

# U.S. Companies Beware:

## Federal Reporting Requirements for Foreign Investment

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Late last year, the U.S. Commerce Department's Bureau of Economic Analysis ("BEA") published a final rule<sup>1</sup> to reinstate the reporting requirements of Form BE-13, which was discontinued in 2009. U.S. businesses which have been funded by a foreign entity (e.g., a Cayman Islands exempted limited partnership or exempted company) resulting in such entity acquiring at least 10 percent - *direct or indirect* - of the voting interest in the U.S. entity will be required to file a Form BE-13 with the BEA (the "Form"). Acquisition of such voting interest could be by direct investment in an existing U.S. business, establishment of a new U.S. business, acquisition of a U.S. business merged into an existing U.S. affiliate of a foreign entity or expansion of an existing U.S. affiliate of a foreign entity. The Form must be filed within 45 days of the completion of the transaction, the establishment of the new legal entity, the commencement of the expansion or the cost update is requested (such cost update relates to an entity that filed a Forms BE-13B or BE-13D indicating it is still under construction). The final rule was effective September 15, 2014.

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This article provides a brief description of the history and purpose of the Form. In addition, we examine the reporting requirements of the new Form, as well as advise on the amendments to the prior rule. Finally, we provide some key points for filers to consider when preparing the Form.

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It is important to note that the Form must be filed by the U.S. entity receiving the foreign investment, NOT the foreign investor (although foreign funds that invest in the U.S. should be mindful of these requirements for their portfolio companies).

## HISTORY AND PURPOSE OF THE FORM

The BEA created the Form in 1977 to collect and analyze data relating to the impact of foreign investment on the U.S. economy. As described above, the Form was discontinued in 2009, but reinstated last year by the Commerce Department to better assess its promotion efforts through the “Build It Here, Sell It Everywhere” campaign - created to expand foreign business investment in the United States and ensure coverage of the BEA’s other foreign investment statistics.

The Form continues to collect information on the acquisition or establishment of U.S. business enterprises by foreign investors; however, unlike the old Form, the new Form collects information on expansions by existing U.S. affiliates of foreign companies. The BEA eliminated the following items: investment incentives, sales by industry (total sales and overall industry code for the new operation, however, are still collected), equity ownership interest (voting interest is still collected), address of foreign parent (country is still collected) and acres of U.S. land owned. The Form will be collected under the authority of the International Investment and Trade in Services Survey Act. This BEA survey, unlike other BEA surveys, requires persons subject to the reporting requirements to respond by filing the Form **whether or not contacted by BEA**.

## REPORTING REQUIREMENTS

The following U.S. entities will be required to file one of six forms - BE-13A, BE-13B, BE-13C, BE-13D, BE-13E or a Claim of Exemption - (i) any U.S. company that accepts a foreign direct investment; (ii) an existing U.S. affiliate of a foreign parent that establishes a new U.S. legal entity, expands its U.S. operations or acquires a U.S. business enterprise; or (iii) a U.S. business that previously filed BE-13B or BE-13D indicating the established or expanded entity is still under construction. Each form is tailored to address the particular type of investment transaction. A U.S. entity must file the Form if a foreign entity acquires a direct or indirect ownership or control of 10% or more of the “voting securities” of the U.S. entity. A U.S. entity that crosses this threshold must file if the cost of acquiring or establishing this entity is greater than \$3.0 million. If the cost does not exceed \$3.0 million but the 10% threshold is reached, the U.S. entity must file a Claim of Exemption. The Form requires the U.S. entity filer to include information on the reportable transaction, such as, the name and ownership information of the U.S. entity, including foreign parents; existing U.S. affiliates of foreign parents and other U.S. entities; and certain financial and operating information.

## KEY POINTS AND CONSIDERATIONS

Private investment funds that have a non-U.S. entity as the general partner or managing member (or a general partner or managing member that has a non-U.S. entity owning more than 10% of its voting

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securities) may have reporting obligations. In addition, most private investment funds and some operating businesses are organized as limited liability companies or limited partnerships and there is no formal BEA guidance regarding the determination of “voting securities” with respect to U.S. entities that are organized as limited liability companies or limited partnerships. The BEA has orally confirmed that the instructions contained in the Form BE-12 and Form BE-15 are the appropriate guidance for determining what constitutes “voting securities” in a limited liability company or limited partnership. In a limited partnership context, voting securities would reside with the partner who “controls” the limited partnership, not necessarily the partner with the greatest ownership interest. In this case, it would be a general partner who would control the partnership and consequently hold 100% of the voting securities of the partnership, unless there was a clause to the contrary in the limited partnership agreement. A similar analysis would apply to limited liability companies, provided the managing member or manager is responsible for the day-to-day operations of the limited liability company and does not need approval for material decisions related to the management of the limited liability company.

It is important to note that a subsequent recapitalization or reorganization of the U.S. reporting entity may require an additional filing for the newly formed U.S. affiliate within 45 days of the recapitalization or reorganization if 10% or more of the voting securities of the new U.S. affiliate are held by the foreign parent.

The Form is also kept confidential and used only for statistical analysis. It cannot be used for purposes of taxation, investigation or regulation. After the initial filing, the BEA requires quarterly, annual and five year benchmark filings under certain circumstances.

We would further recommend companies require investors state their jurisdiction of organization in the schedule of purchasers at the time of execution of the definitive transaction documents to ensure U.S. reporting entities are aware of the investor’s country of jurisdiction so they may comply with the BEA reporting requirements.

## **PENALTIES FOR FAILING TO COMPLY WITH THE REPORTING REQUIREMENTS**

Failure to file could result in penalties of up to \$25,000 and the BEA may seek injunctive relief. Willful violations may result in criminal penalties of up to \$10,000 and imprisonment of up to one year. Notwithstanding the foregoing, the BEA has not been penalizing late filers to date and has in the past granted extensions for late filings. To the extent the BEA continues to accept such late submissions without penalty, requests can be submitted by email to [be-13@bea.gov](mailto:be-13@bea.gov) and should include the name of the filing entity, jurisdiction of its foreign parent, date of the transaction in which the foreign parent reached the 10% threshold and the date the filing entity reasonably expects to file the Form. The BEA previously responded to informal inquiries indicating that a 30 day extension would be granted without issue.

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1. *Direct Investment Surveys: BE-13 Survey of New Foreign Direct Investment in the United States.* <http://www.gpo.gov/fdsys/pkg/FR-2014-08-14/pdf/2014-19256.pdf>.

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