

A row of various international flags hanging from a building facade. The flags are arranged in a line, receding into the distance. The building is made of light-colored stone with classical architectural details. The flags include the flag of the United States, the flag of the United Kingdom, the flag of the Netherlands, the flag of the United Arab Emirates, the flag of the United States of America, the flag of the United Kingdom, the flag of the Netherlands, the flag of the United Arab Emirates, the flag of the United States of America, the flag of the United Kingdom, and the flag of the Netherlands.

**Buchanan**

# **Navigating the Law:** **U.S. Antiboycott Handbook**

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U.S. antiboycott laws prohibit U.S. entities and persons from taking certain actions with the intent to comply with, further, or support unsanctioned foreign boycotts, with a primary focus on the boycott of Israel by the Arab League. In certain instances, the regulations further require U.S. persons to report requests to participate in boycotts. These antiboycott laws and regulations are administered by the Office of Anti-Boycott Compliance (OAC), a subdivision of the Department of Commerce, Bureau of Industry and Security (BIS), and the Department of Treasury. The antiboycott provisions administered by Treasury regulate activities of U.S. corporate taxpayers and, in certain instances, extend to non-U.S. affiliate companies. The Commerce antiboycott provisions regulate activities of U.S. persons engaged in commerce, whether interstate or foreign.

U.S. antiboycott laws and regulations can be generally categorized into one of three levels, including:

- **Primary:** One country refuses to do business with another (and with which the U.S. does not typically interfere).
- **Secondary:** One country refuses to trade with anyone who does business with a boycotted country.
- **Tertiary:** One country refuses to trade with anyone who does business with companies or firms on their respective “blacklist.”

While the antiboycott regulations administered by the U.S. Department of Treasury and Commerce may overlap, an activity permitted by one agency may be prohibited or penalized by the other. For this reason, among others, it is vital that companies and individuals engaging in exports, imports, financial transactions, and/or other international dealings have experienced counsel assist in navigating the nuanced antiboycott requirements of both the Internal Revenue Service (IRS) Code and the Export Administration Regulations (EAR).

U.S. entities and individuals subject to antiboycott regulations must be vigilant in their compliance efforts. Violation of these laws may result in the denial of tax benefits, stiff financial penalties, and/or imprisonment. While intent is an important factor in determining whether a violation has occurred, a U.S. entity may still be held liable for violations of antiboycott laws even where it did not have either knowledge or an understanding of the full scope of these legal requirements.

## HISTORY & STATUTORY AUTHORITY

The legal authorities underlying the current antiboycott regimes were first enacted in the late 1970s, when the United States sought to prohibit U.S. entities and persons from participating in the economic boycotts and restrictive trade practices of other countries. To that end, in 1977, the Export Administration Act was amended to prohibit certain activities engaged in by U.S. persons that promoted unsanctioned international boycotts. These amendments formed the foundation of Section 8 of the Export Administration Act of 1979, which provided the statutory basis for the antiboycott regulations. This section of the Export Administration

Act was implemented as Part 760 of the Export Administration Regulations.

The current basis for administration and enforcement of OAC's regulations is provided for in the Anti-Boycott Act of 2018, which was signed into law on August 13, 2018. Further antiboycott authorities are provided in the Ribicoff Amendment to the 1976 Tax Reform Act, which is administered by the Department of the Treasury.

## COMMERCE ANTIBOYCOTT PROVISIONS

### Background

The United States' international trade policy includes a long history of establishing export control regimes. These export control restrictions also include antiboycott provisions governing activities by U.S. persons.

### Jurisdiction

Part 760 of the EAR regulates certain activities by "U.S. persons," undertaken with "boycott intent," in the "interstate or foreign commerce of the United States." Each of these key terms is defined in the EAR as follows:

- **U.S. Person:** Includes all U.S. citizens, U.S. residents, U.S. corporations, and unincorporated associations that are resident in the United States and their foreign subsidiaries and affiliates.
- **Boycott Intent:** Intent to comply with, further, or support an unsanctioned foreign boycott must be present in order for the regulations to apply.



- **Interstate or Foreign Commerce of the United States:** Includes activities involving the sale, purchase, or transfer of goods (including information) or services between two or more U.S. states or between a U.S. state and a foreign country. Exports and imports to or from the U.S. of goods or services may also be covered.



## What is Prohibited?

Section 760.2 of the EAR prohibits the following antiboycott activities:

- Refusing or agreeing to refuse to conduct business in or with a boycotted country or blacklisted company.
- Discriminating or agreeing to discriminate against a U.S. person on the basis of race, religion, sex, or national origin.
- Furnishing information or agreeing to furnish information about business relationships with or in a boycotted country or with a blacklisted company.
- Furnishing or agreeing to furnish information regarding a U.S. person's business relationship(s) with a boycotted country or blacklisted company.
- Furnishing information about work with charitable or fraternal organizations which support a boycotted country.
- Paying, honoring, or otherwise implementing a letter of credit that requires complying with an unsanctioned boycott.
- Evading, attempting to evade, or assisting with the evasion of the above provisions.

## Exceptions

15 CFR § 760.3 details the exceptions to the Commerce antiboycott regulations. Each exception is narrow, fact-specific, and may still require reporting. Some of the most commonly utilized exceptions include:

- **Compliance with Import Requirements of a Boycotting Country**

A U.S. person, in supplying goods or services to a boycotting country or to a national or resident of a boycotting country, may comply or agree to comply with requirements of such boycotting country. Further, a U.S. person may comply or agree to comply with such import requirements whether or not he/she has received a specific request to comply.

By its terms, this exception applies only to transactions involving imports into a boycotting country. Under this exception, a U.S. person may not uniformly refuse to do business with a boycotted country or a national or resident of a boycotted country.

- **Compliance with Requirements Regarding the Shipment of Goods to a Boycotting Country.**

A U.S. person, in shipping goods to a boycotting country, may comply or agree to comply with requirements of that country which prohibit the shipment of goods.

A specific request that a U.S. person comply or agree to comply with requirements concerning the use of carriers of a boycotted country is not necessary if the U.S. person knows, or has reason to know, that the use of such carriers for shipping goods to the boycotting country is prohibited by requirements of the boycotting country.

- **Compliance with Import and Shipping Document Requirements of a Boycotting Country**

A U.S. person, in shipping goods to a boycotting country, may comply or agree to comply with import and shipping document requirements of that country. Such information must be stated in positive, nonblacklisting, nonexclusionary terms except for information

with respect to the names or nationalities of carriers or routes of shipment, which may continue to be stated in negative terms in conjunction with shipments to a boycotting country, in order to comply with precautionary requirements protecting against war risks or confiscation.

- **Compliance with a Boycotting Country's Unilateral and Specific Selection**

A U.S. person may comply or agree to comply in the normal course of business with the "unilateral and specific" selection by a boycotting country of carriers, insurers, or suppliers of services to be performed within the boycotting country or specific goods, provided that with respect to services, it is necessary and customary that a not insignificant part of the services be performed within the boycotting country.

- **Compliance with a Boycotting Country's Requirements regarding Shipment and Transshipment of Exports**

A United States person may comply or agree to comply with the export requirements of a boycotting country with respect to shipments or transshipments of exports to such country or a national thereof.

- **Compliance with Immigration, Passport, Visa, or Employment Requirements of a Boycotting Country**

A U.S. person may comply or agree to comply with the immigration, passport, visa, or employment requirements of a boycotting country, and with requests for information from a boycotting country made to ascertain whether such individual meets requirements for employment within the boycotting country, provided that they furnish information only



about themselves or a member of their family and not about any other U.S. person, including their employees, employers, or coworkers.

- **Compliance with Local Law**

This exception contains two parts. The first covers compliance with local law with respect to a U.S. person's activities exclusively within a foreign country; the second covers compliance with local import laws by U.S. persons resident in a foreign country. Under both parts of this exception, local laws are laws of the host country, whether derived from statutes, regulations, decrees, or other official sources having the effect of law in the host country. This exception is not available for compliance with presumed policies or understandings of policies unless those policies are reflected in official sources having the effect of law. Both parts of this exception apply only to U.S. persons resident in a foreign country. For purposes of this exception, a U.S. person will be considered to be a resident of a foreign country only if they are a bona fide resident. A U.S. person may be a bona fide resident of a foreign country even if such person's residency is temporary.

- Is the activity in the interstate or foreign commerce of the U.S.?
- Is the activity expressly prohibited by section 760.2 of the EAR?
- Do any exceptions listed in Section 760.3 of the EAR apply?
- Is the action reportable under Section 760.5 of the EAR? Further explanation of reporting is provided below.

Along with conducting the above due diligence, entities and individuals should be cognizant of certain key words and phrases which may indicate that the underlying transaction could be subject to U.S. antiboycott laws:

- Any reference to "Israel" or other "boycotted" or "embargoed" countries, such as:
  - » "Goods originating in Israel are not acceptable."
  - » "Seller shall not supply goods manufactured in Israel."
  - » "Contractor shall abide by terms issued by the Israel Boycott Office in X country."
- Any reference to "blacklisted" companies, persons, or vessels.

## Antiboycott Due Diligence

When considering whether a transaction may be subject to the EAR antiboycott provisions and, therefore, potentially triggering a reporting requirement, a party entering into a transaction should consider the following questions:

- Is the activity performed by a U.S. person or the foreign affiliate of a U.S. person? It is important to note that a "related party" may also fall under this scope: if a person controls a corporation, then any participation/cooperation with a boycott by the corporation is presumed to be participation/cooperation by the person, and vice versa.



- Any reference to the “eligibility” of the transporting vessel to enter the destination country’s ports.
- Any request for the “place of birth” or “nationality” of or other personal information about an employee, an employee’s family, or a supplier.
- Any requirement to certify the “origin of the goods.”
- Any requirement to furnish information concerning business relationships with particular countries or companies.

## Reporting and Records

Section 760.5 of the EAR require any requests that conflict with antiboycott laws to be reported quarterly. A request is “reportable” if the U.S. entity/person “knows or has reason to know that the purpose of the request is to enforce, implement, or otherwise further, support, or secure compliance” with an unsanctioned foreign boycott.

The EAR require that records related to antiboycott matters must be maintained for at least five years from the date of creation. Examples of such records include, but are not limited to, memoranda, notes, emails, contracts, invitations to bid, and financial records.

## Voluntary Self-Disclosures

If a U.S. person discovers that they may have violated the Commerce’s antiboycott regulations, they may file a voluntary self disclosure (VSD) detailing the potential violations. BIS encourages those who believe they have violated the regulations to file a VSD by giving the disclosing party “great weight” mitigation in the assessment of any potential penalties. Section 764.8 of the EAR includes requirements regarding the timing and contents of the initial filing, the subsequent narrative account of the violation(s), and certifications required in connection with a VSD. After receipt and review of the VSD and any supporting documentation, OAC will inform the filing party of any action it intends to take.

After OAC receives the filing and any supporting documentation, they will review and investigate the events detailed in the submission before issuing any determination or action it intends to take. BIS looks at the below factors when determining whether to pursue an enforcement action:



- The category of violations:

- » Category A:

- Discriminating against U.S. persons.
- Furnishing information about race, religion, sex, or national origin of a U.S. person.
- Evading provisions of Part 760.4.
- Furnishing information about associations with charitable or fraternal organizations which support a boycotted country.

- » Category B:

- Knowingly agreeing to refuse to do business.
- Requiring or knowingly agreeing to require any other person to refuse to do business.
- Implementing letters of credit with prohibited provisions.
- Furnishing information about business relationships with boycotted countries or blacklisted persons.
- Making recordkeeping violations.

- » Category C:

- Failing to timely report receipt of boycott requests.

- Degree of seriousness.
- Was it a knowing violation?
- Multiple violations from unrelated transactions.
- Familiarity with antiboycott provisions.



## Violations

For administrative violations, BIS may impose the following penalties:

- A monetary penalty in the amount of approximately \$300,000 per violation or twice the value of the underlying transaction, whichever is greater.
- Denial of export privileges.
- Revocation of any BIS export licenses.

For criminal violations, the Department of Justice may impose a penalty of up to \$1 million. Individuals may additionally (or alternatively) face up to 20 years imprisonment.

Recent violations and fines imposed by BIS include the following:

- Wabtec Corporation (1/30/2024) was found liable for 43 violations for failure to report receipt of a request to engage in restrictive trade practice or foreign boycott and assessed a civil penalty of \$153,175. Specifically, Wabtec received requests from a Pakistani customer





to refrain from importing goods originating in Israel. Wabtec failed to report the receipt of these requests. However, a number of remedial actions taken by Wabtec resulted in a substantially reduced penalty.

- Pratt & Whitney (9/6/23) was found liable for 13 violations for failure to report receipt of a request to engage in restrictive trade practice or foreign boycott and assessed a civil penalty of \$48,750. Specifically, Pratt & Whitney received a request from a Qatar customer to refrain from importing goods originating in Israel in fulfillment of purchase orders. Pratt & Whitney failed to report the receipt of the request. However, received a reduced civil penalty as a result of cooperation with BIS.
- Kuwait Airways Corp. (New Jersey) (1/14/2020) was found liable for 14 violations for refusal to do business with a boycotted country and assessed a civil penalty of \$700,000. Specifically, Kuwait Airways refused to accept passengers with Israeli passports on flights from New York to London.

## TREASURY ANTIBOYCOTT PROVISIONS

### Background & History

U.S. and non-U.S. companies that run afoul of the U.S. antiboycott laws and regulations may face the loss of certain U.S. tax benefits. Additionally, Treasury's antiboycott provisions apply regardless of whether there is a U.S. nexus; the transaction does not need to fall in the category of interstate or foreign commerce of the U.S.

26 U.S.C. § 999 provides that any person or a member of a controlled group that has "operations in, or related



to” a country that is listed on Treasury’s boycott list or “in any other country ... in which such person[s] ... had operations during the taxable year if such person ... knows or has reason to know that participation in or cooperation with an international boycott is required as a condition of doing business within such country” must report those operations to the U.S. Treasury, as well as “operations with the government, a company, or a national of that country.”

Section 999 and the Export Control Reform Act were enacted to discourage cooperation with international antiboycott regimes. While there is considerable overlap in these provisions, such as which activities qualify as cooperation, there are several noteworthy differences.

- For tax purposes, the activity in question does not need to have a U.S. nexus.
- While violations assessed by BIS are typically disclosed publicly on the OAC’s website (both the content of the violation and the financial penalty), determinations by the IRS are not.
- A “foreign affiliate” under the regulations administered by Commerce may not fall under the “foreign affiliate” definition as specified in Treasury’s regulations.

These differences and more underlie the complexity of both sets of regulations. Recently, the Treasury Department enhanced its enforcement attention on these issues and has assisted foreign countries in identifying and addressing deficiencies that include, among others, antiboycott regimes.

### Reporting and Penalties

The practical impact of Treasury’s antiboycott regulations is such that any person or member of a controlled group with operations in or related to a country named on the boycott list, or with the government, a company, or a national of a listed country, is required to file a Form 5371, *International Boycott Report*, with the IRS, subject to certain exceptions. This form must also be filed by anyone with operations in a nonlisted country that requires participation in or cooperation with an international boycott as a prerequisite for doing business with the government or country. The Secretary of the Treasury publishes a list of countries that require or may require cooperation with an unsanctioned international boycott. The Department of Treasury’s updated list, as of February 2024, includes: Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, and Yemen. However, the Treasury Department does not limit enforcement to countries on this list. Participation in an international boycott sponsored by a country not on the list can result in the same tax penalties as participation in an international boycott sponsored by one of the listed



countries. In addition, a taxpayer is required by Treasury's antiboycott provisions to identify on its U.S. tax return any other country which the taxpayer knows or has reason to know requires cooperation with an unsanctioned international boycott as a condition of doing business in or with that country.

Taxpayers who are required but fail to file an IRS Form 5371 are at risk of losing certain benefits, including: (1) foreign tax credits; (2) deferral of taxation of earnings of a controlled foreign corporation; or (3) exemption of foreign trade and exclusion of extraterritorial income from gross income.

In addition to the loss of tax benefits, a U.S. corporate taxpayer's willful failure to report on its U.S. tax return information required by Treasury's antiboycott provisions can trigger criminal penalties. Specifically, a U.S. company's willful failure to report required information by the tax antiboycott provisions may be subject to further criminal penalties. 26 U.S.C. § 999(f) provides that any person required to report under the antiboycott regulations, who willfully fails to make such a report, shall be fined not more than \$25,000, imprisoned for not more than one year, or both.

If a U.S. corporate taxpayer is unsure about whether a transaction might violate these regulations, it may request that the Secretary issue a determination regarding whether a particular transaction constitutes participation in or cooperation with a boycott.

The Secretary can issue the determination before the transaction. If the request is made before the transaction has started or before the end of the taxable year in which the transaction is carried out, the Secretary may decline to issue a determination before the close of the taxable year.

## Exceptions

The Treasury antiboycott regulations do not list an exception for compliance with local laws but do largely mirror the Commerce antiboycott exceptions, including limited exceptions for:

- Compliance by individuals with passport, visa, or employment requirements of a boycotting country.
- Compliance with boycotting country's requirements regarding shipments and transshipments of exports from such country.
- Compliance with boycotting country's request to select a supplier of service to be performed in or supplied to such country.
- Compliance with boycotting country's import and shipping document requirements.
- Compliance with boycotting country's import requirements.

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## BUCHANAN'S ANTIBOYCOTT AND EXPORT CONTROL EXPERIENCE

For assistance with antiboycott and export control matters, Buchanan's team of national security and tax attorneys are here to help. In addition to assisting clients with antiboycott and export control matters, our attorneys also counsel clients on a wide variety of trade and tax-related matters, including, but not limited to, U.S. economic sanctions, the Foreign Corrupt Practices Act, the Foreign Agents Registration Act, and Foreign Ownership, Control, or Influence (FOCI) issues.



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In his specialty practice, Dan Pickard brings more than 20 years of experience providing guidance pertaining to foreign policy and national security matters such as U.S. economic sanctions and export controls, including the International Traffic in Arms Regulations (ITAR), antiboycott measures, and the Foreign Corrupt Practices Act (FCPA). Dan provides comprehensive international trade law compliance guidance, including to U.S. and international clients that provide goods and services that may be regulated due to national security reasons. He has extensive experience in matters related to trade remedy investigations, including antidumping, countervailing duty, and safeguard cases, which provide relief to U.S. producers who have been injured as a result of import competition. Dan develops customized and specialized corporate compliance programs related to the NISPOM, FCPA, ITAR, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), the Foreign Agents Registration Act (FARA), and mitigating Foreign Ownership, Control, or Influence (FOCI) issues.