

Attention All U.S. Funds and Businesses With Foreign Investment: Required Department of Commerce Filings Due May 2023

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While many U.S. funds and businesses may not be aware of the Bureau of Economic Analysis (BEA) or its reporting requirements, they are still obligated to submit a filing to the BEA by May 2023. The BE-12 benchmark survey is required for all U.S. entities in which a foreign investor directly or indirectly owns or controls a 10 percent or greater voting interest and asks for information related to fiscal year 2022. The benchmark survey is conducted every five years, replaces the annual BE-13 filing requirement for the relevant year, and is mandatory.

What is the Bureau of Economic Analysis?

The BEA at the Department of Commerce administers mandatory reporting requirements that oblige all U.S. businesses to file reports identifying both inbound foreign direct investment (FDI) and outbound U.S. investment abroad. The BEA administers these requirements pursuant to the International Investment and Trade in Services Survey Act based on business structure and certain financial criteria. Most required BEA reports are filed at the inception of an investment and then every five years in a follow-up benchmark survey. Additionally, the BEA will contact certain companies to make additional filings.

Who is required to file?

All U.S. business enterprises (including real estate held for nonpersonal use) in which a

foreign individual or entity owns or controls, directly or indirectly, at least 10 percent of the voting interest or equivalent. Complex business structures file on a consolidated basis, so U.S. affiliate entities should be included in a parent company's filing when a parent holds at least 50 percent of the affiliate's voting rights.

Even if a business is contacted by the BEA to submit a filing, exemptions are available if foreign ownership is less than 10 percent, the business is consolidated with another U.S. affiliate, or the business was liquidated or dissolved. Note, the business must still file a form to claim the exemption.

Additionally, certain private funds¹ that do not hold direct or indirect interests in any operating companies² may be automatically exempt or may qualify to file a claim for exemption. When assessing the direct or indirect voting interest of foreign entities in funds, note that limited partner interest is not considered to be voting interest.

When in the BE-12 survey due?

BE-12 surveys must be filed by May 31, 2023.

What other mandatory BEA filings might apply to me?

The BEA requires that U.S. entities make filings related to both inbound and outbound investments. Reporting requirements can apply

¹ Private fund refers to the same class of financial entities defined by the Securities and Exchange Commission as private funds on Form PR: "any issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c) (7) of ... [that] Act."

² The BEA considers an operating company to be a business enterprise that is not a private fund or a holding company.

regardless of whether the investments are made directly or indirectly.

Mandatory inbound FDI reporting is triggered when:

1. A foreign investor/entity acquires ownership or control of 10 percent or more of a U.S. business.
2. A foreign investor/entity or its existing U.S. affiliate establishes a new U.S. business resulting in the foreign investor/entity having at least 10 percent ownership or control (direct or indirect).
3. An existing U.S. affiliate of a foreign investor/entity expands its U.S. operations.
4. An existing U.S. affiliate of a foreign investor/entity acquires a U.S. business, giving the foreign entity at least 10 percent ownership or control.

Mandatory outbound investment reporting is triggered every five years when the BEA initiates its benchmark survey of U.S. direct investment abroad. This survey is conducted on a form BE-10. The last BE-10 survey was undertaken in 2020 covering fiscal year 2019.

In the case of both inbound and outbound investments, the BEA may contact businesses

directly to require that additional forms are filed. In the event you are contacted by the BEA to submit additional investment-related forms, filing is mandatory.

Are there penalties for not filing?

Yes. Failure to file or provide accurate data can result in civil penalties or criminal penalties.

What does the BEA do with the information?

The BEA publishes the anonymized results to track the scale of foreign investment activities in the United States and their effects on the U.S. economy. The BE-12 is the BEA's most comprehensive survey, and the BEA uses the results to produce statistics that help business leaders, Congress, the White House, federal agencies, researchers, policymakers, and state and local officials learn how foreign direct investment affects U.S. jobs, wages, productivity, and taxes and assists these stakeholders in making investment, hiring, policy, wage, tax, and a variety of other decisions.

If you need assistance in completing or submitting a BE-10 or other BEA form, contact Abbey Baker or Doreen Edelman on Lowenstein's Global Trade & National Security Team.

Contacts

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