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September 10, 2020

MUSA Rulemaking, Matter No. P074204
Via Online Comment Portal

Office of the Secretary
Secretary April J. Tabor
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Re: Comments on Federal Trade Commission's Notice of Proposed Rulemaking for Made in USA Claims

Dear Secretary Tabor:

The Southern Shrimp Alliance hereby submits comments in response to the Federal Trade Commission's ("FTC" or "Commission") Notice of Proposed Rulemaking related to Made in the USA ("MUSA") unqualified claims, which was published in the Federal Register on July 16, 2020.[1] These comments explain how current laws and rules governing seafood labeling on a federal and state level fail to meaningfully address menu labeling in restaurants; discuss the statutory ambiguity that allows the FTC to define the scope of its rule; and explain the impact

[1] 85 Fed. Reg. 43,162 ("Notice of Proposed Rulemaking").

that an overly narrow rule would have on the domestic seafood industry, which has long been plagued by deceptive and misleading menu labeling practices.

The Southern Shrimp Alliance is a non-profit industry association comprised principally of small- and medium-sized family owned and operated businesses along the United States' southern coastline. Its membership includes shrimp fishermen, unloading dock workers, shrimp processors, seafood retailers and wholesalers, and other shrimp-related businesses ranging from Texas to North Carolina.

The Southern Shrimp Alliance is committed to preserving truth in advertising and ensuring that the domestic shrimp industry competes on a level playing field when marketing its products to consumers. Along with many others in the U.S. seafood industry, the Southern Shrimp Alliance has endeavored to enhance and augment consumer choice by advocating for legislation, at all levels of government, requiring restaurants and food service establishments to label the country of origin for seafood products, including shrimp and shellfish. Nevertheless, in the absence of such laws, the domestic shrimp industry is directly injured by dishonest tactics used by some U.S. importers and restaurant owners to portray their products as American-made. Labeling practices that falsely convey to consumers that seafood offered for sale in restaurants and food service establishments are Made in the USA, despite being imported and foreign-produced, are pervasive. Accordingly, and as further fully explained below, the Southern Shrimp Alliance provides these comments in strong support of the Commission's proposed rulemaking.

I. OVERVIEW OF CURRENT COUNTRY OF ORIGIN LAWS

Country of origin labeling ("COOL") requirements are in effect at both the federal and the state level. At the federal level, restaurants are exempt from these labeling requirements. In

the absence of federal regulation of restaurants, a few states have addressed the void and passed legislation requiring restaurants to label the country of origin of certain products on their menus.

The affirmative requirements discussed below, wherein entities are obligated to disclose the country of origin, can be distinguished from the FTC's MUSA rule, which simply requires that if an entity chooses to make a claim of domestic origin, that claim must be able to be substantiated. Because restaurants are exempt from labeling requirements at the federal level, it is especially important that in cases where restaurants choose to make claims of domestic origin, they be held to the same standard as grocery stores and retailers in marketing domestic products truthfully and accurately. Because an understanding of existing regulatory obligations is helpful in describing the context in which some restaurants and food service establishments elect to present false MUSA claims through labeling, the Southern Shrimp Alliance sets out an overview of COOL requirements in the United States below.

A. USDA COOL Requirements

The U.S. Department of Agriculture's (USDA) COOL regulations require that retailers (such as grocery stores and wholesalers) inform the final consumer of the country of origin for certain commodities.[2] Commodities covered by the regulations include muscle cuts of lamb, chicken, and goat; ground lamb, chicken, and goat; fresh and frozen fruits and vegetables; fish; shellfish; and peanuts, pecans, macadamia nuts, and ginseng.[3] Fish and shellfish must also be

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[2] "Country of Origin Labeling (COOL)," *USDA Agricultural Marketing Service,* https://www.ams.usda.gov/rules-regulations/cool .

[3] 7 C.F.R. § 60.105; 7 C.F.R. § 65.135.

labeled with the method of production (*i.e.*, wild or farm-raised).[4] Regulations for fish and shellfish became effective in 2005, and the final rule for all covered commodities went into effect in 2009. The COOL requirements are overseen by the USDA's Agricultural Marketing Service (AMS).[5]

There are several important exceptions to COOL requirements. First, the requirements do not apply to food service establishments such as restaurants, lunch rooms, bars, or food stands.[6] Additionally, COOL requirements do not apply to retailers that are not licensed under the Perishable Agricultural Commodities Act ("PACA") of 1930.[7] Under PACA, any entity that sells less than 2,000 pounds of fresh or frozen fruits or vegetables per year is not required to be licensed. In practice, this excludes the vast majority of seafood retail stores from being subject to COOL requirements.[8]

B. CBP Marking Requirements

U.S. Customs and Border Protection ("CBP") requires that every article of foreign origin entering the United States must be legibly marked with the English name of the country of

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[4] 7 C.F.R. § 60.200(d).

[5] "Country of Origin Labeling (COOL)," *USDA Agricultural Marketing Service,* https://www.ams.usda.gov/rules-regulations/cool.

[6] 7 C.F.R. § 60.107.

[7] 7 C.F.R. § 60.124.

[8] As with food service establishments, while some seafood retail stores are exempt from the USDA's COOL obligations, these businesses run afoul of the FTC's MUSA rules if they make affirmative claims regarding the domestic-origin of seafood offered for sale when, in fact, the product is imported.

origin.[9] These disclosures must be visible to the ultimate purchaser, meaning the last person in the United States who will receive the article in the form in which it was imported.[10] Marking requirements do not apply to establishments like restaurants, or any establishment that presents an article to the consumer in a way other than its original imported form.[11] The marking must be legible and ideally should be a part of the article itself in the form of branding, stenciling, stamping, printing, molding, or other similar methods.[12] Tags and adhesive labels may also be used, but are not recommended.

C. State-Level Legislation

In the absence of federal COOL requirements for restaurants, a few states have passed laws related to country of origin labeling. The laws discussed below address the most relevant examples.

In Louisiana, food service establishments, such as restaurants, that sell foreign crawfish or shrimp must indicate the country of origin for those products on the menu.[13] The notice must

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[9] "Marking of Country of Origin on U.S. Imports," *U.S. Customs and Border Protection*, https://www.cbp.gov/trade/rulings/informed-compliance-publications/marking-country-origin-us-imports.

[10] *Id.*

[11] *Id.*

[12] "Marking of Country of Origin on U.S. Imports: Informed Compliance Publication," *U.S. Customs and Border Protection*, https://www.cbp.gov/sites/default/files/assets/documents/2020-Jul/ICPMarking-of-COO-onUS-Imports.pdf at p. 2. Certain articles, such as watches, clocks, cutlery, scissors, razors, scientific laboratory equipment, pliers, pipe and pipe fittings, manhole covers, and compressed gas cylinders, are subject to additional marking requirements. *Id.* at pp. 3-4.

[13] LA R.S. §40:5.5.4.

be at least the same font size as the product, and be placed immediately adjacent to the product.[14] If an establishment does not use menus, it must display country of origin information on a sign posted at the main entrance.[15]

In Mississippi, all retailers and food service establishments that sell catfish or fish products are required to inform the ultimate consumers of the product of the country of origin (including if the product is from the United States) for the catfish or fish.[16] This information can be disclosed via label, stamp, mark, placard, or other clear and visible sign reasonably near to the product.[17] If the information is printed on a menu, it must be in the same font and style as the product in question.[18] If the food service establishment only serves domestic fish and catfish, it can print this information on a prominent sign in lieu of printing it on the menu.[19] Such signs must be approved by the Mississippi Department of Agriculture and Commerce.[20] Further, any country of origin label for fish must distinguish between wild and farm-raised fish.[21]

In Alabama, food service establishments are required to disclose the country of origin for any catfish sold, if it is from a country other than the United States.[22] The country of origin can

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[14] *Id.*

[15] *Id.*

[16] MS Code § 69-7-607.

[17] MS Code § 69-7-607 (1)(b)(i)(1).

[18] MS Code § 69-7-607 (1)(b)(ii).

[19] *Id.*

[20] *Id.*

[21] MS Code § 69-1-309(2).

[22] AL Code §22-20A-31(b)-(c).

be listed either on the menu, in the same location and font size as the product, or on a sign or tabletop display.[23] The sign must be in a conspicuous location in plain view of all patrons, and any tabletop display must be at least 30 square inches, and placed on each table used for service.[24] Alabama food service establishments are not required to disclose the country of origin for fish.[25] However, the customer has the right to know, upon request, the country of origin of their fish.[26] The restaurant must inform customers of this right either on the menu, or on a placard no smaller than 8.5 x 11 inches.[27]

As explained above, while some state-level efforts address menu labeling, the vast majority of U.S. states do not require restaurants to label their products with the country of origin. Even more worrisome than the lack of country of origin information on menus is the possibility of false or misleading country of origin information. The MUSA rule promulgated by the FTC has the potential to serve as a strong deterrent to restaurants making false Made in USA claims, but only if the Commission opts to exercise its authority to include mail order catalogs and mail order promotional materials.[28] This inclusion would not force restaurants to include the country of origin of items on their menus, but it would ensure that when a restaurant chooses to make a claim of domestic origin, the claim must be able to be substantiated.

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[23] AL Code §22-20A-31(c).

[24] *Id.*

[25] AL Code §22-20A-3(b).

[26] AL Code §22-20A-3(c).

[27] *Id.*

[28] As discussed in detail below, provisions governing mail order catalog and mail order promotional material should be understood to include menus.

II. THE FTC HAS THE AUTHORITY TO FILL IN STATUTORY AMBIGUITIES

The "Made in U.S.A." requirement under 15 U.S.C. § 45a governs all "label{s}, or the equivalent thereof."[29] Therefore, in exercising its rulemaking authority under 15 U.S.C. § 45a, the Commission's Proposed Rule applies to a wide range of markings, including "any mail order catalog or mail order promotional material {that} includes a seal, mark, tag, or stamp."[30] The Proposed Rule further defines the terms "mail order catalog" and "mail order promotional material" to mean "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."[31]

Various Commissioners have indicated their concern that such a definition for applicable "labels" subject to the Made in USA regulation is overly expansive and would not stand up to judicial scrutiny.[32] However, as discussed below, the definition adopted in the Proposed Rule is well within the bounds of the FTC's discretion as an administering agency to fill statutory gaps. Further, such an exercise of authority is essential in closing a regulatory

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[29] 15 U.S.C. § 45a.

[30] Notice of Proposed Rulemaking.

[31] *Id.*

[32] *See* "Statement of Commissioner Christine S. Wilson: Concurring in Part and Dissenting in Part" *Federal Trade Commission* (June 22, 2020) ("Statement of Commissioner Wilson"); *see also* "Dissenting Statement of Commissioner Noah Joshua Phillips: Made in the USA Labeling Rule – Notice of Proposed Rulemaking" *Federal Trade Commission* (June 22, 2020) ("Statement of Commissioner Phillips").

loophole that has undermined the economic well-being of the domestic shrimp industry and harmed U.S. consumers.

> The text of 15 U.S.C. § 45a does not explicitly define the scope of its application:
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> To the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a "Made in the U.S.A." or "Made in America" label, or the equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission issued pursuant to section 45 of this title. This section only applies to such labels.[33]

The plain language of the statute suggests that Congress intended section 45a to apply to a wide range of markings, as indicated by the inclusion of the phrase "or the equivalent thereof" following the word "label," without further specifying the definition of "label" and what types of markings constitute "the equivalent thereof."

The legislative history further supports a broad application of the statute. Specifically, in an earlier draft of the bill that eventually codified 15 U.S.C. § 45a, a definition of "label" was included.[34] In that earlier draft, "label" was defined as "any written, printed, or graphic matter on, or attached to a product or any of its containers or wrappers."[35] Such language was removed in the final version of the bill.[36] The removal of a precise definition for the term "label"

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[33] 15 U.S.C. § 45a.

[34] Engrossed Amendment House for H.R. 3355 (Apr. 21, 1994) (https://www.congress.gov/bill/103rd-congress/house-bill/3355/text/eah).

[35] *Id.*

[36] Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong. § 320933 (1994).

demonstrates that Congress intended to leave the task of defining the applicable scope of the "Made in USA" requirement under section 45a to the administering agency.

When an agency exercises its gap-filling authority via rulemaking, the court affords the agency's construction of the statute significant deference, so long as the interpretation is reasonable.[37] Here, the Commission's Proposed Rule, if ever challenged in court, will likely pass judicial scrutiny, given that it adopts the same scope with respect to the types of markings covered as that under the agency's Wool Rules and Textile Rules.[38]

The Commission first promulgated the Wool Rules in 1941, pursuant to rulemaking authority granted under the Wool Products Labeling Act of 1939.[39] The Wool Products Labeling Act provides that any misbranded wool product introduced for sale will be considered an unfair or deceptive act or practice, and clarifies that a product will be considered misbranded "{i}f it is falsely or deceptively stamped, tagged, labeled, or otherwise identified."[40]

The text of the statute frequently refers to products that are "stamped, tagged, or labeled" in a deceptive manner, although no definitions are provided for any of these terms.[41] Accordingly, in exercising its gap-filling authority, the FTC specified in its Wool Rules that the requirements under the Wool Products Labeling Act applies to "labels," defined as "the stamp, tag, label, or other means of identification, or authorized substitute therefore, required to be on or

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[37] *Chevron U.S.A., Inc. v NRDC*, 467 U.S. 837, 844 (1984) ("*Chevron"*).

[38] *See* 16 C.F.R. § 300; 16 C.F.R. § 303.

[39] *See* 50 Fed. Reg. 15,101 (Apr. 17, 1985); 15 U.S.C. § 68d.

[40] 15 U.S.C. § 68b.

[41] 15 U.S.C. § 68b.

affixed to wool products by the Act or Regulations and on which the information required is to appear," as well as "mail order catalog" and "mail order promotional material," which encompasses "any materials, used in the direct sale or direct offering for sale of wool products, that are disseminated to ultimate consumers in print or by electronic means, other than by broadcast, and that solicit ultimate consumers to purchase such wool products by mail, telephone, electronic mail, or some other method without examining the actual product purchased."[42] The scope of this rule has never been challenged in court.

The FTC exercised its authority in a similar way in implementing the Textile Products Identification Act of 1958 when it promulgated the Textile Rules, which became effective in 1960.[43] The Textile Products Identification Act simply prohibits the introduction for sale of any textile products that are misbranded or deceptively advertised.[44] Although it frequently uses the word "label," it does not provide a definition.[45] As such, in the Textile Rules, the FTC aligned the applicable scope of markings with the covered commodities in its Wool Rules.[46]

Here, in the Proposed Rule, the FTC reasonably interpreted "the equivalent thereof" under 15 U.S.C. § 45a to encompass markings such as "stamps" and "tags," which are explicitly mentioned under the Wool Products Labeling Act. Further, consistent with its Wool Rules and Textile Rules, the Commission opts to include mail order catalog and mail order promotional

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[42] 16 C.F.R. § 300.1(h)-(i).

[43] 16 C.F.R. § 303.

[44] 15 U.S.C. § 70a.

[45] *See* 15 U.S.C. § 70.

[46] *See* 16 C.F.R. § 303.1(f); 303.1(u); 303.34.

materials in the scope of the Proposed Rules.[47] By doing so, the Commission aligns the applicable scopes of markings under three different pieces of legislation that were all enacted to protect consumers from fraudulent advertisement. This is a reasonable interpretation of the statute and a proper exercise of the Commission's authority. In evaluating statutory construction under *Chevron*, the court can take into account whether an agency is acting in accordance with a past or established practice.[48] In this case it is evident that the FTC's actions align with the scope of past rules governing labeling.

Commissioner Wilson, citing to a Congressional Report filed in the House of Representatives in August 1994, suggests that the phrase "equivalent thereof" may been intended to modify the "Made in the U.S.A." statement, as opposed to "label."[49] In other words, Commissioner Wilson is of the opinion that Congress intended to provide flexibility on the types of statements that constitute a "Made in the U.S.A." representation, but not the types of markings that the requirements under 15 U.S.C. 45a apply to. Although such an interpretation is not an unreasonable reading of the statute, as discussed above, it is not the only reasonable reading of the statute. When a statute "is susceptible to multiple interpretations, the court {. . .} defers to the agency's interpretation," and it is up to the agency to decide whether and to what extent it wishes to exercise its regulatory authority.[50]

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[47] Notice of Proposed Rulemaking.

[48] *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2145 (2016).

[49] Statement of Commissioner Wilson at 2 (citing Conf. Rep. on H.R. 3355 (filed in House (8/21/1994)).

[50] *See King v. Burwell*, 759 F.3d 358, 367 (4th Cir. 2014); *see also Apotex Inc. v. FDA*, 414 F. Supp. 2d 61, 69 (D.D.C. 2006); *see also Trout Unlimited v. Lohn*, 559 F.3d 946, 954 (9th Cir. 2009) ("if the statutory provision at issue is susceptible to multiple interpretations, 'the question

III. AN OVERLY NARROW RULE WILL UNDULY HARM THE DOMESTIC SEAFOOD INDUSTRY

It is essential for the FTC to exercise its authority by adopting a reasonable scope of applicable markings which includes mail order catalogs and mail order promotional materials (and, under the definition of those terms, restaurant menus). The Proposed Rule in its current form is not only legally permissible, but it is also crucial for the FTC to fulfill its mandate to protect both consumers and the domestic industry. The scope adopted under the Proposed Rule allows the Commission to exercise jurisdiction over "Made in U.S.A." statements on restaurant menus, as a form of "Mail order promotional material" or "mail order catalog."[51] First, a menu is "used in the direct sale or direct offer for sale" of a product – food. Second, the menu is disseminated in print when it is either delivered to the consumer's table in the restaurant or the consumer's location outside of the restaurant. Alternatively, a menu can be delivered "by electronic means" through a website for take-out or delivery orders. Further, the dissemination of a menu is for the purpose of "solicit{ing} the purchase" of a product, i.e., food, without the consumers "examining the actual product purchased."

As discussed previously, country of origin labeling is regulated by various agencies, such as the USDA and CBP. However, these rules do not cover country of origin information on

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for the court is whether the agency's answer is based on a permissible construction of the statute.'" (citing *Chevron* at 843)).

[51] "Mail order promotional material" and "mail order catalog" are defined as "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." (*See* Notice of Proposed Rule).

restaurant menus. As a result of this legal loophole, misleading or deceptive restaurant menu labeling on the country of origin of seafood products is common.

A 2019 study by the advocacy group Oceana found that seafood fraud is pervasive in the United States – one out of every three establishments sold mislabeled seafood, and seafood was most frequently mislabeled in restaurants.[52] The report found that often "imported seafood {is} sold as regional favorites, fooling consumers into thinking their seafood is locally sourced."[53] For example, the study found that imported fish from Europe and Asia were often labeled as Great Lakes yellow perch.[54] In addition to overtly lying to consumers about the type of seafood being offered for sale, some restaurants attempt to deceive customers as to the country of origin of seafood offered by using particular words and phrases to convey that a product is locally sourced, such as restaurants advertising Vietnamese shrimp as "Gulf shrimp."[55] Seafood Source reports that officially, "Gulf shrimp are found along the southeastern U.S. coast {. . .} and along the entire western Gulf."[56] However, a 2014 study found that 1/3 of shrimp labeled as "gulf

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[52] Drs. Kimber Warner, Whitney Roberts et al. "Casting a Wider Net: More Action Needed to Stop Seafood Fraud in the United States," *Oceana* (March 2019) ("Oceana Report of Seafood Fraud").

[53] "Casting a Wider Net: More Action Needed to Stop Seafood Fraud in the United States," *Oceana* https://usa.oceana.org/publications/reports/casting-wider-net-more-action-needed-stop-seafood-fraud-united-states.

[54] Oceana Report on Seafood Fraud at 2.

[55] Benjamin Alexander-Bloch, "Is 'Gulf' shrimp really from the Gulf of Mexico? Not always, study says," *The Times Picayune* (Oct. 30, 2014) https://www.nola.com/news/environment/article_97719815-6527-5b11-b93c-785bb74e5928.html.

[56] "Shrimp, Gulf," *Seafood Source* (January 23, 2014) https://www.seafoodsource.com/seafood-handbook/shellfish/shrimp-

shrimp" were actually sourced from somewhere in Asia.[57] The study concluded that "the Gulf label deserves better definition and protection."[58]

Given that a substantial amount of seafood is consumed in restaurants, deceptive menu labeling hurts both consumers and the domestic seafood industry.[59] Consumers have a vested interest in ensuring that the seafood they consume is safe and free from harmful chemicals. The Government Accountability Office has explained that about half of seafood imported into the US is raised on farms, and that "{f}armers may treat fish with antibiotics and other drugs."[60] Further, "{m}isuse of drugs can leave residues in seafood that cause health problems for consumers."[61] Even so, the FDA tests less than 0.1 percent of all seafood imports for drug

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gulf#:~:text=Brown%2C%20white%20and%20pink%20shrimp,particularly%20on%20Mexico's%20Campeche%20Banks.

[57] Benjamin Alexander-Bloch, "Is 'Gulf' shrimp really from the Gulf of Mexico? Not always, study says," *The Times Picayune* (Oct. 30, 2014) https://www.nola.com/news/environment/article_97719815-6527-5b11-b93c-785bb74e5928.html.

[58] *Id.*

[59] *See* D. Love, F. Asche, Z. Conrad, R. Young, J. Harding, E. Nussbaumer, A. Thorne-Lyman, R. Neff, *Food Sources and Expenditures for Seafood in the United States*, Nutrients, 12, 1810 (June 2020) ("*Center for a Livable Future* study") and Jessica Fu, "Seventy percent of seafood is purchased when dining out. What happens when the nation is ordered to stay home?" *The Counter* (April 1, 2020) https://thecounter.org/seafood-fishermen-revenue-restaurants-covid-19-coronavirus/#:~:text=70%20percent%20of%20seafood%20is%20eaten%20dining%20out. For shrimp, a majority of the consumption of this seafood is done outside the home. *See Center for a Livable Future* study at p.5, Table 3 (reporting that 55 percent of shrimp, by weight, was consumed by U.S. adults outside the home).

[60] United States Government Accountability Office, "FDA and USDA Could Strengthen Efforts to Prevent Unsafe Drug Residues" *GAO* (September 2017) https://www.gao.gov/products/GAO-17-443.

[61] *Id.*

residues.[62] It is unsurprising that consumers show a "strong preference for local seafood" and a willingness to pay up to 27 percent higher prices for domestic product.[63] Deceiving consumers deprives them of their ability to make an informed decision and robs the domestic industry of a level playing field at the institutions at which substantial quantities of seafood are consumed.[64]

Because restaurants are not required to label when a product is from a foreign nation (unlike grocery stores), it is even easier to deceptively market these products. The Commission recognizes that there is a benefit to marketing products as Made in the USA,[65] in large part because U.S. consumers are willing to pay higher prices for such goods.[66] However, the benefit

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[62] Jamie Grey and Lee Zurik, "Untested water: 99.9 percent of foreign fish goes without testing for unsafe drugs" *Fox News* (Feb. 4, 2019) https://www.kfyrtv.com/content/news/Untested-water-999-percent-of-foreign-fish-goes-without-testing-for-unsafe-drugs.html.

[63] "Will Consumers Spend More for Local and Eco-Friendly Seafood?" *Sea Grant North Carolina* (Dec. 23, 2019) https://ncseagrant.ncsu.edu/hooklinescience/2019/12/23/will-consumers-spend-more-for-local-and-eco-friendly-seafood/; *see also* Charlie French et al, "Consumer and Retailer Demand for Local Seafood: Opportunities in the N.H. Marketplace" *University of New Hampshire* (January 2014) https://seagrant.unh.edu/sites/seagrant.unh.edu/files/media/pdfs/extension/alternative_seafood_marketing.pdf (The study found that consumers "are willing to pay, on average, $2.25 more per pound for seafood if it is local.").

[64] *See Center for a Livable Future* study.

[65] Lisa Lake, "Prefer Products Born in the USA? Be Sure to Check the Label" *Federal Trade Commission Consumer Information* (July 26, 2013) https://www.consumer.ftc.gov/blog/2013/07/prefer-products-born-usa-be-sure-check-label ("{M}any consumers prefer clothing, cars, and other products bearing a label proudly claiming it to be 'Born in the USA.'"); *see also* "Made in the USA: an FTC Workshop: Staff Report of the Bureau of Consumer Protection," *Federal Trade Commission* (June 19, 2020) https://www.ftc.gov/system/files/documents/reports/made-usa-ftc-workshop/p074204_-_musa_workshop_report_-_final.pdf ("three stakeholders described testing showing that consumers might be willing to pay a price premium for MUSA products.").

[66] *See* "Will Consumers Spend More for Local and Eco-Friendly Seafood?" *Sea Grant North Carolina* (Dec. 23, 2019) https://ncseagrant.ncsu.edu/hooklinescience/2019/12/23/will-consumers-spend-more-for-local-and-eco-friendly-seafood/.

that this provides to the domestic industry is lost without consistent enforcement of MUSA claims in restaurants. A restaurant owner has no incentive to pay a premium for locally sourced shrimp if it can purchase cheaper, imported shrimp and market them as locally sourced without consequences. President Trump's recent Executive Order on seafood underscores the importance of creating an even playing field for the domestic seafood industry in the midst of a global pandemic. That Executive Order acknowledges that "illegal, unreported, and unregulated fishing {. . .} unfairly competes with the products of law-abiding fisherman and seafood industries around the world."[67]

IV. The Commission Should Act to Identify and Define Practices that Result in Misleading Labeling of Seafood on Menus

In many instances, labeling intended to falsely convey that seafood offered for sale in restaurants is Made in the USA is obvious in its deception (*i.e.*, offering for sale imported shrimp as "Gulf" shrimp). In others, the use of visual imagery of commercial fishing vessels (*i.e.*, shrimp boats to sell foreign, farm-raised shrimp), references to commercial fishermen in menu labeling (*i.e.*, offering for sale "Shrimper's Net Catch" for foreign, farm-raised shrimp), or the use of specific geographic terminology in the menu offering (*i.e.*, "New Orleans Shrimp" or "Charleston Shrimp & Grits" to sell imported shrimp), is intended to convey to the consumer that they are purchasing seafood products that were Made in the USA. Pursuant to Section 18 of the *Federal Trade Commission Act* (15 U.S.C. § 57a(1)(B)), Congress invested the Commission with the authority to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce . . ." Although the comments provided

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[67] Exec. Order No. 13921, 85 Fed. Reg. 28,471 (May 7, 2020).

here are directly in response to the Notice of Proposed Rulemaking, the Southern Shrimp Alliance requests that the Commission act under its Section 18 authority to prescribe rules that "define with specificity" practices in menu labeling that unfairly or deceptively present seafood for sale to American consumers with the false implication that it was Made in the USA.

V. Conclusion

As mentioned above, menu labeling represents a blind spot in labeling laws. There is currently insufficient guidance and incentive for restaurants to truthfully and meaningfully disclose the origin of their seafood. Deceptive menu labeling is precisely the kind of unfair and deceptive act that the Commission is empowered to act against, and it should take this opportunity to do so by including mail order catalogs and promotional materials in the scope of the Proposed Rule.

Respectfully submitted,

John Williams
Executive Director