

Dissenting Statement of Commissioner Noah Joshua Phillips
Made in the USA Labeling Rule – Notice of Proposed Rulemaking
Matter No. P074204

June 22, 2020

At a time when Americans are asking questions about supply chain resiliency and international trade, the appeal of adopting a rule to add civil penalties to the Federal Trade Commission’s “Made in the U.S.A.” enforcement program cannot be gainsaid. We have clear statutory authority to issue such a rule. But the notice of proposed rulemaking that the Commission issues today proposes one that, I believe, exceeds that authority; so, I respectfully dissent.

The FTC’s Made in the U.S.A. enforcement program is built on Section 5 of the FTC Act, which governs deceptive acts and practices in commerce.¹ It applies to a host of advertising and other claims about the U.S. origin of products. In 1994, Congress codified Section 5a, titled “Labels on products”.² As that title makes clear, Section 5a applies to “a product with a ‘Made in the U.S.A.’ or ‘Made in America’ label”.³ It requires that any such “label” – representing that the product was in whole or substantial part of domestic origin – be consistent with decisions and orders of the FTC issued pursuant to our Section 5 unfairness and deception authority.⁴ Relevant here, Section 5a also grants the FTC authority to use Administrative Procedures Act (APA) rulemaking to promulgate rules to effectuate this specific purpose. The FTC may seek civil penalties for violations of such rules.⁵

Rather than propose a rule concerning the “[l]abels on products” contemplated by Section 5a, however, a majority of the Commission today proposes to regulate:

“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” that “include[] a seal, mark, tag, or stamp labeling a product Made in the United States”.⁶

¹ 15 U.S.C. § 45.

² Pub. L. 103-322, title XXXII, §320933 (Sept. 13, 1994), 108 Stat. 2135.

³ Section 5a is more limited than Section 5 and does not apply to all Made in the U.S.A. claims covered by Section 5. That is why, to this day, we routinely rely on Section 5 in our Made in the U.S.A. enforcement. *See, e.g., In re Williams-Sonoma, Inc.*, File No. 2023025 (Mar. 30, 2020), https://www.ftc.gov/system/files/documents/cases/202_3025_williams-sonoma_consent_agreement_decision_order.pdf, *In re Sandpiper of Cal., Inc. et al.*, Docket No. C-4675 (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/cases/sandpiper_order_4-17-19.pdf.

⁴ 15 U.S.C. § 45a.

⁵ *Id.* The statute provides that violations of any rule promulgated pursuant to Section 45a “shall be treated by the Commission as a violation of a rule under section 57a [of the FTC Act] regarding unfair or deceptive acts or practices.” For violations of rules issued pursuant to 15 U.S.C. § 57a, the Commission may commence civil actions to recover civil penalties. 15 U.S.C. § 45(m)(1)(A).

⁶ *See* proposed § 323.3, in conjunction with proposed § 323.1(b).

That goes well beyond “[l]abels on products”, to include advertising claims appearing in catalogs and online.

Despite the clear text of Section 5a, Commissioner Chopra argues that the Commission has discretion to interpret the term “label” consistent with the Commission’s Wool and Textile rules, which require certain disclosures in mail order advertising. But those rules were promulgated under statutes very different from Section 5a, and which were *specifically amended* to address such “advertising”.⁷ To the extent those other rules, passed under other statutes, provide any guidance, they indicate that the scope of Section 5a does not reach as far as the rule proposed by the Commission.

Commissioner Chopra is not wrong to be concerned about deceptive online Made in the U.S.A. labeling. I am, too, which is why I supported the substantial monetary relief the Commission assessed in the *Williams-Sonoma* case. But that is a policy argument; and here the question is the scope of our authority, as determined by the statute.

As I have said before, when entrusted with APA rulemaking authority, it is imperative that the Commission work to effectuate congressional intent.⁸ As Justice Antonin Scalia wrote, “[t]he best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President”.⁹ That our collective policy preference may be to go further is beside the point. At a time not only when the Commission itself has requested APA rulemaking authority for privacy and data security,¹⁰ but also when other members of the Commission are

⁷ See 15 U.S.C. § 68b; 15 U.S.C. § 70b.

⁸ See, e.g., Opening Keynote of Commissioner Noah Joshua Phillips: Privacy Regulation: Why, What, and When?, The Free State Foundation (June 26, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531340/phillips_-_free_state_foundation_keynote_6-26-19_0.pdf; Remarks of Commissioner Noah Joshua Phillips at FTC Workshop: The Future of the COPPA Rule (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_statements/1547700/phillips_-_coppa_workshop_remarks_10-7-19.pdf; Prepared Oral Statement of Commissioner Noah Joshua Phillips Before the Committee on Commerce, Science, Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security: Oversight of the Federal Trade Commission (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423943/njp_oral_statement_112718.pdf (“The tradeoffs are not easy; and there are no simple answers. So, my third point is that, given the important value judgments that must be made, Congress is the place to make them. Broad delegations to an expert agency are a poor substitute for the lawmaking process our Founders created.”); Prepared Remarks of Commissioner Noah Joshua Phillips, Family Online Safety Institute 2018 Annual Conference: Taking Care: The American Approach to Protecting Children’s Privacy (Nov. 15, 2018), https://www.ftc.gov/system/files/documents/public_statements/1422695/phillips_-_taking_care_11-15-18_0.pdf.

⁹ *W. Va. Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991).

¹⁰ See Prepared Statement of the Federal Trade Commission: Protecting Consumers and Fostering Competition in the 21st Century, Committee on Appropriations, Subcommittee on Financial Services and General Government, United States House of Representatives (Sept. 25, 2019), https://www.ftc.gov/system/files/documents/public_statements/1545285/appropriations_committee_testimony_092519.pdf.

clamoring for rulemaking for a wide swath of other matters,¹¹ our obligation – and our ability – to follow the law is critical.

Commission regulatory overreach in decades past led Congress to impose special restrictions on our ability to make rules with respect to unfairness or deception, requiring, absent a specific congressional directive, that the FTC use the more stringent rulemaking procedures outlined by the Magnuson Moss Warranty-Federal Trade Commission Improvements Act.¹² Section 5a is such a directive, and we could fashion a rule according to it. Or, we could use those Magnuson Moss Act procedures to cover a broader swath of Made in the U.S.A. claims. And, of course, Congress, which has expressed interest in our promulgating a “Made in the U.S.A.” rule,¹³ could amend Section 5a to permit us to use the APA to go further.

For now, however, our job is not to regulate beyond the lines Congress has drawn.

¹¹ For example, Commissioner Chopra has called for a rulemakings with respect to, *inter alia*, auto loans, higher education accreditation, non-compete agreements, and endorsements and testimonials. *See, e.g.*, Statement of Commissioner Rohit Chopra, *In re Liberty Chevrolet d/b/a Bronx Honda*, File No. 1623238 (May 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1576002/bronx_honda_final_rchopra_bronx_honda_statement.pdf; Statement of Commissioner Rohit Chopra, *In re University of Phoenix*, File No. 1523231 (Dec. 10, 2019), https://www.ftc.gov/system/files/documents/public_statements/1557180/152_3231_statement_of_commissioner_rohit_chopra_0.pdf; Commissioner Rohit Chopra, Comment Letter on Dep’t of Justice Initiative on Competition in Labor Markets (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf; and Statement of Commissioner Rohit Chopra, *Regarding the Endorsement Guides Review*, File No. P204500 (Feb. 12, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf. *See also* Statement of Commissioner Rebecca Kelly Slaughter, *In re Liberty Chevrolet d/b/a/ Bronx Honda*, File No. 1623238 (May 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1576006/bronx_honda_2020-5-27_bx_honda_rks_concurrence_for_publication.pdf (calling for rulemaking in the auto loan market); and Prepared Remarks of Commissioner Rebecca Kelly Slaughter at Silicon Flatirons, Univ. of Colo. Law Sch.: The Near Future of Privacy (Sept. 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf (requesting general consumer data privacy rule rulemaking).

¹² 15 U.S.C. § 2309. *See also*, 16 C.F.R. §§ 1.7 – 1.20.

¹³ S. Rept. 116-111 at 71 (2019).