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Foreign-Owned U.S. Companies Must Soon Respond to Federal Survey

by Lawrence Ward, Justin T. Huff, Dave Townsend, and T. Augustine Lo

The International Investment and Trade in Services Survey Act ("IITSSA"), 22 USC § 3101 requires the Bureau of Economic Analysis[1] ("BEA") within the U.S. Department of Commerce to conduct a national survey of foreign direct investment in the United States every five years. The main vehicle for that BEA activity is the Benchmark Survey of Direct Foreign Investment in the United States report ("Benchmark Report") required of each foreign-owned company (such as a U.S. corporate subsidiary ("Reporting Company")). The BEA considers any U.S. company to be a Reporting Company if a foreign person owns or controls, directly or indirectly, 10 percent or more of the voting securities of a corporation or if a foreign person holds that same amount of ownership or control through other means of a company if it operates in any form other than a corporation, such as a limited liability company.

All U.S. companies with foreign owners at or above the 10 percent threshold must complete the 2023 Benchmark Report, even if they have not been individually contacted by BEA to ask for such a filing to be made. The latest Benchmark Report rules have also augmented some of the data sought by the BE-12 form regarding investment activities in the domains of data storage, cloud computing, and digital data intermediation, which illustrates ongoing government concerns about the protection of data privacy and security in the United States. The IITSSA protects the confidentiality of the information reported in a BE-12 Benchmark Report and prevents such information from being used by the U.S. Government for any regulatory, tax or investigative purposes.

Filing Deadlines & Legal Exposure

The IITSSA filing deadlines for the 2023 BEA survey are imminent. A Reporting Company must file its Benchmark Report under penalty of perjury using one of several versions of the BEA Form BE-12 by May 31, 2023 if made by a hard copy (paper) filing or by June 30, 2023 if made through BEA's eFile online system. A Reporting Company that believes it cannot make its required BE-12 report filing by the applicable deadline may also seek an extension of time to file from BEA if it asks for such an extension

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Related Capabilities

- Government Enforcement & Corporate Investigations
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before May 31, 2023.

Under the IITSSA, the BEA has the legal authority to impose civil penalties for failure to file a timely Benchmark Report and can even refer such a failure to the U.S. Department of Justice for criminal prosecution that could lead to a criminal fine and/or imprisonment for the company officials who willfully fail to make a timely filing of that report.

Filing Forms for Benchmark Reports

The BEA provides three different versions of the Form BE-12 (designated as versions "12A," "12B" and "12C") based on a Reporting Company's total assets, sales or net income for its 2022 fiscal year. The criteria for selection of the correct Benchmark Report form are as follows:

- **BE-12A**: This is the BEA form to be filed by a "majority-owned" Reporting Company that has, on a fully consolidated basis, total assets, sales or net income greater than US$300 million (positive or negative). The BEA treats a U.S. company as being "majority-owned" if the aggregate direct or indirect voting ownership interests of any foreign persons are over 50 percent.
- **BE-12B**: This is the BEA form to be filed by: (a) a majority-owned Reporting Company that has, on a fully consolidated basis, total assets, sales or net income greater than US$60 million but less than US$300 million (positive or negative) or (b) by a minority-owned Reporting Company with total assets, sales, or net income greater than US$60 million (positive or negative). Again, BEA considers a U.S. company to be "majority-owned" if the aggregate direct or indirect voting ownership interests of any foreign persons are over 50 percent and to be "minority-owned" if the aggregate direct or indirect voting ownership interests of any foreign persons are below 50 percent.
- **BE-12C**: This is the BEA form to be filed by a Reporting Company with total assets, sales or net income less than or equal to US$60 million (positive or negative).

If a U.S. company with a foreign owner has been affirmatively contacted by BEA to ask that the company file such a BE-12 report but believes it is not actually subject to the Benchmark Report requirement, then the U.S. company should file a **BE-12 Claim for Not Filing** in lieu of a full BE-12 survey report in any of the above three forms.

Foundation for Future Federal Policies

The IITSSA requires the BEA to provide its analysis of the information obtained in the Benchmark Reports and other required BEA surveys to the public and Congress, including information on FDI in the United States and foreign ownership of U.S. business.[2] Over the past several years, both Congress and the White House have focused increasing policy attention on the potential adverse effects of foreign direct investment ("FDI") originating from "countries of concern" such as China, Russia and other such nations. For example, in 2018, Congress strengthened substantially the national security reviews of FDI and mergers and acquisitions ("M&A") by the Committee on Foreign Investments in the United States ("CFIUS") through the Foreign Investment Risk Review Modernization Act ("FIRRMA").[3] President Biden also issued Executive Order 14083 on September 15, 2022 to stiffen CFIUS reviews of transactions involving the U.S. defense industrial base or U.S. supply chains for critical goods and technologies.[4]

It is thus likely that BEA's collection of such Benchmark Reports will result in the publication of more current aggregate data on FDI activity in the United States that will then guide Congress and the Executive Branch as they consider further steps to review FDI transactions and M&A activity involving U.S. companies. For instance, the U.S. State Department may base its future annual assessments of the U.S. investment environment vis-à-vis other nations on such updated BEA data.[5]

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Dorsey & Whitney attorneys are available across the United States to assist any Reporting Company or its foreign owners in reviewing these BEA reporting requirements under the IITSSA and in completing the relevant BE-12 report form or Claim for Not Filing, as may be applicable.

[1] See, generally, https://www.bea.gov/surveys/fdiusurv.
[2] Access to the raw data and identifying information collected from Reporting Companies is limited to authorized BEA staff and consultants.
[3] Pub. Law 115-232*. See also*
https://www.dorsey.com/newsresources/publications/client-alerts/2018/08/foreign-investment-risk-review-modernization-act

[4] 87 Fed. Reg.57369 (Sept. 20, 2022). *See also*
https://www.dorsey.com/newsresources/publications/client-alerts/2022/09/takeaways-from-bidens-eo-14083

[5] See, e.g., https://www.state.gov/reports/2022-investment-climate-statements/china/