

Be aware of BEA

Non-US acquirers need to know about America's Bureau of Economic Analysis filing requirements.

By Lee Potter of Duane Morris

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Non-US private equity firms that acquire US companies need to be aware that they may have immediate and ongoing obligations to file reports with Bureau of Economic Analysis (BEA), an agency of the US Department of Commerce. These reporting requirements arise under the International Investment and Trade in Services Survey Act of 1976 and apply even to very small transactions. The Act is a relatively obscure piece of legislation and, as a result, the reporting requirements it imposes likely are often overlooked. Such an oversight could have serious consequences – penalties as high as \$25,000 and prison sentences of up to one year could potentially be imposed for failure to file. Therefore, it is important that parties to cross-border M&A transactions be cognizant of, and compliant with, the Act's provisions.

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Congress passed the Act in 1975 to collect meaningful information on international investment in the US. Under the Act and its implementing regulations, a US enterprise in which a foreign entity directly or indirectly acquires a 10-percent or more voting interest must file a report on Form BE-13 with the BEA no more than 45 days after completing the acquisition. This requirement applies to all but the smallest of transaction – a Form BE-13 must be completed and filed if the total assets of the acquired business exceed \$3 million or if the transaction involves the acquisition of 200 or more acres of US land. (Compare this \$3 million threshold to the current threshold of \$63.1 million for triggering the obligation to file a pre-merger notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.) The threshold is measured on the basis of the aggregate size of the US business without regard to the percentage of that busi-

ness held by foreign interests. Thus, even if a foreign parent owns only ten percent of a US business with total assets of \$3,000,001, the US business will be required to file a Form BE-13. Note also that the requirements apply regardless of whether a foreign entity, such as a non-US private equity firm, first sets up a new US entity to act as the direct acquirer of a US company.

The regulations implementing the Act are broadly written and capture a wide variety of transaction structures, including mergers, consolidations, asset purchases and stock acquisitions. A direct or indirect acquisition by a foreign investor of even just a business segment or operating unit of an existing US business enterprise that is then organized as a separate legal entity would also fall within the reporting requirements, so long as the segment or unit meets the threshold. If the foreign acquirer has an existing US affiliate (i.e., a business enterprise in the US in which the foreign person or entity owns 10-percent or more of the voting securities) and that affiliate acquires a US business enterprise or unit and merges it into itself, the US affiliate must file a Form BE-13 if the total cost of the acquisition was \$3 million or more or involved 200 acres or more of US land.

Although the regulations refer primarily to acquisitions of existing businesses, the reporting requirements under the Act are potentially applicable to startup greenfield operations. The commencement by a foreign individual or entity of business activity in the US will trigger the reporting requirements if the new US entity, together with any US affiliates with which it is consolidated, meets the \$3 million or 200-acre thresholds.

While the Act at least exempts the very smallest transactions from the obligation to prepare and file a Form BE-13, this exemption is not automatic – the rules require that an “Exemption Claim, Form BE-13” be filed in order to “validate” the exemption. Thus, a US entity with less than \$3 million in assets (and owning less than 200 acres of U.S. real estate) will be required to file this Exemption Claim if a foreign person or entity owns more than 10 percent of its voting securities or equivalent interest. This requirement has no *de minimus* exemption and therefore apparently will apply to even absurdly small transactions – such as an uncle who lives abroad that wishes

to teach his 8-year-old American niece about business by giving her \$5 to set up a lemonade stand on the sidewalk in front of her house, with any profits to be shared on some basis that gives the aunt or uncle more than a 10 percent say in the business. Although the BEA presumably is not interested in tracking the activity of sidewalk lemonade stands, the lawyer advising them would nonetheless have to sheepishly advise that the rules technically require the niece to file the Exemption Claim.

The Act and its regulations do allow for a few exemptions. Acquisitions of more than 200 acres of land do not trigger any reporting requirements if the land is residential real estate held exclusively for personal use and not for profit. Moreover, if this land is used as the owner's primary residence, the owner can lease it for a period while he or she is outside of the US, so long as the owner intends to reacquire the premises.

Responsibility for preparing and filing the Form BE-13 (and, if applicable, the other reports described below) falls upon the acquired US business enterprise or on the foreign holder's existing US affiliate, if that affiliate acquired a US business and then merged it into itself. If the transaction involved two or more unaffiliated foreign parent companies, separate reports must be filed describing the interest of each company.

The initial report on Form BE-13 calls for some basic information on the ownership chain of the reporting entity, as well as the transaction giving rise to the filing. The Bureau also wants to know the total assets, net income, and number of employees of the US business (on a consolidated basis, including all US subsidiaries, but excluding foreign subsidiaries) and, for businesses operating in more than one industry, a breakdown of sales into separate industry segments, based on International Surveys Industry codes.

In addition to the initial report on Form BE-13, the Act imposes quarterly and annual reporting requirements, as well as a quinquennial (every five years) survey. The thresholds at which these reports become applicable are somewhat higher than those for the Form BE-13.

Since 2007 is a quinquennial reporting year, the five-year benchmark surveys on Form BE-12 replace the annual reports for the year 2007. Unlike the initial, quarterly and annual reports, there is no small-company exemption from filing this quinquennial survey, although companies with US consolidated assets, annual sales or net income after US income taxes of \$40 million or less may file an ab-

breviated survey on "Form BE-12-Mini."

The BEA has prepared a guide that summarizes the reporting requirements described in this article. The link to this guide can be found at http://www.bea.gov/surveys/pdf/2008fdius_report_req.pdf.

The Act provides that reports filed with the BEA are confidential and may be used only for analytical or statistical purposes. The information provided in reports filed with the BEA cannot be presented in a manner that allows the filer to be individually identified. Information in the reports cannot be used for purposes of taxation, investigation, or regulation. Copies of reports retained in the files of the filing person are immune from legal process.

As mentioned above, failure to comply with the requirements under the Act could result in fines and even prison sentences. Persons failing to report are subject to a civil penalty of \$2,500 to \$25,000, and to injunctive relief commanding such person to comply. (These civil penalties are subject to inflationary adjustments.) Willfully failing to report as required by the Act could lead to additional fines of up to \$10,000 and, if the person is an individual, he or she could face imprisonment for up to one year. (It is not clear to what extent these penalties are actually imposed, if ever.)

The BEA monitors the business media and notifies parties to pending cross-border M&A transactions that may be required to submit reports to the BEA. However, smaller transactions that do not warrant attention from the business press will likely go unreported unless counsels to the parties are aware of the Act's requirements and advise their clients accordingly. ■

FORM BE-13 (REV. 8/2006)		U.S. DEPARTMENT OF COMMERCE BUREAU OF ECONOMIC ANALYSIS		OMB Control No. 0608-0035: Approval Expires 08/31/2009	
INITIAL REPORT ON A FOREIGN PERSON'S DIRECT OR INDIRECT ACQUISITION, ESTABLISHMENT, OR PURCHASE OF THE OPERATING ASSETS, OF A U.S. BUSINESS ENTERPRISE, INCLUDING REAL ESTATE MANDATORY - CONFIDENTIAL		ELECTRONIC FILING		See our web site at www.bea.gov/astar for details.	
MAIL REPORTS TO		U.S. Department of Commerce Bureau of Economic Analysis, BE-49(NI) Washington, DC 20230		DELIVER REPORTS TO	
Mandatory - This survey is being conducted pursuant to the International Investment and Trade in Services Survey Act (P.L. 94-472, 90 Stat. 2059, 22 U.S.C., 3101-3108, as amended - hereinafter "the Act"), and the filing of reports is MANDATORY pursuant to Section 5(b)(2) of the Act (22 U.S.C. 3104). The implementing regulations are contained in Title 15 CFR Part 806.		This report has been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501, et seq.).		such violation, upon conviction, may be punished by a like fine, imprisonment, or both. (22 U.S.C. 3105)	
Penalties - Whoever fails to report may be subject to a civil penalty of not less than \$2,500, and not more than \$25,000, and to injunctive relief commanding such person to comply, or both. Whoever willfully fails to report shall be fined not more than \$10,000 and, if an individual, may be imprisoned for not more than one year, or both. Any officer, director, employee, or agent of any corporation who knowingly participates in		Confidentiality - The Act provides that your report to this Bureau is CONFIDENTIAL, and may be used only for analytical or statistical purposes. Without your prior written permission, the information filed in your report CANNOT be presented in a manner that allows it to be individually identified. Your report CANNOT be used for purposes of taxation, investigation, or regulation. Copies retained in your files are immune from legal process.		Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.	
This report is to be filed by either -		(a) a U.S. business enterprise when a foreign person (hereinafter, the "foreign parent") establishes or acquires directly, or indirectly through an existing U.S. affiliate, a 10 percent or more voting interest in that enterprise, including an enterprise that results from the direct or indirect acquisition by a foreign person of a business segment or operating unit of an existing U.S. business enterprise that is then organized as a separate legal entity; OR		business enterprise, that the existing U.S. affiliate merges into its own operations rather than continuing or organizing as a separate legal entity.	
(b) the existing U.S. affiliate of a foreign person (hereinafter, the "existing U.S. affiliate") when it acquires a U.S. business enterprise, or a business segment or operating unit of a U.S.		NOTE: Real estate purchased for other than personal use constitutes a "business enterprise."		File separate parts V and VI for each foreign parent or existing U.S. affiliate that established or acquired a direct voting interest in the U.S. business enterprise, business segment, operating unit, or real estate.	

Form BE-13: must be completed for and filed if the total assets of the acquired business exceed \$3 million, or if the acquisition involves 200 or more acres of US land.