

FILING ALERT: DO YOUR NON-U.S. OPERATIONS SUBJECT YOU TO QUINQUENNIAL FILING REQUIREMENTS WITH THE DEPARTMENT OF COMMERCE?

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U.S. Investment Management Alert

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The BE-10 benchmark survey is due on May 29, 2020, for U.S. reporters required to file fewer than 50 forms, and June 30, 2020, for U.S. reporters required to file 50 or more forms. But what is a BE-10 report, why would a fund manager need to file, who is a "U.S. reporter," and why so many forms?

WHAT IS A BE-10 REPORT?

The Bureau of Economic Analysis ("BEA") of the U.S. Department of Commerce conducts quarterly and annual reports and five-year benchmark surveys with respect to U.S. investment abroad. [1] The quarterly and annual filings are made by U.S. firms contacted by the BEA to make the applicable filing. The BEA contacts firms that it believes qualify to make an applicable filing based on prior filings or other sources, such as external databases and news reports. Unlike the other BEA filings, every U.S. firm that meets the filing requirements must file the BE-10 benchmark survey. Conducted every five years in place of the annual report, the BE-10 benchmark survey is the BEA's comprehensive survey of U.S. direct investment abroad.

The BEA uses the information in the filings to prepare official U.S. economic statistics that measure the scale of the global business activities of U.S. companies and their impact on the economies of the United States and other countries. The statistical information is available on the BEA's website. The information reported on the Form BE-10 includes the products and services provided by, the number of employees of, and the revenue and other financial data of a U.S. reporter and its non-U.S. affiliates. This information is compiled to help measure the economic impact of U.S. multinational companies.

As the filing requirements are generally consistent with the requirements for the prior benchmark survey, the below is an updated version of a previous alert on this benchmark survey, which was published on May 19, 2015. [2]

WHO IS A "U.S. REPORTER"?

While persons not contacted by the BEA have no reporting responsibilities for the quarterly and annual reporting of U.S. direct investment abroad, *a response with respect to the Form BE-10 is required from all persons subject to the reporting requirements of the 2020 BE-10 benchmark survey, whether or not such persons have been contacted by the BEA.*

Any U.S. person who had a "foreign affiliate" at any time during the U.S. person's 2019 fiscal year is required to report. Generally, a "foreign affiliate" is a non-U.S. entity in which the U.S. person had a direct or indirect ownership or control of at least 10% of the voting or equivalent interest of an incorporated or unincorporated foreign business enterprise. A U.S. person with one or more foreign affiliates is referred to as a "U.S. reporter."

The BE-10 filing of a U.S. reporter must cover the U.S. reporter's "fully consolidated U.S. domestic business enterprise." This consists of a U.S. business enterprise whose voting securities are not more than 50% owned by another U.S. business enterprise and, proceeding down each ownership chain from that U.S. business enterprise, any U.S. business enterprise whose voting securities are more than 50% owned by the U.S. business enterprise above it.

APPLICATION TO FUND MANAGERS

A fund manager would need to file a BE-10 report if it has foreign affiliates, which may include, for example, non-U.S. affiliated managers that are controlled by a U.S. manager, an offshore fund with a U.S. general partner, or a U.S. fund with control investments in non-U.S. companies. The analysis as to whether an entity is a "foreign affiliate" and whether a filing is required can be complex and depends on a variety of factors that are detailed in the instructions for the BE-10 report.

It is important to note that the reporting obligations turn on whether the interest owned is a "voting interest." The BEA has taken the position that the general partner controls a limited partnership and the limited partners have non-voting interests, unless the applicable agreement provides otherwise. Accordingly, a typical U.S. general partner of a fund that is a Cayman Islands limited partnership would have a reporting obligation. There is no requirement to "look through" a fund to its investors to determine the fund's nationality; instead, the BEA looks at the country in which the entity is organized.

In addition, a filing may be required if a fund has at least a 10% voting interest in a non-U.S. portfolio company during the 2019 fiscal year. Note that a portfolio company may include a fund's investment in real estate in a non-U.S. country. A non-U.S. investment of a fund would not be deemed a "foreign affiliate" if the investment has the characteristics of a portfolio investment, meaning that the investment is not intended to control or influence the management of an operating company. Specifically, a U.S. reporter is not required to file for an investment if (i) the private fund does not directly or indirectly own an operating company [3] in which the consolidated U.S. reporter owns at least 10% of the voting interest, and (ii) if the U.S. reporter owns the private fund indirectly, there are no operating companies between the consolidated U.S. reporter and the indirectly owned foreign private fund.

HOW TO REPORT

The BE-10 report is actually a set of forms and may be filed electronically, by fax, or in hard copy. The exact forms that a U.S. reporter must complete depend on the circumstances of the U.S. reporter and its foreign affiliates, as described below.

BE-10A – filed by each U.S. reporter. A U.S. reporter completes the entire form if any one of the following three items of the fully consolidated U.S. domestic business enterprise was greater than \$300 million (positive or negative) at any time during the U.S. reporter's 2019 fiscal year:

- total assets;

- sales or gross operating revenues excluding sales taxes; or
- net income after provision for U.S. income taxes.

If no one of the three items listed above for the fully consolidated U.S. domestic enterprise was greater than \$300 million at any time during the U.S. reporter's 2019 fiscal year, the U.S. reporter is required to complete only certain items on the Form BE-10A.

In addition to filing the Form BE-10A covering itself, the U.S. reporter must complete a Form BE-10B, BE-10C, or BE-10D for *each* applicable foreign affiliate, depending on the size of the foreign affiliate.

- **Form BE-10B** – filed by a U.S. reporter for each directly or indirectly held foreign affiliate for which any one of the following items was greater than \$80 million (positive or negative) at any time during the affiliate's 2019 fiscal year:
 - total assets;
 - sales or gross operating revenues excluding sales taxes; or
 - net
- **Form BE-10C** – filed by a U.S. reporter for:
 - each majority-owned [4] foreign affiliate of the U.S. reporter for which any one of the three items listed under "Form BE-10B" was greater than \$25 million (positive or negative), but for which no one of the items was greater than \$80 million (positive or negative) at any time during the affiliate's 2019 fiscal year;
 - each minority-owned [5] foreign affiliate of the U.S. reporter for which any one of the three items listed under "Form BE-10B" was greater than \$25 million (positive or negative) at any time during the affiliate's 2019 fiscal year; and
 - each foreign affiliate of the U.S. reporter for which no one of the three items listed under "Form BE-10B" was greater than \$25 million (positive or negative) at any time during the affiliate's 2019 fiscal year that is a foreign affiliate parent of another foreign affiliate being filed on Form BE-10B or BE-10C.
- **Form BE-10D** – filed by a U.S. reporter for each foreign affiliate of the U.S. reporter for which no one of the three items listed under "Form BE-10B" was greater than \$25 million (positive or negative) at any time during the affiliate's 2019 fiscal year and is not a foreign affiliate parent of another foreign affiliate being filed on Form BE-10B or BE-10C.

DUE DATES

A fully completed and certified BE-10 report (which is comprised of Form BE-10A and Form(s) BE-10B, BE-10C, or BE-10D, as applicable) is due to the BEA no later than May 29, 2020, for U.S. reporters required to file fewer than 50 forms, and June 30, 2020, for U.S. reporters required to file 50 or more forms. Reasonable requests for an extension of the filing deadline will be considered, but the BEA must receive any such request before the original due date of the report.

CONFIDENTIALITY

The information in a BE-10 report may be used only for analytical and statistical purposes, and access to the information reported is available only to consultants, officials, and employees of agencies designated to perform work with respect to the reporting. [6] Information from a report may not be published or made available in such a manner that the person to whom the information relates can be specifically identified, unless such person consents to the disclosure. Of note (and relief) to investment advisers, reports and copies of the reports are confidential, and their submission or disclosure may not be compelled by any person without the prior written permission of the person filing the report.

PENALTIES

A person who fails to file a required Form BE-10 may be subject to civil penalties and, if found to have willfully failed to file a required Form BE-10 or found to have willfully failed to follow the instructions, may be subject to criminal penalties. An officer, director, employee, or agent of an entity who knowingly participates in a willful failure to file may also be subject to criminal penalties.

HELPFUL LINKS

The BEA publishes a guide to direct investment surveys that is available [here](#). The BEA also has a webpage with information for private funds that is available [here](#).

CONTACT

Please contact your regular K&L Gates attorney or the following attorney if you have questions regarding the Form BE-10.

NOTES

[1] International Investment and Trade in Services Survey Act of 1976, as amended, 22 U.S.C. §§ 3101–3108 (the "Survey Act"). The 2019 benchmark survey is required pursuant to rule under the Survey Act. *Direct Investment Surveys: BE-10 Benchmark Survey of U.S. Direct Investment Abroad*, 84 Fed. Reg. 60912, available [here](#).

[2] Please click [here](#) to read the previous version of this alert.

[3] An "operating company" is a business enterprise that is not a private fund or a holding company, as defined by the BEA.

[4] A "majority-owned foreign affiliate" means a foreign affiliate in which the combined direct and indirect ownership interest of all the U.S. report exceeds 50%.

[5] A "minority-owned foreign affiliate" means a foreign affiliate in which the combined direct and indirect ownership interest of at least one U.S. reporter is 10% or more, but the combined direct and indirect ownership interests of all U.S. reporters of the affiliate is 50% or less.

[6] Survey Act, Section 3104. Pursuant to the Survey Act, the data contained in a BE-10 report is compiled for Congress and certain government agencies. The BEA is prohibited from granting agencies access to the data for tax, investigative, or regulatory purposes. BEA, *A Guide to BEA's Direct Investment Surveys*, available here.

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