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U.S. antiboycott laws: overview and compliance strategies

By Kim Strosnider and Christine Minarich

U.S. antiboycott laws and regulations are complex, and often not well understood. Yet, U.S. and non-U.S. companies that run afoul of these laws and regulations can face potentially significant civil and criminal penalties and the loss of certain U.S. tax benefits.

Recent efforts to overhaul U.S. export controls and recent developments in U.S. economic sanctions have received widespread attention. However, this related area of U.S. antiboycott laws and regulations – which target compliance with the Arab League boycott of Israel – has been little changed in more than 40 years and appears unlikely to be revamped any time soon.

During the 1960s and 1970s, the United States adopted laws and regulations designed to counteract other nations' economic boycotts and embargoes. These antiboycott measures were adopted to encourage, and in some cases require, U.S. firms to refuse to participate in foreign boycotts that the United States does not endorse. They are intended to prevent U.S. firms from supporting the policies of other nations that run counter to U.S. policy.

Despite the lack of attention these laws and regulations receive, they can substantially impact both U.S. and non-U.S. companies. Moreover, as tensions in the Middle East continue, U.S. officials have reported receiving increased reports

Kim Strosnider is a Partner in Covington & Burling LLP's International Trade & Finance practice group (www.cov.com) and leads its trade controls practice. Christine Minarich is Global Trade Compliance Counsel at Raytheon Company. The views expressed in this chapter by Ms. Minarich are her personal views, and not necessarily the views of Raytheon.

U.S. ANTIBOYCOTT LAWS KEY TAKEAWAYS

- Antiboycott laws are intended to discourage U.S. businesses and their foreign branches, subsidiaries, and affiliates from participating in other countries' boycotts that the United States does not endorse.
- The prime focus of U.S. antiboycott laws is the official boycott of Israel, which is maintained and still enforced by some members of the Arab League.
- Both the U.S. Department of Commerce and the U.S. Department of the Treasury maintain antiboycott measures.
- While the Commerce Department antiboycott rules are designed to catch transactions within 'U.S. commerce', transactions conducted outside the United States are not necessarily out of reach of these regulations, and the Treasury antiboycott measures do not have such a 'U.S. commerce' limitation.
- Boycott language can appear in many forms. Examples include:
 - 'The Contractor shall apply all rules of the Israeli Boycott.'
 - 'Certificate issued by the shipping company or its agent testifying that the carrying vessel is allowed to enter the Lebanese port.'
 - 'Goods of Israeli origin not acceptable.'

of boycott requests from that region, Asia, and North Africa.

The United States maintains two separate and distinct antiboycott regimes, one administered by the U.S. Department of Commerce, the other by the U.S. Department of the Treasury. These regimes are sometimes inconsistent. Further, the problematic boycott language targeted by these two schemes can be buried in the fine print of purchase orders or letters of credit and can be difficult to identify, making compliance a challenge.

This chapter provides background and an overview on these laws and regulations, and discusses compliance strategies.

Background

U.S. antiboycott laws and regulations are designed to prohibit or penalise

cooperation with international economic boycotts in which the United States does not participate.

U.S. antiboycott legislation adopted in 1965 required persons exporting from the United States to report to the Commerce Department the receipt of any request to take action or provide information supportive of an international boycott directed against a country friendly to the United States. The law was amended in the 1970s to extend these reporting requirements to all entities controlled by U.S. firms and, for the first time, prohibited certain boycott-related conduct. In addition, a 1976 law created a separate tax return reporting requirement and imposed tax burdens on U.S. taxpayers if they or members of their controlled groups participate in certain international economic boycotts.

The primary (but not the only) target of U.S. antiboycott programmes is the Arab League boycott of Israel. This boycott has a primary aspect, which bars the import of Israeli goods and services into the boycotting countries and bars the export of goods and services from those countries to Israel. However, U.S. antiboycott laws generally do not target such prohibitions. Rather, they are directed against the secondary and tertiary aspects of the boycott. The secondary boycott precludes dealings with companies and individuals that do business with Israel. The tertiary boycott precludes doing business with companies or individuals who have been 'blacklisted' because of their relationships with Israel.

Currently, the U.S. government has listed nine countries as supporting the boycott of Israel: Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen. At least several of these countries reportedly have moved away from enforcing aspects of the secondary or tertiary boycott, but continue to maintain those laws on their books.

U.S. Commerce Department antiboycott programme

The U.S. Commerce Department's antiboycott regulations are found in the Export Administration Regulations ('EAR'), 15 C.F.R. part 760. These regulations apply to the conduct of United States persons, which includes individual U.S. residents or nationals, 'domestic concerns,' and non-U.S. entities that are 'controlled in fact' by a 'domestic concern', if the conduct is in 'U.S. commerce'. Domestic concerns include:

1. any partnership, corporation, company, association, or other entity of, or organised under the laws of, any U.S. jurisdiction and
2. any permanent U.S. establishment of a non-U.S. concern.

Penalties for non-compliance with U.S. antiboycott laws and regulations and recent enforcement actions by the U.S. Department of Commerce

Companies ignore U.S. antiboycott laws and regulations at their peril. Maximum penalties for violations of the Commerce antiboycott regulations include civil penalties per violation of \$289,238 or twice the value of the transaction, whichever is greater, and criminal penalties of \$1 million per violation or 20 years' imprisonment.

Companies and operations outside the United States are not beyond the reach of these regulations. In fact, a number of the settlement agreements entered into by the Commerce Department's Office of Antiboycott Compliance ('OAC') involve non-U.S. branches or affiliates of U.S. companies or the U.S. activities of non-U.S. companies.

While the Treasury Department's antiboycott measures do not carry civil or criminal penalties for non-compliance, they can result in adverse U.S. tax consequences, such as a loss of foreign tax credits and the inability to defer foreign-source income. The manner and degree to which U.S. taxes are affected by boycott participation are complex and depend upon the circumstances of the particular taxpayer. In addition, wilful failure to file a required boycott report with the Treasury Department may result in a \$25,000 fine and/or imprisonment for up to one year.

Following are summaries of several recent antiboycott enforcement actions pursued by the Commerce Department's OAC:

- Two related foreign companies doing business in Texas, Vinmar International, Ltd. and Vinmar Overseas, Ltd., agreed in 2015 to settle antiboycott matters for civil penalties of \$19,800 and \$41,400, respectively, for furnishing prohibited information and failing to report boycott requests. The prohibited information allegedly furnished included (in the case of Vinmar Overseas) certificates that vessels used in trade with Lebanon were eligible 'to enter into the Arabian ports' or 'to enter the Lebanese ports' and (in the case of Vinmar International) bills of lading indicating that vessels were not blacklisted.
- In 2014, Electro-Motive Diesel, Inc. of Illinois agreed to pay a civil penalty of \$26,350 for 31 alleged failures to report boycott requests from Bangladesh, which stated as follows: 'Goods and related services from the following countries are not eligible: Israel.'
- Digi-Key Corporation of Minnesota agreed in 2013 to pay a civil penalty of \$56,600 for 63 alleged violations of the EAR, including five charges of furnishing prohibited information and 58 charges of failure to report. The alleged impermissible furnishing of information involved emails and invoices to the UAE that indicated parts were not 'made in Israel'. The requests that Digi-Key allegedly failed to report were from the UAE and, in one case, Malaysia.

A non-U.S. entity is ‘controlled in fact’ by a domestic concern if the domestic concern has the authority to establish the general policies or control the day-to-day operations of the non-U.S. entity. Certain factors – e.g., direct or indirect beneficial ownership or control of a certain percentage of outstanding voting securities, the existence of an exclusive management contract, the authority to appoint a majority of the members of the board of directors or chief operating officer, etc. – give rise to a rebuttable presumption of control in fact.

Below, we discuss the jurisdictional requirement that a transaction be in ‘U.S. commerce’ for these regulations to apply. Then, we describe the type of conduct these regulations prohibit.

U.S. commerce connection

In order to trigger the Commerce Department’s antiboycott regulations, the individual transaction that involves boycott-related conduct or in which the boycott request was made must be in ‘U.S. commerce’.

As a threshold matter, sales, purchases, and transfers of goods or services between persons in the United States and persons inside or outside the United States and its territories are in U.S. commerce, including exports of goods or services from the United States and imports of goods or services into the United States. ‘Services’ in this context includes information. In addition, transactions between a controlled-in-fact foreign affiliate of a domestic concern and a person located in the United States is an activity in U.S. commerce. For example, if a wholly-owned foreign affiliate of a domestic concern purchases goods or services from the United States in order to fill an order for a customer, that transaction will be in U.S. commerce and the Commerce Department antiboycott provisions would apply.

Determining when the non-U.S. sales activities of non-U.S. affiliates of a U.S. company are in U.S. commerce requires a careful transaction-by-transaction inquiry. Generally, non-U.S. sales activities are considered to be in U.S. commerce if they involve:

- Goods or services (including information and ingredients or component parts) specifically acquired from the United States in order to engage in the transaction; or
- Transactional services provided to or for the benefit of the customer by a person in the United States (e.g., U.S. guarantees of performance or technical services provided to the non-U.S. affiliate’s customer). However, this does not include U.S. accounting, legal, or other support to the foreign affiliate itself.

Boycott requests – six categories of prohibited conduct

The Commerce Department defines the term ‘boycott request’ broadly to include virtually any requirement to participate in or cooperate with a boycott. In some countries, registrations or renewals of trademarks and other intellectual property rights may give rise to boycott requests. In addition, boycott requests may appear in questionnaires, purchase orders, tender invitations, contracts, and letters of credit. Boycott requests also may be received from customs or consular officials in the course of clearing goods for import.

There are six categories of prohibited boycott-related conduct under the EAR:

- Refusing or agreeing to refuse to do business with or in a boycotted country (e.g., Israel), or with a national of a boycotted country (e.g., an Israeli company), or a boycotted person (e.g., a ‘blacklisted’ party). This includes, among other things, agreeing to comply with a country’s boycott laws;
- Refusing to employ or otherwise discriminating against a U.S. person, in deference to a boycott request, on the basis of race, religion, sex, or national origin;
- Furnishing information, in response to a boycott request, about the race, religion, sex, or national origin of a U.S. person or any owner, officer, director, or employee of a domestic concern or controlled-in-fact non-U.S. affiliate;
- Furnishing information about any person’s past, ongoing, or proposed future relationships (or the absence of relationships) with other parties, if that information is sought for boycott-related reasons. This includes, for example, furnishing a certificate indicating that the goods were shipped to a boycotting country on a carrier eligible to enter the ports of the boycotting country (other than Saudi Arabia), or furnishing a certificate indicating that the goods are not made in Israel;
- Furnishing information about any person’s association with or support for any charitable or fraternal organisation supporting a boycotted country; and
- Paying, honouring, confirming, or otherwise implementing a letter of credit that contains any prohibited boycott requirement or request.

There are several narrowly-drawn exceptions to these prohibitions. For example, it is permissible to agree not to ship goods to a boycotting country on Israeli vessels or airlines or on a ship or aircraft that will call at an Israeli port en route to a boycotting country. These requirements are treated as reasonable

security measures of a boycotting country rather than prohibited boycott requests.

Commerce Department statistics indicate that traditional boycotting countries propagate most boycott requests, with the UAE and Iraq among the leading propagators of boycott requests in recent years. However, companies also must be alert for requests that may come from other countries, such as Bahrain, Bangladesh, Malaysia, Oman, Pakistan, and Tunisia, with requests from Malaysia, in particular, being quite numerous in recent years. In addition, companies may receive boycott requests from distributors or other intermediaries working for customers in boycotting countries. For example, a distributor in the European Union with a Lebanese customer may propagate a boycott request in order to satisfy the requirements of its customer. On some occasions, though rare, boycott requests may relate to boycotts other than the boycott of Israel, such as boycotts between China and Taiwan, India and Pakistan, and Turkey and Cyprus.

U.S. Treasury Department antiboycott programme

The U.S. Treasury Department's antiboycott measures are codified in section 999 of the Internal Revenue Code ('IRC'). These measures penalise U.S. taxpayers if they or members of their controlled groups agree to participate in or cooperate with a boycott that is not sanctioned by the United States. Such agreements are not prohibited and do not carry civil or criminal penalties but, rather, can result in adverse U.S. tax consequences for the taxpayer.

Boycott participation under the IRC

The definition of 'boycott participation' under the IRC does not align exactly with prohibited boycott activities under the EAR. Under the IRC, the term includes any agreement – as a condition of doing business within a boycotting country or with the government, a company, or a national of a boycotting country – to refrain from any of the following:

- Doing business with or in a boycotted country (e.g., Israel) or with the government, companies, or nationals of a boycotted country;
- Doing business with a boycotted or blacklisted person or undertaking, as a condition of sale, not to ship goods on a blacklisted carrier or insure goods with a blacklisted insurer;
- Doing business with a company by reason of the nationality, race, or religion of its owners or individuals in its management, or removing corporate directors or individuals from management for such reasons; or

- Employing individuals of a particular nationality, race, or religion.

Some of the most common types of boycott participation agreements are undertakings to comply generally with the laws of a boycotting country (deemed to include that country's boycott laws). For example, an agreement to comply generally with the laws of the UAE would be reportable to and penalizable by Treasury, but not prohibited by nor reportable to Commerce (unless the compliance provision specifically referenced the boycott laws). In addition, Treasury considers an agreement to provide certain information in the future, such as a commitment to provide a certification of non-blacklist status, to be boycott participation.

Perhaps most importantly, unlike the EAR provisions, the IRC provisions reach the conduct of non-U.S. affiliates who are members of a U.S. taxpayer's controlled group under the IRC, even if that conduct is not associated with an activity in U.S. commerce.

Compliance strategies

Responding to boycott requests

Receiving a boycott request in the course of a proposed transaction does not necessarily require companies to walk away from the business opportunity. Rather, companies can negotiate amendments and changes to problematic boycott language so as to arrive at contract language that is not prohibited or penalized by U.S. antiboycott laws. Often, small changes that may appear subtle to business partners can successfully neutralize problematic boycott requests. The likelihood of successfully negotiating the necessary changes will depend on the customer, country, and goods involved in each transaction. However, many customers in boycotting countries are aware of U.S. antiboycott laws and accept that U.S. companies and their affiliates must comply with these laws or risk penalties or the loss of tax benefits. Further, a number of boycotting countries have moved away from enforcing the secondary and tertiary boycotts, focusing instead on the primary boycott (including in some cases requests that are not prohibited or penalizable under U.S. antiboycott law).

Recommended compliance measures

Given the complex and nuanced nature of these regulations, implementing practical and effective compliance strategies can be a challenge. At a minimum,

companies that are subject to U.S. antiboycott regulations should consider the following compliance strategies:

Review

Train responsible employees to carefully review all oral and written communications, including, but not limited to, emails, contracts, purchase orders, letters of credit, import documents, invoices, tenders, and requests for information, to determine whether any boycott language is present. Special attention should be paid to documents emanating from the countries identified by the U.S. Treasury Department as boycotting countries and countries identified by the U.S. Commerce Department as having propagated recent boycott requests. All transaction documents should be reviewed, even if the company does not intend to pursue the business. Problematic boycott language might include:

- References to 'Israel' or 'Israeli' when the transaction does not otherwise involve any apparent connection to Israel;
- References to a vessel or aircraft being eligible to enter the ports or airports of a boycotting country;
- References to 'negative' certificates of product origin (e.g., goods are 'not of Israeli origin');
- References to an insurance company having a qualified agent or representative in a boycotting country;
- Requests to comply with the laws or regulations of a boycotting country generally or boycott laws specifically; or
- Boycott questionnaires seeking information about relationships with Israel, including data about the company's ownership, management, subsidiaries, licensees, or affiliated firms.

This list is not exhaustive. Whether a boycott request is problematic from a U.S. legal standpoint will depend on jurisdictional factors and how the request is framed.

Refer

If any problematic boycott language is identified, place the transaction on hold and promptly forward a copy of the exact language received to the export compliance or legal department for further evaluation. Given the complexities involved in applying this area of the law, companies frequently elect for a centralised review rather than training employees extensively on the nuances of this area.

Further examples of boycott language

The following are examples of boycott requests reported to the U.S. Commerce Department in recent years:

Prohibited boycott conditions in a contract

'The (tenders) committee may also exclude any bid that does not abide by the provisions of the commercial and economic laws and the provisions of the law of boycott of Israel applicable in the state.'

'[A certificate required stating] that the items have not been manufactured in Israel and that any of the components thereof have not been manufactured in Israel.'

Prohibited condition in a contract

'Certificate issued by the manufacturer or exporter stating that the goods are not of Israeli origin, have not been exported from Israel, and do not contain any Israeli materials.'

Prohibited boycott condition in a purchase order

'Goods/equipment subject to Israeli Boycott terms must not be quoted.'

Prohibited boycott condition in a letter of credit

'Under no circumstances may a bank listed in the Arab Israeli Boycott Black List be permitted to negotiate this Documentary Credit.'

Prohibited boycott condition in a contract

'Vendor shall comply with the Israel boycott laws in performing his contractual obligations.'

Prohibited boycott condition in a contract

'The seller warrants that no supplier or manufacturer or any part of the product is precluded from doing business with Saudi Arabia under the terms of the Arab boycott regulations.'

Reportable boycott condition in list of documents required by a freight-forwarder

'Certificate from insurance company stating that they are not blacklisted.'

Prohibited boycott condition in a purchase order

'Following statement should appear at foot of invoice: 'We hereby certify that these goods are not of Israeli origin nor do they contain materials of Israeli origin and they are manufactured by....'

Prohibited boycott condition in a contract

'The Contractor whether an Establishment or Company, National or Foreign, shall not import or enter into Agreement with any Foreign Company or Establishment as Sub-

Contractor particularly if such Company did not have previous dealing in the Kingdom of Saudi Arabia, except after contacting the Regional office of the Arab Boycott to Israel, or one of the two Sub-Offices of the Ministry of Commerce at Jeddah or Dammam, to ensure of the status of the said Foreign Company, in light of the Rules and orders issued by the office of the Arab Boycott of Israel.'

Prohibited boycott condition in a contract

'Israeli Boycott: The Contractor shall apply all rules of the Israeli Boycott.'

Prohibited boycott condition in a boycott questionnaire

'Company/Corporation Background:

1. Has the company/corporation engaged in or conducted business in Israel?
2. Does the company/corporation or its subsidiary have an office, facility or business operation in Israel?'

Prohibited boycott condition in a tender

'The quotation should not include any material manufactured or exported by boycotted companies as per the Kingdom of Saudi Arabia regulations.'

Prohibited boycott condition in a tender

'Eligible Bidders: The bidder/supplier who are not subject to the Boycott regulations of the League of Arab States or of the Kingdom of Saudi Arabia will only be considered.'

Source: BIS website at: <https://www.bis.doc.gov/index.php/enforcement/oac/7-enforcement/578-examples-of-boycott-requests>)

Respond/report

The export compliance or legal department should provide instructions on how to proceed. This may involve amending or striking the problematic language. It also could involve collecting information necessary to ensure proper and timely reporting of any boycott requests to the Commerce and/or Treasury departments. Commerce Department reports are required to be filed within 30 days after the end of the calendar quarter in which a reportable boycott request is received (or 60 days after the end of the relevant calendar quarter if the request is received outside of the United States). Treasury Department boycott reports are filed annually with the U.S. taxpayer's tax returns. Boycott requests must be reported (unless an exception applies) even if the prohibited or penalised action was not taken.

Conclusion

The complex and sometimes inconsistent nature of U.S. antiboycott programmes can substantially impact both U.S. and non-U.S. companies and, in some situations, lead to civil or criminal penalties or the loss of tax benefits. As a result, companies should ensure that compliance staff are adequately trained on this area of U.S. law. In addition, compliance policies for U.S. and covered non-U.S. entities should include procedures for reviewing transaction materials, referring problematic boycott-related language for appropriate review, and reporting boycott requests as required.

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