

# Export and Import Compliance Programs

*Designing, Implementing, and Updating Systems  
to Comply with U.S. Export and Import Laws*

## Introduction

This is a guideline to help companies design and implement effective systems for complying with export and import (customs) laws. Such programs are known by a variety of names, including export managements systems (EMS), preventative or due diligence programs, and internal compliance programs (ICPs). We will use the phrase internal compliance program, with the acronym ICP.

There is no single, correct way for designing and implementing an ICP. However, the price for this latitude is that you must make sure your ICP incorporates and anticipates legal requirements. You should consider this guide as only a generalized introduction. It's not comprehensive and it's not legal advice customized for your company's unique needs. You still need to do a great deal of additional homework, including making sure that the information provided within this guide remains current and correct.

## 1. COMMIT TO HAVING AN EXPORT/IMPORT COMPLIANCE PROGRAM

Following are a few pros and cons of a good ICP:

### A. PROS

1. No Matter What, You Must Have a Reliable Method for Ensuring that Your Company is complying with Export and Import Laws

Designing a good ICP may be initially expensive and time-consuming. However, ICPs are now standard in the corporate world and for international merchants. If you don't have an ICP and your company is caught violating an export or import law, you will be sorry. You will then be spending so much more money and time, including paying fines and penalties and working anxiously trying to re-earn the Government's good will, when some simple preventative measures could have spared you of needless pain. Perhaps most gruesome of all, you risk years of intrusive scrutiny from government inspectors.

2. No Matter What, You Must Have a Reliable Method of Keeping Export and Import Records and Producing Those Records Upon Demand From the Government. U.S. federal law imposes significant recordkeeping responsibilities on both importers and exporters, and their agents. Violators risk harsh penalties, delays of shipments, and the enmity of government auditors. The list is extensive of the documents you must keep and must produce upon the Government's demand (see Commandment 9 and 10, below). The only adequate way to know if you are complying with these recordkeeping requirements is to have an ICP in place.

3. You Can Incorporate the Laws of Other Countries. Your compliance obligations don't stop at USA borders. Other nations are becoming as prolific as the USA in regulating international trade and investment. Countries are forming regional alliances to create additional opportunities and barriers for transnational trade. Supra-national organizations (like the World Trade Organization) are creating new forums for resolving trade disputes. It is becoming increasingly difficult to even think about complying with the laws of other jurisdictions without first having a good ICP in place.

4. A Good ICP will Help You Keep a Step Ahead of the Government. You'll be able to respond to and correct problems before the Government ever finds out. The more you know, the more options you have for dealing with export or import violations. For example, although there is no affirmative duty to report a violation to the Government, your company has the option of disclosing the violation to the Government. A "voluntary self-disclosure" may convince the Government to decrease the penalty or not to penalize your company at all. Even if you don't disclose, you will know how to prevent this type of violation in the future.

5. You Can Customize Your ICP. Although all good ICPs share basic characteristics, your company has a great deal of flexibility in designing its own ICPs. The Government does not require that you institute an ICP (although it does impose qualifications to certify your ICP for special benefits). Everyone understands that any ICP must reflect your company's unique needs and a corporate culture. Think of an ICP as another valuable tool that will help your company plan its business decisions.

6. If the Government Finds Violations, an honest ICP May Reduce Bad Consequences. A good, honest ICP tends to positively impress government

officials who uncover company violations or an administrative body or court that imposes sanctions for those violations.

## B. CONS

1. A Good ICP Costs Money and Time. You may have to spend much human and financial capital instituting a good ICP, especially if your company has been lax in its compliance efforts. But, again, pay now or pay a lot more later (see Commandment 1(A)(1), above).

2. A Crummy ICP is Worse Than Not Having One. An ICP cannot guarantee that your company won't be penalized criminally or administratively. How much your exposure is reduced depends on how sincere your company is in designing and implementing a good ICP. A half-hearted attempt won't impress the Government, and surely cannot provide the needed guidance for your exporting and importing needs.

3. An Incriminating Paper Trail. A good ICP will always assume that violations will be discovered (because they will). You don't want to make an incriminating paper trail that will support lawsuits or criminal prosecutions against your company. There are ways to minimize risks, and a competent attorney can advise you how best to safeguard your information and secrets (see Commandment 12, below).

## C. WHAT IF YOU ALREADY HAVE AN ICP?

Whatever compliance program you already have in place, it cannot be a one-time, half-hearted, perfunctory effort. A good ICP must be organic, constantly growing and responding to your company needs, and incorporating vital personnel in a free-flow of information and adjustment. An ICP could always use some tweaking, some refinement to make sure your company is complying as effortlessly as possible with export and import laws. Some ICPs may need to be totally revamped to reflect the company's renewed efforts at compliance and to reflect changes in the law.

## 2. DESIGN A SYSTEM TO REFLECT YOUR CORPORATE CULTURE

There is no single, correct way to design, implement, and update an ICP. However, here are some issues to consider:

### A. DECIDE ON HOW MUCH YOU WANT TO CENTRALIZE YOUR EXPORT AND IMPORT TASKS

A good ICP consolidates information and company policies so that it becomes a dependable guide for everyone with exporting or importing responsibilities. However, whether functions, tasks, and responsibilities should also be centralized depends on the corporation. There are some things to consider: Be careful about mingling corporate functions that may compromise compliance objectives (for example, mixing sales with export/import responsibilities). Be careful about assigning all or most compliance responsibilities to a person who is not sufficiently high in the corporate hierarchy to take remedial actions. Have backups in place in case an office or a key compliance person leaves or disappears.

Your company may wish to decentralize some of its exporting or importing functions. Decentralization is not the same as forgoing corporate oversight of compliance efforts. Decentralization merely means that some functions or employees related to exporting or importing are dispersed in your company. The aim always remains the same: create a unified vision of what your ICP does and a unified method of accomplishing that goal.

### B. DECIDE WHETHER TO SEPARATE YOUR EXPORT/IMPORT ICP FROM OTHER CORPORATE COMPLIANCE SYSTEMS.

Depending on the size of your company, you probably already have compliance and recordkeeping programs that cover other legal issues (environmental, employment, tax, etc.). Most companies will find it easier to comply with the law by segregating their exporting/importing ICP from these existing programs.

If your company both imports and exports, a more difficult question is whether to consolidate exporting and importing into one ICP. Although different government agencies sometimes share responsibilities for enforcing both export and import laws (for example, the Bureau of Export Administration and the US Customs Service both enforce export laws), there are still considerable differences

between the requirements imposed on exporters and importers. It may be wise to set up separate ICPs, but still make it possible for key traffic and logistics personnel to periodically exchange information.

### C. GET ELECTRONIC

If you're not automating your exporting or importing functions and records, you are way behind the competitive edge. You will be treated like a pariah by customers and the Government. You will not be able to take advantage of emerging technologies (like the internet, intranets, and EDI) or government initiatives like remote filing of export and import documents. There is no reason not to automate. Software and digital communication technologies will reduce transaction costs. Automation decreases your reliance on middle-men and consultants for preparing, keeping, and filing of export and import documents.

## 2. PICK AND EMPOWER THE RIGHT PEOPLE TO LEAD YOUR COMPLIANCE TEAM

### A. RECRUIT GOOD PEOPLE

Compliance personnel should be concerned primarily with expending reasonable efforts to comply with export and import laws. They should be able to see beyond the immediate economic bottom line, to the long-range legal exposure that your company risks by not instituting an effective ICP. Also, avoid giving compliance responsibilities to crooks.

### B. EMPOWER YOUR COMPLIANCE OFFICERS

Although your ICP should establish formal lines of authority and communication, it should also provide sufficient discretion so that compliance officers can go outside normal channels to fix existing problems. The Bureau of Export Administration suggests that "regardless of the method of export control coordination or the size of the exporting firm, the person or entity responsible should be sufficiently high in the management hierarchy to reflect a strong commitment to export control activities." Also, consider the risks of assigning major compliance duties to an in-house attorney. Will people get the wrong idea that your company considers compliance as merely a legal, not a business, concern? Also, will the dual role of the attorney/compliance officer waive the attorney-client privilege? (see Commandment 12, below).

### 3. HONOR THE LAWS

#### A. TRY TO EXCEED MINIMUM LEGAL REQUIREMENTS

Your ICP should aim as high as practical. By overcompensating, you'll avoid quibbling later with the Government on whether you met some amorphous standard. For example, if your company is required, as it is under the Customs Modernization Act, to use "reasonable care", try to be even more careful than what you think the Government expects and more careful than others in your industry. Aim beyond the letter of the law to its spirit.

#### B. INTELLECTUAL PROPERTY RIGHTS

Law regulating intellectual property rights are in utter confusion, and there are few uniform standards that apply trans-nationally. Infringement is becoming a bigger problem as international trade goes becomes electronic and as technology makes it easier to illegally copy and exploit the works of others. You must protect your intellectual property rights to the extent possible, which sometimes means registering your rights in separate jurisdictions. You should also have internal checks to make sure that you are not violating the rights of others.

#### C. TAKE ADVANTAGE OF LEGAL OPPORTUNITIES

Whatever you are exporting or importing (products, services, information, or money), governments the world over impose transactions costs on your company. These costs may take the form of regulatory directives, taxes, duties, or tariffs. Many of these transactions costs and trade barriers are being reduced or phased out entirely.

Your ICP may specify how to respond to the lowered trade barriers. Depending on the nature of your company, the lowering of barriers may mean that your company will be able to build on a competitive edge or that your market share is likely to drop. Either way, you should be prepared. Your company may wish to "tariff engineer" or redesign products to get the most favorable treatment possible under revised tariff schedules. You may also want to move production and sourcing to countries that are reducing barriers.

You should also take advantage of government certification or benefits programs provided by the Government. For example, there may be special benefits, certification, or pre-certification programs relating to drawback, cargo release, advisory opinions, classification rulings, recordkeeping, and licensing.

## D. INCORPORATE IMPORTANT EXPORT AND CUSTOMS LAWS

Here are some laws that your ICP should focus on. This list is not exhaustive:

- · Export Administration Regulations and the Export Administration Act
- · Arms Export Control Act and the International Traffic in Arms Regulations
- · Foreign Assets Control Regulations
- · Customs Modernization Act
- · Foreign Corrupt Practices Act
- · Federal Register - federal agencies continuously issue public announcements related to international trade regulation. This may include new rules, proposed rules, meetings, and additions/deletion of prohibited parties, activities, and countries.
- · International Treaties

## 5. ENFORCE YOUR ICP

### A. GET EVERYONE'S SUPPORT

Directives and policy statements must be generated, approved, and signed by the highest echelons within the company. A commitment to export and import compliance must be communicated conspicuously and regularly within the corporation. However, as a management style, top-down directives are only marginally successful. In addition to having top management support compliance, try to develop your program through inclusion of others besides top management. Line personnel know the nuts and bolts behind exporting and importing, and they will be people who actually carry out your policies.

### B. MAKE YOUR ICP SELF-POLICING AND SELF-CORRECTING

Having an ICP that is not enforced is worse than no ICP. Provide for periodic monitoring and auditing to find out whether compliance is working. In many instances, this means ensuring that contractors, suppliers, and agents are passing legal muster. Also, don't discourage reporting of violations. An ICP

should allow and encourage your employees to offer constructive criticisms, including the reporting of violations without the fear of retribution. Moreover, you don't want to violate any whistle-blower laws or be sued by an employee who was only trying in good faith to obey the law.

### C. SPELL OUT PENALTIES FOR VIOLATIONS

Your ICP should describe penalties (legal sanctions by the Government and disciplinary actions taken by your company) for violating the ICP, corporate policy, and export/import laws. Be honest, but be graphic. For example, violations of import recordkeeping laws may cost your company hundreds of thousands of dollars, or even more!

## 6. SCREEN FOR COMPLIANCE AND FOR QUALITY

Our Government uses export and import laws to punish enemies, to protect domestic industries, and to safeguard the national security. As a consequence, there are many people, companies, and even countries with whom you are prohibited from dealing with, and many items that you cannot trade. The Government tends to punish violators harshly.

Screening is a good idea even if the Government did not punish violators. Screening is part of your due diligence or standard of care. Screening merely means that rotten apples don't contaminate your company. You should be screening prospective employees to make sure that they won't commit or hide violations. You should screen contractors and agents to make sure they are reputable. You should screen your products to make sure that they are not adding to the monstrous proliferation of weapons.

If exporting, the Export Administration Regulations provide some helpful "red flags" to alert you that your product is being used in an illegal way or by someone or in some country that is prohibited.

You may hire freight forwarders, consultants, brokers, and others to assist you with your company's exporting and importing. However, your company remains ultimately responsible and liable for any mistakes. Thus, you must choose your agents well, and make sure that they too honor the letter and the spirit of your ICP.

## 7. TRAIN KEY EMPLOYEES

Compliance is a moving target. While you can become reasonably informed about the state of the law and the health of your business, you cannot remain so without continuous education and reeducation.

Both the government and private industry provide excellent compliance training, and employees involved in export or import should periodically attend seminars and workshops. However, the quality of export and import compliance training varies considerable.

The Government expects your company to attend seminars and to enlist the assistance of international trade experts as needed. The Government may reward your company if you prove that compliance training is promoted by your ICP. Thus, document all attendance at training programs.

## 8. DEVELOP AN ICP MANUAL

Not only will a written manual simplify compliance, but it also proves to the Government that your company takes compliance seriously. A compliance manual should be as short and simple as possible. Create visual aids and resources lists. For example, create matrices of documents you keep and where they are kept. You should be able to reduce any process, policy, or information to a user-friendly flowchart, checklist, or matrix,. If you can't do this, then the process, policy, or information is too complicated for others to follow. Go back to the drawing board.

Your compliance manual should list helpful contacts. Include contact information not only for people within your company, but also for key people in affiliated companies, outside legal counsel, brokers, freight forwarders, consultants, agents, and trade associations. Also list important government agencies. For example, the Bureau of Export Administration assists with classifying items that are exported, the Census Bureau provides hands-on help on how to prepare export documents, and the International Trade Administration provides "scope reviews" to let you know whether you owe antidumping duties. Also describe the process needed and authorization required before any outside firm or government agency can be consulted.

As part of your ongoing compliance training (see Commandment 7, above), you may want to develop a library of helpful resources. This can include books, videos, and software packages.

## 9. KEEP YOUR RECORDS WELL

### A. SECURITY, RETENTION, AND DESTRUCTION

Your ICP should clearly state the company's document retention and destruction policy (which should, of course, detail that documents and records are kept in a manner and for a period required by law before they are destroyed). If a private litigant or the Government request documents after they have been destroyed, and if your ICP provides for automatic destruction as a matter of course, no one should accuse your company of obstructing justice or undermining the civil discovery process.

Records are increasingly kept in electronic form. Export and import laws recognize and allow for this new medium. However, as with paper documents, there are security risks. Invest in security. Electronic security technologies are developing more quickly than our laws can keep pace. You should be aware that there may be strict legal restrictions on the use and export of these technologies. For example, presently our Government strictly limits the use and export of encryption technology.

### B. GOVERNMENT REGULATION AND AUDITING

Presently the Customs Modernization Act and the Export Administration Regulations require that you and your agents keep records for five years and in a manner that you can produce records upon a demand from the Government. Moreover, these laws expand the number of parties subject to recordkeeping requirements and detail what documents are to be kept. Violators of import or export recordkeeping requirements face stiff fines, criminal prosecution, and delay or confiscation of shipments.

## 10. PREPARE FOR GOVERNMENT AUDITS, INVESTIGATIONS, OR DEMANDS FOR DOCUMENTS

You may be investigated or audited by any number of government agencies that enforce export and import laws. Your ICP should anticipate what actions to take, including:

- Make sure that the investigating agency is following all investigative safeguards and procedures required by the law, including providing you with adequate notice of any audit or investigation, and following all procedural safeguards under a search warrant.

- Designate a "quick response" team. This includes designating a person or persons to be the company's official voice during the audit or investigation. You should also have ready the right technical personnel to retrieve records from your computer data banks. Your team may include outside consultants. An experienced international trade attorney is especially helpful in answering your questions and in being a buffer between your company and the Government.
- Decide what documents and records you will allow the Government to inspect. Although all your employees should comply fully with all legal requirements, you should not assume that government inspectors will do the same. You should know how to firmly, but politely, fend off any overreaching by the Government (outside legal counsel a definite plus with this problem). You should also not volunteer information or documents beyond your legal requirements or beyond what the investigators are requesting.
- It is hard to predict the extent of the Government's intrusion into your company's affairs. Sometimes an exchange of correspondences or phone calls appeases the Government, and sometimes the Government sets up shop within the company and reviews records and interviews employees for months. The former is likely, but be prepared for the latter.

## 11. ANTICIPATE YOUR SHIPMENTS BEING DELAYED OR CONFISCATED BY THE GOVERNMENT

The Government knows that some companies would rather risk being fined to going through the bother of setting up a good ICP. If your company reflects this philosophy, you should be aware that the Government wields an even more powerful weapon than fines -- confiscation and delay of your shipments. In the modern, just-in-time, produce-or-perish environment of international trade, your company cannot afford such delays. You may want to prepare contingency plans if your company's shipments are detained.

## 12. USE THE ATTORNEY-CLIENT PRIVILEGE TO PROTECT YOUR RECORDS AND COMMUNICATIONS FROM UNWANTED DISCLOSURE

The number and kind of consultants that are offering compliance training and guidance is proliferating. However, only a law firm can provide the substantial protection offered by the attorney-client privilege to protect your records and communications from unwanted disclosure.

To design, implement, and update an ICP, your company will review and produce documents, correspondences, and reports. You will discover violations even if your company has been earnest and diligent in its compliance efforts. Violations (depending on their kind and severity) do not necessarily reflect badly on your

company. It is impossible to be in complete compliance all the time with all the export and import laws. The best you can hope for is to have a competent ICP in place that reflects a robust, honest effort at compliance.

Once you discover violations, you must seek legal advice on how to proceed. Given the augmented efforts at monitoring and enforcing compliance, the Government may very well discover your violations. Unless protected by a privilege recognized under the law, you may be forced to produce incriminating documents and records to the Government.

Only an attorney can provide adequate and thorough legal advice and interpretation of the evolving rules, regulations, and case law. You may well discover problems during your compliance audit that require immediate legal attention. Even if not hired initially, your company may be forced to hire qualified international trade counsel to deal with these problems. Moreover, many companies enlist the assistance of outside legal counsel to augment and direct the compliance efforts provided by other consultants and professionals.

The attorney-client privilege may be available only if you enlist the advice and guidance of lawyers outside the corporation. The law does not recognize the privilege for any other professionals, not even for an attorney working for an accounting or consulting firm. It is theoretically possible, but much more problematic, for in-house counsel to maintain the privilege. The privilege is easily lost if corporate counsel deals at all with the business side of the company. Most of the time, the safer course is to hire competent outside legal counsel to assist.

### 13. BE ETHICAL

Because your company is involved in international trade, you affect the lives of people in many countries. Your company no doubt makes money and creates jobs, but that's not enough. To be a responsible, ethical corporate citizen, your company must dispense as much good will as possible. You should not be doing this solely to avoid a public relations nightmare (although companies should be cognizant of this danger). More importantly, your company does not want a history of compromising basic morals. Once that happens, it becomes increasingly difficult and costly to reclaim the high moral ground.

Fortunately, there are numerous resources and organizations to help guide your company in instituting an ethical code that is verifiable (don't be toothless) and that includes agents and contractors with whom your company deals.