

**BUY AMERICAN, HIRE
AMERICAN: Is your (or your
competitor's) product really
"Made in the USA"?**

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Today's Presenters



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Consumers Notice “Made in the USA”

- Consumer surveys consistently show:
 - 4 out of 5 shoppers notice “Made in the USA” claims on pack.
 - Most of those shoppers (76%) claim that they are more likely to purchase a product after noticing the “Made in the USA” claim.
 - Purchase rationale: To help the economy.
 - Particular preference for food, medicine, personal care items.
 - “Made in China” affiliated with lower price.
 - Both claims more likely to be noticed by persons age 35+ than 18-34 year olds.

Companies Notice

WeatherTech®
Automotive Accessories

SHOP BY PRODUCT SHOP BY VEHICLE CUSTOMER SERVICE

Continue Shopping | **TechLiner® Bed and Tailgate Protection**



DRAG OR HOVER TO ZOOM

Select Year

MAKE

YEAR

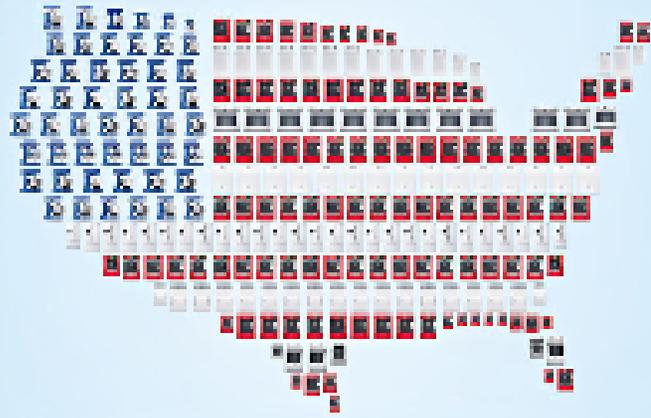
MODEL

Can't find your vehicle?

American Manufacturing Done Right™



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BUILDING THE BEST IN THE WORLD RIGHT HERE AT HOME

For 100 years, we've been committed to engineering, engineering and assembling the best appliances in the world, and we're proud to do it here in the USA. Our commitment to innovation, quality, and customer service is what makes us the industry leader. We're proud to be building products that improve lives. Our focus on quality is what makes Whirlpool a great choice for your home. We're proud to be building products that improve lives.

Whirlpool

Whirlpool KitchenAid Maytag Amana

**Kelley
Drye**

The President Has Noticed

From the President's February 27 speech:

the progress I have made in keeping those promises. Since my election, Ford, Fiat, Chrysler, General Motors, Sprint, Softbank, Lockheed, Wal Mart, and many others have announced they will invest billions and billions of dollars in the United States and will create tens of thousands of new American jobs.

We have cleared the way for the construction of the Keystone and Dakota Access pipelines.

Thereby creating tens of thousands of jobs, and I've issued a new directive that new American pipelines be made with American steel.

This effort will be guided by two core principles: Buy American and hire American.

FTC Enforcement Policy Statement on U.S. Origin Claims

- General FTC principles for “Made in USA” claims:
 - Claim must be truthful and substantiated before it is made.
 - Claims may be express (“Made in USA”; “American Made”) or implied (based on net impression conveyed by juxtaposition of phrases, images, etc.).
 - U.S. symbols or geographic references, such as U.S. flags, outlines of U.S., etc., could convey a claim of U.S. origin.
 - Case-by-case determination.
 - Ordinarily, FTC will not consider marketer’s use of American brand name or trademark, without more, to constitute a domestic origin claim.
 - Same with merely listing company’s U.S. address non-prominently.

The “All of Virtually All” Standard

- **Unqualified** “Made in USA” claims must meet the “all or virtually all” standard.
- What does “all or virtually all” mean?
 - All significant parts and processing are of U.S. origin.
 - Only a *de minimis*/negligible amount of foreign content.
 - Last “substantial transformation” and final assembly/processing must take place in the U.S.

Substantial Transformation

- “All or Virtually All” Q&A
 - What is meant by the term “substantial transformation”?
 - “Substantial transformation” is “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.”
 - Determination of whether a process “substantially transforms” a product is made by U.S. Customs and Border Protection (CBP).
 - Made on a case-by-case basis.
 - Screwdriver-type assembly, such as assembling previously manufactured major components of a product, is generally not enough to be considered a substantial transformation.

Energizer Battery Case

- ***Energizer Battery, Inc. v. United States***, 2016 WL 7118538 (Ct. Int'l. Trade 2016)
- The CIT upheld U.S. Customs and Border Protection's determination that Energizer's Generation II military flashlights are made in China.
- Energizer argued that domestic assembly of its foreign components amounts to substantial transformation into a product of U.S. origin.
- The court found that because imported parts had a pre-determined usage at the time of import, their fulfillment of that use through assembly could not constitute substantial transformation.
- The imported parts would need to undergo "further work" beyond mere assembly to be considered substantially transformed. What is required for "further work" would vary depending on the product at issue.

Qualified Claims

- Where a product is not “all or virtually all” made in the U.S., any U.S. origin claim should be **qualified**.
 - Qualifications must be clear, prominent, and understandable.
 - *E.g.*, “60% U.S. content”; “Made in USA from imported leather”; and “Assembled in USA from French components”.
 - Qualified claims can be made for specific processes or parts of U.S. origin, but the claim should be carefully tailored to avoid implying more U.S. content than is the case.
 - *E.g.*, A “Made in USA” claim on the package of an imported drill to refer to the origin of the packaging without more information would likely be deceptive, but the claim “Drill Made in China – Packaging Made in USA” would not.

Screwdriver Assembly Insufficient

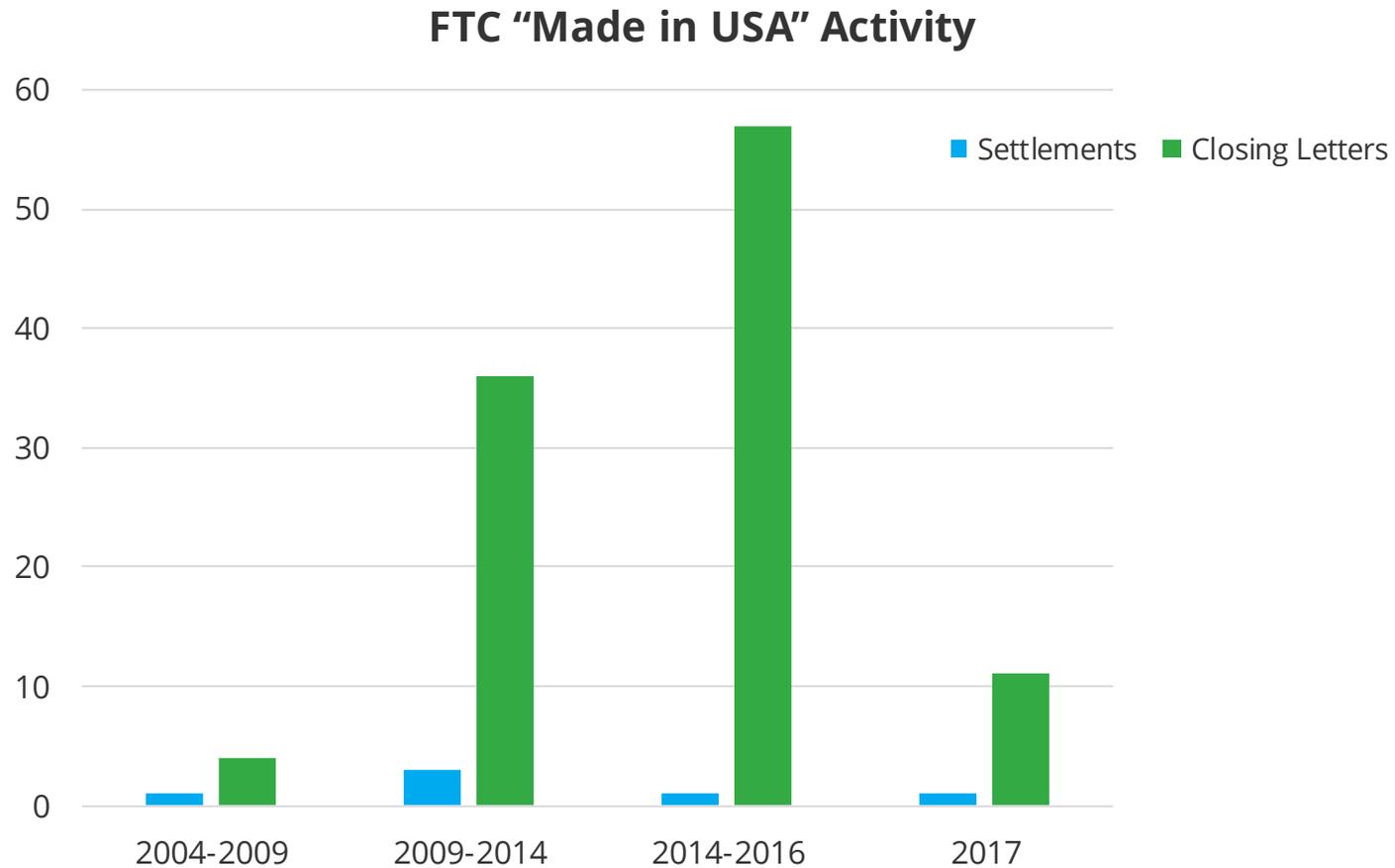
- “Made in USA of U.S. and imported parts” or “Assembled in USA with Indonesian materials”
- FTC believes that consumers understand that the last assembly, processing, or finishing occurred in the U.S. and it must be significant
 - In other words, such claims should only be made where the product was last substantially transformed in the U.S.
 - Such claims would be inappropriate where U.S. assembly only includes “screwdriver-type” assembly

Choose Qualifying Terms Carefully

Potentially Synonymous With “Made In”:

- “Manufactured in”
- “Crafted” or “Handcrafted in”
- “Born in America”
- “Built in”

Recent Closing Letter Activity



2017 FTC Staff Closing Letters

- Since January 2017, the FTC Staff has settled one matter and issued Closing Letters to 11 companies
 - **Nature of the Inquiry.** Possible violations of Section 5 in connection with certain marketing materials that may have overstated the extent to which products were made in the United States
 - **Reason for Closing Inquiry.** The implementation of a remedial action plan to remove, clarify or qualify claims at issue and avoid deceiving consumers.
- Products involved include guitar pedals, LED tubes, pillows, pulleys, cell phone signal boosters, solar chargers, water filtration systems.

In the Matter of Block Division, Inc.



 **Block Division, Inc.**
November 25 at 11:39am · 🌐

Hunting? Boat storage? Creating a theater or stage production? We offer a variety of pulley blocks to meet your needs!
<http://www.blockdivision.com/Block-and-Tackle-Rope-Pulleys-...>


MADE IN USA

Block and Tackle Pulley Systems, Sheaves Snatch Bushings
Small to large, light to heavy duty, industrial block and tackle pulley systems; zinc electroplated or stainless steel; swivel, fixed hook, eye, flat...

WWW.BLOCKDIVISION.COM

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FTC vs. Chemence, Inc. (Oct. 2016)



- Chemence makes glue (Kwik Fix, Hammer Tite, Krylex)
- FTC alleged that 55% of the cost of the substances in the glues came from imports
- FTC also alleged that Chemence assisted others in deceiving consumers by distributing marketing materials to private-label sellers and third-party sites/storefronts that included misleading “Made in USA” claims
- \$220,000 remedy for consumer redress

In the Matter of iSpring Water Systems, LLC



Roll over image to zoom in

iSpring RCC7 - WQA Gold Seal Certified
- 5-Stage 75 GPD Residential Under-Sink Reverse Osmosis Drinking Water Filtration System
by iSpring
★★★★★ 2,145 customer reviews | 896 answered questions
#1 Best Seller in Hot & Cold Water Dispensers

Price: **\$178.09 & FREE Shipping**. Details

Your cost could be **\$173.09**. Qualified customers get \$5 in Gift Card funds on first \$100 reload of their Amazon Gift Card Balance. Learn more

Prime

In Stock.
Want it Monday, Oct. 24? Order within **26 hrs 56 mins** and choose **Two-Day Shipping** at checkout. Details
Ships from and sold by Amazon.com in easy-to-open packaging. Gift-wrap available.

Want your water filter replaced by a professional?
Buy water filter replacement services directly on Amazon. Backed by our Happiness Guarantee.
Estimate \$150.95

- Rejects up to 99% of 1,000+ pollutants including chlorine, fluoride, lead, arsenic, pesticides, pathogens, sulfur, THMs, PFOA and PFOS
- European Style Brushed Nickel Faucet, Transparent housing for visual filter monitoring
- Earned Water Quality Association (WQA) Gold Seal for exceptional quality, safety, and durability
- Streamlined DIY installation process. Fits most under sink cabinets
- **Proudly Built in the USA, Based out of Atlanta, Georgia**

In the Matter of iSPRING WATER SYSTEMS, LLC

 **iSpring RCC7 - WQA Gold Seal Certified - 5-Stage 75 GPD Residential Under-Sink Reverse Osmosis Drinking Water Filtration System**
\$178.09 & FREE Shipping [Details](#) [In Stock](#) Ships from and sold by Amazon.com in **easy-to-open packaging**. Gift-wrap available.
[View larger](#) [View larger](#) [View larger](#) [View larger](#)

The faucet will be presented in your kitchen, so we made sure no corners were cut. The faucet's brass body gives it a high quality feel and appearance to provide a seamless fit with your other fixtures.

Don't be left in the dark on filter life. With the transparent housing you will know it is time for a filter change before a problem occurs.

The more water the better. The RCC7 outperforms its peers with a 75 gallons per day rating, ensuring you have your water when you need it.

The RCC7 is the only system in its class to earn the Water Quality Association's Gold Seal Certification. Don't settle for anything less!



Lifetime
TECH SUPPORT
GUARANTEED

Lifetime Support
Questions? Contact our team of WQA certified professionals for a prompt and informative answer.



Gold Seal

Superior Performance
One of few to earn the WQA Gold Seal Certification for overall quality and performance.



1 YEAR
MONEY BACK
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Customer Confidence
Love it or leave it, simple as that. We provide a full 1-year money back guarantee with every system sold.



Built in USA

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 iSpring@iSpringWater.com
 iSpring.com

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Commando Lock (Dec. 2016)

- Illustrates the significance of certain parts to the finished product.

In this case, although Commando performs significant work on its products in the United States, the imported cylinders and keys are essential to the locks' function. Accordingly, to avoid deceiving consumers, Commando implemented a remedial action plan to clarify its representations by clearly and prominently qualifying all of its U.S.-origin claims. This plan included: (1) updating all U.S.-origin claims on Commando websites and social media to state "Made in USA with US and global components"; (2) updating product packaging to ensure consistent claim qualification in an increased font size; (3) reviewing sales and training materials; and (4) making all diligent efforts to identify and correct unqualified claims made by third-party marketers.

A BETTER PADLOCK AT THE BEST VALUE.

We're a proud US Military supplier with over 30 years of experience supplying technology and lock components to some of the leading padlock brands on the market. All Commando locks are military-grade from design through manufacturing with superior strength and security our top priority. Commando locks are shim and bypass proof. Our standard lock boasts a very pick-resistant 5-pin high-security cylinder with anti bump technology and up to 10 security pins. Protecting US Military assets around the world, protecting your assets at home. Commando locks are made in USA with US and global components.

Takeaways

- “Made in USA” claims are frequent subjects of FTC investigation
- If you receive an inquiry, the following steps may be particularly important to resolving it:
 - Prompt and cooperative response
 - Updating claims substantiation process
 - Training personnel on how to comply with the relevant standards
 - Retrieval, review, and revision of materials

Changes to CA's Standard

- SB 633 signed into law on September 2, 2015
- A “Made in USA” claim may be used in a product’s labeling in California provided no more than five percent – or in certain instances, ten percent – of the product’s component inputs originate from outside of the United States.



Pending Legislation

- Reinforcing American-Made Products Act of 2017
- Proposes requiring the Federal Trade Commission's regulation of the labeling of products as "Made in the U.S.A." or "Made in America" to supersede any state laws regarding the extent to which a product is introduced, delivered, sold, advertised, or offered for sale in interstate or foreign commerce with such a label in order to represent that the product was in whole or substantial part of domestic origin.
- Sponsors: Sens. Mike Lee (R-Utah), Shelley Moore Capito (R-W.V.), Susan Collins (R-Maine), Deb Fischer (R-Neb.), Angus King (I-Maine).

Challenging Competitor's Claims

Key Considerations

- Claim substantiation issue or disclosure issue?
 - Are the materials not available in the U.S.?
 - Can customs records provide insight?
 - Has the advertiser created evidence that contradicts their claims?

Challenging Competitor's Claims

Options for Challenging

- Cease and Desist Letter – company to company
- Report to FTC – via complaint or anonymously
- Report to Customs – address issue at port
- National Advertising Division – confidential proceeding but public decision
- False Advertising Litigation – Lanham Act theory

National Advertising Division

- STIHL Incorporated (Handheld Power Tools), NAD Case No. 5634, (Sept. 2013)
 - **Basis of Inquiry:** A consumer questioned the following advertiser claims:
 - “All These Built in America*”, and
 - “*A majority of STIHL Products are built in the United States from domestic and foreign components.”
 - **Decision:** NAD determined that:
 - The advertiser’s “Built in America” was reasonably understood as “Made in the U.S.A.”
 - The advertiser may make a properly qualified “Made in the U.S.A.”. NAD recommended modifications to the disclosure to ensure it was sufficiently clear and conspicuous.

False Advertising Litigation

- The Lanham Act prohibits an individual or an entity from making
 - “false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion,
 - misrepresents the ... geographic origin of
 - his or her or another person’s goods, services, or commercial activities.” 15 U.S.C. § 1125(a)(1)(B).

False Advertising Litigation

- A plaintiff asserting a claim for false advertising under this statute must establish:
 - (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his or another's product or service;
 - (2) the misrepresentation is material, in that it is likely to influence purchasing decisions;
 - (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience;
 - (4) the defendant placed the false or misleading statement in interstate commerce; and
 - (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation.

The Buy American Act and “Buy America” Domestic Preference Procurement Laws

Buy American Act

- Applies to direct federal procurement broadly (construction materials and supplies)
- *Distinguish from...*
- **Federal-Aid Buy Americaa Laws**
 - Iron and steel specific
 - Highway, transit, rail, drinking water and waste water federal-aid projects

The Buy American Act

- Preference since 1933 in federal procurement for U.S. mined or domestic end product;
- **The Buy American Act Test**
 - End product is considered domestic if it is:
 - Mined, produced or manufactured in the USA; and
 - The cost of its domestic components exceed fifty percent of the cost of all of its components;

The Buy American Act

Origin Considerations: End Products, Components, and Subcomponents

- BAA Looks At Origin of:
 - **End Product; and**
 - **Its Components**
- BAA Does Not Look to Origin of Earlier (Subcomponents) Precursor Inputs
- A “component” means an “article, material, or supply incorporated directly into an end product or construction material.”

The Buy American Act

“Manufacturing” Under the Buy American Act

- Second part of Buy American Act Test
- Similar to but different than the “Substantial Transformation” Test
- The basic standard is:
- If the operations performed on the foreign item create a new material or result in a substantial change in physical character, the item is manufactured in the United States.

The Buy American Act

Waivers of the Buy American Act Requirements

- *Use Abroad*
- *Public Interest*
- *Unreasonable Cost*
- *Unavailability*
- *Statutory waivers (micro-purchase, COTS)*
- *Exceptions Under Various International Agreements*

The Buy American Act

Buy American Act is Waived by Certain Trade Agreements

- Together, current trade agreements result in the waiver of the **Buy American Act** for certain products from 45 countries. These waivers are authorized by the Trade Agreements Act of 1979 (“TAA”) and are limited to procurements that:
 1. Are conducted by the federal entities covered by an agreement;
 2. Exceed dollar thresholds established in each agreement (as adjusted); and
 3. Involve certain categories of products.
- Agreements include NAFTA’s Chapter 10, WTO’s Government Procurement Agreement

The Buy American Act

Violations

- Contracting Officers will review allegations of Buy American Act violations
 - Unless fraud is suspected, the contractor will be notified of the apparent unauthorized use of foreign construction material who must reply and include proposed corrective action that may include
 - Requiring the removal and replacement of the unauthorized foreign construction material
 - If removal is impracticable the contracting officer may determine in writing that the foreign construction material need not be removed and replaced but contractor is still subject to :
 - Suspension
 - Debarment
 - Contractual remedies: Reduced contract price or contract termination
 - Fraudulent noncompliance may result in criminal charges!

Executive Order 13788 “Buy American and Hire American”

- Executive Order 13788 “Buy American and Hire American” was signed by President Trump on April 18, 2017. The order seeks to improve the administration of existing Buy American laws in order to “maximize domestic content” in government acquisitions.

Executive Order 13788 “Buy American and Hire American”

150 Days:

- EO 13788 directs federal agencies to, within 150 days:
 - 1) Assess enforcement, implementation and compliance with applicable Buy American laws;
 - 2) Assess the use of waivers to avoid Buy American laws and to construe them narrowly going forward; and
 - 3) Make recommendations to strengthen policies to maximize the use of materials produced in the United States, including steel, iron, aluminum and cement in federal procurements and federal financial assistance awards.

Executive Order 13788 “Buy American and Hire American”

60 Days:

- The order directs the Secretaries of Commerce and Director of the Office of Management and Budget (OMB), in consultation with the Secretaries of Labor and State as well as the United States Trade Representative (USTR) and Federal Acquisition Regulatory (FAR) Council to issue guidance to federal agencies concerning how to assess current policies and develop policies to implement the Buy American objectives of the order. Agency findings are required to be submitted to the Commerce Secretary and Director of OMB.

Executive Order 13788 “Buy American and Hire American”

150 Days:

- The order directs the Secretary of Commerce and the USTR to assess the impacts of all U.S. free trade agreements and the WTO Government Procurement Agreement on the operation of Buy American laws within 150 days of the date of the order.

Executive Order 13788 “Buy American and Hire American”

220 Days:

- The OMB Director, Secretaries of Commerce and State and the USTR will also be required under the order to submit a report to the President on the findings of the required agency reviews, which is also to include specific recommendations to strengthen implementation of Buy American laws within 220 days of the order.

EO 13788 Seeks to Rein in Use of Waivers

- Relative to waivers of Buy American laws, the order directs agencies to narrowly construe “public interest” waivers provided under various Buy American laws to ensure the maximum utilization of goods, products, and materials produced in the United States.
- The order directs:
 - public interest waivers be rendered by agency heads and
 - agencies to take into consideration unfair trade practices that may have resulted in cost advantages.

EO 13788 Applies Origin Standard for Iron and Steel Products

- The order establishes a standard for domestic origin of iron and steel that treats as “produced in the United States” those iron and steel products for which “all manufacturing processes, from the initial melting stage through the application of coatings” occurred in the United States.
- Often referred to as “melt and pour,” standard has been employed in existing federal Buy America policies since enactment of 1982 Buy America law applied to federal assistance for surface transportation infrastructure

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