

## Investment Management Alert

May 6, 2015

### Bureau of Economic Analysis Mandatory 2014 BE-10 Survey Reporting Requirement Deadline Approaches

The Bureau of Economic Analysis of the U.S. Department of Commerce requires all U.S. persons that own or control more than 10 percent of the voting securities (a “**Direct Investment**”) of a “foreign”<sup>1</sup> business enterprise to report on its BE-10 Benchmark Survey of U.S. Direct Investment Abroad for the fiscal year 2014. Form BE-10 is due by May 29, 2015, for respondents reporting fewer than 50 Foreign Affiliate forms (as discussed below) and June 30, 2015, for 50 or more forms. Official BE-10 forms and instructions can be found [here](#), on the Bureau of Economic Analysis website.

#### Purpose and Applicability

The BE-10, Benchmark Survey of U.S. Direct Investment Abroad (the “**BE-10 Survey**”), is a mandatory survey conducted once every five years by the Bureau of Economic Analysis (the “**BEA**”) under the International Investment and Trade in Services Survey Act (the “**Act**”). The purpose of the BE-10 Survey is to obtain economic data—financial and operating characteristics—of, and information on positions and transactions between, U.S. parent companies and their foreign affiliates. The scope of the form appears to also capture investment funds, both as reporting persons and as foreign affiliates of a reporting person. The BE-10 Survey collects a large amount of information regarding (i) the Direct Investment and (ii) “enterprise-level information” regarding the business enterprise<sup>2</sup> in which the Direct Investments were made. Any U.S. person (including its fully consolidated U.S. domestic enterprise)<sup>3</sup> with 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, (each a “**Reporter**”) at any time during such Reporter’s 2014 fiscal year is required to file a BE-10 report comprising Form BE-10A and Form(s) BE 10B, BE-10C or BE-10D, as applicable (a “**BE-10 Report**”). As this is a “benchmark year,” this reporting is required of all relevant persons, regardless of whether the Reporter has been contacted by the BEA to do so; publication in the Federal Register is considered notice to all persons required to report.

The definition of a “Reporter” specifically includes the general partner of a limited partnership. The general partner generally controls a limited partnership and, therefore, has 100 percent of the voting interests in the limited partnership. The information reported by the general partner of a limited partnership is somewhat duplicative of the information reported by limited partners in the Treasury International Capital forms filed with the Federal Reserve Bank of New York, but is broader in scope of reported information.

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<sup>1</sup> Whether a person is foreign-based depends on the physical location of the business enterprise. However, a foreign incorporated or organized entity is reportable even if it conducts its business operations from, and is located in, the United States.

<sup>2</sup> “Business Enterprise” means any organization, association, branch or venture which exists for profit-making purposes or to otherwise secure economic advantage, and any ownership of any real estate.

<sup>3</sup> “Fully consolidated U.S. domestic business enterprise” means (i) a U.S. corporation whose voting securities are not owned more than 50 percent by another U.S. corporation, and (ii) proceeding down each ownership chain from that U.S. corporation, any U.S. corporation (including “foreign sales corporations,” as defined in the instructions, located in the United States) whose voting securities are more than 50 percent owned by the U.S. corporation above it. This consolidation excludes foreign branches and all other foreign affiliates.

**Reporters: From BE-10A**

A Reporter must file a complete Form BE-10A if any of the (i) total assets, (ii) sales or gross operating revenues excluding sales taxes or (iii) net income after provision for U.S. income taxes (i, ii or iii, the "**Measurement Factor**" of a consolidated U.S. business enterprise was greater than \$300 million (positive or negative) at any time during such Reporter's 2014 fiscal year. If a Reporter does not meet the foregoing requirements, such Reporter is subject to reduced reporting requirements and must fill out only a partial Form BE-10A (items 1 through 42 and 97 through 114). If two or more Reporters jointly own, directly or indirectly, a foreign affiliate, each Reporter must file a Form BE-10A.

**Foreign Affiliates: Forms BE-10B, BE-10C and BE-10D**

Regardless of whether a Reporter is filing a complete or partial BE-10A, each Reporter must also complete a Form BE-10B, BE-10C or BE-10D for each business enterprise located outside the United States in which the fully consolidated domestic business enterprise has a Direct Investment (a "**Foreign Affiliate**"). The appropriate form to be filed for any Foreign Affiliate depends on whether the threshold for such form was reached at any time during such Foreign Affiliate's 2014 fiscal year. The following forms must be filed by the Reporter, as applicable, and in addition to Form BE-10A to complete the BE 10 Report:

- Form BE-10B must be filed for majority-owned Foreign Affiliates of U.S. parent entities with any of the Measurement Factors for the Foreign Affiliate exceeding \$80 million (positive or negative).
- Form BE-10C must be filed for (i) Foreign Affiliates with any of the Measurement Factors exceeding \$25 million (positive or negative) and, only in the case of majority-owned Foreign Affiliates,<sup>4</sup> all of the Measurement Factors are less than \$80 million (positive or negative) and (ii) for minority-owned Foreign Affiliates for which none of its Measurement Factors is greater than \$25 million (positive or negative) and is a Foreign Affiliate parent of another Foreign Affiliate being filed on Form BE-10B or BE-10C.
- Form BE-10D must be filed for Foreign Affiliates for which none of its Measurement Factors are greater than \$25 million (positive or negative) and that is not a Foreign Affiliate parent of another Foreign Affiliate being filed on Form BE-10B or BE-10C.

In its instructions to the BE-10 Report, the BEA provides a chart as guidance, summarizing the coverage of the forms related to Foreign Affiliates:

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<sup>4</sup> When determining the percentage ownership of a Reporter, the Reporter must look through intermediate Foreign Affiliates.

Ownership U.S. \$ amount	MAJORITY-OWNED FOREIGN AFFILIATE	MINORITY-OWNED FOREIGN AFFILIATE
At least one of the three items* is greater than \$300 mil. (+ or -).	BE-10B, except Part III	BE-10C
At least one of the three items* is greater than \$80 mil. (+ or -), but no one is greater than \$300 mil. (+ or -),	BE-10B, except Part IV	
At least one of the three items* is greater than \$25 mil. (+ or -), but no one is greater than \$80 mil. (+ or -),	BE-10C**	
All three items* are less than \$25 mil. (+ or -).	BE-10D**	

\* Total assets, sales or gross operating revenues excluding sales taxes, net income (loss) after provision for foreign income taxes.

\*\* If a foreign affiliate meeting the reporting requirements for Form BE-10D owns another foreign affiliate being filed on Form BE-10B or BE-10C, the foreign affiliate parent must be filed on Form BE-10C.

## Content of Report

The BE-10 Report will require the Reporter to disclose information regarding its legal identity, sales and employment data, contract manufacturing services, financial and operating data, and export and import business, along with investments and transactions between the Reporter and its Foreign Affiliates. Additionally, for any Form(s) BE-10B, BE-10C or BE-10D filed, the Reporter must disclose similar information pertaining to its Foreign Affiliates.

## Filing and Penalties

All Reporters must file a BE-10 Report. Reporters required to file fewer than 50 total Foreign Affiliate forms must file a completed and certified BE-10 Report no later than May 29, 2015. Reporters required to file 50 or more Foreign Affiliate forms, on the other hand, must file a completed and certified BE-10 Report no later than June 30, 2015. Any U.S. Person that had no Foreign Affiliates during its 2014 fiscal year, but has been contacted by the BEA must file a "BE-10 Claim for Not Filing" to report having no Foreign Affiliate; no other action is required.

The BEA allows Reporters to mail in their BE-10 Reports to the U.S. Department of Commerce or, alternatively, file their BE-10 Report electronically on the BEA website.

The failure of a Reporter to fulfill its reporting obligation could result in a civil penalty or injunctive relief commanding such Reporter to comply, or both. The BEA may assess civil penalties ranging from \$2,500 to \$25,000. However, whoever willfully fails to file a BE-10 Report could be fined up to an additional \$10,000 and, if an individual, may be imprisoned for not more than one year, or both. Any officer, director, employee or agent of any corporate Reporter who knowingly participates in such violations, upon conviction, may be punished by a like fine, imprisonment or both.

## Confidentiality

Information filed on Form BE-10 is available only to officials and employees (including consultants and contractors and their employees) of agencies designated to perform functions under the Act. No information contained in reports may be published or made available in such a manner that the person to whom the information relates can be specifically identified.

## Contact Information

If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or

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