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## Commerce/Treasury Enforcement

# Commerce and Treasury impasse; no solution outside of Congress

## Commerce investigating 92 possible violations; many more to come

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In his testimony March 28th before the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs, Senior Deputy Assistant Treasury Secretary for Industry and Trade, Stanley Marcuss, provided additional information on the subjects of the February and March columns.

We reported in February that another six months will be required for Commerce to fully staff its Anti-boycott Compliance Unit and that about a third of the positions were then filled. In his testimony, Marcuss specified that 12 of 34 Compliance Officers are now at work while 4 of 7 slots for boycott report processors have been filled.

Marcuss also indicated that 92 cases are now under active investigation by the current staff and that this number will grow substantially as new staff comes on board and as computers begin to be used to verify anti-boycott reports.

Regarding the rumored new Treasury guidelines that will rule against the Saudi Monetary Authority's (SAMA's) current practice of requiring

"self-certification" by U.S. shippers and insurers, Marcuss had the following comment:

"We have done everything possible to harmonize the Treasury and Commerce Department's anti-boycott programs. 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. However, 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."

Marcuss added, "We do not know the precise effect of these differences on U.S. firms or on U.S. antiboycott efforts. We are told by the business community, however, that the two regulatory schemes cause uncertainty, complicate the activities of exporters and inhibit potential exporters from marketing their goods and services to foreign buyers. U.S. Posts abroad have also advised that these differences are causing difficulties in those countries seeking to modify their boycott practices with precision. These are plausible consequences, but there is no real way to pin that down."

It's interesting to note that in another section of Marcuss' testimony where he ticks off "cooperative arrangements with other federal agencies," he indicates that "a good working relationship" has been achieved with "diplomatic posts, the Justice

Department, the Customs Bureau, the Federal Reserve Board, and other government agencies." He also specifically notes that "The State Department has been helpful in providing us with information about the boycott practices of boycotting countries." No such positive expressions are made concerning the Treasury Department.

There is still no definite information when and if for sure the new Treasury guidelines will be made public and come into effect. But the tone of comments here in Washington give the firm impression that the actual guidelines are already a fait accompli and only the timing of the announcement is in doubt.

Lending support to this hypothesis, Commerce officials are now quick to indicate that the two laws are indeed different and cannot be totally synchronized. Furthermore, it is emphasized by Commerce people, Leonard Santos at Treasury has publicly indicated that the new guidelines should only have prospective application. "It'll be up to the Saudis what to do if the new guidelines are issued," one Commerce source shrugs.

An educated political guess would be that there's a hurried behind-the-scenes effort being made—not just between Treasury and Commerce to minimize the negative impact of the new guidelines—but also by the U.S. Government and the Saudi Government to ameliorate any potential political or business tensions that could result.

But one lingering result of this year-long Commerce/Treasury squabble, even if everything goes smoothly from now on, is a substantial feeling at both departments that the other guy's been too pushy.

Last month's column clearly noted Treasury's disenchantment at the way Commerce and State had been dealing with Treasury views and with Section 999 of the tax laws.

Over at Commerce, feelings have also been bruised. "We have very little leeway in our law, and our law doesn't compel the conclusion (that self-certification) is illegal," says one Commerce official. "But their law (Treasury's) is broad and does not compel their conclusion."

"Treasury's law only applies to agreements while Commerce's law applies to agreements and actions," says another official at Commerce. "Because Treasury can only latch on to agreements, it tries to find implied agreements everywhere," he adds, suggesting that that's what is being done in these new guidelines.

The basic problem seems to be that by agreeing to self-certify, by in effect saying "I'm eligible," Treasury says that shippers and exporters are entering an implied contract not to do anything to be blacklisted in the interim of time covered by the contract. This is a step beyond simply noting that they themselves are not blacklisted at the time of self-certification, says Treasury.

Commerce agrees both that the exporter could not provide boycott related information about his shipper and insurer and that the self-certification by the shipper or insurer are boycott related and report-generating.

But for Commerce, self-certification is simply an OK statement that "I'm not on the blacklist," not an agreement to comply with the boycott or reveal prohibited information.

It no longer appears there's any way the two sets of guidelines will be coordinated on this important self-certification procedure. One day soon, maybe even before this issue of BLB has been fully read, the new Treasury guidelines may become available.

As one lower level Treasury official notes, "The two different laws are the real problem and any real solution (to these guideline differences) must come from Congress."

**"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.**