May 1, 2023

Are You Required to Participate in Bureau of Economic Analysis' Benchmark Survey?

Every five years, including this year, the Bureau of Economic Analysis (BEA) of the U.S. Department of Commerce conducts a detailed survey (Benchmark Survey) of certain foreign-owned U.S. businesses. Every U.S. affiliate, i.e., U.S. business enterprises that have a foreign person or entity as a direct or indirect owner of 10 percent or more of the U.S. entity's voting securities, is required to participate in the survey.

Benchmark Survey participants must complete and file a Form BE-12 with the BEA by May 31 (if filing a paper copy) or June 30 (if filing electronically). The Benchmark Survey asks for information regarding any fiscal year ending in 2022. Details and instructions are available on the BEA's website.

For purposes of the Benchmark Survey, real estate that is for "profit-making purposes" is subject to the reporting requirements. The ownership of such real estate is defined to be a "business enterprise," and if the real estate is foreign owned, it is considered a U.S. affiliate of a foreign person. Consequently, a foreign person who is an individual or a foreign entity with a direct ownership interest in real estate may have to file a Form BE-12 even if the real estate is not technically owned by a U.S. entity. However, real estate that is held exclusively for personal use (and not for profit-making purposes) is *not* subject to the reporting requirements. For example, a residence that is the owner's primary residence that is then leased by the owner while the owner is outside the United States, but which the owner intends to reoccupy, is considered real estate held for personal use and is not subject to the reporting requirements. In addition, ownership of U.S. residential real estate by a corporation whose *sole* purpose is to hold the real estate for the personal use of the owner(s) of the corporation is considered to be real estate held for personal use and therefore not subject to the reporting requirements either.

There are four different variants of Form BE-12 from which the foreign-owned U.S. business entity must choose. Each contains varying amounts of detail. One of these is Form BE-12 Claim for Not Filing, which may need to be filed even if an entity is exempt from otherwise filing because it is consolidated with another entity higher up in an organizational chain.

The Form BE-12 responses require access to financial information, so respondents would be well advised to consult with their accountants or internal financial reporting resources regarding completion of the form. Day Pitney attorneys are available to work with you and your external or internal financial teams in selecting the proper variant of the form to use, whether to consolidate responses among several subsidiaries and other related issues that may arise.

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