I.R.C. Section 999: Taxing the Arab Boycott

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In 1951 the Arab League\(^1\) instituted a formal\(^2\) trade boycott against Israel and its supporters.\(^3\) The Arab boycott attracted little attention until the recent oil price increases made many Arab nations major world economic powers. As Middle Eastern trade opportunities increased, Arab nations successfully pressured United States firms to comply with boycott restrictions in order to compete in this lucrative market.\(^4\) Despite congressional recognition that the Arab boycott is contrary to basic principles of competition and fundamental notions of freedom,\(^5\) early legislative efforts to control United States involvement proved ineffective.\(^6\) The Tax Reform Act of 1976,\(^7\) however, contains a potentially

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1. The League of Arab States is an informal association comprised of the following twenty Middle Eastern countries: Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Peoples' Democratic Republican of Yemen, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yeman Arab Republic. See generally R. MacDonald, The League of Arab States (1965).

2. The formation of a Central Boycott Office, with headquarters in Damascus, marked the beginning of the formal trade boycott. L. Preston, Trade Patterns in the Middle East 51 (1970).

3. Because foreign trade is a matter of national sovereignty, a trade boycott is not a violation of international law. Hyde & Wehele, The Boycott in Foreign Affairs, 27 Am. J. Int'l L. 1, 2 (1933). Many nations, including the United States, have used trade boycotts to achieve various economic, diplomatic, and foreign policy objectives. See Muir, The Boycott in International Law, 9 J. Int'l L. & Econ. 187, 187-95 (1974).

The Arab boycott of Israel takes many forms. The primary boycott is the refusal of Arab countries to trade with Israel. The secondary boycott is a refusal to deal with those who trade with or support Israel. The third form, sometimes termed an "extended secondary," "peripheral," or "tertiary" boycott, is the Arabs' refusal to deal with those doing business with supporters of Israel. See Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., The Arab Boycott and American Business 1 (Subcomm. Print 1976) [hereinafter cited as Boycott Report]; Baker, Antitrust Remedies Against Government-Inspired Boycotts, Shortages, and Squeezes: Wandering on the Road to Mecca, 61 Cornell L. Rev. 911, 938 (1976). The Arab boycott is coordinated by the Central Boycott Office which maintains a blacklist of firms and individuals with known "Zionist affiliation."


effective weapon against unchecked compliance with Arab boycott demands.

This Note focuses on the antiboycott provisions of the Tax Reform Act of 1976 as codified in section 999 of the Internal Revenue Code. The value of the tax sanctions of section 999 as a deterrent to boycott participation and as an incentive to comply with the section's reporting requirements will be examined. The Note then explores the potential impact of these reporting requirements in light of domestic antitrust and civil rights legislation, and concludes with a discussion of the fifth amendment self-incrimination problems inherent in the reporting requirements.

I

SECTION 999

A. REPORTING REQUIREMENTS

A central feature of section 999 is its two-part reporting requirement. The first requires any person conducting operations in, or related to,
boycotting countries, or with the governments, companies, or nationals of boycotting countries, to file a return indicating all such operations. Certain other persons who have not conducted such operations must report the activities of those with whom they are affiliated through

11. The term "operation" encompasses all forms of business or commercial activities whether or not productive of income, including but not limited to, sales; purchases; banking, financing and similar activities; extracting; processing; manufacturing; production; construction; transportation; activities ancillary to the foregoing (e.g., contract negotiating, advertising, site selecting, etc.); and the performance of services, whether or not ancillary to the foregoing. Guidelines I, supra note 10, at 49,925 (para. B-1). The term "operation" does not include performance of personal services as an employee or eligibility for social security arising therefrom. Guidelines II, supra note 10, at 1094 (paras. B-2, B-3).

12. The Secretary of the Treasury maintains a list, updated quarterly, of boycotting countries. The initial list may be found at 41 Fed. Reg. 48,384 (1976). Countries not on the Secretary's list will be considered boycotting countries if and only if: (1) a person knows or has reason to know that the country requires boycott participation within the meaning of I.R.C. § 999(b)(3)-(4), discussed in notes 24-50 infra and accompanying text; and (2) the person actually conducted operations in that country during the year. Operations merely related to that country are insufficient. I.R.C. § 999(a)(1)(B). Guidelines II, supra note 10, at 1093 (para. A-i). For the classification of operations see note 13, infra. Circumstances satisfying the "reason to know" requirement include receipt of an official boycott request or knowledge that others have received similar requests. Guidelines I, supra note 10, at 49,925 (para. C-1).

13. An operation is in, or related to, a boycotting country, or with the government, a company or national of a boycotting country if it:

1. Is carried on in whole or part in a boycotting country ("in a country");
2. Is carried on outside a boycotting country either for or with the government, a company, or a national of a boycotting country ("with the government, a company, or a national of a country"); or
3. Is carried on outside a boycotting country for the government, a company, or a national of a non-boycotting country if the person having the operation knows or has reason to know that a specific good or service produced by the operation is intended for use in a boycotting country or for the government, a company, or a national of a boycotting country ("related to a country"). Guidelines I, supra note 10, at 49,925 (para. B-1). The definition of "operations related to a country" compels a person funnelling his Arab League trade through independent foreign brokers to file operations reports. Although this definition by its terms includes trade between any number of United States persons if the product or service involved is ultimately and knowingly destined for a boycotting country, the reporting requirement is waived in such circumstances. Guidelines I, supra note 10, at 49,924 (para. A-11). Purely "incidental" contacts with Arab nationals in the normal course of business are also excepted. See Guidelines II, supra note 10, at 1094 (para. A-18).

The terms "in," "with," and "related to" do not appear uniformly throughout § 999, leading to unintended and inconsistent results. See notes 38, 54 & 59 infra. To take advantage of these inconsistencies, the taxpayer should divide his operations into three classes, noting, however, that an operation may fit more than one class.

business form or stock ownership.\(^\text{15}\) This provision will facilitate audits because multiple returns describing the same operations must be filed. Data compiled from the operations returns will indicate the quantum of United States economic involvement in boycotting countries.

Second, a taxpayer\(^\text{16}\) must report whether, in any of these operations, he participated in or cooperated with an international boycott\(^\text{17}\) during the year or was requested to do so.\(^\text{18}\) The taxpayer must also report the precise nature of any boycott participation or requests therefor.\(^\text{19}\) Again, taxpayers who have not participated in an international boycott must report the participation of, and requests made to, certain affiliates.\(^\text{20}\)

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15. A United States 10 percent shareholder of a foreign corporation as defined in I.R.C. § 951(b) must declare the foreign corporation's reportable operations. Guidelines I, supra note 10, at 49,923-24 (paras. A-1, A-2). One issue arising in this context is the extent of a shareholder's duty to gather the necessary information from a corporation over which he has no control. See Guidelines II, supra note 10, at 1094 (paras. A-16, A-18) (information reasonably available).


The 10 percent shareholder rule coupled with the controlled group rule requires all members of a controlled group to include in their returns all operations of foreign corporations of which any United States member is a 10 percent shareholder. Guidelines II, supra note 10, at 1093 (para. A-13). This requirement is by no means obvious from the confusing language of I.R.C. § 999(a)(1)(B)-(a)(2).

Each partner must report the operations of the entire partnership unless, in the case of a partnership that has not participated in an international boycott during the year (see notes 23-49 infra and accompanying text), the partnership files the return. Guidelines II, supra note 10, at 1093-94 (paras. A-1, A-17).

16. "Taxpayer" is a less inclusive term than "person." I.R.C. § 7701(a)(14). Nonetheless, the Guidelines ascribe no importance to this difference; generally, the same group required to file operations reports under I.R.C. § 999(a)(1) must file participation reports under I.R.C. § 999(a)(2). The statutory meaning of "person" is discussed at note 10 supra.

17. "Participation in or cooperation with an international boycott" is § 999's central term; for its analysis, see notes 23-49 infra and accompanying text. Presumptive participation or cooperation arises in certain circumstances and must be reported. See notes 20, 54 & 55 infra and accompanying text.

18. Unanswered, unsolicited requests that occur outside a course of bargaining or negotiation need not be reported. Guidelines II, supra note 10, at 1093 (para. A-15).

19. I.R.C. § 999(a)(2). Presumably, the description of the boycott participation must at least indicate under which subsection of IRC § 999(b)(3)-(4) it falls.

20. For a discussion of these affiliates, see note 15 supra. Also, where a "person" controls a corporation, boycott participation by that person is irrebuttable presumed to be partici-
Because the taxpayer classifies all business as boycott or non-boycott operations, reports filed under section 999 will give a clear and comprehensive picture of American involvement in the Arab boycott. Each year the Secretary of the Treasury will transmit to Congress a summary of all section 999 returns. The summaries will enable Congress to make informed legislative judgments on the Arab boycott issue.

B. Boycott Participation or Cooperation

A person engages in boycott operations within the purview of section 999 if he "participates in or cooperates with" an international boycott.°


22. The Treasury's reports to Congress will help "assess the effectiveness of this legislation in discouraging participation in or cooperation with international boycotts." H.R. REP. No. 1515, 94th Cong., 2d Sess. 470 (1976). The Treasury will notify the House Ways and Means and Senate Finance Committees of the number of reports indicating operations in boycotting countries and the number of reports admitting compliance with boycott requests. Other information on revenue, audits, and administration will be included, but the identity of any person filing will not be disclosed to Congress. Id.

23. The term "participation in or cooperation with" an international boycott is key to § 999.

[A] person participates in or cooperates with an international boycott if he agrees

(A) as a condition of doing business directly or indirectly within a country or with the government, a company, or a national of a country—

(i) to refrain from doing business with or in a country which is the object of the boycott or with the government, companies, or nationals of that country;

(ii) to refrain from doing business with any United States person engaged in trade in a country which is the object of the boycott or with the government, companies, or nationals of that country;

(iii) to refrain from doing business with any company whose ownership or management is made up, all or in part, of individuals of a particular nationality, race, or religion, or to remove (or refrain from selecting) corporate directors who are individuals of a particular nationality, race, or religion; or

(iv) to refrain from employing individuals of a particular nationality, race, or religion; or

(B) as a condition of the sale of a product to the government, a company, or a national of a country, to refrain from shipping or insuring that product on a carrier owned, leased, or operated by a person who does not participate in or cooperate with an international boycott (within the meaning of subparagraph (A)).
The essential elements of participation or cooperation are an agreement, as a condition of doing business, to engage in any of the proscribed activities. Participation or cooperation will only occur when all three elements are present simultaneously.

1. Agreements as a Condition of Doing Business

A section 999 agreement may be oral, written, tacit, or inferred from a course of dealing and is not negated by a breach. Nevertheless, a section 999 agreement will not be inferred “from the mere fact that any country is [unilaterally] exercising its sovereign rights.” Certain ex-
plicit agreements to comply with a country's import or export laws are also specifically exempted from the operation of the statute. By limiting the definition of "agreement" in this fashion, section 999 respects the sovereign right of a country to conduct a trade boycott from within its borders, and addresses itself entirely to the secondary aspects of the Arab boycott. Of course, any agreement must be made as a condition of doing business before the statute applies. This element provides the necessary nexus between the agreement and the trade boycott.

2. Proscribed Activities

A person participates in or cooperates with an international boycott if he agrees to refrain from doing business in a boycotted country, or with its government, nationals, or companies. No other federal law directly addresses this particular aspect of the Arab secondary boycott; however, four states currently have antiboycott legislation in force, and New York's could apply here.

An agreement to refrain from doing business with certain United States persons also constitutes participation where at least one of those persons is "engaged in trade" in a boycotted country "or with the
government, companies, or nationals of that country.”38 Much of this type of boycott compliance, however, will go unreported since many firms are blacklisted because of their support of Israel or their “Zionist connections,” but have no direct trade relations in Israel or with Israelis.37 Another loophole allows a person to avoid participation or cooperation by channelling his Arab League trade through a neutral foreign broker or middleman.38

Participation also includes agreements “to refrain from doing business with any company whose ownership or management is made up . . . of individuals of a particular nationality, race, or religion.”39 This subsection could be interpreted to extend to any agreement to boycott a firm, if that firm happened to employ certain individuals, but the guidelines require that the agreement must be to refrain from doing

36. I.R.C. § 999(b)(3)(A)(ii) (emphasis added). The term “engaged in trade” is left undefined in § 999. However, I.R.C. § 864(b)(1)(A), which speaks of being engaged in trade or business within the United States, might be a guide. If so, such trade must be substantial, regular, and continuous. Commissioner v. Spermacet Whaling & Shipping Co., 281 F.2d 646, 650 (6th Cir. 1960); Lewellyn v. Pittsburgh B. & L.E.R.R. Co., 222 F. 177, 185 (3d Cir. 1915). Contra, Rev. Rul. 58-63, 1958-1 C.B. 624; Rev. Rul. 60-249, 1960-2 C.B. 284 (single horse race entry is engaging in trade in United States). Generally, whether a person engages in trade or business within the United States is a fact question determined on a case-by-case basis. Treas. Reg. § 1.864-2(e), T.D. 6948, 1968-1 C.B. 327, 335-36. A taxpayer may be hard-pressed to decide whether he has participated in an international boycott if he must ascertain where or with whom those persons that he agreed to boycott are engaged in trade. The undefined extent of the taxpayer’s duty to gather such information complicates his problem. Fortunately extra penalties under I.R.C. § 999(f) are only assessed for willful failures to report.


38. Under such a scheme, the broker, who must be neither a “person” within the meaning of § 999, see note 10 supra, nor a national of a boycotting country, makes the agreements not to deal with blacklisted firms. The broker’s American exporters make no agreements to boycott anyone and thus do not participate in the international boycott despite any reluctance to deal with any blacklisted firms for fear of being blacklisted themselves and then cut off by the broker. Thus the imposition of the broker in the stream of commerce serves to separate the “agreement” from the “proscribed activity” and prevent boycott participation. See Guidelines I, supra note 10, at 49,929-30 (para. H-22). Further, the absence of the term “related to” in I.R.C. § 999(b)(3)(A) indicates that participation will not occur with respect to such operations, which include those conducted by the foreign broker method. For a discussion of the classifications of operations, see note 13 supra.

On the other hand, an agreement between an American exporter and his foreign broker may be inferred from a course of dealing, see note 26 supra, and the term “indirectly” in I.R.C. § 999(b)(3)(A) might be construed to include trading through a foreign broker. Under such a construction, participation or cooperation could be found. Further, the form of a transaction may be disregarded if it is a mere device for tax avoidance. Gregory v. Helvering, 293 U.S. 465, 469 (1935).

business because a firm employs these individuals. In other words, there must be a causative rather than a circumstantial relationship between the agreement and the character of the firm's management. Moreover, since the guidelines require a specific reference in the agreement to a particular religion or nationality and because firms are often blacklisted for reasons other than the makeup of their management, this subsection does not apply to agreements to refuse to deal with blacklisted firms as such. Thus its utility is greatly restricted.

Further, a person participates where he agrees “to remove (or refrain from selecting) corporate directors” or “to refrain from employing individuals of a particular nationality, race, or religion.” This form of participation is rare and is easily avoided by invoking the sovereign rights exception.

Lastly, participation encompasses agreements not to ship or insure a product on or with a carrier that does not participate in an international boycott. The many statutory hurdles in this subsection prevent its wide application, and evading its literal terms is quite simple.

41. Id. (para. L-2). Of course, if any of the blacklisted firms are engaged in trade in a boycotting country, participation occurs under subsection (b)(3)(A)(ii). See notes 34-38 supra and accompanying text.
42. The apparent intent of this subsection is to include firms blacklisted for religious reasons. An amendment to that effect would increase the efficacy of § 999. The Secretary could maintain and publish the blacklist as he does the list of boycotting countries under § 999(a)(3).
45. See notes 28 & 29 supra. Thus a person may not agree to exclude from consideration for employment members of any religious sect, but he may condition all employment contracts on the employee's ability to obtain visas for the boycotting country without having participated in the boycott. The employer will not have made an agreement, even though no members of the blacklisted sect apply for the jobs because they know they will be unable to procure the necessary visas. Guidelines I, supra note 10, at 49,928-29 (paras. H-9 to H-15).
47. Under this subsection, the agreement must be as a condition of sale instead of a condition of doing business. Thus the subsection only applies to sellers, not freight forwarders, insurers, or carriers. Guidelines I, supra note 10, at 49,930, 49,933 (paras. H-27, H-28, M-4). The agreement must contain shipping or insurance directions; voluntary compliance with Arab import and shipping laws does not constitute an agreement. Id. at 49,930 (para. H-23).
48. The easiest way to avoid this subsection is for the seller to have another person make the shipping and insurance arrangements. See Guidelines I, supra note 10, at 49,923.
In sum, the definition of participation in or cooperation with an international boycott has several major loopholes. Further, the rules ignore many of the more common boycott clauses. However, the most invidious boycott compliance, including many outright refusals to deal and agreements to discriminate, must be reported.

C. Tax Benefit Denial

The Tax Reform Act of 1976 also denies taxpayers the benefits of the foreign tax credit, the DISC rules, and foreign income deferral attributable to participation in or cooperation with an international boycott. The statutory language of the tax benefit denial is simple, but the computation thereof is not.

If the taxpayer participates in or cooperates with an international boycott in just one instance, a rebuttable presumption arises that the taxpayer has participated in the boycott with respect to all his operations in every boycotting country. The taxpayer may rebut the pre-
sumption for each "clearly separate and identifiable" operation by "clearly demonstrat[ing] that he . . . did not participate in or cooperate with the international boycott in connection with that operation." Thus, the taxpayer loses his tax benefits with respect to all operations in all boycotting countries except those for which the presumption has been rebutted, irrespective of actual participation. This statutory presumption functions primarily as an adjunct to the reporting provisions of section 999. A taxpayer can minimize his tax benefit loss by admitting specific boycott operations and maintaining records sufficient to clearly demonstrate the innocent character of the remaining operations. This scheme effects a proportional trade-off between the revenue and information collected by the IRS.

The taxpayer must elect one of two systems for calculating the

ments, companies, or nationals of such countries. Nevertheless, the presumption may be rebutted with respect to operations in or related to a boycotting country, even though the presumption does not apply to operations related to a boycotting country. The inconsistent use of the three terms forced the Department of the Treasury to conclude that the presumption applies only to operations conducted in boycotting countries. Guidelines I, supra note 10, at 49,925 (para. D-1). For a discussion of the different classes of operations, see note 12 supra. This inconsistency severely restricts the utility of the presumption and should be remedied.

Where a person controls a corporation, that person's participation is presumptively participation by the corporation and vice versa. I.R.C. § 999(e). See also note 20 supra.

55. I.R.C. § 999(b)(2)(B). The burden of proof is on the taxpayer to establish separate operations. Guidelines I, supra note 10, at 49,925 (para. D-2). The existence of a separate and identifiable operation depends on "facts and circumstances" such as separate negotiation and performance of contracts, different personnel on the job, and different products or services. Id. (para. D-3).


57. It is expected that the returns and the determinations by the taxpayer will be audited and the accuracy of the taxpayer's determinations will be verified . . . . It is anticipated that the IRS will develop a group of experts who are knowledgeable in audit aspects of determining whether a taxpayer is involved in an international boycott.


58. Section 999 was not designed to be a revenue raising provision. It is expected to bring in less than $100 million per year. S. REP. No. 938, 94th Cong., 2d Sess. 290 (1976). This optimistic figure is less than one quarter of one percent of regular corporate income tax collected each year. COMMISSIONER OF INTERNAL REVENUE, ANNUAL REPORT 94 (1974).
amount of denied tax benefits. One system involves the application of the International Boycott Factor (IBF)\(^5\) to the taxpayer's otherwise available tax benefits. The other alternative allows the loss of only those tax benefits "specifically attributable to the operations in which the taxpayer participated in or cooperated with an international boycott."\(^6\)

There are significant tax differences between the two systems, and structuring transactions to take advantage of these differences may attenuate the impact of section 999.\(^4\)

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I.R.C. § 999(c)(1) provides that the IBF numerator include all operations in or related to boycotting countries for which there is actual or unrebutted presumptive boycott participation. For a discussion of the classes of operations and presumptions of participation, see notes 13, 20 & 54 supra and accompanying text. Participation or cooperation, however, does not normally arise with respect to operations related to a boycotting country. See note 38 supra. Nor does the rebuttable subsection (b) presumption of participation apply to such operations. See note 54 supra. Due to these statutory inconsistencies, the IBF numerator should in theory reflect the purchases, sales, and payroll only of operations in boycotting countries. The temporary regulations purport to adopt this view. See Tress. Reg. § 7.999-1(b)(5)-(9). Nonetheless, to satisfy the obvious legislative intent to deny those tax benefits attributable to boycott operations both in and related to boycotting countries, the regulations devise an "ultimate destination rule" whereby a sale, purchase, or exchange of property (including money) or services (and payroll incidental thereto) is deemed to be located in the country of ultimate use, consumption, or disposition. Tress. Reg. § 7.999-1(b)(5)-(8), (10). Thus operations related to boycotting countries (and some operations with their nationals) are subsumed in the IBF definition of operations in those countries.

60. I.R.C. § 999(c)(2). Under this option, the taxpayer must demonstrate those portions of income and paid taxes attributable to operations in which there was actual or presumptive participation or cooperation "by performing an in-depth analysis of the profit and loss data of each separate and identifiable operation." Guidelines II, supra note 10, at 1095 (para. F-6). (Quaere whether under this method the taxpayer is absolved of his DISC benefit loss by the incorrect reference to nonexistent I.R.C. § 995(b)(1)(D)(ii) instead of subparagraph (F)(ii)).

61. The taxpayer must apply one method (IBF or "taxes specifically attributable") to all his operations for that taxable year; however, no member of a controlled group is bound by another member's election. Guidelines I, supra note 10, at 49,927 (paras. F-4, F-5).

Boycott operations determine the applicable IBF. Because "operations" are merely activity without regard to profit or taxes, see note 11 supra, the IBF method may be preferable where a taxpayer's boycott operations are taxed at a higher average rate, have a higher rate of return, or have a lower overhead than his other world-wide operations. See note 59 supra. The "specifically attributable" method is preferable where operations can be structured to produce little tax benefit subject to disqualification and can be particularly advantageous where the foreign tax credit is the most important tax benefit. Under this method, the total amount of foreign taxes paid is reduced by the disqualified amount before the overall limitation of I.R.C. §§ 904, 907 is applied. Guidelines II, supra.
The reporting and tax-sanction provisions of section 999 jointly satisfy the primary purpose of the Act: congressional access to accurate data detailing United States involvement in international trade boycotts, and the imputing of a higher cost to participation through tax sanctions, stiff penalties for noncompliance, and monetary "rewards" for detailed reporting. However, section 999 contains more subtle, and more powerful, weapons to combat the Arab boycott. The sophisticated reporting system and pre-existing criminal and civil statutes combine with section 999's definition of boycott participation to produce a statutory scheme that may substantially reduce compliance with Arab boycott demands.

II

BOYCOTT COMPLIANCE AND ANTITRUST LAW

Official rumblings that participation in the Arab secondary boycott might be a violation of United States antitrust laws begun in early 1975. Later that year, the Department of Justice announced that an agreement to boycott Israel as a condition of doing business with a boycotting country might constitute a Sherman Act violation, and that peripheral boycott compliance was "[e]ven more suspect." This section will examine the theories under which relevant boycott practices
are held to be antitrust violations, and examine the similarity between the elements of proof required to establish antitrust violations and the particulars of the reporting requirements under section 999.

A. APPLICABILITY OF THE SHERMAN ACT

Section 1 of the Sherman Act\textsuperscript{66} reaches foreign activities having effects within the United States,\textsuperscript{67} despite the fact that the contract, combination, or conspiracy is formed in a foreign country,\textsuperscript{68} as long as the parties affect or intend to affect United States trade.\textsuperscript{69} The extraterritorial power of the Sherman Act is sufficient to encompass all international secondary boycott activity involving American citizens.\textsuperscript{70}

Although a unilateral refusal to deal, without more, is not an antitrust violation since there is no combination,\textsuperscript{71} a group boycott, or concerted refusal to deal, is generally recognized as a per se antitrust violation.\textsuperscript{72} In a leading boycott case, \textit{Klor's, Inc. v. Broadway-Hale Stores, Inc.},\textsuperscript{73} the defendant induced manufacturers and distributors to boycott a sin-

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\textsuperscript{66} 15 U.S.C. § 1 (1970). Section 1 of the Sherman Act outlaws any “contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” Id.


\textsuperscript{68} Thomsen v. Cayser, 243 U.S. 66, 88 (1917).

\textsuperscript{69} United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945); see Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). The \textit{Alcoa} case has been broadly endorsed by the Supreme Court. See, e.g., United States v. Griffith, 334 U.S. 100, 106-07 (1948); American Tobacco Co. v. United States, 328 U.S. 781, 811-14 (1946).

\textsuperscript{70} Essentially, the Sherman Act reaches a restraint if it occurs in the course of foreign commerce or if it substantially affects either foreign or interstate commerce. Rahl, \textit{Foreign Commerce Jurisdiction of the American Antitrust Laws}, 43 A.B.A. ANTITRUST L.J. 521, 523 (1974).


\textsuperscript{72} Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild, Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

\textsuperscript{73} 359 U.S. 207 (1959).
gle retail outlet. The Court, rejecting the defendant's argument that a boycott of one small firm produced no public injury, stated: "Group boycotts, or concerted refusals by traders to deal with other traders have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . ."74 Neither coercion nor economic desirability is a recognized antitrust defense.75 Acquiescence in an illegal conspiracy is as reprehensible as the creation of one.76 Even if the acquiescence is coerced, resulting in an "involuntary" restraint of trade, the result is the same.77 Thus the fact that an American firm must choose between dealing exclusively with the Arabs or the Israelis is irrelevant to the governing antitrust principles.

One apparent but specious difference between an ordinary commercial boycott and the Arab boycott of Israel is that the latter involves a political purpose,78 which might mitigate antitrust liability.79 An American firm or person participating in the Arab boycott does so for one

74. Id. at 212 (footnote omitted). The per se rule is applied in commercial group boycott cases; no inquiry is made into the reasonableness of the conspirators' actions. Bird, supra note 65, at 275-77.

75. The Supreme Court disapproved the economic "desirability" argument in a similar situation:

We . . . reject the suggestion that the Sherman Act should not be enforced . . . because what appellant has done is reasonable in view of current foreign trade conditions. This position ignores the fact that the provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. Those provisions of the Act are wholly inconsistent with [the] argument that American business must be left free to participate in international cartels, that free foreign commerce in goods must be sacrificed in order to foster export of American dollars . . . . Acceptance of [this] view would make the Sherman Act a dead letter insofar as it prohibits contracts and conspiracies in restraint of foreign trade. If such a drastic change is to be made in the statute, Congress is the one to do it.


77. Id.

78. Boycotts ancillary to a political purpose have not fared well in the courts. In Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967), the defendant realtors' association conspired to prevent Blacks from renting or purchasing property in "white" neighborhoods. The district court found these facts to state a cause of action under the Sherman Act. In I.P.C. Distrib., Inc. v. Chicago Moving Picture Mach. Operators Local 110, 132 F. Supp. 294 (N.D. Ill. 1955), a motion picture distributor brought an antitrust action against the defendant union whose members collectively refused to show a picture on the ground that it was offensive to the working class. The court held the action cognizable under § 1 of the Sherman Act.

reason—profit; therefore, the United States businessman is involved in a garden variety commercial boycott. The American firm should not be benefited by a co-conspirator's divergent motive.

B. AGREEMENTS UNDER SECTION 999 AND THE SHERMAN ACT

The most difficult element of proof of a section 1 Sherman Act violation is the contract, combination, or conspiracy—two or more parties acting in concert. If the conspiracy is manifest in a written agreement, there is no difficulty in establishing this element through discovery. If the agreement is oral or tacit, proof becomes more difficult. A section 999 return will, in many cases, contain this elusive element since boycott participants must report boycott agreements whether oral, tacit, or established by a course of dealing.

American firms engaged in boycott activities may be involved in at least two different types of conspiracies. An examination of each reveals the utility of the section 999 returns for recording the conspiratorial agreement. The most obvious conspiracy is a boycott agreement between an American firm and its Arab trading partner. In this situation, the American firm has joined a foreign conspiracy restraining United States trade. The recent litigation in United States v. Bechtel Corp. is illustrative of this type of conspiracy. In Bechtel, the United States charged that the defendant, a major international prime contractor, had violated section 1 of the Sherman Act by agreeing to "refuse to deal with Blacklisted Persons as Subcontractor . . . and . . . require Subcontractors to refuse to deal with Blacklisted Persons . . . ." The case was recently settled in the government's favor; the defendants agreed to a consent accord, promising not to boycott firms dealing with

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80. Coons, supra note 79, at 712, 726-29; Bird, supra note 65, at 249.
81. See Note, supra note 32, at 891.
82. By comparison, the jurisdictional requirement that the restraint be in foreign or interstate domestic commerce is easily met.
85. See Baker, supra note 3, at 940-42.
86. Id. at 940.
Israel. Section 999 reports will show precisely whether a Bechtel-type agreement has been made.

The second boycott antitrust conspiracy occurs when a national of a boycotting country forces a group of American firms to agree with each other to boycott blacklisted firms or individuals as a prerequisite to their doing business. Such a conspiracy arose when the Kuwait International Investment Company demanded the exclusion of Lazard Freres & Co. from various financing syndicates because of the religious make-up of its management. This situation, a clear domestic antitrust violation, must also be reported and described under section 999.

C. SECTIONS 999 AND SHERMAN ACT DEFENSES

Although a prima facie antitrust case may be established, certain defenses may preclude successful prosecution. Section 999 anticipates these problems by exempting those groups who are unlikely antitrust defendants. American companies doing business in an Arab country must comply with the laws and regulations of the sovereign. In the current boycott context this means respecting the trade barrier between Arab nations and Israel. No doubt any sovereign may establish, however irrationally, its own import and export laws. An American firm respecting this sovereign right should not, and does not, run afoul of American antitrust law, as long as the command and the obedience to the command are territorially coextensive with the sovereign's power.

In Interamerican Refining Corp. v. Texaco Maracaibo, Inc., the court recognized a narrow sovereign compulsion antitrust defense for international boycott activity. There the Venezuelan government ordered defendants, United States oil companies with Venezuelan concessions, to comply with Venezuelan law. The court found this defense applicable even though the command was not territorially coextensive with the sovereign's power.


90. See notes 34-36 supra and accompanying text. Because of the loopholes in I.R.C. § 999(b)(3)(A)(ii), see notes 37-38 supra and accompanying text, not all boycott demand compliance will be reported; any participation reported under that subsection is, however, an antitrust violation.

91. Baker, supra note 3, at 941.


93. See notes 34 & 39 supra and accompanying text.

94. For example, the § 999 requirement that agreements be as a condition of doing business or as a condition of sale eliminates all agreements not in restraint of trade.


sions, to boycott plaintiff, a United States refiner. The court found that:

Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far.

The anti-competitive acts must be the result of the sovereign effectively exerting its compulsion within its territorial boundaries or there is no defense; in *Interamerican* the agreement, the restraint, and the defendants were all within Venezuela. Conversely, where the acts in restraint of trade occur without the territorial limits of the sovereign, or where the acts are actually those of private parties utilizing the foreign law as an artifice, antitrust liability will attach. Thus, legitimate sovereign compulsion does not exist where private conspirators act in conformity with a foreign law and effect a restraint on United States foreign commerce, or where they are aided by discriminatory legislation, or where the private party chooses to deal with a sovereign outside of his territorial boundaries where the command has no force. Section 999 reflects the sovereign compulsion defense and its territorial limitations and exempts a boycott agreement such as that involved in *Interamerican*.

III

EMPLOYMENT DISCRIMINATION

A. Applicability of Title VII

Title VII of the Civil Rights Act of 1964 prohibits discriminatory employment practices in the private sector. Section 999 requires the

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97. Id. at 1298 (emphasis added)(footnote omitted).
98. Id. at 1298 nn.18 & 19.
104. It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . religion . . . or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way
reporting of all agreements to remove or refrain from selecting corporate directors or to refrain from employing individuals of a particular nationality, race, or religion. Many, if not all, discriminatory agreements reported under section 999 are clear Title VII violations.

An employer may discriminate on the basis of religion or national origin where these traits are "bona fide occupational qualification[s] reasonably necessary to the normal operation of that particular business or enterprise." It is unlikely that religion or national origin is a bona fide occupational qualification (BFOQ) for an employee hired for work inside any Arab country even though members of some religious sects are currently unable to obtain entry visas.

Although there is no federal case directly in point, certain principles may be derived from the Equal Employment Opportunity Commission (EEOC) regulations. The EEOC guidelines on religious discrimination do not refer to BFOQ's, probably because few legitimate religious qualifications exist. With regard to sex-based discrimination the guidelines provide that "[t]he refusal to hire an individual because of the preferences of . . . clients or customers" is not a situation warranting the

which would . . . tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . . or national origin.


106. Two issues arise in this context. Section 999 requires reports on a foreign subsidiary's discriminatory agreements, see note 20 supra, but is not clear whether Title VII has similar extraterritorial application. Title VII probably applies to discrimination against United States citizens overseas, but not to aliens. Note, Civil Rights in Employment and the Multinational Corporations, 10 CORNELL INT'L L.J. 87 (1976); Foreign Investment and Arab Boycott Legislation: Hearings on S. 425, S. 953, S. 995, and S. 1303 Before the Subcomm. on Int'l Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 165 (1975) (statement of Antonin Scalia, Assistant Attorney General). Therefore, only United States resident taxpayers' § 999 returns can safely be assumed to reveal Title VII violations.

The second issue is whether Title VII applies to discrimination against corporate directors. Directors are elected and removed, but Title VII speaks only of hiring and discharging individuals. See note 104 supra. Further, the statute covers employment, id., and a director acts as a fiduciary. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS 415 (2d ed. 1970). See Foust v. Transamerica Corp., 391 F. Supp. 312, 315 (N.D. Cal. 1976).


application of the BFOQ exception. Further, a BFOQ must be "reasonably necessary to the normal operation of that particular business" which entails the application of the "business necessity" test. This test, however, concerns only the ability of the prospective employee to perform the job with the requisite degree of safety and efficiency, and in the boycott context, religion has no relation to either job safety or efficiency.

B. SECTION 999 Exceptions

Under section 999, employers are permitted to make employment contingent upon the worker obtaining an entry visa for an Arab country without having participated in an international boycott. Furthermore, the employer has arguably not run afoul of Title VII since he has offered equal terms of employment to all. This exception resembles the stipulation entered in a state employment discrimination case involving similar facts. The stipulation provided: "[I]n connection with applicants hired for work in Saudi Arabia . . . [the employer] may advise such applicants that their employment is contingent upon such applicants' ability to obtain a visa from the Saudi Arabian government . . ." The validity of contingent contracts of employment under Title VII has not been decided. The scheme, although neutral on its face, results in a discriminatory effect and might be unlawful. On the other hand, under the contingent or conditional contract, the Arab government discriminates by refusing visas to certain parties in a legitimate exercise of sovereign power; the American party, having offered equal terms to all, should be insulated from Title VII liability. Any other solution would end United States economic presence within the Arab League or force

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domestic concerns to hire overseas beyond the reach of Title VII.\textsuperscript{119}

In sum, agreements to discriminate made by American corporations hiring domestically and reported under section 999 are similar to Title VII violations. As is also true of antitrust violations, the section 999 returns will reveal the nature of the discrimination and will contain a description of the particular operation in which it occurred.

IV

DISCOVERY OF SECTION 999 RETURNS

Information returns containing incriminating evidence have little deterrent value unless a party with an interest in instituting a suit can obtain the return. Thus the procedures available for the disclosure of tax returns are crucial to an assessment of the impact that section 999 will have on boycott operations.\textsuperscript{120}

Federal tax returns\textsuperscript{121} are generally deemed to be confidential communications between a taxpayer and the United States Government.\textsuperscript{122} The

\textsuperscript{119} See note 106 supra.

\textsuperscript{120} Under authority of the EAA, the Department of Commerce requires exporters and related service organizations to report all boycott related requests. 41 Fed. Reg. 46,443-45 (1976) (to be codified in 15 C.F.R. § 369.4). The new EAA reporting forms, 41 Fed. Reg. 46,446-47 (1976), require the taxpayer to state whether or not he complied with the request. 41 Fed. Reg. 46,445 (1976) (to be codified in 15 C.F.R. § 369.4(b)(2), (c)(2)). Further, all reports filed under the EAA are open to public inspection. 41 Fed. Reg. 46,445 (1976) (to be codified in 15 C.F.R. § 369.4(a)). See also note 6 supra. The publicly disclosed reports filed under the EAA have an antiboycott potential similar to § 999 returns which are not in the public domain. See Note, supra note 6, at 98. The EAA reports, however, differ from § 999 returns in several important aspects; only exporters and related service organizations must report; boycott transactions carried out through foreign brokers or subsidiaries are not covered. The Department of Commerce’s enforcement record is very weak; it hands out few sanctions for noncompliance. Because of the inherent conflict between its duties as the EAA administrator and its duties as a promoter of export trade, stringent enforcement in the future is unlikely. See note 6 supra. Should a federal agency charged with the enforcement of antitrust or civil rights statutes attempt to use these reports as an investigative or prosecutorial tool, compliance with the EAA reporting requirements might diminish. In contrast, § 999 has an inherent enforcement mechanism precluding wholesale noncompliance—multiple returns describing the same boycott participation filed by persons not personally involved in that operation and having no interest in noncompliance. See notes 15, 20 & 54 supra and accompanying text. Also, being a tax statute, § 999 will be enforced by the Department of the Treasury which has no direct stake in export trade volume. Audits, fines, and prison sentences for willful noncompliance complete the rigorous enforcement scheme. I.R.C. §§ 999(f), 6872, 7201, 7206-07. See note 57 supra. Further, § 999 returns have an element of prosecutorial convenience; because the definition of boycott participation is narrowly drawn, admissions of certain classes of participation are bound to be violations of some other law. See notes 82-119 supra and accompanying text.

\textsuperscript{121} The term “return” includes § 999 information returns. I.R.C. § 6103(b)(1).

\textsuperscript{122} I.R.C. § 6103(a).
privileged status given tax returns is based on the theory that a voluntary taxation system is better served if the taxpayer can be reasonably certain that his disclosures are made in confidence. Often, the government's need for information conflicts with this theory and a balance is struck through limited disclosure. Assuming that some section 999 returns "may constitute evidence of a violation of [antitrust] laws," the Secretary of the Treasury may, on his own initiative, disclose to the Department of Justice data indicating the fact, frequency, and total number of such violations. Most importantly, the Secretary may also disclose the identity of a boycott participant and the exact nature of the participation whenever this information has been reported to the IRS by another person. Under this scheme, the Department of Justice will be able to sensibly allocate antitrust enforcement resources; the Department will also know the identity of at least some boycott antitrust violators.

Any section 999 return may be disclosed to the Department of Justice for antitrust law enforcement upon application for a court order. Although the statute does not explicitly state that the application must include the identity of the taxpayer, it does require that there be, in

123. Heathman v. United States Dist. Court, 503 F.2d 1032, 1036 (9th Cir. 1974).
125. I.R.C. § 6103(i)(3). See notes 63-102 supra and accompanying text.
126. I.R.C. §§ 6103(b), (i)(3). In addition, the President or Congress could demand that the Secretary take such action.
127. Id. Section 999 requires persons to report participation or cooperation by others with whom they are affiliated by business form or stock ownership. See notes 15, 20 & 54 supra and accompanying text. For example, if one partner reports another partner's participation, the Secretary may, on his own initiative, transmit that information along with the participant's identity to the Department of Justice. There can be similar disclosure of some of the participation of members of controlled groups (other members reporting) and of DISCs (shareholders reporting). This important result was not an unintentional consequence of the I.R.C. §§ 6103(b)(2)-(3) definitions: "[I.R.C. § 6103(i)] authorizes the IRS . . . to disclose in writing to the Justice Department . . . information relating to the possible violation of a Federal criminal law which is received from sources other than the taxpayer . . . ." H.R. REP. No. 1515, 94th Cong., 2d Sess. 478 (1976) (emphasis added).
128. The § 999 return information received under this scheme will not be the equivalent of an admission against interest as the information will be received from a source other than the participant. See note 127 supra. Nonetheless, the information will constitute the "reasonable cause" necessary to obtain by court order the boycott participant's own return, which will be an admission. See note 130 infra and accompanying text.
129. I.R.C. § 6103(i)(1).
addition to some necessity, "reasonable cause to believe . . . that a specific criminal act has been committed." A "specific criminal act" implies a specific criminal actor, so this disclosure method is probably limited to the returns of identified taxpayers. Even this limited access to individual returns through court order will be of immense value to the Department of Justice. Where a possible boycott-related antitrust offense is discovered through independent means, the related return will show whether or not an offense was committed, and could establish all the elements of a prima facie case.

Private parties aggrieved by boycott-related antitrust violations cannot utilize the alleged offender's section 999 returns for an investigatory purpose, but once an action is commenced, returns may be subject to discovery in appropriate circumstances. Although the statutory confidentiality accorded federal tax returns only restricts dissemination by government officials, some courts have read into the statutory scheme an implied, limited protection against discovery by private parties, finding a public policy against disclosure. Nonetheless, the majority rule requires a litigant to produce his returns upon a discovery demand where the return bears on a central issue in the case. If the litigant has not retained a copy, he must obtain a copy of his return from the government. Under the majority formulation, section 999 returns are discoverable and admissible because they contain admissions against interest bearing on a central issue in dispute.


131. See notes 120 & 128 supra and accompanying text.


Although the EEOC may not obtain federal income tax returns directly from the IRS, the EEOC does have unrestricted access to all documentary evidence, including retained copies of tax returns, of any person or firm being investigated. Since most persons realize when they have been victimized by discriminatory employment practices, the victim can identify the discriminating employer when the complaint is filed, which will provide the EEOC with the initial discovery of the offense. The copies of the section 999 returns obtained by the EEOC will establish, by admission, the type of discriminatory employment practice condemned by Title VII.

The potential of the Tax Reform Act of 1976 to reduce domestic compliance with the Arab boycott depends on both the effort expended by the appropriate government agencies and the willingness of private litigants to press their claims. Instead of a direct prohibition, section 999 facilitates a flexible enforcement-oriented approach causing boycott activity to vary with the allocation of enforcement resources. Should Congress or the Executive find that cessation of boycott activities outweighs any concomitant negative impact on foreign trade and foreign policy, each may direct and implement more strict enforcement of the antitrust and civil rights laws. The process may be reversed, if and when the need should arise.

V

FIFTH AMENDMENT CONSIDERATIONS

Where the law requires reports disclosing criminal violations to government officials, issues concerning the applicability of the fifth amendment privilege against self-incrimination are bound to arise. This section will examine the circumstances under which the privilege may be invoked and the procedure for asserting this right.

The fifth amendment privilege against compulsory self-incrimination is not available to corporations or to any collective entity in which the members operate in a representative capacity. Nor may a member of

136. I.R.C. § 6103(i)(1)-(4) only relates to criminal statutes; Title VII creates only civil remedies.
138. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. In any case, the fifth amendment will only apply to reports of boycott participation which constitute Sherman Act violations.
such an entity invoke the privilege with respect to the entity's records, even though he might be personally incriminated by their production.\textsuperscript{141} Clearly, the fifth amendment enables no United States corporation or collective entity engaged in international boycott operations to refuse to comply with section 999 on grounds of self-incrimination.

The individual businessman, broker, trader, or sole proprietor stands on a very different footing. Because the admissions of a taxpayer's own illegal activity present real hazards of incrimination\textsuperscript{142} and constitute "link[s] in the chain" of evidence\textsuperscript{143} necessary to convict, an individual may invoke the fifth amendment privilege.\textsuperscript{144}

"The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a 'witness,' as that term is used . . . " in the amendment.\textsuperscript{145} Regarding standard income tax returns, it is settled that the fifth amendment may not be used as a defense for failure to file a return.\textsuperscript{146} In \textit{United States v. Sullivan} the taxpayer claimed that the fifth amendment justified his willful failure to file a standard return, which asked a taxpayer's occupation, because he had earned his income through illegal activities. The Court, recognizing that illegal income is normally subject to taxa-


\textsuperscript{142.} \textit{See} Rogers v. United States, 340 U.S. 367, 374-75 (1951).


\textsuperscript{144.} The "required records" exception to the fifth amendment privilege should not apply. Under this doctrine records required by statute or regulation to be made, preserved, and produced are not private and therefore are not accorded fifth amendment privilege. In Shapiro v. United States, 335 U.S. 1 (1948), the Court found that where records are required to be preserved for examination as an aid for enforcement of a statutory program, they are public documents not subject to fifth amendment privileges. However, in Shapiro the "required records" were an essential part of a particular legislative program. Even though the IRS requires that all tax-related records be kept and that returns be filed, I.R.C. §§ 6001, 6011(a), the absence of an explicit coordinate nontax legislative program in § 999 necessitating records for its enforcement should preclude application of the Shapiro doctrine. \textit{See generally Note, The Fifth Amendment and the Production of Records: Are Ownership and Possession Always Necessary?}, 9 GA. L. Rev. 658, 659-63 (1975); Note, \textit{Required Information and the Privilege Against Self-Incrimination}, 65 COLUM. L. Rev. 681 (1965). In any case, rigorous application of the required records exception would substantially weaken the privilege against self-incrimination, allowing Congress to decide when and where the privilege could be asserted. For this reason it is not often pressed. \textit{See} Stuart v. United States, 416 F.2d 459, 462 n.2 (5th Cir. 1969).


\textsuperscript{146.} \textit{Id.}; United States v. Sullivan, 274 U.S. 259, 262 (1927).

\textsuperscript{147.} 274 U.S. 259 (1927).
tion, remarked: "If the form of the return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all . . ."148 In Garner v. United States,149 which involved a non-tax criminal prosecution, the Court held that if a taxpayer fails to assert a valid privilege on the return itself, it is lost.

In contrast to the general rule, there have been several reporting situations where any reply, including an assertion of the privilege, would have been incriminating; in such cases the individual was allowed to assert the privilege by filing no return.150 Should section 999 returns fall into this category, an individual could lawfully refuse to file.151 In each of the cases where failure to file was approved, the government had sought answers to questions not "neutral on their face and directed at the public at large,"152 but aimed at individual members of "a highly selective group inherently suspect of criminal activities."152 The statutory schemes involved in these cases assured disclosure of any reply to state or federal prosecutors. The constitutional deficiencies of some of the foregoing statutory schemes were eliminated by amendments prohibiting disclosure of reported information.154

148. Id., at 263.
150. See, e.g., Marchetti v. United States, 390 U.S. 39 (1968) (gambling registration statute); Grosso v. United States, 390 U.S. 62 (1968) (gambling excise tax); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965) (registration of Communists). Both Marchetti and Grosso involved coordinate statutes that required gamblers to maintain books and records on gambling activities and also provided that lists of registered gamblers be maintained for public inspection. Marchetti overruled United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955).
151. A total failure to file might be an excessively liberal safeguard and a third method might be devised.
153. Id.

A parallel situation was presented in Haynes v. United States, 390 U.S. 85 (1968). There the Court invalidated on fifth amendment grounds a statutory scheme requiring registration of firearms commonly used in criminal activities. Related statutes made the registration information available to prosecutors. Amendments to the statutes that effected absolute nondisclosure of the information rehabilitated the statutory scheme. The Court tested these amendments in United States v. Freed, 401 U.S. 601 (1971), and concluded: "[T]he claimant is not confronted by 'substantial and "real"' but merely 'trifling or imaginary hazards of incrimination . . . by reason of the unavailability of the registration data . . . to local, state, and other federal agencies . . ." Id. at 606.
Section 999 returns likewise require answers to questions not "neutral on their face." An assertion of the privilege in response to a question asking, in effect, whether the taxpayer committed any boycott-related antitrust violations tells the investigator that the taxpayer has in fact committed the crime. However, under the provisions limiting disclosure of tax returns, the investigator must be reasonably sure of that fact in order to obtain the return and he will find little additional evidence where the taxpayer has asserted his privilege in response to particular questions. This protection relieves the taxpayer of any substantial hazard of further incrimination, rendering a failure to file an unlikely method of asserting the fifth amendment privilege.

CONCLUSION

Arab countries conducting a trade boycott against Israel and its supporters require American firms to join the boycott as a condition of doing business. Section 999 of the Tax Reform Act of 1976 contains potentially powerful antiboycott provisions that deny certain tax benefits to boycott participators, and inform Congress of the scope of United States involvement in the boycott. Moreover, the reports required under this section in conjunction with federal antitrust and civil rights laws should substantially reduce boycott participation because of their availability to prospective governmental and private litigants. The provisions provide a flexible antiboycott weapon, as their efficacy depends on the willingness of law enforcement officials to pursue the Arab boycott issue. Finally, the self-reporting aspects of the provisions present minimal fifth amendment self-incrimination problems.

Charles H. Wagner

As this Note went to press, President Carter signed the Export Administration Amendments of 1977, Pub. L. No. 95-52 (1977). These amendments substantially strengthen the EAA and empower the President to issue rules and regulations prohibiting compliance with certain boycott demands. The regulations promulgated under the Amendments should be considered with respect to any transaction involving American compliance with foreign boycotts.

155. For a discussion of the limited disclosure provisions, see notes 125-37 supra and accompanying text.
156. See note 154 supra.