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Commerce/Treasury Enforcement

"Commerce/Treasury Enforcement" is a regular monthly feature of the Boycott Law Bulletin. It provides news and information about the U.S. government's anti-boycott enforcement policies, procedures and actions.

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U.S.-SAUDI DEAL RENDERS NEW GUIDELINES ON SAMA REQUIREMENTS MOOT.

Resulting from a U.S.-Saudi deal negotiated over the past few months, Saudi Minister of Finance and National Economy Sheikh Muhamed Aba Al-Khail recently sent U.S. Treasury Secretary William Miller a cret letter. As interpreted by the U.S., the letter in effect renders the long-anticipated and newly released additional Treasury guidelines (those that relate to the SAMA requirements) essentially moot.

(The full text of the new Treasury guidelines, as well as the corresponding Commerce "Interpretation" in response to the Saudi "understanding," appears in this issue. See also the article on the guidelines by William Holden in this issue, and this month's "How the Rules Apply" column for full explanations of the effect of the Treasury and Commerce rules changes.)

As we reported back in March, the Treasury Department had then completed in-house preparations for releasing the new guidelines interpreting the anti-boycott provisions of the Tax Reform Act of 1976 and supplementing those first issued on January 20, 1978. At that time the new guidelines would have ruled against the practice of the Saudi Arabian Monetary Agency (SAMA) of requiring shippers and insurers utilized by U.S. exporters to make declarations of "self-certification" that they were in full compliance with the laws of Saudi Arabia — a practice which the Saudis had good reason to believe had been blessed hv the Commerce and State Departments, since it had lved during discussions with the Saudis about revising their practices to conform with the anti-boycott requirements of the Commerce-administered EAA rules.

And so, a rather intense struggle broke out pitting Commerce and State against Treasury. As one embittered Treasury official noted at the time, "The Commerce people view themselves as saviours responsible for allowing business to go forward. Many of their rules are intentionally created loopholes. They see large changes in Arab practices and they feel we'll mangle our laws half-way to meet what the Saudis have done.... There's been incredible pressure put on Treasury by Commerce to go along." Said another, "State Department people are convinced of their need to protect the world from the Treasury Department."

But a Treasury official more sensitive to U.S.-Saudi dealings over the years took a far different stance, one going to the heart of the controversy whether the new guidelines should be released. "The Saudis have been accommodating to our anti-boycott laws," this official insisted. "The 'self-certification' is a face-saving device the Saudis came up with, and now we're going to bash them in the teeth" by issuing the new guidelines.

Pushed on by Treasury, the new guidelines became a source of much inter-agency and U.S.-Saudi negotiations throughout the summer. Frustrated partly by a feeling that Treasury anti-boycott responsibilities were being pushed under by Commerce's attitude that the EAA was really the important anti-boycott law, some Treasury officials continued to assert the imperative of releasing the new guidelines as soon as possible.

Then Senior Deputy Assistant Commerce Secretary for Industry and Trade (now Acting Assistant Secretary) Stanley Marcuss, reviewing the difficult situation in March 28th Congressional testimony before the Subcommittee on International Economic Policy and Trade, indicated the basic problem:

"We have done everything possible to harmonize the Treasury and Commerce Department's anti-boycott programs," he noted. But, he added, "There are limits as to how far we can go because the statutes differ."

"Agreeing to comply with a country's laws generally or agreeing that the country's laws will apply to the contract (without specific reference to boycott laws) offends no prohibitions under the Commerce regulations," Marcuss pointed out. "However," he continued, "under the Treasury guidelines, agreeing to comply generally with a country's laws is deemed to be an agreement to participate in the boycott. Thus, in certain cases, agreements which are lawful under Commerce regulations could invite tax sanctions under the Treasury guidelines."

Stressing the bureaucratic infighting then taking place, another Commerce official then told the BLB, "We have very little lee-way in our law, and our law doesn't compel the conclusion (that self-certification) is illegal. But their law (Treasury's) is broad and does not compel their conclusion."

Stated yet another government official, "Treasury law only applies to agreements while Commerce's law applies to agreements and actions. Because Treasury can only latch on to agreements, it tries to find impicit agreements everywhere."

The now revealed U.S.-Saudi deal worked out since March began to take shape in June when Stan Marcuss and Assistant Treasury General Counsel Russell Munk visited Saudi Arabia specifically on this matter. Accompanying Marcuss was the Acting Director of the Commerce Antiboycott Compliance Staff, Vincent Rocque. As we then reported in August, while officials became noticeably closed-mouthed about the Marcuss-Munk visit and its results, "some quiet deal is being worked out with the Saudis."

"The Saudis are working on some revised language and procedures that will not offend what might be watered down new guidelines when they are finally released," we added in September. Furthermore, we then noted, "U.S. officials involved seem eager to have the entire matter played down, presumably to avoid angering either the anti-boycott proponents in this country or the Saudis."

Treasury meanwhile continued to maintain that the new guidelines still "reflect Treasury's longstanding position."

But the reality of the situation is that the now released guidelines have been rendered irrelevant by the confidential Al-Khail letter to Miller. By indicating in his letter that the shipping and insurance certificates required by SAMA relate to commercial considerations other than the boycott, SAMA will continue its present requirements, and under the new guidelines U.S. persons can legally comply with them. It is an effective diplomatic arrangement; both sides can rightly claim that they have not altered their requirements.

It should be noted, however, that since thusfar only Saudi Arabia has provided an "understanding" regarding the non-boycott nature of their shipping and insurance certifications, the new guidelines do make illegal any compliance with similar certifications required by other boycotting countries. However, Treasury officials report that there are discussions under way with other boycotting countries to obtain similar "understandings." Treasury would not name the countries involved, except to say that more than one other boycotting country is involved in the talks. This is important because compliance with such certification requirements from boycotting countries other than Saudi Arabia is now technically illegal; but as in the case of the Saudi "understanding" subsequent similar arrangements with other boycotting countries will very probably also be termed retroactive by Treasury.

Not everyone at Treasury is happy with the deal with the Saudis. Said one Treasury official, "The new guidelines are little more than a roadmap to how to get around the guidelines." And the Department is not anxious for publicity. Said the same official, "Everybody here would be happy if all this didn't get any attention, except, of course, from the Boycott Law Bulletin."

The Saudi letter to Secretary Miller is being treated with utmost discretion — few involved officials have even seen it. Ambassador John West himself returned to Washington (possibly carrying the letter) and handled the final phases of the deal. Neither the U.S. government nor the Saudis are willing to release the text or even talk about the letter. A Treasury official said that the letter was not for publication because "it was given at a high level between government officials who anticipated that it would be kept private." Only a thorough investigation by the BLB revealed even the above details. "The whole damn thing is so sensitive," said one Commerce insider familiar with the numerous back-and-forths of the past months.

To close the matter, just before leaving for Saudi Arabia on Thanksgiving day, Secretary Miller sent a short, three-sentence letter to Al-Khail. It was apparently sent unclassified as a cable, though it is not being treated that way and the actual text remains confidential at Treasury. The BLB has, however, learned the substance of the letter.

Miller first thanked Al-Khail for his letter which referred to the shipping and insurance certificates. Then Miller assured his Saudi counterpart that with these Saudi assurances that the SAMA requirements are based on "commercial reasons," U.S. laws are not being violated. Miller concluded that Al-Khail's letter had "facilitated mutually beneficial trade" between the two countries.

But the matter regarding other boycotting countries' shipping and insurance certifications is not closed and awaits the results of the negotiations noted above. With the Saudis having taken the lead in

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providing an "understanding," it may be that other such arrangements will be forthcoming — but that is not certain. Treasury, as noted, will not identify the other boycotting countries being asked for such understandings, so it is difficult to say whether they include those countries which, like Kuwait, often follow the Saudi lead.

The drawn-out episode in anti-boycott enforcement is, to say the least, curious. As shown in the text of Commerce's "Interpretation" of the Saudi "understanding" the SAMA requirements under the EAA rules are not only permissible, they are also now not reportable. What began as a highly disruptive Treasury interpretation now ends with the SAMA requirements being acceptable for Treasury and also nonreportable for Commerce.

The immediate effect for business with Saudi Arabia is beneficial. But the net effect for businessmen and their counsel who must cope with the anti-boycott rules is additional confusion — there are new guidelines that prohibit compliance with some countries' requirements but not with another country's requirements. Along with Commerce's proposed revision which would permit compliance with "to or through" requirements (See text in this issue), the new guidelines show that the U.S. anti-boycott provisions are creatures of flux, making it difficult for business to get settled with the rules. As one Treasury official predicted in 1977, "The anti-boycott rules will be like living things, growing and changing all the time."

NEW SECRETARY OF COMMERCE PHILIP M. KLUTZNICK.

Confirmation of Philip M. Klutznick as Secretary of Commerce is expected to be painless and quick. Privately, though, some questions have been raised about Klutznick's attitude toward the Arab boycott of Israel in view of his decades of leadership in the American Jewish community and his Presidency of the World Jewish Congress.

But those who know the lively 72-year-old entrepeneur and statesman are confident he will manifest a completely objective attitude in administering anti-boycott affairs. Klutznick is known for his no-nonsense, level-headed approach and he has been a leading behind-the-scenes moderate helping promote Arab-Israeli understanding even before the Sadat visit to Jerusalem.

In short, Klutznick is a principle pragmatist who is not likely to make any major changes in the current enforcement patterns being established by the Anti-boycott Compliance Staff — though he may take more of an interest that did retiring Secretary Kreps.

FOURTH COMMERCE ENFORCEMENT ACTION IS AGAINST CORE LABORATORIES OF DALLAS; ANTIBOYCOTT OFFICIAL TALKS ABOUT QUESTION OF CONSENT AGREEMENTS.

In its fourth enforcement action to date, the Commerce Department Antiboycott Compliance Staff has charged Core Laboratories, Inc., of Dallas, Texas, with 28 counts of EAA violations. (See texts of Commerce charging letter and Commerce announcement of the action elsewhere in this issue.)

The charges against Core, a $36 million resivoir engineering service company, allege that the firm furnished information about tis business relationships with a boycotted country (Israel) in 28 different transactions, primarily involving invoices and certificates of origin of goods but including one bid document. All, says Commerce, were violations of Section 369.2(d) of the EAR.

The fact that Core has not settled immediately for a consent agreement does not necessarily mean that the company intends to contest the charges. Of the four enforcement actions to date, two, Finagrain and Cameron Iron Works, were settled with consent agreements concurrent with the public issuance by Commerce of the charges against each. The other two, Library Bureau and now Core Laboratories, had charging letters issued to them and publicly announced by Commerce without any indication of how they would be settled.

Antiboycott Compliance officials at Commerce say there is no set rule about when a consent agreement is to be arranged — Commerce simply waits for the charged company to bring the matter up.

"As a matter of procedure," said a principal enforcement officer, "it is always our policy that prior to issuance of a charging letter we advise the company of our intention to entertain any discussions that they may wish to enter into at that time, before we issue the charging letter."

"As in the Library Bureau case, when we do issue a charging letter, we have had those discussions before issuing the letter — so any time you see a charging letter you can assume that there were some discussions which, at that point, were not fruitful."

Are companies that are about to be charged given a set time period in which to initiate consent discussions before the charging letter is issued or made public?

"There is no formal period from the time when we inform a company of intended charges to the time we actually issue the charging letter," the official said. "Invariably, there have been discussions throughout the investigation stage and leading up to the charging letter, prior to our making a determination of any kind [whether or not to make charges or to issue only a warning letter]. We do not present it to a company as 'here are your options,' but simply indicate to the company that the staff is prepared to make a recommendation of a charge or warning letter or whatever."

"At that time, the company can pursue any options that are open to it...we simply inform them as to what we are going to recommend."

There are some indications that the nature of the dealings a suspect company has with Commerce may have an effect on how Commerce handles the case. This is not to say that cheerful cooperation will secure a smaller fine for a charged company, but it may make the process less difficult. The Commerce official noted that the handling of a case in part depends "on the relationship our investigators have had with the company — each situation is unique."

COMMERCE WITHDRAWS WARNING LETTER ON NON-REPORTABLE LATE REPORT.

As earlier reported, the Commerce Antiboycott Staff issues "warning letters" in cases of minor infractions of the EAA rules. Most if not all warning letters issued to date have dealt with late reporting by companies.

Although there are no penalties involved in warning letters, the fact that a company has been warned about late filing probably reflects badly on a company — if only by drawing Commerce's attention to the firm later when the Antiboycott Compliance Staff conducts a computer search for other possible problems.

So it may be in a company's interest to be certain that any warning letters it receives are warranted. One recipient of a warning letter discovered that the late filing that was the subject of the warning involved an action that was non-reportable in the first place. The company informed Commerce that since the action was not a reportable one, the warning letter it drew should not have been issued and should not be on the company's record.

Commerce agreed and the warning letter has been withdrawn.