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Recommended Citation
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The Foreign Investor in the United States: Disclosure, Taxation and Visa Laws

The United States has traditionally maintained an "open door" policy with respect to foreign investment in American enterprise and real property including agricultural land. This policy springs from the dual premise that the investment process works best in the absence of government intervention, and that foreign investment decisions should be accorded neither preferential nor discriminatory treatment. Underlying the policy is a pragmatic assessment of the national interest: were the United States to restrain inward foreign investment, foreign states might restrict American investment within their jurisdictions. The stakes are indeed high. In 1983, the U.S. direct investment position abroad earned $20,758m., and the

1. (m. = million). The figure comprises interest, dividends, earnings and retained earnings. On December 31, 1983, the book value of the U.S. position abroad was $226,117m. generating 1983 income per industry as follows: petroleum $9,172m.; manufacturing $5,789m.; all other $5,797m. Income for the first quarter of 1984 was $8,028m. distributed by industry as follows: petroleum $3,188m.; manufacturing $2,988m.; all other, $1,852m. At year-end 1983, U.S.

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1. To protect vital national interests, the United States limits foreign participation in banking, communications, energy, natural resources, public contracts, national defense, and transportation. See 12 U.S.C. § 72 (directors of national banks); id. § 619 (controlling interest in Edge Act Corporations); 47 U.S.C. §§ 310(a), 222(d), 303(1) (licensing of radio or television stations and instrumentalities for the transmission of communications); id. § 734(d) (ownership of Comsat stock); 42 U.S.C. §§ 2133, 2134 (licensing of atomic energy utilization or production facilities); 30 U.S.C. §§ 22, 24, 71, 181, 185, 352, 1015 and 43 U.S.C. §§ 315(b), 329, 682(c) (grazing rights, entries, rights of way, leases, patents, profits, purchases and dispositions involving public lands); 16 U.S.C. § 1821 (fishing); 41 U.S.C. § 10(a)-(d) (government procurement); 49 U.S.C. § 1378(a) (aeronautics); id. § 1371(a) (domestic air navigation and commerce); id. § 1401(b) (registration of aircraft); 46 U.S.C. § 11 (registry of marine vessels); id. §§ 802, 883, 888 (coastal and fresh water shipping and shipping between points in the U.S. or its territories); 19 U.S.C. § 1641 (customs brokering); Exec. Order Nos. 10450, 10865, 11652: Dep't of Defense 5220.22-R, Section II, Part 2—Industrial Security Program (national security clearances).

2. The Foreign Investor in the United States: Disclosure, Taxation and Visa Laws

The United States has traditionally maintained an "open door" policy with respect to foreign investment in American enterprise and real property including agricultural land. This policy springs from the dual premise that the investment process works best in the absence of government intervention, and that foreign investment decisions should be accorded neither preferential nor discriminatory treatment. Underlying the policy is a pragmatic assessment of the national interest: were the United States to restrain inward foreign investment, foreign states might restrict American investment within their jurisdictions. The stakes are indeed high. In 1983, the U.S. direct investment position abroad earned $20,758m., and the
book value of 1983 periodic foreign direct investment in the United States\(^3\) was $11,594m. for an accumulated total, as of calendar year-end 1983, of $133,497m.\(^4\) Moreover, as of year-end 1983, privately-held U.S. portfolio investment in foreign direct investment in the United States totalled $84,812m. and inward foreign portfolio investment in U.S. securities, other than U.S. Treasury securities, totalled $114,694m.\(^5\)

Foreign investment in the United States is today subject to a variety of laws and regulations. This article abstracts the current disclosure law gov-

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3. "Foreign direct investment in the United States" means the direct or indirect ownership or control—by a nonresident alien individual or foreign government; foreign corporation, organization, association, estate, trust, partnership, branch, or "associated group" (see infra note 8)—of 10 percent or more of the voting securities of a business enterprise incorporated within the United States or an equivalent interest in an unincorporated U.S. business enterprise or venture which exists for profit-making purposes or to otherwise secure economic advantage, including any ownership of real property located within the United States. 22 U.S.C. \(\S\) 3102(3), (5), (6), (10); 15 C.F.R. \(\S\) 806.15(a)(1). See 15 C.F.R. \(\S\) 806.7(c), (e), (f), (j), (l), (m). Limited partnership interests are excluded from the definition. 15 C.F.R. \(\S\) 806.12. “United States,” when used in a geographic sense, means the several states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States. 22 U.S.C. \(\S\) 3102(1), 7 U.S.C. \(\S\) 3508(6); see 15 C.F.R. \(\S\) 806.7(a), 7 C.F.R. \(\S\) 781.2(k).

4. \textit{Survey of Current Business, supra} note 2. In 1982 (most recent figures available) foreign direct investors acquired or established U.S. businesses through investment outlays totalling $8,580m. distributed per industry as follows: $2,325m. real estate; $1,932m. manufacturing; $1,374m. banking, finance and insurance; $1,019m. wholesale and retail trade; $906m. mining and petroleum; $194m. agriculture and forestry; $756m. other. \textit{Survey of Current Business} (BEA), vol. 63, no. 6 (June 1983). At year-end 1982, the amount of the foreign direct investment position in the U.S. was $101,844m. distributed as follows: $32,186m. manufacturing; $20,630m. wholesale and retail trade; $20,488m. petroleum; $14,844m. finance and insurance; $13,696m. other. \textit{id.}, vol. 63, no. 8 (Aug. 1983). The distribution by country of equitable ownership was: $23,334m. United Kingdom; $21,446m. Netherlands; $9,823m. Canada; $8,742m. Japan; $8,181m. Fed. Rep. Germany; $4,810m. Switzerland; $4,671m. France; $2,424m. Belgium and Luxembourg; $1,481m. Sweden; $949m. Italy; $16,003m. all other. \textit{id.} The position grew to its current level from $90,421m. in 1981; $68,351m. in 1980; $54,426m. in 1979; $42,471m. in 1978. \textit{id.}

5. \textit{id.}, vol. 64, no. 6 (June 1984). ("Portfolio investment" means international investment which is not direct investment. 22 U.S.C. \(\S\) 3102(11); see 15 C.F.R. \(\S\) 806.7(k), 31 C.F.R. \(\S\) 129.2(i) (1984)). The inward foreign investment position in U.S. securities other than U.S. Treasury securities grew from $93,552m. in 1982. The inward foreign investment position in U.S. Treasury securities totalled $33,941m. at year-end 1983, up from $25,812m. in 1982. At year-end 1983, all foreign assets in the United States totalled $781,483m., up from $668,596m. at year-end 1982. \textit{Survey of Current Business, supra}.  

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erning inward foreign direct investment, inward foreign portfolio investment and foreign investment in agricultural land. It further profiles the new rules concerning federal taxation of foreign income earners in the United States, and reviews the U.S. tax treaty exemption provisions which eclipsed in 1984. This is followed by a note on recent business visa matters.

I. Disclosure and Reporting Requirements

The duty to disclose inward foreign direct investment extends to counsel who manage or assist the transfer of such investment interests, and to directors and officers of corporations in which foreign direct investment positions are held. For inward foreign portfolio investment, the duty to report extends to U.S. persons holding securities of U.S. issuers on behalf of foreign persons. Domestic corporations having foreign shareholders or a principal place of business outside the United States are obliged to reveal foreign ownership of U.S. agricultural land. The United States requires the filing of detailed periodic and transactional reports as to acquisitions or establishments of inward foreign direct investment interests, in part, to compute and analyze the taxation of U.S. entities in which a foreign direct investment position is held.6

A. INTERNATIONAL INVESTMENT SURVEY ACT7

1. Transactional Reporting

This law requires that extensive informational disclosures be made whenever a foreign person8 creates, buys or sells a 10 percent or greater voting interest in a U.S. business enterprise or in U.S. real estate. U.S. law

6. The power to require disclosure derives from the commerce clause of the federal Constitution and from the Constitutional provisions relating to the maintenance of national defense and the conduct of foreign policy. The authority to use reported information “for computing and analyzing . . . the taxes . . . of U.S. affiliates [U.S. entities hosting foreign direct investment]” is granted by 22 U.S.C. §§ 3101(b), 3103(a)(1), 3104(c). See infra note 45.


8. “Foreign person” means a nonresident alien individual; foreign government or instrumentality thereof including a government sponsored agency; corporation, association, partnership, branch, estate, trust, or other organization (whether or not organized under the laws of any State) which is resident outside the United States or is subject to the jurisdiction of a country other than the United States; and any “associated group” of any two or more of the foregoing persons “who, by the appearance of their actions, by agreement, or by an understanding, exercise their voting privileges in a concerted manner to influence the management of a business enterprise.” 22 U.S.C. § 3102(2), (3), (5), (6); 15 C.F.R. § 806.7(1); see 15 C.F.R. § 806.7(b), (c), (e), (m). The definition would seem to embrace U.S. corporations and enterprises having a principal place of business outside the United States or having property or conducting operations in countries where the law of the sovereign permits in personam jurisdiction to attach on the basis of property located within, or operations conducted within, the jurisdiction.

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firms, for example, acting as managers of tender offers fall squarely within the category of persons required to file transactional reports.\textsuperscript{9} Significantly, where a 10 percent voting interest in a U.S. business enterprise is acquired by a U.S. affiliate, counsel assisting the purchase or sale must file even though the foreign parent may not indirectly acquire a 10 percent equity interest in connection with the transaction.\textsuperscript{10}

The disclosures mandated\textsuperscript{11} by the law, which require reporting on Forms BE-13 or BE-14 include: the legal interest established or transferred (when an undivided interest is involved the entire interest must be reported);\textsuperscript{12} the identity\textsuperscript{13} of the transferor, the transferee, and the beneficial owner of the interest;\textsuperscript{14} the enterprise or property in which the interest is held (the "U.S. affiliate")\textsuperscript{15} and the "foreign parent" of the U.S. affiliate;\textsuperscript{16} the management and financial structure of the U.S. affiliate and the composition of its debts, assets and income; and the extent of transnational trade in goods or services conducted or to be conducted by the U.S. affiliate.\textsuperscript{17} The following parties to a transaction must each file a separate report.\textsuperscript{18} Report Form BE-13 must be filed by: an enterprise that becomes a U.S. affiliate, including

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\textsuperscript{9} See 15 C.F.R. § 806.3(b) ("reports . . . required from . . . U.S. persons which assist or intervene in the purchase or sale of direct investment interests, such as real estate brokers and brokerage houses acting as managers of tender offers").

\textsuperscript{10} See infra text accompanying note 24.

\textsuperscript{11} See 22 U.S.C. § 3104(b); 15 C.F.R. §§ 806.3(b), 806.4. Reports must be filed within 45 days following the conclusion of the transaction.

\textsuperscript{12} 16 C.F.R. § 806.15(j)(3)(ii)(b), (c), (j)(4)(ii)(b).

\textsuperscript{13} "Identification," "identity" or "identify" herein means disclosure of the legal name, address, nature, citizenship and principal place of business. See 22 U.S.C. § 3104, 7 U.S.C. § 3501(a); 15 C.F.R. § 806.15, 7 C.F.R. § 781.3(c), (f), (g).

\textsuperscript{14} 15 C.F.R. § 806.15(b); but see id. § 806.11(a) (for reporting purposes, estate, not beneficiary, is deemed owner). id. § 806.11(b) (trust settlor is deemed owner where there is or may be a reversion; moreover, a corporation or organization which creates a trust designating its shareholders or members as beneficiaries "shall be deemed . . . owner of the investments of the trust, or succeeding trusts where the presently existing trust has evolved out of a prior trust"); id. § 806.15(a)(6) ("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"); see also id. § 806.12 (determination of existence of foreign direct investment in a U.S. partnership "shall be based on the country of residence of, and the percentage of control exercised by, the general partner(s)"); see infra text accompanying notes 32-34.

\textsuperscript{15} 15 C.F.R. § 806.15(b). If a business enterprise is in the form of real property not identifiable by name, reports are required to be filed by and in the name of the beneficial owner, or in the name of the beneficial owner by the intermediary of the beneficial owner. id. § 806.6. "U.S. affiliate" is defined at id. § 806.15(a)(2); see 22 U.S.C. § 3102(8).

\textsuperscript{16} "Foreign parent" is defined at 15 C.F.R. § 806.15(a)(3); see 22 U.S.C. § 3102(7).

\textsuperscript{17} At year-end 1980 (most recent figures available), U.S. affiliates owned $292,033m. of assets including $127,837m. of capital assets. U.S.-affiliate trade activity in 1980 included: $412,705m. sales; $75,803m. merchandise imports (F.A.S.); $52,199m. merchandise exports (F.A.S.). Foreign Direct Investment in the United States (1981 BEA Staff Report with respect to 1980 BE-12 Benchmark Survey).

\textsuperscript{18} 15 C.F.R. § 806.15(j)(3)(ii).
an enterprise which results from the acquisition by a foreign person of a business segment or operating unit of a U.S. business enterprise which is then organized as a separate legal entity; an existing U.S. affiliate that acquires an interest in another U.S. enterprise or real property to such extent that a foreign parent indirectly acquires a 10 percent voting interest therein; and a U.S. affiliate that acquires a U.S. enterprise or business segment or operating unit thereof which the affiliate merges into its own operations rather than continues as a separate legal entity. Report Form BE-14 must be filed by each U.S. person who enters into a joint venture as to the formation of a U.S. affiliate or as to the creation of a holding in U.S. real property where foreign direct investment is present, and by each "U.S. person—including, but not limited to, an intermediary, a real estate broker, business broker, and a brokerage house—who assists or intervenes in the sale to, or purchase by, a foreign person or a U.S. affiliate of a foreign person, of a 10 percent or more voting interest in a U.S. business enterprise, including real estate."

Several exclusions and exemptions apply. Residential real estate held exclusively for personal use and not for profitmaking purposes is not subject to the reporting requirements. Residential real estate owned by a corporation whose sole purpose is to hold the real estate for the personal use of its shareholders need not be reported, nor an individual owner's primary residence which the owner leases while he is outside the United States but which he intends to reoccupy. If the capitalization (including loans from U.S. joint venturers) of an affiliate which is to be established, or if the total asset value (including all assets, not just the foreign parent's or existing U.S. affiliate's prospective share) of an enterprise which is to be acquired, is $1m. or less at the time of the establishment or acquisition, then neither the resulting U.S. affiliate nor any U.S. person intervening or assisting in the establishment or acquisition need report, provided the acquired or established enterprise, as consolidated, does not own 200 or more acres of U.S.

20. Id.
21. Id. § 806.15(j)(3)(ii).
22. Id. § 806.15(j)(4)(ii). However, "[a] U.S. person is required to report only when such foreign involvement is known; it is not incumbent upon the U.S. person to ascertain the foreign status of a person involved in an acquisition unless the U.S. person has reason to believe the acquiring party may be a foreign person." Id.
23. "Intermediary" means agent, nominee, manager, custodian, trust, or any person acting in a similar capacity. Id. § 806.7(n).
24. Id. § 806.15(j)(4)(i); see supra note 15. Form BE-14 is not required from U.S. persons who file Form BE-13. 15 C.F.R. § 806.15(j)(4)(ii).
26. Id.
27. Id.
28. Generally, a U.S. affiliate must file on a fully consolidated basis, including in the consolidation all other U.S. affiliates in which the reporting affiliate directly or indirectly owns a
land.\textsuperscript{29} Also, an existing U.S. affiliate need not report merger acquisitions where the purchase cost is $1m. or less, the purchase does not involve acquisition of 200 acres in the aggregate, and the acquired enterprise or business segment or operating unit is merged into the operations of the acquiring affiliate.\textsuperscript{30} An exemption claim, however, must be filed in such instances to validate the exemption.\textsuperscript{31}

A transaction not falling within one of the exemptions, subjects all foreign persons in the ownership chain to disclosure, back to the "ultimate beneficial-owner," \textit{i.e.}, the beneficial owner that is not more than 50 percent owned or controlled by a foreign person.\textsuperscript{32} However, if a company in the foreign ownership chain has publicly traded bearer shares, identification of the ultimate beneficial owner may stop with identification of the company whose capital stock is represented by such bearer shares.\textsuperscript{33} If the ultimate beneficial owner is an individual, only the citizenship of the individual need be disclosed.\textsuperscript{34}

2. \textit{Survey Reporting}

In addition to transactional reports, the International Investment Survey Act mandates that an annual survey Form BE-15,\textsuperscript{35} and a five-year survey Form BE-12,\textsuperscript{36} be filed as required even if the foreign direct investment interest is established, transferred, liquidated or inactivated during the reporting period.\textsuperscript{37} The reporting liability of an intermediary managing a foreign direct investment interest is worth noting:

\begin{itemize}
\item \textsuperscript{29} 50 percent or greater voting interest. 15 C.F.R. § 806.15(e). Generally accepted U.S. accounting principles should be followed. \textit{Id.} § 806.13.
\item \textsuperscript{29} \textit{Id.} § 806.15(j)(3)(ii)(c), (j)(4)(ii)(b). A report must be filed regardless of the capitalization or asset valuation if the resulting U.S. affiliate as consolidated owns 200 acres in the aggregate. \textit{Id.}
\item \textsuperscript{30} 15 C.F.R. § 806.15(j)(3)(ii)(c). A report must be filed regardless of the purchase cost if 200 acres in the aggregate are acquired. \textit{Id.}
\item \textsuperscript{31} \textit{Id.}; see \textit{infra} text accompanying notes 41 and 42.
\item \textsuperscript{32} 15 C.F.R. § 806.15(a)(6). The International Investment Division of the BEA takes the position that an affiliate is able to determine the citizenship of its parents as well as of investors of its parents, over as many layers of ownership as may be necessary to comply with the Act. The requirement to identify the ultimate beneficial owner rests with the U.S. affiliate. \textit{Id.} § 806.15(c). Compliance is achieved through the penalty process. \textit{See infra} text accompanying notes 52, 54, 55.
\item \textsuperscript{33} 15 C.F.R. § 806.15(c).
\item \textsuperscript{34} \textit{Id.} § 806.15(b).
\item \textsuperscript{35} \textit{Id.} § 806.15(i).
\item \textsuperscript{36} 22 U.S.C. § 3103(b); see 15 C.F.R. § 806.15(i). The next benchmark survey is to be conducted in 1988 with respect to year-end 1977. New regulations are published for each benchmark survey. As to regulations for the last 5-year survey, \textit{see} 15 C.F.R. § 806.17. Note that a recent amendment to the Act postponed, from 1986 to 1988, the next 5-year survey in order that the survey (covering affiliates as consolidated at the enterprise level) coincide with the 1988 Economic Census to be conducted by the U.S. Bureau of the Census with respect to unconsolidated affiliates, \textit{i.e.} affiliates at the establishment level.
\item \textsuperscript{37} 15 C.F.R. § 806.15(f).}

\end{itemize}
"If a particular foreign direct investment . . . is held, exercised, administered, or managed by a U.S. intermediary for the foreign beneficial owner, such intermediary shall be responsible for reporting the required information for, and in the name of, the U.S. affiliate, and shall report on behalf of the U.S. affiliate or shall instruct the U.S. affiliate to submit the required information. Upon so instructing the U.S. affiliate, the intermediary shall be released from further liability to report provided it has informed this Bureau [Bureau of Economic Analysis, Department of Commerce] of the date such instructions were given and the name and address of the U.S. affiliate, and has supplied the U.S. affiliate with any information in the possession of, or which can be secured by, the intermediary that is necessary to permit the U.S. affiliate to complete the required reports. When acting in the capacity of an intermediary, the accounts or transactions of the U.S. intermediary with a foreign beneficial owner shall be considered as accounts or transactions of the U.S. affiliate with the foreign beneficial owner. To the extent such transactions or accounts are unavailable to the U.S. affiliate, they may be required to be reported by the intermediary."  

38. Id. § 806.11(c)(3). For exposure to civil and criminal penalties for noncompliance, see infra note 55 and text accompanying notes 52–55. As to inward foreign portfolio investment, any U.S. person—including nominees, agents, trustees, other fiduciaries, banks, brokers, or other intermediaries—who, on behalf of a foreign person, holds title to voting or nonvoting securities or indentures of a "U.S. issuer," see 31 C.F.R. § 129.2(b), or who, on behalf of a foreign person, acts as a custodian for bearer securities of a U.S. issuer, must make 1984 survey disclosures unless, as of fiscal year-end 1984, the aggregate value of all U.S.-issue securities held for all foreign persons by the "U.S. holder of record," see id. § 129(i), was less than $10m. 31 C.F.R. §§ 129.4, 129.5, 129.8(a), 129.11(a), (c) (1984). Form FPI-2 is used. The due date for filing 1984 survey reports is March 31, 1985. (The Foreign Portfolio Investment Survey Project of the Treasury Department conducted its first 5-year survey in 1980; interim data on securities transactions is supplemented monthly through the Department's "Form S" international capital reporting system applicable to dealers in securities). ("Securities" include publicly and privately traded common and preferred stocks or investment company shares including rights, warrants and scrip; bonds, debentures, equipment trust certificates; long-term corporate, municipal, state and federal debt instruments; U.S. Treasury securities and principal or interest coupons thereon; and shares in investment trusts or certificates or receipts representing underlying investment in equity securities or debt principal, whether or not freely alienable. 31 C.F.R. § 129.2(g). Money market funds fall within the definition).

To track U.S.-issue securities held directly by foreign persons rather than through a U.S. holder of record, the 1984 regulations require a U.S. issuer to report if its consolidated assets total $1 billion (irrespective of evidence of foreign investment in its securities). Id. § 129.10(a)(1) (1984). A combined report may be submitted by a parent corporation for its affiliated or controlled corporations, or by a broker, bank or institution with respect to U.S. holders affiliated with or under the common control of such broker, bank or institution. Id. §§ 129.10(h), 129.11(b) (1984). The 1984 regulations raised to $10m. the exemption level for U.S. holders of record. (The 1979 survey exemption level was $50,000.) The U.S. holder exemption level does not apply to U.S. holders under the common management or control of a broker, bank or other institution if the aggregate value of securities held on behalf of foreign persons under such common parent exceed $10m. Id. § 129.11(c) (1984). The recordkeeping requirements, the sanctions with respect to failures to supply required information, and the confidentiality provisions with respect to reported data, are the same as those for inward foreign direct investment. See 31 C.F.R. §§ 129.3; 129.4, 129.6, 129.7 (1984); 15 C.F.R. 806.2; see also infra notes 42, 49 and text accompanying notes 44, 46, 48–50, 52, 54–55.

The 1979 survey revealed $47,830m. (not adjusted for unrealized gains or losses) of accumulated foreign portfolio investment in U.S. equity securities as of December 31, 1978. See Foreign Portfolio Investment Survey Project, U.S. Treasury Dep't, "Inward Foreign Portfolio Investment: 1979 Survey" (unpublished staff report).

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Consolidated U.S. affiliates are exempted from filing an annual report if total assets, annual sales or gross operating revenues excluding sales taxes, and fiscal year income after federal taxation, are each between positive and negative $10m. A quarterly Report Form BE-605 is required for each U.S. affiliate exceeding an exemption level of $10m. A person claiming an exemption from filing a transactional or a periodic report must furnish a certification as to the levels of the items on which the exemption is based. Journals or other books of original entry, minute books, stock transfer records, or financial statements may be required to be presented in connection with the exemption certification. Real estate holdings must be aggregated for the purpose of applying the exemption level tests.

3. Confidentiality

The Act expressly restricts the use of reported information to "analytical or statistical purposes with the United States government," including "computing and analyzing the taxes of . . . U.S. affiliates," and to enforcement proceedings brought pursuant to the Act. Access to reported information is limited to the United States government, including computing and analyzing the taxes of U.S. affiliates, and to enforcement proceedings brought pursuant to the Act.

39. 15 C.F.R. § 806.15(i) (1984), 49 Fed. Reg. 3174. The 1984 regulations raised the exemption level from $5m. to $10m. and dropped a requirement that to qualify for exemption the consolidated affiliates, at no time during the reporting period, owned 1,000 acres in the aggregate of U.S. land. 49 Fed. Reg. 3173. The exemption levels for the next 5-year survey may not resemble those for the last such survey ($1m./200 acres). See supra note 36.

40. Id. § 807.15(b)(1) (1984), 49 Fed. Reg. 3174. The 1984 regulations raised the exemption level to $10m.

41. Id. § 806.15(g). Annual Survey exemption claimants need file the exemption claim and related documents only if contacted by the International Investment Division. 49 Fed. Reg. 3173.

42. 22 U.S.C. § 3104(b) ("persons subject to the jurisdiction of the United States shall maintain . . . journals or other books of original entry, minute books, stock transfer records, lists of shareholders, financial statements, [and any information] which is essential for carrying out the surveys . . . "); see 15 C.F.R. § 806.2.

43. 15 C.F.R. § 806.15(d).

44. 22 U.S.C. § 3104(c)1; see 15 C.F.R. § 806.5(d).

45. 22 U.S.C. § 3103(a)(1); see 15 C.F.R. § 806.5(b). Importantly, data on individual firms or other persons reporting under the Act is not available to the Internal Revenue Service except as such information is published in statistical reports by the BEA. The position of the International Investment Division is that a request for information must be considered as against the purpose of the requesting agency. Requests for nonaggregated data are denied where the general purpose of the requesting agency is anything other than statistical analysis. A "reasonable use" test is applied to requests from agencies whose purpose is purely statistical. A recent request for information by the Commission on Foreign Investment in the United States, an executive agency, was denied on the ground that a purpose of the Commission was to examine the operations of individual enterprises to assay the desirability of restrictive action as to foreign economic participation in selected industries. To date, most interagency exchange has occurred between the Division and the Foreign Portfolio Investment Survey Project of the Treasury Department for the purpose of separating and recategorizing raw data incorrectly submitted. The Division has on a limited basis provided information to the International Trade Administration of the Commerce Department. A tentative data exchange program has been established with the Bureau of the Census but as yet no data has been transferred.

46. 22 U.S.C. § 3104(c)(2).
information is restricted to officials or employees (including consultants and contractors and their employees\(^{47}\)) of federal agencies designated by the President to perform functions under the Act.\(^{48}\) No such person may disclose reported information in its particulars without the prior written consent of the person who provided the information.\(^{49}\) Any such person who willfully violates the confidentiality provisions of the Act "shall, upon conviction, be fined not more than $10,000 in addition to any other penalty imposed by law."\(^{50}\) Thus, persons not performing functions under the Act, such as policy bodies,\(^{51}\) industry representatives, foreign governments or other interested persons, are meant to have access to reported information only as such information is aggregated in government publications.

4. **Penalties for Non-compliance**

A civil penalty not exceeding $10,000 may be imposed on any person required to file a periodic or a transactional report who "... fails to furnish any information required ... or to comply with any rule, regulation, order or instruction,"\(^{52}\) including the failure to file Form BE-607 if the industrial classification of a U.S. affiliate changes.\(^{53}\) For willful failure to submit required information or willful violation of any rule, regulation, order, or instruction, the affiliate, parent or intermediary "upon conviction, shall be fined not more than $10,000 and, if an individual, may be imprisoned for not more than one year, or both, and any officer, director, employee, or agent of any corporation who knowingly participates in such violation, upon convict-

\(^{47}\) Not-in-house personnel are routinely hired only to perform raw data reduction services.

\(^{48}\) 22 U.S.C. § 3104; see 15 C.F.R. § 806.5(a). The Foreign Portfolio Investment Survey Project of the Treasury Department is so designated.

\(^{49}\) 22 U.S.C. § 3104(c) ("No person can compel the submission or disclosure of any report or constituent part thereof ... or any copy or constituent part thereof, without the prior written consent of the person who maintained or furnished such report ... and without prior written consent of the customer, where the person who maintained or furnished such report included information identifiable as being derived from the records of such customer"). "No official or employee designated to perform functions under this Act may publish or make available to any other person any information collected ... in a manner that the person who furnished the information can be specifically identified." \(\text{id. See 15 C.F.R. § 806.5 ("Information collected ... is confidential")}; id. § 806.5(f) ("Reports and copies of reports ... are confidential and their submission or disclosure shall not be compelled by any person without the prior written permission of the person filing the report and the customer of such person where the information supplied is identifiable as being derived from the records of such customer"); id. § 806.5(e) ("No official or employee ... shall publish or make available to any other person any information collected under the Act in such a manner that the person to whom the information relates can be specifically identified"). The wording of the Act and the implementing regulations are meant to protect reported information from disclosure under the Freedom of Information Act. See American Jewish Congress v. Kreps, 564 F.2d 624 (D.C. Cir. 1978).

\(^{50}\) 22 U.S.C. § 3104(d).

\(^{51}\) See supra note 45.

\(^{52}\) 22 U.S.C. § 3105(a); see 15 C.F.R. § 806.6(a); see also infra note 55.

\(^{53}\) See 15 C.F.R. § 806.15(j)(1)(ii).
tion, may be punished by a like fine, imprisonment, or both." Additional-
ly, "an appropriate district court of the United States, or the appropriate
United States court of any territory . . . may enter a restraining order or a
permanent or temporary injunction commanding such person to furnish
such information or to comply with such rule, regulation, order, or
instruction."55

B. AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT

The stated purpose of this Act is to gather data to "determine the effects
of foreign persons acquiring, transferring, and holding agricultural land," particularly the effects of such acquisitions, transfers, and holdings on
family farms and rural communities."59 The Act requires that foreign per-

54. 22 U.S.C. § 3105(c); see 15 C.F.R. § 806.6(b); see also infra note 55.
55. 22 U.S.C. § 3105(b); see 15 C.F.R. § 806.6(a). No action has ever been filed by the Justice
Department pursuant to the Act. In 1983 the International Investment Division of the BEA
referred 3 cases to the Justice Department and compliance was achieved before legal action
commenced. The Division reports that most recalcitrants comply immediately prior to referral.
57. "Foreign person" means any (1) individual who is not a citizen of the United States, the
Northern Mariana Islands, or the Trust Territory of the Pacific Islands, or who is not lawfully a
permanent resident of the United States; (2) foreign government; (3) corporation, company,
joint stock company, partnership, firm, association, society, trust, estate or other legal entity
(a) which is created or organized under the laws of a jurisdiction other than the United States,
or (b) which has its principal place of business located outside the United States as defined supra
note 3; or (c) which is created or organized within the United States and in which any person
described in subsections (1), (2), (3)(a) or (3)(b) above holds 10 percent ownership, or in which
any "coalition of such persons, individuals, or governments . . . acting in concert" holds a 10
percent ownership interest "even though no single person, individual, or government holds an
interest of 10 percent," or in which any combination of "foreign persons" holds ownership of 50
percent in the aggregate. 7 U.S.C. §§ 3508(2)-(4); 7 C.F.R. § 781.2(e)-(h), (k), (l) (1984), 49
Fed. Reg. 35,074-075. The term "combination" does not require a coalition intending to
achieve a common objective. Id. § 781.2(g)(4)(ii)(D) (1984), 49 Fed. Reg. 35,074. As the
regulations make clear, if no single foreign owner or coalition of foreign owners acting in
concert holds directly or indirectly a 10 percent equity interest, then foreign persons do not hold
"significant interest or substantial control" unless they hold "an interest of 50 percent in the

The definition encompasses U.S. corporations having foreign shareholders. Notably, a U.S.
entity in an ownership chain of U.S. entities each having a domestic principal place of business
comes within the definition if, between such entity and the entity in which a foreign person or
persons hold "significant interest or substantial control," each link in the chain is 10 percent
owned by the immediately preceding intervening link. The 1984 regulations, which raised from
a flat 5 percent the foreign ownership interest triggering the duty to report, places beyond the
reach of the Act most publicly traded U.S. entities now reporting.
58. "Agricultural land" is land currently used (or if currently idle, within the last 5 years most
recently used for) farming, ranching, forestry, or timber production, except a landholding not
exceeding 10 acres in the aggregate with respect to which the gross sales of natural products
therefrom do not exceed $1,000. 7 C.F.R. § 781.2(b) (1984), 49 Fed. Reg. 35,074.
59. 7 U.S.C. § 3504(a)(1); 7 C.F.R. § 781.1. The Act was designed to monitor foreign
penetration of American agriculture and foreign economic competition in the U.S. agricultural
products market. Farm product raw material exports in 1981 by U.S. affiliates totalled

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sons acquiring or transferring any interest, other than a security interest in agricultural land, report such acquisitions or transfers within 90 days following the conclusion of the transaction. The disclosures mandated include: the legal description and acreage of the subject land; the date of transfer and the fair market value of the land at the time of transfer; the price paid or consideration given at transfer and the value of other consideration if any to be paid after the time of transfer; the agricultural use contemplated by the transferee; the legal interest transferred; the identification of transferee and transferee; a characterization of the economic relationship between transferee and transferee; and the name, address, and relationship of the representative if any completing the report form. A non-governmental

$19,196m. on sales of $36,670. Foreign Direct Investment in the United States, supra note 17. In 1981, inward foreign direct investment in newly acquired or established U.S. affiliates engaged in agriculture or forestry totalled $404m.; in 1982, $194m. Survey of Current Business (BEA) vol. 63, no. 6 (June 1983). On December 31, 1983, 13,739,602 acres (approximately 1%) of privately held U.S. agricultural land, or just over 0.6% of the land area of the United States—was owned by "foreign persons" with such ownership concentrated in large corporate-owned tracts. Agricultural land use by foreign persons in 1983: 57% forest, 24% pasture, 14% cropland. Surface area owned by: corporations 83%, partnerships 9%, individuals 7%, other foreign persons 1%. Percent of all privately held agricultural land owned by foreign persons: Me. 14.3; Ga. 3.3; S.C. 3.2; Hawaii 3; Ariz. 2.6; N.H 2.4; Utah 2.2; Ala., Fla., 2; Cal., Vt., 1.9; Wash. 1.7; N.Y., Or., Tenn., 1.6; Colo., Miss., N.M., 1.3; Idaho 1.1; N.C. 1; all others, less than 1% each. Value of foreign-owned land holdings (1983): Cal. $2.175m., Tex. $1,568m., Fla. $1,164m., Wash. $1,107m., all others less than $1,000m. each. Attorneys act as owner's representatives as to (thousand acres): 156 of the 332 acquired by foreign persons in 1983; 2,560 of the accumulated total. Value of 1983 acquisitions: $155m. excluding interests of U.S. corporations with foreign shareholders, $379m. including interests of such corporations. Accumulated value: $5,076m. excluding; $13,740m. including. Country of foreign owner, directly or through a U.S. corporation: Canada 31%, United Kingdom 14%, Hong Kong 13.6%, Fed. Rep. Germany 9%, Netherlands Antilles 5%, Netherlands 3.5%, Switzerland 3.3%, France 2.9%, Mexico 1.7%, Panama 1.6%, Liechtenstein 1.2%, Japan 1%. Natural Resource Economics Division, Economic Research Service, U.S. Dep’t of Agriculture, Foreign Ownership of U.S. Agricultural Land Through December 31, 1983 (Staff Report No. AGES840328, April 1984) (DeBraal, Majchrowicz).

60. "Interest" encompasses proprietary interests under contracts of sale and options to buy, noncontingent future interests which become possessory upon the termination of the present possessory estate, leaseholds of 10 years or more, interests solely in mineral rights, and other ownership interests except surface or subsurface easements, profits, and rights of way used for a purpose unrelated to agricultural production. 7 C.F.R. § 781.2(c) (1984), 49 Fed. Reg. 35,074.


62. Nonexempt occurrences include (i) the conversion to agricultural land of nonagricultural land, (ii) the conversion to nonagricultural land of agricultural land, (iii) the change of status into a foreign person of a U.S. person holding any reportable interest in agricultural land, (iv) the change of status into a U.S. person of a foreign person holding any reportable interest in agricultural land, and (v) the incidence of ownership of agricultural land by a foreign person on the effective date of the Act, February 1, 1979. 7 U.S.C. § 3501(b)-(d); 7 C.F.R. § 781.3(b)-(d), (i), (j) (1984), 49 Fed. Reg. 35,075-076.

63. 7 U.S.C. § 3501(a); 7 C.F.R. § 781.3(b)(2) (1984), 49 Fed. Reg. 35,075. Where a series of acquisitions is planned, or where cumulative transfers are contemplated, each incremental step must be reported within 90 days even if full assembly of the complete parcel remains outstanding. Form ASCS-153 is the all-purpose transactional report.

64. 7 U.S.C. § 3501(a)-(d), 7 C.F.R. § 781.3(e) (1984), 49 Fed. Reg. 35,075. Attorneys act as
entity owning a reportable interest must identify each foreign person or coalition of foreign persons holding 10 percent of its equity, or any combination of foreign persons holding 50 percent of its equity. There is a continuing duty to keep the reporting foreign person’s legal name and address current.

Under the investigative actions section of the statute, the Secretary of Agriculture may request a reporting non-governmental entity to identify any person (including U.S. persons) holding any of its equity. Moreover, the Secretary may require (jurisdiction permitting) any foreign entity identified by the reporting entity to identify any person holding any of its equity. All information submitted in compliance with the Act, except penalty review documents, is available for public inspection at the Department of Agriculture in Washington, D.C., within 10 days of its receipt. Twice a year, the Department must transmit to the departments of agriculture of the several states, such information as pertains to agricultural land within their jurisdiction.

Penalties for late reporting are severe: 1/10 of 1 percent of the fair market value of the subject interest for each week that the violation is not corrected, up to a maximum of 25 percent of the value of such interest. For incom-

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66. The Foreign Investment Disclosure Branch (FIDB) of the Agricultural Stabilization and Conservation Service (ASCS) takes the position that a foreign entity holding agricultural land is able to determine the citizenship of its equitable owners over as many layers of ownership as may be necessary to determine whether it has a duty to report. See, 7 C.F.R. § 781.3(f)-(h) (1984), 49 Fed. Reg. 35,075-076. In this regard, the regulations provide that certain reporting entities “shall send[s] questionnaires to each investment institution holding an interest in it inquiring as to whether the entities for which they are investing are foreign persons.” Id. § 781.3(h)(3) (1984).
68. 7 U.S.C. § 3503 provides: “The Secretary may take such actions as the Secretary considers necessary to monitor compliance . . . and to determine whether the information contained in any report submitted . . . accurately and fully reveals the ownership interest of all foreign persons in any foreign person who is required to submit a report. . . .”
69. 7 U.S.C. § 3501(f); 7 C.F.R. § 781.3(f)(2) (1984). As a matter of policy, the FIDB has never inaugurated a request for information as to holders of less than “significant interest or substantial control” as defined in the implementing regulations. See supra note 57.
70. 7 U.S.C. § 3501(f); see 7 C.F.R. § 781.3(g) (1984). As a practical matter, FIDB requests under this provision historically have targeted entities of the Cayman Islands, Lichtenstein, the Netherlands Antilles, Panama, and Switzerland. In any event the ASCS has construed the congressional intent as to 7 U.S.C. § 3503 (investigative actions) to empower the FIDB to probe the foreign ownership chain only as far as persons holding interests in persons holding interests in the landed entity. See 7 C.F.R. § 781.3(h) (1984).
72. 7 C.F.R. § 781.4(b)(1). “Fair market value” means the value of the subject interest on the date of penalty assessment or on the date the subject land was last used for agriculture if
plete, false or misleading reports, or a failure to update reportable information where required, the fine is 25 percent of the fair market value of the interest. Downward adjustment of penalties may be sought through an elaborate review procedure and a penalized person has a right to offset, as against any penalty assessed, any amounts approved for disbursement to such person under programs administered by the Department of Agriculture. The Act enables the Attorney General to sue to collect an assessed penalty.

II. Taxation

A. Foreign Investor's Tax Act

Three major delineations determine the tax treatment of a foreign person earning income in the United States. First, the taxpayer is taxed agricultural use was discontinued. The ASCS Committee in the county where the land is located may adjust upwards or downwards any reported value submitted by the holder of the interest. Id. § 781.4(c).

73. See id., § 781.3(j)-(k) (1984). During the first quarter of 1985, all persons holding or hosting interests that were reportable under the regulations effective prior to October 9, 1984 (when the foreign ownership threshold which triggered the duty to report was a flat five percent) will receive mandatory-response FIDB questionnaires as the FIDB seeks to determine which of the approximately 18,000 previously reporting persons still hold interests that are reportable under the new regulations.

74. Id. § 781.4(b)(2).

75. Id. § 781.4(b)(3); see id. § 781.5 (penalty review procedure). Since the inception of the Act roughly 17,000 penalties have been assessed.

76. Id. § 781.4(b)(3). The programs referred to are farm programs administered under 7 C.F.R. § 13.

77. 7 U.S.C. § 3502(a) ("If . . . a person (1) has failed to submit a report . . . or (2) has knowingly submitted a report . . . (A) which does not contain all the information required . . . or (B) which contains information which is misleading or false, such person shall subject to a civil penalty . . . recoverable in a civil action brought by the Attorney General . . . "). The penalty "shall be such amount as . . . appropriate to carry out the purposes of this Act, except that such amount shall not exceed 25 percent of the fair market value . . . of the interest . . . " Id. § 3502(6). See 7 C.F.R. § 781.5 ("If a foreign person fails to respond to the notice of apparent liability . . . or fails to pay the penalty imposed . . . the case will, without further notice, be referred . . . to the Department of Justice for prosecution . . . to recover the amount of the penalty"). No suit has ever been filed under the Act. The FIDB reports that most recalcitrants comply upon referral of the case to the Justice Department pursuant to 7 C.F.R. § 781.5(g).


79. "Foreign person" means a nonresident alien individual, or any trust, estate, partnership, joint venture, joint stock company, association, company, syndicate, pool, group, or other organization through or by means of which any business, financial operation, or venture is carried on and which is created or organized under the laws of a jurisdiction other than the United States. I.R.C. §§ 7701(a)(1)-(5).

80. "United States" for income tax purposes includes only the several States and the District of Columbia. Id. § 7701(a)(9).

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either as an individual or as an entity.\textsuperscript{81} Second, earned income is taxed either as "passive income" or as "effectively-connected income" depending on whether the income is attributable to the conduct of a trade or business within the United States.\textsuperscript{82} Third, income is characterized either as U.S.-source or as foreign-source\textsuperscript{83} for the purpose of determining its taxability.\textsuperscript{84}

1. \textit{Individual or Entity}

Generally, effectively-connected income wherever derived is taxed to the foreign taxpayer at the graduated rate applicable to a U.S. taxpayer of the same legal nature as the foreign taxpayer,\textsuperscript{85} with reasonable business expenses actually incurred in furtherance of the income-producing activity, including allocable indirect expenses, deductible from adjusted gross income.\textsuperscript{86} Nonresident alien individuals are, however, allowed deductions only with respect to U.S.-source effectively-connected income, and only if a return is filed.\textsuperscript{87} Resident foreign corporations are allowed deductions with

\begin{itemize}
  \item \textsuperscript{81} See id. §§ 871, 881(a), 882. Entities are taxed either as corporations or as trusts and estates. See id. § 641.
  \item \textsuperscript{82} "Passive income" herein means capital gain and "fixed or determinable annual or periodic gains, profits and income," see id. § 871(a)(1)(A), that is not "effectively connected with the conduct of a U.S. trade or business," see id. § 864(c). "Effectively-connected income" herein means income or gain derived from assets used in or held for use in a U.S. trade or business, see id. § 864(c)(2)(A), or from trade or business activities within the United States that were a material factor in the realization of the income or gain, see id. § 864(c)(2)(B).
  \item \textsuperscript{83} Source of income rules appear at I.R.C. sections 861 through 864 and at 26 C.F.R. (Treas. Reg.) sections 1.861–1 to 1.864–7. Dividends and interest paid by domestic corporations are presumed U.S.-source. I.R.C. §§ 861(a)(1), (2); but see id. §§ 861(a)(1)(B), (a)(2)(A), Treas. Reg. §§ 1.861–2(b)(3)(i), -3(a)(3)(i)(a) (domestic corporate dividends or interest treated as foreign-source income item); see also I.R.C. §§ 861(a)(1)(C), (D), (a)(2)(B), (C) (foreign corporate dividends and interest treated as U.S.-source income item). The extraterritorial sale of corporate stock of a domestic corporation generally gives rise to U.S.-source income even though gain from the sale or purchase of personal property is usually treated as sourced within the jurisdiction where the sale occurs. See Treas. Reg. § 1.861–7(a); see also I.R.C. §§ 861(a)(6), 864(c)(4)(B)(iii). Where income is generated both within and without the United States, income items must be allocated between U.S.-source and foreign-source with certain income items partially allocable to each source. See I.R.C. § 863, Treas. Reg. § 1.863–1. All income attributable to transportation which begins and ends in the United States "shall be treated as derived from sources within the United States." I.R.C. § 163(e) (1984) effective as to transportation which begins on or after July 19, 1984. Certain transportation between the United States and U.S. possessions or territories gives rise to income which is 50 percent U.S.-source. \textit{Id.}
  \item \textsuperscript{84} Taxable effectively-connected foreign-source income items include, \textit{e.g.}, foreign rents or royalties derived from the active conduct of a U.S. licensing business, or income from inventory sold extraterritorially through a U.S. office where no extraterritorial office of the taxpayer participated materially in the sale. I.R.C. § 864(c)(4)(B); see Treas. Reg. § 1.864–5. Foreign-source not-effectively-connected income is not taxed. See National Paper & Type Co. v. Bowers, 266 U.S. 373 (1925); Barclay & Co. v. Edwards, 267 U.S. 442 (1925).
  \item \textsuperscript{85} I.R.C. §§ 871(b), 882(a). In determining the appropriate marginal rate, items of income that are not effectively connected are excluded. \textit{Id.} §§ 871(b)(2), 882(a)(2).
  \item \textsuperscript{86} Id. §§ 861(b), 862(b); see generally Treas. Reg. §§ 1.861–8 as to allocation and apportionment of deductions.
  \item \textsuperscript{87} I.R.C. §§ 873(a), 874(a), Treas. Reg. 1.873–1(a); but see I.R.C. § 873(b).
\end{itemize}
respect to all effectively-connected income (whether U.S.-source or foreign-source), but only if a return is filed. A nonresident foreign corporation from a tax treaty nation is allowed deductions only if it elects to be subject to tax on a net basis, and only if a return is filed; a nonresident foreign corporation from a non-treaty nation is allowed no deductions.

2. "Passive" or "Effectively-Connected"

Whether a foreign taxpayer is engaged in a U.S. trade or business—thus subjecting passive-type income items to graduated taxation to the extent that such items are effectively connected with the trade or business—is a question of fact determined annually by the substantiality, continuity, and duration of the income-producing trade or business activity. In general the test for conduct constituting trade or business activity is whether there has been concerted effort over time in pursuit of profit. However, one transaction within the United States of a type ordinarily conducted by the foreign taxpayer’s foreign business may constitute U.S. trade or business activity. Noteworthy is the fact that a foreign person, who is a beneficiary of an estate or trust which is engaged in business within the United States or who is a partner in a partnership which is so engaged, is deemed to be engaged in a U.S. trade or business.

To determine whether a particular asset produces effectively-connected income as to a foreign taxpayer who is engaged in the conduct of a U.S. trade or business, an "asset use" or "business activity" test is applied: if the asset is acquired or held in the ordinary course, or to meet present trade or business needs, or is acquired or held for the principal purpose of promoting the present conduct of the trade or business, or if the asset produces income, gain or loss which arises directly from the active conduct of the taxpayer’s trade or business, then the asset produces effectively-connected income.

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88. I.R.C. §§ 882(c)(1)(A), (c)(2), Treas. Reg. 1.882–3(c); but see I.R.C. § 882(c)(1)(B).
90. Examples of passive-type income items taxable as effectively connected: dividends derived by a securities dealer, capital gain derived by an investment broker, royalties derived by a licensing firm. See I.R.C. § 864(c)(2), Treas. Reg. § 1.864–4(c)(2), (c)(3).
91. See, e.g., Treas. Reg. § 1.871–8(c)(1).
95. I.R.C. § 875.
97. Id. § 1.864–4(c)(2)(i)(c), (c)(2)(iii).
98. Id. § 1.864–4(c)(2)(ii)(a).
99. Id. § 1.864–4(c)(3).
100. Id. § 1.864–4(c)(1)(i).
U.S.-source passive income (including capital gain which is not effectively connected) is taxed at a flat rate of 30 percent unless a treaty rate applies. The tax on passive income must be withheld at source by any person having control over the funds; the withholding obligation matures when the income is paid over, mere accrual being insufficient to create a duty to set the funds aside. Certain activities are deemed to produce passive income: (i) trading in stocks, securities or commodities, provided the taxpayer does not have a U.S. office through which or by the direction of which such transactions are made or effected; (ii) trading in stocks or securities for one's own account, provided the taxpayer is not a dealer in stocks or securities or a corporation whose principal business is trading in stocks or securities for its own account and whose principal place of business is in the United States; (iii) trading in commodities for one's own account,

101 I.R.C. §§ 871(a)(1), 881(a). N.b., the 30 percent tax on interest on the portfolio indebtednesses of U.S. corporations paid to foreign corporations and to nonresident alien individuals has been repealed with respect to obligations of U.S. borrowers created after July 18, 1984. See id. §§ 864(c)(2), 871(h), 881(c), 1441(c)(9), 1442(a) (1984). However, the original issue discount and coupon stripping rules of TEFRA, are now applicable to foreign investors. I.R.C. §§ 871(a)(1)(c), 881(a)(3), 871(g) (1984).

102. I.R.C. § 894(a) provides, "Income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation." The United States has income tax treaties with 36 nations: Australia, Austria, Bangladesh, Belgium, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Jamaica, Japan, Korea, Luxembourg, Malta, Morocco, Netherlands, Netherlands Antilles, New Zealand, Norway, Pakistan, Philippines, Poland, Romania, South Africa, Soviet Union, Sweden, Switzerland, Trinidad and Tobago, United Kingdom. Treaties are being negotiated with: Anguilla, Antigua, Barbados, Belize, Brazil, Costa Rica, Falkland Islands, Gambia, Grenada, Indonesia, Malawi, Montserrat, Nevis, Nigeria, St. Christopher, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Sri Lanka, Thailand, Tunisia, and Zambia. Treaties were terminated in 1984 with Burundi and Rwanda. For interim tax legislation with respect to the Caribbean nations, see I.R.C. § 274(h)(6)(c) (1984) ("Caribbean Basin Statute" coordinating with the Caribbean Basin Economic Recovery Act) allowing deductions for entertainment expenses incurred in connection with business conventions, seminars or meetings held in Bermuda or in the Caribbean excluding Cuba. See generally, Zagaris, A Caribbean Perspective of the Caribbean Basin Initiative, 18 INT'L LAW. 563 (1984).

Under most of the treaties (a) interest income and industrial royalties that are not effectively connected are tax exempt; (b) dividend income that is not effectively connected is withheld at the rate of 15% rather than at the I.R.C. rate of 30%; (c) passive income from real estate rentals and natural resource rentals are taxable at the rate of 15%. The taxation of gain with respect to the disposition of capital assets not used or held for use in a U.S. trade or business is precluded with respect to nationals of Belgium, Finland, Germany, Hungary, Iceland, Japan, Korea, Norway, Poland, Romania and Sweden. Taxation of not-effectively-connected capital gain excluding gain from dispositions of real property is precluded with respect to nationals of Canada and the Netherlands. See 26 U.S.C. §§ 1441, 1442 (Tax Treaties and Conventions); Tax Treaties (P-H) ¶ 42,001 at pp. 42,006-007 (June 28, 1984).


105. Id. § 864(b)(2)(A)(ii).
provided the taxpayer is not a dealer in commodities.\(^{106}\) Certain gains from the sale, use or exchange of patents, copyrights, trademarks, franchises or goodwill also produce passive income.\(^{107}\)

If a foreign individual is not engaged in a U.S. trade or business during the taxable period when income is derived, such income, even if generated from prior year trade or business activity, is not considered to be effectively-connected income.\(^{108}\) However, income derived from prior year trade or business activity is characterized as effectively-connected income if received during a taxable period when the recipient is engaged in any trade or business, even though an unrelated trade or business.\(^{109}\)

3. **U.S.- and Foreign-Source Income**

A foreign taxpayer from a treaty nation will not be taxed as to effectively-connected industrial or commercial profits unless the taxpayer has a "permanent establishment"\(^{110}\) in the United States.\(^{111}\) Ingredient to a finding of no permanent establishment is a determination

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106. *Id.* § 864(b)(2)(B)(ii).


109. *Id.*

110. The term "permanent establishment" as used in the U.S. tax treaties corresponds to the term "fixed place of business" as used in the Internal Revenue Code: *See, e.g.,* Article V(1) of the 1981 Canada-United States tax convention, Tax Treaties (CCH) ¶ 1031; see also U.S. Treas. Dept., Canada-U.S. Tax Treaty Technical Explanation, Can. Tax Rep. (CCH) Special Report No. 470, Para. 30 (Jan. 19, 1981). "Hence the same test . . . " Jan Casimir Lewenhaupt, 20 T.C. 151, 161 (1953), aff'd per curiam, 221 F.2d 227 (9th Cir. 1955). A permanent establishment or fixed place of business may be an office, warehouse, branch, workshop, factory, store or sales outlet, or the like, through which a foreign person engages wholly or partly in a trade or business; a mine, quarry, other place of extraction of natural resources; a construction project or dredging or salvage operation lasting more than 12 months. Treas. Reg. § 1.864-7(a), (b). An agency may so qualify if the agent has authority to conclude contracts or fill orders from a stock of merchandise. *Id.* § 1.864-7(d). Under certain circumstances, the conduct of consulting or management activity may qualify, *id.* § 1.864-7(c), typically where the consultant has control over a premises. A general distributor who obtains title will not of itself cause the seller to be engaged in a U.S. trade or business, *see* Handfield v. Commissioner, 23 T.C. 633 (1955); see also Rev. Rul. 73-158, 1973-1 C.B. 337; Rev. Rul. 63-113, 1963-1 C.B. 410; Rev. Rul. 56-594, 1956-2 C.B. 1126, nor will consignment sales to a U.S. subsidiary, *see* Rev. Rul. 76-322, 1976-2 C.B. 487, nor will maintenance of a stock of goods or merchandise solely for purposes of storage, display or delivery, *see* Article V (4)(b) of the Model Double Taxation Convention on Income and Capital 19-44 (1977) of the Organization for Economic Cooperation and Development (O.E.C.D.). *See* Tax Treaties (P-H) ¶ 1017 (O.E.C.D. Model Convention). The definition in the O.E.C.D. convention corresponds to the definition in the Model Income Tax Treaty of the U.S. Treasury Department. *See* Tax Treaties (CCH) ¶ 153; Tax Treaties (P-H) ¶ 1017 (1977 U.S. Model Treaty); see also Tax Treaties (P-H) ¶ 1022 (1981 U.S. Model Treaty).

111. Management service remuneration is variously included or excluded from the definition of "industrial or commercial profits" in specific bilateral treaties. *See infra* note 112.
that the U.S. enterprise bears the attendant entrepreneurial risk.\textsuperscript{112} A foreign taxpayer who has a fixed place of business within the United States may usually avoid the taxation of extraterritorial sales by causing an extraterritorial office of the taxpayer to "participate materially in the sale."\textsuperscript{113} Taxation of international sales as to foreign taxpayers doing business within the United States may also be mitigated where such taxpayers qualify as Foreign Sales Corporations.\textsuperscript{114}

Generally, foreign corporations are not taxed as to not-effectively-connected U.S.-source capital gain;\textsuperscript{115} moreover, such gain is not taxed\textsuperscript{116} to the nonresident alien individual who has not had a "substantial presence" in the United States during the taxable period.\textsuperscript{117} As a further matter, foreign persons residing in countries that do not have a treaty exemption for passive interest income may avoid taxation on such income by routing loans through a subsidiary, trust or other entity established in a treaty-exempt country.\textsuperscript{118}

4. \textit{Real Property}

With specific reference to U.S. real property, income or gain from U.S. situs real estate is U.S.-source income regardless of where monies are paid

\begin{flushright}
\textsuperscript{113} I.R.C. § 864 (c)(4)(B)(iii).
\textsuperscript{114} Congress has replaced the Domestic International Sales Corporation (DISC) system for U.S. exporters with a less favorable Foreign Sales Corporation system. Tax Reform Act, \textit{supra} note 78, section 801, adding I.R.C. §§ 245(c), 901(h), 906(b)(5), 921 to 927, 934(f), 951(e), 1248(d)(6), and amending I.R.C. §§ 274(b)(6)(D), 275(a)(4), 904(d)(1), 956(b)(2), 996(g), and 7651(S)(B) effective for transactions after 1984. The change was made to resolve the General Agreement on Tariffs and Trade dispute over whether DISCs were an illegal export subsidy. \textit{See} Block, Gilbert & Kuenster, \textit{Transition from DISC to Foreign Sales Corporation: Tax and Other Considerations}, 19 INT’L LAW. 343 (1985).
\textsuperscript{115} I.R.C. section 881 does not speak to this type of gain; \textit{but see infra} text accompanying notes 119–122, 132–134.
\textsuperscript{116} I.R.C. § 871 does not speak to this type of gain unless the taxpayer is present within the United States for 183 days within a taxable year. \textit{But see infra} note 117 and text accompanying notes 119–122, 132–134.
\textsuperscript{117} \textit{See I.R.C. § 7701(b) (1984) superseding prior law which visited tax on the nonresident alien with respect to such gain only if the alien individual was physically present in the United States for 183 or more days. Under present law, an alien meets the substantial presence test if (a) he was present in the United States for at least 31 days during the calendar year, and (2) the sum of the number of days he was present in the current calendar year, plus one-third of the days present in the preceding year, plus one-sixth of the days present in the second preceding year, is at least 183 days. However, a nonresident alien who has not taken steps to become a permanent resident is not treated as meeting the substantial presence test if (1) he is present in the United States for less than 183 days and (2) he establishes to the satisfaction of the Commissioner that he has a “tax home” in a foreign nation and has a “closer connection” with such nation than with the United States.
\textsuperscript{118} Joint Committee on Taxation, \textit{Comment on House Bill 7553, “Exemptions from U.S. Tax for Interest Paid to Foreign Persons,”} at 5–6 (Comm. Print 1980). The result holds despite the anti-abuse provision of the U.S. Model Treaty. \textit{See Rev. Rul. 75–23, 1971–1 C.B. 290; but see I.R.C. §§ 881(b), 1442(c) and 7651(S)(B) (1984) limiting U.S. tax avoidance use as to territorial conduit corporations of the U.S. Virgin Islands or Guam. As to the repeal of taxation
or received.\textsuperscript{119} Gain from disposition is treated as effectively-connected\textsuperscript{120} and is therefore taxed at a graduated marginal rate regardless of whether the owner is engaged in a U.S. trade or business.\textsuperscript{121} Such gain is subject to withholding at source,\textsuperscript{122} even though such gain, deemed to be effectively connected, is therefore not a "passive" income item. Importantly, the mere realization of such gain does not cause the taxpayer to be engaged in a U.S. trade or business, for the reason that bare ownership of U.S. situs real property does not cause the owner to be so engaged;\textsuperscript{123} nor does leasing or renting U.S. real property necessarily cause the owner to be so engaged.\textsuperscript{124} However, leasing, net leasing, or renting a number of U.S. properties may constitute the conduct of a U.S. trade or business.\textsuperscript{125} Foreign persons owning U.S. real property may elect to be considered engaged in a U.S. trade or business with respect to such property (an election would reduce the tax burden on a foreign taxpayer whose marginal rate is less than 30 percent).\textsuperscript{126} Real property held by a partnership is treated as held proportionately by the partners.\textsuperscript{127}

5. \textit{State Income Tax}

In addition to federal income tax, a foreign taxpayer doing business in the United States may incur state income tax liability in any jurisdiction in which he maintains a taxable situs.\textsuperscript{128} The concept of tax situs corresponds to the concept of fixed place of business or permanent establishment: "The term . . . suggests something more substantial than a license, a letterhead and isolated activities. It implies the existence of an office . . . or facilities equipped to carry on the ordinary routine of . . . business activity."	extsuperscript{129} Where the foreign taxpayer has a taxable situs in more than one jurisdiction, the state taxes are usually apportioned by applying to the total taxable with respect to certain interest payments, see \textit{supra} note 101. See \textit{generally infra} text accompanying note 202.

\textsuperscript{119} I.R.C. §§ 861(a)(4) (rentals and royalties), 861(a)(5) (dispositions).
\textsuperscript{120} Id. § 897(a).
\textsuperscript{121} Id.
\textsuperscript{122} Id. § 1445 (1984) superseding prior law under which such gain was not taxed at source.
\textsuperscript{123} See Inez de Amodio, 34 T.C. 894, 906 (1960), \textit{aff'd}, 299 F.2d 623 (3d Cir. 1962).
\textsuperscript{124} Elizabeth Herbert, 30 T.C. 26 (1958).
\textsuperscript{125} Jan Casimir Lewenhaupt, \textit{supra} note 110; Pinchot v. Commissioner, 113 F.2d 718 (2d Cir. 1940); \textit{compare Rev. Rul.} 73-522, 1973-2 C.B. 226.\textsuperscript{126} I.R.C. §§ 871(d), 882(d). An election applies to all U.S. real property and to all income from such property. Treas. Reg. § 1.871-10(b)(1); \textit{but see id.} § 1.871-10(b)(2). Like a treaty election under section 897, see \textit{infra} note 172 and accompanying text, an election under section 871 or 882 is revocable only with the consent of the I.R.S. \textit{Id.} §§ 871(d)(1), 882(d)(1).
\textsuperscript{127} See I.R.C. § 702, Treas. Reg. § 1.702-1.
\textsuperscript{128} States that do not now impose an income tax are Nevada, South Dakota, Texas, Washington, and Wyoming. Delaware has an income tax which applies only to income derived from within that state even as to corporations incorporated or domiciled therein. State income taxes are deductible from adjusted gross income in computing federal income tax.
\textsuperscript{129} Consolidated Premium Iron Ores, Ltd. v. Commissioner, \textit{supra} note 93.
income wherever derived of the taxpayer’s enterprise, a matrix composed of three functions: in-state property to all property wherever located, in-state payroll to total payroll, and in-state sales to all sales. Some states including California treat commonly owned or controlled enterprises having an integrated or “unitary” character as one for the purpose of applying the three-factor allocation formula, thus taxing the income of enterprises which may transact no business and have no property or employees in the state.130

B. FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT131

This law, or FIRPTA, subjects gain realized by foreign persons from dispositions of “United States real property interests (USRPI),”132 which


131. As amended by the Tax Reform Act, supra note 78, the Foreign Investment in Real Property Tax Act of 1980 has been codified. Major provisions: I.R.C. §§ 897 (taxing); 6038B, 6039C (reporting); 6652(g) (penalty assessment). The implementing regulations appear at Treas. Temp. Reg. §§ 6a.897-1, -2, -4 (1982); 6a.897-3, 6a.6039C-4, 6a.6652g-1 (1983); and 6a.6039C-1, -2, -3, -5, 6a.6652g-2 (1984). The temporary regulations at section 6a.6039C and 6a.6652g have been superseded by statute, see I.R.C. §§ 6038B, 6039C (1984).

132. “United States real property interest” means an interest, other than an interest solely as a creditor, in (1) real property located within the United States or U.S. Virgin Islands; (2) foreign or domestic corporations (excluding shares of a class of stock that is regularly traded on an established securities market, unless the person disposing of such shares held or holds or constructively held or holds 5 percent of the class so traded) to the extent such corporations are United States real property holding corporations, see infra note 144, and (3) partnerships, estates and trusts (excluding domestically-controlled real estate investment trusts, see infra note 145) to the extent the assets of such persons consist of USRPI. I.R.C. §§ 897(c)(1)-(5), (h)(2)-(4); Temp. Reg. § 6a.897-1(c). “Real property” encompasses land or improvements thereon and leaseholds of land or improvements thereon, and options to acquire the same, I.R.C. § 897(c)(6)(A); movable walls, furnishings, id. § 897(c)(6)(B); standing timber, growing crops, elevators, escalators, Temp. Reg. § 6a.897-1(b)(2); mines, wells, other natural deposits, I.R.C. § 897(c)(1)(A)(i); and mining equipment and farm machinery used in connection with mining and farming operations, Temp. Reg. § 6a.897-1(b)(4)(i). “Real property interests” under the Act include fee ownership or co-ownership; life estates, time-sharing interests, remainders, reversionary interests; direct or indirect rights to share in appreciations in value of, or proceeds or profits generated by, real property; receipts of indebtedness where the holder has any right to share in proceeds, profits, or appreciations with respect to real property of the debtor or of a related party; production payments with respect to real property; and options, contracts, or rights of first refusal to acquire any of the foregoing or any other non-creditor interest in real property. I.R.C. § 897(c)(6)(A); Temp. Reg. §§ 6a.897-1(d)(2)(i), (d)(3). See Temp Reg. §§ 6a.897-1(d)(4)-(7), (e); see also I.R.C. §§ 385 (debt as equity), 636 (mineral production payments). Despite Article VI and House Report 96-1479, see infra note 133, real property does not encompass livestock, office equipment or factory machinery, Treas. Reg. § 6a.897-(b)(4)(i), but would seem to embrace restaurant and hotel equipment as “personal property the use of which is an ordinary and necessary corollary of the use to which the real property is put” Id. There are no cases illustrating the difference between “personal property associated with the use of real property” (which property is within the Act) and “personal property with which the use of real property is associated” (which property falls outside the Act). See Temp. Reg. § 6a.897-1(b)(4)(i); See also infra note 133. However, it is clear that
are ownership interests in "immovable property" located within the United States, to taxation at graduated rates as if such income were effectively connected with the conduct of a U.S. trade or business. Although the tax liability accrues only upon alienation of USRPI, any foreign person not engaged in a U.S. trade or business who at any time during a calendar year holds USRPI having an aggregated fair market value of $50,000 or more must file an informational return providing identifying data as to the USRPI held by such person during the calendar year. USRPI held by a partnership, trust or estate are treated as owned proportionately by partners or beneficiaries, and USRPI held by a spouse or minor child of an individual are treated as owned by such individual. Where a partnership, trust, or estate, uses or holds USRPI for use in a trade or business, such use is imputed to the partners or beneficiaries.

The Act also established a byzantine periodic reporting system applicable to entities that hosted foreign investment interests where the assets of such entities consisted in whole or in part of USRPI. The Tax Reform Act of 1984 junked the periodic reporting system, to replace it with a transactional disclosure system which nevertheless incorporates the essential

"[Local law definitions will not be controlling for purposes of determining the meaning of the term 'real property.'"] id. § 6a.897-1(b)(1). See generally Feder, and Parker, U.S. Legislation Taxing Gains of Foreign Persons from Dispositions of Direct and Indirect Interests in U.S. Real Property (Part I), 1981 BRITISH TAX REV. 83, (Part II) 1981 BRITISH TAX REV. 176.

133. "Real property is intended to have the same meaning ... that it has in the U.S. Treasury's model income tax treaty and thus it includes personal property associated with real property." House Report No. 1479, 96th Cong. 2d. Sess. 186 (1980). Article VI of the U.S. model treaty provides: "The term 'immovable property' shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property." Article VI is identical to the definition of immovable property in the O.E.C.D. Model Convention. See Tax Treaties (CCH) ¶ 151; See also Tax Treaties (P-H) ¶ 1017 (O.E.C.D. model draft), ¶ 1022 (1981 U.S. model treaty), ¶ 1017 (1977 U.S. model draft).

134. I.R.C. § 897(a)(1). As such gains are deemed effectively connected, business deductions allocable thereto are allowable.

135. "Identifying data" or "identifying information" herein means disclosure of type of property, nature of interest held, adjusted basis, most recent sale or purchase price, holding period, and fair market value.

136. See I.R.C. § 6039C (1984). Although the Tax Reform Act, supra note 79, completely revamped I.R.C. § 6039C, it is expected that much of the substance of Temp. Reg. § 6a.6039C-1 (1984) will remain applicable under the forthcoming 1985 draft temporary regulations. On this basis, the informational returns are due May 15 for the previous calendar year.


138. USRPI so treated "shall be so treated ... successively to partnerships, trusts, or estates which are above the first partnership, trust, or estate in a chain thereof." I.R.C. § 897(c)(4)(B).

139. See supra note 78.

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features of prior law. Present law requires any United States person who, after December 1, 1984, transfers, to a foreign person, any property in the course of a corporate reorganization, or as part of a complete or partial liquidation of a subsidiary, or in an exchange between commonly-controlled corporations, to make extensive disclosures. The penalty for a failure to furnish information as required is 25 percent of the amount of gain if any realized on the exchange, transfer, or distribution, where the failure is due to wilful neglect and not to reasonable cause.

1. Reporting Requirements

As of this writing, proposed regulations as to present law have not been published, but much of the substance of the temporary regulations of prior law may continue to define the scope of disclosure under present law. The superceded regulations required entities hosting foreign ownership or transferring property to a foreign person to disclose as follows: (I) if the entity was a domestic United States real property holding corporation, (a) the identity of each foreign shareholder; (b) detailed information as to the financial structure of the reporting entity; (c) the location of all USRPI held by the entity at the end of the calendar year; and (d) the identity of each entity in which the reporting entity held any USRPI at any time during the calendar year; (II) if the reporting entity was a domestically-controlled real estate investment trust (REIT), (a) the same information as that required of entities in group I above; and (b) the greatest percentage of stock in such REIT at any time directly or indirectly held by foreign persons; (III) if the reporting entity was a foreign-controlled REIT, (a) the same information as that required of a group II REIT, and (b) the amount of calendar-year gain from dispositions of USRPI where such gain was not treated as capital gain dividend; (IV) if the reporting entity was a foreign corporation or a

141. See Tax Reform Act, supra note 78, at section 131(g)(1).
142. The disclosures required include "identifying data," see supra note 135, and in addition: the amount realized, the amount of gain or loss (even where not recognized) and the identity of transferees or distributees. See Temp. Reg. §§ 6a.6039C-2(b)(5), -3(c)(7), -8, -4(d)(4) (1984) which in substance are to be incorporated into the 1985 draft Proposed Reg. § 6038B.
144. "United States real property holding corporation" means any corporation (whether foreign or domestic) if the fair market value of its USRPI equals 50 percent of the sum of the value of its USRPI, its real property interests located outside the United States, and its other assets used or held for use in a trade or business, I.R.C. § 897(c)(2), excepting classes of corporate stock that is regularly traded at all times during the calendar year on an established securities market, id. § 897(c)(3). See Temp. Reg. § 6a.6039C-2(a)(1) (1984).
145. A "domestically-controlled REIT" is one in which at all relevant times less than 50 percent in value of the stock is directly or indirectly held by foreign persons. I.R.C. § 897(c)(4)(B); see id. § 897(b)(4)(D).
146. A "foreign-controlled REIT" is one in which at any relevant time foreign persons held 50 percent in value of the stock. See I.R.C. § 897(h)(4)(B)-(D).
147. The relevant definition of "capital gain dividend" appears at I.R.C. § 857(b)(3)(C).
partnership, trust, or estate (whether foreign or domestic), (a) the identity of each "substantial investor in United States real property"148 and such investor's pro rata share of USRPI held by the reporting entity; (b) the identity of any entity with respect to which the reporting entity was a substantial investor;149 and (c) identifying information as to calendar year distributions of the reporting entity, transfers of interest by investors (whether or not substantial investors) in the reporting entity, and locations and descriptions of all USRPI held by the reporting entity at year-end. In general, nominees and chains of nominees had to be identified, as well as the foreign ultimate beneficial owner. Curiously, "the fact that disclosure of ownership would contravene a secrecy law of any country [did] not constitute reasonable cause . . . for failure to comply . . . "150 It is unknown at present how detailed the 1985 implementing regulations will be. For the reason that information "shall [be supplied] with respect to such exchange or distribution,"151 it is reasonable to expect that the regulations will be thorough, yet less fanciful than the regulations of prior law.

2. Withholding Requirement

The Tax Reform Act of 1984 also imposes a withholding obligation on the transferee of USRPI acquired from a foreign person with respect to transfers occurring on or after January 1, 1985.152 Such transferees must withhold the smaller of 10 percent of the amount realized by the transferor on the disposition153 or the transferor's maximum tax liability with respect to the transfer plus the transferor's unsatisfied prior withholding tax liability as to the USRPI or a predecessor interest thereof.154 Withholding is not required where (a) the transferee acquires the property for personal residential use and the purchase price is $300,000 or less;155 (b) the transferred property is corporate stock of a class regularly traded on an established securities...
market;\(^{156}\) (c) the transferor is tax exempt, or prior arrangements to pay the transfer tax have been made, or the Internal Revenue Service has been provided with adequate security to ensure payment of the transfer tax;\(^{157}\) the transfer is of an interest in a nonpublicly traded domestic corporation that is not a United States real property holding corporation and such corporation furnishes the transferee with a sworn affidavit that it has not at any relevant time been a United States real property holding corporation;\(^{158}\) or the transferor furnishes the transferee with a sworn affidavit that the transferor is not a foreign person.\(^{159}\) (If the transferee has actual knowledge that the material facts of an affidavit are false, the withholding obligation applies despite delivery and receipt of the affidavit).\(^ {160}\) The transferor may seek and obtain amounts withheld in excess of the transferor's maximum tax liability.\(^ {161}\)

Any negotiating or settlement agent of a transferor or transferee is at risk to the extent of his compensation with respect to the transaction where the transferor supplies an affidavit known by the agent to be false, unless such agent either so notifies the transferee or deducts and withholds the transfer tax.\(^ {162}\) A transferor's agent is similarly at risk even in the absence of a false affidavit where the transferor is a foreign corporation, unless such agent either so notifies the transferee or deducts and withholds the transfer tax.\(^ {163}\)

Special rules relate to distributions, exchanges, and dispositions by certain corporations, partnerships, trusts, or estates. United States real property holding corporations must withhold 10 percent of the gross amount of any distribution to a foreign shareholder in redemption or liquidation of its stock.\(^ {164}\) A domestic partnership, trust, or estate making a distribution to a foreign person that is attributable to a disposition of USRPI must withhold 10 percent of any amount that is so attributable of which the partnership, trustee, or executor has custody.\(^ {165}\) Similarly, a foreign or domestic partnership, trust, or estate must withhold 10 percent of the fair market value of

\(^{156}\) Id. § 1445(b)(6).
\(^{157}\) See id. § 1445(b)(4)(B). On the basis that much of the substance of Temp. Reg. §§ 6a.6039C-5(a), -5(b) (1984) may be incorporated in the 1985 draft temporary regulations, the security, to be furnished to the District Director of the Foreign Operations District of the Internal Revenue Service (I.R.S.), may be a recorded security interest in real property, surety bond, binding voluntary withholding agreement, letter of credit, escrowed funds, or a contractual agreement.
\(^{158}\) I.R.C. § 1445(b)(4); see I.R.C. § 897(c)(1)(A)(ii) (relevant period defined); see also supra note 144 (U.S. real property holding corporation defined).
\(^{159}\) I.R.C. § 1445(b)(2).
\(^{160}\) Id. § 1445(b)(7)(A)(i).
\(^{161}\) Id. § 1445(c)(1)(C).
\(^{162}\) Id. § 1445(d).
\(^{163}\) Id.
\(^{164}\) Id. § 1445(e)(3).
\(^{165}\) Id. § 1445(e)(1).
any taxable distribution of USRPI to a foreign person. The transferee of a partnership interest or a beneficial interest in a trust or estate must deduct and withhold 10 percent of the amount realized on the disposition. A foreign corporation making a distribution must withhold 28 percent of the amount of gain recognized on the distribution.

3. Tax Treaties

Until 1985, the U.S. tax treaties which contain capital asset exclusions continue to insulate from tax liability gain realized by foreign persons from dispositions of USRPI. Treaties renegotiated after 1980 but before 1985 may escape the impact of the Act for a limited time. A foreign corporation from a treaty country may elect to be treated as a domestic corporation for the purposes of the Act if the relevant treaty contains a nondiscrimination clause. However, foreign corporations electing to be treated as domestic corporations for purposes of the substantive and reporting provisions of the Act are treated as foreign persons with respect to the withholding provisions.

4. State Laws

As a collateral matter, although few federal limitations exist as to foreign ownership of USRPI, thirty states had restrictive alien landownership laws in effect as of December 31, 1983. The statutory restrictions range

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166. Id. § 1445(e)(4). Fair market value is determined as of the time of distribution. The section is addressed to transfers of USRPI in exchange for the transferee's interest in the distributing entity.
167. Id. § 1445(e)(5).
168. Id. § 1445(e)(2).
169. The Act "shall apply to dispositions after June 18, 1980... (1) after December 31, 1984, nothing... shall be treated as requiring, by reason of any treaty obligation of the United States, an exemption from (or reduction of) any tax imposed... on a gain described in section 897..." I.R.C. § 897 (note). The I.R.S. will honor treaty provisions as to dispositions made prior to January 1, 1985, where the reporting or taxing paperwork is completed after December 31, 1984. Ltr. Rul. 8216073.
170. "If... any treaty... is signed on or after January 1, 1981, and before January 1, 1985, then paragraph (1) [see supra note 169] shall be applied with respect to obligations under the old treaty by substituting for 'December 31, 1984' the date (not later than 2 years after the new treaty was signed) specified in the new treaty..." I.R.C. § 897 (note).
171. An election is revocable only with the consent of the I.R.S. I.R.C. § 897(i)(2). An effect of the election is to allow a foreign corporation otherwise taxable with respect to the transaction to recognize no gain where a domestic corporation would recognize no gain under the nonrecognition provisions of the I.R.C.
172. See id. § 1445(f)(3).
173. See generally supra note 1.
from outright prohibition of foreign ownership, to restrictions as to method of acquisition (purchase, inheritance, or devise), to quantitative restrictions (value, size, or duration of estate), to qualitative restrictions (nature of estate or interest, residency or reciprocity requirements, land use prescriptions). Of the several states, fourteen have legislation either requiring foreign ownership interests in land to be reported, or authorizing the state agency responsible for monitoring inward foreign investment in land to obtain information reported to the federal government.

III. Business Visas

A. Applicants from Treaty Countries (E-Type)

There is no prescribed limit on the total length of time a nonimmigrant may remain in the United States as an employee or as a self-employed person under an E-type visa issued pursuant to a U.S. treaty of commerce and navigation. The E-type visa applicant from a treaty country comes to the United States "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national" (E-1 "treaty trader") or "to develop and direct the operations of an enterprise in which he has invested, or . . . is actively in the process of investing, a substantial amount of capital" (E-2 "treaty investor").


176. The states are: Arkansas, Florida, Georgia, Illinois, Iowa, Kentucky, Minnesota, Missouri, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, and Virginia.


178. 8 U.S.C. § 1101(a)(15)(E)(ii). The provisions of this section apply only to nationals of: "Argentina, Austria, Belgium, China, Colombia, Costa Rica, Ethiopia, France, Federal
applicant who qualifies derivatively on the basis of employment must be employed by a treaty trader or treaty investor "or by an organization which is principally owned by a person or persons having the nationality of the treaty country and, if not residing abroad, maintaining nonimmigrant treaty trader/treaty investor status."\textsuperscript{179} The initial period of admission under an E-type visa may not exceed one year, and extensions may be granted in increments of not more than one year.\textsuperscript{180} Applications must disclose the percentage of the qualifying enterprise owned by foreign nationals, and the countries with which the enterprise trades.

B. OTHER TYPES

The B-1 visa, available to nationals of any country, admits the holder for the purpose of conducting limited business activity including scouting, researching, conferencing, and the like; however, the B-1 temporary visitor for business may not engage in gainful employment while in the United States nor may he receive U.S.-source income other than reimbursement for business-related expenses. The B-1 visa may be extended in increments of up to six months each beyond the initial period of up to one year.\textsuperscript{181} The B-1 visitor present in the United States for ninety or more days during a taxable period may be required to disclose the source of monies used during the visit.\textsuperscript{182}

At present, there are no other visa classifications for entry based on entrepreneurial status. (The nonpreference visa category which formerly permitted a foreign businessman not attaining a nonimmigrant business to reside in the United States permanently or for an indefinite period in connection with an investment of $40,000 or more, was closed in 1978).\textsuperscript{183}

\textsuperscript{179} 22 C.F.R. §§ 41.40(a), 41.41(a).
\textsuperscript{180} 8 C.F.R. § 214.2(e).
\textsuperscript{181} 8 C.F.R. § 214.2(b)(1).
\textsuperscript{182} I.R.S. Form 1040C is used for this purpose.
\textsuperscript{183} The Simpson-Mazzoli Bill (Bill), H.R. 1510, 98th Cong., 2d Sess., passage vacated, June 20, 1984, passed in lieu, S.529 ("Immigration Reform and Control Act of 1983"), 98th Cong., 2d Sess., provides:

§ 202. Qualified immigrants who have invested or have established to the satisfaction of the Attorney General their intention to invest substantial capital in the amount to be established by the Attorney General of not less than $250,000.00, in an enterprise in the United States of which the alien will be a principal manager and which will benefit the U.S. economy and which will create full-time employment for not fewer than four eligible individuals [not including the qualified immigrant's spouse or issue] shall be allocated any visas not required.
Generally, the spouse and unmarried minor children of the principal alien who has attained a visa are eligible for derivative visas.\textsuperscript{184}

IV. Observations on Terminology, Applicability and Requirements

A. Taxation

1. Major Variances and Consistencies

Major variances appear in the terminology of the federal taxation and reporting statutes of specific application to foreign investors. For example, the tax definition of "United States" encompasses only the several states and the District of Columbia, whereas the definition in the reporting statutes embraces all territories of the United States. Similarly, the tax definition of "foreign person" includes only foreign citizens (whether individual or corporate), whereas the definition of the same term in the reporting statutes includes qualifying U.S. citizens. The federal taxation and reporting laws also apply to inward foreign investors in different ways. Foreign governments and their agencies or instrumentalities, and international organizations are wholly exempted from income tax,\textsuperscript{185} whereas income derived by treaty-nation foreign taxpayers are subject to taxation at reduced rates as provided by the relevant treaty, convention, or agreement. Tax-exempt or treaty-nation "foreign persons" are, nevertheless, embraced by the reporting and disclosure laws, and may be required to file informational reports with the Internal Revenue Service, the Bureau of Economic Analysis, or the Foreign Investment Disclosure Branch of the Agricultural Stabilization and Conservation Service.

On the other hand, the passive-type income items of any taxable foreign person who has a fixed place of business within the United States are taxed at a graduated rate to the extent that such items are effectively-connected with the conduct of the U.S. trade or business.

Not-effectively-connected foreign-source income is not taxed to foreign persons, even if such persons are engaged in a U.S. trade or business. In this regard, it has been determined that the disparity of treatment between

\textsuperscript{184} See 22 C.F.R. §§ 41.40(c), 41.41(b).

\textsuperscript{185} I.R.C. § 892. Income derived by a foreign central bank of issue from bankers' acceptances, however, is treated differently.
foreign persons and U.S. persons (who must pay tax on worldwide income whether passive or effectively-connected) is constitutional.\textsuperscript{186}

2. \textit{Major Changes}

The Tax Reform Act of 1984 effectuated major changes in the tax treatment of inward foreign investors. A new definition of resident alien individual for federal income tax purposes\textsuperscript{187} should substantially increase the number of nonresident aliens taxable at graduated rather than at flat rates. The new definition also has the effect of causing to be taxable the foreign-source passive income of any nonresident alien individual who is treated as a resident alien for income tax purposes. Generally replacing the FIRPTA informational return system as to USRPI holdings and transfers is a tax withholding system which requires the transferee of a qualifying USRPI transfer, or of a qualifying distribution that is attributable to a disposition of USRPI, to withhold at transfer 10 percent of the amount realized on the transaction by the transferor. The fact of withholding does not relieve the transferor of his additional tax liability, if any, with respect to gain realized on the transaction. Further, interest paid to foreign lenders with respect to U.S. corporate debt obligations created after July 18, 1984, is not taxable,\textsuperscript{188} but the tax-avoidance use of territorial conduit corporations is limited,\textsuperscript{189} and the original issue discount and coupon stripping rules of TEFRA are now applicable to inward foreign investors.\textsuperscript{190} The Tax Reform Act also: ends opportunities for married nonresident alien couples from community property foreign countries to split the effectively-connected income of one spouse to reduce their U.S. tax liability;\textsuperscript{191} repeals certain ownership attribution rules with respect to nonresident alien individuals for determining whether a foreign corporation is a Foreign Personal Holding Company;\textsuperscript{192} and adjusts the accelerated cost recovery schedule with respect to depreciable real property placed in service after March 15, 1984, to extend to eighteen years the fifteen-year period of prior law.\textsuperscript{193} Moreover, as under prior law, any person engaged in a U.S. trade or business making payment in the course of such trade or business, in the amount of $600 or more during a taxable period, of rent, salaries, wages, premiums, annuities, compensations, remunerations, endowments, or other fixed or determinable gains, profits and income, must file an annual informational return with

\textsuperscript{186} See \textit{supra} note 84. \\
\textsuperscript{187} See \textit{supra} note 117. \\
\textsuperscript{188} See \textit{supra} note 101. \\
\textsuperscript{189} I.R.C. §§ 881(b), 1442(c), 7651(5)(B) (1984). \\
\textsuperscript{190} See \textit{supra} note 101. \\
\textsuperscript{191} I.R.C. § 879(a) (1984). \\
\textsuperscript{192} See \textit{id.} §§ 551(f), 554(a), 951(d) (1984). \\
\textsuperscript{193} Thus \textit{pro tanto} the Tax Reform Act supersedes the accelerated cost recovery system of ERTA.
Finally, any person including a nominee who makes or transfers corporate dividend or earnings and profits payments aggregating $10 or more during a calendar year must file an annual informational return.\textsuperscript{195}

B. REPORTING

Several of the reporting statutes vary in their applicability. The foreign ownership threshold triggering the duty to report under IISA is a 10 percent voting interest, whereas the reporting obligation of AFIDA is triggered variously by a 10 percent ownership interest held by an individual or a coalition of individuals acting in concert, or, alternately, by aggregated foreign ownership of 50 percent. The reporting and penalty provisions of IISA extend to any intermediary of, and to any reporting corporate officer or director of, the U.S. affiliate, whereas the reporting and penalty provisions of AFIDA embrace not only the foreign person reporting in the first instance, i.e. the landed person hosting foreign ownership, but also owners of interests in the landed foreign person ("second-tier owners") as well as owners of interests in second-tier owners ("third-tier owners") when such remote owners are requested to report.

C. FOREIGN OWNERSHIP OF REAL PROPERTY

Certain ownership interests fall within the purview of all three reporting statutes (IISA, AFIDA, and the Foreign Investment in Real Property Tax Act (FIRPTA), and must be separately reported as required under each act. An election to treat real property income as effectively connected with a U.S. business\textsuperscript{196} enables the foreign taxpayer owning real property, who is not engaged in a U.S. trade or business, to deduct costs incurred in connection with acquiring, maintaining (including depreciation), or disposing of such property. An election by a treaty-nation foreign corporation to be treated as a domestic corporation,\textsuperscript{197} for the purposes of FIRPTA, enables the electing corporation to expense costs allocable to dispositions of USRPI without requiring that income derived from USRPI during the period of ownership be taxed as effectively-connected income. Further, an election makes available to the electing corporation certain nonrecognition provisions as to gain on the transaction.\textsuperscript{198}

D. CONFIDENTIALITY

Federal informational returns filed for tax administration purposes are confidential\textsuperscript{199} except that such returns are open to inspection by, or disclo-

\textsuperscript{194} I.R.C. § 6041(a) (1984).
\textsuperscript{195} Id. § 6042(a); \textit{but see id.} § 6042(b) (1984).
\textsuperscript{196} \textit{See supra} note 126 and accompanying text.
\textsuperscript{197} See I.R.C. § 897(i).
\textsuperscript{198} \textit{See id.} § 897(d), (e); see \textit{supra} note 171.
\textsuperscript{199} Id. § 6103(a), (c), (j)(4).
sure to, *inter alia*, State tax authorities\(^{200}\) and to the tax agencies of treaty-nation foreign governments to the extent provided in the relevant bilateral treaty, convention, or agreement.\(^{201}\) Informational reports filed pursuant to the International Investment Survey Act (IISA), however, are treated confidentially, whereas reports filed pursuant to the Agricultural Foreign Investment Disclosure Act (AFIDA) are treated as public documents.

**V. Conclusion**

Inward foreign investment, particularly inward foreign direct investment, is expected to increase dramatically during the next several years. Fueling the growth of inward foreign investment are such factors as budding U.S. trade protectionism, civil strife among and within certain of the less developed countries, the reversion of territorial sovereignty over Hong Kong to the Peoples' Republic of China in 1997, and federal deficits which are expected to remain massive throughout the foreseeable future. Although the United States will continue to maintain an "open door" policy with respect to inward foreign investment, it is expected that inward foreign investors will substantially modify the conduct of their entrepreneurial activities or the manner of their foreign investment in this country in response to the Tax Reform Act provisions which narrow the avenues through which inward foreign investors may occasionally receive tax treatment more favorable than that afforded resident aliens or U.S. citizens. It is unlikely that there will be significant change in the taxation provisions exempting bank deposit interest income from withholding tax both as to nonresident alien individuals and to foreign corporate depositors,\(^{202}\) nor is it anticipated there will be changes in the provisions subjecting to withholding the compensation for labor or personal services performed in the United States by independent contractors.\(^{203}\) As to sales, passing the risk of loss when the subject matter is outside the United States should continue to cause income derived on the transaction to be sourced outside the United States.\(^{204}\)

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\(^{200}\) Id. § 6103(d).

\(^{201}\) Id. § 6103(k)(4).


\(^{204}\) See I.R.C. § 861(a)(6); A. P. Green Export Co. v. United States, 284 F.2d 383 (Ct. Cl. 1960); but see Treas. Reg. § 1.861–7(c) (1983) (extraterritorial sale must accomplish a business purpose other than bare tax avoidance); compare, Otis Elevator Co. v. United States, 618 F.2d 712 (Ct. Cl. 1980) (court looks at substance of transaction and does not automatically accept taxpayer's characterization of place of transaction).