



Foreign Investment in the U.S.

BOYER LAW FIRM, PL Attorneys & Counselors at Law

Jacksonville (904) 236-5317

Orlando (407) 574-2573

Miami (305) 921-9665

Email: Office@BoyerLawFirm.com

www.BoyerLawFirm.com

FOREWORD

This overview will start with the important issue of taxation on foreign persons and investments.

Some of the regulations placed or reinforced by the United States after the events of September 11, 2001 will be addressed in two sections. The first section will look at investments in sectors of activity that may trigger national security concerns. The second section deals with purely reporting rules that a foreign investor is subject to.

Lastly, a miscellaneous section will contain some remarks that can be useful in designing an investment structure.

This memorandum has been prepared on the basis of the law and practice as at the date referred to below.

Boyer Law Firm, PLLC
Jacksonville, Florida

September 2008

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1. Introduction

A foreign investor in the United States (“U.S.”) enjoys the same flexibility in financial arrangements as U.S. citizens:

- There is no need to obtain formal approval from governmental authorities to set up a company.
- Foreign exchange controls are generally absent.
- The foreign-owned company may freely transfer U.S. profits abroad, and its owners may freely repatriate their investment.

The United States is open for business!

2. U.S. Taxation On Foreign Investments

The United States has long been open to [foreign direct investment](#) (in which the foreign investors control or participate in the operations of the U.S. business), and portfolio investments (loans or portfolio equity that does not give the foreign investors significant participation in the operations of the U.S. business). This policy is reflected in the relative absence of restrictions compared to those imposed by other countries.

Foreign investors generally enjoy the same rights as U.S. nationals:

- There is no need to obtain formal approval from authorities to set up a company.
- Foreign exchange controls are generally absent.
- The foreign investor is generally free to make any desired arrangements for financing the U.S. business. There is no requirements to register the investment of foreign equity capital or loans.
- Joint-venture with a U.S. firm is not mandatory to enter the U.S. market.
- Foreign investors may freely repatriate their equity. The same applies to dividends, interest, royalties although such payments may be subject to U.S. withholding tax of 30% or a lower treaty rate.

Restrictions on international investment are largely matter of federal law, since the U.S. Constitution has been interpreted to prevent states from discriminating against foreign commerce.

2.1 Tax Withholding on Foreign Persons

Payments of income to foreign persons are subject to special withholdings on their U.S. source gross income.

The term “United States person” means¹:

- a. A [citizen or resident of the United States](#),
- b. A partnership created or organized in the United States or under the law of the United States or of any State,
- c. A [corporation](#) created or organized in the United States or under the law of the United States or of any State, or
- d. Any [estate or trust](#) other than a foreign estate or foreign trust.
- e. Any other person that is not a foreign person.

The term “foreign person” means²:

- a. A nonresident alien individual;
- b. A corporation created or organized in a foreign country or under the laws of a foreign country;
- c. A partnership created or organized in a foreign country or under the laws of a foreign country;
- d. A foreign trust;
- e. A foreign estate, or
- f. Any other person that is not a U.S. person.³

Exemption from taxation of foreign government income does not apply to dividend income from stock of United States corporations held by hospitals of foreign countries where stock was acquired with donated funds, but which are not government funds under foreign country's laws.⁴

Financial organizations that are wholly owned and controlled by foreign governments and cannot independently exercise any substantial powers binding on its member countries is neither foreign government nor international organization.⁵

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¹ I.R.C. 7701(a)(30) and Treas.Reg. 1.1441-1(c)(2).

² Treas.Reg. 1.1441-1(c)(2).

³ See Internal Revenue Code section 7701(a)(31) for the definition of a foreign estate and a foreign trust.

⁴ Rev Rul 69-361 (1969) 1969-1 CB 193.

⁵ Rev Rul 77-4 (1977) 1977-1 CB 141.