M E M O R A N D U M

TO: Rohit Chopra, Federal Trade Commissioner
FR: Lori Wallach, director, Public Citizen's Global Trade Watch
RE: Made in the USA FTA Rulemaking, Docket # FTC-2020-0056
DT: January 15, 2021

On behalf of Public Citizen's more than 500,000 members and supporters, I am writing to follow up on our conversation and summarize our views on the Federal Trade Commission (FTC) rulemaking regarding 'Made in USA' (MUSA) and other unqualified U.S.-origin claims on product labels.

Public Citizen supports the proposed rule, applauds the FTC for initiating this rulemaking and urges the Commission to adopt the rule without delay.

The rule's emphasis on imposition of civil penalties for violations is critical to consumers and businesses that comply with U.S. law. The FTC's past practices have helped to exacerbate deceptive product origin claims. The worst actors have known that until very recently they would face no peril at all if they create a major scam, rip off consumers, and make a fast buck. All that the FTC has done is send out cease and desist letters with no penalties for the lawbreaker or restitution for consumers. While we appreciate the fine finally imposed on Williams Sonoma, it came only after a long process and repeated violations. Meaningful enforcement, including the rule's proposed financial penalties available to punish first-time violations, the possibility of injunctive relief and refunds, and other relief for consumers, is essential to ensure enforcement of critical consumer protections and to treat fairly the businesses that act honestly and follow the law. Public Citizen appreciates that the rule also allows states to provide even tougher penalties for such fraudulent conduct. Consumers being subject to systematic deceptions about where products are made, which happens all too regularly online as well as with physical labels on goods, creates a vicious circle: U.S. producers and those who sell their products are penalized by the lack of enforcement against cheating businesses' fraud that tricks consumers into acting against their values. Consumers who get scammed become less trusting of labels and online representations, and this diminishes the value to legitimate made-in-the-USA producers and sellers that provide the goods that data show Americans prefer. There clearly is a consumer preference that gives the Made in USA label value. The FTC is well informed about the data showing that U.S. consumers favor products made in the United States and that they rely on Made in USA labels to act on those preferences.

lwallach@citizen.org
Public Citizen's Global Trade Watch
215 Pennsylvania Ave. SE Washington, D.C. 20003

The problem of false Made in USA representations is proliferating online: The FTC's statutory authority to protect consumers and ensure accurate information clearly covers online labels and other online marketing information. An important feature of this rule is that it would also expressly apply to mail order catalogs and mail order promotional materials. We find arguments by some in industry and some Commissioners, that this clarification extends beyond the FTC's statutory authority, entirely unconvincing. Indeed, it requires a tortured reading of the specific statutory language (15 U.S.C. § 45(a)) to conclude that Congress only sought to regulate labels literally stuck onto products. Moreover, it is hard to imagine an understanding of the FTC's basic authority that does not extend to protecting consumers with respect to online information about products and the online labeling of products purchased online. Even before the COVID-19 crisis shifted an even greater amount of shopping online, U.S. consumers were relying extensively on online representations. A fundamental mission of the FTC is to ensure that consumers have accurate information. Stopping online misrepresentations has become even more important since the COVID-19 crisis in another way. The crisis revealed that we could not make or acquire goods essential to managing the crisis. Sudden awareness about the extreme vulnerability of brittle, hyperglobalized supply chains has created demand for more domestic production. By increasing the value of goods made here by helping consumers' ability to rely on Made in USA labels, this rulemaking can help create more incentives for manufacturers to invest in domestic production and rebuild our national resilience to crises.

The standard for a product legally bearing a Made in USA label must not be weakened and must remain unrelated to the Rule of Origin standards applicable to determining Customs treatment for imported goods. Some industry interests have tried to conflate Customs law standards with the Made in USA label standard. The proper standard that is necessary for consumers to obtain accurate information is precisely what is required: "Final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States." The National Association of Manufacturers (NAM), for instance, in its comments about this rule claims that this standard does not comply with "global supply chain reality" and instead should be replaced by a "substantial transformation" standard. First, there is no natural law nor phycological state called "global supply chain reality." Rather, the NAM is referring to the *voluntary* decision by some manufacturers to procure inputs from and/or largely assemble their goods in countries with low wages and lax environmental, safety and labor standards. Of course, producers are free to make that choice, and a part of that decision includes foregoing the benefit of being able to represent their good as Made in USA. Second, the "substantial transformation" standard that the NAM seeks to have replace the current rule's appropriate standard is unrelated to providing consumers with accurate information with respect to the origin of a good. Rather, that standard relates to the sort of Customs treatment, and thus possible tariffs, to which imported goods are subject. The substantial transformation standard does not confer Made in USA status on a product. Rather, it determines from which country parts or a finished product should be considered as sourced for border taxation. For instance, under the NAM's proposal, for textile and apparel goods any small value-added done in the United States that could shift a good from one tariff line description to another is considered a substantial transformation even if most of a product's value and the work on it occurred elsewhere. Under the NAM's preferred approach, some food products could be grown and harvested or slaughtered/processed elsewhere and be labeled as a U.S. product after modest processing. (This is an issue that must be addressed given some restaurants provide menu and online ordering information representing food as domestically produced, such as

shrimp that were breaded and refrozen in the United States but were grown in fish farms in Vietnam and other countries that pose health and safety threats from forbidden antibiotics and other substances used to keep fish raised in feces-laden pools from dying.) As well, based on a case-by-case basis, the NAM-favored approach would allow the mere assembling of a good here from 100% foreign-made parts to qualify. This would deceive U.S. consumers. The NAM argues allowing this flimsy standard somehow would help U.S. competitiveness. Whether or not that is even true, it is irrelevant. The FTC's mission is protecting U.S. consumers from inaccurate and false information.

The proposed rule does not remedy a significant remaining problem - disciplining third-party sellers' false representations online. Public Citizen is extremely concerned about the issue that the June 2020 FTC Staff Report identified with respect to fraudulent representations by the third-party sellers that comprise an enormous portion of commerce on sites such as Amazon. This is a problem that extends beyond false Made in USA claims or the sale of counterfeit goods. Many major e-commerce retailers' focus on expanding sales has come to the detriment of consumer health and safety and accurate labeling. The online platforms claim that they are not sellers of the goods, despite providing marketing and curating what consumers view on their platforms, providing consumers access to the goods, collecting consumers' payments and delivering the goods to purchasers. Claiming not be the sellers, the platforms assert that they, thus, are not responsible for health and safety problems or false representations related to the products sold on their platforms nor legally liability when consumers are injured. Indeed, as the FTC Staff Report notes, the platforms claim legal immunity for liability as protected entities under Section 230 of the Communications Decency Act. Yet, as the staff report notes, the actual sellers, many of whom operate from outside the United States, are beyond the FTC's reach with respect to enforcement actions. Whatever one thinks about Section 230's application to speech communicated via online platforms, clearly the purpose of the law was <u>not</u> to absolve online sellers from product liability nor to expose consumers to false information nor possible injury relating to online commerce. Yet without some duty of care placed on platforms that enable U.S. sales, it is hard to conceive of how the FTC can close this gaping enforcement loophole.