

DEALING WITH ANTIBOYCOTT REQUESTS IN THE REAL WORLD

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You arrive at your office and check your e-mail. When reviewing your messages you notice that you have received the following message from the export compliance manager located in your company's Dutch subsidiary:

From: Export Compliance Manager, XYZ America B.V.

To: Corporate Counsel, XYZ America Corp.

Re: Boycott language in letter of credit for sale to Kuwait

Message: Today we received from our customer in Kuwait the final sales confirmation and shipping instructions for our pending export of electronic equipment. When reviewing the terms and conditions of the shipping instructions we noticed that it contained the following language: "Importation of goods from Israel is strictly prohibited by Kuwait import regulations; therefore, a certificate of origin stating that the goods did not originate in Israel must be provided." While it has been some time since our company received such a request, I reviewed our company's export management system manual and found that it is against our company's policy to comply with such a request. The export management system also indicates that I am supposed to notify you anytime that we received document containing any boycott language. Please let me know what I should do next. Regards.

What Should I do Now?

You had recently heard about the renewed calls by certain foreign governments for boycotts of Israeli businesses and U.S. companies that do business with Israel. However, it had been some time since your company had received such a request. While you are pleased that your Dutch subsidiary brought this boycott language to your attention, you are aware that you need further information to determine whether the receipt of this boycott request is reportable to the Bureau of Industry and Security's (BIS) Office of Antiboycott Compliance (OAC) and to the Internal Revenue Service (IRS).

Obtain Further Information and Documentation

Your first step is to request the export compliance manager located in your Dutch subsidiary send you copies of all documentation associated with this sales transaction. Such documents should include copies of the document containing the boycott language as well as correspondence with the customer, the customer's purchase order, pro forma invoice, sales contract and letter of credit. You should also obtain a complete description of the goods subject to the transaction, including the country of origin of the products.

It is important to obtain these documents to ensure that you have a complete understanding of the transaction at issue and to ensure that no other boycott related requests are contained in the correspondence with the customer. For example, if the language stating that a "certificate of origin covering goods originating in Israel is not acceptable" appears in the shipping instructions, a similar request may appear in the letter of credit. An additional reason for requesting copies of these documents is to make sure that you have a complete set of documents in your files, since the documents containing the boycott language will have to be submitted to OAC in the event that you must file a boycott report.

Is the Entity That Received the Boycott Request Covered by U.S. Antiboycott Laws?

While waiting to receive the documentation that you requested, you should consult Section 760 of the U.S. Export Administration Regulations ("EAR" or the "Antiboycott Regulations") to determine if the entity that received the boycott request is covered by the U.S. antiboycott laws. The antiboycott provisions of the EAR apply to all "U.S. persons." The EAR defines the term "U.S. persons" as individuals and companies located in the United States and their "controlled in fact" foreign subsidiaries and affiliates. Whether your company's foreign subsidiary is "controlled in fact" will depend on whether the U.S. parent has the authority or ability to establish the general policies or to control day-to-day operations of its foreign subsidiary.

In this case, you are aware that your company's subsidiary, while incorporated in the Netherlands is 80% owned by its U.S. parent. You also know that two thirds of the board of directors of your Dutch subsidiary sit on the board of its U.S. parent. Based on these facts you determine that the

antiboycott regulations apply to your company's foreign subsidiary.

Is the Sale Associated With an Activity in the Interstate or Foreign Commerce of the United States?

Because you are aware that the antiboycott provisions of the EAR apply only to "activities in the interstate or foreign Commerce of the United States" you have asked your subsidiary to provide you with information about the electronic goods that will be sold to the customer in Kuwait. You know that your Dutch subsidiary does not manufacture electronic goods in the Netherlands, but serves as your company's European distributor of good manufactured in the U.S and elsewhere. The pro forma invoice that you receive from the export compliance manager confirms that the products that will be sold to the customer in Kuwait include products that were manufactured by your company in the U.S. and products manufactured by your company's subsidiary in Ireland. Because this sale to Kuwait will involve U.S.-origin goods that have not been substantially altered or modified you conclude that this transaction is "in U.S. commerce."

Is the Language Contained in the Shipping Instructions Received From the Customer Prohibited?

Now that you have determined that your subsidiary is covered by the antiboycott laws and the transaction is in U.S. commerce, the next step is to determine whether the language contained in the shipping instructions issued by the customer in Kuwait is prohibited. The U.S. antiboycott laws prohibit the following conduct: agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies; agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin or nationality; and agreements to furnish or actual furnishing of information about business relationships with or in Israel or with blacklisted companies. There is often a fine line between wording that can be interpreted as supporting a boycott or not. In fact, the EAR devotes numerous pages to "interpretations" as to whether a boycott request is permissible or not.

The antiboycott provisions of the EAR permit U.S. companies and their foreign subsidiaries to agree to comply with certain import and shipping document requirements relating to the country of origin of the goods. However, the EAR states that information relating to the country of origin of goods must be stated in positive, non-blacklisting and non-exclusionary terms. Therefore, while a certificate of origin stating that these products are "Made in U.S.A. and Ireland" is acceptable, you determine that a certificate of origin stating that the goods are "Not made in Israel" will not be permissible.

Send the Customer a Letter Stating That You are Unable to Comply With The Request and Not to Send Similar Requests in the Future

Once you have determined that the boycott language received from the customer is not permissible, you should ask your foreign subsidiary to send a letter to the customer stating that it is not possible to comply with the request. The letter should also ask the customer not to include similar language in any other documents in the future. The letter should be sent to the customer as soon as possible and before any report is filed with OAC.

This letter will serve several purposes. First, the letter serves to notify the customer that you are unable to comply with such unlawful request. Second, notifying the customer not to include similar language in the future will help reduce the number of boycott related requests and consequently, the number of boycott related reports that must be filed. Finally, the letter serves as documentary evidence that your company has not and will not take the action requested.

You should notify your foreign affiliate that it should not be concerned that sending the letter will offend the customer or lead to a loss of sales in the future. Typically, such requests are included as boilerplate language on documents issued by companies located in boycotting companies. Most companies will delete such language from their documents if requested to do so. In addition, even if certain documentation is "required" by the local customs authorities, customers are generally willing to forego such requirements in certain cases.

Is the Receipt of This Boycott Language Reportable to the Office of Antiboycott Compliance?

The EAR requires U.S. persons who receive 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 OAC. In addition, the EAR states that a request received by a controlled in fact foreign subsidiary is reportable if it is received in connection with a transaction or activity in the interstate or foreign commerce of the United States.

Given that you have previously determined your foreign subsidiary is controlled in fact and that the transaction at issue was received in connection with a transaction or activity in the interstate or foreign commerce of the United States you conclude that you must file a boycott report with the OAC.

How and When do I File a Report?

The antiboycott regulations state that each United States person actually receiving a reportable request must report that request. However, the antiboycott regulations note that such persons may designate someone else to report on their behalf. Currently, all boycott reports must be filed on Form BIS 621-P for single requests or Form BIS 6051-P for multiple requests. In the future, practitioners will have the ability to file boycott reports on the Web using BIS' Simplified Network Application Process (SNAP). Because this is a single request, Form BIS 621-P should be used. This form is a one-page form that comes with two additional carbonless pages. The first page on which the information is typed is white; the second page is pink and third is yellow. The white original is the part of the form that is submitted to OAC at the address listed on the form. The yellow copy is also submitted to OAC and is included in the public file maintained by OAC. The pink copy is kept by the submitter.

It is a good idea to first make a photocopy of the form and use the copy to draft the answers. Once the language on the form has been finalized, the answers can then be typed directly on the form. Boycott 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 will be taken by the time the report is required to be filed, the reporting person must advise OAC what action will be taken within 10 business days after deciding.

Two copies of the documents containing the boycott language must be submitted with the form. In addition, in order to ensure that no business proprietary information is released in the copy placed in the public file you should prepare a public version of the documents, by redacting customer names and any other business proprietary information included in the documents. The bottom portion of the yellow form should be torn off to ensure that the description and value of the goods is not included in the public version.

Boycott requests must be filed with OAC within the time limits specified in the EAR. Normally, boycott reports must be filed by the last day of the month following the calendar quarter in which the request was received. However, in cases where the person receiving the request is 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. Boycott requests should be sent to the OAC by certified mail, return receipt requested and it is a good idea to include an extra copy of the

submitted documents and a self-addressed stamped envelope so that the copy can be date-stamped by OAC and returned.

Is the Receipt of This Boycott Language Reportable to the IRS?

Finally, in addition to filing the boycott form with OAC, you are aware that the Internal Revenue Service (IRS) requires corporations to report on IRS Form 5713 all "operations" in, with or related to a boycotting country or its nationals and requests received to participate in or cooperate with an international boycott. According to section 999(a)(1) of the Internal Revenue Code, a "boycotting country" is any country included on a list maintained by the Secretary of Treasury Department or any other unlisted countries if the taxpayer "knows or has reason to know" that country requires boycott participation as a condition of doing business. Tax and other penalties may be imposed on corporations that fail to report boycott request on an annual basis.

You are also aware that your company obtains certain tax benefits that are associated with its overseas operations. After reviewing the *Federal Register*, you learn that Kuwait has consistently been named as a "boycotting country" on the Treasury Department's "List of Countries Requiring Cooperation With an International Boycott." Finally, after perusing the Treasury Department's Boycott Guidelines you realize that a request from Kuwait to provide a negative certificate of origin must be reported to the IRS on Form 5713. Therefore, because the antiboycott provisions of the IRC are applicable to this transaction, your company's tax department should be notified that you filed a boycott report with OAC. A complete copy of the boycott form should be submitted to the tax department as soon as possible to ensure that the information is included with the company's tax return.

Final Steps

Because this boycott request was brought to your attention it appears that your company's export management system is working properly. Nevertheless, in order to ensure that your company continues to be vigilant you should send a message to the appropriate persons in your company's U.S. and overseas operations reminding them of their obligation to report any boycott-related language to you as soon as possible.

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