

Mandatory Form BE-10 Reporting Requirement for All U.S. Persons with Foreign Investments - Due Dates Extended to August 31, 2020

Insights

June 17, 2020

In 2015, the U.S. Department of Commerce's Bureau of Economic Analysis (the "BEA") expanded its benchmark survey on U.S. investment in foreign business enterprises via the Form BE-10. Prior to 2015, this type of survey data had only been collected from U.S. persons that the BEA specifically requested provide such information. The new survey imposed mandatory reporting requirements, without the need for a prior BEA request, recurring every 5 years beginning in 2015 (Similar data may still collected annually on the BE-11 but reporting is only required if specifically requested by the BEA). The survey applies to all U.S. persons who directly or indirectly owned or controlled 10% or more of the voting securities of a foreign affiliate during the fiscal year immediately preceding the applicable BE-10 reporting year.

In mid-May, anticipating impacts from COVID-19, we inquired with the BEA on behalf of our clients whether the BEA would be extending the deadline for survey data submissions. As currently published on the instructions to the BE-10 and the BEA website for the BE-10 Benchmark Survey, all U.S. persons who directly or indirectly owned or controlled 10% or more of the voting securities of a foreign affiliate during such U.S. person's 2019 fiscal year would have been required to file Form BE-10 with the BEA by **May 29, 2020** for a U.S. reporter making fewer than 50 foreign affiliate filings or by **June 30, 2020** for a U.S. reporter making 50 or more foreign affiliate filings. However, notwithstanding that the instructions and web site remained

unchanged as of the date of this alert, in our communications with the BEA they stated that the deadline has been extended to **August 31, 2020**. Further, due to the impacts of COVID-19, the BEA advises use of their electronic filing system for both BE-10 filings and any extension requests, as their capabilities to handle mailed physical submissions are severely limited.

Below is a Q&A to assist in understanding the general scope and requirements of Form BE-10.

What is Form BE-10?

The Form BE-10 is part of a recurring 5-year benchmark survey designed by the BEA to gather current economic data on the foreign investment operations of U.S. multinational enterprises and their foreign affiliates. All “U.S. reporters” with one or more foreign affiliates during their 2019 fiscal year must make Form BE-10 filings regardless of whether they were contacted by the BEA.

Who is required to report on the Form BE-10?

Any U.S. person who directly or indirectly owned or controlled 10% or more of the voting securities of a foreign affiliate during fiscal year 2019 is considered to be a “U.S. reporter” and must file a Form BE-10A in respect of the U.S. reporter, as well as a Form BE-10B, BE-10C, BE-10D, or BE-10 Claim for Not Filing, as applicable, for each of its foreign affiliates. For purposes of these forms, a “U.S. person” is any individual, entity, association, branch, estate, trust, corporation, associated group or other organization resident in the United States or subject to the jurisdiction of the United States.

What is a “foreign affiliate” for purposes of this survey?

A “foreign affiliate” means any business enterprise located outside of the United States in which the U.S. person directly or indirectly owned or controlled 10% or more of the voting stock or equivalent equity of such foreign enterprise. A “business enterprise” means any organization, association, branch or venture that exists for profit-making purposes or to otherwise secure economic advantage, and any ownership of any real estate.

How is a “foreign affiliate” and “voting equity” determination made in the case of a private equity fund?

In 2016, the BEA issued guidance to clarify the application of the BE-10 rules to private funds, drawing a conceptual distinction between fund portfolios consisting of minority investment holdings, such as a hedge fund or mutual fund, and portfolios

consisting of investments in operating companies where the fund intends to have influence on management and operations. The BEA guidance treats the general partner entity of a foreign limited partnership as holding 100% of the voting interest in the private fund and limited partners as having no voting interest. If one or more investments of the private fund are “operating companies” (a business enterprise that is not itself a private fund or a holding company), the private fund owns 10% or more of the voting interests of one or more operating companies, and the U.S. reporter owns 10% or more of the voting interests of such company through the private fund, then the U.S. reporter should include the private fund on its BE-10. See the BEA Private Funds Reporting Change [here](#). Private funds with exclusively minority investment holdings (*i.e.* the private fund holds less than 10% of the voting interests in each of its investments in fiscal year 2019) are exempt from BE-10 reporting but may be subject to alternative reporting systems. You can find a helpful [decision tree diagram](#) to aid in the reporting determination and [presentation explaining the changes](#).

What does the report on Form BE-10 consist of?

Form BE-10 consists of 5 forms for 2019 reporting, Forms BE-10A, BE-10B, BE-10C, BE-10D and the BE-10 Claim for Not Filing. Form BE-10A is used to report data and information regarding the U.S. reporter, and a Form BE-10B, BE-10C, BE-10D or BE-10 Claim for Not Filing, as applicable, must be completed for each of the U.S. reporter’s foreign affiliates. Form BE-10B, BE-10C or BE-10D is used depending on the foreign affiliate’s assets, sales or net income, and Form BE-10 Claim for Not Filing is used where the foreign affiliate is included on another related U.S. reporter’s filings, or where foreign affiliates were sold, merged, liquidated, or otherwise ceased to exist during the 2019 fiscal year.

Is the data required for the 2019 Form BE-10 survey different than for the 2014 survey?

Generally, other than clarifying changes to aid reporters and changes to reduce production of data no longer considered analytically valuable by the BEA, the data required for the 2019 BE-10 is the same as for the 2014 BE-10. The most material changes focus on the BEA’s growing interest in differentiating data related to the digital economy, including digital marketplaces and remote intermediary services platforms, from more traditional business models. The BEA provides specific guidance on changes in the survey related to the Digital Economy [here](#).

Is the information reported on Form BE-10 confidential?

The information that is collected on Form BE-10 is confidential and may be used only for analytical and statistical purposes. Access to the information will be available only to the BEA and is not subject to FOIA or other investigative requests by other Federal agencies. The results of the survey will be made available to the general public at an aggregated level so that neither U.S. persons providing information nor their foreign affiliates can be identified. See [here](#) for more detail.

What is the due date for filing the Form BE-10?

A complete Form BE-10 would ordinarily have been required to be delivered to the BEA by **May 29, 2020** for a U.S. reporter making fewer than 50 foreign affiliate filings and by **June 30, 2020** for a U.S. reporter making 50 or more foreign affiliate filings. However, as discussed above, the BEA has communicated to us via an email inquiry that due to the impacts of COVID-19, submissions are due on **August 31, 2020**. The [BEA website](#) suggests that all extension requests use the BEA electronic filing system.

What are the penalties for failing to report?

Failure to comply with the BEA's filing requirements may result in civil penalties of between just over \$4,800 and just under \$50,000, and injunctive relief forcing compliance, or both, and potentially criminal penalties for a willful failure to report of not more than \$10,000 and, if an individual, imprisonment for not more than one year, or both, including officers, directors, employees or agents of a corporation who knowingly participates in the violation.

How must the reports be submitted?

While users have previously had the option to file by physical mailing, fax or online, the BEA is encouraging all users to submit Form BE-10 electronically via the [BEA eFile website](#). If you are a new filer, the BEA eFile site will allow you to set up a user name and login password for submissions. Prior to the demands of the COVID-19 environment, if you were a new filer of BE-10 forms, you were not eligible to file the forms electronically unless you contacted the BEA to set up an account. The BEA will also accept forms by fax at (301) 278-9502.

Where can I find additional information regarding Form BE-10 and the reporting requirements?

The complete *2019 Benchmark Survey of Direct Investment Abroad (Forms BE-10A, BE-10B, BE-10C, BE-10D and BE-10 Claim for Not Filing)* may be downloaded [here](#) and instructions to the Forms may be downloaded [here](#). The *Guide to Industry*

Classifications for International Surveys, 2017, which contains industry classifications, may be downloaded [here](#). The instructions provide detailed information about the reporting requirements for each Form BE-10, as well as specific instructions for their completion and submission. We encourage all of our clients to carefully review these instructions and related publications to determine if you have a BE-10 reporting obligation and, if so, how to complete Form BE-10A and Forms BE-10B, BE-10C, BE-10D or BE-10 Claim for Not Filing, as appropriate.

Please do not hesitate to contact one of your Gunderson Dettmer attorneys if you have questions about this update.

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