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The necessary components of an effective export compliance program

by Paul Mayer

International expansion can often yield advantageous and profitable results for businesses and organizations that take care to execute an appropriate globalization strategy. However, this is not a simple undertaking. There are a variety of factors that management must consider when expanding outside of the United States and offering goods and services internationally. These include supply chain and logistical matters, local market demands and conditions, local laws, culture, and political climate, among others.

One of the most critical factors management must consider when expanding internationally is export compliance. Countries worldwide have specific laws and regulations surrounding exporting and importing goods. These are often complex, and vary in each country. If these laws and regulations are violated, not only can the violating entity face sizeable penalties and fines, but the organization's day-to-day business operations may be delayed, and additional costs may be incurred.

Export compliance can often be overwhelming for organizations looking to conduct business in other countries and can cause management to question if international expansion is worth the hassle and risk. To combat this, the single most effective and comprehensive way management can be confident their business remains compliant with export laws is to develop an export compliance program (ECP) in alignment with the *Export Compliance Guidelines* published by the U.S. Department of Commerce Bureau of Industry and Security (BIS).[1] Furthermore, an ECP is the most complete way to ensure compliance with individual regulatory requirements of the Export Administration Regulations (EAR), International Traffic in Arms Regulations, and Office of Foreign Assets Control, among other federal regulations. In addition, a documented and complete ECP is the most effective way to mitigate higher-level scrutiny from governmental oversight entities.

While the development of a comprehensive ECP is not a current regulatory requirement, the federal government expects all applicable organizations to address the key elements of an ECP. As defined by BIS, the following eight key elements make up an effective ECP.

Element 1: Management commitment

One of the most important elements of an effective ECP is senior management commitment. This requires that an organization's senior management give significance and legitimacy to the organization's program by publicly supporting compliance policies and procedures, providing sufficient resources, and supporting export compliance and training sessions. With this support from management, the ECP is more likely to be embraced by the organization and integrated into the company's daily operations.

An effective way senior management can demonstrate support and commitment for export policies and procedures is to have the CEO, president, or other senior executives personally sign a management commitment statement. This formal statement communicates to all employees and staff the importance of export compliance and demonstrates management's commitment to upholding export laws and regulations. This statement should be reviewed and disseminated annually for all employees to read and sign. It should also be included in the opening pages of an organization's ECP manual.

Element 2: Risk assessment

Export compliance risks can be defined as threats that can negatively affect an organization's reputation and business operations if ignored. An effective ECP should involve a risk assessment process designed to identify preventable risks companies may face—as well as safeguards to protect against these risks.

Many companies fail to identify risks early on and instead focus solely on providing goods and services. This can create vulnerabilities in the organization's compliance program and will ultimately require more resources to correct later. The best way an organization can avoid these unnecessary issues is by working to identify risks early on and develop corresponding safeguards.

Element 3: Export authorization

The goal of export authorization is to build procedures, processes, process flows, and decision tables to help guide employees to make consistent and correct export decisions. The four components of this element include the following:

- **Jurisdiction:** The first consideration for export control decisions should be which agency has jurisdiction over an export.

- **Classification:** Once jurisdiction has been determined, the specific export control classification number (ECCN) for the export must be confirmed.

- **License determination:** After the export's EECN has been determined, employees must use the EAR Country Chart (Supplement 1 to Part 738) to verify if a license is required for the ultimate destination.[2]

- **Screening:** The final step in export authorization is screening against the US proscribed parties list prior to exporting.

Element 4: Recordkeeping

An essential element of any effective compliance program is recordkeeping. Export compliance programs are no exception. Part 762 of the EAR details exactly what types of records should be kept, how long to keep records, how to reproduce documents if required, and which documents are exempt from retention.[3]

There are some documents that may not be required by regulation, but it may be in an organization's best interest to maintain these. For example, internal documentation that describes the technical decision to classify an export in a specific ECCN—along with who made this decision—would be crucial to keep in export control records. Another example would be records of due diligence disputes.

Element 5: Training

Another critical element of an effective compliance program is training. Oftentimes, employees are consumed in their day-to-day tasks and have little time to devote to export compliance. When designing training programs, it

is therefore vital that export compliance managers tailor messaging as specifically as possible to help employees understand their roles and how they need to contribute. This includes providing job-specific knowledge based on need, communicating the export responsibilities for each employee, and holding employees accountable for export training through assessments.

To this end, training programs should include periodic reviews and revisions based on EAR updates as well as changes in an organization's products and services or end-uses/users. It is imperative that organizations remain up to date with these changes and communicate the impacts of each to their employees.

Element 6: Audits

To ensure effectiveness, compliance programs must also be periodically tested and recalibrated. One way to do this is through audits, which assess the effectiveness of current processes and check for inconsistencies in day-to-day operations.

If resources allow, periodically using an outside auditor is a good business practice. External audits can provide an unbiased third-party evaluation and validation of an organization's overall export compliance program and practices.

Element 7: Handling export violations and taking corrective action

Policies and procedures that provide clear guidance to all employees concerning what actions to take in the event of suspected incidents or export-related noncompliance are crucial to an organization's export compliance program. Early detection and fast responses to resolve noncompliance issues are fundamental to minimizing an organization's exposure. It is also important that management foster a culture of compliance and encourage employees to report concerns as they arise.

Element 8: Build and maintain your export compliance manual

Building and maintaining an export compliance manual is the final element of an effective ECP. A written export compliance manual will not only protect against unintended export violations but also help members of an organization understand their specific responsibilities and how they integrate with other parts of the organization.

When building an export compliance manual, organizations should consider the following:

- Drafting a management commitment statement;

- Developing, documenting, and implementing a formal risk assessment process;

- Developing a process to periodically evaluate/screen for items that may be added to the Commerce Control List;

- Developing, documenting, and implementing a recordkeeping policy/procedure;

- Reviewing and updating the current training program and assessing and developing additional required training;

- Implementing a formal auditing/monitoring process;

- Developing, documenting, and implementing a process for reporting any potential export compliance violations and/or communicating the process for using the anonymous hotline; and

- Developing, implementing, and updating the ECP manual/reviewing the ECP on an annual basis.

Though it may seem daunting, developing an ECP in alignment with the BIS's *Export Compliance Guidelines* is an effective way for businesses to successfully expand operations internationally—and mitigate risk when doing so.

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Takeaways

- When expanding internationally, companies must abide by appropriate export laws and regulations to avoid unintended consequences.

- The best way management can be confident their business remains compliant with export laws is to develop an export compliance program (ECP).

- When developing an ECP, organizations should follow the *Export Compliance Guidelines* published by the U.S. Department of Commerce Bureau of Industry and Security.

- The eight elements of an effective ECP include management commitment, risk assessment, export authorization, recordkeeping, training, audits, corrective actions, and an export compliance manual.

- Organizations should consider aligning with a trusted adviser who can offer specific guidance on developing, implementing, and monitoring an effective ECP.

1 U.S. Department of Commerce, Bureau of Industry and Security, *Export Compliance Guidelines: The Elements of an Effective Export Compliance Program*, January 2017, https://www.bis.doc.gov/index.php/documents/pdfs/1641-ecp/file.
2 U.S. Department of Commerce, Bureau of Industry and Security, Export Administration Regulations, "Part 738: Commerce Control List Overview and the Country Chart," October 2021, https://www.bis.doc.gov/index.php/documents/regulation-docs/2254-part-738-commerce-control-list-overview-and-the-country-chart-1/file.
3 U.S. Department of Commerce, Bureau of Industry and Security, Export Administration Regulations, "Part 762: Recordkeeping," October 2022, https://www.bis.doc.gov/index.php/documents/regulation-docs/429-part-762-recordkeeping/file.

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