

BIS Antiboycott Module

Slide 1:

The Office of Antiboycott Compliance is part of the Bureau of Industry and Security in the U.S. Department of Commerce and is charged with enforcing the U.S. antiboycott provisions of the Export Administration Act of 1979, as amended, or the EAA. These provisions are implemented by the Export Administration Regulations, which I will refer to as the EAR or the regulations.

These antiboycott provisions are designed to address foreign governments' economic boycotts of countries friendly to the U.S. The impetus for the establishment of the antiboycott provisions was the Arab League boycott of Israel. The Arab League boycott seeks to isolate Israel economically through participating countries' denial of imports and exports to Israel and by blacklisting, which prevents those companies that contribute to Israel's economic or military development from doing business in the Arab world.

Slide 2:

In the mid-1970s, the U.S. adopted two laws that bar and penalize the participation of U.S. firms in other nations' economic boycotts of countries friendly to the United States. These laws, known as antiboycott laws, are the Ribicoff Amendment to the 1979 Tax Reform Act, found in Section 999 of the IRS Code, and the 1977 Amendments to the EAA, found in Section 8 of the EAA. The antiboycott provisions of the EAR found at 15 C.F.R. 760 implement the antiboycott provisions set forth in Section 8 of the EAA.

Section 8 of the EAA was adopted to prohibit U.S. persons from taking actions to further, endorse, or support foreign government's boycotts that the U.S. does not sanction. The law has the effect of preventing U.S.-based businesses from being used to advance the foreign government's policies that are contrary to U.S. policy.

Slide 3:

In some contexts, the term "boycott" may refer to a range of forms of non-violent coercion or intimidation. In the context of the EAA and the EAR, the term is used to refer to economic coercion associated with such tactics as refusing to engage in business transactions or conditioning business transactions on agreements that a party will not do business with another party or country.

As applied in the international context, there are three identifiable levels of boycotts: primary, secondary, and tertiary.

A primary boycott is where one country refuses to trade with another. The Arab countries' refusal to trade with Israel is a primary boycott. Primary boycotts are a recognized tool of international trade and politics, and the U.S. Congress did not have any intention to substantially interfere with the primary Arab League boycott of Israel or other primary boycotts in enacting the antiboycott laws and regulations.

The secondary boycott refers to a situation where one country refuses to trade with anyone who does business with the country being boycotted. An Arab country's refusal

to do business with a country or company which does business with Israel would be a secondary boycott. This is a level of boycott that Congress found troubling and is covered by the EAA and the EAR.

Tertiary boycotts are where a country refuses to trade with anyone who does business with companies or firms on their “blacklist.” This level of boycott is also covered by the EAR and EAA’s antiboycott provisions.

Slide 4:

The U.S. recognizes the Arab countries’ sovereign right to refuse to trade with Israel. However, the Arab League boycott is not a simple primary boycott of Israel. It also attempts to dictate the conditions under which foreign persons may do business.

The EAR defines the requirements that determine which persons and transactions are subject to its provisions; it prohibits specific types of conduct; it provides exceptions to the prohibitions; and it establishes reporting requirements. Together the prohibitions and exceptions regulate U.S. persons’ actions relating to the secondary and tertiary levels of the boycott.

Slide 5:

If you want to know whether certain activity violates the law, you need to proceed as follows.

First, Section 8 of the EAA applies to the activities of “U.S. persons” in the “interstate or foreign commerce of the United States.” Therefore, first ask if the activity is being performed by a U.S. person. If the answer is no, the law simply does not apply. “U.S. persons,” is a defined term. “U.S. persons” includes individuals and companies located in the United States and their foreign affiliates. These persons are subject to the EAR when their activities relate to the sale, purchase, or transfer of goods, services, or information between the U.S. and a foreign country. The full definition of “U.S. persons” and illustrative examples can be found in Section 760.1(b) of the EAR. This can be accessed through the BIS home page.

Next, you need to determine whether the “activity is in the interstate or foreign commerce of the United States”. Again, if the answer is no, the law does not apply. The sale, transfer, or purchase of goods and services (including information) to or from the United States is considered activity in the interstate or foreign commerce of the United States. There are also other situations that constitute “activities in the interstate or foreign commerce of the United States” The full definition of “activities in the interstate or foreign commerce of the United States” and illustrative examples can be found in Section 760.1(d) of the EAR. This can be accessed through the BIS home page.

Slide 6:

Second, ask if the activity is prohibited by one of the express prohibitions in the law. If the answer is no, the activity is permissible. I will discuss the prohibitions in more detail

later, but you should be aware that a list of the prohibitions may be found in Section 760.2 of the EAR

Third, if you find that the activity is being performed by a U.S. person, is in the interstate or foreign commerce of the United States, and is prohibited by the law; turn to the list of exceptions. I will discuss the exceptions in more detail later, but you should be aware that a list of the exceptions may be found in Section 760.3 of the EAR

Slide 7:

You also need to determine whether or not the action needs to be reported to the U.S. Government. A U.S. 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 U.S. or against any U.S. person must report such a request to the Department of Commerce. This reporting applies to all three levels of boycotts and requests must be reported even if it is legal for you to comply with the request. Like many rules, there are also exceptions to the reporting requirements. I will discuss the reporting requirements in more detail later but you should be aware that they may be found in Section 760.5 of the EAR

Slide 8:

In order to violate the antiboycott provisions of the EAR you must have “intent to comply with, further, or support an unsanctioned foreign boycott.” Such “intent” is present if the boycott is at least one of the reasons for the action taken. The person need not intend to

violate U.S. laws or regulations or necessarily agree with the boycott. In fact, he or she may not even be aware of the EAR or EAA's antiboycott provisions. If at least one reason for taking the action is to comply with, further or support an unsanctioned foreign boycott, the person will be deemed to have the requisite intent.

Intent is a specifically defined term within the scope of the antiboycott provisions. The definition and illustrative examples of "intent" can be found in the EAR in Section 760.1(e)

Slide 9:

As I noted before, in order to comply with the antiboycott provisions of the EAA and EAR, you must understand which activities are expressly prohibited. These prohibitions include:

1. Refusing or knowingly agreeing to refuse to do business with a boycotted country or blacklisted companies pursuant to a requirement of, an agreement with, or a request from or on behalf of, a boycotting country.

A "knowing agreement to refuse" can be inferred from explicit terms or conditions in contracts or letters of credit. For example, a clause may read "do not ship on blacklisted vessels" or "do not use blacklisted suppliers." OAC takes an aggressive stance in interpreting this prohibition. For example, responding to tender document that contain a

term or condition which calls for a prohibited refusal is deemed to be an agreement to refuse.

2. Furnishing or knowingly agreeing to furnish information about business relationships with a boycotted country or with blacklisted companies.

Furnishing information about business relationships in Israel generally account for more OAC enforcement actions than any other form of activity. Such information pertains to a person's past, present or future business relations and includes a broad range of commercial relations. Examples include sales, purchase or supply relationships and legal or commercial representation.

3. Refusing or requiring any other person to refuse to employ or otherwise discriminate against any U.S. person on the basis of race, religion, sex, national origin or nationality.

One of the most common examples of furnishing prohibited information about business relationships is furnishing a negative certificate of origin, wherein a party certifies that the shipment contains no items made in a boycotted country. Other examples include boycott-related requests for lists of suppliers and requests to certify that one is not related to a particular firm.

The prohibition on discrimination applies whether or not the discriminatory act is taken in response to a request. In addition, disparate treatment of a U.S. person on religious or national origin grounds is a violation.

Slide 10:

Just as there are specific prohibited activities related to foreign boycotts within the EAR, there is also a specific list of exceptions to these prohibitions. The primary purpose of the exceptions is to recognize the legitimacy of international primary boycotts. In addition, they address concerns relating to applying U.S. law to persons legally residing in other nations and the impact of certain prohibitions on trade with boycotting countries.

The following are exceptions to the prohibitions:

1. U.S. persons may comply with certain boycotting country shipping requirements concerning importing goods or using carrying vessels.

This first exception permits U.S. persons to comply or agree to comply with the import restrictions of a boycotting country that prohibit imports from the boycotted country or firms organized under the laws of or owned by nationals of the boycotted country. When shipping goods to a boycotting country, a U.S. person may comply or agree to comply with the requirements of the boycotting country which prohibit the shipment of goods on a carrier of the boycotted country; or by a route other than that prescribed by the boycotting country or the recipients of the shipment. The agreement may be stated in

positive or negative terms. The exception does not authorize an agreement to refrain from using blacklisted vessels or to use only vessels eligible to enter Arab waters.

2. U.S. persons may comply with certain shipping document requirements.

The second exception allows a company to furnish certain information which would otherwise be prohibited in order to comply with the import and shipping document requirements of the boycotting country. The information a company may provide under this exception includes a positive certificate stating the origin of the goods, a positive statement of the name of the supplier of the goods or the provider of the services, and a positive or negative statement as to the route of the shipment or the name of the carrier of the goods. The exception authorizes furnishing the information only on the shipping documents.

3. A U.S. person may furnish positive certificates of origin of goods and may certify concerning his/her/its own blacklist status.

The third exception permits statements in positive terms only apart from the allowance of statements about the route of the shipment (“will not call at Israeli ports”) and the name of a carrier (“not shipped on Israeli vessels”). Positive certifications certify that the goods are of a particular country or countries of origin. Technically, this rule does not apply to a self-certification provision. Certifying one’s own blacklist status (“we are not

on the blacklist”) is permissible because it does not disclose information about business relationships with another person.

Slide 11:

As I referenced before, there are reporting provisions of the EAR that require U.S. persons who receive requests to take certain actions which have the effect of furthering or supporting a restrictive trade practice or boycott to report receipt of such requests to the Office of Antiboycott Compliance.

These reports are to be filed quarterly on form BIS 621-P (the single transaction report form). Failure to report receipt of a boycott request within the time period mandated by the regulations constitutes a violation.

The receipt of the request must be reported regardless of whether the recipient intends to comply. Under the EAR, a request is “reportable” if the U.S. person “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. Requests to take actions that are permissible must be reported unless a specific reporting requirement exception exists.

Reports must be postmarked by the end of the month following the calendar quarter in which the U.S. person received the boycott request if the U.S. person is located in the United States. If the U.S. person who received the request is located outside the United

States, the deadline is two months after the end of the quarter in which was request was received.

All reports received are made available for public inspection and copying. However, if the person making the report certifies that disclosure by the Commerce Department of information regarding quantity or value of the items being shipped would place a United States person to whom the report relates at a competitive disadvantage, that information may be withheld from public disclosure. To make a non-disclosure request the person furnishing the information must provide two copies, one that is unedited and one in which the information to be withheld is redacted.

The U.S. person must also maintain records containing information relating to a reportable boycott request, including a copy of any documents in which the request appears, must be maintained by the recipient for a five-year period after the receipt of the request.

Slide 12:

If you have any questions or concerns, the Office of Antiboycott Compliance operates a telephone and email advice line. The telephone number is 202-482-2381 and is staffed from 9 am to 5 pm Eastern time. Our Web site is located at www.bis.doc.gov. You can