

# Attorneys Say New Task Force Shows Trade Is 'Top-Tier' Priority, FCA Leading Enforcement Tool

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The task force, announced earlier this month (see 2509020052), builds on DOJ's earlier efforts of increased trade fraud enforcement, including the separate establishment from July of the "Market, Government, and Consumer Fraud (MGCF) Unit," housed in the agency's criminal division (see 2507150070). Attorneys at DLA Piper said that while the "official status" of the new MGCF Unit "remains unknown, DOJ's message is clear: trade fraud is not a niche customs matter but a top-tier DOJ enforcement priority."

Since the announcement of the task force and the MGCF Unit, questions remain about exactly how these divisions will operate to pursue trade fraud. Joshua Kurland, a former DOJ attorney and current partner at Hogan Lovells, told us that the establishment of the task force means the civil and criminal divisions charged with targeting trade fraud, along with CBP, will be "talking to each other more" and "in contact regularly." The task force will ensure the folks in charge of enforcement "have coordinators who are making sure that this hand talks to that hand."

Attorneys at Akin said the task force "will streamline coordination and improve data sharing across agencies," particularly in light of the announcement that CBP will closely partner with DOJ to "identify and prosecute customs violations." Kurland said that while there was an "effort to raise the profile of these issue" prior to the creation of the task force, what makes it a "different ballgame than in

the past” is that “all of these agencies are now going to be placing an emphasis and resources on pursuing these kinds of issues.”

Kurland noted that CBP “has pretty detailed and robust data about imports into the United States,” adding that it’s “just a matter of putting the resources to examining and mining the data to see if there are patterns that emerge, or if they can identify people who might be appropriate targets for scrutiny.” CBP can mine data to check for unusual alterations of importing activity, such as the source of certain goods or changes in classifications, he said.

“The difference now is the agencies may be ready to put people at those computers analyzing the data to try to determine whether anyone’s committing fraud,” Kurland said. While in the past, this data may have turned into significant duty liability under the AD/CVD regime, “now there’s a significant chance that it may result in [False Claims Act] or criminal liability, because the authorities on both the civil and criminal side of” DOJ and the “CBP penalty world have all made it clear that they are looking for cases to bring.”

One way for DOJ to bring cases is through the FCA as a “reverse” false claims case, where a company or individual is accused of submitting a false claim or statement meant to lower the amount of duties they otherwise owe the government, the DLA Piper attorneys said. Tony Burba, partner at Barnes Thornburg, said during a Sept. 17 webinar that the FCA “will be one of the most, if not the most, used mechanisms for the Department of Justice to pursue those that they believe have underpaid tariffs.”

Burba noted that the FCA allows for treble damages, whereby companies found liable for violating the statute have to pay up to three times the amount of the actual damages sustained by the government, and also applies to “knowing fraud” and “reckless or deliberately ignorant conduct.” Kurland said the FCA’s civil scienter requirement is “different from the intent requirement to establish

criminal fraud. I do think that cases that maybe don't rise to the level of criminal fraud may still be brought as FCA cases."

Another advantage of the FCA is that the cases can be brought by whistleblowers, as opposed to solely being brought by the government, Burba said. A recent decision from the U.S. Court of Appeals for the 9th Circuit, *Island Industries v. Sigma*, made this feature even more important, since the court found that FCA claims brought by whistleblowers can be brought concurrently with customs penalty cases brought by the government under 19 U.S.C. Section 1592.

While this ruling was limited to FCA claims brought by whistleblowers, Burba said whether the government can file its own FCA lawsuit without the whistleblower and not have to file a Section 1592 case "is an open question." However, he said he suspects the 9th Circuit "will ultimately find that the government can choose whichever pathway" is available in the case.

Yet another advantage of bringing FCA cases instead of Section 1592 cases is that the actions can be brought by whistleblowers in district courts as opposed to the Court of International Trade, Burba said. Going to the trade court "could lead to other delays or complexities you don't have when litigating at a district court," he said.

As part of its announcement of increased trade fraud enforcement, DOJ also emphasized its whistleblower pilot program, through which individuals or companies with knowledge of trade fraud can share that knowledge directly with DOJ. Through both the FCA whistleblower lawsuit process and the whistleblower pilot program, parties that bring this information, either to a district court or the DOJ, can get a cut of any reward secured by the government.

Under the pilot program, whistleblowers can get up to 30% of the first \$100 million in "net proceeds forfeited," and up to 5% of any net proceeds forfeited between \$100 million and \$500 million. DOJ noted that for the first \$10 million,

the agency "will apply a presumption in favor of awarding a whistleblower the maximum 30 percent of such proceeds." DOJ said it will assess what percentage to pay the whistleblower based on "various factors, including the usefulness of the whistleblower's information and the level of assistance provided, with any awards made in DOJ's discretion."

Under the FCA, whistleblowers can get 15% to 25% of the proceeds collected by the U.S. if the government intervenes in the case, whereas the party can get up to 30% of the proceeds if the government doesn't step in. Kurland said he thinks both outlets are in play, given the similar financial incentives behind each method for whistleblowers to lead enforcement actions.

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