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The Foreign Direct Investment Regulations: Constitutional Questions and Operational Aspects Examined - Part Two: Operational Aspects of The Foreign Direct Investment Regulations

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PART TWO: OPERATIONAL ASPECTS OF THE FOREIGN DIRECT INVESTMENT REGULATIONS

Under the Foreign Direct Investment Regulations (FDIR), United States investors who hold a 10 percent or greater interest in foreign business entities, both incorporated and unincorporated, may be restricted in the amounts of capital that they can transfer to such entities and, under certain circumstances, may be required to return to the United States some or all of their proportionate share of the earnings of their foreign affiliates.[1] In addition, they may be required to repatriate to this country a portion or all of their liquid foreign assets, such as money in foreign bank accounts.[2] Meshing neatly with the Interest Equalization Tax, the FDIR do not regulate transfers to foreign corporations of which the United States investor owns less than 10 percent.[3] The program, administered by the Office of Foreign Direct Investments (OFDI), limits the annual quantum of "positive direct investment" by direct investors in their affiliated foreign nationals.[4] "Positive direct investment" is defined as the sum of (1)

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[1] The regulations appear at 15 C.F.R. § 1000.101 et seq. (1969). The most recent compendium of the FDIR was issued by the United States Department of Commerce on August 27, 1969 (as in effect on August 9, 1969) and, except as otherwise noted, this description is based on the regulations in effect on August 9, 1969. The FDIR are applicable to "persons within the United States" (as defined in § 1000.322), including United States residents, United States citizens wherever residing "the center of whose economic interests is located within the United States," and United States corporations, partnerships, estates and trusts. Id. The FDIR do not apply to banks or other financial institutions certified by the Board of Governors of the Federal Reserve System as being subject to the Federal Credit Restraint Program. Id. § 1000.201(b)(2). For the financial institutions so certified by the Board of Governors, see 33 Fed. Reg. 6999 (1968), 34 Fed. Reg. 9729 (1969).

[2] See generally, "Liquid Foreign Balances," 15 C.F.R. § 1000.203 (1969).

[3] The Interest Equalization Tax, Int. Rev. Code of 1954, §§ 4911-31, imposes an excise tax of 11.25% on the acquisition, by United States persons, of stock in foreign corporations and a tax of .79 to 11.25% on the acquisition of debt obligations of foreign obligors with a period remaining to maturity of 1 to 28½ years. The Interest Equalization Tax does not, however, apply to acquisitions of stock or debt obligations of foreign corporations in which the United States investor owns (or will own as a result of the acquisition) 10% of the total combined voting power, so long as the foreign corporation is not itself availed of for the acquisition of stock or debt obligations which, if made directly by the United States person, would result in imposition of Interest Equalization Tax. Id. § 4915.

[4] The term "direct investor" means any person within the United States who directly or indirectly owns or acquires a 10% interest in a corporation or partnership organized under the laws of a foreign country or in a business venture conducted within a foreign country on its behalf. 15 C.F.R. § 1000.305 (1969).

An "affiliated foreign national" is any foreign corporation or partnership or business venture in which a person within the United States owns, directly or indirectly, a 10% interest. In the case of a corporation, "interest" is defined in terms of "total combined voting power" and, in the case of unincorporated entities, in terms of "profits interest." Id. § 1000.304. An "indirect interest" arises through ownership by

net transfers of capital between the direct investor and its affiliated foreign nationals (which may be a positive or a negative amount), and (2) the direct investor's share in the undistributed earnings ("reinvested earnings") of its affiliated foreign nationals (which may be a positive or a negative amount). If the sum of (1) and (2) is a positive amount, it will represent a positive direct investment and may not exceed the annual amount authorized by the regulations.[5]

Net transfers of capital are the sum of "positive transfers" made by direct investors to foreign affiliates and "negative transfers" made by foreign affiliates to direct investors. A "positive transfer" is defined to include any transfer of funds or other property

> by or on behalf or for the benefit of a direct investor directly or indirectly to or on behalf or for the benefit of an affiliated foreign national . . . and any transaction . . . as a result of or in connection with which the direct investor directly or indirectly acquires or increases a debt or equity interest in the affiliated foreign national. . . .[6]

Thus, for example, the acquisition of an equity interest in or a debt obligation of an affiliated foreign national, or a capital contribution to an affiliated foreign national, or the complete or partial satisfaction of a debt obligation of an affiliated foreign national, is a "positive transfer" of capital.[7] On the other hand, a "negative transfer" of capital would include a loan from an affiliated foreign national or a repayment of debt by an affiliated foreign national to a direct investor and the complete or partial satisfaction of a debt obligation of a direct investor by an affiliated foreign national.[8]

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an intervening person or chain of persons and is calculated by multiplying together the direct interest of each person in the chain. Id. § 1000.902. Subpart I establishes certain rules for treating "affiliated groups," "family groups," and "associated groups," as single direct investors for purposes of measuring compliance with the program. Id. § 1000.901-.907. The OFDI has issued three general bulletins of interpretative analyses and statements defining the above terms (and other terms referred to below) in considerable detail. See Gen. Bull. No. 1, 33 Fed. Reg. No. 198 (1968); Gen. Bull. No. 2, 33 Fed. Reg. No. 209 (1968); 1969 Gen. Bull., 34 Fed. Reg. No. 213 (1969).

[5] See generally "Positive and Negative Direct Investment," 15 C.F.R. § 1000.306 (1969). Sections 1000.503 and 1000.504 authorize a prescribed quantum of positive direct investment by way of exemption to the blanket prohibition contained in § 1000.-201(a). The Secretary of Commerce has reserved the right to amend or revoke the authorizations set forth in §§ 1000.503 and 1000.504, and he may exercise discretion with respect to any direct investor. Id. § 1000.201(d).

[6] 15 C.F.R. § 1000.312(a) (1969).

[7] See 15 C.F.R. §§ 1000.312(a)(1)-(9) (1969).

[8] 15 C.F.R. §§ 1000.312(b)(1)-(6) (1969). Transfers of capital between affiliated foreign nationals in different schedule areas are treated as negative transfers to the direct investor (from the schedule area of the lender), and then as positive transfers by the direct investor (to the schedule area of the borrower). Id. § 1000.505. Additional, triangular and parallel loan arrangements, e.g., a loan by a United States company to a domestic subsidiary of a foreign firm in consideration of a loan by the foreign firm to

The direct investor calculates its annual positive direct investment limitations (its "allowables") either on a world-wide or on a scheduled area basis. Presently at least 75 percent of the direct investors reporting to the OFDI are calculating their allowables under Section 503 of the Regulations, which permits world-wide annual positive direct investment of $1,000,000 (in addition to positive direct investment in Canada).[9] A simple section 503 example would be: United States company *A* owns 100 percent of the voting stock of a British subsidiary which had 1969 earnings of $400,000, and also owns 50 percent of the voting stock of a French subsidiary which had 1969 losses of $300,000. *A* transfers $100,000 (long-term loans) to each of the two subsidiaries. *A* has made net transfers of capital of $200,000 and *A*'s share in the earnings of all affiliated foreign nationals is $250,000 ($400,000 less 50 percent of the French company's losses). Thus, *A* has made positive direct investment of $450,000, well within the section 503 limitation. Company *A* cannot "carry forward" its unused positive direct investment into 1970 but it does allow for a major acquisition abroad before the end of 1969 (up to $550,000).

Under Section 504 of the Regulations the larger direct investors compute their allowables on a scheduled area basis. For these investors, the world is divided into three groups of countries. Schedule A includes all the economically less developed countries. Schedule B consists of the oil producing countries, certain countries on the sterling standard (including England and Australia), and Japan. Schedule C includes the economically developed countries (primarily the Western European countries) and all the Communist Countries with the exception of Yugoslavia. Canada is not included in any schedule and, generally speaking, is exempt from the OFDI program. The quantum of positive direct investment allowed direct investors in their Schedule A affiliates is greater than in Schedule B or C affiliates and, in turn, the rules for Schedule B are less stringent than those which obtain for Schedule C.[10]

an affiliated foreign national of the United States investor, will be treated as a transfer of capital by the United States company. See Dep't of Commerce Release, FDI 69-12, (Sept. 2, 1969).

[9] See generally "Positive Direct Investment Not Exceeding $1,000,000," 15 C.F.R. § 1000.503 (1969). When the program was initiated, the world-wide minimum allowance was only $100,000. 33 Fed. Reg. 8664 (1968). It was increased to $200,000 on Aug. 17, 1968 (effective Jan. 1, 1968), 33 Fed. Reg. 11709 (1968) and to $1,000,000 on June 7, 1969 (effective Jan. 1, 1969), 34 Fed. Reg. 9061 (1969). On December 17, 1969 Secretary of Commerce Stans stated in a press release that the § 503 minimum investment allowable would be raised from $1 million to $5 million, provided that the additional $4 million be used in Schedule A countries. CCH Balance of Payment Rep. ¶ 9155 (Dec. 19, 1969).

[10] The more liberal treatment for less developed countries is consistent with the tax incentives for investment in less developed countries introduced by the Revenue Act of 1962. See Int. Rev. Code of 1954, §§ 902, 955, 1248. The Interest Equalization Tax

Direct investors who compute allowables on a scheduled area basis must choose between the "historical allowables" system and the "earnings allowables" system. Under the "historical allowables" system, the direct investor computes his allowables on the basis of the investments he made in a particular scheduled area in the "historical" base period, 1965 and 1966. Investors who made large transfers of capital to foreign affiliates in those years have a larger base for future investments than investors who, in compliance with the then voluntary program for restricting capital transfers, kept foreign investments to a minimum.[11] Under the historical allowables system, positive direct investment is authorized in an amount equal to 110 percent in Schedule A and 65 percent in Schedule B, respectively, of the average direct investment in 1965 and 1966. In Schedule C, positive direct investment is authorized in an amount equal to the *lesser* of (1) 35 percent of the average direct investment in 1965 and 1966, or (2) an amount equal to a percentage of the direct investor's share in the total earnings of all of its incorporated affiliated foreign nationals in Schedule C during the current year, which is the same as the percentage of its share of the 1965-1966 earnings not repatriated to the United States.[12]

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does not impose a tax on the acquisition of stock or debt obligations of "less developed country corporations" or on the acquisition of debt obligations of less developed countries designated in executive orders from time to time in force, issued pursuant to § 4916 of the Internal Revenue Code of 1954. Under the FDIR, Schedule A countries are designated by executive order 15 C.F.R. § 1000.319(a) (1969). See Exec. Order No. 11285, 3 C.F.R. 421 (Supp. 1969), Int. Rev. Code of 1954, § 4916.

Schedule B countries are those foreign countries which the Secretary of Commerce "may determine to be developed countries in which a high level of capital inflow is essential for the maintenance of economic growth and financial stability, and where those requirements cannot be adequately met from non-U.S. sources." 15 C.F.R. § 1000.319(b) (1969). The following countries have been determined to fall into this category: Abu Dhabi, Australia, The Bahamas, Bahrain, Bermuda, Canada, Hong Kong, Iran, Iraq, Ireland, Japan, Kuwait, Kuwait-Saudi Arabia Neutral Zone, Libya, New Zealand, Qatar, Saudi Arabia, and the United Kingdom. Id. These countries do not receive preferred treatment for purposes of United States income or Interest Equalization taxation (except Canada and Japan), but the preferred treatment under the FDIR is consistent with the authorization contained in the Federal Credit Restraint Program (applicable to banks and certain financial institutions).

[11] On Feb. 10, 1965 President Johnson announced the Voluntary Cooperation Program and thereafter the Secretary of Commerce wrote to over 600 corporations requesting them: (1) to establish a balance of payments ledger for 1964 and to estimate the amount of improvement believed possible for 1965, (2) to increase their efforts to expand exports, (3) to return more foreign earnings to the United States, (4) to repatriate short-term funds held abroad merely to earn a higher rate of interest, (5) to delay or postpone direct investment expenditures in developed countries when such investments were of marginal importance, and (6) to make greater use of foreign loans for direct investment. It is estimated that between 1964 and 1966, over 700 United States corporations participated in the Voluntary Cooperation Program and increased their over-all contributions to the United States balance of payments from $15.1 billion to $18.6 billion. CCH Balance of Payments Rep. ¶149, at 132-33.

[12] 15 C.F.R. § 1000.504(a) (1969). This latter percentage is referred to as the direct investor's "reinvestment ratio" and is calculated by dividing (a) a sum equal to the

To the extent that a direct investor has "unused" allowables in Schedule A which it wants to use in Schedule B or C, or unused allowables in Schedule B which it wants to use in Schedule C, an adjustment to the "upstream" schedule area is permitted to the extent that 30 percent of the earnings in the upstream area exceeds the historical allowables for that area.[13]

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direct investor's share in the aggregate reinvested earnings of its incorporated Schedule C affiliated Foreign Nationals during 1964, 1965, and 1966 by (b) a sum equal to the direct investor's share in the aggregate total earnings of its incorporated Schedule C Affiliated Foreign Nationals during 1964, 1965, and 1966. 33 Fed. Reg. 15189 (1968).

[13] 15 C.F.R. § 1000.504(c) (1969). The following description of the mechanics of the "Upstream" Adjustment is taken from OFDI's official comment on § 1000.504 as amended. For the complete text see 34 Fed. Reg. 9061 (1969).

Historical Allowable after "Upstream" Adjustment

If the DI [Direct Investor] elects under § 502(a) (2) the historical allowable, § 504(a) and (c) will govern. A DI with historical allowables in Schedule B and/or A may then be eligible under new § 504(c) to have all or part of those allowables readjusted "upstream." Historical allowables will not, however, be adjusted "upstream" unless, and only to the extent that, 30 percent of DI's share of 1968 "annual earnings" in the "upstream" scheduled area exceeds the § 504(a) historical allowable in the "upstream" scheduled area. Note that for the purposes of § 504(c) a DI may not adjust "upstream" an amount in excess of its downstream historical allowables, and that the amount of historical allowables which may be adjusted "upstream" does not include § 504 allowables carried forward from previous years. Like any other § 504 allowable in an "upstream" scheduled area, allowables in Schedules B or C which arise from "upstream" adjustment may be used downstream or carried forward into subsequent years under § 504(d).

The following examples are illustrative of the § 504(b) 30 percent earnings allowable and the § 504(c) "upstream" adjustment of § 504(a) historical allowables.

In 1969, DI has § 504(a) historical allowables in each of the scheduled areas as shown on line (1) of the table below. DI also has a carry-forward of unused allowables from 1968 in Schedule A of $1,000,000 (see line (2) below). In 1968, DI's share of annual earnings of its AFN's [Affiliated Foreign Nationals] in each scheduled area was as shown on line (3) below. If DI elects under § 502(a) (2) for 1969, DI's historical allowables under § 504(a) are adjusted under § 504(c) to increase its Schedule C allowable by $2,000,000 of which $1,500,000 is moved upstream from Schedule A to Schedule C and $500,000 is moved upstream from Schedule B. Corresponding reductions are made in the Schedule A and B historical allowables.

		(000 omitted)			
		Schedule C	Schedule B	Schedule A	Total
(1)	§ 504(a) historical allowables	1,000	2,500	1,500	5,000
(2)	§ 504(f) carry-forward allowables	0	0	1,000	1,000
(3)	1968 annual earnings	10,000	4,000	2,000	16,000
(4)	30 percent of line (3)	3,000	1,200	600	4,800
(5)	1969 § 504(a) historical allowables after §504(c) "upstream" adustments	3,000	2,000	0	5,000
(6)	§ 504(f) carry-forward allowables	0	0	1,000	1,000

As an alternative to the historical allowables system or the $1,000,000 minimum election of section 503, the FDIR offer the "earnings allowables" system, which provides an allowable in each area in an amount equal to 30 percent of the annual earnings of the year immediately preceding.[14] Under both the earnings allowables and historical allowables system, unused direct investment can be carried forward to subsequent years.[15] And each year the direct investor can elect, from among the three methods, the system which produces maximum authorized direct investment, but it must make the same election for all schedule areas.[16]

To the extent that a direct investor must reduce its quantum of positive direct investment to a prescribed level, it will, in many cases, be able to choose between reducing reinvested earnings and reducing net transfers of capital. Since, as a practical matter, it is enormously difficult to reduce reinvested earnings without incurring an immediate United States tax (and often a foreign tax), the direct investor will try to reduce positive direct investment by limiting positive transfers of capital or by effecting negative non-taxable transfers from its foreign affiliates, such as loans and repayment of debt and receivables. If repatriation is the only solution, the direct investor will try to repatriate funds through non-taxable negative transfers rather than reducing reinvested earnings by taking taxable dividends.

As a matter of United States tax law, however, there are several restraints. If the foreign subsidiary is undercapitalized, that is, if it has a high ratio of debt to equity, the repayments of debt may be treated

Presumably, DI will elect to use its adjusted historical allowable rather than elect the 30 percent earnings allowable under § 504(b), since the total historical allowables ($5,000,000) under § 504(a) exceed the total allowables available to DI ($4,800,000 as shown on line 4) if DI elected the 30 percent earnings allowable. While no part of the $1,000,000 carry-forward allowable in Schedule A from 1968 can be adjusted upstream, DI may use that $1,000,000 carry-forward allowable in Schedule A.

Under § 504(d), DI may use any portion of its Schedule C adjusted historical allowable downstream in Schedule B or A, thereby, in effect, returning those allowables to their original scheduled areas.

Since DI has an unadjusted historical allowable in Schedule C of $1,000,000, the amount moved to Schedule C from Schedules A and B is $2,000,000, i.e., the difference between 30 percent of 1968 earnings in Schedule C and the historical allowable in Schedule C. The total amount of adjusted historical allowable of $3,000,000 can be used in Schedules C, B or A, in 1969 or in Schedules C, B, or A in succeeding years in the same manner as is generally permitted for § 504 allowables in Schedule C.

[14] 15 C.F.R. § 1000.504(b) (1969). Beginning in 1970 a new "incremental earnings" formula will allow additional positive direct investment in each scheduled area in a sum equal to the amount by which 40% of the increase in aggregate earnings over the base 1966-1967 period exceeds positive direct investment otherwise authorized. Id. § 1000.506.

[15] 15 C.F.R. § 1000.504(d) (1969).

[16] 15 C.F.R. § 1000.502 (1969).

as taxable dividends,[17] and if the foreign subsidiary is a "controlled foreign corporation," loans to its United States parent will be taxed to the parent as dividends to the extent of the foreign subsidiary's increase in earnings over the current year.[18] In many cases, therefore, it may be virtually impossible to effect a negative transfer of capital without the risk of incurring United States taxation. This has prompted demands for reform of the OFDI program.

Although it is uncertain whether OFDI should be, as a matter of policy, concerned with the tax implications of the program,[19] the tax distorting effects of the FDIR will require many direct investors to resort to adroit planning. Apart from current United States taxation, compliance with the FDIR may destroy or change the particular tax status of various corporate entities described in the Internal Revenue Code,[20] and may create unwanted holding company status for others.[21] Moreover, it is arguable that the FDIR effectively repeal certain sections of the Internal Revenue Code including the provision which allows first-tier "controlled foreign corporations" to purify their tainted dividend and interest income by reinvesting it in less developed countries and in "less developed country corporations."[22]

The rigidity of the system described above is ameliorated by the very important rule that an investment of the proceeds of a long-term foreign borrowing in an affiliated foreign national will not be treated as a transfer of capital.[23] Rather, the transfer of capital will be deemed to occur in the year when the loan is repaid, and, more important, if

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17 Current folklore has it that the Internal Revenue Service will not mount a thin capitalization attack on foreign subsidiaries whose ratio of debt to equity is not in excess of 5 to 1. The Service has adopted a 5 to 1 test for ruling purposes in connection with domestic and foreign "finance subsidiaries." Rev. Rul. 69-377, 1969 Int. Rev. Bull. No. 27, 28.

18 Int. Rev. Code of 1954, § 956.

19 It would be unfair to suggest that OFDI is wholly indifferent to the tax consequences of forced repatriation of earnings. The "Revised Instructions for Submitting Applications for Specific Authorizations or Exemptions or for Interpretive Opinions," issued by OFDI on June, 6, 1969, do contemplate the possibility of "applications for reinvested earnings relief on the basis of tax hardship on payment of dividends." See textual discussion of specific authorizations, infra notes 50-53.

20 A large dividend flow will operate to disqualify a Western Hemisphere Trade Corporation, Int. Rev. Code of 1954, § 921; a "possessions" corporation, id. § 931; and a "subchapter S" corporation, id. § 1372(e).

21 See "personal holding companies," Int. Rev. Code of 1954, § 541; "foreign personal holding companies," id. § 551; and "foreign base company income," id. § 954.

22 Int. Rev. Code of 1954, § 954(b)(1). The FDIR have wreaked havoc with the already tortuous labyrinth of "Subpart F," id. §§ 951-964, especially in the case of first-tier holding companies (which may be forced to receive dividends from operating subsidiaries), and less developed country corporations which may be disqualified on account of unwanted dividends from non-less developed country corporations. For a particularly thorough discussion of the United States tax implications of the FDIR, see M. Berens, "Tax Problems Incident to Foreign Direct Investment Regulations," Practicing Law Institute, Living with the Foreign Direct Investment Regulations, 170 (1968).

23 15 C.F.R. §§ 1000.324, 1000.1001-.1003, (referred to as Subpart J) (1969).

the direct investor has filed the appropriate certificate with OFDI, it will be allowed to repay the loan even if repayment requires it to exceed authorized allowables in that year.[24] The favored treatment of loans under the FDIR has created an unprecedented demand for foreign funds (especially Eurodollars) to finance the capital requirements of foreign affiliates and, indirectly, to avoid repatriation of foreign earnings to the United States.

For a loan to qualify as a long-term foreign borrowing, certain criteria must be met. The lender must be a foreign national other than an affiliated foreign national of the direct investor, and the loan must have an original maturity of at least twelve months.[25] In the case of loans from foreign persons other than banks and foreign governments the loan will not qualify unless (1) the loan has an original maturity of at least three years and the acquisition of the debt by United States persons would be subject to interest equalization tax, or (2) the lender agrees in writing that for a period of three years or until maturity, whichever first occurs, it will not sell the debt to United States or Canadian persons, or to persons who it has reason to believe will resell to such persons.[26] With respect to convertible obligations, original maturity will have to be seven years and, except in the case of a public offering, the conversion privilege may not be exercisable within three years.[27]

Although most long-term loans have been made from foreign banks (including foreign branches of United States banks), a large number of United States companies have financed the capital needs of their foreign affiliates through public offerings abroad of convertible debentures. Since the Internal Revenue Code (in the absence of a tax treaty provision) requires 30 percent withholding of tax on interest payments if the United States parent company is the obligor,[28] the debentures will usually be issued by a domestic or foreign "finance

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[24] 15 C.F.R. § 1000.1002 (1969). Generally speaking, the certificate requires an affirmation that the direct investor believes, on the basis of all existing facts and circumstances, that if repayments are in fact required within a 7-year period that repayment will be authorized under §§ 1000.503 or 1000.504. A foreign lender's rights against a direct investor will not be affected or impaired by reason of the FDIR if the lender does not have "actual knowledge" at the time of the loan that any transaction in connection therewith will violate the regulations. Id. § 1000.702. As a practical matter, most foreign lenders will want to see a copy of the certificate filed by the direct investor with the OFDI. To the extent that repayment of foreign borrowings does result in positive direct investment not otherwise authorized by the regulations, the unauthorized excess will be charged against allowables in subsequent years. Id. § 1000.1003.

[25] 15 C.F.R. § 1000.324 (1969).

[26] 15 C.F.R. § 1000.324(e)(3), (4) (1969).

[27] 15 C.F.R. § 1000.1002(c)(2) (1969).

[28] Sections 1441 and 1442 of the Internal Revenue Code require 30% withholding on interest payments constituting United States source income under § 861(a)(1). Int. Rev. Code of 1954, §§ 1441-42.

subsidiary."[29] Such a subsidiary can pay interest free of United States withholding. In the case of convertibles, the debentures will usually be convertible into stock of the United States parent. The finance subsidiary will normally lend the proceeds of the offering to the parent's foreign affiliates and/or to the United States parent and its domestic affiliates. Interest payments by a domestic corporation formed for this purpose will not be subject to United States withholding if 80 percent of the company's gross income is derived from sources outside the United States.[30] If it is intended that more than 20 percent of the proceeds of the loan will be loaned to the United States parent or to its domestic affiliates, the finance subsidiary will be formed abroad (usually in the Netherlands Antilles or Luxembourg),[31] and payments of interest to foreign debenture holders will not be subject to United States withholding if less than 50 percent of the finance subsidiary's gross income is "effectively connected with the conduct of a trade or business in the United States."[32] Under the FDIR a domestic finance subsidiary and its United States parent are considered a single direct investor with the result that the parent can off-set the borrowings of its subsidiary against its own positive transfers of capital,[33] and the OFDI will give favorable consideration to a request for specific authorization that an off-shore finance subsidiary and its parent be treated as a single United States direct investor.[34]

In addition to the regulations governing positive direct investment, the FDIR also require United States direct investors to repatriate short term financial assets to the United States.[35] Specifically, a direct investor holding "liquid foreign balances" in excess of $25,000, other than "direct investment liquid foreign balances"[36] and Canadian

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[29] The term "finance subsidiary" is used to describe a company with a United States parent whose principal business purpose is to borrow money abroad and invest it in or loan it to foreign or domestic affiliates of its United States parent or the United States parent itself.

[30] Under the Internal Revenue Code interest payments by such a corporation will not be treated as United States source income. Int. Rev. Code of 1954, § 861(a)(1)(B).

[31] Neither country imposes withholding tax on dividends and interest paid to nonresidents. Under the United States Income Tax Treaty with the Netherlands, as extended to the Netherland Antilles, a Netherlands Antilles corporation is exempt from United States tax on interest, provided it does not elect to be taxed at the Netherlands Antilles reduced "holding company" income tax rates on its United States source income. United States source interest if paid to a Luxembourg holding company is subject to the statutory United States withholding tax rate but it is not subject to Luxembourg income tax.

[32] Under the Internal Revenue Code interest payments by such a corporation will not be treated as United States source income. Int. Rev. Code of 1954, § 861(a)(1)(C).

[33] 15 C.F.R. § 1000.323 (1969).

[34] OFDI General Bull. § B323(b).

[35] See generally 15 C.F.R. § 1000.203 (1969).

[36] Direct investment liquid foreign balances are defined in § 203(a) as liquid foreign balances which represent the proceeds of long-term foreign borrowings by a DI

balances, must have reduced such balances as of June 30, 1968 and as of the end of each month thereafter, to a level not exceeding the average end-of-month balance held during 1965 and 1966.[37] The term "liquid foreign balances" includes money on deposit abroad, including certificates of deposit and fixed-interest deposits, negotiable and non-negotiable instruments, commercial paper and securities acquired after June 30, 1968 and/or having a maturity date of one year or less.[38]

The Regulations state that transactions which are not generally authorized may be effected only under specific authorization from the OFDI.[39] Requests for permission to exceed authorized positive direct investment will not usually be granted unless the direct investor can prove that it is unable to borrow the money abroad.[40] One situation to which the OFDI may be sympathetic is the case of the direct investor who is legally incapable of causing a reduction in reinvested earnings, for example, a minority shareholder in a foreign company which refuses to declare dividends.[41] And the OFDI may be sympathetic to certain special situations requiring large non-recurring cash investments which will produce long-term benefits for the overall balance of payments, for example, movie-making abroad and exploration and development expenditures in the extractive industries.[42]

If a specific authorization request is denied, the direct investor may file a petition for reconsideration with the OFDI or appeal to the Foreign Direct Investment Appeals Board.[43] The investor may appeal in writing to the Board on the ground that an administrative action or a decision on petition for reconsideration with respect to such person

and which are held by the DI primarily in anticipation of making transfers of capital to AFNs of the DI. 15 C.F.R. § 1000.203(a) (1969).

[37] 15 C.F.R. § 1000.203(c) (1969).

[38] 15 C.F.R. § 1000.203(a)(2) (1969).

[39] 15 C.F.R. § 1000.801(a) (1969).

[40] See "Revised Instructions for Submitting Applications for Specific Authorizations or Exemptions or for Interpretive Opinions," issued by OFDI on June 6, 1969. The "Borrowing Test" requires that the applicant demonstrate either that foreign debt financing has been attempted and cannot be arranged, or that it can only be arranged at a cost considered prohibitive by the applicant, or that it cannot be arranged in such a way as to qualify as a "long-term foreign borrowing," i.e., on terms which will permit the applicant to file a certificate under Subpart J of the Regulations.

[41] Applications for relief regarding reinvested earnings based on restrictions imposed by foreign law, contractual restrictions, or because of minority positions in foreign affiliates, must include an opinion of a qualified United States attorney or accountant confirming statements made regarding applicable restrictions and proof of the applicant's inability to meet the schedular limits on positive direct investment. Id.

[42] OFDI has made a herculean effort to deal with exploration and development expenditures in proposed Subpart L (originally proposed on Nov. 14, 1968, 33 F.R. No. 222, and later proposed on May 9, 1969 in 34 Fed. Reg. No. 89). On the basis of comments received and further analysis of past and projected expenditures, OFDI withdrew proposed Subpart L on June 25, 1969.

[43] 15 C.F.R. § 1000.802 (1969). The Appeals Board consists of three "responsible officials" of the Commerce Department appointed by the Secretary of Commerce, none of whom may be OFDI employees. Id. § 1000.802(c)(1).

"resulted in unusual hardship upon appellant and is inconsistent with achievement of the goals and objectives of Executive Order 11387 and [the Regulations]."[44] The Board's decision constitutes final Departmental action[45] but the functions exercised by the OFDI are subject to judicial review under the Administrative Procedure Act and appeals may lie in certain cases.[46]

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[44] 15 C.F.R. § 1000.802(c)(1) (1969).
[45] 15 C.F.R. § 1000.802(c)(4) (1969).
[46] 5 U.S.C. § 1009 (1964).