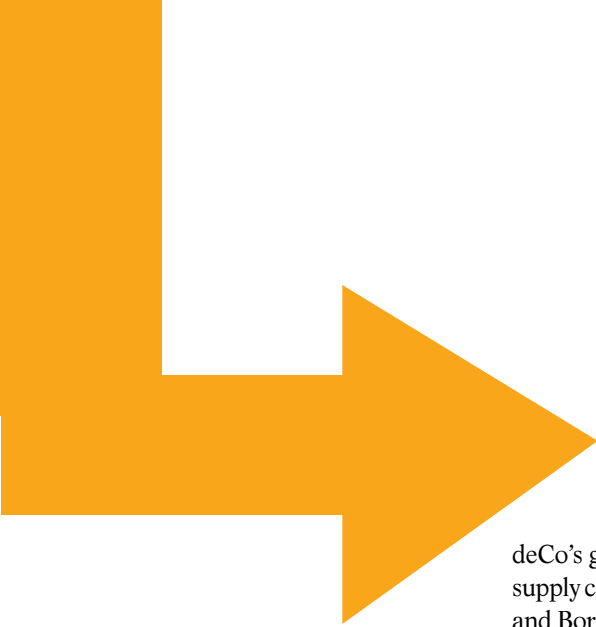




Compliance Programs for

Importing




Imagine a US company with foreign manufacturing subsidiaries, sales offices, and distribution operations. This company, USTradeCo, makes and sells widgets both in the United States and abroad. One day USTradeCo's general counsel gets a call from the vice president of supply chain, who reports that the local office of US Customs and Border Protection (CBP) has told him that the company has been scheduled for an audit of its importing activities, and that CBP is curious, among other things, about whether the company has declared its payments of royalties and licensing fees to foreign entities on its customs paperwork.

Later that morning, the general counsel gets another call from the same vice president, who tells him that an agent from the Bureau of Industry and Commerce (BIS) has called him and is curious about certain sales of US produced widgets the company's overseas subsidiaries have made to nuclear facilities in India and Russia. He wants information about the exported widgets' functional capabilities, as well as information about the foreign purchasers and their planned end uses for the widgets. The BIS official said an administrative subpoena for these documents would be faxed over soon.

When the somewhat shell-shocked general counsel relates the morning's events to the CEO at lunch, the CEO asks, "What internal controls do we have in place to deal with these kinds of business activities? Have they been effective? Are we in trouble here?" The GC is forced to respond that when he asked the supply chain VP the same questions, the VP replied that the company has always relied on its freight forwarders and customs brokers to keep things square with the authorities. "The truth is, we don't know if what we have been doing is OK or not," the GC admits. It appears the company is not prepared to respond.

and Exporting

By Roger McCrary and Kenneth G. Weigel



While the timing of the government's communications in the described scenario is unlikely, the compliance risks that accompany the benefits of ever-expanding international trade are very real. Today, it is hard to find a company that is not involved, to some extent, in importing or exporting. Sometimes companies engage unknowingly in activities that trigger legal obligations under the import or export laws. For example, US law provides that a domestic company which sells merchandise in the United States to a foreign entity for delivery to a freight forwarder for exportation will be the exporter of record for US regulatory purposes, and is subject to the full panoply of regulatory obligations connected with the status of "exporter of record."¹ Similarly, a US company that issues a NAFTA certificate in support of its domestically sold product has engaged in international trade, to the point of exposing itself to the possibility of an audit by a foreign government.² Now consider the company that is consciously engaged in international trade, and how many more opportunities exist for trade-related compliance issues to arise. In-house lawyers must play a role in ensuring their companies understand and comply with the many laws, regulations, and rules that apply to their importing and exporting activities.

At the fundamental level, implementing an import or export compliance program is simply good business practice. Failure to abide by import and export requirements can result in significant adverse consequences to a company. In the export area, fines and penalties are possible, and have reached eight figures in certain cases, but the draconian remedy is denial of export privileges (wherein the offending company is prohibited from exporting). In the import area, significant fines and penalties are possible, and can reach the multi-million dollar level. In extreme cases, criminal penalties have been levied against companies and individuals for import and export violations. Also, where a company's international trade activities can have a material bearing on its financial reporting, Sarbanes-Oxley requires companies to have provable internal controls in place to ensure accurate financial reporting. Even foreign governments can levy painful monetary penalties and impose other sanctions for importing and exporting missteps. These consequences mandate import and export compliance programs and the attention of in-house counsel to these activities.



ROGER MCCRARY is senior counsel, corporate law and compliance, for Bayer Corporation. He also serves as counsel to Bayer's political action committee (BAYPAC) and their Technology Services division, and he was formerly director and counsel of the company's International Trade and Compliance Group. He graduated from Michigan State University's Detroit College of Law and has since worked in both law firm and corporate environments. He can be reached at roger.mccrary.b@bayer.com.



KENNETH G. WEIGEL is co-leader of the International Trade Regulatory Group at Alston & Bird, and an authority on international trade regulation law with over 25 years experience in the practice area. His recent activities have included focused assessments by US Customs and Border Protection and advice on security issues in trade. He received his JD from George Washington University. He can be reached at ken.weigel@alston.com.

In considering your company's import and export compliance programs, the authors offer the following program components and best practices:

1. Compliance Can Never be Completely Outsourced—Have an Internal Compliance Function

In our example, USTradeCo thought it had outsourced its importing and exporting compliance to freight forwarders and customs brokers. As a legal matter, however, liability for a company's international trade activities rests with the company, not with its forwarders or brokers. The authorities will look to the company for ongoing compliance and when violations occur. While it is possible to outsource import and export *operations*, companies cannot, as a practical matter, outsource *compliance*, i.e., the requirement that those operations comply with applicable laws and regulations.

In our experience, outsourced *operational* activities must be supervised. Failure to supervise such activities frequently results in compliance nonconformities for the unsuspecting company, which if discovered by the authorities can result in punitive action against the company. Specifically, the government will pursue the company for any violations, and the company will then have to deal with the consequences of not having a compliance program in place. Providers of outsourced *operational* services typically do not

agree to indemnify the companies they serve, and in those few cases where they do agree to indemnify, their liability is usually limited to a nominal amount. Thus, the company will likely not be fully reimbursed for the penalties it ends up paying for the mistakes of its service provider. Other related costs such as attorneys' fees will also most likely have to be borne by the company.

To avoid this situation, we recommend that the company create and maintain a compliance function to govern its import and export activities, whether these activities are performed in-house or outsourced. This function should be supported by the legal department.

In our example, USTradeCo had outsourced its importing and exporting through the supply chain. USTradeCo has no internal compliance program which can be called upon to respond to the inquiries of CBP and BIS. USTradeCo is in a situation that will be perceived as inadequate by both BIS and CBP.

2. Compliance Programs Address a Company's Risks in International Trade

To design an effective import or export compliance program, the company must first recognize that the past practice of US government scrutiny occurring when the merchandise crossed the border has now been replaced by pre-transaction data collection and post-transaction audits. Getting the goods across the border and released from government custody is now perhaps the easiest part of the import or export transaction. Even the documentation filed with the government is generally reviewed for accuracy and completeness subsequent to the movement of the goods. With this in mind, a compliance program must address the processes that need to occur before the goods cross the border, and the processes that need to occur after they cross the border. Basically, before crossing, facts must be learned and documents prepared to describe fully and accurately the necessary details of the transaction. After the crossing, what was declared must be reviewed to ensure the declaration was done correctly based on the facts.

As achieving compliance is met through a risk management system, an effective international trade compliance program must be custom-designed to address the risks the company has identified in its importing and exporting activities. The US government essentially performs a risk assessment when it reviews a company's importing or exporting operations and this is the place to start for a company implementing or testing a compliance program. Performing such a risk assessment requires examining the company's importing or exporting activities and determining what issues can arise in those trade flows.

Once risks are identified, compliance personnel need to analyze those risks and, to the extent possible, create reasonable processes and procedures to ensure that the risks are monitored and do not violate the law. At the same time, the processes and procedures must have as little impact as possible on day-to-day business operations. In this regard, a compliance program should be supportive of existing company operations, procedures, and policies to the extent possible and tailored to fit a company's operations. Typically, there are many ways to address risks, and the successful compliance programs are the ones that serve as an overlay to the company's existing processes and procedures. A compliance program is not useful unless it actually works in practice. One recipe for ensuring push-back when trying to implement a compliance program is to insist that significant changes in operations are needed to become compliant. Experience shows that in the vast majority of cases, business and subject matter knowledge coupled with intelligent analysis will result in a compliance program that does not require an operational overhaul, and indeed will result in increases in efficiency and ease of work for the program's adherents.

Referring back to USTradeCo, CBP wanted to know details of USTradeCo's financial relationships with its foreign suppliers. Why? Because in those types of trade flows, CBP knows that many companies ignore the fact that royalties and license fees paid on imported merchandise are frequently dutiable. CBP audits are intended, in part, to quantify unrecognized revenue, collect it, and if necessary, penalize offending companies. Likewise, BIS wanted to know about USTradeCo's sales to foreign nuclear facilities because most exports to these kinds of end users require export licenses, and BIS knows that companies often will not obtain a license because their product is benign and they do not

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understand the nature of, and policy goals surrounding, the governing export control provision. Thus, the government has identified two risks for the company that should have been addressed with in-house procedures and processes. Now, USTradeCo is being forced to play catch up by CBP and BIS. Its next steps should be to examine risks in its operations and create the beginnings of a compliance function to respond to their requests.

3. Compliance Requires Knowledge, Authority, and Communication

To be able to take responsibility, create accountability, and successfully achieve compliance, the company needs an appropriate knowledge base to oversee the compliance function. Another way to say this is that the company requires a “center of expertise” in imports or in exports, or both.

The center of expertise could consist of one person, or it

Trade Compliance Function

While there is no perfect home for the trade compliance function, some homes are certainly better than others. In deciding where to locate the function, consider:

- **Can the function operate independently?**

Compliance, a long-term process that seeks a sustained level of compliant operational performance, is frequently at odds with business needs, both perceived and real. Elements of a compliance program may be ignored due to operational pressures. Thus, locating export compliance in a sales or shipping department is generally not a good idea. Similarly, locating import compliance in the supply chain department is usually ill-advised. If the compliance positions are located at the higher management level in the group, these locations may prove satisfactory. Even then, however, compliance is often not part of the performance metrics of such departments. In sum, the segregation of compliance from business needs is typically needed to provide effective internal control. Thus, a location in the legal, tax or finance group is recommended when the primary consideration is independence of operation.

- **Are resources available?**

The function should be located where growth is possible and support is available. Compliance is a cost center; not a profit generator, and thus will negatively impact the bottom line of its department. On the other hand, similarities between the compliance function and the tax or legal functions may indicate that compliance function is a good fit for either department, and in these cost center departments, resources should be more readily available as reasonably needed. In any respect, the support of a strong legal, finance or tax department usually results in sufficient resources to sustain a compliance program over the long term.

- **Can the function operate efficiently?**

As mentioned above, compliance processes and procedures work best when they overlay the company’s operations. As exports are a component of sales and shipping, and imports

are a component of the purchasing, shipping/logistics/supply chain and manufacturing functions, location of the compliance function in one of these areas should facilitate the exchange of business information, which is a key part of the compliance knowledge base. Location in one of these operational areas also facilitates coordination of work. In contrast, location in tax, finance or legal can isolate the function and result in the perception that the compliance function lacks experience with operational processes and systems. Location outside an operations department may also create the perception that the compliance function is less able to make quick decisions, as perceived to be required by operations.

- **Other factors: Intangibles**

Decision makers should also take into account any intangible factors when deciding on where to locate the import or export compliance function. For example, sometimes it seems clear that the function will do well in a particular location simply because of “fit.” In further illustration, imagine the company’s finance department head used to work for CBP; thus locating compliance under this person may be a good fit. Sometimes, an intangible factor like fit can be the deciding factor.

- **Relocation**

Compliance programs, once located, are not immovable. Indeed, they may need to be moved for various reasons. For example, a company may have had its import compliance program in the traffic department. Thereafter, the company created a complete compliance function which was designed to cover all areas, including import compliance. As the new overall compliance function was located in the tax department, import compliance was moved from the traffic department to the tax department. In another instance, location of the export compliance function in the order fulfillment department resulted in pressure on compliance from business personnel who were anxious to complete export sales. To alleviate this pressure, the function was moved to the legal department.

could encompass an entire department. The size of the center of expertise will depend on a number of factors, including the complexity and volume of the company's import and export transactions, the types of risks that are faced, and the degree of automation present in the operational functions.

A center of expertise requires two key knowledge sets:

- A. The first key knowledge set is knowledge of the company's business. This business knowledge must encompass more than just the importing or exporting activities of the company. An intuitive understanding of core business processes, (e.g., products, purchasing, manufacturing, sales, and finance) is a necessary prerequisite to effective compliance.
- B. The second key knowledge set is comprehension of the relevant legal requirements. The center of expertise must have a firm grasp of the legal requirements on an ongoing basis to be able to determine if trade activities are compliant. The center of expertise need not be an attorney or other legal expert, but he or she must comprehend the general legal requirements applicable to the company's operations. To that end, this knowledge may reside in more than one person. This is an area where in-house counsel can play a critical role in ensuring the appropriate level of knowledge is maintained. Frequently, outside counsel will also play a role here. Outside counsel should be the final piece needed to complete this knowledge base, not the only piece.

Business facilitation, while a necessary part of a **top-shelf program**, should not be allowed to **overshadow** the function's core objectives, which rightfully **focus** on achieving **provable levels** of compliant activity.

With both key knowledge sets in place, the center of expertise can bridge the gap between legal requirements and business operations.

While knowledge and expertise can command respect, the center of expertise must also possess the authority necessary to get the job done. The center of expertise must be heard and respected by management personnel, and obeyed by operations personnel. Our experience demonstrates that the person in charge of import and export (international trade) compliance should be, depending on the size and culture of the company, at a manager level. Too low a rank can inhibit optimal program performance. The right rank will send the message to operations personnel that the company is serious about its commitment to compliance.

Finally, the center of expertise must be able to communicate effectively and efficiently. Management must be properly apprised of issues and their resolution, and operational personnel must be effectively informed as to appropriate practices. The leader of the compliance function must be able to perform both of these tasks with sensitivity, and possess sufficient gravitas to be convincing when directing company activities.

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ACC Docket

Cracking the Customs Code: How to Export to Europe Effectively (2006). It has happened to more than one unsuspecting company: A deal is struck to import a product into an EU member state, with importing costs borne by the importer and based on experience with another EU member state. Everyone is happy with the deal, until the importer discovers the new country's customs agency does not agree with the classification granted elsewhere, and the new country is going to assess a hefty duty that will nearly wipe out all profit on the deal. Lesson: While customs duties worldwide may be falling, they can represent a sizable deduction from the bottom line unless you account for them early in product planning and marketing discussions. Learn how in this article. www.acc.com/resource/v7234

Books

A Basic Guide to Exporting (2005). Guidance on developing an export strategy, a marketing plan, and general exporting advice can be found in this publication developed by the US Department of Commerce. www.acc.com/resource/v6447

Sample Forms and Policies

- *Export Controls—Employee Guidelines* (2002). Provides a basic understanding of export restrictions. www.acc.com/resource/v3473
- *Kraft Foods Code of Conduct for Compliance and Integrity* (2004). www.acc.com/resource/v498
- *Purchase Order Terms and Conditions for US* (2006). www.acc.com/resource/v7494

In our example, USTradeCo left responsibility for its importing and exporting activities solely to the Supply Chain group. Supply Chain in turn believed it outsourced compliance for these activities along with the activities. As a result of the government inquiries, however, the Supply Chain group has been forced to seek help of the general counsel to cobble together the expertise needed to properly respond to the inquiries. These inquiries will force USTradeCo to begin creation of a compliance function and to put one or more individuals in charge of responding to these inquiries. Aware of the need for appropriately high ranking personnel to be in charge, the general counsel recommends to the VP Supply Chain that she designate an individual in the Supply Chain group at a manager level to be responsible for imports and another person at a manager level to be responsible for exports, and to lead the teams that will respond to the government inquiries.

4. Location of the Compliance Function

An important factor to consider is where the compliance function should be located in the organization. There is no universally correct location for this function. Different companies have located the compliance function in various departments, with varying results. Typically, companies locate the compliance function in the legal, procurement, logistics/supply chain, finance or tax department. Proper location of the function can be a key factor in its success or failure. Companies should invest suitable thought and discussion into decision. Likewise, if the compliance program is not as effective as it should be, or is in danger of this dissolving due to business pressures on its sponsoring department, a move to a new department can greatly help with the overall performance of the function, or even preserve its existence.

In deciding location of the function, it may be helpful to note that in the typical company, both the legal and tax departments play a combination role of business facilitation and compliance. In contrast, purchasing, sales, manufacturing, receiving, and shipping focus almost solely on business operations. Since the compliance function is designed to govern business activities, care must be taken to ensure that its location is properly balanced between business facilitation and compliance enforcement. The bottom line is that business facilitation, while a necessary part of a top-shelf program, should not be allowed to overshadow the function's core objectives, which rightfully focus on achieving provable levels of compliant activity.

In our example, USTradeCo had the importing and exporting function in the Supply Chain Group. To respond to the CBP inquiry, an individual in the Supply Chain Group was designated to work with USTradeCo's broker and the legal department. He is coordinating with purchasing and

receiving, as well as with the finance and accounts payable departments, to pull together the needed information. Similarly, on the BIS inquiry, another Supply Chain Group employee is working with the company's forwarder and with the legal department. She is also working with sales, customer service, and shipping departments to collect information on the questioned shipments. The company has decided that keeping the compliance function in the Supply Chain Group is necessary for being able to respond to the two inquiries, but plans to create a compliance function in a more independent department moving forward.

5. The Role of In-house and Outside Counsel in Compliance Programs

Importing and exporting activities are governed by sophisticated laws and regulations, leading at times to technical legal issues with potentially significant liabilities. Therefore, there is a critical role for in-house counsel in the import and export compliance functions. The extent of that role will differ by company and individual.

The primary role of outside counsel is to provide supplementary expertise and representation as needed to compliment the company's in-house capabilities. Thus, the role of outside counsel depends on the role of in-house counsel. Moreover, experience shows that this in-house—outside counsel relationship is a fluid situation, as the responsibilities and knowledge of in-house counsel change over time.

In most companies, import and export responsibilities should be assigned to one in-house attorney. By assigned, we are suggesting that responsibility for these areas be part of the lawyer's job description. Whether one lawyer should be responsible for imports and another responsible for exports, or one lawyer should be responsible for both, will vary from company to company. Should the company's scope of importing and exporting activities allow, one attorney may be sufficient for both areas, as there are substantive similarities between import and export law. Our point, however, is that the primary responsibility for exports and for imports be focused on no more than two in-house lawyers (one import and one export) so that the organization may coordinate activities and also develop internal expertise. Through shared interaction on various issues over time, outside counsel can educate in-house counsel, thereby enabling the company to increase the role of in-house counsel and, assuming the volume of work permits, gain important efficiencies in this subject matter. The resulting cost savings from decreased use of outside counsel can be used to demonstrate a positive return on investment for the compliance function.

Once the in-house lawyer is identified, role specifics must be decided. The in-house counsel's role might be that of a gatekeeper, liaising between compliance personnel and outside counsel. Or, a more experienced in-house counsel could handle the routine compliance matters, reserving outside counsel for issues like audits and investigations, as well as issues with a public or scandalous dimension where outside counsel may add value as the company's face to the authorities, or simply act as a second set of eyes.

Proper use of outside counsel results in superior legal results and increased value. But which outside counsel should be selected to further the company's goals? One consideration is finding the appropriate type and level of knowledge. Import law and export law, while similar in rubric, are technical, regulatory-based fields of endeavor, and while some attorneys achieve

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some level of competency in both skills, there are few who are true experts in both. On the other hand, “trade” is also often a different substantive legal area. If the company’s import and export issues are relatively simple, one trade generalist may fit the bill nicely. If trade issues are more complicated and require some measure of subtlety in their resolution, it may be advisable to retain a specialist for each subject matter. In any event, the company should ask candidate outside counsel about their experience in the specific substantive area at issue.

In our US TradeCo example, until the Supply Chain VP called the general counsel, the legal department played no role in importing or exporting. The Supply Chain Group handled operational issues by retaining a customs broker for imports and a freight forwarder for exports. As the goods were moving uninterruptedly back and forth across the border, with only occasional, easily answered questions being raised by the government, no issues had bubbled up to the legal department. Now, the legal department was faced with new issues that required immediate action. The general counsel assigned an in-house lawyer familiar with government investigations and audits to both issues and, relying on references from colleagues, located outside counsel to take the lead with these inquiries. Thus, USTradeCo now has a responsible in-house counsel to work with the Supply Chain Group and outside counsel to formulate appropriate responses to the inquiries.

Unlike a compliance policy, a procedure is not an aspirational document.

6. Elements of Top-Shelf Compliance Programs

As the company scrambles to respond to the CBP and BIS inquiries, USTradeCo’s general counsel decides that USTradeCo needs a compliance program in these areas. In considering this activity, we suggest that the most effective trade compliance programs share certain features, which include the following:

a. Management Commitment

This characteristic of successful corporate endeavors is so well known, that to mention it risks stating the obvious. However, the proven commitment to compliance of senior management confers three benefits:

1. Employees come to believe that the organization is seri-

ous about enforcing compliance, and appropriately align their conduct, thus increasing compliance performance;

2. Commitment tends to be expressed through the implementation of responsibility and accountability mechanisms, as well as the provision of resources, thus creating an atmosphere wherein artificial obstacles to compliance improvement are removed; and
3. Greater credibility with government agencies, which have increasingly learned that evidence of corporate commitment signals the existence of compliant import and export activities.

Evidence of this commitment is largely found in the program elements that follow. After all, the commitment must be demonstrable, and if the following features are not present in a program, a company will be hard-pressed to say that its management is committed to effective compliance.

b. Compliance Policy

The company should have a written compliance policy for all its international trade activities. The company may choose to have one overarching policy, or it may find multiple policies dealing with individual compliance areas, e.g., exports, imports, Foreign Corrupt Practices Act, more helpful. However many policies a company may wish to implement, each policy should be in writing and should be signed by a high-level executive (VP or higher). Ideally, this executive is the person ultimately responsible for the area at issue. On the other hand, designating a high level figure head can create problems, especially if she is interviewed by government agents and found to be merely a figurehead without an active compliance role.

A compliance policy is an aspirational document, and in broad fashion should describe the company’s values, set forth the company’s compliance objectives, and include a stated commitment to comply with current applicable regulatory and statutory requirements. The policy may also include a commitment to continuous improvement and describe how it is to be periodically reviewed and revised. The policy must be communicated to all employees and must be consistent with other company policies.

c. Procedures

Not many programs will achieve satisfactory results without processes in place to guide activities, and trade compliance is no different. Procedures are the backbone of the compliance program. They implement the compliance policy at the operational level. Examples of import procedures can be found on CBP’s website.³ Examples of export procedures can be found on the website of BIS.⁴

A company has numerous business activities (e.g., purchasing, sales, finance-A/P, shipping, receiving, and customer service) that are affected by import and export laws and regulations. Risk areas in each such business activity should be governed by appropriate procedural controls. The objective is to create consistency in how the company handles the risks that arise in these trade-related activities. Procedures, if well written, understood and followed by employees, offer the best chance to achieve consistently compliant performance.

Unlike a compliance policy, a procedure is not an aspirational document. A procedure is used to do things, and as such it must reflect business reality. Therefore operational personnel should be involved in writing, reviewing, and approving procedures. One of the biggest benefits of involving operational personnel in the drafting of procedures is they become stakeholders in compliance. The author of a procedure is much more likely to comply with it than someone who has had it imposed upon him.

Procedures must be updated regularly as laws and regulations change, and in response to business developments. Counsel should ensure that procedures accurately reflect relevant legal requirements.

Compliance procedures should be grouped according to subject matter. For example, a company should have both an import procedures manual, and an export procedures manual. These manuals should be widely available to all employees. We recommend that manuals be maintained in electronic form. Finally, historical versions of obsolete procedures should be retained for both internal reference and external use. An example of a beneficial external use is when CBP audits a company's importing conduct, CBP can be shown the procedure manual's revision history, thus demonstrating the company's identification of compliance risks and its efforts to design ever-better controls for those risks.

d. Compliance Organization

As discussed previously, the company must establish a proper compliance knowledge base—the center of expertise—empower it, and locate it appropriately so it can effectively govern trade activities. Additionally, the center of expertise needs a web of support surrounding it. The center of expertise is at the core of the compliance organization. Radiating from it are lines of responsibility and accountability upward to superiors, downward to operational personnel, and across to needed peer supports. For example, the center of expertise should report to a genuinely interested and invested senior executive, with the clout to drive change when needed and whose

everyday support positively colors the compliance effort. The company should foster a network of peers that can be called upon to offer business input into, and support for, program elements. Lastly, the organization should be structured so that the center of expertise has the authority to enforce the company's compliance policy on an operational level. The import and export departments should know that they are accountable to the center of expertise for their compliance performance.

e. Training

One of the most important services the compliance function can provide is training on the company's compliance program. We recommend that every employee receive basic training on international trade compliance, and every employee with a connection to the company's trade activities also receive targeted, recurring training on their role in importing or exporting. The trainer should first identify all personnel with a connection to trade by function and area of responsibility. The trainer may then create training rosters by subject matter. Training may be conducted one-on-one or in groups; it may be done both in person and electronically. Training should include competency testing and the results should be recorded and part of the employee's evaluation. Deficiencies uncovered in training must be addressed with appropriate corrective action, and results documented. Effective, competency-based training has been shown to give superior results in an organization's compliance performance. Also, US authorities may give great weight to a good training program in certain enforcement scenarios. Training is an investment that pays dividends.

f. Auditing

Once the company has made a significant investment in its compliance program, with policies, procedures, training, and etc., it should act to test and to protect that investment. Periodic audits under the supervision and control of the legal department are the company's best bet to ensure its compliance program is functioning effectively and addressing all identified risks. At the fundamental level, an audit consists of comparing procedures with operations, intentions with actions. It answers the question, is the company doing what it says it is doing with respect to compliance?

Audits should mimic the authorities' style of auditing. For example, a company's review of its import activities should mimic CBP's current audit methodology, known as a Focused Assessment.⁵ The internal auditor can download CBP's Focused Assessment manual and related materials from CBP's website, as well as confer with counsel to design an approach that reflects how the regulator would

examine the company, keeping in mind the company's previously identified risks. Outside counsel can add value by looking for new, unidentified risks.

Since the goal of an audit is to determine whether the compliance program is working effectively, audits should target unusual transactions as well as routine ones. To identify audit targets, the company can use government data, such as CBP's ACE portal, and it can also review internal data. Some companies use internal audit templates with a worksheet for each audit area.

From time to time, an audit will disclose a significant compliance issue. In all such cases, the company, under the supervision and control of the legal department, should perform a root cause analysis of the compliance nonconformity and take appropriate corrective action. A record should be made of this activity as it is strong evidence of an effective compliance program.

Audits should be conducted at the request of counsel, and the attorney-client privilege should be protected where possible. Audit results should be freely discussed with personnel connected to the subject of audit, with those who are essential to corrective action efforts, and with senior management as needed.

g. Automation

One of the key objectives of a compliance program is consistency of approach to similar issues. The company wants to avoid treating similar events differently as inconsistency leads to nonconformity, and nonconformity tends to lead to violations of governing laws and regulations. Automation of compliance processes greatly enhances the company's efforts to achieve consistency of approach, and therefore of result. For example, if the company depends on an employee to check each new customer against the various US government control lists, mistakes can occur that otherwise would not with automation. An automated denied parties screening system will always have updated data, will never get tired and forget to check a list, and will not allow the sales manager to persuade it to allow the shipment even though a red flag has been triggered. Automated systems also feature electronic audit trails and other helpful features.

Automation may often be supported economically based on its positive return on investment. As international trade increases, and the number of, and complexity of, laws and regulations multiply, automation of compliance processes is highly recommended. Automation allows complex organizations to take their compliance to the next level.

It is a year later at USTradeCo and the general counsel is hosting a meeting of the company's Trade Compliance


Network. The director of international trade compliance reports on the resolution of the two matters:

The CBP auditor has recognized we have come a long way. With our new company policy, and the Trade Compliance Network in place, CBP is confident we have management involvement in these issues. With our new procedures, CBP sees that we have a handle on the royalties and license fees and other financial components of our imports' entered value, and they are confident we are paying the right amount of duties.

The BIS auditor has applauded us for our training efforts and for our audits of our overseas subsidiaries. Now here at corporate headquarters we know what is being shipped where, and with our new automated systems, we have a proven record of compliance with the export laws in our shipments worldwide.

After congratulations are shared, the GC adds:

Our external Sarbanes-Oxley auditors have signaled their satisfaction with this area of our internal controls. They agree with us that our international trade activities are accurately reported throughout the company's financials.

While no program can guarantee a perfect compliance outcome, implementation of these best practices will help your company become a top-shelf compliance practitioner. We encourage you to get to work on your own happy ending. 

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NOTES

1. See 15 C.F.R. §§ 30.4 (c) (census regulation requirements) and 758.5 (b) (Bureau of Industry and Security, Export Administration Regulations requirements). The domestic company can avoid being designated as exporter of record if it takes certain steps. The status of exporter of record is not an unavoidable burden in this scenario.
2. See 19 C.F.R. § 163.1 (creating a NAFTA Certificate of Origin, pursuant to 19 C.F.R. § 181.11(b), is a trade activity, the record of which must be maintained for Custom's inspection purposes); and 19 C.F.R. § 163.2(c) (any person who exports goods to Canada or Mexico for which a Certificate of Origin was completed and signed pursuant to the North American Free Trade Agreement must maintain records).
3. www.cbp.gov/xp/cgov/import/reg_audit/focused_assessment/fap_documents/.
4. www.bis.doc.gov/ComplianceAndEnforcement/ExportManagementSystems.htm.
5. The Compliance Assessment Team Document (CAT Kit) at www.cbp.gov/xp/cgov/import/reg_audit/archive/compliance_assessment/.