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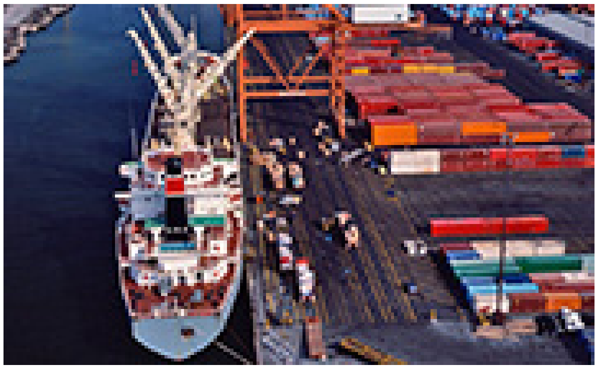

Importers Beware: False Claims Act Enforcement of Import Procedures on the Rise

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Importers are facing potential additional liability for actions they take in connection with importing items into the United States. In addition to administrative penalties imposed by U.S. Customs and Border Protection ("CBP"), private litigants and the U.S. Department of Justice ("DOJ") have been bringing cases under the False Claims Act ("FCA") to penalize false and fraudulent statements allegedly made during the import process. The FCA is a particularly powerful enforcement tool as it allows for treble damages and penalties, and because FCA claims can be initiated by private *qui tam* plaintiffs, known as relators. To avoid these actions, companies importing merchandise into the United States must establish procedures and practices to ensure that declarations made to CBP in connection with those activities, whether by the company itself or its customs broker, are accurate and complete.

The FCA prohibits knowingly making false or fraudulent claims for payment from the U.S. government. It also allows claims for so-called "reverse" false claims, which seek to recover damages resulting from false or fraudulent conduct that causes a person or company to conceal, avoid, or reduce payments due to the government. Under this theory, a person may institute a reverse false claims action against an importer alleging that false or fraudulent statements by that importer caused it to pay less duties than it should have paid.

The FCA is a popular enforcement statute for several reasons. As mentioned above, it allows for damages in the amount of three times the actual amount of damages caused by any false claims. It also calls for civil penalties of between $5,500 and $11,000 for each claim submitted

—and claims can be broadly defined, allowing for stacking of this penalty. For example, a single invoice that itemizes the amounts due by contract line item may result in allegations that several, or all, of the individual line items comprise an independent false statement count. Similarly, the transmittal email or letter with the seemingly banal statement that the amount on the enclosed improper invoice is due and payable can be alleged to constitute an independent false statement. The statute also provides that violators must pay attorneys' fees, which can be substantial.

Other features of the FCA are designed to encourage claims under the statute. The most important of these are the *qui tam* provisions, which allow individuals to initiate an FCA lawsuit on behalf of the U.S. government. A relator can file an FCA suit under seal and send the case to the DOJ. The DOJ then investigates the matter while it is under seal, often in coordination with the affected U.S. agency (here, CBP). After investigating, the DOJ can decide to intervene in the case and take it over. In the alternative, even if the DOJ declines the case, the relator can continue to pursue the action. If there is any recovery (whether the DOJ intervenes or not), the statute provides that the relator is entitled to receive a percentage of the amount recovered in most circumstances. In addition to these provisions, the FCA also has a statute of limitations provision that goes beyond the standard period of limitations. As such, even though the time period may have run on administrative penalties, it could remain alive for FCA claims. These provisions are designed to entice potential whistleblowers into bringing FCA actions.

Reverse false claims in the import context have played out in several different scenarios. The most commonly alleged type of action involves allegations that an importer has misrepresented the country of origin of imported items to avoid paying antidumping or countervailing duties. These types of claims are likely the most popular because antidumping and countervailing duties can be quite large—in some cases as much as 300 percent of the value of imported merchandise. As a result, treble damages under the FCA can result in importers paying millions of dollars to resolve these actions.

FCA claimants have also brought cases alleging that an importer has used two sets of invoices (known as "double invoicing"), where one set of invoices reflects actual prices and a second set contains reduced prices to lower the amount of duties paid. An additional type of claim in the growing trend of customs-based FCA cases is one in which a claimant argues that an importer knowingly misclassified imported merchandise to avoid paying duties or to reduce the amount of duties paid to CBP (i.e., classifying merchandise under a tariff classification subject to 2.5 percent duties rather than the actual tariff classification of the merchandise, which is subject to 7.5 percent duties).

Recent customs-based FCA enforcement actions provide evidence of the incentives individuals have to bring these claims. For example, an importer recently paid $45 million (plus interest) and the relator received more than $7.875 million for allegations that the importer knowingly declared Japan and Mexico as the country of origin of merchandise when they actually were sourced from China and India. Chinese- and Indian-origin products of this particular type were subject to antidumping and countervailing duties. In addition, a U.S.-based importer paid $4.3 million and the relator received $830,000 for allegations that the importer knowingly undervalued imported merchandise into the United States and made other false statements in documents submitted to CBP. Also, a third importer paid $1.2 million and the relator received $252,000 for allegations that the importer knowingly engaged in a double invoicing scheme, pursuant to which imports were undervalued and incorrectly described, resulting in the importer paying less than 10 percent of the duties and fees payable to CBP.

All signs point to the trend of customs-based FCA claims continuing. As a result, importers are likely to continue to face additional liability for violations of the U.S. import laws. Companies importing merchandise into the United States should evaluate and, as necessary, update their existing compliance policies and procedures to avoid potentially massive exposure by making sure that declarations made by or on behalf of those companies are accurate and complete.

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