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Boycott Law Bulletin

Timely news coverage and expert analysis of anti-boycott and anti-bribery laws, regulations and court developments for corporate executives, exporters, bankers, attorneys, accountants and U.S. and foreign government officials.

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.

By Mark A. Bruzonsky

Mark Bruzonsky, a consultant on Middle East Affairs with the Washington firm of International Associates, writes this column monthly for the Boycott Law Bulletin.

FIRST ENFORCEMENT ACTION ANNOUNCED; MORE TO COME

On Aug. 27, just as the Bulletin was going to press, the Commerce Department's Anti-boycott Compliance Staff announced the first of its enforcement actions. (For full details of the first action, see the texts beginning on front page of this issue.)

Other actions will soon be released, probably within a week on the first consent decree. "There are a number of cases in the works," a compliance officer told the Bulletin, "and they will be coming out very shortly."

Although the first action, involving a consent decree with a U.S. parent company whose foreign subsidiary was the principal in the alleged anti-boycott violation, is not in itself enough to gauge the compliance staff's enforcement priorities — it will likely take some months of enforcement proceedings for a pattern to develop — it is interesting that the first case should involve a foreign subsidiary. It is with their foreign subsidiaries that U.S. companies are probably most vulnerable to anti-boycott violations. While companies in the U.S. have generally established painstaking compliance monitoring proceedures, it is amost axiomatic that their controlled-in-fact foreign subsidiaries are less thoroughly protected.

Since no other country has anti-boycott laws (except France, whose anti-boycott law is, for all practical purposes, without effect), it is unlikely that the executives and employees of U.S. subsidiaries abroad will have U.S. anti-boycott laws uppermost in their minds when conducting business from countries that do not impose such restrictions on trade with boycotting states.

The lag time in communications between far-flung subsidiaries and the U.S.-based parent companies may also present the parent companies with irrevocable situations that will lead to anti-boycott violation charges.

If the first enforcement action can be considered a harbinger of the compliance staff's focus, the coming Commerce Department survey of subsidiaries' boycott participation in transactions outside U.S. commerce (and therefore outside EAA jurisdiction) takes on added significance.

CONSENT AGREEMENTS ARE FINAL, NOT PRELIMINARY

Last month we reported, while noting that "this matter is not yet fully decided," that consent agreements reached between Commerce and companies charged with violations of the anti-boycott provisions of the EAA would at first be considered "preliminary." Other interested parties, it seemed then, would be given a formal period in which to make their opinions known about consent agreements before they were made final.

It now seems, however, that no formal distinction of "preliminary" will be made and consent agreements will be considered complete and final when released.

The General Counsel's office at Commerce is responsible for coming up with the detailed procedural regulations which apply to consent agreements and other enforcement actions. The "interim,final procedural regulations" are expected very soon and will become final after a 60-day comment period. "We encourage written

Enforcement

Continued from previous page

comments, and I don't think we will accept calls," one high-ranking official said.

NEW GUIDELINES STILL ON HOLD; HINTS OF FURTHER TREASURY REVIEW

No one's talking, but behind-the-scenes top Treasury officials are still grappling with those new guidelines which threaten to unravel much of the progress made in getting changes in Saudi boycott practices to conform to the anti-boycott provisions of the EAA which the Commerce Department administers. The two new Treasury guidelines are still on indefinate hold; this has been the situation throughout the year, as readers of this column will recall.

The early summer visit to Riyadh of Senior Deputy Assistant Commerce Secretary Stanley Marcuss and Assistant Treasury Department General Counsel Russell Munk is said to have opened Munk's eyes to the serious difficulties inherent in his department's as yet unreleased new guidelines. Vincent Rocque, Acting Director of the anti-boycott compliance staff at Commerce, accompanied Marcuss and Munk on the intense, 3-day series of discussions with Saudi officials.

Some sources here maintain that the new guidelines will remain bottled up, especially with U.S.-Saudi relations on edge as they are. Others involved in U.S. Middle East policy indicate that some quiet deal is being worked out with the Saudis so that when the new guidelines are released, both sides can avoid a public schism — with the Saudis sticking to their boycott requirements and the U.S. penalizing American companies through the tax code.

Still other sources report that as a result of their trip to Saudi Arabia, the Treasury Department is discussing its in-house attitude toward the SAMA issue itself and, perhaps, other aspects of the published guidelines. These sources suggest that these discussions are along the lines of further harmonization between the Treasury and Commerce anti-boycott regulations; but the sources caution that the in-house review is informal and not at all certain to lead to any harmonizing changes in the existing guidelines.

BACKLOG BUILDING IN BOYCOTT REPORTS

Thousands of reports detailing requests for participation in various boycotts — Form ITA-621P — are pouring into the Commerce Department each month. The reports go first to the Bureau of Trade Regulation, Room 1617M, for processing, and then to the anti-boycott compliance unit for scrutiny. A public disclosure copy goes on file in Rom 3012 where all reports are sorted and put on microfilm.

According to Commerce officials, there can be as much as a two- to four-week delay from the time the reports are received at BTR and then forwarded to the compliance unit. This means that a month or more may pass before a company suspected of a violation (based on its report) may hear from the compliance unit regarding a request for additional information.

The microfilming process at this point is some months behind. The latest reports on microfilm are from May 1979. However, this backlog is due mainly to the departure in May of the office's microfilm operator; the position has not yet been filled. Officials in the office indicate they hope to catch up with the backlog within a short time, but the officials wonder aloud whether the task isn't considered high enough priority, thus explaining the long delay in replacing the microfilmer.

At the moment, thousands of reports are piled up, awaiting sorting and microfilming. Looking through them, a few facts are immediately evident. Every report — without any exception among the random reports examined — includes Israel as the country which is the object of the boycott request. Though the great majority of the reports note Arab countries as the boycott requests originators, there are instances where Cyprus, Pakistan and other third world countries are the originators. In some cases Israel is joined by South Africa, Rhodesia or Taiwan as boycotted countries. In the case of one report from a Pakistani company, all four countries were boycotted.

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EAA EXTENDED WITH TOUGHER FINES

The EAA was extended Sept. 29 — just one day short of its scheduled expiration — when President Carter signed the Export Administration Act of 1979 into law.

In keeping with the private arrangement worked out between the principal anti-boycott protagonists, the Jewish service organizations and the Business Roundtable, the anti-boycott provisions of the EAA, Title II, were renewed without alteration.

However, there were some changes in the penalties prescribed for criminal violation of the statute. Fines of up to $50,000 or five times the value of the exports involved (whichever is greater) and/or up to five years imprisonment are now applicable to first violations by criminal violators. Previous sanctions were a fine of $25,000 and/or up to one year imprisonment for the first criminal violation.

One other change: Commerce now reports to Congress on anti-boycott matters annually rather than semi-annually.

"WARNING LETTERS" ISSUED

Some hundreds of what are being termed "warning letters" have been quietly sent during the past few months to companies whose reports detailing boycott requests have been tardy or neglected.

Says Vincent Rocque, acting director of the anti-boycott compliance staff at Commerce, such letters "are a useful device to remind those that haven't reported promptly that the reports must be done within a certain time-frame."

Quarterly reports are now required, i.e., reports for July, August and September are due by the end of the following month (October 31) for domestic concerns, and the end of two months (November 30) for foreign subsidiaries or affiliates.,

FINAGRAIN ACTION DRAWS FIRE

Not everyone is totally applauding the Commerce Department's first enforcement action released last month — a two-violation, $20,000 Consent Agreement with Finagrain, a Swiss subsidiary of Continental Grain Company, accused of illegally certifying that commodities sold to Iraq were not of Israeli origin and that Finagrain was not affiliated with any blacklisted company.

Some criticism can be heard that the violations were so blatant that more than a consent agreement might have been called for. Others have wondered why it took the anti-boycott compliance staff so long to make such a clear-cut case public. In addition, a fine of $20,000 is hardly too great a penalty for major firms to absorb as a cost of doing business.,

But most reaction to the Finagrain arrangement has been favorable to Commerce's approach, as noted in a September 3rd article in Washington's new publication, the "Legal Times of Washington."

Said one lawyer interviewed, "I don't regard it as having taken them so long to gear up. The had staffing problems." Said another, "They should be able to use this agreement to pressure other companies. They got the maximum in this case. Twenty thousand dollars might not frighten anyone else the size of Continental, but it should scare some smaller companies."

The Finagrain case established three major precedents:

First, Finagrain was fined the maximum of $10,000 for two illegal certifications which involved the same transaction. "They could have interpreted the rules to permit a maximum fine per transaction," suggested one business lawyer interviewed by the "Legal Times."

Second, the Commerce order issued by Deputy

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Assistant Secretary Stanley Marcuss specifies a series of "corrective measures" Finagrain must take "to ensure its future compliance with the anti-boycott provisions of the Export Administration Act." These "corrective measures" and the stigma attached to them in future business dealings by Finagrain are probably more important than the monetary fine.

Finagrain is required by the consent agreement to report back to the anti-boycott compliance staff in six months to show exactly what steps it has taken to ensure that the company will not again violate the EAA rules. This report, if it will be made part of the public record in the case, will offer other companies, espcially foreign subsidiaries, a solid example of what Commerce considers an acceptable and effective monitoring and compliance program.

Third, in the words of one attorney specializing in boycott matters, "This settlement certainly is a precedent for administrative action. I would hope they would not go to court on every case. They don't have the manpower, and the administrative framework is familiar to everyone."

More enforcement actions – possibly criminal as well as civil – were imminent as the Bulletin went to press.

ADMINISTRATIVE PROCEDURES COMING SOON

Also imminent are the "interim proposed" administrative procedures which will govern the anti-boycott unit's continuing enforcement efforts. These have been delayed for some weeks in the General Counsel's office which has primary responsibility for them. The EAA requires that boycott cases be tried in accordance with the requirements of the Administrative Procedures Act. And this Act mandates that there be a separation between the agency's regulatory and adjudicatory officials.

When released, there will be a 60-day period for public comment before the administrative procedures are made final.

NEW TREASURY GUIDELINES

There is a new indication regarding the final outcome of the long-awaited, long-expected and much-discussed new Treasury Guidelines relating to the SAMA letter of credit provisions.

The early summer visit to Riyadh by Senior Deputy Assistant Commerce Secretary Stanley Marcuss (accompanied by Vincent Rocque) and Assistant Treasury Department General Counsel Russell Munk seems to have yielded some kind of behind-the-scenes game-plan.

Although neither Commerce or Treasury officials will confirm this, an educated guess is that 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. Thus it appears that both sides, Treasury and the Saudis, are going to compromise a bit on their respective legal requirements. 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.

TRANE DEPOSITIONS REVEAL ASPECTS OF COMMERCE'S ANTI–BOYCOTT ENFORCEMENT PROCEDURES AND PRIORITIES

In its suit contesting the constitutionality of the EAA anti-boycott provisions and regulations, the Trane Company of LaCrosse, Wisconsin, has taken depositions from a number of Commerce Department anti-boycott compliance staff officials – deposition which shed a little light on some of the enforcement procedures and priorities of the staff.

In one deposition, a compliance officer was asked by counsel for Trane, "If a company indicates that it is not going to respond [to a boycott questionnaire] do you ever engage in any investigative technique to discover whether or not they are being forthright with that answer and in fact have responded in violation of the law?"

The anti-boycott compliance officer answered: "...we are entering into an area of investigative technique which really must remain within the purview of the anti-boycott compliance staff. I can say that we do make an effort to confirm by other means the information contained on the reports that are filed with us."

Question: "....Is the fact of being blacklisted or not being blacklisted something that you consult in determining or trying to determine whether or not a company has in fact answered a [boycott] questionnaire in violation of the U.S. [anti-boycott] law?"

Answer: "....Perhaps what I could say is that if we

learned that a company had been taken off a blacklist...it would be one of our responsibilities, I believe, to try to ascertain whether in the process of being removed from the blacklist any prohibited information was given that would violate the regulations."

Q: "Has there ever been an instance where you were aware of a company that received a questionnaire from an Arab country that subsequently, to your knowledge, was never put on a blacklist by that Arab country, and as a result of that you became suspicious that they might have supplied the information? I am not asking for the name of the company. I want to know whether or not that's ever occurred."

A: "....I don't know if it's ever occurred. I would say that we would be interested to know if that did come to our attention and would perhaps wish to explore or to investigate the matter."

Q: "I guess this gets back to an earlier point I was trying to probe and I am just a little curious. It would appear from your last answer that whether or not a company is on a blacklist might have some – be it in many instances minimal – but at least some value in deciding and determining whether or not that company has violated the U.S. statute; and I guess I am wondering why your staff doesn't make an effort to compile a list of what companies are on the blacklists."

A: ".....If you knew what this staff has gone through to become a staff and the hiring freezes we have faced and the difficulties we have had in building our staff, you would understand that we do the very best we can under the circumstances, and there are many areas we would like to explore but haven't had the luxury – if that is the right word – of being able to do so."

Q: "Is that something if you had the manpower you would probably do?"

A: "I can't say probably or improbably. I don't know. I would say that if we had unlimited manpower, there are many avenues we would explore which we have not been able to."

Q: "Do you have any idea how companies get removed from a blacklist?"

A: "I have an idea, and I don't know for certain for the very basic reason that few U.S. companies are inclined to share with [us] how they remove themselves from the blacklist simply because it's my expectation that they have probably furnished information or otherwise responded to requests for some boycott-related information, quite possibly in violation of this particular law and regulations."

Q: "Let me try and rephrase what you just said, except in the instances where a company is divested from another company that is on the blacklist, and in those instances they are removed from the blacklist because they are no longer associated; but putting that aside as an exception, do you as an enforcement officer assume when you see a company being deblacklisted that it has provided information?"

A: "No, sir, I don't make that assumption; but if I had the opportunity, I would want to find out more, if I were able to, as to just why the company was deblacklisted....There may be many reasons [for deblacklisting]. It may be – to give you an example of a quite legitimate reason from the standpoint of these regulations – it may be that the Arab League member state went through its own records and determined through its own information that there was no longer any reason to blacklist a company. It's conceivable that the U.S. company involved didn't actually furnish information. But, yes, it raises a question. The question's raised in my mind but it's not a conclusive presumption."

Q: "Do you have any idea how many U.S. companies have been taken off blacklists?"

A: "No, sir, I do not. From time to time in the cable traffic or in newspapers – well, trade publications, various sources – [we] hear of companies that have been removed from the blacklist, but I wouldn't be able to tell you how many. I don't know."

Q: "As an enforcement officer, do you then generally look in to see why these companies got taken off the blacklists or does that not trigger enforcement–

A: "....Certainly if [we] learn of a group of companies which are being taken off the blacklist, [we] will make at least a mental note that [we'd] like to know why this has happened. I am not a liberty to tell you what, if anything, we would do about it in my office, but it certainly is something of interest to us, yes."

Q: "I'll ask a similar question here as I did earlier. Do you know of anybody in the United States government who regularly attempts to keep a list of companies that are de-blacklisted?"

A: "I was hoping you would not ask that question. Yes, I'm supposed to be keeping my eyes out for instances like that. It's a very sporadic effort, and probably beyond that I shouldn't go into investigative technique but –"

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Q: "Although you don't maintain a list of companies that are additionally blacklisted necessarily, you do make more efforts to keep track of companies that are taken off blacklists?"

A: "....We do take note of instances where we learn of companies that have been taken off the blacklist, but our information, in my own view, is very far from being complete information. ....And no determination has yet been made to my knowledge as to what specifically will be done. There is not a conclusive presumption. When we get a name of a company taken off the blacklist, we may institute investigation. That remains very much to be determined from other circumstances."

In another part of the same deposition, the anti-boycott compliance officer was queried about the procedures for handling U.S. companies' boycott reports to the Commerce Department:

Q: "Do you review these [boycott] reports when they are filed generally?"

A: "My office does not — it is not the office of first instance. There is a boycott processing unit. We are talking about many thousands of reports. The reports which seem to embody potential problems or violations of the regulations are forwarded to my office where a review, a second review, is made."

Q: "Do you mean reports that on their face suggest it might be violated?"

A: "That's correct."

Q: "Other than these reports which suggest on their face there might be violations, what's done with the remainder?"

A: "The reports on which no action is taken and on which — well, the reports are kept which the Department of Commerce copies and are sent to the Freedom of Information Office for inspection. Copies are kept in the Department of Commerce files for a period of time before they are sent to the archives. I am not certain how long they are actually kept. It's a matter of years. We do take a representative sampling of reports that would not otherwise come up to our office as a second check, so to speak, on our screening system."

Q: "What's the name of the office that collects these and reviews them to determine whether or not they ought to be forwarded to you?"

A: "Boycott Processing Unit. It's a section of the Office of Export Administration. ....The Operations Division of the Office of Export Administration. Kent Knowles is acting director."

Q: "Am I not correct in saying that the Department of Export Administration sometime in — a couple of years ago used to encompass the function that you are now doing?"

A: "The Office of Export Administration includes a Compliance Division. The Compliance Division of OEA, as it's styled, used to have anti-boycott enforcement authority. We were created when the 1977 Amendments to this law were passed. There had been an anti-boycott law prior to '77 with different prohibitions. It was much less extensive...."

Q: "One more question about these reports. When a report is filed but it is not forwarded to your office for action because on its face there might be a problem, is an index made of all these companies that have received requests for information so that you at least have some listing of everyone that's ever received a questionnaire?"

A: "Yes, sir. There is a computer link-up. I am by no means an expert on the exact details. But every report that's filed is keyed into the computer along with the name of the company,...for instance, as a matter of practice, when we undertake an investigation against a company, we will examine, if at all possible, every other report the company has ever filed to see if there are other possible problems to doublecheck our enforcement pre-screening mechanism downstairs."