

New Reporting Requirements on the Horizon for US Financial Services Providers Doing Business With Non-US Persons

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Following closely on the heels of the reinstated reporting requirements for inbound and outbound direct investment involving U.S. entities,¹ the U.S. Department of Commerce's Bureau of Economic Analysis (BEA) has announced plans to require U.S. financial service providers to respond to the Form BE-180 Benchmark Survey of Financial Services Transactions Between U.S. Financial Services Providers and Foreign Persons. As proposed, responses to Form BE-180 will be required by October 1, 2015, from all U.S. financial service providers that, during their 2014 fiscal year, had financial transactions totaling \$3 million or more on a consolidated basis directly with non-U.S. persons (including individuals, corporations and other entities).² Failure to file a report can lead to civil and criminal penalties under the International Investment and Trade in Services Survey Act and related statutes.

Those likely to be affected by BEA's proposed new reporting requirements have an opportunity to make their voices heard. Specifically, BEA has requested written comments on the proposed Form BE-180 reporting requirements by March 30, 2015. A final rule implementing such requirements is expected to be issued in advance of the proposed October 1, 2015, filing deadline.

As explained below, the scope of financial services subject to BEA's proposed reporting requirement is very expansive. Moreover, the proposed requirement casts a wide net to include any "U.S. person" providing any type of financial service to non-U.S. persons.³ For example, if implemented as currently drafted, the proposed reporting requirement would sweep in U.S. branches and subsidiaries of foreign entities as well as entities of various state, local and other governments that may offer financial services to non-U.S. persons.

The \$3 million reporting threshold proposed by BEA applies to the value of all transactions with foreign persons in the aggregate. Thus, even a U.S. financial service provider that had a large number of small-value transactions with many different foreign persons during its 2014 fiscal year would be required to report so long as the total value of all such transactions equaled or exceeded \$3 million. Moreover, in determining whether or not it meets the \$3 million threshold for reporting, a U.S. entity is required to add up the value of all financial service transactions engaged in by itself and each of its consolidated subsidiaries. As proposed by BEA, this means that a U.S. parent that otherwise does not offer any financial services would still be required to file a Form BE-180 if any of its U.S. subsidiaries bought financial services directly from, or sold financial services directly to, a foreign person and the total value of such transactions equaled or exceeded \$3 million on a consolidated basis.

¹ See the Skadden memorandum, "Important but Frequently Overlooked Reporting Requirements for Inbound and Outbound Direct Investment Involving US Entities," published Jan. 16, 2015.

² BEA benchmark surveys are normally conducted every five years. The last BE-180 benchmark survey covered the 2009 fiscal year.

³ As drafted, the requirement applies to "each U.S. person that is a financial services provider or intermediary." "U.S. person" is defined by BEA as "any person resident in the United States or subject to the jurisdiction of the United States," and "person" is defined as "any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization ... and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency)."

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As proposed by BEA, the scope of reportable financial services transactions is very broad and includes:

- brokerage services, including those related to equity transactions;
- underwriting and private placement services;
- financial management services;
- credit-related services, including credit card services;
- financial advisory and custody services;
- securities lending services; and
- electronic funds transfer services.

According to BEA, U.S. financial service providers coming within the scope of the proposed reporting requirement include providers of:

- depository credit intermediation (including commercial banking, savings institutions, credit unions and other depository credit intermediation);
- non-depository credit intermediation (including credit card issuing, sales financing and other non-depository credit intermediation);
- activities related to credit intermediation (including mortgage and nonmortgage loan brokers, financial transactions processing, reserve and clearinghouse activities, and other activities related to credit intermediation);
- securities and commodity contracts intermediation and brokerage (including investment banking and securities dealing, securities brokerage, commodity contracts and dealing, and commodity contracts brokerage);
- securities and commodity exchanges;

- other financial investment activities (including miscellaneous intermediation, portfolio management, investment advice and all other financial investment activities);
- insurance carriers, insurance agencies, insurance brokerages and other insurance-related activities;
- insurance and employee benefit funds (including pension funds, health and welfare funds, and other insurance funds); and
- other investment pools and funds (including open-end investment funds, trusts, estates, agency accounts, real estate investment trusts and other financial vehicles).

Also covered are U.S.-based holding companies that own, or influence the management decisions of, firms principally engaged in the aforementioned activities.

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Skadden's international team continues to follow developments at BEA closely. We encourage you to contact any of the attorneys listed here or your regular Skadden contact with any questions about BEA's proposed new reporting requirement or its request for written comments.