

# CUSTOMS-NOTES

Written by George R. Tuttle Law Offices for informational use by the trade and import community on selected topics of general interest concerning Customs and import related matters.

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The Federal Trade Commission (FTC) recently issued a publication regarding the use of "Made-in-USA," and statements with a similar connotation, in product labeling and marketing. The FTC is charged with preventing deception and unfairness in the marketplace, and has the power to bring law enforcement actions against false or misleading claims that a product is of U.S. origin.

As many of the products that are assembled, manufactured or produced on the United States contain parts or materials that are of foreign origin, the FTC's rules on the "Made-in-USA," have a significant impact on how products are labeled and marketed.

Traditionally, the FTC has required that a product advertised as *Made in USA* be "all or virtually all" made in the U.S. After a comprehensive review of *Made in USA* and other U.S. origin claims in product advertising and labeling, the FTC announced in December 1997 that it would retain the "all or virtually all" standard. At that time, the FTC also issued an Enforcement Policy Statement on U.S. Origin Claims to provide guidance to marketers who want to make an unqualified *Made in USA* claim under the "all or virtually all" standard, and those who want to make a qualified *Made in USA* claim.

The FTC's new publication provides additional guidance about how to comply with the "all or virtually all" standard. It also offers general information about the U.S. Customs Service's requirement that all products of foreign origin imported into the U.S. be marked with the name of the country of origin. A summary of this document follows.

## **The Standard for Unqualified Made In USA Claims**

For a product to be called *Made in USA*, or claimed to be of domestic origin without qualifications or limits on the claim, the product must be "all or virtually all" made in the U.S. (The term "United States," includes the 50 states, the District of Columbia, and the U.S. territories and possessions.)

### **What Is The "all or virtually all" Standard?**

"All or virtually all" means that all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content. The publication gives an example knobs as "non-

significant” parts that could be of foreign origin, and still not have the unqualified statement of origin be considered false.

### **What Substantiation Is Required for a *Made in USA* Claim?**

According to the FTC, when a manufacturer or marketer makes an unqualified claim that a product is *Made in USA*, it should have — and rely on — a "reasonable basis" to support the claim at the time it is made. This means a manufacturer or marketer needs competent and reliable evidence to back up the claim that its product is "all or virtually all" made in the U.S.

If given in good faith, manufacturers and marketers can rely on information from suppliers about the domestic content in the parts, components, and other elements they produce. Rather than *assume* that the input is 100 percent U.S.-made, however, the publication recommends to manufacturers and marketers to *ask* the supplier for specific information about the percentage of U.S. content before they make a U.S. origin claim.

### **Making Qualified Claims Of U.S. Content Or Processes**

The publication reviews the appropriateness of “qualified claims” (claims that describes the extent, amount or type of a product’s domestic content or processing; but indicate that the product isn’t entirely of domestic origin), and claims that a particular manufacturing or other process was performed in the U.S.

A product that includes foreign components may be called "Assembled in USA" without qualification when its principal assembly takes place in the U.S. and the assembly is substantial. For the "assembly" claim to be valid, the product’s last "substantial transformation" also should have occurred in the U.S. The publication notes that a "screwdriver" assembly in the U.S. of foreign components into a final product doesn’t usually qualify for the "Assembled in USA" claim.

### **What is the U.S. Customs Service’s Jurisdiction Over Country-of-Origin Claims?**

The Tariff Act of 1930 gives U.S. Customs the authority to administer the legal requirement that imported goods be marked with their country of origin (for example, "Made in Japan").

Under the Customs laws, the failure to properly mark goods, and/ or their containers, with the origin of the article can result in the detention of goods until properly marked, as well as, the assessment of 10% marking penalties and the assessment of liquidated damages equal the value of the merchandise.

When an imported product incorporates materials and/or processing from more than one country, Customs considers the country of origin to be the last country in which a "substantial transformation" took place. Customs 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 the change.

The Customs Service also regulates imported goods which are subject to post-importation processing, so as to evaluate whether the subsequent processing substantially transforms the goods from a product of foreign origin. Under Customs' rules, if the foreign article does not undergo a "substantial transformation" after importation, it must retain its original country-of-origin marking.

Customs makes country-of-origin determinations using the "substantial transformation" test on a case-by-case basis.<sup>1</sup> Typically, the origin of an article can be confirmed through a ruling request to Customs.

The FTC cautions that if a product is of foreign origin (that is, it has been substantially transformed abroad), manufacturers and marketers should make sure the imported goods also satisfy Customs' markings statute and regulations that require such products to be marked with a foreign country of origin.

### **What is the interaction between the FTC and Customs regarding country-of-origin claims?**

Even if Customs determines that an imported product does not need a foreign country-of-origin mark, it is not necessarily permissible to claim that the product is *Made in USA*. The FTC considers additional factors to decide whether a product can be advertised or labeled as *Made in USA*.

Manufacturers and marketers should check with Customs to see if they need to mark their products with the foreign country of origin. If they don't, they should look at the FTC's standard to check if they can properly make a *Made in USA* claim.

The FTC has jurisdiction over foreign origin claims on products and in packaging that are beyond the disclosures required by Customs (for example, claims that supplement a required foreign origin marking to indicate where additional processing or finishing of a product occurred).

Please contact us if you would like additional information regarding Customs' Country-of-Origin marking requirements, or the use of the "Made-in-USA" on your products.

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<sup>1</sup> In some instances, Customs uses a "tariff shift" analysis, comparable to "substantial transformation," to determine a product's country of origin.