



## Consumer Protection/FTC ADVISORY ■

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### FTC Enforces New “Made in USA” Labeling Rule for First Time

By [Kathleen Benway](#) and [Robert Poole](#)

On April 12, 2022, the Federal Trade Commission (FTC) filed its first complaint and proposed stipulated order in federal court exercising its authority under its 2021 Made in USA Labeling Rule. The [complaint](#) alleges that a battery retailer affixed “Made in USA” labels to its products and claimed the same on social media and in other advertisements despite knowing that its products included “significant imported components.” The complaint also named the company’s owner individually. If approved, the stipulated order will require the parties to refrain from misrepresenting their products’ country of origin and pay civil penalties of \$105,319.56—*three times* the company’s profits attributable to its allegedly illegal acts.

#### The Made in USA Labeling Rule

The FTC’s [Made in USA Labeling Rule](#) took effect August 13, 2021 and prohibits claims that a product was made in the United States *unless*:

- (1) Final assembly or processing of the product occurs in the United States,
- (2) All 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 rule was promulgated pursuant to Section 5a of the FTC Act, 15 U.S.C 45a—a section Congress added in 1994 to allow the FTC to create rules governing the use of “Made in the USA” or “Made in America” labels. Of note, despite Section 5a specifically stating the law would only apply to “label[s] or the equivalent thereof,” the rule applies the term more broadly than the labels located on a product’s packaging and extends it to “mail order catalogs” and “mail order promotional materials,” which it defines to include:

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any materials, used in the direct sale or direct offering for sale of any product or service, that are disseminated in print 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.

The rule therefore governs any “seal, mark, tag, or stamp labeling a product Made in the United States” both on the packaging of a product itself *as well as* in advertisement and marketing materials. The rule was not unanimously approved. Both Republican commissioners voted against it. Commissioner Christine S. Wilson issued a [dissent](#) arguing that when Congress enacted Section 5a, it intended to extend rulemaking authority only to those labels *on a product*—not claims made in advertising or marketing materials generally. Wilson’s concerns echo those that Commissioner Noah Joshua Phillips expressed in a [similar dissent](#) in June 2020, when the FTC issued the notice of the then-proposed rulemaking.

While the rule provided the FTC with enhanced remedies for violation, including civil penalties of up to \$46,517 per violation, the substance of the rule mirrors the FTC’s [Enforcement Policy Statement on U.S. Origins Claims](#), which has been in effect since 1997, including the “all or virtually all” standard. The 1997 policy statement clarified that “in order for a product to be considered ‘all or virtually all’ made in the United States, the final assembly or processing of the product must take place in the United States.” The FTC would then consider other facts as well, such as “the portion of the product’s total manufacturing costs that are attributable to U.S. parts and processing[] and how far removed from the finished product any foreign content is.” The FTC has found claims that do not meet this standard violate Section 5 of the FTC Act. The FTC [continues to reference](#) the 1997 policy statement as guidance on how to navigate the 2021 Made in USA Labeling Rule.

## The FTC’s First Enforcement Action

On April 12, 2022, the FTC filed a complaint against a Florida-based battery retailer, Lithionics Battery LLC, and its owner, Steven Tartaglia, in the Middle District of Florida. That same day, the FTC filed a stipulated order to settle the allegations of that complaint.

The complaint alleges that, between 2018 and August 2021, Lithionics affixed a label on its products featuring an American flag paired with the words “Made in U.S.A.” Similar images and representations were found on Lithionics’ social media and marketing materials. For example, Lithionics’ website claimed that the battery systems sold were “engineered and manufactured in [their] Clearwater, FL USA factory.” Lithionics also published a chart in its marketing materials comparing its products with “imports,” emphasizing to customers why Lithionics’ battery systems were better than other imported products. In videos posted to Lithionics’ YouTube page, Tartaglia himself described the company’s practice of printing Made in U.S.A. labels and applying them to Lithionics’ products. These statements were made while importation documents listed Tartaglia “as the consignee and point of contact to receive Lithionics’ shipments of lithium energy storage batteries arriving from Hong Kong.” Because Lithionics’ batteries incorporated significant other imported components, the FTC claims that these country-of-origin claims were false, violating both the Made in USA Labeling Rule and Section 5 of the FTC Act.

The FTC's [proposed settlement](#) illustrates the extent of remedies the FTC can seek under the rule. If approved by the court, the FTC's stipulated order would, among other things, prohibit the defendants from making misleading country-of-origin claims for Lithionics products and require the defendants pay jointly and severally civil penalties of \$105,319.56. The proposed order does not provide for consumer redress. It does, however, require defendants to notify consumers who purchased Lithionics' batteries between August 13–30, 2021 that the products were "not all or virtually all 'Made in USA,'" but rather "contains significant imported components including, in the case of battery and battery module products, imported lithium ion cells." August 13–30, 2021 is the period between the finalization of the Made in USA Labeling Rule and the date the defendants stopped affixing their own Made in USA labels on Lithionics products.

While the *Lithionics* case features the traditional label affixed to a product that Congress may have had in mind when it enacted Section 5a of the FTC Act, the FTC's citation to representations on the company's YouTube page and marketing materials certainly illustrates Wilson's and Phillips's concerns about the FTC's broad application of the rule. To avoid liability under the rule and the civil penalties that result, companies should be sure that they are able to substantiate country-of-origin claims on any label or packaging or in any advertising or marketing materials in accordance with the three elements of the rule.

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