

"MADE IN USA" CLAIMS CAN BE CONSIDERED DECEPTIVE UNLESS SUBSTANTIATED

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Although every product (unless excepted) that is imported into the United States must be marked with its country of origin pursuant to Section 304 of the Tariff Act of 1930, most products manufactured domestically are not required to list the United States as the country of origin. However, if manufacturers or retailers do choose to market their products as "Made in the USA," these claims must be substantiated, or risk being considered deceptive under federal or state law.

On the federal level, the Federal Trade Commission has issued guidelines and considers representations that a product is "Made in the USA" to be deceptive, unless (1) "all or virtually all" of a product's components are of U.S. origin, and (2) "all or virtually all" processing takes place in the United States. Furthermore, the FTC considers phrases such as "Produced in the USA," "Built in the USA," or "Manufactured in the USA," as conveying a near-identical meaning to "Made in the USA," and applies the same standard.

The standards for "Made in the USA" claims may vary from state to state. Under California law, for example, such labeling claims are allowed only "if all of the articles, units, or parts of the merchandise obtained from outside the United States constitute not more than 5 percent of the final wholesale value of the manufactured product." Such labels are also allowed if the manufacturer makes a showing that it cannot produce or obtain a certain article, unit or part within the United States for reasons other than cost, and the article, unit or part does not constitute more than 10 percent of the final wholesale value of the manufactured product.

Retailers should consider the following when advertising that a product is "Made in the USA," or defending a suit alleging a deceptive "Made in the USA" claim:

- **Make sure that your labels match.** Verify that any descriptions that are placed on the product, its package, or on collateral advertising (e.g., online descriptions) match. To the extent that there is a discrepancy, consider clarifying why the discrepancy exists. For example, if a package states "Made in the USA" because the *package* was made in the United States, not the *product*, consider adding clarifying language to the statement to avoid allegations by consumers or regulators that the description is misleading.

- **Reliance upon third parties.** If a third party (*g.*, a manufacturer or vendor) has supplied a product that is marked “Made in the USA,” consider whether to obtain indemnification or a guarantee that the description is accurate.
- **Compliance with state laws.** Even if a product complies with the Federal Trade Commission’s standards for “Made in the USA” claims, verify that the product also complies with any unique standards in the states in which the product will be sold.
- **Tracking cost and constituent parts.** Consider what level of due diligence is required to ascertain the true origins of the parts, materials, and components of a product, in order to make your own determination as to whether a “Made in the USA” designation is beneficial overall. In some instances, designing a compliance program to track and document the origins of inputs may make sense to mitigate litigation risks.
- **Plan how to respond to mistakes and inquiries.** Be prepared to respond if your company learns of information which might call into question a “Made in the USA” description used on a product. The Federal Trade Commission has proven willing to close investigations into “Made in America” claims without further action where a company promptly responds to the agency’s inquiry and takes immediate action to rectify the agency’s concerns.

MEET THE TEAM



Merrit M. Jones

San Francisco

merrit.jones@bclplaw.com

[+1 415 675 3435](tel:+14156753435)

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