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# Implications and Effects of the FTC's Decision to Retain the "All or Virtually All" Standard

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## COMMENT

### IMPLICATIONS AND EFFECTS OF THE FTC'S DECISION TO RETAIN THE "ALL OR VIRTUALLY ALL" STANDARD

I.	INTRODUCTION .....	728
II.	THE LEGAL MEANING OF "MADE IN USA" .....	730
	A. <i>U.S. Customs Regulations</i> .....	730
	B. <i>FTC Regulations</i> .....	732
III.	FTC CONSIDERS CHANGING ITS TRADITIONAL STANDARD FOR REGULATING UNQUALIFIED "MADE IN USA" LABELING CLAIMS .....	733
	A. <i>Background and Reasons Compelling the FTC to Consider Changing Its "All or Virtually All" Standard</i> .....	733
	B. <i>FTC's Newly Proposed Standard for "Made in USA" Labeling Claims</i> .....	735
	1. Percentage Content Safe Harbor & Its Problems .....	736
	2. Processing Safe Harbor & Its Problems .....	738
IV.	FTC DECIDES TO RETAIN THE "ALL OR VIRTUALLY ALL" STANDARD .....	739
	A. <i>The Driving Forces Behind the FTC's Decision to Retain the "All or Virtually All" Standard</i> .....	739
	B. <i>The FTC Enforcement Policy Statement</i> .....	740
V.	IMPLICATIONS & POTENTIAL EFFECTS OF THE FTC'S DECISION ON THE CONSUMER ELECTRONICS INDUSTRY IN THE WESTERN HEMISPHERE .....	742

VI.	POSSIBLE SOLUTIONS FOR THE RECURRING CONFLICTS BETWEEN INTERNATIONAL ECONOMIC FORCES AND THE REGULATION OF "MADE IN USA" LABELING CLAIMS .....	745
VII.	CONCLUSION .....	747

## I. INTRODUCTION

It is common knowledge that the world's economies are becoming increasingly interdependent.<sup>1</sup> Such economic change causes nations to constantly analyze and reevaluate how their laws serve the functions that they were originally designed to accomplish, and to consider whether such functions are still desirable.

Of particular interest is the increased interdependence between the United States, Canada, and Mexico brought about by the North American Free Trade Agreement<sup>2</sup> (NAFTA), and the effects that this interdependence has had on the consumer electronics industry. NAFTA has helped to fuel the growth in the consumer electronics industry in Mexico, which currently hosts about 658 electronics-related manufacturing plants.<sup>3</sup> These plants produce both final and sub-component consumer electronics products.<sup>4</sup> As a result, some products that were once produced in the U.S. domestic market are now produced in Mexico in enormous quantities.<sup>5</sup>

However, many consumer electronics manufacturers still produce their products in the United States<sup>6</sup> to take advantage of marketing their products under the unqualified<sup>7</sup> "Made in USA"

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1. See MICHAEL STEWART, *THE AGE OF INTERDEPENDENCE: ECONOMIC POLICY IN A SHRINKING WORLD* 19 (1983).

2. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., available in 32 I.L.M. 612 (1993).

3. See Susan Avery, *Electronics Say Si to Maquilas*, Plants Sites & Parks Magazine (July/Aug. 1997) <<http://www.bizsites.com/PastPres/JA97/indoutside.html>>.

4. See *id.*

5. See Bloomberg News, *NAFTA Results Prove Popular: Economies Thrive in Three Nations*, MIAMI HERALD, Dec. 30, 1998, at 2C.

6. See Consumer Electronics Manufacturers Association, *Consumer Electronics & the U.S. Economy: Factoids Online* (visited May 23, 1999) <<http://www.cemacity.org/cemacity/govt/vfiles/page1.htm>>.

7. An unqualified "Made in USA" label is one that does not make any reference to

label.<sup>8</sup> The Federal Trade Commission (FTC) has the power to regulate the use of manufacturer's U.S. origin claims, and to see that consumers are protected against fraud and deception from manufacturers.<sup>9</sup> However, it is becoming increasingly difficult for such manufacturers to comply with the current FTC standards regarding unqualified "Made in USA" labeling.<sup>10</sup>

This comment analyzes the FTC's "Made in USA" regulation and its relation with the consumer electronics industry as it has developed after the enactment of NAFTA, and argues that the FTC's use of the "all or virtually all" standard does not comport with current global economic realities. Therefore, the FTC will continue to encounter immense pressure to change this standard.

Part II examines the regulatory bodies charged with the authority to regulate unqualified "Made in USA" claims that manufacturers place upon products and the rules these regulatory bodies apply. Specifically, the FTC and the U.S. Customs both regulate products and how products may be marked.

Part III discusses the reasons why the FTC considered changing its current "all or virtually all" standard for "Made in USA" labeling claims. The FTC's newly proposed standard and its two safe harbor provisions are examined. The difficulties with these two safe harbor provisions are analyzed as well.

Part IV describes the ultimate position that the FTC took with regard to unqualified "Made in USA" claims and illuminates the driving forces behind its decision. This part also briefly highlights the FTC's newly issued enforcement policy statement on U.S. origin claims.

Part V analyzes some of the potential effects of the FTC's decision to retain its "all or virtually all" standard for unqualified "Made in USA" claims on the consumer electronics industry in the Western Hemisphere. Part V also concludes that the FTC

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the amount of domestic and/or foreign content and labor that composes a particular product. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,770 (1997).

8. See Electronic Indus. Ass'n, *Comments of Electronic Industries Association in Response to Supplemental Federal Trade Commission Questions on "Made in U.S.A." Labeling: "Made in U.S.A. Policy Comment,"* FTC File No. P894219 (July 1996) <<http://www.cemacity.org/cemacity/govt/files/ftc796.htm>>.

9. See 15 U.S.C. §45(a) (1998).

10. See Electronic Indus. Ass'n, *supra* note 8.

will continue to face these same issues in the near future, and that the FTC must provide manufacturers with clearer standards consistent with current global economic realities. Finally, Part V offers several possible solutions to the problems associated with the current FTC regulation, and analyzes their effects, using the consumer electronics industry as an example.

## II. THE LEGAL MEANING OF "MADE IN USA"

Both the FTC and the United States Customs Service (U.S. Customs) regulate unqualified "Made in USA" labels.<sup>11</sup> Any standard that the FTC adopts must not conflict with the standard that the U.S. Customs uses.<sup>12</sup>

### A. U.S. Customs Regulations

The United States began regulating country of origin marking on products with the passage of The Tariff Act of 1890.<sup>13</sup> Congress codified the fundamental principles underlying the 1890 Act in the Tariff Act of 1930,<sup>14</sup> and the rules regulating marking remain essentially the same today.<sup>15</sup> The intention of the statute was to make the country of origin of an imported product known to the ultimate purchaser so that they would be able to buy or refuse to buy if such marking made a difference to them.<sup>16</sup> The Tariff Act of 1930 required each imported item of merchandise to bear the name of its country of origin in plain English.<sup>17</sup>

The U.S. Custom's regulations become more complicated when a product is both imported and further processed in the United States. Under federal regulations the "ultimate purchaser" is the last person in the United States to receive an article in its imported form.<sup>18</sup> If the article is intended for

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11. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,767 (1997).

12. See *id.*

13. Tariff Act of 1890, ch. 1244, 2504, 26 Stat. 567, 613 (1891) (codified at 19 U.S.C. § 1304 (1994)).

14. Tariff Act of 1930, 19 U.S.C. §§ 1303-1677h (1930).

15. See Donna L. Bade, *Beyond Marking: Country of Origin Rules and the Decision in CPC International*, 31 J. MARSHALL L. REV. 179, 180 (1997).

16. See *id.* (citing *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 (1940)).

17. See 19 U.S.C. §1304(a) (1994).

18. See 19 C.F.R. § 134.1(d) (1996).

manufacture within the United States, the U.S. manufacturer is the ultimate purchaser.<sup>19</sup> In order for the U.S. manufacturer to be able to label a product as "Made in USA," the U.S. manufacturing process must "substantially transform" the product.<sup>20</sup> The substantial transformation test originated in case law whereby it meant that after processing an article must acquire "a new name, character, and use" after processing in the United States.<sup>21</sup> Currently, U.S. Customs defines substantial transformation as a manufacturing or other process that results in a new and different article of commerce, "having a new name, character, and use that is different from that which existed prior to processing."<sup>22</sup>

For goods imported into the United States under NAFTA, the U.S. Customs applies both its substantial transformation test as well as NAFTA's tariff-shift requirements.<sup>23</sup> Under the latter, the country of origin of imported goods (other than textiles) is the country in which the good is either wholly obtained or produced, or produced exclusively from domestic materials, or where each foreign material used in that good undergoes a change in tariff classification as set out in §102.20.<sup>24</sup>

Thus, U.S. Customs uses the substantial transformation test and the tariff-shift test for NAFTA goods as threshold barriers that a product must overcome in order to be exempt from carrying a foreign country of origin marking. Yet, this does not mean that if a product passes the substantial transformation test and the NAFTA tariff-shift test it must be labeled "Made in USA." Nor does this mean that if a product passes both the substantial transformation test and the NAFTA tariff-shift test and it is labeled "Made in USA," that it will be in compliance with the standards adopted by the FTC. Rather, this means that in order for a manufacturer or marketer to label a product as "Made in USA," the product must comply with both the U.S. Customs and FTC regulations.

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19. See 19 C.F.R. § 134.1(d)(1) (1996).

20. *Id.*

21. See *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267, 273 (1940).

22. Rules of Origin Applicable to Imported Merchandise, 59 Fed. Reg. 141 (1994) (internal quotes omitted).

23. See 19 C.F.R. § 102 (1996). See also *CPC Int'l Inc. v. United States*, 933 F. Supp. 1093, 1098 (Ct. Int'l Trade 1996). See generally *Bade*, *supra* note 15, at 189-191.

24. See 19 C.F.R. § 102.11 (1996).

### B. *FTC Regulations*

The FTC derives its authority to regulate U.S. origin claims from The Federal Trade Commission Act,<sup>25</sup> which prohibits “unfair or deceptive acts or practices.”<sup>26</sup> In its Deceptive Policy Statement, the Commission, in interpreting its authority under The Federal Trade Commission Act, stated that it will find an advertisement or label deceptive if it contains a material representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances.<sup>27</sup> Thus, implicit in objective U.S. origin claims is the assumption that the marketer possesses and relies upon a reasonable basis to substantiate the claim.<sup>28</sup>

Throughout the past 50 years, the FTC has established through case law that it is deceptive for a marketer to promote a product with an unqualified “Made in USA” claim unless that product is wholly of domestic origin.<sup>29</sup> Federal statutory law has been silent on the specific use of the label “Made in USA.”<sup>30</sup> However, in 1994 Congress Passed the Violent Crime Control and Law Enforcement Act, which added 15 U.S.C. § 45(a).<sup>31</sup> Section 45(a) states that “Made in the USA,” “Made in America,” or equivalents of such labels can be used only if they are consistent with FTC orders and decisions.<sup>32</sup> Section 45(a) also authorizes the FTC to periodically consider an appropriate percentage of imported components which may be included in the product and still be reasonably consistent with such decisions and orders.<sup>33</sup>

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25. 15 U.S.C. § 45(a) (1998).

26. 15 U.S.C. § 45(a)(2) (1998).

27. See Letter from the Commission to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), reprinted in *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, app. (1984).

28. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,767 (1997).

29. See *In re Windsor Pen Corp.*, 64 F.T.C. 454 (1964); *In re Vulcan Lamp Works, Inc.*, 32 F.T.C. 7 (1940).

30. See John M. Haurykiewicz & Matt Luxton, *FTC Considers Standards for Using “Made in USA” Label* (last modified Aug. 5, 1996) <<http://www.faegre.com/areas/areaip17.html>>.

31. 15 U.S.C. § 45(a) (1998).

32. See *id.*

33. See *id.*

Also, in 1994, the FTC further refined what "Made in USA" meant by adopting the "all or virtually all" standard. In two 1994 cases, the FTC stated that a product advertised as "Made in USA" must be "all or virtually all"<sup>34</sup> made in the United States.<sup>35</sup> Regardless of whether the standard was termed "wholly domestic" or "all or virtually all," the FTC has generally treated unqualified claims of domestic origin as claims that the product is in all but de minimis amounts made in the United States.<sup>36</sup> However, there has been increased pressure, due to global economic forces, on the FTC to dispose of its "all or virtually all" standard.

### III. FTC CONSIDERS CHANGING ITS TRADITIONAL STANDARD FOR REGULATING UNQUALIFIED "MADE IN USA" LABELING CLAIMS

The FTC has reevaluated its "all or virtually all" standard, and has proposed new standards to regulate U.S. origin claims.

#### A. *Background and Reasons Compelling the FTC to Consider Changing Its "All or Virtually All" Standard*

The controversy surrounding the FTC's "all or virtually all" standard for unqualified "Made in USA" claims originated in 1994 with the FTC accusing New Balance Athletic Shoe,

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34. The phrase "all or virtually all" has been interpreted to mean anywhere from 98% or more domestic content. See Eric Schmitt, *Bid to Relax Labeling Standards Gets Flayed in the USA*, SAN DIEGO UNION-TRIB., Dec. 7, 1997, at A46.

35. *In re Hyde Athletic Indus., Inc.*, File No. 922-3236 (F.T.C. Sept. 20, 1994)(WL, Fed. Antitrust & Trade Regulation Database, F.T.C. Decisions Identifier); *In re New Balance Athletic Shoes, Inc.*, Docket No. 9268 (Sept. 6, 1994)(WL, Fed. Antitrust & Trade Regulation Database, F.T.C. Decisions Identifier). These cases first introduced the "all or virtually all" language which came to be known as the FTC's traditional standard for enforcing its "Made in USA" regulations. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997).

36. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997). See Kathyleen A. O'Brien, *When Is a Product "Made in U.S.A."? New FTC Guidelines for Manufacturers in the Global Marketplace*, in ADVERTISING LAW IN THE NEW MEDIA AGE, 443-447 (Jefferey S. Edelstein chair, PLI Corporate Law and Practice Course Handbook Series No. B4-72-2, 1997). The author points out that "all or virtually all" means that "all or virtually all" of a product's component parts were made in the United States and that "all or virtually all" of the assembly work was performed in the United States. See *id.* at 445.



Incorporated,<sup>37</sup> and Hyde Athletic Industries<sup>38</sup> of violating the rarely enforced standard. New Balance produced most of its shoes in its factories in the United States, but many of those shoes used outer soles that were imported from China.<sup>39</sup>

After the FTC made these accusations, New Balance sought the help of the congressional delegations of Maine and Massachusetts, where it employs 1,300 workers, and initiated a campaign for more flexible standards on products that originate in the United States.<sup>40</sup> Footwear lobbyists then brought together similarly situated trade groups that represented manufacturers of bicycles, furniture, candy, luggage, and other products, and sought the help of about thirty congressmen.<sup>41</sup> Some of these manufacturers stated that the “all or virtually all standard” must be changed because it is “impossible to meet and unrealistic in today’s global economy,”<sup>42</sup> and it is “unreasonably restrictive in light of modern commercial realities.”<sup>43</sup>

The manufacturers and congressmen were able to effectively influence the FTC to rethink its current regulations. In July 11, 1995, the FTC announced that it would comprehensively review U.S. origin claims and examine whether its traditional “all or virtually all” standard for evaluating such claims “remained consistent with consumer perceptions and continued to be appropriate in today’s global economy.”<sup>44</sup> Director of the FTC’s Bureau of Consumer Protection, Jodie Bernstein, said, “[U]nderstanding what the claim means to consumers is difficult given today’s world marketplace.”<sup>45</sup> The FTC stated that in its review and in considering new guidelines, it wants to ensure that consumers are not deceived when they see a “Made in USA” label, and also make sure that American manufacturers have enough flexibility to meet global competition.<sup>46</sup> Thus, the FTC

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37. See Schmitt, *supra* note 34, at A46.

38. See Thomas G. Donlan, *Made in USA? The FTC Practices Protection Politics*, BARRON’S, Dec. 8, 1997, at 70.

39. See Schmitt, *supra* note 34, at A46.

40. See *id.*

41. See Donlan, *supra* note 38, at 70.

42. Haurykiewicz, *supra* note 30.

43. O’Brien, *supra* note 36, at 445.

44. Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997).

45. *FTC Wants to Alter “Made in USA” Standards* (last modified May 5, 1997) <<http://lubbockonline.com/news/050697/ftcwants.htm>>.

46. See *id.*

engaged in a two-year comprehensive review of "Made in USA" and other U.S. origin claims in product advertising and labeling, which included a two-day public workshop and a request for public comments.<sup>47</sup>

### B. *FTC's Newly Proposed Standard for "Made in USA" Labeling Claims*

After reviewing consumer perception evidence, public comments, and the workshop proceedings, the FTC proposed, on May 7, 1997, to adopt a new set of guidelines for the use of "Made in USA" claims, and once again sought public comment on the proposed guidelines.<sup>48</sup> Such guidelines are administrative interpretations of laws administered by the FTC.<sup>49</sup> Guidelines, unlike rules and regulations, do not have the force of law, but they do provide the public with guidance as to how the FTC is likely to apply Section 45(a) to the use of "Made in USA" claims.<sup>50</sup>

Under the proposed guidelines, a marketer making an unqualified claim of U.S. origin must have a reasonable basis substantiating that "substantially all" of the product was made in the United States at the time it makes the claim.<sup>51</sup> In addition, the proposed new guidelines provide guidance to marketers as to how to meet this "substantially all" standard by including two alternative "safe harbors" under which an unqualified U.S. origin claim would not be considered deceptive.<sup>52</sup> Furthermore, the proposed guidelines would allow for marketers to make qualified

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47. See *FTC to Retain "All or Virtually All" Standard for "Made in USA" Advertising and Labeling Claims* (last modified Dec. 1, 1997) <<http://www.ftc.gov/opa/9712/musa2.htm>>.

48. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997). At the end of the FTC's extensive review, it concluded that most Americans valued the "Made in USA" label, but that few products are made with all-American parts and labor. See Schmitt, *supra* note 34, at A46.

49. See *FTC Proposes New Standard for "Made in USA" Claims; Agency Seeks Public Comment on New Proposal* (last modified May 5, 1997) <<http://www.cemacity.org/govt/files/ftcnews.htm>>.

50. See *id.* The proposed guidelines would not apply to automobiles, textile, and woolen or fur industries which are regulated by individual laws. See generally American Automobile Labeling Act 49 U.S.C. § 32,304 (1994); Textile Fiber Products Identification Act 15 U.S.C. § 70 (1958); Wool Products Labeling Act 15 U.S.C. § 68 (1980); and Fur Products Labeling Act 15 U.S.C. § 69 (1951).

51. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997).

52. See *id.*

U.S. origin claims where their products could not meet the standard for an unqualified "Made in USA" label.<sup>53</sup> Nearly all of the controversy is centered on the unqualified U.S. origin claims.<sup>54</sup>

## 1. Percentage Content Safe Harbor & Its Problems

The first safe harbor proposed by the FTC is known as the "percentage content"<sup>55</sup> safe harbor.<sup>56</sup> Under this provision, an unqualified U.S. origin claim would not be considered deceptive when the U.S. manufacturing costs constitute seventy-five percent of the total costs of manufacturing the product and the product is "substantially transformed" (under U.S. Customs Service standards) in the United States.<sup>57</sup>

This proposed safe harbor provision appears to allow manufacturers and marketers more flexibility in labeling their products with U.S. origin claims. First, the "percentage content" safe harbor would not interfere with U.S. Custom's regulations because the second part of the provision requires that the product be last "substantially transformed" in the United States under U.S. Custom's standards. Secondly, on its face it would seem to allow U.S. manufacturers who produce their products in the United States using some foreign inputs to effectively label their products as "Made in USA." However, there are problems with this proposed standard.

The first problem with using the "percentage content" safe harbor provision stems from the fact that currency rates fluctuate over time. Devaluation of the dollar versus other world currencies would make the foreign inputs that U.S. manufacturers use in their "Made in USA" products more

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53. *See id.*

54. *See generally* Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997).

55. "Percentage content" has been described as a calculation of the sum of the purchase cost of domestic parts and the cost of labor and overhead in assembly divided by the total product cost. *See* Haurykiewicz, *supra* note 30.

56. *See FTC Proposes New Standard for "Made in USA" Claims; Agency Seeks Public Comment on New Proposal, supra* note 49.

57. *See* Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997). *See generally* discussion *supra* § II(A) (defining "substantial transformation" under U.S. Customs Service standards).

expensive.<sup>58</sup> This, in turn, would increase the foreign costs that go into the calculation of the total product cost, which would result in a lower percentage of U.S. manufacturing costs comprising the total product cost. Thus, moderate or average currency fluctuations would not be much of an issue for those manufacturers who are well within the seventy-five percent U.S. content threshold. However, for those manufacturers who are hovering around the fringes of this seventy-five percent mark, currency fluctuations present a real problem.

Another problem with using the “percentage content” safe harbor derives from the fact that sourcing requirements change constantly as well.<sup>59</sup> Although a manufacturer may be in compliance with the “percentage content” safe harbor provision, it may lose a source of supply and have to settle for a more expensive replacement which might then disable it from using the “Made in USA” label.

Finally, using the “percentage content” safe harbor would present the significant problem of determining how many steps back in the manufacturing process should be considered in determining what the “percentage content” of a product is.<sup>60</sup> In determining the amount of U.S. and foreign costs that compose the total costs of a manufactured product, the “percentage content” standard does not instruct manufacturers as to how far back to look in the manufacturing process. For example, should a consumer electronics manufacturer be required to examine only one step back in the manufacturing process, such as the percentage of U.S. and foreign costs composing the manufacturer’s subassembly inputs? Or should the manufacturer be required to determine the percentages of U.S. and foreign costs that went into the metals that produced the raw materials which produced the subassembly inputs as well?

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58. See YAKOV AMIHU, EXCHANGE RATES AND CORPORATE PERFORMANCE 3 (Yakov Amihud & Richard M. Levich eds.) (1994) (discussing how currency fluctuations affect the prices of products).

59. See *Response of Electronic Industries Association to Federal Trade Commission Questions on “Made in USA” Labeling: “Made in USA Policy Comment,” FTC File No. P894219* (last modified Jan., 1996) <<http://www.cemacity.org/cemacity/govt/files/ftc196.htm>>.

60. This issue is particularly important in the consumer electronics industry where a typical electronics product is composed of raw materials such as transistors, capacitors, and wiring which are transformed into subassembly components such as populated circuit boards and hybrid modules, which are transformed into the final consumer electronics product. See *id.*

## 2. Processing Safe Harbor & Its Problems

The second safe harbor that the FTC proposed is known as the "processing" safe harbor.<sup>61</sup> Under this safe harbor, an unqualified U.S. origin claim would not be considered deceptive when the final product is last substantially transformed in the United States and all significant inputs into the final product are substantially transformed in the United States.<sup>62</sup>

This proposed safe harbor provision also seems like a viable solution to the current difficulties that manufacturers have in complying with the "all or virtually all standard." Once again, the FTC uses the "substantial transformation" language that the U.S. Customs Service also utilizes so that both the finished products and imported component parts will be exempt from carrying a foreign country of origin marking.<sup>63</sup> Also, it seems fair that if both a product and all of its significant inputs pass the "substantial transformation" test, then the product could be labeled and marketed as "Made in USA."

However, as with the "percentage content" safe harbor, the "processing" safe harbor would present many difficulties if adopted in its current form. First, the term "significant" is not defined in the draft guidelines or accompanying materials and it is not a term of art under the U.S. Customs law.<sup>64</sup> Thus, it is unclear how the FTC would apply this term. If the FTC begins rigorously enforcing its regulations, as some believe it will,<sup>65</sup> this undefined term could lead to much litigation.

Another problem associated with the "processing" safe harbor provision prevalent in the consumer electronics industry is that although the final product and its significant inputs may be substantially transformed in the United States, the product

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61. See *FTC Proposes New Standard for "Made in USA" Claims; Agency Seeks Public Comment on New Proposal*, *supra* note 49.

62. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997). See generally discussion *supra* § II(A) (defining "substantial transformation" under U.S. Customs Service standards).

63. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997).

64. See Michael E. Fine, *Summary of Proposed "Made in USA" Advertising Guidelines* (last modified May, 1997) <<http://www.pgfm.com/publications/ftc1.html>>.

65. See Stacey Singer, "Made in USA" Standard Intact: Letters Prompt FTC to Reject Call for Looser Product Content Labeling, *SUN-SENTINEL* (Ft. Lauderdale, Fla.), Dec. 4, 1997, at 10B.

could contain a significant amount of foreign parts. For example, a U.S. consumer electronics product such as a compact disc player could be substantially transformed in the United States; the compact disc player's subassemblies could be substantially transformed in the United States; yet all of the parts could be of foreign origin and the compact disc player could effectively be labeled "Made in USA." Although a product produced in such a manor could be safe under the "processing" safe harbor, to some people, it might seem un-American to label it "Made in USA."

#### IV. FTC DECIDES TO RETAIN THE "ALL OR VIRTUALLY ALL" STANDARD

After reviewing the public's reaction to the newly proposed standard and its safe harbor provisions, the FTC decided on December 1, 1997, to retain the "all or virtually all standard."<sup>66</sup>

##### A. *The Driving Forces Behind the FTC's Decision to Retain the "All or Virtually All" Standard*

The FTC received over 1,000 written responses to the proposed guides.<sup>67</sup> A large majority of these responses were negative and firmly rejected loosening the "all or virtually all standard."<sup>68</sup> Also, a well-financed coalition of labor unions, consumer groups, and domestic manufacturers lobbied hard on Capitol Hill to prevent the proposed changes from taking effect.<sup>69</sup>

The large negative response overwhelmed the FTC, but its decision to discard the newly proposed standard was most influenced by Congress signing resolutions to retain the "all or virtually all standard."<sup>70</sup> Finally, the Commission voted 4-0 to keep the traditional standard.<sup>71</sup>

There were three predominant concerns that formed the foundation for the large negative reaction to the FTC's proposed

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66. See Schmitt, *supra* note 34, at A46.

67. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,757 (1997).

68. See Bruce Ingersoll, *FTC Reverses Its Plan to Relax Policy Governing Some 'Made in USA' Labels*, WALL ST. J., Dec. 2, 1997, at A6.

69. See *id.*

70. See *id.* A majority of the House, 226 members, sponsored a resolution to retain the "all or virtually all standard," and the Senate sponsored its own resolution. See *id.*

71. See *id.*

new standard. First, commentators stated that changing the current standard would deceive or confuse consumers who desire to buy American products, leaving them unable to determine whether a product was truly made in the United States.<sup>72</sup> Second, the public comments stated that if the proposed standard were adopted, the American manufacturing base would be harmed because companies would have less incentive to use domestic labor and product components.<sup>73</sup> Thus, American jobs would be imperiled because companies would seek out less expensive foreign sources.<sup>74</sup> Lastly, commentators expressed concern that weakening the standard would deny manufacturers, whose products were "all or virtually all" made in the USA, the marketing advantage attributable to labeling products as "Made In USA."<sup>75</sup>

Thus, it appears that manufacturers, labor unions, and consumer groups were able to effectively lobby their respective concerns for marketing advantages, domestic job retention, and preventing consumer deception. The intense public reaction and the underlying concerns previously discussed compelled the FTC to retain its "all or virtually all" standard. Although the FTC did not change its traditional standard, it did issue an enforcement policy statement which aims to clarify FTC regulation of U.S. origin claims.

### *B. The FTC Enforcement Policy Statement*

On December 2, 1997, the FTC published its enforcement policy statement on U.S. origin claims in the Federal Register.<sup>76</sup> The enforcement policy statement lists the general principles to which the FTC will adhere in enforcing the requirement that goods marketed as "Made in USA" must be "all or virtually all" made in the United States.<sup>77</sup> The FTC states that the enforcement policy statement is intended to provide guidance on making and substantiating U.S. origin claims, but because of the

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72. See Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,758 (1997).

73. See *id.*

74. See *id.*

75. See *id.* at 63,759.

76. See *id.* at 63,756.

77. See *id.* at 63,765

highly complex nature of factual scenarios in this area of law, issues will be resolved on a case-by-case basis.<sup>78</sup>

The Enforcement Policy Statement states that U.S. origin claims will be regulated using the "all or virtually all standard."<sup>79</sup> It also states that a marketer must possess and rely on a reasonable basis that a product is in fact all or virtually all made in the United States at the time an unqualified claim is made.<sup>80</sup> The statement then provides that there is no "bright line" test for determining when a product is or is not "all or virtually all" made in the United States, but there are a number of factors that the FTC will look to in making its determination.<sup>81</sup>

The first factor is that the final assembly or processing of the product must take place in the United States in order for a product to be considered "all or virtually all" made in the United States.<sup>82</sup> The FTC considers this factor important because consumer perception evidence shows that the country in which a product is put together or completed is highly significant to consumers in evaluating where the product is made.<sup>83</sup>

The second factor the FTC will consider is the portion of the total manufacturing costs of the product that are attributable to U.S. parts and processing.<sup>84</sup> Once again, the FTC states that there is no fixed point at which all products are considered to be "all or virtually all" made in the United States.<sup>85</sup> However, the FTC stated that it would balance the proportion of U.S. manufacturing costs along with the other factors and take into account the nature of the product and the consumers' expectations.<sup>86</sup>

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78. *See id.*

79. *See id.* at 63,768. *See also* discussion *supra* § II(B) (describing the FTC's "all or virtually all" standard).

80. *See id.* The enforcement policy statement also states that although a product is last substantially transformed in the United States, if the product is thereafter assembled or processed (beyond de minimis finishing process) outside the United States, the Commission is unlikely to consider that product to be all or virtually all made in the United States. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.* at 63,769.

86. *See id.* The FTC puts forth an example and states that when a product has an extremely high amount of U.S. content, any potential deception resulting from an unqualified "Made in USA" claim is likely to be very limited, and therefore the costs of



The final factor the FTC will consider is how far removed from the finished product the foreign content is for purposes of determining whether any foreign content in a product will prevent the product from being marketed as "Made in USA."<sup>87</sup> The FTC states that, in determining the percentage of U.S. content in a product, a marketer should look far enough back in the manufacturing process that a reasonable marketer would expect that it had accounted for any significant foreign content.<sup>88</sup>

As an additional guideline, the FTC stated that 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.<sup>89</sup> The FTC explained that marketers could make claims about specific processes or parts.<sup>90</sup>

Due to the contextual nature of the FTC's factors and guidelines for enforcing the "all or virtually all standard," the FTC declared that it would make determinations with regard to enforcing such regulations on a case-by-case basis.<sup>91</sup>

#### V. IMPLICATIONS & POTENTIAL EFFECTS OF THE FTC'S DECISION ON THE CONSUMER ELECTRONICS INDUSTRY IN THE WESTERN HEMISPHERE

The first implication of the FTC's decision to retain the "all or virtually all" standard is that the FTC will start to enforce its U.S. origin regulations more stringently. In the years past when trade barriers were up and international economic

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bringing an enforcement action challenging such a claim are likely to substantially outweigh any benefit that might accrue to consumers and competition. *See id.*

87. *See id.*

88. *See id.* The FTC states that a manufacturer who purchases a component from a U.S. supplier should not automatically assume that the component is 100% U.S. made, but should inquire of the supplier as to the percentage of U.S. content in the component. *See id.* Of particular significance to consumer electronics manufacturers, the FTC stated that its main concern is with the immediate inputs of the final product (subassemblies) and the parts that make up such immediate inputs. *See id.* The FTC is not too concerned with raw materials, such as steel, which is likely to constitute a very small portion of the total cost of the final product. *See id.*

89. *See id.* As examples of such acceptable qualified claims the FTC listed: "Made in USA of U.S. and imported parts"; "60% U.S. content"; "Made in USA from imported leather"; and "Made in USA from French components." *See id.* at 63,770.

90. *See id.*

91. *See* Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,765 (1997).

interdependence was uncommon, it was relatively easy to determine whether a product was "Made in USA" or not.<sup>92</sup> Now, with many U.S. manufactured products containing much foreign input, it is more difficult to make such a determination. The FTC will face increased pressure from both sides of the issue<sup>93</sup> and consequently will have to start enforcing its rules.<sup>94</sup> This implication weighs heavily on consumer electronics manufacturers in the United States because such products, which generally contain many foreign input parts, are likely to be targets for the FTC's increased scrutiny.

Secondly, the FTC's guidelines are unclear and ambiguous. Although the FTC does provide the factors it will consider in enforcing its regulations, it does not provide marketers with clear guidelines that, if followed, would keep their claims safe from attack by the FTC.<sup>95</sup> The FTC even states that its standard provides no "bright line" or specific percentage to establish when a product is or is not "all or virtually all" made in the United States.<sup>96</sup> This ambiguous standard has some marketers confused about how it affects their company.<sup>97</sup> A manufacturer of consumer electronics, which uses much foreign input in its final product, will likely encounter much confusion and difficulty in trying to comply with this unclear standard.<sup>98</sup> Many of these manufacturers will likely be charged with violating the FTC regulations due to the ambiguous nature of the standard coupled with the expected increased enforcement of the regulations.<sup>99</sup>

The last implication of the FTC's decision to retain its "all or virtually all" standard is the potential economic effects it will have upon the consumer electronics industry in the Western

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92. See O'Brien, *supra* note 36, at 445.

93. This refers to consumer groups, manufacturers, and unions desiring a strict no or low foreign content rule versus their counterparts who would like a more lenient rule that would mirror current global economic realities.

94. Commissioner Roscoe Starek III stated, "I expect to see the traditional 'Made in USA' standard enforced, so that we no longer labor under the self-imposed moratorium that consumed several years while we explored various policy options." Singer, *supra* note 65.

95. See Ingersoll, *supra* note 68, at A6.

96. See Associated Press, *Labeling Ruling Confuses: Shoe Firm Debates "Made in USA,"* BANGOR DAILY NEWS, Dec. 3, 1997.

97. A spokeswoman for New Balance Athletic Shoe Inc., which uses soles made overseas because such soles are not available in the United States, stated that she is unsure how the decision affects the company. See *id.*

98. See *id.*

99. See Singer, *supra* note 65.

Hemisphere. As previously discussed, one of the driving forces behind the FTC's decision to retain its "all or virtually all" standard was the fear that manufacturers would move production offshore if the standard was relaxed.<sup>100</sup> Ironically, the FTC's decision to retain this standard may actually have the same economic effect the FTC intended to prevent. If manufacturers cannot take advantage of the "Made in USA" label under the current standard, then they have one less incentive to keep their production facilities in the United States. Therefore, even by retaining the standard at its current level, the FTC might actually encourage U.S. manufacturers to shift production offshore. Moreover, because consumer electronics manufacturers use substantial amounts of foreign inputs in their products, this decision could have a potentially large impact upon this industry.

Under the current "all or virtually all" standard, a consumer electronics manufacturer making a product with a large amount of U.S. content (i.e. eighty-five percent) receives the same treatment as a manufacturer making a similar competing product that contains very little U.S. content but was last substantially transformed in the United States or went through the tariff-shift rules under NAFTA.<sup>101</sup> Neither product requires a foreign country of origin marking under U.S. Custom's rules, nor will these products be able to carry a U.S. origin label because they do not pass the FTC's "all or virtually all" test. Thus, the current state of FTC regulation provides no marketing incentive for the manufacturer that uses eighty-five percent U.S. inputs in its products to manufacture products in the United States.

Also, it is common knowledge that the costs of U.S. labor and input products are relatively higher than the costs of the same manufacturing inputs in foreign nations. Since the costs of manufacturing in the United States are relatively expensive, increased price pressure on those consumer electronics manufacturers who use a large amount of U.S. content, but who cannot meet the threshold to make U.S. origin claims, will likely force them to shift more production to other countries such as Mexico. It makes good business sense to shift production abroad if a consumer electronics manufacturer, facing price pressure

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100. See discussion *supra* § IV(A) (discussing the driving force behind the FTC's decision).

101. See Christopher Brewster, *We May Soon Regret the FCC's Lack of Courage*, NAT'L L.J., Jan. 12, 1998, at 1.

from foreign competition, cannot receive any marketing advantage by utilizing a large percentage of U.S. inputs in their products. The current standard makes it too expensive for U.S. consumer electronics manufacturers to comply with the "all or virtually all" standard in order to gain a "Made in USA" marketing advantage. Thus, under the current FTC regulations, some of the remaining U.S. consumer electronics manufacturers will shift production to foreign countries because they will not receive any marketing advantages by producing in the United States.

#### VI. POSSIBLE SOLUTIONS FOR THE RECURRING CONFLICTS BETWEEN INTERNATIONAL ECONOMIC FORCES AND THE REGULATION OF "MADE IN USA" LABELING CLAIMS

The FTC will increasingly face pressure, due to international economic forces, to change its "all or virtually all" standard. As described above, the FTC's standard, if more strictly enforced, may cause some current U.S. manufacturers to lobby even harder for a more realistic standard in light of current global economic realities. But even more importantly, the FTC must provide marketers and manufacturers with clearer standards before strictly enforcing its regulations.

The first possible solution to the problem of the FTC's regulations being unclear and unconnected with current global economic realities is that Congress could pass special legislation regulating labeling requirements for particular industries. Congress has already done this for some industries,<sup>102</sup> and could certainly do the same for an industry such as the consumer electronics industry. Legislative-based regulation of U.S. origin claims has the advantage of allowing industries such as consumer electronics to be regulated in light of current economic realities because such legislation could be designed to both protect consumers and still encourage U.S. manufacturing. After all, it is almost impossible for an U.S. consumer electronics manufacturer to produce a product composed of entirely or almost entirely U.S. content. Additionally, legislative-based regulation would be industry-specific so that the FTC's "all or

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102. See generally American Automobile Labeling Act 49 U.S.C. § 32,304 (1994); Textile Fiber Products Identification Act 15 U.S.C. § 70 (1958); Wool Products Labeling Act 15 U.S.C. § 68 (1980); Fur Products Labeling Act 15 U.S.C. § 69 (1951).

virtually all" standard would continue to apply to all products not within the narrow scope of the special legislation. Such industry-specific legislation would be a much less dramatic shift in regulation than had the FTC's proposed guidelines been adopted.

If the FTC decides to change its standard, then it should adopt the previously proposed "substantially all" standard.<sup>103</sup> This standard was created through much time and effort and appears to be appropriate if the current standard is relaxed and the problems with the safe harbor provisions are worked out.<sup>104</sup>

However, if the FTC decides to retain its "all or virtually all" standard it must provide marketers with clearer standards for enforcement. Under the current "all or virtually all standard," the FTC could still require a *de minimis* foreign content requirement but, by amending its regulations, the FTC could allow manufacturers to use more than *de minimis* foreign content where they can show that after a diligent search no similar U.S. substitutes for the foreign inputs were found. Of course, the FTC would have to set a specific percentage ceiling on foreign content allowed. A figure such as seventy percent U.S. content would be reasonable. This does not mean that as long as the U.S. content composes seventy percent of the product the manufacturer is safe. Rather, if domestic substitute parts are available for the foreign parts used in the product, and the manufacturer knew or reasonably should have known of their availability, the manufacturer would be in violation of the FTC's regulations if it used foreign parts, even if the resulting U.S. content of its final product is higher than seventy percent.

This solution would enable U.S. manufacturers who currently produce their products in the United States and use more than *de minimis* foreign content only because of the unavailability of domestic inputs to make "Made in USA" claims. It will also give these manufacturers a marketing incentive for producing their products in the United States and encourage them to utilize domestic inputs when available. Finally, a specific percentage figure will provide clearer guidance to manufacturers than the current FTC regulations.

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103. See discussion *supra* § III(B) (explaining the FTC's proposed "substantially all" standard).

104. See discussion *supra* §§ III(B)(1)-(2) (analyzing the problems associated with the "percentage content" and the "processing" safe harbor provisions of the FTC's proposed guidelines).

## VII. CONCLUSION

Due to the increasingly global nature of business, U.S. origin claims, which previously were infrequently regulated, have become a controversial area of the law. This can be seen by the immense pressure which forced the FTC to reevaluate and almost change its traditional standard for U.S. origin claims. The FTC's decision to retain its current standard might actually encourage U.S. manufacturers to shift production to countries with cheaper labor and input parts such as Mexico.

The guidelines set forth by the FTC are unclear and ambiguous. This further complicates the matter, as U.S. manufacturers cannot be sure whether they are complying with U.S. origin regulations. Also, the FTC by its words and actions made it known that it will start to enforce its regulations more regularly. Thus, more manufacturers are likely to face a challenge from the FTC. Such uncertainty might encourage U.S. manufacturers to shift production to other countries within the Western Hemisphere.

This issue promises to remain. The more globalized business becomes, and the more scarce U.S. domestic input products become, the more difficult it will be for U.S. manufacturers to comply with the FTC's "all or virtually all" standard for unqualified U.S. origin claims.<sup>105</sup> The FTC must therefore set out clear guidelines for whatever standard it adopts that take into account the current global economic realities.

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105. Of course a manufacturer can always make a qualified U.S. origin claim. However, qualified claims are not the subject of this comment because such claims carry with them their own complexities such as how to account for the percentage of foreign content in a product when the costs of input parts are constantly changing due to currency rate fluctuations. For a discussion on qualified U.S. origin claims, see generally Enforcement Policy Statement on U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997).

\* Juris Doctor candidate, May 2000, University of Miami School of Law. This article is dedicated to my amazingly wonderful wife Amy for all of her love and support. Also, special thanks to Professor Alan C. Swan for all of his valuable insight and guidance throughout the process of writing this Comment.