

Crossing the Border in 2017: How In-House Attorneys Can Keep Businesses Out of Hot Water With the Department of Commerce's Bureau of Economic Analysis

By Robert M. Schechter and Christopher F. Schultz

2017 Cross-Border Business Structures and Transactions

2017 began with a new U.S. president, the slow installation of a new cabinet, and an immediately heightened focus on the U.S. borders. That focus includes close scrutiny of who and how persons and businesses cross U.S. borders. To stay out of the crosshairs of the current administration and the Federal agencies that work at its direction, in-house counsel, finance and compliance groups are looking for guidance from those professionals who are staying attuned to the evolving regulatory requirements for cross-border business matters.

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For (i) U.S. businesses that are 10% or more foreign owned; (ii) U.S. persons and businesses that hold a 10% or greater ownership interest in a foreign business, and (iii) U.S. parties that transact with foreign parties for the sale or purchase of services or intellectual property related rights, staying out of hot water includes strict adherence to mandatory filing requirements imposed by the U.S. Department of Commerce ("DOC"). Specifically, the DOC's Bureau of Economic Analysis ("BEA") imposes both transaction-triggered and periodic mandatory reporting requirements upon the aforementioned parties, and their foreign affiliates, through the BEA's foreign direct investment and balance of trade divisions. For reporting purposes, cross-border business ownership is deemed to exist even when ownership is indirect, through intermediate entities. Furthermore, reporting obligations are often due to the BEA with or without notice and failure to file mandatory reports is subject to both civil and criminal penalties pursuant to Section 3105 of title 22 of the United States Code.

2017 BEA Reporting Highlights: Focus on U.S. Subsidiaries of Foreign Companies and Cross-Border Services Sector and IP Transactions

Current and upcoming BEA filing deadlines relating to 2017 transactions and data require particular attention for U.S. businesses that are 10% or more foreign owned and U.S. parties that have receipts from, or payments to, foreign parties for the sale or purchase of services or intellectual property related rights. BE-13 filings are presently required by foreign-owned U.S. businesses on a rolling basis. These reports are due within 45 days of a BE-13 report-triggering event, which includes business formations, expansions and acquisitions. For example, a foreign owned U.S. business that purchases new property, leases new space or acquires a product line may be required to report such transactions within 45 days of the occurrence. Also impacting U.S. businesses this year are BE-12 filing requirements, which will be due shortly after year-end. These "benchmark" reports, typically issued on a 5-year cycle, will require foreign-owned U.S. businesses and their foreign owners to submit detailed 2017 financial and operational data. Both BE-13 and BE-12 reports are due with or without individualized notice. The particular BE-13 and BE-12 form that a party is required to submit to the BEA requires a fact specific inquiry into the business structure, relevant financial data and nature of the business transactions of each party.

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Similarly, U.S. parties that have receipts from, or payments to, foreign parties for the sale or purchase of services or intellectual property related rights will be required to submit "benchmark" BE-120 reports shortly after the close of 2017. The BE-120 report applies across business sectors to a wide array of business transactions involving the cross-border sale or purchase of services and/or intellectual property related rights and is not dependent upon cross-border business ownership. The BE-120, like the BE-13, is due with or without individualized notice.

Other BEA Reporting Obligations

BEA reporting obligations include 18 different reports, many of which are comprised of multiple forms. Some forms are triggered by the ownership structure of a business, some by the nature and industry of a business, and others by the types of transactions that U.S. parties engage in with foreign counterparties. These reporting obligations vary considerably from client-to-client and year-to-year, which adds a significant challenge to determining, tracking and timely meeting BEA reporting requirements and deadlines. Following are the 18 different BEA reports and the matters to which they apply:

- BE-9—Quarterly Survey of Foreign Airline Operators’ Revenues and Expenses in the United States;
- BE-10—Benchmark Survey of U.S. Direct Investment Abroad;
- BE-11—Annual Survey of U.S. Direct Investment Abroad;
- BE-12—Benchmark Survey of Foreign Direct Investment in the United States;
- BE-13—Survey of New Foreign Direct Investment in the United States;
- BE-15—Annual Survey of Foreign Direct Investment in the United States;
- BE-29—Foreign Ocean Carriers’ Expenses in the United States (To Be Reported by Foreign Carriers’ U.S. Agents);
- BE-30—Ocean Freight Revenues and Foreign Expenses of United States Carriers;
- BE-37—U.S. Airline Operators’ Foreign Revenues and Expenses;
- BE-45—Quarterly Survey of Insurance Transactions by U.S. Insurance Companies with Foreign Persons;
- BE-120/125—Benchmark & Quarterly Survey of Transactions in Selected Services and Intellectual Property with Foreign Persons Survey Respondents;
- BE-140—Benchmark Survey of Insurance Transactions by U.S. Insurance Companies with Foreign Persons;
- BE-150—Quarterly Survey of Payment Card and Bank Card Transactions Related to International Travel;
- BE-180/185—Benchmark & Quarterly Survey of Financial Services Transactions Between U.S. Financial Services Providers and Foreign Persons;

- BE-577—Quarterly Survey of U.S. Direct Investment Abroad; and
- BE-605—Quarterly Survey of Foreign Direct Investment in the United States.

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It must also be noted that the BEA takes a broad view as to whom mandatory BEA reporting obligations apply. For example, businesses, which are regularly referred to as “business enterprises” by the BEA, are defined by the BEA to mean “any organization, association, branch, or venture which exists for profit-making purposes or to otherwise secure economic advantage, and any ownership of any real estate.” Thus, a parent or subsidiary in a multinational business structure as well as a foreign owned U.S. apartment (or U.S. owned foreign apartment) that is not held exclusively for personal use and is at times rented would all qualify as “business enterprises” with BEA reporting obligations under the applicable regulations. Similarly, references to “persons” by the BEA 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).

As a result, parties involved in cross-border business structures, transactions and real estate holdings often fall within BEA regulatory obligations notwithstanding their size or complexity.

Why the Reporting Burden?

As a principal agency of the U.S. Federal Statistical System, the BEA generates and collects data that has a direct influence on decision-making by government officials, the business community, and individuals. The BEA’s economic statistics, with extensive data on the U.S. economy including gross domestic product (GDP) figures, are relied upon for critical decisions affecting

monetary policy, tax and budget projections, and business investment plans. The BEA achieves its regulatory mission of tracking international commerce and publishing leading economic indicators, including GDP, in part, by imposing the aforementioned reporting requirements on parties engaged in cross-border business structures and transactions. The BEA has been a reporting agency in existence for over a century, evolving through various predecessor agencies, beginning as the Division of Commerce and Navigation (1820-1866) and the Bureau of Statistics (1866-1903) within the Department of Treasury and Department of State, and ultimately becoming what it is today as an agency of the Department of Commerce, retitled the BEA in 1972.

Takeaways

Whether intentionally in the international business arena or not, in-house attorneys across numerous practice areas are increasingly stepping into business structures and transactions that involve interests beyond the borders of their corporate client's home country. Businesses that involve even minor cross-border investments or transactions, such as a minority stock or real estate interest or sale or purchase of services or IP rights, may require special consideration and counseling to avoid harsh penalties for failure to satisfy regulatory reporting

requirements. With a new administration and renewed focus on cross-border business ownership and transactions, it is in the best interest of businesses small and large, and their counsel, to be proactive in assessing their current and upcoming BEA filing obligations.

In his role as Vice President of Porzio Compliance Services, Robert M. Schechter guides individual and business clients on the implementation of systematic data collection, analyses and retention policies in order to ensure U.S. Bureau of Economic Analysis (BEA) compliance. Additionally, as a member of Porzio, Bromberg & Newman, P.C.'s Financial Restructuring and Bankruptcy Department, Mr. Schechter advises stakeholders in business finance, corporate compliance and restructuring matters.

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