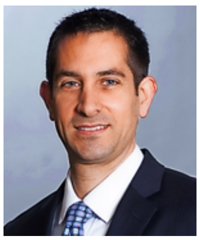
Bloomberg BNA

BNA's
Bankruptcy Law Reporter™

Restructurings with Cross-Border Investments: Maintaining U.S. Bureau of Economic Analysis Regulatory Compliance and Meeting May and June 2015 Deadlines



BY ROBERT M. SCHECHTER AND CHRISTOPHER F. SCHULTZ

Whether seeking work in the international insolvency arena or not, restructuring and insolvency professionals are increasingly jumping into engagements with clients who hold interests beyond the borders of the clients' home country. Clients (corporate or individual) with even minor business investments abroad, such as a minority stock interest or real estate holding for business purposes, may require special consideration and counseling to avoid harsh penalties for failure to satisfy regulatory reporting requirements.

Robert M. Schechter is a principal of Porzio, Bromberg & Newman (''Porzio'') based in the firm's Princeton, New Jersey office. A member of Porzio's Financial Restructuring and Bankruptcy Department, Rob concentrates his practice on the representation of stakeholders in both in-court and out-of-court restructuring matters, business finance and corporate compliance including BEA compliance. Rob can be reached at rmschechter@pbnlaw.com or 609-524-1838.

Christopher F. Schultz is a principal of Porzio, Bromberg & Newman (''Porzio'') based in the firm's New York City office. Co-chair of Porzio's Corporate, Securities, and Mergers & Acquisitions Department, he counsels companies, private equity funds, and hedge funds, advising senior management and boards of directors on key corporate compliance issues including BEA compliance, strategic issues including U.S. and international M&A transactions and securities law matters. Chris can be reached at cfschultz@pbnlaw.com or 646-348-6755.

Two scenarios that highlight this concern are: (1) a U.S. client who recently held or holds direct or indirect ownership or control of 10 percent or more of the voting stock of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise; or *vice versa* (2) a foreign person or entity who recently held or holds, directly or indirectly, 10 percent or more of the voting stock in an incorporated U.S. client, or an equivalent interest in an unincorporated U.S. client.

If it is determined that either situation exists, then there is a good chance that the U.S. client qualifies as a ''U.S. Reporter,'' as that term is commonly used by the Department of Commerce's Bureau of Economic Analysis (BEA), and, in turn, must satisfy the BEA's mandatory reporting requirements. Failure to satisfy these reporting requirements can come with severe civil and criminal penalties, including potential fines of $25,000 and even one year of imprisonment for willful noncompliance by corporate officers and directors.

BEA-reporting requires intensive, time-consuming data gathering that goes beyond the data normally found in corporate financial statements. As a result, the quicker the necessity of BEA-reporting is assessed, the easier and more cost efficient it is likely to be for a U.S. Reporter to establish a system of information gathering and retention to systematically satisfy BEA regulatory requirements, some of which require the assemblage of information not typically aggregated for internal or external business purposes. A significant level of management time is required to assemble and confirm the required data. The areas of information gathered by the BEA include, among other things, revenues; income; assets and liabilities; property, plant and equipment expenditures; employment statistics; research and development expenditures; shareholder equity; capital contributions; and transactions between related entities. The BEA uses this information to assemble and report key economic data that is commonly relied upon by both the public and private sectors.

By their very nature, restructuring professionals often swoop into an atmosphere of cost cutting. Nevertheless, whether a U.S. client has consistently failed to comply with BEA regulations or has recently dropped the ball on satisfying BEA reporting requirements, restructuring professionals must be attuned to the existence of the BEA regulations and the penalties for noncompliance so that a regulatory failure does not occur on their watch as a result of imprudent cost cutting or a simple lack of awareness. The fiduciary duties and heightened scrutiny that come with entrance into the zone of insolvency can make satisfying BEA reporting requirements even more critical for restructuring professionals working with clients holding foreign interests or clients that are themselves owned by minority or majority foreign interests.

At first blush, BEA reporting requirements may be viewed as a burdensome cost and significant time commitment that is performed only for the sake of regulatory compliance and avoidance of harsh penalties, and as discussed further below, the reporting exercise can most certainly be nothing more than a ''cost of doing business'' if not approached in an efficient and effective manner. If BEA reporting is addressed in a systematic and streamlined fashion, however, the burden and expense of reporting can be drastically reduced. Moreover, with proper vetting and review of the categories and type of data collected to satisfy BEA reporting requirements, reorganizing entities seeking to exploit growth areas, trim unprofitable activity, analyze cost and profit centers, or compare their operations and structure to the broader market, can dual purpose the extensive data collection and review exercise for BEA reporting to assist with strategic planning. Whether a reorganization process is focusing upon asset sales, strategic partnership, cash flow improvement, research and development expenditures for future growth or other means of advancing a companies' financial well-being and overall value, the data collected for BEA reporting can be of significant utility to a strategic reorganization planning process.

For example, certain BEA reports require information that is specific to narrow business segments within an entity, including financial data and employee allocation to a particular business segment. Gathering the granular level of detail required for this type of BEA data collection presents a ripe opportunity to consider employee allocation, return on investment and potential for advantageous adjustment of narrow operational segments within a larger business structure. For the strategic restructuring professional, the dual purpose use of data collected for BEA reporting is not limited to the foregoing.

The BEA issues surveys to collect data on U.S. direct investment abroad and foreign direct investment into the U.S. on a quarterly, annual and quinquennial (5-year) basis. The quinquennial surveys, which gather a substantial amount of data on U.S. investments in foreign business enterprises and foreign investments in U.S. business enterprises, are the most comprehensive surveys issued by the BEA. In fact, the BEA estimated that its most recent quinquennial survey of foreign direct investment in the United States could take as many as 633 hours to complete, and an average of 96 hours per response. With this potential reporting burden, implementing efficiencies and thoughtful processes in information gathering, retention and reporting for BEA compliance is likely to provide long term value to U.S. clients as part of cost cutting measures.

The reporting period for the next quinquennial survey, which will require comprehensive reporting of information on U.S. direct investments abroad, is through fiscal year-end 2014. Completed submissions in response to this 5-year survey are due to the BEA on either *May 29, 2015* or *June 30, 2015* depending upon the particular reporting requirements for each U.S. person or business that held, during their 2014 fiscal year, a direct or indirect ownership interest in a foreign business enterprise. The BEA estimates that this required report on U.S. direct investment abroad will take the average U.S. Reporter 144 hours to complete. The number of hours projected by the BEA for completion of the current 5-year report on U.S. investment abroad is of course only an estimate and the actual time required to complete the report will vary significantly depending upon the complexity of the business organization, the number of related entities, and the familiarity and expertise of the professionals and staff inside and out of the U.S. Reporter that are assisting with satisfying the reporting requirements.

Restructuring professionals with engagements that include or conclude with a transaction, expansion or creation of a new business venture must also be aware that BEA regulatory compliance does not end with the aforementioned quarterly, annual and 5-year reports. Pursuant to recent BEA rulemaking activity, U.S. business enterprises that are newly established, expanded or acquired by foreign investment are also required to file a report with the BEA within 45 days of an acquisition, establishment of a new legal entity or the start of certain business expansions.

   ISSN 1044-7474