



## **Overview**

The Bureau of Economic Analysis (BEA) of the U.S. Department of Commerce is the government agency that compiles statistics about the U.S. economy, including the U.S. gross domestic product (GDP). BEA also compiles statistics on foreign trade and investment in the United States, as well as other U.S. industry data. As part of its data-gathering process, BEA makes use of a variety of surveys and other reports directed at U.S. businesses and certain individuals.

Responding to these surveys is typically mandatory, and the obligation to respond applies even if the business or individual was not contacted by BEA.

Two of BEA's most comprehensive five-year benchmark surveys have impending filing deadlines, which applicable U.S. businesses and individuals must meet. The two surveys are as follows:

- **BE-12.** "2022 Benchmark Survey of Foreign Direct Investment in the U.S." (Form BE-12).
- **BE-120.** "2022 Benchmark Survey of Transactions in Selected Services and Intellectual Property with Foreign Persons" (Form BE-120).

These BEA forms are discussed in more detail below, including who must file, potential exemptions, and which form to use.

## **Form BE-12**

**The deadline is May 31, 2023, via mail and June 30, 2023, via BEA's eFile System.**

### **Who needs to file?**

The BE-12 survey is conducted every five years and was last due in 2018 for calendar year 2017. Form BE-12 is a mandatory filing for all U.S. business enterprises (regardless of whether they are incorporated) in which a foreign person or entity (each a "Foreign Parent") owns or controls, directly or indirectly, more than 10% of the voting shares/securities or equivalent interest (the "U.S. affiliate"). Responding to the BE-12 is mandatory, regardless of whether the U.S. affiliate or Foreign Parent is contacted by BEA.

### **Are private funds required to file?**

Private funds are exempt from filing Form BE-12 provided they meet certain requirements, as discussed below.

### **Where can I find Form BE-12?**

Form BE-12 is posted on the BEA [website](#). There are four different versions of Form BE-12: BE-12A, BE-12B, BE-12C, and BE-12 Claim for Not Filing.

### **Which of the four versions of Form BE-12 should I use?**

At a high level, selection of the correct Form BE-12 depends on the size of the U.S. affiliate and the percentage of foreign ownership, as follows:

1. **BE-12A.** This version is for a majority-foreign-owned U.S. affiliate (50% or more collective ownership by all Foreign Parents) with total assets, sales, or net income of more than \$300 million (positive or negative) at the end of the 2022 fiscal year.
2. **BE-12B.** This version is for either:
  - A majority-foreign-owned U.S. affiliate (50% or more collective ownership by all Foreign Parents) with total assets, sales, or net income of more than \$60 million (positive or negative), but for which none of these exceed \$300 million (positive or negative) at the end of the 2022 fiscal year.
  - A minority-foreign-owned U.S. affiliate (collective ownership by all Foreign Parents is less than 50%) with total assets, sales, or net income of more than \$60 million (positive or negative) at the

end of the 2022 fiscal year.

3. **BE-12C.** This version is for a majority- or minority-foreign-owned U.S. affiliate with total assets, sales, or net income of \$60 million or less (positive or negative).
4. **BE-12 Claim for Not Filing.** This version is for any person from whom BEA has requested a BE-12 survey response but does not meet the filing requirements for Forms BE-12.

BEA has provided a [decision tree](#) to help businesses and individuals determine which form to file.

Importantly, U.S. real estate ownership by a Foreign Parent is considered a U.S. affiliate for the purposes of the BE-12 survey, and all U.S. real estate investment by a Foreign Parent must be aggregated for purposes of the dollar thresholds in Forms BE-12A, B, and C.

### **Private Fund Exemption**

A U.S. affiliate is exempt from filing Form BE-12A, B, or C (but must still file a Form BE-12 Claim for Not Filing if contacted by BEA) if **all** the following apply:

- The U.S. business enterprise is a private fund.<sup>[1]</sup>
- The private fund does not own, directly or indirectly, an "operating company" (i.e., a company other than a private fund or holding company) in which the Foreign Parent owns at least 10% 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.

BEA provides more information regarding [private funds](#) on its website.

### **Form BE-120**

**The filing deadline is July 31, 2023.**

Certain U.S. individuals, companies, and other entities (U.S. Persons) must submit a Form BE-120 to BEA by the deadline if they had sales to foreign persons or purchases from foreign persons in the services and intellectual property categories covered by the survey during the 2022 fiscal year. If certain sales levels are met, as described below, the filing is mandatory and must be made whether or not the U.S. Person is contacted to do so by BEA.

#### **Who needs to file?**

Unlike the BE-12 survey, the BE-120 survey is not restricted to U.S. affiliates. Five categories of U.S. Persons are required to file BE-120 surveys for 2022:

1. **Sales over \$2 million.** Any U.S. Person whose combined sales to foreign persons of covered services and intellectual property *exceeded \$2 million for its 2022 fiscal year on an accrual basis* is required to provide data on total sales for each type of service and intellectual property transaction in which they engaged. They must disaggregate the totals by country and by relationship to the foreign transactor (foreign affiliate, foreign parent group, or unaffiliated) through filing Form BE-120.
2. **Purchases over \$1 million.** Any U.S. Person whose combined purchases from foreign persons of covered services and intellectual property *exceeded \$1 million for its 2022 fiscal year on an accrual basis* is required to provide data on total purchases for each type of service and intellectual property transaction in which they engaged. They must disaggregate the totals by country and by relationship to the foreign

transactor (foreign affiliate, foreign parent group, or unaffiliated) through filing Form BE-120.

3. **Sales \$2 million or under.** Any U.S. Person whose combined sales to foreign persons of covered services and intellectual property *were \$2 million or less for its 2022 fiscal year, on an accrual basis*, is required to provide data on total sales for each type of transaction in which they engaged through filing Form BE-120.
4. **Purchases \$1 million or under.** Any U.S. Person whose combined purchases from foreign persons of covered services and intellectual property *were \$1 million or less for its 2022 fiscal year, on an accrual basis*, is required to provide data on total purchases for each type of transaction in which they engaged through filing Form BE-120.
5. **No sales or purchases, but received BEA notification.** Any U.S. Person who is notified by BEA about the Form BE-120 survey but did not have transactions in the covered services or intellectual property is still required to complete through Page 6 of Form BE-120.

The difference between filers in Categories 1 and/or 2 and filers in Categories 3 and/or 4 is that those U.S. Persons falling into the first two categories must provide significantly more detail regarding each type of service and intellectual property transaction. U.S. Persons falling into Category 5 must first be notified by BEA about the Form BE-120 survey and are not required to disclose data.

### **What services and intellectual property are covered?**

The services and intellectual property transactions covered by this survey are very broad and include: advertising and related services; architectural, engineering, scientific, and other technical services; computer services; construction; financial services (for reporters who are not financial services providers); franchises and trademarks licensing fees; information services; legal, accounting, management consulting, and public relations services; licenses for the use of outcomes of research and development; licenses to reproduce and/or distribute computer software; licenses to reproduce and/or distribute audiovisual products; maintenance and repair services; manufacturing services; operating leasing services; other business services; personal, cultural, and recreational services; research and development services; primary insurance premiums and losses (for reporters who are not a U.S. insurance company); space transport services; telecommunications services; trade-related services; taste treatment and depollution, agricultural, and mining services.

Additional information about the covered services and intellectual property, as well as exemptions, can be found in [Form BE-120](#).

### **Penalties**

Those U.S. affiliates and/or U.S. Persons who are required to file BE-12 and/or BE-120 surveys for fiscal year 2022 are subject to penalties if they fail to file by the required deadline (or fail to request an extension by the deadline) or otherwise violate the applicable regulations. These penalties may include civil penalties ranging from \$5,580 to \$55,808 and/or injunctive relief. There are criminal penalties of a fine of up to an additional \$10,000 and, for individuals, imprisonment of not more than one year.

### **Takeaways**

The upshot of the Form BE-12 and Form BE-120 filing requirements is that U.S. affiliates and/or U.S. persons that fall under the filing requirements outlined above, or that have been asked by BEA to file, must take care to either submit their responses or request an extension to do so by the applicable deadlines.

The forms are detailed and may take significant time to prepare. Failure to file, or filing with incorrect information, can result in steep penalties.

For matters related to foreign direct investment and other foreign trade-related compliance matters, companies and individuals should consult with experienced counsel.

## **Endnote**

[1] "Private Fund" refers to 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."

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