

# Enforcement of Export Control Violations on the Rise

RECENTLY, THERE HAS been an increase in the number of companies that are accused of violating U.S. export laws. Assistant Attorney General Wainstein called the criminal prosecution of export control violations the Justice Department's "leading counterintelligence priority." Many of these cases are unnecessarily brought to trial for several reasons: 1) Justice lawyers are not experts in the export and sanctions laws and regulations, and may be prosecuting cases that have no business in the criminal system based on the evidence and the standard of proof required under the law and 2) DOJ prosecutors have been increasingly overzealous and may be working these cases with a political agenda.

For example, a major U.S. defense contractor was recently fined \$100 million for criminal violations of International Traffic in Arms Regulations, and the firm's major business units were barred from exporting munitions items for three years. Another defense firm was convicted for exporting unlicensed ballistic helmets, and yet another firm was indicted for exporting technical drawings related to military helicopters. In addition, a large U.S. food company was fined \$25 million for providing monetary support to a designated terrorist group in South America.

A minimum of three federal departments have regulations that govern exports: the State Department, through its Directorate of Defense Trade Controls (DDTC); the Commerce Department, through its Bureau of Industry and Security (BIS); and the Treasury Department, through its Office of Foreign Asset Control (OFAC). These agencies have compiled numerous lists with attendant regulations and procedures. Some lists identify a wide range of people, countries, and organizations with which trade and other business is prohibited, others list munitions that cannot be exported, and still others identify federal requirements for government sales and list commodity classification numbers for dual-use items.

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 the company's hard drives for review. Such raids are followed by several years of investigations of possible criminal and civil violations in order to determine whether the business has broken 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 to incur substantial legal fees for their defense. The best defense, however, is a strong compliance plan.

The DDTC, BIS, and OFAC explicitly agree on the need for a corporate commitment to complying with export regulations. Such plans require a senior-level corporate executive to be responsible for implementing a proactive, companywide program to ensure that the firm's export activities are in compliance with the rules and that compliance issues are routinely considered by the highest levels of the company. The company's compliance program should include several components:

1. *Knowing the rules that apply to the company's 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 contributors to 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, when a review of the technical specifications of a product or service clearly showed that it fell under a specific classification on the Commerce Control List and *did* require a license. Rather than proceeding to export the product or service based on an assumption that is classified as EAR99, companies should determine the controlling authority for their product or service. A commodity jurisdiction decision from the DDTC may be required if the product or service could potentially be classified on the U.S. Munitions List.
2. *Integrating business and compliance processes:* Compliance programs cannot operate in parallel to the firm's day-to-day business activities. Compliance with export regulations must be an integral part of a firm's core business practices. Management must ensure that all employees involved in potential export transactions are aware of the implications of their activities when it comes to compli-

ance and know that they should engage corporate compliance personnel and practices when appropriate. Particular attention should be paid to sales and technical personnel who are in direct contact with foreign customers and who may expose the firm to liability to penalties.

3. *Enabling the parties who are involved in compliance:* All employees involved in potential export transactions should be given the tools and training needed to comply with regulations. Sales and technical personnel must be capable of identifying transactions that are subject to controls and must know how to proceed when such a situation arises.
4. *Keeping the program up-to-date:* It is important for the compliance program to keep up with changes to export control requirements. To do so the company should subscribe to list server notices posted on agencies' Web sites or monitor those Web sites as well as the *Federal Register* for changes that may affect the company's product or services. The company's commodity jurisdiction and classification guidance should be updated as the rules change and as new products or services are introduced; internal procedures should be updated as necessary to keep pace with these changes. The company should pay attention to guidance it 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 Customs and Border Protection (CBP), BIS, ICE, and even the Federal Bureau of Investigation (FBI). Any guidance the company receives should be used as a tool to improve its internal controls and continuing compliance efforts.
5. *Periodically reviewing the efficacy of the program:* Formal program reviews and compliance audits should be conducted periodically to ensure that policies and procedures are being followed and are achieving the intended goals. The results of these reviews should be used to identify deficiencies in the program so that corrective action can be taken.
6. *Knowing the company's customers and business transactions and watching 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. The company must make certain it knows who will use its product or service as well as where and how it will be used. It is also important to know what impact those factors will have on the controls placed on transactions. This often requires screening parties to the company's transactions against the various lists of restricted and prohibited parties. The company should also know which countries its products will pass through as well as where they will ultimately reside. Transactions should be monitored for unusual requests or

activity, which may indicate that the products or services are intended for restricted or prohibited end users, destinations, or uses. Appropriate due diligence may be necessary to confirm the validity of the transaction.

7. *Taking prompt corrective action:* If periodic reviews uncover process deficiencies, they should be corrected to ensure future compliance. If the company determines that it has violated a rule, the company 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, the company should take internal steps to ensure that 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.
8. *Documenting compliance activities:* The company should fully document all phases of its compliance program with organizational charts, all written policies and directives, training material, and descriptions of the results of periodic and due diligence reviews as well as any corrective actions taken when deficiencies or violations were uncovered. The documenting process should be used to inform all levels of the company about export requirements and to fully implement the program company-wide. The company should not neglect the record keeping requirements for export transactions that are mandated by the DDTC, BIS, OFAC, and the Census Bureau. Failure to keep required records is another common basis for administrative penalties imposed by export control agencies.

These eight concepts should form the basis of the company's efforts to comply with federal regulations governing exports. Building the company's export compliance program on these fundamentals not only will help to ensure that the firm is following the rules and requirements set by the various agencies but also can, if needed, demonstrate to export enforcement officials that the company has made a commitment to complying with the rules. **TFL**

---

*Doreen Edelman is an international trade attorney specializing in export issues in the Washington, D.C., office of Baker, Donelson, Bearman, Caldwell & Berkowitz.*