

Reporting Requirements for Foreign Investments in the United States

October 15, 2014

Client Advisory

October 15, 2014 by Guy P. Lander and David I. Karabell

Introduction

Foreign investors either interested in investing in a U.S. business or currently investing in a U.S. business should be aware of the mandatory reporting requirements under the International Investment and Trade in Services Survey Act ("Act"). It was enacted to allow the Bureau of Economic Analysis ("BEA"), an agency of the U.S. Department of Commerce, to administer various surveys to acquire an accurate and complete understanding of the level and the kind of international investment occurring within the United States.^[1] These surveys are conducted in the form of reports that must be filed at various times. Mandatory reporting under the Act has been required since 1979.^[2] However, the focus of this advisory will be on various investment reports which will become available by the end of November 2014 but will retroactively apply to all new foreign investments since January 1, 2014.

Initial Investment Reports Initial investment reporting is required whenever a foreign person directly or indirectly acquires, establishes or purchases of a U.S. business enterprise.^[3] The initial investment report must be filed by the U.S. business enterprise. Effective September 15, 2014, persons subject to reporting requirements under the Act must file the initial investment report^[4] and^[5]. The following transactions require the filing of an initial investment report on the forms listed:

1. **Form BE-13A** – A foreign person, directly or indirectly through a U.S. subsidiary, acquires at least a 10% voting interest in a U.S. business enterprise or a 10% voting interest in a segment or operating unit of a U.S. business enterprise, which is operated as a separate legal entity;
 2. **Form BE-13B** – A foreign person, directly or indirectly through a U.S. subsidiary, creates a new U.S. legal entity and the foreign person, directly or indirectly through a U.S. subsidiary, owns at least a 10% voting interest in the new U.S. legal entity;
 3. **Form BE-13C** – A foreign person, directly or indirectly through a U.S. subsidiary, acquires by merger a U.S. business enterprise or a business segment of a U.S. business enterprise;
 4. **Form BE-13D** – A U.S. subsidiary of a foreign parent expands and begins to conduct business in a new facility;
 5. **Form BE-13E** – A U.S. subsidiary of a foreign parent, having filed either a Form BE-13B or Form BE-13D, reports that the created or expanded U.S. business enterprise is still under construction;
 6. **Form BE-13, Claim for Exemption** – A U.S. business enterprise does not meet the filing requirements for the forms listed above.^[6]
-

In order to trigger the mandatory reporting requirement for the various BE-13 forms the transaction must fall under one of the first five categories listed above and the value of the total assets of the new entity or acquired entity must be more than \$3 million at the time of creation or acquisition, or the cost of the transaction or expansion at issue must be more than \$3 million as of the date the transaction occurred.^[7] Reporting is required if the total assets of the new entity or acquired entity exceed \$3 million, not just the value of the foreign person's direct or indirect share of those assets. An initial investment report must be submitted to the BEA by filing the applicable BE-13 form within 45 days after the date on which the transaction occurred.^[8] If a transaction falls under one of the first five categories listed above but the total assets of the new entity or acquired entity are \$3 million or less or the transaction cost is \$3 million or less, then that transaction is exempted from the initial investment reporting requirement. However, the exemption must be claimed by filing Form BE-13, Claim for Exemption.^[9]

The BE-13 forms include the following data: 1) equity and debt components of the foreign parent funding; 2) whether the new U.S. operation will have research and development activities; 3) whether the new operation is under construction; 4) employment projections; and 5) actual and projected construction expenditures by type and by year.^[10]

Penalties for Failing to File an Initial Investment Report

The penalty for failing to file an initial investment report may be an injunction forcing the violator to comply with the reporting requirements, a civil penalty ranging from \$2,500 to \$25,000, or both.^[11] If it is found that the failure was willfully committed, then a penalty of up to \$10,000 may be imposed.^[12] If the willful violator is an individual, then that individual may be imprisoned for up to year in addition to incurring a civil penalty.^[13] A corporation's officers, directors or employees could be fined or imprisoned if they knowingly participated in the failure to file an initial investment report.^[14]

Additional Reporting Requirements

The Act also requires quarterly, annual and benchmark (every 5 years) reports under certain circumstances. Failure to file these reports will result in the same penalties applied to failure to file an initial investment report.

A. Quarterly Reports

Quarterly reports are filed on Form BE-605. If a foreign person (a "foreign parent") owns at least a 10% voting interest in a U.S. business enterprise (a "U.S. affiliate"), then that U.S. affiliate must file form BE-605 within the period that a U.S. affiliate is established, acquired, liquidated, sold or becomes inactive^[15], within 30 days after the close of the first three fiscal or annual quarters and within 45 days after the close of the fourth fiscal quarter of the U.S. affiliate. According to the BEA: A U.S. affiliate must file on a fully consolidated domestic U.S. basis, including in the full consolidation all U.S. business enterprises proceeding down each ownership chain whose voting securities are more than 50 percent owned by the U.S. business enterprise above. The fully consolidated entity is considered one U.S. affiliate.^[16]

A U.S. affiliate is not required to file Form BE-605 under three circumstances. First, the foreign parent, directly or indirectly through a U.S. subsidiary, does not possess a 10% voting interest in the U.S. affiliate during the reporting period. Second, the U.S. affiliate's total assets, annual sales or operating revenues, and annual net income were each \$60 million or less. Third, a U.S. affiliate is held by another U.S. affiliate that is owned by a foreign parent and no direct transactions exist between the U.S. affiliates or the foreign parent or any affiliates of the foreign parent.^[17]

B. Annual Reports

The following are the circumstances that trigger annual reporting requirement on the following forms since 2013:

1. **Form BE-15A** – Foreign parents control voting interests in a U.S. affiliate that are greater than 50% (“majority owned”) and the U.S. affiliate’s total assets, sales or gross operating revenues, or net income are greater than \$300 million;
2. **Form BE-15B** – A) A U.S. affiliate is majority owned and its total assets, sales or gross operating revenues, or net income are greater than \$120 million but not greater than \$300 million; or B) foreign parents control voting interests in a U.S. affiliate that are 50% or less (“minority owned”) and the U.S. affiliate’s total assets, sales or gross operating revenues, or net income are greater than \$120 million;
3. **Form BE-15(EZ)** – The U.S. affiliate’s total assets, sales or gross operating revenues, or net income are greater than \$40 million but not greater than \$120 million and either: A) The BEA has provided written instruction to the U.S. affiliate to file a BE-15; or B) The U.S. affiliate has never filed a Form BE-12 or Form BE-15.

The applicable form must be filed at the end of the U.S. affiliate’s fiscal year in the corresponding reporting calendar year.

An exemption may be claimed by a U.S. affiliate by filing Form BE-15, Claim for Exemption. A U.S. affiliate is exempted from the annual reporting requirement if: 1) The voting interest of all the foreign parents in the U.S. affiliate are less than 10%; 2) The U.S. affiliate is merged into another U.S. affiliate; or 3) The U.S. affiliate’s total assets, sales or gross operating revenues, or net income are each \$40 million or less. The Claim for Exemption has to be filed only once if the U.S. affiliate continues to fall outside the annual reporting requirements. However, should the BEA mail a Form BE-15 to the U.S. business affiliate, then another Form BE-15, Claim for Exemption, must be filed.

C. Benchmark Reports

The benchmark report is filed every five years on the BE-12 forms at the end of the U.S. affiliate’s fiscal year in the corresponding reporting calendar year.^[18] On the fifth year, the U.S. affiliate must file the corresponding BE-12 form instead of the BE-15 form. If the benchmark reporting requirement is triggered, then the following BE-12 forms must be filed:

1. **Form BE-12A** – A U.S. affiliate is majority owned and its total assets, sales or gross operating revenues, or net income are greater than \$300 million;
2. **Form BE-12B** – A) A U.S. affiliate is majority owned and its total assets, sales or gross operating revenues, or net income are greater than \$60 million but not greater than \$300 million; or B) A U.S. affiliate is minority owned and its total assets, sales or gross operating revenues, or net income are greater than \$60 million;
3. **Form BE-12C** – A U.S. affiliate’s total assets, sales or gross operating revenues, and net income are \$60 million or less. However, only certain questions must be answered on Form BE-12C if the total is \$20 million or less.^[19]

If the foreign parent(s) owns less than a 10% voting share, then a Form BE-12, Claim for Not Filing, may be filed. This form may also be filed if the U.S. affiliate is merged into another U.S. business enterprise or if the U.S. affiliate no longer exists.^[20]

Conclusion

The foreign direct investment reporting requirements are complex and all foreign investors and U.S. business enterprises acquiring funds from foreign investors should be aware of them. Legal counsel can be asked to determine if a particular foreign investment transaction will trigger the initial, quarterly, annual or benchmark reporting requirements and to also determine which survey form should be filed. Failure to file as required by the Act can result in civil or criminal liability which can be easily avoided by timely filing the appropriate forms.

For more information concerning the matters discussed in this publication, please contact **Guy P. Lander** (212-238-8619, lander@clm.com), **David I. Karabell** (212-238-8852, karabell@clm.com) or your regular CL&M attorney.

Endnotes

[1] 22 U.S.C. §§ 3101-3108 (2012).

[2] 44 Fed. Reg. 32586 (June 6, 1979).

[3] The Act defines a “person,” “foreign person” and “business enterprise” in the following manner:

“Person” means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency);

“Foreign person” means any person resident outside the United States or subject to the jurisdiction of a country other than the United States;

“Business enterprise” means any organization, association, branch, or venture which exists for profitmaking purposes or to otherwise secure economic advantage, and any ownership of any real estate. 22 U.S.C. § 3102 (3), (5) and (6) (2012).

[4] Direct Investment Surveys: BE-13, Survey of New Foreign Direct Investment in the United State, 79 Fed. Reg. 47573 (final rule announced on Aug. 14, 2014) (to be codified at 15 C.F.R. pt. 801.7).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] 22 U.S.C. § 3105 (2012).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Current Reporting Requirements for BEA Surveys Of Foreign Direct Investments In The United States, Bureau of Econ. Analysis (April 2012), available at http://www.bea.gov/surveys/pdf/current_Reporting_Requirements.pdf.

[16] *Id.* at 1.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 3.

[20] *Id.*

Carter Ledyard & Milburn LLP uses Client Advisories to inform clients and other interested parties of noteworthy issues, decisions and legislation which may affect them or their businesses. A Client Advisory does not constitute legal advice or an opinion. This document was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. © 2020 Carter Ledyard & Milburn LLP.

© Copyright 2014

related professionals

Guy P. Lander / Partner

D 212-238-8619

lander@clm.com