

# Client Alert

International Trade & Litigation Practice Group

June 2, 2015

## First Time Filers of BE-10 Benchmark Survey Get Temporary Reprieve

The U.S. Commerce Department's Bureau of Economic Analysis (BEA), a principal statistical agency tasked with collecting various U.S. economic data, including data on U.S. direct investment abroad, has **informed** first time filers that they have until June 30, 2015 to file the BE-10 Benchmark Survey of U.S. Direct Investment Abroad ("BE-10").

Essentially, this extension benefits those first time filers who must file less than 50 foreign affiliate forms, as the original deadline for such filings was May 29, 2015. First time filers who must file 50 or more foreign affiliate forms are already required to make the filing by June 30, 2015. Notably, filers who are in the BEA system, or those who made filings with BEA in the past, and those contacted by BEA remain subject to existing filing deadlines.

### BE-10 General Requirements

BE-10 reporting is mandatory for any U.S. person (*e.g.*, corporation, partnership, private equity fund, etc.) that had direct or indirect ownership or control of at least 10 percent of the voting stock of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise at any time during the U.S. person's 2014 fiscal year. This means that the reporting requirement applies to any 10 percent or higher voting interest held by the U.S. person during the 2014 fiscal year, including those established, acquired, seized, liquidated, sold, expropriated, or inactivated during the U.S. person's 2014 fiscal year. Also, the 10 percent voting interest requirement applies regardless of the value of such interest.

With respect to private funds (*e.g.*, feeder, master, and other funds), if a U.S. private fund parent had at least 10 percent voting interest in a foreign business enterprise, including a fund, it must report regardless of whether it had any equity (financial) interest in the foreign fund. An investment manager may be a U.S. parent if it meets these criteria. If a private fund is a limited partnership, BEA considers ownership of voting interest in limited partnerships to be divided equally among the general partners, with the limited partners owning no voting interest, unless otherwise specified in the ownership agreement.

For more information, contact:

**Christine Savage**  
+1 202 626 5541  
csavage@kslaw.com

**John Wilson**  
+1 212 556 2277  
jwilson@kslaw.com

**Jane Cohen**  
+1 202 661 7842  
jcohen@kslaw.com

**King & Spalding**  
**Washington, D.C.**  
1700 Pennsylvania Avenue, NW  
Washington, D.C. 20006-4707  
Tel: +1 202 737 0500  
Fax: +1 202 626 3737

[www.kslaw.com](http://www.kslaw.com)

## Real Estate Holdings

If foreign real estate is owned by a U.S. person, it may also be subject to BE-10 reporting requirements. For example, if a U.S. person has a direct or indirect voting ownership interest of 10 percent or more in a joint venture, partnership, or another entity formed to own and hold, develop, or operate real estate, such entity in its entirety, not just the U.S. person's share must be reported as part of BE-10 filing.

In contrast, real estate that is normally included in the property, plant, and equipment account of a foreign affiliate does not need to be reported as a separate affiliate. Also, residential real estate held exclusively by a U.S. person for personal use and not for profit-making purposes is not subject to the reporting requirements.

## BE-10 Reports Are Consolidated

As a general rule, a qualifying U.S. person (referred to as "U.S. Reporter") must file a consolidated report that covers the "fully consolidated U.S. domestic business enterprise" for the 2014 fiscal year. The term "fully consolidated U.S. domestic business enterprise" is defined as: (1) the U.S. business enterprise whose voting securities are not owned more than 50 percent by another U.S. business enterprise, and (2) proceeding down each ownership chain from that U.S. business enterprise, any U.S. business enterprise (including Foreign Sales Corporations located in the United States) whose voting securities are more than 50 percent owned by the U.S. business enterprise above it. This consolidation excludes foreign branches and all other foreign affiliates.

With respect to private funds, if a U.S. investment manager has a majority voting interest in several U.S. funds and one or more of these funds meet the filing requirements for the BE-10 survey, the U.S. investment manager and the majority-owned U.S. funds must be consolidated on one Form BE-10A form. However, if a U.S. investment manager manages or advises, but does not have majority voting interest in such U.S. funds, these entities should each separately file Form BE-10A if they meet the filing requirements for the BE-10 survey.

If a U.S. person is unable to file a consolidated report, a specific authorization from BEA may need to be obtained before an unconsolidated report is filed with BEA.

## Exemptions to BE-10 Reporting Requirements

There are no exclusions from the BE-10 reporting based on certain specified criteria for otherwise qualifying U.S. persons. However, Form BE-10 "Claim for Not Filing" may be filed instead of the BE-10 report under certain circumstances. Specifically, the Form BE-10 "Claim for Not Filing" may be filed if the U.S. person subject to BE-10 reporting:

- Did not own or control, directly and/or indirectly, 10 percent or more of the voting securities of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise (including a branch or real estate held for other than personal use) at any time during its fiscal year; or
- Did own or control, directly or indirectly, 10 percent or more of the voting securities of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise (including a branch or real estate held for other than personal use) during its fiscal year, but (1) the owners are citizens of a foreign country who (a) are residing in the United States as a result of official employment by a foreign government (including the immediate family of such persons), or (b) have been and expect to be residing in the U.S. for less than one year; or (2) is fully consolidated in the BE-10 report of another U.S. person.

## Penalties

Failure to file the required BE-10 report may result in civil or criminal penalties. Civil penalties include fines that range from \$2,500 to not more than \$25,000 and injunctive relief commanding compliance with the filing requirements. Criminal penalties for willful failures to file required forms include fines of not more than \$10,000 and, for individuals, imprisonment for not more than one year, or both. Any officer, director, employee, or agent of any corporation who knowingly participates in such violations upon conviction may be punished by a like fine, imprisonment, or both.

*Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at [www.kslaw.com](http://www.kslaw.com).*

*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."*