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## *U.S. Government Revives “New Foreign Direct Investment” Reporting Requirement: Questions and Answers on Completing the BE-13 Survey*

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A little-known U.S. Government statistical reporting bureau has revived a dormant regulation mandating that U.S. entities submit a report when they take on, or are created as a result of, qualifying new foreign direct investment in the United States.

The Bureau of Economic Analysis (“BEA”) of the U.S. Department of Commerce publishes comprehensive statistics on the United States economy. To produce these reports, BEA collects data directly from companies and other sources, produces economic models and estimates, and conducts research and analysis. Among the economic data compiled and disseminated by the BEA are statistics on new foreign direct investment in the United States. BEA historically mandated that parties submit **Form BE-13**, a multi-page, confidential survey, no later than 45 days after completion of a qualifying foreign investment transaction, but the requirement was discontinued in 2009 due to budgetary constraints. It is back.

Here, we provide some answers to basic questions about the new BE-13 survey requirement:

### **What Transactions Trigger the Filing Requirement?**

Any of the following transactions occurring on or after January 1, 2014 triggers the requirement to file a Form BE-13:

- A transaction creating new “foreign direct investment” in the United States;
- A transaction whereby 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; or
- When a U.S. business enterprise has previously filed a BEA survey, but the established or expanded entity is still under construction.<sup>1</sup>

In the case of new acquisitions or expansions, the transaction will trigger the reporting requirement when a foreign person acquires ten percent or more of a U.S. business enterprise’s voting securities (either through the acquisition of or establishment of an interest in a U.S. legal entity). The regulations set the threshold for qualifying transactions at \$3 million.

## Who Must File a BE-13 Report?

The report must be filed by the “ultimate U.S. parent” of the U.S. business that was created by, or expanded by, the qualifying transaction. The ultimate U.S. parent must report on a fully-consolidated basis for each U.S. business enterprise proceeding down the ownership chain in which it holds, directly or indirectly, more than 50 percent of the voting securities. (The “ultimate U.S. parent” is the entity in which the foreign person directly holds ten percent or more of the voting securities.) Collectively, the consolidated U.S. entities are referred to as the “U.S. affiliate.” A separate report must be made for each foreign person that meets the ten percent ownership threshold.

The U.S. affiliate (not the foreign parent) must report information on any qualifying expansions, acquisitions, and establishments of U.S. business enterprises by foreign investors when the total cost of the acquisition or new investment is greater than \$3 million.

## What is “Foreign Direct Investment” for Purposes of the BE-13?

Foreign direct investment means the ownership or control, directly or indirectly, by a foreign person of ten percent or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise. A “foreign person” is any person resident outside the United States or subject to the jurisdiction of a country other than the United States.

## Does “Foreign Direct Investment” Include Limited Partnership Interests?

Limited partners are not considered direct investors when they do not have voting or governance rights. This type of investment is considered a *portfolio* investment as opposed to a *direct* investment and is thus not subject to the regulations. However, if a limited partner has additional contractual rights beyond those in a typical limited partnership, which result in a limited partner holding ten percent or more of the voting interest in the partnership, this will be treated as direct investment and may be subject to reporting. Importantly, each general partner in which a foreign parent has a ten percent or greater voting interest in a U.S. business enterprise is subject to these reporting requirements.

## Does an Investment in Real Estate Trigger the Filing Requirement?

U.S. real estate investments conducted for commercial purposes qualify as a U.S. business enterprise, which includes any organization, association, branch, or venture located in the United States or subject to United States jurisdiction that exists for profitmaking purposes or to otherwise secure economic advantage, *including ownership of any real estate.*<sup>2</sup> Purchase of residential real estate that is held exclusively for personal use and not for profit making purposes will not trigger the BEA reporting requirements.

## What if an Investment Does Not Meet the \$3 Million Reporting Threshold?

A U.S. business enterprise that meets all the requirements for filing Form BE-13 except the \$3 million reporting threshold must still file a special **Form BE-13 “Claim for Not Filing.”**

## When Must the Survey Form Be Filed?

Form BE-13 must be filed within 45 days after the event triggering the reporting requirement occurs. However, BEA has not yet released its new survey forms. It expects to do so in November 2014, and U.S. businesses will have 45 days from the date of that release to make a filing. Although the new rule took effect on September 15, 2014, it applies to all transactions conducted on or after January 1,

2014, and thus all U.S. businesses that engaged in triggering events this year will be required to submit a survey.

## **What Information Must Be Submitted?**

Although the new forms have not yet been released, likely required information will include details identifying the U.S. affiliate, the foreign parent, and the ultimate beneficial owner (if the foreign parent is more than 50 percent owned by another person); information on whether the U.S. operation has or will have research and development activities; employment projections; and other financial, operational, and industry data for the U.S. affiliate.

## **Must the Identity of Upstream Foreign Owners Be Provided?**

Information regarding the identities of each foreign parent (owner of 10 percent or more of the voting interest) and the ultimate beneficial owner must be provided. The ultimate beneficial owner is the final person or entity proceeding up the ownership chain who is not itself more than 50 percent owned or controlled by another person or entity. Other foreign owners who do not meet the definition of a foreign parent or ultimate beneficial owner need not be separately identified.

## **Is the Information Submitted in the Filing Kept Confidential?**

Yes. By federal statute, reports to the BEA are confidential and are used only for analytical and statistical purposes.<sup>3</sup> Unless the submitting business gives its prior written consent, the BEA must not present information contained in a report in a manner that allows it to be individually identified. Further, these reports cannot be used for purposes of taxation, investigation, or regulation.

## **Are There Any Continuing Obligations to File Updated Information?**

Separately from the initial filing requirement, the BEA regulations also impose quarterly, annual, and five-year benchmark filing requirements after the initial Form BE-13 is filed.<sup>4</sup>

## **What if I Fail to or Refuse to File?**

Failure to supply the information required in the BE-13 carries both civil and criminal penalties. Specifically, a person who fails to file may face civil penalties of up to \$25,000 and BEA is authorized to seek injunctive relief compelling a response. Willful violations can carry criminal penalties of up to \$10,000 and, for individuals, imprisonment of up to one year, or both.

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:*

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<sup>1</sup> Direct Investment Surveys: BE-13, Survey of New Foreign Direct Investment in the United States, 79 Fed. Reg. 157, 47575 (Aug. 14, 2014) (to be codified at 15 C.F.R. 801.7).

<sup>2</sup> 15 C.F.R. §801.2(f).

<sup>3</sup> 22 U.S.C. 3104(c); *see also* 15 C.F.R. § 801.5

<sup>4</sup> Upon liquidation, sale, or inactivation of a U.S. affiliate, the U.S. affiliate must also submit a quarterly filing for the quarter in which the event occurs.

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