

FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: DISCLOSURE REGULATIONS

I. INTRODUCTION

Foreign direct investment¹ in the United States quintupled in the past decade, reaching an estimated \$65.5 billion in 1980.² The reasons for such interest in the United States market are numerous; they include the economic and political stability of the United States, the availability of high technology and a skilled labor force, the depreciation of the dollar in foreign exchange markets, and the proximity of natural resources.³

Historically, the United States has maintained an "open door" policy for foreign investment.⁴ However, skyrocketing oil prices in the early 1970's and a subsequent influx of Organization of Petroleum Exporting Countries (OPEC) revenues evoked national concern over the possible ramifications of OPEC-controlled foreign investment, and increased demands for more regulation of foreign investment. Little useful data on foreign investment in the United States existed at this time; thus Congress responded with the International Investment Survey Act (IISA) in 1976.⁵ This act is intended to provide statistical and analytical information on foreign investment in the United States and United States investment abroad. The IISA confers broad authority on the President to secure

¹ Foreign direct investment is defined as the ownership or control, directly or indirectly, by one foreign person of 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch. 15 C.F.R. § 806.15(a)(1) (1981). A lesser degree of control is considered portfolio investment and is reported in statistical data by the Treasury Department. U.S. DEPT OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, VOLUME 1: REPORT OF THE SECRETARY OF COMMERCE TO THE CONGRESS 5 (1976). Foreign direct investment will be referred to in this article as foreign investment.

² U.S. DEPT OF COMMERCE, SURVEY OF CURRENT BUSINESS 40 August, 1981. This figure is the book value of foreign direct investors' equity in, and net outstanding loans to, their U.S. affiliates. The ownership of foreign investment in the United States is highly concentrated by country. Almost 90% of total foreign investment is accounted for by eight countries: the Netherlands accounted for 25%; the United Kingdom, 17%; Canada, 15%; Germany, the Netherlands Antilles, Japan and Switzerland each accounted for 6% to 8%; and France accounted for 4%. The members of the Organization of Petroleum Exporting Countries (OPEC) together accounted for less than 1% of the total foreign investment. *Id.*

³ HOUSE COMM. ON GOVERNMENT OPERATIONS, THE ADEQUACY OF THE FEDERAL RESPONSE TO FOREIGN INVESTMENT IN THE UNITED STATES: TWENTIETH REPORT, H.R. Doc. No. 1216, 96th Cong., 2d Sess. 9 (1980) [hereinafter cited as 20TH REPORT].

⁴ COMM. TO STUDY FOREIGN INVESTMENT IN THE UNITED STATES OF THE SECTION OF CORPORATION, BANKING AND BUSINESS LAW OF THE AMERICAN BAR ASSOCIATION, A GUIDE TO FOREIGN INVESTMENT UNDER UNITED STATES LAW 1-31 (1979).

⁵ 22 U.S.C. §§ 3101-08 (1979).

current international investment information. President Ford delegated survey power to the Commerce Department,⁶ which in turn has assigned survey responsibility to its Bureau of Economic Analysis (BEA). Implementing regulations were published by the end of 1977,⁷ and on April 24, 1981, the BEA issued final rules for foreign investment reports required under the IISA.⁸

Foreign investment is viewed by many United States politicians as highly desirable to help revive the flagging economy.⁹ This uncritical endorsement of foreign investment overlooks valid concerns regarding its potential negative effects.

Foreign investment often is seen as a means to eradicate the United States balance of payments deficit.¹⁰ However, most foreign investment leads to little net increase in capital flows because the majority of funds are borrowed in the United States.¹¹ In addition, repatriation of profits to the home country will have a negative effect on the United States balance of payments.¹²

Foreign investors may have objectives that are not related entirely to investment. Foreign-owned businesses may be influenced heavily by foreign environments or governments and therefore less sensitive to demands of the local economy.¹³ Foreign parents¹⁴ may seek to assure their home country access to natural resources

⁶ EXEC. ORDER NO. 11858, 40 Fed. Reg. 20,263 (1975).

⁷ 15 C.F.R. § 806.15 (1977).

⁸ 46 Fed. Reg. 23,226-23,227 (1981) (to be codified in 15 C.F.R. § 806.15).

⁹ Typical of such views are comments made by John G. Heimann, Comptroller of the Currency, before the House of Representatives, Commerce, Consumer, and Monetary Affairs Subcommittee of the Committee on Government Operations:

Our country has welcomed, in fact encouraged, foreign investment in our domestic enterprises, and foreign capital has contributed significantly to our economic development.

The open door policy is rooted in economic principle. Foreign investment in the United States benefits the economy in the same way as domestic investment, leading to increased competitive ability, greater employment, higher production, and improved technology. To date, there is little evidence that foreign ownership of domestic enterprises has been other than beneficial to the public interest.

The Operations of Federal Agencies in Monitoring, Reporting On, and Analyzing Foreign Investments in the United States: Hearings Before a Subcomm. of the House Comm. on Government Operations: Part 4, 96th Cong., 1st Sess. 56 (1979) (statement of John G. Heimann) [hereinafter referred to as *Hearings*].

¹⁰ The merchandise trade deficit on a balance of payments basis for the year 1981 was \$27.84 billion, compared with \$25.34 billion in 1980. WALL. ST. J., Feb. 8, 1982, at 1, col. 2.

¹¹ 20TH REPORT, *supra* note 3, at 13.

¹² *Hearings* (Part 3), *supra* note 9, at 213.

¹³ 20TH REPORT, *supra* note 3, at 13.

¹⁴ "Foreign Parent" is defined as the foreign person, or the first person outside the United States in a foreign chain of ownership, which has a direct investment in a U.S. business enterprise, including a branch. 15 C.F.R. § 806.15(a)(3) (1981).

available in the United States.¹⁵ Finally, foreign investment can hamper the competitiveness of United States industries. For example, acquisitions may be used to reduce the worldwide competitive position of the United States firm acquired; or, even if the United States firm acquired does not have a significant world market share, the acquiring foreign firm may have such a substantial share in the world market that the acquisition will increase industrial concentration.¹⁶

The validity of these concerns can be measured only by adequate data revealing the sources and scope of foreign investment in the United States. To formulate an intelligent national policy toward investment by foreign persons in the United States and by United States persons abroad, reliable data on foreign investment is an absolute necessity.

II. BEA DATA ACQUISITION FORMS

The IISA requires each United States business enterprise¹⁷ in which a foreign person¹⁸ owns or controls, directly or indirectly, 10% or more of the voting stock of an incorporated enterprise (or its equivalent in an unincorporated enterprise) to file the reports discussed below.¹⁹

"Person" is defined to mean any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency). 15 C.F.R. § 806.7(c) (1981).

¹⁵ 20TH REPORT, *supra* note 3, at 18.

¹⁶ *Id.* at 17.

¹⁷ "Business enterprise" means any organization, association, branch, or venture which exists for profitmaking purposes or to secure economic advantage, and any ownership of any real estate. 15 C.F.R. § 806.7(f) (1981).

¹⁸ "Foreign person" means any person or entity residing outside the United States or subject to the jurisdiction of a country other than the United States. 15 C.F.R. § 806.7(e) (1981). See *supra* note 14 (definition of "person" under the regulations).

¹⁹ In addition to the reports described in the text, several less common reports are required of some persons:

Form BE-607: Industry Classification Questionnaire.

A U.S. affiliate must obtain a BEA 3-digit industry classification code number and use this number on all BEA forms. To obtain a BEA industry classification, a Form BE-607 must be filed. The BEA then assigns a code number to represent the affiliate's type of industry. Form BE-607 normally is filed in conjunction with BE-13 reports, but must be completed anew if an existing U.S. affiliate's industry classification changes.

Form BE-14: Report by a U.S. Person Who Assists or Intervenes in the Acquisition of a U.S. Business Enterprise by, or who Enters into a Joint Venture With, a Foreign Person. If a U.S. person required to file a Form BE-14 files either Form BE-13A or Form BE-13B,

A. *BE-13A and BE-13B (at Time of Acquisition)*

A one-time BE-13 report is required when a foreign person establishes, acquires or purchases the operating assets of a United States business enterprise.²⁰ There are two, complementing BE-13 forms. Form BE-13A is required of a United States business enterprise, business segment or operating unit that has been established or acquired by a foreign person, or by an existing United States affiliate of a foreign person that merges the enterprise, segment or unit into its own operations.²¹ Form BE-13B is required of the foreign person or existing United States affiliate of a foreign per-

relating to the acquisition of the U.S. business enterprise by a foreign person, then completion of a Form BE-14 is not necessary. 15 C.F.R. § 806.15(g)(4)(B) (1981).

Exemption forms must be filed if a U.S. business enterprise is exempt from filing BE-13 or BE-12 reports.

The BE-13A, BE-13B, BE-12, BE-15 and BE-605 forms are available by writing: U.S. Department of Commerce, Bureau of Economic Analysis BE-50, Washington, D.C. 20230. Copies of these forms will be kept on file at the University of Georgia School of Law Library.

²⁰ Form BE-13A, Form For a U.S. Business Enterprise, Business Segment, or Operating Unit that Has Been Established or Acquired by a Foreign Person or Existing U.S. Affiliate of a Foreign Person, Revised February 1981. See note 19.

²¹ "U.S. affiliate" means an affiliate located in the United States in which a foreign person has a direct investment. 15 C.F.R. § 806.15(a)(2) (1981).

Form BE-13A must be completed either:

- a) by a U.S. business enterprise when a foreign person 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
- b) by the existing U.S. affiliate of a foreign person when it acquires a U.S. business enterprise, or a business segment or operating unit of a U.S. business enterprise, that the existing U.S. affiliate merges into its own operations rather than continuing or organizing as a separate legal entity.

Form BE-13B . . . must be completed either:

- a) by a foreign person when it establishes or acquires a direct voting interest in a U.S. business enterprise that becomes its U.S. affiliate, or by the new U.S. affiliate for the foreign person to the extent it has or can secure the information; or
- b) by an existing U.S. affiliate of a foreign person when it establishes or acquires a direct voting interest in a U.S. business enterprise of such a magnitude that the established or acquired enterprise becomes a U.S. affiliate of the foreign person, i.e., the foreign person thereby acquires an indirect (or direct and indirect) voting interest of 10 percent or more in the established or acquired U.S. business enterprise; or
- c) by an existing U.S. affiliate of a foreign person when it acquires a U.S. business enterprise, or a business segment or operating unit of a U.S. business enterprise, and merges it into its own operations.

A separate Form BE-13B must be completed by or for each foreign parent, or by each existing U.S. affiliate, that has secured a direct voting interest in a new U.S. affiliate.

son that establishes or acquires the United States business enterprise, business segment or operating unit.²²

Form BE-13A requires the identification and capital structure of the new United States affiliate or, alternatively, the identification of the United States business enterprise (in whole or in part) that has been acquired by and merged into an existing United States affiliate.²³ Land, plants and equipment must be reported, showing acreage, historical cost, and primary use. As in the BE-15 form,²⁴ the reporting entity must list all United States subsidiaries fully consolidated into the new United States affiliate and all other United States affiliates in which the new affiliate has a direct equity interest. A special provision has been made in the BE-13A instructions to minimize reporting of multiple stage transactions that otherwise would require the filing of several BE-13 reports or exemption claims.²⁵

Form BE-13B requires information on the sources of financing the total investment and background on acquisition of the new ownership interests. A major change in the BE-13B forms, effective with the publication of the April rules, is the required disclosure of the "ultimate beneficial owner" controlling 10% or more of a United States business enterprise.²⁶

Forms BE-13A and BE-13B are due no later than 45 days after the investment transaction occurs. Form BE-607, the Industry Classification Questionnaire,²⁷ must be completed by a new United States affiliate and returned with Form BE-13A.

Form BE-13A, Form BE-13B, *infra* note 19.

"A report is required even though the foreign person's equity percentage may have been established, acquired, liquidated, sold or inactivated during the reporting period." 15 C.F.R. § 806.15(f) (1981).

²² Form BE-13B, Form for Foreign Person, or Existing U.S. Affiliate of a Foreign Person, That Establishes or Acquires a U.S. Business Enterprise, or a Business Segment or Operating Unit of a U.S. Business Enterprise, Revised February, 1981, at 1, col. 1. *See supra* note 19.

²³ Form BE-13A, Form for a U.S. Business Enterprise, Business Segment or Operating Unit That Has Been Established or Acquired By a Foreign Person or Existing U.S. Affiliate of a Foreign Person, Revised February, 1981, at 1, col. 1. *See supra* note 19.

²⁴ Form BE-15, Interim Survey of Foreign Direct Investment in the U.S. 1979, Revised May, 1980 at 5-8; Form BE-13A, Form for a U.S. Business Enterprise, Business Segment, or Operating Unit that Has Been Established or Acquired by a Foreign Person or Existing U.S. Affiliate of a Foreign Person, Revised February, 1981, at 5-8. *See supra* note 19.

²⁵ BE-13 Report On a Foreign Person's Establishment, Acquisition, or Purchase of the Operating Assets of a U.S. Business Enterprise, Including Real Estate Instructions (Forms BE-13A and BE-13B), Revised February, 1981, at 2, col. 2.

²⁶ 46 Fed. Reg. 23,226 (1981) (to be codified in 15 C.F.R. § 806.15). *See infra* text accompanying notes 36-47.

²⁷ *See supra* note 19.

B. *BE-12 (Benchmark Survey)*

Section 4b of IISA provides that a comprehensive benchmark survey of foreign investment in the United States shall be conducted at least once every five years.²⁸ The last benchmark survey of foreign investment occurred in 1974;²⁹ the BEA currently is conducting a benchmark survey for 1981. The IISA was amended August 7, 1981, delaying the date for a subsequent benchmark survey from 1985 to 1987, with benchmark surveys to be made every five years thereafter.³⁰ This adjusted schedule coincides with the schedule for the Census Bureau's economic census; it is hoped this will reduce some duplication of the economic surveys.³¹

C. *BE-15 (Annual Survey)*

Form BE-15³² calls for a comprehensive annual survey of the financial activity and position of the United States affiliates owned or controlled by foreign persons.³³ It requires that a balance sheet, income statement and statement of retained earnings be submitted. Total expenditures for new plants and equipment, and for research and development must be reported. All land owned at year end must be computed in terms of historical cost and number of acres used for agricultural purposes. A detailed schedule of employees, land and mineral rights, property, plants and equipment, by state of location, must be completed. The reporting affiliate must list all United States corporations that are fully consolidated in the report, and all United States affiliates in which it has a direct equity interest that are not consolidated in the report.

The BE-15 must be filed by August 31st for the year ending the prior December 31st. In benchmark survey years, the annual BE-15 forms are not required. Banks are not required to file BE-15 forms.

²⁸ 22 U.S.C. § 3103(c) (1979).

²⁹ The 1974 benchmark survey of foreign direct investment in the United States is a result of the Foreign Investment Study Act of 1974, Pub. L. No. 93-474, 88 Stat. 1450 (1974), the forerunner of IISA. Results of this study were published in U.S. DEPT OF COMMERCE, REPORT TO THE CONGRESS: FOREIGN DIRECT IMPROVEMENT IN THE UNITED STATES (1976).

³⁰ Authorization, Appropriations—International Investment Survey Act of 1981, Pub. L. No. 97-33, 95 Stat. 170 (amending 22 U.S.C. § 3103 (1976)).

³¹ COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, AUTHORIZATION FOR THE INTERNATIONAL INVESTMENT SURVEY ACT OF 1976, S. REP. NO. 97-68, 97th Cong., 1st Sess. 4 (1981). See also *Hearings (Part 5)*, *supra* note 9, at 12.

³² See Form BE-15, *supra* note 24.

³³ See *supra* note 19.

D. BE-605 or BE-606B (*Quarterly Surveys*)

The BE-605³⁴ covers transactions between a United States affiliate³⁵ and its foreign parent, including items received from, paid to, or entered into intercompany accounts with the foreign parent or its foreign affiliates. For example, the United States affiliate must report direct payments to and receipts from the foreign parent for rentals of tangible property. A foreign parent's share in annual income and the equity position of the United States affiliate also is required on a BE-605 form. Items are to be reported according to the books of the United States affiliate.³⁶ These reports are to be filed within 30 days of the close of each calendar (or fiscal) quarter, except for the final quarter of each calendar or fiscal year, when the deadline is extended to 45 days after the end of the quarter.

III. BEA REGULATIONS

A. *Ultimate Beneficial Owner*

Many foreign investors are reluctant to disclose their identity. Anonymity in investing in both property and securities has been a traditional and legitimate practice in Europe and throughout the world.³⁷ The desire for confidentiality stems from a number of considerations other than tradition, however. Many investors are wary of legal and political consequences of investing in the United States.³⁸ Profits may be subject to compelled repatriation to the investor's country of residence, as the flow of capital in and out of several countries is closely regulated by exchange controls.³⁹

The new rules issued by the BEA on April 24, 1981, increase the difficulty of preserving investor anonymity. The required disclosure of the "ultimate beneficial owner" of the foreign invest-

³⁴ Form BE-606B is required of a U.S. bank branch or agency with a foreign parent. This form will not be discussed in this note. Form BE-606B, Transactions of U.S. Banking Branch or Agency With Foreign Parent, Revised February 1981. Form BE-606B is also available by writing the Bureau of Economic Analysis. See *supra* note 19.

³⁵ See *supra* note 22.

³⁶ An exception is Section V of Form BE-605: "Change During the Quarter in Foreign Parent's Equity in U.S. Affiliate," which requires that all amounts be reported at transactions value, i.e., the value of the consideration given (received) by the foreign parent. Form BE-605, Transactions of U.S. Affiliate, Except an Unincorporated Bank, with Foreign Parent, Revised February, 1981, at 1, col. 2.

³⁷ R. SCHLESINGER, *COMPARATIVE LAW* 570-89 (1970).

³⁸ Richards, "Commerce Dept. Demands Foreign Investor Identity," *Nat. L. J.*, June 15, 1981, at 17, col. 4.

³⁹ H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS*, 1167-68 (2d ed. 1976).

ment, rather than the record owner, represents a major change in BEA reporting requirements. The ultimate beneficial owner (UBO) is defined as "that person, proceeding up the ownership chain, beginning with and including the foreign parent, that is not more than 50 percent owned or controlled by another person."⁴⁰ Before the April rules were issued, ownership disclosure requirements could be avoided by several methods.⁴¹

First, in a diamond holding pattern, the UBO could frustrate BEA inquiry into the ownership chain by dividing the ownership of a holding company into three or more entities, none having greater than a 50% interest in the holding company. Under prior BEA regulations, BEA inquiry would cease with this holding company because the next tier of ownership is diluted below 50%. The foreign investor then brought these entities back into his control at the next higher tier of ownership. The UBO thus maintained anonymity while complying with BEA regulations. The cost of forming and maintaining new corporations detracted from the popularity of this method.

The new regulations expressly prohibit this form of maintaining anonymity:

An owner who creates a trust, proxy, power of attorney, arrangement or device with the purpose or effect of divesting such owner of the ownership of an equity interest as part of a plan or scheme to avoid reporting information, is deemed to be the owner of the equity interest.⁴²

A second method of avoiding the old disclosure requirements was to invest through bearer share corporations (that is, those in which ownership of the stock is not registered).⁴³ The bearer share is the customary form of equity in most European and South American countries.⁴⁴ BEA's final rules specifically state that "bearer share" is not an acceptable response to ownership inquiry for non-publicly traded bearer share corporations.⁴⁵ The United States affiliate must pursue the identification of the UBO through managing directors or any other official or intermediary.⁴⁶ However, publicly traded bearer share corporations may retain the privacy of the UBO with a "bearer share" response.

⁴⁰ 46 Fed. Reg. 23,226 (1981) (to be codified in 15 C.F.R. § 806.15).

⁴¹ Richards, *supra* note 38, at 22, col. 2.

⁴² 46 Fed. Reg. 23,226 (1981) (to be codified in 15 C.F.R. § 806.15).

⁴³ Richards, *supra* note 38, at 22, col. 2.

⁴⁴ R. SCHLESINGER, *COMPARATIVE LAW*, 425-43 (2d ed. 1959).

⁴⁵ 46 Fed. Reg. 23,226 (1981) (to be codified in 15 C.F.R. § 806.15).

⁴⁶ *Id.*

Under the old disclosure requirements, concealing the identity of the UBO was also as simple as transferring legal ownership through a trust, proxy or power of attorney. These arrangements are precluded by the new rules.⁴⁷

A major exception to the required revelation of the ultimate beneficial owner permits a UBO, if an individual, to report only his or her country of residence.⁴⁸ Another method of maintaining confidentiality of ownership is left intact by the new rules: investment in a publicly traded bearer share corporation qualifies the foreign parent to name this corporation as the UBO and preserve the privacy of its stockholders.

B. *Exemptions*

BEA reports need be filed only if aggregate foreign investment surpasses minimum levels in dollar amounts or real estate acreage. For all BEA forms, reports are required only if aggregate real estate holdings total more than 200 acres.⁴⁹ Exemption levels reflecting the value of the investment differ among the various BEA forms. An established, purchased, or acquired United States business enterprise need not file the BE-13A or BE-13B unless the fair market value of its total assets at the time of acquisition or immediately thereafter equal at least \$1,000,000.⁵⁰ The BE-15 (annual survey) and BE-605 and BE-606B (quarterly surveys) are not required unless *each* of the following three items for the United States affiliate (not the foreign parent) is less than \$5 million during the reporting period:

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ The new regulations require the foreign investor holding real estate to aggregate all such holdings when applying exemption level tests. If the aggregate amount exceeds the exemption level, reports must be filed even if individually the holdings are not in excess of the exemption level. 46 Fed. Reg. 23,226 (1981) (to be codified in 15 C.F.R. § 806.15).

⁵⁰ The regulations provide:

(b) An existing U.S. affiliate is exempt from reporting the acquisition of either a U.S. business enterprise, or a business segment or operating unit of a U.S. business enterprise, that it then *merges* into its own operations, if the total cost of the acquisition was \$1,000,000 or less and does not involve the purchase of 200 acres or more of U.S. land. (If the acquisition involves the purchase of 200 acres or more of U.S. land, it must be reported regardless of the total cost of the acquisition.)

(c) An established or acquired U.S. business enterprise, as consolidated, is exempt if its total assets (not the foreign parent's or existing U.S. affiliate's share) at the time of acquisition or immediately after being established were \$1,000,000 or less and it does not own 200 acres or more of U.S. land.

- 1) Total assets
- 2) Net sales or gross operating revenues (excluding sales taxes)
- 3) Net income after provision for United States income taxes.⁵¹

C. Consolidation

An incorporated United States affiliate must file annual and quarterly reports on a fully consolidated basis, including in the consolidation all other United States affiliates in which it directly or indirectly owns more than 50% of the outstanding voting interest.⁵² Foreign subsidiaries of the United States affiliate are to be excluded unless necessary for the equity method of accounting.⁵³ The fully consolidated entity then is considered to be one United States affiliate for purposes of the reporting requirements. However, when a given United States affiliate normally is not consolidated because it has unrelated operations or because it is not controlled by the reporting affiliate, separate reports may be filed upon written permission of the BEA.⁵⁴

D. Penalties

Failure to comply with BEA regulations can invoke a \$10,000 fine, imprisonment up to one year, or both.⁵⁵ Criminal sanctions for noncompliance apply not only to the officers or directors of a corporation, but also to any employee or agent (that is, attorney), who knowingly participates in the violation.⁵⁶ Such penalties are comparatively light. The Agricultural Foreign Investment Disclosure Act of 1978⁵⁷ imposes a civil penalty of up to 25% of the fair

⁵¹ See instructions accompanying Forms BE-15 and BE-605, *supra* note 19.

⁵² *Id.*

⁵³ When significant influence can be exercised over the dividend policies of another corporation (as in foreign direct investment), the net income of the other corporation can be obtained, almost at will (by means of dividends), by the investor company. As a consequence under the equity method of accounting, each year the investor company recognizes its proportionate part of the net income (or net loss) of the other corporation as part of its own net income, rather than awaiting the receipt of dividends.

G. WELCH & R. ANTHONY, *FUNDAMENTALS OF FINANCIAL ACCOUNTING* 464 (1974).

⁵⁴ Exactly what constitutes a "unitary business" is a subject of some uncertainty. Involved is the question whether an interstate (or international) unitary business is conducted by a single corporation or by a group of corporations under common ownership and control. See generally Rudolph, *State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups*, 25 *TAX. L. REV.* 171 (1970).

⁵⁵ 22 U.S.C. § 3105 (1979).

⁵⁶ *Id.*, § 3105(c).

⁵⁷ 7 U.S.C. § 3101 (Supp. 1981). This act establishes a national system for monitoring foreign investment in U.S. farmland and for analyzing data collected thereunder. See generally

market value of the interest in agricultural land.⁵⁸ To many foreign investors, the risk of a \$10,000 fine may represent simply another cost of doing business in the United States.

E. *Confidentiality of Reported Information*

The Bureau of Economic Analysis assures that all information acquired through its surveys is confidential, as required by IISA.⁵⁹ The confidentiality rules of the BEA are based on Section 5(c) of the 1976 Act, which states that no information collected under the Act may be published or released "in a manner that the person who furnished the information can be specifically identified as provided in this section."⁶⁰ This procedure leads, for example, to the grouping of OPEC investment data in BEA publications under "Other Asia" and "Other Africa" categories.⁶¹

F. *The Information Burden*

The BEA regulations impose a heavy reporting burden on foreign investors in the United States. Compilation of the numerous, comprehensive BEA reports requires a substantial amount of man-hours and funds.⁶² The surveys are especially burdensome for real estate investors, who often do not have available either the requested information or the operating revenues to absorb survey response costs readily.⁶³

However, the burden must be weighed against the need for investment information. To evaluate the movement of capital into and out of this country, and its effects on the United States economy, most of the questions asked on the BEA forms are necessary. Also, they are required specifically by IISA.⁶⁴

Zagaris, *The Agricultural Foreign Investment Disclosure Act of 1978: How Will it Affect the Market in U.S. Real Estate?*, 8 REAL ESTATE L. J. 3 (1979).

⁵⁸ 7 U.S.C. § 3502(b) (Supp. 1981).

⁵⁹ 22 U.S.C. § 3104 (1979).

⁶⁰ *Id.* If two individual investors (which includes business entities and government institutions, as well as individual persons) own "90 percent of all investments in a particular industry sector or from one country, or one individual owns 80 percent or more of the same, the BEA will not reveal the dollar figures." 20TH REPORT, *supra* note 3, at 129.

⁶¹ 20TH REPORT, *supra* note 3, at 131.

⁶² Telephone interview with Lindsay Roach, Arthur Anderson & Co. in Atlanta (Jan. 4, 1982).

⁶³ *Id.*

⁶⁴ IISA requires the following information:

(b) With respect to the United States direct investment abroad Benchmark
and foreign direct investment in the United States, the President shall survey.
conduct a comprehensive benchmark survey at least once every five years and

The reporting burden is increased, perhaps unnecessarily, by additional United States data collection on foreign investment. The Census Bureau, the Federal Trade Commission, and the Departments of Commerce, Treasury and Agriculture all are studying various aspects of foreign investment in the United States.⁶⁵ A review of the various forms reveals considerable overlap in foreign investment data collection efforts.⁶⁶ Legislation⁶⁷ and agency reluctance to date have precluded sharing of foreign investment data.⁶⁸ Amendments to IISA, enacted in August, 1981, are expected to

for such purpose, shall, among other things and to the extent he determines necessary and feasible—

(1) identify the location, nature, and magnitude of and changes in total investment by any parent in each of its affiliates and the financial transactions between any parent and each of its affiliates;

(2) obtain (A) information on the balance sheet of parents and affiliates and related financial data, (B) income statements, including the gross sales by primary line of business (with as much product line detail as is necessary and feasible) of parents and affiliates in each country in which they have significant operations, and (C) related information regarding trade between a parent and each of its affiliates and between each parent or affiliate and any other person; Financial data.

(3) collect employment data showing both the number of United States and foreign employees of each parent and affiliate and the levels of compensation, by country, industry, and skill level; Employment data.

(4) obtain information on tax payments by parents and affiliates by country; and

(5) determine, by industry and country, the total dollar amount of research and development expenditures by each parent and affiliate, payments or other compensation for the transfer of technology between parents and their affiliates, and payments or other compensation received by parents or affiliates from the transfer of technology to other persons.

22 U.S.C. § 3103(b) (1979).

⁶⁵ *Hearings (Part 1)*, *supra* note 9, at 16.

⁶⁶ 20TH REPORT, *supra* note 3, at 88. For example, the Federal Trade Commission's Line of Business (LOB) Reports require much of the same information as is sought by the BEA on its BE-12 and BE-15 forms. *Id.*

⁶⁷ 13 U.S.C. § 9 (1976). This statute addresses the confidentiality of information gathered by the Census Bureau. The Commerce Department has interpreted this legislation to mean that identifiable information collected and maintained by the Census Bureau cannot be shared with any other agency of the Department of Commerce (including the Bureau of Economic analysis). *See, e.g.*, Letter from C.L. Haslam, Office of General Counsel of the United States Department of Commerce to Honorable Benjamin S. Rosenthal, Chairman, Subcomm. on Commerce, Consumer and Monetary Affairs, Comm. on Government Operations (Sept. 1978), *reprinted in Hearings (Part 1)*, *supra* note 9, at 244.

⁶⁸ 20TH REPORT, *supra* note 3, at 81-88. Census Bureau reluctance to share data with the BEA is evidenced by the statement of Shirley Kallek, Associate Director for Economic Fields, Bureau of the Census, U.S. Dept. of Commerce:

MR. ROSENTHAL: Thank you. Let me ask a few questions. Apparently there is a problem with another Commerce Department agency in getting your data. Is that correct?

MS. KALLEK. You say a problem?

bring about more cooperation between the BEA and the Census Bureau.⁶⁹ If a "good match" can be made by firms reporting to these two agencies, the Census Bureau will publish production-oriented data for foreign-owned United States companies, while the BEA focuses on financial data.⁷⁰

IV. ENFORCEMENT

Enforcement of IISA reporting requirements raises difficult problems. If a foreign parent of a United States affiliate refuses to divulge the ultimate beneficial owner of its United States investment, prosecution may be hampered severely by difficulties in obtaining necessary evidence. Production of documents in foreign countries often is precluded by foreign nondisclosure laws,⁷¹ many of which were enacted in the wake of recent United States anti-trust litigation.⁷²

It is questionable whether the United States has the authority to order production of documents abroad in enforcing compliance with BEA survey regulations, when such an order conflicts with foreign nondisclosure laws. The majority of cases suggest that a court should not order production of evidence if the order gives rise to a violation of foreign nondisclosure laws.⁷³ More recent cases,

MR. ROSENTHAL. Is there a problem? They contend they have not been able to obtain your data.

MS. KALLEK. Mr. Chairman, the Census Bureau shares data with nobody.

MR. ROSENTHAL. It shares data with nobody? All right, you have now waived the flag. [Laughter]. Is there a law that restricts you?

MS. KALLEK. Yes.

MR. ROSENTHAL. What section?

MS. KALLEK. Section 9, title 13.

Hearings (Part 1), supra note 9, at 237.

⁶⁹ Authorization, Appropriations—International Investment Survey Act of 1981, PUB. L. NO. 97-33, 95 Stat. 170 (amending 22 U.S.C. § 3103 (1979)).

⁷⁰ COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, AUTHORIZATION FOR THE INTERNATIONAL INVESTMENT SURVEY ACT OF 1976, S. DOC. NO. 68, 97th Cong., 1st Sess. 5 (1981); 20TH REPORT, *supra* note 3, at 83-88.

⁷¹ Such statutes are usually of two types. The first type provides that a government official on his own initiative may prohibit production of a class of documents. *See e.g.*, Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Austl. Acts No. 121 § 5; Shipping Contracts and Commercial Documents Act, 1964, c. 87, § 2 (United Kingdom).

Statutes of two Canadian provinces prohibit the production of any documents requested by a foreign tribunal unless such documents normally are sent out of the province in the regular course of business. Business Records Protection Act, 1947, ONT. REV. STAT. c. 54 (1970); Business Concerns Records Act, 1964, QUE. REV. STAT. c. 278 (1964).

⁷² In 1980, the British Parliament enacted legislation providing that a government official may on his own initiative prohibit production of a class of documents. Protection of Trading Interests Act, c. 11 § 2, Mar. 20, 1980.

⁷³ First National City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959); *Ings v. Ferguson*, 282

however, express a contrary view.⁷⁴ The final resolution of this question remains unsettled.

The question of the capacity of a United States court to order document production abroad under United States case law is superseded by a foreign government's reception of such orders. The United States in many cases will have neither the power nor the ability to enforce such a discovery order.⁷⁵ Without a waiver or special cooperation from the affected nation, the BEA must rely on voluntary compliance from foreign investors located in countries with nondisclosure laws.

BEA investigation of noncompliance to date has not focused on revelation of the ultimate beneficial owner, but on cases of failure to file required forms.⁷⁶ Detecting noncompliance with UBO requirements is simply beyond the scope of BEA responsibility or funding. According to James T. Bomkamp, Chief, Direct Investment in the United States Branch of the International Investment Division, the BEA could not begin to check reports filed by foreign parents without "an extensive auditing staff, and a great deal of resources to fund travelling expenses, etc., which the BEA just does not have."⁷⁷

The BEA, when faced with a delinquent reporter, usually will make telephone and letter contact with the reporter.⁷⁸ If the United

F.2d 149 (2d Cir. 1960); Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962). These cases apparently did not follow the Supreme Court's reasoning in *Societe Internationale, Inc. v. Rogers*, 357 U.S. 197 (1958), where the court implied that United States courts have the power to issue discovery orders even where compliance would violate a nondisclosure law. See, e.g. Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747 (1974); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

⁷⁴ *Arthur Anderson & Co. v. Finesilver*, 546 F.2d 338, 342 (10th Cir. 1977); *United States v. Vetco, Inc.*, 644 F.2d 1324, 1332 (9th Cir. 1980); but see *F.T.C. Campagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1327 (D.D.C. 1980). The result of these decisions is unclear if the discovery orders are held unenforceable by a foreign court. See generally, Augustine, *Obtaining International and Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad: An Exposition of the Procedures and a Practical Example—In Re Westinghouse's Uranium Contract Litigation*, 10 GA. J. INT'L & COMP. L. 101 (1980).

⁷⁵ Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and A Practical Example: In Re Westinghouse Uranium Contract Litigation*, 10 GA. J. INT'L & COMP. L. 101, 109 (1980).

⁷⁶ Telephone interview with James T. Bomkamp, Chief, Direct Investment in the United States Branch of the International Investment Division, Bureau of Economic Analysis in Washington, D.C. (Jan. 22, 1982).

⁷⁷ *Id.* (Nov. 24, 1981).

⁷⁸ Telephone interview with Philip C. Freije, Office of the General Counsel of the Department of Commerce, in Washington, D.C. (Jan. 22, 1982).

States affiliate still fails to comply, the case is referred to the General Counsel of the Department of Commerce for preliminary investigation.⁷⁹ The case then is referred to the Justice Department for enforcement.⁸⁰ Although well over one hundred cases have been referred to the General Counsel of the Commerce Department, no criminal penalties for failure to comply with BEA reporting requirements had been levied by the end of 1981.⁸¹

CONCLUSION

The August 7, 1981 amendments to IISA charge the Secretary of Commerce with the responsibility of preparing "a report on the estimated cost of monitoring and compiling data on legislation enacted by the major trading partners of the United States, and such other foreign nations as the Secretary deems appropriate, which regulates or restricts foreign inward investment in such foreign nations."⁸² European countries, as well as other nations, have mandatory registration and surveillance systems over foreign investment in their nations.⁸³ The purpose of these amendments is not to seek the enactment of protectionist investment laws in the United States; the Senate Committee on Commerce, Science and Transportation concluded that the United States should conduct this comparative survey in order to evaluate better its policies toward foreign investment.⁸⁴ The results of this study, if conducted, might suggest radical changes in the method of gathering information on foreign investment in the United States. In light of the substantial burden on foreign investors that current BEA surveys represent, the difficulties inherent in enforcing these regulations, and the importance of such information in the face of the increasing interdependence of national economies, perhaps the reevaluation of the International Investment Survey Act that the study would facilitate is long overdue.

Diane E. McNamara

⁷⁹ *Id.*

⁸⁰ Interview with James L. Bomkamp, *supra* note 75.

⁸¹ Interview with Philip C. Freije, *supra* note 77.

⁸² Authorization, Appropriations—International Investment Survey Act of 1981, PUB. L. No. 97-33, 95 Stat. 170 at § 3103(2)(e).

⁸³ 20TH REPORT, *supra* note 3, at 102.

⁸⁴ COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, AUTHORIZATION FOR THE INTERNATIONAL INVESTMENT SURVEY ACT OF 1976, S. DOC. No. 68, 97th Cong., 1st Sess. 5 (1981).

