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August 11, 1997

Office of the Secretary
Federal Trade Commission
Room 159
Sixth and Pennsylvania Avenue, N. W.
Washington, D.C. 20580

Dear Mr. *Secretary:*

Re: Made in USA Policy Comment. FTC File No. P894219

On behalf of The Timken Company, a U.S. manufacturer of tapered roller bearings, we hereby comment on the Proposed Guides for the Use of U.S. Origin Claims, published in the *Federal Register* on May 7, 1997,62 Fed. Reg. 25,020. In general, we approve of the proposed guidelines and applaud the Commission for its effort to modernize its approach. In addressing the four issues raised by the Commission, however, we review below three concerns. First, use of an "Assembled in USA" mark, without more, is not informative and is likely to be misleading to consumers. Second, creation of a second-tier "Origin: USA" mark is not justified and, if merchandise so marked is circulated in the U.S. market, will likely cause confusion. Third, the Commission should continue its rebuttable presumption that unmarked goods are "made in USA."

1. *Compliance with the two safe harbors will be likely to ensure that products are labeled in a manner that is not misleading or deceptive*

The proposed guidelines are a significant improvement as compared to the "all or virtually all" standard. Global sourcing of components is by now so well-known that consumers recognize the fact that "USA" merchandise may contain a small foreign content. In the case of Timken's operations, all of our materials and operations typically are within the United States. From time to time, however, maintenance at one of our plants, unanticipated demand, or another temporary occurrence may result in the use of some foreign components. As explained in the proposed guidelines, such events would not prevent a "made in USA" mark so long as, on average, our products meet the safe harbor criteria.

The content threshold, 75% by value, is sufficiently high to reflect the results of consumer polls. 62 Fed. Reg. at 25,036. At the same time, a bright-line test offers commercial certainty and predictability to manufacturers. Even assuming that component prices fluctuate with exchange rates and due to other factors, the 75'% threshold is not unreasonable. See 62 Fed. Reg. at 25,028.

By the same token, Timken believes that the additional, substantial transformation requirement is essential. In our markets, imports from some sources have been made at prices far below U.S. producer or world-market prices. Imports of bearing parts at such price levels might well be assembled and sold in the United States with the result that the "value" of the imported components might account for less than 25°/0 of the total cost of manufacture. The independent requirement that the U.S. process involve a substantial transformation will protect against a finding that simple assembly would shift the country of origin.

With respect to the question of double substantial transformation, however, the Commission's proposal would permit "substantial transformation" to be defined by two different standards. The proposed guidelines indicate that either the U.S. Customs' traditional definition of substantial transformation, or the NAFTA change-in-classification approach may be used to satisfy the double substantial transformation requirement. 62 Fed. Reg. at 25,045. Under the pre-NAFTA rulings of the U.S. Customs Service, there was the potential for a "green," i.e., unfinished, bearing race to be imported, heat-treated and ground and thereby undergo "substantial transformation." Under the NAFTA marking rule (as well as the U.S. proposal to the WTO), such operations would not be sufficient to confer origin.

The NAFTA rule is part explained by the fact that the bearing races account for roughly two-thirds of the total cost of manufacture of a bearing. Even a "green" race, not yet heat-treated, can account for a substantial part of the total cost of manufacture of the finished bearing. And, typically each bearing has two races (inner and outer). See Letter to the Secretary, U.S. International Trade Commission, dated July 17, 1995, re International Harmonization of Customs Rules of Origin, Inv. No. 332-360 (this letter was attached to our comments dated January 17, 1996, addressed to the FTC).

Use of the pre-NAFTA substantial transformation test in the context of a double substantial transformation analysis could in the case of roller bearings or ball bearings result in a finished product deemed "made in USA" even though 50°/0 or more of its value was imported. Specifically with respect to the question of "green" components (i. e., not heat-treated) imported for heart-treatment, grinding and assembly, the Japanese Bearing

Industry Association took the position in 1995 that Customs should adopt a rule that would deem such finished bearings to be U.S. origin. Timken opposed that position, by comments dated July 19, 1995, and submitted to the FTC on January 17, 1996. Customs has ruled in the context of NAFTA, and the ITC has adopted for purposes of the WTO harmonization exercise. a rule that requires more than heat treatment, finishing and assembly. In such cases the product cannot be deemed "substantially all made in the United States." 62 Fed. Reg. at 25,044.

Indeed, the very reason that the Commission has proposed two safe harbors that essentially both involve substantial transformation "plus," is that substantial transformation alone is inadequate: "Products substantially transformed in the United States could still contain higher foreign content than consumers might be led to belive by affirmative Made in USA labels or advertisements." *Request for Public Comment in Preparation for Public Workshop, 60* Fed. Reg. 53,922,53,925 (Oct. 18, 1995). For these reasons, the Federal Trade Commission guidelines should also require adherence to the more recent NAFTA rule.

In any event, the rule to be applied by Customs in this case will likely be debated and resolved in the context of the international harmonization of rules of origin currently underway before the World Trade Organization. 62 Fed. Reg. at 25,039. Thus, the Commission should, in the case of a conflict between NAFTA marking rules and the Customs Service's rulings, adopt the more recent test advanced by the United States to the WTO and consistent with the goal of "substantially all made in the United States" and with the 75°/0 threshold.

2. *Use of an "Assembled in USA" mark or label should not be permitted without qualification*

The proposed guidelines request comments on the question of using a mark indicating "assembled in USA" without further qualification. 62 Fed. Reg. at 25,045-46. Such a mark would not be encountered by the U.S. Customs Service, because assembly presumably would never occur until after importation of the parts and components. Other than the Federal Trade Commission, therefore, no agency might scrutinize the actual U.S.-value-added of an article marked "Assembled in USA." Nor is there any apparent U.S. content implied by such a mark. However, as shown by the Commission's survey results. 62 Fed. Reg. at 25,036, for articles with 50% or less U.S. value added, a substantial majority of respondents did not believe a "Made in USA" label was appropriate. Given the similarly between "Made" and "Assembled," and given the

importance attached by respondents to assembly, *id., an* unqualified "Assembled in USA" mark is inappropriate.

The Proposed Guides note that other countries accept qualified origin labels, such as "Made in USA of foreign and domestic components." 62 Fed. Reg. at 25,039, n.202. In the case of bearings, to allow an unqualified "Assembled in USA" mark would permit U.S. subsidiaries of foreign bearing manufacturers to import finished bearing components and perform very simple assembly operations without disclosing the true country of origin. Final assembly will account for only a fraction of the total manufacturing cost of a bearing, typically less than 10O/O. At this level, 74°/0 of the FTC survey respondents indicated that a "Made in USA" label was not appropriate. 62 Fed. Reg. at 25,036. So, too, an "Assembled in USA" label, without more, should not be permitted.

3. *The Commission should not establish an "Origin: USA" mark that is not needed and would cause confusion in the mark-et*

Timken is opposed to the establishment of such a mark *for use on products sold within the United States.* If one assumes that a foreign country's marking rules would require the origin of a product to be "USA," but U.S. rules would not deem that product to be "made in USA," then the manufacturer should have two choices. Either(1) identify the United States as an assembly point and further qualify the origin, e.g., "Assembled in USA from Components of U.S. and Foreign Origin;" or (2) apply separate labels or marks to the merchandise, depending upon the destination of the goods.

In the bearing industry, there are several "transplant" operations in which foreign-owned producers import foreign bearing parts for final assembly in the United States. Both finished and unfinished parts are imported and the operations performed in the United States may range from heat-treatment and grinding to simple assembly of finished components. Certain "unfinished" bearing parts have in the past been considered by U.S. Customs to be substantially transformed when they are heat treated. However, it is not always the case that heat treatment, grinding, and final assembly will be sufficient to add 75% value to imported components. Hence, there is a very real potential that certain bearings could fall into the category of products where a "made in USA" mark would not be permitted by the FTC, but foreign countries might consider the exported bearings to be U.S. origin.

As the largest fully integrated U.S. manufacturer of tapered roller bearings, Timken supports a rule that will preserve for consumers the significance of "made in

USA." Our competitors, who in many cases operate facilities in the United States that simply finish or assemble imported bearing parts, should not be entitled to advertise or mark their bearings "USA." The Commission's proposed safe harbors will already diminish the standard, by lowering the threshold from "all or virtually all." But, as noted above, the proposed safe harbors would not permit mere assembly or minor processing to confer origin. Adoption of an even weaker mark. such as "Origin: USA," will lead to confusion and will further undermine the significance of U.S. origin to our customers.

Of course, the Commission's proposal would require sellers to qualify the "Origin: USA" mark by indicating that the product contains "substantial foreign content." 62 Fed. Reg. at 25,046. Yet, there is no requirement to identify the country of origin or the amount of such content. Nor is it clear what amount would be "substantial." Finally, the only apparent benefit of such a mark would be the ability to use the same mark on exports and sales within the U.S. market.

In sum, the benefit in terms of additional costs from separate labels does not justify the costs in terms of potential confusion caused by the "Origin: USA" mark and the rather vague standard for qualification. For these reasons, the Commission should not permit even a qualified "Origin: USA" mark.

4. *The Commission should not eliminate the presumption that unmarked products are made in USA*

As noted in Section VI, under Section 5 of the FTC Act, a U.S. origin claim may be "either express or implied." 62 Fed. Reg. at 25,042. The traditional presumption that unmarked merchandise was "made in USA," recognized that in the absence of any mark, origin would be implied by the location of the seller, the name of the producer or seller, or other circumstances attending the sale. The Commission now proposes to abandon that presumption, instead requiring disclosure of foreign origin only where "with respect to the particular type of product at issue, a significant minority of consumers view country of origin as material and believe that the goods in question, when unlabeled, are domestic." *Id.*

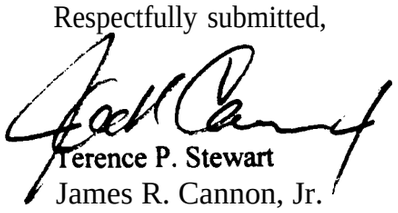
Although we do not disagree that consumers are by now aware that merchandise "made in USA" will often contain some amount of import content, we do not agree that abandoning the presumption with respect to unmarked goods is good policy. First, the Commission's Proposed Guide, the survey evidence, and the results of the workshops established that consumer do believe country of origin to be "material." The

Commission's proposal suggests that, nonetheless, additional surveys might be needed on a product-by-product basis to assess consumer views. Given that there is already evidence that at least a "significant minority" of *consumers* relies *to* some extent upon the origin of merchandise in making purchasing decisions, it should not be necessary to retest this conclusion for each unmarked product. See, e.g., ***Print*** *Advertising* ***Study,*** Table 2 (Feb. 1991).

Hence, the only additional inquiry required as to specific products would be whether consumers made any assumption with respect to the unmarked goods. In this regard, the tradition presumption did not foreclose the possibility that consumers were knowledgeable, it simply allocated the burden of proof. A rebuttable presumption is a time-tested means of allocating such burdens in legal and other proceedings. It is entirely appropriate that the producer of a given product that does not meet the "safe harbor" tests and that is unmarked should bear the burden of showing that the lack of a mark is not deceptive. Neither the Commission nor other domestic producers should be required to come forward with evidence concerning the unmarked goods until the producer of the goods first makes some showing that consumer do not assume U.S. origin.

For these reasons, the Commission should continue its traditional policy, assuming that unmarked goods are "made in USA," and requiring unmarked goods to meet the appropriate standards for a U.S. origin mark, unless the producer of the merchandise shows that consumers are not mislead by the lack of any origin marking.

Respectfully submitted,



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