



Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

6-29-2018

Trade Fraud: the Wild, New Frontier of White Collar Crime

Pamela Bucy Pierson

University of Alabama - School of Law, ppierson@law.ua.edu

Ben Bucy

Frohsin, Barger & Walthall, ben@frobar.com

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Pamela B. Pierson & Ben Bucy, *Trade Fraud: the Wild, New Frontier of White Collar Crime*, (2018).

Available at: https://scholarship.law.ua.edu/fac_working_papers/34

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

**Trade Fraud: The Wild, New Frontier of White
Collar Crime**

Pamela Bucy Pierson & Benjamin Patterson Bucy

19 ORE. REV. INT'L LAW 1 (2018)



This paper can be downloaded without charge
from the Social Science Research Network

Electronic Paper Collection:

<http://ssrn.com/abstract=3198237>

ARTICLES

PAMELA BUCY PIERSON AND BENJAMIN PATTERSON BUCY*

Trade Fraud: The Wild, New Frontier of White Collar Crime

Introduction	3
I. What Is Trade Fraud and Why Should It Be Prosecuted?	5
II. Why Trade Fraud Is Difficult to Detect, Prove, and Deter	9
III. Analysis of the Database: Trade Fraud Cases from 2000 to 2016	10
A. Data Collection Methodology and Overview of Findings	10
B. Discussion of Cases	15
1. Misrepresentations Regarding the Nature of Products Imported	15
2. Misrepresentations Regarding Country of Origin to Avoid Import Duties	17
a. What are Antidumping and Countervailing Duties and Why Have Them?	18
b. The Rationale Behind Antidumping and Countervailing Duties	23
c. Criminal Prosecution of Antidumping and Countervailing Duties	24

* Pamela Bucy Pierson is Professor of Law, University of Alabama School of Law, and former Assistant United States Attorney, E.D. MO. Benjamin Patterson Bucy is an attorney with Frohsin Barger Walthall, a national white-collar law firm. The authors thank Blake Beals, Legal Research Services Librarian, University of Alabama School of Law; Tyner Hanes, *UA Law* '17; Albert W. Copeland, *UA Law* '18; Tyler Foster, *UA Law* '19; Professor and Director of International Programs Daniel H. Joyner, University of Alabama School of Law, Dean Mark Brandon, and the University of Alabama Law School Foundation.

[1]

d.	Use of the Civil False Claims Act to Pursue Antidumping and Countervailing Duty Violations.....	25
3.	Misrepresentations Regarding Country of Origin to Qualify for U.S. Government Contracts.....	28
IV.	The Civil False Claims Act: Why It Is a Potent Weapon Against Trade Fraud.....	32
A.	History of the FCA: Diseased Mules and Defective Muskets.....	34
B.	How Does the FCA Work?.....	36
C.	Procedure Under the FCA.....	39
D.	Why the FCA Is Effective in Fighting Fraud.....	41
1.	The FCA Provides the Resource of Inside Information.....	42
2.	The FCA Supplements DOJ Resources.....	44
3.	The FCA Provides an Effective “Middle Ground” Between Criminal Prosecution and Civil Liability.....	46
4.	The FCA Promotes Effective Regulation in Industries that Are Undergoing Significant Policy Debate.....	48
E.	How to Enhance the FCA’s Effectiveness as a Weapon Against Trade Fraud.....	49
1.	Coordinate Federal Law Enforcement Efforts....	49
2.	Dedicate Specialists Within DOJ to Trade Fraud.....	52
3.	Enhance Transparency in Shipping Records.....	53
4.	Maintain More Consistent and Centralized Reporting.....	56
	Conclusion.....	57
	Appendix A: Trade Fraud Cases, 2000–2016.....	59
	Appendix B: Trade Data.....	85

INTRODUCTION

“They’ll have to pry that money out of my cold, dead hands before I’ll pay it.”¹

Bonnie Jimenez worked as a supply chain director at Otter Products, Inc., a company that produces protective cases for electronic devices with \$168.9 million in annual revenue.² Jimenez was fired a few months after she advised her supervisors that Otter Products should accurately report to customs officials the value of its imported products.³ Mario Industries, a family-owned lighting business in Roanoke, Virginia, had to lay off employees and reduce shifts when it lost long-standing contracts to a competitor who was underpricing lighting products.⁴ Mario’s competitor was able to beat market prices by buying cheap lighting in China, falsifying the country of origin, and avoiding paying import duties.⁵ GES, a Birmingham, Alabama, family-owned business that sold graphite rods used in steel production lost major customers to a competitor who undercut prices.⁶ The competitor purchased graphite rods made in China and reduced its costs by falsely marking products as made in India to avoid paying import taxes.⁷ Consumers of prescription drugs such as Xanax® and Valium® unknowingly purchased medications that contained entirely different ingredients or substandard dosages.⁸ Importers of these drugs labeled them as “gifts” or “toys” to avoid paying import taxes and thereby preempted customs inspections of the defective drugs.⁹ Customers throughout the United States bought what they thought was sole,

¹ Response by CEO when advised to stop misrepresenting the value of company imports. Complaint at 17, United States *ex rel.* Jimenez v. Otter Products, LLC, No. 1:11-cv-02937-RM-MJW (D. Colo. Nov. 10, 2011) (Appendix A, #41).

² *Id.* at 3.

³ *Id.* at 16–17.

⁴ Complaint at 5, United States *ex rel.* Scutellaro v. Direct Resources, Inc., No. 1:10-cv-00113-JDB (D.D.C. Jan. 20, 2010) (Appendix A, #25).

⁵ *Id.* at 4, 15.

⁶ Complaint at 6, United States *ex rel.* Graphite Electrode Sales, Inc. v. Ameri-Source Holdings, Inc., No. 2:13-cv-00474-JFC (W.D. Pa. Apr. 1, 2013) (Appendix A, #54) [hereinafter Graphite Electrode Sales].

⁷ *Id.* at 3.

⁸ Press Release, U.S. Dep’t of Justice, Three Indicted in Prescription Drug Smuggling Ring (Oct. 6, 2014), <https://www.justice.gov/opa/pr/three-indicted-prescription-drug-smuggling-ring>.

⁹ *Id.* See also Complaint at 30, United States v. Giddens, No. 6:14-cr-00061-MHS-JDL (E.D. Tex. Oct. 24, 2014) (Appendix A, #51).

grouper, or flounder but which was, in fact, Vietnamese catfish laced with prohibited antibiotics.¹⁰ Seafood importers nationwide had falsified the country of origin and the type of fish they were importing into the United States to circumvent inspections of the fish and avoid import taxes.¹¹ These are the victims of trade fraud: the United States Treasury that is robbed of millions of dollars in import duties when businesses lie about their imported goods, honest businesses that are hurt by dishonest competitors, consumers who are exposed to unsafe products, employees who are fired for blowing the whistle, and industries that are targeted for ruin by companies that are dumping products and engaging in predatory pricing.

Why engage in trade fraud? The simple answer is money. By lying about what they are importing, unscrupulous businesses can avoid millions of dollars in import taxes owed, reduce their costs, and beat competitors' prices. In today's global world, where international trade permeates every economic exchange, there is tremendous financial incentive for dishonest businesses and individuals to lie when they import, receive, or sell imported products. They can avoid millions of dollars in duties and tariffs and avoid customs inspection of defective products. Realistically, there is little chance these modern-day smugglers will be caught.¹² Countries' borders are too vast, the volume of imports too great, global customs inspections too porous, and law enforcement resources too few for effective monitoring or deterrence of trade fraud. This Article suggests what can be done to tame this wild, new frontier of white-collar crime.

This Article proceeds in four Parts. Part I discusses what trade fraud is and how it fits within the political debate on trade. We argue that whatever the merits of the free trade-protectionism debate, no one has the right to lie about what he or she is bringing into a country. For this reason, stopping trade fraud is not a question of politics but of law—whether unscrupulous should be allowed to take advantage of those who follow the rules. Part II addresses the nature of trade fraud and discusses how it compares to other white-collar crime and why it is

¹⁰ Press Release, U.S. Dep't of Justice, Two Individuals Arrested for Conspiracy to Import Falsely Labeled Fish (June 7, 2007), https://www.justice.gov/archive/opa/pr/2007/June/07_enrd_413.html.

¹¹ *Id.*; Press Release, U.S. Dep't of Justice, Illinois Resident Pleads Guilty to Illegally Dealing in Falsely Labeled Fish From Vietnam (Jan. 14, 2008), https://www.justice.gov/archive/opa/pr/2008/January/08_enrd_026.html.

¹² See generally PETER ANDREAS, SMUGGLER NATION: HOW ILLICIT TRADE MADE AMERICA (2013) (discussing the history of smuggling and its role in the growth of the United States).

particularly difficult to detect, prove, and deter. Part III discusses the database of cases we have created for this Article. This database consists of all criminal and civil trade fraud cases pursued by the U.S. Department of Justice from 2000 to 2016. While such a database would appear to be readily available, it is not, within the Department of Justice or otherwise, because of inconsistencies in reporting and incomplete data sets. Thus, our database is the first to compile all trade fraud cases in the United States. We discuss the trends revealed in this collection, including the growth of criminal prosecutions and the criminal offenses used to pursue modern-day smugglers, the increasing reliance on the civil False Claims Act (FCA) to combat trade fraud, the types of trade fraud pursued, the characteristics of each type of trade fraud, and the practical and policy implications of pursuing the various types of trade fraud. Part IV concludes with our recommendations on how to enhance the fight against trade fraud.

As the discussion in this Article shows, trade fraud cases are full of intrigue. There are “factories” in India allegedly producing sophisticated products that are, in reality, old, dilapidated buildings incapable of any production.¹³ There is a spurned lover who brings customs officials a hard drive showing millions of dollars of import fraud by her boss’s company.¹⁴ There are falsified shipping manifests, fake shipping labels, and misbranded products. There are ships that travel to ports worldwide to conceal the country origin of the products they carry.¹⁵

I

WHAT IS TRADE FRAUD AND WHY SHOULD IT BE PROSECUTED?

Those who favor free trade policy advance the argument of absolute advantage.¹⁶ This argument posits that free trade policies advantage

¹³ Graphite Electrode Sales, *supra* note 6, ¶ 47.

¹⁴ Press Release, U.S. Dep’t of Justice, Companies and CEOs Indicted in School Supply Scam (Oct. 22, 2012), <https://www.justice.gov/archive/usao/gan/press/2012/10-22-12.html>.

¹⁵ Criminal Indictment at 19–20, United States v. Apego, Inc., No. 1:12-cr-00350-SCJ-AJB (N.D. Ga. Oct. 17, 2012) (Appendix A, #32).

¹⁶ *See generally* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 69 (Edwin Cannan ed., 1937) (1776). In an argument known as “absolute advantage,” renowned economist Adam Smith reasoned that free trade benefits both parties because each nation can trade goods it produces at lower costs in exchange for the goods it produces at higher costs. *Id.* at 423 (“If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage.”).

everyone because each nation can trade goods it produces at lower costs in exchange for goods it can produce only at higher costs. Free trade proponents also argue that free trade policies allow countries access to foreign suppliers who can produce higher quality products than if those countries produced such products themselves.¹⁷ This leads to the exchange of new ideas and technology,¹⁸ reduces war,¹⁹ and promotes individual rights.²⁰

Those who favor trade protectionist policies argue that protection is needed to shield “infant” domestic industries until they mature enough to compete internationally.²¹ They also argue that countries can raise

This specialization or division of labor increases productivity because workers become more efficient in their tasks, which results in the rise of a country’s “real revenue and wealth.” *Id.* Classical economist David Ricardo expounds on Smith’s ideas through his theory of “comparative advantage,” which states that each country should specialize in producing goods for which it has an advantage relative to other countries. *See* DAVID RICARDO, *On The Principles of Political Economy and Taxation*, in *THE WORKS AND CORRESPONDENCE OF DAVID RICARDO* 128–49 (Piero Sraffa ed., 2004) (1817) (using England and Portugal as an example to explain that global consumption of wine and cloth increases if each country specializes in the good for which it has a lower opportunity cost to produce relative to the other country).

¹⁷ *See* SMITH, *supra* note 16, at 459 (“A nation that would enrich itself by foreign trade is certainly more likely to do so when its neighbours are all rich, industrious and commercial nations.”).

¹⁸ *Id.* at 18.

¹⁹ *See, e.g.*, FREDERICK BASTIAT, *ECONOMIC HARMONIES*, reprinted in *ECONOMIC HARMONIES* xxxvi (George B. de Huszar ed., W. Hayden Boyers trans., Foundation for Economic Education 1968) (1850) (concluding that “[w]e should also have an end to . . . the constant threat of war . . . and those entrusted with the responsibility of governing would work together for, and not against, the universal harmony. . . .”). *See also* Richard Cobden, *On The Effects Of Protection Of The Agricultural Interests of the Country*, Speech to British House of Commons (Mar. 13, 1845), in CHARLES K. ADAMS, *REPRESENTATIVE BRITISH ORATIONS* 152 (1884) (advocating against the British Corn Laws in his famous speech to the House of Commons when the statesmen proclaimed that the free flow of goods “is calculated to knit nations more together in the bonds of peace . . .”).

²⁰ *See* JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* 17 (Thomas P. Peardon ed., 1952) (1690); FREDERICK BASTIAT, *PROPERTY AND LAW*, reprinted in *SELECTED ESSAYS ON POLITICAL ECONOMY* 112 (George B. de Husza ed., Seymour Cain trans., Irvington-on-Hudson 1964) (1848) (stating that to impose government regulations that prohibit the exercise of the natural right of free exchange is to “legitimize an act of plunder and to violate the law of justice”); SMITH, *supra* note 16, at 307 (arguing against the government’s wasteful, inefficient, and destructive practices, classical liberalism economists believe that free trade restores “the natural system of liberty” to pursue their own crafts); 2 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 531–33 (D. Appleton and Company 1883) (1848).

²¹ First introduced by John Stuart Mill in the nineteenth century, economists have repeatedly revisited the “infant industry” argument since its formulation. *See* Suhail Abboushi, *Trade Protectionism, Reasons and Outcomes*, 20 *COMPETITIVENESS REV.* 5, 388 (2010) (stating that, theoretically, the state lifts the temporary protection until these infant

their national income by improving their purchasing power of exports²² and by protecting domestic workers as they transition to other jobs or industries when their positions become obsolete because of trade competition.²³ Lastly, protectionists argue that a pro-protection trade policy allows countries to engage in “strategic trade policy” and “level an unequal playing field”²⁴ by subsidizing a domestic company or industry so it can better compete in an international market.²⁵

Trade tariffs are one way in which countries implement their trade policies. When businesses import products, they often are required to pay import taxes. The type, size, and frequency of such tariffs depend

industries are mature enough to compete with international competitors). *See also* Anne O. Krueger & Baran Tuncer, *An Empirical Test of the Infant Industry Argument*, 72 AM. ECON. REV. 5, 1142–43 (1982); *see generally, e.g.*, Tran Lam Anh Duong, *Optimal Infant Industry Protection During Transition to World Trade Organization Membership, A Numerical Analysis for the Vietnamese Motorcycle Industry*, 23 J. INT’L TRADE & ECON. DEV. 4, 492–93 (2014) (summarizing briefly the modern empirical and theoretical research sources regarding “infant industry” literature).

²² DOUGLAS A. IRWIN, FREE TRADE UNDER FIRE 107–08 (2015) (discussing a country’s terms of trade). A country’s terms of trade are “the ratio at which a country exchanges exports for imports.” Countries that impose protectionist trade restrictions, such as adjusting export or import prices, can potentially increase its purchasing power of exports thereby raising its national income. *Id.* However, a country’s ability to improve its terms of trade usually requires the ability to influence international markets. *See, e.g., id.* at 108 (exemplifying a country’s terms of trade through oil, diamond, and rare metal industries).

²³ Cletus C. Coughlin, K. Alec Chrystal & Geoffrey E. Wood, *Protectionist Trade Policies, A Survey of Theory, Evidence and Rationale*, FED. RES. BANK OF ST. LOUIS 22 (JAN./FEB. 1988), *reprinted in* JEFFRY A. FRIEDEN & DAVID A. LAKE, INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH 312 (Routledge 4th ed. 2000). According to this theory, when a country’s imports increase from international competitors, affected domestic industries pivot by lowering cost and reducing production. *Id.* This adjustment may result in productive resources reallocating to other domestic industries, thereby causing workers in specific industries to lose their jobs or relocate. *Id.*

²⁴ *See id.* at 315. Amidst trade deficits and unbalanced reciprocity agreements, protectionists claim that governmental measures—even retaliatory ones—may be necessary to protect disadvantaged, domestic companies from the threat of an unequal trading field. *Id.* However, the concept of “fair trade,” like many other protectionists’ arguments, remain hotly contested by critics—both domestic and abroad. *Id.*

²⁵ *See IRWIN, supra* note 22, at 111. Strategic trade policy is a measure “in which the government undertakes a precise, strategic intervention on behalf of domestic firms in a way that increases national welfare.” *Id.* In these situations, governments subsidize exports from a domestic company that is competing with an international rival with the intent to siphon profits that might otherwise shift to the foreign competitor. *See Coughlin, supra* note 23, at 314 (using American economist Paul Krugman’s Boeing and Airbus aircraft manufacturing hypothetical to illustrate effect of strategic trade policy). Protectionists argue that, absent governmental intervention, a country might lose an opportunity to acquire additional profits in the global market. *See IRWIN, supra* note 22, at 112.

on a nation's stance on free trade versus protectionism.²⁶ Import taxes range from a few dollars to millions of dollars depending on the product and the volume of imports. Importers self-declare what they are importing and its value; taxes are assessed based upon these representations. Misrepresentations to minimize or avoid these import taxes is fraud. Because the process for assessing and paying import taxes is largely voluntary and unchecked, trade fraud is easy to commit and hard to detect. Because import taxes can be significant, the incentive to engage in such fraud is significant.

When trade laws are flouted and duties evaded, an array of stakeholders are injured. Law-abiding importers who have adjusted their business practices by shifting supply chains—generally buying their supplies at greater cost or paying import taxes now assessed—are injured by the dishonest importers who gain large profit margins by offering customers dumping level prices.²⁷ Industries that have made business decisions, financial investments, and undertaken contractual and debt commitments based on U.S. government commitments in trade policies are injured when import laws are not enforced.²⁸ Consumers who are subject to unsafe products are harmed when greedy importers avoid paying import taxes by hiding dangerous information about medicine, food, or other products they bring into the country.²⁹

²⁶ Countries that engage in free trade policies still may impose import duties. For example, the United States signed a Free Trade Agreement with Israel in 1985. *See Israel Country Commercial Guide*, <https://www.export.gov/article?id=Israel-Import-Tariffs> (last updated May 30, 2017). This agreement substantially lowered tariffs between the two countries essentially eliminating most tariffs between them. Nevertheless, both countries retain tariffs on agricultural goods from the other. *See id.*

²⁷ *See, e.g.*, Complaint at ¶ 58, *United States ex rel. Graphite Electrode Sales, Inc. v. Ameri-Source Holdings, Inc.*, No. 2:13-cv-00474-JFC (W.D. Pa. Apr. 1, 2013) (Appendix A, #54); Complaint at ¶¶ 28-29, *United States ex rel. Reade Mfg. Co. v. ESM Group*, No. 1:10-cv-00504-WMS (W.D.N.Y. June 17, 2010) (Appendix A, #55).

²⁸ *See, e.g.*, Complaint at 5, *United States ex rel. Scutellaro v. Direct Resources, Inc.*, No. 1:10-cv-00113-JDB (D.D.C. Jan. 20, 2010) (Appendix A, #25); Complaint at ¶ 58, *United States ex rel. Graphite Electrode Sales, Inc. v. Ameri-Source Holdings, Inc.*, No. 2:13-cv-00474-JFC (W.D. Pa. Apr. 1, 2013) (Appendix A, #54); *Reade Mfg. Co.*, *supra* note 27 (Appendix A, #55).

²⁹ *See, e.g.*, Press Release, U.S. Dep't of Justice, Two Individuals Arrested for Conspiracy to Import Falsely Labeled Fish (June 7, 2007), https://www.justice.gov/archive/opa/pr/2007/June/07_enrd_413.html (Appendix A, #7); *United States v. Wong* (Appendix A, #7); *United States v. Groeb Farms, Inc.*, No. 1:13-cr-00139 (N.D. Ill. Feb. 12, 2013) (Appendix A, #33); *Giddens*, *supra* note 9 (Appendix A, #51).

II

WHY TRADE FRAUD IS DIFFICULT TO DETECT, PROVE, AND
DETER

Trade fraud, like all white-collar crime, is difficult to detect, prove, and deter.³⁰ There are \$2.71 trillion of imports³¹ and 32.4 million trade entries into the United States each year.³² Imports arrive in the United States through 328 ports, 7,000 miles of land borders, and 95,000 miles of shoreline.³³ Customs Agents inspect only a tiny percentage of these imports.³⁴ Even if customs' inspections were increased exponentially, however, they would miss most trade fraud. Modern-day smuggling is too diffused and too concealed for detection by visual inspection.³⁵ Forensic accounting to trace monetary transactions, grants of immunity to obtain testimony, analysis of paper trails, piercing of fictitious organizations, and dissecting layers of fraudulent transactions are the essential investigatory tools. But these tools are expensive, time-consuming, and resource intensive. Furthermore, they do not even guarantee success. Even with such yeoman investigative efforts, most trade fraud, like most white-collar crime, is missed by law enforcement.

³⁰ Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 926 (2002) (“With computerization and the Internet, economic wrongdoing has entered a different world . . . [it] is easier to commit and harder to stop.”) [hereinafter *Information as a Commodity*]; Pamela H. Bucy, Elizabeth P. Formby, Marc S. Raspanti & Kathryn E. Rooney, *Why Do They Do It? The Motives, Mores, and Character of White Collar Criminals*, 82 ST. JOHN’S L. REV. 401 (discussing trend noted in study of white collar practitioners “that white collar crimes and their investigations have become more complex”).

³¹ See INT’L TRADE ADMIN., U.S. TRADE OVERVIEW 2016, 5, 6 (Apr. 2017), http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_005537.pdf.

³² See U.S. CUSTOMS AND BORDER PROT., PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2016, 6, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Mar/FY-2016-CBP-PAR-508C.pdf> (last visited May 31, 2017).

³³ *Id.* at 8 (last visited May 31, 2017).

³⁴ See generally U.S. CUSTOMS AND BORDER PROT., PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2016, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Mar/FY-2016-CBP-PAR-508C.pdf> (last visited May 31, 2017).

³⁵ See, e.g., Amended Complaint, United States *ex rel.* Dickson v. Toyo Mfg. Co., No. 3:09-CV-438 (W.D.N.C. May 14, 2010) (Appendix A, #31); Criminal Indictment, United States v. Blyth, No. 1:10-cr-00011-CG-M (Jan. 28, 2010) (Appendix A, #19); Bill Singer, *A Fishy Tale: Defendants Plead Guilty to Seafood Felonies*, FORBES (May 5, 2011), <https://www.forbes.com/sites/billsinger/2011/05/05/a-fishy-taledefendants-plead-guilty-to-seafood-felonies/#1add4db11e01>; United States v. Popa, No. 1:10-cr-00011-CG-M (S.D. Ala. Jan. 28, 2010) (Appendix A, #20); Indictment, United States v. Garcia-Adarme, No. 3:13-cr-00353-FAB (D.P.R. June 20, 2013) (Appendix A, #36).

While all white-collar crime is difficult to detect,³⁶ trade fraud is harder. Smugglers' success is limited only by human ingenuity. Trade fraud is hidden in layers of organizations, concealed in byzantine electronic communications, and obscured by money laundering. The simplest exchange spans the globe; the smallest shipment involves international monetary transactions. Successful detection of trade fraud is hampered by the varying honesty, competence, and resources of nations' customs regulators.

III

ANALYSIS OF THE DATABASE: TRADE FRAUD CASES FROM 2000 TO 2016

To examine trade fraud, we sought to collect all prosecutions of import trade fraud, criminal and civil, brought by the U.S. Department of Justice between 2000 and 2016. Section A describes our search methodology and overall findings. Section B discusses the trends shown in these cases, including the increase in criminal prosecutions, the growing reliance on the FCA, the types of trade fraud pursued, the characteristics of each type of trade fraud, and the practical and policy implications of pursuing the various types of trade fraud.

A. Data Collection Methodology and Overview of Findings

Using multiple search terms³⁷ in various databases,³⁸ we searched for trade fraud cases brought by the U.S. Department of Justice between

³⁶ *Information as a Commodity*, *supra* note 30, at 940–41 (discussing how “the complex nature of economic crime and the diffuse nature of the business environment” make it difficult for regulators to detect white collar crime in time to prevent it).

³⁷ We used the following terms, individually and in combination: “trade fraud;” “Trade Agreements Act;” “antidumping;” “countervailing duties;” “CVD;” and “False Claims Act.”

³⁸ We first ran a Google search of the current and archived Department of Justice press release collections (located at <https://www.justice.gov/opa/pr/> and <https://www.justice.gov/archive/opa/pr/> respectively). The results of these searches were manually inspected, and those that were on-topic were noted and copied.

After the initial search, we found that there were press releases held on Department of Justice (DOJ) servers that were not included in the main archive, primarily in individual pages for United States Attorney offices. To find these we ran an expanded search of the entire DOJ domain (<https://www.justice.gov/>), using search terms similar to the press release archive, with additional terms such as “for immediate release” that would denote a press release. To be as exhaustive as possible, we expanded the previous search to the entire .gov domain.

We then searched federal district court dockets via Bloomberg Law for the complaints of all cases we found in the press release search. We also initiated a keyword and cause of

2000 and 2016. We confined our collection to import fraud cases because there are no duties or tariffs associated with export fraud.³⁹ Using this combined search methodology, we found forty-seven trade fraud cases⁴⁰ involving hundreds of defendants that have been brought by the U.S. Department of Justice between 2000 and 2016. The defendants include individuals, “mom and pop” businesses, and large conglomerates. Appendix A catalogs these cases by name, description of facts, type of fraud, and status or outcome.

Several trends are apparent from this collection of cases. In the sixteen years between 2000 and 2016, court activity in import trade fraud cases increased nine-fold with a major spike beginning in 2012, which peaked in 2014. As Chart 1 below demonstrates, both criminal prosecutions and civil FCA cases increased during this sixteen-year period. During this same time period, forty-two percent of trade fraud cases have been criminal prosecutions and fifty-eight percent have been brought under the civil FCA. The criminal prosecutions include charges of smuggling, and smuggling-related offenses, such as receipt of smuggled goods,⁴¹ misbranding,⁴² and prohibited trade in wildlife,

action search for False Claims Act and trade, antidumping, or countervailing duties. Due to the limitations of PACER, where these documents are sourced, we were only able to search the user keyed metadata, and not the actual content of the filings.

Lastly, we conducted a Westlaw case search in all federal district courts, using the same key words.

³⁹ We did not include cases that were dismissed. So, for example, we did not include the complaint filed by a relator that included trade fraud allegations when the settlement did not include trade fraud and the relator’s claims were dismissed. *See, e.g., United States ex rel. Sandager v. Dell Marketing L.P.*, 872 F. Supp. 2d 801 (D. Minn. 2012). *See also* Press Release, U.S. Dep’t of Justice, Hewlett-Packard Company Agrees to Pay \$32.5 million for Alleged Overbilling of the U.S. Postal Service (Aug. 1, 2014). Nor did we include cases in which the United States did not intervene and where the courts dismissed the action on other grounds such as statute of limitations or whether there was fraud. *See United States ex rel. Thornton G. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288 (4th Cir. 2008) (The court held that the relator’s claim barred by the FCA’s six-year statute of limitations; FCA’s statute of limitations extends beyond six years only when the United States is a party, not in relator actions in which the United States has not intervened; the defendants’ alleged false statement about product (whether components were permanently installed at the time of importation) was immaterial; there was no customs fraud because the product (bus shells) qualified for duty-free treatment.).

⁴⁰ As can be seen in Appendix A, we have included fifty-seven entries in our catalog of trade fraud cases. We found it helpful in some cases to list multiple stages of some cases, but the total number of cases is forty-seven.

⁴¹ 18 U.S.C.S. §§ 541–54 (Lexis through Pub. L. No. 115-140).

⁴² 21 U.S.C.S. §§ 331(a), 352(a) & (f), 333(a)(2) (Lexis through Pub. L. 115-140).

fish, and plants.⁴³ Criminal prosecutions also include generic white-collar offenses such as wire fraud,⁴⁴ conspiracy,⁴⁵ money laundering,⁴⁶ and obstruction of justice.⁴⁷ Sentences levied after conviction tend to be minimal: probation is common. When incarceration is imposed, sentences generally range from one-to-three years.

Restitution in significant amounts has been ordered in some criminal cases (\$12 million,⁴⁸ \$7.16 million,⁴⁹ \$6.246 million,⁵⁰ \$3 million,⁵¹ \$1.017 million⁵²). Forfeiture of assets, also in significant amounts, has been imposed upon conviction (\$12 million,⁵³ \$400,000,⁵⁴ \$197,930⁵⁵). As with other white-collar frauds, parallel criminal prosecutions and

⁴³ The Lacey Act, 16 U.S.C.S. §§ 3371–77 (Lexis through Pub. L. 115-140).

⁴⁴ 18 U.S.C.S. § 1343 (Lexis through Pub. L. No. 115-140).

⁴⁵ 18 U.S.C.S. § 371 (Lexis through Pub. L. No. 115-140).

⁴⁶ 18 U.S.C.S. § 1956 (Lexis through Pub. L. No. 115-140).

⁴⁷ 18 U.S.C.S. § 1505 (Lexis through Pub. L. 115-140).

⁴⁸ Press Release, U.S. Dep't of Justice, President of Company that Illegally Imported Catfish Sentenced to More Than Five Years in Federal Prison (May 19, 2009), <https://www.justice.gov/opa/pr/president-company-illegally-imported-catfish-sentenced-more-five-years-federal-prison>.

⁴⁹ Press Release, U.S. Dep't of Justice, Cigarette Importer Agrees to Pay U.S. \$3.1 Million as Part of \$10.6 Million Settlement with Justice Department (Dec. 4, 2007), https://www.justice.gov/archive/opa/pr/2007/December/07_civ_966.html (discussing *United States v. Premier Manufacturing Inc.*, No. 2:05-cr-00344-DCN (D.S.C. Mar. 25, 2005) (Appendix A, #8)).

⁵⁰ Press Release, U.S. Dept. of Justice, Father and Son Sentenced for Defrauding the United States (Sept. 8, 2015), <https://www.justice.gov/usao-wdny/pr/father-and-son-sentenced-defrauding-united-states> (discussing *United States v. Magness*, No. 1:10-cr-00125-WMS-JJM (Sept. 8, 2015) (Appendix A, #50)).

⁵¹ Press Release, U.S. Immigration & Customs Enf't, Caviar Distributor Pleads Guilty to Multi-Million Dollar Customs Fraud Scheme (Nov. 29, 2012), <https://www.ice.gov/news/releases/caviar-distributor-pleads-guilty-multi-million-dollar-customs-fraud-scheme>. *See also* Appendix A, #30.

⁵² Complaint at 2, *United States v. Fai Po Jewellery*, No. 3:12-cr-00068-SLG (D.C. Ak. Aug. 8, 2012) (Appendix A, #28).

⁵³ Press Release, U.S. Dep't of Justice, Two Found Guilty of Conspiracy Involving the Importation and Sale of Falsely Labeled Fish from Vietnam (Oct. 30, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-enrd-967.html> (discussing *United States v. Lam* (Appendix A, #12)).

⁵⁴ Press Release, U.S. Dept. of Justice, Online Clothing Business Owners Sentenced for Customs Fraud, Money Laundering (May 5, 2014), <https://www.justice.gov/usao-edca/pr/online-clothing-business-owners-sentenced-customs-fraud-money-laundering> (discussing *United States v. Nguyen*, No. 1:13-cr-000360LJO-SKO (E.D. Cal. Jan. 31, 2013) (Appendix A, #42)).

⁵⁵ Indictment at 1, *United States v. True World Foods Chicago, LLC*, No. 2:07-cr-01271 (C.D. Cal. Nov. 15, 2007) (Appendix A, #10).

civil suits under the civil FCA have been brought in a number of trade fraud cases.⁵⁶

All civil trade cases have been brought under the civil FCA. Resolution in FCA cases include some significant settlements: \$45 million,⁵⁷ \$27.95 million,⁵⁸ and several settlements of \$15 million.⁵⁹ Awards to relators include \$7.875 million,⁶⁰ \$3.335 million,⁶¹ \$2.4 million,⁶² \$2.25 million,⁶³ \$2.1 million,⁶⁴ \$1.5 million,⁶⁵ and \$1.2 million.⁶⁶

⁵⁶ See, e.g., Complaint at 1, United States *ex rel.* Ludlow v. CMAI Indus., LLC, No. 2:09-cv-14860 (E.D. Mich. 2012) (Appendix A, #26). See also Magness, *supra* note 50; Reade Mfg. Co., *supra* note 27 (Magness was prosecuted for the same activity at issue in the civil FCA case, *Reade Mfg. Co.*).

⁵⁷ Press Release, U.S. Dep't of Justice, Japanese-Based Toyo Ink and Affiliates in New Jersey and Illinois Settle False Claims Allegations for \$45 Million (Dec. 17, 2012), <https://www.justice.gov/opa/pr/japanese-based-toyo-ink-and-affiliates-new-jersey-and-illinois-settle-false-claims-allegation>.

⁵⁸ United States *ex rel.* Safina Office Products v. Office Depot, No. 1:03-cv-00003-RMC (D.D.C. Jan. 2, 2003) (Appendix A, #2, 3, 4, 5). See Press Release, U.S. Dep't of Justice, Defendant Office Max Settles Case for \$9.8 million (May 19, 2005); Press Release, U.S. Dep't of Justice, Defendant Office Depot Settles Case for \$4.75 Million (Sept. 19, 2005); Press Release, U.S. Dep't of Justice, Defendant Staples Settles Case for \$7.4 Million (Oct. 18, 2005); and Press Release, U.S. Dep't of Justice, Defendant Corporate Express Settles Case for \$5.02 Million (Feb. 10, 2006).

⁵⁹ Press Release, U.S. Dep't of Justice, Texas-Based Importers Agree to Pay \$15 Million to Settle False Claims Act Suit for Alleged Evasion of Customs Duties (Dec. 21, 2015), <https://www.justice.gov/opa/pr/texas-based-importers-agree-pay-15-million-settle-false-claims-act-suit-alleged-evasion> [hereinafter Univ. Lofts] (Appendix A, #52); Press Release, U.S. 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. 26, 2015), <https://www.justice.gov/opa/pr/california-based-z-gallerie-llc-agrees-pay-15-million-settle-false-claims-act-suit-alleging> [hereinafter Wells] (Appendix A, #56).

⁶⁰ Dickson, *supra* note 35.

⁶¹ Safina Office Products, *supra* note 58.

⁶² Wells, *supra* note 59.

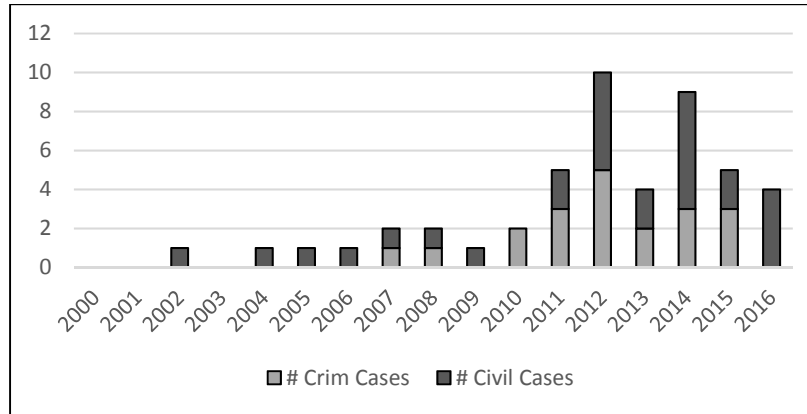
⁶³ Univ. Lofts, *supra* note 59.

⁶⁴ Alex Lawson, Whistleblower Awarded \$2M in Apparel Duty Evasion Suit, LAW 360 (May 2, 2014, 11:30 AM), <https://www.law360.com/articles/533498/whistleblower-award-ed-2m-in-apparel-duty-evasion-suit>. See also United States *ex rel.* Krigstein v. Siouni & Zar Corp., No. 1:11-cv-04247-CM (S.D.N.Y. Dec. 9, 2013) (Appendix A, #40).

⁶⁵ False Claims Complaint, United States *ex rel.* Liotine v. CDW-Government, Inc., No. 3:05-cv-00033-DRH-PMF (S.D. Ill. Jan. 19, 2005) (Appendix A, #34).

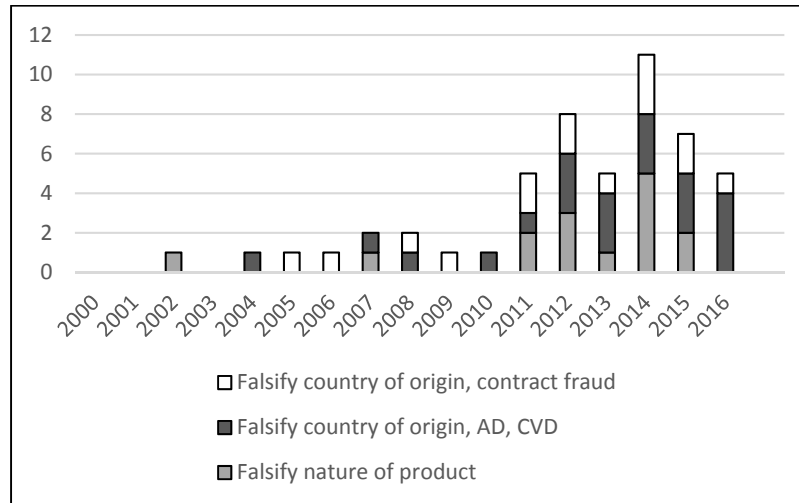
⁶⁶ Ludlow, *supra* note 56.

Chart 1. Trade fraud cases—criminal and civil by year



All import trade fraud cases, criminal or civil, fall into two types of fraud: (1) misrepresentations regarding the nature of the goods imported, and (2) misrepresentations regarding the origin of goods. Importers falsify the country of origin for two reasons: to avoid antidumping or countervailing import duties, and/or to qualify goods for sale to the U.S. government. Chart 2 below summarizes the trends in types of trade fraud.

Chart 2. Trade fraud cases—type of fraud by year



B. Discussion of Cases

*“Commercial smuggling schemes not only rob the government of vital revenues, they also undermine the economy and penalize businesses that follow the rules.”*⁶⁷

1. Misrepresentations Regarding the Nature of Products Imported

Import duties are imposed based upon what is being imported, and sometimes, on the value or quantity of goods. To avoid or reduce the duties they would otherwise owe, unscrupulous importers falsify what they are importing or understate the weight⁶⁸ or value⁶⁹ of their imports.⁷⁰ They falsify the travel route of goods to make them appear to be shipped “through” the United States rather than as “entering” U.S. commerce.⁷¹ They falsely declare imported goods to be “samples” rather than goods for sale,⁷² misrepresent how goods are made,⁷³ and falsely describe ingredients in imports, including prescription drugs,⁷⁴ magnesium powder used in anti-aircraft flares,⁷⁵ and computer networking equipment.⁷⁶

⁶⁷ Press Release, U.S. Dep’t of Justice, Online Clothing Business Owners Sentenced for Customs Fraud, Money Laundering (May 5, 2014), <https://www.justice.gov/usao-edca/pr/online-clothing-business-owners-sentenced-customs-fraud-money-laundering> (statement of Mike Prado, U.S. Homeland Security Investigation discussing U.S. v. Nguyen).

⁶⁸ Press Release, U.S. Dep’t of Justice, Cigarette Importer Agrees to Pay U.S. \$3.1 Million as Part of \$10.6 Million Settlement with Justice Department (Dec. 4, 2007), https://www.justice.gov/archive/opa/pr/2007/December/07_civ_966.html (discussing United States v. Premier Manufacturing Inc. No. 2:05-cr-00344-DCN (D.S.C. Mar. 25, 2005) (Appendix A, #8)).

⁶⁹ Fai Po Jewellery, *supra* note 52; Complaint and Jury Demand at ¶ 16, United States *ex rel.* Karlin v. Noble Jewelry Holdings Ltd., No. 1:08-cv-07826-JGK-KNF (S.D.N.Y. Aug. 29, 2011) (Appendix A, #23).

⁷⁰ Krigstein, *supra* note 64; Wong, *supra* note 29.

⁷¹ Complaint, United States v. Chavez, No. 3:12-cr-03137-MMA (S.D. Cal. July 23, 2012) (Appendix A, #29).

⁷² Nguyen, *supra* note 54.

⁷³ An “assist” is “materials or components in the imported merchandise supplied directly to indirectly by the buyer of such merchandise without adequate compensation, for use related to the production on sale for export to the U.S.” Jimenez, *supra* note 1.

⁷⁴ Giddens, *supra* note 9.

⁷⁵ Reade Mfg. Co., *supra* note 27.

⁷⁶ Press Release, U.S. Dept. of Justice, Maryland Man Sentenced to 30 Months in Prison for Importing and Selling Counterfeit Cisco Computer Networking Equipment (Aug. 18, 2011), https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2012/03/15/cone_Sent.pdf (discussing United States v. Cone, No. 11-4888 (E.D. Va. Nov. 10, 2010), *rev’d*, No. 11-4934 (4th Cir. Apr. 14, 2013) (Appendix A, #22)).

A criminal prosecution of individuals in Texas exemplifies this type of fraud. In *United States v. Giddens*,⁷⁷ defendants falsely claimed they were importing “gifts” or “toys” when in fact they were importing medications such as Xanax®, Valium®, Cialis®, Viagra®, and Still NOx®.⁷⁸ The defendants not only avoided import duties by concealing the true nature of their goods, but also preempted any possible inspections by customs officials of the medications—which were in fact defective. According to the law enforcement officials, “None of the pills . . . were legitimate. Some were sub-potent, but most contained entirely different active ingredients than the legitimate, approved versions.”⁷⁹

United States v. Cone provides another example of misrepresentation of an import’s nature.⁸⁰ Defendants in Virginia were convicted at the conclusion of a twelve-day jury trial for misrepresenting the nature of their imports, computer equipment, to avoid or minimize import duties.⁸¹ Operating “a large-scale counterfeit computer networking business” in China, defendants “altered Cisco products” and used pirated software.⁸² To conceal their fraud and avoid import duties, they mislabeled their imported products and packaging, used false names and addresses on importation documents, and “hid millions of dollars of counterfeit proceeds through a web of bank accounts and real estate held in the . . . names of family members in China.”⁸³ The jury’s verdict included forfeiture of assets “including two Porsches, one Mercedes, seven bank accounts containing more than \$41.6 million, as well as four homes and three condominiums with a total value of more than \$2.6 million.”⁸⁴

The prosecution of a customs broker in California demonstrates the type of convoluted schemes defendants undertake to conceal the true nature of their imports. Gerardo Chavez was hired by wholesalers of goods to manage the importation of their goods into the port at Long Beach, California, including payment of import duties.⁸⁵ When the

⁷⁷ Giddens, *supra* note 9.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Cone, *supra* note 76.

⁸¹ Nathan M. Peak, *\$2 Million FCA Settlement*, ASHCRAFT & GEREL, <http://ashcraftandgerel.com/news/2-million-fca-settlement> (last visited Jan. 26, 2018).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Chavez, *supra* note 71.

goods arrived in Long Beach, truck drivers hired by Chavez transported the goods to warehouses in southern California where false paperwork and data entries were created to reflect that the goods were not entering U.S. commerce but were being transshipped to other countries, such as Mexico.⁸⁶ The goods were then shipped to destinations throughout the United States.⁸⁷ This scheme avoided millions of dollars in import taxes, which Chavez had already collected from the wholesalers.⁸⁸ Chavez and his conspirators pocketed the import duties paid by his clients, thus cheating them as well as the U.S. Treasury.⁸⁹ In addition, because Chavez and his conspirators “had now effectively imported the goods tax-free, they could, in turn, sell more merchandise at cheaper prices—and reap greater profits—than their law-abiding competitors, including American manufactures of the same goods.”⁹⁰ This scheme led to the importation of more than \$100 million in foreign goods and caused a loss of more than \$18 million in U.S. taxes.⁹¹

2. Misrepresentations Regarding Country of Origin to Avoid Import Duties

Some import duties are imposed only on designated products from certain countries.⁹² Most common among these country and product specific duties are antidumping and countervailing duties.⁹³ Of all tariffs assessed in today’s global market, antidumping and countervailing duties have become the most prevalent, at least in the United States.⁹⁴ These duties are also the most controversial.

⁸⁶ Press Release, Office of the U.S. Attorney, President of San Diego Customs Brokers Association Pleads Guilty to Overseeing \$100 Million Customs Fraud (Nov. 15, 2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See, e.g., Safina Office Products, *supra* note 58; United States *ex rel.* Schweizer v. OCE N.V., No. 1:06-cv-00648-RCL (D.D.C. Apr. 7, 2006) (Appendix A, #6); United States v. Intertex Apparel Groups, Inc., No. 1:05-cv-05313-NRB (S.D.N.Y. May 13, 2008) (Appendix A, #11).

⁹³ See *Enforcement and Compliance: Antidumping and Countervailing Investigations Initiated After January 1, 2000*, INT’L TRADE ADMIN., <http://enforcement.trade.gov/stats/inv-initiations-2000-current.html> (last updated Aug. 17, 2016) (listing the total AD/CVD investigations opened and which of those resulted in duties).

⁹⁴ *Id.*

a. What are Antidumping and Countervailing Duties and Why Have Them?

Antidumping duties (“AD”) are designed to “protect against foreign companies ‘dumping’ products on U.S. markets at prices below cost.”⁹⁵ ADs are assessed when businesses from non-market countries sell a product in the United States at a price lower than the price for which the product is sold in the country of origin—i.e., the country of origin (“normal value”)⁹⁶ and as a result, an industry in the United States is “materially injured, threatened with material injury,” or the establishment of an industry is “materially retarded.”⁹⁷ The duty assessed is the “dumping” margin which is the “amount by which the normal value exceeds the export price.”⁹⁸ Antidumping duties currently assessed by the United States include, for example, 305% on Chinese imports of pure magnesium, 329% on Chinese saccharin, and 429% on Chinese drill pipe.⁹⁹

Countervailing duties (“CVD”) are assessed to “offset foreign government subsidies.”¹⁰⁰ Subsidies are especially common in non-market economies where the government owns certain industries or pumps considerable public and governmental resources into an industry.¹⁰¹ CVDs are assessed on the products that benefit from such

⁹⁵ Press Release, U.S. Dep’t of Justice, Three Importers to Pay Over \$3 Million to Settle False Claims Act Suit Alleging Evaded Customs Duties (Feb. 12, 2015), <https://www.justice.gov/opa/pr/three-importers-pay-over-3-million-settle-false-claims-act-suit-alleging-evaded-customs>.

⁹⁶ *Id.*

⁹⁷ In antidumping cases, the United States will impose duties if (1) Commerce determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value and (2) the Commission determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation. *See* 19 U.S.C.S. § 1673 (Lexis through Pub. L. No. 115-140).

⁹⁸ 19 U.S.C.S. § 1677(35) (Lexis through Pub. L. No. 115-140).

⁹⁹ *See* 66 Fed. Reg. 57936 (Nov. 19, 2001); 68 Fed. Reg. 40906 (July 9, 2003); 76 Fed. Reg. 11757 (Mar. 3, 2011).

¹⁰⁰ Press Release, U.S. Dept. of Justice, Ohio-Based Basco Manufacturing Co. to Pay \$1.1 Million for Allegedly Falsifying Customs Documents to Evade Import Duties on Chinese Products (Nov. 14, 2013), <https://www.justice.gov/opa/pr/ohio-based-basco-manufacturing-co-pay-11-million-allegedly-falsifying-customs-documents-evade> (Complaint at ¶¶ 30–34, *United States ex rel. Valenti v. Tai Shan Golden Gain Aluminum Products, Ltd.*, No. 11-cv-368 (M.D. Fla. Oct. 18, 2013) (Appendix A, #37)).

¹⁰¹ *See* Appendices B-4 and B-5 noting number of countervailing duty orders on Chinese products—a non-market economy. For a fuller discussion, *see Special Report: The World Economy*, THE ECONOMIST 5–16 (Oct. 1, 2016).

subsidies. Sample CVDs imposed by the United States include 206% of value on Chinese ammonium sulfate; 210% on Chinese carbon and steel alloy plates, and 235% on Chinese corrosion-resistant steel products.¹⁰²

The major products on which AD and CVD are imposed are iron and steel, followed by chemicals, and plastic/rubber/stone/glass.¹⁰³ Goods from China, India, and Korea are the subject of most AD and CVD duties currently imposed.¹⁰⁴ Worldwide, the number of ADs and CVDs have increased in the past two years following steady increases beginning in 2011.¹⁰⁵ Not surprisingly, the uptick in the imposition of ADs and CVDs by the U.S. coincides with a surge in trade fraud prosecutions by the United States.¹⁰⁶ Since 2000, there have been multiple cycles in the number of ADs and CVDs imposed, with dips in the global number of ADs and CVDs in 2007 and 2011, and peaks in 2008 and 2016.¹⁰⁷ Currently, Brazil, India, the EU, the United States, and China impose the greatest number of ADs; Russia, Indonesia, and South Korea impose the fewest.¹⁰⁸ The United States imposes the highest number of countervailing duties of any other country.¹⁰⁹ The United States imposes four and a half times more CVDs than the next highest imposing country, and more than all other countries

¹⁰² See 81 Fed. Reg. 76332 (Nov. 2, 2016); 81 Fed. Reg. 62871 (Sept. 13, 2016); 80 Fed. Reg. 68843 (Nov. 6, 2015). In countervailing duty cases, the United States will impose duties if it determines that (1) the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and (2) in cases of merchandise imported from a Subsidies Agreement country, the Commission determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation. 19 U.S.C.S. § 1671 (Lexis through Pub. L. No. 115-140).

¹⁰³ Appendix B-1.

¹⁰⁴ Appendix B-5.

¹⁰⁵ Appendix B-6.

¹⁰⁶ See *supra* Chart 1.

¹⁰⁷ Appendix B-6.

¹⁰⁸ Appendix B-2.

¹⁰⁹ The United States imposed 9 CVDs in 2015 (and 216 from 1981 to 2015), compared to China (which imposed none in 2015, and 6 from 2010 to 2014), Brazil (none in 2015 and 10 from 2001 to 2015) and Canada (2 in 2015 and 33 from 1985 to 2015). Appendix B-5. Note that data maintained on the number of CVDs is not maintained in congruent time spans.

combined.¹¹⁰ While the total number of ADs and CVDs imposed worldwide is small, they account for millions of dollars.

As noted, antidumping and countervailing duties are imposed after findings of “dumping” (ADs) or “subsidization” of products (CVDs). Additionally, before antidumping or countervailing duties are imposed, there must be a finding that importation of products materially impacts, retards, or weakens American industries.¹¹¹ All findings are made in an administrative process that involves two federal agencies, with multiple hearings and appeals.¹¹² All parties are given the opportunity to be heard, present evidence, and seek appeals. This litigation process is lengthy and requires investment of time, money, and resources by the parties. For this reason and because of the harm to law-abiding businesses that result from trade fraud¹¹³ we argue that whatever one’s views on the free trade versus protectionism debate, it is compelling public policy to aggressively pursue trade fraud. The parties that have invested in this administrative process are entitled to rely on the findings and orders that result from this process. They have made business decisions based upon the outcome of this administrative process. Their reliance on the rule of law inherent in these administrative proceedings is justified.

The first step in the administrative process leading to possible imposition of import duties is a petition filed with the U.S. Department of Commerce (DoC) and the International Trade Court (ITC) by the party seeking imposition of the duties.¹¹⁴ The petitioner must show that it is a “qualified party,”¹¹⁵ and that “an industry in the U.S. is materially

¹¹⁰ *Id.*

¹¹¹ See, e.g., Michael O. Moore & Mark Wu, *Antidumping and Strategic Industrial Policy: Tit-for-Tat Trade Remedies and the China-X Ray Equipment Dispute*, 14 *WORLD TRADE REV.* 239, 239–86 (2015); Thomas A. Hemphill & George O. White III, *China’s National Champions: The Evolution of a National Industrial Policy—Or a New Era of Economic Protectionism*, 55 *THUNDERBIRD INT’L BUS. REV.* 194, 202 (2013).

¹¹² This process does not determine whether products are imported with the intent, by a nation or a company, as part of an economic policy, to target, weaken, impede or destroy a particular industry. Rather, the assumption of such intent is presumed from the fact that products are being sold at below value cost (antidumping duties) or are subsidized by a country (countervailing duties) and the sale of such products “materially injured, threatened with material injury” or the establishment of an industry is “materially retarded.” 19 U.S.C.S. § 1673 (Lexis through Pub. L. No. 115-140).

¹¹³ See *supra* text accompanying notes 2–10; *infra* text accompanying notes 130–94.

¹¹⁴ See U.S. INT’L TRADE COMM’N, *ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK* 1-3 (June 2015), https://www.usitc.gov/trade_remedy/documents/handbook.pdf; 19 U.S.C.S. § 1671a (Lexis through Pub. L. No. 115-140).

¹¹⁵ 19 U.S.C.S. §§ 1677(9)(C)–(G) (Lexis through Pub. L. No. 115-140).

injured or threatened with material injury or that the establishment of an industry is materially retarded” by reason of the antidumping or subsidy activity.¹¹⁶ There must be an affirmative preliminary determination on the petition by the DoC¹¹⁷ before the matter may proceed to the ITC for investigation.¹¹⁸ If the ITC’s determination is affirmative following its investigation, the ITC relays its facts and conclusions back to the DoC¹¹⁹ which then determines whether there is a “reasonable basis” to believe or suspect that “dumped” merchandise is being sold for less than the fair value or that a countervailing subsidy is being provided for the merchandise at issue.¹²⁰ If the DoC finds in

¹¹⁶ 19 U.S.C.S. §§ 702(b), 732(b), 1677(9) (Lexis through Pub. L. No. 115-140). The petition must be accompanied by “information reasonably available to the petitioner supporting those allegations.” 19 U.S.C.S. §§ 1671a(b)(1), 1673a(b)(1) (Lexis through Pub. L. No. 115-140). The petition must also comply with several other rules which govern: (1) the contents of a petition, (2) filing requirements, (3) notification of foreign governments, (4) pre-initiation communications with the Secretary, and (5) assistance to small businesses in preparing petitions. 19 C.F.R. §§ 351.202(b)–(h) (2016). The Commission also refers interested parties to the additional regulations located under 19 C.F.R. § 351.202 regarding the contents of their petitions. 19 C.F.R. § 351.202(a).

¹¹⁷ DoC determines whether the petition (1) has been filed by or on behalf of the industry interested party’s petition, (2) sufficiently alleges the necessary elements, and (3) provides the information reasonably available to petitioner supporting the allegations. 19 U.S.C.S. §§ 1671a(c)(1)(a), 1673a(c)(1)(a) (Lexis through Pub. L. No. 115-140). The DoC has twenty days to respond from the filing of the petition, but may delay its initial determination up to additional twenty days in cases involving “exceptional circumstances” to “poll or otherwise determine support for the petition by the industry.” 19 U.S.C.S. §§ 1671a(c)(1)(b), 1673a(c)(1)(b) (Lexis through Pub. L. No. 115-140). If the DoC’s determination is negative, the agency closes its investigation and the proceedings conclude. 19 U.S.C.S. §§ 1671b(a)(1)(B), 1673b(a)(1)(B) (2012).

¹¹⁸ 19 U.S.C. §§ 1671a(c)(2), 1673a(c)(2) (Lexis through Pub. L. No. 115-140). In the preliminary phase of the Commission’s investigation, the body has forty-five days after the date on which the petition is filed to determine, based on the information available, whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise and that the imports of the subject merchandise are not negligible. 19 U.S.C.S. §§ 1671b(a)(1), 1673b(a)(1) (Lexis through Pub. L. No. 115-140). This preliminary phase of investigation includes several additional stages of investigation. *See* U.S. INT’L TRADE COMM’N, *supra* note 114, at II-5 (“The preliminary phase of the Commission’s investigation may be broken down into six stages: (1) institution of the investigation and scheduling of the preliminary phase, (2) questionnaires, (3) staff conference and briefs, (4) staff report and memoranda, (5) briefing and vote, and (6) determination and views of the Commission.”). If the DoC’s determination is negative, the agency terminates the proceedings. 19 U.S.C.S. §§ 1671(a), 1671b(a), 1673b(a) (Lexis through Pub. L. No. 115-140).

¹¹⁹ 19 U.S.C.S. §§ 1671b(f), 1673b(f) (Lexis through Pub. L. No. 115-140).

¹²⁰ 19 U.S.C.S. §§ 1671b(b), 1673b(b) (Lexis through Pub. L. No. 115-140). In countervailing duty investigations, if DoC concludes there is a reasonable basis for its

the affirmative, the ITC makes its final determination on material injury, threatened material injury, or material retardation.¹²¹ If the ITC finds such harm, the DoC engages in a lengthy¹²² fact-finding process that includes submission of questionnaires, reports, comments, and briefs by the parties.¹²³ At the conclusion of the fact finding process,

decision, the agency estimates a subsidy rate for each firm or country investigated. 19 U.S.C.S. § 1671b(d)(1)(A)(i) (Lexis through Pub. L. No. 115-140). This determination is made within sixty-five days after DoC initiates an investigation. 19 U.S.C.S. § 1671b(b)(1) (Lexis through Pub. L. No. 115-140). But in extraordinarily complicated cases, or by request of the petitioner, DoC's determination can be made within 130 days. 19 U.S.C.S. § 1671b(c)(1)(B)(ii) (Lexis through Pub. L. No. 115-140). In antidumping investigations, if DoC concludes there is a reasonable basis for its decision, the agency estimates the weighted-average dumping margin and an estimated all-others rate for all exporters and producers not individually investigated. 19 U.S.C.S. § 1673b(d)(1)(A)(i)-(ii) (Lexis through Pub. L. No. 115-140). This determination is made 140 days—or 190 days in extraordinarily complicated cases or by request of the petitioner—after DoC initiates its investigation. 19 U.S.C.S. §§ 1673b(b)(1)(A), 1673b(c)(1)(B)(ii) (Lexis through Pub. L. No. 115-140).

If DoC's preliminary determination is affirmative, the agency orders (1) the posting of a cash deposit, bond, or other security for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate and (2) the suspension of liquidation of all entries of merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date on which notice of the determination is published in the Federal Register. 19 U.S.C.S. §§ 1671b(d)(1)-(2), 1673b(d)(1)-(2) (Lexis through Pub. L. No. 115-140).

¹²¹ 19 U.S.C.S. §§ 1671d(b), 1673d(b) (Lexis through Pub. L. No. 115-140). The Commission completes its investigation either before the 120th day after DoC makes its affirmative preliminary determination, or the 45th day after DoC makes its affirmative final determination, whichever is later. 19 U.S.C.S. §§ 1671d(b)(2), 1673d(b)(2) (Lexis through Pub. L. No. 115-140). This last stage consists of several phases before the Commission publishes its final determination and views. *See* U.S. INT'L TRADE COMM'N, *supra* note 114, at II-15 ("The final phase of the Commission's investigation may be broken down into eight stages: (1) scheduling of the final phase, (2) questionnaires, (3) prehearing staff report, (4) hearing and briefs, (5) final staff report and memoranda, (6) closing of the record and final comments by parties, (7) briefing and vote and (8) determination and views of the Commission."). Once the Commission makes its final determination, it issues a public notification of its findings and the determination is published in the Federal Register. 19 U.S.C.S. §§ 1671d(d), 1673d(d) (Lexis through Pub. L. No. 115-140).

¹²² The Commission completes its investigation either before the 120th day after DoC makes its affirmative preliminary determination, or the 45th day after DoC makes its affirmative final determination, whichever is later. 19 U.S.C.S. §§ 1671d(b)(2), 1673d(b)(2) (Lexis through Pub. L. No. 115-140).

¹²³ If DoC's preliminary determination is affirmative, the agency orders (1) the posting of a cash deposit, bond, or other security for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate and (2) the suspension of liquidation of all entries of merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date on which notice of the determination is published in the Federal Register. 19 U.S.C.S. §§ 1671b(d)(1)-(2), 1673b(d)(1)-(2) (Lexis through Pub. L. No. 115-140).

the DoC makes a final determination of injury and issues a public notice of its findings.¹²⁴

b. The Rationale Behind Antidumping and Countervailing Duties

The following hypothetical demonstrates the rationale for imposing ADs and CVDs. Assume Businesses A and B manufacture widgets. Business A embarks on a plan to capture the market. Business A prices its widgets below its production cost, increases production, and floods the market with a low-cost alternative to Business B's higher-priced product. Business A succeeds in driving Business B out of business.

In a market economy, if Business A chooses to assume the risks of its plan to force out its competitor, it may do so as long as it follows all applicable laws. Business A's aggressive plan is permissible because Businesses A and B are subject to the same laws and the same capital, tax, and other regulatory requirements. Neither business receives help from the government, such as subsidies, that is not available to the other. Businesses A and B are competing on a level playing field. Business A's activity is not fair, however, if the government subsidizes Business A but not Business B, or provides advantages to Business A that it does not provide to Business B, thus unfairly altering the market conditions.

Antidumping duties (AD) and countervailing duties (CVD) seek to address situations when the players are not subject to the same market conditions. As proponents of such duties argue, imposition of AD or CVD duties provide protection when:

[T]he goal of foreign manufacturers that sell goods at an artificially low price, for example, below cost . . . is to charge such prices long enough to put out of business competitors lacking the capacity to absorb the costs of matching the artificially low price for any length of time.¹²⁵

¹²⁴ 19 U.S.C.S. §§ 1671d(b), 1673d(b) (Lexis through Pub. L. No. 115-140). This last stage consists of several phases before the Commission publishes its final determination and views. See U.S. INT'L TRADE COMM'N, *supra* note 114, at II-15 ("The final phase of the Commission's investigation may be broken down into eight stages: (1) scheduling of the final phase, (2) questionnaires, (3) prehearing staff report, (4) hearing and briefs, (5) final staff report and memoranda, (6) closing of the record and final comments by parties, (7) briefing and vote and (8) determination and views of the Commission."). Once the Commission makes its final determination, it issues a public notification of its findings and the determination is published in the Federal Register. 19 U.S.C.S. §§ 1671d(d), 1673d(d) (Lexis through Pub. L. No. 115-140).

¹²⁵ Dickson, *supra* note 35.

The harm from unfair market conditions is shown in the above hypothetical, if Business A receives government support when Business B does not. The above hypothetical also demonstrates the potential harm to consumers who pay higher prices for lesser quality widgets and receive worse customer service when Business A gains control of the market. Law enforcement officials describe the harm that can result to consumers from “dumping” activity by subsidized economies: “By eliminating competition, foreign firms subsidized by foreign governments, are then free to raise prices to anti-competitive levels and recover the temporary cost of the dumping scheme.”¹²⁶ In the above example, consumers who need widgets are harmed when Business A, now with a subsidized monopoly, raises prices, cuts quality, and reduces customer service.

c. Criminal Prosecution of Antidumping and Countervailing Duties

As noted in Section A above,¹²⁷ violations of antidumping and countervailing duty laws may lead to criminal prosecution. This is aptly demonstrated in multiple prosecutions of importers of Vietnamese catfish who falsified the country of origin to avoid antidumping duties and to help hide prohibited chemicals in their fish.

Catfish farmers throughout the United States had previously petitioned and obtained antidumping duties from the DoC on imports of catfish from Vietnam after showing that catfish was being dumped by Vietnamese companies in the U.S. market at prices less than the fish were sold in Vietnam (with currency adjustments).¹²⁸ Thereafter, a number of seafood companies in the United States continued to import Vietnamese catfish but falsely listed their imports as sole, grouper, and flounder to avoid paying the now applicable antidumping duties on

¹²⁶ *Id.* As law enforcement officials explain: “Countervailing and antidumping duties are designed to provide a level playing field between companies that purchase products domestically and those that import products from countries that subsidize their production . . . Importers who use fraud to avoid paying these duties gain an unfair business advantage over competitors who abide by the rules.” *Id.*

¹²⁷ Dickson, *supra* note 35.

¹²⁸ See, e.g., Press Release, U.S. Dep’t of Justice, Two Individuals Arrested for Conspiracy to Import Falsely Labeled Fish (June 7, 2007), https://www.justice.gov/archive/opa/pr/2007/June/07_enrd_413.html (United States v. Wong, Appendix A, #7); True World Foods, *supra* note 55; Press Release, U.S. Dep’t of Justice, Two Found Guilty of Conspiracy Involving the Importation and Sale of Falsely Labeled Fish from Vietnam (Oct. 30, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-enrd-967.html> (United States v. Lam, Yavelberg, Appendix A, #12).

catfish.¹²⁹ Some of these catfish also posed a health hazard, testing positive for malachite green, a chemical compound used in overseas fish farming, and Enrofloxin, an antibiotic banned by the FDA.¹³⁰ Both malachite green and Enrofloxin are banned from use in food in the United States.¹³¹ The defendants were convicted of Lacey Act offenses.¹³²

In a similar case, a honey broker in Texas was prosecuted for falsely stating that Vietnamese honey was from Malaysia and India to avoid \$37.9 million in antidumping duties.¹³³ This honey contained Chloramphenicol, another antibiotic banned in the United States in food products.¹³⁴

d. Use of the Civil False Claims Act to Pursue Antidumping and Countervailing Duty Violations

There are more civil suits aimed at antidumping and countervailing duty fraud brought under the FCA than criminal prosecutions for this activity.¹³⁵ The case of *United States ex rel. Graphite Electrode Sales (GES) v. Ameri-Source*,¹³⁶ demonstrates use of the FCA to combat antidumping violations. This case also demonstrates how private parties can initiate FCA cases and work hand-in-hand with the U.S. Department of Justice in pursuing them.¹³⁷ GES, a multi-generational, family-owned company, imports and sells graphite electrodes which are used to heat molten scrap metal in steel production.¹³⁸ For years, GES imported graphite electrodes from a variety of foreign sources

¹²⁹ Press Release, Two Individuals Arrested for Conspiracy to Import Falsely Labeled Fish, *supra* note 128.

¹³⁰ True World Foods, *supra* note 55.

¹³¹ *Id.*

¹³² Lacey Act, 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

¹³³ Press Release, U.S. Dep’t of Justice, Texas Honey Broker Sentenced to Three Years in Prison for Avoiding \$37.9 Million in Tariffs on Chinese-Origin Honey (Nov. 14, 2013), <https://www.justice.gov/usao-ndil/pr/texas-honey-broker-sentenced-three-years-prison-avoiding-379-million-tariffs-chinese> (discussing *United States v. Groeb Farms, Inc.*, No. 1:13-cr-00139 (N.D. Ill. Feb. 12, 2013) (Appendix A, #33)).

¹³⁴ *Id.*

¹³⁵ See *supra* Chart 2.

¹³⁶ *Graphite Electrode Sales*, *supra* note 6.

¹³⁷ The ability of private parties to file FCA actions and participate in them is unique in American law. This aspect of the FCA is discussed more fully in Part IV (c). See *infra* text accompanying notes 241–63.

¹³⁸ *Graphite Electrode Sales*, *supra* note 6, ¶ 13.

including sources in Ukraine, France, and, until 2009, China.¹³⁹ In 2009, an antidumping duty of approximately 160% was imposed on “small diameter” graphite electrodes imported from China.¹⁴⁰ Imposition of this duty rendered the Chinese products unprofitable and GES located other suppliers, at a significantly higher cost.¹⁴¹ Not long after, GES discovered that it was losing long-time customers to a competitor that was selling small diameter graphite rods at a lower cost.¹⁴² The prices at which the competitor, Ameri-Source, was selling graphite electrodes were consistently lower than anything that could be obtained on the global market—except from Chinese manufacturers.¹⁴³ This led GES to suspect that Ameri-Source, was continuing to import graphite electrodes from China and somehow avoiding the 160% antidumping duties.¹⁴⁴

Using its contacts within the industry, GES investigated what Ameri-Source was doing.¹⁴⁵ GES hired investigators who traveled to the Mumbai, India “facility” that allegedly was producing the graphite rods for Ameri-Source.¹⁴⁶ The “factory” was a “dilapidated warehouse” incapable of “any significant job work,” and “too small to load or unload an international shipping container of the type normally used to transport small diameter graphite electrodes and other graphite products.”¹⁴⁷ It was incapable of graphite electrode production, which “requires very expensive and highly advanced technology.”¹⁴⁸

Additionally, through conversations with its customers and by examining the rods sold by Ameri-Source, GES determined that the rods sold by Ameri-Source had been stripped of all manufacturer-identifying data.¹⁴⁹ Unlike the GES electrodes, which “were clearly labeled as ‘Graphite India’ with metal tags, specification sheets, and

¹³⁹ *Id.* ¶ 22.

¹⁴⁰ Antidumping Duty Order: Small Diameter Graphite Electrodes from the People’s Republic of China, 74 Fed. Reg. 8775 (Feb. 26, 2009).

¹⁴¹ Graphite Electrode Sales, *supra* note 6, ¶¶ 58–60.

¹⁴² *Id.* ¶ 56.

¹⁴³ *Id.* ¶ 57.

¹⁴⁴ *Id.* ¶ 58. As GES explained: “The market price for small diameter graphite electrodes in the US was approximately \$2.25 per pound. Ameri-Source was taking business away from legitimate market participants by offering small diameter graphite electrodes at \$1.85 per pound and that the country of origin is India, South Korea or the Ukraine.” *Id.*

¹⁴⁵ *Id.* ¶¶ 61–65.

¹⁴⁶ *Id.* ¶ 47.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶ 64.

‘Graphite India’ stickers on the product,” the Ameri-Source electrodes had no identifying markings except for a small, white “Made in India”¹⁵⁰ sticker on the end of the rods.¹⁵¹ GES contacted Indian manufacturers of graphite electrodes who confirmed that they had “never sold electrodes to Ameri-Source and that any representation that Ameri-Source had imported electrodes from India . . . was false.”¹⁵²

Using a worldwide shipping database, GES traced the route of the Ameri-Source graphite rods.¹⁵³ The route showed that Ameri-Source’s rods came from China through India, from China through South Korea, or directly from China into the United States.¹⁵⁴ In each case, false shipping manifests concealed China as the true country of origin and enabled Ameri-Source to avoid paying millions of dollars in antidumping duties.¹⁵⁵ GES brought its information to the DoC, the United States partially intervened, and the case settled for \$3 million. In a parallel criminal proceeding, Ameri-Source pled guilty to two felony counts of smuggling goods into the United States.¹⁵⁶

Fraud to avoid countervailing and antidumping duties was also at issue in *United States ex rel. Dickson v. Toyo Ink Manufacturing Co., Ltd.*¹⁵⁷ Nation Ford Chemical Company (Nation Ford) and others petitioned and obtained imposition of countervailing duties on “CVP-23,” ink used in printer cartridges manufactured in India and China.¹⁵⁸ Nation Ford had previously presented evidence that production of CVP-23 in these countries was subsidized by their governments and dumped in the United States, and that such actions were harming domestic producers of CVP-23.¹⁵⁹ As a result, countervailing duties were imposed on CVP-23 by the DoC.¹⁶⁰ Thereafter, importers continued to import CVP-23, but falsely claimed that the ink was

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* ¶ 69.

¹⁵³ *Id.* ¶¶ 50–51.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* ¶ 43.

¹⁵⁶ Press Release, U.S. Dep’t of Justice, Four Pennsylvania-Based Companies and Two Individuals Agree to Pay \$3 Million to Settle False Claims Act Suit Alleging Evaded Customs Duties (Feb. 22, 2016).

¹⁵⁷ *Dickson*, *supra* note 35.

¹⁵⁸ *Id.* ¶ 27.

¹⁵⁹ *Id.* ¶ 28.

¹⁶⁰ *Id.* ¶ 29. The petitioners also obtained anti-dumping duties on CVP-23 upon proof of dumping practices on United States markets by Chinese and Indian manufacturers. *Id.*

produced in Japan and Mexico.¹⁶¹ In so doing, they avoided millions of dollars in antidumping and countervailing duties.¹⁶² Nation Ford and its CEO, John Dickson, brought a case under the civil FCA against Toyo Ink Manufacturing Company¹⁶³ and the United States intervened.¹⁶⁴ The case settled for \$45 million. Dickson, as relator, received \$7,875,000 of the settlement.¹⁶⁵

3. Misrepresentations Regarding Country of Origin to Qualify for U.S. Government Contracts

The Buy American Act provides that goods supplied to the federal government, except those specifically exempted, must be produced in the United States.¹⁶⁶ The Trade Agreements Act requires that if goods sold to the United States government are not made in the United States, they must be made in a country with an approved reciprocal trade agreement with the United States.¹⁶⁷ The Trade Expansion Act requires that goods deemed essential to national defense be manufactured in the United States or specified ally countries.¹⁶⁸ Dishonest individuals and companies that seek to sell nonconforming goods to the federal government misrepresent the country where goods are produced to meet this requirement.¹⁶⁹ This false representation constitutes crimes under Titles 16, 18, and 21 of the United States Code as well as violations of the civil FCA under Title 31.¹⁷⁰

Our database revealed no criminal prosecutions between 2000 and 2016 for contract fraud involving misrepresentations regarding country of origin. However, there were multiple civil cases brought under the FCA. Examples of civil cases include a case against an Indiana

¹⁶¹ *Id.* ¶¶ 33, 98, 132.

¹⁶² Press Release, U.S. Dep't of Justice, Japanese-Based Toy Ink and Affiliates in New Jersey and Illinois Settle False Claims Allegations for \$45 Million (Dec. 17, 2012).

¹⁶³ Dickson, *supra* note 35.

¹⁶⁴ Press Release, *supra* note 162.

¹⁶⁵ *Id.*

¹⁶⁶ *See* Buy American Act, 41 U.S.C. §§ 10(a)–(d) (1988) (repealed Jan. 5, 2010); *see also* 41 U.S.C. §§ 1801–03 (2012) (replacing the original Buy American Act which was repealed).

¹⁶⁷ Trade Agreements Act of 1979, 19 U.S.C.S. § 2501-78 (Lexis through Pub. L. No. 115-140).

¹⁶⁸ Trade Expansion Act, 19 U.S.C.S. § 1862 (Lexis through Pub. L. No. 115-140).

¹⁶⁹ The incentive for this type of fraud likely will increase if the current Administration seeks to “maximize” buy American laws for federal procurement contracts. Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017).

¹⁷⁰ *See, e.g.*, Safina Office Products, *supra* note 58 (Appendix A, #2, 3, 4, 5) (use of the FCA); Apego, *supra* note 15 (Appendix A, #32); Giddens, *supra* note 9 (Appendix A, #51).

company that sold Malaysian-made furniture to the United States Marine Corps,¹⁷¹ an Ohio company that sold Chinese-made lighting products to the United States Air Force and Environmental Protection Agency,¹⁷² an Illinois company that sold Chinese information technology, equipment, and services to numerous federal agencies (including Alcohol, Tobacco and Firearms, Internal Revenue Service, and Secret Service),¹⁷³ a New Jersey company that sold Chinese electronics to federal agencies while falsely representing that the countries of origin were South Korea and Mexico,¹⁷⁴ and a Minnesota company that sold Chinese and Malaysian medical products for cardiac patients and for use in spinal surgeries while falsely representing that the products were manufactured in the United States or other approved countries.¹⁷⁵

The case of *United States ex rel Reade Manufacturing Company v. ESM Group, Inc.*¹⁷⁶ is an example of defendants who misrepresented the country of origin of their product to meet national security requirements for sale of goods deemed essential to national defense to the U.S. government.¹⁷⁷ In 2004, Reade Manufacturing Company (Reade), located in New Jersey, was the only supplier approved by the U.S. Department of Defense (DoD) to sell ultra-fine magnesium powder to the U.S. military services.¹⁷⁸ Magnesium powder “is a highly volatile substance” used to produce countermeasure flares.¹⁷⁹ These flares are carried by military aircraft to defend against incoming heat-seeking missiles.¹⁸⁰ Because ultra-fine magnesium powder is deemed “critical to the support of national defense,”¹⁸¹ by authority of the Secretary of the Army, it must be manufactured in the United States or

¹⁷¹ Complaint at ¶ 18, *United States ex rel. Furniture by Thurston, Inc. and Lee Thurston v. J. Squared, Inc.*, No. 1:06-cv-01058-RMC (D.C. Cir. June 8, 2008) (Appendix A, #14).

¹⁷² Scutellaro, *supra* note 4.

¹⁷³ Liotine, *supra* note 65.

¹⁷⁴ Complaint at 18, *United States ex rel. Simmons v. Samsung Electronics America, Inc.*, No. AW-11-2971 (D. Md. Oct. 18, 2011) (Appendix A, #44).

¹⁷⁵ *United States ex rel. Cox v. Medtronic, Inc.*, No. 0:12-cv-02562-PAM-JSM (D. Minn. Oct. 5, 2012) (Appendix A, #47).

¹⁷⁶ Reade Mfg. Co., *supra* note 27.

¹⁷⁷ Strom Thurmond National Defense Authorization Act, Section 806, P.L. 105-261 (Oct. 17, 1998), 10 U.S.C. § 2304 (Presidential Directive, Apr. 20, 2017 regarding steel industry).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* ¶ 12; Reade Mfg. Co., *supra* note 27.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* ¶ 16.

Canada.¹⁸² Reade began losing long-time customers who said they were switching suppliers because they could purchase ultra-fine magnesium powder elsewhere “at a significantly lower price.”¹⁸³ Reade officials suspected their competitors were importing magnesium powder from China, “the largest and least expensive source of fine magnesium powder.”¹⁸⁴

Reade officials began to investigate. Using their sources within the industry, Reade officials learned that a Chinese company was shipping ultra-fine magnesium powder into the United States by falsely labeling it as “magnesium desulphurization reagent” and hiding it inside aluminum rods.¹⁸⁵ Reade officials traced the falsely labeled shipments through a publicly available database of trade shipments and confirmed the shipments were coming from China.¹⁸⁶ Reade also obtained a sample of the mislabeled product and confirmed that an ingredient present in the powder, silicon, was typical of magnesium powder manufactured in China.¹⁸⁷

Reade filed a complaint under the civil FCA alleging contract and import fraud by its competitor.¹⁸⁸ Reade alleged that by falsely describing the ultra-fine magnesium as “magnesium desulphurization reagent,” Reade’s competitors paid a 5% import duty, rather than the 305.56% duty applicable to “ultra-fine” magnesium powder imported from China.¹⁸⁹ The United States intervened.¹⁹⁰ The defendants settled for \$8 million.¹⁹¹ In a parallel criminal prosecution, five former employees and agents of Reade’s competitor pled guilty to related charges.¹⁹² One of the defendants, the former President of one of the companies involved, agreed to pay more than \$14 million in

¹⁸² *Id.* In addition, the U.S. Dep’t of Commerce has issued an anti-dumping order subjecting ultra-fine magnesium powder imported from China to a duty of 305.56%. *Id.* ¶ 21.

¹⁸³ *Id.* ¶ 28.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* ¶ 32.

¹⁸⁶ *Id.* ¶ 35.

¹⁸⁷ *Id.* ¶ 36.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* ¶ 70.

¹⁹⁰ Press Release, U.S. 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 U.S. 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>.

¹⁹¹ *Id.*

¹⁹² *Id.* See also Magness, *supra* note 50.

restitution.¹⁹³ Reade received \$400,000 as relator's share of the award.¹⁹⁴

The *Reade* case demonstrates an important point. When businesses and individuals misrepresent the country of origin for the purpose of qualifying goods for sale to the federal government, they violate one provision of the civil FCA.¹⁹⁵ In addition, as demonstrated in the *Reade* case, they may well violate another provision of the FCA¹⁹⁶ if they are falsifying the country of origin at the time goods are imported. Falsifications at the point of entry into the United States will certainly help conceal the true source of goods when the goods are later sold to the U.S. government. It is reasonable to think that many companies that falsely represent to the U.S. government that their goods comply with "made in America" requirements, begin their fraud at the time such goods are imported. Given this reality, it is surprising how few contracting fraud cases brought by the Department of Justice and relators under FCA provisions do not allege and prove all FCA violations being committed. Prosecutors and relators may well be "leaving money on the table" by not investigating and including import fraud when investigating and charging contracting fraud cases.¹⁹⁷ For the same reason, corporate counsel should ensure that clients who sell goods to the federal government, and who are in the supply chain of such goods, are not at risk of liability for import fraud under 31 U.S.C. § 3729(a)(1)(G). Businesses involved in any aspect of "port to point of sale" of goods sold to the federal government may well have liability

¹⁹³ Press Release, *supra* note 190.

¹⁹⁴ *Id.*

¹⁹⁵ 31 U.S.C.S. § 3729(a)(1)(A) (Lexis through Pub. L. No. 115-140). As an aside, when this section is violated, § 3729(a)(1)(B) may also be violated. Section 3729(a)(1)(B) creates liability for using or causing to be used a false record or material statement to a false claim. *See, e.g.,* Simmons, *supra* note 174; Press Release, U.S. Dep't of Justice, Telecommunications Firm to Pay Us \$1 Million to Settle Alleged Violations of the Trade Agreements Act (July 9, 2012), <https://www.justice.gov/opa/pr/telecommunications-firm-pay-us-1-million-settle-alleged-violations-trade-agreements-act> (Appendix A, #27); Furniture by Thurston, *supra* note 171.

¹⁹⁶ 31 U.S.C.S. § 3729(a)(1)(G) (Lexis through Pub. L. No. 115-140) (known as the "reverse" false claims act provision).

¹⁹⁷ Scutellaro, *supra* note 4 is an example where both types of fraud appear to be present but only contracting fraud was alleged in the complaint. The complaint in this case alleged that "large quantities" of "lighting products were being shipped from China to the United States" but bore the insignia "Made in China." This allegation would indicate that there was evidence of import fraud as well as contracting fraud as a result of misrepresentations about the country of origin. *Id.*

under the FCA for import fraud committed by their importers given the FCA's "reckless disregard" mens rea requirement.¹⁹⁸ 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 U.S. government to liability under the civil FCA for import fraud. Corporate compliance plans should include training to businesses that sell products to the federal government about their potential "downstream" import fraud and liability. Effective corporate compliance plans should include systems for detecting import fraud that may be occurring within the client's business or affiliated businesses.

IV

THE CIVIL FALSE CLAIMS ACT: WHY IT IS A POTENT WEAPON AGAINST TRADE FRAUD

*"[The False Claims Act] creates market place incentives to encourage the private sector to do the public's work."*¹⁹⁹

As noted *supra*,²⁰⁰ all of the civil trade fraud cases brought by the U.S. Department of Justice from 2000 to 2016 have been under the civil FCA. The FCA is a unique statute. The FCA creates an unusual partnership between law enforcement and private individuals. Heralded for decades as the premier tool to fight white collar crime,²⁰¹ the FCA is well-designed for the complexities of trade fraud. This Section explains what the FCA is and how it applies to trade fraud.

Experience has shown that the civil FCA is effective in fighting fraud in heavily regulated fields such as healthcare,²⁰² defense

¹⁹⁸ 31 U.S.C.S. § 3729(b)(1) (Lexis through Pub. L. No. 115-140).

¹⁹⁹ Interview by the Corporate Crime Reporter with John R. Phillips (Nov. 9, 1987) [hereinafter Phillips Interview]. Phillips is generally credited with passage of the 1986 Amendments, which revitalized the FCA. In this interview, Phillips discusses how the 1986 Amendments came about, and how they changed dynamics within the United States Department of Justice and within industries relevant to FCA liability. *Id.*

²⁰⁰ See *supra* Chart 2; see also Appendix A.

²⁰¹ "[T]he False Claims Act . . . has been the Department's primary civil enforcement tool to combat fraud. . . ." *Hearings Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 14 (1998) (testimony of Donald K. Stern, U.S. Att'y, Dist. Mass. and Chair, Att'y Gen.'s Advisory Comm., U.S. Dep't of J.).

²⁰² See Press Release, U.S. Dep't of Justice, Justice Department Recovers Over \$4.7 Billion From False Claim Act Cases in Fiscal Year 2016 (Dec. 14, 2016), <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016> ("[The] vigorous pursuit of health care fraud prevents billions more in losses by deterring others who might otherwise try to cheat the system for their own gain."); Press Release, U.S. Dep't of Justice, Justice Department Announces Largest Health Care Fraud

contracting,²⁰³ and environmental regulation.²⁰⁴ The FCA's effectiveness is due, in large part, to the public-private partnership it creates between individuals, known as *qui tam* relators, and the U.S. Department of Justice. As the FCA has shown, where complex and multi-layered transactions are standard fare, guidance from industry insiders such as relators as to whether fraud is occurring, who is committing it, and what evidence exists, is invaluable.²⁰⁵ The evolution of the FCA in the healthcare field is telling. In 1987, the first year after the FCA was amended and thereby galvanized as a fraud-fighting tool, there were only three FCA relator cases involving health care fraud and zero dollars realized in recoveries from such cases. In 2016, four decades later, there were 501 such cases and \$2.499 billion realized in recoveries from healthcare FCA cases.²⁰⁶ Only recently has the FCA been used to combat trade fraud.²⁰⁷ This Part discusses how the FCA works and how its unique partnering of individuals, private attorneys, and law enforcement²⁰⁸ is as well-suited to the complexities of trade

Settlement in Its History (Sept. 2, 2009), <https://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history> (stating that Pfizer agreed to pay \$2.3 billion for violation of the FCA); Press Release, U.S. Dep't of Justice, GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report> (stating the \$3 billion plea deal is the largest health care fraud settlement in the history of the FCA).

²⁰³ See Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Files and Simultaneously Settles False Claims Act Lawsuit Against Defense Contractor And Its President For Multi-Year Fraud Involving Sale of Defective Weapons Sights to U.S. Military And Other Agencies (Nov. 25, 2015), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-files-and-simultaneously-settles-false-claims-act-lawsuit-against> (stating that over \$25 million was recovered from a defense contractor for falsifying weapon sight information and violating the FCA).

²⁰⁴ See Consent Decree, *In re: Oil Spill by the Oil Rig "Deep Water Horizon" in the Gulf of Mexico*, on April 20, 2010, 18–30 (E.D. La. Apr. 4, 2016), <https://www.justice.gov/enrd/file/838066/download> (summarizing, in part, the application of the FCA to BP company after the Deepwater Horizon incident based on its false reports of drilling margins) The consent decree ordered a \$20 billion payout. *Id.*

²⁰⁵ *Information as a Commodity*, *supra* note 30, at 940–47 (discussing how the FCA provides regulators with much needed inside information about fraud and other wrongdoing in society).

²⁰⁶ Press Release, U.S. Dep't of Justice, Fraud Statistics – Health and Human Services (Dec. 13, 2016), <https://www.justice.gov/opa/press-release/file/918361/download>. Relators recovered over \$450.5 million from these cases. *Id.*

²⁰⁷ See *supra* Chart 1 & Chart 2.

²⁰⁸ See, e.g., Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FL. ST. U. LAW REV. 603, 606–607 (2004) [hereinafter *Games and Stories*];

fraud as it is to healthcare or other complex frauds against the government.

A. History of the FCA: Diseased Mules and Defective Muskets

Frustrated that diseased mules and defective muskets were being delivered to Union troops by government contractors, President Abraham Lincoln urged the passage of the FCA in 1863.²⁰⁹ It was quickly passed by Congress in a very similar form to the current FCA.²¹⁰ The FCA has been amended several times since,²¹¹ most dramatically in 1986.²¹² The FCA grows out of a long tradition of using private parties to supplement law enforcement efforts.²¹³ One court

Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 53–54, 61–62 (2002) [hereinafter *Private Justice*].

²⁰⁹ 132 CONG. REC. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman). According to the 1863 investigation, one thousand mules delivered to the Union army were “unfit for the service, and almost worthless, for being too old or too young, blind, weak-eyed, damaged, worn out or diseased. . . .” *Id.* See also *False Claims Act Amendments: Hearings on H.R. 3334 Before the Subcomm. on Admin. Law & Gov’t Relations of the H. Comm. on the Judiciary*, 99th Cong. 1 (1986); *The History and Development of Qui Tam*, 1972 WASH. U. L. REV. 81 (1972); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C.L. REV. 539 (2000).

²¹⁰ The original FCA contained both criminal and civil penalties for its violation. Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696–98 (1863). In 1874, the criminal and civil provisions were separately codified. REV. STAT. 3490–94 and 5438 (1875). The civil FCA is now found at 31 U.S.C.S. §§ 3729–31 (Lexis through Pub. L. No. 115–140). The criminal provisions are found in 18 U.S.C.S. §§ 286, 287, 1001, 1002 (Lexis through Pub. L. No. 115–140). Significant amendments in 1986 changed the qui tam provisions of the statute, see *supra* note 166.

²¹¹ REV. STAT. 3490–94 and 5438 (1875); 89 CONG. REC. S7606 (daily ed. Sept. 17, 1943); False Claims Amendment Act of 1986, Pub. L. No. 99–562, 100 Stat. 3153 (1986); Act of July 5, 1994, Pub. L. No. 103–272, 108 Stat. 1362; Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1621 (clarifying parts of 31 U.S.C. §§ 3729 & 3731).

²¹² False Claims Amendment Act of 1986, Pub. L. No. 99–562, 100 Stat. 3153 (1986). The 1986 Amendments are credited with revitalizing the FCA, which had fallen into disuse. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.04[H] (Wolters Kluwer 2017) (1993). The 1986 Amendments increased the amount of recovery a private party who brought an FCA action (termed a “relator”) could receive; guaranteed a minimum amount of recovery for the relator; relaxed the “jurisdictional bar” provisions which had prevented many relators from filing suit; clarified and relaxed the mens rea requirement; expanded the statute of limitations; clarified the burden of proof; and added protection for whistleblowers who are retaliated against by their employers. *Private Justice*, *supra* note 208, at 47–48.

²¹³ Known as “informer” actions, law suits that use private parties to supplement law enforcement efforts, termed “informer” actions, were common in thirteenth century England and colonial America. See *Information as a Commodity*, *supra* note 30, at 909–17. These early actions provided for minimal, if any, oversight of “informers” and were subject to

explained that the FCA operates on the theory “that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators . . . liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain.”²¹⁴

The FCA remained relatively dormant until amendments in 1986 invigorated the role of private parties, known as “qui tam relators.”²¹⁵ “Qui tam” comes from the Latin phrase, “qui tam pro domino rege quam pro se ipso in hac parte sequitur” which means “he who pursues this action on our Lord the King’s behalf as well as his own.”²¹⁶ Under the “qui tam” provisions, any person, not just the party injured by the alleged conduct, may file an action under the FCA.²¹⁷ This plaintiff, known as a “relator,” is deemed to have standing on the theory that the federal government is the injured party and may assign its right to sue under the FCA.²¹⁸ Eyeing the success of the invigorated 1986 FCA, thirty states and a number of municipalities have passed their own FCAs covering false claims submitted to state governments.²¹⁹

many abuses. By the mid-twentieth century, they had been abolished in England and fell into disuse in America. *Id.*; Beck, *supra* note 209.

²¹⁴ United States v. Griswold, 24 F. 361, 366 (D. Or. 1885). *See also* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n. 5 (1943) (quoting *Griswold* with approval); Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997).

²¹⁵ *Private Justice*, *supra* note 208, at 48–49.

²¹⁶ Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n. 1 (2000). *See also* *The History and Development of Qui Tam*, WASH. U. L. Q. 81, 83 (1972) *citing* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1st ed. 1768).

²¹⁷ 31 U.S.C.S. § 3730(b) (Lexis through Pub. L. No. 115-140).

²¹⁸ In *Vermont Agency of Natural Resources*, the Supreme Court held “that adequate basis for the relator’s suit . . . is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” *Vt. Agency of Nat. Res.*, 529 U.S. at 765, 773. *See also* 31 U.S.C.S. § 3730(b)(1) (Lexis through Pub. L. No. 115-140).

²¹⁹ *State False Claims Act*, TAF EDUC. FUND., https://taf.org/Public/Resources_by_Topic/FAC_False_Claims_Act/State_FCA_s/Public/Resources_by_Topic/FCA_False_Claims_Act/State_FCA_s.aspx?hkey=a0879c08-1539-44f6-8b51-f8aed240c448 (listing of all states and municipalities with FCA statutes); *see* James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks & Marc S. Raspanti, *States, Statutes and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465 (2005) (discussing and evaluating state FCA statutes). These states include: California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, and Washington. Additionally, the District of Columbia and several notable cities such as Chicago and New York have statutes modeled after the FCA. *Id.* *See The 1986 False*

B. How Does the FCA Work?

The FCA prohibits seven types of conduct, all of which pertain to the submission of false or fraudulent claims to the U.S. government.²²⁰

The FCA covers any person who:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government²²¹

Liability under the FCA attaches only if conduct is committed “knowingly.” The FCA defines knowingly as “actual knowledge” or conduct committed with “deliberate ignorance” or “reckless disregard” of the truth or falsity of the claim submitted.²²² Liability under the FCA attaches only if the falsity is material to the claim.²²³ The FCA defines materiality as “having a natural tendency to influence, or be capable of

Claims Amendment Act, TAXPAYERS AGAINST FRAUD EDUC. FUND, http://taf.org/public/drupal/TAF-fca-25anniversary_12%281%29.pdf (last visited May 17, 2017).

²²⁰ 31 U.S.C.S. §§ 3729(a)(1)(A)–(G) (Lexis through Pub. L. No. 115-140).

²²¹ *Id.*

²²² 31 U.S.C.S. § 3729(b)(1) (Lexis through Pub. L. No. 115-140).

²²³ 31 U.S.C.S. § 3729(b)(4) (Lexis through Pub. L. No. 115-140).

influencing, the payment or receipt of money or property.”²²⁴ Each violation of the FCA carries a mandatory penalty of between \$11,000 and \$21,563 per false claim,²²⁵ as well as treble damages,²²⁶ and attorneys’ fees and costs.²²⁷ Cooperation and disclosure to the U.S. Department of Justice are rewarded. If a party discloses to the U.S. government all information about false claims it has submitted to the government and cooperates with the government, then no penalties will be assessed and damages are reduced from treble to double.²²⁸ However, this disclosure must be prior to the commencement of any action by the government against the person for the fraud at issue.²²⁹

All trade fraud falls under § 3729(a)(1)(G) of the FCA, known as the “reverse false claim” section. This provision creates liability for any person who “knowingly conceals or knowing and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.” Misrepresentations about the nature of goods or the country of origin of goods imported to avoid or minimize import duties fall within § 3729(a)(1)(G).

U.S. Customs Form 7501 is the starting point to determine if trade fraud has been committed. Every importer must file a U.S. Customs Form 7501 with each shipment of goods brought into the United States.²³⁰ As discussed above,²³¹ all trade fraud falls into two general types of false claims or statements under the FCA. Both types of fraud will arise from false statements and claims made on U.S. Customs Form 7501. Box 28 (description of merchandise),²³² Box 32 (value),²³³ and Box 33 (duty rate)²³⁴ will be false when importers misrepresent the nature of the product they are importing. Box 10 (country of

²²⁴ *Id.* See also *Universal Health Servs. Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016).

²²⁵ See Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustment, 81 Fed. Reg. 43429, 43430 (July 1, 2016).

²²⁶ 31 U.S.C.S. § 3729(a) (Lexis through Pub. L. No. 115-140).

²²⁷ 31 U.S.C.S. §§ 3730(d)(1)–(2) (Lexis through Pub. L. No. 115-140).

²²⁸ 31 U.S.C.S. § 3729(a)(2) (Lexis through Pub. L. No. 115-140).

²²⁹ 31 U.S.C.S. § 3729(a) (Lexis through Pub. L. No. 115-140).

²³⁰ U.S. DEP’T OF HOMELAND SEC., CUSTOMS AND BORDER PROTECTION ENTRY SUMMARY (CBP FORM 7501) [hereinafter CBP FORM 7501].

²³¹ See *supra* Chart 2 and text accompanying notes 57–153.

²³² CBP FORM 7501, *supra* note 230.

²³³ *Id.*

²³⁴ *Id.*

origin)²³⁵ and Box 33 (dutiable rate)²³⁶ will be false when defendants misrepresent the country of origin. Box 26 (importer of record)²³⁷ is the likely defendant. Depending on the knowledge, or reckless disregard of facts, additional defendants may include individuals and businesses that handled shipping, wholesaling, retailing, or sales service of the imported goods.²³⁸

Although the fraud itself may be difficult to detect and prove, use of the FCA to pursue trade fraud is simple and straightforward. Every false statement or claim made by an importer will be on Form 7501. With trade fraud, there is no need to delve into “implied certification” analysis.²³⁹ Nor will materiality be a difficult hurdle for plaintiffs in trade fraud cases—as is often true in other uses of the FCA. Materiality “look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.”²⁴⁰ Therefore, the accuracy or falsity of information provided to CBP on Form 7501, which is directly utilized in calculating the appropriate duties to be paid, is material because that information is determinative of Customs’ assessment of money owed to the government.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ 31 U.S.C.S. § 3729(a)(1) (Lexis through Pub. L. No. 115-140). *See supra* text accompanying notes 193–96.

²³⁹ The “Implied Certification” analysis is a body of False Claims Act case law that has been developed addressing a theory of False Claims Act liability “commonly referred to as implied false certification.” *Universal Health Servs., Inc.*, 136 U.S. at 1995. “According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant’s violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim “false or fraudulent” under § 3729(a)(1)(A).” *Id.* (Universal Health Services was denoted as an “implied false certification” case because it was alleged Defendants defrauded the Medicaid program by submitting reimbursement claims that made representations about the specific mental health services provided by specific types of professionals, but that failed to disclose serious violations of Massachusetts Medicaid regulations pertaining to staff qualifications and licensing requirements for these services and therefore such services were actually provided by nurses and not physicians.) In *Universal Health Services, Inc.*, the Court approved of the basis of liability colloquially referred to as “implied certification theory” and in doing so eliminated the distinction of the legal fiction of “implied certification” vs. “express certification” (circumstances in which a defendant is alleged to submitted a claim that is false because it expressly certifies compliance with a statute or regulation yet fails to meet the requirements of that statute or regulation). The Court provided that the determinative factor—in any type of False Claims Act case—is that a misrepresentation about compliance with a statutory, regulatory, or contractual requirement *must be material* to the Government’s payment decision in order to be actionable under the False Claims Act. *Id.*

²⁴⁰ *Id.*

C. Procedure Under the FCA

The procedure under the FCA is unique. Relators initiate FCA actions by filing the case in the name of the U.S. government as well as in their own name.²⁴¹ The style of an FCA case brought by a relator is titled *United States ex rel.* [name of relator] v. [defendant]. Relators are required to file their complaints under seal, not serving it on a defendant, and provide a copy of their complaint to the U.S. Department of Justice along with a written report of “all material evidence and information” the relator possesses.²⁴² The relator’s complaint remains under seal, often for months or even years, to allow the Department of Justice an opportunity to investigate the charges made by the relator.²⁴³ The secrecy provided by the sealed complaint protects a defendant’s reputation if the relator’s information amounts to nothing,²⁴⁴ as well as facilitates the Department of Justice’s investigation of the relator’s information.²⁴⁵

After investigating the matter, the Department of Justice determines whether it will intervene in the relator’s case.²⁴⁶ Often when it intervenes, the Department of Justice amends the relator’s complaint based upon its own investigation.²⁴⁷ After intervention, the Department

²⁴¹ 31 U.S.C.S. § 3730(b)(1) (Lexis through Pub. L. No. 115-140).

²⁴² 31 U.S.C.S. § 3730(b)(2) (Lexis through Pub. L. No. 115-140). Not only does the FCA require that relators provide DOJ with all information they have pertaining to an FCA case prior to filing the complaint, it is to relators’ advantage to disclose full information to DOJ filing a complaint. *Id.* As a strategic matter doing so helps overcome potential hurdles. *Id.* Relators have a greater chance of qualifying as an “original source” and thus overcoming jurisdictional bar issues. 31 U.S.C.S. § 3730(e) (Lexis through Pub. L. No. 115-140). Early and full disclosure also helps demonstrate they are “first to file,” thus solidifying their right to bring a qui tam action. 31 U.S.C.S. § 3730(b)(5) (Lexis through Pub. L. No. 115-140).

²⁴³ ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER 33 (2000).

²⁴⁴ *Private Justice*, *supra* note 208, at 69–70.

²⁴⁵ Phillips Interview, *supra* note 199; WEST, *supra* note 243, at 33; Sen. Rep. 99-345, 99th Cong. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5281.

²⁴⁶ A unique investigative avenue available to the Department of Justice in FCA cases is the “civil investigative demand,” or “CID.” 31 U.S.C.S. § 3733 (Lexis through Pub. L. No. 115-140). This investigatory tool allows the Department of Justice authority to demand documents, compel answers to interrogatories, and obtain oral testimony. CIDs can be extremely powerful prosecutorial tools. *See, e.g., Private Justice*, *supra* note 208; PAMELA H. BUCY, HEALTH CARE FRAUD, ENFORCEMENT AND COMPLIANCE ch. 6 (LJSP 2001) (discussing the investigation of health care fraud cases).

²⁴⁷ The Department of Justice amends most complaints filed by relators because of the additional information the Department gathers with the more extensive investigatory tools it has at its disposal compared to the investigative resources available to qui tam relators. For a discussion of these resources, *see Private Justice*, *supra* note 208, at 51 n. 291.

of Justice sometimes handles the entire case,²⁴⁸ in other cases, the Department of Justice works hand-in-hand with relators sharing investigative and litigation duties.²⁴⁹

If the Department of Justice declines to intervene in the relator's case, then a relator may pursue the case alone.²⁵⁰ Historically, the Department of Justice has intervened in less than twenty-five percent of cases filed by relators,²⁵¹ and relators who proceeded on their own after the Department of Justice declined to intervene as a plaintiff have enjoyed little success.²⁵² These cases are dismissed more frequently and the recoveries are substantially less.²⁵³ In the event the Department of Justice does not join a relator's case, the Department of Justice may monitor the case and intervene at any time, even for limited purposes, such as appeal.²⁵⁴

Regardless of whether or not it intervenes, the Department of Justice retains authority to settle or dismiss a relator's suit—although the relator is given an opportunity in court to be heard before the case is settled or dismissed.²⁵⁵ The Department of Justice also retains authority

²⁴⁸ If the Department of Justice intervenes in the case as a relator, it assumes "primary responsibility" for the case although the relator remains as a plaintiff and is guaranteed a participatory role. 31 U.S.C.S. § 3730(b)(2) (Lexis through Pub. L. No. 115-140).

²⁴⁹ *See, e.g.*, United States *ex rel.* Alderson v. Quorum Health Grp., Inc., 171 F. Supp. 2d 1323 (M.D. Fla. 2001); United States *ex rel.* Merena v. Smithkline Beecham Corp., 114 F. Supp. 2d 352 (E.D. Pa. 2000) (facts more fully discussed in United States *ex rel.* Merena v. Smithkline Beecham Corp., 52 F. Supp. 2d 420 (E.D. Pa. 1998), *rev'd* 205 F.3d 97 (3rd Cir. 2000)).

²⁵⁰ 31 U.S.C.S. § 3730(c)(3) (Lexis through Pub. L. No. 115-140).

²⁵¹ U.S. DEP'T OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS 2, https://www.justice.gov/sites/default/files/usao-edpa/legacy/2011/04/18/fcprocess2_0.pdf (last visited May 17, 2017).

²⁵² *Private Justice*, *supra* note 208, at 51–52.

²⁵³ In 2016, for example, realtors' awards in cases in which the Department of Justice intervened totaled \$2.8 billion, while total relator recovery in cases in which the Department of Justice declined to intervene totaled \$104.98 million. *See* Press Release, U.S. Dep't of Justice, Fraud Statistics—Overview (Dec. 13, 2016), <https://www.justice.gov/opa/press-release/file/918361/download>.

²⁵⁴ 31 U.S.C.S. § 3730(c)(3) (Lexis through Pub. L. No. 115-140). *See, e.g.*, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 489 (5th Cir. 2001).

²⁵⁵ 31 U.S.C.S. § 3730(c)(2)(A)–(B) (Lexis through Pub. L. No. 115-140). DOJ may move for dismissal or oppose a settlement without intervening. *See, e.g.*, *Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 350–51 (D.D.C. 1990) (DOJ moved to dismiss relator's case after declining to intervene.); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340–41 (6th Cir. 2000) (After declining to intervene, DOJ opposed the settlement reached by relator and defendant.).

to seek limitations on the relator's involvement in the case²⁵⁶ and to seek alternative remedies, such as administrative sanctions, in lieu of the relator's lawsuit.²⁵⁷ Some circuits have held that the Department of Justice retains authority to veto any settlement reached by the defendants and the relators.²⁵⁸

Only relators who are "first to file" are eligible to receive a share of any judgment recovered²⁵⁹ and, while the statute guarantees relators between 15% and 30% of a judgment,²⁶⁰ the actual award within this statutory range depends upon the relator's helpfulness to the government in pursuing the case.²⁶¹ Judgments under the FCA have been large, some as large as \$2.4 billion, \$1.4 billion, \$540 million and \$325 million.²⁶² Relators' awards have also been large. In 2016, for example, relators received awards of \$98 million, \$84 million, and \$51 million.²⁶³

D. Why the FCA Is Effective in Fighting Fraud

For four reasons, the FCA has proven extraordinarily successful in combatting fraud against the federal government. First, because of its ability to enlist the help of private persons who have information about ongoing fraud, the FCA brings otherwise unknown information about fraud to law enforcement's attention. Second, the FCA's unique partnering of private individuals, private counsel, and government

²⁵⁶ 31 U.S.C.S. § 3730(c)(2)(C) (Lexis through Pub. L. No. 115-140).

²⁵⁷ 31 U.S.C.S. § 3730(c)(5) (Lexis through Pub. L. No. 115-140).

²⁵⁸ *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 333 (4th Cir. 2017).

²⁵⁹ 31 U.S.C.S. § 3730(b)(5) (Lexis through Pub. L. No. 115-140). *See BOESE, supra* note 212, at § 4.03(C)(2).

²⁶⁰ 31 U.S.C.S. § 3730(d) (Lexis through Pub. L. No. 115-140). If the DOJ joins the relator's case, the relator is guaranteed at least fifteen percent and up to twenty-five percent of any judgment or settlement. If the DOJ does not join the relator's case, the relator is guaranteed twenty-five percent to thirty percent of the judgment or settlement. The award to the relator, which must be approved by the court "depends on the extent to which the person substantially contributed to the prosecution of the action." *Id.*

²⁶¹ For example, a relator's case cannot proceed, and is "jurisdictionally barred," if the information brought to the DOJ by the relator was already public, unless the relator is the "original source" of the information and the relator disclosed the information to the government. 31 U.S.C.S. § 3729(e)(4) (Lexis through Pub. L. No. 115-140).

²⁶² *FY 2009 False Claims Act Settlements*, TAXPAYERS AGAINST FRAUD EDUC. FUND, <http://www.taf.org/total2009.htm> (last visited May 18, 2017).

²⁶³ *Top 15 FCA Cases of 2016*, TAXPAYERS AGAINST FRAUD EDUC. FUND (Oct. 26, 2016), <http://www.taf.org/blog/top-15-fca-cases-2016>.

authorities supplements limited law enforcement litigative resources. Third, as a “punitive” civil cause of action, the FCA’s treble damages and mandatory monetary penalties deter future wrongdoing by businesses as effectively as a criminal prosecution, but without the difficulty and expense of a criminal investigation or trial. Fourth, the FCA has demonstrated effectiveness in policing heavily regulated industries undergoing policy debate.²⁶⁴

1. The FCA Provides the Resource of Inside Information

Complex economic activity is buried in electronic and paper trails, concealed in false statements, disguised in layers of organizations, and hidden in complex financial transactions. Multiple individuals, offices, divisions, companies, and countries, are likely to have participated in some stage of a fraud.²⁶⁵ Because few individuals are foolish enough, careless enough, or bold enough to submit false claims without creating complex cover-ups, there is always concealment. For example, when a healthcare provider submits claims to Medicare for services not performed, patient files have likely been falsified to corroborate the fraudulent claim.²⁶⁶ When quality control tests have been altered, or are not performed, records likely have been falsified to reflect that such tests were performed to reflect (falsely) and that the product met specifications.²⁶⁷ If importers engage in fraud to avoid paying import duties, there will be false shipping manifests, customs declarations, and product labels.²⁶⁸ There may be diversionary shipping routes spanning the globe. Every fraud is hard to penetrate. Trade fraud is even harder. Information from those inside the business committing the fraud is essential for law enforcement to know what is going on and who is doing it.

For these reasons, fraud cannot be effectively detected or deterred without the help of those who are intimately familiar with it.²⁶⁹ Insiders

²⁶⁴ See *Private Justice*, *supra* note 208, at 53–54.

²⁶⁵ *Information as a Commodity*, *supra* note 30, at 940.

²⁶⁶ Pamela Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 *FORDHAM L. REV.* 383, 434–37 (1994).

²⁶⁷ See, e.g., *United States ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787 (3d Cir. 2002).

²⁶⁸ See, e.g., *Graphite Electrode Sales*, *supra* note 6, at 16–19.

²⁶⁹ See, e.g., Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers*, 67 *N. C. L. REV.* 855, 871–81 (1989); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime*, 54 *U. PITT. L. REV.* 405, 406–13 (1993); John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of*

know what has happened, who is to blame, and where evidence is located, and their participation is essential.²⁷⁰ Insiders know what is fake and what is real. They can explain customs and habits of the business or industry, direct investigators to evidence of fraud, interpret evidence, and provide industry expertise.²⁷¹ Information about fraud from an industry insider is sometimes the only way to alert the government and the public to the wrongdoing that is occurring. Without insiders, fraud may not be apparent, perhaps for years. By then much harm may have been done and evidence to prove what happened may have disappeared. An insider's early warning can prevent harm to unaware victims and enable law enforcement to take timely action. As law enforcement officials who have worked with relators explain, "[w]histleblowers are essential to our operation. Without them, we wouldn't have cases."²⁷²

The FCA's relator provisions provide both an incentive for individuals with information about fraud to come forward, and a mechanism to do so. Historically, relators have been employees and former employees of defendants. They have also been competitors of defendants.²⁷³ This is not surprising. Employees are the first to see or discover that fraud is being committed. Competitors are often the first hurt by other businesses' fraud. These groups have a "bird's eye" view of fraud and the harm it inflicts. As one seasoned prosecutor said when

Federal Prosecution, 46 HASTINGS L.J. 1095, 1103–17 (1995); William H. Webster, *An Examination of FBI Theory and Methodology Regarding White-Collar Crime Investigation and Prevention*, 17 AM. CR. L. REV. 275, 276–77 (1980); *Hearing Before Subcomm. on General Oversight and Investigation of the H. Comm. on Banking and Fin. Services*, 105th Cong. 16 (1998) (testimony of William F. Baity, Acting Director, Financial Crimes Enforcement Network); *Medicare at Risk: Emerging Fraud in Medicare Programs: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Security and Governmental Affairs*, 105th Cong. 126–35 (1997) (Prepared Statement of Pamela H. Bucy).

²⁷⁰ *Private Justice*, *supra* note 208, at 60–62; *Games and Stories*, *supra* note 208, at 614–16.

²⁷¹ *Information as a Commodity*, *supra* note 30, at 940–41.

²⁷² Justin Gillis, *Whistleblowing: What Price Among Scientists?*, WASH. POST, Dec. 28, 1995, at A21 (quoting Lawrence J. Rhoades, a division director at the U.S. Department of Health and Human Services, which polices federal health research for scientific misconduct). See also *Health Care Initiatives Under the False Claims Act that Impact Hospitals: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 105th Cong. 15 (1998) (statement by Lewis Morris, Assistant Inspector General for Legal Affairs, U.S. Department of Health and Human Services) (indicating that the FCA, a purpose of which is to encourage whistleblowing, has been an essential tool in combating fraud).

²⁷³ See BOESE, *supra* note 212, at §§ 4.01(B)(1)–(3).

announcing a multi-million-dollar settlement of an FCA trade fraud case brought by a relator:

This case is an excellent example of the essential public service a whistle-blower can perform by partnering with the government to expose illegal conduct that adversely affects the public fisc.²⁷⁴

Our review of trade fraud cases pursued by Department of Justice from 2000 to 2016 shows that relators come from three groups: competitors, employees or former employees of defendants, and industry insiders.²⁷⁵ The largest group of relators are competitors of defendants. These businesses have been most immediately and dramatically impacted by a defendant's dishonesty. They have lost customers and contracts to defendants that underpriced them by cheating on import duties. Relators in trade fraud cases have also been employees of defendants, many of whom lost or quit their jobs after alerting supervisors, in vain, of ongoing import fraud within the company. A few of the relators in trade fraud cases have been industry insiders: individuals who had enough knowledge of the field to spot those who were engaging in import fraud.

2. *The FCA Supplements DOJ Resources*

The FCA creates a mechanism not only for relators to provide information about fraud to federal agencies but also a way for relators' counsel to work with Department of Justice attorneys and federal agents and thereby supplement the Department of Justice's litigative resources. By including the relator as a co-plaintiff with the Department of Justice, the FCA creates a working partnership between relators, their attorneys, and government prosecutors and agents.²⁷⁶ This co-plaintiff relationship is unique. While there are a number of statutes that create mechanisms for individuals to provide information of wrongdoing to law enforcement authorities and receive monetary compensation for doing so,²⁷⁷ no other statute creates a structure for a whistleblower to proceed as co-plaintiff with the federal government or share in the litigative duties on the case.²⁷⁸

²⁷⁴ Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Settles Civil Fraud Lawsuit Against Jewelry Companies Engaged in a Decade-Long Customs Fraud Scheme (Aug. 31, 2011), <https://www.justice.gov/archive/usao/nys/pressreleases/August11/noblejewelrysettlementpr.pdf>.

²⁷⁵ See generally Appendix A.

²⁷⁶ See, e.g., *Games and Stories*, *supra* note 208, at 608–19.

²⁷⁷ See *Private Justice*, *supra* note 208.

²⁷⁸ *Id.* at 61–62.

The FCA crafts this unusual partnership by giving the Department of Justice and the relator certain rights. It preserves the Department of Justice's guidance on the case, control of precedent, and direction of Department of Justice policy by requiring that relators present their information to the Department of Justice prior to filing a complaint and under seal.²⁷⁹ These steps allow the Department of Justice the opportunity to investigate a relator's information before the case proceeds further and before the allegations become public.²⁸⁰ Such a protocol helps ensure that a case is meritorious, that the Department of Justice's initiatives are not disrupted, and that innocent defendants' reputations are not tarnished.²⁸¹ The FCA gives the Department of Justice "primary responsibility" for the case, including authority to amend the complaint, oppose certain actions by a relator, and petition the court for limitations on the relator's role.²⁸²

The FCA also preserves certain rights for the relator by guaranteeing the relator a minimum share in any recovery,²⁸³ requiring that the Department of Justice notify the relator about government decisions in the case,²⁸⁴ giving the relator the opportunity to be heard on dismissal or settlement,²⁸⁵ the right to proceed in the case as co-plaintiff if the government intervenes, and the right to continue the case as sole plaintiff if the government does not intervene.²⁸⁶

Trade fraud cases brought by relators demonstrate the level of assistance knowledgeable relators and experienced relators' counsel can provide to the Department of Justice. Relators have discovered fake "factories" in India,²⁸⁷ volatile magnesium being imported under false label (as a more stable and safe magnesium product),²⁸⁸ fake drugs,²⁸⁹ counterfeit computer equipment,²⁹⁰ and products misdescribed to avoid paying import duties.²⁹¹ Qui tam relators have purchased dishonest

²⁷⁹ 31 U.S.C.S. § 3730(b)(2) (Lexis through Pub. L. No. 115-140).

²⁸⁰ 31 U.S.C.S. § 3733 (Lexis through Pub. L. No. 115-140).

²⁸¹ *Games and Stories*, *supra* note 208, at 609–10.

²⁸² 31 U.S.C.S. § 3730(c) (Lexis through Pub. L. No. 115-140).

²⁸³ 31 U.S.C.S. § 3730(d) (Lexis through Pub. L. No. 115-140).

²⁸⁴ 31 U.S.C.S. § 3730(c) (Lexis through Pub. L. No. 115-140).

²⁸⁵ *Id.*

²⁸⁶ 31 U.S.C.S. § 3730(c)(3) (Lexis through Pub. L. No. 115-140).

²⁸⁷ Graphite Electrode Sales, *supra* note 6.

²⁸⁸ Reade Mfg. Co., *supra* note 27.

²⁸⁹ Giddens, *supra* note 9.

²⁹⁰ Cone, *supra* note 76.

²⁹¹ Nguyen, *supra* note 54.

competitors' products and tested them, confirming ingredients from disallowed countries.²⁹² Relators have used their knowledge of shipping patterns within industries to trace false shipping routes and routes designed to disguise the true country of origin.²⁹³ Relators have provided computer hard drives showing fraud,²⁹⁴ incriminating statements of defendants,²⁹⁵ false records,²⁹⁶ and accurate records²⁹⁷ that dispute the false records. Relators have provided names of corroborating and knowledgeable witnesses.²⁹⁸ In every trade fraud case brought by relators, the relators were the first to detect fraud. They have saved the U.S. Treasury millions of dollars, protected the marketplace from corruption, and consumers from unsafe products.

3. *The FCA Provides an Effective "Middle Ground" Between Criminal Prosecution and Civil Liability*

Criminal prosecution of wrongdoers carries a "big bang for the buck." Nothing gets the attention of wrongdoers more than an indictment or a "perp walk." However, criminal prosecutions are difficult, time-consuming, and resource intensive.²⁹⁹ They should be. The U.S. Constitution provides criminal defendants with rights not granted to defendants in civil cases, including the right to a grand jury finding of probable cause,³⁰⁰ assistance of counsel,³⁰¹ confrontation of witnesses,³⁰² speedy trial,³⁰³ and unanimous verdict.³⁰⁴ Criminal convictions require proof beyond a reasonable doubt of all elements of

²⁹² Scutellaro, *supra* note 4.

²⁹³ Graphite Electrode Sales, *supra* note 6.

²⁹⁴ Simmons, *supra* note 174.

²⁹⁵ Jimenez, *supra* note 1.

²⁹⁶ In every trade fraud case, false statements appear on U.S. Customs Form 7501. *See supra* text accompanying notes 231–38.

²⁹⁷ *See, e.g.*, Graphite Electrode Sales, *supra* note 6. The relator in this case used its knowledge of the industry to research the Port Import/Export Reporting Service (PIERS) database to confirm that the defendant had imported goods from China through India as part of the defendant's fraudulent conduct of concealing China as the true source of its goods.

²⁹⁸ Wells, *supra* note 59.

²⁹⁹ Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1437 (criminal prosecution "is the most potent regulatory mechanism society possesses.").

³⁰⁰ *See* U.S. Const. amends. V, VI.

³⁰¹ U.S. Const. amend. VI.

³⁰² U.S. Const. amend. VI.

³⁰³ U.S. Const. amend. VI.

³⁰⁴ *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §22.1(e) (4th ed. 2016).

an offense³⁰⁵ and proof of specific intent to break the law.³⁰⁶ The burden of proof required in criminal cases is hard to meet, especially when complex transactions are at issue and misunderstandings of the law create a legal defense.³⁰⁷

For many crimes, criminal prosecution is the only way to protect the public from perpetrators other than through criminal prosecution. However, for white-collar frauds against the government, this is not true. Every fraud against the federal government is also a civil cause of action under the FCA and thus a civil lawsuit under the FCA provides an effective alternative to criminal prosecution.³⁰⁸ The FCA's stiff penalties, treble damages, and heightened mens rea requirement carry a "big bang for the buck," and can deter future wrongdoing effectively.³⁰⁹ However, because the FCA is a civil action and not a criminal prosecution, FCA cases are easier to bring and win than criminal prosecutions. They are a cost-efficient, effective way to deter trade fraud.

³⁰⁵ See LAFAVE, *supra* note 304, at § 26.4(h).

³⁰⁶ *Id.*

³⁰⁷ *Private Justice*, *supra* note 208, at 3–4.

³⁰⁸ Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1802 (1992). See also BUCY, WHITE COLLAR CRIME, CASES AND MATERIALS 236 (West Academic 2010); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?* Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B. U. L. REV. 193, 202–08 (1991); Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 391 (1994).

³⁰⁹ See *IBM Will Pay the U.S. \$14.8 Million to Settle False Claims Charge*, WALL ST. J., Mar. 5, 1993, at C15; Peter Loftus, *Corporate News: Judge Orders J&J to Pay \$1.2 Billion*, WALL ST. J., Apr. 12, 2012, at B3; *Teledyne Settles U.S. Suit, Agrees to Pay \$2.15 Million*, WALL ST. J., Feb. 22, 1993, at A4; Vauhini Vara, *Oracle Agrees to Pay \$98.5 Million to Settle Suit Over GSA Contracts*, WALL ST. J., Oct. 11, 2006, at B3.

4. *The FCA Promotes Effective Regulation in Industries that Are Undergoing Significant Policy Debate*

The FCA is also very effective at fighting fraud in an industry undergoing significant public policy disagreement. Instead, the information about fraud which the FCA brings forth helps shed light on systemic changes that can be made within the industry to discourage and prevent fraud.

For example, the Medicare and Medicaid programs have been subject to constant, vigorous debate on multiple fronts since they were enacted.³¹⁰ However, throughout these ongoing disagreements on fundamental public policy issues involving these programs, the FCA has been deployed consistently and successfully to combat fraud by the wide variety of healthcare providers. The ongoing policy debates have not detracted from the FCA's ability to combat fraud in these programs. Rather, FCA cases identifying fraud in governmental healthcare programs have helped identify aspects of these programs that could and should be changed to reduce fraud, save taxpayers money that was being diverted to fraud, improve the programs, and enhance patient care.³¹¹

The FCA can serve the same role regarding trade fraud. There are many similarities between health care fraud and trade fraud. Both are heavily regulated. In both, there is significant financial incentive to commit fraud and endless ability to conceal it. Although health care fraud involves payments *from* the federal government for medical services and trade fraud involves payments due *to* the United States as import duties and tariffs, both types of fraud are explicitly covered by the FCA.³¹² The government payment structure in the healthcare field is based on an elaborate scaffolding of government regulations and

³¹⁰ See 141 CONG. REC. E1868 (daily ed. Sept. 28, 1995) (statement of Rep. Brian Bilbray); 141 CONG. REC. H10333-34 (daily ed. Oct. 19, 1995); *Saving Medicare, Hearing Before H. Comm. on Ways and Means*, 104th Cong. 4, 37-58 (1995); 149 CONG. REC. S15927-29 (daily ed. Nov. 25, 2003).

³¹¹ See 147 CONG. REC. S1008 (daily ed. Feb. 1, 2001) (statement of Sen. Grassley); *Health Care Initiatives Under the False Claims Act That Impact Hospitals, Hearing Before Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 15-25, 44 (1998) (statement of Lewis Morris Ass. Inspector General for Legal Affairs, Office of Inspector General) (summarizing problems with fraud in Health Care and suggesting that FCA audits improve the systems); *Medicaid Waste, Fraud, and Abuse: Threatening the Health Care Safety Net, Hearing Before S. Comm. on Fin.*, 109th Cong. 10-11 (2005) (statement of James Moorman, President and CEO, Taxpayers Against Fraud).

³¹² Section 3729(a)(1)(A) of the FCA pertains to almost all health care fraud, while § 3729(a)(1)(G) pertains to trade fraud. 31 U.S.C.S. § 3729(a)(1)(A) (Lexis through Pub. L. No. 115-140); 31 U.S.C.S. § 3729(a)(1)(G) (Lexis through Pub. L. No. 115-140).

administrative procedures. An understanding of this underlying regulatory system and how it can be manipulated by dishonest providers is crucial to successful detection, proof, and deterrence of health care fraud. The duty and tariff system in trade is similarly constructed upon an elaborate base of government regulation and administrative procedure. Like healthcare, successful detection and deterrence of trade fraud depends upon intimate knowledge of how this trade and tariff system can be manipulated. Within both healthcare and trade fraud, only insiders have enough access to see that fraud is occurring, who is doing it, and how to prove it. This is why the FCA, with its ability to incentivize insiders to come forward and work with law enforcement, is as ideally suited to fighting trade fraud as it is to combatting health care fraud.

E. How to Enhance the FCA's Effectiveness as a Weapon Against Trade Fraud

1. Coordinate Federal Law Enforcement Efforts

Collaboration between the various federal agencies that have a role in combatting trade fraud is essential to effectively detecting, prosecuting, and ultimately deterring trade fraud. To successfully coordinate the multi-agency efforts directed at trade fraud, the Department of Justice should utilize the interagency task force model used successfully for decades by multiple U.S. Attorneys' offices to combat health care fraud, another type of fraud that by its nature involves many investigative agencies and expertise.

The primary entities involved in fighting trade fraud are the U.S. Customs and Border Protection (CBP) and the U.S. Immigration and Customs Enforcement Homeland Security Investigations (ICE HSI), both part of the Department of Homeland Security, the Department of Justice and its U.S. Attorney Offices, the Department of Commerce and its International Trade Administration, and the International Trade Commission. Each of these Departments or Agencies play unique roles in detecting and prosecuting trade fraud. For example, ICE HSI investigates a wide array of international crime,³¹³ the CBP is the

³¹³ See *Homeland Security Investigations*, U.S. IMMIGRATION AND CUSTOMS ENF'T, <https://www.ice.gov/hsi> (last updated Aug. 22, 2017) (HSI is a critical investigative arm of the Department of Homeland Security and is a vital U.S. asset in combating criminal organizations illegally exploiting America's travel, trade, financial, and immigration systems.).

“boots on the ground” at the U.S. borders and has a mission centering on monitoring the flow of people and items entering the United States and collecting tariffs and duties.³¹⁴ The Department of Justice is charged with prosecuting cases, coordinating law enforcement investigations, evaluating relator FCA actions, and working with relators on FCA actions.³¹⁵ The DoC, specifically the International Trade Administration (ITA), and ITC promote specific trade enforcement initiatives and establish duty classifications, such as antidumping and countervailing duties.³¹⁶

That so many entities have so many roles and competing responsibilities regarding trade demonstrates the importance of coordinating trade fraud efforts for coherent trade policy. This is especially true with regard to the prosecution of trade fraud where the stakes are high—for victims as well as putative defendants. Consider the following scenario. A relator files an FCA complaint in federal district court alleging that a defendant is perpetrating a scheme to evade antidumping duties. The complaint should come to the attention of an Assistant U.S. Attorney (AUSA) prior to filing in one of the 94 U.S. Attorneys’ offices. Pursuant to Department of Justice guidelines and protocols, the AUSA will then communicate with attorneys at the Department of Justice’s Civil Fraud Division in Washington D.C. to seek guidance and approval to pursue the case.

The AUSA and/or main Department of Justice trial attorneys likely will contact the International Trade Administration (ITA) within the DoC since this agency oversees the administration of antidumping orders. The AUSA will gather information from ITA staff about the technical aspects of the specific product and the scope of the particular order to determine if the product at issue in the FCA complaint actually qualifies under the order. The Department of Justice attorneys will serve as a liaison between the relator and their counsel to integrate their knowledge of the alleged fraud into an investigative strategy that will be implemented by the CBP agents and ICE HSI agents.

³¹⁴ See *About CBP*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/about> (last updated Nov. 21, 2016).

³¹⁵ See *Organization, Mission and Function Manual: Civil Division*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-civil-division> (last updated Sept. 9, 2014); see also 31 U.S.C.S. § 3730 (Lexis through Pub. L. No. 115-140).

³¹⁶ See *International Trade Administration (ITA)*, U.S. DEP’T OF COMMERCE, <https://www.commerce.gov/doc/international-trade-administration#2/43.4/-112.0> (last visited Nov. 17, 2017); see also *About the USTC*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/about_usitc.htm (last visited Nov. 10, 2017).

Such coordination likely will require monitoring the imports and duty rates declared by the defendant and cross-referencing these reports and facts with the relator's knowledge. More investigation likely will be needed, quite possibly with the relator's active involvement, which may include interpreting industry procedures, identifying further evidence and possible witnesses, and even wearing recording devices to talk with targets and suspects. The Department of Justice will likely issue Civil Investigative Demands (CIDs),³¹⁷ that are unique to the FCA investigation requesting pertinent information from the Defendant. The responses to the CIDs as well as additional evidence gathered in the ongoing investigation will then be communicated to the CBP and ICE HSI to further direct the investigation. Ultimately, the information uncovered will form the basis of the government's decision whether to intervene in the relator's FCA action, whether to also criminally prosecute the defendant in a parallel action, or whether the allegations lack merit.

As can be seen, at all phases of this hypothetical investigation, communication between the various entities is paramount. This example demonstrates why collaboration and established communication channels among all affected federal agencies is crucial. Not only would creation of interagency trade fraud task forces facilitate such communication and collaboration, it would also help eliminate redundancies in the learning curve for AUSAs first encountering trade fraud cases. Additionally, because trade fraud cases can implicate a number of federal districts and foreign countries, utilizing centralized task forces, along with specialized training for the Department of Justice attorneys in such task forces, would further this needed communication among districts and foreign countries.

Such interagency task forces have been used for years in the area of health care fraud. These health care fraud task forces have experience bringing together Department of Justice attorneys, FBI agents, Postal Inspectors (who have jurisdiction and experience in investigating mail fraud and wire fraud schemes), Special Agents with the Department of Health and Human Services (HHS), Drug Enforcement Agents and their state counterparts who investigate pharmacy and other drug-related provider fraud, Department of Labor, Department of Veterans Affairs, and other entities as necessary based on the context of a

³¹⁷ 31 U.S.C.S. § 3733 (Lexis through Pub. L. No. 115-140).

specific case.³¹⁸ These task forces also integrate the relators who bring forth information about health care fraud, work with government law enforcement personnel to further investigate the case when needed, and through their counsel, often provide significant litigative resources.³¹⁹ This task force approach has worked well in healthcare and should be adopted with regard to trade fraud.

2. Dedicate Specialists Within DOJ to Trade Fraud

In addition to encouraging, training, and facilitating individual USAOs to utilize interagency task forces directed at trade fraud, the Department of Justice would benefit by better coordinating its personnel with the “Centers for Excellence” created by the Department of Homeland Security and the CBP. The international scope of trade does not comport with the localized structure of the U.S. Attorney Offices.

The CBP has taken such an approach to combatting trade fraud by creating “Centers for Excellence and Expertise.” These “Centers of Excellence” focus on certain categories of imported products.³²⁰ For instance, there is a “Base Metals Center” located in Chicago, Illinois; an “Apparel, Footwear and Textiles Center” in San Francisco, California; and a “Pharmaceuticals, Health and Chemicals” center in New York, New York.³²¹ In total there are ten Centers of Excellence. This initiative demonstrates the specific product category approach necessary to effective trade enforcement.

The Department of Justice should establish a team of attorneys experienced in trade fraud to be similarly dedicated to specific areas of trade fraud enforcement. To best integrate with the established and successful CBP Centers of Excellence, the Department of Justice should place at least one attorney dedicated to pursuing trade fraud to be stationed in the U.S. Attorneys’ offices where a CBP Center of Excellence operates who is similarly focused on prosecuting trade fraud violations related to those product groups. By working directly with the CBP’s subject-matter experts, these Department of Justice

³¹⁸ See Press Release, U.S. Dep’t of Justice, AstraZenica to Pay \$7.9 Million to Resolve Kickback Allegations (Feb. 11, 2015), <https://www.justice.gov/opa/pr/astrazeneca-pay-79-million-resolve-kickback-allegations>; see also Press Release, U.S. Dep’t of Justice, GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report>.

³¹⁹ *Id.*

³²⁰ 19 C.F.R. 101.10 (2016).

³²¹ *Id.*

trade fraud specialists would gain knowledge of fraud involved with the importation of particular product groups and be better equipped to coordinate agency efforts.

Furthermore, by incorporating the Department of Justice into otherwise routine CBP trade enforcement, the FCA can be utilized more often to prosecute trade fraud as opposed to CBP regulatory penalties. By utilizing the FCA instead of Customs' enforcement remedies, the United States can recover significantly more money from trade fraud actions and provide greater deterrence from future fraud.³²² Whereas Customs fraud statutes provide penalties for "a civil penalty in an amount not to exceed the domestic value of the merchandise,"³²³ the FCA mandates treble damages and civil monetary penalties of \$10,957 to \$21,916 for each false claim.³²⁴

3. Enhance Transparency in Shipping Records

Making international shipping records more centralized and transparent would greatly enhance the ability of private parties, specifically FCA relators, to investigate and corroborate their allegations through shipping records prior to filing a trade fraud FCA action. Enhancing the ability of private parties, specifically putative FCA relators, to access public, full shipping records would shift investigatory resources and labor from government investigators to their private attorney general partners and help fight trade fraud.

The most important set of records to make more easily accessible to the public, and thus to potential whistleblowers of trade fraud, is the Entry Summary, Customs Form 7501.³²⁵ This form is not among the publicly available documents corresponding to an import entry. However, much of the information corresponding to a shipment is publicly available, such as importer of record, shipping date, the disclosed contents of the shipment, the foreign port of lading, the U.S. port of unloading, and the transport method and vessel. While this "truly publicly available" information is helpful, it primarily provides information about the shipping voyage of the imported goods, not what the importer declares to Customs, such as the declared country of origin or the declared duties for the shipment. What is declared to the CBP on

³²² 31 U.S.C.S. § 3729 (Lexis through Pub. L. No. 115-140).

³²³ 19 U.S.C.S. § 1592(c)(1) (Lexis through Pub. L. No. 115-140).

³²⁴ 31 U.S.C.S. § 3729 (Lexis through Pub. L. No. 115-140).

³²⁵ CBP FORM 7501, *supra* note 230.

Customs Form 7501 is the pertinent information to either confirm or refute suspicions of trade fraud.

The Department of Homeland Security does allow for the disclosure of CBP-generated records including the Form 7501 information necessary to confirm or refute trade fraud suspicions.³²⁶ The information defined as Customs Generated Records includes the “Entry Number”—which is the CBP-assigned number unique to each Entry Summary (CBP Form 7501) and the “Entry Type”—and most important for trade fraud investigations, the sub-entry type—which “further defines the specific processing type within the entry category (i.e., free and dutiable, quota/visa, antidumping/countervailing duty, and appraisement).”³²⁷ These two pieces of information are vital to the identification and corroboration of trade fraud because they identify the specific Entry Summary to cross-reference with other shipping and manufacturing details (often supplied by relators), and most importantly, that identify the rate of duty claimed by the importer—the evasion of which is the crux of trade fraud.

This needed information is already collected and maintained in an organized manner by CBP. However, currently, the only way a private party such as a relator may obtain access to it is through the Freedom of Information Act (FOIA) process, which is particularly unsuited for FCA realtor actions.³²⁸ The FOIA process is problematic because it allows the potential defendant to learn it is being investigated by a private party and to challenge the disclosure of the information (i.e., the potentially incriminating customs submissions). Putative defendants can prevent the FOIA disclosure by filing a “reverse FOIA” action against the requesting party.³²⁹ Thus, for all practical purposes, utilizing the existing FOIA procedures to obtain relevant data to prepare a trade fraud FCA complaint simply alerts the potential defendant that it is being investigated and who is investigating it. By providing a warning to a potential defendant, the FOIA process allows now-alerted defendants to alter and better conceal trade fraud to subvert

³²⁶ See 80 Fed. Reg. 49256, 49261 (Aug. 17, 2015).

³²⁷ See 80 Fed. Reg. 49256, 49259 (Aug. 17, 2015).

³²⁸ See *id.* at 49262.

³²⁹ See 19 C.F.R. § 103.35 (2012). “CBP will provide business submitters with prompt written notice of receipt of FOIA requests or appeals that encompass their commercial information. The written notice will describe either the exact nature of the commercial information requested, or enclose copies of the records or those portions of the records that contain the commercial information. The written notice also will advise the business submitter of its right to file a disclosure objection statement as provided under paragraph (c)(1) of this section.” *Id.*

detection. For these reasons, making the Customs Generated Records, specifically the information submitted on Customs Form 7501, available in a public, searchable database that could be accessed without alerting potential defendant would tremendously enhance the effectiveness of the FCA as a trade fraud weapon.

Similar publicly searchable databases are utilized in other contexts of government contracting and claim submission, such as in healthcare. These databases are invaluable resources to inform the public about the actions of healthcare providers as well as sources that help relators corroborate and build their cases to present to the Department of Justice. The Centers for Medicare and Medicaid publishes “Medicare Provider Utilization and Payment Data” each year.³³⁰ This data provides the billing data, including type of service and frequency, for every medical provider in the nation that has submitted claims for payment to Medicare.³³¹ This billing data is a critical resource for law enforcement and private parties, including FCA relators, because it identifies billing outliers, a red flag indicator of fraud. Similarly, the Affordable Care Act established the “Open Payments” database that collects and publishes information about drug and device company payments to physicians and teaching hospitals for expenses like travel, research, and speaking fees, as well as ownership interests that physicians and their immediate family have in drug and medical device companies.³³² This database has proven to be a vital tool for investigating potential kickback or Stark Law-related FCA violations.

Establishing a full and open database for trade law claim submissions should be no different. The collection of appropriate tariffs and duties is similarly in the interest of public policy. Furthermore, the success of these important healthcare databases demonstrates why the potential argument that public disclosure of Customs Form 7501 information violates importers’ right to confidential business information is unconvincing. The publication of the duties actually paid and country of origin declared is no more confidential than the methods

³³⁰ *Medicare Provider Utilization and Payment Data: Physician and Other Supplier*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/Physician-and-Other-Supplier.html> (last updated June 15, 2017).

³³¹ *Medicare Provider Utilization and Payment Data: Physician and Other Supplier PUF CY2015*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <https://data.cms.gov/Medicare-Physician-Supplier/Medicare-Provider-Utilization-and-Payment-Data-Phys/sk9b-znav/data> (last visited Aug. 11, 2017).

³³² See 78 Fed. Reg. 9458–528 (Feb. 8, 2013).

and manner by which a physician bills Medicare or the payments made by a pharmaceutical company to physicians who have ownership interests in company products or who are paid to speak on the company's behalf. Simply put, when private companies' submission of claims to the government impacts the public fisc and important public policy issues such as healthcare and trade, the pertinent details of those claims should be made easily accessible to the public.

4. Maintain More Consistent and Centralized Reporting

Another way to enhance the use of the FCA (as well as criminal prosecution) as a way to combat trade fraud is to make public information about trade fraud cases more readily available. Currently, there is no way to search databases maintained by the U.S. Administration of Courts, the Department of Justice,³³³ PACER, or docket searching systems such as Bloomberg Law to gather information on criminal or civil trade fraud cases. Case information is not uniformly collected or stored. There is considerable disparity in the sophistication, thoroughness, and type of information available in these databases. For example, the documents currently uploaded to PACER, and systems such as Bloomberg Law docket search, currently include scanned copies of docket entries and pleadings that do not use Optical Character Reading (OCR). Without OCR, a document cannot be electronically searched or indexed to permit searching within a document collection. This sharply limits the usefulness of search systems for finding docket materials, because a search of unindexed files will only return items that were specifically tagged with particular keywords. Creating PDFs directly from the original source Word or WordPerfect documents, or running an OCR program on scanned documents would make the searches within PACER and docket

³³³ A significant hurdle when searching DOJ press releases on trade fraud is the lack of standardization as to where and in what format the press releases are made available. The DOJ press release database and archive available on DOJ's website included a good number of press releases, but these two collections were not complete. For example, we examined press releases available at DOJ's news link, <https://www.justice.gov/news> websites, as well as websites separately maintained by the ninety-four individual U.S. Attorney's offices and found there was no consistent format of the DOJ press releases. Some cases were reported; some were not. Some releases contained case names; others did not. Some releases reported settlement amounts; others did not. Some releases were issued when a case was filed, an indictment returned, or an individual arrested; others did not. Some settlements were reported and details provided while other settlements were never reported or provided incomplete information. Consistent reporting, listing, and archiving of press releases would be invaluable to inform DOJ and relators how to better plead and prepare both criminal prosecutions of trade fraud and use of the FCA in trade fraud.

systems more accurate as well as far more efficient. Consistent text searchability would also allow docket searching systems, particularly commercial services, to index the individual filings and improve the usability of the keyword search feature.

Simple, cost-free changes would remedy this search problem. A more readily available way to access public information about trade fraud cases would be invaluable to the Department of Justice in crafting theories of these cases, directing development of precedent, and identifying trends and problems. Easier access to what is already public information would help relators and their counsel evaluate, screen, and prepare cases for presentation to the Department of Justice and filing of complaints. More information about trade fraud and who is liable would help businesses and their counsel establish internal systems to prevent such fraud.

CONCLUSION

As the tide of global trade rises, so will trade fraud. Regardless of the merits of the free-trade-protectionism debate, trade fraud should be aggressively pursued. No one has the right to lie about what they are bringing into a country. This Article discussed the variety of stakeholders injured when trade laws are flouted and import duties avoided. Not only is a country's treasury robbed of millions of dollars in import duties, but honest businesses are hurt by dishonest competitors, consumers are exposed to unsafe products, and industries suffer economic losses because of companies that dump products and engage in predatory pricing.

To gain a better understanding of trade fraud enforcement trends, we constructed a database of all trade fraud cases pursued in the United States between 2000 and 2016. While such a database would appear to be readily available, it is not because of inconsistencies in reporting and incomplete government data sets. Thus, our database is the first to compile all trade fraud cases brought in recent years. This database shows that trade fraud cases brought by the U.S. Department of Justice increased nine-fold between 2000 and 2016. Forty-two percent of these cases have been criminal prosecutions, while fifty-eight percent have been civil cases. All civil cases have been brought under the FCA and almost every FCA case has been initiated by relators under the FCA's *qui tam* provisions. All trade fraud cases fall into two basic types of fraud: misrepresentations regarding the nature of products imported, and misrepresentations regarding a product's country of origin. We

discussed the characteristics of each type of fraud and the practical and policy implications of pursuing each type. We also discussed how and why many trade fraud cases brought by the Department of Justice and relators under the FCA fail to include import fraud charges even though such fraud likely is occurring and is chargeable under the FCA and applicable criminal statutes.

The FCA has proven uniquely and extraordinarily effective over the past four decades in combatting health care fraud, defense fraud, environmental fraud, and other frauds upon federal and state governments. We discussed how and why it can be as effective in detecting and deterring trade fraud. We explained how the FCA works, how it applies to trade fraud, and what makes it effective against trade fraud. We also discussed the implications for businesses that have exposure to trade fraud liability. Suspicious pricing (“prices too good to be true”) coupled with sloppy import protocols by suppliers, and the FCA’s “reckless disregard” mens rea, likely subject every business engaging in the import of goods as well as in the purchase, sale, or marketing of imported goods to liability under the FCA. We discussed steps businesses can take to ensure that their corporate compliance plans, in-house training, and internal investigation protocols adequately address their exposure for trade violations. Lastly, we identified steps policymakers, particularly the U.S. Departments of Justice and Homeland Security, could take to enhance the FCA’s effectiveness in combatting trade fraud.

APPENDIX A
Trade Fraud Cases
2000-2016

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
2000							
11/7/00 United States v. Universal Fruits and Vegetables et al. ² (C.D. Cal. 2000)	Provided false information about shipping dates to avoid antidumping duties on fresh garlic imported from China.	FCA ³	2	Civil	Complaint filed ⁴		1
2001-2004 NONE							
2005							
5/19/05 United States <i>ex rel.</i> Safina Office Products v. Office Depot, ⁵ (D.D.C. 2003)	Defendants misrepresented where products were manufactured to qualify products for sale to the U.S. government. Products were in fact manufactured in China and Taiwan, which are not approved under the Trade Agreements Act.	FCA ⁶ Trade Agreements Act ⁷	3	Civil	\$9.8 million settlement	Relators (Safina Office Products and two of its executives), competitors of the defendant, collectively received \$1.47 million as relator's award.	2

¹ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

² Complaint, United States v. Universal Fruits and Vegetable Corp. et al., No. 00-11698R (C.D. Ca. Nov. 7, 2000).

³ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

⁴ Summary judgment for plaintiff in the amount of \$3,914,474. Judgement held unenforceable for lack of jurisdiction. United States v. Universal Fruits and Vegetable Corp., 29 Ct. Int'l Trade 673, Slip Op. 06-79 at 12 (May 25, 2006). See also United States v. Universal Fruits and Vegetable Corp. 370 F.3d. 829 (9th Cir. 2004).

⁵ Complaint for Violations of Federal False Claims Act, United States *ex rel.* Safina Office Products v. Office Depot, No. 1:03-cv-00003-RMC (D.D.C. Jan. 2, 2003).

⁶ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

⁷ 19 U.S.C.S. §§ 2501–2581 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁸	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
5/19/05 United States <i>ex rel.</i> Safina Office Products v. Office Depot, ⁹ (D.D.C. 2003)	Defendants misrepresented where products were manufactured to qualify products for sale to the U.S. government. Products were in fact manufactured in China and Taiwan, which are not approved under the Trade Agreements Act.	FCA ¹⁰ Trade Agreements Act ¹¹	3	Civil	\$4.75 million Settlement	Relators (Safina Office Products and two of its executives), competitors of the defendant, collectively received \$712,500 as relator's award.	3
10/18/05 United States <i>ex rel.</i> Safina Office Products v. Office Depot, ¹² (D.D.C. 2003)	Defendants misrepresented where products were manufactured to qualify products for sale to the U.S. government. Products were in fact manufactured in China and Taiwan, which are not approved under the Trade Agreements Act.	FCA ¹³ Trade Agreements Act ¹⁴	3	Civil	\$7.4 million settlement	Relators (Safina Office Products and two of its executives), competitors of the defendant, collectively received \$1.11 million as relator's award.	4

⁸ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁹ Complaint for Violations of Federal False Claims Act, *supra* note 4.

¹⁰ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹¹ 19 U.S.C.S. §§ 2501–2581 (Lexis through Pub. L. No. 115-140).

¹² Complaint for Violations of Federal False Claims Act, *supra* note 5.

¹³ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁴ 19 U.S.C.S. §§ 2501–2581 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁵	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
2006							
2/10/06 United States <i>ex rel.</i> Safina Office Products v. Office Depot, ¹⁶ (D.D.C. 2003)	Defendants misrepresented where products were manufactured to qualify products for sale to the U.S. government. Products were in fact manufactured in China and Taiwan, which are not approved under the Trade Agreements Act.	FCA ¹⁷ Trade Agreements Act ¹⁸	3	Civil	\$5.02 million settlement	Relators (Safina Office Products and two of its executives), competitors of the defendant, collectively received \$753,000 as relator's award.	5
4/07/06 United States <i>ex rel.</i> Schweizer v. OCÉ N.V., ¹⁹ (D.D.C. 2006)	Defendants falsely claimed that imported printed products were from the Netherlands when they were from China.	FCA ²⁰	?	Civil	Settlement amount of \$1.2 agreed upon by DOJ and defendant; relator objected. Remanded. ²¹		6

¹⁵ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁶ Complaint for Violations of Federal False Claims Act, *supra* note 5.

¹⁷ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁸ 19 U.S.C.S. §§ 2501–2581 (Lexis through Pub. L. No. 115-140).

¹⁹ Complaint for Violations of Federal False Claims Act, United States *ex rel.* Schweizer v. OCÉ N.V., No. 1:06-cv-00648-RCL (D.D.C. Apr. 7, 2006).

²⁰ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

²¹ United States *ex rel.* Schweizer v. OCÉ N.V., 677 F.3d 1228 (D.C. Cir. 2012) (holding that DOJ did not have unfettered discretion to settle FCA cases when a relator objects to the settlement; courts must examine the reasonableness of the settlement agreement).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ²²	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
2007							
6/7/07 United States v. Wong, et al., ²³ (C.D. Cal. 2007)	Six individuals and ten seafood companies charged with conspiracy to avoid anti-dumping custom duties by falsely labeling over ten million pounds of imported Vietnamese catfish as sole, grouper, flounder, and conger pike.	Lacey Act ²⁴	2	Criminal	Arrested	NA	7
4/4/07 United States v. Premier Manufacturing, Inc., ²⁵ (D. S.C. 2007)	Understated weight of cigarettes to avoid millions of dollars in import duties.	FCA ²⁶	1	Civil	\$3.1 million settlement (Defendant previously agreed to pay \$7.16 million restitution as part of a criminal plea.)	NA	8

²² Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

²³ Press Release, U.S. Dep't of Justice, Two Individuals Arrested for Conspiracy to Import Falsely Labeled Fish (June 7, 2007), https://www.justice.gov/archive/opa/pr/2007/June/07_enrd_413.html.

²⁴ 6 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

²⁵ United States v. Premier Manufacturing Inc., No. 2:05-cr-00344-DCN (D.S.C. Mar. 25, 2005).

²⁶ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ²⁷	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
2008							
1/14/08 United States v. Wong, ²⁸ (C.D. Cal. 2008)	Conspiracy to avoid anti-dumping custom duties by falsely labeling over ten million pounds of imported Vietnamese catfish as sole, grouper, flounder, and conger pike.	Lacey Act ²⁹	2	Criminal	Defendant, David Wong, plead guilty to two misdemeanor violations of the Lacey Act. Sentenced to one year and one day in prison followed by one year of supervised release. \$25,000 fine	NA	9
3/12/08 United States v. True World Foods Chicago, LLC ³⁰ (C.D. Cal. 2007)	Conspiracy to avoid anti-dumping custom duties by falsely labeling over ten million pounds of imported Vietnamese catfish as sole, grouper, flounder, and conger pike.	Lacey Act ³¹	2	Criminal	Defendant, True World Foods Chicago, LLC, plead guilty to violation of the Lacey Act. Sentenced to a fine of \$60,000. Forfeiture of \$197,930	NA	10

²⁷ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

²⁸ Press Release, U.S. Dep't of Justice, Illinois Resident Pleads Guilty to Illegally Dealing in Falsely Labeled Fish From Vietnam (Jan. 14, 2008), https://www.justice.gov/archive/opa/pr/2008/January/08_enrd_026.html.

²⁹ 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

³⁰ United States v. True World Foods Chicago, LLC, No. 2:07-cr-01271 (C.D. Cal. Nov. 15, 2007).

³¹ 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ³²	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
5/12/08 United States v. Intertex Apparel Groups, Inc. ³³ (S.D.N.Y. 2008)	Scheme to avoid import duties by importing into the United States goods manufactured in China, while misrepresenting that the goods were manufactured in either Russia or Korea.	FCA ³⁴	3	Civil	\$2,798,872 settlement.	Relator was a former employee of defendant. Settlement percentage not known.	11
10/30/08 United States v. Peter Xuong Lam; Arthur Yavelberg ³⁵ (C.D. Cal. 2008)	Conspiracy to avoid anti-dumping custom duties by falsely labeling over ten million pounds of imported Vietnamese catfish as sole, grouper, flounder, and conger pike.	Lacey Act ³⁶	2	Criminal	Two defendants, Lam and Yavelberg, proceeded to trial. Convicted by jury.	NA	12
2009							
5/19/09 United States v. Peter Xuong Lam ³⁷ (C.D. Cal. 2008)	Conspiracy to avoid anti-dumping custom duties by falsely labeling over ten million pounds of imported Vietnamese catfish as sole, grouper, flounder, and conger pike.	Lacey Act ³⁸	2	Criminal	Defendant Lam sentenced to sixty-three months in prison. Forfeiture of \$12 million to avoid anti-dumping duties. Defendant Guitierrez sentenced to one year probation.	NA	13

³² Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

³³ United States v. Intertex Apparel Groups, Inc., No. 1:05-cv-05313-NRB (S.D.N.Y. May 13, 2008).

³⁴ 6 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

³⁵ Press Release, US Dep't of Justice, Two Found Guilty of Conspiracy Involving the Importation and Sale of Falsely Labeled Fish from Vietnam (Oct. 30, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-enrd-967.html>.

³⁶ 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

³⁷ Indictment, United States v. Lam, No. 2:07-cr-00449-PSG (C.D. Cal. May 24, 2007).

³⁸ 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ³⁹	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
6/26/09 United States <i>ex rel.</i> Furniture by Thurston Inc. and Lee Thurston v. J. Squared Inc., d/b/a University Loft Co. ⁴⁰ (D.D.C. 2009)	Misrepresented the country of origin (Malaysian) of furniture sold to the federal government.	FCA ⁴¹ Trade Agreements Act ⁴²	3	Civil	\$400,000 settlement.	Relator, Furniture by Thurston Inc. and Lee Thurston, competitor of defendant, received \$66,000 as relator's share.	14
2010							
1/20/10 United States v. George ⁴³ (D.N.J. 2010)	Conspiracy to avoid anti-dumping custom duties by falsely labeling over ten million pounds of imported Vietnamese catfish as sole, grouper, flounder, and conger pike.	Lacey Act ⁴⁴	2	Criminal	George, GEO of Sterling Seafood Corporation, plead guilty to one count of importing falsely labeled goods and one count of selling falsely labeled fish with intent to defraud. (Subsequently sentenced to 22 months in prison and ordered to pay \$64,173,839 in restitution and \$50,000 to National Fish and Wildlife Foundation	NA	15

³⁹ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁴⁰ United States *ex rel.* Furniture by Thurston, Inc. and Lee Thurston v. J. Squared, Inc., No. 1:06-cv-01058-RMC (D.C.C. June 8, 2008).

⁴¹ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

⁴² 19 U.S.C.S. §§ 2501–81 (Lexis through Pub. L. No. 115-140).

⁴³ United States v. George, No. 2:10-cr-00029-FSH (D. N.J. Jan. 20, 2010).

⁴⁴ 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁴⁵	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
1/28/10 United States v. Karen L. Blyth, et al ⁴⁶ (S.D. Ala. 2010)	Defendants indicted on twenty-eight counts for falsely describing imported Vietnamese catfish as “wild caught sole” to avoid anti-dumping duties. Defendants, co-owners of seafood companies in Phoenix, Arizona (Blyth) and Pensacola, Florida (Phelps). Some of the fish tested positive for antibiotics banned from U.S. food.	Lacey Act ⁴⁷	2	Criminal	Indicted.	NA	16
2011							
1/13/11 United States v. Fastenal Co., ⁴⁸ (W.D. Mo. 2011)	Provided false information to federal government on contracts, including country of origin.	FCA ⁴⁹	3	Civil	Settlement of \$6.25 million.	NA	17

⁴⁵ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁴⁶ United States v. Karen L. Blyth, et al., No. 1:10-cr-00011-CG-M (S.D. Ala. Jan. 28, 2010).

⁴⁷ 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

⁴⁸ Press Release, U.S. Dep’t of Justice, Minnesota-based National Hardware Store Distributor Fastenal to Pay U.S. \$6.25 Million to Resolve False Claims Act Allegations (Jan. 13, 2011), <https://www.justice.gov/opa/pr/minnesota-based-national-hardware-store-distributor-fastenal-pay-us-625-million-resolve-false>.

⁴⁹ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁵⁰	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
1/24/11 United States v. Blyth et al. ⁵¹ (S.D. Ala. 2010)	Falsely described imported Vietnamese catfish as “wild caught sole” to avoid anti-dumping duties and marketed the fish as expensive seafood.	Lacey Act, ⁵² Receiving smuggled goods, ⁵³ misbranding ⁵⁴	2	Criminal	Defendants Blyth and Phelps pled guilty to thirteen counts.	NA	18
5/5/11 United States v. Blyth et al. ⁵⁵ (S.D. Ala. 2011)	Falsely described imported Vietnamese catfish as “wild caught sole” to avoid anti-dumping duties and marketed the fish as expensive seafood.	Lacey Act, ⁵⁶ Receiving smuggled goods ⁵⁷	2	Criminal	Sentenced to thirty-three months (Karen L. Blyth) and twenty-four months (David H.M. Phelps). Both fined \$5000.		19
5/26/11 United States v. Popa (S.D. Ala. 2011) ⁵⁸	Falsely described imported Vietnamese catfish as “wild caught sole” to avoid anti-dumping duties and marketed the fish as expensive seafood.	Lacey Act, ⁵⁹ Receiving smuggled goods ⁶⁰	2	Criminal	Sentenced to thirteen months in prison.		20

⁵⁰ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁵¹ United States v. Karen L. Blyth, et al., No. 1:10-cr-00011-CG-M (S.D. Ala. Jan. 28, 2010).

⁵² 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

⁵³ 18 U.S.C.S. § 545 (Lexis through Pub. L. No. 115-140).

⁵⁴ *Id.*

⁵⁵ United States v. Karen L. Blyth, et al., No. 1:10-cr-00011-CG-M (S.D. Ala. Jan. 28, 2010).

⁵⁶ 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

⁵⁷ 18 U.S.C.S. § 352 (Lexis through Pub. L. No. 115-140).

⁵⁸ United States v. Popa, No. 1:10-cr-00011-CG-M (S.D. Ala. Jan. 28, 2010).

⁵⁹ 16 U.S.C.S. §§ 3371–78 (Lexis through Pub. L. No. 115-140).

⁶⁰ 18 U.S.C.S. § 545 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁶¹	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
6/1/11 United States <i>ex rel.</i> Bukh v. Guldmann, Inc. ⁶² (N. D. Ill. 2011)	Falsified country of origin in sales of medical equipment to Department of Veterans Affairs.	FCA ⁶³	3	Civil	\$2 million settlement ⁶⁴	Relator was an employee of defendant.	21
8/18/11 United States v. Cone et al. ⁶⁵ (E.D. Va. 2011)	Imported and sold counterfeit computer networking equipment, avoided import duties.	Wire Fraud, ⁶⁶ Conspiracy ⁶⁷ Importation and sale of improperly declared goods, ⁶⁸ wire fraud ⁶⁹	1	Criminal	Convicted by jury ⁷⁰	NA	22
8/31/11 United States <i>ex rel.</i> Karlin v. Noble Jewelry Holdings Ltd., ⁷¹ (S.D.N.Y. 2011)	Understated the value of imported jewelry.	FCA ⁷²	1	Civil	\$3.85 million settlement	Relator, Kenneth Karlin, employee of defendant, receive \$727,000 relator's share.	23

⁶¹ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁶² United States *ex rel.* Bukh v. Guldmann, Inc., No. 8:14-cv-01089-SDM-JSS (N.D. Ill. June 1, 2011).

⁶³ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

⁶⁴ DOJ did not intervene in the case. *\$2 Million FCA Settlement*, ASHCRAFT & GEREL, LLP, <http://ashcraftandgerel.com/news/2-million-fca-settlement/>.

⁶⁵ Superseding Indictment, United States v. Cone et al., No. 1:10-cr-00317-GBL (E.D. Va. Nov. 10, 2010).

⁶⁶ 18 U.S.C.S. § 1343 (Lexis through Pub. L. No. 115-140).

⁶⁷ 18 U.S.C.S. § 371 (Lexis through Pub. L. No. 115-140).

⁶⁸ 18 U.S.C.S. §§ 542, 545 (Lexis through Pub. L. No. 115-140).

⁶⁹ 18 U.S.C.S. § 1343 (Lexis through Pub. L. No. 115-140).

⁷⁰ Superseding Indictment, United States v. Cone, No. 1:10-cr-00317-GBL (E.D. Va. Nov. 10, 2010), *rev'd*, No. 11-4934 (4th Cir. Apr. 14, 2013).

⁷¹ Complaint and Jury Demand, United States *ex rel.* Karlin v. Noble Jewelry Holdings Ltd., No. 1:08-cv-07826-JGK-KNF (S.D.N.Y. Aug. 29, 2011).

⁷² 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁷³	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
2012							
4/24/12 United States <i>ex rel.</i> Dickson v. Toyo Mfg. Co. Ltd. ⁷⁴ (W.D.N.C. 2012)	Misrepresent-ed country of origin to avoid paying antidumping and countervailing duties. (Represented that product, printing ink, was manufactured Japan and Mexico, when in fact ink was manufactured in China and India).	FCA ⁷⁵	2	Civil	United States intervenes.		24
5/8/12 United States <i>ex rel.</i> Scutellaro v. Direct Resource ⁷⁶ (D.D.C. 2010)	Defendants falsely claimed that goods sold to the U.S. government (office supplies) were manufactured in a country with a reciprocal trade agreement with the United States when in fact the goods were from China, which does not have such an agreement.	FCA, ⁷⁷ Trade Agreements Act ⁷⁸	3	Civil	\$450,000 settlement.	Louis Scutellaro, owner of a competitor of the defendant, received \$675,000 relator's share.	25

⁷³ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁷⁴ Amended Complaint, United States *ex rel.* Dickson v. Toyo Mfg. Co., No. 3:09-CV-438 (W.D.N.C. May 14, 2010).

⁷⁵ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

⁷⁶ Complaint, United States *ex rel.* Scutellaro v. Direct Resources, Inc., No. 1:10-cv-00113-JDB (D.D.C. Jan. 20, 2010).

⁷⁷ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

⁷⁸ 19 U.S.C.S. §§ 2501–81 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁷⁹	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
6/8/12 United States <i>ex rel.</i> Ludlow v. CMAI Industries, LLC ⁸⁰ (E.D. Mich. 2012)	Misclassified auto parts as “unfinished” to evade \$2.5 million in duties. CMAI collected the duties due from its customers but pocketed the money instead of paying the duties.	FCA ⁸¹	2	Civil and Criminal	\$6.3 million settlement. Guilty plea to criminal charges. Received sentence of two years’ probation and \$25,000 fine.	Relator, Theodore Ludlow, former sales account manager of defendant, received \$1.2 million as relator’s share.	26
7/9/12 United States v. ADC Telecommunications Inc. ⁸² (D.D.C. 2012)	Defendants falsely claimed that goods it sold to the U.S. government (telecommunications hardware, such as modems) were imported from a country which has a reciprocal trade agreement with the United States, when in fact the good were imported from China, which does not have such an agreement.	FCA, ⁸³ Trade Agreements Act ⁸⁴	3	Civil	Company disclosed its violations; \$1 million settlement.		27

⁷⁹ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁸⁰ Complaint for Violation of the Civil False Claims Act, United States *ex rel.* Ludlow v. CMAI Industries, LLC, No. 2:09-cv-14860-PDB-MKM (E.D. Mich. Dec. 15, 2009).

⁸¹ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

⁸² Press Release, U.S. Dep’t of Justice, Telecommunications Firm to Pay Us \$1 Million to Settle Alleged Violations of the Trade Agreements Act (July 9, 2012), <https://www.justice.gov/opa/pr/telecommunications-firm-pay-us-1-million-settle-alleged-violations-trade-agreements-act>.

⁸³ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

⁸⁴ 19 U.S.C.S. §§ 2501–81 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁸⁵	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
8/27/12 United States v. Fai Po Jewellery (H.K.) Co., LTD ⁸⁶ (D. Ak. 2012)	Understated value of jewelry imported into the U.S. avoiding more than \$1 million in duties.	Intentionally defrauding U.S. of customs duties ⁸⁷	1	Criminal	Defendant pled guilty to one count information. Sentenced to three years of probation and ordered to pay \$800,000 criminal fine, restitution of \$1,017,737, costs of investigation of \$144,324.	NA	28
11/15/12 United States v. Chavez ⁸⁸ (S.D. Ca. 2012)	Avoided \$18 million in customs duties by falsely stating that more than \$100 million in Chinese goods were traveling through the territory of the United States when in fact the goods entered the commerce of the United States.	Conspiracy, ⁸⁹ Entry of goods by means of false statements, ⁹⁰ Obstruction of justice ⁹¹	1	Criminal	Chavez plead guilty and was sentenced to thirty-seven months in prison and forfeiture of property located in Tecate, Ca.	NA	29

⁸⁵ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁸⁶ Complaint, United States v. Fai Po Jewellery, No. 3:12-cr-00068-SLG (D.C. Ak. Aug. 8, 2012).

⁸⁷ 18 U.S.C.S. § 545 (Lexis through Pub. L. No. 115-140).

⁸⁸ United States v. Chavez, No. 3:12-cr-03137-MMA (S.D. Ca. July 23, 2012).

⁸⁹ 18 U.S.C.S. § 371 (Lexis through Pub. L. No. 115-140).

⁹⁰ 18 U.S.C.S. § 542 (Lexis through Pub. L. No. 115-140).

⁹¹ 18 U.S.C.S. § 1519 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁹²	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
11/29/12 Unites States v. Garbarino, ⁹³ (S.D.N.Y . 2012)	Avoided duties owed by understating the weight (over 100,000 pounds) and value (more than \$10 million) of Russian and Iranian caviar.	Entry of goods falsely classified, ⁹⁴ Entry of goods my means of false statements, ⁹⁵ Smuggling ⁹⁶	1	Criminal	Defendant pled guilty. Sentenced to time served, fined \$10,000, and \$3 million in restitution.	NA	30
12/17/12 United States <i>ex rel.</i> Dickson v. Toyo Ink Mfg. Co., Ltd., ⁹⁷ (W.D.N.C. 2012)	Misrepresented country of origin to avoid paying antidumping and countervailing duties. (Represented that product, printing ink, was manufactured Japan and Mexico, when in fact ink was manufactured in China and India).	FCA ⁹⁸	2	Civil	\$45 million settlement.	Relator, John Dickson, president of competitor of defendant, received over \$7,875,000 as relator's share.	31

⁹² Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

⁹³ Press Release, U.S. Immigration & Customs Enforcement, Caviar Distributor Pleads Guilty to Multi-million Dollar Customs Fraud Scheme (Nov. 11, 2012), <https://www.ice.gov/news/releases/caviar-distributor-pleads-guilty-multi-million-dollar-customs-fraud-scheme>.

⁹⁴ 18 U.S.C.S. § 541 (Lexis through Pub. L. No. 115-140).

⁹⁵ 18 U.S.C.S. § 542 (Lexis through Pub. L. No. 115-140).

⁹⁶ 18 U.S.C.S. § 545 (Lexis through Pub. L. No. 115-140).

⁹⁷ *United States ex rel. Dickson v. Toyo Ink Mfg. Co., Ltd.*, No. 3:09-cv-00438-RJC-DSC (W.D. N.C. May 14, 2010).

⁹⁸ 19 U.S.C.S. §§ 2501–81 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ⁹⁹	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
12/22/12 United States v. Apego Inc., ¹⁰⁰ (N.D. Ga. 2012)	Conspiracy to avoid an estimated \$20 million in duties on paper by "transshipping" Chinese products through Taiwan and labeling them as "Made in Taiwan."	Entry of goods falsely classified, ¹⁰¹ Entry of goods by means of false statements ¹⁰²	2	Criminal	Indictment filed	NA	32
2013							
2/20/13 United States v. Groeb Farms, Inc. et al. ¹⁰³ (N.D. Ill. 2013)	Misrepresented country of origin as India or Malaysia for honey from China to avoid more than \$180 million in anti-dumping duties. Honey tested positive for Chloramphenicol, an antibiotic not allowed in food products in the U.S.	Entry of goods by means of false statements, ¹⁰⁴ Smuggling ¹⁰⁵	2	Criminal	Charges filed and deferred prosecution agreements reached with companies and agreements to plead guilty reached with individual defendants.	NA	33
3/29/13 United States <i>ex rel.</i> Liotine, v. CDW-Government, Inc., ¹⁰⁶ (S.D. Ill. 2012)	Misrepresented country of origin for products made in China in sales to the U.S. government.	FCA, ¹⁰⁷ Trade Agreements Act ¹⁰⁸	3	Civil	\$5.66 million settlement	Relator, Joe Liotine, former sales representative of defendant, received \$1,585,892 as relator's share.	34

⁹⁹ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁰⁰ Criminal Indictment, *United States v. Apego, Inc.*, No. 1:12-cr-00350-SCJ-AJB (N.D. Ga. Oct. 17, 2012).

¹⁰¹ 18 U.S.C.S. § 541 (Lexis through Pub. L. No. 115-140).

¹⁰² 18 U.S.C.S. § 542 (Lexis through Pub. L. No. 115-140).

¹⁰³ Violation, *United States v. Groeb Farms, Inc.*, No. 1:13-cr-00139 (N.D. Ill. Feb. 12, 2013).

¹⁰⁴ 18 U.S.C.S. § 542 (Lexis through Pub. L. No. 115-140).

¹⁰⁵ 18 U.S.C.S. § 545 (Lexis through Pub. L. No. 115-140).

¹⁰⁶ False Claims Complaint, *United States ex rel. Liotine v. CDW-Government, Inc.*, No. 3:05-cv-00033-DRH-PMF (S.D. Ill. Jan. 19, 2005).

¹⁰⁷ 19 U.S.C.S. §§ 2501–81 (Lexis through Pub. L. No. 115-140).

¹⁰⁸ *Id.*

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁰⁹	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
5/30/13 United States <i>ex rel.</i> Customs Fraud Investigations, LLC v. Victaulic Co. ¹¹⁰ (E.D. Pa. 2013)	Failed to properly mark imported iron and steel pipe fittings with country of origin, thereby avoiding “marking” duties of 10% of the value of imports.	FCA ¹¹¹	1	Civil	Pending remand after Third Circuit held that failure to properly mark imports is a false claim under the FCA. ¹¹²	Relator is a company that conducts research and analysis on potential customs fraud.	35
6/21/13 United States v. Garcia-Adarme, ¹¹³ (D.P.R. 2013)	Avoided anti-dumping duties of 30-33% and countervailing duties of 374.14% on aluminum made in China by “transshipping” through Malaysia.	Conspiracy, ¹¹⁴ Smuggling, ¹¹⁵ Wire fraud, ¹¹⁶ Money laundering ¹¹⁷	2	Criminal	Indictment returned against three individuals and three companies.	NA	36

¹⁰⁹ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹¹⁰ United States *ex rel.* Customs Fraud Investigations, LLC v. Victaulic Co., No. 5:13-cv-02983-MAM (E.D. Pa. May 30, 2013).

¹¹¹ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹¹² United States *ex rel.* Customs Fraud Investigations, LLC v. Victaulic Co. 839 F.3d 242 (3d Cir. 2016).

¹¹³ Indictment, United States v. Garcia-Adarme, No. 3:13-cr-00353-FAB (D.P.R. June 20, 2013).

¹¹⁴ 18 U.S.C.S. § 371 (Lexis through Pub. L. No. 115-140).

¹¹⁵ 18 U.S.C.S. § 545 (Lexis through Pub. L. No. 115-140).

¹¹⁶ 18 U.S.C.S. § 1343 (Lexis through Pub. L. No. 115-140).

¹¹⁷ 18 U.S.C.S. § 1956 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹¹⁸	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
11/14/13 United States <i>ex rel.</i> Valenti v. Tai Shan Golden Gain Aluminum Products Ltd., et al., ¹¹⁹ (M.D. Fl. 2013)	Avoided antidumping and countervailing duties, by falsely alleging that aluminum extrusions were from Malaysia when they were in fact from China.	FCA ¹²⁰	2	Civil	Settlements of more than \$4.58 million; Defendant Basco Mfg. Co. settled for \$1.1 million; defendant C.R. Laurence Co. Inc., settled for \$2,300,000; defendant Southeastern Aluminum Products settled for \$650,000; and defendant Waterfall Group LLC settled for \$100,000. ¹²¹	Relator, James F. Valenti, received \$555,100 as relator's share.	37
2014							
1/24/14 United States <i>ex rel.</i> Estey v. Tennessee Orthopaedic Clinics PC, et al. ¹²² (E.D. Tenn. 2012)	Misrepresented country of medication thereby obtaining reimbursement from Medicare, Medicaid and other federal programs for medications not approved by the FDA.	FCA ¹²³	3	Civil	\$1.85 million settlement.	Relator, Douglas Estey, a physician's assistant who spoke to medical providers about the product, received \$323,750 as relator's share.	38

¹¹⁸ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹¹⁹ Complaint, United States *ex rel.* Valenti v. Tai Shan Golden Gain Aluminum Products Ltd., No. 3:11-cv-00368-BJD-MCR (M.D. Fl. Oct. 18, 2013).

¹²⁰ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹²¹ See Press Release, U.S. Dep't of Justice, Three Importers to Pay Over \$3 Million to Settle False Claims Act Suit Alleging Evaded Customs Duties (Feb. 12, 2015), <https://www.justice.gov/opa/pr/three-importers-pay-over-3-million-settle-false-claims-act-suit-alleging-evaded-customs>.

¹²² Complaint, United States *ex rel.* Estey v. Tennessee Orthopaedic Clinics, P.C., No. 3:12-CV-85 (E.D. Tenn. Feb. 21, 2012).

¹²³ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹²⁴	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
3/12/14 United States <i>ex rel.</i> Zhonghui Tu v. Bizlink Tech., Inc., ¹²⁵ (N.D. Cal. 2014)	Understated the value of goods imported (used two sets of invoices; one set stated actual price of goods, the other set falsely stated a lower cost). Import duties were calculated on the lower, false cost.	FCA ¹²⁶	1	Civil	\$1.2 million settlement.	Relator, Zhonghui Tu, a former manager of the defendant, received \$252,000 as relator's share.	39
4/9/14 United States <i>ex rel.</i> Michael Krigstein v. Siouni & Zar Corp., et al. ¹²⁷ (S.D.N.Y. 2014)	Understated value of imported apparel to avoid customs duties.	FCA ¹²⁸	1	Civil	\$10 million settlement.	Relator, Michael Krigstein, former employee of defendant Dana Kay Inc., received \$2.1 million as relator's share.	40
4/21/14 Unites States <i>ex rel.</i> Jimenez v. Otter Products, Inc., ¹²⁹ (D. Colo. 2014)	Avoided paying import duties owed by understated the value of product imported (protective cases for electronic devices).	FCA, ¹³⁰ Tariff Act of 1930 ¹³¹	1	Civil	\$4.3 million settlement.	Relator, Bonnie M. Jimenez, former employee of defendant, received \$830,000 as relator's share.	41

¹²⁴ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹²⁵ Complaint, United States *ex rel.* Tu v. Kuo, No. 3:12-cv-04166-WHO (N.D. Cal. Aug. 8, 2012).

¹²⁶ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹²⁷ Complaint, United States *ex rel.* Krigstein v. Siouni & Zar Corp., No. 1:11-cv-04247-CM (S.D.N.Y. Dec. 9, 2013).

¹²⁸ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹²⁹ Complaint, United States *ex rel.* Jimenez v. Otter Products, LLC, No. 1:11-cv-02937-RM-MJW (D. Colo. Apr. 21, 2014).

¹³⁰ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹³¹ 19 U.S.C.S. § 1592(c)(4) (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹³²	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
5/5/14 United States v. Nguyen, ¹³³ (E.D. Cal. 2014)	Nguyen made false declarations to avoid customs duties (declared clothing imported from China as samples rather than for sale).	Conspiracy, ¹³⁴ Mail Fraud, ¹³⁵ Money laundering, ¹³⁶	1 and 2	Criminal	Sentenced to one year in prison, and ordered to pay \$70,000 in restitution. Forfeiture of \$400,000 in property.	NA	42
6/4/14 United States v. Santos, ¹³⁷ (S.D. Tex. 2014)	Avoided paying import duties, by falsely stating that goods from Italy and India were from Mexico. Santos was a U.S. Customs broker. His broker responsibilities involved valuing shipments for importation into the U.S. and submitting appropriate payments on behalf of his clients for import duties due. He collected correct amount from his clients, and pocketed the difference.	Entry of goods by false certification, ¹³⁸ Smuggling, ¹³⁹ False Statement to law enforcement ¹⁴⁰	1 and 2	Criminal	Sentenced to twenty-eight months in prison; paid \$140,000 in restitution.	NA	43

¹³² Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹³³ Indictment, United States v. Nguyen, No. 1:13-cr-00036-LJO-SKO (E.D. Cal. Jan. 31, 2013).

¹³⁴ 18 U.S.C.S. § 371 (Lexis through Pub. L. No. 115-140).

¹³⁵ 18 U.S.C.S. § 1341 (Lexis through Pub. L. No. 115-140).

¹³⁶ 18 U.S.C.S. § 1956 (Lexis through Pub. L. No. 115-140).

¹³⁷ Indictment, United States v. Santos, No. 5:12-cr-01161 (S.D. Tex. Dec. 18, 2012).

¹³⁸ 18 U.S.C.S. § 542 (Lexis through Pub. L. No. 115-140).

¹³⁹ 18 U.S.C.S. § 545 (Lexis through Pub. L. No. 115-140).

¹⁴⁰ 18 U.S.C.S. § 1001 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁴¹	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
8/19/14 United States <i>ex rel.</i> Simmons v. Samsung Electronics America, Inc., et al., ¹⁴² (D. Md. 2011)	Defendants falsely certified that goods sold to the U.S. government were from Korea or Mexico, both of which have a reciprocal trade agreements with the U.S., as required in contracts to sell goods to the federal government. In fact, the goods were manufactured in China, which does not have such an agreement.	FCA ¹⁴³ Trade Agreements Act ¹⁴⁴	3	Civil	\$2.3 million settlement.	Robert Simmons, former Samsung employee, received \$414,000 relator's share.	44
9/9/14 United States v. Sandiford, ¹⁴⁵ (D.N.J. 2014)	Falsified which Chinese factories made wooden bedroom furniture, thereby paying a 7.24% antidumping duty instead of the 216% antidumping duty owed. Avoided \$7 million in duties owed.	Entry of goods by means of false statements ¹⁴⁶	2	Criminal	Pled guilty to one count of importing merchandise from China by means of false statements.	NA	45

¹⁴¹ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁴² Complaint, United States *ex rel.* Simmons v. Samsung Electronics America, Inc., No. AW-11-2971 (D. Md. Oct. 18, 2011).

¹⁴³ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁴⁴ 19 U.S.C.S. §§ 2501–81 (Lexis through Pub. L. No. 115-140).

¹⁴⁵ Complaint, United States v. Sandiford, No. 2:14-cr-00520-WJM (D.N.J. Sept. 9, 2014).

¹⁴⁶ 18 U.S.C.S. § 542 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁴⁷	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
12/4/14 United States <i>ex rel.</i> McKinney v. DHS Technologies, LLC, ¹⁴⁸ (M.D. Pa. 2011)	Falsely represented the country of origin for products sold to the U.S. so as to qualify products for federal contracts.	FCA, ¹⁴⁹ Trade Agreements Act ¹⁵⁰	3	Civil	\$1.9 million.	Relator, former employee of defendant, received approximately \$361,000 relators award.	46
2015							
4/2/15 United States <i>ex rel.</i> Cox et al v. Medtronic, Inc. et al, ¹⁵¹ (D. Minn.)	Defendants falsely claimed that goods sold to the federal government (cardiac care devices and devices used in spin surgeries) were made in the U.S. or another country with a reciprocal trade agreement with the U.S., when in fact the goods were made in China and Malaysia, which do not have such agreements with the U.S.	FCA ¹⁵² Trade Agreements Act ¹⁵³	3	Civil	\$4.41 million settlement.	Three relators, former employees of defendants, share \$749,700.	47

¹⁴⁷ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁴⁸ United States *ex rel.* McKinney v. DHS Technologies, LLC, No. 3:11-cv-00146-RDM-MCC (M.D. Pa. Jan. 20, 2011).

¹⁴⁹ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁵⁰ 19 U.S.C.S. §§ 2501–81 (Lexis through Pub. L. No. 115-140).

¹⁵¹ Complaint, United States *ex rel.* Cox, Medtronic, Inc., No. 0:12-cv-02562-PAM-JSM (D. Minn. Oct. 5, 2012).

¹⁵² 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁵³ 19 U.S.C.S. §§ 2501–81 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁵⁴	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
6/1/15 United States v. Xilin Chen et al. ¹⁵⁵ (C.D. Cal. 2015)	Avoided paying customs duties owed by claiming merchandise imported from China was worth \$86,635, when the true value of the clothing was \$175,535. Laundered money for drug cartel. Procured citizenship by means of false statements (falsely declared he was not involved in illegal activity).	Money laundering. ¹⁵⁶ Presentation of false immigration document ¹⁵⁷	1	Criminal	Defendant, Xilin Chen, pled guilty to three felony counts including customs fraud, conspiracy to launder money and unlawful procurement of citizenship. Sentenced to 110 months in prison and \$2 million fine.	NA	48
2/12/15 United States <i>ex rel.</i> Valenti v. Tai Shan Golden Gain Aluminum Products Ltd. ¹⁵⁸ (M.D. Fl. 2011)	Avoided antidumping and countervailing duties, by falsely alleging that aluminum extrusions were from Malaysia when they were in fact from China.	FCA ¹⁵⁹	2	Civil	\$385,000 settlement (Defendant Winfield); \$50,000 settlement (Defendant Ma).	Relator, James F. Valenti Jr., received \$79,000 in relator's share.	49

¹⁵⁴ Types of fraud: (1) falsely describe the import to avoid or minimize import duties, (2) falsify country of origin to avoid import duties (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁵⁵ United States v. Xilin Chen et al., No. 2:14-cr-00499-PA (C.D. Cal. Sept. 2, 2014).

¹⁵⁶ 18 U.S.C.S. § 1956 (Lexis through Pub. L. No. 115-140).

¹⁵⁷ 18 U.S.C.S. § 1546 (Lexis through Pub. L. No. 115-140).

¹⁵⁸ Complaint, United States *ex rel.* Valenti v. Tai Shan Golden Gain Aluminum Products Ltd., No. 3:11-cv-00368-BJD-MCR (M.D. Fl. Oct. 18, 2013).

¹⁵⁹ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁶⁰	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
9/8/15 United States v. Magness, et al., ¹⁶¹ (W.D.N.Y. 2015)	Misrepresented nature of imported magnesium product to qualify for a 5% duty instead of applicable 305% duty.	Conspiracy to smuggle merchandise into the United States and conspiracy to launder money ¹⁶²	2	Criminal	Father (Gregory Magness) sentenced to eighteen months and ordered to pay \$6,246,605 in restitution. Son (Justin Magness) sentenced to one year probation and ordered to pay \$4,500 restitution.	NA ¹⁶³	50
10/6/15 United States v. Giddens et al., ¹⁶⁴ (E.D. TX. 2014)	Defendants misrepresented forty-three imported shipments of prescription drugs such as Xanax® and Valium® as “gifts” or “toys” to reduce duties owed. The imported drugs were sub-potent or contained entirely different active ingredients from legitimate versions.	Conspiracy ¹⁶⁵ Misbranded drug offenses ¹⁶⁶	1	Criminal	Defendants Giddens and Hollis sentenced to fifteen months in prison.	NA	51

¹⁶⁰ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁶¹ Indictment, United States v. Magness, No. 1:10-cr-00125-WMS-JJM (W.D.N.Y. Apr. 30, 2010).

¹⁶² 18 U.S.C.S. § 371 (Lexis through Pub. L. No. 115-140).

¹⁶³ Complaint, United States *ex rel.* Reade Mfg. Co. v. ESM Group, Inc., No. 1:10-cv-00504-WMS (W.D.N.Y. June 17, 2010).

¹⁶⁴ Indictment, United States v. Giddens, No. 6:14-cr-00061-MHS-JDL (E.D. Tex. Oct. 24, 2014).

¹⁶⁵ 18 U.S.C.S. § 371 (Lexis through Pub. L. No. 115-140).

¹⁶⁶ 21 U.S.C.S. §§ 331 (a), 352(a), 352(f)(1), 333(a)(2) (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁶⁷	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
12/21/15 United States ex rel. University Loft Company v. University Furnishings, LP, ¹⁶⁸ (W.D. Tex. 2015)	Avoided anti-dumping duties by falsely describing imported furniture from China as “office furniture,” which is not subject to antidumping duties, when in fact the furniture was “bedroom furniture” which was subject to antidumping duties.	FCA ¹⁶⁹	2	Civil	\$15 million settlement.	Relator, University Loft Co, competitor of defendant, received \$2.25 million as relator’s share.	52
2016							
10/6/15 United States v. Giddens et al., ¹⁷⁰ (E.D. Tex. 2014)	Defendants misrepresented forty-three imported shipments of prescription drugs such as Xanax® and Valium® as “gifts” or “toys” to reduce duties owed. The imported drugs were sub-potent or contained entirely different active ingredients from legitimate versions.	Conspiracy ¹⁷¹ Misbranded drug offenses ¹⁷²	1	Criminal	Defendant Nix sentenced to fifteen months in prison.		53

¹⁶⁷ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁶⁸ Press Release, U.S. Department of Justice, Texas-Based Importers Agree to Pay \$15 Million to Settle False Claims Act Suit for Alleged Evasion of Customs Duties (Dec. 21, 2015), <https://www.justice.gov/opa/pr/texas-based-importers-agree-pay-15-million-settle-false-claims-act-suit-alleged-evasion>.

¹⁶⁹ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁷⁰ Indictment, United States v. Giddens, No. 6:14-cr-00061-MHS-JDL (E.D. Tex. Oct. 24, 2014).

¹⁷¹ 18 U.S.C.S. § 371 (Lexis through Pub. L. No. 115-140).

¹⁷² 21 U.S.C.S. §§ 331 (a), 352(a), 352(f)(1), 333(a)(2) (Lexis through Pub. L. No. 115-140).

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁷³	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
2/22/16 United States <i>ex rel.</i> Graphite Electrode Sales, Inc. v. Ameri-Source Holdings, Inc., ¹⁷⁴ (W.D. Pa. 2016)	Avoided \$2,127,420 in antidumping duties on imports of graphite electrodes used in steel manufacturing from China by falsifying size of electrodes.	FCA ¹⁷⁵ Entry of goods by false documentation ¹⁷⁶	2	Civil	\$3 million settlement.	Relator, Graphite Electrode Sales Inc., a competitor of the defendant, received \$480,000 as relator's share.	54
3/28/16 United States <i>ex rel.</i> Reade Mfg. Co. v. ESM Group, Inc., ¹⁷⁷ (W.D.N.Y. 2016)	Conspiracy to sell defective infrared counter-measure flares to the US (magnesium in flares failed to meet specifications). Also, avoided antidumping duties by misrepresenting the nature of imported magnesium product to qualify imports for a 5% duty instead of applicable 305% duty.	FCA ¹⁷⁸	2	Civil	\$8 million settlement. ¹⁷⁹	Relator, Reade Mfg. Co, competitor of defendant, received \$400,000 as relator's share.	55

¹⁷³ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁷⁴ Qui Tam Complaint, United States *ex rel.* Graphite Electrode Sales, Inc. v. Ameri-source Holdings, Inc., No. 2:13-cv-00474-JFC (W.D. Pa. Apr. 1, 2013).

¹⁷⁵ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁷⁶ 19 U.S.C.S. § 1484 (Lexis through Pub. L. No. 115-140).

¹⁷⁷ Jury Trial Demand, United States *ex rel.* Reade Mfg. Co. v. ESM Group, Inc., No. 110-cv-00504-WMS (W.D.N.Y. June 17, 2010).

¹⁷⁸ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁷⁹ Prior to the civil settlement, five former ESM employees pled guilty to related criminal charges, including ESM's former president, Charles Wright. The criminal defendants were ordered to pay more than \$14 million in restitution. Press Release, U.S. 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 U.S. 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>. See also Magness, *supra* note 140.

CASE NAME	ALLEGED CONDUCT	STATUTES	TYPE OF FRAUD ¹⁸⁰	CIVIL OR CRIMINAL	STATUS	RELATOR INFORMATION	CHART #
4/27/16 United States <i>ex rel.</i> Wells v. Z Gallerie, LLC, ¹⁸¹ (S.D. Ga. 2016)	Avoided antidumping duties by falsely describing Chinese wooden bedroom furniture (which is subject to antidumping duties) as “grand chests” and “hall chests” (which are not subject to antidumping duties).	FCA, ¹⁸² Trade Facilitation and Trade Enforcement Act ¹⁸³	2	Civil	\$15 million settlement.	Relator, Kelly Wells, an e-commerce retailer of furniture, received \$2.4 million as relator’s award.	56
9/30/16 United States <i>ex rel.</i> Bissanti, Jr. v. Daniel Scott Goldman et al., ¹⁸⁴ (W.D. Tex. 2016).	Avoided anti-dumping duties by falsely describing imported furniture from China as “office furniture” which is not subject to antidumping duties when in fact the furniture was “bedroom furniture,” which was subject to antidumping duties.	FCA ¹⁸⁵	2	Civil	\$1,525,000 settlement.	Relator, Matthew L. Bissanti, Jr., prior employee of defendant, received \$228,750 relator’s share.	57

¹⁸⁰ Types of fraud: (1) falsely describe the import to avoid or minimize import duties; (2) falsify country of origin to avoid import duties; (3) falsify country of origin to qualify goods for sale to the U.S. government. See text and accompanying footnotes 57–154 in *Trade Fraud: The Wild, New Frontier of White Collar Crime*.

¹⁸¹ Press Release, U.S. 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. 26, 2015), <https://www.justice.gov/opa/pr/california-based-z-gallerie-llc-agrees-pay-15-million-settle-false-claims-act-suit-alleging>.

¹⁸² 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

¹⁸³ 19 U.S.C.S. § 4301 (Lexis through Pub. L. No. 115-140).

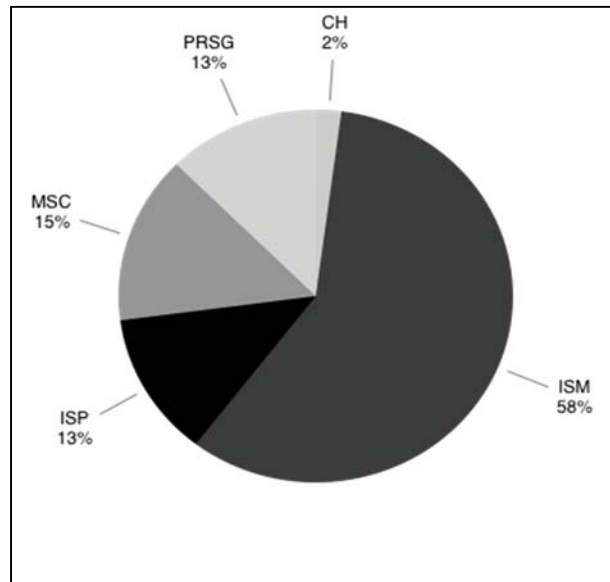
¹⁸⁴ Complaint, United States *ex rel.* Bissanti v. Goldman, No. 1:14-cv-00497-SS (W.D. Tex. May 29, 2014).

¹⁸⁵ 31 U.S.C.S. §§ 3729–33 (Lexis through Pub. L. No. 115-140).

APPENDIX B: TRADE DATA

- B-1. Antidumping and Countervailing Orders by Product, 2016
- B-2. Antidumping Orders Issued by Country, 2016
- B-3. Antidumping Orders Issued by Country, Comparison, 2005 and 2015
- B-4. Countervailing Duty Orders Issued by Country, Comparison, 2005 and 2015
- B-5. Countries Named in Antidumping and Countervailing Orders by U.S. 2016
- B-6. Total Combined AD/CVD Orders Per FY

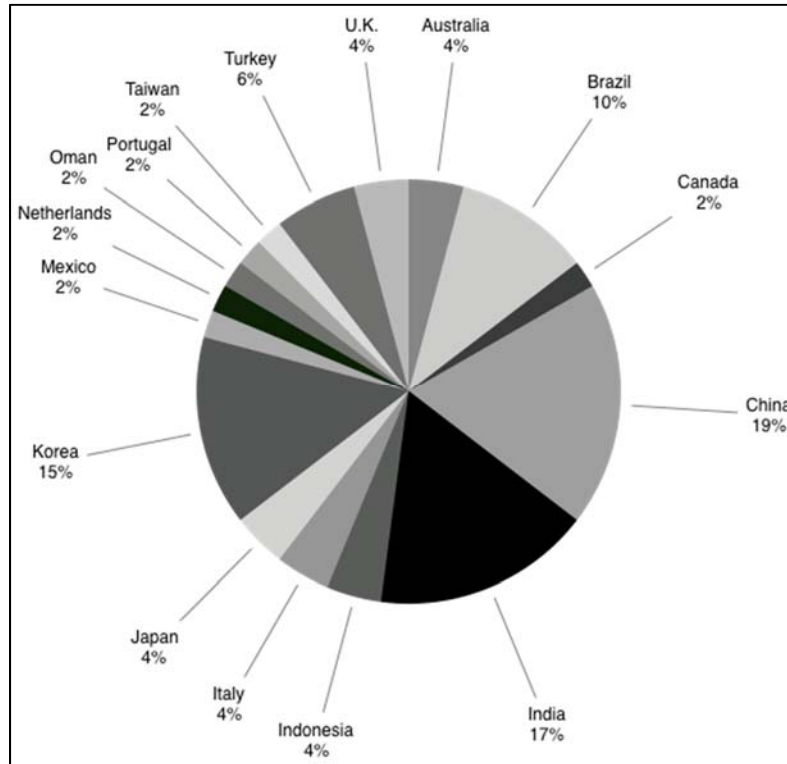
APPENDIX B-1

Antidumping and Countervailing Duties by Product, 2016¹

Active AD/CVD Orders by Product: 2016	
Product Type	Number of Orders
AG (Agriculture and Food)	0
CH (Chemicals)	1
ISM (Iron and Steel: Mills)	28
ISO (Iron and Steel: Other)	0
ISP (Iron and Steel: Pipe)	6
MM (Metals and Minerals)	0
MSC (Miscellaneous Products)	7
PRSG (Plastic, Rubber, Stone, Glass)	6
TX (Textiles and Apparel)	0
ME (Machinery and Electric Equipment)	0
PSRG (correction by USITC for PRSG category)	0

¹ *Antidumping and Countervailing Duty Orders Currently in Place*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm (under research tools sidebar click on "AD/CVD Orders") (last visited on June 2, 2017).

APPENDIX B-2

Antidumping Orders Issued by Country, 2016²

² Chad P. Brown, *Global Antidumping Database*, WORLD BANK, <http://econ.worldbank.org/ttbd/gad/> (last visited on May 31, 2017). We used the spreadsheets for each country with “detailed data in the database” provided by the Global Antidumping Database (supposedly current through 2015) and initiated a search that singled out only the affirmative (A) decisions in the F_DUMP_DEC field (there were partial decisions as well however, because they were not always affirmative, the info was ambiguous). Then we ordered the affirmative decisions chronologically by F_AD_DATE (the date the final AD measure was imposed on), counting how many decisions occurred in 2005 and how many occurred in 2015.

APPENDIX B-3Antidumping Orders Issued by Country,
Comparison, 2005 and 2015³

Country	Number of AD Orders	
	2005	2015
Argentina	8	11
Australia	3	10
Brazil	3	31
Canada	4	13
China	5	16
European Union	9	19
India	38	22
Indonesia	6	2
Malaysia	5	7
Mexico	9	7
Russia	5	2
South Korea	3	3
USA	14	18

³ *Id.* See text accompanying note 2.

APPENDIX B-4Countervailing Duty Orders Issued by Country,
Comparison, 2005 and 2015⁴

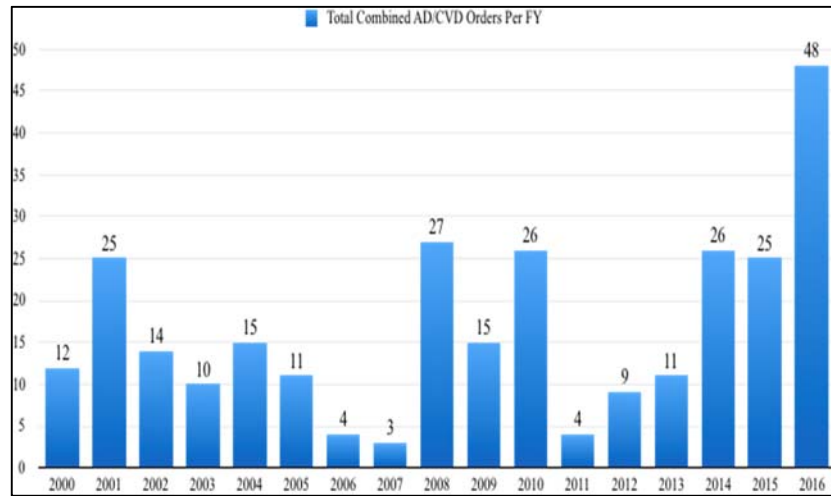
Country	Affirmative CVD Decisions 2015	Total Affirmative CVD Decisions (note varying time periods)
Argentina	NA	5 total from 1992-1998
Australia	2	10 total from 2001-2015
Brazil	NA	10 total from 1991-2008
Canada	2	33 total from 1985-2015
Chile	NA	2 total in 2000
China	NA	6 total from 2010-2014
European Union	1	44 from 1977-2015
Mexico	NA	9 total from 1995-2014
United States	9	216 from 1981-2015

⁴ Chad P. Brown, *Global Countervailing Duties Database*, WORLD BANK, <http://econ.worldbank.org/ttbd/gcvd/> (last visited May 31, 2017). To gather this data, we used the spreadsheets for each country with “detailed data in the database” provided by the Global Countervailing Duties Database (listed as current through 2015) and initiated a search that singled out only the affirmative (A) decisions in the F_SUB_DEC field (there were partial decisions as well however, because they were not always affirmative, the info was ambiguous). We ordered the affirmative decisions chronologically by F_CVD_DATE (the date the final CVD measure was imposed on), counting how many decisions occurred in 2005 and how many occurred in 2015. We did not count any decisions where the date was missing (where there were no decisions for the year based on our criteria). We listed as “NA” where information was unavailable or because it was 0.

APPENDIX B-5Countries Named in Antidumping and Countervailing Orders by U.S.⁵
2016

Country	Number of Orders
China	9
India	8
Korea	7
Brazil	5
Turkey	3
Australia, Indonesia, Italy, Japan, U.K.	2

⁵ *Antidumping and Countervailing Duty Orders Currently in Place*, *supra* note 1.

APPENDIX B-6Total Combined AD/CVD Orders Per FY⁶

⁶ *Id.*

