



Office of Commissioner  
Rohit Chopra

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

## **STATEMENT OF COMMISSIONER ROHIT CHOPRA**

*In the Matter of Sandpiper/PiperGear USA  
April 17, 2019*

Law enforcement actions without consequences harm honest businesses forced to compete with those who don't play by the rules. With our economy experiencing a rise in counterfeit goods from overseas that rely on fake branding and are sold through e-commerce marketplaces, more and more law-abiding firms are feeling the pain of lost sales. When there are few consequences for breaking the law, this represents a wrongful transfer of wealth from the law-abiding to the law-breaking.

Prominent American companies fight hard to protect their brands, but the job of protecting the Made in USA brand falls to the Federal Trade Commission. The no-money, no-fault resolution reached in this case shows that the Commission needs to make significant changes to its approach in protecting and defending the integrity of the Made in USA brand. The FTC should activate legal switches granted by Congress decades ago that will allow us to seek substantial fines against companies that abuse and cheapen the Made in USA brand.

### **Sandpiper/PiperGear USA**

In its investigation, Commission staff uncovered evidence that Sandpiper/PiperGear USA engaged in egregious Made in USA fraud. Sandpiper imported the vast majority of its military-themed merchandise from China and Mexico, but boasted in its promotional materials about its "U.S. manufacturing" while inserting false U.S.-made labels in its products. Using this fraudulent labeling, Sandpiper sold thousands of items on American military bases to American service members.

In September 2018, the Commission put forth a no-money, no-fault settlement proposal for public comment. Notably, the public comments were unanimously opposed to the proposed settlement. The comments also provided further evidence of potential harm to competitors. For example, the Commission received a comment on behalf of a Sandpiper competitor<sup>1</sup> that believed it lost out on a valuable Army and Air Force exchange listing based on Sandpiper's

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<sup>1</sup> Smith, Gambrell & Russell, LLP on behalf of Advantus, Corp. (Comment #5) at 3-4, [https://www.ftc.gov/system/files/documents/public\\_comments/2018/10/00005-155955.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/10/00005-155955.pdf).

deception.<sup>2</sup> In addition, a submission from *Consumer Reports* highlighted key flaws in the argument that the Commission cannot pursue consequences for Sandpiper's violations.<sup>3</sup>

In spite of this feedback from the public, the majority have voted to finalize a resolution that essentially lets Made in USA fraudsters get off scot-free. For reasons I have detailed here and in my previous statement on the proposed settlement, I respectfully disagree.

### **Turning on the Penalty Switch**

While the Commission currently has the authority to seek some relief<sup>4</sup> from companies that violate the FTC's Made in USA standard, it would be far more effective to levy stiff civil penalties against flagrant violators.

Shortly after the North American Free Trade Agreement (NAFTA) came into force in 1994, Congress authorized the FTC to codify rules that would trigger civil penalties for violators of the Made in USA standard.<sup>5</sup> However, the Commission never turned on this penalty switch. By restating longstanding Commission policy, after notice and public comment, the Commission could switch on financial penalties to deter and punish flagrant Made in USA fraud. *See Attachment: Activating Civil Penalties for Made in USA Fraud.*

Separate and apart from this 1994 authority, there are additional ways that the Commission could turn on penalties on a case-by-case basis. First, Section 5(m)(1)(B) of the FTC Act allows the Commission to seek penalties from companies that knowingly engage in an act or practice that the FTC has declared to be unfair or deceptive in a final order (other than a consent order), even if those companies were not the target of that original order. The Commission has used this authority in the past to protect the integrity of bamboo labeling, but it remains unused to protect Made in USA claims.

Second, as I noted in the Commission's *SoFi* matter,<sup>6</sup> we can also bring enforcement actions alongside state attorneys general, who can often seek civil penalties in the first offense under statutes they enforce. This was similar to the approach we took in a 1999 Made in USA investigation conducted with Missouri and Connecticut, which resulted in civil penalties.<sup>7</sup>

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<sup>2</sup> Since the Commission's proposal, Sandpiper has been purchased by a Chinese supplier, Innovapro, which is aggressively fighting a Lanham Act lawsuit by that same competitor. *See Innovapro Corp.'s Mot. to Dismiss at 13–16, Advantus Corp. v. Sandpiper of California, Inc., No. 3:18-cv-01368 (M.D. Fla. filed Jan. 28, 2019).*

<sup>3</sup> Consumers Union (Comment #6), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/10/00006-155956.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/10/00006-155956.pdf) (pointing out that proving "price premium" is not a necessary predicate to seeking disgorgement).

<sup>4</sup> For example, the Commission can utilize its authority under Section 13(b) or Section 19 to seek redress and other remedies, but the authorities under these sections do not provide for civil penalties that deter misconduct in the first instance. *See* 15 U.S.C. §§ 53(b), 57(b). In my [September statement](#), I discussed further how monetary relief likely would have been available through settlement or litigation. I am concerned that the Commission too often asks for \$0 in settlement discussions.

<sup>5</sup> *See* 15 U.S.C. § 45a.

<sup>6</sup> Statement of Comm'r Chopra In the Matter of Social Finance, Inc. Commission File No. 1623197 (Oct. 29, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1418711/162\\_3197\\_statement\\_of\\_commissioner\\_chopra\\_on\\_sofi\\_10-29-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1418711/162_3197_statement_of_commissioner_chopra_on_sofi_10-29-18.pdf).

<sup>7</sup> *See* FED. TRADE. COMM'N, U.S. ORIGIN CLAIMS: ENFORCEMENT AND COMPLIANCE ACTIVITIES SINCE DECEMBER 1997 3–4 (1999), <https://www.ftc.gov/sites/default/files/documents/reports/u.s.origin-claims-enforcement-and->

While these other penalty switches would not deter wrongdoing as effectively as the 1994 authority, they are far superior to our current approach of seeking no money, no notice to consumers and competitors, and no findings or admissions of fact.

### **Conclusion**

At a time when the Commission is seeking greater resources and authority from Congress on a host of problems in the marketplace, our call to action will be more effective when we are vigorously using our existing resources and authorities to the fullest extent possible.<sup>8</sup>

We cannot effectively protect honest businesses and promote fair competition if there are no consequences for violating the law. Given troubling trends in today's economy, I intend to make a motion to pursue a Made in USA rule that would allow the Commission to seek meaningful penalties against those that harm law-abiding companies that make goods in America.

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[compliance-activities-december-1997/musareport.pdf](#) (describing a joint investigation of The Stanley Works by the FTC, Missouri, and Connecticut).

<sup>8</sup> Our unused Made in USA authority is not the only penalty switch we have not turned on. It has been nearly a decade since Congress gave the FTC streamlined authority to issue regulations that would trigger civil penalties for wrongdoing in the auto lending market. *See* 12 U.S.C. § 5519.

## *Attachment*

### **ACTIVATING CIVIL PENALTIES FOR MADE IN USA FRAUD**

#### **Summary**

To better protect the integrity of the Made in USA label that honest American businesses rely on, the Federal Trade Commission (FTC) should codify elements of its longstanding policy into a rule that activates civil penalties against first-time violators.

#### **Made in USA Matters**

Displaying a Made in USA label is a right reserved for companies that manufacture their products in the United States. The Made in USA label signals a sense of national pride and can help a brand communicate quality, durability, authenticity, and high standards. Only companies that invest, hire, and produce in this country should receive the competitive advantage that the Made in USA label can confer.

The Made in USA label is especially important to small businesses, who can tout it to set them apart from more established competitors, even if their products may be more expensive. A 2012 survey by the Boston Consulting Group shows that more than 80 percent of Americans express a willingness to pay more for American-made products compared to those made in China,<sup>1</sup> which is a boon to producers of high-quality American goods. Small businesses that invest in the United States may not be able to challenge big players on brand recognition, but they have earned the right to compete on country of origin.

But their ability to compete is now being undermined by a scourge of counterfeiting and fraud. The growing proportion of consumer goods purchased online has made it easier for foreign counterfeiters to trick consumers and steal sales from companies that tell the truth. According to a Government Accountability Office investigation, 40% of brand-name goods purchased from third-party sellers on popular consumer websites were found to be counterfeit.<sup>2</sup> Meanwhile, nearly a quarter of Americans no longer trust that “Made in USA” means “Made in USA.”<sup>3</sup> In this environment, large incumbent corporations can spend significant resources to defend their brands from imitators,<sup>4</sup> but small businesses that rely on the Made in USA brand cannot. That makes the FTC’s role more vital than ever.

If enforcers are unable to defend our national brand, this puts small firms that rely on the Made in USA label at a disadvantage in online marketplaces flooded with counterfeits. Twenty-five years ago, Congress gave the FTC a strong tool to defend the Made in USA brand, but the agency has never deployed it. It is time to do so.

#### **Background on FTC Penalty Authority**

While the Federal Trade Commission Act broadly prohibits unfair or deceptive acts or practices, the agency’s ability to seek civil penalties paid to the Treasury for first-time offenders is limited.

Even when the agency repeatedly finds a practice to be unlawful, violators, regardless of their size or sophistication, can still get a free pass for their wrongdoing – and only if they are caught.

To *deter* wrongful conduct in the first instance, the FTC must activate a legal switch to “turn on” civil penalties for the first offense, which can expose violators to \$42,530 in fines per violation. This activation can be achieved by codifying the unlawful practice in a rule.

The FTC can codify a rule by initiating procedures under Section 18 of the FTC Act. However, in some cases, Congress has explicitly provided the Commission with the authority to use procedures under the Administrative Procedure Act (APA) – which are more efficient compared to Section 18 procedures – to give notice of practices where violations can lead to civil penalties.

### **Dormant Authority to Combat Made in USA Fraud**

Since at least the 1940s, the Commission has held that under Section 5 of the FTC Act, a product must be wholly domestic or all or virtually all made in the United States to support a Made in USA claim.<sup>5</sup> As global trade has accelerated, attention to country-of-origin claims has only grown.

In 1994, shortly after the North American Free Trade Agreement (NAFTA) took effect, Congress gave the FTC authority to codify Made in USA rules pursuant to streamlined APA procedures. Following that legislation, the Commission undertook a comprehensive review of its Made in USA program – a review so expansive that one Commissioner at the time compared it to a rulemaking.<sup>6</sup> What emerged from that review, however, was a statement that reiterated the decades-old “all or virtually all” standard for unqualified Made in USA claims. That statement and the accompanying guidance remain in force today.

But “statements” do not trigger the Commission’s civil penalty authority and resulting deterrent effect unless codified into a rule. This means that if firms choose to make false Made in USA claims in spite of 80 years of FTC guidance and warnings, they are unlikely to face any penalties on their first offense.

The Commission can change these incentives by codifying its existing “all or virtually all” standard as a rule, thereby subjecting all violators to civil penalties. Importantly, by restating the FTC’s existing view of the law, such a rule would lead to no additional substantive requirements for market participants. The Commission would maintain flexibility to calibrate its approach based on the facts and circumstances of violations.

All businesses stand to benefit from clear rules of the road that protect the integrity of the Made in USA label and punish those who abuse it.

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<sup>1</sup> THE BOSTON CONSULTING GROUP, MADE IN AMERICA, AGAIN: UNDERSTANDING THE VALUE OF ‘MADE IN THE USA’ (2012) (finding that ~80% of Americans prefer goods made in America to those made in China). *See also Made in America: Most Americans Love the Idea of Buying a U.S.-made Product Instead of an Import. But Sometimes It’s Hard to Tell What’s Real and What’s Not*, CONSUMER REPORTS (May 21, 2015, 10:00 AM), <https://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm> [hereinafter *Made in America*] (reporting on a national survey finding that 60%+ of Americans would pay a 10% premium for Made in USA goods); *Price of patriotism: How much extra are you willing to pay for a product that’s made in America?*, REUTERS (July 18, 2017), <http://fingfx.thomsonreuters.com/gfx/rngs/USA-BUYAMERICAN-POLL/01005017035/index.html> (reporting on a national survey finding that 60%+ of Americans would pay a premium of 5% or more).

<sup>2</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-216, INTELLECTUAL PROPERTY: AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEITS MARKET (2018), <https://www.gao.gov/assets/690/689713.pdf>.

<sup>3</sup> *Made in America*, *supra* note 1 (reporting on a national survey finding that 23% of Americans lack trust in “Made in America” labels).

<sup>4</sup> *See, e.g.*, James Vincent, *Apple Lawsuit Says 90 Percent of ‘Official’ Chargers Sold on Amazon Are Fake*, THE VERGE (Oct. 20, 2016, 3:59 AM), <https://www.theverge.com/2016/10/20/13343682/fake-apple-chargers-amazon-lawsuit>.

<sup>5</sup> FED. TRADE. COMM’N, U.S. ORIGIN CLAIMS: ENFORCEMENT AND COMPLIANCE ACTIVITIES SINCE DECEMBER 1997 1 (1999), <https://www.ftc.gov/sites/default/files/documents/reports/u.s.origin-claims-enforcement-and-compliance-activities-december-1997/musareport.pdf>.

<sup>6</sup> “Made in USA” and Other U.S. Origin Claims, 62 Fed. Reg. 63755, 63771 (Dec. 2, 1997), [https://www.ftc.gov/sites/default/files/documents/federal\\_register\\_notices/made-usa-and-other-u.s.origin-claims/971202madeinusa.pdf](https://www.ftc.gov/sites/default/files/documents/federal_register_notices/made-usa-and-other-u.s.origin-claims/971202madeinusa.pdf) (reprinting Commissioner Starek’s statement that the Commission’s “expansive review” was “similar to a rulemaking”). In the course of that review, the Commission considered modifying the “all or virtually all” standard around unqualified Made in USA claims, but backed down in the face of “overwhelming” consumer interest in maintaining the historic standard. *Id.* at 63764.