

The Thirteen Commandments of Export/Import Compliance Programs



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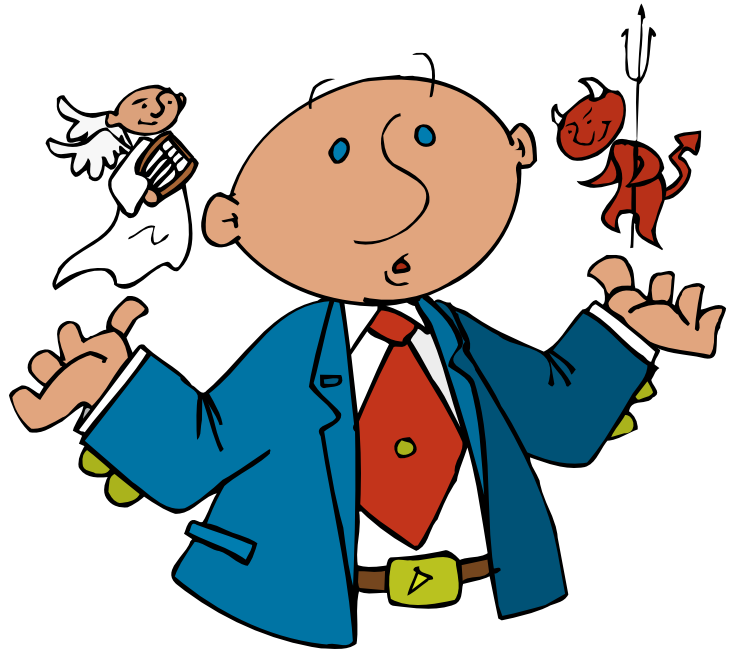
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1. Ignore Your Inner Devil

If you believe some companies, there is never a good time for legal compliance. These companies concoct all sorts of rationalizations to keep from instituting or updating a good compliance program.

During flush times, they feel immune to any outside or internal threat. They are too busy filling orders or making money to concentrate on legal compliance. "Why rock the boat? If it aint broke, don't fix it." They are confident that they have the money and resources to handle any crisis. When times are lean, companies think that compliance should take a backseat to economic survival and stability. "We won't have worry about compliance if we're not around."



Small companies sometimes think that enforcement agencies target, or at least should target, only large, prominent companies. "No one will notice me. I'm just a little fish in a big pond." Large companies feel immune because they have the trappings on success and power. "We must be doing something right, at least for the most part, or how else did we get where we are?"

The funny thing is that the enforcement graveyard is full of the old bones and dead bodies of big, small, successful, obscure, and famous companies who shared this cavalier attitude. The funnier thing is that these companies howled the loudest when they became the targets of an investigation, penalty, or fine. Sometimes not even a full-blown investigation or a brutalizing penalty changed their minds or practices.

If you are reading this, chances are that you put some value on export and customs compliance. You are probably not the type who wants to go down with a ship that will be inevitably sinking in short order because of its negligence or malfeasance. You appreciate the dangers of not having a good compliance program. You may be facing some difficulty convincing others in your company of this reality, but take comfort. These 13 Commandments should provide you with the tools and information that you need to convince anyone (that is, anyone who will listen) that there is no greater priority for a company involved in international trade than legal compliance.

2. Prepare A Compliance Manual

You should codify your export and customs compliance procedures. If your company does not have much in the way of procedures and policies, put fingers to keyboard and see if you devise viable procedures that upper management will approve.

Not only will a written manual simplify compliance, but it is also evidence of a real commitment on your company's part (but see Commandment 6, below). Under the U.S. Sentencing Guidelines, a compliance manual and program can help reduce a criminal penalty against you or your company. See USSG, §8A1.2.



A compliance manual should be as short and simple as possible. Create visual aids and resource lists. For example, create matrices of documents you keep and where they are kept. Create tables of the products you export or import, with information like classification numbers, value, licenses, etc. You can 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. List important government agencies. For example, the Bureau of Industry and Security and the Office of Foreign Assets Control provide hotlines. The Census Bureau and the BIS companies classify products for export. The International Trade Administration provides "scope reviews" to let you know whether you owe antidumping duties. CBP offers advance rulings (official interpretations). List our website (www.exportimportlaw.com). We compiled most of the information that you need in free, simple to use, format.

Create a quick response team. This team needs to take charge when enforcement officials notify your company of a formal investigation or penalty, or when investigators come knocking at or even kicking down your company's doors. While you want to comply fully with all legal requirements, you need people who can fend off any overreaching from the Government.

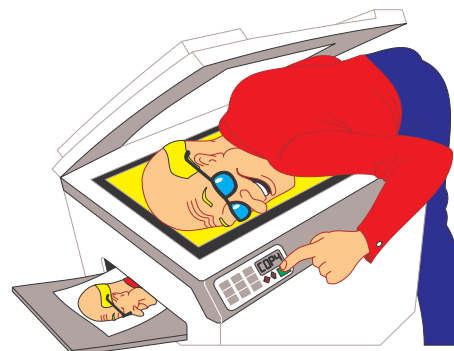
It is hard to predict the extent of the Government's intrusion into your company's affairs. Sometimes an exchange of correspondences or phone calls will appease the Government, and sometimes the Government sets up shop within a company and reviews records and interviews employees for months. The former is likely, but be prepared for the worse case.

3. Hesitate Before You Template

There are all sorts of manuals, guides, best practices, and primers on export and customs/import compliance. Some are free and offered by the Government, and some are costly templates sold by private companies and consultants. All these can help, but they should never be adopted “off the shelf” as your company’s compliance manual.

A compliance program manual must be customized to your company’s needs and compliance style. It is not solely a list of admonitions and suggestions, but it should reflect upon carefully considered procedures drafted over time. It is organic script, following the events and culture within a company as well as dictating employee and management comportment.

There are some excellent primers offered for free by the Government. One has to consider the source, of course. Many of these guides are heavily peppered with obligations to immediately report violations to enforcement agencies. While voluntary or prior disclosure should be explored and full compliance with the laws should unquestionably be the goal, rushing to turn your company into the Government for every suspected error may not be the wisest choice. Having said this, here are some primers that your company should consult. While they do not provide ironclad protection, the Government would be hard-pressed to punish your company for following the Government’s own templates. Here are some of our favorites (all can be found on our law firm’s links page at www.exportimportlaw.com):



- GRVR Compliance Guides – If you like these 13 Commandments, you will like the many other guides, quizzes, trade alerts, newsletters, and other information our firm offers for free to the international trade community. All can be found at www.exportimportlaw.com.
- Export Management System (EMS) Guidelines - These are getting pretty long in the tooth (they were issued in 1997), but the Bureau of Industry and Security (BIS) still lists them on its website.
- CBP’s Informed Compliance Guides
- BIS’s Best Practices For Export Transshipments
- OFAC Sanctions and Country Summaries
- Focused Assessment Program – Example of Internal Control Manual
- CBP’s Best Practices of Compliant Companies – Importer Self-Assessment Program
- Antidumping Manual (Commerce Department)

4. Be Secure

No one has to tell you that this is a much more dangerous world than just a few years back for international trade. While some industries (e.g., oil and heavy construction) never felt much daunted by severe dangers and risks, manufacturers, transportation, insurance, logistics and other companies have a reputation for being more timid and seeking the safest avenues for doing transnational business. But 9/11 brought the world's horrors home. It is no longer possible for business to seek only safe havens. Now business must take active steps to make the world a safer place.

There are two forces pushing security. There is, of course, the Government. Our federal enforcement agencies have taken extraordinary steps to ensure that our borders are secure and that cargo entering our territory is free (as can be) from terrorist threats. There are advance manifest and cargo rules, supply chain initiatives (like the Customs-Trade Partnership Against Terrorism – C-TPAT), and food supply programs designed to prevent bioterrorism. Industry is also pushing security. Security is becoming increasingly part of quality control. To dismiss security is to risk losing market share to competitors.

The wonderful thing about improving security, as studies have shown, is that it helps a company's bottom line. A good security program requires discipline. Companies quickly find and correct problems relating to theft and safety, for example.

Some companies complain, "but we don't deal in dangerous goods. We deal in textiles." The frightening aspect about modern terrorism is its ability to transform common, inane, seemingly innocuous items (like box cutters) into the implements of terror. Any commodity can be contaminated, any means of transportation forcibly hijacked, any technology twisted into destructive means, and any ingredient used to concoct mayhem.

In sum, government and industry now require that your company pay close attention and invest as needed in improved security. It's good for the country and good for your company.

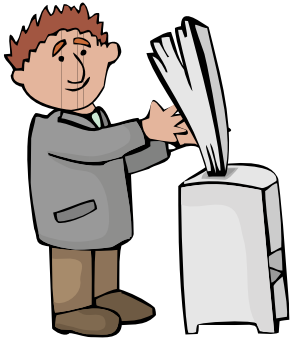
None of this is to say that your company should invest unthinkingly in all the gadgets, buzzers, and bells that the security industry is peddling. Sometimes a simple fence or a sign-in sheet can be more effective than, say, a biometric electronic key card system. Sometimes doing a criminal background check will do more to filter out harm than hiring a private security team. Often talking with your employees and making them part of your compliance team is the best hedge against any wrongdoing.

Normally I don't like taking the bull by the horns, but who wants to get gored?



5. Shred and You're Dead

Arthur Andersen, one of the most prestigious and powerful companies on earth, was charged with violating federal criminal laws because it destroyed documents relating to the Enron scandal. Arthur Andersen is no more, but its legal excesses (and those of Enron and company) gave birth to Sarbanes-Oxley (lovingly and commonly referred to as SOX), a federal law that stiffened penalties for corporate misconduct. The new law reads, in part, (18 USC § 1519):



Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

By violating this provision you are obstructing justice. The penalties are not only stiff, but they are also mandatory under the US Sentencing Guidelines (USSG, § 3C1.1). Any violator within or outside the company or organization can be found guilty. The statute is not limited to publicly held companies. Private companies, and even persons working within government agencies, are included. Violations are not limited to securities fraud, but extend to any law administered or within the jurisdiction of any federal agency or department. Of course, customs and export laws come within the law's reach.

If your company does not have a document retention program, start one immediately. If there is a program but it has not been updated to reflect SOX, then do that immediately. Remember, Arthur Andersen, one of the world's most powerful, rich, and prestigious companies – a company whose main utility was to keep other companies' books in order -- was brought down by inappropriate document shredding. This demise happened before there was a law on the books (i.e., SOX) that clearly prohibited improper document and evidence destruction. The compliance bar has been raised significantly now that SOX is the law. Courts and enforcement officials are just as apt to infer guilt from the destruction of documents as the existing of damning evidence.

SOX has not been tested in the courts. Legal challenges may reduce its reach and sting sometime in the future, but you can't count on that. SOX is extremely popular politically because of actual and perceived corporate predation and plunder. Furthermore, you do not want your company to be the test case. For now, your company is clearly obligated to comply with SOX completely. Your company must design and implement a good document retention and destruction program. Destroy documents only under a routine, structured program.

A document retention program should prevent the destruction of records, including electronic ones, when there is even a whiff of a violation or of a government investigation. It should also comply with retention periods required by law. Assign a central authority with the power to carry out this kind of mandate. If your company has one, the general counsel might be a good choice. Involve your information technology (IT) team. They design the safeguards for your company's electronic records and systems and they know how data is stored and purged.

6. Dump Outdated Policies and Procedures



What is worse than not having a compliance program? Having one that is outdated, irrelevant, or inaccurate. This is prima facie proof that you're not using reasonable care. It is the "smoking gun" that your company should fear.

Your company, if it is to keep in business, is evolving. It might be growing or downsizing. It might be purchasing assets or engaging new partners, agents, and service providers. Even if you perceive your company as being static and unchanging, the laws are not. Customs and export laws are constantly being revised and, for the most part, stiffened. That's the irony of international trade compliance. With the initiation of NAFTA and the WTO, tariffs on most of the world's goods have

been greatly reduced or eliminated. But heightened legal compliance standards, regional compacts, anti-corruption program, and security initiatives took their place. In other words, compliance is more important than ever and your company must keep pace.

It is not possible to go through all the shipment delays, enforcement audits, cargo seizures, penalties, fines, and prison terms facing companies that do not have good compliance programs in place (we have the most prominent penalties colorfully demonstrated on our website at www.exportimportlaw.com). However, you should know that customs and export laws are enforced by a growing number of agencies and departments, including the U.S. Customs and Border Protection, Bureau of Industry and Security, the Office of Foreign Assets Controls, Office of Defense Controls, Food and Drug Administration, and others. There are more people with guns and badges than ever whose main function and legal mandate is to trip your company up and shut you down for export and customs violations.

Your only option is to keep your export and customs compliance current with existing legal obligations. Periodically review your policies and procedures against the Federal Register, for example. Have a legal professional update your policies and procedures regularly.

7. Hire and Empower the Right People

Screen Prospects

The new focus on security makes pre-employment screening essential. For example, it is included in CBP's Recommendations for C-TPAT. Of course, your company should be careful to abide by any labor or civil rights laws, but criminal background and references checks should be routine within your export and customs compliance program.

People With The Right Attitude

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 internal compliance program. In sum, they should abide by Commandment 1, above.

Empower Your People

Although your compliance program should establish formal lines of authority and communication (these lines should be especially honored when a violation is discovered), it should also provide sufficient discretion so that compliance personnel can go outside normal channels to fix existing problems.



8. You Can't Outsource Liability

From traffic, logistics, customs entry, sales, security, labeling, export licensing, customs and export classification, etc., companies are finding that outsourcing can save money. It is wise to hire attorneys or others to supplement your compliance efforts as a sign of reasonable care and due diligence. An attorney can help you structure transactions to decrease your company's exposure, including tinkering with the terms of sale (Incoterms) and having other parties agree to indemnify your company. But you cannot outsource liability. You can outsource function, but you cannot outsource responsibility. You cannot transfer your company's obligations for export and customs compliance to a third party. Your company remains on the hook for violations for transactions in which it was involved, and it remains primarily liable if the transactions are carried out on its behalf or direction.



Enron, Tyco, Arthur Andersen, Worldcom, and the others in that great pantheon of legal obstructionists sought to push off liability onto others. They commanded whole armies of outside accountants, consultants, and others to provide them with a false sense of security. These companies thought that these agents and the degrees of separation that they afforded completely insulated the companies from liability. But a company cannot self-blind. It cannot announce to the world that it can meet and know all its customers' needs and offer complete quality control, and yet claim ignorance about obvious violations of the law. Upper management should be particularly cognizant that it will be held accountable. That is why the CEOs and CFOs in public companies must now certify the accuracy of financial statements filed with the SEC.

9. Commit To Audit

How can you tell whether your company has a good compliance program in place? First, you must be able to make that distinction (see Commandment 5, above). Second, the absence of fines and penalties is not the best indicator. You may have just been lucky. A real test of your compliance program's strengths and weaknesses is required and that can only be done through internal reviews or audits.

Your company should be periodically performing compliance audits throughout its export and import compliance chain. Fortunately, there are free audit guides that the Government provides, including:

- Export Management System Review Module (BIS)
- Importer Self-Assessment Program Handbook (CBP)
- Focused Assessment Program Documents (CBP). There are several different audit and pre-audit templates that are industry-specific.
- C-TPAT Validation Fact Sheet (CBP)

All these can be found on our law firm's website (www.exportimportlaw.com).

There are many ways to perform export and customs internal audits, and one size does not fit all. However, we do recommend that internal audits be done at the direction of outside legal counsel. The main reason behind an internal audit is to uncover gaps, problems, and possible violations. Your company wants to find these out before outsiders do. But you also want to have the opportunity to review your options in private and without the worry of having your communications, correspondences, and discussions revealed to third parties. The only way to accomplish this effectively is through the attorney-client privilege. No other professional, not even an attorney working for a consultant or an accounting firm, can provide the privilege. See Commandment 12, below.



10. Be Kind To Whistleblowers



Whistleblowers are both hated and loved. If you are the company with the whistleblower, you tend to isolate them and treat them as traitors. They are reviled as troublemakers, grouse, and grandstanders. The public takes a more generous view. Whistleblowers are courageous embodiments of rectitude and balance. They brave vile retaliations from bosses and workers because their conscience does not allow them to partake in illegalities. Competitors love them as long as they are in someone else's camp.

Regardless of how one may view them, whistleblowers are integral to export and customs compliance. Few cases of corporate misconduct would ever see the light of day without the trigger that whistleblowers pull. Federal and state laws prohibit retaliating against whistleblowers. SOX protects whistleblowers that report violations of any federal law, including export and customs law. Violators face stiff civil and criminal penalties.

Your company must accommodate whistleblowers. You cannot retaliate. Your company must be extremely careful before taking any action to replace, relocate, reassign, demote, punish, discipline, evaluate, or train an employee who has complained about a possible violation. This means that your company must establish formal written procedures and policies protecting whistleblowers, and that those policies and procedures must be enforced and followed. Whistleblowers should feel that they can report violations anonymously and that the company will investigate and take action if necessary. A company may create its own hotline or hire an outside company to provide the service. Before adopting either option (especially the second one), careful consideration must be given to the attorney-client privilege. The privilege cannot work against unwanted disclosure if the information is being leaked intentionally to third parties.

11. Train Until You Strain

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. Undoubtedly there is a great deal of expertise within your company that can supplement this effort. However, who will train your in-house trainer? Compliance training has become specialized. Shop around. Quality and experience vary tremendously. We recommend that you hire a law firm for your training. Our firm, for example, is now in its second decade of providing compliance training. Just as your company would not hire a law firm to do brokerage or to carry out transportation logistics, you do not want to entrust legal compliance training to anyone but attorneys.



Training should be both informative and entertaining (yes, entertaining!). If your instructor or her/his materials put people to sleep, then find another instructor. Your company is certainly not getting its money's worth.

There should be rewards and incentives to participate in training. These can be as simple as accommodating employees' schedules, paying for seminar trips, and providing certificates of attendance.

The company should also keep records of all training sessions. Participants should sign attendance logs and the logs should be kept on file. These logs are evidence that the company is discharging its responsibility for training its employees.



12. Don't Get The World Mad At You – Be Ethical

International trade has come under extreme fire all over the world. If you dismiss the scandals and all the protests as mindless and aberrant, please reread Commandment I, above. Issues relating to sweatshops, human rights, and environmental destruction are dictating whether, for example, countries are able to reach new accords in the WTO, whether the US imposes tariffs on steel imports, and whether our nation's genetically modified crops can be introduced into the EU.



Because your company trades internationally, you affect the lives of people in many countries. Undoubtedly you make money and create jobs. You help power the mighty economic engine that is transforming the world. But that's not the whole picture. International commerce often inflicts unbearable working conditions on our fellow humans as capital seeks the lowest labor and transportation costs. International commerce also pollutes the earth, disrupts customs and traditional wisdom, and causes ecological havoc and political corruption too rapid to categorize or defend against. Just as you should be proud of your achievements, do not hide your complicity in the damage.

Consider your company's legal liability. Foreign nationals dusted off the Alien Torts Claims Act (until recently, it was used sparingly over the past two hundred years) as an effective weapon against multinational companies. The foreign nationals are suing in US courts for alleged wrongs perpetrated by the companies in the foreign nationals' home country. While this type of litigation is relatively new and untested in the courts, human rights groups have forced huge concessions from multinational companies by threatening lawsuits under ATCA and other laws. This push to level the playing field between huge corporations and local communities is spreading beyond our borders, of course. The United Nations recently finalized its Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. More, much more, will be coming. The standard of care for ethical comportment has risen considerably, and your company looks away at its own extreme risk.

None of this should be surprising because the law often catches up with expectations, industry practices, and community standards. Because of all the concerns with security and terrorism, and all the governmental initiatives being developed to deal with security and terrorism (e.g., C-TPAT), your company must become master of its supply chain. It must and will know the quality and character of all its agents and all of its end-users and customers. This knowledge will make it impossible for any company to claim ignorance about overseas working conditions.

There are many resources available to guide your. Our law firm has a compliance group that assists companies develop enforceable codes of conduct. The UN, non-governmental organizations, and even trade groups devised guidelines and benchmarks. Our law firm compiled the links to these guides on our website (www.exportimportlaw.com).

Implement an ethical code that is verifiable (don't be toothless) and that incorporates agents and contractors with whom your company deals. Perform regular ethics audits and inspections (see Commandment 9, above) and let the world know about your successes. You can manufacture your product in a more sustainable fashion and have it certified by fair trade organizations. You can incorporate indigenous and environmental groups in your overseas business decisions. Go back to basic tenets (perhaps the ones you learned as a child) to help guide you. You may even think of new ways to do business ethically, do things that have never been done before. Imagination and drive made you money; now use these talents to do good. You can do right from wrong, but only if you are open to the distinction.

13. Trust An Experienced Trade Attorney

You can't beat a good international trade lawyer for helping your company with its compliance program. You may think that you wish to keep compliance completely in-house or that a consultant might do as good a job and charge lower fees. **DON'T DO IT.** At least, don't do it without having a good customs attorney guide the process. Why not? Well, there is the attorney-client privilege. With Enron, Arthur Andersen, and the rest of the corporate scandals that have rocked corporate America in the past few years, the attorney-client privilege has taken a beating. But it is still with us. There is no better way to protect your communications from unwanted disclosure to third parties and to the Government than through the attorney-client privilege. No other professional can get you the privilege. An attorney working for a consulting or accounting firm can't do it (though they have been trying desperately for years to get it), and perhaps not even an in-house attorney. And in the course of your company's internal review, you will find out information and documents that you will prefer to keep confidential. You will find incriminating information even if you are the most scrupulous company in the world. There is no need to hang your dirty laundry out in public if you can avoid it.



There's another reason to hire an experienced trade attorney. We think and work differently from other professionals. Just think about all the lawyer jokes you've heard. We are trained advocates, zealous defenders of our clients. We are, in sum, pains in the rear for anyone trying to mess with our clients. If we do our jobs correctly, we ferret out facts and advance honest defenses that benefit those whom we represent. Many enforcement officials have told us over the years that they prefer when companies are not represented by legal counsel. Is that to your or their advantage? We are officers of the Court and have a responsibility for ethical comportment, but we are also the best people in your corner to help you avoid legal tangles and to have around if problems surface. And, if we are good people, we should be able to also work with any other professional and consultant that your company wishes to engage.

Questions About the 13 Commandments?

Now that you have the written guide, get additional insight and suggestions from the author and the other attorneys in our law firm. There is a companion lecture that goes with these written materials. To find out whether a seminar is scheduled for your city or town or whether one of our attorneys can speak at one of your trade functions on this or other trade topics, please contact:

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