Business Transactions Solutions § 273:38

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Part XI. Going Global: Building an International Business
B. Global Compliance Programs
Chapter 273. Antiboycott Compliance
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§ 273:38. Executive summary for clients regarding antiboycott law compliance

§ 1. Introduction

An antiboycott law compliance program presents special challenges in that it requires awareness and cooperation from a number of different functions and business units. Obviously managers and employees continuously involved in business transactions with boycotting countries need to be knowledgeable about what is and is not permitted under the antiboycott laws and regulations. However, since requests for information regarding the company's business activities may be diverted to other departments, such as accounting and human resources, the company must establish procedures for making sure that responses do not violate the regulations. Moreover, personnel must be trained to respond quickly and correctly to the reporting obligations.

Design and implementation of antiboycott compliance should begin with designation of a senior manager to oversee the entire compliance effort including training programs, reporting procedures, creation and maintenance of compliance manuals and policies, and audit of compliance procedures. The duties and reporting obligations of this manager, often referred to as a "compliance officer," should be carefully spelled out and the manager should be given sufficient financial and other resources to carry out his or her obligations. The organizational structure for the antiboycott compliance initiative should be described in written compliance policies and explained to employees during training sessions so that they have a better understanding of who they should go to in the event that questions or issues arise with respect to the compliance.

Since the Antiboycott Regulations are administered and enforced by the BIS, it is common for responsibility for compliance to be handled by the same group or department that coordinates export compliance matters. While this general makes sense, it should not be forgotten that a comprehensive compliance program will address and satisfy both sets of applicable legal and regulatory requirements administered by two different agencies: the BIS and the Treasury Department. Accordingly, procedures should be established to coordinate the preparation and delivery of reports to both agencies and all regulatory reports should be collected in one place and maintained along with all other information (e.g., boycott-related requests) necessary to fulfill the recordkeeping requirements imposed by the agencies. In order for this to occur, a task force of representatives from the export compliance, finance and tax groups should be formed to ensure the necessary coordination.

§ 2. Preliminary risk assessment

While antiboycott compliance, like other compliance areas, is important, companies are constrained in the resources they can devote to their antiboycott compliance programs. It is therefore important to begin with identifying the most significant risks for the company and investing the most resources in monitoring activities and transactions most likely to harbor compliance problems. The first thing to consider is where the company will be doing business. If the company will be doing a significant amount of business with countries involved in an unsanctioned boycott, such as participants in the Arab League boycott of

Israel, activities and transactions involving those countries should be placed on a "Red Flag" list and given priority attention in the compliance process. Second, attention should be paid to independent agents of the company, such as freight forwarders and customs agents, who may take actions on behalf of the company, such as executing documents, that might violate antiboycott prohibitions. Third, as discussed below, employees of the company working in foreign subsidiaries which have been established in, or do business with, countries on the Red Flag list need to be alerted to the issues that are raised by the need to comply with antiboycott laws and regulations and should be required to forward all potential boycott-related request to experts in the headquarters office for review and instruction.

Scarce resources should be focused on the types of relationships and transactions most likely to include boycott-related requests from other parties, such as the first transaction with a new customer from an Arab League country, since this is the point where the customer will be looking to see if the company is willing to comply with the customer's boycott-related requirements; negotiation of supply contracts that include boycott-related requirements; entry of goods into an Arab League country, many of which attempt to request boycott-related information as a condition of approving importation of goods; and transactions involving a letter of credit, since customers from Arab League countries may attempt to incorporate boycott-related requirements in the letter of credit as a condition for the supplier to be paid.

§ 3. Compliance policy and procedures

As is the case in other areas, the cornerstone of compliance with respect to the antiboycott laws is a clear and concise statement of policy that affirms the intent of the company to comply with applicable laws and regulations in the U.S. and in other countries where the company conducts business activities. A policy statement is important for several reasons. First, both the tax and export laws contain the concepts of "intent" and "inadvertent violations." Both laws require boycott actions to be taken with some degree of intent, and both contain examples where boycott actions were not violations because they were done inadvertently by persons who either failed to notice the boycott language or did not appreciate its significance. A good corporate policy statement might make the difference in a close case where some document was accepted or certification made. The policy would bolster any argument that low level employee actions inconsistent with the policy were "inadvertent" or that any given action was not taken with the requisite "intent." This, however, should not be overplayed. It is likely that it would make a difference only in a very close case. Second, a policy statement can focus management's attention on some of the complexities and perhaps greatly simplify the compliance problem. For example, if management were to allow counsel to simply prohibit any corporate action which could cause a tax problem, compliance on that front would be much simpler than weighing various actions against potential loss of tax benefits. Finally, the policy statement presents an opportunity to spell out the various roles of company personnel in the overall compliance effort: management, the general counsel, the tax department and employees.

The policy should specifically prohibit officers and employees from: (i) refusing to do business with any country, entity, or person for boycott-related reasons; or (ii) providing information, statements, certificates, or any other communications, whether written or oral, which would violate the regulations. The policy should make it clear that any information regarding activities that might violation the regulations must be reported immediately to the compliance department and that failure to comply with the policy will result in disciplinary action, up to and including dismissal. The compliance policy should be supplemented by guidelines and procedures that cover the most common situations that may arise that bring these laws and regulations into play including the following:

- The fundamental premise of the regulations is that companies cannot refuse to do business with a company in a boycotted country or with a boycotted country because a customer in a boycotting country has indicated that it would not purchase goods containing materials that originated in the boycotted country. Officers and employees must be admonished to immediately report any demand by a boycotted country that would place the company in violation of the regulations. Moreover, any decision not to do business with a company in a boycotted country or with a boycotted country should be carefully documented to ensure that it was not made for reasons prohibited by the regulations.

• Officers and employees should not provide any information with regard to the company's relationship with a boycotted country or any national thereof, whether in positive or negative terms, or provide any other information, if requested for boycott-related purposes. For example, it is not appropriate for the company to respond to a "boycott questionnaire" from a central boycott office that seeks information as to whether or not the company does business with a boycotted country or anticipates doing business with that country.

• It is not a violation of the regulations to comply with laws of the boycotting country which relate exclusively to activities that take place entirely within the boycotting country, such as complying with a local prohibition on the import of goods or service from the boycotted country. However, in order to be sure that this exception will apply, companies must carefully collect information regarding the local laws of any boycotting country in which they opt to do business.

• It is a violation of the regulations, as well as broader employment law principles, to discriminate against any person on the basis of race, religion, or national origin (e.g., discouraging individuals from a boycotted country from applying for a job with the company's subsidiary in a boycotting country even when it is known that the individual would not be granted a work permit by the local government). Accordingly, the company's human resources personnel need to be involved in employment decisions relating to activities in boycotted and boycotting countries. It is, however, not a violation of the regulations to replace persons to whom the boycotting country government refuses to give a work permit.

• Officers and employees must be told not to furnish any information about whether or not any person has any business relationship with or in the boycotted country, such as signing a statement that the company does not do business with Israel. Companies can sign a statement that the company has not been "blacklisted" by the boycotting countries because those firms or persons do business in or with a boycotted country.

• When doing business with a boycotting country, the company must avoid choosing among a list of carriers, insurers, or suppliers of goods acceptable to the boycotting country or agreeing to do business only persons on such a list. It is acceptable, however, to use a specifically named carrier, insurer, or supplier of goods.

• Companies must take care in handling requests from boycotting countries with respect to markings on goods and packaging. For example, it is unlawful to agree not to include a Jewish star on packaging of goods to be sent into a boycotting country, since this is a statement that the company will not ship goods made or handled by persons of the Jewish religion. On the other hand, companies may disclose or certify the name of the supplier or manufacturer of the goods shipped.

Companies should also develop internal transmittal forms for reporting boycott requests, business unit report forms that can be prepared and submitted monthly to ensure that there is a record of all boycott-related requests, and a set of questions that can be used to guide regular audits of internal procedures established for antiboycott law compliance.

Since a policy statement is only effective and valuable if it distributed to all persons within the company who have duties and responsibilities under the policy preparation of the policy statement should include a process for obtaining certifications/acknowledgements of receipt of the policy from all such persons and ensuring that copies of such certifications/acknowledgements are preserved, perhaps in personnel files. Responsibility for this process should be assigned to a specific person or group, such as the compliance officer and his or her compliance team.

Closely related to the question of a company policy statement is the question of the appropriate company procedures. There are fairly elaborate reporting requirements under both the EAR and the tax laws, and there must, of course, be some procedure to make sure that these reporting requirements are met. Beyond that, however, there is the same "intent/inadvertent violation" question that militates strongly in favor of good procedures. Conversely, the lack of good and relatively formal procedures for handling boycott matters could be turned against the company. It is necessary to know all the places where boycott language could be received by the company and where boycott certifications could be made. This is not the whole

picture because, as pointed out above, problems can arise in places other than the order desk. However, the order desk or the quotation desk is where most of the problems are likely to arise. Locations outside the company should also be considered. Freight forwarders, customs agents, warehouse operations, and agents are places where documents could be executed on behalf of the company. There should be appropriate instructions to all of these people.

There should be procedures for actually dealing with boycott requests. Following are some possibilities: (1) have every document containing any boycott language forwarded to someone who is expressly charged with knowing all about the boycott laws; (2) draft a list of "preapproved" certifications which can be made at the order desk level (e.g., positive certificates of origin that present no problem under either the tax or export laws) and require that any situation that does not involve the "preapproved" language must be forwarded to someone who is knowledgeable about the boycott laws; and (3) adopt a training program, as discussed below, for a relatively large number of company people, particularly those persons working in operations that frequently do business in the Middle East.

§ 4. Reporting and documenting boycott requests

The fundamental premise of the Antiboycott Regulations is that companies cannot refuse to do business with a company in a boycotted country or with a boycotted country because a customer in a boycotting country has indicated that it would not purchase goods containing materials that originated in the boycotted country. Managers and employees of the company must be admonished to immediately report any demand by a boycotted country that would place the company in violation of the regulations. Moreover, any decision not to do business with a company in a boycotted country or with a boycotted country should be carefully documented to ensure that it was not made for reasons prohibited by the Antiboycott Regulations. Some companies attempt to increase the likelihood that reporting obligations will be satisfied by requiring internal reports of all business dealings with firms in boycotting countries and company personnel responsible for business activities in those countries should be trained on the requirements of the Antiboycott Regulations so that they are cognizant of what events will trigger a reporting obligation and the steps that should be taken to complete specific transactions in a manner that does not run afoul of the Antiboycott Regulations.

§ 5. Dissemination of information

Many of the prohibitions in the Antiboycott Regulations pertain to dissemination of information to a boycotting country and procedures should be implemented to review all requests for information before a response is made. For example, managers and employees should not provide any information with regard to the company's relationship with a boycotted country or any national thereof, whether in positive or negative terms, or provide any other information, if requested for boycott-related purposes. One situation to avoid is responding to a "boycott questionnaire" from a central boycott office that seeks information as to whether or not the company does business with a boycotted country or anticipates doing business with that country. In addition, company personnel should not furnish any information about whether or not any person has any business relationship with or in the boycotted country, such as signing a statement that the company does not do business with Israel. Companies can sign a statement that the company has not been "blacklisted" by the boycotting countries because those firms or persons do business in or with a boycotted country.

§ 6. Human resources

It is a violation of the regulations, as well as broader employment law principles, to discriminate against any person on the basis of race, religion, or national origin (e.g., discouraging individuals from a boycotted country from applying for a job with the company's subsidiary in a boycotting country even when it is known that the individual would not be granted a work permit by the local government). Accordingly, the company's human resources personnel need to be involved in employment decisions relating to activities in boycotted and boycotting countries. It is, however, not a violation of the regulations to replace persons to whom the boycotting country government refuses to give a work permit.

§ 7. Procurement and logistics activities

When doing business with a boycotting country, the company must avoid choosing among a list of carriers, insurers, or suppliers of goods acceptable to the boycotting country or agreeing to do business only persons on such a list. It is acceptable, however, to use a specifically named carrier, insurer, or supplier of goods. In addition, companies must take care in handling requests from boycotting countries with respect to markings on goods and packaging. For example, it is unlawful to agree not to include a Jewish star on packaging of goods to be sent into a boycotting country, since this is a statement that the company will not ship goods made or handled by persons of the Jewish religion. On the other hand, companies may disclose or certify the name of the supplier or manufacturer of the goods shipped.

§ 8. Training

Companies need to establish continuous training procedures for personnel throughout the company who are likely to receive and/or review boycott-related requests. Special attention should be paid to personnel involved in sales activities in countries that are members of the Arab League including training on what information can and cannot be shared with prospective customers in those countries. Initial training should occur when an employee is first hired and should be refreshed on a regular basis. The goal should not be to create an army of experts on every detail of the antiboycott regulations, but rather to introduce tools that make employees more sensitive to and aware of potential problems and empower them to seek help from specialists in the area. Training should begin by focusing on the basic prohibitions that are clearly spelled out in the regulations of both regulatory agencies. Trainees should be provided with illustrations of how things might unfold in the "real world" and training materials should include the compendium of problematic contract clauses that the regulatory agencies have published and examples of allowable "positive" certifications (e.g., 100% of the components in the goods are U.S.-origin) and prohibited "negative" certifications (e.g., none of the components of these goods originated in Israel). Trainees should also understand that a mere request for information or actions that would violate the antiboycott regulations is reportable, even if the request is ignored or explicitly denied or the transaction moves forward following changes to the documents to remove objectionable clauses.

The functional responsibilities of the trainee should also be taken into account. There are some rather unusual provisions in these regulations that call attention to problems that might not be apparent at first examination. This would seem to mean that counsel should go through each of the regulations and identify the people in the company who should be advised of the general rules and the specific rules that may be applicable. For example, the regulations note that patent procedures in some Arab countries require certifications that might be illegal or might cost tax benefits. Therefore, the company's patent counsel and everyone who works for him or her (including outside counsel) should be informed of the problem if the company registers or licenses any patents in the Middle East. The company's sales force should be informed of the problems to the extent they make calls on Arab customers. This is compounded by the fact that the EAR prohibitions are against furnishing information—even information stating that the company does business in Israel and intends to continue to do so. Finally, employees working in the finance and credit groups should be trained on boycott-related requests commonly found in proposed letters of credit.

§ 9. Foreign subsidiaries

The first issue in setting up an antiboycott compliance system for foreign subsidiaries is determining the best organizational structure. Several options are available including requiring that all compliance issues, including fulfillment of reporting obligations, by directed through a central legal or trade compliance department established and operated inside the parent company in the U.S. or allowing each subsidiary to take care of its own compliance and reporting issues while providing regular reports to the parent company. Some companies allow foreign subsidiaries to rely extensively on outside counsel chosen by those subsidiaries to handle compliance and reporting issues with relatively little interaction with the parent company; however, this is not a recommended solution. Local counsel should, of course, be used for guidance on local laws

in order to determine whether any of the so-called "local law" exceptions to the antiboycott laws are available in a certain instance.

Whatever decision is made regarding delegation of responsibility for compliance and reporting obligations procedures must be implemented to ensure that the antiboycott activities of all subsidiaries is adequately captured and analyzed and that individuals working for those subsidiaries are properly trained about what requests and responses may trigger a reporting obligation and/or be prohibited under the Antiboycott Regulations. Each subsidiary should have one person responsible for antiboycott compliance and the parent company should plan on conducting regular compliance reviews including audits of the subsidiary records regarding antiboycott matters. The parent company should also be sure that foreign subsidiaries have direct and immediate access to legal and compliance experts within the parent company in the event that questions arise that cannot be answered using the resources available at the subsidiary level. Additional compliance training, and reconsideration of procedures, should occur if and when subsidiaries alter their business model due to acquisitions or pursuit of new local opportunities. Finally, if subsidiaries are given the responsibility to file reports a formal process should be established to ensure that deadlines are met and that any third parties acting on behalf of the subsidiary in filing reports (e.g., freight forwarders or banks) fulfill their obligations.

§ 10. Treasury Department antiboycott reporting requirements

As discussed above, an important organizational issue that needs to be considered is where responsibility should be vested for compliance the antiboycott reporting requirements that are enforced by the Treasury Department. The tax report must be filed annually, and the EAR report must be filed periodically as requests are received. While the underlying legal principles for the Treasury Department regulations are similar to those in the Antiboycott Regulations, many companies decide to have their tax or finance departments handle Treasury Department antiboycott reporting obligations while another department, typically the legal or trade compliance group, handles issues arising under the Antiboycott Regulations. If this type of structure is used it is essential for the company to establish communication procedures and guidelines to ensure that the efforts of both departments are properly coordinated and that reports are filed on time and include complete and consistent disclosures and other information about all activities that generate a reporting obligation. The alternative is to have all boycott requests reported as received to a central location which would both advise on what should be done and be responsible for the necessary reports. The time delays inherent in this kind of process in a large company would weigh against it unless there were very good communication facilities between all the locations.

§ 11. Records retention

The general recordkeeping provisions under the EAR apply to antiboycott-related situations and require that records pertaining to transactions involving restrictive trade practices or boycotts must be retained for five (5) years from the date the regulated person receives the boycott-related request or requirement. The EAR make specific references to certain documents that are required to be retained, and then generally mentions other parts, sections, or supplements of the EAR which require the retention of records or contain recordkeeping requirements. For example, regulated persons must retain copies of export control documents as defined in Part 772 of the EAR, except parties submitting documents electronically to BIS via the SNAP-R system are not required to retain copies of documents so submitted. In addition, regulated persons must retain copies of the original records of memoranda; notes; correspondence; contracts; invitations to bid; books of account; financial records; restrictive trade practice or boycott documents and reports; notification from BIS of an application being returned without action; notification by BIS of an application being denied; notification by BIS of the results of a commodity classification or encryption review request conduct by BIS; and other records pertaining to the designated types of transactions, which are made or obtained by a person regulated by the EAR.

All "U.S. persons," not just exporters, are covered by the recordkeeping requirements. This means banks and financial institutions, insurers, freight forwarders, and manufacturers have to look out for boycott requests, even when such requests are unrelated to a transaction or activity. It should also be noted that the BIS has clarified that violation is not a strict liability defense—the standard is whether one "knew or should have known" that the records fell within these requirements. This is a

broad provision. The regulation stipulates that the recipient is the one who must maintain the records. Someone other than the actual recipient in an export transaction may have an obligation to report (such as through a delegation of authority). This other party would be liable for failing to submit a report but would not be liable for failing to keep a copy (unless it separately received the same request). In terms of the procedure for BIS investigations, while the bureau "encourage[s] voluntary cooperation," it is authorized to issue subpoenas for both witnesses and "books, records, and other writings."

The regulated person must maintain the original records in the form in which that person receives or creates them unless that person meets certain conditions relating to reproduction of records. Records should be organized in a manner that makes it easy to examine files, collect information to complete reports and audit the entire records retention process. While the statutory retention period is five (5) years from the date the regulated person receives the boycott-related request or requirement, general practice is to retain records for at least six (6) years.

§ 12. Compliance audits

Along with a compliance program, a company should develop audit procedures to ensure that the compliance program is adequate. To develop an effective audit procedure, the company should test several areas, including employees' knowledge of prohibited conduct, adequacy of methods of educating employees, the mechanisms for reporting such conduct within the company and to the proper authorities (as well as making sure these methods and mechanisms are kept up to date), whether records consistently reflect all compliance efforts, and the efficacy of procedures for spotting issues in the most risky situations mentioned above.

Several specific compliance issues should be among the primary focus points of the audit. For example, there should be a written compliance program that clearly informs employees of prohibited conduct, to whom such conduct should be reported, and who is available to answer questions, and there should also be a method to document that this information is updated regularly. In addition, there should be a system to ensure that all letters, documents, or other communications received from the Middle East are carefully reviewed for boycott requests, that any boycott requests are reported to the appropriate person(s) so that the appropriate report may be filed with the BIS/OAC, and that the company files the appropriate report with the Treasury Department. To answer some of these questions, a sample of documentation received from each known boycotting country should be checked, as well as picking a transaction at random and verifying that the documentation does not contain any boycott related language that went unreported. When conducting the audit, attention should also be paid to potential issues under other substantive areas of law such as antitrust, export controls and employment.

Footnotes

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The Founding Director of the Institute is Alan Gutterman, who is the developer and author of Business Transactions Solution, a Thomson Reuters Legal Solution available through Westlaw Next. Alan is a well-known and widely respected legal and business counselor to entrepreneurs, emerging companies and investors. He received his law degree from Boalt Hall at the University of California in Berkeley and has also earned a PhD from the Faculty of Law at the University of Cambridge, where he was affiliated with the ESRC Centre for Business Research. He has been a partner and senior counsel at internationally recognized law firms where he has specialized in general corporate and securities matters, venture capital, mergers and acquisitions, international law and transactions, strategic business alliances, technology transfers and intellectual property. He has also served as the chief legal officer of a leading international wholesaler in the information technology industry headquartered in Silicon Valley. In addition to his work with the Institute, he is the Founding Director of the Growth-Oriented Sustainable Entrepreneurship Project (gseproject.org), which engages in and promotes research, education and training activities relating to entrepreneurial ventures launched with the aspiration to create sustainable enterprises that achieve significant growth in scale and value creation through the development and commercialization of innovative products or services which form the basis for a successful international business. More information about Alan is available here.

Information on the Institute's publications is available through the Institute's website (businesscounselorinstitute.org) and currently include the popular and innovative online Business Transactions Solution, available exclusively on Westlaw Next; Business Counselor Practice Guides covering legal and regulatory compliance, law firm management, technology management and transactions and strategic alliances; California Transactions Forms for Business Entities and Business Transactions; and Going Global: A Guide to Building an International Business.

