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Client Alert

FDA & Life Sciences and International Trade & Litigation Practice Groups

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False Claims Act Update

GSA Contractor Reasonably Relied Upon Distributor Certifications Of Product Origin And Trade Agreements Act Compliance

The United States Court of Appeals for the District of Columbia Circuit recently upheld a District Court's dismissal of a False Claims Act (FCA) complaint against a federal government contractor in a case that will be of interest to companies in a variety of industries, including pharmaceuticals, medical devices, and construction. The Court upheld the dismissal – which occurred at Summary Judgment – when the Relator was unable to point to any evidence contradicting the contractor's evidence that it reasonably had relied upon supplier certifications that the products sold to the government complied with the origin requirements of the Trade Agreements Act of 1979 (TAA), 19 U.S.C.§§ 2501-2581.

In short, as a result of this ruling, businesses that sell their products to the federal government may more reasonably rely on suppliers' certifications of TAA compliance, and issuers of such certifications may come under greater scrutiny.

United States ex rel. Folliard v. Gov't Acquisitions, Inc. and Govplace, No. 13-7049, 2014 U.S. App. LEXIS 16691 (D.C. Cir. Aug. 29, 2014) presented a scenario in which many companies selling products to the federal government could find themselves. Defendant Govplace sold third-party products to the Federal government pursuant to a General Services Administration (GSA) schedule contract that included a TAA clause requiring only U.S.-made or designated country end products be offered and sold under the contract. *Id.* at *3.

In *Folliard*, the record showed that Govplace obtained Letters of Supply from both its distributor and a third-party manufacturer, which stated that the products at issue were compliant with the TAA and thus eligible for resale to the federal government. *Id.* at *4.

The record also showed that GSA had conducted multiple on-site visits at Govplace "to evaluate its compliance with GSA schedule contract requirements," and that Govplace explained to GSA during those visits that it relies on its distributors' country-of-origin (COO) "information and certifications for the items" listed on the GSA contract. *Id.* at *5. After

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each on-site evaluation, GSA concluded "that Govplace demonstrated compliance with the TAA." *Id.*

In assessing Govplace's FCA potential liability for relying upon the supplier COO and TAA certifications, the D.C. Circuit evaluated whether Govplace "'knowingly' sold . . . products that originated from non-designated countries," in violation of the FCA. *Id.* at *22. The D.C. Circuit explained that the "knowledge" requirement of the FCA is satisfied when a person: (1) has actual knowledge, (2) acts in deliberate ignorance, or (3) acts with reckless disregard. *See id.* at *22-*23. In concluding that the Relator had failed to present any evidence that Govplace had "knowledge" that any of the products originated from non-designated countries, the D.C. Circuit recognized that the un-contradicted evidence in the record showed that Govplace's supplier "expressly certifies to resellers, such as Govplace, that COO information is accurate, and more generally that the products it distributes comply with the TAA." *Id.* at *23.

The D.C. Circuit also placed equal weight on the fact that GSA "implicitly approved of Govplace's reliance" on its supplier certifications during the multiple on-site compliance visits. *Id.* at *23-*24. The D.C. Circuit explained that "a contractor like Govplace is ordinarily entitled to rely on a supplier's certification that the product meets TAA requirements." *Id.* at *24. Thus, the D.C. Circuit concluded that "Govplace reasonably relied upon" its supplier's COO certification. *Id.* Because the Relator failed to raise a genuine issue of material fact as to whether Govplace knowingly sold products to the Federal government that did not comply with TAA requirements, the D.C. Circuit affirmed the lower court's decision to dismiss the action. *See id.*

One practical consequence of *Folliard* may be that certifying parties more directly become the focus of government investigations and Relator actions, since the government and Relators may be less inclined simply to name a contractor that has secured TAA certifications when bringing an FCA case. That said, a government contractor who relies on third-party certifications should be prepared to demonstrate that it did not "put its head in the sand" if and when it is confronted with potential red flags and that it acted reasonably when relying on any certification it received. Thus, contractors who secure third-party TAA certifications should consider under what circumstances they intend to test the veracity of certifications received (within the context of their industry) and what diligence they plan to undertake when doing so.

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