

## Investment Management Alert

May 18, 2018

### **Bureau of Economic Analysis Mandatory 2018 BE-12 Survey Reporting Requirement Deadline Approaches**

The Bureau of Economic Analysis of the U.S. Department of Commerce (BEA) requires U.S. businesses in which a foreign person or entity owns or controls, directly or indirectly, more than 10 percent of the voting securities (a “Direct Investment”) of an incorporated U.S. business enterprise<sup>1</sup> (or an equivalent interest in an unincorporated U.S. business enterprise, such as a general partner in a limited partnership) to report such holdings on its BE-12 Benchmark Survey of Foreign Direct Investment in the United States for fiscal year 2017 (the “BE-12 Survey”). The BE-12 Survey is due by May 31, 2018, or June 30, 2018, if submitting it through the BEA’s eFile system. Official BE-12 forms and instructions can be found [here](#), on the BEA website.

#### **Purpose and Applicability**

The BE-12 Survey is a mandatory survey conducted once every five years by the BEA under the International Investment and Trade in Services Survey Act. The purpose of the BE-12 Survey is to obtain economic data—financial and operating characteristics—of, and information on positions and transactions between, a U.S. business enterprise and the person that owns a Direct Investment in the U.S. business enterprise (a “Foreign Parent”). All direct and indirect lines of ownership held by a Foreign Parent in a given U.S. business enterprise must be aggregated to determine whether the Foreign Parent has a Direct Investment in the U.S. business enterprise (any U.S. business enterprise in which a Foreign Parent owns a Direct Investment is being referred to as a “U.S. Affiliate”).

The BE-12 Survey collects a large amount of information regarding (i) the Direct Investment and (ii) “enterprise-level information” regarding the business enterprise<sup>2</sup> in which the Direct Investments were made. Since this is a “benchmark year,” each U.S. Affiliate is required to file a BE-12 Survey report comprising Forms BE-12A, BE-12B, BE-12C or BE-12 Claim for Not Filing, as applicable, regardless of whether contacted by the BEA to do so; publication in the Federal Register is considered notice to all persons required to report.

Even if a private fund<sup>3</sup> is a U.S. Affiliate, the private fund may be exempt from filing a BE-12 Survey if all of the following apply:

- The U.S. Affiliate is a private fund.
- The private fund does not own, directly or indirectly through another business enterprise, an “operating company” (being a business enterprise that is not a private fund or a holding company<sup>4</sup> in which the Foreign Parent owns, directly and indirectly, at least 10 percent of the voting interest).

- If the Foreign Parent owns the private fund indirectly (through one or more other U.S. business enterprises), there are no U.S. “operating companies” between the Foreign Parent and the indirectly owned private fund.

In the case of partnerships, the general partner generally controls a limited partnership and is therefore presumed to have 100 percent of the voting interests in the limited partnership. However, the determination of the percentage of voting interest of a general partner is based on who controls the partnership, **not** on the percentage of ownership in the partnership’s equity. The information reported by the general partner of a limited partnership in the BE-12 Survey is somewhat duplicative of the information reported by limited partners in the Treasury International Capital (TIC) forms filed with the Federal Reserve Bank of New York, but is broader in scope with regard to reported information.

### **Versions of Form BE-12**

The **BE-12** Survey consists of four forms. The form that a U.S. Affiliate must file is determined by the size of the U.S. Affiliate<sup>5</sup> and its percentage of foreign ownership, as follows:

**BE-12A** is filed for a U.S. Affiliate that is majority-owned (50 percent or more) by a Foreign Parent and has total assets (do not net out liabilities), sales or gross operating revenues (excluding sales taxes) or net income (loss) that exceeds \$300 million (positive or negative) at the end of its 2017 fiscal year.

**BE-12B** is filed for a U.S. Affiliate that satisfies one of the following criteria:

- It is majority-owned (50 percent or more) by a Foreign Parent and has any of (i) total assets (without netting out liabilities), (ii) sales or gross operating revenues (excluding sales taxes) or (iii) net income (or loss) that exceeds \$60 million, but none of these items exceed \$300 million or
- It is minority-owned (at least 10 percent, but less than 50 percent) by a Foreign Parent and has one of total assets (do not net out liabilities), sales or gross operating revenues (excluding sales taxes) or net income (loss) that exceeds \$60 million.

**BE-12C** is filed for a U.S. Affiliate that is majority-owned or minority-owned, and none of the total assets (do not net out liabilities), sales or gross operating revenues (excluding sales taxes) or net income (loss) was greater than \$60 million.

**BE-12 Claim for Not Filing** is filed if (1) foreign ownership of the U.S. business has fallen below 10 percent in 2017, (2) the U.S. business has been fully consolidated or merged into another U.S. business, (3) the U.S. business has been dissolved or liquidated, or (4) the U.S. business was contacted by BEA, but is not required to file.

Also see the flowchart in Appendix A to determine the BE-12 filings that are appropriate.

A U.S. Affiliate in which a direct ownership interest and an indirect ownership interest are held by different foreign persons should not be fully consolidated into another U.S. Affiliate, but must complete and file its own BE-12 Survey.

## **Filing and Penalties**

The BEA allows reporting persons to mail in the appropriate forms of the BE-12 Survey to the U.S. Department of Commerce or, alternatively, file their BE-12 Survey electronically on the BEA website. All reporters must file the appropriate forms of the BE-12 Survey by May 31, 2018, except that, if filing electronically using the BEA's eFile system, the deadline is extended to June 30, 2018.

The failure of a U.S. Affiliate to fulfill its reporting obligation could result in a civil penalty or injunctive relief commanding such U.S. Affiliate to comply, or both. The BEA may assess civil penalties ranging from \$4,527 to \$45,268. However, whoever willfully fails to file a BE-12 Report could be fined up to an additional \$10,000 and, if an individual, may be imprisoned for not more than one year, or both. Any officer, director, employee or agent of any corporate U.S. Affiliate who knowingly participates in such violations, upon conviction, may be punished by a like fine, imprisonment or both.

## **Confidentiality**

Information filed as part of the BE-12 Survey is available to only officials and employees (including consultants and contractors and their employees) of agencies designated to perform functions under the International Investment and Trade in Services Survey Act. No information contained in reports may be published or made available in such a manner that the person to whom the information relates can be specifically identified.

## **Appendix A**

The BEA provides the following [chart](#) as guidance of which form to potentially file in its instructions to Form BE-12.

## Contact Information

If you have any questions regarding this alert, please contact:

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<sup>1</sup> “Fully consolidated U.S. domestic business enterprise” means (i) a U.S. corporation whose voting securities are not owned more than 50 percent by another U.S. corporation, and (ii) proceeding down each ownership chain from that U.S. corporation, any U.S. corporation (including “foreign sales corporations,” as defined in the instructions, located in the United States) whose voting securities are more than 50 percent owned by the U.S. corporation above it. This consolidation excludes foreign branches and all other foreign affiliates.

<sup>2</sup> “Business Enterprise” means any organization, association, branch or venture that exists for profit-making purposes or to otherwise secure economic advantage, and any ownership of any real estate.

<sup>3</sup> The term “private fund” is defined as “the same class of financial entities defined by the Securities and Exchange Commission as private funds on form PF: ‘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.’”

<sup>4</sup> A “holding company” is a business enterprise that is engaged in holding the securities or financial assets of companies and enterprises for the purpose of owning a controlling interest in them or influencing their management decisions. Businesses in this industry do not manage the day-to-day operations of the firms whose securities they hold. To be considered a holding company, income from equity investments must be more than 50 percent of total income. A business that engages in holding company activities, but generates more than 50 percent of its total income from other activities, is not a holding company under BEA standards. Holding companies in an ownership chain that includes only private funds and/or other holding companies are considered to be in a chain with no “operating companies” (i.e., companies that are not private funds or holding companies).

<sup>5</sup> A U.S. Affiliate must file on a fully consolidated domestic U.S. basis, including in the full consolidation all U.S. business enterprises proceeding down each ownership chain whose voting securities are more than 50 percent owned by the U.S. business enterprise. The fully consolidated entity is considered one U.S. Affiliate.