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September 14, 2020

VIA ELECTRONIC SUBMISSION

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: MUSA Rulemaking, Matter No. P074204: Notice of Proposed Rulemaking for Unqualified U.S.-Origin Claims

Dear Commissioners:

The Council for Responsible Nutrition (CRN) appreciates the opportunity to submit these comments to the Federal Trade Commission ("FTC" or "Commission") on its proposed rule relating to "Made in USA" and other unqualified U.S.-origin claims ("MUSA claims") on product labels.[1] CRN is the leading trade association for dietary supplement companies, representing more than 150 companies that manufacture and distribute these products.[2] CRN is providing comments in response to the FTC's July 16, 2020 Federal Register notice.

CRN supports FTC's efforts to police unfair and deceptive "Made in USA" and other U.S.-origin claims. CRN, however, has concerns related to the scope of this proposed rule and codifying a standard for unqualified U.S.-origin claims that is based on consumer perception data that has not been reanalyzed by the Commission in over 20 years.

The proposed rule prohibits companies from including unqualified U.S.-origin claims on product labels unless (1) final assembly or processing of the product occurs in the United States; (2) all

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[1] The proposed rule was published on July 16, 2020 in the Federal Register at 85 Fed. Reg. 43162.

[2] The Council for Responsible Nutrition (CRN), founded in 1973 and based in Washington, D.C., is the leading trade association representing dietary supplement and functional food manufacturers, marketers and ingredient suppliers. CRN companies produce a large portion of the functional food ingredients and dietary supplements marketed in the United States and globally. Our member companies manufacture popular national brands as well as the store brands marketed by major supermarkets, drug stores and discount chains. These products also include those marketed through natural food stores and mainstream direct selling companies. CRN represents more than 150 companies that manufacture dietary ingredients, dietary supplements and/or functional foods, or supply services to those suppliers and manufacturers. Our member companies are expected to comply with a host of federal and state regulations governing dietary supplements and food in the areas of manufacturing, marketing, quality control and safety. Our supplier and manufacturer member companies also agree to adhere to additional voluntary guidelines as well as to CRN's Code of Ethics. Learn more about us at www.crnusa.org.

significant processing that goes into the product occurs in the United States; and (3) all or virtually all ingredients or components of the product are made and sourced in the United States.

The proposed rule would also regulate unqualified U.S.-origin claims appearing in "mail order catalog and mail order promotional material," which the proposed rule defines broadly to mean "any materials, used in the direct sale or direct offering for sale of any product or by electronic means, and that solicit the purchase of such product or service by mail, telephone, electronic mail, or some other method without examining the actual product purchased."

Scope of the Proposed Rule Goes Beyond FTC's Statutory Authority

The FTC states that it has the authority to promulgate a U.S.-origin claim rule under 15 U.S.C. § 45a. This statute provides authority for the following:

> *To the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a "Made in the U.S.A." or "Made in America" label, or the equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission issued pursuant to section 45 of this title. This section only applies to such labels. Nothing in this section shall preclude the application of other provisions of law relating to labeling. . . . The Commission shall administer this section pursuant to section 45 of this title and may from time to time issue rules pursuant to section 553 of title 5 regarding unfair or deceptive acts or practices."*

15 U.S.C. § 45a Labels on products.

The statute consistently uses the term "label" to describe the prohibited conduct and FTC rulemaking authority. In its rulemaking, however, the FTC incorrectly refers to the statute as providing rulemaking authority for MUSA "labeling" and the proposed rule includes prohibitions that go beyond claims made on a product label (*i.e.,* "mail order catalog and mail order promotional material"). This expansion of the proposed rule to other advertising material is not consistent with the definition of 'label" found elsewhere in statutes enforced by the FTC or similar consumer product statutes, such as the Food, Drug, and Cosmetic Act (FDCA).

For example, the Fair Packaging and Labeling Act (FPLA), which is enforced by the FTC, defines "label" as "any written, printed, or graphic matter affixed to any consumer commodity or affixed to or appearing upon a package containing any consumer commodity."[3] This is similar to the definition found in the FDCA.[4] The FDCA also is an instructive statute to understand what type of material should be considered "labeling", and thus, would be outside the scope of the FTC Section 45a authority. The FDCA specifically defines "labeling" to mean "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2)

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[3] 15 U.S.C. § 1459(c).

[4] 21. U.S.C. § 321(k) ("[t]he term 'label' means a display of written, printed, or graphic matter upon the immediate container of any article . . .").

accompanying such article."[5] Such definition indicates that the term "labeling" is broader than the term "label" and that the term "label" is limited to material that is physically affixed to a product. The material described as "mail order catalog or mail order promotional material" included in the FTC's proposed U.S.-origin claim rule should be considered "labeling" outside the scope of FTC's authority to promulgate a rule related to a product "label."

In support for its determination that the term "label" in 15 U.S.C. § 45a also includes "labeling," FTC Commissioner Rohit Chopra cites regulations for textile labeling that require mail order materials to contain specific information about the textiles.[6] The regulations cited by Commissioner Chopra, however, are based on statutes that specifically require certain textile descriptions to appear on both the label and mail order material.[7] As such, the regulations covering mail order material for textiles do not appear to be based on an expansive definition of the term "label", but, rather are based on specific statutory requirements applying to mail order material. The FTC does not indicate why these statues, which specifically include requirements for mail order material, are instructive, but other statutes that define "label" as material physical attached to a product and distinguish "label" from "labeling" are not.[8]

This concern that the proposed rule goes beyond FTC's authority was raised by two other FTC Commissioners – Commissioner Phillips and Wilson.[9] We concur with their concerns and urge the FTC to ensure that the scope of this proposed rule is statutorily sound. The FTC can still bring cases against companies making deceptive MUSA claims through labeling using its general Section 5 authority (under Section 5 of the FTC Act). To go beyond its statutory authority here could have implications for other statutes enforced by the FTC that use the term "label", such as the FPLA, and leave this rule open to legal challenge.

Consumer Perceptions of U.S.-Origin Claims

The FTC's takes the position that unqualified U.S.-origin claims imply that "no more than a *de minimis* amount of the product is of foreign origin."[10] This is the standard that the Commission proposes to have codified in the current rulemaking. This standard was developed in 1997, over 20 years ago, based on consumer perception research and public comments.[11] CRN is not aware of any consumer perception research that has been conducted by the FTC since the 1997 guidance

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5 21 U.S.C. § 321(m).

6 Statement of Commissioner Rohit Chopra Regarding the Notice of Proposed Rulemaking on Made in USA, Commission File No. P074204, June 22, 2020.

7 *See e.g.,* 15 U.S.C. § 68b(e) and 15 U.S.C. § 70b(i).

8 Commissioner Chopra's letter also indicates that its peer agency, FDA, interchanges the term "label" and "labeling" and cites to an enforcement action against a social media post based on an alleged violation of a "label" rule as proof. The FDA statute in question, however, imposes restrictions on labeling. FDA, in certain circumstances, considers social media to be a form of "labeling"; thus, FDA does in fact distinguish between these two terms and assigns them different meanings.

9 Dissenting Statement of Commissioner Noah Joshua Phillips, *Made in USA Labeling Rule – Notice of Proposed Rulemaking*, Matter No. P074204; Statement of Commissioner Christine S. Wilson Concurring in Part and Dissenting in Part *Notice of Proposed Rulemaking related to Made in U.S.A. Claims*, June 22, 2020.

10 85 Fed. Reg. at 43163.

11 *See Enforcement Policy Statement on U.S. Origin Claims*, 62 Fed. Reg. 63756, Dec. 2, 1997.

was created. In the workshop on U.S.-origin claims that the FTC held in fall 2019, only one additional consumer perception survey was cited – a survey from 2013 that was not developed by the FTC.[12] If a rule is codified to the 1997 standard, it will replace guidance, which allows the FTC to engage in a flexible process to make updates, with a rule that can only be changed through inflexible notice-and-comment rulemaking.

Given significant changes to the global economy, consumer perceptions of U.S.-origin claims are very likely to have changed over time and consumer perception in 1997, and even 2013, could be very different from how consumers perceive U.S.-origin claims today. CRN believes it is important that the Commission consider current consumer perception, of which it does not have current data, before it moves from guidance to a rule.

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CRN appreciates this opportunity to engage with the FTC on these important issues and looks forward to the Commission addressing the comments provided by CRN and other commenters.

Sincerely,

Megan Olsen
Vice President & Associate General Counsel

[12] Made in the USA: An FTC Workshop, Staff Report of the Bureau of Consumer Protection, June 19, 2020.