

Recent Changes to the BEA Foreign Direct Investment Reporting

The U.S. Department of Commerce, through the Bureau of Economic Analysis (the “BEA”), requires certain U.S. entities (such as investment funds or their portfolio companies) to file annual reports of foreign direct investments with the BEA (the “BE-13” filing). Previously, a BE-13 filing had only been required of entities specifically contacted by the BEA. In a recent, largely unpublicized, [notice](#) published on the BEA website on November 26, 2014, the BEA announced that any entity that crosses certain reporting thresholds (a “reportable transaction”) will be required to file, regardless of whether the BEA has contacted such entity. In addition to requiring prospective filing after a “reportable transaction”, the BEA is requiring retroactive reporting by January 12, 2015 by any entity that crossed a reporting threshold between January 1, 2014 and November 26, 2014.

Reporting Thresholds

A U.S. entity is required to make a BE-13 filing if a non-U.S. person acquires direct or indirect ownership or control of 10% or more of the “voting securities” of such U.S. entity. An entity that crosses this 10% threshold must file a Form BE-13 if the cost of acquiring (or establishing) such interest exceeds \$3 million. Depending on the triggering event (e.g., formation, acquisition, merger or expansion), the U.S. entity is required to file one of the five BE-13 forms. If such cost does not exceed \$3 million (but the 10% threshold was crossed), an entity must file a BE-13 Claim for Exemption. Note that the retroactive January 12, 2015 deadline only applies if the 10% threshold was first exceeded during the January 1 to November 26, 2014 period.

Reporting Deadline

While reports for reportable transactions between January 1, 2014 and November 26, 2014 are due by January 12, 2015, the BEA has orally confirmed that it will grant extensions routinely, particularly those that are requested prior to the due date. Such requests should be submitted to BE-13@bea.gov, and should include the name of the prospective filer, the date of the reportable transaction, and the date the filer reasonably expects to be able to make the filing. Reports for reportable transactions after November 26, 2014 are required within 45 days of a reportable transaction. After an initial BE-13 filing is made, the BEA requires quarterly, annual, and five-year benchmark filings.

Content of the Form BE-13

The forms require U.S. entities to provide information regarding, among other things, the reportable transaction, the name and ownership percentage of underlying U.S. entities owned by the filing entity, information on ownership percentages and ultimate beneficial owners, and certain financial and operating information. The BEA reports are kept confidential and used for statistical analysis.

Practical Implications for Asset Managers

As investor interests in funds with a general partner or managing member are generally not considered “voting securities,”¹ most funds would not need to report a 10% investment by a non-U.S. investor. However, if a non-U.S. entity (or an entity owned 10% or more by a non-U.S. entity) became the general partner or managing member of a U.S. fund in or after 2014, such U.S. fund may be required to file Form BE-13.

In addition, a U.S. portfolio company of a non-U.S. fund may be required to file Form BE-13 if such non-U.S. Fund acquired an interest of 10% or more in such portfolio company’s voting securities in or after 2014 (e.g., a Cayman Islands fund acquires a U.S. portfolio company). **As a result, U.S. portfolio companies acquired by non-U.S. funds in 2014 may need to make a Form BE-13 filing by the January 12, 2015 deadline (or request an extension).**

Consequences for Failure to File

While the BEA has stated informally that it does not intend to penalize an entity that fails to file, despite now having an obligation to do so, persistent failure to file may ultimately result in civil and criminal penalties. The BEA may pursue civil penalties up to \$25,000 and seek injunctive relief, and willful violations may result in criminal penalties of up to \$10,000 and imprisonment for up to one year.

Changes to Other BEA Forms

In addition to BE-13, the BEA, in a separate late November release, also changed the requirement for U.S. entities to file form BE-10 (Form BE-10A and Form(s) BE-10B, BE-10C, and/or BE-10D) to report U.S. direct investment abroad (along similar reporting criteria as the BE-13 used for foreign direct investment in the U.S.). Form BE-10 is a survey conducted every five years, with the last survey covering through the year 2009. Entities are now required to file form BE-10 if the reporting criteria are met irrespective of whether they have been contacted by the BEA.² The BE-10 reports are due in May 29, 2015 for those U.S. reporters filing fewer than 50 foreign affiliates, and June 30, 2015 for those U.S. reporters filing 50 or more foreign affiliates. The BEA has indicated that it will offer additional guidance to investment fund filers, possibly in the form of Frequently Asked Questions (FAQs).

¹ While there are no instructions on BE-13 regarding the treatment of limited partnership and LLC interests as voting securities, other BEA forms provide the following guidance. The determination of percentage of voting securities in a limited partnership is based on who controls the partnership—not based on the percentage of ownership in the limited partnership’s equity. Therefore, the general partner of a limited partnership typically holds 100 percent of the voting securities in the limited partnership and, unless a clause to the contrary is contained in the limited partnership agreement, limited partners are presumed to have zero voting securities in the limited partnership. A similar analysis applies to LLCs and their members and managing members, so long as the managing member is responsible for the day-to-day operations of the LLC and does not need to obtain approval for annual operating budgets and for decisions relating to other significant management issues from the other members.

² Generally, a BE-10 report is required of any U.S. person that had direct or indirect ownership or control of 10 percent or more of the voting stock of a foreign entity (a “foreign affiliate”) at any time during the U.S. person’s 2014 fiscal year.