

CLIENT MEMORANDUM

U.S. Commerce Department Reporting for Foreign Direct Investments

February 4, 2015

AUTHORS

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The U.S. Commerce Department's Bureau of Economic Analysis (the "BEA") recently reinstated the BE-13, Survey of New Foreign Direct Investment in the United States reporting requirement pursuant to which U.S. entities are required to report transactions meeting certain reporting thresholds on a Form BE-13. The survey is used by the BEA to gather information for the purpose of measuring the level of new foreign direct investment in the United States and to analyze its impact on the U.S. economy. The BEA is required by law not to use the information provided for any purpose other than statistical reporting. The BEA may not disclose any specific information without the consent of the reporting entity.

Reportable Transactions

A U.S. person receiving an investment from a foreign person or, in some cases, a U.S. affiliate, is required to report a transaction (including a real estate transaction) in which such foreign person or its affiliate invests more than \$3 million in connection with:

1. such foreign person acquiring (directly or indirectly through one or more foreign or U.S. affiliates) 10% or more of the voting securities (or equivalent) of the U.S. person or in connection with the creation of a U.S. business enterprise; or

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2. such foreign entity establishing a new U.S. person and owning 10% or more of the U.S. person's voting interests (directly or indirectly); or
3. such foreign entity expanding its U.S. operations of a U.S. person, or acquiring a U.S. business enterprise.

The U.S. person must file a Form BE-13 if a transaction meets the thresholds listed above. The filing requirement is mandatory for all covered transactions, whether or not the U.S. person has received a notice from the BEA. If a foreign direct investment transaction does not meet the \$3 million threshold, the U.S. person may still be required to file an exemption form with the BEA. The Form BE-13 filing requirement applies to qualifying transactions that took place on or after January 1, 2014.

Reporting Deadlines and Extensions

A Form BE-13 is due within 45 days of the reportable event. It is important to note that the purpose of the survey is to gather information, and while failure to file could result in penalties, in our experience, the BEA uses notifications and repeated contacts to obtain compliance. We are not aware of any history of BEA enforcement actions for failure to file.

These new rules are not well known and ambiguities exist. Recognizing that it may take some time for U.S. entities to prepare the necessary reports, the BEA has set up a process for obtaining extensions of the deadlines and has indicated that requests for extensions will likely be granted. Extension requests may be made via email to the BEA at be13@bea.gov. An extension request should include the name of the filer, the date of the transaction and the date the filer expects to be able to make such filing.

Other Filings

We also note that every five years the BEA conducts the Benchmark Survey of U.S. Investment Abroad using the Form BE-10, which deals with U.S. investment in non-U.S. entities. As with the Form BE-13, U.S. entities may be subject to a filing requirement even if they have not been contacted directly by the BEA. The BEA is expected to publish the Form BE-10 in the near future. Depending on the circumstances, a filing may be due by May 29, 2015 or June 30, 2015. It is important to note that the BEA has a variety of forms, some of which require filing upon request and some of which, like the Form BE-13 and the upcoming Form BE-10, may have to be filed even absent a request by the BEA.

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