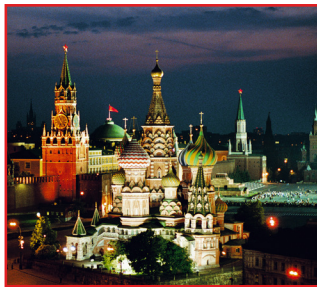


**BAKER DONELSON**  
**GEARS OF JUSTICE**  
**GRIND EXPORTS TO A HALT**



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BEARMAN, CALDWELL & BERKOWITZ, PC

**EXPAND YOUR EXPECTATIONS™**

Photos by Howard Baker, senior member of the Firm, and former chief of staff to the President, Senate majority leader and ambassador to Japan.

Recently, there has been a rise in the number of companies that are accused of violating U.S. export laws. Since 9/11, there has been a significant increase in the regulations and procedures governing the exportation of goods from the U.S. The Department of Justice (DOJ) has indicated that aggressive prosecution of export violations is a top priority for law enforcement and companies have been fined millions of dollars in civil and criminal penalties. Unfortunately, many of these cases go to trial unnecessarily and have involved increasingly overzealous prosecutors, often working with those who have a political agenda.

While there is little a company can do about the inner workings of the government, they can protect against any possible accusations by hiring specialized attorneys who know all of the rules that apply to the company products.

Federal agencies have compiled numerous lists with attendant regulations and procedures but most companies do not pay attention to the many intricacies of these requirements until Immigration and Customs Enforcement (ICE) agents arrive at their businesses with guns and badges, and begin removing company hard drives for review. Such raids are followed by several years of potential criminal and civil investigations to determine whether the business has violated the law. Even if no violation is found, lack of attention to detail will force the raided business to lose copious amounts of time and incur substantial legal fees to maintain their defense. The best defense is a strong compliance plan.

The Defense Directorate of Trade Controls (DDTC), Bureau of Industry and Security (BIS) and Office of Foreign Assets Control (OFAC) explicitly agree on the need for a corporate commitment to export compliance. Such plans require a senior level corporate executive to be responsible for

implementing a proactive, company-wide program to ensure compliance in export activities, and routine consideration of compliance issues at the highest levels of the company.

## **Know the Rules that Apply to the Company Product**

The first goal of any compliance program should be to know the rules that apply to the company's product. Commodity jurisdiction and classification issues are the most frequent factor in strict-liability, regulatory export infractions. Countless cases have involved an exporter's assumption that its product was classified as EAR99 and thus did not need a license. In many cases, a review of the product's technical specifications clearly showed it fell under a specific classification on the Commerce Control List (CCL) and did require a license. Rather than proceeding to export based on an assumption of EAR 99, companies should determine the controlling authority for their product/service. A commodity jurisdiction (CJ) decision from DDTC may be required if the product/service could potentially be classified on the U.S. Munitions List (USML).

## **Integrate Business and Compliance Processes**

Export compliance programs cannot operate in parallel to the day-to-day business in which your firm engages. Compliance must be an integral part of the core business practices. Ensure all employees involved in potential export transactions are aware of the export compliance implications of their activities, and know to engage corporate compliance personnel/practices when appropriate. Pay particular attention to sales and technical personnel who are in direct contact with foreign customers and who may expose the firm to penalty liability.

## **Enable Parties Involved in Compliance**

Give all employees involved in potential export transactions the tools and training needed to comply. Sales/technical personnel must be capable of identifying transactions subject to controls and know how to proceed when such a situation arises.

## **Keep Your Program Up-to-Date**

Keep up with changes to export control requirements. Subscribe to list server notices at agency websites or monitor those websites and the Federal Register for changes that may affect the company product/services. Update the company commodity jurisdiction and classification guidance as the rules change and as new products/services are introduced. Update internal procedures as necessary to keep pace with these changes. Also pay attention to guidance the company receives from export control and enforcement officials. The internal procedures should require that compliance personnel be notified of, and optimally involved in, all contacts with inspectors and investigators from BIS, Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE) and even the Federal Bureau of Investigation (FBI). Use the guidance the company receives as a tool to improve its internal controls and continuing compliance efforts.

## **Periodically Review Program Efficacy**

Conduct periodic, formal program reviews and compliance audits to ensure that policies and procedures are being followed and are attaining the intended ends. Use the results of these reviews to identify program deficiencies to facilitate instituting corrective action.

## **Know your Customer, Know Your Transaction, and Watch for Red Flags**

Failures to confirm the bona fides of an export transaction are the most frequent cause of serious export violations involving proscribed end-users, end-uses and destinations. Make certain to know who will use the company's product or service, as well as where and how it will be used. Also know how those factors impact the controls placed on your transaction. This often requires screening parties

to the company's transactions against the various lists for restricted and prohibited parties. Know the countries the products will pass through as well as where they will ultimately reside. Monitor transactions for unusual requests or activity which may indicate that the products/services are intended for restricted/prohibited end-users, destinations or uses. Appropriate due diligence may be necessary to either confirm the validity of the transaction.

## **Take Prompt Corrective Action**

If periodic reviews uncover process deficiencies, correct them to ensure future compliance. If the company determines that it has committed a violation, it should make a voluntary disclosure to the appropriate export control agency. A voluntary self-disclosure can help to limit potential liability to penalties. In addition, take internal steps to ensure future violations do not occur. Such corrective actions may address training deficiencies, implement new internal controls or, where warranted, provide counseling or disciplinary action for employees responsible for the violations.

## **Document Your Compliance Activities**

Fully document all phases of the compliance program with organizational charts, including all written policies and directives, training, the results of periodic and due diligence reviews, as well as any corrective actions taken where program deficiencies or violations are uncovered. Use the documenting process to inform all levels of the company of export requirements and to fully implement the program company-wide. Further, do not neglect the record-keeping requirements for export transactions mandated by DDTC, BIS, OFAC and the Census Bureau. The failure to keep required records is another common basis for administrative penalties imposed by export control agencies.

While companies can do very little about sloppy government work, targeted accounts based on political networks and overzealous DOJ prosecutors, they are not defenseless. Arming your company with a comprehensive compliance program is the best way to protect your company from prosecution.



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Doreen Edelman has significant experience in import and export matters, including advising clients on U.S. laws relating to the export and import of medical device products. She ensures that export and import legal requirements are met in merger and acquisition due diligence and advises clients regarding compliance anti-corruption laws, including the FCPA, and in U.S. government investigations relating to export controls. Ms. Edelman works with U.S. companies entering new markets overseas and foreign companies doing business in the U.S. This includes drafting agency, licensing and distribution agreements for large and small companies, working with foreign counsel to assist her clients overseas and navigating U.S. foreign investment reporting requirements. She helps companies prepare global business plans, establish offshore corporations and obtain foreign government approvals. For companies expanding into the U.S. market, Ms. Edelman advises on product importation issues such as tariff classification, valuation and duty rate as well as the benefits of free trade programs like GSP and NAFTA.

### Firm Recognition

- With 188 of its attorneys selected for inclusion in the 2011 edition of *The Best Lawyers in America*®, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC is the fourth highest ranked law firm in the country, based on the number of attorneys named to the list.
- Ranked by FORTUNE as one of the top ten public policy firms in Washington, D.C. in its most recent survey of this kind.
- Named as 73rd largest law firm by *National Law Journal* in 2009 (number of attorneys).
- Ranked 114th largest law firm in the U.S. by *The American Lawyer* in 2010.
- Listed as a "Go-To Law Firm" in the Directory of In-House Law Departments of the Top 500 Companies published by CORPORATE COUNSEL.
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- Ranked in the "Top 100 Law Firms for Women" since 2008 by *Multicultural Law* magazine.
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