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## The BE-10 Is Due Whether You Are “Invited” to Participate or Not

*By Beth Clark and Sonia R. Gioseffi*

Did you hear? The BE-10 report is due. It is due at the end of May—May 29, 2015, to be exact—for U.S. reporters required to file fewer than 50 forms, and June 30, 2015 for U.S. reporters required to file 50 or more forms, as discussed below. But what is a BE-10 report, who is a “U.S. reporter,” and why so many forms?

### What is a BE-10?

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.<sup>1</sup> The BEA uses this information 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. 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 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.

### Who Must Report

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 2015 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 2014 fiscal year is required to report. 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 stock (of an incorporated foreign business enterprise) or equivalent interest (with respect to an 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 owned, more than 50%, by another U.S. business enterprise and, proceeding down each ownership chain from that U.S. business enterprise, any U.S.

<sup>1</sup> International Investment and Trade in Services Survey Act of 1976, as amended, 22 U.S.C. 3101-3108 (the “Survey Act”). The 2015 benchmark survey is required pursuant to rule under the Survey Act. *Direct Investment Surveys: BE-10 Benchmark Survey of U.S. Direct Investment Abroad*, 79 FR 69041, available at:

[www.federalregister.gov/articles/2014/11/20/2014-27421/direct-investment-surveys-be-10-benchmark-survey-of-us-direct-investment-abroad](http://www.federalregister.gov/articles/2014/11/20/2014-27421/direct-investment-surveys-be-10-benchmark-survey-of-us-direct-investment-abroad).

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business enterprise whose voting securities are more than 50% owned by the U.S. business enterprise above it.

### Application in the Fund Context

If, at any time during the 2014 fiscal year, a U.S. fund had at least a 10% voting interest in a foreign business enterprise, including another fund (such as a master fund formed as a Cayman Islands exempted company), it must 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 limited partnership interests and limited liability company interests are not voting interests, unless the applicable agreement provides otherwise. Rather, the general partner of a non-U.S. limited partnership is generally deemed to own 100% of the voting interests of the limited partnership. Accordingly, the U.S. general partner of a fund that is a Cayman Islands limited partnership may 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 owned at least 10% of a non-U.S. portfolio company during the 2014 fiscal year. Note that a portfolio company may include a fund’s investment in real estate in a non-U.S. country.

### How to Report

The BE-10 report is actually a set of forms and may be filed electronically 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 a U.S. reporter 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 2014 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 2014 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* 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 2014 fiscal year:
  - total assets;
  - sales or gross operating revenues excluding sales taxes; or
  - net income after provision for foreign income taxes.

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- **Form BE-10C** – filed by a U.S. reporter for:
  - each majority-owned<sup>2</sup> 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 2014 fiscal year;
  - each minority-owned<sup>3</sup> 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 2014 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 2014 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 2014 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, 2015 for U.S. reporters required to file fewer than 50 forms, and June 30, 2015 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 no later than the original due date of the report and the request must state the substantive reasons for an extension.

### 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.<sup>4</sup> 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 reports are confidential and their submission or disclosure may not be compelled by any

<sup>2</sup> A “majority-owned foreign affiliate” means a foreign affiliate in which the combined direct and indirect ownership interest of all U.S. reporters of the affiliate exceeds 50%.

<sup>3</sup> 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.

<sup>4</sup> 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 at:

<http://www.bea.gov/surveys/pdf/A%20Guide%20to%20BEA%27s%20Direct%20Investment%20Surveys.pdf>

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person without the prior written permission of the person filing the report and the customer of such person where the information supplied is identifiable as being derived from the records of such customer.

### Penalties

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

### Helpful Links

The BEA publishes a helpful guide to direct investment surveys that can be found here: <http://www.bea.gov/surveys/pdf/A%20Guide%20to%20BEA%27s%20Direct%20Investment%20Surveys.pdf>.

Additionally, the BEA recently published FAQs with respect to private funds that can be found here: <http://www.bea.gov/surveys/pdf/be10/faqprivatefunds.pdf>.

### Contact

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

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