Client Alert
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The Rise of Private Party-Initiated Trade Enforcement Actions

The U.S. Department of Justice recently announced that a Japanese company, and several of its U.S. affiliates, have agreed to pay $45 million, plus interest, to settle allegations that they violated the False Claims Act (31 U.S.C. §§ 3729-3733) by knowingly failing to pay U.S. antidumping and countervailing duties. The U.S. Government alleged that the defendants knowingly misrepresented (or caused to be represented) the country of origin of imported pigment on documentation presented to U.S. Customs and Border Protection ("U.S. Customs") in order to avoid paying antidumping and countervailing duties on Chinese- and Indian-origin pigments[1]. The defendants settled the case without admitting liability.

Under the False Claims Act, any person who knowingly submits a false or fraudulent claim to the U.S. Government for payment or approval may be liable for a civil penalty of up to $11,000 for each claim, plus three times the amount of the damages sustained by the U.S. Government, including attorneys fees. Historically, False Claims Act cases have frequently involved allegations that a party has made a "false claim" in relation to a contract with the U.S. Government.

Companies should take note of this case for two reasons. First, the "false claim" alleged to be involved here did not involve any contracts with the U.S. Government. Instead, it was purely trade-related and based on alleged misstatements made on import documentation filed with U.S. Customs. Second, the case arose as a result of a whistleblower action filed by a competitor. In this instance, the competitor, a U.S. pigment producer, will receive more than $7,875,000 of the settlement amount.

The False Claims Act allows private parties, known as "relators", to bring lawsuits on behalf of the United States when such parties have information that another has made a false or fraudulent claim to the United States. This type of private party litigation is known as a "qui tam" action and is often times commenced by a competitor or a disgruntled employee. The qui tam relator files a complaint under seal and the U.S. Department of Justice then reviews the complaint and decides whether or not to intervene and prosecute the case. Relators may receive between 15% to 30% of the amount recovered by the U.S. Government.

As one might expect, given the increased competition companies face as a result of the continuing economic slump, we are seeing an increase in the number of trade-related qui tam actions being brought against companies by competitors. As the above case demonstrates, these trade-related cases are

[1] The underlying case is captioned United States ex rel. Dickson v. Toyo Ink Manufacturing Co., Ltd., et al., No. 09-CV-438 (W.D.N.C.).

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often based on allegations involving the misclassification of imports and/or misdeclaration of their origin to avoid the payment of antidumping and/or countervailing duties. Other common types of cases concern allegations involving the misstatement of origin in the government procurement context.

Actions to Consider

In light of the rise in False Claims Act trade-related cases, all companies should review their internal controls – particularly with respect to (i) antidumping and countervailing duty issues and (ii) sales to the U.S. Government -- to ensure that they are working effectively. Also, if a company is aware of non-compliance by competitors that is unfairly tilting the playing field (e.g., not paying antidumping duties rightfully owed, or misstating the origin of products, to gain a competitive advantage), there are steps that can be taken to address such acts, even if the responsible agency has not done so.

We trust that the foregoing is helpful. If you have any questions concerning these issues, please contact Ted Murphy, Holly Files or Junko Suetomi.

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