FEDERAL LAWS AND REGULATIONS AFFECTING THE FOREIGN INVESTOR IN THE UNITED STATES

Immigrant Investors: Creating Employment for U.S. Communities

by Doreen Edelman[1]

INTRODUCTION

As we go to print, we continue to see a huge need for capital for investment in the U.S. Banks aren't lending and foreign investors see many opportunities from real estate development to hotels to wineries. Everyone needs funding. The options for foreign investment continue to expand and investors get more creative with their investment vehicles. However, legal advisors need to take a minute and step back and consider if the US government imposes any restrictions on such investment. Often the answer is "no," but there are reporting and disclosure requirements and several programs that do need to be considered before an investor is given the green light to proceed. With the economic crises, the downturn of Wall Street, the U.S. under constant threat of terrorist attacks and China holding the purse strings, foreign investment is a potential open wound for those opposed to globalization or those who see national security threatened by a Germans running a U.S. coal mine or an Emarati running a U.S. Port.[2]

The adoption by Congress of the "employment creation" provisions of the Immigration Act of 1990[3]—encouraging the immigration of individuals who seek to invest, or who are actively in the process of investing, in a new business in the United States—ties the immigration attorney more closely to the investment process itself, an activity usually performed by business attorneys. If they choose to do so, immigration attorneys may, therefore, now become much more actively involved in counseling on various investment-related issues. These issues, include whether investment in the business sector selected by the client is permissible and, if permissible, whether statutory reporting, disclosure, or other requirements are applicable to that investment. The latter issue is extremely important since short deadlines accompany many of the reporting requirements and civil and criminal penalties exist for negligent or willful failure to observe the deadlines.

This article will briefly outline the various federal laws and regulations that require reporting and disclosure, and highlight other federal laws that relate to the foreign investment process. However, this article does *not* consider applicable federal or state

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[2] In 2006, a proposed acquisition of commercial operations at six U.S. ports by Dubai Ports World raised questions concerning national security. This action brought scrutiny upon the Committee on Foreign Investment in the United States (CFIUS). Congressional questions followed as to whether Congress could properly oversee CFIUS due to its lack of transparency. The issue of national security and its linkage to foreign investment within the U.S. was also raised. It was posited that U.S. security and economic concerns had changed since the events of September 11th, 2001. *See* U.S. Congressional Research Service. The Committee on Foreign Investment in the United States (CFIUS), (RL33388; Nov. 6, 2009) by James K. Jackson. *available at* http://fas.org/sgp/crs/natsec/RL33388.pdf.

[3] Immigration Act of 1990, Pub. L. No. 101-649, §121(b)(5), 104 Stat. 4978.

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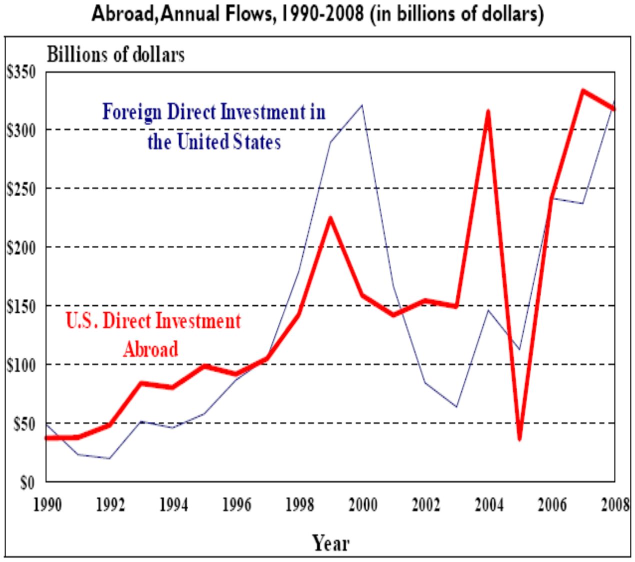
tax reporting requirements *nor* does it consider the array of state prohibitions, restrictions, or other provisions that also are applicable to the foreign investment process. This information should be used to educate yourself so you can recognize related issues and consult appropriate specialists to work with you and your clients/investors during the investment process.

U.S. POLICY REGARDING FOREIGN INVESTMENT IN THE UNITED STATES

The United States is both host and home to the world's largest amount of international investment.[4] Following the Second World War, when most other economies were languishing, U.S. business rapidly moved abroad in amounts sufficient to give rise to the term "multinational corporation." U.S. companies invested abroad, built new plants, created jobs, and transferred technology, all in the compelling spirit of their new global strategy.

Interestingly, despite the impressively large U.S. investment presence in developing countries, the question of U.S. businesses' political interference in these countries' internal affairs, or their "loss of sovereignty" to United States or other foreign investors, has been largely a nonissue. U.S. citizens have felt for 200 years that international investment is a "win-win" issue, and our host investment partners around the world have largely felt the same.

Figure 1. Foreign Direct Investment in the United States and U.S. Direct Investment Abroad, Annual Flows, 1990-2008 (in billions of dollars)



Source: U.S. Department of Commerce

for 95 percent of all foreign direct investment in the United States, directed primarily toward the manufacturing sector, followed by the banking and finance, retail and wholesale trade, and information sectors. *Id.* at 3.

Nevertheless, the pattern of U.S. direct investment abroad and foreign direct investment in the United States[5] has not always been smooth, reflecting, among other factors, the relative rates of growth between U.S. and foreign economies. As Figure 1 illustrates, since 1980, foreign direct investment in the United States has grown at a much faster rate than was typical for the preceding 50 years, accentuated by the spike in investment during the last half of the 1990s. Foreign investors have become much more visible throughout this country and this visibility has frequently excited concern. While these concerns have manifested themselves in various ways,[6] little has emerged from the debate to suggest that the theoretical principles underlying our "open door" investment policy have suddenly become unworthy.

Foreign investment, both U.S. investment abroad and foreign investment in the United States, is important in allocating resources to their most efficient uses. The results are greater productivity and enhanced international competitiveness—more jobs,

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[5] The United States defines foreign direct investment in the United States as the ownership or control, directly or indirectly, by one foreign person (individual, branch, partnership, association, government, etc.) of 10 percent or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise. 15 CFR §806.15(a)(1). (U.S. direct investment abroad is defined analogously). This definition is narrower than the broad current account calculation that takes into account not only income or returns from foreign investments, but total receipts and expenditures from the export of goods and services, and unilateral transfers. In current account terms, at the end of 2004, foreigners owned $12.5 trillion worth of assets in the United States, which was $2.5 trillion more than the value of U.S.-owned assets abroad. This difference represents the so-called current-account deficit. *See* "Why Does U.S. Investment Abroad Earn Higher Returns than Foreign Investment in the United States?," CBO Economic and Budget Issue Brief, Nov. 30, 2005. http://assets.opencrs.com/rpts/RS21118_20091105.pdf

[6] In the 1980s, concerns over foreign direct investment, where they existed, tended to focus on the potential loss of international competitiveness. The current debate, however, centers more on the overall phenomenon of "globalization" and how that might affect jobs in the economy. With job security becoming the most important public issue, opposition to foreign direct investment appears to have largely dissipated. The U.S. economy remains a prime destination for foreign direct investment and state governments, as well as the federal government, expend considerable resources vying for foreign investment projects along with the capital, technology, and jobs that accompany them.

better jobs, and higher wages, leading to an enhanced standard of living for all Americans.

As a matter of policy, the United States has always welcomed foreign investors and sought to accord such investors the same fair, equitable, and nondiscriminatory treatment given to U.S. investors. In 2009, foreign investment accounted for 14% of all new investment in the United States.[7] U.S. investment policy is governed by the following principles:[8]

- **National Treatment**. Foreign investors should be given treatment that is no less favorable in like situations than domestic enterprises, except to protect national security and related interests.
- **Most-Favored-Nation Status**. Foreign investors from different countries should be granted equal treatment.
- **Protection of Investor Rights**. Any expropriation of investment or abrogation of an investor's financial, physical, and intellectual property rights should be done for a public purpose, in a nondiscriminatory fashion under due process of law without violating previous contractual arrangements, and accompanied by prompt, adequate, and effective compensation.

Multilaterally, the United States has long worked to promote these principles. U.S. support in the Organization for Economic Cooperation and Development (OECD) for its *Declaration on International Investment and Multinational Enterprises* (1976) and its *Code of Liberalisation of Capital Movements* (1982) was strong. However, foreign investment often produces sharp differences over regulation between the developed and developing countries, and these foreign investment issues so far have defied consensus in international forums. In the OECD itself, during 1997 and 1998, such concerns sparked intense public opposition to the OECD's proposed agreement on investment, known as the *Multilateral Agreement on Investment* (MAI). Ultimately, in late 1998, the OECD Ministers were compelled to announce that they had ceased all further negotiations on the MAI.

In the Uruguay Round negotiations for the World Trade Organization (WTO), the negotiators were successful in addressing a more limited, trade-related, agenda.[9] By adopting the *Agreement on Trade-Related Investment Measures* (TRIMs Agreement), the WTO members at least have a basis to deal with certain national practices, such as local content requirements, that arise in the investment context but have the effect of restricting and distorting trade in doing so. However, the measures addressed by the TRIMs Agreement are highly selective, and do not in any way attempt to regulate the entry and treatment of foreign investment.[10]

Absent a broad multilateral agreement, it is very likely that the United States and other nations will continue to liberalize foreign investment restrictions, unilaterally in competition with other countries or through the adoption of bilateral investment treaties. Under the direction of the U.S. Trade Representative (USTR), the United States is actively pursuing basic *trade and investment framework agreements* (TIFAs) with some countries, expanding on an existing broad network of formal *bilateral investment treaties* (BITs), and negotiating comprehensive free trade agreements with interested countries such as the NAFTA.[11]

While the debate over foreign direct investment in the United States has largely dissipated, or perhaps shifted to other issues, the publicly expressed concerns of the 1970s led Congress to pass legislation that increased data collection and disclosure requirements for foreign owners of U.S. assets.[12]

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[7] From 2008 to 2009, foreign direct investment declined by 57%.

[8] U.S. Department of State, "Foreign Direct Investment in Global Economy" (Mar. 1989).

[9] *See generally* trade and investment topic at *www.wto.org/english/tratop_e/invest_e/invest_e.htm*.

[10] The current U.S. position is that the WTO's Working Group on the Relationship between Trade and Investment, which was also created during the Uruguay Round, is the best vehicle to attempt to address the multitude of differences that separate the developed and developing countries, as well as those issues that divide the developed countries in the investment arena. Another WTO Agreement that can bear on the investment issue is the *General Agreement on Trade in Services* (GATS), which concerns the supply of services by foreign companies.

[11] *See generally www.ustr.gov/Trade_Sectors/Investment/ Section_Index.html.* The BITs program complements in part the investment protection provisions contained in more than 40 bilateral "Treaties of Friendship, Commerce and Navigation" that the United States has been concluding for more than a century.

[12] 22 USC §§3101–3108; *see infra*, note 22.

Legislation passed in the 100th Congress granted the President the power to block foreign direct investments that he determines could impair U.S. national security.[13] Legislation considered in the 101st Congress would have required great disclosure of foreign investment activities, and another proposal would have required reciprocal treatment in the United States for investments from countries that deny national treatment to U.S. investors.[14] Both policy analysts and members of Congress have argued for prior screening of foreign investment in the United States and for selected performance requirements to govern specific investments.

Along with proposed screening measures there have been other examples of distrust of foreign investors in the U.S. One can be found in the Federal Election Campaign Act of 1971(FECA)[15] as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA)[16]. This act prohibits foreign nationals from participating in U.S. elections which includes making contributions. Foreign owned businesses are also subject to special rules under the FECA-BCRA. Although domestic corporations and partnerships must follow certain rules under these acts, those business entities owned by foreign nationals have many more restraints. This includes a prohibition against foreign business owners from taking part in any donation or decision about any donation that the business entity might make.[17] "Rather than merely a means of regulating the influence of money on politics, this prohibition reflects a visceral fear embedded in the American psyche that un-American forces seek to manipulate and control the American political system."[18]

[13] 50 App. USC §2170; *see infra*, note 59.

[14] While these pieces of legislation were never adopted, Congress, in 1990, did adopt legislation amending the International Investment and Trade in Services Survey Act, 22 USC §§3101–3108 (1988), discussed *infra*, to allow greater sharing of data among government agencies, and additional legislation entitled, "Foreign Direct Investment and International Financial Data Improvements Act," 22 USC §§3141–3146, requiring an annual report by the Secretary of Commerce on foreign direct investment in the United States, to be followed by a similar report by the Government Accountability Office.

[15] 2 U.S.C. § 431 *et seq*.

[16] 11 C.F.R § 100 *et seq*.

[17] *See generally* Nichloas G. Karambelas, *Examining the Law That Prohibits Foreign Nationals From Participating in U.S. Elctions*, Washington Lawyer (Feb. 2010).

[18] *Id*. at 32.

By and large, however, the United States continues to avoid screening, reciprocity, or performance requirements in connection with foreign investments. The U.S. approach is to utilize various foreign investment *disclosure* requirements that are found in selected statutes and provisions (see annexed table), as well as other laws designed to protect, broadly speaking, national security concerns, competition, and key sectors of the economy. The principal such statutes and provisions are reviewed briefly below.[19]

FOREIGN INVESTMENT DISCLOSURE STATUTES

Three of the major federal statutes that have an impact on foreign investment in the United States are information-gathering and disclosure statutes, instead of restriction statutes.

The Securities Exchange Act of 1934

The Securities and Exchange Act of 1934[20] requires disclosure of investment information in a nondiscriminatory manner from all acquirors of certain publicly-held securities. The act directs any person or group acquiring more than 5 percent of any equity security of a 1934 Act company[21] to file a Schedule 13D form[22] with the Securities and Exchange Commission (SEC). Schedule 13D imposes no reporting requirements on the foreign investor beyond those shared by the American investor—both must disclose their citizenship and residence, the source and amount of funds used to make the purchase, and their intentions with regard to changes in control of the subject corporation.[23]

For the most part, the securities laws do not treat foreign *issuers* any differently than they treat American issuers. There is no special form for foreign issuers who register their securities under the Securi-

[19] Federal tax statutes that impose reporting requirements on foreign investments (*see, e.g.*, IRC §6038A) are not considered in this article nor are any applicable state restrictions.

[20] 15 USC §78 (1988).

[21] A 1934 Act company means, for this purpose, an issuer that "has total assets exceeding $1,000,000 and a class of equity security . . . held of record by five hundred or more . . . persons." 15 USC §78(l)(g)(1)(b).

[22] 15 USC §78(m)(d)(1). 17 CFR §240.13d-1 requires Schedule D to be filed within 10 days of the date of acquisition. *See www.sec.gov/about/forms/sched13d.pdf*.

[23] 17 CFR §240.13d-101.

ties Act of 1933,[24] which is the major federal statute concerning the initial registration of securities.

Because the securities laws of the United States require full and accurate disclosure of all material financial information, foreign issuers may face a problem if they also are offering their securities in countries that do not require such significant disclosure. This type of problem may be resolved by requesting confidential treatment by the SEC in order to protect investors.[25]

International Investment and Trade in Services Survey Act of 1976

In 1976, Congress enacted the International Investment Survey Act[26] to obtain "comprehensive and reliable information on international investment."[27] The act authorized the President to construct a "regular data collection program" with regard to foreign investment in the United States, to conduct studies and surveys, to study the adequacy of information, disclosure, and reporting requirements, and to publish statistical information.[28]

Under the act, information is collected by the Secretary of Commerce, acting through its Bureau of Economic Analysis (BEA), with respect to "direct investment," defined by the regulations to mean "the ownership or control, directly or indirectly, by one person of 10 percentum or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise."[29] However, the Department of Treasury also has authority to conduct periodic comprehensive surveys of foreign "portfolio investment," which is defined as "any international investment which is not direct investment."[30] With the exception of the Securities and Exchange Act of 1934, the United States does not impose significant reporting requirements on foreign investors whose holdings fall short of this 10 percent threshold.

The BEA collects data on the operations of U.S. affiliates of foreign firms and investors through a series of initial transfer reports and periodic updates.[31] In general, the BEA requires transaction reports from U.S. affiliates at the time the foreign investment is made if the total cost of the acquisition is $3 million or more and, thereafter, periodic reports in the form of quarterly reports if the total assets acquired exceed $20 million and annual reports if the total assets exceed $10 million. Purchases of residential real estate solely for personal use are exempt from reporting.[32]

Two forms are utilized by the BEA at the time that the investment is made or the transaction occurs:

- **Form BE-13**. Form BE-13 is used in connection with a foreign person's direct or indirect acquisition, establishment, or purchase of a U.S. enterprise, including a business segment, operating unit, or real estate (other than real estate purchased for personal use) of a business enterprise. The regulations require that Form BE-13 must be filed by either the U.S. enterprise being purchased or the existing U.S. affiliate of the person making the acquisition.[33] In addition, a separate

[24] 15 USC §§77a *et seq.*

[25] 17 CFR §230.406.

[26] 22 USC §§3101–3108. In 1984, the statute became known as the International Investment and Trade in Services Survey Act.

[27] 22 USC §3101(b).

[28] Statistical information is collected primarily through quinquennial "benchmark surveys," which were required for the years 1980, 1987, and every fifth year thereafter. 22 USC §3103(b). The benchmark survey mandates disclosure of a multitude of information about transactions between foreign parent companies and U.S. subsidiaries, including balance sheets, income statements, trade in goods and services, employment data, taxes paid, R&D expenditures, payments arising out of technology transfers, and the like.

[29] 15 CFR §806.7(j).

[30] 15 CFR §806.7(k). Notice of surveys is published in the *Federal Register*. 31 CFR Part 129. Foreign portfolio investment generally includes items such as bank deposits, government securities, corporate bonds, and noncontrolling interests in corporate stock.

[31] In general, the reporting requirements may be categorized as:

- The initial investment reports representing establishment or acquisition of a U.S. affiliate (Forms BE-13 and BE-13C Exemption Claim, and BE-14);
- Quarterly reporting for qualifying reporters (Forms BE-605 and BE 606B);
- Annual reporting for qualifying reporters (Form BE-15); and
- Quinquennial reporting in bench mark surveys (Form BE-12).

[32] 15 CFR §806.8; 15 CFR §806.15(j)(3)(A).

[33] 15 CFR §806.15(j)(3). *See* current form and instructions at *www.bea.gov/bea/surveys/be13.pdf*.

report must be filed by the foreign parent or other U.S. affiliate that is party to the transaction.[34]

- **Form BE-14**. Form BE-14 is used whenever a U.S. person (1) enters into a joint venture in the United States with a foreign person or (2) assists or acts as an intermediary in the acquisition of a U.S. business enterprise by a foreign person. Form BE-14 must be filed by the U.S. venturer of the new joint venture enterprise or by a U.S. person who assists or intervenes in the transaction and who has not filed a Form BE-13.[35]

As provided by the forms themselves, both Forms BE-13 and BE-14 must be filed no later than 45 days after the investment transaction occurs. A civil penalty of not less than $2,500, nor more than $25,000, will lie for failure to furnish the required information.[36]

Certain "veils" that were utilized in the past to avoid disclosure of ownership information have been eliminated through regulation.[37] First, beneficial, not record, ownership is the basis of the reporting criteria for BEA reports. Thus, an owner who creates a trust, proxy, power of attorney, arrangement, or device with the purpose or effect of divesting such owner of the ownership of an equity interest as part of a plan to avoid reporting the information required by any of the BEA reports is deemed to be the owner of the equity interest.[38] Second, the U.S. affiliate of a foreign investor is required to identify the holder of bearer shares of the affiliate under certain circumstances.[39] Third, the regulations now prevent hiding foreign ownership via a "diamond holding pattern," through which the ownership of a holding company was divided into three or more entities, none having greater than a 50 percent interest in the holding company.[40] Fourth, reporting requirements now attach to estates, trusts, and other intermediaries.[41]

From the perspective of the foreign investor, it is important to stress that confidentiality under the International Investment and Trade in Services Survey Act will be strictly maintained. The act expressly provides that no information collected under its provisions may be published or released "in a manner that the person who furnished the information can be specifically identified except as provided in this section."[42] In addition, where the ultimate beneficial owner (UBO) is an individual, the U.S. affiliate need only report his or her country of residence.[43] Similarly, there is no requirement that a U.S. affiliate disclose the identity of the UBO who invests in publicly traded, as opposed to closely held, bearer shares.[44]

Agricultural Foreign Investment Disclosure Act of 1978

A large part of the public and governmental concern over foreign investment in the United States has focused on the increased foreign purchases of agricultural land. Driving up of prices in rural communities led to displacement and significant social problems. As a result, Congress, in 1978, adopted the Agricultural Foreign Investment Disclosure Act (AFIDA).[45] AFIDA requires a foreign person who acquires, disposes of, or holds any interest other than a security interest in agricultural land to submit a report on Form FSA-153 to the Secretary of Agricul-

[34] *Id.* A short form filing (Supplement C, Exemption Claim, Form BE-13) may be filed if the cost of the acquisition or established enterprise totals $3 million or less and 200 acres of U.S. land or less is involved in the transaction. 15 CFR §806.15(j)(3)(C).

[35] 15 CFR §806.15(j)(4). *See* current form and instructions at *www.bea.gov/bea/surveys/be14.pdf*. Under the statute, attorneys, accountants, investment bankers, brokers, and others involved in structuring and carrying out a foreign investment transaction may each conceivably be required to submit Form BE-14. However, the BEA normally does not require unaffiliated persons to submit a Form BE-14 if any party to the transaction has filed a Form BE-13. Professionals should, thus, take care that either the acquiring party or the acquired party files a Form BE-13. Form BE-14 need not be filed if the acquired U.S. business enterprise has total assets of $3 million or less or the joint venture to be established is capitalized at less than $3 million, and the enterprise does not own more than 200 acres of U.S. land. 15 CFR §806.15(j)(4)(B). In addition, a report is not required if the transaction is for residential real estate held exclusively for personal use. 15 CFR §806.15(j)(4)(A).

[36] 22 USC §3105(a).

[37] P. Butterfield, "Who Owns America: The Adequacy of Federal Foreign Investment Disclosure Requirements," 24 *Columbia Journal of Law and Social Problems* 79 (1990).

[38] 15 CFR §806.15(a)(6).

[39] 15 CFR §806.15(c).

[40] 15 CFR §806.15(a)(4).

[41] 15 CFR §806.11.

[42] 22 USC §3104(c).

[43] 15 CFR §806.15(b).

[44] 15 CFR §806.15(c).

[45] 7 USC §§3501–3508; 7 CFR §781.

ture not later than 90 days after the date of the acquisition or transfer.[46] Form FSA-153 must be filed by (1) any foreign person who holds, acquires or transfers any interest in agricultural property; and (2) any non–foreign person holding agricultural property who becomes a foreign person.[47]

"Agricultural property" is defined by the regulations as property in the United States currently used or if currently idle, last used within the past five years for farming, ranching, forestry, or timber production, except land not exceeding 10 acres in the aggregate if the annual gross receipts from the sale of farm, ranch, forestry, or timber products produced thereon do not exceed $1,000.[48]

Foreign persons who meet the requirements of AFIDA must submit Form FSA-153 to the office of the County Farm Service Agency where the land is located. Form FSA-153 requires disclosure of various information pertaining to the property and the owner thereof, including the following: (1) specific identification of the individual or corporate purchaser/transferee; (2) a legal description of the property; (3) the purpose for which the property will be used; (4) the type of interest held; (5) the details of the land value, including the purchase price and its estimated current market value; and (6) if the purchaser is a corporation, information regarding any persons with substantial (10 percent) control of the purchaser.[49]

AFIDA authorizes the Secretary of Agriculture to determine the true owners of foreign and foreign-controlled organizations by requiring reports from persons in the second and third tiers of ownership of such organizations.[50]

Civil penalties in the amount of 25 percent of the fair market value of the foreign person's interest in the land in question may be imposed for persons who fail to submit reports, submit incomplete reports, or who knowingly submit reports that are false or misleading or fail to maintain the accuracy of any submitted report. For late reports, the penalty can be 1 percent of the foreign person's interest in the agricultural land for each week or portion thereof that the report is late, not to exceed 25 percent of the fair market value of the foreign person's interest.[51]

LAWS THAT PROTECT THE INTEGRITY OF THE FINANCIAL SYSTEM

Reporting of International Capital and Foreign Currency Transactions, etc.

Every United States person must furnish information on relevant report forms if that person is engaged in (1) any transactions in foreign exchange; (2) any transfer of credit between any person within the United States and any person outside the United States; or (3) the export or withdrawal from the United States of any currency or coin that is legal tender in the United States.[52] The Department of Treasury provides numerous report forms pertaining to a variety of transactions between foreign persons and persons subject to U.S. jurisdiction. All report forms that are relevant to a specific transaction must be separately submitted.[53]

Depending on the type of report, civil and criminal fines for failure to submit the report of up to $10,000 may be imposed, as may imprisonment of up to one year, or both.[54] The information reported remains confidential.[55]

Transportation of Currency or Monetary Instruments

Financial Crimes Enforcement Network (FinCEN) Form 105 must be submitted by any person who directly or indirectly physically transports, mails, or ships currency or other monetary instruments from the United States or into the United

[46] *See* 7 CFR §781-3(b). All interests must be reported except security interests, leaseholds of less than 10 years, certain future interests, easements unrelated to agricultural production, and interests solely in mineral rights. 7 CFR §781.2(c). Form FSA-153 must be filed within 90 days of acquisition or disposition if a single foreign investor holds a 10 percent or greater aggregate interest or if unrelated foreign investors together hold a 50 percent or greater aggregate interest. *See www.fsa.usda.gov/wi/programs/factsheets/afida/FSA0153.pdf.*

[47] 7 CFR §781.3.

[48] 7 CFR §781.2(b).

[49] 7 CFR §781.3(e).

[50] 7 USC §§3501(e) and (f).

[51] 7 CFR §781.4.

[52] 31 CFR §128.2(a).

[53] 31 CFR §128.11–128.37.

[54] 31 CFR §128.4.

[55] 31 CFR §128.3.

States in an amount exceeding $10,000.[56] The report is due at the time of such entry or departure.[57] Form 105 does not need to be submitted in connection with a transfer of funds through normal banking channels that does not involve the physical transportation of currency or monetary instruments.[58]

Civil penalties for failure to file the required report may be assessed up to the amount of the transported currency/monetary instrument. The transported currency itself also may be subject to forfeiture, in which case the civil penalty will be reduced by the amount forfeited.[59] Criminal penalties include fines of up to $500,000, and prison terms of up to 10 years.[60]

Reports of Foreign Financial Accounts

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country is required to report this relationship for each year in which the relationship exists to the Department of Treasury on Form 90-22.1, Report of Foreign Bank and Financial Accounts.[61]

Form 90-22.1 should be filed by June 30 of each year, and the individual also should answer questions about such accounts that appear on Part III to Schedule B of Form 1040.[62] The principal exemption to this filing requirement is if the combined value of the foreign accounts was $10,000 or less during the preceding year or if the accounts were at a U.S. military banking facility operated by a U.S. financial institution.

LAWS THAT PROTECT NATIONAL SECURTIY

During the 1980s, there was a sharp increase in Congressional concern over foreign direct investment in U.S. businesses and assets. A number of legislative proposals were considered, but the key foreign investment provision emerging from the Congressional debate was Exon-Florio.[63]

The Exon-Florio provision authorizes the President, or his designee, to investigate foreign acquisitions to determine their effect on national security, and to take such action as he deems appropriate to prohibit or suspend such acquisitions if the President finds that:

- There is credible evidence to believe that the foreign investor might take action that threatens to impair the national security; and
- Existing laws, other than the International Emergency Economic Powers Act and the Exon-Florio provision, do not provide adequate and appropriate authority to protect the national security.

The President may direct the Attorney General to seek appropriate judicial relief, including divestment, and the President's findings are not subject to judicial review. A later amendment to the statute *requires an investigation* in cases where the acquirer is controlled by or acting on behalf of a foreign government, and the acquisition could result in control of a person engaged in interstate commerce in the

[56] 31 USC §5316; 31 CFR §103.23(a). Currency is defined as any customarily used coin and paper money of any country, and includes U.S. notes and Federal Reserve notes, official foreign bank notes, and notes that customarily are accepted as a medium of exchange in a foreign country. 31 CFR §103.11(e). Monetary instruments consist of currency, all negotiable instruments (including personal and business checks, cashier's checks, promissory notes, traveler's checks, and money orders), and securities or stock in such form that title passes upon delivery. 31 CFR §103.11(m)(1). Monetary instruments do not include warehouse receipts or bills of lading. 31 CFR §103.11(m)(2).

[57] 31 CFR §103.27(b)(1).

[58] 31 CFR §103.23(d). Moreover, a person who is not a resident or citizen of the United States that makes shipments from abroad of currency or other monetary instruments to a bank or broker/dealer through the postal service or by common carrier is not required to submit Form 105. 31 CFR §103.23(c)(4).

[59] 31 CFR §103.58(d).

[60] 31 CFR §103.59(c). *See www.fincen.gov/fin105_cmir.pdf.*

[61] 31 CFR §103.24. Persons having interests in 25 or more foreign financial accounts need only note that fact on the form, and may be required to provide more detailed records regarding each account if so requested. *See www.fincen.gov/f9022-1.pdf.*

[62] Corporations also are required to file Form 90-22.1 and to complete Part L of IRS Form 1120.

[63] Pub. L. No. 100-418, §721, 102 Stat. 1107; Pub. L. No. 102-99, §8, 105 Stat. 487 (50 USC App. §2170). The Exon-Florio provision was added as §721 of the Defense Production Act of 1950 by virtue of §5021 of the Omnibus Trade and Competitiveness Act of 1988.

United States that could affect the national security of the United States.[64]

Exon-Florio was not intended to inhibit foreign direct investments in industries that are not of national security interest. Nevertheless, it potentially widens the scope of industries that fall under the national security rubric. Previous legislation barred foreign direct investment in such industries as maritime, aircraft, banking, resources, and power. Generally, these sectors were closed to foreign investors to prevent public services and public interest activities from falling under foreign control, primarily for national defense purposes.

Under Exon-Florio, however, the term national security is intended to be interpreted broadly without limitation to a particular industry. As such, it could apply to a firm in practically any industry.[65] Nevertheless, the legislative history also shows that Congress rejected proposals to expand the statute's coverage to include threats to "essential commerce" and "economic welfare," which undercuts the arguments of those that contend the term "national security" should be construed broadly enough to subsume within it notions of economic security and international competitiveness.

By Executive Order 12662 of December 27, 1988, the President designated the Committee on Foreign Investment in the United States (CFIUS) to receive notices and other information regarding acquisitions; to determine whether investigations should be undertaken; and once an investigation has been completed, to prepare a report and a recommendation to the President.[66]

The law provides a framework of a maximum 90-day review of notified transactions. This period includes 30 days to determine whether to investigate a transaction (commenced by a receipt of "written notification"),[67] 45 days to complete an investigation,[68] and a final 15 days for the President to announce his decision on the transaction.[69] If a transaction moves from the 30-day review to the formal 45-day investigation, then the President must decide its disposition.[70]

CFIUS review is initiated by receipt of a written notification of a transaction.[71] The regulations pro-

[64] Pub. L. No. 102-484, 106 Stat. 2315, 2463. In a recent high-profile case, Dubai Ports World, a terminal operator owned by the government of the United Arab Emirates, voluntarily submitted for investigation its proposed acquisition of certain port terminal operations.

[65] The statute does give the President or his designee some guidance on the factors that should be considered in taking action. These factors include, but are not limited to, domestic production needed for projected national defense requirements; the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services; the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security; the potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons or is a regional threat military threat to the interests of the United States or is on the "Nuclear Non-Proliferation-Special Country List"; the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security; the potential national security-related effects on United States critical infrastructure; whether the transaction is a foreign government-controlled transaction; and the long-term projection of U.S. requirements for sources of energy and other critical resources and material. 50 USC App. §2170(f)(1)-(11). CFIUS has considered notifications of foreign acquisitions ranging from lawn seed and tulips to defense contractors.

[66] CFIUS membership is the Secretary of the Treasury (chair), the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Commerce, the Director of the Office of Management and Budget, the Chair of the Counsel of Economic Advisers, the U.S. Trade Representative, Director of the Office of Science and Technology Policy, Assistant to the President for National Security Affairs, Assistant to the President for Economic Policy, and the Secretary of the Department of Homeland Security. Other government agencies are included in CFIUS deliberations when a notification raises questions within their area of expertise. *Id.* §2170(k)(2)(A)-(J).

[67] *See id* §2170(b)(1)(E).

[68] *See id.* §2170(b)(2)(C).

[69] *See id.* §2170(d)(2).

[70] *Id.*

[71] Notifications to CFIUS generally include the following information:

- A description of the parties to the transaction;
- Details on the acquisition arrangements;
- Identification of the foreign parent and the ultimate beneficial owner and information on both;
- Other filings with U.S. government agencies that have been made or are contemplated;

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vide that notice may be given only by a party to the transaction or by a CFIUS member agency.[72] Notice from third parties is not accepted. Notification is voluntary under the Exon-Florio provision. Many foreign acquisitions do not involve issues related to national security and, consequently, parties to the transaction may decide not to notify CFIUS.[73]

In July, 1989,[74] CFIUS issued proposed regulations under the Defense Production Act. Over 70 organizations commented on the regulations, which included over 700 pages of comments.[75] The Treasury Department, Office of International Investment, issued final regulations in 1991.[76]

In 2007, more changes to legislation[77] ensued after the events of September 11th, 2001, Congressional opposition to the Dubai Ports World's attempt to buy operations of U.S. ports and China's CNOOC's attempted purchase of UNOCAL shook confidence in Congress' ability to provide sufficient oversight through a lack of CFIUS transparency.[78] These legislative additions expanded the scope of transactions subject to national security review as well as increased Congressional reporting requirements for CFIUS. This Congressional scrutiny will continue for foreign acquisitions in areas of critical technology and infrastructure.

LAWS THAT PROTECT COMPETITION

Clayton Act

The antitrust laws may prevent a particular acquisition by either domestic or foreign investors because of its effect on actual or potential competition. Section 7 of the Clayton Act is the principal statute that provides safeguards against further industrial concentrations in the United States.[79] That section prohibits any merger or acquisition by one corporation of the stock of another corporation if such action may tend substantially to lessen competition or create a monopoly in any line of commerce anywhere in the United States.

As distinguished from the earlier Sherman Act,[80] §7 of the Clayton Act allows the government to challenge anticompetitive business practices in their

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- A list of contracts, both classified and unclassified, with Department of Defense or other U.S. government agencies; and
- The plans of the acquiring company for the U.S. company. 31 CFR §800.402.

[72] *See* 50 USC App. §2170(b)(1)(C) and (D).

[73] Once a notification is received, Treasury, as the first step, decides if it is complete. If so, the 30-day review period begins. During that period, CFIUS agencies evaluate the transaction. At the end of the 30-day period, if no agencies request an investigation, the parties to the transaction are notified that there are no national security issues sufficient to warrant an investigation and that action under the Exon-Florio provision is concluded with respect to the notified transaction. If agencies decide to request an investigation, CFIUS then decides at the Assistant Secretary level whether to initiate an investigation. A decision to investigate begins the statutory investigation period, which is not to exceed 45 days. At the completion of the investigation, CFIUS must send the President a report and a recommendation. If CFIUS is unable to reach a unanimous recommendation, the Secretary of the Treasury, as chair, submits a CFIUS report to the President that sets forth the differing views and presents the issues for decision. The President then has 15 days to announce his decision on the case. *See id.* §2170 *et.seq.*

[74] 54 Fed. Reg. 29744.

[75] The key concerns expressed by the commentators were the following:

- The need for a definition of, or clear guidance as to the meaning of, "national security." Neither the Exon-Florio provision and its legislative history nor the Defense Production Act define national security. The proposed regulations left the term undefined, apparently to preserve presidential flexibility.
- The preference for a bright line definition of "control," for example, in terms of board membership or share ownership. The proposed regulations define control functionally, in terms of the ability to make important decisions about the company.
- The absence of a limiting provision that would, after a period of time, remove the threat of presidential action against investors who choose not to notify.

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- The status of foreign lenders who make commitments to finance an acquisition of a U.S. company, but who do not thereby acquire control or even contemplate control, absent default on loans.
- The need for special treatment for hostile transactions to take into account the fact that they are highly time-sensitive.
- The desirability of a formal fast-track procedure to enable more rapid handling of transactions that bear no relation to national security.

[76] 31 CFR §800 *et seq.*

[77] "P.L 110-49: The Foreign Investment and National Security Act of 2007." (121 Stat. 246;Date: 7/18/91).

[78] Jackson, *supra* note 1.

[79] 15 USC §18.

[80] 15 USC §1.

incipiency, before their consequences come to fruition.

Hart-Scott-Rodino

To facilitate enforcement of §7, Congress, in 1976, passed the Hart-Scott-Rodino Antitrust Improvement Act, which in part added a new §7A, providing for premerger notification.[81] The primary purpose of the premerger notification process is to allow the government sufficient opportunity to compile data concerning an impending merger, and, if that merger appears to violate §7, to facilitate the obtaining of a preliminary injunction against it.

In general, §7A:

- Prohibits persons, including foreign persons, from acquiring the stock or assets of other firms unless advance notice is given to the Federal Trade Commission and the U.S. Department of Justice;
- Establishes a 30-day waiting period after such notification, or 15 days if the tender offer is in cash;
- Exempts certain acquisitions (such as the purchase of stock for investment purposes only or the creation of subsidiaries) that pose no anti-competitive problems; and
- Authorizes up to $10,000 per day in penalties for violations of the act.

Detailed information on a prescribed form[82] must be submitted to the two agencies. To be subject to the premerger notification provisions, either party must meet certain "size of person" requirements,[83] and the transaction must be of a certain size.[84]

LAWS THAT PROTECT CLASSIFIED INFORMATION

The Executive orders and Department of Defense regulations that constitute the National Industrial Security Program may make it difficult for foreign-controlled corporations to obtain the security clearances necessary to carry out a contract involving classified information.[85] Both a *facility* clearance and *individual* clearances for key management personnel and others who may have access to classified information are required for any company in the Untied States carrying out a classified contract.

Generally, facilities that are under "foreign ownership, control, or influence" are ineligible for facility clearances unless foreign management is excluded. A foreign-controlled U.S. subsidiary might obtain clearances by forming a "voting trust" or "proxy agreement" in which it gives up management rights, but retains rights to profits, or by formally agreeing with the United States government to special management arrangements that attempt to ensure the security of the classified information.

LAWS THAT PROTECT PARTICULAR SECTORS OF THE ECONOMY

Over the years, Congress has expressed its belief that certain industries are "essential" or could affect national security and, therefore, should have limits on foreign investment. These industries include the maritime industry, the aircraft industry, banking, mining, energy, public lands, communications, government contracting, and investment regulations. A few of these specific business sectors are noted below.

Atomic Energy

The Atomic Energy Act[86] requires the issuance of a license for the operation, transfer, receipt, manufacture, product, acquisition, possession, or import or export of facilities that produce or use nuclear materials. Aliens, foreign governments, foreign corporations, or corporations owned, controlled, or dominated by such interests cannot be issued a license for any of the above activities except the export of such facilities.[87]

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81 15 USC §18a; 16 CFR §801. Pub. L. No. 94-435, 90 Stat. 1390.

82 16 CFR Pt. 803, Appendix.

83 15 USC §18A(a)(2).

84 15 USC §18A(a)(3). Pursuant to amendment of the statute, the Federal Trade Commission is required to revise the thresholds annually.

85 *See* Industrial Security Regulation, DoD 5220.22-R (Dec. 1985), and Industrial Security Manual for Safeguarding Classified Information, DoD 5220.22-M (Sept. 1987). The National Industrial Security Program was established by Executive Order on January 6, 1993, for the protection of classified national security information, and is under the policy direction of the National Security Council.

86 42 USC §2011 *et seq.*

87 42 USC §2133(d).

Radio and Television

The Communications Act[88] prohibits foreign governments and their representatives from holding any radio station license.[89] Also, aliens and their representatives, foreign chartered corporations, and foreign-owned corporations are prohibited from holding any licenses for broadcast or common carrier radio stations. (A corporation is considered "foreign owned" if any director or officer is an alien, or if more than 20 percent of its capital stock is owned or voted by aliens, a foreign government, or a foreign corporation.[90])

A domestic corporation that is foreign controlled may not hold a broadcast or common carrier license if the Federal Communications Commission finds the denial of the license to be in the public interest.[91] (A corporation is considered to be "foreign controlled" if a controlling corporation has an alien officer or if more than 25 percent of its directors are aliens or more than 25 percent of its stock is owned or voted by foreign interests.[92])

Aviation

The Federal Aviation Act (FAA) requires a carrier to obtain a license to carry persons, property, or mail between points within the United States.[93] A carrier must be a U.S. citizen to obtain such a license. To qualify a company as a U.S. citizen under the FAA, 75 percent or more of its voting interest must be owned or controlled by U.S. citizens, and the president and two-thirds or more of its management and board of directors must be U.S. citizens.[94]

LAWS THAT PROTECT THE U.S. TECHNOLOGY BASE

Arms Export Control Act

Under the Arms Export Control Act,[95] the Department of State promulgated implementing regulations—the "International Traffic in Arms Regulations" (ITAR)[96]—that were specifically amended to provide that defense firms must provide the Office of Defense Trade Controls with written notice at least 60 days prior to a planned transfer in ownership to a foreign purchaser.[97]

Such notice provides the U.S. government with the opportunity to point out to firms that, with limited exceptions, the ITAR requires a license for the transfer of technical data to a foreign person whether the recipient is within or outside the United States.[98] Licenses can be denied for foreign policy or national security reasons and, thus, may be difficult or impossible to obtain, depending on the degree of sophistication of the technical data and the nationality of the foreign investor.

Export Administration Act

The Export Administration Act of 1979, as amended,[99] authorizes the United States to restrict exports of goods and technology that would make a significant contribution to the military potential of any other country or combination of countries that would prove detrimental to the national security interests of the United States. In particular, the Department of Commerce requires firms to seek licenses for exports of "dual use" technologies. Of great concern are high performance computers, encryption technology, satellites, and certain machine tools. In 1997, the Department of Commerce determined that the mere release of technology to a foreign national was a "deemed export," vastly increasing the need for licenses."[100]

Note there is also a bar to admission to the United States of any alien who may violate U.S. laws prohibiting the export of goods, technology, or sensitive information from the United States.[101]

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[88] Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), 47 USC §151 *et seq.*

[89] 47 USC §310(a).

[90] 47 USC §310(b)(3).

[91] 47 USC §310(d).

[92] 47 USC §310(b)(4).

[93] 49. USC §41101(a).

[94] 49 USC §40102(15).

[95] 22 USC §§2751–96.

[96] 22 CFR §§120–30.

[97] 22 CFR §122.4(b).

[98] 22 CFR §125.3(c) .

[99] 50. USC App. §2401 *et seq. See also* 15 CFR Part 770 ff.

[100] 15 CFR §§730–74.

[101] *See* T.L. Loke Walsh, "The Technology Alert List, Visa Mantis and Export Control: Frequently Asked Questions," 2 *Immigration & Nationality Law Handbook* 412 (AILA, 2004–05 ed.).

FEDERAL DISCLOSURE AND REPORTING REQUIREMENTS						
Statute	**Agency & Form(s)**	**Who Files? When?**	**Thresholds**	**Penalties**	**What Information?**	**Confidentiality**
International Investment and Trade in Services Survey Act of 1976 22 USC §§3101–3108 15 CFR §806	**Department of Commerce, Bureau of Economic Analysis** Initial reports (*Forms BE-13, BE-13C, and BE-14*) Quarterly reports (*Forms BE-605 and BE-606B*) Annual report (*Form BE-15*) Quinquennial report (*Form BE-12*) Industry classification (*Form BE-607*)	U.S. business enterprise U.S. person who assists or intervenes in acquisition of a U.S. business enterprise by, or who enters into a joint venture with, a foreign person (*e.g.*, attorneys, CPAs, brokers, etc.) *Report due within 45 days of investment*	Direct or indirect interest of 10% or more of voting securities of incorporated U.S. business or its equivalent Full exemption if real estate purchased for personal use; partial exemption if U.S. business enterprise has total assets of $3 million or less and owns less than 200 acres of U.S. land	Civil penalties for failure to furnish information involves civil fines not exceeding $10,000 Willful noncompliance subject to criminal fines and imprisonment	Identifying information, including ultimate beneficial ownership, and location, nature and cost of investment Information on parent's balance sheet and related data, trade between entities, employment data, and tax payments	Reports are confidential and may be used by the government only for "analytical or statistical" purposes, unless the President directs they be disseminated to other federal agencies
Agricultural Foreign Investment Disclosure Act of 1978 7 USC §§3501–3508 7 CFR §781	**Department of Agriculture, Office of Agricultural Stabilization and Conservation Service** *Form FSA-153*	Foreign person who acquires, disposes of, or holds an interest in U.S. "agricultural land" (other than a security interest, leaseholds less than 10 years, etc.) *Report due within 90 days of acquisition*	Must exceed 10 acres in aggregate or produce more than $1,000 annually from farming, ranching, forestry or timber production	Civil penalties up to 25% of fair market value for incomplete, false or misleading reports, or failure to update; late filings also penalized	Legal description and acreage; date of transfer and fair market value; price; legal interest conveyed and prospective use; identity of parties (*i.e.*, the true owners)	Reports are filed in Agricultural Stabilization and Conservation Service (FSA) County office and are available for public inspection ten days after filing; copy is sent to state Department of Agriculture

Currency and Foreign Transactions Reporting Act of 1970 31 USC §§321, 5311–5322 31 CFR §103 31 CFR §128	**Customs Service** **Internal Revenue Service** *Form 4790* (Customs) *Form 4789* (IRS)	Financial institutions Any person physically transporting or receiving currency or monetary instruments Any person having an interest in, or signatory or other authority over foreign financial account *Report due at time of entry or departure*	$10,000 Some exemptions applicable in case of financial institutions reporting requirements Transfer of funds by bank check, bank draft or wire transfer are exempt from the individual reporting requirement	Willful violations by financial institutions may involve civil fines from $25,000 to $100,000 Civil penalties for failure to file required report; currency and monetary instruments in transit may be subject to seizure and forfeiture Substantial criminal penalties also apply to willful violations of the Act	Financial institutions report each deposit, withdrawal, exchange of currency, or other payment by, through, or to such institution Any person who physically transports, mails or ships coins or currency or other "monetary instruments" (*e.g.*, investment securities in bearer form or registered form if endorsed in blank; promissory notes; etc.)	Reports are exempt from disclosure under Freedom of Information Act (FOIA), but may be provided by Secretary of Treasury to other agencies
Domestic and Foreign Investment Improved Disclosure Act of 1977 15 USC §78m 17 CFR §240.13d-1	**Securities and Exchange Commission** *Schedule 13D*	Any person or "group" acquiring, directly or indirectly, beneficial ownership of certain classes of securities *Report due within 10 days of date of acquisition*	5% of voting equity securities of corporation registered pursuant to Section 12 of the Act	Civil and criminal penalties under the federal securities laws	Name and address of the beneficial owner; citizenship or place of organization; source of funds; future plans	Information is public record and available for public inspection; confidential treatment may be requested
Hart-Scott-Rodino Antitrust Improvements Act of 1976 15 USC §18a 16 CFR §§801–803	**Federal Trade Commission** **Department of Justice, Antitrust Division** Notification and Report Form for Certain Mergers and Acquisitions Advance written notification of merger; 30-day waiting period before consummating transaction	Both parties to merger (acquiring party only in case of tender offer) *Report due in advance of merger or acquisition*	Transactions by which (i) one party has consolidated assets or annual sales of $100 million and other party has consolidated assets or annual sales of $10 million, and (ii) as a result of acquisition, acquiring person would have aggregate voting securities or assets of the acquired person in excess of $15 million or at least 15% of the voting securities or assets of the acquired person	Civil penalties against any person, officer, director, or partners of entity in amount not to exceed $10,000 per day Equitable relief (injunction against acquisition pending compliance)	Identity of parties; description of acquisition and assets; information related to industry and to specific business; previous acquisition information; etc.	Information is confidential and exempt from disclosure under Freedom of Information Act (FOIA); can be made public only in administrative or judicial proceeding or disclosed to committee of Congress

Defense Production Act of 1950 (Exon-Florio) 50 USC App. §2170 31 CFR §800	**Committee on Foreign Investment in the United States** Written notification to CFIUS is voluntary; may trigger up to 90-day review period	Foreign investor U.S. target *Report is voluntary*	Whether foreign investor is acquiring "control" over the U.S. entity Whether foreign investor is taking action which would impair "national security"	No formal sanction for failing to file, but appropriate judicial relief is available, including the blocking of a pending transaction and the forced divestment of an already completed transaction	Description of parties, parents, transaction, other government filings, future plans, business activities of both parties, etc.	Information is confidential and exempt from disclosure under Freedom of Information Act (FOIA); can be made public only in administrative or judicial proceeding or disclosed to committee of Congress
Internal Revenue Code	**Internal Revenue Service** Form 1120 Form 5472 Form 1042 Form 1120 F Form 1040 NR	Taxpayer Reporting Corporation *Filing dates are specified by statute and/or regulation*		Civil and criminal penalties	Income, gains, losses, deductions, credits, and amount of tax; taxpayer identification; reportable transactions	
International Emergency Economic Powers Act of 1977 50 USC §§1701–1706 *See also* various regulations for assets control, sanctions, and transactions administered by Office of Foreign Assets Control, U.S. Treasury Department	**President of the United States** Formal declaration of national emergency	N.A.	In case of extraordinary and unusual threat to national security, foreign policy or economy of the U.S., President may investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit, and import or export of currency or securities; President also has broad powers with respect to any transaction involving a foreign country or national	Civil penalties not to exceed the greater of $250,000 or an amount that is twice the amount of the transaction that is the basis of the penalty Criminal penalties not to exceed $1,000,000 or 20 years imprisonment, or both	Disclosure may be required from any person before, during, or after completion of transaction, including production of books of account, records, contracts, letters, memoranda, or other papers	No formal confidentiality provision but process is nonpublic in nature