

Client Alert

June 2018

Reporting Deadline Imminent for Bureau of Economic Analysis BE-12 Five-Year Benchmark Survey of Foreign Direct Investment in the U.S.

The U.S. Department of Commerce's Bureau of Economic Analysis ("BEA") requires that U.S. businesses complete various surveys regarding certain investments outside the United States, as well as foreign investment activities in the United States by or involving foreign investors. These surveys include the [BE-12 benchmark survey](#) of foreign direct investment in the U.S. The BE-12 survey is conducted every five years, and is being conducted currently for fiscal years ending in 2017. The deadline for filing BE-12 survey responses is May 31, 2018, but is extended to June 30, 2018 for survey responses submitted through the BEA's eFile electronic system).

Purpose of the Survey

The BEA conducts surveys of foreign direct investment in the U.S. on a transactional, quarterly, annual, and five-year basis, with the five-year benchmark survey being the most comprehensive. The survey covers fiscal years ending in 2017. The BE-12 survey is conducted in place of the BE-15 annual survey. Accordingly, any U.S. business entity that would normally file a BE-15 annual survey must instead file a BE-12 survey for 2017. The surveys gather information on the operations of U.S. business enterprises of which 10 percent or more of the voting shares (or equivalent interest in an unincorporated enterprise) are owned, directly or indirectly, by a foreign person or entity (which U.S. business enterprises are referred to as "U.S. affiliates") and on transactions between U.S. affiliates and their foreign parents. However, there is an exemption for any U.S. affiliate that is a private fund that does not own an operating company directly or indirectly and that has no U.S. operating company in the chain of ownership running to its foreign parent. The exemption will generally be available provided the foreign investor does not own 10% or more of a U.S. operating company indirectly through its ownership of the fund's general partner or other voting interests in the fund.¹ Certain BEA surveys are required to be filed only if the BEA contacts the relevant reporting parties. In the case of the BE-12 survey, all U.S. entities subject to the reporting requirements must file a BE-12 form, even if they are not contacted by BEA.

Reporting Parties. U.S. business enterprises with a foreign person or entity as a parent, including certain U.S. private funds and foreign owners of U.S. real estate for business purposes, are required to file a BE-12 survey response form if they meet the criteria

¹ Limited partnership interests in a private fund, such as a fund relying on a Section 3(c)(1) or 3(c)(7) exemption from registration under the Investment Company Act, are generally not considered voting interests for purposes of the BE-12 survey.

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described herein. The U.S. affiliate in or through which the foreign parent makes or owns its U.S. investment (rather than the foreign parent) is responsible for filing the BE-12 form. Where a foreign parent holds multiple layers of investments in the United States, the U.S. entity directly owned by the foreign parent is required to file a consolidated BE-12 form covering itself and all U.S. businesses the majority of whose voting securities (or the equivalent) are owned by the reporting U.S. affiliate. A BE-12 filing is not required for a U.S. business enterprise that was liquidated or dissolved prior to the end of the 2017 calendar year.

BE-12 Forms

The BE-12 survey has four forms, but only one must be filed, depending on the following reporting criteria:

1. Form BE-12A is filed for majority-owned U.S. affiliates with total assets, sales or gross operating revenues, or net income or loss, of over \$300 million.
2. Form BE-12B is filed for: (i) majority-owned U.S. affiliates with total assets, sales or gross operating revenues, or net income or loss, of more than \$60 million but for which none of these exceed \$300 million; or (ii) minority-owned U.S. affiliates with total assets, sales or gross operating revenues, or net income or loss, of more than \$60 million.
3. Form BE-12C is filed for U.S. affiliates with total assets, sales or gross operating revenues, or net income or loss, of \$60 million or less. For a U.S. affiliate that has total assets, sales or gross operating revenues, or net income of less than \$20 million (positive or negative), only certain specified data items on this form must be completed.
4. Form BE-12 Claim for Not Filing is filed if a U.S. affiliate does not meet the requirements for filing the BE-12A, BE-12B or BE-12C but was contacted by the BEA with a notification to file a BE-12 form. Examples of situations where entities do not have to file a BE-12 survey include those where: the foreign voting ownership interest or its equivalent in the U.S affiliate is less than 10 percent.

The BEA provides a flow chart to assist in determining which BE-12 form must be filed, available [here](#).

Penalties

Entities that are required to submit a BE-12 report but fail to do so may be subject to a civil penalty of not less than \$4,527, and not more than \$45,268, and to injunctive relief

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commanding such person to comply, or both. In the instance of willful failure to submit a report, such persons may also be subject to criminal penalties in the form of fines of not more than \$10,000 and, if an individual, imprisonment for not more than one year, or both. Any officer, director, employee, or agent of any corporation who knowingly participates in such violations, upon conviction, may be punished by a like fine, imprisonment, or both.

Confidentiality

BEA reports are confidential. Information submitted as part of the survey is used solely for analytical and statistical purposes, and may not be used for investigative, taxation, or regulatory purposes.

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About Curtis

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