News and alerts

U.S. enforces anti-boycotting laws

The United States Bureau of Industry and Security ('BIS') announced settlements with a total value of $72,000 for alleged anti-boycotting law violations, at the end of October. The settlements were with four companies.

U.S. anti-boycott laws prohibit U.S. persons from acting with intent to comply with or support unsanctioned foreign boycotts. In the vast majority of cases, this means the boycott against Israel by the Arab League or other countries.

The settlements

Chemguard Inc. of Texas agreed to pay $22,000 to settle seven allegations that it violated the anti-boycott provisions of the EAR.

BIS alleged that, between 2005 and 2007 the company made seven violations, in connection with transactions involving the sale and/or transfer of goods or services (including information) from the United States to the United Arab Emirates. On two occasions, BIS says, the company furnished prohibited information in a statement regarding the blacklist status of the carrying vessel, and, on five occasions, failed to report the receipt of a request to engage in a restrictive trade practice or boycott, as required by the Export Administration Regulations ('EAR'), to the Department of Commerce .

The Shanghai-branch of the *Bank of New York Mellon* agreed to pay $30,000 to settle allegations that, in connection with transactions involving the sale and/or transfer of goods or services (including information) from the United States to United Arab Emirates, the bank 'furnished prohibited information in a statement certifying that the goods were neither of Israeli origin nor contained Israeli materials'. *World Kitchen LLC* of Pennsylvania, which, it is alleged, failed on five occasions to report to the Department of Commerce the receipt of a request to engage in a restrictive trade practice or boycott, in connection with transactions between the United States and the United Arab Emirates, will pay $10,000.

Tollgrade Communications, also of Pennsylvania, which, on three occasions, it is alleged, furnished prohibited information in a statement regarding its activities with or in Israel, and on one occasion failed to report the receipt of a request to engage in a restrictive trade practice, will also pay $10,000.

Scope of controls

The U.S. Treasury and the Department of Commerce each have their own anti-boycott legislation, with subtle differences in scope and application. One key difference between the regimes is that while the BIS publishes details of enforcement, the Treasury does not.

There are also differences as to whom each applies. Commerce Department legislation (section 8 of the Export Administration Act, the International Emergency Economic Powers Act, and the Restrictive Trade Practices and Boycotts part of the EAR) apply to: 'U.S. persons, including individuals who are U.S. residents and nationals, business and "controlled in fact" foreign subsidiaries, with respect to activities in the interstate or foreign commerce of the United States.'

By contrast, Treasury powers under the Ribicoff Amendment to the Tax Reform Act 1976 apply to 'Any U.S. tax payer or member of a controlled group which includes such tax payer', and also includes U.S. shareholders of foreign companies.

Caveat SME

Dj Wolff, an associate at the Washington D.C. office of Crowell & Moring, has been following BIS anti-boycott law enforcement. He told *WorldECR* that while larger companies fielding sophisticated compliance teams are on top of U.S. laws, dangers lurk for those smaller companies who may not 'know anything about the Arab League, the boycott, or the boycotting laws and run the risk of violating the sanctions without having any intention to ostracize Israel.'

Activities that are prohibited by the EAR and penalized by BIS include:

- Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies.
- Agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin or nationality.
- Agreements to furnish or actual furnishing of information about business relationships with or in Israel or with blacklisted companies.
- Agreements to furnish or actual furnishing of information about the race, religion, sex, or national origin of another person.

Wolff says that of around ten settlements announced each year, enforcement only represents a fraction of the possible number of violations given that boycott provisions are found in many contracts drafted by Arab League and other countries, which, he warns, are not always obviously worded. 'A contract may request that the other party conforms to, for example, all UAE laws. This could be interpreted as meaning conforming to boycotting legislation. Companies recognizing a clause – or something that could be interpreted as a clause – in a contract should ask either for it to be removed, or clarified. For example, to specify that "conformity" with UAE or Saudi or Yemeni law, means "conformity with health and safety, environmental or employment law," and not with an anti-Israeli boycott.'

Higher penalties

Wolff also points out that while average settlement amounts have not typically been high (around $3,000-$4,000 per violation), that is not to say that there is not potential for more significant penalties to be imposed. There is speculation that the lower penalties reflect BIS's litigation risk assessment – sums it believes it can settle for without pushing alleged violators to the courtroom. In fact, anti-boycott regulations are currently governed by the International Emergency Economic Powers Act ('IEEPA'), which provides for penalties of up to the greater of $250,000 per violation 'or twice the value of the transaction for administrative violations of Anti-boycott Regulations, and up to $1 million and 20 years' imprisonment per violation for criminal anti-boycott violations,' according to the BIS website.

For a comparison of the two regimes, see:
http://www.bis.doc.gov/complianceandenforcement/comparison-antiboycott-laws.pdf