

What Every General Counsel Needs to Know to Comply With New Bureau of Economic Analysis Reporting Requirements

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Overview

In 1976, Congress passed legislation requiring the Bureau of Economic Analysis (BEA) of the U.S. Department of Commerce to collect information on investment flows between the United States and foreign countries. Subsequently expanded and amended by the International Investment and Trade in Services Survey Act, this legislation now serves as the authority for BEA to issue a wide range of mandatory surveys to U.S. and foreign companies and investors.

In recent months, BEA has been actively expanding the scope of its surveys to cover many industries and companies that may not have had to report previously.¹ Often announced with little fanfare, the surveys can involve significant time and expense for affected companies and may lead to substantial civil and criminal penalties for those who fail to comply.

Given the penalties and reporting burdens involved, these BEA surveys should be on the radar of every general counsel. This article provides an outline of key points that general counsels should be aware of to protect their companies from liability and the steps companies can take to reduce or eliminate their compliance burden, including by engaging directly with BEA officials and advisory groups.

BEA Surveys Apply to a Wide Range of Transactions

BEA broadly defines the “persons” to which its reporting requirements apply as “any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization ... and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency).” Among the transactions by such persons that can trigger a requirement to report are:

- Investments by non-U.S. persons in entities and real estate in the United States;²
- Investments by U.S. persons in overseas entities and real estate;³
- Insurance transactions by U.S. insurance companies with non-U.S. persons;
- Financial services provided to non-U.S. persons;⁴
- Airlines engaging in transactions with non-U.S. persons;
- Transactions involving intellectual property and certain services provided to non-U.S. persons;
- Credit card and bank card transactions involving international travel; and
- Transactions and expenses of U.S. and overseas ocean carriers.

¹ See “New Reporting Requirements on the Horizon for US Financial Services Providers Doing Business With Non-US Persons,” available at <http://www.skadden.com/insights/new-reporting-requirements-horizon-us-financial-services-providers-doing-business-non-us-persons>.

² See “Important but Frequently Overlooked Reporting Requirements for Inbound and Outbound Direct Investment Involving US Entities,” available at <http://www.skadden.com/insights/important-frequently-overlooked-reporting-requirements-inbound-and-outbound-direct-investment-involving-us-entities>.

³ See *id.*

⁴ See “New Reporting Requirements on the Horizon for US Financial Services Providers Doing Business With Non-US Persons.”

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Certain BEA surveys — such as those on investment by non-U.S. persons in the United States, those on U.S. direct investment overseas and those on the provision of financial services to non-U.S. persons — must be completed and filed by all covered persons by the applicable deadlines, regardless of whether such persons are contacted by BEA.⁵ Certain other surveys need only be completed and filed when BEA contacts a company directly.

Failure to Respond Could Lead to Civil, Criminal Penalties

Failure to timely respond to a BEA survey when a response is required can result in civil penalties of up to \$32,500 and criminal penalties of \$10,000 and one year imprisonment.

Prepare Now, Save Time and Trouble Later

To avoid missing BEA requests, companies should make sure they have mechanisms in place to promptly identify and forward all communications from BEA to company counsel. Companies engaging in transactions with foreign persons — including U.S. companies receiving foreign direct investment or making direct investments overseas — should be aware of the applicable mandatory reporting deadlines and include them on internal compliance checklists and corporate reporting calendars. In addition, companies engaging in international transactions should carefully monitor announcements by BEA concerning new and updated reporting requirements and applicable deadlines.

It may take significant time to complete responses to BEA surveys, but this can be reduced by notifying your accounting

and other relevant departments in advance and giving them time to prepare. Companies with diverse investments and a wide range of transactions affected by BEA requirements may wish to develop internal mechanisms to collect and be in a position to report relevant data on a real-time basis.

Engage With BEA and Other Stakeholders

In recent months, BEA has been in the process of revamping and updating many of its surveys. BEA has requested comments on these surveys from affected persons and has signaled that it is looking for ways to make its surveys less burdensome. Affected companies should consider ways they can engage with BEA and other relevant stakeholders to provide feedback to BEA and reduce their overall compliance burden in this area. Comments can be submitted in response to specific BEA notices as well as more informally directly to BEA officials. The Department of Commerce has also recently announced the creation of a “Commerce Data Advisory Council” that will seek input from the private sector on ways to improve the work of BEA.

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Skadden’s international team closely monitors developments at BEA. We encourage you to contact any of the attorneys listed here or your regular Skadden contact with any questions about BEA’s surveys and reporting requirements.

⁵ See *id.* and “Important but Frequently Overlooked Reporting Requirements for Inbound and Outbound Direct Investment Involving US Entities.”