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Recommended Citation

Cutler, Jamie, "The Federal Trade Commission's 'Made in America' Policy Has Disincentivized Domestic Production but Supply Chain Issues Associated with Coronavirus May Incentivize Reshoring" (2021). *AELJ Blog*. 264.

<https://larc.cardozo.yu.edu/aelj-blog/264>

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The Federal Trade Commission's 'Made in America' Policy Has Disincentivized Domestic Production but Supply Chain Issues Associated with Coronavirus May Incentivize Reshoring

BY [MANAGING EDITOR](#)/ ON FEBRUARY 8, 2021



Image by Mary Pahlke from Pixabay

Americans are proud of their domestic incorporations, sourcing, and/or production and want to market as such.¹ The Federal Trade Commission ("FTC") is a federal agency charged with the authority to regulate unfair and deceptive advertising in the marketplace.² If a business wants to legally advertise as Made in America ("MIA"), it has to comply with the FTC's *Enforcement Policy Statement on U.S. Origin Claims* ("*Enforcement Policy*").³ For a product to be legally labeled as MIA under the *Enforcement Policy*, it must be "all or virtually all" made in the United States ("all or virtually all standard").⁴ This means "all [or a *de minimis* amount of] significant parts and processing that go into the product are of U.S. origin."⁵ The FTC has also implemented a prerequisite for satisfying the all or virtually all standard, which requires a good's final assembly or processing to occur in America and is rereferred to as the location where the product was last substantially transformed.⁶ Lastly, an advertiser's MIA claim must

be truthful and substantiated.⁷ This means the advertiser must have a reasonable basis for making the claim, such as competent and reliable evidence, showing that all or virtually all processes and materials did in fact happen in and came from the United States.⁸

The Commission's MIA policy has been found infeasible to satisfy for a multitude of reasons.⁹ The first difficulty in satisfaction stems from the ambiguity of the *Enforcement Policy*.¹⁰ The policy requires a product to contain only a negligible amount of foreign parts or processing, but does not provide a numerical mechanism for determining whether a product is all or virtually all from the U.S. as to fulfill the standard's requirement.¹¹ The ambiguity of the policy deters marketers from advertising as MIA' in fear of enforcement action by the FTC, which can result in severe penalties.¹² The policy is also infeasible to satisfy due to the differences between foreign and domestic production costs.¹³ Since U.S. labor laws require higher compensation than other countries, such as China, Vietnam, and Mexico, American goods are inevitably more expensive than goods produced in countries where labor is cheaper.¹⁴ Most U.S. businesses have neither the cash flow to increase production costs nor the trademark strength to increase retail prices and retain customers in order to produce all or virtually all of its goods in America.¹⁵

The 'all or virtually all' standard being infeasible to comply with disincentivizes companies from producing domestically or using U.S. components in its products. If they cannot legally obtain the benefit that comes with informing consumers that they have MIA products, companies will produce overseas and source from foreign markets, as it is less expensive.¹⁶ If a manufacturer cannot meet the all or virtually all threshold to legally claim its goods are MIA, why would it use any domestic parts or processing when it can all be done cheaper abroad?¹⁷ Thus, under the current FTC standards, producers will continue to manufacture internationally absent any American marketing advantages.¹⁸ This is evident by the substantial decrease in domestic production and increase in foreign manufacturing and importation.¹⁹ In 2018, U.S. manufacturing represented 11.3% of gross domestic production ("GDP"), but in 1970, manufacturing made up over double the current percentage of GDP at 24.3%.²⁰ America also lost its spot as the world's largest manufacturer to China in 2010.²¹

There is, however, a new-found incentivization of onshore production. Retailers in the United States are facing unprecedented supply chain problems due to the Coronavirus and are working to find solutions.²² Forty percent of clothing sold in America is imported from China and the first wave of Coronavirus forced Chinese factories to close for weeks, leaving retailers with significantly less inventory to sell.²³ April 2020 survey results, provided by accounting firm EY, found "83% of multinational executives were contemplating 'reshoring' – or in other words, bringing manufacturing back to their home turf . . ." due to supply chain issues caused by Coronavirus.²⁴ In July 2020, ThomasNet, an online platform for American suppliers and product sourcing, conducted a similar survey and found 69% of manufacturing companies were looking to bring production to the U.S.²⁵ Thus, the abroad manufacturing issues caused

by COVID-19 has incentivized suppliers, manufacturers, and retailers to reevaluate foreign production and the benefit of manufacturing in America.

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2. Inc. Editorial, Inc. Staff, Federal Trade Commission (FTC), Inc., <https://www.inc.com/encyclopedia/federal-trade-commission-ftc.html> [<https://perma.cc/86MP-TGVP>] (last updated Jan. 5 2021); Fed. Trade Comm'n, What the FTC Does, F.T.C., <https://www.ftc.gov/news-events/media-resources/what-ftc-does> [<https://perma.cc/95VJ-78GG>] (last visited Sept. 20, 2020).
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11. *Id.*; Fed. Trade Comm'n, Enforcement Policy Statement on U.S. Origin Claims, *supra* note 4.
12. The Fashion L., "Made in" Labels are Marketing Gold but Not Without Potential Legal Consequences, Fashion L. (May 14, 2020), <https://www.thefashionlaw.com/made-in-labels-are-marketing-gold-but-not-without-legal-consequences/> [<https://perma.cc/7F3S-3PWF>].
13. See Shaheen, Mudge, & Lee, *supra* note 9, at 3.
14. Dana Varinsky, Here's what 5 of your favorite products would cost if they were made in the US, Bus. Insider (Nov. 27, 2016, 2:40 PM), <https://www.businessinsider.com/how-much-products-would-cost-if-made-in-us-2016-11> [<https://perma.cc/6WRK-KQZH>]; Scott Shapiro, How Much More Should Americans Pay for 'Made in America'?, Forbes (Aug. 21, 2017, 1:27 PM), <https://www.forbes.com/sites/scottshapiro/2017/08/21/how-much-more-should-americans-pay-for-made-in-america/#eaddf8f1be75> [<https://perma.cc/TJD6-KXNP>].
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17. Bales, *supra* note 16, at 744; Shaheen, Mudge, & Lee, *supra* note 9, at 5.
18. Bales, *supra* note 16, at 745; Shaheen, Mudge, & Lee, *supra* note 9, at 5.
19. See The Fashion L., As Fashion Contemplates Reshoring, a Look at What "Made in USA" Means, Fashion L. (Jan. 20, 2021) <https://www.thefashionlaw.com/a-fashion-talks-reshoring-made-in-labeling-rules-come-under-the-microscope/> [<https://perma.cc/J5LT-XLQX>] ("[M]ore than 90 percent of the apparel sold in the U.S. . . . is made internationally.").
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23. *Id.*
24. *Id.*
25. *Id.*