

Direct Investment Survey Reporting Requirements: What Private Equity Funds and Investors Need To Know

The U.S. Department of Commerce, through the Bureau of Economic Analysis (the “BEA”), requires U.S. resident entities (such as private equity funds or portfolio companies) to file annual reports with the BEA if a U.S. resident entity (i) directly or indirectly owns 10% or more of the voting securities of a foreign affiliate and (ii) the foreign affiliate meets or exceeds certain financial thresholds (such reports herein referred to as “Direct Investment Surveys”). The next annual Direct Investment Survey must be filed by May 31, 2012 (subject to any extensions granted by the BEA).¹

Reporting Requirements

History. The BEA filing requirements (including the annual, quarterly and benchmark filings described below) have been in existence for many years. The BEA has orally confirmed that it does not intend to penalize an entity that has not previously filed, despite having an obligation to do so, where it was not contacted by the BEA. The BEA has stated informally, however, that it intends to police these filings more rigorously going forward (i.e., the BEA’s underlying interest is to promote the future filing of all U.S. resident entities that may have an obligation to do so).

General Requirements. Annual Direct Investment Surveys must be filed by or on behalf of a U.S. resident entity that directly and/or indirectly (1) owns 10% or more of the voting securities of a foreign affiliate and the value of the foreign affiliate’s (a) total assets, (b) sales or gross operating revenues, or (c) net income, meets or exceeds \$60 million for the most recent financial reporting year *or* (2) establishes or acquires 10% or more of the voting securities of a foreign affiliate and the value of the foreign affiliate’s (a) total assets, (b) sales or gross operating revenues, or (c) net income, meets or exceeds \$25 million for the most recent financial reporting year, but does not exceed \$60 million.² A “voting security” is a controlling ownership interest in the entity in which an investor holds the voting security.³ Thus, Direct Investment Survey reporting requirements may apply to U.S. resident institutional investors, U.S. resident funds and U.S. resident portfolio companies that invest in the voting securities of non-U.S. resident entities. For example, U.S. private equity funds may need to report with respect to their non-U.S. portfolio companies and U.S. portfolio companies may need to report with respect to their non-U.S. subsidiaries.

Foreign Affiliate Determination. Generally, a “foreign affiliate” is any foreign entity, 10% or more of the voting securities of which are directly and/or indirectly owned by a U.S. resident entity. However, not all foreign entities in which a U.S. resident entity owns 10% or more are reportable and certain factors are used to determine whether a foreign entity qualifies as a “separate” foreign affiliate (i.e. which must be reported). This factor-based analysis is very complicated and fact specific. In general, the foreign affiliate needs to have a physical presence outside of the U.S. and must be engaged in a trade or business separate from that of the U.S. resident and consequently, non-U.S. holding companies, blocker entities and other non-U.S. vehicles created purely for structuring purposes that are not engaged in business separate from that of the U.S.

¹The information contained in this alert is based upon information and research gathered from Direct Investment Surveys, instructions to Direct Investment Surveys, other documents related thereto and oral discussions with personnel at the BEA.

² These determinations are made based on data at the end of, or for, the foreign affiliate’s previous fiscal year. Exchange rate translations should be made according to FASB ASC 830 (FAS 52).

³ Limited partner interests in limited partnerships are not a “voting security” because such interests do not carry voting rights. However, investments made by a general partner into a limited partnership are considered to be direct investments and must be reported on the Direct Investment Surveys (provided the requisite financial thresholds are met).

resident entity and without a physical presence outside of the U.S., are generally not deemed to be separate foreign affiliates and do not need to be reported as such.

Reportable Information. A U.S. resident entity must report selected financial and operating data of a foreign affiliate on the annual Direct Investment Survey. This includes a description of the balance sheet, exports and imports of goods by the foreign affiliate, distributions of sales or gross operating revenues, and costs and expenses of the foreign affiliate. This also includes descriptions of employment agreements, compensation, property and equipment, industries of the foreign affiliate and any research and development operations of the foreign affiliate.

In the event information is unattainable by the U.S. reporter after reasonable inquiry to the foreign affiliate, estimates of such figures and values may be reported instead. Furthermore, if reasonable estimates cannot be made by the U.S. reporter, such information may be left blank and a brief explanation regarding the absence of information should be noted in the “Remarks” section of the Direct Investment Survey.

Filing Direct Investment Surveys

Required Surveys to File. Each U.S. resident entity that meets the required thresholds for an annual Direct Investment Survey must file (a) one Direct Investment Survey for itself (Form BE-11A) and (b) one Direct Investment Survey for each foreign affiliate (the specific Direct Investment Survey is dependent upon the financial information of the foreign affiliate).

Due Date. Annual Direct Investment Surveys for the 2011 financial reporting year must be filed by May 31, 2012. An extension to this deadline may be requested by completing a “Request for Extension.” The length of the extension varies depending upon the number of forms to be filed with the BEA. A “Request for Extension” is available [here](#).

How to File. U.S. resident entities may file Direct Investment Surveys by (i) using the Internet Electronic Submissions System or (ii) mailing a paper Direct Investment Survey. Electronic filing may be done via the BEA’s [website](#). Reports must be retained for at least three (3) years from the date of submission to the BEA. The BEA estimates that on average, the Direct Investment Surveys will take approximately 86 hours for all foreign affiliates combined.

Confidentiality. Direct Investment Surveys filed with the BEA are confidential and may only be used for analytical or statistical purposes. The information contained in a Direct Investment Survey cannot be presented in a manner that allows a reporter to be identified without such reporter’s prior written permission. Furthermore, a Direct Investment Survey may not be used for purposes of taxation, investigation or regulation.

Penalties for Non-Compliance

Direct Investment Surveys are mandatory, regardless of whether a U.S. resident entity has been contacted by the BEA. Failure to report can result in a civil penalty of at least \$2,500 and at most \$25,000. Willful failure to report can result in criminal penalties, including a fine of at most \$10,000 and imprisonment for no more than one year. An officer, director, employee, or agent of an entity who knowingly participates in the willful failure to report can also face these criminal penalties. Penalties for failure to file are applicable only to the U.S. resident entity or individual with the obligation to file a Direct Investment Survey. All penalties (incurred through willful misconduct or otherwise) are assessed separately with respect to each instance of noncompliance.

Related Direct Investment Survey Reporting Requirements

Direct Investment in Foreign Entities. In addition to an annual Direct Investment Survey reporting requirement, U.S. residents may also have an obligation to make a quarterly filing and a benchmark filing (every five years) subject to certain financial thresholds. Quarterly Direct Investment Surveys must be filed within 30 days after the close of each calendar quarter, except the report for the fourth calendar quarter, which may be filed 45 days after the close of such quarter. The next benchmark survey will be due for the 2014 calendar year.

Foreign Direct Investment in the United States. Similar filing obligations also exist for a U.S. resident entity if a non-U.S. resident entity (i) owns 10% or more of the voting securities of such U.S. resident and (ii) such U.S. resident meets or exceeds certain financial thresholds. For example, a U.S. company may need to file if a non-U.S. fund owns 10% or more of its voting securities. In such case, a U.S. resident entity may have quarterly, annual and/or benchmark reporting obligations. The next benchmark survey will be due for the 2012 calendar year.

For additional information and guidance, the Direct Investment Surveys and Instructions are available [here](#).

If you have any additional questions about the Direct Investment Surveys or the reporting requirements, please contact your usual Ropes & Gray attorney.