§760.1

DEFINITIONS

In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C.

(a) Definition of "Person"

For purposes of this part, the term "*person*" means any individual, or any association or organization, public or private, which is organized, permanently established, resident, or registered to do business, in the United States or any foreign country. This definition of "person" includes both the singular and plural and, in addition, includes:

(1) Any partnership, corporation, company, branch, or other form of association or organization, whether organized for profit or non-profit purposes;

(2) Any government, or any department, agency, or commission of any government;

(3) Any trade association, chamber of commerce, or labor union;

(4) Any charitable or fraternal organization; and

(5) Any other association or organization not specifically listed in paragraphs (a)(1) through (4) of this section.

(b) Definition of "United States Person"

(1) This part applies to United States persons. For purposes of this part, the term "*United States person*" means any person who is a United States resident or national, including individuals, domestic concerns, and "controlled in fact" foreign subsidiaries, affiliates, or other permanent foreign establishments of domestic concerns. This definition of "*United States person*" includes both the singular and plural and, in addition, includes:

(i) The government of the United States or any department, agency, or commission thereof;

(ii) The government of any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any subdivision, department, agency, or commission of any such government;

(iii) Any partnership, corporation, company, association, or other entity organized under the laws of paragraph (b)(1)(i) or (ii) of this section;

(iv) Any foreign concern's subsidiary, partnership, affiliate, branch, office, or other permanent establishment in any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and

(v) Any domestic concern's foreign subsidiary, partnership, affiliate, branch, office, or other permanent foreign establishment which is controlled in fact by such domestic concern. (See paragraph (c) of this section on "Definition of 'Controlled in Fact'.")

(2) The term "*domestic concern*" means any partnership, corporation, company, association, or other entity of, or organized under the laws of, any jurisdiction named in paragraph (b)(1)(i) or (ii) of this section, or any permanent domestic establishment of a foreign concern.

(3) The term "*foreign concern*" means any partnership, corporation, company, association, or other entity of, or organized under the laws of, any jurisdiction other than those named in paragraph (b)(1)(i) or (ii) of this section.

(4) The term "*United States person*" does not include an individual United States national who is resident outside the United States and who is either employed permanently or temporarily by a

non-United States person or assigned to work as an employee for, and under the direction and control of, a non-United States person.

EXAMPLES OF "UNITED STATES PERSON"

The following examples are intended to give guidance in determining whether a person is a "United States person." They are illustrative, not comprehensive.

(i) U.S. bank A has a branch office in foreign country P. Such branch office is a United States person, because it is a permanent foreign establishment of a domestic concern.

(ii) Ten foreign nationals establish a manufacturing plant, A, in the United States, incorporating the plant under New York law.

A is a United States person, because it is a corporation organized under the laws of one of the states of the United States.

(iii) A, a foreign corporation, opens an office in the United States for purposes of soliciting U.S. orders. The office is not separately incorporated.

A's U.S. office is a United States person, because it is a permanent establishment, in the United States, of a foreign concern.

(iv) A, a U.S. individual, owns stock in foreign corporation B.

A is a United States person. However, A is not a "domestic concern," because the term "domestic concern" does not include individuals.

(v) A, a foreign national resident in the United States, is employed by B, a foreign corporation.

A is a United States person, because he is resident in the United States.

(vi) A, a foreign national, who is resident in a foreign country and is employed by a foreign corporation, makes occasional visits to the United States, for purposes of exploring business opportunities.

A is not a United States person, because he is not a United States resident or national.

(vii) A is an association of U.S. firms organized under the laws of Pennsylvania for the purpose of expanding trade.

A is a United States person, because it is an association organized under the laws of one of the states of the United States.

(viii) At the request of country Y, A, an individual employed by U.S. company B, is transferred to company C as an employee. C is a foreign company owned and controlled by country Y. A, a U.S. national who will reside in Y, has agreed to the transfer provided he is able to retain his insurance, pension, and other benefits. Accordingly, company B has agreed to keep A as an employee in order to protect his employee benefits, and company C has agreed to pay for A's salary. At all times while he works for C, A will be under C's direction and control.

A is not a United States person while under C's direction and control, because he will be resident outside the United States and assigned as an employee to a non-United States person. The arrangement designed to protect A's insurance, pension, and other benefits does not destroy his status as an employee of C so long as he is under the direction and control of C.

(ix) A, a U.S. citizen, has resided in Europe for three years, where he is a self-employed consultant for United States and foreign companies in the communications industry.

A is a United States person, because he is a U.S. national and because he is not a resident outside the United States who is employed by other than a United States person.

(c) Definition of "Controlled in Fact"

(1) This part applies to any domestic concern's foreign subsidiary, partnership, affiliate, branch, office, or other permanent foreign establishment which is "controlled in fact" by such domestic concern. "Control in fact" consists of the authority or ability of a domestic concern to establish the general policies or to control day-to-day operations of its foreign subsidiary, partnership, affiliate, branch, office, or other permanent foreign establishment.

(2) A foreign subsidiary or affiliate of a domestic concern will be presumed to be controlled in fact by that domestic concern, subject to rebuttal by competent evidence, when:

(i) The domestic concern beneficially owns or controls (whether directly or indirectly) more than 50 percent of the outstanding voting securities of the foreign subsidiary or affiliate;

(ii) The domestic concern beneficially owns or controls (whether directly or indirectly) 25 percent or more of the voting securities of the foreign subsidiary or affiliate, if no other person owns or controls (whether directly or indirectly) an equal or larger percentage;

(iii) The foreign subsidiary or affiliate is operated by the domestic concern pursuant to the provisions of an exclusive management contract;

(iv) A majority of the members of the board of directors of the foreign subsidiary or affiliate are also members of the comparable governing body of the domestic concern;

(v) The domestic concern has authority to appoint the majority of the members of the board of directors of the foreign subsidiary or affiliate; or

(vi) The domestic concern has authority to appoint the chief operating officer of the foreign subsidiary or affiliate.

(3) A brokerage firm or other person which holds simple record ownership of securities for the convenience of clients will not be deemed to control the securities.

(4) A domestic concern which owns, directly or indirectly, securities that are immediately convertible at the option of the holder or owner into voting securities is presumed to own or control those voting securities.

(5) A domestic concern's foreign branch office or other unincorporated permanent foreign establishment is deemed to be controlled in fact by such domestic concern under all circumstances.

EXAMPLES OF "CONTROLLED IN FACT"

The following examples are intended to give guidance in determining the circumstances in which a foreign subsidiary, affiliate, or other permanent foreign establishment of a domestic concern is "controlled in fact." They are illustrative, not comprehensive.

(i) Company A is incorporated in a foreign country. Fifty-one percent of the voting stock of A is owned by U.S. company B.

A is presumed to be controlled in fact by B. This presumption may be rebutted by competent evidence showing that control does not, in fact, lie with B.

(ii) Company A is incorporated in a foreign country. Ten percent of the voting stock of A is owned by U.S. company B. A has an exclusive management contract with B pursuant to which A is operated by B.

As long as such contract is in effect, A is presumed to be controlled in fact by B. This presumption may be rebutted by competent evidence showing that control does not, in fact, lie with B.

(iii) Company A is incorporated in a foreign country. Ten percent of the voting stock of A is owned by U.S. company B. A has 10 persons on its board of directors. Six of those persons are also members of the board of directors of U.S. company B.

A is presumed to be controlled in fact by B. This presumption may be rebutted by competent evidence showing that control does not, in fact, lie with B.

(iv) Company A is incorporated in a foreign country. Thirty percent of the voting securities of A is owned by U.S. company B and no other person owns or controls an equal or larger share.

A is presumed to be controlled in fact by B. This presumption may be rebutted by competent evidence showing that control does not, in fact, lie with B.

(v) Company A is incorporated in a foreign country. In A's articles of incorporation, U.S. company B has been given authority to appoint A's board of directors.

A is presumed to be controlled in fact by B. This presumption may be rebutted by competent evidence showing that control does not, in fact, lie with B.

(vi) Company A is a joint venture established in a foreign country, with equal participation by U.S. company B and foreign company C. U.S. Company B has authority to appoint A's chief operating officer.

A is presumed to be controlled in fact by B. This presumption may be rebutted by competent evidence showing that control does not, in fact, lie with B.

(vii) Same as (vi), except that B has no authority to appoint A's chief operating officer.

B is not presumed to control A, absent other facts giving rise to a presumption of control.

(viii) Company A is incorporated in a foreign country. U.S. companies B, C, and D each own 20 percent of A's voting securities and regularly cast their votes in concert.

A is presumed to be controlled in fact by B, C, and D, because these companies are acting in concert to control A.

(ix) U.S. bank B located in the United States has a branch office, A, in a foreign country. A is not separately incorporated.

A is deemed to be controlled in fact by B, because A is a branch
office of a domestic concern.

(x) Company A is incorporated in a foreign country. Fifty-one percent of the voting stock of A is owned by company B, which is incorporated in another foreign country. Fifty-one percent of the voting stock of B is owned by C, a U.S. company.

Both A and B are presumed to be controlled in fact by C. The presumption of C's control over B may be rebutted by competent evidence showing that control over B does not, in fact, lie with C. The presumption of B's control over A (and thus C's control over A) may be rebutted by competent

evidence showing that control over A does not, in fact, lie with B.

(xi) B, a U.S. individual, owns 51 percent of the voting securities of A, a manufacturing company incorporated and located in a foreign country.

A is not "controlled in fact" under this part, because it is not controlled by a "domestic concern."

(d) Definition of "Activities in the Interstate or Foreign Commerce of the United States"

ACTIVITIES INVOLVING UNITED STATES PERSONS LOCATED IN THE UNITED STATES

(1) For purposes of this part, the activities of a United States person located in the United States are in the interstate or foreign commerce of the United States if they involve the sale, purchase, or transfer of goods or services (including information) between:

(i) Two or more of the several States (including the District of Columbia);

(ii) Any State (including the District of Columbia) and any territory or possession of the United States;

(iii) Two or more of the territories or possessions of the United States; or

(iv) A State (including the District of Columbia), territory or possession of the United States and any foreign country.

(2) For purposes of this part, the export of goods or services from the United States and the import of goods or services into the United States are activities in United States commerce. In addition, the action of a domestic concern in specifically directing the activities of its controlled in fact foreign subsidiary, affiliate, or other permanent foreign establishment is an activity in United States commerce.

(3) Activities of a United States person located in the United States may be in United States commerce even if they are part of or ancillary to activities outside United States commerce. However, the fact that an ancillary activity is in United States commerce does not, in and of itself, mean that the underlying or related activity is in United States commerce.

(4) Hence, the action of a United States bank located in the United States in providing financing from the United States for a foreign transaction that is not in United States commerce is nonetheless itself in United States commerce. However, the fact that the financing is in United States commerce does not, in and of itself, make the underlying foreign transaction an activity in United States commerce, even if the underlying transaction involves a foreign company that is a "United States person" within the meaning of this part.

(5) Similarly, the action of a United States person located in the United States in providing financial, accounting, legal, transportation, or other ancillary services to its controlled in fact foreign subsidiary, affiliate, or other permanent foreign establishment in connection with a foreign transaction is in United States commerce. But the provision of such ancillary services will not, in and of itself, bring the foreign transaction of such subsidiary, affiliate, or permanent foreign establishment into United States commerce.

ACTIVITIES OF CONTROLLED IN FACT FOREIGN SUBSIDIARIES, AFFILIATES, AND OTHER PERMANENT FOREIGN ESTABLISHMENTS

(6) Any transaction between a controlled in fact foreign subsidiary, affiliate, or other permanent foreign establishment of a domestic concern and a person located in the United States is an activity in United States commerce.

(7) Whether a transaction between such a foreign subsidiary, affiliate, or other permanent foreign establishment and a person located outside the United States is an activity in United States commerce is governed by the following rules.

ACTIVITIES IN UNITED STATES COM MERCE

(8) A transaction between a domestic concern's controlled in fact foreign subsidiary, affiliate, or other permanent foreign establishment and a person outside the United States, involving goods or services (including information but not including ancillary services) acquired from a person in the United States is in United States commerce under any of the following circumstances:

(i) If the goods or services were acquired for the purpose of filling an order from a person outside the United States;

(ii) If the goods or services were acquired for incorporation into, refining into, reprocessing into, or manufacture of another product for the purpose of filling an order from a person outside the United States;

(iii) If the goods or services were acquired for the purpose of fulfilling or engaging in any other transaction with a person outside the United States; or

(iv) If the goods were acquired and are ultimately used, without substantial alteration or modification, in filling an order from, or fulfilling or engaging in any other transaction with, a person outside the United States (whether or not the goods were originally acquired for that purpose). If the goods are indistinguishable as to origin from similar foreign-trade goods with which they have been mingled in a stockpile or inventory, the subsequent transaction involving the goods is presumed to be in United States commerce unless, at the time of filling the order, the foreign-origin inventory on hand was sufficient to fill the order.

(9) For purposes of this section, goods or services are considered to be acquired for the purpose of filling an order from or engaging in any other transaction with a person outside the United States where:

(i) They are purchased by the foreign subsidiary, affiliate, or other permanent foreign establishment upon the receipt of an order from or on behalf of a customer with the intention that the goods or services are to go to the customer;

(ii) They are purchased by the foreign subsidiary, affiliate, or other permanent foreign establishment to meet the needs of specified customers pursuant to understandings with those customers, although not for immediate delivery; or

(iii) They are purchased by the foreign subsidiary, affiliate, or other permanent foreign establishment based on the anticipated needs of specified customers.

(10) If any non-ancillary part of a transaction between a domestic concern's controlled foreign subsidiary, affiliate, or other permanent foreign establishment and a person outside the United States is in United States commerce, the entire transaction is in United States commerce. For example, if such a foreign subsidiary is engaged in filling an order from a non-United States customer

both with goods acquired from the United States and with goods acquired elsewhere, the entire transaction with that customer is in United States commerce.

ACTIVITIES OUTSIDE UNITED STATES COMMERCE

(11) A transaction between a domestic concern's controlled foreign subsidiary, affiliate, or other permanent foreign establishment and a person outside the United States, not involving the purchase, sale, or transfer of goods or services (including information) to or from a person in the United States, is not an activity in United States commerce.

(12) The activities of a domestic concern's controlled foreign subsidiary, affiliate, or other permanent foreign establishment with respect to goods acquired from a person in the United States are not in United States commerce where:

(i) They were acquired without reference to a specific order from or transaction with a person outside the United States; and

(ii) They were further manufactured, incorporated into, refined into, or reprocessed into another product.

(13) The activities of a domestic concern's controlled foreign subsidiary, affiliate, or other permanent foreign establishment with respect to services acquired from a person in the United States are not in United States commerce where:

(i) They were acquired without reference to a specific order from or transaction with a person outside the United States; or

(ii) They are ancillary to the transaction with the person outside the United States.

(14) For purposes of this section, services are "ancillary services" if they are provided to a controlled foreign subsidiary, affiliate, or other permanent foreign establishment primarily for its own use rather than for the use of a third person. These typically include financial, accounting, legal, transportation, and other services, whether provided by a domestic concern or an unrelated entity.

(15) Thus, the provision of the project financing by a United States bank located in the United States to a controlled foreign subsidiary unrelated to the bank is an ancillary service which will not cause the underlying transaction to be in United States commerce. By contrast, where a domestic concern, on behalf of its controlled foreign subsidiary, gives a guaranty of performance to a foreign country customer, that is a service provided to the customer and, as such, brings that subsidiary's transaction with the customer into United States commerce. Similarly, architectural or engineering services provided by a domestic concern in connection with its controlled foreign subsidiary's construction project in a third country are services passed through to the subsidiary's customer and, as such, bring that subsidiary's foreign transaction into United States commerce.

GENERAL

(16) Regardless of whether the subsequent disposition of goods or services from the United States is in United States commerce, the original acquisition of goods or services from a person in the United States is an activity in United States commerce subject to this part. Thus, if a domestic concern's controlled foreign subsidiary engages in a prohibited refusal to do business in stocking its inventory with goods from the United States, that action is subject to this part whether or not subsequent sales from that inventory are.

(17) In all the above, goods and services will be considered to have been acquired from a person in the United States whether they were acquired directly or indirectly through a third party, where the person acquiring the goods or services knows or expects, at the time he places the order, that they will be delivered from the United States.

LETTERS OF CREDIT

(18) Implementation of a letter of credit in the United States by a United States person located in the United States, including a permanent United States establishment of a foreign concern, is an activity in United States commerce.

(19) Implementation of a letter of credit outside the United States by a United States person located outside the United States is in United States commerce where the letter of credit (a) specifies a United States address for the beneficiary, (b) calls for documents indicating shipment from the United States, or (c) calls for documents indicating that the goods are of United States origin.

(20) See §760.2(f) of this part on "Letters of Credit" to determine the circumstances in which paying, honoring, confirming, or otherwise implementing a letter of credit is covered by this part.

EXAMPLES OF ACTIVITIES IN THE INTERSTATE OR FOREIGN COMMERCE OF THE UNITED STATES

The following examples are intended to give guidance in determining the circumstances in which an activity is in the interstate or foreign commerce of the United States. They are illustrative, not comprehensive.

UNITED STATES PERSON LOCATED IN THE UNITED STATES

(i) U.S. company A exports goods from the United States to a foreign country. A's activity is in U.S. commerce, because A is exporting goods from the United States.

(ii) U.S. company A imports goods into the United States from a foreign country. A's activity is in U.S. commerce, because A is importing goods into the United States.

(iii) U.S. engineering company A supplies consulting services to its controlled foreign subsidiary, B. A's activity is in U.S. commerce, because A is exporting services from the United States.

(iv) U.S. company A supplies consulting services to foreign company B. B is unrelated to A or any other U.S. person.

A's activity is in U.S. commerce even though B, a foreign-owned company located outside the United States, is not subject to this part, because A is exporting services from the United States.

(v) Same as (iv), except A is a bank located in the United States and provides a construction loan to B.

A's activity is in U.S. commerce even though B is not subject to this part, because A is exporting financial services from the United States.

(vi) U.S. company A issues policy directives from time to time to its controlled foreign subsidiary, B, governing the conduct of B's activities with boycotting countries.

A's activity in directing the activities of its foreign subsidiary, B, is an activity in U.S. commerce.

FOREIGN SUBSIDIARIES, AFFILIATES, AND OTHER PERMANENT FOREIGN ESTABLISHMENTS OF DOMESTIC CONCERNS

(i) A, a controlled foreign subsidiary of U.S. company B, purchases goods from the United States.

A's purchase of goods from the United States is in U.S. commerce, because A is importing goods from the United States. Whether A's subsequent disposition of these goods is in U.S. commerce is irrelevant. Similarly, the fact that A purchased goods from the United States does not, in and of itself, make any subsequent disposition of those goods an activity in U.S. commerce.

(ii) A, a controlled foreign subsidiary of U.S. company B, receives an order from boycotting country Y for construction materials. A places an order with U.S. company B for the materials.

A's transaction with Y is an activity in U.S. commerce, because the materials are purchased from the United States for the purpose of filling the order from Y.

(iii) A, a controlled foreign subsidiary of U.S. company B, receives an order from boycotting country Y for construction materials. A places an order with U.S. company B for some of the materials, and with U.S. company C, an unrelated company, for the rest of the materials.

A's transaction with Y is an activity in U.S. commerce, because the materials are purchased from the United States for the purpose of filling the order from Y. It makes no difference whether the materials are ordered from B or C.

(iv) A, a controlled foreign subsidiary of U.S. company B, is in the wholesale and retail appliance sales business. A purchases finished air conditioning units from the United States from time to time in order to stock its inventory. A's inventory is also stocked with air conditioning units purchased outside the United States. A receives an order for air conditioning units from Y, a boycotting country. The order is filled with U.S.-origin units in A's inventory.

A's transaction with Y is in U.S. commerce, because its U.S.-origin goods are resold without substantial alteration.

(v) Same as (iv), except that A is in the chemicals distribution business. Its U.S.-origin goods are mingled in inventory with foreign-origin goods.

A's sale to Y of unaltered goods from its general inventory is presumed to be in U.S. commerce unless A can show that at the time of the sale the foreign-origin inventory on hand was sufficient to cover the shipment to Y.

(vi) A, a foreign subsidiary of U.S. company B, receives an order from boycotting country Y for computers. A places an order with U.S. company B for some of the components; with U.S. company C, an unrelated company, for other components; and with foreign company D for the rest of the components. A then assembles the computers and ships them to Y.

A's transaction with Y is an activity in U.S. commerce, because some of the components are acquired from the United States for purposes of filling an order from Y.

(vii) Same as (vi), except A purchases all the components from non-U.S. sources.

A's transaction with Y is not an activity in U.S. commerce, because it involves no export of goods from the United States. It makes no difference whether the technology A uses to manufacture computers was originally acquired from its U.S. parent.

(viii) A, a controlled foreign subsidiary of U.S. company B, manufactures computers. A stocks its general components and parts inventory with

purchases made at times from the United States and at times from foreign sources. A receives an order from Y, a boycotting country, for computers. A fills that order by manufacturing the computers using materials from its general inventory.

A's transaction with Y is not in U.S. commerce, because the U.S.-origin components are not acquired for the purpose of meeting the anticipated needs of specified customers in Y. It is irrelevant that A's operations may be based on U.S.-origin technology.

(ix) Same as (viii), except that in anticipation of the order from Y, A orders and receives the necessary materials from the United States.

A's transaction with Y is in U.S. commerce, because the U.S.-origin goods were acquired for the purpose of filling an anticipated order from Y.

(x) A, a controlled foreign subsidiary of U.S. company B, manufactures typewriters. It buys typewriter components both from the United States and from foreign sources. A sells its output in various places throughout the world, including boycotting country Y. Its sales to Y vary from year to year, but have averaged approximately 20 percent of sales for the past five years. A expects that its sales to Y will remain at approximately that level in the years ahead although it has no contracts or orders from Y on hand.

A's sales of typewriters to Y are not in U.S. commerce, because the U.S. components are not acquired for the purpose of filling an order from Y. A general expectancy of future sales is not an "order" within the meaning of this section.

(xi) U.S. company A's corporate counsel provides legal advice to B, its controlled foreign subsidiary, on the applicability of this Part to B's transactions.

While provision of this legal advice is itself an activity in U.S. commerce, it does not, in and of itself, bring B's activities into U.S. commerce.

(xii) A, a controlled foreign subsidiary of U.S. company B, is in the general construction business. A enters into a contract with boycotting country Y to construct a power plant in Y. In preparing engineering drawings and specifications, A uses the advice and assistance of B.

A's transaction with Y is in U.S. commerce, because B's services are used for purposes of fulfilling the contract with Y. B's services are not ancillary services, because the engineering services in connection with construction of the power plant are part of the services ultimately provided to Y by A.

(xiii) Same as (xii), except that A gets no engineering advice or assistance from B. However, B's corporate counsel provides legal advice to A regarding the structure of the transaction. In addition, B's corporate counsel draws up the contract documents.

A's transaction with Y is not in U.S. commerce. The legal services provided to A are ancillary services, because they are not part of the services provided to Y by A in fulfillment of its contract with Y.

(xiv) A, a controlled foreign subsidiary of U.S. company B, enters into a contract to construct an apartment complex in boycotting country Y. A will fulfill its contract completely with goods and services from outside the United States. Pursuant to a provision in the contract, B guarantees A's performance of the contract.

A's transaction with Y is in U.S. commerce, because B's guaranty of A's performance involves the acquisition of services from the United States for purposes of fulfilling the transaction with Y, and those services are part of the services ultimately provided to Y.

(xv) Same as (xiv), except that the guaranty of A's performance is supplied by C, a non-U.S. person located outside the United States. However, unrelated to any particular transaction, B from time to time provides general financial, legal, and technical services to A.

A's transaction with Y is not in U.S. commerce, because the services acquired from the United States are not acquired for purposes of fulfilling the contract with Y.

(xvi) A, a foreign subsidiary of U.S. company B, has a contract with boycotting country Y to conduct oil drilling operations in that country. In conducting these operations, A from time to time seeks certain technical advice from B regarding the operation of the drilling rigs.

A's contract with Y is in U.S. commerce, because B's services are sought for purposes of fulfilling the contract with Y and are part of the services ultimately provided to Y.

(xvii) A, a controlled foreign subsidiary of U.S. company B, enters into a contract to sell typewriters to boycotting country Y. A is located in non-boycotting country P. None of the components are acquired from the United States. A engages C, a U.S. shipping company, to transport the typewriters from P to Y.

A's sales to Y are not in U.S. commerce, because in carrying A's goods, C is providing an ancillary service to A and not a service to Y.

(xviii) Same as (xvii), except that A's contract with Y calls for title to pass to Y in P. In addition, the contract calls for A to engage a carrier to make delivery to Y.

A's sales to Y are in U.S. commerce, because in carrying Y's goods, C is providing a service to A which is ultimately provided to Y.

(xix) A, a controlled foreign subsidiary of U.S. company B, has general product liability insurance with U.S. company C. Foreign-origin goods sold from time to time by A to boycotting country Y are covered by the insurance policy.

A's sales to Y are not in U.S. commerce, because the insurance provided by C is an ancillary service provided to A which is not ultimately provided to Y.

(xx) A, a controlled foreign subsidiary of U.S. company B, manufactures automobiles abroad under a license agreement with B. From time to time, A sells such goods to boycotting country Y.

A's sales to Y are not in U.S. commerce, because the rights conveyed by the license are not acquired for the specific purpose of engaging in transactions with Y.

(e) "Intent"

(1) This part prohibits a United States person from taking or knowingly agreeing to take certain specified actions with intent to comply with, further, or support an unsanctioned foreign boycott.

(2) A United States person has the intent to comply with, further, or support an unsanctioned foreign boycott when such a boycott is at least one of the reasons for that person's decision whether to take a particular prohibited action. So long as that is at least one of the reasons for that person's action, a violation occurs regardless of whether the prohibited action is also taken for non-boycott reasons. Stated differently, the fact that such action was taken for legitimate business reasons does not remove that action from the scope of this part if compliance with an unsanctioned foreign boycott was also a reason for the action.

●**(3)** Intent is a necessary element of any violation of any of the prohibitions under §760.2. It is not

sufficient that one take action that is specifically prohibited by this part. It is essential that one take such action with intent to comply with, further, or support an unsanctioned foreign boycott. Accordingly, a person who inadvertently, without boycott intent, takes a prohibited action, does not commit any violation of this part.

(4) Intent in this context means the reason or purpose for one's behavior. It does not mean that one has to agree with the boycott in question or desire that it succeed or that it be furthered or supported. But it does mean that the reason why a particular prohibited action was taken must be established.

(5) Reason or purpose can be proved by circumstantial evidence. For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he knowingly supplies that information in response, he clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes. On the other hand, if a person refuses to do business with someone who happens to be blacklisted, but the reason is because that person produces an inferior product, the requisite intent does not exist.

(6) Actions will be deemed to be taken with intent to comply with an unsanctioned foreign boycott if the person taking such action knew that such action was required or requested for boycott reasons. On the other hand, the mere absence of a business relationship with a blacklisted person or with or in a boycotted country does not indicate the existence of the requisite intent.

(7) In seeking to determine whether the requisite intent exists, all available evidence will be examined.

EXAMPLES OF "INTENT"

The following examples are intended to illustrate the factors which will be considered in determining whether the required intent exists. They are illustrative, not comprehensive.

(i) U.S. person A does business in boycotting country Y. In selecting firms to supply goods for shipment to Y, A chooses supplier B because B's products are less expensive and of higher quality than the comparable products of supplier C. A knows that C is blacklisted, but that is not a reason for A's selection of B.

A's choice of B rather than C is not action with intent to comply with Y's boycott, because C's blacklist status is not a reason for A's action.

(ii) Same as (i), except that A chooses B rather than C in part because C is blacklisted by Y.

Since C's blacklist status is a reason for A's choice, A's action is taken with intent to comply with Y's boycott.

(iii) U.S. person A bids on a tender issued by boycotting country Y. A inadvertently fails to notice a prohibited certification which appears in the tender document. A's bid is accepted.

A's action in bidding was not taken with intent to comply with Y's boycott, because the boycott was not a reason for A's action.

(iv) U.S. bank A engages in letter of credit transactions, in favor of U.S. beneficiaries, involving the shipments of U.S. goods to boycotting country Y. As A knows, such letters of credit routinely contain conditions requiring prohibited certifications. A fails to take reasonable steps to prevent the implementation of such letters of credit. A receives for implementation a letter of credit which in fact contains a prohibited condition but does not examine the letter of credit to

determine whether it contains such a condition.

Although Y's boycott may not be a specific reason for A's action in implementing the letter of credit with a prohibited condition, all available evidence shows that A's action was taken with intent to comply with the boycott, because A knows or should know that its procedures result in compliance with the boycott.

(v) U.S. bank A engages in letter of credit transactions, in favor of U.S. beneficiaries, involving the shipment of U.S. goods to boycotting country Y. As A knows, the documentation accompanying such letters of credit sometimes contains prohibited certifications. In accordance with standard banking practices applicable to A, it does not examine such accompanying documentation. A receives a letter of credit in favor of a U.S. beneficiary. The letter of credit itself contains no prohibited conditions. However, the accompanying documentation, which A does not examine, does contain such a condition.

All available evidence shows that A's action in implementing the letter of credit was not taken with intent to comply with the boycott, because A has no affirmative obligation to go beyond applicable standard banking practices in implementing letters of credit.

(vi) A, a U.S. company, is considering opening a manufacturing facility in boycotted country X. A already has such a facility in boycotting country Y. After exploring the possibilities in X, A concludes that the market does not justify the move. A is aware that if it did open a plant in X, Y might object because of Y's boycott of X. However Y's possible objection is not a reason for A's decision not to open a plant in X.

A's decision not to proceed with the plant in X is not action with intent to comply with Y's boycott, because Y's boycott of X is not a reason for A's decision.

(vii) Same as (vi), except that after exploring the business possibilities in X, A concludes that the market does justify the move to X. However, A does not open the plant because of Y's possible objections due to Y's boycott of X.

A's decision not to proceed with the plant in X is action taken with intent to comply with Y's boycott, because Y's boycott is a reason for A's decision.

(viii) A, a U.S. chemical manufacturer, receives a "boycott questionnaire" from boycotting country Y asking, among other things, whether A has any plants located in boycotted country X. A, which has never supported Y's boycott of X, responds to Y's questionnaire, indicating affirmatively that it does have plants in X and that it intends to continue to have plants in X.

A's responding to Y's questionnaire is deemed to be action with intent to comply with Y's boycott because A knows that the questionnaire is boycott-related. It is irrelevant that A does not also wish to support Y's boycott.

●(ix) U.S. company A has a manufacturing facility in boycotted country X. A receives an invitation to bid on a construction project in boycotting country Y. The invitation states that all bidders must complete a boycott questionnaire and send it in with the bid. The questionnaire asks for information about A's business relationships with X. Regardless of whether A's bid is successful, A intends to continue its business in X undiminished and in fact is exploring and intends to continue exploring an expansion of its activities in X without regard to Y's boycott.

A may not answer the questionnaire, because, despite A's intentions with regard to its business operations in X, Y's request for completion of the questionnaire is for boycott purposes and by responding, A's action would be taken with intent to comply with Y's boycott.

§760.2

PROHIBITIONS

(a) Refusals to do business

PROHIBITION AGAINST REFUSALS TO DO BUSINESS

(1) No United States person may: refuse, knowingly agree to refuse, require any other person to refuse, or knowingly agree to require any other person to refuse, to do business with or in a boycotted country, with any business concern organized under the laws of a boycotted country, with any national or resident of a boycotted country, or with any other person, when such refusal is pursuant to an agreement with the boycotting country, or a requirement of the boycotting country, or a request from or on behalf of the boycotting country.

(2) Generally, a refusal to do business under this section consists of action that excludes a person or country from a transaction for boycott reasons. This includes a situation in which a United States person chooses or selects one person over another on a boycott basis or takes action to carry out another person's boycott-based selection when he knows or has reason to know that the other person's selection is boycott-based.

(3) Refusals to do business which are prohibited by this section include not only specific refusals, but also refusals implied by a course or pattern of conduct. There need not be a specific offer and refusal to constitute a refusal to do business; a refusal may occur when a United States person has a financial or commercial opportunity and declines for boycott reasons to consider or accept it.

(4) A United States person's use of either a boycott-based list of persons with whom he will not deal (a so-called "blacklist") or a boycott-based list of persons with whom he will deal (a so-called "whitelist") constitutes a refusal to do business.

(5) An agreement by a United States person to comply generally with the laws of the boycotting country with which it is doing business or an agreement that local laws of the boycotting country shall apply or govern is not, in and of itself, a refusal to do business. Nor, in and of itself, is use of a contractual clause explicitly requiring a person to assume the risk of loss of non-delivery of his products a refusal to do business with any person who will not or cannot comply with such a clause. (But see §760.4 of this part on "Evasion.")

(6) If, for boycott reasons, a United States general manager chooses one supplier over another, or enters into a contract with one supplier over another, or advises its client to do so, then the general manager's actions constitute a refusal to do business under this section. However, it is not a refusal to do business under this section for a United States person to provide management, procurement, or other pre-award services for another person so long as the provision of such pre-award services is customary for that firm (or industry of which the firm is a part), without regard to the boycotting or non-boycotting character of the countries in which they are performed, and the United States person, in providing such services, does not act to exclude a person or country from the transaction for boycott reasons, or otherwise take actions that are boycott-based. For example, a United States person under contract to provide general management services in connection with a construction project in a boycotting country may compile lists of qualified bidders for the client if that service is a customary one and if persons who are qualified are not excluded from that list because they are blacklisted.

●**(7)** With respect to post-award services, if a client makes a boycott-based selection, actions

taken by the United States general manager or contractor to carry out the client's choice are themselves refusals to do business if the United States contractor knows or has reason to know that the client's choice was boycott-based. (It is irrelevant whether the United States contractor also provided pre-award services.) Such actions include entering into a contract with the selected supplier, notifying the supplier of the client's choice, executing a contract on behalf of the client, arranging for inspection and shipment of the supplier's goods, or taking any other action to effect the client's choice. (But see §760.3(d) on "Compliance with Unilateral Selection" as it may apply to post-award services.)

(8) An agreement is not a prerequisite to a violation of this section since the prohibition extends to actions taken pursuant not only to agreements but also to requirements of, and requests from or on behalf of, a boycotting country.

(9) Agreements under this section may be either express or implied by a course or pattern of conduct. There need not be a direct request from a boycotting country for action by a United States person to have been taken pursuant to an agreement with or requirement of a boycotting country.

(10) This prohibition, like all others, applies only with respect to a United States person's activities in the interstate or foreign commerce of the United States and only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott. The mere absence of a business relationship with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with national(s) or resident(s) of the boycotted country, or with any other person does not indicate the existence of the required intent.

EXAMPLES OF REFUSALS AND AGREEMENTS TO REFUSE TO DO BUSINESS

The following examples are intended to give guidance in determining the circumstances in which, in a boycott situation, a refusal to do business or an agreement to refuse to do business is prohibited. They are illustrative, not comprehensive.

REFUSALS TO DO BUSINESS

(i) A, a U.S. manufacturer, receives an order for its products from boycotting country Y. To fill that order, A solicits bids from U.S. companies B and C, manufacturers of components used in A's products. A does not, however, solicit bids from U.S. companies D or E, which also manufacture such components, because it knows that D and E are restricted from doing business in Y and that their products are, therefore, not importable into that country.

Company A may not refuse to solicit bids from D and E for boycott reasons, because to do so would constitute a refusal to do business with those persons.

(ii) A, a U.S. exporter, uses company B, a U.S. insurer, to insure the shipment of its goods to all its overseas customers. For the first time, A receives an order for its products from boycotting country Y. Knowing that B is on the blacklist of Y, A arranges with company C, a non-blacklisted U.S. insurer, to insure the shipment of its goods to Y.

A's action constitutes a refusal to do business with B.

(iii) A, a U.S. exporter, purchases all its liability insurance from company B, a U.S. company that does business in boycotted country X. A wishes to expand its operations into country

Y, the boycotting country. Before doing so, A decides to switch from insurer B to insurer C in anticipation of a request from Y that A sever its relations with B as a condition of doing business in Y.

A may not switch insurers for this reason, because doing so would constitute a refusal to do business with B.

(iv) U.S. company A exports goods to boycotting country Y. In selecting vessels to transport the goods to Y, A chooses only from among carriers which call at ports in Y.

A's action is not a refusal to do business with carriers which do not call at ports in Y.

(v) A, a U.S. bank with a branch office in boycotting country Y, sends representatives to boycotted country X to discuss plans for opening a branch office in X. Upon learning of these discussions, an official of the local boycott office in Y advises A's local branch manager that if A opens an office in X it will no longer be allowed to do business in Y. As a result of this notification, A decides to abandon its plans to open a branch in X.

Bank A may not abandon its plans to open a branch in X as a result of Y's notification, because doing so would constitute a refusal to do business in boycotted country X.

(vi) A, a U.S. company that manufactures office equipment, has been restricted from doing business in boycotting country Y because of its business dealings with boycotted country X. In an effort to have itself removed from Y's blacklist, A ceases its business in X.

A's action constitutes a refusal to do business in boycotted country X.

(vii) A, a U.S. computer company, does business in boycotting country Y. A decides to explore business opportunities in boycotted country X. After careful analysis of possible business opportunities in X, A decides, solely for business reasons, not to market its products in X.

A's decision not to proceed is not a refusal to do business, because it is not based on boycott considerations. A has no affirmative obligation to do business in X.

(viii) A, a U.S. oil company with operations in boycotting country Y, has regularly purchased equipment from U.S. petroleum equipment suppliers B, C, and D, none of whom is on the blacklist of Y. Because of its satisfactory relationship with B, C, and D, A has not dealt with other suppliers, including supplier E, who is blacklisted by Y.

A's failure affirmatively to seek or secure business with blacklisted supplier E is not a refusal to do business with E.

(ix) Same as (viii), except U.S. petroleum equipment supplier E, a company on boycotting country Y's blacklist, offers to supply U.S. oil company A with goods comparable to those provided by U.S. suppliers B, C, and D. A, because it has satisfactory, established relationships with suppliers B, C, and D, does not accept supplier E's offer.

A's refusal of supplier E's offer is not a refusal to do business, because it is based solely on non-boycott considerations. A has no affirmative obligation to do business with E.

(x) A, a U.S. construction company, enters into a contract to build an office complex in boycotting country Y. A receives bids from B and C, U.S. companies that are equally qualified suppliers of electrical cable for the project. A knows that B is blacklisted by Y and that C is not. A accepts C's bid, in part because C is as qualified as the other

potential supplier and in part because C is not blacklisted.

A's decision to select supplier C instead of blacklisted supplier B is a refusal to do business, because the boycott was one of the reasons for A's decision.

(xi) A, a U.S. general contractor, has been retained to construct a highway in boycotting country Y. A circulates an invitation to bid to U.S. manufacturers of road-building equipment. One of the conditions listed in the invitation to bid is that, in order for A to obtain prompt service, suppliers will be required to maintain a supply of spare parts and a service facility in Y. A includes this condition solely for commercial reasons unrelated to the boycott. Because of this condition, however, those suppliers on Y's blacklist do not bid, since they would be unable to satisfy the parts and services requirements.

A's action is not a refusal to do business, because the contractual condition was included solely for legitimate business reasons and was not boycott-based.

●(xii) Company A, a U.S. oil company, purchases drill bits from U.S. suppliers for export to boycotting country Y. In its purchase orders, A includes a provision requiring the supplier to make delivery to A's facilities in Y and providing that title to the goods does not pass until delivery has been made. As is customary under such an arrangement, the supplier bears all risks of loss, including loss from fire, theft, perils of the sea, and inability to clear customs, until title passes.

Insistence on such an arrangement does not constitute a refusal to do business, because this requirement is imposed on all suppliers whether they are blacklisted or not. (But see §760.4 on "Evasion".)

(xiii) A, a U.S. engineering and construction company, contracts with a government agency in boycotting country Y to perform a variety of services in connection with the construction of a large industrial facility in Y. Pursuant to this contract, A analyzes the market of prospective suppliers, compiles a suggested bidders list, analyzes the bids received, and makes recommendations to the client. The client independently selects and awards the contract to supplier C for boycott reasons. All of A's services are performed without regard to Y's blacklist or any other boycott considerations, and are the type of services A provides clients in both boycotting and non-boycotting countries.

A's actions do not constitute a refusal to do business, because, in the provision of pre-award services, A has not excluded the other bidders and because A customarily provides such services to its clients.

(xiv) Same as (xiii), except that in compiling a list of prospective suppliers, A deletes suppliers he knows his client will refuse to select because they are blacklisted. A knows that including the names of blacklisted suppliers will neither enhance their chances of being selected nor provide his client with a useful service, the function for which he has been retained.

A's actions, which amount to furnishing a so-called "whitelist", constitute refusals to do business, because A's pre-award services have not been furnished without regard to boycott considerations.

(xv) A, a U.S. construction firm, provides its boycotting country client with a permissible list of prospective suppliers, B, C, D, and E. The client independently selects and awards the contract to C, for boycott reasons, and then requests A to advise C of his selection, negotiate the contract with C, arrange for the shipment, and inspect the goods upon arrival. A knows that C was chosen by the client for boycott reasons.

A's action in complying with his client's direction is a refusal to do business, because A's post-award actions carry out his client's boycott-based decision. (Note: Whether A's action comes within the unilateral selection exception depends upon factors discussed in §760.3(d) of this part).

(xvi) Same as (xv), except that A is building the project on a turnkey basis and will retain title until completion. The client instructs A to contract only with C.

A's action in contracting with C constitutes a refusal to do business, because it is action that excludes blacklisted persons from the transaction for boycott reasons. (Note: Whether A's action comes within the unilateral selection exception depends upon factors discussed in §760.3(d) of this part).

(xvii) A, a U.S. exporter of machine tools, receives an order for drill presses from boycotting country Y. The cover letter from Y's procurement official states that A was selected over other U.S. manufacturers in part because A is not on Y's blacklist.

A's action in filling this order is not a refusal to do business, because A has not excluded anyone from the transaction.

●(xviii) A, a U.S. engineering firm under contract to construct a dam in boycotting country Y, compiles, on a non-boycott basis, a list of potential heavy equipment suppliers, including information on their qualifications and prior experience. A then solicits bids from the top three firms on its list--B, C, and D--because they are the best qualified. None of them happens to be blacklisted. A does not solicit bids from E, F, or G, the next three firms on the list, one of whom is on Y's blacklist.

A's decision to solicit bids from only B, C, and D, is not a refusal to do business with any person, because the solicited bidders were not selected for boycott reasons.

(xix) U.S. bank A receives a letter of credit in favor of U.S. beneficiary B. The letter of credit requires B to certify that he is not blacklisted. B meets all other conditions of the letter of credit but refuses to certify as to his blacklist status. A refuses to pay B on the letter of credit solely because B refuses to certify as to his blacklist status.

A has refused to do business with another person pursuant to a boycott requirement or request.

(xx) U.S. bank A receives a letter of credit in favor of U.S. beneficiary B. The letter of credit requires B to provide a certification from the steamship line that the vessel carrying the goods is not blacklisted. B seeks payment from A and meets all other conditions of the letter of credit but refuses or is unable to provide the certification from the steamship line about the vessel's blacklist status. A refuses to pay B on the letter of credit solely because B cannot or will not provide the certification.

A has required another person to refuse to do business pursuant to a boycott requirement or request by insisting that B obtain such a certificate. (Either A or B may request an amendment to the letter of credit substituting a certificate of vessel eligibility, however. See Example (xxi) below).

●(xxi) U.S. bank A receives a letter of credit from a bank in boycotting country Y in favor of U.S. beneficiary B. The letter of credit requires B to provide a certification from the steamship line that the vessel carrying the goods is eligible to enter the ports in Y. B seeks payment from A and meets all other conditions of the letter of credit. A refuses to pay B solely because B cannot or will not provide the certification.

A has neither refused, nor required another person to refuse, to do business with another person pursuant to a boycott requirement or request because a request for a vessel eligibility certificate to be furnished by the steamship line is not a prohibited condition. (See Supplement No. 1 of this part, paragraph (I)(B), "Shipping Certificate".)

(xxii) U.S. bank A confirms a letter of credit in favor of U.S. beneficiary B. The letter of credit contains a requirement that B certify that he is not blacklisted. B presents the letter of credit to U.S. bank C, a correspondent of bank A. B does not present the certificate of blacklist status to bank C, but, in accordance with these rules, bank C pays B, and then presents the letter of credit and documentation to bank A for reimbursement. Bank A refuses to reimburse bank C because the blacklist certification of B is not included in the documentation.

A has required another person to refuse to do business with a person pursuant to a boycott requirement or request by insisting that C obtain the certificate from B.

(xxiii) U.S. bank A receives a letter of credit in favor of U.S. beneficiary B. The letter of credit requires B to certify that he is not blacklisted. B fails to provide such a certification when he presents the documents to A for payment. A notifies B that the certification has not been submitted.

A has not refused to do business with another person pursuant to a boycott requirement by notifying B of the omitted certificate. A may not refuse to pay on the letter of credit, however, if B states that B will not provide such a certificate.

(xxiv) U.S. bank A receives a letter of credit in favor of U.S. beneficiary B from the issuing bank for the purpose of confirmation, negotiation or payment. The letter of credit requires B to certify that he is not blacklisted. A notifies B that it is contrary to the policy of A to handle letters of credit containing this condition and that, unless an amendment is obtained deleting this condition, A will not implement the letter of credit.

A has not refused to do business with another person pursuant to a boycott requirement, because A has indicated its policy against implementing the letter of credit containing the term without regard to B's ability or willingness to furnish such a certificate.

AGREEMENTS TO REFUSE TO DO BUSINESS

(i) A, a U.S. construction firm, is retained by an agency of boycotting country Y to build a primary school. The proposed contract contains a clause stating that A "may not use goods or services in the project that are produced or provided by any person restricted from having a business relationship with country Y by reason of Y's boycott against country X".

A's action in entering into such a contract would constitute an agreement to refuse to do business, because it is an agreement to exclude blacklisted persons from the transaction. A may, however, renegotiate this clause so that it does not contain terms prohibited by this part.

●(ii) A, a U.S. manufacturer of commercial refrigerators and freezers, receives an invitation to bid from boycotting country Y. The tender states that the bidder must agree not to deal with companies on Y's blacklist. A does not know which companies are on the blacklist; however, A submits a bid without taking exception to the boycott conditions. A's bid makes no commitment regarding not dealing with certain companies.

At the point when A submits its bid without taking exception to the boycott request in Y's tender, A

has agreed to refuse to do business with blacklisted persons, because the terms of Y's tender require A to agree to refuse to do business.

(iii) A, a U.S. construction firm, is offered a contract to perform engineering and construction services in connection with a project located in boycotting country Y. The contract contains a clause stating that, in the event of a contract dispute, the laws of Y will apply.

A may enter into the contract. Agreement that the laws of boycotting country Y will control in resolving a contract dispute is not an agreement to refuse to do business.

(iv) Same as (iii), except that the contract contains a clause that A and its employees will comply with the laws of boycotting country Y. A knows that Y has a number of boycott laws.

Such an agreement is not, in and of itself, an agreement to refuse to do business. If, however, A subsequently refuses to do business with someone because of the laws of Y, A's action would be a refusal to do business.

●(v) Same as (iv), except that the contract contains a clause that A and its employees will comply with the laws of boycotting country Y, "including boycott laws."

A's agreeing, without qualification, to comply with local boycott laws constitutes an agreement to refuse to do business.

●(vi) Same as (v), except that A inserts a proviso "except insofar as Y's laws conflict with U.S. laws," or words to that effect.

Such an agreement is not an agreement to refuse to do business.

(vii) A, a U.S. general contractor, is retained to construct a pipeline in boycotting country Y. A provision in the proposed contract stipulates that in purchasing equipment, supplies, and services A must give preference to companies located in host country Y.

A may agree to this contract provision. Agreeing to a "buy local" contract provision is not an agree ment to refuse to do business, because A's agreement is not made for boycott reasons.

(viii) A, a U.S. exporter planning to sell retail goods to customers in boycotting country Y, enters into a contract to purchase goods wholesale from B, a U.S. appliance manufacturer. A's contract with B includes a provision stipulating that B may not use components or services of blacklisted companies in the manufacture of its appliances.

A's contract constitutes a refusal to do business, because it would require another person, B, to refuse to do business with other persons for boycott reasons. B may not agree to such a contract, because it would be agreeing to refuse to do business with other persons for boycott reasons.

(ix) Same as (viii), except that A and B reach an implicit understanding that B will not use components or services of blacklisted companies in the manufacture of goods to be exported to Y. In the manufacture of appliances to be sold to A for export to non-boycotting countries, B uses components manufactured by blacklisted companies.

The actions of both A and B constitute agreement to refuse to do business. The agreement is implied by their pattern of conduct.

(x) Boycotting country Y orders goods from U.S. company B. Y opens a letter of credit with foreign bank C in favor of B. The letter of credit specifies that negotiation of the letter of credit with a bank that appears on the country X boycott blacklist is prohibited. U.S. bank A, C's correspondent bank, advises B of the letter of

credit. B presents documentation to bank A seeking to be paid on the letter of credit, without amending or otherwise taking exception to the boycott condition.
B has agreed to refuse to do business with blacklisted banks because, by presenting the letter of credit for payment, B has accepted all of its terms and conditions.

(b) Discriminatory actions

PROHIBITIONS AGAINST TAKING DISCRIMINATORY ACTIONS

(1) No United States person may:

(i) Refuse to employ or otherwise discriminate against any individual who is a United States person on the basis of race, religion, sex, or national origin;

(ii) Discriminate against any corporation or other organization which is a United States person on the basis of the race, religion, sex, or national origin of any owner, officer, director, or employee of such corporation or organization;

(iii) Knowingly agree to take any of the actions described in paragraph (b)(1)(i) and (ii) of this section; or

(iv) Require or knowingly agree to require any other person to take any of the actions described in paragraph (b)(1)(i) and (ii) of this section.

(2) This prohibition shall apply whether the discriminatory action is taken by a United States person on its own or in response to an agreement with, request from, or requirement of a boycotting country. This prohibition, like all others, applies only with respect to a United States person's activities in the interstate or foreign commerce of the United States and only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott.

(3) The section does not supersede or limit the operation of the civil rights laws of the United States.

EXAMPLES OF DISCRIMINATORY ACTIONS

The following examples are intended to give guidance in determining the circumstances in which the taking of particular discriminatory actions is prohibited. They are illustrative, not comprehensive.

(i) U.S. construction company A is awarded a contract to build an office complex in boycotting country Y. A, believing that employees of a particular religion will not be permitted to work in Y because of Y's boycott against country X, excludes U.S. persons of that religion from consideration for employment on the project.

A's refusal to consider qualified U.S. persons of a particular religion for work on the project in Y constitutes a prohibited boycott-based discriminatory action against U.S. persons on the basis of religion.

(ii) Same as (i), except that a clause in the contract provides that "no persons of country X origin are to work on this project."

A's agreement constitutes a prohibited boycott-based agreement to discriminate against U.S. persons, among others, on the basis of national origin.

(iii) Same as (i), except that a clause in the contract provides that "no persons who are citizens, residents, or nationals of country X are to work on this project."

A's agreement does not constitute a boycott-based agreement to discriminate against U.S. persons on the basis of race, religion, sex, or national origin, because the clause requires exclusion on the basis

of citizenship, residency, and nationality only.

(iv) U.S. construction company A enters into a contract to build a school in boycotting country Y. Y's representative orally tells A that no persons of country X origin are to work on the project.

A may not comply, because to do so would constitute discrimination on the basis of national origin.

It makes no difference that A learned of Y's requirement orally. It makes no difference how A learns about Y's discriminatory requirement.

(v) Boycotting country Y tenders an invitation to bid on a construction project in Y. The tender requires that the successful bidder's personnel will be interviewed and that persons of a particular religious faith will not be permitted to work on the project. Y's requirement is based on its boycott of country X, the majority of whose citizens are of that particular faith.

Agreement to this provision in the tender document by a U.S. person would constitute a prohibited agreement to engage in boycott-based discrimination against U.S. persons of a particular religion.

(vi) Same as (v), except that the tender specifies that "women will not be allowed to work on this project."

Agreement to this provision in the tender by a U.S. person does not constitute a prohibited agreement to engage in boycott-based discrimination, because the restriction against employment of women is not boycott-based. Such an agreement may, however, constitute a violation of U.S. civil rights laws.

(vii) A is a U.S. investment banking firm. As a condition of participating in an underwriting of securities to be issued by boycotting country Y, A is required to exclude investment banks owned by persons of a particular faith from participation in the underwriting. Y's requirement is based on its boycott of country X, the majority of whose citizens are of that particular faith.

A's agreement to such a provision constitutes a prohibited agreement to engage in boycott-based discrimination against U.S. persons on the basis of religion. Further, if A requires others to agree to such a condition, A would be acting to require another person to engage in such discrimination.

(viii) U.S. company A is asked by boycotting country Y to certify that A will not use a six-pointed star on the packaging of its products to be imported into Y. The requirement is part of the enforcement effort by Y of its boycott against country X.

A may not so certify. The six-pointed star is a religious symbol, and the certification by A that it will not use such a symbol constitutes a statement that A will not ship products made or handled by persons of that religion.

(ix) Same as (viii), except that A is asked to certify that no symbol of boycotted country X will appear on the packaging of its products imported into Y.

Such a certification conveys no statement about any person's religion and, thus, does not come within this prohibition.

(c) Furnishing information about race, religion, sex, or national origin

PROHIBITION AGAINST FURNISHING INFORMATION ABOUT RACE, RELIGION, SEX, OR NATIONAL ORIGIN

(1) No United States person may:

(i) Furnish information about the race, religion, sex, or national origin of any United States person;

(ii) Furnish information about the race, religion, sex, or national origin of any owner, officer, director, or employee of any corporation or other organization which is a United States person;

(iii) Knowingly agree to furnish information about the race, religion, sex, or national origin of any United States person; or

(iv) Knowingly agree to furnish information about the race, religion, sex, or national origin of any owner, officer, director, or employee of any corporation or other organization which is a United States person.

(2) This prohibition shall apply whether the information is specifically requested or is offered voluntarily by the United States person. It shall also apply whether the information requested or volunteered is stated in the affirmative or the negative.

(3) Information about the place of birth of or the nationality of the parents of a United States person comes within this prohibition, as does information in the form of code words or symbols which could identify a United States person's race, religion, sex, or national origin.

(4) This prohibition, like all others, applies only with respect to a United States person's activities in the interstate or foreign commerce of the United States and only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott.

EXAMPLES OF THE PROHIBITION AGAINST FURNISHING DISCRIMINATORY INFORMATION

The following examples are intended to give guidance in determining the circumstances in which the furnishing of discriminatory information is prohibited. They are illustrative, not comprehensive.

(i) U.S. company A receives a boycott questionnaire from boycotting country Y asking whether it is owned or controlled by persons of a particular faith, whether it has any persons on its board of directors who are of that faith, and what the national origin of its president is. The information is sought for purposes of enforcing Y's boycott against country X, and A knows or has reason to know that the information is sought for that reason.

A may not answer the questionnaire, because A would be furnishing information about the religion and national origin of U.S. persons for purposes of complying with or supporting Y's boycott against X.

(ii) U.S. company A, located in the United States, is asked by boycotting country Y to certify that A has no persons of a particular national origin on its board of directors. A knows that Y's purpose in asking for the certification is to enforce its boycott against country X.

A may not make such a certification, because A would be furnishing information about the national origin of U.S. persons for purposes of complying with or supporting Y's boycott against X.

(iii) U.S. company A believes that boycotting country Y will select A's bid over those of other bidders if A volunteers that it has no shareholders, officers, or directors of a particular national origin. A's belief is based on its knowledge that Y generally refuses, as part of its boycott against country X, to do business with companies owned, controlled, or managed by persons of this particular national origin.

A may not volunteer this information, because it would be furnishing information about the national origin of U.S. persons for purposes of complying with or supporting Y's boycott against X.

(iv) U.S. company A has a contract to construct

an airport in boycotting country Y. Before A begins work, A is asked by Y to identify the national origin of its employees who will work on the site. A knows or has reason to know that Y is seeking this information in order to enforce its boycott against X.

A may not furnish this information, because A would be providing information about the national origin of U.S. persons for purposes of complying with or supporting Y's boycott against X.

(v) Same as (iv), except that in order to assemble its work force on site in Y, A sends visa forms to its employees and asks that the forms be returned to A for transmittal to Y's consulate or embassy. A, itself, furnishes no information about its employees, but merely transmits the visa forms back and forth.

In performing the ministerial function of transmitting visa forms, A is not furnishing information about any U.S. person's race, religion, sex, or national origin.

(vi) Same as (iv), except that A is asked by Y to certify that none of its employees in Y will be women, because Y's laws prohibit women from working.

Such a certification does not constitute a prohibited furnishing of information about any U.S. person's sex, since the reason the information is sought has nothing to do with Y's boycott of X.

(vii) U.S. company A is considering establishing an office in boycotting country Y. In order to register to do business in Y, A is asked to furnish information concerning the nationalities of its corporate officers and board of directors.

A may furnish the information about the nationalities of its officers and directors, because in so doing A would not be furnishing information about the race, religion, sex, or national origin of any U.S. person.

(d) Furnishing information about business relationships with boycotted countries or blacklisted persons

PROHIBITION AGAINST FURNISHING INFORMATION ABOUT BUSINESS RELATIONSHIPS WITH BOYCOTTED COUNTRIES OR BLACKLISTED PERSONS

(1) No United States person may furnish or knowingly agree to furnish information concerning his or any other person's past, present or proposed business relationships:

(i) With or in a boycotted country;

(ii) With any business concern organized under the laws of a boycotted country;

(iii) With any national or resident of a boycotted country; or

(iv) With any other person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

(2) This prohibition shall apply:

(i) Whether the information pertains to a business relationship involving a sale, purchase, or supply transaction; legal or commercial representation; shipping or other transportation transaction; insurance; investment; or any other type of business transaction or relationship; and

(ii) Whether the information is directly or indirectly requested or is furnished on the initiative of the United States person.

(3) This prohibition does not apply to the furnishing of normal business information in a commercial context. Normal business information may relate to factors such as financial fitness,

technical competence, or professional experience, and may be found in documents normally available to the public such as annual reports, disclosure statements concerning securities, catalogs, promotional brochures, and trade and business handbooks. Such information may also appear in specifications or statements of experience and qualifications.

(4) Normal business information furnished in a commercial context does not cease to be such simply because the party soliciting the information may be a boycotting country or a national or resident thereof. If the information is of a type which is generally sought for a legitimate business purpose (such as determining financial fitness, technical competence, or professional experience), the information may be furnished even if the information could be used, or without the knowledge of the person supplying the information is intended to be used, for boycott purposes. However, no information about business relationships with blacklisted persons or boycotted countries, their residents or nationals, may be furnished in response to a boycott request, even if the information is publicly available. Requests for such information from a boycott office will be presumed to be boycott-based.

(5) This prohibition, like all others, applies only with respect to a United States person's activities in the interstate or foreign commerce of the United States and only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott.

EXAMPLES CONCERNING FURNISHING OF INFORMATION

The following examples are intended to give guidance in determining the circumstances in which the furnishing of information is prohibited. They are illustrative, not comprehensive.

(i) U.S. contractor A is considering bidding for a contract to build a dam in boycotting country Y. The invitation to bid, which appears in a trade journal, specifies that each bidder must state that he does not have any offices in boycotted country X. A knows or has reason to know that the requirement is boycott-based.

A may not make this statement, because it constitutes information about A's business relationships with X.

(ii) U.S. contractor A is considering bidding for a contract to construct a school in boycotting country Y. Each bidder is required to submit copies of its annual report with its bid. Since A's annual report describes A's worldwide operations, including the countries in which it does business, it necessarily discloses whether A has business relations with boycotted country X. A has no reason to know that its report is being sought for boycott purposes.

A, in furnishing its annual report, is supplying ordinary business information in a commercial context.

(iii) Same as (ii), except that accompanying the invitation to bid is a questionnaire from country Y's boycott office asking each bidder to supply a copy of its annual report.

A may not furnish the annual report despite its public availability, because it would be furnishing information in response to a questionnaire from a boycott office.

(iv) U.S. company A is on boycotting country Y's blacklist. For reasons unrelated to the boycott, A terminates its business relationships with boycotted country X. In exploring other marketing areas, A determines that boycotting country Y offers great potential. A is requested to complete a questionnaire from a central boycott office which inquires about A's business relations with X.

A may not furnish the information, because it is information about A's business relationships with a boycotted country.

(v) U.S. exporter A is seeking to sell its products to boycotting country Y. A is informed by Y that, as a condition of sale, A must certify that it has no salesmen in boycotted country X. A knows or has reason to know that the condition is boycott-based.

A may not furnish the certification, because it is information about A's business relationships in a boycotted country.

(vi) U.S. engineering company A receives an invitation to bid on the construction of a dam in boycotting country Y. As a condition of the bid, A is asked to certify that it does not have any offices in boycotted country X. A is also asked to furnish plans for other dams it has designed.

A may not certify that it has no office in X, because this is information about its business relationships in a boycotted country. A may submit plans for other dams it has designed, because this is furnishing normal business information, in a commercial context, relating to A's technical competence and professional experience.

(vii) U.S. company A, in seeking to expand its exports to boycotting country Y, sends a sales representative to Y for a one week trip. During a meeting in Y with trade association representatives, A's representative desires to explain that neither A nor any companies with which A deals has any business relationship with boycotted country X. The purpose of supplying such information is to ensure that A does not get blacklisted.

A's representative may not volunteer this information even though A, for reasons unrelated to the boycott, does not deal with X, because A's representative would be volunteering information about A's business relationships with X for boycott reasons.

(viii) U.S. company A is asked by boycotting country Y to furnish information concerning its business relationships with boycotted country X. A, knowing that Y is seeking the information for boycott purposes, refuses to furnish the information asked for directly, but proposes to respond by supplying a copy of its annual report which lists the countries with which A is presently doing business. A does not happen to be doing business with X.

A may not respond to Y's request by supplying its annual report, because A knows that it would be responding to a boycott-based request for information about its business relationships with X.

(ix) U.S. company A receives a letter from a central boycott office asking A to "clarify" A's operations in boycotted country X. A intends to continue its operations in X, but fears that not responding to the request will result in its being placed on boycotting country Y's blacklist. A knows or has reason to know that the information is sought for boycott reasons.

A may not respond to this request, because the information concerns its business relationships with a boycotted country.

(x) U.S. company A, in the course of negotiating a sale of its goods to a buyer in boycotting country Y, is asked to certify that its supplier is not on Y's blacklist.

A may not furnish the information about its supplier's blacklist status, because this is information about A's business relationships with another person who is believed to be restricted from having any business relationship with or in a boycotting country.

(xi) U.S. company A has a manufacturing plant in boycotted country X and is on boycotting country Y's blacklist. A is seeking to establish operations in Y, while expanding its operations in X. A applies to Y to be removed from Y's blacklist. A is asked, in response, to indicate whether it has manufacturing facilities in X.

A may not supply the requested information, because A would be furnishing information about its business relationships in a boycotted country.

(xii) U.S. bank A plans to open a branch office in boycotting country Y. In order to do so, A is required to furnish certain information about its business operations, including the location of its other branch offices. Such information is normally sought in other countries where A has opened a branch office, and A does not have reason to know that Y is seeking the information for boycott reasons.

A may furnish this information, even though in furnishing it A would disclose information about its business relationships in a boycotted country, because it is being furnished in a normal business context and A does not have reason to know that it is sought for boycott reasons.

(xiii) U.S. architectural firm A responds to an invitation to submit designs for an office complex in boycotting country Y. The invitation states that all bidders must include information concerning similar types of buildings they have designed. A has not designed such buildings in boycotted country X. Clients frequently seek information of this type before engaging an architect.

A may furnish this information, because this is furnishing normal business information, in a commercial context, relating to A's technical competence and professional experience.

(xiv) U.S. oil company A distributes to potential customers promotional brochures and catalogs which give background information on A's past projects. A does not have business dealings with boycotted country X. The brochures, which are identical to those which A uses throughout the world, list those countries in which A does or has done business. In soliciting potential customers in boycotting country Y, A desires to distribute copies of its brochures.

A may do so, because this is furnishing normal business information, in a commercial context, relating to professional experience.

(xv) U.S. company A is interested in doing business with boycotting country Y. A wants to ask Y's Ministry of Trade whether, and if so why, A is on Y's blacklist or is otherwise restricted for boycott reasons from doing business with Y.

A may make this limited inquiry, because it does not constitute furnishing information.

(xvi) U.S. company A is asked by boycotting country Y to certify that it is not owned by subjects or nationals of boycotted country X and that it is not resident in boycotted country X.

A may not furnish the certification, because it is information about A's business relationships with or in a boycotted country, or with nationals of a boycotted country.

(xvii) U.S. company A, a manufacturer of certain patented products, desires to register its patents in boycotting country Y. A receives a power of attorney form required to register its patents. The form contains a question regarding A's business relationships with or in boycotted country X. A has no business relationships with X and knows or has reason to know that the information is sought for boycott reasons.

A may not answer the question, because A would be furnishing information about its business relationships with or in a boycotted country.

●(xviii) U.S. company A is asked by boycotting country Y to certify that it is not the mother company, sister company, subsidiary, or branch of any blacklisted company, and that it is not in any way affiliated with any blacklisted company.

A may not furnish the certification, because it is information about whether A has a business relationship with another person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

(e) Information concerning association with charitable and fraternal organizations

PROHIBITION AGAINST FURNISHING INFORMATION ABOUT ASSOCIATIONS WITH CHARITABLE AND FRATERNAL ORGANIZATIONS

(1) No United States person may furnish or knowingly agree to furnish information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports a boycotted country.

(2) This prohibition shall apply whether:

(i) The information concerns association with or involvement in any charitable or fraternal organization which (a) has, as one of its stated purposes, the support of a boycotted country through financial contributions or other means, or (b) undertakes, as a major organizational activity, to offer financial or other support to a boycotted country;

(ii) The information is directly or indirectly requested or is furnished on the initiative of the United States person; or

(iii) The information requested or volunteered concerns membership in, financial contributions to, or any other type of association with or involvement in the activities of such charitable or fraternal organization.

(3) This prohibition does not prohibit the furnishing of normal business information in a commercial context as defined in paragraph (d) of this section.

(4) This prohibition, like all others, applies only with respect to a United States person's activities in the interstate or foreign commerce of the United States and only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott.

EXAMPLES OF PROHIBITION AGAINST FURNISHING INFORMATION ABOUT ASSOCIATIONS WITH CHARITABLE OR FRATERNAL ORGANIZATIONS

The following examples are intended to give guidance in determining the circumstances in which the furnishing of information concerning associations with charitable or fraternal organizations is prohibited. They are illustrative, not comprehensive.

(i) U.S. engineering firm A receives an invitation to bid from boycotting country Y. The invitation includes a request to supply information concerning any association which A's officers have with charitable organization B, an organization which is known by A to contribute financial support to boycotted country X. A knows or has reason to know that the information is sought for boycott reasons.

A may not furnish the information.

(ii) U.S. construction company A, in an effort to establish business dealings with boycotting country Y, proposes to furnish information to Y showing that no members of its board of directors are in any way associated with charitable organizations which support boycotted country X. A's purpose

is to avoid any possibility of its being blacklisted by Y.

A may not furnish the information, because A's purpose in doing so is boycott-based. It makes no difference that no specific request for the information has been made by Y.

(iii) A, a citizen of the United States, is applying for a teaching position in a school in boycotting country Y. In connection with his application, A furnishes a resume which happens to disclose his affiliation with charitable organizations. A does so completely without reference to Y's boycott and without knowledge of any boycott requirement of Y that pertains to A's application for employment.

The furnishing of a resume by A is not a boycott-related furnishing of information about his association with charitable organizations which support boycotted country X.

(f) Letters of credit

PROHIBITION AGAINST IMPLEMENTING LETTERS OF CREDIT CONTAINING PROHIBITED CONDITIONS OR REQUIREMENTS

(1) No United States person may pay, honor, confirm, or otherwise implement a letter of credit which contains a condition or requirement compliance with which is prohibited by this part, nor shall any United States person, as a result of the application of this section, be obligated to pay, honor or otherwise implement such a letter of credit.

(2) For purposes of this section, "implementing" a letter of credit includes:

(i) Issuing or opening a letter of credit at the request of a customer;

(ii) Honoring, by accepting as being a valid instrument of credit, any letter of credit;

(iii) Paying, under a letter of credit, a draft or other demand for payment by the beneficiary;

(iv) Confirming a letter of credit by agreeing to be responsible for payment to the beneficiary in response to a request by the issuer;

(v) Negotiating a letter of credit by voluntarily purchasing a draft from a beneficiary and presenting such draft for reimbursement to the issuer or the confirmer of the letter of credit; and

(vi) Taking any other action to implement a letter of credit.

(3) In the standard international letter of credit transaction facilitating payment for the export of goods from the United States, a bank in a foreign country may be requested by its customer to issue a revocable or irrevocable letter of credit in favor of the United States exporter. The customer usually requires, and the letter of credit provides, that the issuing (or a confirming) bank will make payment to the beneficiary against the bank's receipt of the documentation specified in the letter of credit. Such documentation usually includes commercial and consular invoices, a bill of lading, and evidence of insurance, but it may also include other required certifications or documentary assurances such as the origin of the goods and information relating to the carrier or insurer of the shipment.

Banks usually will not accept drafts for payment unless the documents submitted therewith comply with the terms and conditions of the letter of credit.

(4) A United States person is not prohibited under this section from advising a beneficiary of the existence of a letter of credit in his favor, or from taking ministerial actions to dispose of a letter of credit which it is prohibited from implementing.

(5) Compliance with this section shall provide an absolute defense in any action brought to compel payment of, honoring of, or other implementation of a letter of credit, or for damages resulting from failure to pay or otherwise honor or implement the letter of credit. This section shall not otherwise relieve any person from any obligations or other liabilities he may incur under other laws or regulations, except as may be explicitly provided in this section.

LETTERS OF CREDIT TO WHICH THIS SECTION APPLIES

(6) This prohibition, like all others, applies only with respect to a United States person's activities taken with intent to comply with, further, or support an unsanctioned foreign boycott. In addition, it applies only when the transaction to which the letter of credit applies is in United States commerce and the beneficiary is a United States person.

IMPLEMENTATION OF LETTERS OF CREDIT IN THE UNITED STATES

(7) A letter of credit implemented in the United States by a United States person located in the United States, including a permanent United States establishment of a foreign bank, will be presumed to apply to a transaction in United States commerce and to be in favor of a United States beneficiary where the letter of credit specifies a United States address for the beneficiary. These presumptions may be rebutted by facts which could reasonably lead the bank to conclude that the beneficiary is not a United States person or that the underlying transaction is not in United States commerce.

(8) Where a letter of credit implemented in the United States by a United States person located in the United States does not specify a United States address for the beneficiary, the beneficiary will be presumed to be other than a United States person. This presumption may be rebutted by facts which could reasonably lead the bank to conclude that the beneficiary is a United States person despite the foreign address.

IMPLEMENTATION OF LETTERS OF CREDIT OUTSIDE THE UNITED STATES

(9) A letter of credit implemented outside the United States by a United States person located outside the United States will be presumed to apply to a transaction in United States commerce and to be in favor of a United States beneficiary where the letter of credit specifies a United States address for the beneficiary and calls for documents indicating shipment from the United States or otherwise indicating that the goods are of United States origin. These presumptions may be rebutted by facts which could reasonably lead the bank to conclude that the beneficiary is not a United States person or that the underlying transaction is not in United States commerce.

(10) Where a letter of credit implemented outside the United States by a United States person located outside the United States does not specify a United States address for the beneficiary, the beneficiary will be presumed to be other than a United States person. In addition, where such a letter of credit does not call for documents indicating shipment from the United States or otherwise indicating that the goods are of United States origin, the transaction to which it applies will be presumed to be outside United States commerce. The presumption that the beneficiary is other than a United States person may be rebutted by facts which could reasonably lead the bank to conclude that the beneficiary is a United States person. The presumption that the transaction to which the letter of credit applies is outside United States commerce may be rebutted by facts which could reasonably lead the bank to conclude that the underlying

transaction is in United States commerce.

EXAMPLES OF THE PROHIBITION AGAINST IMPLEMENTING LETTERS OF CREDIT

The following examples are intended to give guidance in determining the circumstances in which this section applies to the implementation of a letter of credit and in which such implementation is prohibited. They are illustrative, not comprehensive.

IMPLEMENTATION OF LETTERS OF CREDIT IN UNITED STATES COMMERCE

(i) A, a U.S. bank located in the United States, opens a letter of credit in the United States in favor of B, a foreign company located outside the United States. The letter of credit specifies a non-U.S. address for the beneficiary.

The beneficiary is presumed to be other than a U.S. person, because it does not have a U.S. address. The presumption may be rebutted by facts showing that A could reasonably conclude that the beneficiary is a U.S. person despite the foreign address.

(ii) A, a branch of a foreign bank located in the United States, opens a letter of credit in favor of B, a foreign company located outside the United States. The letter of credit specifies a non-U.S. address for the beneficiary.

The beneficiary is presumed to be other than a U.S. person, because it does not have a U.S. address. The presumption may be rebutted by facts showing that A could reasonably conclude that the beneficiary is a U.S. person despite the foreign address.

(iii) A, a U.S. bank branch located outside the United States, opens a letter of credit in favor of B, a person with a U.S. address. The letter of credit calls for documents indicating shipment of goods from the United States.

The letter of credit is presumed to apply to a transaction in U.S. commerce and to be in favor of a U.S. beneficiary because the letter of credit specifies a U.S. address for the beneficiary and calls for documents indicating that the goods will be shipped from the United States. These presumptions may be rebutted by facts showing that A could reasonably conclude that the beneficiary is not a U.S. person or that the underlying transaction is not in U.S. commerce.

(iv) A, a U.S. bank branch located outside the United States, opens a letter of credit which specifies a beneficiary, B, with an address outside the United States and calls for documents indicating that the goods are of U.S.-origin. A knows or has reason to know that although B has an address outside the United States, B is a U.S. person.

The letter of credit is presumed to apply to a transaction in U.S. commerce, because the letter of credit calls for shipment of U.S.-origin goods. In addition, the letter of credit is presumed to be in favor of a beneficiary who is a U.S. person, because A knows or has reason to know that the beneficiary is a U.S. person despite the foreign address.

●(v) A, a U.S. bank branch located outside the United States, opens a letter of credit which specifies a beneficiary with a U.S. address. The letter of credit calls for documents indicating shipment of foreign-origin goods.

The letter of credit is presumed to be in favor of a U.S. beneficiary but to apply to a transaction outside U.S. commerce, because it calls for documents indicating shipment of foreign-origin goods. The presumption of non-U.S. commerce may be rebutted by facts showing that A could reasonably conclude that the underlying

transaction involves shipment of U.S.-origin goods or goods from the United States.

PROHIBITION AGAINST IMPLEMENTING LETTERS OF CREDIT

(i) Boycotting country Y orders goods from U.S. company B. Y opens a letter of credit with foreign bank C in favor of B. The letter of credit specifies as a condition of payment that B certify that it does not do business with boycotted country X. Foreign bank C forwards the letter of credit it has opened to U.S. bank A for confirmation.

A may not confirm or otherwise implement this letter of credit, because it contains a condition with which a U.S. person may not comply.

(ii) Same as (i), except U.S. bank A desires to advise the beneficiary, U.S. company B, of the letter of credit.

A may do so, because advising the beneficiary of the letter of credit (including the term which prevents A from implementing it) is not implementation of the letter of credit.

(iii) Same as (i), except foreign bank C sends a telegram to U.S. bank A stating the major terms and conditions of the letter of credit. The telegram does not reflect the boycott provision. Subsequently, C mails to A documents setting forth the terms and conditions of the letter of credit, including the prohibited boycott condition.

A may not further implement the letter of credit after it receives the documents, because they reflect the prohibited boycott condition in the letter of credit. A may advise the beneficiary and C of the existence of the letter of credit (including the boycott term), and may perform any essentially ministerial acts necessary to dispose of the letter of credit.

●(iv) Same as (iii), except that U.S. company B, based in part on information received from U.S. bank A, desires to obtain an amendment to the letter of credit which would eliminate or nullify the language in the letter of credit which prevents A from paying or otherwise implementing it.

Either company B or bank A may undertake, and the other may cooperate and assist in, this endeavor. A could then pay or otherwise implement the revised letter of credit, so long as the original prohibited boycott condition is of no force or effect.

(v) Boycotting country Y requests a foreign bank in Y to open a letter of credit to effect payment for goods to be shipped by U.S. supplier B, the beneficiary of the letter of credit. The letter of credit contains prohibited boycott clauses. The foreign bank forwards a copy of the letter of credit to its branch office A, in the United States.

A may advise the beneficiary but may not implement the letter of credit, because it contains prohibited boycott conditions.

●(vi) Boycotting country Y orders goods from U.S. company B. U.S. bank A is asked to implement, for the benefit of B, a letter of credit which contains a clause requiring documentation that the goods shipped are not of boycotted country X origin.

A may not implement the letter of credit with a prohibited condition, and may accept only a positive certificate of origin as satisfactory documentation. (See §760.3(c) on "Import and Shipping Document Requirements.")

●(vii) [Reserved]

(viii) B is a foreign bank located outside the United States. B maintains an account with U.S. bank A, located in the United States. A letter of credit issued by B in favor of a U.S. beneficiary

provides that any negotiating bank may obtain reimbursement from A by certifying that all the terms and conditions of the letter of credit have been met and then drawing against B's account. B notifies A by cable of the issuance of a letter of credit and the existence of reimbursement authorization; A does not receive a copy of the letter of credit.

A may reimburse any negotiating bank, even when the underlying letter of credit contains a prohibited boycott condition, because A does not know or have reason to know that the letter of credit contains a prohibited boycott condition.

(ix) Same as (viii), except that foreign bank B forwards a copy of the letter of credit to U.S. bank A, which then becomes aware of the prohibited boycott clause.

A may not thereafter reimburse a negotiating bank or in any way further implement the letter of credit, because it knows of the prohibited boycott condition.

●(x) Boycotting country Y orders goods from U.S. exporter B and requests a foreign bank in Y to open a letter of credit in favor of B to cover the cost. The letter of credit contains a prohibited boycott clause. The foreign bank asks U.S. bank A to advise and confirm the letter of credit. Through inadvertence, A does not notice the prohibited clause and confirms the letter of credit. A thereafter notices the clause and then refuses to honor B's draft against the letter of credit. B sues bank A for payment.

A has an absolute defense against the obligation to make payment under this letter of credit. (Note: Examples (ix) and (x) do not alter any other obligations or liabilities of the parties under appropriate law.)

(xi) [Reserved]

(xii) Boycotting country Y orders goods from U.S. company B. A letter of credit which contains a prohibited boycott clause is opened in favor of B by a foreign bank in Y. The foreign bank asks U.S. bank A to advise and confirm the letter of credit, which it forwards to A.

A may advise B that it has received the letter of credit (including the boycott term), but may not confirm the letter of credit with the prohibited clause.

(xiii) Same as (xii), except U.S. bank A fails to tell B that it cannot process the letter of credit. B requests payment.

A may not pay. If the prohibited language is eliminated or nullified as the result of renegotiation, A may then pay or otherwise implement the revised letter of credit.

(xiv) U.S. bank A receives a letter of credit in favor of U.S. beneficiary B. The letter of credit requires B to certify that he is not blacklisted.

A may implement such a letter of credit, but it may not insist that the certification be furnished, because by so insisting it would be refusing to do business with a blacklisted person in compliance with a boycott.

(xv) A, a U.S. bank located in the U.S. opens a letter of credit in favor of U.S. beneficiary B for B's sale of goods to boycotting country Y. The letter of credit contains no boycott conditions, but A knows that Y customarily requires the seller of goods to certify that it has dealt with no blacklisted supplier. A, therefore, instructs B that it will not make payment under the letter of credit unless B makes such a certification.

A's action in requiring the certification from B constitutes action to require another person to refuse to do business with blacklisted persons.

(xvi) A, a U.S. bank located in the U.S., opens a letter of credit in favor of U.S. beneficiary B for B's sale of goods to boycotting country Y. The letter of credit contains no boycott conditions, but A has actual knowledge that B has agreed to supply a certification to Y that it has not dealt with blacklisted firms, as a condition of receiving the letter of credit in its favor.

A may not implement the letter of credit, because it knows that an implicit condition of the credit is a condition with which B may not legally comply.

(xvii) Boycotting country Y orders goods from U.S. company B. Y opens a letter of credit with foreign bank C in favor of B. The letter of credit includes the statement, "Do not negotiate with blacklisted banks." C forwards the letter of credit it has opened to U.S. bank A for confirmation.

A may not confirm or otherwise implement this letter of credit, because it contains a condition with which a U.S. person may not comply.

§760.3

EXCEPTIONS TO PROHIBITIONS

(a) Import requirements of a boycotting country

COMPLIANCE WITH IMPORT REQUIREMENTS OF A BOYCOTTING COUNTRY

(1) A United States person, in supplying goods or services to a boycotting country, or to a national or resident of a boycotting country, may comply or agree to comply with requirements of such boycotting country which prohibit the import of:

(i) Goods or services from the boycotted country;

(ii) Goods produced or services provided by any business concern organized under the laws of the boycotted country; or

(iii) Goods produced or services provided by nationals or residents of the boycotted country.

(2) A United States person may comply or agree to comply with such import requirements whether or not he has received a specific request to comply. By its terms, this exception applies only to transactions involving imports into a boycotting country. A United States person may not, under this exception, refuse on an across-the-board basis to do business with a boycotted country or a national or resident of a boycotted country.

(3) In taking action within the scope of this exception, a United States person is limited in the types of boycott-related information he can supply. (See §760.2(d) of this part on "Furnishing Information About Business Relationships with Boycotted Countries or Blacklisted Persons" and paragraph (c) of this section on "Import and Shipping Document Requirements.")

EXAMPLES OF COMPLIANCE WITH IMPORT REQUIREMENTS OF A BOYCOTTING COUNTRY

The following examples are intended to give guidance in determining the circumstances in which compliance with the import requirements of a boycotting country is permissible. They are illustrative, not comprehensive.

●(i) A, a U.S. manufacturer, receives an order from boycotting country Y for its products. Country X is boycotted by country Y, and the import laws of Y prohibit the importation of goods produced or manufactured in X. In filling this type of order, A would usually include some component parts produced in X.

For the purpose of filling this order, A may substitute comparable component parts in place of parts produced in X, because the import laws of Y prohibit the importation of goods manufactured in X.

●(ii) Same as (i), except that A's contract with Y expressly provides that in fulfilling the contract A "may not include parts or components produced or manufactured in boycotted country X."

A may agree to and comply with this contract provision, because Y prohibits the importation of goods from X. However, A may not furnish negative certifications regarding the origin of components in response to import and shipping document requirements.

●(iii) A, a U.S. building contractor, is awarded a contract to construct a plant in boycotting country Y. A accepts bids on goods required under the contract, and the lowest bid is made by B, a business concern organized under the laws of X, a country boycotted by Y. Y prohibits the import of goods produced by companies organized under the laws of X.

For purposes of this contract, A may reject B's bid and accept another, because B's goods would be refused entry into Y because of Y's boycott against X.

(iv) Same as (iii), except that A also rejects the low bid by B for work on a construction project in country M, a country not boycotted by Y.

This exception does not apply, because A's action is not taken in order to comply with Y's requirements prohibiting the import of products from boycotted country X.

(v) A, a U.S. management consulting firm, contracts to provide services to boycotting country Y. Y requests that A not employ residents or nationals of boycotted country X to provide those services.

A may agree, as a condition of the contract, not to have services furnished by nationals or residents of X, because importation of such services is prohibited by Y.

(vi) A, a U.S. company, is negotiating a contract to supply machine tools to boycotting country Y. Y insists that the contract contain a provision whereby A agrees that none of the machine tools will be produced by any business concern owned by nationals of boycotted country X, even if the business concern is organized under the laws of a non-boycotted country.

A may not agree to this provision, because it is a restriction on the import of goods produced by business concerns owned by nationals of a boycotted country even if the business concerns themselves are organized under the laws of a non-boycotted country.

(b) Shipment of goods to a boycotting country

COMPLIANCE WITH REQUIREMENTS REGARDING THE SHIPMENT OF GOODS TO A BOYCOTTING COUNTRY

(1) A United States person, in shipping goods to a boycotting country, may comply or agree to comply with requirements of that country which prohibit the shipment of goods:

(i) On a carrier of the boycotted country; or

(ii) By a route other than that prescribed by the boycotting country or the recipient of the shipment.

(2) A specific request that a United States person comply or agree to comply with requirements concerning the use of carriers of a boycotted country is not necessary if the United States person knows, or has reason to know, that the use of such carriers for shipping goods to the boycotting

country is prohibited by requirements of the boycotting country. This exception applies whether a boycotting country or the purchaser of the shipment:

(i) Explicitly states that the shipment should not pass through a port of the boycotted country; or

(ii) Affirmatively describes a route of shipment that does not include a port in the boycotted country.

(3) For purposes of this exception, the term "carrier of a boycotted country" means a carrier which flies the flag of a boycotted country or which is owned, chartered, leased, or operated by a boycotted country or by nationals or residents of a boycotted country.

EXAMPLES OF COMPLIANCE WITH THE SHIPPING REQUIREMENTS OF A BOYCOTTING COUNTRY

The following examples are intended to give guidance in determining the circumstances in which compliance with import and shipping document requirements of a boycotting country is permissible. They are illustrative, not comprehensive.

(i) A is a U.S. exporter from whom boycotting country Y is importing goods. Y directs that the goods not pass through a port of boycotted country X.

A may comply with Y's shipping instructions, because they pertain to the route of shipment of goods being shipped to Y.

(ii) A, a U.S. fertilizer manufacturer, receives an order from boycotting country Y for fertilizer. Y specifies in the order that A may not ship the fertilizer on a carrier of boycotted country X.

A may comply with this request, because it pertains to the carrier of a boycotted country.

(iii) B, a resident of boycotting country Y, orders textile goods from A, a U.S. distributor, specifying that the shipment must not be made on a carrier owned or leased by nationals of boycotted country X and that the carrier must not pass through a port of country X enroute to Y.

A may comply or agree to comply with these requests, because they pertain to the shipment of goods to Y on a carrier of a boycotted country and the route such shipment will take.

(iv) Boycotting country Y orders goods from A, a U.S. retail merchant. The order specifies that the goods shipped by A "may not be shipped on a carrier registered in or owned by boycotted country X."

A may agree to this contract provision, because it pertains to the carrier of a boycotted country.

(v) Boycotting country Y orders goods from A, a U.S. pharmaceutical company, and requests that the shipment not pass through a port of country P, which is not a country boycotted by Y.

This exception does not apply in a non-boycotting situation. A may comply with the shipping instructions of Y, because in doing so he would not violate any prohibition of this part.

●(vi) Boycotting country Y orders goods from A, a U.S. manufacturer. The order specifies that goods shipped by A "must not be shipped on vessels blacklisted by country Y".

A may not agree to comply with the this condition because it is not a restriction limited to the use of carriers of the boycotted country.

(c) Import and shipping document requirements

COMPLIANCE WITH IMPORT AND SHIPPING DOCUMENT REQUIREMENTS OF A BOYCOTTING COUNTRY

(1) A United States person, in shipping goods to a boycotting country, may comply or agree to comply with import and shipping document requirements of that country, with respect to:

(i) The country or origin of the goods;

●(ii) The name and nationality of the carrier;

(iii) The route of the shipment;

●(iv) The name, residence, or address of the supplier of the shipment;

●(v) The name, residence, or address of the provider of other services.

●**(2)** Such information must be stated in positive, non-blacklisting, non-exclusionary terms except for information with respect to the names or nationalities of carriers or routes of shipment, which may continue to be stated in negative terms in conjunction with shipments to a boycotting country, in order to comply with precautionary requirements protecting against war risks or confiscation.

EXAMPLES OF COMPLIANCE WITH IMPORT AND SHIPPING DOCUMENT REQUIREMENTS

The following examples are intended to give guidance in determining the circumstances in which compliance with the import requirements of a boycotting country is permissible. They are illustrative, not comprehensive.

●(i) Boycotting country Y contracts with A, a U.S. petroleum equipment manufacturer, for certain equipment. Y requires that goods being imported into Y must be accompanied by a certification that the goods being supplied did not originate in boycotted country X.

A may not supply such a certification in negative terms but may identify instead the country of origin of the goods in positive terms only.

(ii) Same as (i), except that Y requires that the shipping documentation accompanying the goods specify the country of origin of the goods.

A may furnish the information.

●(iii) [Reserved]

●(iv) A, a U.S. apparel manufacturer, has contracted to sell certain of its products to B, a national of boycotting country Y. The form that must be submitted to customs officials of Y requires the shipper to certify that the goods contained in the shipment have not been supplied by "blacklisted" persons.

A may not furnish the information in negative terms but may certify, in positive terms only, the name of the supplier of the goods.

●(v) Same as (iv), except the customs form requires certification that the insurer and freight forwarder used are not "blacklisted."

A may not comply with the request but may supply a certification stating, in positive terms only, the names of the insurer and freight forwarder.

●(vi) A, a U.S. petrochemical manufacturer, executes a sales contract with B, a resident of boycotting country Y. A provision of A's contract with B requires that the bill of lading and other shipping documents contain certifications that the goods have not been shipped on a "blacklisted" carrier.

A may not agree to supply a certification that the carrier is not "blacklisted" but may certify the

name of the carrier in positive terms only.

(vii) Same as (vi), except that the contract requires certification that the goods will not be shipped on a carrier which flies the flag of, or is owned, chartered, leased, or operated by boycotted country X, or by nationals or residents of X.

Such a certification, which is a reasonable requirement to protect against war risks or confiscation, may be furnished at any time.

(viii) Same as (vi), except that the contract requires that the shipping documents certify the name of the carrier being used.

A may, at any time, supply or agree to supply the requested documentation regarding the name of the carrier, either in negative or positive terms.

(ix) Same as (vi), except that the contract requires a certification that the carrier will not call at a port in boycotted country X before making delivery in Y.

Such a certification, which is a reasonable requirement to protect against war risks or confiscation, may be furnished at any time.

(x) Same as (vi), except that the contract requires that the shipping documents indicate the name of the insurer and freight forwarder.

A may comply at any time, because the statement is not required to be made in negative or blacklisting terms.

(xi) A, a U.S. exporter, is negotiating a contract to sell bicycles to boycotting country Y. Y insists that A agree to certify that the goods will not be shipped on a vessel which has ever called at a port in boycotted country X.

As distinguished from a certification that goods will not be shipped on a vessel which will call enroute at a port of boycotted country X, such a certification is not a reasonable requirement to protect against war risks or confiscation, and, hence, may not be supplied.

(xii) Same as (xi), except that Y insists that A agree to certify that the goods will not be shipped on a carrier that is ineligible to enter Y's waters.

Such a certification, which is not a reasonable requirement to protect against war risks or confiscation may not be supplied.

•*(d) Unilateral and Specific Selection*

COMPLIANCE WITH UNILATERAL AND SPECIFIC SELECTION

•**(1)** A United States person may comply or agree to comply in the normal course of business with the unilateral and specific selection by a boycotting country, a national of a boycotting country, or a resident of a boycotting country (including a United States person who is a bona fide resident of a boycotting country) of carriers, insurers, suppliers of services to be performed within the boycotting country, or specific goods, provided that with respect to services, it is necessary and customary that a not insignificant part of the services be performed within the boycotting country. With respect to goods, the items, in the normal course of business, must be identifiable as to their source or origin at the time of their entry into the boycotting country by (a) uniqueness of design or appearance or (b) trademark, trade name, or other identification normally on the items themselves, including their packaging.

(2) This exception pertains to what is permissible for a United States person who is the recipient of a unilateral and specific selection of goods or services to be furnished by a third person. It does not pertain to whether the act of making such a selection is permitted; that question is covered,

with respect to United States persons, in paragraph (g) of this section on "Compliance with Local Law." Nor does it pertain to the United States person who is the recipient of an order to supply its own goods or services. Nothing in this part prohibits or restricts a United States person from filling an order himself, even if he is selected by the buyer on a boycott basis (e.g., because he is not blacklisted), so long as he does not himself take any action prohibited by this part.

UNILATERAL AND SPECIFIC CHARACTER OF THE SELECTION

(3) In order for this exception to apply, the selection with which a United States person wishes to comply must be unilateral and specific.

(4) A "specific" selection is one which is stated in the affirmative and which specifies a particular supplier of goods or services.

(5) A "unilateral" selection is one in which the discretion in making the selection is exercised by the boycotting country buyer. If the United States person who receives a unilateral selection has provided the buyer with any boycott-based assistance (including information for purposes of helping the buyer select someone on a boycott basis), then the buyer's selection is not unilateral, and compliance with that selection by a United States person does not come within this exception.

(6) The provision of so-called "pre-selection" or "pre-award" services, such as providing lists of qualified suppliers, subcontractors, or bidders, does not, in and of itself, destroy the unilateral character of a selection, provided such services are not boycott-based. Lists of qualified suppliers, for example, must not exclude anyone because he is blacklisted. Moreover, such services must be of the type customarily provided in similar transactions by the firm (or industry of which the firm is a part) as measured by the practice in non-boycotting as well as boycotting countries. If such services are not customarily provided in similar transactions or such services are provided in such a way as to exclude blacklisted persons from participating in a transaction or diminish their opportunity for such participation, then the services may not be provided without destroying the unilateral character of any subsequent selection.

SELECTION TO BE MADE BY BOYCOTTING COUNTRY RESIDENT

(7) In order for this exception to be available, the unilateral and specific selection must have been made by a boycotting country, or by a national or resident of a boycotting country. Such a resident may be a United States person. For purposes of this exception, a United States person will be considered a resident of a boycotting country only if he is a bona fide resident. A United States person may be a bona fide resident of a boycotting country even if such person's residency is temporary.

(8) Factors that will be considered in determining whether a United States person is a bona fide resident of a boycotting country include:

(i) Physical presence in the country;

(ii) Whether residence is needed for legitimate business reasons;

(iii) Continuity of the residency;

(iv) Intent to maintain the residency;

(v) Prior residence in the country;

(vi) Size and nature of presence in the country;

(vii) Whether the person is registered to do business or incorporated in the country;

(viii) Whether the person has a valid work visa; and

(ix) Whether the person has a similar presence in both boycotting and non-boycotting foreign countries in connection with similar business activities.

Note to paragraph (d)(8) of this section: No one of the factors is dispositive. All the circumstances will be examined closely to ascertain whether there is, in fact, a bona fide residency. Residency established solely for purposes of avoidance of the application of this part, unrelated to legitimate business needs, does not constitute bona fide residency.

(9) The boycotting country resident must be the one actually making the selection. If a selection is made by a non-resident agent, parent, subsidiary, affiliate, home office or branch office of a boycotting country resident, it is not a selection by a resident within the meaning of this exception.

(10) A selection made solely by a bona fide resident and merely transmitted by another person to a United States person for execution is a selection by a bona fide resident within the meaning of this exception.

DUTY OF INQUIRY

(11) If a United States person receives, from another person located in the United States, what may be a unilateral selection by a boycotting country customer, and knows or has reason to know that the selection is made for boycott reasons, he has a duty to inquire of the transmitting person to determine who actually made the selection. If he knows or has reason to know that the selection was made by other than a boycotting country, or a national or resident of a boycotting country, he may not comply. A course or pattern of conduct which a United States person recognizes or should recognize as consistent with boycott restrictions will create a duty to inquire.

(12) If the United States person does not know or have reason to know that the selection it receives is boycott-based, its compliance with such a selection does not offend any prohibition and this exception is not needed.

SELECTION OF SERVICES

(13) This exception applies only to compliance with selections of certain types of suppliers of services-carriers, insurers, and suppliers of services to be performed "within the boycotting country." Services to be performed wholly within the United States or wholly within any country other than the boycotting country are not covered.

(14) For purposes of this part, services are to be performed "within the boycotting country" only if they are of a type which would customarily be performed by suppliers of those services within the country of the recipient of those services, and if the part of the services performed within the boycotting country is a necessary and not insignificant part of the total services performed.

(15) What is "customary and necessary" for these purposes depends on the usual practice of the supplier of the services (or the industry of which he is a part) as measured by the practice in non-boycotting as well as boycotting countries, except where such practices are instituted to accommodate this part.

SELECTION OF GOODS

(16) This exception applies only to compliance with selections of certain types of goods--goods that, in the normal course of business, are identifiable as to their source or origin at the time of their entry into the boycotting country. The definition of "specifically identifiable goods" is the same under this section as it is in paragraph (g) of this section on "Compliance with Local Law."

(17) Goods "specifically identifiable" in the normal course of business are those items which at

the time of their entry into a boycotting country are identifiable as to source or origin by uniqueness of design or appearance; or trademark, trade name, or other identification normally on the items themselves, including their packaging. Goods are "specifically identifiable" in the normal course of business if their source or origin is ascertainable by inspection of the items themselves, including their packaging, regardless of whether inspection takes place. Goods are not considered to be "specifically identifiable" in the normal course of business if a trademark, trade name, or other form of identification not normally present is added to the items themselves, including their packaging, to accommodate this part.

GENERAL

(18) If a unilateral selection meets the conditions described in paragraph (d) of this section, the United States person receiving the unilateral selection may comply or agree to comply, even if he knows or has reason to know that the selection was boycott-based. However, no United States person may comply or agree to comply with any unilateral selection if he knows or has reason to know that the purpose of the selection is to effect discrimination against any United States person on the basis of race, religion, sex, or national origin.

EXAMPLES OF COMPLIANCE WITH A UNILATERAL SELECTION

The following examples are intended to give guidance in determining what constitutes a unilateral selection and the circumstances in which compliance with such a selection is permissible. They are illustrative, not comprehensive.

SPECIFIC AND UNILATERAL SELECTION

(i) A, a U.S. manufacturer of road-grading equipment, is asked by boycotting country Y to ship goods to Y on U.S. vessel B, a carrier which is not blacklisted by Y. A knows or has reason to know that Y's selection of B is boycott-based.

A may comply with Y's request, or may agree to comply as a condition of the contract, because the selection is specific and unilateral.

(ii) A, a U.S. contractor building an industrial facility in boycotting country Y is asked by B, a resident of Y, to use C as the supplier of air conditioning equipment to be used in the facility. C is not blacklisted by country Y. A knows or has reason to know that B's request is boycott-based.

A may comply with B's request, or may agree to comply as a condition of the contract, because the selection of C is specific and unilateral.

(iii) A, a U.S. manufacturer of automotive equipment, is asked by boycotting country Y not to ship its goods to Y on U.S. carriers, B, C, or D. Carriers B, C, and D are blacklisted by boycotting country Y. A knows or has reason to know that Y's request is boycott-based.

A may not comply or agree to comply with Y's request, because no specific selection of any particular carrier has been made.

(iv) A, a U.S. exporter shipping goods ordered by boycotting country Y, is provided by Y with a list of eligible U.S. insurers from which A may choose in insuring the shipment of its goods. A knows or has reason to know that the list was compiled on a boycott basis.

A may not comply or agree to comply with Y's request that A choose from among the eligible insurers, because no specific selection of any particular insurer has been made.

(v) A, a U.S. aircraft manufacturer, is negotiating to sell aircraft to boycotting country Y. During the negotiations, Y asks A to identify the company which normally manufactures the engines for the aircraft. A responds that they are normally

manufactured by U.S. engine manufacturer B. B is blacklisted by Y. In making the purchase, Y specifies that the engines for the aircraft should be supplied by U.S. engine manufacturer C.

A may comply or agree to comply with Y's selection of C, because Y's selection is unilateral and specific.

(vi) A, a U.S. construction firm, is retained by an agency of boycotting country Y to build a pipeline. Y requests A to suggest qualified engineering firms to be used on-site in the construction of the pipeline. It is customary for A, regardless of where it conducts its operations, to identify qualified engineering firms to its customers so that its customers may make their own selection of the firm to be engaged. Choice of engineering firm is customarily a prerogative of the customer. A provides a list of five engineering firms, B-F, excluding no firm because it may be blacklisted, and then confers with and gives its recommendations to Y. A recommends C, because C is the best qualified. Y then selects B, because C is blacklisted.

A may comply with Y's selection of B, because the boycott-based decision is made by Y and is unilateral and specific. Since A's pre-award services are of the kind customarily provided in these situations, and since they are provided without reference to the boycott, they do not destroy the unilateral character of Y's selection.

(vii) A, a U.S. aircraft manufacturer, has an order to supply a certain number of planes to boycotting country Y. In connection with the order, Y asks A to supply it with a list of qualified aircraft tire manufacturers so that Y can select the tires to be placed on the planes. This is a highly unusual request, since, in A's worldwide business operations, choice of tires is customarily made by the manufacturer, not the customer. Nonetheless, A supplies a list of tire manufacturers, B, C, D, and E. Y chooses tire manufacturer B because B is not blacklisted. Had A, as is customary, selected the tires, company C would have been chosen. C happens to be blacklisted, and A knows that C's blacklist status was the reason for Y's selection of B.

A's provision of a list of tire manufacturers for Y to choose from destroys the unilateral character of Y's selection, because such a pre-selection service is not customary in A's worldwide business operations.

(viii) A, a U.S. aircraft manufacturer, receives an order from U.S. company C, which is located in the United States, for the sale of aircraft to company D, a U.S. affiliate of C. D is a bona fide resident of boycotting country Y. C instructs A that "in order to avoid boycott problems," A must use engines that are manufactured by company B, a company that is not blacklisted by Y. Engines built by B are unique in design and also bear B's trade name.

Since A has reason to know that the selection is boycott-based, he must inquire of C whether the selection was in fact made by D. If C informs A that the selection was made by D, A may comply.

(ix) Same as (viii), except that C initially states that the designation was unilaterally and specifically made by D.

A may accept C's statement without further investigation and may comply with the selection, because C merely transmitted D's unilateral and specific selection.

(x) Same as (ix), except that C informs A that it, C, has selected B on behalf of or as an agent of its affiliated company resident in the boycotting country.

A may not comply with this selection, because the decision was not made by a resident of the boycotting country.

(xi) A, a U.S. management consulting firm, is advising boycotting country Y on the selection of a contracting firm to construct a plant for the manufacture of agricultural chemicals. As is customary in its business, A compiles a list of potential contractors on the basis of its evaluation of the capabilities of the respective candidates to perform the job. A has knowledge that company B is blacklisted, but provides Y with the names of companies B, C, D, and E, listing them in order of their qualifications. Y instructs A to negotiate with C.

A may comply with Y's instruction, because Y's selection is unilateral and specific.

(xii) A, a U.S. exporter, is asked by boycotting country Y not to ship goods on carriers B, C, or D, which are owned by nationals of and are registered in country P, a country not boycotted by Y.

A may comply or agree to comply with Y's request even though the selection is not specific, because A does not know or have reason to know that the request is boycott-based. (NOTE: In example (xii), A has violated no prohibition, because it does not know or have reason to know that Y's instruction is boycott-based. Therefore, A could not act with the requisite intent to comply with the boycott.)

(xiii) A, a U.S. construction company, receives a contract to construct a hotel in boycotting country Y. As part of the contract, A is required to furnish Y with lists of qualified suppliers of various specifically identifiable items. A compiles lists of various qualified suppliers wholly without reference to the boycott, and thereafter Y instructs A to negotiate with, enter into contracts with, and arrange for delivery from each of the suppliers which Y designates. A knows that Y's choices are made on a boycott basis.

A may comply with Y's selections and carry out these post-award services for Y, because Y's selections were unilateral and specific and A's pre-award services were provided without reference to Y's boycott.

EXAMPLES OF BOYCOTTING COUNTRY BUYER

(The factors in determining whether a United States person is a "bona fide resident" of a boycotting country are the same as in paragraph (g) of this section on "Compliance with Local Law." See also the examples in that section.)

(i) A, a U.S. exporter, is asked by B, a U.S. person who is a bona fide resident of boycotting country Y, to ship goods on U.S. carrier C. C is not blacklisted by Y, and A knows that B has chosen on a boycott basis in order to comply with Y's boycott laws.

A may comply or agree to comply with B's request, because B is a bona fide resident of Y.

(ii) A is a U.S. computer company whose subsidiary, B, is a bona fide resident of boycotting country Y. A receives an order from B for specific, identifiable products manufactured by company C in connection with a computer which B is installing in Y.

A may comply or agree to comply with B's unilateral and specific selection, so long as the discretion was in fact exercised by B, not A. (NOTE: Unilateral selection transactions involving related United States persons will be scrutinized carefully to ensure that the selection was in fact made by the bona fide resident of the boycotting country.)

(iii) A, a U.S. engineering firm, has chief engineer B as its resident engineer on a dam construction site in boycotting country Y. B's presence at the site is necessary in order to ensure proper supervision of the project. In order to comply with local law, B selects equipment

supplier C rather than D, who is blacklisted, and directs A to purchase certain specific equipment from C for use in the project.

A may comply with this unilateral selection, because the decision was made by a bona fide resident of Y.

(As noted above, unilateral selections involving related United States persons will be scrutinized carefully to ensure that the selection was in fact made by the bona fide resident of the boycotting country.)

(iv) B, a branch of U.S. bank A, is located in boycotting country Y. B is in need of office supplies and asks the home office in New York to make the necessary purchases. A contacts C, a U.S. company in the office supply business, and instructs C to purchase various items from certain specific companies and ship them directly to B. In order to avoid any difficulties for B with respect to Y's boycott laws, A is careful to specify only non-blacklisted companies or suppliers. C knows that that was A's purpose. C may not comply with A's instruction, because the selection of suppliers was not made by a resident of a boycotting country.

(v) Same as (iv), except that A has given standing instructions to B that whenever it needs office supplies, it should specify certain suppliers designated by A. To avoid running afoul of Y's boycott laws, A's designations consist exclusively of non-blacklisted firms. A receives an order from B with the suppliers designated in accordance with A's instructions.

A may not comply with B's selection, because the selection was not in fact made by a bona fide resident of the boycotting country, but by a person located in the United States.

EXAMPLES OF SUPPLIERS OF SERVICES

(i) A, a U.S. manufacturer, is asked by boycotting country Y to ship goods to Y on U.S. vessel B, a carrier which is not blacklisted by Y.

A may comply or agree to comply with Y's re quest, because compliance with the unilateral and specific selection of carriers is expressly permitted under this exception.

(ii) A, a U.S. exporter shipping goods ordered by C, a national of boycotting country Y, is asked by C to insure the shipment through U.S. insurer B.

A may comply or agree to comply with C's request, because compliance with the unilateral and specific selection of an insurer is expressly permitted under this exception.

(iii) A, a U.S. construction company, is hired by C, an agency of the government of boycotting country Y, to build a power plant in Y. C specifies that A should subcontract the foundation work to U.S. contractor B. Part of the foundation design work will be done by B in the United States.

A may comply or agree to comply with Y's designation, because a necessary and not insignificant part of B's services are to be performed within the boycotting country, and such services are customarily performed on-site.

(iv) A, a U.S. contractor, is engaged by boycotting country Y to build a power plant. Y specifies that U.S. architectural firm B should be retained by A to design the plant. In order to design the plant, it is essential that B's personnel visit and become familiar with the site, although the bulk of the design and drawing work will be done in the United States.

A may comply or agree to comply with Y's unilateral and specific selection of architectural firm B, because a necessary and not insignificant part of B's services are to be performed within Y, and such on-site work is customarily involved in the provision of architectural services. The fact that the bulk of the actual work may be performed in the United States is irrelevant since the part to be performed within Y is necessary to B's effective performance.

(v) Same as (iv), except that Y specifies that the turbine for the power plant should be designed by U.S. engineer C. It is neither customary nor necessary for C to visit the site in order to do any of his work, but C has informed A that he would probably want to visit the site in Y if he were selected for the job.

A may not comply or agree to comply with Y's request, because, in the normal course of business, it is neither customary nor necessary for engineer C's services to be performed in Y.

(vi) A, a U.S. aircraft manufacturer, receives a contract from boycotting country Y to manufacture jet engines for Y's use. Y specifies that the engines should be designed by U.S. industrial engineering firm B.

A may not comply or agree to comply with Y's request, because, in the normal course of business, the services will not be performed in Y.

(vii) U.S. company A has a contract to supply specially designed road graders to boycotting country Y. Y has instructed A that it should engage engineering firm B in the design work rather than engineering firm C, which A normally uses, because C is blacklisted. When A contacts B, B informs A that one of B's personnel customarily visits the location in which any equipment B designs is used after it is in use, in order to determine how good a design job B has done. Such visits are necessary from B's point of view to provide a check on the quality of its work, and they are necessary from Y's point of view because they make it possible for Y to discuss possible design changes should deficiencies be detected.

A may not comply with Y's selection of B, because the services which B would perform in Y are an insignificant part of the total services to be performed by B.

EXAMPLES OF SPECIFICALLY IDENTIFIABLE GOODS

(The test of what constitutes "specifically identifiable goods" under this exception also applies to the term "specifically identifiable goods" as used in paragraph (g) of this section on "Compliance with Local Law.")

(i) A, a U.S. contractor, is constructing an apartment complex, on a turnkey basis, for boycotting country Y. Y instructs A to use only kitchen appliances manufactured by U.S. company B in completing the project. The appliances normally bear the manufacturer's name and trademark.

A may comply with Y's selection of B, because Y's unilateral and specific selection is of goods identifiable as to source or origin in the normal course of business at the time of their entry into Y.

(ii) Same as (i), except that Y directs A to use lumber manufactured only by U.S. company C. In the normal course of business, C neither stamps its name on the lumber nor identifies itself as the manufacturer on the packaging. In addition, normal export packaging does not identify the manufacturer.

A may not comply with Y's selection, because the goods selected are not identifiable by source or origin in the normal course of business at the time of their entry into Y.

(iii) B, a U.S. contractor who is a bona fide resident of boycotting country Y, is engaged in building roads. B retains the services of A, a U.S. engineering firm, to assist it in procuring construction equipment. B directs A to purchase road graders only from manufacturer C because other road grader manufacturers which A might use are blacklisted. C's road graders normally bear C's insignia.

A may comply with B's selection of C, because the goods selected are identifiable by source or origin in the normal course of business at the time of their entry into Y.

(iv) A, a U.S. company, manufactures computer-operated machine tools. The computers are mounted on a separate bracket on the side of the equipment and are readily identifiable by brand name imprinted on the equipment. There are five or six U.S. manufacturers of such computers which will function interchangeably to operate the machine tools manufactured by A. B, a resident of boycotting country Y, contracts to buy the machine tools manufactured by A on the condition that A incorporate, as the computer drive, a computer manufactured by U.S. company C. B's designation of C is made to avoid boycott problems which could be caused if computers manufactured by some other company were used.

A may comply with B's designation of C, because the goods selected are identifiable by source or origin in the normal course of business at the time of their entry into Y.

(v) A, a U.S. wholesaler of electronic equipment, receives an order from B, a U.S. manufacturer of radio equipment, who is a bona fide resident of boycotting country Y. B orders a variety of electrical components and specifies that all transistors must be purchased from company C, which is not blacklisted by Y. The transistors requested by B do not normally bear the name of the manufacturer; however, they are typically shipped in cartons, and C's name and logo appear on the cartons.

A may comply with B's selection, because the goods selected by B are identifiable as to source or origin in the normal course of business at the time of their entry into Y by virtue of the containers or packaging used.

(vi) A, a U.S. computer manufacturer, receives an order for a computer from B, a university in boycotting country Y. B specifies that certain integrated circuits incorporated in the computer must be supplied by U.S. electronics company C. These circuits are incorporated into the computer and are not visible without disassembling the computer.

A may not comply or agree to comply with B's specific selection of these components, because they are not identifiable as to their source or origin in the normal course of business at the time of their entry into Y.

(vii) A, a U.S. clothing manufacturer, receives an order for shirts from B, a retailer resident in boycotting country Y. B specifies that the shirts are to be manufactured from cotton produced by U.S. farming cooperative C. Such shirts will not identify C or the source of the cotton.

A may not comply or agree to comply with B's designation, because the cotton is not identifiable as to source or origin in the normal course of business at the time of entry into Y.

(viii) A, a U.S. contractor, is retained by B, a construction firm located in and wholly-owned by boycotting country Y, to assist B in procuring construction materials. B directs A to purchase a range of materials, including hardware, tools, and trucks, all of which bear the name of the manufacturer stamped on the item. In addition, B directs A to purchase steel beams manufactured by U.S. company C. The name of manufacturer C

normally does not appear on the steel itself or on its export packaging.

A may comply with B's selection of the hardware, tools, and trucks, because they are identifiable as to source or origin in the normal course of business at the time of entry into Y. A may not comply with B's selection of steel beams, because the goods are not identifiable as to source or origin by trade name, trademark, uniqueness or packaging at the time of their entry into Y.

●EXAMPLE OF DISCRIMINATION ON BASIS OF RACE, RELIGION, SEX, OR NATIONAL ORIGIN

(i) A, a U.S. paper manufacturer, is asked by boycotting country Y to ship goods to Y on U.S. vessel B. Y states that the reason for its choice of B is that, unlike U.S. vessel C, B is not owned by persons of a particular faith.

A may not comply or agree to comply with Y's request, because A has reason to know that the purpose of the selection is to effect religious discrimination against a United States person.

(e) Shipment and transshipment of exports pursuant to a boycotting country's requirements

COMPLIANCE WITH A BOYCOTTING COUNTRY'S REQUIREMENTS REGARDING SHIPMENT AND TRANSSHIPMENT OF EXPORTS

(1) A United States person may comply or agree to comply with the export requirements of a boycotting country with respect to shipments or transshipments of exports to:

(i) A boycotted country;

(ii) Any business concern of a boycotted country;

(iii) Any business concern organized under the laws of a boycotted country; or

(iv) Any national or resident of a boycotted country.

(2) This exception permits compliance with restrictions which a boycotting country may place on direct exports to a boycotted country; on indirect exports to a boycotted country (i.e., those that pass via third parties); and on exports to residents, nationals, or business concerns of, or organized under the laws of, a boycotted country, including those located in third countries.

(3) This exception also permits compliance with restrictions which a boycotting country may place on the route of export shipments when the restrictions are reasonably related to preventing the export shipments from coming into contact with or under the jurisdiction of the boycotted country. This exception applies whether a boycotting country or the vendor of the shipment:

(i) Explicitly states that the shipment should not pass through the boycotted country enroute to its final destination; or

(ii) Affirmatively describes a route of shipment that does not include the boycotted country.

(4) A United States person may not, under this exception, refuse on an across-the-board basis to do business with a boycotted country or a national or resident of a boycotted country.

EXAMPLES OF COMPLIANCE WITH A BOYCOTTING COUNTRY'S REQUIREMENTS REGARDING SHIPMENT OR TRANSSHIPMENT OF EXPORTS

The following examples are intended to give guidance in determining the circumstances in which compliance with the export requirements of a boycotting country is permissible. They are

illustrative, not comprehensive.

(i) A, a U.S. petroleum company, exports petroleum products to 20 countries, including the United States, from boycotting country Y. Country Y's export regulations require that products not be exported from Y to boycotted country X.

A may agree to and comply with Y's regulations with respect to the export of goods from Y to X.

(ii) Same as (i), except that Y's export regulations require that goods not be exported from boycotting country Y to any business concern organized under the laws of boycotted country X.

A may agree to and comply with Y's regulations with respect to the export of goods from Y to a business concern organized under the laws of X, even if such concern is located in a country not involved in Y's boycott of X.

(iii) B, the operator of a storage facility in country M, contracts with A, a U.S. carrier, for the shipment of certain goods manufactured in boycotting country Y. A's contract with B contains a provision stating that the goods to be transported may not be shipped or transshipped to boycotted country X. B informs A that this provision is a requirement of C, the manufacturer of goods who is a resident of boycotting country Y. Country M is not boycotted by Y.

A may agree to and comply with this provision, because such a provision is required by the export regulations of boycotting country Y in order to prevent shipment of Y-origin goods to a country boycotted by Y.

(iv) A, a U.S. petroleum refiner located in the United States, purchases crude oil from boycotting country Y. A has a branch operation in boycotted country X. Y requires, as a condition of sale, that A agree not to ship or transship the crude oil or products refined in Y to A's branch in X.

A may agree to and comply with these requirements, because they are export requirements of Y designed to prevent Y-origin products from being shipped to a boycotted country.

(v) A, a U.S. company, has a petrochemical plant in boycotting country Y. As a condition of securing an export license from Y, A must agree that it will not ship or permit transshipment of any of its output from the plant in Y to any companies which Y lists as being owned by nationals of boycotted country X.

A may agree to this condition, because it is a restriction designed to prevent Y-origin products from being exported to a business concern of boycotted country X or to nationals of boycotted country X.

(vi) Same as (v), except that the condition imposed on A is that Y-origin goods may not be shipped or permitted to be transshipped to any companies which Y lists as being owned by persons whose national origin is X.

A may not agree to this condition, because it is a restriction designed to prevent Y-origin goods from being exported to persons of a particular national origin rather than to residents or nationals of a particular boycotted country.

(vii) A, a U.S. petroleum company, exports petroleum products to 20 countries, including the United States, from boycotting country Y. Y requires, as a condition of sale, that A not ship the products to be exported from Y to or through boycotted country X.

A may agree to and comply with this requirement because it is an export requirement of Y designed to prevent Y-origin products from coming into contact with or under the jurisdiction of a

boycotted country.

(viii) Same as (vii), except that boycotting country Y's export regulations require that products to be exported from Y not pass through a port of boycotted country X.

A may agree to and comply with Y's regulations prohibiting Y-origin exports from passing through a port at boycotted country X, because they are export requirements of Y designed to prevent Y-origin products from coming into contact with or under the jurisdiction of a boycotted country.

(ix) Same as (vii), except that Y's export regulations require that A not transship the exported products "in or at" boycotted country X.

A may agree to and comply with Y's regulations with respect to the transshipment of goods "in or at" X, because they are export requirements of Y designed to prevent Y-origin products from coming into contact with or under the jurisdiction of a boycotted country.

(f) Immigration, passport, visa, or employment requirements of a boycotting country

COMPLIANCE WITH IMMIGRATION, PASSPORT, VISA, OR EMPLOYMENT REQUIREMENTS OF A BOYCOTTING COUNTRY

(1) A United States individual may comply or agree to comply with the immigration, passport, visa, or employment requirements of a boycotting country, and with requests for information from a boycotting country made to ascertain whether such individual meets requirements for employment within the boycotting country, provided that he furnishes information only about himself or a member of his family, and not about any other United States individual, including his employees, employers, or co-workers.

(2) For purposes of this section, a "United States individual" means a person who is a resident or national of the United States. "Family" means immediate family members, including parents, siblings, spouse, children, and other dependents living in the individual's home.

(3) A United States person may not furnish information about its employees or executives, but may allow any individual to respond on his own to any request for information relating to immigration, passport, visa, or employment requirements. A United States person may also perform any ministerial acts to expedite processing of applications by individuals. These include informing employees of boycotting country visa requirements at an appropriate time; typing, translation, messenger and similar services; and assisting in or arranging for the expeditious processing of applications. All such actions must be undertaken on a non-discriminatory basis.

(4) A United States person may proceed with a project in a boycotting country even if certain of its employees or other prospective participants in a transaction are denied entry for boycott reasons. But no employees or other participants may be selected in advance in a manner designed to comply with a boycott.

EXAMPLES OF COMPLIANCE WITH IMMIGRATION, PASSPORT, VISA, OR EMPLOYMENT REQUIREMENTS OF A BOYCOTTING COUNTRY

The following examples are intended to give guidance in determining the circumstances in which compliance with immigration, passport, visa, or employment requirements is permissible. They are illustrative, not comprehensive.

(i) A, a U.S. individual employed by B, a U.S. manufacturer of sporting goods with a plant in boycotting country Y, wishes to obtain a work visa so that he may transfer to the plant in Y. Country

Y's immigration laws specify that anyone wishing to enter the country or obtain a visa to work in the country must supply information about his religion. This information is required for boycott purposes.

A may furnish such information, because it is required by Y's immigration laws.

(ii) Same as (i), except that A is asked to supply such information about other employees of B.

A may not supply this information, because it is not information about himself or his family.

(iii) A, a U.S. building contractor, has been awarded a construction contract to be performed in boycotting country Y. Y's immigration laws require that individuals applying for visas must indicate race, religion, and place of birth. The information is sought for boycott purposes. To avoid repeated rejections of applications for work visas by A's employees, A desires to furnish to country Y a list of its prospective and current employees and required information about each so that Y can make an initial screening.

A may not furnish such a list, because A would be furnishing information about the race, religion, and national origin of its employees.

(iv) Same as (iii), except that A selects for work on the project those of its current employees whom it believes will be granted work visas from boycotting country Y.

A may not make a selection from among its employees in a manner designed to comply with the boycott-based visa requirements of Y, but must allow all eligible employees to apply for visas. A may later substitute an employee who obtains the necessary visa for one who has had his application rejected.

(v) Same as (iii), except that A selects employees for the project and then allows each employee individually to apply for his own visa. Two employees' applications are rejected, and A then substitutes two other employees who, in turn, submit their own visa applications.

A may take such action, because in so doing A is not acting in contravention of any prohibition of this part.

(vi) Same as (v), except that A arranges for the translation, typing and processing of its employees' applications, and transmits all the applications to the consulate of boycotting country Y.

A may take such ministerial actions, because in so doing A is not itself furnishing information with respect to race, religion, sex, or national origin, but is merely transmitting information furnished by its individual employees.

●(vii) A, a U.S. contractor, selects U.S. subcontractor B to perform certain engineering services in connection with A's project in boycotting country Y. The work visa application submitted by the employee whom B has proposed as chief engineer of this project is rejected by Y because his national origin is of boycotted country X. Subcontractor B thereupon withdraws.

A may continue with the project and select another subcontractor, because A is not acting in contravention of any prohibition of this part.

(g) Compliance with local law

(1) This exception contains two parts. The first covers compliance with local law with respect to a United States person's activities exclusively within a foreign country; the second covers compliance with local import laws by United States persons resident in a foreign country. Under both parts of this exception, local laws are laws of the host country, whether derived from statutes, regulations, decrees, or other official sources

having the effect of law in the host country. This exception is not available for compliance with presumed policies or understandings of policies unless those policies are reflected in official sources having the effect of law.

(2) Both parts of this exception apply only to United States persons resident in a foreign country. For purposes of this exception, a United States person will be considered to be a resident of a foreign country only if he is a bona fide resident. A United States person may be a bona fide resident of a foreign country even if such person's residency is temporary.

(3)(i) Factors that will be considered in determining whether a United States person is a bona fide resident of a foreign country include:

(A) Physical presence in the country;

(B) Whether residence is needed for legitimate business reasons;

(C) Continuity of the residency;

(D) Intent to maintain the residency;

(E) Prior residence in the country;

(F) Size and nature of presence in the country;

(G) Whether the person is registered to do business or incorporated in the country;

(H) Whether the person has a valid work visa; and

(I) Whether the person has a similar presence in both boycotting and non-boycotting foreign countries in connection with similar business activities.

(ii) No one of the factors in paragraph (g)(3) of this section is dispositive. All the circumstances involved will be closely examined to ascertain whether there is, in fact, bona fide residency. Residency established solely for purposes of avoidance of the application of this part, unrelated to legitimate business needs, does not constitute bona fide residency.

EXAMPLES OF BONA FIDE RESIDENCY

The following examples are intended to give guidance in determining the circumstances in which a United States person may be a bona fide resident of a foreign country. For purposes of illustration, each example discusses only one or two factors, instead of all relevant factors. They are illustrative, not comprehensive.

(i) A, a U.S. radio manufacturer located in the United States, receives a tender to bid on a contract to supply radios for a hotel to be built in boycotting country Y. After examining the proposal, A sends a bid from its New York office to Y.

A is not a resident of Y, because it is not physically present in Y.

(ii) Same as (i), except that after receiving the tender, A sends its sales representative to Y. A does not usually have sales representatives in countries when it bids from the United States, and this particular person's presence in Y is not necessary to enable A to make the bid.

A is not a bona fide resident of Y, because it has no legitimate business reasons for having its sales representative resident in Y.

(iii) A, a U.S. bank, wishes to establish a branch office in boycotting country Y. In pursuit of that objective, A's personnel visit Y to make the necessary arrangements. A intends to establish a permanent branch office in Y after the necessary arrangements are made.

A's personnel in Y are not bona fide residents of Y, because A does not yet have a permanent business operation in Y.

●(iv) Same as (iii), except A's personnel are required by Y's laws to furnish certain non-discriminatory boycott information in order to establish a branch in Y.

In these limited circumstances, A's personnel may furnish the non-discriminatory boycott information necessary to establish residency to the same extent a U.S. person who is a bona fide resident in that country could. If this information could not be furnished in such limited circumstances, the exception would be available only to firms resident in a boycotting country before January 18, 1978.

(v) A, a U.S. construction company, receives an invitation to build a power plant in boycotting country Y. After receipt of the invitation, A's personnel visit Y in order to survey the site and make necessary analyses in preparation for submitting a bid. The invitation requires that otherwise prohibited boycott information be furnished with the bid.

A's personnel in Y are not bona fide residents of Y, because A has no permanent business operation in Y. Therefore, A's personnel may not furnish the prohibited information.

●(vi) Same as (v), except that A is considering establishing an office in boycotting country Y. A's personnel visit Y in order to register A to do business in that country. A intends to establish ongoing construction operations in Y. A's personnel are required by Y's laws to furnish certain non-discriminatory boycott information in order to register A to do business or incorporate a subsidiary in Y.

In these limited circumstances, A's personnel may furnish non-discriminatory boycott information necessary to establish residency to the same extent a U.S. person who is a bona fide resident in that country could. If this information could not be furnished in such limited circumstances, the exception would be available only to firms resident in a boycotting country before January 18, 1978.

(vii) A, a subsidiary of U.S. oil company B, is located in boycotting country Y. A has been engaged in oil explorations in Y for a number of years.

A is a bona fide resident of Y, because of its pre-existing continuous presence in Y for legitimate business reasons.

(viii) Same as (vii), except that A has just been established in Y and has not yet begun operations.

A is a bona fide resident of Y, because it is present in Y for legitimate business reasons and it intends to reside continuously.

(ix) U.S. company A is a manufacturer of prefabricated homes. A builds a plant in boycotting country Y for purposes of assembling components made by A in the United States and shipped to Y.

A's personnel in Y are bona fide residents of Y, because A's plant in Y is established for legitimate business reasons, and it intends to reside continuously.

(x) U.S. company A has its principal place of business in the United States. A's sales agent visits boycotting country Y from time to time for purposes of soliciting orders.

A's sales agent is not a bona fide resident of Y, because such periodic visits to Y are insufficient to establish a bona fide residency.

(xi) A, a branch office of U.S. construction company B, is located in boycotting country Y. The branch office has been in existence for a

number of years and has been performing various management services in connection with B's construction operations in Y.

A is a bona fide resident of Y, because of its longstanding presence in Y and its conduct of ongoing operations in Y.

(xii) U.S. construction company A has never done any business in boycotting country Y. It is awarded a contract to construct a hospital in Y, and preparatory to beginning construction, sends its personnel to Y to set up operations.

A's personnel are bona fide residents of Y, because they are present in Y for the purposes of carrying out A's legitimate business purposes; they intend to reside continuously; and residency is necessary to conduct their business.

(xiii) U.S. company A manufactures furniture. All its sales in foreign countries are conducted from its offices in the United States. From time to time A has considered opening sales offices abroad, but it has concluded that it is more efficient to conduct sales operations from the United States. Shortly after the effective date of this part, A sends a sales representative to boycotting country Y to open an office in and solicit orders from Y. It is more costly to conduct operations from that office than to sell directly from the United States, but A believes that if it establishes a residence in Y, it will be in a better position to avoid conflicts with U.S. law in its sales to Y.

A's sales representative is not a bona fide resident of Y, because the residency was established to avoid the application of this part and not for legitimate business reasons.

(xiv) Same as (xiii), except that it is in fact more efficient to have a sales office in Y. In fact, without a sales office in Y, A would find it difficult to explore business opportunities in Y. A is aware, however, that residency in Y would permit its sales representative to comply with Y's boycott laws.

A's sales representative is a bona fide resident of Y, because A has a legitimate business reason for establishing a sales office in Y.

(xv) U.S. company B is a computer manufacturer. B sells computers and related programming services tailored to the needs of individual clients. Because of the complex nature of the product, B must have sales representatives in any country where sales are made. B has a sales representative, A, in boycotting country Y. A spends two months of the year in Y, and the rest of the year in other countries. B has a permanent sales office from which A operates while in Y, and the sales office is stocked with brochures and other sales materials.

A is a bona fide resident of Y, because his presence in Y is necessary to carry out B's legitimate business purposes; B maintains a permanent office in Y; and B intends to continue doing business in Y in the future.

(xvi) A, a U.S. construction engineering company, is engaged by B, a U.S. general contracting company, to provide services in connection with B's contract to construct a hospital complex in boycotting country Y. In order to perform those services, A's engineers set up a temporary office in a trailer on the construction site in Y. A's work is expected to be completed within six months.

A's personnel in Y are bona fide residents of Y, because A's on-site office is necessary to the performance of its services for B, and because A's personnel are continuously there.

(xvii) A, a U.S. company, sends one of its representatives to boycotting country Y to explore new sales possibilities for its line of transistor

radios. After spending several weeks in Y, A's representative rents a post office box in Y, to which all persons interested in A's products are directed to make inquiry.

A is not a bona fide resident of Y, because rental of a post office box is not a sufficient presence in Y to constitute residency.

(xviii) A, a U.S. computer company, has a patent and trademark registered in the United States. In order to obtain registration of its patent and trademark in boycotting country Y, A is required to furnish certain non-discriminatory boycott information.

A may not furnish the information, because A is not a bona fide resident of Y.

(h) Activities exclusively within a foreign country

(1) Any United States person who is a bona fide resident of a foreign country, including a boycotting country, may comply or agree to comply with the laws of that country with respect to his activities exclusively within that country. These activities include:

(i) Entering into contracts which provide that local law applies or governs, or that the parties will comply with such laws;

(ii) Employing residents of the host country;

(iii) Retaining local contractors to perform work within the host country;

(iv) Purchasing or selling goods or services from or to residents of the host country; and

(v) Furnishing information within the host country.

(2) Activities exclusively within the country do not include importing goods or services from outside the host country, and, therefore, this part of the exception does not apply to compliance with import laws in connection with importing goods or services.

EXAMPLES OF PERMISSIBLE COMPLIANCE WITH LOCAL LAW WITH RESPECT TO ACTIVITIES EXCLUSIVELY WITHIN A FOREIGN COUNTRY

The following examples are intended to give guidance in determining the circumstances in which compliance with local law is permissible. They are illustrative, not comprehensive.

ACTIVITIES EXCLUSIVELY WITHIN A FOREIGN COUNTRY

(i) U.S. construction company A, a bona fide resident of boycotting country Y, has a contract to build a school complex in Y. Pursuant to Y's boycott laws, the contract requires A to refuse to purchase supplies from certain local merchants. While Y permits such merchants to operate within Y, their freedom of action in Y is constrained because of their relationship with boycotted country X.

A may enter into the contract, because dealings with local merchants are activities exclusively within Y.

(ii) A, a banking subsidiary of U.S. bank B, is a bona fide resident of boycotting country Y. From time to time, A purchases office supplies from the United States.

A's purchase of office supplies is not an activity exclusively within Y, because it involves the import of goods from abroad.

(iii) A, a branch of U.S. bank B, is a bona fide resident of boycotting country Y. Under Y's boycott laws, A is required to supply information

about whether A has any dealings with boycotted country X. A compiles and furnishes the information within Y and does so of its own knowledge.

A may comply with that requirement, because in compiling and furnishing the information within Y, based on its own knowledge, A is engaging in an activity exclusively within Y.

(iv) Same as (iii), except that A is required to supply information about B's dealings with X. From its own knowledge and without making any inquiry of B, A compiles and furnishes the information.

A may comply with that requirement, because in compiling and furnishing the information within Y, based on its own knowledge, A is engaging in an activity exclusively within Y.

(v) Same as (iv), except that in making its responses, A asks B to compile some of the information.

A may not comply, because the gathering of the necessary information takes place partially outside Y.

(vi) U.S. company A has applied for a license to establish a permanent manufacturing facility in boycotting country Y. Under Y's boycott law, A must agree, as a condition of the license, that it will not sell any of its output to blacklisted foreign firms.

A may not comply, because the agreement would govern activities of A which are not exclusively within Y.

DISCRIMINATION AGAINST UNITED STATES PERSONS

(i) A, a subsidiary of U.S. company B, is a bona fide resident of boycotting country Y. A manufactures air conditioners in its plant in Y. Under Y's boycott laws, A must agree not to hire nationals of boycotted country X.

A may agree to the restriction and may abide by it with respect to its recruitment of individuals within Y, because the recruitment of such individuals is an activity exclusively within Y. However, A cannot abide by this restriction with respect to its recruitment of individuals outside Y, because this is not an activity exclusively within Y.

(ii) Same as (i), except that pursuant to Y's boycott laws, A must agree not to hire anyone who is of a designated religion.

A may not agree to this restriction, because the agreement calls for discrimination against U.S. persons on the basis of religion. It makes no difference whether the recruitment of the U.S. persons occurs within or without Y. (NOTE: The exception for compliance with local law does not apply to boycott-based refusals to employ U.S. persons on the basis of race, religion, sex, or national origin even if the activity is exclusively within the boycotting country.)

(i) Compliance with local import law

(1) Any United States person who is a bona fide resident of a foreign country, including a boycotting country, may, in importing goods, materials or components into that country, comply or agree to comply with the import laws of that country, provided that:

(i) The items are for his own use or for his use in performing contractual services within that country; and

(ii) In the normal course of business, the items are identifiable as to their source or origin at the time of their entry into the foreign country by:

(a) Uniqueness of design or appearance; or

(b) Trademark, trade name, or other identification normally on the items themselves, including their packaging.

(2) The factors that will be considered in determining whether a United States person is a bona fide resident of a foreign country are those set forth in paragraph (g) of this section. Bona fide residence of a United States company's subsidiary, affiliate, or other permanent establishment in a foreign country does not confer such residence on such United States company. Likewise, bona fide residence of a United States company's employee in a foreign country does not confer such residence on the entire company.

(3) A United States person who is a bona fide resident of a foreign country may take action under this exception through an agent outside the country, but the agent must act at the direction of the resident and not exercise his own discretion. Therefore, if a United States person resident in a boycotting country takes action to comply with a boycotting country's import law with respect to the importation of qualified goods, he may direct his agent in the United States on the action to be taken, but the United States agent himself may not exercise any discretion.

●**(4)** For purposes of this exception, the test that governs whether goods or components of goods are specifically identifiable is identical to the test applied in paragraph (d) of this section on "Compliance With Unilateral and Specific Selection" to determine whether they are identifiable as to their source or origin in the normal course of business.

(5) The availability of this exception for the import of goods depends on whether the goods are intended for the United States person's own use at the time they are imported. It does not depend upon who has title to the goods at the time of importation into a foreign country.

(6) Goods are for the United States person's own use (including the performance of contractual services within the foreign country) if:

(i) They are to be consumed by the United States person;

(ii) They are to remain in the United States person's possession and to be used by that person;

(iii) They are to be used by the United States person in performing contractual services for another;

(iv) They are to be further manufactured, incorporated into, refined into, or reprocessed into another product to be manufactured for another; or

(v) They are to be incorporated into, or permanently affixed as a functional part of, a project to be constructed for another.

(7) Goods acquired to fill an order for such goods from another are not for the United States person's own use. Goods procured for another are not for one's own use, even if the furnishing of procurement services is the business in which the United States person is customarily engaged. Nor are goods obtained for simple resale acquired for one's own use, even if the United States person is engaged in the retail business. Likewise, goods obtained for inclusion in a turnkey project are not for one's own use if they are not customarily incorporated into, or do not customarily become permanently affixed as a functional part of the project.

(8) This part of the local law exception does not apply to the import of services, even when the United States person importing such services is a bona fide resident of a boycotting country and is importing them for his own use. In addition, this exception is available for a United States person who is a bona fide resident of a foreign country only when the individual or entity actually present

within that country takes action through the exercise of his own discretion.

(9) Use of this exception will be monitored and continually reviewed to determine whether its continued availability is consistent with the national interest. Its availability may be limited or withdrawn as appropriate. In reviewing the continued availability of this exception, the effect that the inability to comply with local import laws would have on the economic and other relations of the United States with boycotting countries will be considered.

(10) A United States person who is a bona fide resident of a foreign country may comply or agree to comply with the host country's import laws even if he knows or has reason to know that particular laws are boycott-related. However, no United States person may comply or agree to comply with any host country law which would require him to discriminate against any United States person on the basis of race, religion, sex, or national origin, or to supply information about any United States person's race, religion, sex, or national origin.

EXAMPLES OF PERMISSIBLE COMPLIANCE WITH LOCAL IMPORT LAW

The following examples are intended to give guidance in determining the circumstances in which compliance with local import law is permissible. They are illustrative, not comprehensive.

COMPLIANCE BY A BONA FIDE RESIDENT

(i) A, a subsidiary of U.S. company B, is a bona fide resident of boycotting country Y and is engaged in oil drilling operations in Y. In acquiring certain large, specifically identifiable products for carrying out its operations in Y, A chooses only from non-blacklisted firms because Y's import laws prohibit the importation of goods from blacklisted firms. However, with respect to smaller items, B makes the selection on behalf of A and sends them to A in Y.

A may choose from non-blacklisted firms, because it is a U.S. person who is a bona fide resident in Y. However, because B is not resident in Y, B cannot make boycott-based selections to conform with Y's import laws prohibiting the importation of goods from blacklisted firms.

(ii) Same as (i), except that after making its choices on the larger items, A directs B to carry out its instructions by entering into appropriate contracts and making necessary shipping arrangements.

B may carry out A's instructions provided that A, a bona fide resident of Y, has in fact made the choice and B is exercising no discretion, but is acting only as A's agent. (NOTE: Such transactions between related companies will be scrutinized carefully. A must in fact exercise the discretion and make the selections. If the discretion is exercised by B, B would be in violation of this part.)

(iii) U.S. construction company A has a contract to build a school in boycotting country Y. A's employees set up operations in Y for purposes of commencing construction. A's employees in Y advise A's headquarters in the United States that Y's import laws prohibit importation of goods manufactured by blacklisted firms. A's headquarters then issues invitations to bid only to non-blacklisted firms for certain specifically identifiable goods.

A's headquarters' choice of non-blacklisted suppliers is not a choice made by a U.S. person who is a bona fide resident of Y, because the discretion in issuing the bids was exercised in the United States, not in Y.

(iv) Same as (iii), except that A's employees in Y

actually make the decision regarding to whom the bids should be issued.

The choices made by A's employees are choices made by U.S. persons who are bona fide residents of Y, because the discretion in choosing was exercised solely in Y. (NOTE: Choices purportedly made by employees of U.S. companies who are resident in boycotting countries will be carefully scrutinized to ensure that the discretion was exercised entirely in the boycotting country.)

SPECIFICALLY IDENTIFIABLE GOODS

The test and examples as to what constitutes specifically identifiable goods are identical to those applicable under paragraph (d) of this section on "Compliance With Unilateral Selection."

● IMPORTS FOR U.S. PERSON'S OWN USE WITHIN BOYCOTTING COUNTRY

(i) A, a subsidiary of U.S. company B, is a bona fide resident of boycotting country Y. A plans to import computer operated machine tools to be installed in its automobile plant in boycotting country Y. The computers are mounted on a separate bracket on the side of the equipment and are readily identifiable by brand name. A orders the tools from U.S. supplier C and specifies that C must incorporate computers manufactured by D, a non-blacklisted company. A would have chosen computers manufactured by E, except that E is blacklisted, and Y's import laws prohibit the importation of goods manufactured by blacklisted firms.

A may refuse to purchase E's computers, because A is importing the computers for its own use in its manufacturing operations in Y.

(ii) A, a subsidiary of U.S. company B, is a bona fide resident of boycotting country Y. To meet the needs of its employees in Y, A imports certain specifically identifiable commissary items for sale, such as cosmetics; and canteen items, such as candy. In selecting such items for importation into Y, A chooses items made only by non-blacklisted firms, because Y's import laws prohibit importation of goods from blacklisted firms.

A may import these items only from non-blacklisted firms, because the importation of goods for consumption by A's employees is an importation for A's own use.

(iii) A, a U.S. construction company which is a bona fide resident of boycotting country Y, has a contract to build a hospital complex for the Ministry of Health in Y. Under the contract, A will be general manager of the project with discretion to choose all subcontractors and suppliers. The complex is to be built on a turnkey basis, with A retaining title to the property and bearing all financial risk until the complex is conveyed to Y. In choosing specifically identifiable goods for import, such as central air conditioning units and plate glass, A excludes blacklisted suppliers in order to comply with Y's import laws. These goods are customarily incorporated into, or permanently affixed as a functional part of, the project.

A may refuse to deal with blacklisted suppliers of specifically identifiable goods, because importation of goods by a general contractor to be incorporated into a construction project in Y is an importation of goods for A's own use.

(iv) Same as (iii), except that, in addition, in choosing U.S. architects and engineers to work on the project, A excludes blacklisted firms, because Y's import laws prohibit the use of services rendered by blacklisted persons.

A may not refuse to deal with blacklisted architectural or engineering firms, because this exception does not apply to the import of services. It is irrelevant that, at some stage, the architectural

or engineering drawings or plans may be brought to the site in Y. This factor is insufficient to transform such services into "goods" for purposes of this exception.

(v) Same as (iii), except that the project is to be completed on a "cost plus" basis, with Y making progress payments to A at various stages of completion.

A may refuse to deal with blacklisted suppliers of specifically identifiable goods, because the importation of goods by A to be incorporated in a project A is under contract to complete is an importation of goods for its own use. The terms of payment are irrelevant.

(vi) A, a U.S. construction company which is a bona fide resident of boycotting country Y, has a contract for the construction of an office building in Y on a turnkey basis. In choosing goods to be used or included in the office complex, A orders wallboard, office partitions, and lighting fixtures from non-blacklisted manufacturers. A likewise orders desks, office chairs, typewriters, and office supplies from non-blacklisted manufacturers.

Because they are customarily incorporated into or permanently affixed as a functional part of an office building, the wallboard, office partitions, and lighting fixtures are for A's own use, and A may select non-blacklisted suppliers of these goods in order to comply with Y's import laws. Because they are not customarily incorporated into or permanently affixed to the project, the desks, office chairs, typewriters, and office supplies are not for A's own use, and A may not make boycott-based selections of the suppliers of these goods.

(vii) A, a U.S. company engaged in the business of selling automobiles, is a bona fide resident of boycotting country Y. In ordering automobiles from time to time for purposes of stocking its inventory, A purchases from U.S. manufacturer B, but not U.S. manufacturer C, because C is blacklisted. Retail sales are subsequently made from this inventory.

A's import of automobiles from B is not an import for A's own use, because the importation of items for general inventory in a retail sales operation is not an importation for one's own use.

(viii) A, a U.S. company engaged in the manufacture of pharmaceutical products, is a bona fide resident of boycotting country Y. In importing chemicals for incorporation into the pharmaceutical products, A purchases from U.S. supplier B, but not U.S. supplier C, because C is blacklisted.

A may import chemicals from B rather than C, because the importation of specifically identifiable items for incorporation into another product is an importation for one's own use.

(ix) A, a U.S. management company which is a bona fide resident of boycotting country Y, has a contract with the Ministry of Education in Y to purchase supplies for Y's school system. From time to time, A purchases goods from abroad for delivery to various schools in Y.

A's purchase of goods for Y's school system does not constitute an importation of goods for A's own use, because A is acting as a procurement agent for another. A, therefore, cannot make boycott-based selections of suppliers of such school supplies.

(x) A, a U.S. company which is a bona fide resident of boycotting country Y, has a contract to make purchases for Y in connection with a construction project in Y. A is not engaged in the construction of, or in any other activity in connection with, the project. A's role is merely to purchase goods for Y and arrange for their delivery to Y.

A is not purchasing goods for its own use, because

A is acting as a procurement agent for Y. A, therefore, cannot make boycott selections of suppliers of such goods.

(xi) A, a U.S. company which is a bona fide resident of boycotting country Y, imports specifically identifiable goods into Y for exhibit by A at a trade fair in Y. In selecting goods for exhibit, A excludes items made by blacklisted firms.

A's import of goods for its exhibit at a trade fair constitutes an import for A's own use. However, A may not sell in Y those goods it imported for exhibit.

●(xii) A is a bona fide resident of boycotting countries Y and Z. In compliance with Y's boycott laws, A chooses specifically identifiable goods for its oil drilling operations in Y and Z by excluding blacklisted suppliers. The goods are first imported into Y. Those purchased for A's use in Z are then transshipped to Z.

In selecting those goods for importation into Y, A is making an import selection for its own use, even though A may use some of the imported goods in Z. Further, the subsequent shipment from Y to Z of those goods purchased for use in Z is an import into Z for A's own use.

§760.4

EVASION

(a) No United States person may engage in any transaction or take any other action, either independently or through any other person, with intent to evade the provisions of this part. Nor may any United States person assist another United States person to violate or evade the provisions of this part.

●***(b)*** The exceptions set forth in §760.3(a) through (i) do not permit activities or agreements (express or implied by a course of conduct, including a pattern of responses) which are otherwise prohibited by this part and which are not within the intent of such exceptions. However, activities within the coverage and intent of the exceptions set forth in this part do not constitute evasion regardless of how often such exceptions are utilized.

(c) Use of any artifice, device or scheme which is intended to place a person at a commercial disadvantage or impose on him special burdens because he is blacklisted or otherwise restricted for boycott reasons from having a business relationship with or in a boycotting country will be regarded as evasion for purposes of this part.

●***(d)*** Unless permitted under one of the exceptions, use of risk of loss provisions that expressly impose a financial risk on another because of the import laws of a boycotting country may constitute evasion. If they are introduced after January 18, 1978, their use will be presumed to constitute evasion. This presumption may be rebutted by a showing that such a provision is in customary usage without distinction between boycotting and non-boycotting countries and that there is a legitimate non-boycott reason for its use. On the other hand, use of such a provision by a United States person subsequent to January 21, 1978 is presumed not to constitute evasion if the provision had been customarily used by that person prior to January 21, 1978.

(e) Use of dummy corporations or other devices to mask prohibited activity will also be regarded as evasion. Similarly, it is evasion under this part to divert specific boycotting country orders from a United States parent to a foreign subsidiary for purposes of complying with prohibited boycott requirements. However, alteration of a person's structure or method of doing business will not constitute evasion so long as the alteration is based on legitimate business considerations and is not

undertaken solely to avoid the application of the prohibitions of this part. The facts and circumstances of an arrangement or transaction will be carefully scrutinized to see whether appearances conform to reality.

EXAMPLES

The following examples are intended to give guidance to persons in determining circumstances in which this section will apply. They are illustrative, not comprehensive.

(i) A, a U.S. insurance company, receives a request from boycotting country Y asking whether it does business in boycotted country X. Because furnishing such information is prohibited, A declines to answer and as a result is placed on Y's blacklist. The following year, A's annual report contains new information about A's worldwide operations, including a list of all countries in which A does business. A then mails a copy of its annual report, which has never before contained such information, to officials of the government of country Y.

Absent some business justification unrelated to the boycott for changing the annual report in this fashion, A's action constitutes evasion of this part.

(ii) A, a U.S. construction firm resident in boycotting country Y, orders lumber from U.S. company B. A unilaterally selects B in part because U.S. lumber producer C is blacklisted by Y and C's products are therefore not importable. In placing its order with B, A requests that B stamp its name or logo on the lumber so that A "can be certain that it is, in fact, receiving B's products." B does not normally so stamp its lumber, and A's purpose in making the request is to appear to fit within the unilateral selection exception of this part.

Absent additional facts justifying A's action, A's action constitutes evasion of this part.

●(iii) A, a U.S. company, has been selling sewing machines to boycotting country Y for a number of years. A receives a request for a negative certificate of origin from a new customer. A is aware that furnishing such certificates are prohibited; therefore, A arranges to have all future shipments run through a foreign corporation in a third country which will affix the necessary negative certificate before forwarding the machines on to Y.

A's action constitutes evasion of this part, because it is a device to mask prohibited activity carried out on A's behalf.

●(iv) A, a U.S. company, has been selling calculators to distributor B in country C for a number of years and routinely supplies positive certificates of origin. A receives an order from country Y which requires negative certificates of origin. A arranges to make all future sales to distributor B in country C. A knows B will step in and make the sales to Y which A would otherwise have made directly. B will make the necessary negative certifications. A's warranty, which it will continue to honor, runs to the purchaser in Y.

A's action constitutes evasion, because the diverting of orders to B is a device to mask prohibited activity carried out on A's behalf.

(v) A, a U.S. company, is negotiating a long-term contract with boycotting country Y to meet all Y's medical supply needs. Y informs A that before such a contract can be concluded, A must complete Y's boycott questionnaire. A knows that it is prohibited from answering the questionnaire so it arranges for a local agent in Y to supply the necessary information.

A's action constitutes evasion of this part, because it is a device to mask prohibited activity carried out on A's behalf.

(vi) A, a U.S. contractor which has not previously dealt with boycotting country Y, is awarded a construction contract by Y. Because it is customary in the construction industry for a contractor to establish an on-site facility for the duration of the project, A establishes such an office, which satisfies the requirements for bona fide residency. Thereafter, A's office in Y takes a number of actions permitted under the compliance with local law exception.

A's actions do not constitute evasion, because A's facility in Y was established for legitimate business reasons.

(vii) A, a controlled foreign subsidiary of U.S. company B, is located in non-boycotting country M. A and B both make machine tools for sale in their respective marketing regions. B's marketing region includes boycotting country Y. After assessing the requirements of this part, B decides that it can no longer make machines for sale in Y. Instead, A decides to expand its facilities in M in order to service the Y market.

The actions of A and B do not constitute evasion, because there is a legitimate business reason for their actions. It is irrelevant that the effect may be to place sales which would otherwise have been subject to this part beyond the reach of this part.

(viii) A, a U.S. manufacturer, from time to time receives purchase orders from boycotting country Y which A fills from its plant in the United States. A knows that it is about to receive an order from Y which contains a request for a certification which A is prohibited from furnishing under this part. In order to permit the certification to be made, A diverts the purchase order to its foreign subsidiary.

A's diversion of the purchase order constitutes evasion of this part, because it is a device to mask prohibited activity carried out on A's behalf.

(ix) A, a U.S. company, is engaged in assembling drilling rigs for shipment to boycotting country Y. Because of potential difficulties in securing entry into Y of materials supplied by blacklisted firms, A insists that blacklisted firms take a 15 percent discount on all materials which they supply to A. As a result, no blacklisted firms are willing to transact with A.

A's insistence on the discount for materials supplied by blacklisted firms constitutes evasion of this part, because it is a device or scheme which is intended to place a special burden on blacklisted firms because of Y's boycott.

●(x) Same as (ix), except that shortly after January 18, 1978, A, a U.S. company, insists that its suppliers sign contracts which provide that even after title passes from the supplier to A, the supplier will bear the risk of loss and indemnify A if goods which the supplier has furnished are denied entry into Y for boycott reasons.

A's action constitutes evasion of this part, because it is a device or scheme which is intended to place a special burden on blacklisted persons because of Y's boycott.

●(xi) Same as (x), except that A customarily insisted on such an arrangement with its supplier prior to January 18, 1978.

A's action is presumed not to constitute evasion, because use of this contractual arrangement was customary for A prior to January 18, 1978.

●(xii) A, a U.S. company, has a contract to supply automobile sub-assembly units to boycotting country Y. Shortly after January 18, 1978, A insists that its suppliers sign contracts which provide that even after title passes to A, the supplier will bear the risk of loss and indemnify A if goods which the supplier has furnished are denied entry into boycotting country Y for any reason.

A's insistence on this arrangement is presumed to constitute evasion, because it is a device which is intended to place a special burden on blacklisted firms because of Y's boycott. The presumption may be rebutted by competent evidence showing that use of such an arrangement is customary without regard to the boycotting or non-boycotting character of the country to which it relates and that there is a legitimate non-boycott business reason for its use.

(xiii) Same as (vii), except that A requires that all suppliers make in-country delivery.

A's action does not constitute evasion, because it is an ordinary commercial practice to require in-country delivery of goods.

(xiv) Same as (xii), except that A requires that title remain with the supplier until delivery in Y has been made.

A's action does not constitute evasion, because it is ordinary commercial practice to require that title remain with the supplier until delivery has been made. This example is distinguishable from example (xii), because in example (xii) A had insisted on an extraordinary arrangement designed to require that the risk of loss remain with the supplier even after title had passed to A.

●(xv) U.S. bank A is contacted by U.S. company B to finance B's transaction with boycotting country Y. Payment will be effected through a letter of credit in favor of B at its U.S. address. A knows that the letter of credit will contain restrictive boycott conditions which would bar its implementation by A if the beneficiary were a U.S. person. A advises B of the boycott condition and suggests to B that the beneficiary should be changed to C, a shell corporation in non-boycotting country M. The beneficiary is changed accordingly.

The actions of both A and B constitute evasion of this part, because the arrangement is a device to mask prohibited activities.

●(xvi) Same as (xv), except that U.S. company B, the beneficiary of the letter of credit, arranges to change the beneficiary to B's foreign subsidiary so that A can implement the letter of credit. A knows that this has been done.

A's implementation of the letter of credit in the face of its knowledge of B's action constitutes evasion of this part, because A's action is part of a device to mask prohibited activity by both parties.

(xvii) U.S. bank A, located in the United States, is contacted by foreign company B to finance B's transaction with boycotting country Y. B is a controlled subsidiary of a U.S. company. The transaction which is to be financed with a letter of credit payable to B at its foreign address, requires B to certify that none of its board members are of a particular religious faith. Since B cannot legally furnish the certificate, it asks A to convey the necessary information to Y through A's bank branch in Y. Such information would be furnished wholly outside the letter of credit transaction.

A's action constitutes evasion of this part, because it is undertaken to assist B's violation of this part.

(xviii) U.S. bank A is asked by foreign corporation B to implement a letter of credit in favor of B so that B might perform under its long-term contract with boycotting country Y. Under the terms of the letter of credit, B is required to certify that none of its suppliers is blacklisted. A knows that it cannot implement a letter of credit with this condition, so it tells B to negotiate the elimination of this requirement from the letter of credit and instead supply the certification to Y directly.

A's suggestion to B that it provide the negative certification to Y directly constitutes evasion of

this part, because A is taking an action through another person to mask prohibited activity on A's part.

§760.5

REPORTING REQUIREMENTS

(a) Scope of reporting requirements

(1) A United States person who receives a request to take any action which has the effect of furthering or supporting a restrictive trade practice or boycott fostered or imposed by a foreign country against a country friendly to the United States or against any United States person must report such request to the Department of Commerce in accordance with the requirements of this section. Such a request may be either written or oral and may include a request to furnish information or enter into or implement an agreement. It may also include a solicitation, directive, legend or instruction that asks for information or that asks that a United States person take or refrain from taking a particular action. Such a request shall be reported regardless of whether the action requested is prohibited or permissible under this part, except as otherwise provided by this section.

(2) For purposes of this section, a request received by a United States person is reportable if he knows or has reason to know that the purpose of the request is to enforce, implement, or otherwise further, support, or secure compliance with an unsanctioned foreign boycott or restrictive trade practice.

(i) A request received by a United States person located in the United States is reportable if it is received in connection with a transaction or activity in the interstate or foreign commerce of the United States, as determined under §760.1(d)(1) through (5) and (18) of this part.

(ii) A request received by a United States person located outside the United States (that is, a foreign subsidiary, partnership, affiliate, branch, office, or other permanent foreign establishment which is controlled in fact by any domestic concern, as determined under §760.1(c) of this part) is reportable if it is received in connection with a transaction or activity in the interstate or foreign commerce of the United States, as determined under §760.1(d)(6) through (17) and (19) of this part.

(iii) A request such as a boycott questionnaire, unrelated to a particular transaction or activity, received by any United States person is reportable when such person has or anticipates a business relationship with or in a boycotting country involving the sale, purchase or transfer of goods or services (including information) in the interstate or foreign commerce of the United States, as determined under §760.1(d) of this part.

(3) These reporting requirements apply to all United States persons. They apply whether the United States person receiving the request is an exporter, bank or other financial institution, insurer, freight forwarder, manufacturer, or any other United States person subject to this part.

(4) The acquisition of information about a boycotting country's boycott requirements through the receipt or review of books, pamphlets, legal texts, exporters' guidebooks and other similar publications does not constitute receipt of a reportable request for purposes of this section. In addition, a United States person who receives an unsolicited invitation to bid, or similar proposal, containing a boycott request has not received a reportable request for purposes of this section where he does not respond to the invitation to bid or other proposal.

(5) Because of the use of certain terms for boycott and non-boycott purposes; because of Congressional mandates to provide clear and

precise guidelines in areas of inherent uncertainty; and because of the Department's commitment to minimize paperwork and reduce the cost of reporting where it will not impair the Department's ability to continue to monitor foreign boycotts, the following specific requests are not reportable:

(i) A request to refrain from shipping goods on a carrier which flies the flag of a particular country or which is owned, chartered, leased or operated by a particular country or by nationals or residents of a particular country, or a request to certify to that effect.

(ii) A request to ship goods via a prescribed route, or a request to refrain from shipping goods via a proscribed route, or a request to certify to either effect.

(iii) A request to supply an affirmative statement or certification regarding the country of origin of goods.

(iv) A request to supply an affirmative statement or certification regarding the name of the supplier or manufacturer of the goods shipped or the name of the provider of services.

(v) A request to comply with the laws of another country except where the request expressly requires compliance with that country's boycott laws.

(vi) A request to an individual to supply information about himself or a member of his family for immigration, passport, visa, or employment purposes.

(vii) A request to supply an affirmative statement or certification indicating the destination of exports or confirming or otherwise indicating that such cargo will be unloaded or discharged at a particular destination.

(viii) A request to supply a certificate by the owner, master, charterer, or any employee thereof, that a vessel, aircraft, truck or any other mode of transportation is eligible, otherwise eligible, permitted, or allowed to enter, or not restricted from entering, a particular port, country, or group of countries pursuant to the laws, rules, or regulations of that port, country, or group of countries.

(ix) A request to supply a certificate from an insurance company stating that the insurance company has a duly authorized agent or representative within a boycotting country and/or the name and address of such agent.

(x) A request to comply with a term or condition of a transaction that provides that the vendor bear the risk of loss and indemnify the purchaser if the vendor's goods are denied entry into a country for any reason ("risk of loss clause") if such clause was in use by the purchaser prior to January 18, 1978.

(6) No United States person may engage in any transaction or take any other action, either independently or through any other person, with intent to evade the provisions of this part.

(7) From time to time the Department will survey domestic concerns for purposes of determining the worldwide scope of boycott requests received by their controlled foreign subsidiaries and affiliates with respect to their activities outside United States commerce. This pertains to requests which would be reportable under this section but for the fact that the activities to which the requests relate are outside United States commerce. The information requested will include the number and nature of non-reportable boycott requests received, the action(s) requested, the actions(s) taken in response and the countries in which the requests originate. The results of such surveys, including the names of those surveyed, will be made public.

(b) Manner of reporting

(1) Each reportable request must be reported. However, if more than one document (such as an invitation to bid, purchase order, or letter of credit) containing the same boycott request is received as part of the same transaction, only the first such request need be reported. Individual shipments against the same purchase order or letter of credit are to be treated as part of the same transaction. Each different boycott request associated with a given transaction must be reported, regardless of how or when the request is received.

(2) Each United States person actually receiving a reportable request must report that request. However, such person may designate someone else to report on his behalf. For example, a United States company, if authorized, may report on behalf of its controlled foreign subsidiary or affiliates; a freight forwarder, if authorized, may report on behalf of the exporter; and a bank, if authorized, may report on behalf of the beneficiary of a letter of credit. If a person designated to report a request received by another receives an identical request directed to him in connection with the same transaction, he may file one report on behalf of himself and the other person.

(3) Where a person is designated to report on behalf of another, the person receiving the request remains liable for any failure to report or for any representations made on his behalf. Further, anyone reporting on behalf of another is not relieved of his own responsibility for reporting any boycott request which he receives, even if it is an identical request in connection with the same transaction.

●**(4)** Reports must be submitted in duplicate to:

Report Processing Staff
Office of Antiboycott Compliance
U.S. Department of Commerce
Room 6098
Washington, D.C. 20230.

Each submission must be made in accordance with the following requirements:

●(i) Where the person receiving the request is a United States person located in the United States, each report of requests must be postmarked by the last day of the month following the calendar quarter in which the request was received (e.g., April 30 for the quarter consisting of January, February, and March).

●(ii) Where the person receiving the request is a United States person located outside the United States, each report of requests must be postmarked by the last day of the second month following the calendar quarter in which the request was received (e.g., May 31 for the quarter consisting of January, February, and March).

(5) At the reporting person's option, reports may be submitted on either a single transaction form (Form BXA-621P, Report of Restrictive Trade Practice or Boycott Request Single Transaction (revised 10-89)) or on a multiple transaction form (Form BXA-6051P, Report of Request for Restrictive Trade Practice or Boycott Multiple Transactions (revised 10-89)). Use of the multiple transaction form permits the reporting person to provide on one form all required information relating to as many as 75 reportable requests received within any single reporting period.

(6) Reports, whether submitted on the single transaction form or on the multiple transaction form, must contain entries for every applicable item on the form, including whether the reporting person intends to take or has taken the action requested. If the reporting person has not decided what action he will take by the time the report is required to be filed, he must later report the action he decides to take within 10 business days after deciding. In addition, anyone filing a report on behalf of another must so indicate and identify that other person.

(7) Each report of a boycott request must be accompanied by two copies of the relevant page(s) of any document(s) in which the request appears. Reports may also be accompanied by any additional information relating to the request as the reporting person desires to provide concerning his response to the request.

(8) Records containing information relating to a reportable boycott request, including a copy of any document(s) in which the request appears, must be maintained by the recipient for a five-year period after receipt of the request. The Department may require that these materials be submitted to it or that it have access to them at any time within that period. (See part 762 of the EAR for additional recordkeeping requirements.)

(c) Disclosure of information.

(1) Reports of requests received on or after October 7, 1976, as well as any accompanying documents filed with the reports, have been and will continue to be made available for public inspection and copying, except for certain proprietary information. With respect to reports of requests received on or after August 1, 1978, if the person making the report certifies that a United States person to whom the report relates would be placed at a competitive disadvantage because of the disclosure of information regarding the quantity, description, or value of any articles, materials, and supplies, including related technical data and other information, whether contained in a report or in any accompanying document(s), such information will not be publicly disclosed except upon failure by the reporting entity to edit the public inspection copy of the accompanying document(s) as provided by paragraph (c)(2) of this section, unless the Secretary of Commerce determines that the disclosure would not place the United States person involved at a competitive disadvantage or that it would be contrary to the national interest to withhold the information. In the event the Secretary of Commerce considers making such a determination concerning competitive disadvantage, appropriate notice and an opportunity for comment will be given before any such proprietary information is publicly disclosed. In no event will requests of reporting persons to withhold any information contained in the report other than that specified in this paragraph be honored.

(2) Because a copy of any document(s) accompanying the report will be made available for public inspection and copying, one copy must be submitted intact and another copy must be edited by the reporting entity to delete the same information which it certified in the report would place a United States person at a competitive disadvantage if disclosed. In addition, the reporting entity may delete from this copy information that is considered confidential and that is not required to be contained in the report (e.g., information related to foreign consignee). This copy should be conspicuously marked with the legend "Public Inspection Copy." With respect to documents accompanying reports received by the Department on or after July 1, 1979, the public inspection copy will be made available as submitted whether or not it has been appropriately edited by the reporting entity as provided by this paragraph.

(3) Reports and accompanying documents which are available to the public for inspection and copying are located in the BXA Freedom of Information Records Inspection Facility, Room 4525, Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230. Requests to inspect such documents should be addressed to that facility.

(4) The Secretary of Commerce will periodically transmit summaries of the information contained in the reports to the Secretary of State for such action as the Secretary of State, in consultation with the Secretary of Commerce, may deem appropriate for carrying out the policies in section 8(b)(2) of the

Export Administration Act of 1979.

EXAMPLES

The following examples are intended to give guidance in determining what is reportable. They are illustrative, not comprehensive.

(i) A, a U.S. manufacturer, is shipping goods to boycotting country Y and is asked by Y to certify that it is not blacklisted by Y's boycott office. The request to A is reportable, because it is a request to A to comply with Y's boycott requirements.

(ii) A, a U.S. manufacturing company, receives an order for tractors from boycotting country Y. Y's order specifies that the tires on the tractors be made by B, another U.S. company. A believes Y has specified B as the tire supplier because otherwise A would have used tires made by C, a blacklisted company, and Y will not take shipment of tractors containing tires made by blacklisted companies.

A must report Y's request for tires made by B, because A has reason to know that B was chosen for boycott reasons.

(iii) Same as (ii), except A knows that Y's request has nothing to do with the boycott but simply reflects Y's preference for tires made by B.

Y's request is not reportable, because it is unrelated to Y's boycott.

(iv) Same as (ii), except A neither knows nor has reason to know why Y has chosen B.

Y's request is not reportable, because A neither knows nor has reason to know that Y's request is based on Y's boycott.

(v) A, a controlled foreign subsidiary of U.S. company B, is a resident of boycotting country Y. A is a general contractor. After being supplied by A with a list of competent subcontractors, A's customer instructs A to use subcontractor C on the project. A believes that C was chosen because, among other things, the other listed subcontractors are blacklisted.

The instruction to A by its customer that C be used on the project is reportable, because it is a request to comply with Y's boycott requirements.

(vi) A, a controlled foreign subsidiary of U.S. company B, is located in non-boycotting country P. A receives an order for washing machines from boycotting country Y. Y instructs A that a negative certificate of origin must accompany the shipment. The washing machines are made wholly in P, without U.S. components.

Y's instruction to A regarding the negative certificate of origin is not reportable, because the transaction to which it relates is not in U.S. commerce.

(vii) Same as (vi), except that A obtains components from the United States for the purpose of filling the order from Y. Y's instruction to A regarding the negative certificate of origin is reportable, because the transaction to which it relates is in U.S. commerce.

(viii) A, a U.S. construction company, receives in the mail an unsolicited invitation to bid on a construction project in boycotting country Y. The invitation to bid requires those who respond to certify that they do not have any plants or branch offices in boycotted country X. A does not respond.

A's receipt of the unsolicited invitation to bid is not reportable, because the request does not relate to any present or anticipated business of A with or in Y.

(ix) Same as (viii), except that A receives a

boycott questionnaire from a central boycott office. A does not do business in any of the boycotting countries involved, and does not anticipate doing any business in those countries. A does not respond.

A's receipt of the boycott questionnaire is not reportable, because it does not relate to any present or anticipated business by A with or in a boycotting country.

(x) A, a U.S. manufacturer, is seeking markets in which to expand its exports. A sends a representative to boycotting country Y to explore Y's potential as a market for A's products. A's representative discusses its products but does not enter into any contracts on that trip. A does, however, hope that sales will materialize in the future. Subsequently, A receives a boycott questionnaire from Y.

A's receipt of the boycott questionnaire is reportable, because the request relates to A's anticipated business with or in a boycotting country. For purposes of determining whether a report is required, it makes no difference whether A responds to the questionnaire, and it makes no difference that actual sales contracts are not in existence or do not materialize.

(xi) Same as (x), except that A's representative enters into a contract to sell A's products to a buyer in boycotting country Y. Subsequently, A receives a boycott questionnaire from Y.

A's receipt of the boycott questionnaire is reportable, because it relates to A's present business with or in a boycotting country. For purposes of determining whether a report is required, it makes no difference whether A responds to the questionnaire.

(xii) A, a U.S. freight forwarder, purchases an exporter's guidebook which includes the import requirements of boycotting country Y. The guidebook contains descriptions of actions which U.S. exporters must take in order to make delivery of goods to Y.

A's acquisition of the guidebook is not reportable, because he has not received a request from anyone.

(xiii) A, a U.S. freight forwarder, is arranging for the shipment of goods to boycotting country Y at the request of B, a U.S. exporter. B asks A to assume responsibility to assure that the documentation accompanying the shipment is in compliance with Y's import requirements. A examines an exporters' guidebook, determines that Y's import regulations require a certification that the insurer of the goods is not blacklisted and asks U.S. insurer C for such a certification.

B's request to A is reportable by A, because it constitutes a request to comply with Y's boycott as of the time A takes action to comply with Y's boycott requirements in response to the request. A's request to C is reportable by C.

(xiv) A, a U.S. freight forwarder, is arranging for the shipment of U.S. goods to boycotting country Y. The manufacturer supplies A with all the necessary documentation to accompany the shipment. Among the documents supplied by the manufacturer is his certificate that he himself is not blacklisted. A transmits the documentation supplied by the manufacturer.

A's action in merely transmitting documents received from the manufacturer is not reportable, because A has received no request to comply with Y's boycott.

(xv) Same as (xiv), except that A is asked by U.S. exporter B to assume the responsibility to assure that the necessary documentation accompanies the shipment whatever that documentation might be. B forwards to A a letter of credit which requires that a negative certificate of origin accompany the bill of lading. A supplies

a positive certificate of origin.

Both A and B must report receipt of the letter of credit, because it contains a request to both of them to comply with Y's boycott.

(xvi) Same as (xiv), except that the manufacturer fails to supply a required negative certificate of origin, and A is subsequently asked by a consular official of Y to see to it that the certificate is supplied. A supplies a positive certificate of origin.

The consular official's request to A is reportable by A, because A was asked to comply with Y's boycott requirements by supplying the negative certificate of origin.

(xvii) A, a U.S. manufacturer, is shipping goods to boycotting country Y. Arrangements have been made for freight forwarder B to handle the shipment and secure all necessary shipping certifications. B notes that the letter of credit requires that the manufacturer supply a negative certificate of origin and B asks A to do so. A supplies a positive certificate of origin.

B's request to A is reportable by A, because A is asked to comply with Y's boycott requirements by providing the negative certificate.

(xviii) A, a controlled foreign subsidiary of U.S. company B, is a resident of boycotting country Y. A is engaged in oil exploration and drilling operations in Y. In placing orders for drilling equipment to be shipped from the United States, A, in compliance with Y's laws, selects only those suppliers who are not blacklisted.

A's action in choosing non-blacklisted suppliers is not reportable, because A has not received a request to comply with Y's boycott in making these selections.

(xix) A, a controlled foreign subsidiary of U.S. company B, is seeking permission to do business in boycotting country Y. Before being granted such permission, A is asked to sign an agreement to comply with Y's boycott laws.

The request to A is reportable, because it is a request that expressly requires compliance with Y's boycott law and is received in connection with A's anticipated business in Y.

(xx) A, a U.S. bank, is asked by a firm in boycotting country Y to confirm a letter of credit in favor of B, a U.S. company. The letter of credit calls for a certificate from B that the goods to be supplied are not produced by a firm blacklisted by Y. A informs B of the letter of credit, including its certification condition, and sends B a copy.

B must report the certification request contained in the letter of credit, and A must report the request to confirm the letter of credit containing the boycott condition, because both are being asked to comply with Y's boycott.

(xxi) Same as (xx), except that the letter of credit calls for a certificate from the beneficiary that the goods will not be shipped on a vessel that will call at a port in boycotted country X before making delivery in Y.

The request is not reportable, because it is a request of a type deemed by this section to be in common use for non-boycott purposes.

(xxii) A, a U.S. company, receives a letter of credit from boycotting country Y stating that on no condition may a bank blacklisted by Y be permitted to negotiate the credit.

A's receipt of the letter of credit is reportable, because it contains a request to A to comply with Y's boycott requirements.

(xxiii) A, a U.S. bank, receives a demand draft from B, a U.S. company, in connection with B's

shipment of goods to boycotting country Y. The draft contains a directive that it is valid in all countries except boycotted country X.

A's receipt of the demand draft is reportable, because it contains a request to A to comply with Y's boycott requirements.

(xxiv) A, a U.S. exporter, receives an order from boycotting country Y. On the order is a legend that A's goods, invoices, and packaging must not bear a six-pointed star or other symbol of boycotted country X.

A's receipt of the order is reportable, because it contains a request to comply with Y's boycott requirements.

(xxv) Same as (xxiv), except the order contains a statement that goods exported must not represent part of war reparations to boycotted country X.

A's receipt of the order is reportable, because it contains a request to A to comply with Y's boycott requirements.

(xxvi) A, a U.S. contractor, is negotiating with boycotting country Y to build a school in Y. During the course of the negotiations, Y suggests that one of the terms of the construction contract be that A agree not to import materials produced in boycotted country X. It is A's company policy not to agree to such a contractual clause, and A suggests that instead it agree that all of the necessary materials will be obtained from U.S. suppliers. Y agrees to A's suggestion and a contract is executed.

A has received a reportable request, but, for purposes of reporting, the request is deemed to be received when the contract is executed.

(xxvii) Same as (xxvi), except Y does not accept A's suggested alternative clause and negotiations break off.

A's receipt of Y's request is reportable. For purposes of reporting, it makes no difference that A was not successful in the negotiations. The request is deemed to be received at the time the negotiations break off.

(xxviii) A, a U.S. insurance company, is insuring the shipment of drilling equipment to boycotting country Y. The transaction is being financed by a letter of credit which requires that A certify that it is not blacklisted by Y. Freight forwarder B asks A to supply the certification in order to satisfy the requirements of the letter of credit.

The request to A is reportable by A, because it is a request to comply with Y's boycott requirements.

●(xxix) A, a U.S. manufacturer, is engaged from time-to-time in supplying drilling rigs to company B in boycotting country Y. B insists that its suppliers sign contracts which provide that, even after title passes from the supplier to B, the supplier will bear the risk of loss and indemnify B if goods which the supplier has furnished are denied entry into Y for whatever reason. A knows or has reason to know that this contractual provision is required by B because of Y's boycott, and that B has been using the provision since 1977. A receives an order from B which contains such a clause.

B's request is not reportable by A, because the request is deemed to be not reportable by these regulations if the provision was in use by B prior to January 18, 1978.

●(xxx) Same as (xxix), except that A does not know when B began using the provision.

Unless A receives information from B that B introduced the term prior to January 18, 1978, A must report receipt of the request.

(xxxi) A, a U.S. citizen, is a shipping clerk for

B, a U.S. manufacturing company. In the course of his employment, A receives an order for goods from boycotting country Y. The order specifies that none of the components of the goods is to be furnished by blacklisted firms.

B must report the request received by its employee, A, acting in the scope of his employment. Although A is a U.S. person, such an individual does not have a separate obligation to report requests received by him in his capacity as an employee of B.

(xxxii) U.S. exporter A is negotiating a transaction with boycotting country Y. A knows that at the conclusion of the negotiations he will be asked by Y to supply certain boycott-related information and that such a request is reportable. In an effort to forestall the request and thereby avoid having to file a report, A supplies the information in advance.

A is deemed to have received a reportable request.

(xxxiii) A, a controlled foreign affiliate of U.S. company B, receives an order for computers from boycotting country Y and obtains components from the United States for the purpose of filling the order. Y instructs A that a negative certificate of origin must accompany the shipment.

Y's instruction to A regarding the negative certificate of origin is reportable by A. Moreover, A may designate B or any other person to report on its behalf. However, A remains liable for any failure to report or for any representations made on its behalf.

●(xxxiv) U.S. exporter A, in shipping goods to boycotting country Y, receives a request from the customer in Y to state on the bill of lading that the vessel is allowed to enter Y's ports. The request further states that a certificate from the owner or master of the vessel to that effect is acceptable.

The request A received from his customer in Y is not reportable because it is a request of a type deemed to be not reportable by these regulations. (A may not make such a statement on the bill of lading himself, if he knows or has reason to know it is requested for a boycott purpose.)

●(xxxv) U.S. exporter A, in shipping goods to boycotting country Y, receives a request from the customer in Y to furnish a certificate from the owner of the vessel that the vessel is permitted to call at Y's ports.

The request A received from his customer in Y is not reportable because it is a request of a type deemed to be not reportable by these regulations.

(xxxvi) U.S. exporter A, in shipping goods to boycotting country Y, receives a request from the customer in Y to furnish a certificate from the insurance company indicating that the company has a duly authorized representative in country Y and giving the name of that representative.

The request A received from his customer in Y is not reportable if it was received after the effective date of these rules, because it is a request of a type deemed to be not reportable by these regulations.

INTERPRETATIONS

It has come to the Department's attention that some U.S. persons are being or may be asked to comply with new boycotting country requirements with respect to shipping and insurance certifications and certificates of origin. It has also come to the Department's attention that some U.S. persons are being or may be asked to agree to new contractual provisions in connection with certain foreign government or foreign government agency contracts. In order to maximize its guidance with respect to section 8 of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2407) and part 760 of the EAR, the Department hereby sets forth its views on these certifications and contractual clauses.[1]

I. CERTIFICATIONS

§760.2(d) of this part prohibits a U.S. person from furnishing or knowingly agreeing to furnish:

"Information concerning his or any other person's past, present or proposed business relationships:

(i) With or in a boycotted country;

(ii) With any business concern organized under the laws of a boycotted country;

(iii) With any national or resident of a boycotted country; or

(iv) With any other person who is known or believed to be restricted from having any business relationship with or in a boycotting country."

This prohibition, like all others under part 760, applies only with respect to a U.S. person's activities in the interstate or foreign commerce of the United States and only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott. (§760.2(d)(5) of this part.)

This prohibition does not apply to the furnishing of normal business information in a commercial context. (§760.2(d)(3) of this part). Normal business information furnished in a commercial context does not cease to be such simply because the party soliciting the information may be a boycotting country or a national or resident thereof. If the information is of a type which is generally sought for a legitimate business purpose (such as determining financial fitness, technical competence, or professional experience), the information may be furnished even if the information could be used, or without the knowledge of the person supplying the information is intended to be used, for boycott purposes. (§760.2(d)(4) of this part).

The new certification requirements and the Department's interpretation of the applicability of part 760 thereto are as follows:

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[1] The Department originally issued this interpretation pursuant to the Export Administration Amendments Act of 1979 (Public Law 95-52) and the regulations on restrictive trade practices and boycotts (15 CFR 369) published on January 25, 1978 (43 FR 3508).

A. *Certificate of origin.* A certificate of origin is to be issued by the supplier or exporting company and authenticated by the exporting country, attesting that the goods exported to the boycotting country are of purely indigenous origin, and stating the name of the factory or the manufacturing company. To the extent that the goods as described on the certificate of origin are not solely and exclusively products of their country of origin indicated thereon, a declaration must be appended to the certificate of origin giving the name of the supplier/manufacturer and declaring:

"The undersigned, _____, does hereby declare on behalf of the above-named supplier/manufacturer, that certain parts or components of the goods described in the attached certificate of origin are the products of such country or countries, other than the country named therein as specifically indicated hereunder:

Country of origin and percentage of value of parts or components relative to total shipment

1. _____.

2. _____.

3. _____.

Dated: _____.

Signature _____.

Sworn to before me, this _____ day of _____, 19 ___. Notary Seal."

INTERPRETATION

It is the Department's position that furnishing a positive certificate of origin, such as the one set out above, falls within the exception contained in §760.3(c) of this part for compliance with the import and shipping document requirements of a boycotting country. See §760.3(c) of this part and examples (i) and (ii) thereunder.

B. *Shipping certificate.* A certificate must be appended to the bill of lading stating: (1) Name of vessel; (2) Nationality of vessel; and (3) Owner of vessel, and declaring:

"The undersigned does hereby declare on behalf of the owner, master, or agent of the above-named vessel that said vessel is not registered in the boycotted country or owned by nationals or residents of the boycotted country and will not call at or pass through any boycotted country port enroute to its boycotting country destination.

"The undersigned further declares that said vessel is otherwise eligible to enter into the ports of the boycotting country in conformity with its laws and regulations.

Sworn to before me, this _____ day of _____, 19 ___. Notary Seal."

●INTERPRETATION

It is the Department's position that furnishing a certificate, such as the one set out above, stating: (1) The name of the vessel, (2) The nationality of the vessel, and (3) The owner of the vessel and further declaring that the vessel: (a) Is not registered in a boycotted country, (b) Is not owned by nationals or residents of a boycotted country, and (c) Will not call at or pass through a boycotted country port enroute to its destination in a boycotting country falls within the exception contained in §760.3(c) for compliance with the import and shipping document requirements of a boycotting country. See §760.3(c) and examples (vii), (viii), and (ix) thereunder.

It is also the Department's position that the owner, charterer, or master of a vessel may certify that the vessel is "eligible" or "otherwise eligible" to enter into the ports of a boycotting country in conformity with its laws and regulations. Furnishing such a statement pertaining to one's own eligibility offends no prohibition under this part 760. See §760.2(f), example (xiv).

On the other hand, where a boycott is in force, a declaration that a vessel is "eligible" or "otherwise eligible" to enter the ports of the boycotting country necessarily conveys the information that the vessel is not blacklisted or otherwise restricted from having a business relationship with the boycotting country. See §760.3(c), examples (vi), (xi), and (xii). Where a person other than the vessel's owner, charterer, or master furnishes such a statement, that is tantamount to his furnishing a statement that he is not doing business with a blacklisted person or is doing business only with non-blacklisted persons. Therefore, it is the Department's position that furnishing such a certification (which does not reflect customary international commercial practice) by anyone other than the owner, charterer, or master of a vessel would fall within the prohibition set forth in §760.2(d) unless it is clear from all the facts and circumstances that the certification is not required for a boycott reason. See §760.2(d)(3) and (4). See also Part A., "Permissible Furnishing of Information," of Supplement No. 5 to this part.

C. *Insurance certificate.* A certificate must be appended to the insurance policy stating: (1) Name of insurance company; (2) Address of its principal office; and (3) Country of its incorporation, and declaring:

> "The undersigned, _____, does hereby certify on behalf of the above-named insurance company that the said company has a duly qualified and appointed agent or representative in the boycotting country whose name and address appear below:
>
> Name of agent/representative and address in the boycotting country.
>
> Sworn to before me this ____ day of _____, 19 ____. Notary Seal."

●INTERPRETATION

It is the Department's position that furnishing the name of the insurance company falls within the exception contained in §760.3(c) for compliance with the import and shipping document requirements of a boycotting country. See §760.3(c)(1)(v) and examples (v) and (x) thereunder. In addition, it is the Department's position

that furnishing a certificate, such as the one set out above, stating the address of the insurance company's principal office and its country of incorporation offends no prohibition under this part 760 unless the U.S. person furnishing the certificate knows or has reason to know that the information is sought for the purpose of determining that the insurance company is neither headquartered nor incorporated in a boycotted country. See §760.2(d)(1)(i).

It is also the Department's position that the insurer, himself, may certify that he has a duly qualified and appointed agent or representative in the boycotting country and may furnish the name and address of his agent or representative. Furnishing such a statement pertaining to one's own status offends no prohibition under this part 760. See §760.2(f), example (xiv).

On the other hand, where a boycott is in force, a declaration that an insurer "has a duly qualified and appointed agent or representative" in the boycotting country necessarily conveys the information that the insurer is not blacklisted or otherwise restricted from having a business relationship with the boycotting country. See §760.3(c), example (v). Therefore, it is the Department's position that furnishing such a certification by anyone other than the insurer would fall within the prohibition set forth in §760.2(d) unless it is clear from all the facts and circumstances that the certification is not required for a boycott reason. See §760.2(d)(3) and (4).

II. CONTRACTUAL CLAUSES

The new contractual requirements and the Department's interpretation of the applicability of part 760 thereto are as follows:

A. *Contractual clause regarding import laws of boycotting country.* "In connection with the performance of this contract the Contractor/Supplier acknowledges that the import and customs laws and regulations of the boycotting country shall apply to the furnishing and shipment of any products or components thereof to the boycotting country. The Contractor/Supplier specifically acknowledges that the aforementioned import and customs laws and regulations of the boycotting country prohibit, among other things, the importation into the boycotting country of products or components thereof: (1) Originating in the boycotted country; (2) Manufactured, produced, or furnished by companies organized under the laws of the boycotted country; and (3) Manufactured, produced, or furnished by nationals or residents of the boycotted country."

●INTERPRETATION

It is the Department's position that an agreement, such as the one set out in the first sentence above, that the import and customs requirements of a boycotting country shall apply to the performance of a contract does not, in and of itself, offend any prohibition under this part 760. See §760.2(a)(5) and example (iii) under "Examples of Agreements To Refuse To Do Business." It is also the Department's position that an agreement to comply generally with the import and customs requirements of a boycotting country does not, in and of itself, offend any prohibition under this part 760. See §760.2(a)(5) and examples (iv) and (v) under "Examples of Agreements To Refuse To Do Business." In addition, it is the Department's position that an agreement, such as the one set out in the second sentence above, to comply with the boycotting country's import and customs requirements prohibiting the importation of products or components: (1) Originating in the

boycotted country; (2) Manufactured, produced, or furnished by companies organized under the laws of the boycotted country; or (3) Manufactured, produced, or furnished by nationals or residents of the boycotted country falls within the exception contained in §760.3(a) for compliance with the import requirements of a boycotting country. See §760.3(a) and example (ii) thereunder.

The Department notes that a United States person may not furnish a negative certification regarding the origin of goods or their components even though the certification is furnished in response to the import and shipping document requirements of the boycotting country. See §760.3(c) and examples (i) and (ii) thereunder, and §760.3(a) and example (ii) thereunder.

B. *Contractual clause regarding unilateral and specific selection*. "The Government of the boycotting country (or the First Party), in its exclusive power, reserves its right to make the final unilateral and specific selection of any proposed carriers, insurers, suppliers of services to be performed within the boycotting country, or of specific goods to be furnished in accordance with the terms and conditions of this contract."

INTERPRETATION

It is the Department's position that an agreement, such as the one set out above, falls within the exception contained in §760.3(d) of this part for compliance with unilateral selections. However, the Department notes that whether a U.S. person may subsequently comply or agree to comply with any particular selection depends upon whether that selection meets all the requirements contained in §760.3(d) of this part for compliance with unilateral selections. For example, the particular selection must be unilateral and specific, particular goods must be specifically identifiable as to their source or origin at the time of their entry into the boycotting country, and all other requirements contained in §760.3(d) of this part must be observed.

INTERPRETATION

The Department hereby sets forth its views on whether the furnishing of certain shipping and insurance certificates in compliance with boycotting country requirements violates the provisions of section 8 of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2407) and part 760 of the EAR[2], as follows:

(i) "The owner, charterer or master of a vessel may certify that the vessel is 'eligible' or 'otherwise eligible' to enter into the ports of a boycotting country in conformity with its laws and regulations;"

(ii) "The insurer, himself, may certify that he has a duly qualified and appointed agent or representative in the boycotting country and may furnish the name and address of his agent or representative."

Furnishing such certifications by anyone other than:

(i) The owner, charterer or master of a vessel, or

(ii) The insurer would fall within the prohibition set forth in §760.2(d) of this part, "unless it is clear from all the facts and circumstances that these certifications are not required for a boycott reason." See §760.2(d)(3) and (4) of this part.

The Department has received from the Kingdom of Saudi Arabia a clarification that the shipping and insurance certifications are required by Saudi Arabia in order to:

(i) Demonstrate that there are no applicable restrictions under Saudi laws or regulations pertaining to maritime matters such as the age of the ship, the condition of the ship, and similar matters that would bar entry of the vessel into Saudi ports; and

(ii) Facilitate dealings with insurers by Saudi Arabian importers whose ability to secure expeditious payments in the event of damage to insured goods may be adversely affected by the absence of a qualified agent or representative of the insurer in Saudi Arabia. In the Department's judgment, this clarification constitutes sufficient facts and circumstances to demonstrate that the certifications are not required by Saudi Arabia for boycott reasons.

●On the basis of this clarification, it is the Department's position that any United States person may furnish such shipping and insurance certificates required by Saudi Arabia without violating §760.2(d) of this part. Moreover, under these circumstances, receipts of requests for such shipping and insurance certificates from Saudi Arabia are not reportable.

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[2] The Department originally issued this interpretation on April 21, 1978 (43 FR 16969) pursuant to the Export Administration Amendments Act of 1977 (Public Law 95-52) and the regulations on restrictive trade practices and boycotts (15 CFR 369) published on January 25, 1978 (43 FR 3508).

●It is still the Department's position that furnishing such a certificate pertaining to one's own eligibility offends no prohibition under part 760. See §760.2(f) of this part, example (xiv). However, absent facts and circumstances clearly indicating that the certifications are required for ordinary commercial reasons as demonstrated by the Saudi clarification, furnishing certifications about the eligibility or blacklist status of any other person would fall within the prohibition set forth in §760.2(d) of this part, and receipts of requests for such certifications are reportable.

It also remains the Department's position that where a United States person asks an insurer or carrier of the exporter's goods to self-certify, such request offends no prohibition under this part. However, where a United States person asks anyone other than an insurer or carrier of the exporter's goods to self-certify, such requests will be considered by the Department as evidence of the requesting person's refusal to do business with those persons who cannot or will not furnish such a self-certification. For example, if an exporter-beneficiary of a letter of credit asks his component suppliers to self-certify, such a request will be considered as evidence of his refusal to do business with those component suppliers who cannot or will not furnish such a self-certification.

The Department wishes to emphasize that notwithstanding the fact that self-certifications are permissible, it will closely scrutinize the activities of all United States persons who provide such self-certifications, including insurers and carriers, to determine that such persons have not taken any prohibited actions or entered into any prohibited agreements in order to be able to furnish such certifications.

INTERPRETATION

Pursuant to Article 2, Annex II of the Peace Treaty between Egypt and Israel, Egypt's participation in the Arab economic boycott of Israel was formally terminated on January 25, 1980. On the basis of this action, it is the Department's position that certain requests for information, action or agreement which were considered boycott-related by implication now cannot be presumed boycott-related and thus would not be prohibited or reportable under the Regulations. For example, a request that an exporter certify that the vessel on which it is shipping its goods is eligible to enter Arab Republic of Egypt ports has been considered a boycott-related request that the exporter could not comply with because Egypt has a boycott in force against Israel (see 43 FR 16969, April 21, 1978). Such a request after January 25, 1980 would not be presumed boycott-related because the underlying boycott requirement/basis for the certification has been eliminated. Similarly, a U.S. company would not be prohibited from complying with a request received from Egyptian government officials to furnish the place of birth of employees the company is seeking to take to Egypt, because there is no underlying boycott law or policy that would give rise to a presumption that the request was boycott-related.

U.S. persons are reminded that requests that are on their face boycott-related or that are for action obviously in furtherance or support of an unsanctioned foreign boycott are subject to the Regulations, irrespective of the country or origin. For example, requests containing references to "blacklisted companies", "Israel boycott list", "non-Israeli goods" or other phrases or words indicating boycott purpose would be subject to the appropriate provisions of the Department's antiboycott regulations.

INTERPRETATION

The question has arisen how the definition of U.S. commerce in the antiboycott regulations (15 CFR part 760) applies to a shipment of foreign-made goods when U.S.-origin spare parts are included in the shipment. Specifically, if the shipment of foreign goods falls outside the definition of U.S. commerce, will the inclusion of U.S.-origin spare parts bring the entire transaction into U.S. commerce?

●Section 760.1(d)(12) provides the general guidelines for determining when U.S.-origin goods shipped from a controlled in fact foreign subsidiary are outside U.S. commerce. The two key tests of that provision are that the goods were "(i) ... acquired without reference to a specific order from or transaction with a person outside the United States; and (ii) ... further manufactured, incorporated into, refined into, or reprocessed into another product." Because the application of these two tests to spare parts does not conclusively answer the U.S. commerce question, the Department is presenting this clarification.

In the cases brought to the Department's attention, an order for foreign-origin goods was placed with a controlled in fact foreign subsidiary of a United States company. The foreign goods contained components manufactured in the United States and in other countries, and the order included a request for extras of the U.S. manufactured components (spare parts) to allow the customer to repair the item. Both the foreign manufactured product and the U.S. spare parts were to be shipped from the general inventory of the foreign subsidiary. Since the spare parts, if shipped by themselves, would be in U.S. commerce as that term is defined in the Regulations, the question was whether including them with the foreign manufactured item would bring the entire shipment into U.S. commerce. The Department has decided that it will not and presents the following specific guidance.

As used above, the term "spare parts" refers to parts of the quantities and types normally and customarily ordered with a product and kept on hand in the event they are needed to assure prompt repair of the product. Parts, components or accessories that improve or change the basic operations or design characteristics, for example, as to accuracy, capability or productivity, are not spare parts under this definition.

Inclusion of U.S.-origin spare parts in a shipment of products which is otherwise outside U.S. commerce will not bring the transaction into U.S. commerce if the following conditions are met:

(I) The parts included in the shipment are acquired from the United States by the controlled in fact foreign subsidiary without reference to a specific order from or transaction with a person outside the United States;

(II) The parts are identical to the corresponding United States-origin parts which have been manufactured, incorporated into or reprocessed into the completed product;

(III) The parts are of the quantity and type normally and customarily ordered with the completed product and kept on hand by the firm or industry of which the firm is a part to assure prompt repair of the product; and

(IV) The parts are covered by the same order as the completed product and are shipped with or at the same time as the original product.

The Department emphasizes that unless each of the above conditions is met, the inclusion of United States-origin spare parts in an order for a foreign-manufactured or assembled product will bring the entire transaction into the interstate or foreign commerce of the United States for purposes of part 760.

INTERPRETATION

A. *Permissible Furnishing of Information*

The information outlined below may be furnished in response to boycott-related requests from boycotting countries or others. This information is, in the view of the Department, not prohibited by the Regulations. Thus, a person does not have to qualify under any of the exceptions to be able to make the following statements. Such statements can be made, however, only by the person indicated and under the circumstances described. These statements should not be used as a point of departure or analogy for determining the permissibility of other types of statements. The Department's view that these statements are not contrary to the prohibitions contained in antiboycott provisions of the Regulations is limited to the specific statement in the specific context indicated.

1. A U.S. person may always provide its own name, address, place of incorporation ("nationality"), and nature of business.

2. A U.S. person may state that it is not on a blacklist, or restricted from doing business in a boycotting country. A company may not make that statement about its subsidiaries or affiliates--only about itself. A U.S. person may not say that there is no reason for it to be blacklisted. To make that statement would provide directly or by implication information that may not be provided. A U.S. person may inquire about the reasons it is blacklisted if it learns that it is on a blacklist (see §760.2(d) of this part example (xv)).

3. A U.S. person may describe in detail its past dealings with boycotting countries; may state in which boycotting countries its trademarks are registered; and may specify in which boycotting countries it is registered or qualified to do business. In general, a U.S. person is free to furnish any information it wishes about the nature and extent of its commercial dealings with boycotting countries.

4. A U.S. person may state that many U.S. firms or individuals have similar names and that it believes that it may be confused with a similarly named entity. A U.S. person may not state that it does or does not have an affiliation or relationship with such similarly named entity.

5. A U.S. person may state that the information requested is a matter of public record in the United States. However, the person may not direct the inquirer to the location of that information, nor may the U.S. person provide or cause to be provided such information.

B. *Availability of the Compliance with Local Law Exception to Establish a Foreign Branch*

●Section 760.3(g), the Compliance With Local Law exception, permits U.S. persons, who are bona fide residents of a boycotting country, to take certain limited, but otherwise prohibited, actions, if they are required to do so in order to comply with local law.

Among these actions is the furnishing of non-discriminatory information. Examples (iv) through (vi) under "Examples of Bona Fide Residency" indicate that a company seeking to become a bona fide resident within a

boycotting country may take advantage of the exception for the limited purpose of furnishing information required by local law to obtain resident status. Exactly when and how this exception is available has been the subject of a number of inquiries. It is the Department's view that the following conditions must be met for a non-resident company to be permitted to furnish otherwise prohibited information for the limited purpose of seeking to become a bona fide resident:

1. The company must have a legitimate business reason for seeking to establish a branch or other resident operation in the boycotting country. (Removal from the blacklist does not constitute such a reason.)

2. The local operation it seeks to establish must be similar or comparable in nature and operation to ones the company operates in other parts of the world, unless local law or custom dictates a significantly different form.

3. The person who visits the boycotting country to furnish the information must be the official whose responsibility ordinarily includes the creation and registration of foreign operations (i.e., the chairman of the board cannot be flown in to answer boycott questions unless the chairman of the board is the corporate official who ordinarily goes into a country to handle foreign registrations).

4. The information provided must be that which is ordinarily known to the person establishing the foreign branch. Obviously, at the time of establishment, the foreign branch will have no information of its own knowledge. Rather, the information should be that which the responsible person has of his own knowledge, or that he would have with him as incidental and necessary to the registration and establishment process. As a general rule, such information would not include such things as copies of agreements with boycotted country concerns or detailed information about the person's dealings with blacklisted concerns.

5. It is not necessary that documents prepared in compliance with this exception be drafted or executed within the boycotting country. The restrictions on the type of information which may be provided and on who may provide it apply regardless of where the papers are prepared or signed.

INTERPRETATION

The antiboycott regulations prohibit knowing agreements to comply with certain prohibited requests and requirements of boycotting countries, regardless of how these terms are stated. Similarly, the reporting rules require that a boycott related "solicitation, directive, legend or instruction that asks for information or that asks that a United States person take or refrain from taking a particular action" be reported. Questions have frequently arisen about how particular requirements in the form of directive or instructions are viewed under the antiboycott regulations, and we believe that it will add clarity to the regulations to provide a written interpretation of how three of these terms are treated under the law. The terms in question appear frequently in letters of credit, but may also be found on purchase orders or other shipping or sale documents. They have been brought to the attention of the Department by numerous persons. The terms are, or are similar to, the following: (1) Goods of boycotted country origin are prohibited; (2) No six-pointed stars may be used on the goods, packing or cases; (3) Neither goods nor packing shall bear any symbols prohibited in the boycotting country.

(a) Goods of boycotted country origin prohibited

●This term is very common in letters of credit from Kuwait and may also appear from time-to-time in invitations to bid, contracts, or other trade documents. It imposes a condition or requirement compliance with which is prohibited, but permitted by an exception under the Regulations (see §760.2(a) and §760.3(a)). It is reportable by those parties to the letter of credit or other transaction that are required to take or refrain from taking some boycott related action by the request. Thus the bank must report the request because it is a term or condition of the letter of credit that it is handling, and the exporter-beneficiary must report the request because the exporter determines the origin of the goods. The freight forwarder does not have to report this request because the forwarder has no role or obligation in selecting the goods. However, the freight forwarder would have to report a request to furnish a certificate that the goods do not originate in or contain components from a boycotted country. See §760.5, examples (xii)-(xvii).

(b) No six-pointed stars may be used on the goods, packing or cases

This term appears from time-to-time on documents from a variety of countries. The Department has taken the position that the six-pointed star is a religious symbol. See §760.2(b), example (viii) of this part. Agreeing to this term is prohibited by the Regulations and not excepted because it constitutes an agreement to furnish information about the religion of a U.S. person. See §760.2(c) of this part. If a person proceeds with a transaction in which this is a condition at any stage of the transaction, that person has agreed to the condition in violation of the Regulations. It is not enough to ignore the condition. Exception must affirmatively be taken to this term or it must be stricken from the documents of the transaction. It is reportable by all parties to the transaction that are restricted by it. For example, unlike the situation described in (a) above, the freight forwarder would have to report this request because his role in the transaction would involve preparation of the packing and cases. The bank and exporter would both have to report, of course, if it were a term in a letter of credit. Each party would be obligated affirmatively to seek an amendment or deletion of the term.

(c) Neither goods nor packaging shall bear any symbols prohibited in the boycotting country

This term appears from time-to-time in letters of credit and shipping documents from Saudi Arabia. In our view, it is neither prohibited, nor reportable because it is not boycott-related. There is a wide range of symbols that are prohibited in Saudi Arabia for a variety of reasons, many having to do with that nation's cultural and religious beliefs. On this basis, we do not interpret the term to be boycott related. See §760.2(a)(5) and §760.5(a)(5)(v) of this part.

INTERPRETATION

Prohibited refusal to do business.

When a boycotting country rejects for boycott-related reasons a shipment of goods sold by a United States person, the United States person selling the goods may return them to its inventory or may re-ship them to other markets (the United States person may not return them to the original supplier and demand restitution). The U.S. person may then make a non-boycott based selection of another supplier and provide the goods necessary to meet its obligations to the boycotting customer in that particular transaction without violating §760.2(a) of this part. If the United States person receives another order from the same boycotting country for similar goods, the Department has determined that a boycott-based refusal by a United States person to ship goods from the supplier whose goods were previously rejected would constitute a prohibited refusal to do business under §760.2(a) of this part. The Department will presume that filling such an order with alternative goods is evidence of the person's refusal to deal with the original supplier.

●The Department recognizes the limitations this places on future transactions with a boycotting country once a shipment of goods has been rejected. Because of this, the Department wishes to point out that, when faced with a boycotting country's refusal to permit entry of the particular goods, a United States person may state its obligation to abide by the requirements of United States law and indicate its readiness to comply with the unilateral and specific selection of goods by the boycotting country in accordance with §760.3(d). That section provides, in pertinent part, as follows:

●"A United States person may comply or agree to comply in the normal course of business with the unilateral and specific selection by a boycotting country ... of ... specific goods, ... provided that ... with respect to goods, the items, in the normal course of business, are identifiable as to their source or origin at the time of their entry into the boycotting country by (a) uniqueness of design or appearance or (b) trademark, trade name, or other identification normally on the items themselves, including their packaging."

The United States person may also provide certain services in advance of the unilateral selection by the boycotting country, such as the compilation of lists of qualified suppliers, so long as such services are customary to the type of business the United States person is engaged in, and the services rendered are completely non-exclusionary in character (i.e., the list of qualified suppliers would have to include the supplier whose goods had previously been rejected by the boycotting country, if they were fully qualified). See §760.2(a)(6) of this part for a discussion of the requirements for the provision of these services.

The Department wishes to emphasize that the unilateral selection exception in §760.3(d) of this part will be construed narrowly, and that all its requirements and conditions must be met, including the following:

-- Discretion for the selection must be exercised by a boycotting country; or by a national or resident of a boycotting country;

-- The selection must be stated in the affirmative specifying a particular supplier of goods;

-- While a permissible selection may be boycott based, if the United States person knows or has reason to know that the purpose of the selection is to effect discrimination against any United States person on the basis of race, religion, sex, or national origin, the person may not comply under any circumstances.

The Department cautions United States persons confronted with the problem or concern over the boycott-based rejection of goods shipped to a boycotting country that the adoption of devices such as "risk of loss" clauses, or conditions that make the supplier financially liable if his or her goods are rejected by the boycotting country for boycott reasons are presumed by the Department to be evasion of the statute and regulations, and as such are prohibited by §760.4 of this part, unless adopted prior to January 18, 1978. See §760.4(d) of this part.

INTERPRETATION

Definition of Interstate or Foreign Commerce of the United States

When United States persons (as defined by the antiboycott regulations) located within the United States purchase or sell goods or services located outside the United States, they have engaged in an activity within the foreign commerce of the United States. Although the goods or services may never physically come within the geographic boundaries of the several states or territories of the United States, legal ownership or title is transferred from a foreign nation to the United States person who is located in the United States. In the case of a purchase, subsequent resale would also be within United States commerce.

It is the Department's view that the terms "sale" and "purchase" as used in the regulations are not limited to those circumstances where the goods or services are physically transferred to the person who acquires title. The EAR define the activities that serve as the transactional basis for U.S. commerce as those involving the "sale, purchase, or transfer" of goods or services. In the Department's view, as used in the antiboycott regulations, "transfer" contemplates physical movement of the goods or services between the several states or territories and a foreign country, while "sale" and "purchase" relate to the movement of ownership or title.

●This interpretation applies only to those circumstances in which the person located within the United States buys or sells goods or services for its own account. Where the United States person is engaged in the brokerage of foreign goods, i.e., bringing foreign buyers and sellers together and assisting in the transfer of the goods, the sale or purchase itself would not ordinarily be considered to be within U.S. commerce. The brokerage service, however, would be a service provided from the United States to the parties and thus an activity within U.S. commerce and subject to the antiboycott laws. See §760.1(d)(3).

The Department cautions that United States persons who alter their normal pattern of dealing to eliminate the passage of ownership of the goods or services to or from the several states or territories of the United States in order to avoid the application of the antiboycott regulations would be in violation of §760.4 of this part.

INTERPRETATION

Activities Exclusively Within a Boycotting Country--Furnishing Information

●§760.3(h) of this part provides that a United States person who is a bona fide resident of a boycotting country may comply with the laws of that country with respect to his or her activities exclusively within the boycotting country. Among the types of conduct permitted by this exception is "furnishing information within the host country" §760.3(h)(1)(v) of this part. For purposes of the discussion which follows, the Department is assuming that the person in question is a bona fide resident of the boycotting country as defined in §760.3(g), and that the information to be provided is required by the laws or regulations of the boycotting country, as also defined in §760.3(g) of this part. The only issue this interpretation addresses is under what circumstances the provision of information is "an activity exclusively within the boycotting country."

The activity of "furnishing information" consists of two parts, the acquisition of the information and its subsequent transmittal. Under the terms of this exception, the information may not be acquired outside the country for the purpose of responding to the requirement for information imposed by the boycotting country. Thus, if an American company which is a bona fide resident of a boycotting country is required to provide information about its dealings with other U.S. firms, the company may not ask its parent corporation in the United States for that information, or make any other inquiry outside the boundaries of the boycotting country. The information must be provided to the boycotting country authorities based on information or knowledge available to the company and its personnel located within the boycotting country at the time the inquiry is received. See §760.3, paragraphs (h)(iii), (iv), (v) of this part. Much of the information in the company's possession (transaction and corporate records) may have actually originated outside the boycotting country, and much of the information known to the employees may have been acquired outside the boycotting country. This will not cause the information to fall outside the coverage of this exception, if the information was sent to the boycotting country or acquired by the individuals in normal commercial context prior to and unrelated to a boycott inquiry or purpose. It should be noted that if prohibited information (about business relations with a boycotted country, for example) has been forwarded to the affiliate in the boycotting country in anticipation of a possible boycott inquiry from the boycotting country government, the Department will not regard this as information within the knowledge of the bona fide resident under the terms of the exception. However, if the bona fide resident possesses the information prior to receipt of a boycott-related inquiry and obtained it in a normal commercial context, the information can be provided pursuant to this exception notwithstanding the fact that, at some point, the information came into the boycotting country from the outside.

The second part of the analysis of "furnishing information" deals with the limitation on the transmittal of the information. It can only be provided within the boundaries of the boycotting country. The bona fide resident may only provide the information to the party that the boycotting country law requires (directly or through an agent or representative within the country) so long as that party is located within the boycotting country. This application of the exception is somewhat easier, since it is relatively simple to determine if the information is to be given to somebody within the country.

Note that in discussing what constitutes furnishing information "exclusively within" the boycotting country, the Department does not address the nature of the transaction or activity that the information relates to. It is

the Department's position that the nature of the transaction, including the inception or completion of the transaction, is not material in analyzing the availability of this exception.

For example, if a shipment of goods imported into a boycotting country is held up at the time of entry, and information from the bona fide resident within that country is legally required to free those goods, the fact that the information may relate to a transaction that began outside the boycotting country is not material. The availability of the exception will be judged based on the activity of the bona fide resident within the country. If the resident provides that information of his or her own knowledge, and provides it to appropriate parties located exclusively within the country, the exception permits the information to be furnished.

Factual variations may raise questions about the application of this exception and the effect of this interpretation. In an effort to anticipate some of these, the Department has set forth below a number of questions and answers. They are incorporated as a part of this interpretation.

1. Q Under this exception, can a company which is a U.S. person and a bona fide resident of the boycotting country provide information to the local boycott office?

A Yes, if local law requires the company to provide this information to the boycott office and all the other requirements are met.

2. Q If the company knows that the local boycott office will forward the information to the Central Boycott Office, may it still provide the information to the local boycott office?

A Yes, if it is required by local law to furnish the information to the local boycott office and all the other requirements are met. The company has no control over what happens to the information after it is provided to the proper authorities. (There is obvious potential for evasion here, and the Department will examine such occurrences closely.)

3. Q Can a U.S. person who is a bona fide resident of Syria furnish information to the Central Boycott Office in Damascus?

A No, unless the law in Syria specifically requires information to be provided to the Central Boycott Office the exception will not apply. Syria has a local boycott office responsible for enforcing the boycott in that country.

4. Q If a company which is a U.S. person and a bona fide resident of the boycotting country has an import shipment held up in customs of the boycotting country, and is required to provide information about the shipment to get it out of customs, may the company do so?

A Yes, assuming all other requirements are met. The act of furnishing the information is the activity taking place exclusively within the boycotting country. The fact that the information is provided corollary to a transaction that originates or terminates outside the boycotting country is not material.

5. Q If the U.S. person and bona fide resident of the boycotting country is shipping goods out of the boycotting country, and is required to certify to customs officials of the country at the time of export that the goods are not of Israeli origin, may he do so even though the certification relates to an export transaction?

A Yes, assuming all other requirements are met. See number 4 above.

INTERPRETATION

(a) The words "Persian Gulf" cannot appear on the document.

This term is common in letters of credit from Kuwait and may be found in letters of credit from Bahrain. Although more commonly appearing in letters of credit, the term may also appear in other trade documents.

It is the Department's view that this term reflects a historical dispute between the Arabs and the Iranians over geographic place names which in no way relates to existing economic boycotts. Thus, the term is neither prohibited nor reportable under the Regulations.

(b) Certify that goods are of U.S.A. origin and *contain no foreign parts*.

●This term appears periodically on documents from a number of Arab countries. It is the Department's position that the statement is a positive certification of origin and, as such, falls within the exception contained in §760.3(c) of this part for compliance with the import and shipping document requirements of a boycotting country. Even though a negative phrase is contained within the positive clause, the phrase is a non-exclusionary, non-blacklisting statement. In the Department's view, the additional phrase does not affect the permissible status of the positive certificate, nor does it make the request reportable §760.5(a)(5)(iii) of this part.

(c) Legalization of documents by any Arab consulate except Egyptian Consulate permitted.

This term appears from time to time in letters of credit but also may appear in various other trade documents requiring legalization and thus is not prohibited, and a request to comply with the statement is not reportable. Because a number of Arab states do not have formal diplomatic relations with Egypt, they do not recognize Egyptian embassy actions. The absence of diplomatic relations is the reason for the requirement. In the Department's view this does not constitute an unsanctioned foreign boycott or embargo against Egypt under the terms of the Export Administration Act. Thus the term is not prohibited, and a request to comply with the statement is not reportable.

INTERPRETATION

Definition of Unsolicited Invitation to Bid

§760.5(a)(4) of this part states in part:

●"In addition, a United States person who receives an unsolicited invitation to bid, or similar proposal, containing a boycott request has not received a reportable request for purposes of this section where he does not respond to the invitation to bid or other proposal."

The Regulations do not define "unsolicited" in this context. Based on review of numerous situations, the Department has developed certain criteria that it applies in determining if an invitation to bid or other proposal received by a U.S. person is in fact unsolicited.

The invitation is not unsolicited if, during a commercially reasonable period of time preceding the issuance of the invitation, a representative of the U.S. person contacted the company or agency involved for the purpose of promoting business on behalf of the company.

The invitation is not unsolicited if the U.S. person has advertised the product or line of products that are the subject of the invitation in periodicals or publications that ordinarily circulate to the country issuing the invitation during a commercially reasonable period of time preceding the issuance of the invitation.

The invitation is not unsolicited if the U.S. person has sold the same or similar products to the company or agency issuing the invitation within a commercially reasonable period of time before the issuance of the current invitation.

The invitation is not unsolicited if the U.S. person has participated in a trade mission to or trade fair in the country issuing the invitation within a commercially reasonable period of time before the issuance of the invitation.

Under §760.5(a)(4) of this part, the invitation is regarded as not reportable if the U.S. person receiving it does not respond. The Department has determined that a simple acknowledgment of the invitation does not constitute a response for purposes of this rule. However, an acknowledgment that requests inclusion for future invitations will be considered a response, and a report is required.

●Where the person in receipt of an invitation containing a boycott term or condition is undecided about a response by the time a report would be required to be filed under the regulations, it is the Department's view that the person must file a report as called for in the Regulations. The person filing the report may indicate at the time of filing that he has not made a decision on the boycott request but must file a supplemental report as called for in the regulations at the time a decision is made (§760.5(b)(6)).

INTERPRETATION

The Department has taken the position that a U.S. person as defined by §760.1(b) of this part may not make use of an agent to furnish information that the U.S. person is prohibited from furnishing pursuant to §760.2(d) of this part.

Example (v) under §760.4 of this part (Evasion) provides:

●"A, a U.S. company, is negotiating a long-term contract with boycotting country Y to meet all of Y's medical supply needs. Y informs A that before such a contract can be concluded, A must complete Y's boycott questionnaire. A knows that it is prohibited from answering the questionnaire so it arranges for a local agent in Y to supply the necessary information.

●A's action constitutes evasion of this part, because it is a device to mask prohibited activity carried out on A's behalf."

●This interpretation deals with the application of the Regulations to a commercial agent registration requirement imposed by the government of Saudi Arabia. The requirement provides that nationals of Saudi Arabia seeking to register in Saudi Arabia as commercial agents or representatives of foreign concerns must furnish certain boycott-related information about the foreign concern prior to obtaining approval of the registration.

The requirement has been imposed by the Ministry of Commerce of Saudi Arabia, which is the government agency responsible for regulation of commercial agents and foreign commercial registrations. The Ministry requires the agent or representative to state the following:

●"Declaration: I, the undersigned, hereby declare, in my capacity as (blank) that (name and address of foreign principal) is not presently on the blacklist of the Office for the Boycott of Israel and that it and all its branches, if any, are bound by the decisions issued by the Boycott Office and do not (1) participate in the capital of, (2) license the manufacture of any products or grant trademarks or tradeware license to, (3) give experience or technical advice to, or (4) have any other relationship with other companies which are prohibited to be dealt with by the Boycott Office. Signed (name of commercial agent/representative/distributor)."

It is the Department's view that under the circumstances specifically outlined in this interpretation relating to the nature of the requirement, a U.S. person will not be held responsible for a violation of this part when such statements are provided by its commercial agent or representative, even when such statements are made with the full knowledge of the U.S. person.

Nature of the requirement. For a boycott-related commercial registration requirement to fall within the coverage of this interpretation it must have the following characteristics:

1. The requirement for information imposed by the boycotting country applies to a national or other subject of the boycotting country qualified under the local laws of that country to function as a commercial representative within that country;

2. The registration requirement relates to the registration of the commercial agent's or representative's authority to sell or distribute goods within the boycotting country acquired from the foreign concern;

3. The requirement is a routine part of the registration process and is not applied selectively based on boycott-related criteria;

4. The requirement applies only to a commercial agent or representative in the boycotting country and does not apply to the foreign concern itself; and

5. The requirement is imposed by the agency of the boycotting country responsible for regulating commercial agencies.

The U.S. person whose agent is complying with the registration requirement continues to be subject to all the terms of the Regulations, and may not provide any prohibited information to the agent for purposes of the agent's compliance with the requirement.

In addition, the authority granted to the commercial agent or representative by the U.S. person must be consistent with standard commercial practices and not involve any grants of authority beyond those incidental to the commercial sales and distributorship responsibilities of the agent.

Because the requirement does not apply to the U.S. person, no reporting obligation under §760.5 of this part would arise.

This interpretation, like all others issued by the Department discussing applications of the antiboycott provisions of the Export Administration Regulations, should be read narrowly. Circumstances that differ in any material way from those discussed in this notice will be considered under the applicable provisions of the Regulations. Persons are particularly advised not to seek to apply this interpretation to circumstances in which U.S. principals seek to use agents to deal with boycott-related or potential blacklisting situations.

INTERPRETATION

SUMMARY

●This interpretation considers boycott-based contractual language dealing with the selection of suppliers and subcontractors. While this language borrows terms from the "unilateral and specific selection" exception contained in §760.3(d), it fails to meet the requirements of that exception. Compliance with the requirements of the language constitutes a violation of the regulatory prohibition of boycott-based refusals to do business.

REGULATORY BACKGROUND

Section 760.2(a) of this part prohibits U.S. persons from refusing or knowingly agreeing to refuse to do business with other persons when such refusal is pursuant to an agreement with, requirement of, or request of a boycotting country. That prohibition does not extend to the performance of management, procurement or other pre-award services, however, notwithstanding knowledge that the ultimate selection may be boycott-based. To be permissible such services: (1) must be customary for the firm or industry involved and (2) must not exclude others from the transaction or involve other actions based on the boycott. See §760.2(a)(6) of this part, "Refusals to Do Business", and example (xiii).

A specific exception is also made in the Regulations for compliance (and agreements to comply) with an unilateral and specific selection of suppliers or subcontractors by a boycotting country buyer. See §760.3(d) of this part. In Supplement No. 1 to part 760, the following form of contractual language was said to fall within that exception for compliance with unilateral and specific selection:

> ●"The Government of the boycotting country (or the First Party), in its exclusive power, reserves its right to make the final unilateral and specific selection of any proposed carriers, insurers, suppliers of services to be performed within the boycotting country, or of specific goods to be furnished in accordance with the terms and conditions of this contract."

●The Department noted that the actual steps necessary to comply with any selection made under this agreement would also have to meet the requirements of §760.3(d) to claim the benefit of that exception. In other words, the discretion in selecting would have to be exercised exclusively by the boycotting country customer and the selection would have to be stated in the affirmative, naming a particular supplier. See §760.3(d)(4) and (5) of this part.

●ANALYSIS OF ADDITIONAL CONTRACTUAL LANGUAGE

●The Office of Antiboycott Compliance has learned of the introduction of a contractual clause into tender documents issued by boycotting country governments. This clause is, in many respects, similar to that dealt with in Supplement No. 1 to part 760, but several critical differences exist.

The clause states:

●*BOYCOTT OF [NAME OF BOYCOTTED COUNTRY]*

In connection with the performance of this Agreement, Contractor acknowledges that the import and customs laws and regulations of boycotting country apply to the furnishing and shipment of any products or components thereof to boycotting country. The Contractor specifically acknowledges that the aforementioned import and customs laws and regulations of boycotting country prohibit, among other things, the importation in to boycotting country of products or components thereof: (A) Originating in boycotted country (B) Manufactured, produced and furnish by companies organized under the laws of boycotted country and (C) Manufactured, produced or furnished by Nationals or Residents of boycotted country.

The Government, in its exclusive power, reserves its right to make the final unilateral and specific selection of any proposed Carriers, Insurers, Suppliers of Services to be performed within boycotting country or of specific goods to be furnished in accordance with the terms and conditions of this Contract.

To assist the Government in exercising its right under the preceding paragraph, Contractor further agrees to provide a complete list of names and addresses of all his Sub-Contractors, Suppliers, Vendors and Consultants and any other suppliers of the service for the project.

The title of this clause makes clear that its provisions are intended to be boycott-related. The first paragraph acknowledges the applicability of certain boycott-related requirements of the boycotting country's laws in language reviewed in part 760, Supplement No. 1, Part II.B. and found to constitute a permissible agreement under the exception contained in §760.3(a) of this part for compliance with the import requirements of a boycotting country. The second and third paragraphs together deal with the procedure for selecting subcontractors and suppliers of services and goods and, in the context of the clause as a whole, must be regarded as motivated by boycott considerations and intended to enable the boycotting country government to make boycott-based selections, including the elimination of blacklisted subcontractors and suppliers.

The question is whether the incorporation into these paragraphs of some language from the "unilateral and specific selection" clause approved in Supplement No. 1 to part 760 suffices to take the language outside §760.2(a) of this part's prohibition on boycott-based agreements to refuse to do business. While the first sentence of this clause is consistent with the language discussed in Supplement No. 1 to part 760, the second sentence significantly alters the effect of this clause. The effect is to draw the contractor into the decision-making process, thereby destroying the unilateral character of the selection by the buyer. By agreeing to submit the names of the suppliers it plans to use, the contractor is agreeing to give the boycotting country buyer, who has retained the right of final selection, the ability to reject, for boycott-related reasons, any supplier the contractor has already chosen. Because the requirement appears in the contractual provision dealing with the boycott, the buyer's rejection of any supplier whose name is given to the buyer pursuant to this provision would be presumed to be boycott-based. By signing the contract, and thereby agreeing to comply with all of its provisions, the contractor must either accept the buyer's rejection of any supplier, which is presumed to be boycott-based because of the context of this provision, or breach the contract.

In these circumstances, the contractor's method of choosing its subcontractors and suppliers, in anticipation of the buyer's boycott-based review, cannot be considered a permissible pre-award service because of the presumed intrusion of boycott-based criteria into the selection process. Thus, assuming all other jurisdictional requirements necessary to establish a violation of part 760 are met, the signing of the contract by the contractor constitutes a violation of §760.2(a) of this part because he is agreeing to refuse to do business for boycott reasons.

Export Administration Regulations

●The apparent attempt to bring this language within the exception for compliance with unilateral and specific selections is ineffective. The language does not place the discretion to choose suppliers in the hands of the boycotting country buyer but divides this discretion between the buyer and his principal contractor. Knowing that the buyer will not accept a boycotted company as supplier or subcontractor, the contractor is asked to use his discretion in selecting a single supplier or subcontractor for each element of the contract. The boycotting country buyer exercises discretion only through accepting or rejecting the selected supplier or contractor as its boycott policies require. In these circumstances it cannot be said that the buyer is exercising right of unilateral and specific selection which meets the criteria of §760.3(d). For this reason, agreement to the contractual language discussed here would constitute an agreement to refuse to do business with any person rejected by the buyer and would violate §760.2(a) of this part.

INTERPRETATION

(a) Contractual clause concerning import, customs and boycott laws of a boycotting country.

The following language has appeared in tender documents issued by a boycotting country:

●"Supplier declares his knowledge of the fact that the import, Customs and boycott laws, rules and regulations of [name of boycotting country] apply in importing to [name of boycotting country].

●Supplier declares his knowledge of the fact that under these laws, rules and regulations, it is prohibited to import into [name of the boycotting country] any products or parts thereof that originated in [name of boycotted country]; were manufactured, produced or imported by companies formed under the laws of [name of boycotted country]; or were manufactured, produced or imported by nationals or residents of [name of boycotted country]."

●Agreeing to the above contractual language is a prohibited agreement to refuse to do business, under §760.2(a) of this part. The first paragraph requires broad acknowledgment of the application of the boycotting country's boycott laws, rules and regulations. Unless this language is qualified to apply only to boycott restrictions with which U.S. persons may comply, agreement to it is prohibited. See §760.2(a) of this part, examples (v) and (vi) under "Agreements to Refuse to Do Business."

The second paragraph does not limit the scope of the boycott restrictions referenced in the first paragraph. It states that the boycott laws include restrictions on goods originating in the boycotted country; manufactured, produced or supplied by companies organized under the laws of the boycotted country; or manufactured, produced or supplied by nationals or residents of the boycotted country. Each of these restrictions is within the exception for compliance with the import requirements of the boycotting country (§760.3(a) of this part). However, the second paragraph's list of restrictions is not exclusive. Since the boycott laws generally include more than what is listed and permissible under the antiboycott law, U.S. persons may not agree to the quoted clause. For example, a country's boycott laws may prohibit imports of goods manufactured by blacklisted firms. Except as provided by §760.3(g) of this part, agreement to and compliance with this boycott restriction would be prohibited under the antiboycott law.

The above contractual language is distinguished from the contract clause determined to be permissible in supplement 1, Part II, A, by its acknowledgment that the boycott requirements of the boycotting country apply. Although the first sentence of the Supplement 1 clause does not exclude the possible application of boycott laws, it refers only to the import and customs laws of the boycotting country without mentioning the boycott laws as well. As discussed fully in Supplement No. 1 to part 760, compliance with or agreement to the clause quoted there is, therefore, permissible.

●The contract clause quoted above, as well as the clause dealt with in Supplement No. 1 to part 760, part II, A, is reportable under §760.5(a)(1).

(b) Letter of credit terms removing blacklist certificate requirement if specified vessels used

The following terms frequently appear on letters of credit covering shipment to Iraq:

●"Shipment to be effected by Iraqi State Enterprise for Maritime Transport Vessels or by United Arab Shipping Company (SAB) vessels, if available.

●If shipment is effected by any of the above company's [sic] vessels, black list certificate or evidence to that effect is not required."

These terms are not reportable and compliance with them is permissible.

The first sentence, a directive to use Iraqi State Enterprise for Maritime Transport or United Arab Shipping vessels, is neither reportable nor prohibited because it is not considered by the Department to be boycott-related. The apparent reason for the directive is Iraq's preference to have cargo shipped on its own vessels (or, as in the case of United Arab Shipping, on vessels owned by a company in part established and owned by the Iraqi government). Such "cargo preference" requirements, calling for the use of an importing or exporting country's own ships, are common throughout the world and are imposed for non-boycott reasons. (See §760.2(a) of this part, example (vii) AGREEMENTS TO REFUSE TO DO BUSINESS.)

In contrast, if the letter of credit contains a list of vessels or carriers that appears to constitute a boycott-related whitelist, a directive to select a vessel from that list would be both reportable and prohibited. When such a directive appears in conjunction with a term removing the blacklist certificate requirement if these vessels are used, the Department will presume that beneficiaries, banks and any other U.S. person receiving the letter of credit know that there is a boycott-related purpose for the directive.

The second sentence of the letter of credit language quoted above does not, by itself, call for a blacklist certificate and is not therefore, reportable. If a term elsewhere on the letter of credit imposes a blacklist certificate requirement, then that other term would be reportable.

(c) Information not related to a particular transaction in U.S. commerce

Under §760.2 (c), (d) and (e), of this part U.S. persons are prohibited, with respect to their activities in U.S. commerce, from furnishing certain information. It is the Department's position that the required nexus with U.S. commerce is established when the furnishing of information itself occurs in U.S. commerce. Even when the furnishing of information is not itself in U.S. commerce, however, the necessary relationship to U.S. commerce will be established if the furnishing of information relates to particular transactions in U.S. commerce or to anticipated transactions in U.S. commerce. See, e.g. §760.2(d), examples (vii), (ix) and (xii) of this part.

The simplest situation occurs where a U.S. person located in the United States furnishes information to a boycotting country. The transfer of information from the United States to a foreign country is itself an activity in U.S. commerce. See §760.1(d)(1)(iv) of this part. In some circumstances, the furnishing of information by a U.S. person located outside the United States may also be an activity in U.S. commerce. For example, the controlled foreign subsidiary of a domestic concern might furnish to a boycotting country information the subsidiary obtained from the U.S.-located parent for that purpose. The subsidiary's furnishing would, in these circumstances, constitute an activity in U.S. commerce. See §760.1(d)(8) of this part.

Where the furnishing of information is not itself in U.S. commerce, the U.S. commerce requirement may be satisfied by the fact that the furnishing is related to an activity in U.S. foreign or domestic commerce. For example, if a shipment of goods by a controlled-in-fact foreign subsidiary of a U.S. company to a boycotting country gives rise to an inquiry from the boycotting country concerning the subsidiary's relationship with another firm, the Department regards any responsive furnishing of information by the subsidiary as related to the shipment giving rise to the inquiry. If the shipment is in U.S. foreign or domestic commerce, as defined by the regulations, then the Department regards the furnishing to be related to an activity in U.S. commerce and subject to the antiboycott regulations, whether or not the furnishing itself is in U.S. commerce.

In some circumstances, the Department may regard a furnishing of information as related to a broader category of present and prospective transactions. For example, if a controlled-in-fact foreign subsidiary of a U.S. company is requested to furnish information about its commercial dealings and it appears that failure to respond will result in its blacklisting, any responsive furnishing of information will be regarded by the Department as relating to all of the subsidiary's present and anticipated business activities with the inquiring boycotting country. Accordingly, if any of these present or anticipated business activities are in U.S. commerce, the Department will regard the furnishing as related to an activity in U.S. commerce and subject to the antiboycott regulations.

In deciding whether anticipated business activities will be in U.S. commerce, the Department will consider all of the surrounding circumstances. Particular attention will be given to the history of the U.S. person's business activities with the boycotting country and others, the nature of any activities occurring after a furnishing of information occurs and any relevant economic or commercial factors which may affect these activities.

For example, if a U.S. person has no activities with the boycotting country at present but all of its other international activities are in U.S. commerce, as defined by the Regulations, then the Department is likely to regard any furnishing of information by that person for the purpose of securing entry into the boycotting country's market as relating to anticipated activities in U.S. commerce and subject to the antiboycott regulations. Similarly, if subsequent to the furnishing of information to the boycotting country for the purpose of securing entry into its markets, the U.S. person engages in transactions with that country which are in U.S. commerce, the Department is likely to regard the furnishing as related to an activity in U.S. commerce and subject to the antiboycott regulations.

INTERPRETATION

Sections 760.2 (c), (d), and (e) of this part prohibit United States persons from furnishing certain types of information with intent to comply with, further, or support an unsanctioned foreign boycott against a country friendly to the United States. The Department has been asked whether prohibited information may be transmitted--that is, passed to others by a United States person who has not directly or indirectly authored the information--without such transmission constituting a furnishing of information in violation of §760.2 (c), (d), and (e) of this part. Throughout this interpretation, "transmission" is defined as the passing on by one person of information initially authored by another. The Department believes that there is no distinction in the EAR between transmitting (as defined above) and furnishing prohibited information under the EAR and that the transmission of prohibited information with the requisite boycott intent is a furnishing of information violative of the EAR. At the same time, however, the circumstances relating to the transmitting party's involvement will be carefully considered in determining whether that party intended to comply with, further, or support an unsanctioned foreign boycott.

The EAR does not deal specifically with the relationship between transmitting and furnishing. However, the restrictions in the EAR on responses to boycott-related conditions, both by direct and indirect actions and whether by primary parties or intermediaries, indicate that U.S. persons who simply transmit prohibited information are to be treated the same under the EAR as those who both author and furnish prohibited information. This has been the Department's position in enforcement actions it has brought.

The few references in the EAR to the transmission of information by third parties are consistent with this position. Two examples, both relating to the prohibition against the furnishing of information about U.S. persons' race, religion, sex, or national origin (§760.2(c) of this part), deal explicitly with transmitting information. These examples (§760.2(c) of this part, example (v), and §760.3(f) of this part, example (vi)) show that, in certain cases, when furnishing certain information is permissible, either because it is not within a prohibition or is excepted from a prohibition, transmitting it is also permissible. These examples concern information that may be furnished by individuals about themselves or their families. The examples show that employers may transmit to a boycotting country visa applications or forms containing information about an employee's race, religion, sex, or national origin if that employee is the source of the information and authorizes its transmission. In other words, within the limits of ministerial action set forth in these examples, employees' actions in transmitting information are protected by the exception available to the employee. The distinction between permissible and prohibited behavior rests not on the definitional distinction between furnishing and transmitting, but on the excepted nature of the information furnished by the employee. The information originating from the employee does not lose its excepted character because it is transmitted by the employer.

The Department's position regarding the furnishing and transmission of certificates of one's own blacklist status rests on a similar basis and does not support the contention that third parties may transmit prohibited information authored by another. Such self-certifications do not violate any prohibitions in the EAR (see Supplement Nos. 1(I)(B), 2, and 5(A)(2); §760.2(f), example (xiv)). It is the Department's position that it is not prohibited for U.S. persons to transmit such self-certifications completed by others. Once again, because furnishing the self-certification is not prohibited, third parties who transmit the self-certifications offend no prohibition. On the other hand, if a third party authored information about another's blacklist status, the act of transmitting that information would be prohibited.

A third example in the EAR (§760.5, example (xiv) of this part), which also concerns a permissible transmission of boycott-related information, does not support the theory that one may transmit prohibited information authored by another. This example deals with the reporting requirements in §760.5 of this part--not the prohibitions--and merely illustrates that a person who receives and transmits a self-certification has not received a reportable request.

It is also the Department's position that a U.S. person violates the prohibitions against furnishing information by transmitting prohibited information even if that person has received no reportable request in the transaction. For example, where documents accompanying a letter of credit contain prohibited information, a negotiating bank that transmits the documents, with the requisite boycott intent, to an issuing bank has not received a reportable request, but has furnished prohibited information.

While the Department does not regard the suggested distinction between transmitting and furnishing information as meaningful, the facts relating to the third party's involvement may be important in determining whether that party furnished information with the required intent to comply with, further, or support an unsanctioned foreign boycott. For example, if it is a standard business practice for one participant in a transaction to obtain and pass on, without examination, documents prepared by another party, it might be difficult to maintain that the first participant intended to comply with a boycott by passing on information contained in the unexamined documents. Resolution of such intent questions, however, depends upon an analysis of the individual facts and circumstances of the transaction and the Department will continue to engage in such analysis on a case-by-case basis.

This interpretation, like all others issued by the Department discussing applications of the antiboycott provisions of the EAR, should be read narrowly. Circumstances that differ in any material way from those discussed in this interpretation will be considered under the applicable provisions of the Regulations.

INTERPRETATION

Pursuant to Articles 5, 7, and 26 of the Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan and implementing legislation enacted by Jordan, Jordan's participation in the Arab economic boycott of Israel was formally terminated on August 16, 1995.

On the basis of this action, it is the Department's position that certain requests for information, action or agreement from Jordan which were considered boycott-related by implication now cannot be presumed boycott-related and thus would not be prohibited or reportable under the regulations. For example, a request that an exporter certify that the vessel on which it is shipping its goods is eligible to enter Hashemite Kingdom of Jordan ports has been considered a boycott-related request that the exporter could not comply with because Jordan has had a boycott in force against Israel. Such a request from Jordan after August 16, 1995 would not be presumed boycott-related because the underlying boycott requirement/basis for the certification has been eliminated. Similarly, a U.S. company would not be prohibited from complying with a request received from Jordanian government officials to furnish the place of birth of employees the company is seeking to take to Jordan because there is no underlying boycott law or policy that would give rise to a presumption that the request was boycott-related.

U.S. persons are reminded that requests that are on their face boycott-related or that are for action obviously in furtherance or support of an unsanctioned foreign boycott are subject to the regulations, irrespective of the country of origin. For example, requests containing references to "blacklisted companies", "Israel boycott list", "non-Israeli goods" or other phrases or words indicating boycott purpose would be subject to the appropriate provisions of the Department's antiboycott regulations.