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International Trade & Regulatory ADVISORY ■

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Unexpected Sources of Importer Liability

Recent cases and investigations under the federal False Claims Act (FCA), California consumer laws and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) suggest that importers should look beyond more familiar customs laws in structuring their compliance programs.

The FCA allows private parties to bring lawsuits on behalf of the United States for fraudulent violations of federal statutes and to retain a portion of the government's damages. The government can intervene in the lawsuit and, if successful, recover three times its damages plus civil penalties, potentially exceeding the recovery provided by the underlying statutes. FCA cases are traditionally associated with government procurement and health care fraud; but past FCA cases have also covered violations of the U.S. textile quotas formerly restricting textile imports, and more recent cases have involved fraudulent undervaluation of imported goods and wrongful circumvention of antidumping duties. Potential high-impact subjects, which could appeal to whistleblowers, unhappy former employees, aggrieved competitors or consumer advocacy groups, might include false duty drawback claims, false preferential tariff claims under free trade agreements, noncompliant imports under health, safety and environmental protection laws and fraudulent tariff misclassifications of goods with high duty rates, such as apparel, footwear, agriculture products, automotive parts and glassware.

Recent lawsuits in California courts have challenged "Made in USA" labeling of consumer goods, particularly jeans sold by well-known retailers. The Federal Trade Commission generally forbids "Made in USA" unless the goods meet a strict all-or-virtually-all U.S. content requirement, even though the goods may be considered U.S. products under U.S. customs laws. But some goods, like apparel and automobiles, are subject to special federal origin laws. The country of origin of an automobile's engine and transmission and the place of the automobile's assembly, for example, require separate sticker disclosure. The sticker must refer to the percentage of "U.S./Canadian content" without distinguishing between the United States and Canada and despite the presence of foreign components, which must also be disclosed by percentage. Apparel makers, for another example, must label all garments' country of origin and must use "Made in USA with foreign fabric," or similar words, if the garments are made domestically with non-U.S. fabric. They may use the unqualified

statement "Made in USA" if the fabric is made in the United States even though the garment contains foreign yarn or any number of non-textile components like buttons, zippers, clasps and rivets. Against the already complicated federal backdrop, California courts are evidently considering whether consumers might be misled under California consumer statutes by the presence of foreign components in products labeled "Made in USA," even if the goods are properly labeled under federal law. Defendants maintain that the federal labeling rules trump California law, but the outcome and consequences are uncertain.

Perhaps the most far-reaching development is the use of FIRREA subpoenas by the Department of Justice (DOJ) in New York and possibly other jurisdictions for investigations of alleged importer violations. FIRREA was adopted to address financial institution fraud in the savings and loan crisis of more than 20 years ago. Beyond authorizing civil investigations, FIRREA provides its own substantial civil penalties of $1.1 million per violation and $1.1 million per day up to a maximum of $5.5 million for continuing violations. It also allows the court to increase penalties up to the amount of the violator's pecuniary gain. The DOJ can seek these penalties against persons that commit predicate offenses under any of 14 criminal statutes. FIRREA modifies the predicate offenses by lowering the standard of proof from "beyond a reasonable doubt" to "preponderance of the evidence" and adds a lengthy 10-year statute of limitations, effectively doubling the period of limitations under otherwise applicable customs civil penalty laws. Most of the predicate offenses are specific to financial institutions and inapplicable to importers, but some, such as the catch-all statute sanctioning false statements to the government, 18 U.S.C. § 1001, may affect importers and other nonfinancial companies. For example, false import documents that understate the value of, and underreport duties on, imported merchandise might be the subject of FIRREA investigations and penalties. Significantly, any predicate offenses, such as violations of Section 1001, that do not specifically relate to financial institutions must "affect a federally insured financial institution," suggesting that importer investigations and penalties might be challenged because this required element is lacking. But the DOJ evidently believes it can conduct importer investigations and seek penalties under FIRREA because import transactions invariably involve transfers of funds by financial institutions and FIRREA includes broadly interpreted mail and wire fraud statutes among its predicate offenses.

These additional sources of potential liability reinforce the need to ensure general compliance with the customs and other laws affecting imports, the correctness of country of origin labeling on imported goods and the accuracy of representations made to the U.S. government in importation and entry processes. Alston & Bird's lawyers specializing in these areas can assist importers in their compliance efforts.

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