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Significant Non-Tax Reporting Requirements Relating to Investment in the United States by Foreign Persons

by John L. Gornall, Jr.*
Phillip Leslie Wharton**

I. Introduction

The two major non-tax reporting schemes relating to foreign investment in the United States are set out in the International Investment Survey Act of 1976¹ (IISA), the Agricultural Foreign Investment Disclosure Act of 1978² (AFIDA), and the regulations promulgated under both Acts.³ Responsibility for implementation of the sections of IISA relating to direct—as opposed to portfolio—foreign investment in the United States lies with the Commerce Department's Bureau of Economic Analysis (BEA). The U.S. Treasury Department (Treasury) has responsibility for implementation of the sections of IISA relating to portfolio investment. Responsibility for implementation of AFIDA lies with the Agricultural Stabilization and Conservation Service (ASCS). A third major reporting scheme which is tax related, but which bears mention in the non-tax context, is the scheme under the Foreign Investment in Real Property Tax Act of 1980⁴ (FIRPTA) which requires foreign persons owning United States real property to file annual information returns with the Internal Revenue Service (IRS).⁵

Other important reporting requirements also exist. Reports must be filed by U.S. persons with respect to payments or receipts in the nature of fees or royalties in connection with transfers of intangible assets or pro-

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¹ 22 U.S.C. §§ 3101-3108 (1976 & Supp. III 1979).

² 7 U.S.C. §§ 3501-3508 (Supp. IV 1980).

³ See 15 C.F.R. § 806 (1981) (as amended by 46 Fed. Reg. 23,225-27 and 30,336-37 (1981)), 31 C.F.R. §§ 128.3, 129 (1981), for regulations under IISA. See also 7 C.F.R. § 781 (1981) for regulations under AFIDA.

⁴ Omnibus Reconciliation Act, Pub. L. No. 96-499, tit. 10(c), 94 Stat. 2599 (1980) (codified in scattered sections of 26 U.S.C.).

⁵ I.R.C. § 6039C(b) (West 1980 Laws Special Pamphlet & West 1981 Pamphlet No. 3).

proprietary rights.⁶ Investment in industries which by law are restricted with respect to foreign ownership or control may precipitate reporting requirements. Investment by foreign persons which is restricted by law due to the nature of relations between the United States and such persons' country of citizenship may require reporting.⁷ Certain transfers of currency and monetary instruments relating to foreign investment involve reporting requirements.⁸ General reporting requirements applicable to U.S. persons are also applicable to foreign investors, including those pursuant to the Securities Exchange Act of 1934 relating to acquisitions of stock in publicly held companies,⁹ and those pursuant to the Hart-Scott-Rodino Antitrust Improvements Act relating to acquisitions of substantial size (pre-merger notification).¹⁰ Some states also have reporting requirements.

II. International Investment Survey Act

The portion of IISA relating to investment in the United States by foreign persons is designed to provide BEA sufficient information to enable it to publish statistical analyses regarding such investment.¹¹ The IISA reporting scheme requires both initial and periodic reports.

A. Direct Investment

(1) *Initial Reports.* Pursuant to the direct investment portions of IISA, initial reports generally must be filed with BEA whenever a foreign person or the U.S. affiliate¹² of a foreign person acquires directly or indirectly a ten percent or greater voting interest in a United States business enterprise.¹³ In order to ensure that real estate investment information is reported as well, the IISA regulations define "business enterprise" to include United States real estate.¹⁴ The initial reports, Forms BE-13 and BE-607, must be filed with BEA within forty-five days of the occurrence of the reported investment transaction.¹⁵

⁶ 15 C.F.R. § 803 (1981).

⁷ See generally The Trading with the Enemy Act, 50 App. U.S.C. §§ 1-44 (1976 & Supp. III 1979); and the International Emergency Economic Powers Act, 50 U.S.C. § 1701-1706 (Supp. III 1979). At this time there are no reporting requirements specified, however, enforcement will be impossible unless such requirements are eventually promulgated.

⁸ See, e.g., 31 U.S.C. § 1121 (1976); 31 C.F.R. § 103 (1981).

⁹ See 15 U.S.C. § 78m (1976 & Supp. IV 1980).

¹⁰ See *id.* § 18a.

¹¹ 22 U.S.C. § 3101 (1976).

¹² The Commerce Department defines an affiliate as a "business enterprise located in one country which is directly or indirectly owned or controlled by a person of another country to the extent of 10 per centum or more of its voting stock for an incorporated business, or an equivalent interest for an unincorporated business, including a branch." Dep't of Commerce Form BE-13.

¹³ 15 C.F.R. §§ 806.15(a)(1), .15(g)(3) (1981) (§ 806.15(g)(3) redesignated as § 806.15(j)(3) by 46 Fed. Reg. 23,225 at 23,226 (1981)).

¹⁴ *Id.* § 806.7(f)(1981).

¹⁵ U.S. Dep't of Commerce Form BE-13 explained at 15 C.F.R. § 806.15(g)(3)(1981). See Appendix A of this issue.

(2) *Periodic Reports*. If the investment is in an enterprise of significant size,¹⁶ the newly affiliated U.S. business enterprise may be required to file quarterly reports regarding transactions with its foreign parent,¹⁷ on Forms BE-605 or 606 (dollar criteria),¹⁸ and annual update reports on Form BE-15 (dollar and/or acreage criteria).¹⁹ At approximately five year intervals, a BE-12 benchmark survey form must be filed with respect to U.S. business enterprises of which ten percent or greater voting interest is held directly or indirectly by a foreign person or the U.S. affiliate of a foreign person.²⁰ A benchmark survey was taken in 1981, therefore, the next benchmark survey should not be taken prior to 1986. The exemption levels for the last benchmark survey were \$1,000,000 rather than \$5,000,000.²¹

If an initial report is filed, BEA will normally send the investor or reporting entity the necessary periodic report forms prior to the respective due dates of those periodic reports. Filing the reports when due, however, is the responsibility of the person required to file; thus, the investor must file the report when due regardless of whether or not BEA has sent the forms.²²

(3) *Exemption*. A total reporting exemption under IISA exists if the investment is a residence acquired for the personal use of the investor.²³ In addition, the reporting requirements are significantly reduced if the U.S. business enterprise acquired has less than \$1,000,000 in total assets, annual sales, or gross operating revenues, or annual net income after provision for U.S. income taxes, and less than 200 acres of real estate. In such case only a short claim for exemption form, BE-13 Supplement C, need be filed.²⁴ If the U.S. business enterprise includes 200 or more acres of land, there is no exemption from or reduction of the required reporting.

It should be noted that limited partnership interests are specifically designated as portfolio investment by the BEA regulations.²⁵ Thus, in

¹⁶ An enterprise which has more than \$5,000,000 in total assets, annual sales or gross operating revenues, or annual net income after provision for U.S. income taxes; or 200 acres or more of real estate is considered to be of significant size for reporting purposes. *Id.* § 806.15(c) and (f) (1981) (redesignated as § 806.15(h) and (i) by 46 Fed. Reg. 23,225 at 23,226 (1981)).

¹⁷ The Commerce Department defines a foreign parent as "the first foreign person in the ownership chain of the U.S. affiliate."

¹⁸ 15 C.F.R. § 806.15(e) (1981) (redesignated at § 806.15(h) by 46 Fed. Reg. 23,225 at 23,226 (1981)). See Appendix B of this issue.

¹⁹ *Id.* § 806.15(f) (1981) (redesignated as § 806.15(i) by 46 Fed. Reg. 23,225 at 23,226 (1981)).

²⁰ *Id.* § 806.17 (1981), as amended by 46 Fed. Reg. 30,336 (1981). See Appendix C of this issue.

²¹ 46 Fed. Reg. 30,336 (1981).

²² 15 C.F.R. § 806.4 (1981).

²³ 46 Fed. Reg. 23,225 at 23,227 (1981) (to be codified at 15 C.F.R. § 806.15(j)(3)(i), Exemptions (a)).

²⁴ 46 Fed. Reg. 23,225 at 23,227 (1981) (15 C.F.R. § 806.15(g)(4), Total Exemptions (b) amended and redesignated as 15 C.F.R. § 806.15(j)(4), Total Exemption (b)).

²⁵ 15 C.F.R. § 806.12 (1981).

the case of a limited partnership, a BEA report must be filed only if one or more of the general partners is a foreign person, as defined in the regulations, and meets the ten percent or greater voting interest criterion.

(4) *Disclosure of Ultimate Owner.* In keeping with the statistical focus of BEA implementation of IISA, with respect to individual investors the regulations permit reports to be filed which disclose only the country of origin of the investment and not the names of such investors. The identity of a non-individual ultimate beneficial owner of the new United States direct investment, however, must be reported to BEA on the initial report forms if there is not an exemption from reporting.²⁶ Complex investment structures created to avoid such disclosure are normally ineffective. Subject to the regulations relating to individual investment, if the foreign "parent" is owned more than fifty percent by another person or entity, each person or entity in the ownership chain must be disclosed all the way back to the person or entity which is not owned more than fifty percent by another person or entity. Note that for the purposes of determining whether an entity is not more than fifty percent owned by another person or entity, a group of entities or persons acting in concert is considered to be one person or entity.²⁷

(5) *"Whistle Blowing."* BEA has a built-in policing mechanism in its direct investment reporting scheme. The mechanism provides that persons assisting or intervening in a foreign direct investment transaction, such as attorneys and brokers, are required to file what is essentially a short form notice of the investment transaction on a Form BE-14, if such U.S. persons do not file the BE-13 report forms on behalf of the foreign investor,²⁸ or do not have a good faith belief that such report forms have been filed.²⁹ This requirement has raised the question of whether an attorney may refuse to file the Form BE-14 on the basis that such a filing would constitute a violation of the confidentiality of the attorney-client relationship.³⁰ This question has not yet been resolved.

B. Portfolio Investment

Under IISA, portfolio interests are reportable to Treasury. Treasury divides its reporting structure into two areas termed Capital Movement³¹

²⁶ 46 Fed. Reg. 23,225 at 23,226 (1981) (to be codified at 15 C.F.R. § 806.15(a)(6)).

²⁷ It is the Commerce Department's view that unrelated stockholders in a closely held corporation will be considered persons acting in concert and thus will be considered to be one person or entity. Accordingly, the ultimate beneficial owner will be the stockholders rather than the corporation, even if no single stockholder owns greater than 50% of the stock of the corporation. Telephone conversation with Ms. Dorrett E. Williams, at BEA (November 5, 1981).

²⁸ 15 C.F.R. § 806.15(g)(4) (1981) (redesignated as § 806.15(j)(4) by 46 Fed. Reg. 23,225 at 23,226 (1981)).

²⁹ Various telephone conversations with Joseph F. Cherry, III, at BEA.

³⁰ See Pedersen, Reporting of Foreign Investment in U.S. Business—Commerce Department Requirements, Tax Mgmt. Int'l J., Aug. 1980, at 11, 30.

³¹ 31 C.F.R. § 128 (1981).

and Portfolio Positions.³²

(1) *Capital Movement*. The Capital Movement portion of the Treasury reporting structure is authorized in part by IISA and in part by the Bretton Woods Agreements. Reports are required of banks, underwriters, securities brokers and dealers, and others in similar positions who engage in transactions in "long term" securities directly with "foreigners."³³ Long term securities are those having no contractual maturity or a maturity of more than one year from date of issuance.³⁴ Securities are defined in the Treasury regulations as rights, warrants, options, and scrip, as well as stocks (common and preferred) and bonds, debentures, and similar obligations, including public as well as private issues.³⁵ It is questionable whether the definition includes limited partnership interests. Treasury, basing its stance on the SEC definition of a security, takes the position that limited partnership interests are included.³⁶ Reports are filed monthly on Treasury Form S within fifteen days after the end of the month.³⁷ Reports are only required when the total amount of purchases and sales of long term securities in transactions with foreigners is \$500,000 or more in the covered month with respect to the reporting entity.³⁸

(2) *Portfolio Positions*. The Portfolio Positions portion of the Treasury reporting structure is effected by a benchmark type survey at five year intervals.³⁹ The last such survey covered positions in calendar year 1978.⁴⁰ The 1978 benchmark survey required little disclosure: only country of residence, amount of the investment, and industry invested in.⁴¹ Limited partnership interests and trusts were definitionally excluded.⁴² Treasury officials foresee the possibility of adding these two areas in the next survey, but foresee few other changes.⁴³

C. Penalties

The maximum authorized penalties for failure to report under IISA are a \$10,000 fine and, if such failure to report is wilful, the additional

³² Id. § 129.

³³ Id. § 128.17.

³⁴ U.S. Department of Treasury Instructions for Preparation of International Capital Form S. Copies of the form and instructions may be obtained from any Federal Reserve Bank or from the Office of the Assistant Secretary for Economic Policy. 31 C.F.R. § 128.10 (1981) [hereinafter cited as Int'l Capital Form S].

³⁵ Id.

³⁶ Telephone conversation with Maxwell Hudgins of the U.S. Dep't of Treasury (Oct. 26, 1981).

³⁷ See Appendix D of this issue.

³⁸ Id.

³⁹ Telephone conversation with David Curry of the U.S. Dep't of Treasury (Oct. 26, 1981) [hereinafter cited as David Curry].

⁴⁰ 31 C.F.R. § 129.9 (1981).

⁴¹ David Curry, *supra* note 39.

⁴² Id.

⁴³ Id.

criminal sanction of one year imprisonment.⁴⁴ At this time, BEA has not shown any disposition toward imposing penalties for late filing where such late filing is the result of inadvertence rather than wilful or grossly negligent conduct.

III. Agricultural Foreign Investment Disclosure Act

A. Reports

The primary purpose of AFIDA is the disclosure of foreign ownership of U.S. agricultural land.⁴⁵ An ASCS-153 Report must be filed whenever a foreign person, including U.S. corporations which are more than five percent held by foreign individuals or legal entities,⁴⁶ acquire or transfer an interest, other than a security interest, in agricultural land.⁴⁷ An ASCS-153 Report must also be filed when there is a change from non-agricultural use to agricultural use, or vice versa, with respect to land held by such a "foreign person." ASCS-153 Reports must be filed within ninety days of the acquisition, transfer or change of use with the ASCS office in the country in which the acquired or transferred land is located.⁴⁸ Reports must be filed only on the acquisition, transfer or change of use of the land—no interim reports are required.⁴⁹ Agricultural land includes land which is used for agricultural, forestry or timber production purposes or, if idle at the time of acquisition or transfer, has been so used within a five year period prior to the acquisition or transfer.⁵⁰

B. Exemptions

Under AFIDA, no foreign person investing in U.S. agricultural land is exempt from reporting. There is, however, a *de minimis* exemption for tracts of land acquired or transferred which do not exceed one acre in the aggregate.⁵¹ AFIDA does not cover the acquisition of: (a) leasehold interests of less than ten years duration; (b) contingent future interests; or (c) noncontingent future interests which do not become possessory upon

⁴⁴ 22 U.S.C. § 3105 (1976).

⁴⁵ See Agricultural Foreign Investment Disclosure Act of 1978, Pub. L. No. 95-460, 92 Stat. 1263 (introductory statement of purpose) (codified at 7 U.S.C. §§ 3501-3508 (Supp. IV 1980)).

⁴⁶ 7 C.F.R. § 781.2(g)(4)(i), (g)(4)(ii), (l) (1981).

⁴⁷ Id. § 781.3(b).

⁴⁸ Id. § 781.3(a), (c).

⁴⁹ See id. § 781.3.

⁵⁰ Id. § 781.2(b).

⁵¹ Id. The regulations include the following additional language: "from which the agricultural, forestry or timber products are less than \$1,000 in annual gross sales and such products are produced for the personal or household use of the person or persons holding an interest in such land." (Emphasis added). This additional language is confusing, because if the products generate gross sales, how can they be for "personal or household use?" Nevertheless, while one acre is a good rule of thumb for an exemption, the additional limitations on such exemption must be considered.

the termination of the present possessory estate.⁵²

C. Disclosure of Ultimate Owner

If the acquiring or transferring entity is a corporation, the identities of the shareholders of that corporation must be revealed on the ASCS-153 Report.⁵³ Moreover, if the shareholders so disclosed are also corporations, the Department of Agriculture, at its option, may require disclosure of the identities of the shareholders of such corporations.⁵⁴ This third tier disclosure is the most the Department of Agriculture may require pursuant to AFIDA.⁵⁵

D. Penalties

Under AFIDA, the Department of Agriculture is authorized to impose penalties for failure to comply with the Act even in the case of inadvertent late filing.⁵⁶ Pursuant to AFIDA regulations, such penalties for inadvertent late filing may be assessed in amounts up to a maximum of one-tenth of one percent of the fair market value of the land acquired or transferred for each week beyond the ninety day deadline that the required report has not been filed.⁵⁷ Such penalties are rarely assessed at the maximum amount, but a substantial penalty is almost always assessed, even for seemingly small infractions. The penalty for wilful failure to file, or the filing of an incomplete or misleading report, is a civil penalty in an amount up to twenty five percent of the fair market value of the land acquired or transferred.⁵⁸

Penalties may be appealed either in writing to ASCS or in a hearing before the ASCS administrator's designee for hearings.⁵⁹ Recently ASCS has instituted a policy of allowing the hearing to be conducted by telephone.⁶⁰ Further appeal may be had in federal district court.⁶¹

IV. Foreign Investment in Real Property Tax Act

On December 5, 1980, President Carter signed FIRPTA into law.

⁵² Id. § 781.2(c).

⁵³ Id. § 781.3(f)(1).

⁵⁴ Id. § 781.3(g).

⁵⁵ See 44 Fed. Reg. 29,029 at 29,030 (1979) for a discussion of the limitations on tracing actual ownership.

⁵⁶ See 7 C.F.R. § 781.4(a)(1) (1981). See also 45 Fed. Reg. 7,775 at 7,775 (1981) for a discussion of penalty provisions under AFIDA.

⁵⁷ 7 C.F.R. § 781.4(b)(1) (1981).

⁵⁸ Id. § 781.4(b)(2) (1981). The penalties for late, incomplete, or misleading reports may be reduced, however, based on such factors as the nature and duration of the violation and also on extenuating circumstances. Id. § 781.4(b)(3).

⁵⁹ Id. § 781.5.

⁶⁰ Letter from Jerome F. Sitter, (Acting) Administrator's Designee for Hearings, Agricultural, Stabilization and Conservation Service, Dep't of Agriculture (June 29, 1981).

⁶¹ If a foreign person fails to respond, however, to notice of apparent liability, or fails to pay the penalty imposed, the case will, without further notice, be referred to the Department of Justice for prosecution in the appropriate district court. 7 C.F.R. § 781.5(g).

FIRPTA subjects the gain derived by foreign investors from the sale or other disposition of U.S. real property interests to U.S. income taxation.⁶² New section 6039C of the Internal Revenue Code (the Code) contains stringent reporting and disclosure requirements designed to assist the IRS in the collection of the taxes imposed by FIRPTA.⁶³ Different reporting requirements are imposed on (i) nonresident alien individuals owning U.S. real property interests directly,⁶⁴ (ii) domestic corporations with foreign shareholders,⁶⁵ (iii) domestic and foreign partnerships, trusts and estates, and foreign corporations, with interests therein held by substantial investors in U.S. real property,⁶⁶ and (iv) foreign entities without substantial investors.⁶⁷

A. Reporting Requirements

(1) *Nonresident Alien Individuals.* A nonresident alien individual will be required to file an annual information return with the IRS if such individual did not engage in a U.S. trade or business at any time during the calendar year, and if the fair market value of the U.S. real property interests held by him equalled or exceeded \$50,000 at any time during the calendar year.⁶⁸ Such return must set forth his name and address, a description of all U.S. real property interests held by him during the calendar year, and such other information as the Secretary may by regulations prescribe.⁶⁹

(2) *Domestic Corporations.* Any domestic corporation, other than a corporation the stock of which is regularly traded on an established securities market at all times during the calendar year, will be required to file an information return for the calendar year if (i) at any time during the calendar year one or more of the shareholders of the corporation was a foreign person, and (ii) at any time during the calendar year or during any of the four immediately preceding calendar years, such corporation was a U.S. real property holding corporation.⁷⁰ Such information return shall set forth the name and address (if known by the corporation) of each foreign person who was a shareholder at any time during the calendar year, and such other information, including information with respect to transfers of corporate stock to and from foreign persons during the calendar year, as the Secretary may by regulations prescribe.⁷¹

(3) *Partnership, Trusts, Estates and Foreign Corporations with Substantial Investors.* A foreign or domestic partnership, trust or estate, or a foreign

⁶² I.R.C. § 897 (West 1980 Laws Special Pamphlet & West 1981 Pamphlet No. 3).

⁶³ Id. § 6039C.

⁶⁴ Id. § 6039C(c).

⁶⁵ Id. § 6039C(a).

⁶⁶ Id. § 6039C(b).

⁶⁷ Id. § 6039C(c).

⁶⁸ Id. § 6039C(c)(2).

⁶⁹ Id. § 6039C(c)(1).

⁷⁰ Id. § 6039C(a)(1)(B).

⁷¹ Id. § 6039C(a)(1)(A).

corporation, will be required to file an annual information return with the IRS if any person having an interest in the entity is at any time during the calendar year a "substantial investor in U.S. real property."⁷² The term "substantial investor in U.S. real property" generally means any foreign person whose pro rata share of the U.S. real property interests held by the entity exceeded \$50,000 at any time during the calendar year.⁷³ The return must set forth the name of each substantial investor, and such other information, including information with respect to the assets of the entity, as the Secretary may by regulations prescribe.⁷⁴

(4) *Other Foreign Entities*. A foreign entity, including a foreign corporation, partnership, trust or estate, that is not required to file a return under the rules set forth in the preceding section because of the absence of a substantial investor, may still be required to file a return reporting its own holdings of U.S. real property interests. The entity must file if (i) the fair market value of such interests equalled or exceeded \$50,000 at any time during the calendar year, and (ii) the entity did not engage in a U.S. trade or business during the calendar year.⁷⁵ The return must set forth the name and address of the entity, a description of all U.S. real property interests held by the entity during the calendar year, and such other information as the Secretary may by regulations prescribe.⁷⁶

B. Disclosure of Ultimate Owners

A substantial investor in U.S. real property will generally not be able to prevent the disclosure of his name and address by interposing a chain of entities between himself and the underlying U.S. real estate. It is expected that the regulations and information returns prescribed by the Secretary will require each entity in any such chain, including the one in which the investor has a direct interest, to file an information return with the IRS unless sufficient security is furnished to the IRS in the manner described below.

Congress recognized that many foreign investors do not want their beneficial ownership of U.S. real estate to be disclosed. Accordingly, it provided an alternative procedure for ensuring that the taxes imposed by FIRPTA are actually paid. Under this procedure, a foreign corporation, or a partnership, trust or estate, will not be required to file annual information returns if the entity furnishes to the Secretary such security as the Secretary determines to be necessary to ensure that any tax imposed with respect to U.S. real property interests held by such entity will be paid.⁷⁷ It is likely that, in most cases, the Secretary will require a recorded security interest in the U.S. real estate held by the entity.

⁷² Id. § 6039C(b)(1).

⁷³ Id. § 6039C(b)(4)(B)(i).

⁷⁴ Id. § 6039C(b)(1).

⁷⁵ Id. § 6039C(c)(2).

⁷⁶ Id. § 6039C(c)(1).

⁷⁷ Id. § 6039C(b)(2).

C. *Due Dates*

FIRPTA provides that the information returns shall be made or furnished at such time and in such manner as the Secretary may by regulations prescribe.⁷⁸ Returns for 1980 and 1981 will probably have to be filed within sixty to ninety days after the issuance of regulations prescribing the information to be contained in the returns. Such regulations are expected in the near future.

D. *Penalties*

In the case of each failure to file a return containing the information required by FIRPTA and the regulations thereunder, a penalty of \$25 per day will be imposed unless it is shown that such failure was due to reasonable cause and not to wilful neglect.⁷⁹

E. *Effective Date*

The reporting requirements of FIRPTA, and the penalties for failure to comply therewith, apply to the period from June 19, 1980, to December 31, 1980, which period shall be treated as a calendar year, and to all subsequent calendar years.⁸⁰

V. **Other Reporting Requirements**

A. *Fees and Royalties Relating to Transfers of Technology and Other Intangible Assets*

BEA also collects information with respect to international transactions involving royalties, licensing fees, film rentals, and management fees paid for rights to use or other proprietary rights in intangible assets.⁸¹ U.S. persons who make or receive payments to or from unaffiliated foreign persons in respect of such intangible assets or proprietary rights which exceed \$25,000 annually must report such payments or receipts to BEA on Form BE-93.⁸² Form BE-93 must be filed annually.⁸³

B. *Investment in Restricted Industries or by Citizens of Nations Hostile to the United States*

Certain reporting requirements arise by virtue of restrictions which exist with respect to alien ownership or control in certain industries. These industries include maritime shipping, mining, energy, air transportation, communications, and banking.⁸⁴ Depending on the industry in-

⁷⁸ Id. § 6039C(e)(2).

⁷⁹ Id. § 6652(g) (West 1980 Laws Special Pamphlet).

⁸⁰ Omnibus Reconciliation Act, Pub. L. No. 96-499, § 1125(b), 94 Stat. 2599 (1980) reprinted in I.R.C. § 897 note (West 1980 Laws Special Pamphlet).

⁸¹ 15 C.F.R. § 803 (1981).

⁸² Id. § 803.4.

⁸³ Id. § 803.3.

⁸⁴ See Council on Int'l Economic Policy and Office of Management and Budget, United

volved, the reporting requirements may arise in the application to the appropriate governmental agency for a license to operate, in periodic reports that must be made to the appropriate governmental regulatory agency with respect to ownership and control, or in the application for government benefits afforded in certain industries to United States "citizens," as that term is defined in the applicable law or regulation.⁸⁵ Other reporting requirements may arise in connection with investment by citizens of certain countries as a result of laws governing relations with countries considered hostile to the United States.⁸⁶

C. Transfers of Currency or Monetary Instruments

The export or import of "monetary instruments," including bearer shares, into or out of the United States in an amount exceeding \$5,000 on any one occasion must be reported to the Bureau of Customs on Customs Form 4790.⁸⁷ Reporting is required not only of travelers who physically transport monetary instruments but also of persons who ship, mail, or receive by mail such instruments from outside the United States.⁸⁸ The report must identify the person to or from whom the instrument was sent or received.⁸⁹ Failure to file a report can result in forfeiture of the instrument or imposition of a civil penalty not to exceed the amount of the instrument in question.⁹⁰ Wilful failure to file can result in the imposition of criminal penalties.⁹¹

Moreover, a U.S. person who has "a financial interest in or signature or other authority over a bank, securities, or other financial account in a foreign country"⁹² in excess of \$1,000 must file Treasury Form 90-22.1 on or before June 30 of the year following the year in which the relationship was established.⁹³ Thus, a U.S. broker or attorney empowered under a special or general power of attorney to transfer funds of an off-shore bank account into the United States must report the existence of this power and the name and address of each owner for whom the account is maintained, the name and address of the bank and, within

States Government Data Collection Activities With Respect to Foreign Investment in the United States (1975) [hereinafter cited as Foreign Investment Report], reprinted in ABA, A Guide to Foreign Investment Under United States Law (1979) [hereinafter cited as ABA Guide]. See also text of ABA Guide 157-91.

⁸⁵ See ABA Guide, *supra* note 84, at 195-201, 214-15.

⁸⁶ See *supra* note 7.

⁸⁷ 31 C.F.R. §§ 103.23(a), .25(b) (1981). See Appendix E of this issue for a copy of Form 4790.

⁸⁸ *Id.* § 103.23(b).

⁸⁹ *Id.*

⁹⁰ *Id.* § 103.47, .48 (respectively).

⁹¹ Criminal penalties include a maximum fine of \$1,000 or one year imprisonment or both if no other violation of federal law is involved. *Id.* § 103.49.

⁹² *Id.* § 103.24.

⁹³ See U.S. Dep't of Treasury Instructions for Preparation of Form 90-22.1, Report of Foreign Bank and Financial Accounts, reprinted as Appendix F of this issue.

limits, the maximum value of the account.⁹⁴ If the U.S. person has authority over but no financial interest in the account, the report need only state that: "No U.S. person had any financial interest in the foreign accounts."⁹⁵

D. General Reporting Requirements

The general reporting requirements that are applicable to U.S. persons will also be applicable to foreign investors. Of particular significance with respect to the initial investment by a foreign person in the United States are the reporting requirements pursuant to the Securities Exchange Act of 1934 and pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976. As most corporate attorneys are aware, numerous reports must be filed with the Securities and Exchange Commission with respect to a publicly-held company. Pursuant to the Domestic and Foreign Investment Improved Disclosure Act of 1977, which was tacked on to the Foreign Corrupt Practices Act of 1977, certain of those reports require additional disclosure information when a foreign investor is involved. Of particular importance to the foreign investor is the requirement that a report be filed with the SEC when that investor acquires the beneficial ownership of five percent or more of the equity securities of a company registered under section 12 of the Securities Exchange Act of 1934.⁹⁶

The foreign investor who acquires the voting stock or assets of a corporation of substantial size must comply with the pre-merger notification required by the Hart-Scott-Rodino Antitrust Improvements Act of 1976.⁹⁷ In essence, this requirement involves a report to the Justice Department and to the Federal Trade Commission (FTC) prior to the merger of two entities when the acquisition meets certain size of person or size of acquisition tests. It should be noted that the reporting requirements are applicable regardless of the citizenship of the persons involved unless the acquisition falls within certain exemptions set forth in rules promulgated by the FTC. The exemptions found in the rules are intended to reflect situations in which the acquisition has minimal impact on the United States.

E. State Reporting Requirements

Aside from federal requirements, certain states have additional reporting requirements applicable specifically to foreign investors.⁹⁸ These requirements are normally associated with the acquisition of land in the

⁹⁴ See Appendix F.

⁹⁵ *Id.*

⁹⁶ 15 U.S.C. § 78m (1976 & Supp. IV 1980).

⁹⁷ *Id.* § 18a.

⁹⁸ See Brodkey, *Foreign Investment in U.S. Real Estate: The Role of State Restrictions in Structuring the Transactions* (Sept. 1978 & Supp. Nov. 1979) (published by Chicago Title Insurance Co.).

state. Counsel for foreign investors should bear in mind, however, that, just as at the federal level, state reporting requirements applicable to all investors may affect disclosure with respect to a foreign investment. Thus, prior to the acquisition of land by a foreign investor, local counsel in the state where the land is located should always be consulted. If the foreign investor is concerned about disclosure, local counsel should be consulted to determine the extent of disclosure required in all reports or other documents to be filed at the state level in connection with the investment.

VI. Conclusion

The scope of this article has been confined to significant reporting requirements relating to investment in the United States by foreign persons and should not be considered a comprehensive survey of these requirements. Depending on the type of investment, reporting requirements other than those mentioned herein may apply. The last comprehensive assemblage of reporting requirements at the federal level is found in a report by the Office of Management and Budget.⁹⁹ A more recent evaluation of foreign investment reporting requirements is found in H.R. Rep. No. 1216.¹⁰⁰

⁹⁹ See Foreign Investment Report, *supra* note 84.

¹⁰⁰ H.R. Rep. No. 1216, 96th Cong., 2d Sess. (1980).

