

Reporting Requirements for U.S. Corporations: The International Investment and Trade in Services Survey Act

Although for some unknown reason it has failed to gain notoriety, the International Investment and Trade in Services Survey Act¹ (IITSSA or the Act), originally known as the International Investment Survey Act of 1976,² requires U.S. companies investing overseas to file certain reports with the Bureau of Economic Analysis (BEA) of the Department of Commerce.³ Many international practitioners are familiar with the extensive reporting requirements under IITSSA for foreigners investing in the United States,⁴ however, the reporting requirements for U.S. corporations doing business abroad have remained obscure. The filing of reports with the BEA's International Investment Division is mandatory if a U.S. person, including a U.S. corporation, has more than a ten percent ownership interest in a foreign business enterprise and such foreign business enterprise has significant assets, sales or after-tax income. Moreover, the BEA has proposed an

*McGrath, North, O'Malley & Kratz, P.C., Omaha, Nebraska. Texas Tech University (B.A., J.D.); University of Sydney (LL.M.). The author acknowledges the research assistance of firm clerk Paul Markwardt. The editorial assistance of Lucinda A. Low is also acknowledged.

1. 22 U.S.C. §§ 3101-3108 (1979 & Supp. 1985).

2. International Investment Survey Act of 1976, Pub. L. No. 94-472, 90 Stat. 2059.

3. The Department of Commerce has issued regulations under the IITSSA. See 15 C.F.R. §§ 806.1-806.18 (1985).

4. See Pederson, *Foreign Investment Reporting* (BNA Portfolio 1984); Scarborough, *The Foreign Investor in the United States: Disclosure, Taxation and Visa Laws*, 19 INT'L LAW. 85 (1985). This article discusses only the reports under the IITSSA which must be filed by U.S. corporations relating to international investment and trade in services but does not discuss foreign investment reporting.

additional report covering international trade in services.⁵ If this proposed report is adopted, a U.S. company that sells services to or purchases services from an unaffiliated foreign person, including legal and accounting services, may be required to file reports with the BEA.

Reports under the IITSSA must be filed even if the U.S. person has not been directly requested to do so by the BEA, and there are significant penalties for failure to file the required reports. The BEA has developed several reporting forms which must be filed at different times, ranging from quarterly reports to annual reports to the next benchmark report due in 1989. Thus, a U.S. corporation must independently determine which reports, if any, must be filed and when those reports are due. The following discusses the reporting forms currently in use by the BEA which are of concern to U.S. corporations and a proposed new reporting form which the BEA may adopt for international service transactions.

I. Purpose of the Reports

Congress enacted the IITSSA in order to alleviate the dearth of information on United States investment abroad.⁶ At the time the Act was passed in 1976, there had not been a complete survey on United States direct investment abroad since 1966. Under the IITSSA, Congress authorized the President to collect information on United States international investment and foreign trade in services. Congress intended the surveys to provide accurate and comprehensive information sufficient to assess the economic significance of U.S. investment abroad and to make informed policy decisions relating to international investment. The 1984 amendments to the IITSSA evidenced Congress' desire to complete detailed studies on international trade in services between unaffiliated parties.⁷

Today, the BEA considers the reporting requirements under the IITSSA necessary in light of the important and far-reaching economic impact of U.S. companies with direct investments abroad.⁸ The BEA expects that the U.S. government will be able to use the information gathered under IITSSA to represent the interests of private companies in bilateral negotiations with foreign countries and in international negotiations before groups such as the General Agreement on Tariffs and Trade (GATT) and the Organization for Economic Cooperation and Development (OECD).⁹ The information gathered may also improve the accuracy of the balance-of-payments

5. See 50 Fed. Reg. 37,867 (1985).

6. H.R. Rep. No. 1492, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 4663, 4664.

7. Trade and Tariff Act of 1984, Pub. L. No. 98—573, 98 Stat. 2948 (1984).

8. See 49 Fed. Reg. 3192 (1984).

9. *Id.*

accounts compiled by the BEA. Lastly, the BEA hopes that the information gathered will assist U.S. businesses in identifying and evaluating foreign market opportunities.

Even though its reporting requirements are somewhat burdensome to some U.S. companies, IITSSA's intent is neither to restrain nor to deter United States investment abroad or trade in services. For this reason, the Act requires the President to design reporting requirements which minimize the costs incurred by persons having to supply information.¹⁰

II. Access to Information Reported

Information collected under IITSSA is available only to U.S. government officials and employees performing functions under the Act.¹¹ In fact, no person can compel the disclosure of any report or part thereof collected under IITSSA without the prior written consent of the person supplying the report.¹² The Act, however, allows the President to authorize the exchange between agencies of information furnished under IITSSA in order to carry out the Act's purposes. Absent presidential direction to the contrary, U.S. government officials and employees performing functions under IITSSA may use information collected only for U.S. government analytical or statistical purposes or for enforcement proceedings instituted under the Act. These persons are subject to a ten thousand dollar fine if they willfully violate the confidentiality requirements of the Act.¹³ Moreover, the confidentiality provisions of IITSSA generally prohibit publication of information in a manner that specifically identifies the person furnishing the information.¹⁴ The Act has been interpreted, however, as not restricting the release of data that provides a rough idea of the investments of a particular person.¹⁵

III. Penalties

Even though to date no cases involving penalties given under IITSSA have been reported, United States companies should not take the requirements of IITSSA lightly considering that the Act provides for significant civil and criminal penalties in the event of failure to file a required report.¹⁶

10. 22 U.S.C. § 3101(c) (Supp. 1985).

11. *Id.* at § 3104(c).

12. *Id.*

13. *Id.* at § 3104(d).

14. *Id.* at § 3104(c).

15. *American Jewish Congress v. Department of the Treasury*, 549 F. Supp. 1270 (D.D.C. 1982), *aff'd mem.*, 713 F.2d 864 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 244 (1983).

16. 22 U.S.C. § 3105 (1979).

Under IITSSA, any person failing to furnish information required by the Act or the regulations promulgated thereunder may be subject to a civil penalty of up to ten thousand dollars, to an injunction commanding such person to comply, or both. In addition, any person who willfully fails to submit any information required by the Act or the regulations promulgated thereunder may be fined up to ten thousand dollars and, if an individual, imprisoned for up to one year, or both. Furthermore, if any corporate officer, director, employee, or agent knowingly participates in such a violation, that person may be subject to a like fine or one year imprisonment, or both.

IV. Reports Regarding Foreign Affiliates

A. GENERALLY

The regulations promulgated under IITSSA require a "United States person" (which includes individuals, branches, partnerships, corporations, estates and trusts) to file certain reports if it owns, directly or indirectly, ten percent or more of the voting securities of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise, including a branch.¹⁷ A U.S. person that has a direct investment of ten percent or more in a foreign business enterprise is called a "U.S. Reporter."¹⁸ A U.S. Reporter is normally consolidated to include the parent company and all domestic subsidiaries in which the parent owns a fifty percent or greater interest.¹⁹ In addition, the U.S. Reporter may report on a consolidated basis for all of its foreign affiliates located in the same foreign country if the affiliates are integral parts of the same business and are considered by the BEA to be engaged in the same industry.²⁰ Generally accepted accounting principles must be followed in preparing all reports.²¹

Even if a U.S. person qualifies as a U.S. Reporter, the IITSSA may not require it to file reports if its foreign affiliate falls within the "exemption level" for the particular report form. To determine exemption levels for individual report forms, a U.S. Reporter must examine the following factors: (1) total assets of the foreign affiliate; (2) net sales or gross operating revenues of the foreign affiliate, excluding sales taxes; and (3) net income of the foreign affiliate after income taxes.²² The regulations state that if any one of these three factors exceeds the stated exemption level, either posi-

17. 15 C.F.R. § 806.14 (1985).

18. *Id.* at § 806.14(a)(2).

19. *Id.*

20. *Id.* at § 806.14(b).

21. *Id.* at § 806.13(a).

22. *Id.* at § 806.14(d).

tively or negatively, a report must be filed.²³ It should be noted that if a foreign affiliate exceeds an exemption level in any one year, the regulations deem the exemption level to be exceeded in the following year for purposes of determining whether a U.S. Reporter must then file reports.²⁴ Thus, in order to be exempt from annual reporting, a U.S. Reporter that filed a report in the prior year must certify to the BEA the levels on which the exemption is based or certify that the information requested is inapplicable.²⁵

It should be remembered that if a U.S. direct investment abroad is held through a U.S. intermediary,²⁶ the U.S. intermediary is generally responsible for reporting on behalf of the principal.²⁷ However, the U.S. intermediary may be released from this responsibility if it instructs the principal to submit the required information and notifies the BEA of these instructions. Conversely, if a U.S. person holds a foreign affiliate through a foreign intermediary, the U.S. person is nonetheless considered to own the foreign affiliate directly for purposes of determining reporting obligations.

If a U.S. Reporter must report under IITSSA and is a company that issues an annual report to stockholders, the U.S. Reporter should²⁸ submit a copy of its annual report to the BEA.²⁹ The U.S. Reporter must also retain any and all records and other information used in preparation of its reports,³⁰ however, neither the IITSSA nor its regulations specify the period for which these records must be retained.

B. BE-577 QUARTERLY REPORT

Form BE-577, concerning transactions of a U.S. Reporter with foreign affiliates during the calendar year, must be filed by the U.S. Reporter no later than thirty days after the end of the calendar quarter in which a foreign affiliate exceeds an exemption level of ten million dollars.³¹ The BEA's policy is to deny any requests for extension of a reporting deadline except in

23. It is unclear how some of these factors can be exceeded negatively.

24. 15 C.F.R. § 806.14(d)(3) (1985).

25. The BEA provides a form to claim an exemption from filing the Annual Survey of U.S. Direct Investment Abroad. *See* Claim for Not Filing a BE-11 (rev. Apr. 1985).

26. 15 C.F.R. § 806.7(n) (1985).

27. *Id.* at § 806.11(c).

28. It is unclear whether submission of an annual report is "required" or "requested." Section 806.13(b) of the regulations states that annual reports are "requested" whereas a reporting form indicates that annual reports are "required." *See* Instructions to Form BE-11 (rev. Apr. 1985).

29. 15 C.F.R. § 806.13(b)(1985).

30. 22 U.S.C. § 3104(b) (1979).

31. 15 C.F.R. § 806.14(e) (1985). Reports for the final quarter of the calendar (or fiscal) year may be filed within forty-five days. *See* Instructions to Form BE-577 (rev. Jan. 1985).

certain hardship cases.³² A foreign affiliate is deemed to meet the “assets test” under the BE-577 exemption level and, thus, reports are required beginning with the quarter in which the foreign affiliate’s total assets exceed ten million dollars. On the other hand, the BE-577 “sales test” and “net income after income taxes test” are met and reports are required for each quarter of the year in which the annual amount of these items exceeds or can be expected to exceed ten million dollars.³³ Once a foreign affiliate has surpassed the quarterly report exemption level, the Department of Commerce may require a U.S. Reporter to file quarterly reports retroactively for the past year.³⁴

C. BE-11 ANNUAL SURVEY OF U.S. DIRECT INVESTMENT ABROAD

In 1984, the BEA began an Annual Survey of U.S. Direct Investment Abroad by requiring U.S. Reporters to submit Form BE-11, giving information on their foreign affiliates’ activities during 1983.³⁵ The 1984 Annual Survey was due on July 31, 1985, but in future years annual reports are expected to be due during April or May of each year. The annual survey is normally sent out by the BEA, approximately sixty days prior to the filing deadline, to companies the BEA has independently determined are not exempt. The purpose of the annual survey is to supplement and maintain the continuity of data obtained from the BEA’s comprehensive BE-10 Benchmark Survey of U.S. Direct Investment Abroad—1982. However, the volume of information required to be submitted on Form BE-11 is substantially less than that required on the 1982 Benchmark Survey. Because Form BE-11 is designed to supplement the BEA’s periodic benchmark survey, the BEA will not mandate the preparation of Form BE-11 during its next benchmark survey in 1989.³⁶

Annual Form BE-11 must be filed by every U.S. person (excluding banks) having a foreign affiliate that exceeds an exemption level of ten million dollars in any of the following: total assets at the end of the fiscal year, annual sales, or annual after-tax income.³⁷ Even if a U.S. person has a foreign affiliate which does not qualify for the ten million dollar exemption,

32. 15 C.F.R. § 806.13(g) (1985).

33. For example, a U.S. Reporter with a foreign affiliate that has net sales of three million dollars in the first quarter of the calendar (or fiscal) year and with similar sales expected for the next three quarters, must file Form BE-577 for the first quarter because it expects the affiliate to exceed the exemption level.

34. See Instructions to Form BE-577 (rev. Jan. 1985).

35. See Annual Survey of Direct Investment Abroad—1983. See also 15 C.F.R. § 806.14(f)(3) (1985).

36. Telephone interview with David Belli, Bureau of Economic Analysis (June 10, 1985).

37. 15 C.F.R. § 806.14(f)(3)(iv) (1985).

the U.S. person need not report on Form BE-11 for the foreign affiliate if it owns less than a twenty-five percent interest, directly or indirectly, in the affiliate. The reasoning behind requiring reports for foreign affiliates which are less than fifty percent but more than twenty-four percent owned is to ensure that information is gathered on foreign affiliates which are located in countries which do not permit majority ownership by foreigners.³⁸

The BE-11 survey is divided into three separate reporting forms: Form BE-11A, Form BE-11B, and Form BE-11C. If a U.S. Reporter has a foreign affiliate that surpasses one of the exemption levels and, therefore, under the regulations must file either Form BE-11B or Form BE-11C,³⁹ the U.S. Reporter is required to complete Form BE-11A.⁴⁰ In addition, the U.S. Reporter must file a Form BE-11B for each "majority owned affiliate"; a "majority owned affiliate" is a foreign affiliate in which the combined direct investment interest of all U.S. Reporters exceeds fifty percent. A U.S. Reporter which has a "minority-owned affiliate" must file a Form BE-11C; a "minority-owned affiliate" is a foreign affiliate in which the combined direct investment of all U.S. Reporters is at least twenty-five percent but not more than fifty percent.

D. BE-133B AND BE-133C ANNUAL REPORTS

Form BE-133C is a Schedule of Expenditures for Property, Plant, and Equipment of U.S. Direct Investment Abroad. Form BE-133B is a follow-up schedule to Form BE-133C. Form BE-133C is due on June 1 of each year and includes surveys as to actual spending for the calendar year and proposed spending for the next two calendar years. Form BE-133B, however, is due on December 1 of each year and requires information regarding revised estimates of projected spending for the next two calendar years. A U.S. Reporter must file each of these schedule-type report forms for each majority-owned foreign affiliate exceeding an exemption level of eight million dollars.⁴¹

E. REPORT FORM BE-507

The BEA has developed a three-digit industry code which is assigned to each foreign affiliate.⁴² Form BE-507 has two purposes: (1) to require each U.S. person who establishes or acquires a new foreign affiliate to report that

38. See 49 Fed. Reg. 3192 (1984) (proposing Annual Survey of Direct Investment Abroad).

39. 15 C.F.R. § 806.14(f)(3)(ii)-(iii) (1985).

40. *Id.* at § 806.14(f)(3)(i).

41. *Id.* at §§ 806.14(f)(1)-806.14(f)(2).

42. Bureau of Economic Analysis, *Direct Investment Industry and Foreign Trade Classifications Booklet BE-799* (rev. Feb. 1983).

event; and (2) to require each U.S. Reporter to report any change in a foreign affiliate's three-digit BEA Industry Code.⁴³ A U.S. Reporter need only file a BE-507 Report on a newly-acquired or newly-established foreign affiliate if the U.S. Reporter is required to file one of the other quarterly or annual reports mentioned above for that affiliate. The BE-507, noting the newly acquired or newly-established foreign affiliate, should be submitted along with this other report. However, if the three-digit BEA industry classification of a foreign affiliate changes, the U.S. Reporter must file Form BE-507 at the time such change occurs; the filing of a BE-507 report due to such a change is not conditioned on the filing of any other report. In order to determine if a change in the industry classification has occurred, the U.S. Reporter should compare the foreign affiliate's present BEA industry classification with its classification on a previous BE-507 report or on a previous BE-10 Benchmark Survey of U.S. Direct Investment Abroad—1982.

F. BE-10 BENCHMARK SURVEY OF U.S. DIRECT INVESTMENT ABROAD

At present, the IITSSA requires the President to conduct a benchmark survey of U.S. direct investment abroad covering the year 1989 and a benchmark survey covering every fifth year thereafter.⁴⁴ The Department of Commerce has yet to release regulations dealing with the 1989 benchmark survey.⁴⁵ Assuming the Department of Commerce retains the exemption levels contained in the 1982 survey, each U.S. Reporter with a foreign affiliate exceeding an exemption level of three million dollars will be required to complete the 1989 benchmark survey. However, the three million dollar exemption level used for the 1982 benchmark survey may be increased for the 1989 survey considering the ten million dollar exemption level established in 1984 for Form BE-11.

V. Proposed Survey Regarding International Service Transactions

In 1984, Congress amended the IITSSA to mandate that the Department of Commerce conduct a benchmark survey on trade in services between unaffiliated U.S. persons and foreign persons.⁴⁶ Congress intended that information on both sales and purchases of services with unaffiliated foreign persons be obtained through a BEA survey of international trade in services. In mid-1985 the BEA issued proposed regulations on surveys of international trade in services, and these regulations include a proposed new

43. 15 C.F.R. § 806.14(g) (1985).

44. 22 U.S.C. § 3103(b) (Supp. 1985).

45. *Cf.* 15 C.F.R. § 806.16 (1985).

46. *See supra* note 44 at § 3103(a)(4).

benchmark survey on report Form BE-20.⁴⁷ The proposed regulations indicate that Form BE-20 will replace Form BE-93, which is a report on transfers of intangible assets with unaffiliated foreign residents presently collected by BEA under the authority of the Bretton Woods Agreement Act.⁴⁸ However, after the proposed regulations were issued the Office of Management and Budget (OMB) rejected the survey as proposed under Form BE-20, stating that "BE-20 in its current form is unreasonably burdensome on reporting firms and would not yield the quality of data required to achieve the survey's purposes."⁴⁹ The OMB directed the BEA to undertake a program of pretesting and intensive consultation with potential reporting companies before making any revisions to Form BE-20.⁵⁰

Until some compromise is reached between the BEA and the OMB,⁵¹ the exact content of the final regulations and of revised Form BE-20 remains uncertain. It is anticipated that the new benchmark survey will be required to be completed by all goods-producing or services-producing U.S. companies if such companies purchase or sell services from or to unaffiliated foreigners.⁵² The exemption level under Form BE-20 will probably be determined on the basis of each category of services and not on an aggregate basis.

At least the following types of services are expected to be covered by revised Form BE-20: insurance; banking; advertising; computer and data processing; management consulting; real estate; communications; engineering; construction; transportation; education; entertainment; health care; and legal, accounting, and other professional services.⁵³ Form BE-20 will probably be a series of schedules with each schedule covering a particular group of services. U.S. Reporters that have sold or purchased any one or more of the above types of services within a certain time period may be expected to report the amounts received from or paid to unaffiliated foreign persons on a country-by-country basis.

47. See 50 Fed. Reg. 37,867 (1985) (proposing new 15 C.F.R. Part 801 concerning "Surveys of International Trade in Services between U.S. and Foreign Persons"). Before issuing the proposed regulations and new survey, the BEA completed a seventy-four page study based on its then existing data on U.S. trade and investment in services. See Bureau of Economic Analysis, Department of Commerce, Staff Paper 41, *U.S. International Trade and Investment in Services: Data Needs and Availability* (1984).

48. 22 U.S.C. § 286 (f) (1979). See also 15 C.F.R. § 803 (1985).

49. Letter from Wendy L. Gramm, Administrator for Information and Regulatory Affairs of the Office of Management and Budget, to Allan H. Young, Director of the Bureau of Economic Analysis (Oct. 21, 1985).

50. *Id.*

51. The dispute between the BEA and the OMB with regard to international service transactions received attention in the *New York Times*. See *Measuring the Service Economy*, *N.Y. Times*, Oct. 27, 1985, at 4F.

52. See 50 Fed. Reg. 37,867 (1985).

53. *Id.* at 37,869.

After the BEA completes its new benchmark survey of international service transactions, the BEA plans to conduct an annual survey of international trade in services to supplement the benchmark survey.⁵⁴ Moreover, the BEA is required by law to conduct additional benchmark surveys on international trade in services at least once every five years.⁵⁵

It is apparent that the proposed new benchmark survey on services and any subsequent annual surveys will require reports from U.S. corporations that were not required to report under IITSSA in the past. In particular, lawyers, accountants, and other professionals who sell their services to or purchase services from unaffiliated foreign persons may be required to report those transactions to the BEA. The impact on U.S. corporations of these reporting requirements for international service transactions could be significant depending on the type of report adopted and the exemption level set by the BEA.

VI. Conclusion

This article has reviewed the little-known requirements under the International Investment and Trade in Services Survey Act for U.S. corporations investing overseas. In addition to highlighting the particular reports that must be filed by U.S. corporations with foreign affiliates, this article has discussed the Bureau of Economic Analysis' proposed report for international trade in services with unaffiliated persons. Hopefully, the preceding discussion will bring these requirements to the attention of international practitioners who counsel clients engaged in international investment and trade in services.

54. *Id.* at 37,867.

55. *See supra* note 44, at § 3103 (a)(4).