The Eleventh Circuit Court of Appeals—The First Ten Years

John C. Godbold
Application of Selected American Laws to United States Companies Transacting Business in Kuwait: Foreign Corrupt Practices Act and Antiboycott Legislation

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American businesses and their subsidiaries working in Kuwait or pursuing business opportunities in that country need not be reminded that they must comply with Kuwaiti business laws and regulations. They will not be transacting business in Kuwait for very long if they do not comply with Kuwaiti law. Equally important are American laws regulating the transaction of business by American companies and their subsidiaries outside the United States. Two of the most important American statutes of concern to Americans transacting business outside the United States are the Foreign Corrupt Practices Act of 1977 ("FCPA"), as amended,¹ and the antiboycott provisions of the Export Administration Act of 1979, as amended.²

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Compliance with these statutes is often inconvenient and can be frustrating given accepted business practices in some parts of the world. However, the penalties for violations of these statutes are sufficiently severe to outweigh the benefits of intentionally violating their provisions. The provisions, applications, and practicalities of these statutes are addressed herein.

I. THE FOREIGN CORRUPT PRACTICES ACT

In the mid-1970s, Americans discovered that certain large multinational corporations paid foreign government officials to gain advantages in obtaining business in those countries. Questionable payments to foreign officials and foreign political campaigns raised concerns regarding the integrity of competition for foreign contracts. Congress passed the FCPA to combat improper and unfair practices which prevented medium and small companies from competing in international markets. The FCPA was designed to prohibit certain types of payments to foreign officials, politicians, and political parties and to require accounting practices that would permit monitoring of corporate financing practices for possible illegal payments.

The FCPA applies to a broad range of companies including Securities and Exchange Commission ("SEC") reporting companies and domestic concerns. SEC reporting companies are those with a class of securities registered under section 12 of the Securities Exchange Act (companies required to file annually with the SEC). A "domestic concern" is defined as:

(A) any individual who is a citizen, national or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States ...

Officers, directors, stockholders, agents, or employees of a company subject to the FCPA are also individually subject to the FCPA. However, foreign officials are not subject to the FCPA and cannot be convicted for conspiracy to violate the FCPA.

5. Id.
6. Id. § 78ff(c).
A. Antibribery Provisions of the FCPA

Prohibited Conduct. As its title suggests, the FCPA is primarily designed to prohibit corrupt practices used to obtain or extend foreign contracts. The FCPA’s intent is to prohibit a contractor from offering anything of value to a foreign official or a member of a foreign government to obtain contracts or renew existing contracts.  

8. Persons covered by FCPA cannot use:

the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official,

(B) inducing such official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, or (ii) inducing such party official, or candidate to do or omit to do any act in violation of the lawful duty of such party, official, or candidate

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly, or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, or (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate,

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.
The antibribery provisions generally prohibit persons covered under the FCPA from using any form of interstate commerce for corrupt purposes to offer to pay, pay or authorize payment to a foreign official or political party to influence that official or party to act or fail to act in a manner which will benefit the offeror or payor.

**Interstate Commerce.** The FCPA defines interstate commerce to include "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof . . . ." This broad definition clearly encompasses communications between the United States and any foreign country or between two states, including simple telephone calls or letters, as well as the transport of goods or services across state lines or national boundaries.

**Corrupt Purpose.** Illegal payments are those which are "intended to induce the recipient to misuse his official position." This applies even if the act is not fully consummated or does not even succeed in producing the desired result.

The original terms of the FCPA created confusion for businesses who were not sure how to define the concept of "corrupt" payments. Amendments to the FCPA in 1988 added an element of knowledge to constitute a violation of the FCPA; simple negligence will not create liability—payments must be made with a corrupt purpose to violate the FCPA. The FCPA covers "any instance where 'any reasonable person would have realized' the existence of the circumstances or result and the defendant has 'consciously chose[n] not to ask about what he had reason to believe' he would discover." A person cannot rely upon the conscious disregard, willful blindness, or deliberate ignorance of facts to maintain that he did not know of a violation.

A person acts in a "knowing" manner if: (1) he is aware that he is engaging in illegal conduct, that the circumstances exist for illegal conduct or that illegal results are substantially likely to occur; or (2) he has a firm belief that the circumstances for illegal conduct exist or the result is sub-


9. Id. § 78dd-2(h)(5).


14. Id. at 1863, 2116.
The “knowing” requirement of the FCPA is designed to protect individuals or companies who inadvertently or unintentionally become involved in transactions that might give rise to illegal conduct from prosecution. However, even if the individual actions would be insufficient to show “knowing” conduct, there remains a prospect of prosecution if numerous transactions have occurred that give rise to illegal conduct.

An individual may be able to defend himself from a charge of violating the FCPA if he can show that his purpose was not corrupt even if his employer’s intent was impure. For example, in *United States v. Liebo*, an employee of an American airplane maintenance contractor was convicted of making illegal payments to a Nigerian official in order to obtain the maintenance contract for Nigerian Air Force cargo planes. The employee apparently agreed to make a “gesture” to the chief of maintenance for the Nigerian Air Force if the American company was awarded the maintenance contract. The employee purchased airline tickets for the Nigerian official’s honeymoon after award of the contract, an act that the trial court found violated the FCPA. The Eighth Circuit Court of Appeals reversed the conviction and remanded the case for a new trial because the employee maintained that new evidence showed he was acting on the direction of superiors in the company in making the payment. The court of appeals found that the employee was entitled to a new trial because if the employee acted on directions from the company’s president, the employee’s actions and motives might have had no personal “corrupt” purpose.

**Business Purpose Limitation.** The FCPA prohibits only those payments made for “obtaining or retaining business for or with, or directing business to, any person.” Payments made for another purpose may fall outside the scope of the FCPA, but any payment made to a foreign official or governmental body will be subject to greater scrutiny whether illegal or not. American businesses should be careful to prevent any suggestion of payments being made for illegal purposes.

**“Grease” Payments Exception.** The FCPA will allow a payment to a foreign official if the payment is for “facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a

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16. 923 F.2d 1308 (8th Cir. 1991).
17. Id. at 1309-10.
18. Id. at 1314.
19. Id.
20. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1988). These sections also prohibit corrupt use of the mails, promises to pay, etc. Id.
routine governmental action." A governmental action will be routine if that action is ordinarily and commonly performed by a foreign official in:

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
(ii) processing governmental papers, such as visas and work orders;
(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
(v) actions of a similar nature.

The critical distinction between these permissible payments and illegal payments is that illegal payments are made to encourage the awarding of new business or to continue doing business with a particular person or company or to encourage such a decision.

Congress enacted the grease payment exception to the FCPA in response to complaints from United States companies that they were at a competitive disadvantage with foreign corporations who could make payments which were considered routine to foreign officials in those countries. The FCPA, as initially written, caused many companies to ban the tipping of clerical or administrative officials in order to avoid any appearance of impropriety. However, the 1988 amendments to the FCPA reflect the practicalities of payments for routine matters not associated with the securing or reissuance of contracts to a particular entity.

While permitted, grease payments must be reported in company accounting records to the SEC by companies subject to the SEC reporting requirements. Failure to report such payments can constitute a violation of the Securities and Exchange Act of 1934.

**Extortion Payments Exception.** American companies may make payments in response to an extortion demand without violating the FCPA, but the demand must actually be designed to extort money from

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27. Id.
the company or individual.\textsuperscript{28} The Senate Committee Report on the 1977 act specified:

That the payment may have been first proposed by the recipient rather than the U.S. company does not alter the corrupt purpose on the part of the person paying the bribe. On the other hand true extortion situations would not be covered by this provision since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose.\textsuperscript{29}

\textbf{Payments Permitted Under Laws of Foreign Countries.} Payments that are lawful under the written laws of the foreign country, or are made as part of demonstrating a product or performing a contractual obligation, can fall outside the FCPA’s prohibitions.\textsuperscript{30} These exceptions are technically “affirmative defenses” so the payor has the burden of showing that the payments fell within these exceptions.\textsuperscript{31}

In some cases, it can be difficult to determine if payment is legal under the laws of a foreign country. Many foreign government agencies, local governments, and foreign judicial or administrative decisions allow or permit certain types of questionable payments. However, these practices or regulations may incorrectly state the foreign country’s law. When a potential payor is relying on the laws of a foreign country, the payor should seek legal counsel before following a nonofficial or semiofficial interpretation of a foreign country’s law.

\textbf{Penalties.} Criminal and civil penalties for violations of the antibribery provisions of the FCPA can be severe. Criminal penalties for violations of the antibribery provisions of the FCPA include: (1) fines for companies of up to $2,000,000;\textsuperscript{32} (2) fines of up to $100,000 for corporate officers, directors, employees, agents, or stockholders who commit a willful violation;\textsuperscript{33} and (3) prison sentences of no more than five years for corporate officers, directors, employees, agents, or stockholders of domestic concerns who commit a willful violation.\textsuperscript{34}

Criminal fines levied against individuals cannot be indemnified by their corporate employers.\textsuperscript{35} American companies or officers, directors, employ-

\begin{itemize}
\item \textsuperscript{28} S. Rep. No. 114, \textit{supra} note 3, at 10-11.
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} 15 U.S.C. §§ 78dd-1(c), 78dd-2(c) (1988).
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.} § 78dd-2(g)(1)(A).
\item \textsuperscript{33} \textit{Id.} § 78dd-2(g)(2)(A) & (B).
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} § 78dd-2(g)(3).
\end{itemize}
ees, agents, or stockholders of domestic concerns that violate the FCPA are also subject to civil penalties of up to $10,000.\textsuperscript{36}

\section*{B. Accounting and Record Keeping Requirements of the FCPA}

\textbf{Requirements.} All publicly held companies must maintain accurate records of foreign transactions and payments to comply with the FCPA.\textsuperscript{37} These accounting provisions are intended to monitor corporate financial activities to prevent the use of illegal payments to gain an advantage in business transactions.

The record keeping and accounting provisions require public companies to:

(A) make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer (of securities or other entity subject to the Act); and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles . . . and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.\textsuperscript{38}

\textbf{Effects of 1988 Amendments on Accounting Requirements.} Many companies criticized the accounting standards of the 1977 FCPA as being overly harsh and lacking certainty and clarity.\textsuperscript{39} For example, one incorrect accounting entry, no matter how slight, could have been construed as a violation of the FCPA prior to 1988.\textsuperscript{40} The pre-1988 accounting provisions were also criticized as dramatically increasing documentation for foreign transactions with resulting increases in administrative costs.\textsuperscript{41} Some complained that companies were so fearful of failing to

\textsuperscript{36} Id. §§ 78dd-2(g)(1)(B), (2)(C).
\textsuperscript{37} Id. § 78m(b)(2).
\textsuperscript{38} Id.
\textsuperscript{39} Shaw, supra note 23, at 164.
\textsuperscript{40} Id. at 168; H. Weisberg & E. Reichenberg, Research Report: The Price of Ambiguity More than Three Years Under the Foreign Corrupt Practices Act, Chamber of Commerce of the United States, 1-2, 13, 30 (1981).
\textsuperscript{41} Shaw, supra note 23, at 168.
comply with the FCPA that they were actually over-complying, a criticism borne out by a 1981 General Accounting Office survey which showed accounting costs increasing as much as 35 percent for some companies.\textsuperscript{48}

Congress modified the FCPA in 1988 to address what constituted "reasonable detail" in record keeping and "reasonable assurances" in internal accounting controls to satisfy the Act.\textsuperscript{44} The 1988 modifications define reasonable detail and reasonable assurances as "such level of detail and degree of assurances as would satisfy prudent officials in the conduct of their own affairs."\textsuperscript{44} The 1988 amendments also limit criminal liability for violations of the FCPA to those who knowingly fail to comply with or fail to implement a system of internal accounting controls or who knowingly falsify their records.\textsuperscript{48} The purpose of these changes is to make the accounting standards less ambiguous and to apply a degree of "reasonableness" to the standards.\textsuperscript{44}

There is no "materiality" standard under the FCPA. Therefore, companies have an obligation to maintain reasonable records and accounting procedures to account for all of their money, not just monies which would be material in the usual financial sense.\textsuperscript{47}

\textbf{SEC Record Keeping and Accounting Rules.} SEC Rules 13b2-1\textsuperscript{48} and 13b2-2\textsuperscript{48} provide guidance for identifying prohibited accounting procedures. These regulations supplement the requirements of the FCPA. Rule 13b2-1 provides that: "no person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act."\textsuperscript{49} Rule 13b2-2 specifies that:

\begin{quote}
No director or officer of an issuer [of securities subject to the Securities Exchange Act] shall, directly or indirectly,
\end{quote}

44. Id.
45. Id.; Shaw, supra note 23, at 169.
49. Id. § 240.13b2-2.
50. Id. § 240.13b2-1. The Securities Exchange Act provides that records include "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language." 15 U.S.C. § 78(c)(37) (1988).
(a) Make or cause to be made a materially false or misleading statement, or
(b) Omit to state, or cause another person to omit to state, any material
fact necessary in order to make statements made, in the light of the cir-
cumstances under which such statements were made, not misleading to
an accountant in connection with (1) any audit or examination of the
financial statements of the issuer required to be made pursuant to this
subpart or (2) the preparation or filing of any document or report re-
quired to be filed with the Commission pursuant to this subpart or
otherwise.51

Penalties. Failure to comply with the record keeping and accounting
requirements of the FCPA can result in substantial fines.52 The 1988
amendments to the FCPA provide that criminal penalties are not availa-
ble for violations of the accounting sections unless the acts are taken to
knowingly circumvent the accounting requirements.53 Thus, criminal pen-
alties are apparently limited to the deliberate falsification of books and
records designed to evade internal accounting control requirements.

Exemption From Accounting Requirements. The FCPA provides
for one exemption from the accounting requirements.54 A company does
not have to comply with the accounting provisions if compliance would
threaten national security.55 The FCPA provides that:

With respect to matters concerning the national security of the United
States, no duty or liability ... shall be imposed upon any person acting
in cooperation with the head of any Federal department or agency re-
sponsible for such matters if such act in cooperation with such head of a
department or agency was done upon the specific, written directive of the
head of such department or agency pursuant to Presidential authority to
issue such directives.56

Clearly, this exemption has limited application. The executive directive
must set forth the national security interest and such directives expire
after one year unless specifically renewed.57

C. Liability for Actions of Subsidiary Companies

Foreign subsidiaries of a United States corporation may fall within the
scope of the FCPA so as to make the parent corporation liable for the
subsidiary's improper payments or failure to comply with applicable accounting procedures. Provisions relevant to parent liability for actions of subsidiaries are discussed below.

**Antibribery Requirements for Subsidiaries.** A United States corporation may be liable for payments made by a foreign subsidiary of the United States corporation if the arrangements between the parent and the subsidiary are sufficiently close that the parent knew or should have known of the subsidiary's improper activities. However, bribes which are originated by the subsidiary and carried out only by the subsidiary without knowledge of the parent would probably not subject the parent to liability. Apparently, the intent of Congress, was to make parent companies liable for actions of their foreign subsidiaries when the parent company participates directly or indirectly in making illegal payments.

To avoid liability, a parent corporation must be able to show that the foreign subsidiary acted on its own when making improper payments. Additionally, an American company may not escape liability for improper payments made through a nonsubsidiary. If the United States company is aware that payments are being made by another individual or company on its behalf and these payments are proscribed by the FCPA then the American company will be liable for the violation of the FCPA. These obligations are particularly important where an American company is employing an agent in a foreign country. The American company must take great pains to fully document all of its involvement with the foreign agent. The agent agreement should specify that the agent agrees to abide by the FCPA and the American company should require careful accounting by the agent of payments made on behalf of the American company.

**Accounting and Record Keeping Requirements for Subsidiaries.** There was a great deal of confusion under the original FCPA as to whether the FCPA accounting procedures applied to the subsidiaries of American corporations subject to the FCPA. As amended in 1988, the FCPA provides that subsidiaries which are more than fifty percent owned by companies subject to the FCPA must also comply with the reporting requirements of the FCPA. If the parent corporation owns fifty percent

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58. EXECUTIVE LEGAL SUMMARY No. 5, supra note 47, at 100.03; 123 CONG. REC. 38600 (December 6, 1977).
59. Id.
60. Id.
61. Id.
62. Id.
64. MITCHELL & BALL, supra note 1, at 116-18.
65. Id. at 111.
or less of the subsidiary's voting securities then the parent corporation can comply with the FCPA by using its influence to the extent reasonable under the circumstances and in good faith to safeguard that the subsidiary will follow the accounting procedures required by the FCPA. So long as the parent company makes a good faith effort to cause a subsidiary to comply with the accounting rules, the parent company will not be responsible for the subsidiary's violations.

D. Enforcement of the FCPA

Enforcement of the FCPA rests principally with the Department of Justice, which is responsible for enforcing the antibribery provisions. The SEC is responsible for monitoring the record keeping requirements.

Department of Justice Enforcement. The Department of Justice is empowered to enforce both criminal and civil proceedings under the FCPA. The Department of Justice may seek injunctive relief with respect to violations by American companies and related individuals and can criminally prosecute American companies and individuals found to have willfully violated the antibribery provisions of the FCPA.

The Department of Justice has brought only a few cases, representing particularly flagrant violations, under the FCPA. In one case, the Department of Justice targeted an individual who had the postage stamp concession for a Caribbean island. Postage stamps were a large source of revenue for the island and the American concessionaire was targeted by the Department of Justice for flying citizens of the island back to the island for purposes of voting for the president when the president was up for reelection. The concessionaire would include the costs of the charter flights for the citizens brought back to the island to vote for the president in his bid for the postage stamp concession. The Department of Justice consid-

66. Id.
67. EXECUTIVE LEGAL SUMMARY No. 5, supra note 47, at 100.03.
69. Id. § 78m. The Department of Justice and SEC share information from their respective investigations despite the fact that the SEC does not have criminal jurisdiction as does the Department of Justice. This practice of sharing information has been judicially sanctioned. SEC v. Dresser Indus., Inc., 628 F.2d 1368 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).
71. Id.; see also Trane Co. v. O'Connor Securities, 718 F.2d 26 (2d Cir. 1983) (only willful violations of FCPA are subject to criminal punishment).
73. EXECUTIVE LEGAL SUMMARY No. 5, supra note 47, at 100.03.
ered this conduct to be bribery of the president in order to retain the stamp concession.\textsuperscript{74}

In another set of cases, the Department of Justice charged International Harvester Company and several of its employees with violating the Act in illegal dealings with officials of Petroleos Mexicanos (Pemex), Mexico's largest oil company.\textsuperscript{75} International Harvester pled guilty to conspiracy to violate the FCPA.\textsuperscript{76}

\textbf{Department of Justice Review Procedure.} The Department of Justice also maintains an “FCPA Review Procedure.”\textsuperscript{77} Individuals or companies about to enter into a transaction they believe to be legal, but which causes some concern can present the details of the proposed transaction to the Department of Justice.\textsuperscript{78} The Department of Justice guidelines provide that a response to the request should be issued within thirty days.\textsuperscript{79} The requesting party can only rely upon a written FCPA review letter signed by the Assistant Attorney General in charge of the criminal division or his delegate so long as the request provided accurate and complete information concerning the proposed transaction.\textsuperscript{80}

The procedure as originally established was designed to enable American companies and individuals who could be accused of having a “reason to know” that a payment to an agent or representative might be paid to a foreign official or political party with a method for determining whether that payment would constitute a legal “grease” payment.\textsuperscript{81} However, few companies have taken advantage of this procedure and only nineteen decisions have been issued by the Department of Justice since the program started in 1980.\textsuperscript{82} Some commentators expect that the review procedure

\textsuperscript{74} Id. at 100.03, 100.04.

\textsuperscript{75} For a brief history of the FCPA violations alleged against International Harvester and some of its employees, see McLean v. International Harvester Co., 902 F.2d 372, 373 (5th Cir. 1990) (citing United States v. Crawford Industries, Inc. (S.C. Tex. Cr. No. 82-224) and United States v. International Harvester Co. (S.D. Tex. Cr. No. H-82-244)); see also McLean v. International Harvester Co., 817 F.2d 1214, 1216-17 (5th Cir. 1987) and Executive Legal Summary No. 5, supra note 47, at 100.03.

\textsuperscript{76} Id.


\textsuperscript{78} Id.

\textsuperscript{79} Id. § 50.18(i).

\textsuperscript{80} Id. § 50.18(j-k) (1991); see also Executive Legal Summary No. 5, supra note 47, at 100.03.

\textsuperscript{81} Executive Legal Summary No. 5, supra note 47, at 100.03.

\textsuperscript{82} Id. at 100.04. Some commentators have expressed concern that the uncertainty as to the privacy of requests has limited the use of the Review Procedure. For example, false information given in a review request might give rise to criminal prosecution. John W. Bagby, Enforcement of the Accounting Standards in the Foreign Corrupt Practices Act, 21 Am. Bus. L.J. No. 2, at 219-20 (Summer 1983).
will be employed even more infrequently in the future since the 1988
amendments to the FCPA remove liability for third party payments un-
less the United States company has "knowledge" of the potentially illegal
payment.\textsuperscript{68} However, the "knowledge" standard of the 1988 amendments
will still cover activities "that, while falling short of what the law terms
'positive knowledge,' nevertheless evidence a conscious disregard or delib-
erate ignorance of known circumstances that should reasonably alert one
to the high probability of violations of the Act."\textsuperscript{64} As a result, the FCPA
review procedure may still provide some protection to companies and in-
dividuals from accusations that they intentionally disregarded indications
of illegal payments.

\textbf{Securities and Exchange Commission.} The Securities and Ex-
change Commission is charged with monitoring the record keeping and
accounting requirements of the FCPA.\textsuperscript{68} The SEC is empowered to refer
evidence of suspected improper payments to the Attorney General for
criminal violations, but the SEC cannot seek criminal prosecution.\textsuperscript{68} How-
ever, they may pursue civil remedies under the FCPA, pursuant to the
provisions of the Securities Exchange Act.\textsuperscript{67}

In a much publicized speech in January of 1981, the Chairman of the
SEC, Harold Williams, set out the guidelines that the SEC would employ
for enforcing the FCPA.\textsuperscript{68} Under the guidelines minor inadvertent record
keeping mistakes would not be subject to SEC enforcement. The guide-
lines further provide: (1) the FCPA does not provide for any specific form
of internal accounting controls but rather the internal controls would be
evaluated on whether, as a whole, the system reasonably met the FCPA's
objectives; (2) the SEC would permit all reasonable forms of accounting
controls to be employed and not require the best or most effective con-
trols; and (3) the FCPA is directed to prevent knowing or reckless con-
duct so that inadvertent mistakes should not be prosecuted.\textsuperscript{68}

The SEC has historically enforced the FCPA record keeping and ac-
counting requirements as an adjunct of other securities reporting viola-

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83. \textit{Executive Legal Summary} No. 5, \textit{supra} note 47, at 100.04.
84. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess., reprinted at 134 CONG. REC. 1863,
2116-17 (April 20, 1988).
85. 15 U.S.C. § 78m (1988). The SEC can enforce the FCPA through: judicial injunctions
to preclude violations; administrative proceedings to force compliance with the Act or to
discipline violators; or referral of the case to the Department of Justice for criminal prosecu-
tions. \textit{Bagby, supra} note 82, at 220-21.
86. 15 U.S.C. § 78u(a)-(d).
87. \textit{Executive Legal Summary} No. 5, \textit{supra} note 47, at 100.03.
88. 46 Fed. Reg., \textit{supra} note 42.
89. \textit{Id.} at 11546-48; \textit{see also Mitchell & Ball, supra} note 1, at 111-12.
\end{flushleft}
The SEC has rarely pursued violations of the FCPA reporting guidelines alone. For example, the SEC brought an enforcement action against Playboy contending that certain executive perquisites in the United States and abroad provided to Hugh Hefner and others were not fully disclosed in proxy statements or in Playboy's SEC Form 10K filing. The SEC further maintained that inadequate controls for audits and record keeping existed at Playboy. The SEC apparently included a count concerning inadequate record keeping under the FCPA as an adjunct to the allegations concerning inadequate disclosure of the perquisites.

Private Enforcement. Few private companies or individuals have attempted to use the FCPA to assert private claims against other companies or individuals. At least one court has held that the FCPA does not confer rights on private citizens or companies to pursue civil actions concerning alleged violations of the FCPA. In Lamb v. Phillip Morris, Inc., the court held that tobacco growers did not have a right to pursue claims under the FCPA against tobacco companies who were allegedly making payments to foreign charities in exchange for foreign government imposition of price controls on foreign tobacco.

90. Executive Legal Summary No. 5, supra note 47, at 100.03.
93. Executive Legal Summary No. 5, supra note 47, at 100.03. Playboy ultimately settled with the SEC and agreed to apply more stringent bookkeeping procedures, without admitting any guilt or liability. 567 Sec. Reg. & L. Rep. (BNA) A-2.
94. Executive Legal Summary No. 5, supra note 47, at 100.03.
96. 915 F.2d at 1029-30; see also McLean v. International Harvester Co., 817 F.2d 1214 (5th Cir. 1987) (FCPA does not grant corporate employee a basis for a claim against the corporation where the corporation allegedly made employee a scapegoat for alleged FCPA violation); Pratt v. Caterpillar Tractor Co., 500 N.E.2d 1001, appeal denied, 506 N.E.2d 959 (1986) (FCPA did not create a public policy sufficient to serve as a basis for a state tort claim of retaliatory discharge of employee who allegedly refused to engage in illegal conduct allegedly requested by employer who fired him).
II. **Antiboycott Provisions of the Export Administration Act of 1979**

The second significant statutory requirement for American companies operating in the Middle East prohibits United States businesses from participating in the Arab League Boycott of Israel. These regulations are particularly important in transacting business in an Arab League country such as Kuwait.

A. **Background**

Congress enacted antiboycott provisions in the Export Administration Act of 1979 (“EAA”) to prevent United States citizens or nationals and United States corporations, partnerships, and other legal entities, from taking any action, including supplying certain requested information, or to refrain from any action, which will further an economic boycott imposed by a foreign government on another country with which the United States does not concur. The requirements were imposed upon United States exporters by the means provided in the 1977 Export Administration Amendments Act. The antiboycott provisions were subsequently reauthorized by the 1985 Export Administration Act.

The primary purpose of the EAA amendments is to counteract effects of economic boycotts directed against Israel and Israeli goods and services, imposed by the Arab League. The amendments were part of an effort to eliminate participation in such boycotts by United States corporations with respect to the import and export of goods.

B. **Definitions and Coverage of Antiboycott Statute and Regulations**

The antiboycott provisions of the EAA apply if (1) the transaction involves a person or entity considered to be a United States “person” under the terms of section 769.1(b) of the Code of Federal Regulations; (2) the United States is the origin of the particular goods or services; and (3) the goods or services obtained from the United States person are acquired

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98. Id. The antiboycott provisions of the EAA are implemented through United States Commerce Department rules and regulations at 15 C.F.R. § 769-769.8 (1991).
103. See infra text accompanying notes 105-06.
for or ultimately used in any transaction not within the United States.\textsuperscript{104} The antiboycott provisions do not apply to those situations: (1) in which a United States person provides goods or services that are (a) not acquired to fill or complete an order or transaction outside of the United States; and (b) the goods or services were further manufactured, incorporated, refined or reprocessed into another product or (2) to the activities of a foreign subsidiary or affiliate controlled by a United States person in which (a) the goods or services were acquired without reference to a specific order or transaction outside the United States; or (b) the goods or services were ancillary to the transaction with the person outside the United States.\textsuperscript{106} In the latter events, the goods or services are not considered as part of the interstate or foreign commerce of the United States, and are therefore not subject to the antiboycott provisions.\textsuperscript{108}

\textbf{United States Persons.} “Persons” subject to the Act include: (1) Individuals or domestic concerns, such as partnerships, corporations, companies, trade associations, or any other association created under United States law or a foreign legal entity with a permanent American presence, and (2) “controlled in fact” foreign subsidiaries, affiliates or other permanent foreign establishments of domestic concerns, including branch offices.\textsuperscript{107} A foreign subsidiary is “controlled in fact” if its United States parent has “the authority or ability” to establish general policies or control the day to day operations of its foreign subsidiary, partnership, affiliate; branch office, or other permanent foreign establishment.\textsuperscript{109}

\textbf{Interstate and Foreign Commerce of the United States.} The EAA prohibits transactions involving United States exportation of goods and services to destinations in foreign markets promoting the boycotts of third party countries.\textsuperscript{108} United States exporters are considered to have provided goods and services to a country engaged in boycotting activities “whether [the goods] were acquired directly or indirectly through a third party, where the person acquiring the goods or services knows or expects, at the time he places the order, that they will be delivered from the United States.”\textsuperscript{110} This provision prohibits United States entities from appointing a foreign distributor and evading the broad sweep of the antiboycott provisions. This provision is also designed to prevent United States exporters from evading liability by lawfully selling to one country

\begin{itemize}
\item \textsuperscript{105} 15 C.F.R. § 769.1(d)(11)-(14).
\item \textsuperscript{106} Id. § 769.1(d)(14)-(15).
\item \textsuperscript{107} Id. § 769.1(b).
\item \textsuperscript{108} Id. § 769.1(c).
\end{itemize}
who will subsequently sell the goods to a country observing a boycott unsupported by United States foreign policy.

The EAA specifies that interstate or foreign commerce of the United States occurs when: (1) the activities are conducted by a United States legal entity or individual located within the United States; or (2) activities of individuals or legal entities which are United States persons are conducted outside the United States.111

**Transactions Subject to EAA.** United States persons fall within the scope of the antiboycott provisions if they engage in any transactions considered to be in interstate or foreign commerce of the United States.112 The transactions giving rise to application of the antiboycott analysis include the sale, purchase, or transfer of goods or services (including the transfer of information), between:

(i) Two or more of the several states (including the District of Columbia);
(ii) Any state (including the District of Columbia) and any territory or possession of the United States;
(iii) Two or more of the territories or possessions of the United States; or
(iv) A state (including the District of Columbia), territory or possession of the United States and any foreign country.113

United States based parent companies must comply with the rules and regulations of the EAA in providing services to their controlled in fact subsidiaries or affiliates with respect to legal, financial, accounting, transportation, or other ancillary services. Any service-oriented transactions with controlled in fact subsidiaries or affiliates will be construed as a transaction in United States foreign commerce.114

Transactions of a controlled in fact subsidiary or affiliate of a domestic concern and a person outside of the United States involving a transaction in goods or services (including information but not including ancillary services) are subject to the rules and regulations of the antiboycott provisions if the goods or services are acquired from a person within the United States,115 and meet the following conditions: (1) goods or services acquired for filling an order from a person not within the United States; (2) goods or services acquired for incorporation, refinement, reprocessing, or manufacture of another product for the purpose of transacting business with a person not within the United States; (3) goods or services acquired for engaging in any other transaction with a person not within

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111. Id. § 769.1(d).
112. Id.
113. Id. § 769.1(d)(1).
114. Id. § 769.1(d)(5).
115. Id. § 769.1(d)(8).
the United States; or (4) goods acquired and ultimately used, without substantial alteration or modification, in filling an order, or engaging in any other transaction with, a person not within the United States (even if the goods were not originally acquired for that purpose).  

Transactions Outside the Scope of the Antiboycott Provisions. Not every transaction between a domestic concern and a person outside the United States is affected by the provisions of the EAA. Transactions between the foreign permanent office or affiliate of a domestic concern and a person outside of the United States that do not involve the "purchase, sale or transfer of goods or services (including information) to or from a person in the United States" are not covered by the antiboycott provisions. However, EAA provisions apply to transactions involving "a domestic concern's controlled foreign subsidiary . . . [with respect to goods or services] acquired from a person in the United States." These transactions are considered not to be in the commerce of the United States if: (1) they were acquired without reference to a specific order from or transaction with a person outside the United States; and (2) they were further manufactured, incorporated into, refined into, or reprocessed into another product.

Transactions consisting solely of services are not always regulated by the antiboycott provisions. If a person in the United States acquires services from a foreign subsidiary or affiliate of a United States company, the services are not within United States commerce when: "they were acquired without reference to a specific order from or transaction with a person not within the United States; or they are ancillary to the transaction with the person outside the United States.

Scope of Proscribed Activities. Inadvertent or accidental participation in a foreign boycott by a United States person is not prohibited by the EAA. Only those instances in which a United States person "knowingly" takes action or "knowingly" agrees to take action with the intent to comply with, further, or support an unsanctioned foreign boycott are prohibited by the EAA. "Intent" within the scope of the EAA means only that a United States person intends to enter into contractual relations with another party involved in a nonsanctioned boycott.

116. Id.
117. Id. § 769.1(d)(11).
118. Id. § 769.1(d)(8).
119. Id.
120. Id. § 769.1(d)(13).
Liability is not premised upon the United States person's desire that the unsanctioned boycott succeed or that it be furthered or supported.\(^{123}\) The regulations impose liability on the basis of one's knowledge when entering into the contractual relationship.\(^{124}\) If the United States person has knowledge that the contractual relationship is being entered into with a party involved in an unsanctioned boycott, liability will be imposed upon the United States person.\(^{125}\) The requirement of "intent" or "knowledge" is essential to support any imposition of liability, but the knowledge or intent factor may be proven by circumstantial evidence.\(^{126}\) "Intent" can be inferred from any showing that the foreign party was involved in a boycott not supported by the United States.\(^{127}\)

Boycott-related statements or requests are often not readily apparent at the outset of the contractual relationship. Boycott statements or requests often appear in the fine print of a contract, request for proposal, bid solicitation, letter of credit or other standard form. Americans working or shipping goods abroad should be aware of the signs that may indicate a violation of the EAA, such as the following:\(^{128}\)

**Requests Not to Act.** Contractors should be cautious of any request not to do business with a boycotted country, or with certain companies, nationals, or residents of such country, or with other entities doing business with such country, or with any other person or company if it could be reasonably suspected that the request is related to a boycott of such country.\(^{129}\)

**Compliance with Boycott Laws.** Contractors should be cautious when entering into agreements which contain clauses requiring or requesting compliance with the local country's boycott laws.\(^{130}\)

**Exclusive Dealing Agreements.** Contractors should be cautious when entering into agreements specifying that business be transacted exclusively with approved firms or persons. These agreements are known as "whitelist" agreements.\(^{131}\)

**Discriminatory Requests.** Contractors should not enter into any agreements which in any way discriminate against any United States person on the basis of race, religion, sex, or national origin.\(^{132}\) If the discriminatory request can be interpreted as furthering a boycott, it is clearly reportable

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123. *Id.* § 769.1(e)(4).
124. *Id.* §§ 769.1(e)(4)-(6).
125. *Id.* §§ 769.1(e)(3), (5).
126. *Id.*
127. *Id.* § 769.1(e)(5).
130. *Id.* § 769.2(a)(5).
131. *Id.* § 769.2(a)(4).
132. *Id.* § 769.2(b)(1).
pursuant to EAA regulations, and compliance with the request is clearly prohibited.\footnote{133}

Requests to Furnish Personal Employee Information. Contractors should be cautious of any requests to furnish information regarding race, religion, nationality, sex, or national origin including, but not limited to, requests to furnish such information about employees with visa applications.\footnote{134} United States persons may comply with the immigration, passport, visa, or employment requirements of a boycotting country.\footnote{135} However, the person may only furnish information concerning himself, herself, or a member of his or her family.\footnote{136} United States law prohibits the contractor from gathering or providing such information about another person.\footnote{137}

Requests for Information Pertaining to Religion or National Origin. American businesses should be cautious when entering into agreements using language indicative of ancestry, nationality, religion, or national origin.\footnote{138} Requests using such language are generally discriminatory or boycott-related.\footnote{139}

Past Business Relationships. Contractors should be cautious when entering into agreements that request information concerning a person’s or company’s past, present, or future business relationships with a boycotting country, with companies, nationals, or residents of such a country, or with blacklisted persons.\footnote{140} This provision does not purport to prohibit a United States corporation or individual from furnishing normal business information in a commercial context, provided that the information is not furnished with the intent to honor a foreign boycott request.\footnote{141}

A domestic concern or other United States person may provide a boycotting country with: its name, address, place of incorporation, and the nature of his business; a statement that the United States person is not on a blacklist, or restricted from doing business in a boycotted country;\footnote{142} a description of its past dealing with boycotting countries; a listing of boycotting countries in which its trademarks are registered; a listing of boycotting countries in which it is registered to do business; a statement

\footnotesize{\begin{itemize}
\item\footnote{133} Id.
\item\footnote{134} Id. § 769.2(c).
\item\footnote{135} Id. § 769.3(e)(1).
\item\footnote{136} Id.
\item\footnote{137} Id. § 769.3(e)(3).
\item\footnote{138} Id. § 769.2(c).
\item\footnote{139} Id.
\item\footnote{140} Id. § 769.2(d).
\item\footnote{141} Id. §§ 769.2(d)(3), (4).
\item\footnote{142} No such information may be provided with respect to a United States corporation's subsidiaries or affiliates. See 15 C.F.R. § 769.2(d) (1991), "Examples Concerning Furnishing of Information."}
\end{itemize}}
that it believes the boycotting country has confused it with another similarly named United States corporation or other entity (but no information regarding the company's affiliation or relationship with the other entity, or lack thereof, may be provided); and a statement that the information requested is a matter of public record in the United States. Contractors should also be cautious of any requests to furnish information about any person's or company's association with charitable or fraternal organizations that support a boycotted country.

**Agents or Affiliates of Boycotting Nations.** Contractors should be cautious when entering into agreements which specify firms or persons, such as contractors or subcontractors, that may have been selected by the boycotting country for the purpose of furthering a boycott. Such requests may be permissible under the exception for "unilateral" or "specific" selection, but all of the requirements for an exception must be met. Contractors should be aware that the reporting and disclosure requirements must be complied with even when this exception is fully satisfied.

**Negative Certificates of Origin.** Contractors should be cautious when entering into agreements which request that a negative certificate of origin of goods be supplied by the contractor. A negative certificate of origin of goods is one that would require language stating, for example, "these goods were not produced in Israel." Requests of this nature can only be stated affirmatively.

**Letters Of Credit Containing Prohibited Conditions.** Violations of the antiboycott provisions occur if a United States person is found to be "implementing," that is, issuing, negotiating, paying, confirming, honoring, or offering, any letters of credit that further a foreign economic boycott. However, violations occur only when the transaction involving the implementation of such letters of credit is in the interstate or foreign commerce of the United States and the beneficiary is a United States person. A rebuttable presumption of nonliability occurs when the beneficiary of the transaction has a non-United States address.
Blacklists and whitelists are of major concern to the Department of Commerce. Any dealings between a United States person and a foreign country involving whitelists or blacklists are heavily scrutinized by the Department of Commerce because of the potential discriminatory effect.152

The Treasury Department also compiles a list of all countries currently listed as boycotting countries.153 United States contractors should be aware of this list, and should exercise caution when entering into an agreement with any country listed by the Treasury Department. The Treasury Department’s present list includes the countries of Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, the United Arab Emirates, the Yemen Arab Republic, and the People's Democratic Republic of Yemen.154 This list is not exhaustive. Other countries such as Turkey, Malaysia, Pakistan, and Indonesia may also impose or request boycott-related requirements. Therefore, it is generally advisable that United States contractors consider the possible presence of any boycott-related issues when entering into any international business transactions.

Exceptions to the EAA. Although the statutes and regulations provide a broad prohibition against transactions with boycotting countries, the statutes and regulations also recognize several exceptions to the antiboycott prohibitions.155

Compliance with Import Requirements of Boycotting Country. A United States person subject to the EAA who supplies goods or services to a boycotting country may still comply “with requirements which prohibit the import of: goods or services from the boycotted country; goods produced or services provided by any business concerns organized under the laws of the boycotted country; or goods produced or services provided by nationals or resident of the boycotted country.”156 A United States person should not enter into an agreement that is more restrictive than the boycotting country requires. Any such action may result in an antiboycott violation.157

Compliance with Routing Requirements of Boycotting Country. The antiboycott rules provide that a United States person shipping goods to a boycotting country “may agree to comply with requirements of the boycotting country which prohibit the shipment of goods: (i) on a carrier of

152. See id. § 769.2(d).
154. Id.
157. Id. §§ 769.3(a-1)(2), (3).
the boycotted country; or (ii) by a route other than that prescribed by the boycotting country or the recipient of the shipment.\textsuperscript{158}

The phrase "carrier of the boycotted country" is defined as any "carrier which flies the flag of a boycotted country or which is owned, chartered, leased, or operated by a boycotted country or by nationals or residents of a boycotted country."\textsuperscript{159} There is no requirement that a specific request for such action be made in order to fall within this exception.\textsuperscript{160} The provision only requires that the contractor know, or have reason to know, that the use of the particular carrier is prohibited by the boycotting country.\textsuperscript{161}

\textbf{Transport Documents.} A United States person or domestic concern shipping goods to a boycotting country, may comply or agree to comply with import and shipping document requirements of that country, with respect to: (i) the country of origin of the goods; (ii) the name of the carrier; (iii) the route of the shipment; (iv) the name of the supplier of the shipment; and (v) the name of the provider of other services.\textsuperscript{162}

The regulations further provide that "all such information must be stated in positive, non-blacklisting, non-exclusionary terms."\textsuperscript{163} However, information with respect to the names of carriers or routes of shipment, 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."\textsuperscript{164}

\textbf{Exemption for Unilateral and Specific Selection.} Requests for contractors or subcontractors may be deemed specific or unilateral. A specific selection provides that a particular country or legal entity be the supplier of the goods or services.\textsuperscript{165} Conversely, a unilateral selection provides that the selection will be made at the discretion of the buying boycotting country and that there has been no prior communication concerning the boycotted activity.\textsuperscript{166} In the normal course of business,

\begin{quote}
A United States person may comply or agree to comply . . . with unilateral and specific selection by: a boycotting country; a national of a boycotting country; or a resident of a boycotting country (including a United States person who is a bona fide resident of a boycotting country) of:
\end{quote}

\begin{itemize}
\item \textsuperscript{158} Id. § 769.3(a-2)(1).
\item \textsuperscript{159} Id. § 769.3(a-2)(3).
\item \textsuperscript{160} Id. § 769.3(a-2)(2).
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id. § 769.3(b)(1).
\item \textsuperscript{163} Id. § 769.3(b)(2).
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. § 769.3(c)(4).
\item \textsuperscript{166} Id. § 769.3(c)(5).
\end{itemize}
carriers; insurers; 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, and with respect to goods, the items in the normal course of business are identifiable as to their source or origin at the time of their entry into the boycotting country by uniqueness of design or appearance; or trademark, trade name, or other identification normally on the items themselves, including their packaging. 167

The exemption is only available if the unilateral and specific selection “has been made by a boycotting country, or by a national or resident of a boycotting country.” 168 If the communication is received by the United States person from someone other than the boycotting country or national, the United States person must investigate as to the origin of the selection. 169

If a unilateral selection complies with the requirements set forth in section 769.3(c) of the Code of Federal Regulations, the United States person may comply with requests of the boycotting country even if the United States person knows, or has reason to know, that the selection was boycott-based. 170 Conversely, the exception is not available in situations in which the unilateral or specific selection is designed to discriminate against a United States person on the basis of race, religion, sex, or national origin. 171

Export Requirements. The EAA also may not apply to a boycotting country's export requirements “with respect to shipments or trans-shipments of exports to: (i) a boycotted country; (ii) a business concern in a boycotted country; (iii) a business concern organized under the laws of a boycotted country; (iv) or any national or resident of a boycotted country.” 172 “This exception permits compliance with restrictions which a boycotting country may [directly or indirectly] place on direct exports to a boycotted country, [or] to residents, nationals, or business concerns of, or organized under the laws of, a boycotted country, including those located in third countries.” 173 Furthermore, a United States person is permitted to comply with the “restrictions which a boycotting country may place on the route of export shipments [in the event that the restrictions] are reasonably related to preventing the export shipments from coming into con-
tact with the boycotted country.'174 Conversely, a United States person may not totally refuse to engage in any business transactions "with a boycotted country, or a national or resident of a boycotted country."175

*Immigration, Passport, Visa, or Employment Requirements.* The antiboycott regulations clearly prohibit a United States corporation or other legal entity from engaging in boycott-based selection of employees. However, the antiboycott regulations recognize a boycotting country's interest in requiring a United States person to comply with its immigration, passport, visa, or employment requirements.176 The United States corporation may only perform the administrative functions of expediting and processing the individual employee applications and related submissions.177 The regulations provide that the administrative function of the United States corporation may involve educating its employees to the visa and employment requirements of the boycotting country, and provide typing, translating, and messenger services that may be necessary for the completion of the application process.178

This exception does not permit a United States corporation to gather information on a collective basis and provide that information to the foreign boycotting country.179 The exception only applies if the individual United States person provides the information personally to the foreign country.180

*Local Laws of Boycotting Country.* The EAA rules and regulations further provide that a United States person who is a "bona fide" resident of a boycotting country, may comply or agree to comply with the local laws of the boycotting country with respect to the activities engaged in solely within the boycotting country and with transactions involving the importation of goods by the boycotting country.181 Local law generally covers contracts subject to local laws, employment of residents of the host country, selection of local contractors to work in the host country, sales of goods or services from or to local residents and merchants, and furnishing information received from within the boycotting country.182

The EAA permits compliance by any United States company or United States person to local import laws with respect to any relevant goods, materials, or components, which it imports, "for [its] own use or for [its]
use in performing contractual services within the country."\textsuperscript{183} However, the origin of such goods must be readily identifiable in the normal course of business, by virtue of a trademark or other identification.\textsuperscript{184}

**Evasion.** Transactions engaged in for the purpose of evading antiboycott provisions are prohibited.\textsuperscript{185} The regulations further prohibit the United States person from aiding or assisting another United States person in any effort to evade or violate the antiboycott provisions.\textsuperscript{186}

The regulations further prohibit any United States company from using an "artifice, device or scheme intended to place a person at a commercial disadvantage or impose on him special burdens because the person is blacklisted or otherwise restricted for boycott reasons from having a business relationship with or in a boycotting country."\textsuperscript{187} Evasion will be presumed whenever a United States person engages in activity which imposes a risk of financial loss on another company or legal entity because of the import restrictions of the boycotting country unless the activity falls within one of the exceptions.\textsuperscript{188} However, this presumption may be rebutted by a showing that the risk of loss provision is included for a reasonable nonboycott reason and is a customary practice "without distinction between boycotting and non-boycotting countries."\textsuperscript{189} Use of a dummy corporation to mask prohibited conduct is also considered to constitute evasion.\textsuperscript{190}

**Antiboycott Act Reporting Requirements.** The antiboycott regulations specify that "[a] United States person who receives a request to take any action which has the effect of furthering or supporting a restrictive trade practice or boycott . . . must report such requests to the Department of Commerce."\textsuperscript{191} The reporting requirements are applicable to those situations involving transactions in United States interstate or foreign commerce (as defined under the Act).\textsuperscript{192} The United States person must also know or have reason to know that the request was made for the purpose of furthering a boycott-related activity.\textsuperscript{193}

\textsuperscript{183} Id. § 769.3(f-2)(1).
\textsuperscript{184} Id. § 769.3(f-2)(4).
\textsuperscript{185} Id. § 769.4.
\textsuperscript{186} Id. § 769.4(a).
\textsuperscript{187} Id. § 769.4(c).
\textsuperscript{188} Id. § 769.4(d).
\textsuperscript{189} Id.
\textsuperscript{190} Id. § 769.4(e).
\textsuperscript{191} Id. § 769.6(a)(1).
\textsuperscript{192} Id. § 769.6(a)(2)(i).
\textsuperscript{193} Id. § 769.6(a)(2).
The reporting requirements provide that a United States person must submit request reports quarterly in duplicate to the report processing staff, Office of Antiboycott Compliance, Department of Commerce. The deadline for filing the quarterly reports is the last day of the month following the quarter's end. United States persons located in a foreign country must have their reports postmarked by the end of the second month following the quarter's end. A United States person may designate an agent, affiliate, or subsidiary, or other representative of a United States person to file the quarterly reports.

The report should include all documentation pertinent to the request and information regarding the reporter's compliance intention. If the reporting party is undecided as to whether it will comply with the foreign country's request, it must state this in its report. Subsequently, the United States person must file a report within ten business days of its decision to comply or refuse to comply with the foreign country's request.

**Reporting Requirement Exceptions.** There is no requirement to report any unsolicited proposal or invitation to bid to which the United States person makes no response. A contractor's response which only constitutes an acknowledgement that such a proposal or invitation was received is not deemed a response requiring notification. However, if the acknowledgement includes a request for future invitations, it may be considered a response covered by the reporting requirements.

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194. Id. § 769.6(b)(4).
195. Id. § 769.6(b)(4)(i).
196. Id.
197. Id. § 769.6(b)(3).
198. Id. § 769.6(b)(6).
199. Id.
200. Id.
201. Id. § 769.6(a)(4).
202. Id.
203. Id. § 769.6(a)(5). The regulations set forth more specific exceptions to the reporting requirements in addition to the exception for unsolicited proposals. A United States contractor is not obligated to report:

A request to refrain from shipping goods on a carrier which flies the flag of a particular country or which is owned, chartered, leased or operated by a particular country or by nationals or by residents of a particular country or a request to certify to that effect; a request to ship goods via a prescribed route or a request to refrain from shipping goods via a proscribed route or a request to certify to either effect; a request to supply an affirmative statement or certification regarding the country of origin of goods; a request to supply an affirmative statement or certification regarding the name of the supplier or manufacturer of the goods shipped or the name of the provider of services; a request to comply with the laws of another country except where the request expressly requires compliance with that coun-
The Department of Commerce places considerable emphasis upon the enforcement of antiboycott reporting requirements. Liability consisting of fines or other penalties may be imposed upon any United States person who fails to report the receipt of a boycott-related request. On many occasions, liability will be imposed even though the domestic entity did not respond to, comply with, or intend to comply with the boycott-related request.

**Enforcement of the Antiboycott Provisions: Sanctions and Penalties.** Substantial penalties, including civil and criminal liability, can be imposed upon violators of the substantive antiboycott provisions. The Commerce Department has a broad range of remedies available to it to enforce the antiboycott requirements. Civil penalties of up to $10,000 for each violation of the antiboycott provisions may be imposed. The government, under specific circumstances, may also seek to deny a contractor export privileges with respect to a boycotting country. Remedies of this nature are properly imposed upon a domestic corporation when denial of export activity may be the only effective remedy available to the government. In many instances, forced compliance with the antiboycott provisions with respect to export activity is a much greater penalty than the imposition of a fine. Furthermore, the government may seize any goods exported pursuant to transactions that violate the antiboycott provisions; the goods seized may be retained by the government.

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try's boycott laws; a request to an individual to supply information about himself or a member of his family for immigration, passport, visa, or employment purposes; a request to supply an affirmative statement or certification indicating the destination of exports or confirming or otherwise indicating that such cargo will be unloaded or discharged at a particular destination; a request to supply a certificate by the owner, master, charterer, or any employee thereof, that a vessel, aircraft, truck or other mode of transportation is eligible, otherwise eligible, or permitted, or allowed to enter, or not restricted from entering, a particular port, country, or group of countries pursuant to the laws, rules, or regulations of that port, country, or group of countries; a request to supply a certificate from an insurance company stating that the issuance company has a duly authorized agent or representative within a boycotting country and/or the name and address of such agent; and a request to comply with a term or condition of a transaction that provides that the vendor bear the risk of loss and indemnify the purchaser if the vendor's goods are denied entry into a country for any reason ("risk of loss clause") if such clause was in use by the purchaser prior to January 18, 1978.

207. Id. §§ 787.1(b)(1), 788.3(a)(1).
208. Id.
A United States person found to have knowingly violated the EAA may be fined up to $50,000 or five times the export value of its act, whichever is greater, and/or imprisoned for a maximum of five years. For willful violations, the government may impose fines of $1,000,000 or five times the export value for each violation, whichever is greater.

Individuals found to have willfully violated the EAA may be fined up to $250,000, and/or imprisoned for a maximum of ten years. Under the regulations, it must be shown that the United States person or individual "knowingly" violated the antiboycott provisions.

Penalties may be imposed through administrative proceedings initiated when the Commerce Department's Antiboycott Compliance Staff sends a charging letter to the violator. Upon receipt, the charged party has thirty days to respond with a request for hearing before an administrative law judge, or to submit a documentary defense. Decisions of the administrative law judge may be appealed to the Under Secretary for Export Administration. The Commerce Department may also file suit in federal district court to enforce the civil penalties assessed under the provisions of the EAA.

Private Right of Action Under the Antiboycott Provisions. The courts have construed the EAA as containing a private right of action. In the 1984 case of Abrams v. Baylor College of Medicine, two Jewish medical students alleged that because of their religious background they were excluded from a rotation program, in which Baylor University supplied surgical teams to a Saudi Arabian hospital. The district court in Texas adhered to the factors enumerated by the United States Supreme Court in Cort v. Ash, and found an implied right of action under the EAA.

213. Id.
214. Id. §§ 787.1(a)(i), (ii).
215. Id. § 788.4.
216. Id. § 788.7(a).
217. Id. § 788.22.
218. Id. § 787.1(b)(3).
220. Id. at 1572.
221. 422 U.S. 66 (1975).
222. 581 F. Supp. at 1581.
The court in Abrams imposed liability on the Baylor College of Medicine based on its finding that the college unilaterally excluded the plaintiff medical students because of their religious background, a violation of the EAA. With respect to the antiboycott violation, however, the court did not award plaintiffs punitive damages because the school's actions were not sufficiently egregious and the students recovered damages under a simultaneous civil rights violation claim, which, in the court's opinion, was sufficient to fully compensate the students.

Other courts have refused to follow the reasoning set forth in Abrams and have declined to imply a private right of action. In Bulk Oil (ZUG) A.G. v. Sun Co., defendant was accused of antiboycott violations when it failed to deliver North Sea crude oil to Israel. Defendant claimed that its decision not to deliver the oil to Israel was justified by the United Kingdom's policy against the delivery. The court in Bulk Oil analyzed the legislative history of the EAA and held that nothing therein indicated that any implied private right of action existed under the EAA. Thus, it is presently unclear as to whether one may assert a private right of action pursuant to any claim under the EAA.

Tax Implications of the Antiboycott Provisions. The international boycott provisions of the EAA were added to the Internal Revenue Code ("IRC") by the Tax Reform Act of 1976. Section 999 of the IRC is the key section of the international boycott rules. Participation in international boycotts is not prohibited by the IRC, but the IRC establishes that participation in international boycotts will diminish certain tax benefits which ordinarily apply to international transactions. Section 999 of the IRC denies an allocable portion of certain tax benefits to any person or member who participates in or cooperates with an international boycott directed at a country with which the United States maintains friendly trade relations. The tax benefits that will be diminished are: an allocable portion of the foreign tax credit; deferral of tax with

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223. Id. at 1580-82.
224. Id. at 1582.
226. 583 F. Supp. at 1138.
227. Id. at 1138-43.
230. Id. §§ 999(a)-(c).
231. Id.
respect to the unrepatriated earnings of a controlled foreign corporation; the exemption from tax under the foreign sales corporation provisions.\textsuperscript{232}

Enforcement of these provisions is obtained through certain reporting requirements which are imposed with respect to: “operations in or related to a country [that] is on the list of countries maintained by the Secretary of the Treasury” that require or may require participation in or cooperation with an international boycott (“a boycotting country”);\textsuperscript{233} operations in any country 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”;\textsuperscript{234} “requests to participate in or cooperate with such a boycott”;\textsuperscript{235} and actual “participation in or cooperation with a boycott.”\textsuperscript{236}

Generally, reporting requirements of section 999 of the IRC are imposed on the person or member of the controlled group that engages in the above activities.\textsuperscript{237} American shareholders of foreign corporations are subject to the reporting requirements based upon the actions of the foreign corporation.\textsuperscript{238} Compliance with the reporting requirements can be made by filing Form 5713, International Boycott Report.\textsuperscript{239} The taxpayer responsible for reporting may request that the Secretary issue “a determination with respect to whether a particular operation of a person, or of a member of a controlled group . . . constitutes participation in or cooperation with an international boycott.”\textsuperscript{240} Participation in or cooperation with an international boycott by such corporation shall be presumed to be participation in or cooperation by such person, and vice versa.\textsuperscript{241}

Participation in a boycott in violation of United States foreign policy will result in the loss of certain tax benefits.\textsuperscript{242} Deferral of earnings of foreign corporations are lost if a person or member of a controlled group participates in or cooperates with an international boycott.\textsuperscript{243} The total loss of tax benefits may be compiled by multiplying the tax benefit by the International Boycott Factor (“IBF”).\textsuperscript{244} The IBF is set forth as a fraction; the numerator indicates the world-wide operations of a person re-

\textsuperscript{232} Id.; Temp. Treas. Reg. §§ 7.999-1(c)(2), (3) (1977).
\textsuperscript{234} Id. § 999(a)(1)(B).
\textsuperscript{235} Id. § 999(a)(2).
\textsuperscript{236} Id. §§ 999(a)(3), (b).
\textsuperscript{237} Id. § 999(a)(1).
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} Id. § 999(d).
\textsuperscript{241} Id. § 999(b)(1).
\textsuperscript{242} Id. § 999(c).
\textsuperscript{243} Id.
\textsuperscript{244} Id. §§ 999(c)(1), (2).
lated to countries associated in carrying out an international boycott with which that person cooperated in the taxable year\(^\text{246}\) and the denominator reflects the world-wide operations of the person.\(^\text{245}\) Once the taxpayer multiplies the tax benefit by the IBF, a determination can be made as to the loss of tax benefits that are “specifically attributable” to the taxpayer’s involvement with boycott-related activities.\(^\text{247}\)

### III. Conclusion

American businesses operating abroad or shipping goods outside the United States must educate themselves to the restrictions imposed on international transactions by American laws and regulations. A businessman may innocently believe he is only “going along to get along” by agreeing to certain conditions requested or required by foreign trading partners or foreign government officials. However, even the most well-intentioned payment to a foreign official or agreement to provide information about employees can lead to intense scrutiny by American government officials of a company’s or individual’s business practices.

American businessmen must diligently inspect their business practices and those of their officers, employees, agents, and representatives to ensure adherence to federal trading regulations. Businesses should establish procedures for educating their officers, employees, agents, and representatives as to federal laws and regulations proscribing certain business practices and provide periodic updates of applicable laws and regulations. Furthermore, American citizens and businesses should monitor all payments made on their behalf through strict requirements mandating that all officers, employees, agents, and representatives account for their expenses and sales proceeds. Businessmen must also carefully scrutinize contracts, proposals for business, and other communications from foreign entities with whom they may contract to ensure that those communications do not promote boycotts violative of the Foreign Corrupt Practices Act. Otherwise, they may find themselves spending time and money defending against federal charges, not to mention possibly incurring severe criminal and civil sanctions.

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245. *Id.* § 999(c)(1).
246. *Id.*
247. *Id.* § 999(c)(2).