

New Mandatory Foreign Direct Investment Reporting Requirement¹

4/1/2015

Practices: Real Estate

Some may recall that in the past, under certain circumstances, "foreign" investors in the United States were required to report their U.S. investments to the Department of Commerce, Bureau of Economic Analysis ("BEA"). In 2009, the BEA suspended such reporting requirements. However, on November 24, 2014, the Federal Office of Management and Budget confirmed amendments to regulations of the BEA reinstating the reporting requirements which had been previously discontinued. Foreign Direct Investment in the United States is defined as the ownership or control, directly or indirectly, by a 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.

The reinstated requirement is fulfilled by completion and submission of a Form BE-13 Survey of New Foreign Direct Investment in the United States. This form collects information on the acquisition or establishment of U.S. business enterprises by foreign investors. The BE-13 Survey form also collects information on expansions by existing U.S. affiliates of foreign companies, including the establishment of new facilities and any information that was not previously collected. With respect to reporting on expansions, U.S. affiliates need to take note of the fact that the instructions to the form BE-13D indicate that expansion includes the construction or lease of a new facility by an existing U.S. affiliate and the construction of a facility that is intended for lease or sale by an existing U.S. affiliate, but excludes the transfer of existing operations from one location to another, the replacement of equipment or upgrade of an existing facility and the expansion of an existing facility (but only if the expansion does not involve a separate facility where business is conducted).

Under the revised regulations, U.S. affiliates report information on expansions, acquisitions, and establishments of U.S. business enterprises by foreign investors. Depending on the type of investment transaction, U.S. affiliates will report information on one of six variations of the Form BE-13 Survey. The filing requirement is mandatory regardless of whether the foreign person has been contacted by the BEA and even if the transaction does not meet the applicable threshold (generally \$3,000,000). Exemptions are not automatic and a BE-13 Claim for Exemption must be filed and accepted in order for any exemption to be effective.

The filing requirements are triggered by the completion of the transaction ("reportable event") and reports are due within 45 calendar days after the transaction is "complete"; i.e., 45 calendar days after the closing of an acquisition, establishment of a new entity or, in the case of an expansion, the date the expansion began. The BEA will collect data retroactively back to January 1, 2014.

Failure to complete the reports in a timely manner and on the appropriate form is subject to criminal (up to \$10,000 per violation and/or imprisonment of not more than one year) and civil penalties (between \$2,500 and \$32,500 for each violation), plus injunctive relief ordering the party to comply.

Late in the Fourth Quarter of 2014, the Real Estate Practice Group of Masuda Funai hosted a seminar in Tokyo and Osaka, Japan - "Foreign Direct Investment: Enhancing Your Real Estate Opportunities and Strategies". Legal and real estate professionals presented strategies for direct investments in real estate in the United States, Canada and Mexico. Speakers included the government agencies of SelectUSA, ProMexico, and Invest-in-Canada. Topics discussed included industrial and commercial investments, public/private partnerships and infrastructure projects. In addition to speakers from Masuda Funai, speakers from Rubio Villegas & Asociados (a prominent Mexican law firm), Davis LLP (a major Canadian law firm), Colliers International, and White Cube, LLP (both real estate consultants and brokers) presented on various F.D.I. topics.