

Fundamental Elements of Effective Trade Compliance Programs

A global approach to trade is commonplace in the current business environment. The opportunity exists for companies of any size, sole-proprietors to multinational corporations, to reach global markets as never before. With such opportunity also comes responsibility for conducting transactions within the laws and regulations that govern trade, both within the United States and abroad. From a U.S. perspective, companies are required to conduct business transactions that are compliant with the laws and regulations established to support the foreign policy, national security, and commerce of the United States. To meet a company's global business objectives while maintaining compliance with applicable laws and regulations, it is essential that any company conducting international transactions develop and adopt a comprehensive trade compliance program.

Failure to establish a comprehensive trade compliance program can lead to a multitude of penalties imposed by regulating authorities including fines, sanctions, and civil or criminal prosecution. To underscore the importance of corporate trade compliance, the U.S. Department of Justice Criminal Division recently updated its prosecutorial guide specifically instructing federal prosecutors regarding the factors to take into consideration when evaluating the effectiveness of a corporate compliance program.¹

The trade compliance program elements identified in this document are considered by industry and the regulatory agencies to be the essential building blocks of an effective trade compliance program. This is not an exhaustive list; it is a sample of the minimum requirements and responsibilities a company should undertake for a successful trade compliance program that balances a company's strategic business goals while minimizing risk.

Commitment to Compliance

Committing to trade compliance as a focused objective of the company is a critical element of an effective trade compliance program. When forming a trade compliance program for the first time, this should be step one. But it is not sufficient to simply make the commitment; the intent should manifest in multiple ways throughout the enterprise. Optimally, trade compliance activities should become a part of a company's 'business DNA,' existing in unison with all other business processes. Following are some examples of ways to give a company's compliance commitment broad visibility:

- Create a written trade compliance commitment statement and publish and distribute the statement to all employees, shareholders, business partners, and customers.

¹ See U.S. Dep't of Justice, Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (Apr. 30, 2019), <https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs> (last visited June 18, 2020).

- Make trade compliance a part of the company mission and vision statement and core values.
- Communicate clearly to the business enterprise the expectation for each individual's awareness and support of trade compliance.
- Embed trade compliance activities into the day-to-day standard work processes and procedures of the company. If your organization follows ISO quality management standards, incorporate trade compliance practices into the standard measures and processes.
- Provide adequate resourcing for implementation and operational effectiveness of trade compliance practices.

Policies and Procedures

A hallmark of any successful trade compliance program is having comprehensive policies and procedures. Trade policy is the body of documents established to codify a company's minimum requirements for trade compliance that must be met across the enterprise. Trade policy documents should follow a consistent format and be easily accessible by all company personnel. Trade policy documents should also be actively monitored for effectiveness and updated regularly to keep pace with regulatory changes and the business landscape.

Trade policy documents should consist of the following core elements:

- Policy and Requirements
 - This constitutes the overarching trade policies the company mandates for compliance with all laws and regulations governing trade compliance matters, both in the United States and any other countries in which business is conducted.
 - These are the foundational principles of the company's compliance program and establishes '*What we will do*' as a company to ensure effective compliance.
 - Sets forth the minimum necessary requirements established by the company for successful compliance.

- Processes and Procedures
 - These support '*What we will do*' for compliance by establishing '*How we will do*' compliance activities.
 - Establishes standard processes and procedures in support of the company's trade compliance policy and requirements.
 - Should be specific to business functional areas where compliance activities are required.

- Work Instructions and Guidelines
 - Consists of work instructions, business systems and tools, forms, guidelines, and reference materials that support trade compliance practices throughout the enterprise.
 - Contains the highest level of detail for trade compliance activities, often down to the desktop or user level of instruction.
 - These documents should be specific to the trade compliance activities of each business functional area.

Training

A well-designed compliance program includes a robust and ongoing training program for all personnel engaged in trade compliance activities. Following are some examples of key elements to an effective compliance training program:

- Effective training programs should employ multiple methods of delivering targeted training to both individuals and groups within the organization, such as instructor-led training, and on-demand, web-based training modules.
- Training should be targeted to each business functional area and specific to the level of engagement in trade compliance processes.
- Training materials should be actively curated to ensure content is appropriate to the business and consistent with current regulations.
- Adequate records of training should be maintained for each employee. Access to a Learning Management System can be very helpful for tracking and maintaining training records.

Consequences of Non-Compliance

Underscoring a company's commitment to compliance should also include clearly communicated repercussions for non-compliance with company trade policy and regulatory controls. Failure to comply with trade controls can have significant negative impact to a business entity as well as individual culpability. It is important that all employees fully understand their individual responsibilities for trade compliance within the company. It is also important to communicate that the company will provide remedial support actions to manage errors but will also discipline or terminate employees if the situation dictates that necessity.

In striving to present a positive voice, some companies may choose to not address difficult topics such as misconduct and disciplinary actions resulting from non-compliance. It is important to note that from a regulatory perspective, adequately communicating the company's position on misconduct is considered a key factor in determining the overall effectiveness of a company compliance program. Therefore, it is important to ensure that this topic is not left unaddressed.

Compliance Violation Reporting and Investigation

To support a healthy compliance environment and foster personal empowerment and responsibility for trade compliance, it is vital to include a system of confidential reporting of potential violations and a standardized process for conducting investigations of potential violations. Some important aspects to consider are:

- Communicate to all employees the company's expectation of individual responsibility to raise potential trade compliance issues for review.
- Include trade compliance in the company code of ethics and maintain a firm non-retaliation policy to ensure employees may freely and independently report suspected instances of potential non-compliance without fear of reprisal.
- Provide a method of anonymous reporting of possible non-compliance issues. A company helpline or publicly-accessible website is a good method to deploy for this purpose.
- Establish a policy mandating specifically how reports of possible non-compliance will be logged and managed to closure, escalated to key personnel and management for review, and recordkeeping requirements.

Self-Evaluation and Continuous Improvement

A compliance program is only effective if it actually works in practice. Once compliance controls are developed and implemented, those controls must be periodically tested to confirm adequate effectiveness. Various methods can be employed to measure effectiveness. Ultimately, a company must determine the method of evaluation that best suits the business enterprise and meets the level of review required for proper benchmarking. In most cases, a mix of evaluation methods yields the most fulsome results. Some methods to employ are as follows:

- Internal Reviews
 - Self-directed internal reviews can range from process and procedure spot-checks to a full review of an internal compliance procedure.
 - Internal audits should be risk-based. Focus on business functional areas where control weaknesses are suspected or where process errors or actual violations have previously occurred.
 - Engage internal personnel to perform cross-functional examinations of compliance processes and procedures. This helps to promote cross-functional awareness of compliance practices and promote self-regulating.
 - Engage functional area personnel in formulating corrective actions when errors or violations are discovered.

- Benchmark your company’s compliance program against other companies that have effective trade compliance programs. Rate your performance against the benchmark standards and look for areas of improvement.
 - At a minimum, perform an annual compliance program health check to review overall performance.
- Third-Party Reviews and Audits
 - Engage an external professional to evaluate the effectiveness of specific compliance program aspects or evaluate overall program performance. In most cases, a full external audit is warranted when internal reviews have proven inadequate to determine areas of weakness or when multiple violations have occurred. In some cases, third-party audits can be required by regulatory agencies.

Regardless of the method of evaluation, once inadequacies are discovered, it is important to conduct a root cause analysis to determine if the issue is situational or systemic. Ensure that your trade compliance program includes procedures for implementing corrective actions and monitoring those actions after implementation to ensure effectiveness. Some points to consider regarding corrective actions and continuous improvement:

- Corrective actions should be developed from findings and observations as a result of program reviews, self-assessments, procedure spot-checks, audits, disclosures (voluntary or directed), and any other methods of analysis.
- Corrective actions should be consistent with company trade policy and regulatory requirements.
- Corrective actions should be recorded in a specific location, tracked to completion, and associated documentation of actions taken retained for recordkeeping and audit purposes.

The Bottom Line

Ultimately an effective trade compliance program is as individual to a company as a fingerprint. While there are basic tenets that are universal for compliance, such as have been touched upon here, there is no singular guideline or method to employ that guarantees a successful compliance program. It is critical to determine the areas of trade compliance that are specific to your business structure and create a roadmap to successful compliance.

Particularly with regard to trade regulations, the requirements for compliance can be many and varied. It is highly recommended to engage qualified trade professionals and legal counsel to assist in developing, implementing, and monitoring an effective trade compliance program. If your company has possible trade violations, it is particularly important to engage legal counsel early in the process to assist with disclosures and engage with regulatory agencies.