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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.

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JEWISH GROUPS CONSIDER PRESSING COMMERCE DEPARTMENT FOR DETAILS OF SAUDI "CLARIFICATION" ON SAMA RULES.

The U.S.-Saudi Arabian accord on "ship eligible" and "insurer's resident agent" certificates may not be the end of the matter after all (See "Commerce/Treasury Enforcement," November 1979 issue, page 343). Jewish service organizations have been privately discussing the matter in an attempt to decide on a unified position — whether to take any action and whether to bring any further pressure.

It is recognized by the Jewish groups that Saudi Arabia did accommodate Washington with Minister of Finance and National Economy Al-Khail's November letter of "clarification" to Treasury Secretary Miller. According to Treasury officials, the letter states that the "ship eligible" and "insurer's resident agent" certifications of the SAMA letter of credit requirements are not boycott-related. On the strength of the clarification, Treasury ruled the SAMA requirements as permissible for U.S. persons, and Commerce ruled that the SAMA requirements, which were already permissible under the Commerce rules, are no longer reportable as boycott participation requests.

But with the Al-Khail letter remaining secret, and with the actual wording of the SAMA certifications unchanged, there is some doubt among the Jewish groups about the credibility of the Saudi "acquiescence." Some sentiments can be heard that the Saudis the U.S. government were able to wiggle out of the entire problem too easily by simply indicating that the certifications are not boycott-related — while no announced changes in language of procedures have taken place (See "How the Rules Apply," December 1979 issue, page 388).

Further, as we reported last month (page 382), Treasury is now having discussions with Kuwait and the United Arab Emirates in hopes of obtaining similar clarifications. Without letters of clarification from these governments, certificates they require and containing substantially the same language as that of SAMA's will invite Treasury Department anti-boycott tax sanctions.

So far, the U.S.-Saudi behind-the-scenes deal, which took most of 1979 to negotiate, has gotten the U.S. out of a tangled and uncomfortable situation with the Arab world's largest purchaser of U.S. goods and services. Says one attorney who has closely followed the matter, "The Saudis bent over backwards to let Treasury out of its self-created box. Treasury was about to make public new rules that would have squelched much business and caused great tax problems." Says another business lawyer, "Treasury had itself in a box because it was making a distinction without a difference. Treasury needed a way out. It was nice of the Saudis to help bail them out, but it would have been much more reasonable for Treasury to have accepted Commerce's position in the beginning."

Should the Jewish groups decide to reopen the subject and step in with Congressional pressures, the whole Pandora's box could be flung wide open once again.

CORE LABS' AMINISTRATIVE HEARING AWAITED WITH ANTICIPATION.

The Core Laboratories contest with Commerce's Anti-boycott Compliance Staff (See "Commerce/-Treasury Enforcement," December 1979 issue, page 379) is being eagerly awaited by Washington anti-boycott followers. "We're delighted," indicated Will Maslow of the American Jewish Congress, publishers of "Boycott Report." When asked about Core Labs' decision to take the matter of Commerce's charges before Administrative Law Judge Hugh J. Dolan in a public hearing, Maslow said he was pleased with the development. "This will draw attention to the fact that companies can't violate the law without being penalized," he said. (Providing, of course, that Judge

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Dolan should find Core Labs guilty of the charges alleged by Commerce.)

Attorneys familiar with anti-boycott note that the "intent" provisions of the anti-boycott section of the EAA have a substantial legislative history in the debate which took place in the Senate. Even so, proving intent may not be any easier. Core Labs' Executive Vice President, Gould Whaley, has indicated that the company's defense will turn on intent, and that the requisite intent specifically required by the law was not present and cannot be proved.

This will be the first real test of both the gut "intent" issue of the law and the Antiboycott Compliance Staff's thoroughness in investigating and charging alleged violators. It will also be the first time that Commerce's internal processes in case selection and settlement offers will be publicly scrutinized.

JUDGE DOLAN SETS SCHEDULE FOR DISCOVERY IN CORE LABS CASE.

On Jan. 4, 1980, following a conference call with counsel for the Commerce Department and Core Laboratories, Administrative Law Judge Hugh J. Dolan ordered submission of discovery requests and interrogatories by the parties by January 15, and notified government counsel that their response would be expected by February 8.

On Feb. 15 Judge Dolan will initiate another conference call to discuss the status of pre-hearing matters, the issues, and to establish a schedule for a heaing.

In his order, Judge Dolan noted that "it does not appear from Counsels' representations that there are facts for determination." This tends to confirm our earlier report that Core Labs will not dispute that it provided the prohibited certifications as alleged by Commerce, but that the company will argue that it did not intend to violate the EAA in providing the certifications.

Judge Dolan told counsel for both sides that at the time of his upcoming Feb. 15 conference call, the parties should be prepared to review "their anticipated evidentiary presentations, including the number and names of witnesses, as well as the expected testimony."

Judge Dolan also notified the parties that "Following review of the regulations, it is my preliminary determination that any hearings will be open, absent a showing of sensitivity from the standpoint of national security or business confidentiality....Since these proceedings arise under section 8 of the Expo Administration Act of 1979, public access will be granted to the entire record during the course of the proceedings unless some restriction is imposed by order made pursuant to Section 388.21(b) of the Export Administration Regulations."

COMMERCE'S "EAGERNESS" FOR CONSENT SETTLEMENTS IS DENIED.

Word has filtered back to the Bulletin that last month's report about Commerce's eagerness to settle anti-boycott cases with consent agreements and reduced fines (page 381) is not the way things are viewed at the Department. In addition, the suggestion that Commerce dangles possible criminal sanctions before charged companies to induce quick civil settlements is denied — although it is true that in all cases Commerce anti-boycott officials carefully explain to counsel for charged companies the various legal penalties provided for in the law. This procedure might make companies feel they are in a de facto plea-bargaining situation.

Nevertheless, most observers of the anti-boycott enforcement program have reached the conclusion that Commerce did reach an internal decision to come out with a series of quick, tight cases, both to avoid drawn-out administrative litigation and to establish the precedent of consent agreement settlements.

Also, because of Commerce's slow start at enforcement (See "Commerce/Treasury Enforcement," February 1979 issue, page 50) there is a general feeling that the decision was made to get a number of cases out and on the record as soon as possible.

BUSINESS ATTORNEYS, JEWISH OFFICIALS COMMENT ON COMMERCE ENFORCEMENT.

Five months after the Commerce Department's first enforcement action on August 27, 1979, the anti-boycott enforcement program is receiving generally favorable comment from business counsel and from the Jewish organizations.

Will Maslow of the American Jewish Congress observed that "We were puzzled by the long delay in getting organized, but now we're quite pleased with the number of actions and the amount of fines and with the promise of much more to come soon."

An attorney representing a number of major companies involved in Middle East business said that "Stan Marcuss and Vin Rocque deserve much credit for making this program work as well as it has."

Attorneys involved in anti-boycott cases say that Marcuss and Rocque have quite carefully and tactfully stroked both sides in an effort to create just such a situation of general acceptance.

Commenting on the enforcement actions thusfar, another business attorney noted that "It's interesting that most of the actions so far seem to be against small companies. Maybe this is due to the inability of small companies to pay the legal price of protecting themselves."

An attorney with a major Washington firm said that "Most of the large companies are trying really hard to comply [with the anti-boycott regulations], sometimes at a substantial cost in foregoing business."

The amounts of the fines imposed thusfar are generally considered to be quite reasonable. One of the attorneys and others surveyed by the Bulletin did feel that the fines are too severe, given the nature of the offense. Still, the same individual notes that "One benefit has been that inadvertent violators have been let off fairly easily, and the larger fines have come in cases where companies apparently knew what they were doing."

Jewish spokesmen and business community representatives strongly disagree on the question of business losses resulting from the anti-boycott laws and enforcement programs.

Most attorneys questioned during the past few weeks say that their clients are at times deterred from doing business in certain countries for anti-boycott reasons. "I think probably the most significant trade loss is not in volume but in type," said one business source. "It's been virtually impossible for small companies to do business in many countries unless on the coattails of large companies who can afford the legal advice and who can put up with the time-consuming procedures and hassles involved" in anti-boycott compliance.

Yet when asked about business losses, Will Maslow of the American Jewish Congress vociferously insists that "We've asked them to prove a single such case and they can't. No business is being lost and small companies aren't being deterred."

MARCUSS RESIGNS FROM COMMERCE; WILL PRACTICE LAW IN WASHINGTON.

A casualty of the struggle for export control policy between the Commerce Department and the National Security Council, Acting Assistant Secretary for Trade Administration Stanley J. Marcuss resigned from the Commerce Department early this month. He told the Bulletin that he will practice law in Washington, D.C.

Marcuss' resignation does not take effect for another two months.

Marcuss said that he felt he had served the Department as long as he thought he was useful in his position, first as Senior Deputy Assistant Secretary and lately as Acting Assistant Secretary. Marcuss moved to the Department in May 1977 from the Senate subcommittee on International Finance where, as counsel, he played a principal role in drafting the anti-boycott language of the predominant Senate versions of the Export Administration Amendments in the 94th and 95th Congresses. At Commerce, he directed the drafting of the EAA anti-boycott regulations and set up the Antiboycott Compliance Staff.

Nominated for the permanent job of Assistant Secretary for Trade Administration, Marcuss had the support of Stuart Eisenstadt and Robert Strauss, among others. But his appointment was opposed by Zbigniew Brzezinski. Brzezinski opposed Marcuss' appointment on the grounds that there was a basic policy difference between himself and Marcuss (and others at Commerce) concerning trade with the Soviet Union.

Marcuss said that press reports that identified him as favoring a more liberal policy on trade with the Soviets was mischaracterized. "My major concern in the two and one-half years I've been here is to make sure that any decision in the export control area, as well as other areas, be soundly based, that all the consequences be identified and thought through before any action is taken — and that any action taken not be arbitrary and that it be sustainable on the record and withstand public scrutiny."

That objective, said Marcuss, "has made it necessary for me from time to time to take objection to proposed courses of action which I and the Department regarded as arbitrary or capricious [on the part of the NSC], and that was the fundamental conflict."

In addition to Marcuss' resignation, the end result of the NSC-Commerce fight is that the NSC now holds greater control over what previously was the Department's export policy.

Marcuss said that when he leaves the Department he will practice law in Washington. "I don't know what the precise circumstances will be," he said, "but I will be practicing law in Washington." Attorneys in Washington say that several of the city's major firms are bidding for Marcuss.

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RHODESIA NOW PROTECTED BY U.S. ANTI-BOYCOTT LAW.

According to Commerce Antiboycott Compliance Staff officials, with the lifting of U.S. trade sanctions against Rhodesia, that country is now technically a beneficiary of the EAA anti-boycott provisions. The EAA prohibits U.S. persons' participation in foreign boycotts conducted against countries friendly to the United States and which are not themselves the object of U.S. trade sanctions or boycotts. With the Dec. 16, 1979, executive order lifting U.S. sanctions against Rhodesia, U.S. persons may not now participate in any remaining boycotts of that African nation.

TREASURY MAKES INCIDENTAL CHANGES IN FORM 5713, " BOYCOTT REPORT."

The Treasury Department has made what it terms "editorial and grammatical" changes in the Internal Revenue Service's Form 5713, the "International Boycott Report." The changes do not involve any substantive alterations of the form or reporting procedures.