

ALERT

# Department of Commerce Undertakes Sweeping, Mandatory Census on IP Transactions

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The U.S. Department of Commerce is undertaking a lightly publicized yet sweeping and mandatory census of most intellectual property (IP) transactions between U.S. and foreign entities. All U.S. entities with combined inbound transactions of \$1 million or outbound transactions of \$2 million during fiscal year 2017 – including intracompany transfers – must report the type, amount, and country involved in the IP transaction. Survey responses are due June 29, 2018 (or July 30, 2018, if e-filed).

The survey, officially called the “BE-120 Benchmark Survey of Transactions in Selected Services and Intellectual Property with Foreign Persons,” is being conducted by the Department of Commerce’s Bureau of Economic Analysis (BEA) through authority provided by the International Investment and Trade in Services Surveys Act – which Congress passed in the 1970s to “provide clear and unambiguous authority [to] the President to collect information on international investment and United States foreign trade in services.” 22 U.S.C. § 301(b). For decades BEA has periodically exercised this authority by undertaking targeted data gathering, but the latest BE-120 survey is notable for two key reasons:

First, the survey is mandatory for all businesses meeting the \$1 million inbound or \$2 million outbound transaction thresholds, whether or not contacted by BEA. Most BEA surveys only require a response if contacted. Failure to respond to the BE-120 survey is punishable by civil fines of up to \$45,000, with criminal penalties possible for willful noncompliance.

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## Practice Areas

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Intellectual Property  
Privacy, Cyber & Data Governance  
Telecom, Media & Technology

Second, the survey demands an unprecedented level of detail and granularity. The survey covers nearly 50 types of IP transactions – ranging from patents and trademarks to software end-user licenses agreements to consulting to cloud computing and data storage services. For each type of transaction, respondents must identify the dollar value of inbound and outbound transactions, the country involved in the transaction, and whether the transaction involved the U.S. company’s foreign parent, foreign affiliate, or an unaffiliated third party.

Survey responses may only be used by the government for analytical and statistical purposes. Individual responses are strictly confidential to BEA and may not be shared with other government agencies. Data cannot be disaggregated to identify individual transactions or responses and cannot be used for taxation, investigation, or regulation purposes. Survey responses are also immune from FOIA requests and discovery in legal proceedings.

Despite these restrictions, the BE-120 survey provides the Department of Commerce with a powerful tool to shape the current debate on international investment and trade. Currently, the Department of Commerce, through its Bureau of Industry and Security (BIS), is the primary government agency with authority to regulate foreign exports of intellectual property. Recent congressional action – notably the Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA) – could expand the authority of the Committee on Foreign Investment in the United States (CFIUS) to review and regulate intellectual property transactions, thus shifting new powers to CFIUS. Although BE-120 survey responses cannot be used in individual enforcement actions, the Secretary of Commerce can use the aggregate data BEA gathers to set BIS enforcement priorities and shape CFIUS reform.

More broadly, this survey may be used to support the goals of the Trump Administration’s “America First” policies. The Administration’s National Security Strategy white paper, released in December 2017, prioritizes enhanced intellectual property protections. Although the focus of the white paper was on illicit activities such as hacking and trade secret theft, it notes the national security dangers posed by “some actors [that] use largely legitimate legal transfers and relationships to gain access to fields, experts, and trusted foundries that fill their capability gaps and erode America’s long-term competitive advantages.” The data being collected in the BE-120 survey thus reflects the Administration’s interest in such transfers and relationships.

The complete BE-120 survey can be found [here](#). The BEA rulemaking underlying the survey can be found [here](#).