U.S. origin for export and duties purposes, but jewelers cannot claim the products are “Made in USA” for marketing purposes within the United States).

overseas or to government procurers should market directly to those audiences and in compliance with the appropriate regulations. Tensions with the FTC Act only arise when a manufacturer chooses to generate a rigid set of one-size-fits-all marketing materials. Materials geared toward U.S. consumers should not promote BAA compliance – which is only relevant to U.S. government purchasers – and should not highlight export designations without qualifying such claims appropriately. Indeed, marketers can always qualify claims if they are unsure whether a product marked in accordance with California law is “all or virtually all” made in the United States. In fact, the Policy Statement states that a “marketer may make any qualified claim about the U.S. content of its products as long as the claim is truthful and substantiated. Qualified claims . . . may be specific, indicating the amount of U.S. content (e.g., “60% U.S. content”).”⁴⁹

c. Strategies to Overcome Concerns

Stakeholders discussed several strategies to overcome concerns associated with enforcing the “all or virtually all” guidance. These included applying an alternative standard to legitimate U.S. manufacturers that attempt to source as many materials as possible from the USA, increasing consumer education efforts, and utilizing more qualified claims.

Several commenters and panelists suggested that for public policy reasons, despite the “all or virtually all” guidance articulated in the Policy Statement, the FTC should allow legitimate U.S. marketers to substantiate unqualified MUSA claims by an alternative standard. Specifically, several panelists and commenters recommended that the FTC adopt a “substantial transformation” standard⁵⁰ for unqualified claims. These commenters asserted that adopting “substantial transformation” would: (1) harmonize the FTC’s approach with the CBP standard for determining foreign country of origin pursuant to the Tariff Act, 19 U.S.C. § 1304; (2) focus analysis on U.S. processing and labor, rather than the product material origin; and (3) avoid penalizing marketers who must use certain materials or parts that cannot be sourced in the United States.⁵¹ Other commenters asked the FTC to establish a standard similar to California’s, that sets a minimum cost or value percentage that must be attributable to U.S. inputs to substantiate

⁴⁹ 62 FR 63756, 63770.

⁵⁰ CBP defines “substantial transformation” as a manufacturing process that results in a new and different product with a new name, character, and use that is different from that which existed before. This standard does not take into account the origin of materials or parts. *See* 19 CFR Part 134; *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308 (Ct. Int’l Tr. 2016) (A substantial transformation occurs when a product emerges from a manufacturing process with a new name, character, and use. The “simple assembly” of a limited number of components does not constitute a substantial transformation.).

⁵¹ Wicks, MUSA Tr. at 37 (MUSA should hinge on site of manufacture, not origin of raw materials); Hanna, MUSA Tr. at 32 (to be competitive, marketers should be able to “[w]orry about the absolute labor that went into creating” and not the origin of raw materials); Kern, MUSA Tr. at 30 (stating that clear rules of the road, including a substantial transformation plus percentage of content standard, would help manufacturers and consumers); International Precious Metals Institute, FTC-2019-0063-0019; American Apparel and Footwear Association, FTC-2019-0063-0022.

an unqualified claim.⁵² However, while these alternatives might promote certain policy goals, they would also allow marketers to make claims that may deceive consumers. The FTC’s mission is to prevent consumer deception, and without a Congressional mandate, adoption of any of these proposals may be inconsistent with this mission.

Workshop panelists also discussed the possibility of finding creative ways to tout manufacturing that does take place in the United States, even if the finished product cannot truthfully be marketed with an unqualified MUSA claim. Through effective marketing and education, consumers may come to appreciate the unique challenges involved in producing goods that are all or virtually all of U.S. origin.⁵³ However, panelist Brookman explained, “it’s really hard to educate consumers around deeply complex issues.”⁵⁴ Moreover, even if armed with this understanding, many Americans may continue to consider unqualified claims deceptive unless the advertised products are “all or virtually all” made in the United States.

Finally, panelists discussed the possibility of using more qualified U.S.-origin claims (e.g., “Assembled in USA” or “Made in USA of Imported Parts”) to better capture the complex supply chains upon which many manufacturers rely. Although appropriately qualified claims are an effective means to guide consumer perception,⁵⁵ marketers raised concerns that consumers are skeptical of qualified claims, and emphasized the value of unqualified claims.⁵⁶

3. *Potential Changes to the FTC’s Policy and Enforcement Approaches*

Although stakeholders held mixed views on consumer perception and the “all or virtually all” guidance in the Policy Statement, almost all commenters at the workshop and in written submissions agreed that the Commission should rethink its enforcement strategy. Specifically, while commenters generally agreed that the staff should continue to counsel inadvertent offenders into compliance,⁵⁷ the majority, including thousands of consumers that signed a

⁵² Gary Girdvainis, FTC-2019-0063-0005, FTC-2019-0063-0007, FTC-2019-0063-0013; Santosh Nalk, FTC-2019-0063-0009; Atelier Precision Manufacture, FTC-2019-0063-0008; Acuity Brands, 2019-0063-0015. *See also* Kern, MUSA Tr. at 30 (substantial transformation plus a specific percentage of costs).

⁵³ MUSA Tr. at 45-46.

⁵⁴ Brookman, MUSA Tr. at 46 (also stating that it might benefit consumers and manufacturers to provide more bright line rules).

⁵⁵ Patten, MUSA Tr. at 50 (consumers “appreciate the honesty” of companies that use appropriately qualified claims).

⁵⁶ *See* Schade, MUSA Tr. at 47 (stating that unqualified claims “have power” and consumer might not understand what qualified claims mean and consider them “watered down”); Hanna, MUSA Tr. at 47 (marketers want messages to be clear, simple, and short, and qualified claims are “bad brand building” and “nonstarter[s]”); Kern, MUSA Tr. at 49 (stating that AAFA members prefer unqualified claims). These arguments parallel those raised in 1997. *See* 62 FR 25020, 25025 (“qualified claims are not an adequate remedy”).

⁵⁷ Paul, MUSA Tr. at 52 (“[S]taff counseling before an issue arises . . . [and] prevention saves all

petition submitted by AAM⁵⁸ and a group of four U.S. senators,⁵⁹ argued that the FTC should pursue orders containing more than just injunctive relief against egregious or intentional offenders, and consider issuing a rule allowing the agency to obtain civil penalties in the first instance.⁶⁰

a. Seeking Additional Relief in Section 5 Cases

Several commenters and panelists argued that the Commission should continue to bring enforcement actions under Section 5 of the FTC Act, but should seek additional remedies in court actions, including monetary relief,⁶¹ admissions of liability,⁶² notice to consumers,⁶³ naming individuals as defendants,⁶⁴ or even jail time.⁶⁵ These stakeholders argued that the Commission’s approach has not been strict enough to deter deceptive claims.⁶⁶

As discussed *supra* Section II, to date, we have focused litigation efforts on egregious offenders, while aggressively working to prevent MUSA misrepresentations through extensive guidance and counseling to any company that seeks it. Although we receive many calls from

sorts of headaches. And so clearly that’s something that could be continued.”); Truth In Advertising, Inc. (TINA.org), FTC-2019-0063-0003, FTC-2019-0063-0020.

⁵⁸ Petition Submitted by Alliance for American Manufacturing, FTC-2019-0063-0024.

⁵⁹ Sens. Sherrod Brown, Tammy Baldwin, Christopher Murphy, and Richard Blumenthal, FTC-2019-0063-0025.

⁶⁰ *See also* Truth In Advertising, Inc. (TINA.org); FTC-2019-0063-0003, FTC-2019-0063-0020; Bob Moses, FTC-2019-0063-0011; Homer Laughlin China Company, FTC-2019-0063-0011; Alliance for American Manufacturing, FTC-2019-0063-0017.

⁶¹ Brookman, MUSA Tr. at 58; Paul, MUSA Tr. at 60; Truth In Advertising, Inc. (TINA.org), FTC-2019-0063-0003, FTC-2019-0063-0020; Alliance for American Manufacturing, FTC-2019-0063-0017; Sens. Sherrod Brown, Tammy Baldwin, Christopher Murphy, and Richard Blumenthal, FTC-2019-0063-0025.

⁶² Paul, MUSA Tr. at 60 (stating that admissions “unlock other possibilities for consumers that have been harmed . . . or competitors as well who have suffered as a result of the fraudulent behavior”); Alliance for American Manufacturing, FTC-2019-0063-0017; Sens. Sherrod Brown, Tammy Baldwin, Christopher Murphy, and Richard Blumenthal, FTC-2019-0063-0025. *See also* Hanna, MUSA Tr. at 62 (possibility of compelled admissions have had deterrent effect in other contexts).

⁶³ Brookman, MUSA Tr. at 59 (notices to consumers could raise public awareness of deceptive claims and allow consumers to get their money back).

⁶⁴ Brookman, MUSA Tr. at 63.

⁶⁵ Bob Moses, FTC-2019-0063-0011.

⁶⁶ *See* Brookman, MUSA Tr. at 54-55 (arguing that the current enforcement approach fails to deter fraudsters because there are “no consequences”); Paul, MUSA Tr. at 55-56; Patten, MUSA Tr. at 56.

companies confused about the “all or virtually all” guidance and several hundred reports of potentially deceptive MUSA claims per year, FTC staff receives few reports of companies engaged in intentional deception. Instead, of the average of 50-60 complaints the staff reviews per month, the vast majority relate to companies that either make overly broad claims on websites or in social marketing (e.g., “Made in USA” or “#madeinusa” when the company sells a mix of MUSA, imported, and assembled in USA products), or companies that make unqualified claims for products that, though substantially transformed in the USA, incorporate imported content. We receive only a small handful of reports of egregious MUSA deception per year – perhaps one per quarter – and almost every verified report has led to administrative or federal court action.

For the policy reasons discussed above, the orders issued in previous MUSA matters have attempted to strike a balance between addressing the deceptive conduct alleged without chilling truthful claims. Despite alleged Section 5 violations regarding certain products, almost all of the FTC’s MUSA matters involved complex facts that could complicate obtaining relief. For example, many of the respondents in those matters maintained manufacturing facilities in the United States, even if they could not substantiate unqualified “Made in USA” claims for the products at issue. Additionally, most cases involved products that functioned as advertised, making it more difficult to ascertain the extent to which consumers relied on false origin claims in making their purchasing decisions, or were otherwise harmed.

Although, as one stakeholder noted, MUSA fraud may be hard to detect,⁶⁷ the staff has seen no evidence that the FTC’s use of the administrative forum or failure to pursue additional relief is emboldening MUSA fraudsters. Reports of outright fraud have remained consistently low, and panelists offered no ideas on how to find additional enforcement targets. Furthermore, with regard to specific deterrence of companies under FTC order, of the 24 administrative orders entered in the past 20 years, the FTC has only had cause to initiate two civil penalty order enforcement proceedings.⁶⁸

It is also important to acknowledge that seeking additional relief in MUSA cases is not costless. As a general matter, when proposed orders incorporate significant monetary relief or admissions of liability, companies are significantly less likely to settle, or settle as early in the process. Furthermore, litigating these matters is time-consuming and can divert resources from other priorities, and likely results in fewer cases per year. Thus, while more extensive relief might deter fraudsters, it may also limit the staff’s ability to pursue additional matters, which could decrease overall deterrence.⁶⁹

⁶⁷ See Brookman, MUSA Tr. at 54.

⁶⁸ See <https://www.ftc.gov/news-events/press-releases/2019/04/marketer-water-filtration-systems-pay-110000-civil-penalty> (announcing settlement with iSpring that imposed a \$110,000 civil penalty for violating prior order regarding U.S.-origin claims); <https://www.ftc.gov/news-events/press-releases/2006/06/ftc-alleges-stanley-made-false-made-usa-claims-about-its-tools> (announcing settlement with Stanley Works that imposed a \$205,000 civil penalty for violating prior order regarding U.S.-origin claims).

⁶⁹ At least one panelist acknowledged this problem, and suggested that the Commission bring fewer cases but seek greater relief. See Brookman, MUSA Tr. At 62.

b. Rulemaking

The commenters expressed nearly universal support for an FTC rule addressing MUSA claims.⁷⁰ As several commenters noted, 15 U.S.C. § 45a authorizes the Commission to issue rules to prevent unfair or deceptive acts or practices relating to MUSA labeling.⁷¹ Indeed, TINA.org submitted a Petition for Rulemaking pursuant to 45a, arguing that there is no downside to promulgating a rule that would allow the Commission to seek civil penalties for first-time offenses.⁷² TINA.org further argued that the Commission could exercise its enforcement discretion and use a rule to obtain civil penalties only in cases involving egregious offenders. This, according to TINA.org, would “have a tremendous deterrent effect . . . [and] change the cost benefit analysis when someone thinks about engaging in deceptive Made in the USA labeling.”⁷³ For unknowing offenders, TINA.org suggested the Commission continue to provide informal staff counseling.

Workshop participants generally agreed that there is little downside to rulemaking,⁷⁴ but disagreed on the benefits of a rule. Specifically, while Brookman agreed with TINA.org that a rule providing for civil penalties in the first instance would be “incredibly important for deterrence,”⁷⁵ manufacturing representatives at the workshop saw some value in a rule that provided additional clarity to marketers,⁷⁶ but disagreed that a rule was needed to deter them

⁷⁰ The Consumer Technology Association stated in its comment that the FTC should not move forward with a rulemaking without conducting updated consumer perception testing. *See* FTC-2019-0063-0018. Four other commenters who considered the issue recommended moving forward with a rulemaking. *See* Truth In Advertising, Inc. (TINA.org), FTC-2019-0063-0003, FTC-2019-0063-0020; American Apparel and Footwear Association, FTC-2019-0063-0022; Acuity Brands, FTC-2019-0063-0015; Sens. Sherrod Brown, Tammy Baldwin, Christopher Murphy, and Richard Blumenthal, FTC-2019-0063-0025.

⁷¹ Under 15 U.S.C. § 45a, “Made in the U.S.A.” product labels “shall be consistent with decisions and orders of the Federal Trade Commission issued pursuant to section 45 of this title.” Section 45a also provides the Commission authority to “from time to time issue rules pursuant to section 553 of title 5 [the Administrative Procedure Act] for such purpose.” *Id.* It further states that violations of such a rule “shall be treated by the Commission as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices.”

⁷² FTC-2019-0063-0003; *see also* Patten, MUSA Tr. at 63 (“[W]hy wouldn’t the FTC want a rule to defend American manufacturing and protect consumers . . . [I]t would be another arrow in your quiver to use at your discretion and only in appropriate cases.”).

⁷³ Patten, MUSA Tr. at 63.

⁷⁴ There was some disagreement, however, about whether the rule should incorporate the “all or virtually all” standard or create a different standard for unqualified MUSA claims. *See, e.g.*, Hanna, MUSA Tr. at 64 (suggesting that a rule should incorporate a substantial transformation standard); Paul, MUSA Tr. at 65 (all or virtually all); Kern, MUSA Tr. at 66 (substantial transformation).

⁷⁵ Brookman, MUSA Tr. at 65-66.

⁷⁶ Kern, MUSA Tr. at 66.

from making false claims. Indeed, manufacturing representatives uniformly stated that a rule would not affect their businesses because the possibility of suit under Section 5 already significantly deters them from making deceptive claims, and in some instances chills what they perceive as truthful MUSA claims.⁷⁷

During the workshop, we asked the panelists advocating for a rule to identify potential downsides to rulemaking. However, none provided any comment.⁷⁸

4. *Unscrupulous Marketers Overseas*

The Commission requested information on how to address MUSA fraud by overseas actors selling directly to U.S. consumers. Deceptive MUSA claims by overseas actors fall into two categories. First, the staff has observed an ever-increasing number of complaints relating to counterfeit goods. According to these complaints, unscrupulous overseas actors build fake product pages on U.S. sales platforms that look very similar to legitimate product pages, mirroring the claims made for the legitimate products including, in some instances, MUSA claims. These marketers prey on consumers who seek out certain brands or logos as proxies for quality or other attributes (including, in some instances, U.S. origin). When a consumer receives a counterfeit good, the consumer has not received the product he or she bargained for. Thus, although there is a nexus between these claims and deceptive MUSA claims, the problem of false country-of-origin claims for these products is secondary to the problem of counterfeiting. Accordingly, FTC staff generally refers such complaints to other government agencies with specific programs to combat counterfeiting.⁷⁹

Distinct from complaints related to counterfeit goods, the staff sees some fraudulent MUSA claims for otherwise legitimate products made by unscrupulous actors overseas. These overseas wrongdoers are largely beyond the FTC's reach (*i.e.*, they are nearly impossible to serve with process, and even if we could effectuate process, collection is not feasible, and the company will simply change its name and continue its deceptive practices). Moreover, the U.S. platforms on which these fraudulent actors advertise to U.S. consumers assert they are largely protected by the Communications Decency Act, 47 U.S.C. § 230(c)(1) ("CDA").

⁷⁷ Wicks, MUSA Tr. at 68; Schade, MUSA Tr. at 68; Kern, MUSA Tr. at 69. *See also* O'Shea, MUSA Tr. at 69 (a rule is not likely to provide additional deterrence); Hanna, MUSA Tr. at 71 (any enforcement is a reputational hit).

⁷⁸ *See* MUSA Tr. at 72.

⁷⁹ The Department of Homeland Security ("DHS") has ongoing interest in targeting and preventing entry of counterfeit goods. On March 11, 2019, DHS announced the formation of the Global Trade Task Force, with a primary mission of, among other things, countering trafficking of counterfeit, substandard, or tainted merchandise. Involved agencies include Homeland Security Investigations, CBP, the Drug Enforcement Administration, the Commerce Department's Bureau of Industry and Security, and the Food and Drug Administration's Office of Criminal Investigations.

Workshop participants acknowledged significant challenges competing with overseas sellers of counterfeit goods on third-party platforms. However, most stakeholders agreed that the problem of sellers making affirmatively deceptive MUSA claims for otherwise legitimate products was – in the words of one participant – “lower on the list.”⁸⁰ To the extent the problem with deceptive claims by overseas marketers exists, some panelists stated that the CDA is “strict . . . right now” and could be problematic from an enforcement perspective.⁸¹

IV. Conclusion

The record does not support issuing updated guidance on MUSA claims at this time. However, the staff continues to seek updated evidence of consumer perception, particularly on the topics outlined above, and will consider the issues raised by the commenters and workshop participants in conjunction with our notice of proposed rulemaking and other future enforcement activities.

⁸⁰ Kern, MUSA Tr. at 73. *See also* O’Shea, MUSA Tr. at 74 (no instance of deceptive MUSA claims by overseas sellers has come to her attention on the Walmart platform).

⁸¹ Patten, MUSA Tr. at 76; *see also* Brookman, MUSA Tr. at 75.



Federal Trade Commission

June 19, 2020