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Locke Lord QuickStudy: BEA Reporting Requirements for Foreign Direct Investment in the United States

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The U.S. Department of Commerce’s Bureau of Economic Analysis (“BEA”) prepares official U.S. economic statistics, such as the U.S. international transactions accounts, the national income and product accounts, and the input-output accounts. These statistics help policy makers gauge the performance of the U.S. economy and the role of the U.S. in the global economy. The statistics on U.S. direct investment abroad (outward direct investment) and foreign direct investment in the U.S. (inward direct investment) are important components of these accounts.

The BEA conducts seven mandatory surveys to collect information on foreign direct investment. These surveys consist of quarterly, annual, and benchmark surveys of outward and inward direct investment and a survey of new inward direct investment. The quarterly surveys provide information on direct investment transactions and income for the international transactions accounts and on direct investment positions for the international investment position accounts.

For this QuickStudy, we’re focusing on foreign direct investment into the U.S. by multinational enterprises. Reporting on BEA’s direct investment surveys is mandatory under the International Investment and Trade in Services Survey Act (P.L. 94–472, 90 Stat. 2059, 22 U.S.C. 3101–3108, as amended). The act protects the confidentiality of the data that companies report. Under the Freedom of Information Act, the public may request access to BEA data, but the BEA has the authority to deny requests if the release of the information would harm national security, commercial interests, or the confidentiality of the survey respondents.

Reporting is required of all U.S. business enterprises in which a foreign person (in the broad legal sense, including a company) owns, directly or indirectly, 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest of an unincorporated U.S. business enterprise. This includes foreign ownership of improved and unimproved real estate except residential real estate held exclusively for personal use. A U.S. business enterprise that is required to report is referred to as a “U.S. affiliate.” A foreign person that owns a 10% or more voting interest (or the equivalent) in a U.S. affiliate is referred to as a “foreign parent.” The foreign parent is the first person outside the U.S. in a foreign chain of ownership. U.S. affiliates that are private funds are not required to report if they meet BOTH of the following criteria: (1) the private fund does not own, directly or indirectly through another business enterprise, an “operating company”—*i.e.*, a business enterprise that is not a private fund or a holding company—in which the foreign parent owns at least 10% of the voting interest, AND (2) if the private fund is owned indirectly (through one or more other U.S. business enterprises), there are no “operating

companies” between the foreign parent and the indirectly-owned private fund.

It is important to note that the BEA takes noncompliance with reporting requirements seriously and has increased its enforcement efforts in recent years. Failure to comply with BEA reporting requirements can result in significant civil and criminal penalties, including fines and imprisonment. When a company fails to comply with BEA reporting requirements, it can create problems in an IPO, financing, or M&A transaction. Investors and lenders may view a company’s failure to comply with government regulations as a red flag, which could lead to decreased interest in the company and potentially harm its ability to raise capital. Additionally, if the company’s financial statements are based on incomplete or inaccurate information due to non-compliance with BEA surveys, it may lead to misrepresentation or material omissions, which can result in legal liabilities and delays in transactions. Therefore, compliance with BEA surveys is an important factor in ensuring the success of IPOs, M&A, and financing transactions.

Survey of New Foreign Direct Investment in the U.S. (Form BE-13)

The purpose of the survey of new foreign direct investment in the U.S. is to capture new investment transactions when a foreign direct investment relationship is created or when an existing U.S. affiliate of a foreign parent establishes a new U.S. legal entity, expands its U.S. operations, or acquires a U.S. business enterprise. The initial report must be filed no later than 45 days after the date of the investment transaction. A response is required from entities subject to the reporting requirements of the BE-13, whether or not they are contacted by the BEA.

This survey has five forms. The version of the form that must be filed is determined by the reporting criteria.

Form BE-13A. This form is filed for a U.S. business enterprise when a foreign entity acquires a voting interest (directly or indirectly through an existing U.S. affiliate) in the enterprise, segment, or operating unit, and the acquisition meets the following criteria:

- The total cost of the acquisition is more than \$3 million.
- At least 10% of the voting interest in the acquired enterprise is now owned, directly or indirectly, by the foreign entity.

Form BE-13B. This form is filed for a U.S. business enterprise when a foreign entity or an existing U.S. affiliate of a foreign entity establishes a new legal entity in the U.S., and the establishment of the new entity meets the following criteria:

- The projected total cost to establish the new legal entity is more than \$3 million.
- At least 10% of the voting interest in the newly established business enterprise is now owned, directly or indirectly, by the foreign entity.

Form BE-13D. This form is filed for an existing U.S. affiliate of a foreign parent when it expands its operations to include a new facility where business is conducted, and the projected total cost of the expansion is more than \$3 million.

Form BE-13E. This form is filed for a U.S. business enterprise that previously filed form BE-13B or form BE-13D, and the established or expanded entity is still under construction.

Form BE-13 Claim for Exemption. This form is filed if a U.S. business enterprise meets any the following criteria:

- The U.S. business enterprise was contacted by the BEA but does not meet the requirements for filing any of the other forms.
- The U.S. business enterprise, whether or not contacted by the BEA, meets all requirements except the \$3 million reporting threshold for filing one of the other forms.

Quarterly Survey of Foreign Direct Investment in the U.S. (Form BE-605)

The purpose of the quarterly survey of foreign direct investment in the U.S. is to report the positions and the transactions between a U.S. affiliate and its foreign parents and between the U.S. affiliate and the foreign affiliates of the foreign parents. A BE-605 report is required for any U.S. affiliate that was established, acquired, liquidated, sold, or became inactive during the reporting period. Quarterly reports must be filed within 30 days after the close of each of the U.S. affiliate's calendar or fiscal quarter, or within 45 days if the report is for the final quarter of the U.S. affiliate's financial reporting year. Entities required to report will be contacted individually by the BEA. Entities not contacted by the BEA have no reporting responsibilities for the BE-605.

Annual Survey of Foreign Direct Investment in the U.S. (Form BE-15)

The purpose of the annual survey of foreign direct investment in the U.S. is to report annual financial and operating data of U.S. affiliates. Entities required to report will be contacted individually by the BEA. Entities not contacted by the BEA have no reporting responsibilities for the BE-15.

Benchmark Survey of Foreign Direct Investment in the U.S. (Form BE-12)

The BE-12 survey is BEA's most comprehensive survey of foreign direct investment in the U.S. It is conducted every five years (in lieu of the BE-15 annual survey). The most recent benchmark survey covered the fiscal year ending in 2017 and the next is scheduled to cover the fiscal year ending 2022. A response is required from entities subject to the reporting requirements of the BE-12, whether or not they are contacted by the BEA.

The consequences of failing to comply with BEA reporting requirements can be significant. We can assist companies navigate the complex rules and regulations of BEA reporting requirements, including determining whether or not they need to file a BEA survey report. We also assist companies with the preparation and filing of the BEA survey report to ensure that the report is accurate, complete and filed in a timely manner. Additionally, we help companies ensure that they are in compliance with BEA regulations. This includes protecting a company's interests in IPOs, financing, or M&A transactions, as well as assessing a company's current BEA compliance procedures and making recommendations for any necessary changes to ensure compliance. Furthermore, if a company is subject to a BEA inquiry or investigation, we are equipped to assist in responding to the inquiry or investigation, as well as help the company navigate any legal issues that may arise during the investigation.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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