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Canadian Investment in the United States: Ohio's Limitations on Foreign Investment

*by Robert E. Glaser**

In looking over the program, I first thought that my topic was less attractive than any of the others. But it is an essential topic in that an overview of the problems which are encountered by foreign investors in the United States is necessary for a full understanding of our general topic today. That doesn't mean that you will hear all of the details with regard to the fact that a corporation which is not incorporated in Ohio is required to file various papers with the Secretary of State and obtain a license to do business before it can do business in Ohio, (OHIO REV. CODE § 1703.01), or that special capital and surplus requirements apply to non-Ohio insurance companies (OHIO REV. CODE § 3927.02); but rather you will hear an overview of all the problems, that totality of problems, which is encountered when an investment is made in Ohio. Although we are dealing with Ohio specifically, that same overview is applicable throughout the country.

Let me set the stage first with a few statistics. The most recent statistics indicate that foreign investment in the United States in real estate alone is between one and two billion dollars per year, and, interestingly enough, Canadians have been the most active investors in the real estate area. This represents an increase of approximately 350 percent in the ten-year period from 1966 to 1976.

In 1979, there were 1,070 direct foreign investment transactions which required reporting to the U.S. Department of Commerce under the International Investment Survey Act of 1976 (22 U.S.C.A. §§ 3101-08) which requires the reporting of certain types of investments. Those transactions had an estimated total value of \$12.5 billion. By contrast there were only 334 such investment transactions in 1978 having an estimated total value of half of the estimate for 1979.

In January of this year, the U.S. Department of Agriculture made its first report under the Agriculture Foreign Investment Disclosure Act of 1978, (7 U.S.C.A. § 3501). Persons who are required to make disclosures under this Act indicated in their reports that foreign groups owned more than 5.2 million acres of agricultural land in the United States as of October 31, 1979.

With this introduction to the magnitude of the situation, let us turn to the specific topic. First, may I again call your attention to the narrowness of the topic, Ohio Limitations on Foreign Investments. I suppose

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that is an appropriate topic for a panel being located in Ohio. However, restrictions exist on a state-by-state basis and, in addition, on a federal basis in the United States.

Although my comments are specifically directed toward various laws which exist in Ohio, I think they can be transposed into a consideration of the national situation. In order to allow you to pursue the broader subject matter of this topic, I call your attention to the bibliography which was distributed before the panel started, not for review at this time, but as a future reference. (See Appendix A.) It is intended to allow you to dig into the subject matter of particular areas which are of interest to or creating problems for you. The cited publications will give you a more sophisticated definition of the problems which can be encountered than is possible during this program.

I specifically call your attention to one reference, the District of Columbia Manual, which was published several years ago and which will come out in the near future in its second edition. This work is an excellent overview and provides an ideal starting point for the more in-depth analysis which is necessary.

Next, let me mention that I believe that the use of the words "limitations" and "restrictions" as regards foreign investment in the State of Ohio, or in the United States, is inappropriate. Many of the rules which are applicable in this area are not limitations or restrictions but are disclosure rules. If they are, in fact, limitations or restrictions, they are not specifically applicable to investors foreign to the United States.

To be sure, there are some direct restrictions which need to be considered in specific situations. For example, Connecticut, Idaho, and Illinois, to name a few, have direct restrictions and limitations on investment in and use of real estate by aliens. However, the vast majority of rules which are applicable in this area are just as applicable to the individual or the business coming from another state into Ohio as they are to the individual or the business coming from a foreign country. The D.C. manual which I mentioned just a moment ago contains a survey of the laws of the United States, all 50 states, and the District of Columbia. It sets forth those laws which relate to these questions in three sections:

1. General land ownership and use limitations;
2. General corporate limitations (such as on directors, officers, mergers and government contracts); and
3. Particular limitations by the economic sector (such as banking, insurance and utilities).

Turning to Ohio, there are four principal areas which have special relevance in the planning of a foreign investment. First, there are potential general land ownership and use limitations and rules. Second, there are limitations and rules dealing with corporations. For example, are there restrictions on who may be a shareholder, a director, or an officer? There are restrictions on the merger, the amalgamation, or the consolida-

tion of corporations. Third, there are particular limitations and rules dealing with specific elements of the economic sector, such as the banking industry or the insurance industry. Finally, there is the general regulation of business operations within the jurisdiction. This last category includes such things as taxation and securities law. Specific reference is made to rules which exist in many of our jurisdictions dealing with tender offers and trade regulation. As you can see, these are rules applicable to everyone. They are not exclusively applicable to foreign nationals. This is also true with regard to the second and third areas which I mentioned.

Ohio corporation law defines a foreign corporation as one which is formed under the laws of another state. "State" is defined as the United States, any state of the Union, any foreign country, or any subdivision thereof (OHIO REV. CODE § 1701.01). As you can see, when Ohio defines something as foreign, it means that it is outside of Ohio. That is true of the general corporation laws of all 50 states.

Ohio has no limitations on ownership or use of land, which is the first area that I mentioned. However, not unlike the Federal Government, Ohio did react to the trend in foreign investment of which we are all aware. In 1979, Ohio enacted a disclosure statute (OHIO REV. CODE § 5301.254) and I would like to turn to that just briefly (since we are dealing with Ohio) and go through this statute as an example of the type of law which you might encounter when you deal with a particular state.

First of all, it defines a nonresident alien as an individual who is not a citizen of and is not domiciled in the United States. Secondly, it provides, subject to certain limitations, that any nonresident alien who acquires any interest in real estate, minerals, or mineral products must report that acquisition to the State of Ohio. The limitation with regard to real estate is more than three acres in land area or a value of more than \$100,000. In the case of minerals and mineral rights, the limitation is a value of more than \$50,000. When a nonresident alien, as defined, acquires property which exceeds those limits, a report must be sent to the Secretary of State. The report is innocuous. It requires only the name, address, telephone number, nationality, and a few other similar facts.

The next section of the law deals with corporations. If a corporation is more than 10 percent owned by a nonresident alien or more than 40 percent owned by any number of nonresident aliens, either directly or indirectly, then that corporation must make a report to the Secretary of State when it acquires any interest in land, minerals, or mineral rights as mentioned. If an existing corporation already owns those interests, it must make a report when its stock is subsequently acquired by nonresident aliens. The Secretary of State has issued administrative rules under this law dealing with distinguishing direct from indirect acquisitions of those interests.

Normally, as a tax lawyer, I would have expected indirect to mean that a corporation acquires an interest in Ohio real estate if its subsidiary acquires an interest in Ohio real estate if its subsidiary acquires such an

interest. The definition issued by the Secretary of State intended to clarify this point ruled against my expectations (Ohio Ad. Rules § 111-8-01). The Secretary of State feels that ownership must be in an individual. If you are dealing with a foreign corporation which has a subsidiary (first, second, or any level) which acquires any of the stated interests in Ohio, it is not required to make the report as indicated under the present interpretation. I might add that although the Office of the Secretary of State advises that the stated interpretation is correct based on the language of the Rule, I do not read the Rule as providing such clarification.

Penalties are rather severe for failure to file—not less than \$5,000 nor more than 25 percent of the value of the investment. In a case that might be considered an abuse, the penalty could be quite substantial.

Turning back to the four categories I mentioned, we have now dealt with land use and ownership. Next are limitations and rules dealing with corporations in Ohio. There are laws which provide that a corporation which is not organized within Ohio and wishes to come in and do business here must be registered. There are requirements that it file an annual report and pay taxes, but, as I stated, they are applicable to any corporation foreign to the State of Ohio. Specific review of these requirements is unnecessary at this point. One need only recognize that they exist.

There are particular limitations on elements of the economic sector such as banking, insurance and others. But, again, these are related to entities which are foreign to the State of Ohio and not necessarily foreign to the United States.

The substance of the message which I would like to leave with you today is as follows: the climate in the United States is not structured on a restriction and limitation basis. There has been a reaction to foreign investment taking place. That reaction is exemplified by the reporting required by the 1978 Federal Act dealing with agricultural land, the Ohio Act I just described, and the 1976 International Investment Survey Act. However, the problems encountered in investing in the United States are the typical problems we deal with regularly in taxation, securities law, trade regulation and similar areas. For a more in-depth review of each of these areas as they apply to “foreign investments,” I again refer you to the bibliography which lists selected articles on each.