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DOJ Turns Attention to Tariff Evasion and Customs Fraud

Article By:

Clinton K. Yu

Anthony J. Burba

At the recent Federal Bar Association annual qui tam conference, U.S. Department of Justice (DOJ) officials stated the agency would aggressively pursue False Claims Act (FCA) investigations and that battling customs fraud would be one of its major areas of focus. Given the recent wave of new tariffs (customs duties) under President Donald Trump's administration and the DOJ's emphasis on battling tariff evasion using the FCA, U.S. importers should conduct business with a heightened sense of awareness of compliance with U.S. Customs and Border Protection (CBP) laws and regulations.

Traditional Customs Enforcement

Parties that act as U.S. importers of record have traditionally been held liable for payment of duties to CBP. If an importer underpays duties, CBP's main statutory authority for enforcement is under 19 U.S.C. § 1592. This statute authorizes CBP to not only recover duties underpaid, but also impose penalties that start at two times the amount underpaid and up to the domestic value of the merchandise, depending on the importer's level of culpability. Though private parties can file allegations of customs violations with CBP (e.g., via CBP's e-allegations portal), only CBP can initiate an enforcement action under 19 U.S.C. 1592.

How FCA Cases Work

Unlike 19 U.S.C. 1592, both the U.S. government and private parties that act as whistleblowers (known as "relators") can bring a case under the FCA against an importer for tariff evasion. Federal law says a person or company who knowingly makes, uses or caused to be made or used, a false record or statement, material to an obligation to pay or transmit money or property to the government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money to the government violates the FCA. Such claims are generally referred to as reverse false claims.

Relators and the DOJ have previously investigated companies under the FCA, using this provision to allege that an individual or company underpaid a tariff or import duty (an obligation), thereby creating a false claim through the underpayment of an obligation to the government.

Parties can take some solace in the fact that innocent mistakes or errors are not subject to the FCA. For an underpayment of import duties to constitute a reverse false claim, it must be knowing, meaning that the individual or company making the underpayment has either subjective knowledge that they are underpaying the obligation, is deliberately ignorant of the obligation, or recklessly disregards the obligation. One caveat to this knowledge standard as it relates to a reverse false claim is that even if the initial underpayment is an innocent mistake, it can become a reverse false claim if the individual or company learns of the underpayment and takes no action to correct it.

Predicting Likely Targets in FCA Tariff Cases

Based on the recent DOJ comments, importers should expect, at the very least, misdeclaration of value and country of origin to CBP to be areas of focus for FCA investigations during the Trump administration.

Valuation affects duties, as the amount owed is based on the declared value of merchandise multiplied by the applicable duty rate. For instance, importers importing from a related overseas manufacturer or supplier will be frequent targets for enforcement. Related party import transactions are subject to higher scrutiny, as declaration of the transaction value may not be acceptable to CBP if certain tests are not met.

Country of origin also directly affects duties owed. Most products of China are now subject to an additional 45 percent duty rate (25 percent under Section 301 combined with 20 percent under IEEPA). Even products that are manufactured outside of China could be subject to the additional 45 percent, if Chinese-origin material contained in the product is not “substantially transformed” into a product of a different country.

Thus, we could certainly see more FCA cases involving importers that fail to declare the proper country of origin on goods, particularly in scenarios where manufacturing has shifted outside of China without satisfying the proper rule of origin.

Misdeclaration of value and origin are just examples of the types of FCA customs fraud cases we should expect to see in the next four years. There will undoubtedly be other areas of risk that could result in non-compliance and trigger an FCA case, such as tariff misclassification. Likewise, we can expect private relators will target their efforts toward whistleblowing on valuation, origin and classification violations, as it will increase the chances of DOJ's intervention in the lawsuit.

In light of the expected increase in enforcement not only under CBP regulations, but also under the FCA, importers now need to ensure they have updated and robust policies and procedures to take into account areas of risk associated not only with past tariff action, but also new tariffs imposed under the current administration.

> A senior U.S. Department of Justice official said … that the Trump administration's focus on government efficiency will include "aggressively" enforcing the False Claims Act, including a strong focus on FCA enforcement of foreign trade issues amid recently imposed tariffs.
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