

Commerce Department Publishes Updated Guidance on Antiboycott Enforcement Policies

October 19, 2022

Key Points

- On October 6, Mathew Axelrod, Assistant Secretary for Export Enforcement at the Department of Commerce, BIS, published a memo providing updated guidance on BIS's policies to enforce the U.S. antiboycott regulations, which prohibit compliance with foreign boycotts that are not sanctioned by the United States, as such boycotts undermine U.S. foreign policy interests and call for U.S. companies to implement discriminatory business or employment practices.
- The memo states that Commerce (i) is adjusting the categories of antiboycott violations it considers to be most serious for purposes of determining penalties during enforcement actions, (ii) will enhance penalty determinations for antiboycott violations, (iii) will require admissions of misconduct when settling matters involving antiboycott violations and (iv) will renew its enforcement focus on foreign subsidiaries of U.S. companies involved in violations of U.S. antiboycott regulations.
- On October 7, BIS published a final rule revising Supplement No. 2 to Part 766 of the EAR. This final rule implements item (i) from the policy memo, recategorizing certain types of antiboycott violations between Category A violations (the most serious) and Category B violations (the second most serious), with some shifting up and others shifting down. The rule did not make any revisions to Category C violations (the least serious).

Background

U.S. antiboycott laws, which are divided into two separate regimes administered by the U.S. Department of Commerce and the U.S. Department of the Treasury, prohibit U.S. persons from participating in foreign boycotts that the United States does not support. Commerce's antiboycott regulations are set out under Part 760 of the Export Administration Regulations (EAR) and are administered by the Office of Antiboycott Compliance (OAC). These regulations apply to U.S. residents or nationals, "domestic concerns" (i.e., entities organized under the laws of the United States) and non-U.S. entities that are "controlled in fact" by a domestic concern, prohibiting such parties from taking certain action or providing certain information in compliance with or support for an unsanctioned foreign boycott. The regulations also impose a

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requirement on parties to report to Commerce instances in which they have received requests to comply with or support such a foreign boycott. In practice, U.S. antiboycott laws have generally only been applied to prohibit compliance with the Arab League boycott of Israel.

Updated Enforcement Policies

On October 6, 2022, Assistant Secretary for Export Enforcement Mathew Axelrod published a policy memo describing enhancements to the Bureau of Industry and Security's (BIS) antiboycott enforcement policies. These enhancements include reprioritization of violation categories, enhanced penalties, requirement to admit misconduct and renewed focus on foreign subsidies of U.S. companies. The subsequent sections will go into more detail for each of these enhancements.

Reprioritization of Violation Categories

Supplement No. 2 to Part 766 (Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases Involving Antiboycott Matters) describes the criteria based on which BIS makes penalty determinations when settling administrative enforcement cases involving violations of the antiboycott regulations. Under Supplement No. 2 to Part 766, BIS recognizes three categories of violations (Category A, B and C) which it differentiates based on the degree of seriousness of the violation, with Category A violations representing the most serious.

Effective via a [final rule](#) published on October 7, 2022, BIS amended Supplement No. 2 to Part 766 to realign its guidance with current boycott-related activity and BIS's enforcement priorities. In the table below, we identify the type of violation (including the regulatory citation describing the violation), noting with the word "CHANGE" the revisions to those items affected by the change in enforcement priorities implemented under the October 7 final rule.

[Click here to view the revisions.](#)

In the preamble to the final rule, BIS stated that it revised Category B to include violations that typically arise in the context of commercial transactions, and that these violations will be the "focus of OAC's antiboycott enforcement and subject to enhanced penalties." With regard to the basis for these revisions, BIS intends for these changes to provide transparency and clarity with respect to the enforcement process; to encourage compliance; to strengthen deterrence; and to compel accountability.

Enhanced Penalties

Going forward, BIS will begin its penalty calculus for Category A violations at the maximum penalty. The maximum civil penalty is currently \$300,000: the baseline maximum under the Antiboycott Act of 2018 (Part II of the Export Control Reform Act of 2018, 50 U.S.C. 4801-4852) is \$300,000, and Commerce's inflation adjustments do not include adjustment for 50 U.S.C. § 4842 (the enforcement provision of the Antiboycott Act of 2018). Past practice had been to impose the maximum penalty for a small subset of Category A violations only. Assistant Secretary Axelrod also noted the penalties for Category B and C violations will also be enhanced, but did not specify particular dollar thresholds.

Requirement to Admit Misconduct

Going forward, parties entering settlement agreements for antiboycott violations will be required to admit to a statement of facts outlining their conduct. In the past, BIS had often resolved antiboycott violations by allowing companies to settle liability with penalty payments, but without requiring an admission of misconduct. Axelrod noted that the past practice carried two disadvantages to antiboycott enforcement: (1) it did not produce a factual recitation clarifying the exact behavior that resulted in a violation, and thus made it difficult for other companies to “learn from their peers’ mistakes” and (2) it did not align with practice under other administrative enforcement cases, in which BIS generally requires companies to admit their conduct to resolve violations in exchange for the significant reduction in penalties that typically accompanies resolution of a matter prior to going forward with administrative and judicial proceedings.

Renewed Focus on Foreign Subsidiaries of U.S. Companies

Assistant Secretary Axelrod’s memo noted that BIS aims not only to deter U.S. companies who receive boycott requests to refrain from complying with them, but also to dissuade foreign parties from making such requests in the first place. To this end, BIS intends to be “more aggressive in exploring ways to deter foreign parties from issuing or making boycott requests of U.S. persons,” and that “[i]n particular, [BIS] will bring a renewed focus to our enforcement efforts against controlled foreign subsidiaries of U.S. parent companies when they act in violation of our antiboycott regulations.”

Conclusion

The updated policy guidance and recategorization of antiboycott violations aligns with BIS’s recent renewed focus on enforcement of export regulations. Assistant Secretary Axelrod issued a [similar memo](#) on June 30, 2022, with respect to the enforcement approach to violations of the EAR. That memo highlighted BIS’s determination to impose significantly higher penalties in serious cases and to eliminate “no admit, no deny” settlements.

The effects of these new enforcement approaches on the decisions and willingness of the regulated public to submit voluntary disclosures remains to be seen. While these actions will not change the fundamental compliance requirements of the U.S. antiboycott regulations, they will increase the risks associated with non-compliance, due to both the increased financial cost associated with higher penalties and the heightened reputational cost associated with the requirement to admit misconduct during the settlement process. Companies exposed to significant antiboycott-related risk, especially those with foreign subsidiaries subject to U.S. antiboycott jurisdiction, should review their compliance programs and consider whether enhancements may be necessary.

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