

BAKER DONELSON RED FLAGS FOR EXPORTERS



BAKER DONELSON
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.

Thanks to the weak economy and the continuing threats of terrorism, government agencies are aggressively prosecuting individuals and companies for export violations. Such prosecutions have even become a top priority for the Justice Department, which has established a task force and called the increasing priority of criminal prosecutions a “leading counterintelligence priority.” Corporate and individual fines have increased into the millions of dollars or up to twice the value of each export. Jail time (up to 20 years) also is being imposed.

An export can be a product or a service or technology. It can be a transmission by email or in a data room or taking your laptop overseas. A minimum of three federal agencies govern exports from the United States: the State Department through its Directorate of Defense Trade Controls; the Commerce Department through its Bureau of Industry and Security and the Treasury Department through its Office of Foreign Assets Control. Many companies do not pay attention to the intricacies of the laws and regulations until the Immigration and Customs Enforcement agents arrive at the door and haul off all of the computer hard drives and hand out a subpoena. In a recent case, the government also raided the owner’s home and took not only the hard drives, but also the children’s cell phones. No apologies are given, even when the government turns out to be wrong.

Protecting Yourself and Your Company

The first step is to have a corporate commitment to compliance, regardless of whether your company is a small partnership or a large manufacturing center. Policy statements and awareness of the export regulations are key, along with a senior level executive responsible for implementing a proactive, company-wide program to ensure compliance. Government agencies are adamant about this. Management must be actively involved.

Then, know the rules for your products. Commodity jurisdiction and classification issues are the most frequent factors 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 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 or service. If a product is designed specifically for military use, registration at the State Department is mandatory if you are an exporter or manufacturer (even if you do not export).

Give all employees involved in potential export transactions the tools and training needed to comply with the Commerce, Treasury and, if applicable, State Department regulations. Sales and technical personnel must be capable of identifying transactions subject to controls and know how to proceed when such a situation arises. Every individual must be familiar with the “red flags” because the government expects your company to perform due diligence on each transaction. Ignorance is not a defense. You must determine and verify that your buyer is not on any of the government’s restricted parties lists (there are approximately 32 lists) and you must ensure that the end-user and end-use do not violate any of the general prohibitions. Unfortunately, the lists are continually updated. Constant vigilance is important and each transaction must be reviewed.

Recognizing Red Flags

There is no substitute to knowing your customers and being aware of the red flags. Reviewing the red flags means questioning your customer when circumstances raise the following types of issues:

- Customer has no available financial information and company is unknown;
- Customer rejects commonly available installation and maintenance services;
- Customer is reluctant to provide end-use/end-user information;
- Customer requests unusual payment terms or currencies;
- Order amounts, packaging, or delivery routing do not correspond with normal industry practice;
- Customer’s line of business or end-use does not conform to performance/design characteristics of product;
- Customer uses only a “P.O. Box” address or has

facilities that appear inappropriate for the commodity(ies) ordered;

- Customer's order is for parts for which the customer appears to have no legitimate need;
- Customer is connected to parties and/or destinations on the restricted parties or embargoed countries lists;
- Product to be shipped to trading company or freight forwarder is not connected to customer;
- Packing requirements are inconsistent with shipping mode and/or destination;
- Circuitous or economically illogical routing and
- Customer appears unfamiliar with the product or application;

Ignorance Is No Excuse

It bears repeating, an internal compliance program is a necessity and ignorance of the law is not a defense in strict liability matters. A good internal compliance program would include a policy statement and compliance manual as well as a system or review of transactions to spot any violations. If a violation is discovered, make a voluntary disclosure to the appropriate export control agency. A good voluntary self-disclosure made by an experienced export compliance attorney can limit liability and reduce penalties by up to 90 percent. 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. Further, do not neglect the record-keeping requirements for export transactions mandated by Directorate of Defense Trade Controls, Bureau of Industry and Security, Office of Foreign Assets Control and the U.S. Census Bureau. Documents must be maintained for five years. The failure to keep required records is another common basis for administrative penalties imposed by export control agencies.

There is no alternative to knowing the law and regulations. Did you know you can export without sending anything outside of the United States? This is called a deemed export and applies when technical information or data that requires a license is shared with a foreign person within the United States. For example, disclosing such information or data to a foreign person at a meeting inside the United States or giving a foreign person a plant tour could be a violation. Even sending an email with such protected information and data is a violation unless an exception applies. Recently, even the Patent and Trademark Office has heightened its focus on these laws.

There are two other laws that affect exporters, and companies that take the time to understand the basics of these laws will be better able to protect themselves. The anti-boycott law requires exporters to report a boycott request by a company to the Commerce Department, even if the exporter has no intention of complying with the boycott requests.

The fact that the Arab League announced in October a call for an increase in its boycott of Israel means that U.S. exporters are well advised to understand global trade situations and heed this law or risk violation, intended or not. The other law is the Foreign Corrupt Practices Act which is also receiving increased attention by the Justice Department. The law prohibits a company or its agents from making a payment or giving anything of value to a foreign official, foreign political party or candidate, directly or indirectly, to influence his or her official actions in violation of his or her duty, or to secure improper advantage or to induce the person to use his influence to affect official action.

The text of the law uses the statement that the making of the payment or gift indirectly through any person "while knowing that the payment or gift will be passed on" is also a violation of the act. Thus, the law specifically forbids the use of intermediaries or subsidiaries to carry out payments. Companies are advised to include the anti-boycott and FCPA laws in their compliance programs and work with all local agents to ensure that no violations occur.

Understanding these laws well enough to spot issues and get help before a violation occurs is obviously critical. Such understanding, together with a compliance program, training, and management support, can protect your company and allow you to take advantage of the global marketplace while reducing your company's exposure to risk and penalties.

Doreen Edelman is an international trade attorney who concentrates on export issues in the Washington, D.C. office of Baker, Donelson, Bearman, Caldwell & Berkowitz. Rick Walker is a shareholder in Baker Donelson's Atlanta office where he focuses his practice on both corporate and intellectual property law.



Doreen M. Edelman
Of Counsel
Washington, D.C.
Phone: 202.508.3460
Fax: 202.220.2260
dme@bakerdonelson.com

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.
- Ranked by FORTUNE as one of the "100 Best Companies to Work For" in 2011.
- Consistently ranked in the "Top 100 U.S. Law Firms for Diversity" by *Multicultural Law* magazine since 2005.
- Ranked in the "Top 100 Law Firms for Women" since 2008 by *Multicultural Law* magazine.
- As the 72nd largest law firm in the U.S., Baker Donelson gives clients access to a team of more than 560 attorneys and public policy advisors representing more than 30 practice areas, all seamlessly connected across 15 offices to serve virtually any legal need.

BAKER DONELSON BEARMAN, CALDWELL & BERKOWITZ, PC