Importing: Risky Business

Trade

For companies that import goods into the United States, increased tariffs have made business much more complicated and expensive. They are also bringing risk on the legal front.

Such risks came to the fore in May 2019 when, following a whistleblower's lawsuit, the U.S. Attorney's Office for the Southern District of New York filed a civil fraud lawsuit against Stargate Apparel and Rivstar Apparel and their CEO. The suit alleged that they had violated the False Claims Act by understating the value of goods they were importing to avoid duties, costing the government more than $1 million in revenue. There have been a growing number of such cases recently—and there are likely to be significantly more in the near future, says David Stepp, a partner at Crowell & Moring.

"With the Trump administration's Section 301 tariffs against China and other countries, there's a lot of pressure on companies that import finished goods and components to reduce the value of their goods coming into the U.S., because the duties are a percentage of the value," says Stepp. He notes that FCA cases can also be filed against companies that declare the incorrect country of origin of the goods—claiming, for example, that goods made in China were actually made in Vietnam.

"With the administration's protectionist policies and increased scrutiny on making sure duties are paid, we anticipate seeing the government taking up more of these FCA cases," says Stepp. That trend will only be accelerated by the incentives given to whistleblowers to report problems, and by the Supreme Court's 2019 ruling in *U.S. ex rel Hunt v. Cochise Consultancy,* which extended the statute of limitations to allow whistleblowers to file lawsuits up to 10 years after a false statement was made if the government has not learned of the violation. And, says Stepp, "there are plenty of plaintiffs' attorneys out there who are willing to file on those whistleblowers' behalf."

Even if the tariff issue recedes over time, importers face other sources of increased risk. For example, misrepresentations of the same factors used in FCA cases—the value of goods, country of origin, classification, and antidumping duties—can also lead to penalties from U.S. Customs and Border Protection under Section 592 of the Tariff Act. What's more, the Department of Justice is reportedly bringing additional attorneys onboard for the International Trade Office in Washington, D.C., which typically handles trade penalty cases. "This likely means that CBP has already determined that a significant amount of penalty cases are not going to be resolved administratively and will proceed to litigation," says Stepp.

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On a different front, there is increased scrutiny on incoming goods produced with forced or child labor, contrary to U.S. laws. "That's really a top priority right now for CBP, the Department of Labor, and other government agencies," says Stepp. However, he says, "it's a relatively new area for them from an enforcement standpoint, so they are trying to determine what the base standard is for each industry, and what their obligations are. And even the definition of forced labor is pretty murky under the current guidelines." In the fall of 2019, CBP issued a number of withhold release orders (WROs) covering a range of products, such as apparel, gloves, and minerals, from at least five different countries. The result is likely to be more litigation from companies that have had their goods excluded, seized, or forfeited as a result of WROs issued by CBP.

In this environment, it is more important than ever for general counsel to work in sync with the business and its global supply chain. "They need to make sure that they have processes in place that let the company make accurate declarations about valuing and classifying imported goods and their country of origin," says Stepp. In general, he says "they really have to do their homework to navigate through the turmoil that's currently out there in the international trade world."