

Reproduced with permission from White Collar Crime Report, 12 WCR 410, 05/12/2017. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

INTERNATIONAL TRADE

Two Seyfarth Shaw attorneys offer cutting-edge observations regarding recent executive orders from President Trump directing the Department of Justice and its law enforcement partners to “vigorously enforce” the country’s trade laws. The authors caution that it is only a matter of time before customs and trade fraud violations are top enforcement priorities for federal prosecutors. They also predict the government’s use of criminal—and not just civil—statutes to enforce these laws and set out a playbook for how the government might go about tackling commercial fraud at the border.

The New Face of White Collar Enforcement: President Trump Signs Executive Orders Directing DOJ to Make Trade, Customs Fraud Enforcement a ‘High Priority’



BY ANDREW S. BOUTROS AND
JOHN R. SCHLEPPENBACH

Elections have consequences. And, since the November election of President Donald J. Trump, pundits, practitioners, and legal observers alike have tried to predict what white collar enforcement priorities might take center stage under the new administration. On March 31, 2017, President Trump removed the guess work from that high-stakes question—at least partially—by issuing two Executive Orders emphasizing his commitment to prosecuting violations of the

United States’s trade and customs laws. Indeed, the Orders could not be more clear: unfair trade practices “expose United States employers to unfair competition and deprive the Federal Government of lawful revenue” and therefore federal prosecutors and other law enforcement partners must “vigorously enforce[e] our Nation’s trade laws.” Doing so, according to the President, must be a “high priority” for the Department of Justice.

This new designation for trade and customs law violations is especially noteworthy because federal law gives prosecutors sweeping authority to prosecute:

- (1) those who import merchandise contrary to law; and
- (2) any person (or company) in the supply chain who handles the merchandise after its importation knowing it was imported into the U.S. contrary to law.

The latter prohibition means that a person or company that **receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale** of imported merchandise knowing the merchandise to have been imported into the U.S. contrary to law commits a 20-year felony and is subject to fine, imprisonment, and forfeiture.

**And, not only can the tainted merchandise, itself,
be restricted or forfeited, but all who transact
in and handle it are subject to criminal
prosecution, so long as they “know” that the
imported merchandise entered the country
“contrary to law.”**

Thus, unlike statutes such as the Foreign Corrupt Practices Act (FCPA) that only authorizes the government to prosecute one side of the criminal equation, namely, those who give bribes (supply) and not the foreign officials who receive them or create the market for them (demand), the trade and customs fraud criminal laws are not subject to the same limitations. To the contrary, the government can investigate and prosecute **both** the supply side (foreign manufacturers, shippers, importers, brokers, and agents) and the demand side (buyers, distributors, packers, wholesale manufacturers, retailers, and industrial end-users) of the trade/customs fraud equation. Although some have predicted that the government might increase its civil and administrative enforcement of our nation’s trade and customs laws, our prediction is of a different order of magnitude: We appear to be the first to predict the government’s increased **criminal** enforcement of trade and customs law violations. With that, the business community is on notice: trade and customs enforcement may well prove to be the next big (criminal) shoe to drop.

Understanding and Preventing Customs and Trade Violations

Some background: The U.S. is the world’s largest importer of goods, having imported \$2.252 trillion worth of goods from around the globe in 2016, up by 40.6 percent since 2009. From a continental perspective, 45.7 percent of America’s total imports by value in 2016 were purchased from Asian countries, with another 25.8 percent supplied by North American partners, and another 21.5 percent from Europe. With such a staggering volume of merchandise entering the U.S. from throughout the world, the opportunity for fraud and chicanery at the border—when merchandise is making entry into the U.S.—is breathtaking.

As such, fulfilling early-made and frequent campaign promises, President Trump’s first March 31 Executive Order focuses on studying and better understanding the scope and magnitude of the country’s trade problems. Among other actions, it directs the Secretary of Commerce and the U.S. Trade Representative to submit a report to the President on the foreign trading partners with which the U.S. has significant trade deficits. In particular, the report is to “address the major causes of the trade deficit, including, as applicable, differential tariffs, non-tariff barriers, injurious dumping, injurious government subsidization, intellectual property theft, forced technology transfer, denial of worker rights and labor standards, and any other form of discrimination

against the commerce of the United States or other factors contributing to the deficit.” Additionally, the report must assess whether these trading partners are unfairly discriminating against U.S. commerce and if the trade relationship has weakened the production capacity and strength of the U.S.’s industrial base.

The President’s second March 31 Executive Order announces a law enforcement policy initiative bearing the presidential stamp of approval: “The Attorney General, in consultation with the Secretary of Homeland Security, **shall develop** recommended prosecution practices and **allocate appropriate resources** to ensure that Federal prosecutors accord a **high priority** to prosecuting **significant offenses** related to **violations of trade laws.**” (Emphases added.) Similarly, the Executive Order directs the Department of Justice’s law enforcement partners, Homeland Security Investigations and Customs and Border Protection, to “develop and implement a strategy and plan for combating violations of United States trade and customs laws for goods and for enabling interdiction and disposal, including through methods other than seizure, of inadmissible merchandise entering through any mode of transportation[.]” And the Order directs the Secretary of the Treasury and the Secretary of Homeland Security “[t]o ensure the timely and efficient enforcement of laws protecting Intellectual Property Rights (IPR) holders from the impor-

Andrew S. Boutros is a former Assistant U.S. Attorney in Chicago who investigated and prosecuted what are regarded as the nation’s largest criminal customs, trade, and antidumping duty fraud cases, which *Bloomberg Businessweek* also described as “the largest food fraud in U.S. history.” His prosecutorial successes in these areas have been featured in Congress and have been the subject of numerous awards, recognitions, and press reports. Boutros is currently the National Co-Chair of Seyfarth Shaw LLP’s White Collar, Internal Investigations and False Claims Team and Lecturer in Law at the University of Chicago Law School. He now represents clients in their most sensitive and important white collar matters, internal investigations, and complex litigations. His first-chair experience handling criminal customs, trade, and antidumping duty fraud cases are market leading. He also provides strategic counseling and advice to clients in a variety of industries and across subject matters, including in the design and implementation of various compliance programs.

John R Schleppebach is Counsel in the Litigation Department of Seyfarth Shaw’s Chicago office. He is a member of the White Collar, Internal Investigations, and False Claims Team, and has experience representing major corporations in all manner of internal investigations and enforcement actions. A former appellate prosecutor, Schleppebach has also published more than three dozen articles on emerging issues in litigation and currently serves as the coach to a moot court team at Northwestern Pritzker School of Law.

tation of counterfeit goods,” specifically through greater information sharing with rights holders. In short, this second Order sets out a significantly more aggressive approach to enforcement of trade and customs laws violations.

Focus on Antidumping And Countervailing Duties

In announcing its new law enforcement priority, the second Executive Order singles out the assessment and collection of antidumping and countervailing duties as areas especially prone to fraud, abuse, and criminal conduct. Antidumping duties are owed when a foreign manufacturer sells goods in the U.S. at less than fair value, causing injury to the domestic industry for those goods. Countervailing duties occur when a foreign government provides assistance and subsidies, such as tax breaks, to manufacturers that export goods to the U.S., enabling the foreign manufacturers to sell the goods cheaper than U.S. manufacturers. The Order notes the past difficulties the U.S. has had in collecting these duties, especially where companies lack assets in the U.S. To improve the U.S. government’s collection of antidumping and countervailing duties, the Executive Order directs the Secretary of Homeland Security and others to develop a system whereby certain importers would be required to post a bond as security for any potential duties before being allowed to import to the U.S. Specifically targeted are importers for whom there is no record of previous imports, those with a record of failing to fully pay duties, and those who have failed to pay in a timely fashion. In addition to the bond requirement, the Order envisions increased enforcement of these duties through “interdiction and disposal, including through methods other than seizure, of inadmissible merchandise.”

Far-Reaching Consequences

From an enforcement standpoint, the implications of the President’s Executive Orders are far-reaching and extend well beyond abuses in antidumping and countervailing duties. This is because federal trade and customs law criminalizes not just fraudulently or knowingly importing merchandise “contrary to law,” but also receiving, purchasing, selling, transporting, or concealing any such merchandise knowing the merchandise to have entered the country contrary to law. That means that federal prosecutors not only can prosecute those involved in abuses on the supply side of the criminal equation, but those in the supply chain who transact in the merchandise after its importation and thereby create the demand-side market for illegally-entered merchandise. That the government can prosecute the entire supply chain of imported goods gives prosecutors wide latitude to target companies and individuals in the U.S., who are free from extradition difficulties and more likely to have attachable assets. This includes a potentially wide range of companies large and small, public and private, as well as their executives and employees. Distributors, packers, wholesalers, retailers, industrial end-users, transporters, and others are *all* subject to criminal prosecution if they knowingly transact in imported merchandise that illegally entered the country.

Additionally, given that the relevant statute speaks in terms of “contrary to law,” the government’s ability to

investigate and prosecute individuals and companies is not just limited to violations involving tariffs and duties, but rather extends to a wide spectrum of prohibitions that make the entry of the merchandise into the U.S. improper. Much like with prosecutions under RICO (the Racketeer Influenced and Corrupt Organizations Act), but with even broader discretion, prosecutors have the ability to choose from any number of predicate offenses when specifying the underlying “law” that was violated. Thus, companies or individuals could find themselves prosecuted for purchasing imported merchandise they know have been tainted by, among other things:

- intellectual property theft;
- counterfeiting activities;
- violations involving country-of-origin markings, product substitutions, and product labeling violations;
- food fraud; and
- forced, child, or abusive overseas labor practices.

No differently than our heavily-enforced export controls laws that seek to restrict the delivery of sensitive technologies and information to hostile regimes overseas (outbound restrictions), federal prosecutors can use longstanding (but until now, largely unknown) trade and customs laws to more vigorously restrict the importation of merchandise that does not reflect our values (inbound restrictions). And, not only can the tainted merchandise, itself, be restricted or forfeited, but all who transact in and handle it are subject to criminal prosecution, so long as they “know” that the imported merchandise entered the country “contrary to law.”

And, as a general intent crime, the standard for “knowledge” of the predicate unlawful acts is not a high one. Actual knowledge is not required, so long as there are red flags that a company or individual can be said to have willfully ignored. As has frequently been the case with prosecutions under the FCPA and other criminal statutes, the government can prove “willful blindness”—the legal equivalent to actual knowledge—from circumstantial evidence, such as general information about the market for the goods in question, prior public statements about similar enforcement actions involving the same products or companies, or even evidence that the price paid by the defendant for the goods was simply too good to be true. As the Seventh Circuit puts it in its pattern criminal jury instruction on knowledge, a jury “may find that the defendant acted knowingly if [it] finds beyond a reasonable doubt that [the defendant] had a strong suspicion that [state fact as to which knowledge is in question, e.g., ‘drugs were in the suitcase,’ ‘the financial statement was false,’] and that he deliberately avoided the truth.”

Conclusion

President Trump’s March 31 Executive Orders make it abundantly clear that this administration intends to vigorously enforce—including perhaps criminally—the U.S.’s trade and customs laws. And, with all enforcement options on the table, it would not be surprising if federal prosecutors (and Main Justice prosecutors, in particular) borrow from some of their tremendous success in criminal enforcement areas such as the FCPA, to

send a resounding message to overseas and domestic market actors who transact in improperly-entered merchandise. It is only a matter of time before we know for sure, but our continued “on the record” prediction is that customs and trade fraud violations are destined for

“high priority” enforcement. If so, other high-profile criminal statutes and white collar enforcement areas will be soon welcoming a new member to the top of the marquee enforcement list.