Client Alert | International Trade / White Collar/Investigations

President Trump's trade wars and the expansion of customs violations into the white-collar space

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The US' ongoing trade wars—with various trading partners and particularly with China—are everywhere in the news. Putting politics and policy aside, the "trade wars" reflect a basic disagreement over the rules that should govern international commerce and a concern that those engaged in international trade are not following the established rules. Enhanced enforcement of existing trade laws is, therefore, to be expected in times of trade conflict: evidence of violations provides fuel for the on-going policy discussion. In the United States, the imposition of increased import duties makes enhanced enforcement even more attractive, as the national Treasury stands to benefit from discovering and exposing schemes that have been used unlawfully to evade the higher import duties.

In a 2017 Executive Order, President Trump estimated that importers lacking US assets had evaded US$2.3 billion in antidumping and countervailing duties for an unspecified period.[1] He therefore instructed the US Attorney General and the Secretary of Homeland Security (which includes US Customs and Border Protection or "CBP") to "develop recommended prosecution practices and allocate appropriate resources" to give prosecution of "significant" trade-law violations "high priority."[2] CBP can investigate alleged import duty violations relating to antidumping and countervailing duties under the US Enforce and Protect Act ("EAPA"), 19 USC § 1517, and related false statements or omissions in entry declarations under 19 USC § 1592.[3]

But two more recent trends are upping the ante and moving import duty violations into the white-collar space: civil lawsuits brought by whistleblowers under the US False Claims Act ("FCA"), 31 USC § 3729, and criminal enforcement by the US Department of Justice ("DOJ"). We expect both trends to continue, given the Trump administration's focus on trade.

The FCA in the trade context—theories of liability

The FCA empowers whistleblowers, also known as relators, to file civil FCA claims in the federal courts on the government's behalf when the government has allegedly lost money because of a false claim or a "reverse"

1 Executive Order 13785, § 1 (Mar. 31, 2017), 83 Fed. Reg. 16719, 16720 (Apr. 5, 2017).

2 *Id*. § 5.

3 Such investigations do not include recently imposed duties under Sections 201, 232, and 301.

false claim.[4] Between 2000 and 2016, whistleblowers[5] increasingly invoked the FCA to seek the payment of unpaid or improperly reduced duties on US imports.[6]

"[A]ny person" is liable under the FCA when that person:

> knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money . . . to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money . . . to the Government.[7]

Unlike the FCA's other provisions, which require the defendant to have made a claim for receiving money *from* the US government, this provision (known as the "reverse-false-claim" provision) focuses on money that the defendant should have paid *to* the government.

CBP calculates duties on foreign-made goods imported into the United States based on information provided by importers. Material false statements or omissions to CBP about the value, country of origin, and nature of the goods imported into the United States can thus expose to civil FCA liability all knowing participants in US importation—foreign manufacturers, importers of record, entities that own or are consignees of the goods at importation, downstream re-sellers and commercial purchasers in the United States, as well as these entities' individual officers and agents.

The FCA has potentially broad reach beyond those who make false statements or records because the statute also (1) creates liability for those entities or individuals that *cause* false statements or records to be made or used,[8] and (2) prohibits *conspiring* to violate the FCA through reverse false claims.[9]

Examples of FCA theories invoked in trade cases include:

- **Misclassifying the actual goods**—typically for the alleged purpose of reducing or avoiding duties (and, most commonly, antidumping and countervailing duties);[10]
- **Misrepresenting the goods' country of origin**—which typically involves allegations that the goods were shipped from their actual country of origin to a second country to which lower duties applied (*i.e.*, the goods were "transshipped");[11]
- **Underreporting the value of the goods**;[12] or

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4 31 USC §§ 3730(b)(1) & (c)(3). The FCA also prohibits attempts, and so certain conduct may be actionable even if the government suffered no financial loss.

5 Once a whistleblower has filed a confidential complaint, the FCA gives the government the option to intervene in the case—that is, to take over the litigation from the whistleblower. 31 USC §§ 3730(b)(4) & (5), (c). Because of certain statutory provisions concerning the jurisdiction of the US Court of International Trade, it appears that the government cannot initiate an FCA case based on import duty violations by itself; only a whistleblower may initiate an FCA case concerning evasion of import duties.

6 *See, e.g.*, Pamela Bucy Pierson & Benjamin Patterson Bucy, Trade Fraud: The Wild, New Frontier of White Collar Crime, 19 Ore. Rev. Int'l Law 1, 11 & nn.39, 40 (2018) (hereafter "Pierson & Bucy") (counting 47 civil and criminal cases between 2000 and 2016 surviving dismissal, and 26 of those were civil FCA cases); *id.* at 13 (identifying civil settlements ranging from $1.2M to $45M). Pierson and Bucy represent whistleblowers.

7 31 USC § 3729(a)(1)(G).

8 31 USC §§ 3729(a)(1)(A), (B), & (G).

9 31 USC § 3729(a)(1)(C).

10 *See, e.g.*, Compl. ¶¶ 4-6 (May 29, 2014) (R. 1) (alleging furniture importer evaded duties as high as 216.01% by misclassifying furniture imported from China), *United States ex rel. Bissanti v. Goldman*, No. 1:14-cv-00497-SS (W.D. Tex.).

11 *See, e.g.*, Compl. ¶¶ 23-29 (Aug. 4, 2015) (R. 1) (alleging that Chinese goods were transshipped through Malaysia), *United States ex rel. Univ. Loft Co. v. Home Furnishing Res. Grp., Inc.*, No. 5:15-cv-00646-OLG (W.D. Tex).

12 *See, e.g.*, Compl. ¶¶ 1, 14-15 (Nov. 10, 2011) (R. 1) (alleging defendant failed to disclose additional value resulting from foreign, third party engineering work), *United States ex rel. Jimenez v. Otter Prods., LLC*, No. 1:11-cv-02937-RM-MJW (D. Colo.).

- **Failing to mark** foreign-made goods with the name of the country in which the goods were made.[13]

In pleading their claims, whistleblowers often rely on purported material and false statements or material omissions on CBP Form 7501, which generally accompanies goods imported into the United States. Form 7501 requires entities completing it to declare that the information they disclose is accurate and to amend the form as necessary.[14]

Whistleblowers also have attempted to plead FCA cases in the trade context when, for instance, defendants sold to government purchasers allegedly foreign-made products when the government's purchasing contracts specified that the goods must be "US-made or designated country end products."[15]

FCA defenses

FCA defendants can invoke several statutory defenses in the early stages of an FCA case.

The public-disclosure bar

Section 3730(e)(4) of the FCA bars lawsuits "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." Three types of "public disclosure" will bar whistleblowers' FCA cases from proceeding. In recent trade cases, FCA defendants have successfully invoked two of them.[16]

First, the public-disclosure bar applies when "a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party"[17] involves the same conduct alleged to violate the FCA. Last year, the district court in *Schagrin v. LDR Indus., LLC* precluded a self-styled industry insider from pursuing FCA claims when CBP had already filed a proof of claim in the defendant's previously filed bankruptcy proceeding to recover duties and penalties that the defendant had evaded when importing steel pipe from China.[18]

The government, however, has contended in one other case that "hearings" under Section 3730(e)(4) do not start until DOJ, on CBP's behalf, files an action to collect a penalty with the US Court of International Trade, even if CBP previously initiated an investigation under Section 1592 and issued a penalty during related administrative proceedings.[19]

Second, defendants have successfully invoked the public-disclosure bar when the allegations underlying the FCA claim were previously disclosed "in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation,"[20] such as ITC reports or responses to FOIA requests.[21]

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13 19 USC § 1304; *see generally United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 255 (3d Cir. 2016) (reversing order denying with prejudice motion to amend Relator's complaint alleging evasion of marking duties).

14 *See* 19 USC § 1484; 19 CFR §§ 141.61, 142.3 (generally requiring importers of record to file CBP Form 7501 entry summaries); *see also* US Customs & Border Protection, CBP Form 7501: Entry Summary (last modified Sept. 20, 2018), https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501 & https://www.cbp.gov/sites/default/files/assets/documents/2019-Sep/CBP%20Form%207501.pdf. A material "omission" also could include, for example, the failure to declare the goods as falling within the scope of a particular antidumping duty order and to tender associated cash deposits, even if the declared classification, country of origin, and value were accurate.

15 *See United States ex rel. Berkowtiz v. Automation Aids, Inc.*, 896 F.3d 834 (7th Cir. 2018) (affirming order granting defendants' motions to dismiss); *United States ex rel. Folliard v. Comstor Corp.*, 308 F. Supp. 3d 56 (D.D.C. 2018) (granting defendant's motion to dismiss). The following authorities set forth various Buy America Act procurement requirements: 41 USC § 8302; 49 USC § 5323(j); 48 CFR §§ 25.201 & 25.202; 49 CFR § 661.5(a).

16 Even where some facts of the underlying alleged fraud are public, defendants still may have difficulty invoking the public-disclosure bar where they cannot show that both the "true facts" and the "false facts" were publicly disclosed. *See United States ex rel. Doe v. Staples, Inc.*, 773 F.3d 83, 86 (D.C. Cir. 2014).

17 31 USC § 3730(e)(4)(A)(i).

18 No. 14 C 9125, slip op. at 1, 2, 5 (N.D. Ill. May 23, 2018) (granting motion to dismiss).

19 United States Statement of Interest in Resp. to Def.'s Mot. to Dismiss (Nov. 8, 2013) (R. 62), *United States ex rel. Jimenez v. Otter Prods., LLC*, No. 1:11-cv-02937-RM-MJW (D. Colo.).

20 31 USC § 3730(e)(4)(A)(ii).

21 *Staples*, 773 F.3d at 85, 86–87 (ITC reports); *cf. Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 US 401, 410–11 (2011) (FOIA responses).

Third, FCA defendants in trade cases have had less success invoking the public disclosure bar when the "news media" have previously disclosed the same allegations underlying the FCA claim.[22]

Lack of knowledge

To prove an FCA violation, a whistleblower or the government must prove that the defendant "knowingly" evaded paying duties or improperly reduced those duties. But a defendant cannot violate the FCA if it lacked knowledge or acted only negligently.

For example, a buyer-defendant argued in one recent case that, without allegations that it knew of the importer's false statements to CBP, it was only a buyer that "received goods imported by someone else and as to which a duty was not properly paid by the importer (not [the defendant]) and that in the process of importing those goods the importer (not [the defendant]) made false statements to the government."[23]

Failure to plead an FCA claim with particularity

Federal Rule of Civil Procedure 9(b)—which federal courts have construed to include FCA claims—requires whistleblowers to "state with particularity the circumstances constituting fraud or mistake" to sufficiently plead a fraud claim. Relying on Rule 9(b), defendants typically contend that the case should be dismissed because the operative pleading omits factual allegations about the "who, what, when, where, and how of the fraud."[24]

The FCA in the trade context—damages and penalties

The FCA creates significant financial exposure for unsuccessful defendants—potentially much more than the administrative penalties otherwise available to CBP for essentially the same conduct. The FCA requires liable defendants to pay:

- Actual damages (in the trade context, duties avoided or underpaid) times three;[25]
- Civil penalties ranging from US$11,181 to US$22,363 for each false statement;[26] and
- The government's costs when the government intervenes in the case.[27]

To put this in context, in the Obama administration's last year—even before the Trump administration's various trade wars—DOJ entered the following FCA trade settlements:

- US$13.3 million with the US importer of Chinese clothing alleged to have underreported the value of the imported goods;[28]
- US$15 million with the US purchaser/re-seller of Chinese wooden bedroom furniture alleged to have misclassified the goods to evade antidumping duties;[29] and

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22 31 USC § 3730(e)(4)(A)(iii).

23 Def.'s R. 12(b)(6) Mot. to Dismiss & Mem. in Support at 16 (Jan. 27, 2014) (R. 35), *United States ex rel. Valenti v. Wingfield*, No. 3:11-cv-00368-BJD-MCR (M.D. Fla.). (The trial court in *Valenti* denied this motion.)

24 *See Automation Aids*, 896 F.3d at 839, 841.

25 31 USC § 3729(a)(1). In certain circumstances, civil penalties under 19 USC § 1592(c) could be *higher* than three times the duties evaded. Section 1592(c) allows CBP to assess civil penalties for fraud equivalent to the merchandise's "domestic value plus payable duties."

26 31 USC § 3729(a)(1). These are the inflation-adjusted per-claim penalties.

27 31 USC § 3729(a)(3).

28 US Dep't of Justice, Manhattan US Attorney Settles Civil Fraud Lawsuit Against Clothing Importer And Manufacturers For Evading Customs Duties (July 13, 2016), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-settles-civil-fraud-lawsuit-against-clothing-importer-and.

29 US Dep't of Justice, California-Based Z Gallerie LLC Agrees to Pay $15 Million to Settle False Claims Act Suit Alleging Evaded Customs Duties (Apr. 27, 2016), https://www.justice.gov/opa/pr/california-based-z-gallerie-llc-agrees-pay-15-million-settle-false-claims-act-suit-alleging.

- US$8 million with the US manufacturer of infrared countermeasure flares and its US chemical-component supplier based on the US military's purchase of flares that included a chemical component allegedly misclassified to evade antidumping duties.[30]

Another significant aspect of the FCA that differs from CBP administrative enforcement is the enormous financial incentive to whistleblowers to bring FCA cases. In CBP cases, whistleblowers not employed by the government who provide information leading to a recovery of duties, a penalty, or a forfeiture of property can receive up to US$250,000.[31] In FCA cases, a whistleblower could collect between 15 and 25 percent of "the proceeds of the action" if the government intervenes, and between 25 and 30 percent if the government does not intervene. (The whistleblower in the US$15 million settlement in the Chinese wooden furniture case personally received just over 15 percent of the recovery—US$2.4 million.) The FCA *also* allows a successful whistleblower to recover reasonable expenses, costs, and attorney's fees.[32]

Given these incentives, the whistleblowers filing the vast majority of civil FCA cases are themselves competitors of the defendant and, less frequently, former employees of the defendant and industry insiders (*e.g.*, supply-chain consultants, brokers, etc.).

Unsealed whistleblower complaints reveal the lengths to which competitors have gone in response to these financial incentives. In one case, the competitor-whistleblower noticed that it had lost substantial business to the defendant competitor and then:

- Retained an in-country intelligence source to scout suspected foreign manufacturers and their product packaging and labeling practices allegedly intended to obscure the good's true nature during importation (and thereby avoid antidumping/countervailing duties);
- Obtained product samples from a suspected manufacturer and tested them; and
- Researched competitors' supply chains.[33]

The risk of criminal enforcement

Companies and individuals importing foreign-made goods into the US must be vigilant about an additional risk—criminal charges by federal prosecutors for the same conduct that could support administrative fines by CBP as well as civil claims under the FCA.[34] For example, in the US$8 million civil settlement in the chemicals-supplier case noted above, the civil resolution followed guilty pleas by five former employers and agents of the US component supplier for related criminal offenses and an order requiring them to pay US$14 million in restitution.

The criminal charges varied for each defendant, but the underlying conduct was consistent with the civil FCA allegations and encompassed violations of several federal criminal statutes: 18 USC § 371 (conspiracy to defraud United States); 18 USC § 1343 (wire fraud); 19 USC § 1436 (failure to report or enter vessel); and 18 USC § 1956 (money laundering). The longest prison sentence was 18 months, with the other defendants sentenced to supervised release and probation—all of which was within the range of sentences in similar, recent criminal trade cases.[35] Other cases involving allegations of evasion of duties also have invoked or

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30 US Dep't of Justice, Tennessee and New York-Based Defense Contractors Agree to Pay $8 Million to Settle False Claims Act Allegations Involving Defective Countermeasure Flares Sold to the US Army (Mar. 28, 2016), https://www.justice.gov/opa/pr/tennessee-and-new-york-based-defense-contractors-agree-pay-8-million-settle-false-claims-act.

31 19 USC § 1619(c).

32 31 USC §§ 3730(d)(1) & (2).

33 Compl. ¶¶ 27–29, 31–39 (June 17, 2010) (R. 1), *United States ex rel. Reade Mfg. Co. v. EMS Grp., Inc.*, No. 1:10-cv-00504-WMS (W.D.N.Y.).

34 Criminal prosecutions of foreign entities or individuals in this space may face an extradition hurdle. For example, the United States and China do not have a bilateral extradition treaty. China is unlikely to extradite any of its foreign nationals for charges in the United States arising from evasion of US trade laws, but the United States may seek extradition of Chinese nationals from countries where those nationals might travel (e.g., Canada) with which the United States has extradition treaties (as the pending extradition case of Huawei CFO Meng Wanzhou, albeit on a different set of facts, illustrates).

35 *See, e.g.*, Pierson & Bucy at 12, 25.

relied on additional federal statutes: 18 USC § 541 (entry of goods falsely classified); 18 USC § 542 (entry of goods by means of false statements); and 18 USC § 545 (smuggling).

Perhaps the most high-profile—and most recent—trade enforcement initiative following President Trump's 2017 executive order was the July 30 unsealing of an indictment against the world's largest aluminum extrusion manufacturer, its controlling shareholder, and various, allegedly related entities and individuals.[36] What is most notable are criminal charges—conspiracy (18 USC §§ 2, 371), wire-fraud (18 USC § 1343), and smuggling (18 USC § 545)—based on the same or related conduct that could constitute civil violations under the FCA: alleged evasion of antidumping/countervailing duties on certain types of Chinese aluminum.[37]

Reducing risk—invest in compliance

How can compliant companies minimize the preceding civil and criminal trade risks? Create, implement, and improve internal compliance programs. Such programs can identify similar issues early and internally—offering companies the opportunity to prevent and correct potential trade violations before incurring the expense, public scrutiny, and distraction of litigation. Even if companies cannot catch problems before they occur, investing in a strong compliance program can provide a material benefit in terms of how DOJ might penalize culpable companies (and responsible individuals).

The DOJ has issued guidelines to evaluate the efficacy of corporate compliance programs in the context of considering potential criminal charges (and, potentially, discounting the penalties DOJ may seek in settlement discussions or plea negotiations). Those guidelines are, unfortunately, vague and preserve significant DOJ discretion.[38]

Nevertheless, the government's 2017 consent order resolving a civil FCA claim against the purchaser/wholesaler of clothing imported from China through evasion illustrates more specifically the government's expectations of what an effective trade compliance might include. In resolving the FCA claims (initiated by a whistleblower, with the government later intervening), the defendant agreed:

- To implement a written compliance policy.
- To appoint one employee to annually distribute the policy "to all employees who communicate with suppliers of foreign-made garments," to respond to employees' questions about the policy, and to update the policy accordingly;
- To seek acknowledgement from foreign suppliers that they will comply with US customs laws and regulations (or for the purchaser to stop doing business with foreign suppliers that are "knowingly violating the customs laws");
- To educate employees about "red flags or fraud" concerning import transactions and to investigate suspect transactions, including by seeking information from suppliers;
- To monitor market and other pricing information to compare pricing offered by the defendant's suppliers to pricing offered by other suppliers for "products in the same classification and country of origin"; and
- To retain a third party to maintain reports or documentation corresponding to the preceding commitments.[39]

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36 Indictment ¶¶ 1–22 (filed May 7, 2019; unsealed July 30, 2019) (R. 1), *United States v. Liu*, No. 19-cr-00282 (C.D. Cal.).

37 In fall 2017, federal prosecutors had filed multiple civil forfeiture actions to seize some of the 2.1M aluminum pallets imported into the United States as part of an alleged effort by this same aluminum manufacturer and related entities to evade antidumping/countervailing duties approaching 400 percent on certain types of Chinese aluminum. Those civil forfeiture actions followed a June 2017 Commerce Department determination that this same manufacturer's aluminum extrusions fashioned into these pallets were themselves subject to antidumping/countervailing duty orders concerning aluminum extrusions. *See, e.g.*, Verified Compl. for Forfeiture *in Rem* ¶¶ 7(a), 10(d), 18, 19 (Sept. 14, 2017) (R. 1), *United States v. Real Prop. Located at 10681 Production Ave., Fontana, Cal.*, No. 5:17-CV-1872 (C.D. Cal.).

38 *See, e.g.*, US Dep't of Justice, Criminal Division, Evaluation of Corporate Compliance Programs, at 1 (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

39 Consent Order at § 5 at 5–6 (Oct. 2, 2017) (R. 90), *United States v. Yingshun Garments, Inc.*, No. 13-Civ. 0055 (LAK) (S.D.N.Y.).

None of these is a strict legal requirement (separate from contractual obligations between the parties to this consent order), although whistleblowers' counsel may contend that they are.[40] In practical terms, these steps outline preventative measures by which companies can minimize the risk of liability under EAPA, Section 1592,[41] and the FCA.

A common concern for any company is that looking for problems means you will find them. But the "knowledge" standards for civil liability under the FCA as well as CBP's administrative enforcement regime make studied ignorance a risk in itself.

Under 19 USC § 1592(c), CBP can levy penalties (beyond the payment of duties evaded) for evading duties based on an entity's or individual's "negligence," "gross negligence," or "fraud."[42] Because mere "[c]lerical errors or mistakes of fact" that are not themselves "part of a pattern of negligent conduct" can provide a Section 1592 defense,[43] companies have a clear incentive to internally investigate trade issues and to distinguish mere transcription mistakes from an alleged pattern of misconduct.

The FCA, moreover, prohibits "knowingly" evading duties, and provides a broad definition of "knowingly." That definition encompasses the highest level of knowledge of fraud—"actual knowledge"—as well as when the defendant "acts in deliberate ignorance" or "in reckless disregard" of "the truth or falsity of the information."[44] In other words, a company increases the risk of FCA exposure when it acts to *avoid* knowing whether it or the companies with which it is doing business are evading US import duties.

Reducing risk—consider self-disclosure options

Companies that lack any working compliance program often lack another effective means of detecting customs issues before they grow and multiply. Compliance gaps can rob entities and individuals of meaningful opportunities to self-report clear legal violations to US law enforcement with the hope of minimizing or even entirely eliminating damages and penalties.

Section 1592(c)(4), for instance, includes a "prior disclosure" process that, if successfully invoked, imposes caps on penalties beyond the assessment of unpaid duties. Caps for successful prior disclosures in cases of gross negligence and negligence could be as low as the interest on unpaid duties, taxes, and fees.[45]

The 2015 enactment of the Enforce and Protect Act (again, also known as "EAPA"), 19 USC § 1517, may only increase the incentives to self-disclose in cases of clear misconduct. Section 1517 authorized new investigative procedures concerning evasion of duties, including "interim measures" when CBP reasonably suspects evasion. Such interim measures have the practical effect of allowing CBP to stop the importer's goods from entering the United States before CBP makes a final determination or even notifies an entity of CBP's interim measures.[46]

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40 *See, e.g.*, Pierson & Bucy at 32 ("Prices 'too good to be true' probably are. Ignoring suspicious pricing, coupled with sloppy import protocol, may well be enough to subject all companies in the supply chain of products sold to the US government to liability under the civil FCA for import fraud.").

41 Factors that can "mitigate" a 19 USC § 1592 penalty include "contributory customs error," "cooperation with the investigation," "immediate remedial action," "inexperience in importing," "prior good record," "inability to pay the customs penalty," and "customs knowledge." 19 CFR pt. 171, App. B, § (G).

42 19 CFR pt. 171, App. B, §§ (C)(1)-(3).

43 19 USC § 1592(a)(2).

44 31 USC § 3729(b)(1).

45 The benefits of cooperation are not available under Section 1592 if the disclosing entity does not act before it knows a formal investigation of evasion has commenced.

45 19 USC § 1592(c)(4)(B).

46 EAPA *mandates* that CBP (among other things):

- Investigate allegations that "reasonably suggest" that the goods were entered into the United States "through evasion," 19 USC § 1517(b)(1);
- Determine within 90 days of initiating an investigation whether there is "reasonable suspicion" that evasion occurred, 19 USC § 1517(e), which is five days *before* the deadline for CBP to notify the target of the investigation, 19 CFR § 165.15(d)(1); and

The FCA's cooperation provisions also provide benefits for self-disclosure—but they are vague. The statute gives the court discretion to assess double (instead of treble) damages for violations. And for cases settled with DOJ, DOJ policies provide credit for self-disclosure and cooperation. But these provisions can apply only if there is no criminal, civil, or administrative proceeding pending concerning the conduct that caused the violation (*i.e.*, no existing CBP investigation) *and* the defendant lacked actual knowledge of any investigation of such a violation.[47]

Self-disclosure has its own potential pitfalls and thus must always be weighed carefully. For instance, the government may not accept the company's characterization of the underlying conduct, disputes can arise over whether the company already had knowledge of the investigation, and the credit offered is highly discretionary.

Conclusion

Trade wars are heating up, creating risks at every stage of importing goods into the United States. Those risks are not merely the financial risk of a CBP claim for underpaid duties or a civil penalty, or a competitor's civil FCA claim, but the risk of a criminal prosecution.

These risks underscore the value and importance of effective compliance programs, the need for entities and individuals to weigh their self-disclosure options in clear cases of evasion (whether intentional or merely negligent), and the promise of successful defenses in appropriate cases. We encourage entities and individuals in the trade space to carefully weigh these issues in working toward compliant trade practices.

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- Suspend importation of goods that CBP reasonably suspects entered the United States through evasion, 19 USC § 1517(e).

Although a Section 1592 penalty action could ordinarily build on a Section 1517 EAPA investigation's final affirmative determination of "evasion," an importer can reduce the threat of Section 1592 penalties by disclosing the Section 1592 violation to CBP before the agency notifies the importer of the existence of an EAPA or Section 1592 investigation. 19 USC §§ 1517(d)(1)(E)(i), 1517(d)(1)(E)(iv), 1517(h) (expressly authorizing government to pursue § 1592 action and other "civil or criminal" proceedings, on top of an EAPA case).

47 31 USC § 3729(a)(2).