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A JOURNEY THROUGH THE ANTIBOYCOTT LAWS

Alan S. Dubin*

I. INTRODUCTION

In both the Tax Reform Act of 1976 (TRA)¹ and the Export Administration Amendments of 1977 (EAA)², Congress strongly denounced American complicity with—and especially American support for—international boycotts imposed against countries friendly to the United States. Primary translation: the Arab boycott of Israel.

Since the enactment of these two laws, the so-called “antiboycott laws,” American businesses, and their foreign affiliates, have faced the unenviable task of interpreting, applying, and complying with a morass of rules and regulations, some of dubious logic, others of inscrutable policy. Usually the laws are harmonious, and compliance with one law results often in compliance with the other. Occasionally, though, the interplay of the laws lays many traps for the unwary and, inexcusably, for the knowledgeable as well.

For those readers who become devotees of the subject, there is a multitude of scholarly explanations available. Some consider the background of the Arab boycott of Israel, some the political situation that encouraged the enactment of the laws; others explore the exquisite tax

* Associate, Arent, Fox, Kinter, Plotkin & Kahn, Washington, D.C.; B.A., with Distinction, University of Rochester; J.D., George Washington University; Member, District of Columbia and Maryland Bars.

1. Pub. L. No. 94-455, 90 Stat. 1520. Sections 1061-1064 of the TRA added the relevant I.R.C. sections.

2. Pub. L. No. 95-52, 91 Stat. 235. Section 201 of the EAA added section 4A to the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (amended 1974). Section 4A has been reenacted with insignificant changes as section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979).

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planning opportunities left in the wake of the TRA.³

This article proposes to set forth at length the requirements imposed by the EAA and the regulations promulgated thereunder by the Commerce Department (Part 369 of the Export Administration Regulations; in this article, the EAR)⁴ and to outline briefly the types of conduct that, under the TRA and the *Guidelines*⁵ written by the Treasury Department, result in the forfeiture of lucrative tax benefits. Finally, the article offers a few suggestions for establishing a compliance program to observe both laws.

II. INTERNATIONAL BOYCOTTS DEFINED

A boycott is a refusal to deal with those the boycotter considers his adversaries. Unionists who refuse to buy goods manufactured by non-union shops are boycotting their adversaries, the non-union shops.

The Arab states⁶ consider Israel their adversary. They refuse to purchase Israeli goods or services, to sell their services or goods to Israel, or to deal in any manner with companies, nationals, or residents of Israel. They boycott Israel.

For analytical convenience, this direct refusal to deal with adversaries is labeled a primary boycott.

Often a primary boycott is perceived as relatively ineffectual. After all, the Israelis do not really need much of what the boycotting Arab nations have to offer; Israel is highly industrialized and very productive. Nor do the Israelis need to sell their goods or services to the Arabs to sustain a healthy economy. The primary Arab boycott of Israel has, in other words, a mild if at all noticeable economic effect on its target.

To enhance the effects of a primary boycott, a boycotter may refuse to deal with those who support the adversary. Unionists may refuse to purchase goods manufactured by any company that sells its

3. See generally *The Arab Boycott and the International Response*, 8 GA. J. INT'L & COMP. L. 527 (1978); Rubinfeld, *Legal and Tax Implications of Participation in International Boycotts*, 32 TAX L. REV. 613 (1977); Flynn & McKenzie, *International Boycotts*, 29 MAJOR TAX PLAN. 139 (1977); and all issues of the BOYCOTT LAW BULLETIN (formerly the ANTI-BOYCOTT BULLETIN), MIDDLE EAST MONTHLY.

4. 15 C.F.R. § 369 (1979).

5. *Department of the Treasury Guidelines, Boycott Provisions of the Internal Revenue Code*, 43 Fed. Reg. 3454-70 (1978).

6. Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, Yemen Arab Republic, and Peoples Democratic Republic of Yemen. This is the list published by the Treasury Department pursuant to I.R.C. § 999. The Commerce Department publishes no such list. For the most recent Treasury publication, see 44 Fed. Reg. 57,001 (1979).

goods to the target of the boycott. Soon enough, all of the target's suppliers will realize that they, strangers to the battle between the boycotters and the target, are suffering. To alleviate the suffering they stop supplying the target and are reinstated in the good graces of the boycotters.

For similar analytical convenience, this situation is labeled a secondary boycott.

The Arab nations have for years implemented a secondary boycott of Israel. American companies that supply goods or services to Israel, build plants there, or otherwise contribute to the health of the Israeli economy have become the targets of the secondary boycott. They have been disqualified from purveying their wares in the Arab nations. They have been "blacklisted."

If the secondary boycott multiplies the effects of the primary boycott geometrically, a further step, the tertiary boycott, can multiply it exponentially.

An American company that does not trade with Israel may trade with other American companies that do. So, for example, an Arab nation may wish to buy widgets, which are manufactured only in the United States. Widgco makes widgets, but it sells many of them in Israel; it is, consequently, blacklisted. Broker, a broker of widgets, may be eligible—not blacklisted—to sell widgets to the Arab buyer. In order to do so, however, it must certify that the widgets it has shipped were not manufactured by Widgco, the blacklisted manufacturer. The certification must be made by Broker as a condition of payment; this is the tertiary boycott, and it becomes self-enforcing.

The tertiary boycott extends beyond this example. If Shipper sends its trawlers to Israel, Broker may be required to use another shipper. Similarly, Insurer may underwrite risks in Israel. Not only will it be ineligible to underwrite risks in the Arab nations—the secondary boycott—but it will be unable, due to the tertiary boycott, to insure Broker's shipment of widgets.

The certification required from Broker may assume many forms. It may be a statement that Widgco did not make the widgets, that Shipper did not carry them, and that Insurer did not insure the shipment. It may be a certification that no blacklisted manufacturer made, no blacklisted shipper carried, and no blacklisted insurer insured the widgets. As an economic matter the form is insignificant. The significance lies

in the fact that the Arab buyer has, in a sense, deputized Broker for boycott enforcement purposes.

Certifications are equally useful to the Arab buyer in enforcing the secondary boycott. "I am not blacklisted," Broker may be required to certify, "and neither are my parent companies, sisters, subsidiaries, branches or affiliates."

Certification requirements serve very well as information accumulating devices. When "these widgets were not purchased from a blacklisted manufacturer" is accompanied by "the manufacturer of these widgets is General Widget Corporation," the obvious message is that General Widget Corporation does not sell its widgets to Israel or include Israeli components in its widgets.

Broker, the hypothetical widget seller, may one day receive a boycott questionnaire. It arrives unannounced from the central boycott office of, for example, Saudi Arabia. It asks a multitude of questions about Broker's business relationships, its suppliers and customers, and perhaps even its owners' national origin or nationality, race, religion, or sex. Broker's answers to these questions provide a wealth of useful information to the Saudi boycott office. In addition to deputizing Broker for enforcement purposes, the central boycott office has received the invaluable services of a volunteer investigative reporter.

It does not require excessive reflection to conclude that the secondary and tertiary aspects of international boycotts intrude severely into America's domestic economy and foreign policies. Supported by our sovereign right to control conduct affecting the United States, the anti-boycott laws attack those secondary and tertiary aspects.⁷

It is analytically important to distinguish the information accumulating facets from the refusal to deal aspects of the secondary and tertiary boycotts. Recognizing that every nation has the sovereign right to control its own domestic affairs, neither the TRA nor the EAA prohibits Americans from agreeing to sell non-Israeli goods to the Arabs. There is no feasible way that America could force the Arabs to accept Israeli goods. But, Americans are prohibited from certifying that the goods are "non-Israeli;" the negative certification is proscribed. It is an interesting and probably successful accommodation: Americans may abide the primary boycott but not more. Serving as information accumulators is unnecessary, because it is sufficient observance of the pri-

7. For the legislative history of the EAA, *see generally* H.R. REP. NO. 95-190, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 362.

mary boycott to certify in positive form that the goods are of U.S. origin.

In the grossest sense, the key to understanding the antiboycott laws is the recognition of the permissibility of primary boycotts and the impermissibility of secondary and tertiary boycotts. The specific rules are discussed below.

III. THE EXPORT ADMINISTRATION REGULATIONS

A. *In General*

The United States has never feared to implement foreign policy through its export control laws. One example is the Trading With the Enemy Act of 1917,⁸ under which the President can declare certain antagonistic nations off-limits as trading partners. Indeed, when the Export Administration Act of 1969 expired in 1976, President Ford invoked the Trading With the Enemy Act to continue the antiboycott reporting program then maintained by the Commerce Department.⁹

The great virtue of the export control laws' antiboycott sections is their restraint. The EAA does not apply unless certain jurisdictional thresholds are crossed. The persons affected by the EAA are only "United States persons;" the law applies only to these United States persons' activities in the "interstate or foreign commerce of the United States;" and the law proscribes only conduct undertaken "with intent to comply with, further or support" an unsanctioned international boycott. (There are some sanctioned boycotts, such as the United States boycott of Rhodesia).

As long as these thresholds are crossed, the EAA prohibits refusals to deal and transmission of boycott-related information, subject, of course, to some narrowly drawn exceptions. The EAA also requires United States persons to report to the Commerce Department the receipt of "requests" to further or support unsanctioned boycotts.

It is important to remember that the conduct the EAA describes is prohibited. Severe civil and criminal penalties may be meted out to violators. The TRA, on the other hand, is inhibitive. It only denies tax benefits otherwise accruing to those who "participate in or cooperate with" unsanctioned international boycotts.

Strictly speaking, the EAA is not self-executing. It does not, in

8. Act of October 6, 1917, ch. 106, 40 Stat. 411.

9. Exec. Order No. 11,940, 41 Fed. Reg. 43,707 (1975).

itself, proscribe anything. Rather, it directs the President (who has redelegated the authority to the Secretary of Commerce) to issue regulations prohibiting certain boycott-related conduct. The following discussion will, therefore, refer exclusively to the EAR, which the author assumes are unassailable by argument that they impermissibly broaden the EAA.

B. The Jurisdictional Thresholds

1. United States Persons

One of legal jargon's great catch-all words is "person." For purposes of the EAR it 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."¹⁰ It includes the singular and plural where contextually appropriate. It also includes, for those still doubtful, partnerships, corporations, companies, branches, or other organizations or associations whether or not organized for profit; any government or its components; any trade association, chamber of commerce or labor union; any charitable or fraternal organization; and "any other association or organization not specifically listed above."¹¹ One does not suspect that the definition of "person" will be frequently litigated.

Much more important is the definition of "United States person." It includes generally any person who resides in or is a national of the United States, "domestic concerns," and "controlled in fact foreign subsidiaries, affiliates or other permanent foreign establishments of domestic concerns."¹² Domestic concerns are entities organized under the laws of the United States, any state, the District of Columbia, Puerto Rico, or any U.S. territory or possession.¹³

"Domestic concern" also includes a foreign concern's branch office, affiliate, partnership or other permanent establishment located in the United States.¹⁴ To illustrate, the New York branch of a London bank is a United States person because it is a domestic concern.¹⁵

The extraterritoriality of the EAR derives from the most complex definition, concerning foreign entities "controlled in fact" by domestic

10. 15 C.F.R. § 369.1(a) (1979).

11. *Id.*

12. 15 C.F.R. § 369.1(b) (1979).

13. *Id.*

14. 15 C.F.R. § 369.1(b)(2) (1979).

15. 15 C.F.R. § 369.1(b) ex.(iii) (1979).

concerns. On this point the EAR should be regarded more as instructive than exclusive; control is an inherently factual concept not easily articulated with precision. Thus, the EAR provide various presumptions of control in illustrative situations, but admonish that under no circumstances is control presumed absent.¹⁶

In general terms the EAR state that “‘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.”¹⁷

A foreign branch or other unincorporated permanent foreign establishment is deemed to be controlled in fact.¹⁸ This is the only conclusive presumption of control. All others are rebuttable by “competent evidence.”¹⁹

A domestic concern is presumed to control its foreign subsidiary or affiliate if:

1. it beneficially owns or controls greater than fifty percent (50%) of the outstanding voting securities;²⁰
2. it beneficially owns or controls twenty-five percent (25%) or more of the outstanding voting securities if no other person owns or controls an equal or larger percentage;²¹
3. it operates the foreign subsidiary or affiliate pursuant to an exclusive management contract;²²
4. a majority of the directors of the foreign entity are also directors of the domestic concern;²³
5. it has authority to appoint a majority of the directors of the foreign entity even if the authority is unexercised,²⁴ or
6. it has authority to appoint the foreign entity’s chief operating officer, even if the authority is unexercised.²⁵

An option rule regards securities convertible at the holder’s option into voting securities of the foreign entity as owned or controlled by the holder.²⁶

16. 15 C.F.R. § 369.1(c) (1979).

17. 15 C.F.R. § 369.1(c)(1) (1979).

18. 15 C.F.R. § 369.1(c)(5) (1979).

19. 15 C.F.R. § 369.1(c)(2) (1979).

20. 15 C.F.R. § 369.1(c)(2)(i) (1979).

21. 15 C.F.R. § 369.1(c)(2)(ii) (1979).

22. 15 C.F.R. § 369.1(c)(2)(iii) (1979).

23. 15 C.F.R. § 369.1(c)(2)(iv) (1979).

24. 15 C.F.R. § 369.1(c)(2)(v) (1979).

25. 15 C.F.R. § 369.1(c)(2)(vi) (1979).

26. 15 C.F.R. § 369.1(c)(4) (1979).

What kinds of foreign entities can escape characterization as controlled in fact? The only clear answer is that a foreign concern controlled by an individual is never "controlled in fact" because the individual is not a "domestic concern."²⁷

2. The Interstate or Foreign Commerce of the United States

The EAR apply only to *transactions* having a minimum nexus with United States commerce. Nearly all transactions undertaken by United States persons located in the United States—whether involving the movement of goods or services within the United States, into the United States or out of the United States—will be transactions in the interstate or foreign commerce of the United States.²⁸

The EAR do not mention the means or instrumentalities of interstate commerce. It may be, accordingly, that the transfer of goods, services, or information within a state, even by an interstate common carrier, such as by railroad, motor carrier, telephone or mail, are not transactions in the interstate or foreign commerce of the United States.

The real definitional problems arise in characterizing the activities of United States persons located outside of the United States. The EAR divide these activities into three categories: the movement of goods, the provision of services (including information), and the implementation of letters of credit.

The disposition of goods acquired by a person outside the United States from a person in the United States is generally a transaction meeting the commerce requirement.²⁹ This rule does not apply, however, to goods obtained from the United States that are acquired without reference to a specific order from or transaction with another person outside the United States *and* are further manufactured, incorporated into, refined into, or reprocessed into another product.³⁰

Consequently, all resales of goods obtained from the United States by trading companies are transactions in the interstate or foreign commerce of the United States. If a trading company commingles its United States source and non-United States source inventory, it is presumed to resell United States source inventory, so that its resale of any of that inventory is a transaction meeting the commerce requirement,

27. 15 C.F.R. § 369.1(c) ex. (xi) (1979).

28. 15 C.F.R. § 369.1(d)(1)-1(d)(2) (1979).

29. 15 C.F.R. § 369.1(d)(8) (1979).

30. 15 C.F.R. § 369.1(d)(12) (1979).

unless at the time of the resale it has sufficient quantities of foreign source goods on hand to fill the order.³¹ Sales by manufacturers of manufactured items containing parts acquired from the United States are transactions in United States commerce if the parts were acquired for the specific job.³²

Strictly speaking, goods do not themselves possess a national identity. If a United States manufacturer sells cars to a British trading company that resells the cars to a French trading company, resales by the French trading company do not meet the commerce requirement. According to the EAR, the French company must have acquired the cars from a "person in the United States," and the British company, even if a United States person, is not a person in the United States.³³

This does not provide an easy loophole, however. Any purposeful structuring of a multinational company's activities to parallel this result would surely violate the EAR's anti-evasion section,³⁴ to be discussed below.

The provision of services acquired by a person outside the United States from a person in the United States is not a transaction in the interstate or foreign commerce of the United States if the services are acquired without reference to the specific order from or transaction with another person outside the United States.³⁵ A United States company may license its foreign subsidiary to manufacture a patented item. Sales of this patented item by the manufacturing subsidiary are not transactions in United States commerce. This presumes that the license was not acquired for the purpose of filling specific orders, but for general business purposes.³⁶

If services are acquired by the foreign subsidiary from its United States parent to fill a specific order, the EAR first look at the nature of the services. Services are divided into two categories: ancillary and non-ancillary. Ancillary services are those provided for the subsidiary's own use, such as legal, accounting, financial, or transportation services.³⁷ Non-ancillary services are those provided for the direct benefit of the subsidiary's customer, such as a guarantee of the subsidiary's

31. 15 C.F.R. § 369.1(d)(8)(iv) (1979).

32. 15 C.F.R. § 369.1(d)(9)(i) (1979).

33. 15 C.F.R. § 369.1(d)(8) (1979).

34. 15 C.F.R. § 369.4 (1979).

35. 15 C.F.R. § 369.1(d)(13)(i) (1979).

36. 15 C.F.R. § 369.1(d) ex.(xx) (1979).

37. 15 C.F.R. § 369.1(d)(14) (1979).

performance by its United States parent or engineering services provided by the parent to enable the subsidiary to complete its obligations to the customer.³⁸ Presumably, financial services are ancillary unless money is the commodity being sold; a United States bank can hardly argue that its provision of funds to its foreign branch that is loaning the funds is an ancillary service.

What is the result if part of a transaction meets the commerce requirement and part does not? Generally, the whole transaction is considered to be in the interstate or foreign commerce of the United States.³⁹ The exception is the ancillary services rule: the acquisition of the ancillary services is in United States commerce, but the remainder of the transaction is not thereby brought into United States commerce.⁴⁰ The remainder of the transaction may for other reasons satisfy the commerce requirement.

Implementation of a letter of credit by a person located in the United States is a transaction in the interstate or foreign commerce of the United States.⁴¹ If the person implementing the credit is outside the United States, the implementation is in United States commerce if the credit specifies a United States address for the beneficiary, requires documents indicating shipment from the United States, or calls for documents indicating United States origin goods.⁴²

3. Intent to Comply with, Further, or Support an Unsanctioned Foreign Boycott

The intent requirement of the EAR is met, quite simply, when the reason or purpose for a person's action is to "comply with, further or support"⁴³ an unsanctioned boycott.

Reason must be distinguished from motivation. Political or philosophical antagonism for the Arab boycott of Israel may be thought commendable in some quarters, but its presence or absence is immaterial to the EAR. Motivation is not significant in the analysis. Reason is.

How, though, is reason defined? The EAR do not really define it, except by example. If a United States person is requested to purchase cars only from General Motors for resale in Saudi Arabia, the United

38. 15 C.F.R. § 369.1(d)(15) (1979).

39. 15 C.F.R. § 369.1(d)(10) (1979).

40. 15 C.F.R. § 369.1(d)(3) (1979).

41. 15 C.F.R. § 369.1(d)(18) (1979).

42. 15 C.F.R. § 369.1(d)(19) (1979).

43. 15 C.F.R. § 369.1(e)(1) (1979).

States person may or may not know why the request was made. If it knows or has reason to know the request was made because Ford is blacklisted, the intent requirement is met.⁴⁴ If the United States person is requested only to supply cars, and it purchases only GM cars because Ford is blacklisted, the intent requirement is met.⁴⁵ But if it buys GM cars because it prefers them, the intent requirement is unsatisfied.⁴⁶ For that matter, the Arab buyer may not want Ford cars because it dislikes them; that Ford is blacklisted is of no moment, and the intent requirement is not met.

Knowledge becomes particularly important in examining the intent requirement, especially when a United States person is requested to furnish information. “Are you the company that built that building in Jerusalem?” may be a boycott-based question, or it may be an attempt by the Arab buyer to avoid hiring the company that built a building that collapsed. The builder has to decide whether the request is boycott-based. He may respond only if he decides it is not—perhaps an unacceptably risky decision.

“You must certify that the insurance company insuring the shipment is registered to do business in Jordan” may be boycott-based. Blacklisted insurers are unlikely to be registered in Jordan. This requirement may, however, be unrelated to the boycott. A reasonable explanation: the buyer wants to know there are assets to attach in the event of an unsatisfied claim.

While the intent requirement may be the simplest to explain, it’s the most difficult to apply. A useful general rule is that counsel should presume that any client who asks in advance whether the intent requirement is met has probably met it.

According to the EAR, if any part of the reason for an action is to comply with, further, or support a boycott, the intent requirement is satisfied.⁴⁷ It does not matter that there may also be legitimate business reasons for the proposed course of action.

C. The Prohibitions and Exceptions of the EAR

There are six categories of prohibited actions. Assuming the jurisdictional thresholds are crossed, no United States person may:

44. 15 C.F.R. § 369.1(e)(6) (1979).

45. 15 C.F.R. § 369.1(e) ex.(ii) (1979).

46. 15 C.F.R. § 369.1(e) ex.(i) (1979).

47. 15 C.F.R. § 369.1(e)(1) (1979).

1. Refuse or knowingly agree to refuse to do business with any other person pursuant to an agreement with, a requirement of or a request from or on behalf of a boycotting country.⁴⁸
2. Discriminate against any other person on the grounds of race, religion, sex or national origin.⁴⁹
3. Furnish information about any person's race, religion, sex, or national origin.⁵⁰
4. Furnish information about its own or any other person's business relationships with or in a boycotted country or with any person known or believed to be restricted from having business relationships with the boycotting country.⁵¹
5. Furnish information about any person's support for fraternal or charitable organizations that support the boycotted country.⁵²
6. Implement a letter of credit containing a requirement prohibited by the first five prohibitions.⁵³

There are also six categories of exceptions. Fundamentally, the exceptions carve out havens of permissible activity designed to support the primary boycott. As stated above, the EAR allow United States persons to comply with or support primary boycott requests, such as requirements that no Israeli goods be sold to an Arab buyer, principally because of an appreciation of every sovereign nation's right to select its own trading partners.

There is another reason, also. It would be self-defeating to outlaw compliance with primary boycott requests because the Arab buyers would simply reject Israeli goods or, worse, reject American suppliers in favor of suppliers who would honor primary boycott requests.

This second reason has a logic and a life all its own. Once it is recognized that the possibility of diminishing American trading opportunities supplies a rationalization for creating exceptions, other exceptions, not strictly necessary to honoring primary boycott requests, become logically acceptable. Thus, there is an exception for unilateral and specific selections of suppliers.⁵⁴ Suppose an Arab buyer orders a

48. 15 C.F.R. § 369.2(a) (1979).

49. 15 C.F.R. § 369.2(b) (1979).

50. 15 C.F.R. § 369.2(c) (1979).

51. 15 C.F.R. § 369.2(d) (1979).

52. 15 C.F.R. § 369.2(e) (1979).

53. 15 C.F.R. § 369.2(f) (1979).

54. 15 C.F.R. § 369.3(c) (1979).

General Motors car because Ford is blacklisted. The prospective American seller may know to a certainty that the selection is boycott-motivated. Nevertheless, since the selection was unilateral—the Arab buyer chose by itself—and specific—G.M. was chosen by name—the American seller can comply. Why? Because refusal to comply would drive the Arab buyer elsewhere. Clearly, the exception protects our own commercial interests. It does more than acknowledge the legitimacy of primary boycotts.

From a practical viewpoint, the unilateral and specific selection exception signifies that the EAR are not easily understood or remembered. A successful analytical approach may begin with the premise that primary boycotts are acceptable and secondary and tertiary boycotts are not, but it cannot end there.

The six exceptions allow a United States person, notwithstanding that the thresholds have been crossed, to:

1. Comply with import requirements of the boycotting country that prohibit the import of goods from the boycotted country or from its nationals, residents or business concerns; or to comply with shipping requirements prohibiting shipment by carriers of the boycotted country, prescribing certain shipping routes or proscribing others.⁵⁵
2. Furnish certain otherwise prohibited information in response to shipping or import document requirements of the boycotting country. In particular, information can be supplied regarding (i) the country of origin of the goods, (ii) the name of the carrier, (iii) the route of the shipment, (iv) the name of the supplier of the shipment, and (v) the names of the providers of other services. The permissible information must generally be couched in positive, non-blacklisting and non-exclusionary language.⁵⁶
3. Comply with certain unilateral and specific selections. In order for the exception to apply, the selection must be made by a boycotting country (which may include United States persons). The selection may refer only to (1) carriers, (ii) insurers, (iii) goods identifiable as to source at the time of importation by virtue of trademarks, uniqueness of design or appearance or other identification on the goods or their packaging (but not on documents), or (iv)

55. 15 C.F.R. § 369.3(a-1) to .3(a-2) (1979).

56. 15 C.F.R. § 369.3(b) (1979).

services to be performed in the boycotting country if such services are customarily and necessarily performed in the customer's country and the services are not an insignificant part of the total package of services provided. In no case, however, may compliance with the selection result in discrimination on the basis of race, religion, sex or national origin.⁵⁷

4. Comply with requirements of the boycotting country prohibiting the export of goods to a boycotted country or its nationals, residents or companies, whether directly or by transshipment through other countries.⁵⁸
5. If the United States person is an individual, comply with a boycotting country's visa, passport, immigration or employment requirements. This means an individual may furnish information about his own and his family's religion. The individual's employer may not furnish such information.⁵⁹
6. If the United States person is a bona fide resident of a boycotting country, comply with local laws regarding its exclusively local activities or regarding imports of goods (not services) for its own use (not resale) in the boycotting country. Under no conditions does the exception allow discrimination on the grounds of race, religion, sex or national origin.⁶⁰

Each of the exceptions relates to one or more of the prohibitions. That is, there is no conduct that is or should be permitted by an exception (or even described by an exception) unless it is prohibited by one of the prohibitions. Although the exceptions deserve meticulous consideration of their own, it appears to the author more informative to combine the discussions of the prohibitions and the exceptions. This is done below.

To preserve this article's limited scope, some of the prohibitions and exceptions will not be discussed further. In particular, the prohibitions against discriminating on the basis of religion, race, sex, or national origin, or supplying information on those issues, and the exception for individual compliance with visa requirements will not be discussed. Basically, these rules will not often be encountered, but when they are the analysis can be lengthy. Instead, the following dis-

57. 15 C.F.R. § 369.3(c) (1979).

58. 15 C.F.R. § 369.3(d) (1979).

59. 15 C.F.R. § 369.3(e) (1979).

60. 15 C.F.R. § 369.3(f) (1979).

cussion will highlight the types of boycott-related problems the majority of American businesses can expect to confront.

1. Refusals to Do Business—the First Prohibition

The first prohibition takes aim at the direct consequence of the secondary and tertiary boycotts, refusals by United States persons to do business with or in the boycotted nation (secondary) or with those who fail to support the boycott (tertiary).

The term “refusal” is quite a bit broader than one might expect. It encompasses actual refusals, knowing agreements to refuse, requiring another person to refuse, and knowingly agreeing to require another person to refuse. It contemplates active refusal as well as passive but conscious declination.⁶¹ The mere absence of a business relationship is not, of itself, evidence of a refusal to do business.⁶² The law imposes no duty to seek out blacklisted suppliers or boycotted nations and begin doing business with them. It only prohibits refusals based on boycott considerations.

Wholesaler, a distributor of brooms, desires to supply brooms to an Arab buyer. Normally Wholesaler buys its brooms from Broomco, a blacklisted concern. To secure an order for brooms, Wholesaler decides to offer brooms made by Sweepco, a non-blacklisted firm. Wholesaler has refused to do business with Broomco.⁶³

Assume that Wholesaler had never dealt with Broomco, but always with Sweepco. Wholesaler’s failure to offer Broomco’s brooms does not imply a refusal to do business.⁶⁴ Nevertheless, if Wholesaler considers purchasing the brooms from Broomco but declines because the latter is blacklisted, Wholesaler has refused to do business with Broomco.⁶⁵

Now suppose Wholesaler secures an order to provide Sweepco’s brooms. Payment will be made by letter of credit, issued by the Arab buyer’s bank in favor of Wholesaler. To draw its draft against the letter of credit, Wholesaler must present shipping, insurance, and country of origin documents, as is typical in international sales. In addition, though, Wholesaler must certify that the brooms were not made by any blacklisted firm. If Wholesaler provides the certification it will be con-

61. 15 C.F.R. § 369.2(a)(2)-(4) (1979).

62. 15 C.F.R. § 369.2(a)(10) (1979).

63. 15 C.F.R. § 369.2(a)(6) (1979).

64. 15 C.F.R. § 369.2(a) ex.(viii) (1979).

65. 15 C.F.R. § 369.2(a)(3) (1979).

cluded that Wholesaler has refused to do business with all blacklisted firms, including Broomco. More to the point—at least in the context of the EAR—Wholesaler has also furnished prohibited boycott-based information. This will be discussed in detail below.⁶⁶

Wholesaler has a branch office in London, engaged in providing procurement services to broom purchasers. The London branch is retained by an Arab buyer in desperate need of broom-buying advice. The Arab buyer requests the London branch to provide a list of qualified broom manufacturers who can supply all of the buyer's requirements for a year. The Arab buyer stipulates that no blacklisted manufacturers are to be recommended. Bristling at this request, the London branch seeks legal advice from its parent's law firm in Oklahoma. What is the correct advice?

Is the proposed transaction in the interstate or foreign commerce of the United States? No, because no United States origin services will be provided. Although the legal services obtained by the London branch are in the interstate or foreign commerce of the United States, they are ancillary services, and do not supply the jurisdictional nexus for the broom-buying advice to be provided the Arab buyer. A necessary jurisdictional threshold not having been crossed, the prohibitions are inapplicable.⁶⁷

Suppose the London branch provides advice it obtains from its parent. Any advice it gives will have been procured from its United States parent for the specific purpose of serving the Arab client. The commerce requirement is now met.⁶⁸ The London branch is clearly a United States person, because it is a controlled-in-fact foreign branch of a domestic concern.⁶⁹ And there is no doubt that the intent requirement is met, since the Arab buyer quite specifically excluded "black-listed" manufacturers.⁷⁰ Now what advice does the Oklahoma attorney provide?

"Don't do it!" Pre-award selection services—what the London branch would be providing—cannot result in the exclusion of black-listed suppliers. Such exclusion would constitute an impermissible refusal to do business.⁷¹

66. See notes 103-31 *infra* and accompanying text.

67. 15 C.F.R. § 369.2(a)(10) (1979).

68. 15 C.F.R. § 369.1(d)(9) (1979).

69. 15 C.F.R. § 369.1(c)(5) (1979).

70. 15 C.F.R. § 369.1(e) (1979).

71. 15 C.F.R. § 369.2(a)(6) (1979).

The London branch successfully negotiates the deletion of the requirement from the Arab client's proposed contract, and a contract is signed. The London branch provides a list of qualified manufacturers all located in the United States. Then the Arab buyer requests the London branch to purchase brooms for it, but only from two of the five manufacturers recommended by the London branch.

If the London branch has reason to know that the other three recommended manufacturers are excluded because they are blacklisted, the London branch may not implement the choice.⁷² That would be a refusal to do business, and illegal unless an exception is available to allow the implementation.

The unilateral and specific selection exception may be available.⁷³ Is the Arab buyer's choice unilateral? If the buyer were to designate a broom manufacturer without assistance of any kind from the London branch, the answer would surely be yes. In the hypothetical, though, the buyer is assisted by the London branch's pre-award survey. The rule is that a pre-award survey does not destroy the unilateral character of a buyer's selection and is not itself a refusal to do business if the survey is not boycott-based—that is, no potential candidates are excluded for reasons related to the boycott—and if the provision of pre-award surveys is a customary service provided by the seller or the seller's industry.⁷⁴ The hypothetical stipulates that the London branch is engaged in providing such services—thus it is customary for the seller—and that the survey provided by the London branch is not boycott-based. The selection, therefore, is still unilateral.

Is the choice specific? Probably not; specific means affirmative and singular.⁷⁵ If the selection identified only one manufacturer, it would be specific.

The next question is whether the goods would be, as required by the unilateral and specific selection exception, identifiable by source at the time of import. Assuming the brooms carry a trademark or are packaged in cardboard boxes stamped with the manufacturer's name, they would be identifiable.⁷⁶

The final issue in determining the availability of the exception is whether the Arab buyer is a member of the class of persons whose uni-

72. 15 C.F.R. § 369.2(a)(7) (1979).

73. 15 C.F.R. § 369.3(c) (1979).

74. 15 C.F.R. § 369.3(c)(6) (1979).

75. 15 C.F.R. § 369.3(c)(4) (1979).

76. 15 C.F.R. § 369.3(c)(1), .3(c)(17) (1979).

lateral and specific selections, assuming the other requirements of the exception are met, may be honored. As a national of a boycotting nation, the Arab buyer belongs to that class.⁷⁷

Thus, assuming only one manufacturer is specified, the unilateral and specific exception is available. The net effect is that the London branch may refuse to deal with some blacklisted persons, although such refusal is generally prohibited. It is imperative that the analysis of issues like those presented by the hypothetical proceeds as illustrated: first ascertain the satisfaction of the jurisdictional thresholds, then determine whether a prohibition would be violated by the proposed contract, and only then determine if an exception is available.

Returning to Wholesaler, the hypothetical American broom seller, suppose the Arab buyer stipulates that no brooms supplied shall be manufactured in Israel, or by Israeli companies, nationals, or residents. Wholesaler may agree to this demand; this would constitute observance of the primary boycott, which is allowed by the first exception.⁷⁸ Under no circumstances do the EAR attempt to force Israeli goods down Arab buyer's throats.

A slight variation will illustrate why Wholesaler observed the primary but not the secondary boycott. Suppose the Arab buyer insists that Wholesaler cease all its dealings with Israel. This request represents the classic secondary boycott: "You can't do business with us if you do business with them." Wholesaler may not agree to the demand, for it would be a refusal to do business generally with the object of the boycott, and no exception would be available. The first exception is limited to particular transactions. It allows compliance only with those import requirements of the boycotting country prohibiting the import of goods or services from the boycotted country, or from companies, nationals, or residents of the boycotted country.⁷⁹

Requests for refusals to do business are not confined to manufacturers or suppliers of goods. Wholesaler may not, for example, refuse to engage an architect because he is blacklisted, refuse to insure a shipment of goods with blacklisted insurers, or refuse to ship goods on blacklisted carriers.

The first exception also allows compliance with certain shipping

77. 15 C.F.R. § 369.3(c)(1) (1979).

78. 15 C.F.R. § 369.3(a-1) (1) (1979).

79. 15 C.F.R. § 369.3(a-1)(2) (1979).

requirements of the boycotting country.⁸⁰ Wholesaler may refuse to ship goods on a ship registered in Israel or owned or operated by Israeli nationals or residents.⁸¹ Further, Wholesaler may agree to routing instructions imposed by the boycotting countries.⁸² Typically Arab buyers will require that the ship be non-Israeli and that it does not stop in Israel *en route* to its destination in the Arab country. The EAR actually treat these requests as wholly unrelated to the boycott. They are characterized, instead, as precautions against the risk of confiscation of the goods by the Arab buyers' enemies.⁸³

The prohibition against refusals to deal is also limited by two other exceptions, the export and transshipment⁸⁴ and local law⁸⁵ exceptions. Briefly, it is a refusal to do business if a United States person refuses to export goods from an Arab country to Israel, or to any blacklisted persons. The refusal to export to Israel is permitted by the export exception, because the refusal to export Arab goods to Israel is an incident of the primary boycott. The refusal to export to blacklisted persons, being an incident of the tertiary boycott, is impermissible.

The local law exception is extremely complex and of limited usefulness. If a United States person is a bona fide resident⁸⁶ of a boycotting country, it may comply with local boycott laws but only with respect to its activities exclusively within the boycotting country, and may comply with boycott-based restrictions on the import of goods—not services—imported for its own use in the boycotting country. Goods are for the United States person's own use if they are consumed by the person, used by the person to perform services for others, further manufactured or incorporated into other products to be resold by the person, or permanently affixed to a project the person is constructing if affixation is customary in similar situations.⁸⁷ Finally, the source of goods must be identifiable at the time of import, either by trademark, uniqueness of design, or distinctiveness in packaging. If goods meet this test, they are "specifically identifiable,"⁸⁸ and the test is the same for the purposes of the unilateral and specific selection exception as

80. 15 C.F.R. § 369.3(a-2) (1979).

81. 15 C.F.R. § 369.3(a-2)(1)(i), (3) (1979).

82. 15 C.F.R. § 369.3(a-2)(1)(ii) (1979).

83. 15 C.F.R. § 369.3(b) ex.(ix) (1979).

84. 15 C.F.R. § 369.3(d) (1979).

85. 15 C.F.R. § 369.3(f) (1979).

86. 15 C.F.R. § 369.3(f)(2) (1979).

87. 15 C.F.R. § 369.3(f-2)(6) (1979).

88. 15 C.F.R. § 369.3(c)(17) (1979).

well as the local law exception.⁸⁹

Whether a United States person is a bona fide resident of a boycotting country is a question of fact. The EAR set forth some factors to consider, including physical presence, continuity of and intent to continue the physical presence, prior residence, legitimacy of the presence for business reasons, registration to do business in the country, and existence of presence in other countries under similar circumstances.⁹⁰ It is important not only to the local law exception but also to the exception for unilateral and specific selections. The class of persons whose selections may be observed comprises the boycotting country, nationals of the boycotting country, and residents of the boycotting country.⁹¹ A United States person is a resident only if it is a bona fide resident.⁹²

Here is an example of the interplay among the prohibition against refusals to deal, the unilateral and specific selection exception, and the local law exception. Assume Contractor is a United States person building an airport complex in Egypt. Contractor is, by assumption, a bona fide resident of Egypt. Wholesaler is a supplier of steel products, based in Oklahoma and, for simplicity, unrelated to Contractor. Wholesaler normally obtains I-beams and sinks for Contractor from Steelco, an Illinois manufacturer, when Contractor constructs airport complexes. But, because Steelco is blacklisted, Contractor cannot import its sinks or I-beams into Egypt. Contractor requests Wholesaler to obtain sinks and I-beams from Stainless, a non-blacklisted manufacturer in New York. Also for boycott reasons, Contractor requests Wholesaler to ship the sinks and I-beams with Shipper, a non-blacklisted carrier, although Wholesaler normally ships to Contractor via Boater, a blacklisted carrier. How do the EAR treat Contractor and Wholesaler?

First, the jurisdictional elements must be considered. Contractor and Wholesaler are both United States persons.⁹³ Contractor is ordering goods from the United States to fill a specific order, and Wholesaler is shipping goods from the United States, so the commerce requirement is met for both.⁹⁴ Contractor certainly fulfills the intent requirement and, assuming Wholesaler has reason to know Stainless and Shipper

89. 15 C.F.R. §§ 369.3(c)(16), .3(f-2)(4) (1979).

90. 15 C.F.R. §§ 369.3(f)(3) (1979).

91. 15 C.F.R. § 369.3(c)(1) (1979).

92. 15 C.F.R. § 369.3(f)(2) (1979).

93. 15 C.F.R. § 369.1(b) (1979).

94. 15 C.F.R. § 369.1(d) (1979).

were chosen because Steelco and Boater are blacklisted, Wholesaler also fulfills the intent requirement.⁹⁵

Next, is a prohibition violated? Yes. Both Contractor and Wholesaler are refusing to do business with Steelco and Boater, because they are blacklisted persons.⁹⁶

Finally, is there an applicable exception? Contractor wants to take advantage of the local law exception. Contractor is a bona fide resident of a boycotting country, as stated. The specification of Stainless concerns goods, and the goods are for Contractor's own use in the boycotting country, because they will be permanently affixed to a project Contractor is constructing.⁹⁷ The I-beams, however, are probably not specifically identifiable. The sinks may be—perhaps they are trademarked—and it is assumed here that they are. The local law exception is therefore unavailable for Contractor's selection of Stainless' I-beams but is available for the selection of its sinks.⁹⁸

The specification of Shipper concerns carriage, a service. Since the local law exception only applies to selections of goods, Contractor's selection is not covered.⁹⁹ Thus, Contractor's selection of Shipper violates the prohibition against refusals to deal.

Wholesaler wants to avail itself of the unilateral and specific selection exception. The selections it receives from Contractor come from a resident of the boycotting country, Contractor, which is only a resident because it is a bona fide resident.¹⁰⁰ The selection of Stainless concerns goods and the selection of Shipper concerns carriers, so the subject matter of the selections is eligible for the exception.¹⁰¹ The I-beams are not specifically identifiable by source at the time of import into Egypt; the sinks are. Finally, both selections are unilateral—made by Contractor by itself—and specific—affirmative and singular. Thus, the unilateral and specific selection exception is only available to Wholesaler for the selection of Stainless' sinks and of Shipper as a carrier.¹⁰²

To conform the hypothetical to a typical situation, assume that Contractor and Wholesaler are both wholly-owned subsidiaries of Conglomerate, an Oklahoma corporation. Counsel for Conglomerate

95. 15 C.F.R. § 369.1(e) (1979).

96. 15 C.F.R. § 369.2(a) (1979).

97. 15 C.F.R. § 369.3(f-2)(6)(v) (1979).

98. 15 C.F.R. § 369.3(f-2) (1979).

99. 15 C.F.R. § 369.3(f-2)(8) (1979).

100. 15 C.F.R. § 369.3(f)(2) (1979).

101. 15 C.F.R. § 369.3(c)(1) (1979).

102. 15 C.F.R. § 369.3(c)(1) (1979).

is faced with this conclusion: Contractor may not select I-beams from Stainless and Wholesaler could not comply with the selection; Contractor may select Stainless' sinks and Wholesaler may comply with the selection; and Contractor may not select Shipper but Wholesaler could comply with the selection.

Clearly these facts pose traps for the unwary! Even more paradoxes are in store. Now consider the next major prohibition—the prohibition against supplying boycott-based information.

2. Furnishing Boycott Based Information—the Fourth Prohibition

The fourth prohibition takes aim at one of the most effective tools employed by the Arab nations to strengthen the boycott of Israel. The accumulation of information is essential to the success of the boycott. In order to engage in the secondary boycott, the Arab nations must identify those companies that trade with or in Israel. Otherwise they would not know whom to blacklist. Similarly, the tertiary boycott can succeed only if companies selling to the Arabs confirm that they have not dealt with blacklisted companies.

The accumulation of the necessary data is a monumental task, and the Arab nations have information networks inadequate to compile it. If the network is expanded, though, to include all of the Arab nations' commercial suitors, the task suddenly becomes manageable. This is what the Arab nations have done, and what the fourth prohibition attempts to undo.

The general prohibition as set forth in the EAR, without paragraph numbering, follows:

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: . . . with or in a boycotted country; . . . with any business concern organized under the laws of a boycotting country; . . . with any national or resident of a boycotting country; *or* . . . with any other person who is known or believed to be restricted from having any business relationship with or in a boycotting country.¹⁰³

The regulation continues with an expansive list of what business relationships are, an admonition that the prohibition applies whether or not the information is requested or supplied without request, and the

103. 15 C.F.R. § 369.2(d)(1) (1979).

important qualification that normal business information may nevertheless be supplied in a commercial context.

Before considering the vagaries of the prohibition, a few general rules may be stated.

The phrase “business relationships” is intended to be broad. It contemplates all profit-oriented relationships, presumably unprofitable as well as profitable, including relationships of sale, purchase, supply, legal or commercial representation, shipping or other transportation, insurance, investment, or any other imaginable type.¹⁰⁴

No information may be supplied in response to an inquiry from a boycott office. All inquiries from boycott offices are deemed to be boycott-based and never to arise in a commercial context.¹⁰⁵ For that matter, any inquiry that explicitly reveals a boycott-related purpose should never be answered.

Neither the presence nor the absence of a business relationship may be discussed. It is quite clearly a violation—assuming the satisfaction of the jurisdictional tests—for a United States person, in answer to any question about its business relationships in Israel, to respond that it has none.¹⁰⁶

The requirement that the person about whom information is furnished be a person known or believed to be restricted from having business relationships with the boycotting country¹⁰⁷ is extremely diluted. In fact and in practice, the requirement is nonexistent. The EAR provide the example of a United States company asked to certify that its supplier is not on the boycotting country’s blacklist. The example concludes that the United States company may not respond, because it would be furnishing information about a person believed to be restricted from having business relationships with the boycotting country.¹⁰⁸

This is an odd answer. Suppose the supplier is not blacklisted, and the United States company knows it. If the United States company responded, it would be providing information about a person known not to be restricted. Nevertheless, the United States company may not respond.

Obviously, the intent of the EAA and the EAR cannot support a

104. 15 C.F.R. § 369.2(d)(2)(i) (1979).

105. 15 C.F.R. § 369.2(d)(4) (1979).

106. 15 C.F.R. § 369.2(d) ex.(i) (1979).

107. 15 C.F.R. § 369.2(d)(1)(iv) (1979).

108. 15 C.F.R. § 369.2(d) ex.(x) (1979).

construction of the literal language that would allow responses only if the person about whom the information is furnished is not blacklisted, for that distinction would itself furnish all the information the Arab inquirers need.

In practice, consequently, any requirement that the person about whom information is furnished be known or believed to be restricted from dealing with the boycotting country should be ignored. The rule may be rewritten as a simple imperative: do not furnish information about business relationships with anyone if the purpose of doing so is boycott-related.

Normal business information may be furnished in a commercial context.¹⁰⁹ The obvious example is the company that wants to peddle its wares in untapped territory. Normally it sends its brochure, perhaps an annual report, to prospective customers. A potential buyer evaluating competing suppliers may request an annual report. Even though the report discloses that the hopeful seller has no business in Israel, the report would be normal business information in a commercial context.¹¹⁰ If, therefore, an Arab buyer asks for such a report, the request may normally be honored. Only if the hopeful seller—to whom all of this will matter only if it is a United States person acting in the interstate or foreign commerce of the United States—has reason to believe the information is requested for boycott-based purposes is the seller prohibited from responding.¹¹¹

Normal business information may be much more specific than the annual report. Suppose three United States corporations are the competing finalists for a construction job in Jordan. Each is requested to provide a list of all similar jobs previously performed. Presumably the lists will allow the Jordanian buyer to evaluate the contractors' technical competence; therefore, the lists may be provided. If, however, any of the corporations has reason to know the lists are requested to ascertain whether it has performed construction jobs in Israel, it may not supply its list.

One nagging interpretive problem with the fourth prohibition involves the "self-certification" controversy. In an interpretation appended to the EAR several months after their initial issuance, the Commerce Department announced that it is permissible for a United

109. 15 C.F.R. § 369.2(d)(3) (1979).

110. 15 C.F.R. § 369.2(d) ex.(ii) (1979).

111. 15 C.F.R. §§ 369.2(d)(4), .2(d) ex.(iii) (1979).

States person to certify that it is not blacklisted.¹¹²

The self-certification issue was so controversial that, in initially issuing the EAR, the Commerce Department dealt with it only obliquely, and in a completely different prohibition. The prohibition against implementing letters of credit—the sixth prohibition—forbids any United States person to implement a letter of credit containing a condition with which the beneficiary of the credit may not legally comply.¹¹³ In the notorious example (xiv)¹¹⁴ under that section, a United States bank confirmed a letter of credit requiring the United States beneficiary to certify that it was not blacklisted. The example concluded that, while the bank could not *insist* that the beneficiary certify, the bank could implement the credit. The bank could not insist because it would be violating the prohibition against refusals to do business, not the letter of credit prohibition. The self-certification issue was wholly ignored in the examples under the prohibition against furnishing information. The subsequent interpretation finally attacked the question frontally. Or did it?

In the interpretation, the Commerce Department set forth its view (why it did not amend the EAR is unclear, especially in view of the inapplicability of the Administrative Procedure Act to the rulemaking process¹¹⁵) that a shipper or insurer may certify that it is “eligible” to do business in the boycotting country. No other person, though, could provide this information about the shipper or insurer. Only self-certification is permitted. The Commerce Department finessed the underlying legal issues and cited as sole authority for its interpretation example (xiv) under the letter of credit prohibition. Disingenuously, the Commerce Department noted that furnishing the information offends no prohibition.

Some conjecture about the real reason for this viewpoint seems in order. Many United States companies that deal or have dealt with Israel remain eligible—not blacklisted—to do business with the Arabs. This occurs because the Arabs need the goods these companies sell or because the Arabs are unaware of the companies’ business relationships. If one of these companies certifies that it is not blacklisted, is it furnishing information? The Commerce Department apparently thinks

112. 15 C.F.R. § 369 Appendix (1979).

113. 15 C.F.R. § 369.2(f)(1) (1979).

114. 15 C.F.R. § 369.2(f) ex.(xiv) (1979).

115. 50 U.S.C.A. App. § 2407 (Supp. 1979) (*reinacted* Export Administration Act of 1979, Pub. L. No. 96-72, § 13(a), 93 Stat 503 (1979)).

not: the blacklist is too unreliable an index of companies that do business with Israel. The case for the Commerce Department's interpretation is even stronger if a company certifies to its eligibility. "Why", the average businessman might wonder, ignorant of the boycott ramifications, "would I be ineligible?" As a matter of policy, the Department thinks the certifications should be permitted.

Why then, cannot one businessman say another is eligible or not blacklisted? Again, as a policy matter, the Commerce Department thinks that certification should be prohibited, perhaps because the mere undertaking to provide information about another should alert the provider to the boycott overtones of the information.

By no means does the Commerce Department believe its interpretation immutably accurate. Anyone asked to supply a self-certification should be cautious for several reasons. First, the Department may change its viewpoint—this is suggested by the use of an interpretation rather than of an amended regulation. Second, rarely is a company asked to certify only to its own status. It is asked about its parents, subsidiaries, and other affiliates, and no information may be furnished about their status.¹¹⁶ Third, and the most persuasive reason, the Treasury Department rejects the Commerce Department viewpoint. Providing a self-certification may result in the forfeiture of tax benefits under the Treasury *Guidelines*.¹¹⁷

An important exception to the prohibition against furnishing information is the exception for import and shipping document requirements, the second exception.¹¹⁸

Under the second exception a United States person may comply or agree to comply with certain import and shipping document requirements of a boycotting country. The following information may be supplied, but only in positive, non-blacklisting and non-exclusionary terms: country of origin of goods, names of suppliers, and the names of other service providers. Negative language may be used to supply the name of a carrier of a shipment and to describe a shipping route, but only to provide information to comply with precautionary requirements protecting against war risks or risks of confiscation.¹¹⁹

Here is a simple illustration of the second exception, and the con-

116. 15 C.F.R. § 369.2(d) ex.(xviii) (1979).

117. This will result if the certification is provided in response to a letter of credit requirement. See note 194 *infra* and accompanying text.

118. 15 C.F.R. § 369.3(b) (1979).

119. 15 C.F.R. §§ 369.3(b)(1)-3(b)(2) (1979).

fusion it has borne. Distributor is a New York trader that receives a tender from Iraq, soliciting bids to provide a quantity of shoes. The tender sets forth all the terms of the resulting sales contract, one of which requires that no Israeli goods be supplied. Distributor bids and is awarded the contract.

So far, Distributor has not violated the EAR. It is a refusal to do business with Israel for Distributor to agree to the boycott term, but Distributor is insulated by the exception for import requirements of a boycotting country.

The Iraqi buyer's bank issues a letter of credit in favor of Distributor. The letter of credit requires Distributor to provide certifications that the carrier is not blacklisted, that the carrier does not fly the flag of Israel, that the carrier does not stop in Israel *en route* to Iraq, that the shoes are of United States origin, that the manufacturer of the shoes is not blacklisted, and that the shoes are of non-Israeli origin. How may Distributor respond?

Assuming Distributor is the manufacturer, it may certify that it, the manufacturer, is not blacklisted.¹²⁰ As the Commerce Department says, this offends no prohibition.

Distributor may not certify that the carrier is not blacklisted. The exception would not apply because the certification does not protect against war risks or risks of confiscation.¹²¹

Distributor may certify that the carrier does not fly the flag of Israel and that it will not stop in Israel *en route* to Iraq.¹²² These are war or confiscation risk certifications. Distributor must be sure to distinguish between stopping in Israel before and after the carrier has arrived in Iraq. Since there is no risk that Israel could confiscate the goods after unloading in Iraq, the risk certification must refer to the period when the risk exists.

Distributor may certify that the goods are of United States origin but not that they are non-Israeli.¹²³ Only positive, non-blacklisting, and non-exclusionary language may be used. Thus, Distributor may agree to sell "non-Israeli" goods,¹²⁴ but it may not later certify that the goods are "non-Israeli."

If Distributor had tax benefits it was willing to forfeit, it could

120. 15 C.F.R. § 369 app. (1979).

121. 15 C.F.R. § 369.3(b) ex.(vi) (1979).

122. 15 C.F.R. § 369.3(b) ex.(vii), (ix) (1979).

123. 15 C.F.R. § 369.3(b) ex.(iii) (1979).

124. 15 C.F.R. § 369.3(a-1) ex.(ii) (1979).

fulfill some of the letter of credit conditions somewhat indirectly. Distributor may not certify that the carrier is not blacklisted, but the carrier may. Distributor could request the carrier to provide the self-certification and forward it for presentment to the paying bank.¹²⁵ In no event, however, could Distributor *insist* that the carrier comply; that would be a refusal by Distributor to do business with the carrier.¹²⁶ If Distributor followed this route, it would constitute "participation in or cooperation with" an international boycott under the *Guidelines*, and could expose Distributor to forfeiture of tax benefits.¹²⁷

One of the conditions of the second exception is that the allowable information—in the appropriate form—may be furnished only in response to *import and shipping document requirements* imposed by the boycotting country. Since documentary letters of credit usually call for presentment of import and shipping documents, letter of credit requirements generally suffice for the purposes of the exception.¹²⁸ Laws, regulations, and ordinances certainly are "requirements." Customs and usages of trade may be, if so common as practically to have the force of law. The point is that whether a request stems from a requirement of the boycotting country or from the personal prejudice of a xenophobic customs inspector is an issue that should not be neglected.

The final major issue arising under the prohibition against furnishing boycott information relates to one of the jurisdictional thresholds, the commerce requirement. The interpretive hurdle is easy to spot but difficult to resolve. If a French subsidiary of a United States corporation receives a general boycott questionnaire from Syria, would answering constitute an activity in the interstate or foreign commerce of the United States?

Generally, the EAR are applied transactionally. If the questionnaire relates to no specific transaction, the commerce requirement may not be met. However, the French subsidiary may require information from its United States parent in order to answer the questions. If it obtains the information from its United States parent specifically to answer the questionnaire, the commerce requirement is probably satisfied.¹²⁹ If it has received the information previously, for reasons

125. 15 C.F.R. § 369 app. (1979).

126. 15 C.F.R. § 369.2(f) ex.(xiv) (1979).

127. See note 194 *infra* and accompanying text.

128. 15 C.F.R. § 369.3(b) ex.(xiii) (1979).

129. 15 C.F.R. § 369.1(d)(9) (1979).

unrelated to the questionnaire, the commerce requirement is probably not satisfied.

The answer is not, however, all that certain. The problem is that the section of the EAR concerning the subsequent disposal of services acquired from a person located in the United States refers only to services, not information.¹³⁰ In other sections the EAR refer to "services (including information)."¹³¹ The Commerce Department has not indicated whether the omission of the parenthetical was an oversight or a conscious attempt to dissuade responses to boycott questionnaires.

3. Implementing Letters of Credit—the Sixth Prohibition

If a letter of credit contains a condition with which the beneficiary may not comply, no United States person may implement the letter of credit.¹³² This is true, of course, only if the jurisdictional tests are satisfied.

"Implementing" includes nearly all actions that may be taken with respect to a letter of credit except advising it and transmitting it. It specifically includes, under the EAR, issuing, opening, honoring, accepting, paying, confirming, negotiating, and, just to be sure, any other action taken to implement a letter of credit.¹³³

Because United States persons that are banks are so hamstrung by the prohibition, compliance with the EAR provides an absolute defense to actions to enforce letters of credit. The defense applies only if the defendant complies with the EAR and is thereby precluded from implementing the letter of credit.¹³⁴

For banks located in the United States, the intent requirement will frequently present interpretive problems. Basically, banks are in the business of buying and selling credit and money. They do not trade in any other commodities. Banks are properly unaware of many or most of the underlying contractual arrangements of many deals the banks finance. When a bank confirms a letter of credit and later accepts or pays drafts drawn under the letter of credit, the bank is interested only in the conformity with the conditions of the letter of credit of all documents presented.

Because conformity of documents—not their accuracy or genuine-

130. 15 C.F.R. § 369.1(d)(13) (1979).

131. 15 C.F.R. § 369.1(d)(11) (1979).

132. 15 C.F.R. § 369.2(f)(1) (1979).

133. 15 C.F.R. § 369.2(f)(2) (1979).

134. 15 C.F.R. § 369.2(f)(5) (1979).

ness—is the banks' principal concern, banks are able to provide letter of credit services rather economically. The whole process from issuance through final payment can be handled simply and efficiently by clerks.

It is not hard to imagine the banker's nightmare about the EAR (and the *Guidelines*): how can clerks be trained to notice and evaluate the significance of every term in a letter of credit? If a clerk overlooks a prohibited certification requirement, has the bank violated the EAR?

The Commerce Department's realistic construction of the intent requirement provides some solace to the banker. If a bank implements suitable systems to monitor letters of credit and to detect boycott-related clauses, the bank has properly discharged its duties. Failure to catch an individual prohibited certification will then be treated as a mistake, and the intent requirement will remain unsatisfied.¹³⁵

If a bank is aware that an underlying contract does contain prohibited conditions, the bank may not implement the letter of credit, even if the letter of credit omits the prohibited conditions.¹³⁶ However, this will not be the usual situation, and banks have no duty to inquire about underlying arrangements.

Two jurisdictional tests apply to the analysis of letter of credit transactions. The prohibition applies only if the implementation of the letter of credit meets the commerce test and only if the beneficiary may not comply with a condition of the letter of credit. Whether the beneficiary may comply depends on whether the underlying transaction meets the jurisdictional tests. Thus, while implementation of a letter of credit by a bank located in the United States will always be a transaction in the interstate or foreign commerce of the United States, such a bank must determine whether the underlying transaction meets the jurisdictional tests. The EAR provide a few rebuttable presumptions.

For banks located within the United States, the beneficiary will be presumed to be a United States person if the beneficiary has a United States address as specified by the letter of credit. Otherwise, the beneficiary will be presumed not to be a United States person.¹³⁷

For banks located outside the United States, the underlying transaction will be presumed to meet the commerce test and the beneficiary presumed a United States person if the credit specifies a United States

135. 15 C.F.R. § 369.1(e) (1979).

136. Prohibition Against Implementing Letters of Credit, 15 C.F.R. § 369.2(f) ex.(xvi) (1979).

137. 15 C.F.R. §§ 369.2(f)(7)-2(f)(8) (1979).

address for the beneficiary and calls for documents indicating shipment from the United States or shipment of United States origin goods. If either element is missing—the United States address suggesting the beneficiary is a United States person or the United States origin shipment suggesting the underlying transaction satisfies the commerce test—the underlying transaction will be presumed not to satisfy the jurisdictional thresholds.¹³⁸

The earlier discussion of example (xiv)¹³⁹ under the letter of credit section now deserves further attention. As stated above, the example supposes the satisfaction of the jurisdictional tests and the presence of a self-certification requirement in a letter of credit. A beneficiary may refuse to provide such a certificate for any number of reasons, including its realistic desire to preserve lucrative tax benefits. The bank may not insist that the beneficiary provide the certification. That is as far as the example goes.

Unfortunately, the example ignores the most practical question of all: must the bank pay? If the bank pays, it violates its contract with its customer, the opener of the credit, by accepting inadequate documentation. The EAR provide the bank no defense to improper payment, just refusals to pay. If the bank refuses to pay, is it “insisting” on the self-certification? If so, it will have violated the first prohibition, but that is no help to the beneficiary, for the EAA provides no civil remedies. The bank is in a relentless predicament, and the beneficiary is not better situated. The beneficiary can not sue successfully, because it has not fulfilled the conditions of the credit. Since the beneficiary is allowed by the EAR to provide the self-certification, the beneficiary can not claim legal inability to comply.

Until this maze is unraveled, there is a simple solution for American sellers: do not accept a letter of credit with a self-certification requirement, unless the forfeiture of tax benefits is also acceptable. In many cases, the self-certification provisions can be successfully deleted after negotiations with the Arab customers.

D. Evasion

The EAR apply to any action taken by a United States person with intent to evade their provisions.¹⁴⁰ Any such action, or any assistance

138. 15 C.F.R. §§ 369.2(f)(9)-2(f)(10) (1979).

139. Prohibition Against Implementing Letters of Credit, 15 C.F.R. § 369.2(f) ex.(xiv) (1979).

140. 15 C.F.R. § 369.4(a) (1979).

provided by one United States person to another to violate or evade the EAR, is itself a violation of the EAR.

Evasion or intent to evade is necessarily difficult to describe comprehensively. A few general rules are provided, and they are discussed here.

First, repeatedly taking advantage of the exceptions to the prohibitions does not constitute evasion.¹⁴¹ Thus, a United States person selling goods or services in Egypt may always refuse to sell Israeli goods or services in Egypt.

Second, 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 . . . will be regarded as evasion."¹⁴²

Third, rearrangement of the structure of a United States person's business relationships with or in Arab countries or Israel will not constitute evasion if undertaken for legitimate business reasons and not solely to avoid the EAR.¹⁴³

One artifice, scheme, or device envisaged by the EAR is the now famous "Aramco clause." Before the effective date of the EAR, Aramco introduced into its procurement contracts a clause providing that its suppliers retained the risk of loss until the goods had arrived in the boycotting country and had cleared customs. Thus, while Aramco would not refuse to purchase goods from blacklisted companies, blacklisted companies would hesitate to sell to Aramco.

Under the anti-evasion section, the introduction of an Aramco or "risk of loss" clause after the effective date, January 18, 1978, will be presumed to be evasion. The presumption may be overcome by a demonstration that the clause is applied evenhandedly and customarily, without distinction between boycotting and non-boycotting countries, or that the clause has been in use since before the effective date.¹⁴⁴

Perhaps the most common form of evasion is the shifting of business to foreign subsidiaries. If a French subsidiary of an American corporation manufactures its products solely with French origin goods and sells them without performance guarantees supplied by the parent, most of its transactions will not satisfy the commerce test. But if the United States parent directs business inquiries to the subsidiary to

141. 15 C.F.R. § 369.4(b) (1979).

142. 15 C.F.R. § 369.4(c) (1979).

143. 15 C.F.R. § 369.4(e) (1979).

144. 15 C.F.R. § 369.4(d) (1979).

avoid the prohibitions of the EAR, the parent will have violated the EAR.¹⁴⁵

E. Reporting Requirements

All United States persons must report the receipt of any requests “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,” provided the commerce requirement is satisfied.¹⁴⁶ The reporting requirements are comprehensive, though not terribly complicated.

The issues that arise in applying the reporting requirements are discussed below. They include: (i) what is a reportable request, (ii) from whom may a reportable request be received, (iii) when is a reportable request received, (iv) what requests are not reportable, (v) how and when are reportable requests reported, and (vi) what information is exempt from public disclosure.

1. What Is a Reportable Request?

a. Request Defined

A “request” is very broadly defined and is intended to cover any communication that asks, suggests, or directs a person to take any action which has the effect of furthering or supporting a boycott. A request may be oral or written. It may be a solicitation, directive, legend, or instruction.¹⁴⁷ General information that describes import requirements of a boycotting country does not constitute a request.¹⁴⁸ For example, an American exporter may obtain publications discussing trade with the boycotting countries, which may reveal that imported goods must be certified to be “non-Israeli.” The exporter has not received a request.¹⁴⁹

An action taken in anticipation of the receipt of a request may not constitute a request.¹⁵⁰ If, for example, a United States exporter inten-

145. 15 C.F.R. § 369.4(e) (1979).

146. 15 C.F.R. § 369.6(a)(1) (1979).

147. *Id.*

148. 15 C.F.R. § 369.6(a)(4) (1979).

149. 15 C.F.R. §§ 369.6(a)(4), .6 ex.(xii) (1979).

150. Preamble to 15 C.F.R. § 369.6 (1978). But, information given to forestall the receipt of a request that the United States person knows it will receive is equivalent to the receipt of a request and is therefore reportable as such.

tionally purchases non-Israeli goods to sell to Egyptian buyers, without having been requested to do so, the exporter has received no reportable request.

b. Exceptions Irrelevant

Because the reporting program endeavors to keep the Commerce Department well-informed on international boycott activity, it is irrelevant that a request may be covered by one of the exceptions to the prohibitions.¹⁵¹ For example, a request to a United States person to refuse to import Israeli goods into Egypt is reportable, because it would have the effect of furthering a boycott, despite the fact that the United States person could agree to the request.

c. Effect of the Request

Whether the effect of any particular request would be to further or support an unsanctioned boycott is a question of fact, but not usually a difficult one. In some instances, however, United States persons receiving requests must read between the lines to determine the potential effect.

Suppose Seller, an Oklahoma corporation engaged in the worldwide marketing of tractors, receives a purchase order from a Syrian buyer for ten Farmco tractors. If Seller knows or has reason to know Farmco is chosen because it is not blacklisted, Seller has received a reportable request.¹⁵² Seller may probably comply with the buyer's unilateral and specific selection, but it must report the request to the Commerce Department.

d. The Commerce Requirement

If a request is received in connection with a particular transaction, the request is reportable if the transaction is in the interstate or foreign commerce of the United States.¹⁵³

Some requests, however, relate to no particular transactions. A general boycott questionnaire may be dispatched to all companies selling certain goods, so that the central boycott office can compile a list of eligible companies for later use. The rule is that such a request is reportable if the recipient has or anticipates having any business relation-

151. 15 C.F.R. § 369.6(a)(1) (1979).

152. 15 C.F.R. §§ 369.6(a)(2), .6 ex.(ii) (1979).

153. 15 C.F.R. § 369.6(a)(2) (1979).

ship in a boycotting country that would satisfy the commerce threshold.¹⁵⁴ While the term “anticipates” is not defined, it should be interpreted as including “hopes for,” no matter how dim the prospects.¹⁵⁵

Inexplicably, the Commerce Department does not specify that the country in which the United States person has or anticipates having a business relationship must be the same country from which the request originates. It appears, however, that a request received from Egypt must be reported only if the United States person has or anticipates having business in Egypt.¹⁵⁶

2. From Whom Received?

The easy answer is anyone. A U.S. corporation may instruct its U.S. freight forwarder to compile all documents required by the relevant letter of credit. If one of the required documents is a certificate of non-Israeli origin, the corporation has made a request—and violated the prohibition against furnishing information—and the freight forwarder has received a reportable request.¹⁵⁷

3. When Received?

Generally, a request is received when it is actually received, but there are a few special rules.

If, during pre-contract negotiations, a United States person receives a reportable request, it is deemed received at the end of the negotiations. The negotiations may terminate, or conclude successfully, but in neither event is the reporting requirement triggered until the negotiations have ended. The reporting program does not interrupt negotiations.¹⁵⁸

In the example of the freight forwarder given above, the freight forwarder has received the request when it has compiled the requested documentation, even if it provides a positive certificate of U.S. origin.¹⁵⁹

154. 15 C.F.R. § 369.6(a)(2)(iii) (1979).

155. 15 C.F.R. § 369.6 ex.(x) (1979).

156. 15 C.F.R. § 369.6 ex.(viii) (1979).

157. 15 C.F.R. § 369.6 ex.(xiii) (1979).

158. 15 C.F.R. § 369.6 ex.(xxvi), (xxvii) (1979).

159. 15 C.F.R. § 369.6 ex.(xiii), (xv) (1979).

4. Some Non-Reportable Requests

For purposes of administrative convenience, the Commerce Department has waived the reporting requirements for the following requests: (i) requests to provide war or confiscation risk certification, (ii) requests for positive certifications of origin, (iii) requests for positive identification of the names of suppliers, manufacturers, or other service-providers, (iv) requests to comply with the laws of a boycotting country that do not expressly refer to the country's boycott laws, (v) requests for affirmative certification of the destination of exports, and (vi) requests to an individual to supply information about himself or his family for immigration, passport, visa, or employment purposes.¹⁶⁰

5. How and When to Report?

Reportable requests are reported to the Commerce Department on forms it provides. Two forms are available, one to report individual requests and one for multiple requests. The reporting person can use whichever form it finds more convenient.¹⁶¹

Often a request is repeated several times during the course of a particular transaction. In a sale of goods delivered in installments, for example, the seller may draw several drafts against a letter of credit, each draft to be accompanied, according to the credit, by the same negative certificate of origin. Or a request for an agreement to sell no goods of Israeli origin may appear in a tender and again in a related letter of credit. The rule is that each separate request must be reported, but only once, the first time it is received.¹⁶²

Copies of the relevant pages of the documents containing reportable requests must accompany the reports.¹⁶³ If a request is received orally, the recipient should prepare a transcript and file it with the report.¹⁶⁴

Before June 30, 1979, the reporting forms had to be filed by the end of the month following the month in which the request is received. If, however, the reporting person is located outside the United States, the form had to be filed by the end of the second month following the

160. 15 C.F.R. § 369.6(a)(5) (1979).

161. 15 C.F.R. § 369.6(b)(5) (1979).

162. 15 C.F.R. § 369.6(b)(1) (1979).

163. 15 C.F.R. § 369.6(b)(7) (1979).

164. Form ITA-621P (Rev. 8-78), Item 8. This is the form used to report single boycott requests to the Commerce Department. See 15 C.F.R. § 369.6(b)(5)(1979).

month of receipt.¹⁶⁵

For requests received after June 30, 1979, reports will be filed quarterly. Persons located in the United States must file by the end of the first month following the quarter of receipt. Persons located outside the United States have until the end of the second month following the quarter of receipt.¹⁶⁶

Reports filed by mail are deemed filed with the Commerce Department according to postmark. As long as the report is postmarked by the last day of the month, the report is considered punctually filed.¹⁶⁷

Although every United States person is legally required to report on its own behalf, it is permissible to designate another person to file the reports. The designation does not, however, relieve the recipient of a request of its own filing obligations. Typically, a foreign subsidiary may appoint its United States parent to report on its behalf, or an United States exporter may designate its freight forwarder or bank to report on its behalf. Still, each recipient of a reportable request must report or have a report filed for that request.¹⁶⁸

6. Public Disclosure

Except for certain proprietary information that may be withheld, the reports and corresponding documentation filed with the Commerce Department are freely available for public inspection.

The proprietary information that may be withheld is data relating only to quantity, description or value of any articles, materials, supplies, and technical data or other information.¹⁶⁹ In order to preserve confidentiality, additional copies of documents should be cleansed of this proprietary information, conspicuously labelled "Public Inspection Copy," and filed with the report to Commerce.¹⁷⁰

The Commerce Department will release no proprietary data unless it determines either that disclosure would not place the reporting person at a competitive disadvantage or that withholding the data would be contrary to the national interest.¹⁷¹

165. 15 C.F.R. § 369.6(b)(4) (1979).

166. *Id.*

167. *Id.*

168. 15 C.F.R. §§ 369.6(b)(2)-6(b)(3) (1979).

169. 15 C.F.R. § 369.6(c)(1) (1979).

170. 15 C.F.R. § 369.6(c)(2) (1979).

171. 15 C.F.R. § 369.6(c)(1) (1979).

In the event the Commerce Department is requested to release proprietary data, it will provide to the reporting person advance notice and opportunity to comment.¹⁷²

No proprietary data other than quantity, description, or value may be kept confidential. Reports filed with excessively cleansed documents will be rejected by the Commerce Department.

F. Penalties

The Commerce Department has at its disposal a powerful arsenal to penalize violations of the EAR.

Criminal penalties, for knowing or intentional violations, are severe. Criminal offenses merit a fine of \$50,000 or three times the value of the goods or services involved, whichever is greater, or five years in jail, or both.¹⁷³

Civil penalties may be equally severe. A fine of \$10,000 may be assessed for each violation,¹⁷⁴ and it is possible that the fine for delinquent reporting may be assessed daily.

The Commerce Department also has authority to seize goods that are being exported from the United States in transactions that violate the EAR. Seized goods may be forfeited to the United States or, at the Department's sole discretion, remitted to the violator.¹⁷⁵

The most devastating civil penalty is the suspension or revocation of export privileges.¹⁷⁶ Under the Export Administration Act, an export license is required to export anything from the United States. (Such licenses are usually automatic, requiring no Commerce Department approval.) Further, goods or information exported from the United States may be restricted from re-export. For example, a product sent to Germany may be prohibited from re-export to South Africa. If the German recipient re-exports in violation of this condition, it will be penalized by the Commerce Department. It will be ineligible to participate in any manner in any transaction subject to United States ex-

172. *Id.*

173. 50 U.S.C.A. App. § 2405(a) (Supp. 1979) (*reinstated*, Export Administration Act of 1979, Pub. L. No. 96-72, § 11(a), 93 Stat. 503 (1979)). Before October 1, 1979, first offenders could receive a lighter penalty of a \$25,000 fine or one year in jail, or both. *Id.*

174. 50 U.S.C.A. App. § 2405(c)(1) (Supp. 1979) (*reinstated*, Export Administration Act of 1979, Pub. L. No. 96-72, § 11(c)(1), 93 Stat. 503 (1979)).

175. 22 U.S.C. § 401 (1976), made applicable by 15 C.F.R. § 387.1(b)(4) (1979).

176. 50 U.S.C.A. App. § 2405(c)(2)(A) (Supp. 1979) (*reinstated*, Export Administration Act of 1979, Pub. L. No. 96-72, § 11(c)(2)(A), 93 Stat. 503 (1979)).

port laws, for the duration of the suspension period, or permanently.¹⁷⁷

As a practical matter, United States persons cannot escape the EAR simply by being outside of the United States, out of the jurisdiction of U.S. courts. Though it remains to be seen whether an American based United States person who controls in fact a United States person located outside the United States may be penalized for violations committed by its controlled-in-fact foreign United States person, the threat of revocation of the export privileges of the foreign United States person is very real and convincingly coercive.

Judicial review of enforcement decisions of the Commerce Department depends on the action taken. If the Commerce Department administratively assesses a monetary civil penalty, it can collect the penalty by suing for enforcement in any federal district court having personal jurisdiction over the alleged violator. In such a suit all issues upon which liability is predicated are tried *de novo*, thus availing the alleged violator of an opportunity for judicial review.¹⁷⁸

Judicial review of other administrative actions is somewhat unclear. As a general proposition, the Administrative Procedure Act (APA)¹⁷⁹ is inapplicable to rules, regulations, and orders issued pursuant to the Export Administration Act.¹⁸⁰ Administrative enforcement proceedings must comply with those sections of the APA regarding adversarial proceedings,¹⁸¹ but the section of the APA regarding the standard of review of administrative actions is expressly inapplicable.¹⁸² While this does not imply that judicial review is unavailable, the reviewing standards may remain a mystery for some time.

IV. AN OUTLINE OF THE ANTIBOYCOTT SECTIONS OF THE INTERNAL REVENUE CODE

The antiboycott sections added to the Internal Revenue Code (Code) by the TRA are as tantalizingly elusive as the EAR. To avoid doubling the length of this article, however, the following explanation

177. 15 C.F.R. § 388.1(a) (1979).

178. 50 U.S.C.A. App. § 2405(f) (Supp. 1979) (*reinstated*, Export Administration Act of 1979, Pub. L. No. 96-72, § 11(f), 93 Stat. 503 (1979)).

179. 5 U.S.C. §§ 551-576 (1976).

180. 50 U.S.C.A. App. § 2407 (Supp. 1979) (*reinstated*, Export Administration Act of 1979, Pub. L. No. 96-72, § 13(a), 93 Stat. 503 (1979)).

181. 50 U.S.C.A. App. § 2405(c)(2)(B) (Supp. 1979) (*reinstated*, Export Administration Act of 1979, Pub. L. No. 96-72, § 11(c)(2)(B), 93 Stat. 503 (1979)).

182. 50 U.S.C.A. App. § 2407 (Supp. 1979) (*reinstated*, Export Administration Act of 1979, Pub. L. No. 96-72, § 13(a), 93 Stat. 503 (1979)).

is in outline form. Readers interested in greater detail may refer to any of the explanations that have been published, including this author's article, *International Boycott Rules—Identification of Problems*.¹⁸³

A. Thresholds

1. There are no jurisdictional requirements as such. Any U.S. taxpayer who has foreign tax credits, DISC benefits, or who is a "United States shareholder" of a "controlled foreign corporation" may lose tax benefits.
2. The key to the loss of tax benefits is "participation in or cooperation with an international boycott."¹⁸⁴
3. The participation or cooperation may be committed by the U.S. taxpayer, any member of the same "controlled group,"¹⁸⁵ or by any other person whose activities produce foreign tax benefits for the United States taxpayer.

B. Participation in or Cooperation with an International Boycott

1. *Agreements* are the sole events of significance; actual participation or cooperation is relevant only insofar as it supports the inference of the existence of an agreement.
2. A person participates in or cooperates with an international boycott by entering one or more of five specified types of agreements. They are:
 - (a) Agreements to refrain from doing business with or in the boycotted country or with the government, companies or nationals of the boycotted country.¹⁸⁶
 - (b) Agreements to refrain from doing business with a United States person¹⁸⁷ engaged in trade in the boycotted country or with the government, companies or nationals of the boycotted country (for convenience, such United States persons are referred to as "black-listed").¹⁸⁸
 - (c) Agreements to refrain from doing business with companies owned or managed by persons of a particular race, religion, or nationality, or to remove or refrain from selecting corporate directors

183. [1978] TAX MNGM'T (BNA) Memorandum 78-10.

184. I.R.C. § 999(b)(3).

185. As defined in I.R.C. § 993(a)(3).

186. I.R.C. § 999(b)(3)(A)(i).

187. As defined in I.R.C. § 7701(a)(30).

188. I.R.C. § 999(b)(3)(A)(ii).

of a particular race, religion or, nationality.¹⁸⁹

(d) Agreements to refrain from employing persons of a particular race, religion, or nationality.¹⁹⁰

(e) Agreements made by the seller of goods to a boycotting buyer to refrain from shipping the goods on blacklisted carriers or insuring the goods with blacklisted insurers.¹⁹¹

3. These agreements must be made "as a condition of doing business directly or indirectly within a [boycotting] country or with the government, a company, or a national of a [boycotting] country"¹⁹² or, in the case of the fifth type, made as a condition of the sale of the goods.¹⁹³
4. Agreements are inferred from conduct. They need not be explicit and need not be in writing. Generally, furnishing information does not support the inference of an agreement, unless the information is furnished in exchange for some present economic benefit, or unless the furnishing of information is accompanied by conduct suggesting the existence of an agreement. Some examples:

(a) A letter of credit is deemed part of the underlying contract, even if it is issued some time after the contract is executed.¹⁹⁴ A certification that the goods are not made by a blacklisted company manifests, then, a prior agreement to refrain from buying goods from a blacklisted company. A certification that the beneficiary is not blacklisted manifests an agreement to do nothing that can cause it to become blacklisted, such as dealing with Israel.

(b) A bank makes an agreement by implementing (excludes advising) a letter of credit containing conditions with which the beneficiary may not comply without being considered to have participated or cooperated. It is seen as agreeing to refrain from doing business with beneficiaries that cannot or will not supply certifications. This applies only if the beneficiary is in the protected class: United States persons, boycotted country persons, or persons unable to certify due to reason of race, religion, or nationality.¹⁹⁵

189. I.R.C. § 999(b)(3)(A)(iii).

190. I.R.C. § 999(b)(3)(A)(iv).

191. I.R.C. § 999(b)(3)(B).

192. I.R.C. § 999(b)(3)(A).

193. I.R.C. § 999(b)(3)(B).

194. *New Boycott Guideline* H-8, 43 Fed. Reg. 3454, 3463 (1978).

195. *New Boycott Guideline* H-29A, H-29B, 43 Fed. Reg. 3454, 3465 (1978).

(c) A certification, during pre-contract negotiations, that the United States seller is not blacklisted is not an agreement. An undertaking to recertify at a later date is an agreement.¹⁹⁶

(d) Furnishing a certificate to customs officials at the time of import that goods are not made by blacklisted manufacturers is not an agreement. Undertaking in advance to provide such a certificate is an agreement.¹⁹⁷

(e) If a contract provides that local law "applies," there is no agreement.¹⁹⁸ If the contractor agrees to "comply" with local law and local law includes boycott requirements, there is an agreement.¹⁹⁹

5. The agreement must generally be made as a condition of doing business with or in the boycotting country or with its government, companies or nationals, directly or indirectly.

(a) A shipowner may require a charterer to avoid ports of the boycotted country. The agreement is not a condition of doing business with the government, companies, or nationals of the boycotting country.²⁰⁰

(b) If a United States seller of goods to a boycotting country buyer asks and a United States manufacturer agrees to purchase raw materials from a non-blacklisted United States persons, both have made an agreement.²⁰¹

6. The agreement must generally be to refrain from doing business with persons in the protected class.

(a) A bank is not doing business with a company whose securities the bank trades on secondary markets.²⁰²

(b) A bank is doing business with companies whose securities the bank purchases directly from the companies.²⁰³

(c) Thus, banks that administer portfolios for boycotting country persons and have authority to purchase original issues participate or cooperate if they agree to refrain from purchasing from blacklisted companies, boycotted country companies, or companies whose

196. *New Boycott Guideline* H-17, 43 Fed. Reg. 3454, 3464 (1978).

197. *New Boycott Guideline* H-32, 43 Fed. Reg. 3454, 3465 (1978).

198. *New Boycott Guideline* H-3, H-7, 43 Fed. Reg. 3454, 3462, 3463 (1978).

199. *New Boycott Guideline* H-4, H-7, 43 Fed. Reg. 3454, 3463 (1978).

200. *New Boycott Guideline* H-27, H-28, 43 Fed. Reg. 3454, 3465 (1978).

201. *New Boycott Guideline* H-34, 43 Fed. Reg. 3454, 3465 (1978).

202. *New Boycott Guideline* J-5, J-6A, 43 Fed. Reg. 3454, 3466 (1978).

203. *New Boycott Guideline* J-6B, 43 Fed. Reg. 3454, 3466 (1978).

owners or manufacturers are of a particular race, religion, or nationality.

7. Agreements designed to protect the boycotting country buyer from war risks or risks of confiscation of goods are permitted.²⁰⁴

C. Exceptions

1. There are three exceptions. The following agreements may be made with no tax penalty:
 - (a) Agreements to support U.S. sanctioned boycotts, such as the U.S. boycott of Rhodesia.²⁰⁵
 - (b) Agreements to comply with requirements prohibiting the import of goods from the boycotted country into the boycotting country.²⁰⁶
 - (c) Agreements to comply with requirements prohibiting the export of goods from the boycotting country to the boycotted country.²⁰⁷
2. The import exception only covers goods imported from the boycotted country. It does not (unlike the EAR) cover services. It also does not (unlike the EAR) permit agreements to refrain from importing goods from locations outside the boycotted country, even if the goods are manufactured by companies of the boycotted country.

D. Calculation of Tax Penalties

1. International Boycott Factor (IBF)—the IBF is a fraction that reflects boycott-tainted operations as a percentage of worldwide foreign operations.²⁰⁸
 - (a) The numerator reflects purchases, sales, and payrolls from all boycott-tainted operations.
 - (b) The denominator reflects purchases, sales, and payrolls from all foreign operations.
 - (c) The IBF is multiplied by the foreign tax credit otherwise

204. *New Boycott Guideline M-5*, 43 Fed. Reg. 3454, 3468 (1978).

205. I.R.C. § 999(b)(4)(A).

206. I.R.C. § 999(b)(4)(B).

207. I.R.C. § 999(b)(4)(C).

208. I.R.C. § 999(c)(1), *See* T.D. 7467, 1977-1 C.B. 243.

allowable. The result is the tax credit disallowance.²⁰⁹

(d) The IBF is multiplied by the non-Subpart F income of all "controlled foreign corporations" of which the taxpayer is a "United States shareholder." The result is additional Subpart F income.²¹⁰

(e) The IBF is multiplied by the DISC deferral and the result is additional income deemed distributed to the DISC's shareholders.²¹¹

2. Specific Attribution Method

(a) This is an alternative to the IBF method. It may be elected by a taxpayer at its option in any taxable year.²¹²

(b) To apply this method, the taxpayer identifies specific operations and traces the income earned and foreign taxes paid. All income earned from tainted operations is recognized as additional Subpart F income or DISC income, and all foreign tax credits arising from tainted operations are lost.²¹³

3. Determination of Tainted Operations

(a) Whichever method of calculating tax benefits lost is used, it is presumed by statute that all operations by all members of the same "controlled group" *in* the same country and *in* all other countries that support the same boycott are tainted if any such operation is tainted.²¹⁴

(b) The presumption may be overcome. The taxpayer must clearly demonstrate that "a particular operation is a clearly separate and identifiable operation from the operation in connection with which the agreement was made, and that no agreement constituting participation in or cooperation with an international boycott applied to, or was made in connection with, such separate and identifiable operation."²¹⁵

(c) Operations to which the presumption does not apply—including operations "related to" a boycotting country or its government, companies, or nationals—are evaluated on a case by case basis.²¹⁶

(d) The countries that have joined in the boycott of Israel are

209. I.R.C. § 908(a).

210. I.R.C. § 952(a)(3).

211. I.R.C. § 995(b)(1)(F).

212. I.R.C. § 999(c)(2).

213. *New Boycott Guideline F-8*, 43 Fed. Reg. 3454, 3462 (1978).

214. I.R.C. § 999(b)(1).

215. *New Boycott Guideline D-1*, 43 Fed. Reg. 3454, 3458 (1978).

216. *Id.*

Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, Yemen Arab Republic, and Peoples Democratic Republic of Yemen.²¹⁷ However, the statutory presumption also applies to non-listed countries that require participation in or cooperation with the boycott.

E. Reporting Requirements

1. IRS Form 5713 is filed as part of the annual tax return.
2. The following persons must file the report:
 - (a) A United States person with operations in or related to a boycotting country.
 - (b) A United States person that is a member of a "controlled group" any member of which has operations in or related to a boycotting country.
 - (c) A "United States shareholder" of a foreign corporation (whether or not it is a controlled foreign corporation) that has operations in or related to a boycotting country.
 - (d) A United States person who is a partner of a partnership that has operations in or related to a boycotting country.
 - (e) A United States person treated as the owner of a trust that has operations in or related to a boycotting country.
 - (f) A person not a United States person who otherwise meets the above requirements and who claims a foreign tax credit or owns stock of a DISC.
 - (g) A person in control (as determined under Code Section 304(c)) of a corporation that has operations in or related to a boycotting country must report for the corporation, and the corporation must report for the person.²¹⁸
3. A boycotting country is one listed by the Treasury or that otherwise requires participation or cooperation. The listed countries are specified above.
4. The following information must be reported.
 - (a) All operations in or related to boycotting countries.
 - (b) All requests for participation in or cooperation with an international boycott.
 - (c) All participation in or cooperation with an international

217. 44 Fed. Reg. 57001 (1979).

218. *New Boycott Guideline A-1*, 43 Fed. Reg. 3454 (1978).

boycott.²¹⁹

5. Waivers of Reporting Requirements.

(a) Requests for participation or cooperation need not be reported if they are neither solicited nor responded to in any manner.²²⁰

(b) Operations "related to" a boycotting country need not be reported if the person having the operation neither receives a request to participate in or cooperate with an international boycott and if the facilitation of participation or cooperation by someone else is not a principal purpose of the operation.²²¹ An operation "related to" a boycotting country is one

carried on outside a boycotting country for the government, a company, or a national of a non-boycotting country if the person having the operation knows or has reason to know that the specific goods, services or funds produced by the operation are intended for use in a boycotting country, for use by or the benefit of the government, a company or a national of a boycotting country, or use in forwarding or transporting to a boycotting country.²²²

(c) Incidental contacts—an operation "with" the government, companies, or nationals of a boycotting country need not be reported if:

- (i) all aspects of the operation take place outside the boycotting country;
- (ii) no request to participate or cooperate is received;
- (iii) the person does not participate or cooperate; and
- (iv) either (A) the value of property or funds involved is less than \$5,000 or (B) the operation does not involve the importation of goods or services into the boycotting country.²²³

(d) Other waivers are provided by the Treasury, chiefly to ease reporting requirements for controlled groups and large partnerships, and are included in Part A of the *Guidelines*.

219. I.R.C. § 999(a).

220. *New Boycott Guideline* A-15, 43 Fed. Reg. 3454, 3456 (1978).

221. *New Boycott Guideline* A-11, 43 Fed. Reg. 3454, 3455 (1978).

222. *New Boycott Guideline* B-1, 43 Fed. Reg. 3454, 3458 (1978).

223. *New Boycott Guideline* A-20, 43 Fed. Reg. 3454, 3457 (1978).

6. Criminal Penalty

Code Section 999(f) provides for a criminal penalty of up to \$25,000 and/or one year in jail for willful failure to adhere to the reporting requirements.

V. SUGGESTIONS FOR FORMULATING A COMPLIANCE SYSTEM

Perhaps the greatest error that can be committed in the development of a compliance system is over-explanation. Upon reflection, the attorney will realize that the compliance system must serve a deterrent, not educational, purpose. It is enough to train employees to stop dead in their tracks when an antiboycott law problem arises. They need not be trained to solve the problem, nor need they be trained to understand why the problem exists.

With this in mind, any information the attorney prepares for distribution to a client's employees should have three essential characteristics: simplicity, clarity, and brevity. The information must be simple, or it will either confuse employees or instill in them a false sense of security. It must be clear, for reasons too obvious to recite. It must be brief, or it will be ignored.

Clarity and brevity are primarily the products of good writing. Constant redrafting, solicitation of constructive criticism, and empathy for the readers' perspectives all contribute to these essential qualities. Simplicity may be the hardest of the goals to achieve. These are no consistent rules, but here are a few observations.

First, simplicity is enhanced in direct proportion to the amount of inessential information omitted. Is it necessary to explain to a shipping clerk for an Oklahoma corporation that his employer is a "United States person," having first laboriously defined the term? Of course not. "You are subject to this law" is quite sufficient. It is equally ludicrous to imbue the shipping clerk with an academic appreciation of the breadth of the "interstate or foreign commerce of the United States."

The shipping clerk should know, on the other hand, that negative certificates of origin are prohibited, that certificates using blacklisting or exclusionary language are prohibited, and that certifications concerning the registry, ownership, or routes of vessels should be brought to the attention of a supervisor competent to evaluate their consequences under the antiboycott laws.

Second, simplicity is enhanced in direct proportion to the number of provisos deleted from an explanation. The problem with provisos is

that they demand too much thought from employees who should be trained to react, not evaluate.

Examine this sentence: "No information may be conveyed about the company's business relationships in Israel, provided, however, that normal business information may be conveyed in a commercial context." The sentence is complete but the idea is not, and the employee must reflect further to comprehend the instructions. The proviso, nevertheless, is significant. Instead of omitting it, rephrase it, with a proper foundation. Early in the explanation, the writer should explain the rudiments of an international boycott and the dependency of a boycott on information about business relationships of various companies. Equipped with a basic appreciation of the goals of the antiboycott laws, the employee can understand this:

In general you may not answer questions about the company's business in Israel. Sometimes, though, you will be asked general questions about the company's business. If your answer would reveal whether or not the company has done business in Israel, ask yourself why the question was asked. If you believe the person who asked the question only wants to determine the company's competence, you may answer. Do not answer if you even suspect the person is trying to find out if the company has done business in Israel.

Granted, it is not brief, but it is simple and will produce the desired result.

Checklists and explanatory guidebooks are two of the most useful documents that can be prepared. Checklists should be distributed to employees who deal with standard forms on a regular basis. Explanatory guidebooks should be dispensed to executives and other employees, such as salespersons, who must react, often intuitively, to less structured situations.

Checklists are probably the more difficult of the two to prepare. Ideally, a checklist should be completely unambiguous and require no effort to apply. A series of closed-end questions will suffice, but the series must be comprehensive.

In preparing a checklist for the evaluation of letters of credit, for example, imagine every conceivable way a letter of credit might require the recipient to report to the Commerce Department. List each possibility in the form of a question asking for a yes or no answer. Instruct the employee who reviews letters of credit to complete the checklist for each credit. If all the answers are negative, further review will be un-

necessary. If any answer is affirmative, the employee will refer the letter of credit for review by the attorney.

Guidebooks, on the other hand, should acquaint the employees with the antiboycott laws in a very general manner. Adopt a conservative approach. Do not indulge in a lengthy exposition on the requirements of, for example, the unilateral and specific selection exception. Inform the salespersons that requests by Arab buyers for specific brands of goods may be boycott-based. Sensitive to this possibility, the salespersons will know to refer these requests to the attorney for review and will be able to respond diplomatically to the prospective customer.

This approach may frustrate field personnel, because they may initially resent being forced to frequently contact the attorney for assistance. There is no cure for the problem but there is a palliative. The attorney should be available and prepared. The attorney should have checklists available, so that most inquiries can be handled quickly.