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## what compliance program?

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*MSK Client Alert*

January 14, 2014

At a recent luncheon, a representative of the U.S. Attorney's Office in Los Angeles made some remarks that are helpful to all companies, regardless of size or industry. The context for the comments by this Assistant U.S. Attorney (AUSA) were the key factors the office considers when deciding whether to pursue a case criminally, civilly, or by way of administrative action. The first factor is whether the company has a robust compliance program that is actually being followed or whether it exists on paper only. Also, is the situation under review an isolated incident or systemic? Is the compliance program designed to root out misbehavior? Are the policies and procedures that underpin the program likely to do the same?

The types of enforcement cases being brought are expanding. There are the usual trade fraud cases, e.g., undervalued or misclassified goods. Prosecutions for export license violations continue; especially serious are the ones involving sensitive goods going to unfriendly countries. There is the recent use of criminal prosecutions related to counterfeit goods. There are also criminal prosecutions for goods subject to antidumping duty misdeclared as originating in a third country. There is a recent False Claims Act case involving misdeclared goods. There are Foreign Corrupt Practices Act enforcement actions also involving misdeclared goods, and the list goes on (and does not even begin to mention the types of cases your competitors could pursue). What is on the horizon is the expansion of the types of charges to such grounds as bribery, money laundering, false statements, and other types of financial crimes. It would also not be surprising to see increasing instances of individuals being charged.

For legitimate companies, there are ways to root out these mistakes before they become systemic and that is through a strong compliance program that regularly reviews transactions for their accuracy (and those reviews should be conducted by staff other than the individuals who made the original declarations). Remember, my business partner messed up is not an excuse. Smaller companies are always faced with too few staff to correctly perform all the functions needed. While the Department of Justice does consider the size of the company, that does not mean because you are small you get a free pass.

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international trade



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With the ever increasing focus on compliance, if you are put in the position of having to interact with the U.S. Attorney's Office, it is obviously a serious matter. The goal should be to get the situation resolved as quickly as possible. Whether that resolution is one where the AUSA is interested in pursuing a criminal case, but can be convinced to go civil or decline to prosecute, or whether the matter has to be tried to be resolved, there are two other critical factors to the AUSA in making a final decision. First, did the matter come to light because the company disclosed it? Second, what level of cooperation has the company exercised in seeking to resolve the matter?

Regarding voluntary disclosures, if the agents are at your door, it's too late. You have to tell the government before it starts coming after you. Whereas, on the import side, prior disclosures are not generally disclosed publicly absent court action, for exports, disclosures can end up with enforcement action and then become public along with the resulting fine. So, if you are going to make a disclosure, think twice before doing it yourself. Remember that disclosure could end up in the hands of an AUSA, so how it is worded is critically important.

Turning finally to the question of cooperation, the concept here means such things as turning others in, providing evidence (helpful and adverse), and working with Justice in a generally cooperative manner to resolve the matter. Clearly, there will be situations where there are disagreements, but that is for the lawyers to fight out. Most of the time those disagreements can be resolved. If not, litigation may be the only choice, as painful as that can often become.

In any case, what the comments from this AUSA remind us is that compliance remains a hot topic, and making sure your program is current, robust, properly documented, and being followed is never old news!