September 18, 2014

New Reporting Requirement for Foreign Investments in the U.S.

By Jeffery Bell and Stephanie Ference

Effective as of September 15, 2014, a new reporting requirement applies to a broad range of direct, and indirect, investments in the U.S. by foreign persons. The U.S. Department of Commerce's Bureau of Economic Analysis (the "BEA") has published a final rule[1] that reinstates and expands the BE-13 survey of foreign direct investment into the U.S. that was discontinued in 2009 due to budgetary constraints. This mandatory reporting requirement, authorized by the International Investment and Trade in Services Survey Act, now applies[2] to reportable transactions regardless of whether the participants have been contacted by the BEA.

The reporting obligation applies to the U.S. business enterprise that is the subject of a reportable transaction. Reportable transactions include transactions in which "(1) A foreign direct investment in the United States relationship is created; (2) 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; (3) A U.S. business enterprise that previously filed a [survey on Form] BE-13B or BE-13D indicating that the established or expanded entity is still under construction." Foreign direct investment is defined as the ownership or control by one foreign person (foreign parent) of 10 percent or more of the voting securities of an incorporated U.S. business enterprise, or an equivalent interest of an unincorporated U.S. business enterprise, including a branch.

Going forward, the applicable BE-13 survey form will be due no later than 45 days after the acquisition is completed, the new legal entity is established, the expansion is begun, or the cost update is requested. Failure to file the required report could result in injunctive relief, civil penalties, and even criminal penalties for willful violations.

The BE-13 survey will be filed on one of six form types corresponding to particular types of investment transactions. Significantly, the transaction-based form types are each subject to a *de minimis* requirement that the transaction value be greater than $3 million. However, to claim an exemption from filing on those form types, participants in transactions having a value of $3 million or less are required to complete and file the sixth form type.

Among the new information required to be reported on the BE-13 survey are items relating to (i) equity and debt components of the foreign parent funding; (ii) whether the new U.S. operation will have research and development activities; (iii) whether the new operation is under construction; (iv) employment projections; and (v) actual and projected construction expenditures by type and by year.

---

1 http://www.gpo.gov/fdsys/pkg/FR-2014-08-14/pdf/2014-19256.pdf

2 Under the final rule, the BEA will make the new survey forms available in November 2014 and respondents will be required to furnish data retroactively to January 1, 2014.

Contact:

Jeffery Bell
(212) 336-4380
jbell@mofo.com

Stephanie Ference
(212) 336-4072
sference@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for 11 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.