THOMPSON HINE

Business Law Update

Spring 2015

International

Foreign Direct Investment in the United States – New BEA Reporting Requirements

By Scott E. Diamond & David Michael Schwartz

Beginning in January 2015, the Department of Commerce's Bureau of Economic Analysis (BEA) reinstated reporting requirements for the gathering of statistical information concerning new foreign direct investment in the United States. The BE-13 *Survey of New Foreign Direct Investment in the United States* was discontinued in 2009 due to budgetary constraints; before that date, reporting had been required only when BEA directly contacted a party to an investment transaction for that information. Under the revised reporting requirements, a transaction involving new foreign investment triggers a mandatory filing whether or not the parties to the transaction are contacted by BEA. Reporting is required under the authority of the International Investment and Trade in Services Survey Act (P.L. 94-472, 90 Stat. 2059, 22 U.S.C. 3101-3108, as amended) and companies must file the appropriate Form BE-13 no later than 45 days after the date that the investment transaction occurs.

New Investment Survey

The reporting of new foreign direct investment is done using the Form BE-13 survey, which collects data on the acquisition or establishment of U.S. business enterprises by foreign investors and the expansion of existing U.S. affiliates of foreign companies to establish new production facilities. The data collected on the survey are used to measure the amount of new foreign direct investment in the United States, assess its impact on the U.S. economy and, based on this assessment, make informed policy decisions regarding foreign direct investment in the United States.

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For more details on any of the topics covered in this *Business Law Update*, please contact the authors via the links at the end of each article or David R. Valz, editor-in-chief. For information on our Corporate Transactions & Securities practice, please contact Frank D. Chaiken, practice group leader.

Reporting requirements are triggered when:

1. A relationship involving foreign direct investment in the United States is created, or

2. An existing U.S. affiliate of a foreign entity:

   i. Establishes a new U.S. legal entity,
   ii. Expands its U.S. operations, or
   iii. Acquires a new U.S. business entity that is then merged into its operations.

A report is also required when a U.S. affiliate has previously filed a BEA survey form but the established or expanded U.S. entity is still under construction. The survey includes foreign ownership of real estate, improved and unimproved, but does not include residential real estate held exclusively for personal use and not for profit-making purposes.

Foreign direct investment is defined as the ownership or control, directly or indirectly, by one foreign person/company of 10 percent or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest of an unincorporated U.S. business enterprise, including a branch. Further, the total cost of the transaction must be greater than $3 million. Companies that do not meet these basic requirements must still file Form BE-13 *Claim for Exemption*. The filing must be made by the U.S. affiliate of the foreign entity and not by the foreign entity itself.

Quarterly, Annual & Benchmark Surveys

The gathering of foreign direct investment data under Form BE-13 will also identify new U.S. affiliates that meet reporting criteria for BEA's related quarterly and annual surveys of foreign direct investment: Form BE-605 (Quarterly) and Form BE-15 (Annual). The purpose of the quarterly survey is to report positions and transactions between a U.S. affiliate and its foreign entity and foreign affiliates of the foreign entity. The purpose of the annual survey is to report annual financial and operating data of U.S. affiliates. These forms are required to be filed only if BEA contacts the U.S. affiliate.

A benchmark survey (Form BE-12) is collected every five years and is BEA's most comprehensive survey on foreign direct investment in the United States. The next benchmark survey year will be 2017. The filing requirements for the BE-12 filing will vary based upon total assets, sales, gross operating revenues or net income thresholds, and its filing will be mandatory whether or not the U.S. affiliate is contacted. Businesses that are below the financial thresholds must still file Form BE-12 *Claim for Not Filing.*

Confidentiality of Information

Information gathered in these surveys is confidential and can be used only for analytical or statistical purposes. Without prior written permission of the party submitting it, the information filed in the reports cannot be presented in a manner that allows it to be individually identified. Moreover, the information from the reports cannot be used for purposes of taxation, investigation or regulation.

Penalties

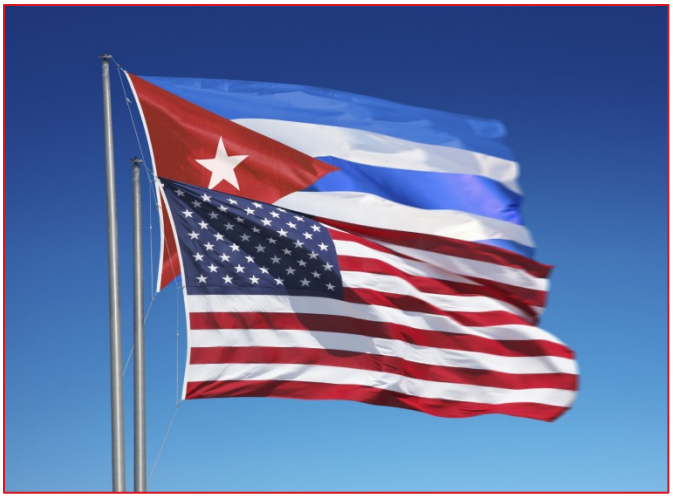
Companies failing to file reports are subject to a civil penalty of not less than $2,500 and not more than $25,000 and/or to injunctive relief demanding compliance. Willful failure to file a report may result in a criminal fine of not more than $10,000 and, if an individual, possible imprisonment of up to one year.

Thompson Hine LLP recommends that U.S. companies and their new foreign parents involved in any foreign direct investment transactions determine whether they are subject to the BEA survey reporting requirements. If so, it will be necessary to determine which form should be submitted to BEA and whether future filing requirements will ensue. It should also be noted that these new BEA reporting requirements are separate and distinct from the national security review of certain covered transactions involving foreign direct investments conducted by the Committee on Foreign Investment in the United States (CFIUS).

Should you have any questions on these BEA reporting requirements, please contact Frank Chaiken, Garrett Evers, David Schwartz or Scott Diamond.

Thawing of U.S. Sanctions Against Cuba – Opportunities for U.S. Businesses?

By James A. Losey



When President Obama announced changes to the long-standing U.S. sanctions against Cuba on December 17, 2014, business trade associations in Washington, D.C. cheered, and companies big and small began to consider possible market opportunities in our island neighbor 90 miles south of Florida. However, now that the President's decision has been put into legal effect by the two respective federal agencies that enforce the Cuban sanctions, it has become clearer that while real opportunities for certain business sectors exist, the changes in the Cuban sanctions are partial, tentative and even a bit risky.

On January 16, 2015, final rules issued by the U.S. Department of Commerce, Bureau of Industry and Security (BIS)[1] and the U.S. Department of Treasury, Office of Foreign Assets Control (OFAC)[2] put into effect the President's announced policy changes. Both BIS and OFAC have issued FAQs to explain numerous issues arising from their respective rule changes, and representatives of each agency have made statements to various groups to further clarify the changes. As the respective final rules and guidance spell out, the changes to the Cuba sanctions do present openings for U.S. companies, but are far from a full "green light."

[1] 80 Fed. Reg. 2286 (BIS final rule).
[2] 80 Fed. Reg. 2291 (OFAC final rule).

Who and What Are Covered by the Cuba Sanctions?

BIS's final rule amends various sections of the Export Administration Regulations (EAR)[3] that pertain to Cuba, and OFAC's final rule amends the Cuban Assets Control Regulations (CACR).[4] The EAR covers exports and "reexports" (i.e., exports to a third country and then on to the end destination) of goods, software and technology – both with respect to Cuba and generally.[5] The EAR applies to all "U.S. origin" items – which, with respect to Cuba, means all items exported from the United States or reexported with 10 percent or more U.S. content.[6]

The CACR (and OFAC sanctions generally) covers all "transactions," which are defined very broadly and include sales, payments, financing terms and travel. The CACR applies to "persons subject to U.S. jurisdiction," including:

- U.S. citizens and permanent residents;
- Any person (individual or entity) within the United States;
- Any entity organized under U.S. laws (federal, state, etc.); or
- Any entity "owned or controlled" by an entity above.[7]

Thus, as defined in the CACR, a company that is incorporated or physically located in the United States, or any of its branches, subsidiaries and other affiliates that are either incorporated/located in the United States or are owned or controlled by a U.S.-incorporated/located company, are considered "persons subject to U.S. jurisdiction" for purposes of the CACR.

What Can Be Exported or Reexported to Cuba?

Prior to the BIS final rule, the EAR permitted very few items to be exported to Cuba, with or without an export license, e.g., certain medicines, medical devices and agricultural commodities. The BIS final rule creates a new license

[3] 15 C.F.R. Chapter VII Subchapter C.
[4] 31 C.F.R. Part 515.
[5] 15 C.F.R. § 734.3.
[6] 15 C.F.R. § 734.4(c).
[7] 31 C.F.R. § 515.329.

exception in the EAR for "Support for the Cuban People" (SCP),[8] and expands the license exception for "Consumer Communications Devices" (CCD).[9] These changes widen the range of authorized items for which no license is required.[10] The final rule also removes a "general policy of denial" for export licenses for certain items related to environmental protection.[11]

1. *Support for the Cuban People (SCP) license exception*

This new license exception authorizes certain exports and reexports to Cuba that are intended to achieve one or more of the following results in Cuba: (a) improve living conditions; (b) support independent economic activity; (c) strengthen civil society; and (d) improve the free flow of information.[12] Under the first two of these headings, the EAR now authorizes export or reexport of:

a. Building materials, equipment and tools for use by the private sector to construct or renovate privately-owned buildings, including privately-owned residences, businesses, places of worship and buildings for private sector social or recreational use;
b. Tools and equipment for private sector agricultural activity; or
c. Tools, equipment, supplies and instruments for use by private sector entrepreneurs.[13]

The recent changes in U.S. sanctions against Cuba are not an unequivocal "green light" to pursue business opportunities in Cuba. A complete dismantling of the sanctions would require action by Congress, which is not likely anytime soon. The current terms of the sanctions – and how those terms are interpreted – aren't clear, so companies should use caution in entering this potentially lucrative market.

The BIS final rule offers a limited indication as to what is meant by "private sector entrepreneur" in the third permitted end-use category; it provides only a few examples of private sector entrepreneurs: mechanics, barbers, hairstylists and restaurateurs.[14] Note that these are all persons who actually *use* tools, equipment, supplies and instruments – i.e., the implication is that they are not just reselling what has been exported to them. The U.S. Department of State (i.e., neither BIS nor OFAC) has indicated that it intends to issue guidance on the scope of the term "private sector entrepreneur." Pending such guidance, if a company would like to export or reexport items under this third end-use category, it may want to check with legal counsel before proceeding.

2. *Consumer Communications Devices (CCD) license exception*

The original CCD license exception put in place in 2009 authorized export and reexport to Cuba of certain specified consumer communications devices, e.g., PCs, mobile phones, TVs, radios and digital cameras. However, under the original exception, exports or reexports of the eligible items had to be donated. The BIS final rule removes the donation requirement and expands the list of eligible items.

3. *General policy of export license approval for environmental protection items*

As noted above, the BIS final rule reverses a general policy of denial for export licenses for certain items related to environmental protection. BIS now will "generally approve" license applications for export or reexport of "items necessary for the environmental protection of U.S. and international air quality, waters, or coastlines (including items related to renewable energy or energy efficiency)…"[15]

What Are the Limitations and Restrictions?

First, the SCP and CCD exceptions are available only for certain product categories in the EAR's Commerce Control List (CCL). For the SCP exception, the item must be either EAR99 or controlled on the CCL only for antiterrorism reasons.[16] Under the CCD exception, eligible items are listed by their specific Export Control Classification Number

[8] 15 C.F.R. § 740.21.
[9] 15 C.F.R. § 740.19.
[10] 15 C.F.R. § 746.2(a)(1)(xiv).
[11] 15 C.F.R. § 746.2(b)(6).
[12] 15 C.F.R. § 740.21(a).
[13] 15 C.F.R. § 740.21(b).
[14] 80 Fed. Reg. 2287.
[15] 15 C.F.R. § 746.2(b)(6).
[16] 15 C.F.R. § 740.21(b),(c), and (d).

(ECCN).[17] For the environmental protection items, there is no classification restriction; since such items still require an export license, presumably BIS would take into account a particular product's ECCN in its review of the license application.

Second, note that the SCP exception stipulates that for all three categories, the items must be *used* for/in certain types of private sector activity. Similarly, although the environmental protection provision does not expressly say the items must be used for one of the specified environmental purposes, such use is implied by the word "necessary" in the text quoted above. However, neither the SCP exception nor the environmental protection provision states that the *first* customer must personally put the items to one of the specified uses, as long as the *end user* does so. Nevertheless, to protect against liability under BIS's "reason to know" standard, companies may want to obtain an end-use certification from the end user before shipping any products under either of these provisions.

Third, although neither final rule is explicit on this point, both BIS and OFAC may, depending on the circumstances, hold a company liable for third-party actions taken on its behalf or in which it had some involvement. Therefore, if a company wants to use a third-party intermediary (distributor, sales representative, etc.) for sales to Cuba, it can reduce its risk of such liability by putting in place clear contractual compliance terms with the third party, stipulating, e.g., that the company's products only be sold for an authorized end use.

How Do We Get Paid?

The EAR is silent on payments for exports and reexports to Cuba; payments are financial transactions, and thus covered by the CACR. The CACR authorizes "[a]ll transactions ordinarily incident to the exportation of items from the United States, or the reexportation of 100 percent U.S.-origin items from a third country, to any person within Cuba… provided that… the exportation or reexportation is licensed or otherwise authorized by the [EAR]."[18]

However, this authorization stipulates that only the following payment and financing terms may be used:

> "(i) **Payment of cash in advance**. For the purposes of this section, the term "payment of cash in advance" shall mean payment before the transfer of title to, and control of, the exported items to the Cuban purchaser; or
>
> (ii) **Financing by a banking institution located in a third country** provided the banking institution is not a designated national, a U.S. citizen, a U.S. permanent resident alien or an entity organized under the laws of the United States or any jurisdiction within the United States (including any foreign branch of such an entity). Such financing may be confirmed or advised by a U.S. banking institution."[19]

Note that although the EAR allows reexport from a third country of certain U.S. items containing only 10 percent U.S. content, in order to qualify for CACR's authorization for transactions incident to an EAR-permitted reexport, the reexported items must be 100 percent U.S. content.

Can I Travel to Cuba to Get Business Started?

The short answer is: it depends. The CACR limits travel to Cuba, and related travel expenses, to twelve designated purposes.[20] Travel for general business purposes is not one of the twelve designated purposes. But the CACR does permit travel, and certain related expenses, incident to

[17] 15 C.F.R. § 740.19(b).
[18] 31 C.F.R. § 515.533(a)(1).
[19] 31 C.F.R. § 515.533(a)(2) (emphasis added).
[20] 31 C.F.R. § 515.560(a).

export/reexport transactions that are authorized by the EAR.[21] Thus, travel to Cuba that is related to exports or reexports under the EAR's new SCP exception, the expanded CCD exception or under a license granted for export/reexport of an environmental protection item is authorized. However, authorized travel is subject to certain restrictions, for example: "[t]he traveler's schedule of activities [must] not include free time or recreation in excess of that consistent with a full-time [work] schedule."[22]

Allowable travel-related expenses include transportation to and from Cuba, living expenses in Cuba, processing certain financial instruments (e.g., credit cards, checks)[23] and "…such additional transactions as are directly incident to the conduct of market research, commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of items consistent with the [EAR]…"[24]

Summary and Final Notes

The recent changes to U.S. sanctions against Cuba will allow *some* products, for *some* uses, to be exported or reexported to Cuba. Under certain specified parameters, U.S. company personnel are permitted to travel to Cuba for purposes related to authorized exports or reexports. And, best of all, companies may even be able to get paid for authorized sales of goods to Cuba.

However, these changes clearly are not a full "green light" – a complete dismantling of the Cuba sanctions would require statutory amendments by Congress, which is not likely in the near term. Moreover, the current terms of the sanctions – and how those terms are interpreted – are a bit of a moving target, as OFAC and BIS continue to issue further guidance in response to questions from the public.

Lastly, both agencies are apt to be closely watching U.S. companies doing new business with Cuba to make sure companies toe the (new) line, and to show critics of the new policy – of which there are many on the Hill – that the Executive Branch has not just opened the barn door. Therefore, companies may want to seek legal counsel before venturing into this potentially lucrative new market.

If you have questions, please contact Jim Losey.

NEXTOhio Internet Startup Conference

Thursday, April 9th
5:30-7:30 p.m. *Program*
7:30-10:30 p.m. *Networking*

Quaker Station, 130 E. Mill Street, Akron, OH 44308

Please join Thompson Hine for an informative, complimentary startup conference presented in association with the University of Akron School of Law. It's geared toward entrepreneurs who have recently started or plan to start an Internet company, and will feature a series of rapid-fire talks on how to get an Internet startup off the ground, including:

- How to Start Your Internet Company if You Don't Code
- How to Learn to Code and/or Find a Technical Cofounder
- What Angel Investors Are Looking for & How to Attract Funding in the Midwest
- Killer Mistakes Startups Make
- IP Strategies Post-*Alice Corp v. CLS Bank International* & the America Invents Act
- Overview of Local Resources for Startups

Please register online to reserve your spot.

For more information, visit NEXTOhio.com or contact Professor Annal Vyas at annal.vyas@uakron.edu with any questions.

[21] 31 C.F.R. § 515.560(a)(12).
[22] 31 C.F.R. §§ 515.533, 515.559(d).
[23] 31 C.F.R. § 515.560(c)(1),(2), and (5).
[24] 31 C.F.R. §§ 515.533(d), 515.559(d).

Risk Management

Limiting Risk: Understanding Business Insurance in the Current Environment

By John L. Watkins

Insurance has been described as a product everyone has to have, but no one wants to use. Even though it's a "must have" product, many businesses, even relatively sophisticated companies, do not know what their insurance policies cover. In the event of a serious claim, insurance may be the only thing standing between a company and bankruptcy. Here are a few tips on understanding business insurance in the current environment:

- For years, the main source of liability protection for many businesses has been the commercial general liability policy, also known as a CGL policy. CGL policies cover claims for "bodily injury" (including death) and "property damage," and also provide coverage for some other claims. If a claim is covered, a CGL policy typically requires the insurer to provide a "defense," meaning the insurer must pay for a lawyer to defend the claim or lawsuit. The policy also provides for paying judgments and settlements of covered claims up to policy limits.

- A potential problem, however, is that CGL policies are not so general any more. Tellingly, in 1986 the Insurance Services Office (ISO), the organization that drafts policy forms used by most insurers, changed the name of the CGL policy from "comprehensive general liability" to "commercial general liability." Today, CGL policies typically contain many exclusions; policies that contain 15-20 exclusions are relatively common.
    - A common theme has been for carriers to adopt broad new exclusions after facing large categories of claims. Thus, after facing many mold claims approximately 10-15 years ago, carriers adopted broad fungus exclusions. When it appeared that claims involving silicosis might present a significant risk, carriers added silica exclusions.
    - Perhaps more troubling, many of these exclusions are not intuitive. For example, some courts have denied coverage for accidents from carbon monoxide leaks in malfunctioning appliances based on the insurer's argument that such claims are barred by the pollution exclusion, even though such claims do not involve environmental pollution.
    - A **key takeaway** on this point, however, is that all CGL policies are not created equal. Some policy forms are less restrictive, particularly on important points such as the pollution exclusion. Further, a good broker or agent may be able to obtain endorsements eliminating or restricting the scope of exclusions.
- Consistent with the shrinking CGL policy, carriers are also forcing businesses to purchase supplemental policies to cover specific additional risks.
    - Although each business will have different needs, potential additional coverages include, among others, employment practices liability coverage, environmental liability coverage and directors and officers liability coverage.
    - A rapidly expanding area is coverage for cyber-related risks, including hacking, theft of customer information and denial of service attacks. There are many different insurance products available in this arena, and companies with cyber-related risks (which, frankly, includes most companies) should make sure that their broker or agent is experienced with these products. There has not yet been a great deal of litigation in this area (although it is sure to grow), and it is difficult to predict how coverage disputes will be resolved.

- A **key takeaway** is that your agent or broker needs both to understand your business and its risks fully *and* be familiar with the products designed to cover those risks.

- For property insurance, many policies contain provisions that may restrict coverage if real property is under-insured, so make sure that scheduled values are realistic. Understand whether your insurance covers replacement cost and, if so, under what conditions. Understand any limitations on coverage for water damage, including flood-related damage.

  - Property insurance may or may not include business interruption insurance, which is designed to pay for lost income caused by physical damage to your business premises and sometimes for extra expenses incurred in getting back in operation. Determine whether you need business interruption insurance and the conditions and limitations associated with such coverage.

  - If you experience a business interruption claim, it is particularly important in this area to involve professionals (a lawyer and a forensic accountant) early on so that the loss is properly documented.

In considering these issues, remember that coverage is usually not fungible: CGL and additional coverage policies can and do differ. As a rule of thumb, policy forms and provisions for special risks vary more among carriers than more standard policies. Again, the assistance of an experienced broker or agent is important in sifting through the available coverage.

In addition to differences between policy forms and provisions, carriers vary in their financial strength and in their approach to paying (or not paying) claims. These practical considerations may be even more important than differences in policy language.

One final key takeaway: If a carrier denies a claim, *never* simply accept the carrier's determination. Consult with your broker or agent and, in this instance, consult with an experienced coverage attorney. We see many instances in which a carrier's initial determination is incorrect, and we are sometimes able to get the carrier to reconsider. Even if the carrier does not reconsider, many denials are reversed in coverage litigation.

If you have questions, please contact John Watkins.

Nine Thompson Hine Lawyers Recognized by Georgia Super Lawyers

Seven lawyers from Thompson Hine LLP were included on the 2015 Georgia Super Lawyers® list and two were chosen as Georgia Rising Stars. Super Lawyers magazine distinguishes the top 5 percent of attorneys in each state in more than 70 practice areas and recognizes those who have attained a high degree of peer recognition and professional achievement. Rising Stars are chosen by their peers as being among the most recognizable up-and-coming lawyers in Georgia.

In addition, three lawyers, **Tim McDonald**, **Russell J. Rogers** and **John L. Watkins** were recognized as Top 100 lawyers in Georgia for receiving the highest point totals in the Georgia nomination and research process.

Included in Georgia Super Lawyers:

Peter D. Coffman (Business Litigation), **Gary S. Freed** (Business Litigation), **John F. Isbell** (Business Restructuring, Creditors' Rights & Bankruptcy), **Ileana Martinez** (Business Litigation, Product Liability Litigation), **Tim McDonald** (Labor & Employment), **Russell J. Rogers** (Business Litigation) and **John L. Watkins** (Business Litigation, Corporate Transactions & Securities).

Included in Georgia Rising Stars:

Christopher Fox, II (Business Litigation) and **Garrett A. Nail** (Business Restructuring, Creditors' Rights & Bankruptcy).

Health Care Reform

Employers Should Be Preparing Now for Form 1095-C Reporting

By Kim Wilcoxon

By January 31, 2016, applicable large employers will be required to send Forms 1095-C to verify certain information about the employer's 2015 health coverage. Form 1095-C will be used by the IRS to verify an individual's compliance with the Affordable Care Act individual mandate, to verify an individual's eligibility for a Marketplace premium tax credit, and to verify an employer's compliance with the employer "pay or play" rules.

Compliance with each of these requirements is determined on a monthly basis, so Form 1095-C will contain a month-by-month report regarding the health coverage offered to an individual and whether the individual and any dependents were actually enrolled in that health coverage. Because the form will contain an individualized month-by-month report, employers should understand the reporting requirements now to ensure that they will have the necessary data for accurate reporting in 2016.

What Is Form 1095-C?

Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, is an individualized statement that informs the employee and the IRS about the employer's health coverage. As with Forms W-2 and W-3, an employer will provide a Form 1095-C to each eligible recipient by January 31 following the reporting year and will transmit copies of those forms to the IRS with Form 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns.

Which Employers Must Provide Form 1095-C?

An employer must provide Form 1095-C if it is an applicable large employer under Internal Revenue Code Section 4980H (known as the "employer mandate" or the employer "pay or play" rules). Generally, an employer is an applicable large employer if it and other employers within its controlled group together employed an average of at least 50 full-time employees and full-time equivalent employees in the prior calendar year.

> ***Note***: Applicable large employers who employed an average of less than 100 full-time employees and full-time equivalent employees in 2015 can qualify for transition relief to delay application of the employer mandate until 2016. However, the reporting requirement is not also delayed. Employers who qualify for this transition relief **will** be required to provide a 2015 Form 1095-C to their full-time employees.

Each employer is responsible for providing Forms 1095-C to its employees. If multiple companies within the same controlled group participate in a single health plan sponsored by the parent company, reporting must nevertheless be done separately by each employer. While an employer may delegate the actual preparation and filing of the reports (for example, to the parent company or a vendor), the employer will ultimately be liable for any non-compliance.

Which Individuals Must Receive Form 1095-C?

An applicable large employer generally must provide Form 1095-C to any employee who is treated as a full-time employee under the Affordable Care Act and to any other employee or non-employee (including a retiree, a former employee enrolled in COBRA coverage, or a non-employee director) enrolled in self-insured health coverage offered by the employer during any month of the year.

Note: Because these forms must be provided to all employees who are considered full-time under the Affordable Care Act, an employer must understand the rules and regulations applicable to a determination of full-time status. Failure to understand these rules could cause the employer to misclassify an employee and therefore be subject to a penalty for failure to provide a Form 1095-C.

If an employer offers affordable (under the federal poverty line safe harbor), minimum value coverage to an individual and any spouse and dependents for all twelve months of the year, the employer may give the individual a certification statement instead of a Form 1095-C. However, the employer will still be required to complete a Form 1095-C for that employee and submit the form to the IRS.

What Information Must Be Reported on Form 1095-C?

Form 1095-C contains three parts:

1. In Part I, an employer will be required to identify the recipient of the form and his employer.

2. In Part II, an employer will be required to use indicator codes to report whether the employer offered affordable, minimum value essential coverage to the employee, his spouse, and/or his dependents for each month of the year.

   Note: Part II communicates the extent to which an employer has satisfied its obligation under the employer mandate, so the accuracy of this Part will depend upon an employer's understanding of the rules and regulations applicable to the employer mandate. Failure to understand those rules could lead to an accuracy-related penalty for failure to correctly complete Form 1095-C and/or assessment of a penalty under Internal Revenue Code Section 4980H.

3. In Part III, an employer who offers self-insured health coverage must report the months during which an individual and each dependent was enrolled in the self-insured health coverage. An employer is not required to complete Part III for an individual if the employer does not offer self-insured health coverage or if the individual was not enrolled in the self-insured health coverage at any time during the year.

What Should an Employer Be Doing Now?

Applicable large employers should be tracking data now to ensure that it can be accurately reported in 2016. Additionally, employers should consider whether they have the knowledge and resources to prepare Forms 1095-C in house or whether they should outsource this function to a vendor. If using a vendor, employers should be carefully reviewing and negotiating service agreements to ensure appropriate allocation of responsibility and liability.

For more information, please contact Kim Wilcoxon or any member of our Employee Benefits & Executive Compensation or Labor & Employment practice groups.

Securities

File the Friendlier Blue Skies

By Andrea R. McCarthy

At the end of 2014, the North American Securities Administrators Association (NASAA) launched the online Electronic Filing Depository (EFD) for state blue sky Form D filings, more than four years after NASAA and the Securities and Exchange Commission (SEC) signed a Memorandum of Understanding to create the EFD. The EFD permits issuers to electronically file state-mandated notices of private placements conducted in reliance on Rule 506 of Regulation D of the Securities Act of 1933.

The EFD promises to be a welcome respite to both clients and counsel alike from the manual filing process that often adds time and additional costs to private securities offerings. As an online filing depository, the EFD allows issuers and their counsel to electronically file Form Ds and pay the required filing fees to the states where investors participating in an offer reside. After the Form D is electronically filed with the SEC, the issuer or its counsel can locate the filed Form D on the EFD, select the state(s) where a notice is to be filed, and pay the filing fee(s) required by each state electronically through the EFD's automated clearing house (ACH) payment service. EFD filings are accepted from 6 a.m. until 11 p.m. Eastern time, Monday through Friday (except federal holidays).

Currently, over 35 states including Ohio accept filings through the EFD, as well as Puerto Rico and the U.S. Virgin Islands. New York, which requires one of the more burdensome Rule 506 filings, has yet to opt in. Due to the recent implementation of the EFD, counsel should closely monitor changes to state regulations to confirm which states have amended their regulations to either permit or make mandatory filing through the EFD. Counsel should also update any charts or memoranda summarizing the Rule 506 notice filing requirements for each state to reflect changes. Because the EFD currently accepts only the Form D filing and payment of the filing fee, counsel should be aware that any additional filings required under state securities laws, such as Form U-2 (Uniform Consent to Service of Process), must be submitted manually through the mail. In addition, because states that accept filings through the EFD may no longer return time-stamped copies of filings for client records, counsel should ensure that policies are in place to retain electronic copies of filings submitted through the EFD.

Despite its time- and cost-saving potential, the EFD's fee structure may offset any benefits of the system. Filers must currently pay a $150 use fee for each individual filing in addition to the fees which may be required by each state. The fee covers each Form D filed using the EFD and any amendments or renewals of such filing. For clients that frequently conduct private placements in reliance on Rule 506, the fee may not justify use of the EFD. For example, if a client files a Form D for one offering and then decides to conduct a separate private placement in reliance on Rule 506 a year later, thereby triggering a new Form D filing, the client would pay an aggregate of $300 in use fees in addition to any state fees. The cost of using the EFD must therefore be weighed against its convenience factor; if an offering will involve multiple states that each allow filings through the EFD, the use fee may be less than the legal and mailing costs associated with having counsel assemble and mail the required filings.

Although the EFD currently accepts only filings related to Rule 506 offerings, NASAA has indicated that the system will likely be expanded in the future to accept additional state notice and securities registration and limited offering exemption filings. The EFD is located at www.efdnasaa.org. The website includes a list of the states currently participating in the EFD and also provides a downloadable guide explaining how to register and use the system.

For more information, please contact Andrea McCarthy or Jurgita Ashley.