

# Memorandum

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## What You Need to Know on Form BE-10

### *Deadline Approaching for Statistical Survey Covering U.S. Companies with “Foreign Affiliates”*

May 12, 2015

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U.S. companies with “foreign affiliates” during their 2014 fiscal year will need to participate in a “benchmark survey” conducted every five years by the Bureau of Economic Analysis (“BEA”) of the U.S. Department of Commerce. The survey is conducted through a series of forms known as the BE-10. Filings are due by May 29 or June 30, depending on the number of foreign affiliates to be reported, but the BEA is granting extension requests on a case-by-case basis. As explained in the Background section below, the BE-10 is one of many forms that may need to be filed by a U.S. company having cross-border relationships or engaging in cross-border transactions. These forms are only statistical surveys and submitted information is accorded confidential treatment.

The BE-10 generally applies to any U.S. company that had a direct or indirect ownership or control of 10% or more of the voting stock (or its equivalent) of a non-U.S. business enterprise at any time during its 2014 fiscal year. If the filer is a corporation, reports must cover the “fully consolidated U.S. domestic business enterprise.”

Participation in the survey is required regardless of whether a U.S. company has securities registered with the U.S. Securities and Exchange Commission or whether it has been contacted by BEA staff to make a filing.

## Background

A number of federal statistical reporting requirements apply to U.S. companies that make investments abroad, are the beneficiaries of foreign direct investment, or otherwise engage in certain cross-border transactions. Two reporting regimes that have been around for decades but have gained more prominent attention in the last few years – and especially in the last year – involve BEA and TIC reports. The U.S. Department of Commerce, through the BEA, and the U.S. Department of the Treasury (“Treasury”), through its Treasury International Capital (“TIC”) reporting system (which is administered by the Federal Reserve Bank of New York), collect data on cross-border portfolio investment flows and positions between U.S. residents and foreign residents. The BEA’s forms generally divide into two groups: “U.S. Direct Investment Abroad” (of which the BE-10 is part and which had its first benchmark survey for the year 1982) and “Foreign Direct Investment in the United States.” This memorandum concerns only the BE-10, but U.S. companies may, from time to time, have reporting obligations on other BEA and TIC forms.

The point of the BEA and TIC forms is to compile information regarding the U.S. balance of payments and to formulate international financial and monetary policies, among other things. Importantly, these forms are *not* tax filings or other filings that must be made to secure regulatory approvals or consents relating to a particular transaction. The BEA and Treasury collect the data pursuant to the International Investment and Trade in Survey Act of 1977 (the “Survey Act”), and they may only use collected data for analytical and statistical purposes, not for purposes of regulation, investigation, or taxation. Copies retained in a filer’s files are immune from legal process.

Under the Survey Act and related regulations, filings are accorded confidential treatment, with the information that is generated in survey and statistical reports being made available to the public on an aggregated basis. Without the permission of a filer, the information filed in BEA and TIC reports cannot be presented in a manner that allows a filer to be individually identified. Government employees with access to the information submitted by filers are subject to penalties for unauthorized disclosure.

The failure to furnish the information required by the forms may result in a filer being subject to monetary penalties of between \$2,500 and \$25,000, as well as injunctive relief requiring a filer to comply with the filing requirements. Additional penalties apply for willful violations. In addition, any officer, director, employee, or agent of any corporation who knowingly participates in such violations may be subject to monetary and criminal penalties. However, our understanding is that cases involving penalties and injunctive relief are extremely rare.

U.S. companies should bear all of this in mind when approaching these forms and deciding how to allocate internal resources to handle filings. In our experience, accounting and compliance-related personnel are typically better equipped to handle these forms, rather than only legal personnel, as the forms are very data intensive and counsel may not readily have access to all of the necessary information.

## Breaking Down the BE-10

The BE-10 breaks down in two ways: (i) the BE-10A covers the “U.S. reporter”; and (ii) the BE-10B, BE-10C, and BE-10D cover its foreign affiliates, with the applicable form generally depending on the size of each foreign affiliate and sometimes on whether it is majority- or minority-owned.

The key question asked by the BE-10 is whether a U.S. reporter had, at any time during its 2014 fiscal year (which must have an ending date in calendar year 2014, but if not, then December 31, 2014 should be used as the 2014 fiscal year end) direct or indirect ownership of 10% or more of the voting stock (or its equivalent) of a “foreign business enterprise” (broadly defined to include any non-U.S. entity or venture that exists for profit-making purposes or otherwise to secure economic advantage, and any ownership of commercial real estate). If so, the foreign business enterprise is referred to as a “foreign affiliate” for BE-10 purposes. In assessing whether the 10% voting threshold is met, note that limited partnership interests are generally not considered voting securities (a general partner is presumed to have a 100% voting interest of a limited partnership).

Consistent with the “survey” nature of the BE-10 series, the BEA’s instructions advise filers to provide estimates if actual data are not available or if only partial data are available for a particular item on a form.

### **BE-10A – Covers the “U.S. Reporter”**

A U.S. company that had a foreign affiliate for the 2014 fiscal year is referred to as a “U.S. reporter.” However, U.S. individuals and U.S. estates, trusts, and non-profit organizations may also be U.S. reporters. This memorandum addresses only U.S. companies, as the BE-10A only asks for very basic information of reporters that are U.S. individuals, estates, trusts and non-profits.

Apart from basic identifying information on the U.S. reporter, the BE-10A form asks fairly detailed information regarding the reporter’s financials and operations, costs and expenses, employee headcount and employee compensation, infrastructure (*i.e.*, property, plant, and equipment spending), and exports and imports.

A full BE-10 needs to be filed if any of the following items of the U.S. reporter was greater than \$300 million (positive or negative) at any time during the 2014 fiscal year:

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

If none of these items is implicated, then the U.S. reporter must file an abbreviated BE-10A. When filing the BE-10A (whether full or abbreviated), a copy of the U.S. company’s 2014 annual report to stockholders (if there is one) should be furnished to the BEA.

According to the BEA's instructions, if the U.S. reporter is a "corporation," then it must calculate the above items for the "fully consolidated U.S. domestic business enterprise," which is defined as (i) the U.S. business enterprise whose voting securities are not owned more than 50% by another U.S. business enterprise, and (ii) 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. Consolidation excludes foreign branches and all other foreign affiliates. A bank holding company with a majority-owned bank must consolidate its banking activities when filing its BE-10A.

### **BE-10B, BE-10C, and BE-10D – Covers Each Foreign Affiliate of the U.S. Reporter**

Then there are forms that need to be filed in respect of each foreign affiliate. Following is a summary of what triggers a BE-10B, BE-10C, or BE-10D:

- **BE-10B** – filed for each 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 2014 fiscal year: total assets ("Assets"), sales or gross operating revenues excluding sales taxes ("Revenues"), or net income after provision for foreign income taxes ("Net Income").
- **BE-10C** – filed for:
  - each majority-owned foreign affiliate for which any one of the Assets/Revenues/Net Income items was greater than \$25 million (positive or negative), but for which no one of these items was greater than \$80 million (positive or negative) at any time during the affiliate's 2014 fiscal year;
  - each minority-owned foreign affiliate for which any one of the Assets/Revenues/Net Income items was greater than \$25 million (positive or negative) at any time during the affiliate's 2014 fiscal year; and
  - each foreign affiliate for which no one of the Assets/Revenues/Net Income items 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 BE-10B or BE-10C.
- **BE-10D** – filed for all foreign affiliates for which no one of the Assets/Revenues/Net Income items was greater than \$25 million (positive or negative) at any time during the affiliate's 2014 fiscal year and that is not a foreign affiliate parent of another foreign affiliate being filed on BE-10B or BE-10C.

These forms generally ask for identifying information on the particular foreign affiliate, as well as on various financial and operating data matters, total number of employees and employee compensation data, infrastructure-related spending, research and development spending, debt and intercompany balances.

### **BE-10 – Claim for Not Filing**

If a U.S. company did not own or control, directly or indirectly, 10% or more of the voting stock of a foreign business enterprise, it can claim an exemption on the BE-10 – Claim for Not Filing. An exemption may also

be claimed by a U.S. company that had a foreign affiliate during its fiscal year, but (i) the owners are citizens of a foreign country who are residing in the United States as a result of official employment by a foreign government or have been and expect to be residing in the United States for less than one year or (ii) is fully consolidated in the BE-10 report of another U.S. reporter. According to an online video tutorial, the BEA regards the BE-10 – Claim for Not Filing form as necessary only if a U.S. company or person was *notified* by the BEA about the need to file the survey but had no foreign affiliates during the 2014 fiscal year. Based on discussions with BEA staff, an e-mail to [be10/11@bea.gov](mailto:be10/11@bea.gov) will also suffice in lieu of the BE-10 – Claim for Not Filing form.

### Deadlines and Extensions

The general deadline is May 29, 2015. By this date, a U.S. company will need to either: (i) file its BE-10 forms (if they have fewer than 50 forms); or (ii) file a “BE-10 – Claim for Not Filing” or certify in writing to the BEA (e-mail is acceptable) that it had no “direct investment” (*i.e.*, no direct or indirect ownership or control of 10% or more of the voting stock in any non-U.S. business enterprise at any time during its 2014 fiscal year). Based on discussions with BEA staff, BEA staff are expecting a BE-10 – Claim for Not Filing or a written response only if the U.S. company had been contacted by BEA staff regarding an obligation to file. For a company that will file 50 or more BE-10 forms, the deadline is June 30, 2015.

BEA staff will entertain a “reasonable” extension request that is made before the applicable deadline and that contains an explanation of why an extension is necessary. The new deadline may be June 30, if fewer than 50 forms are expected to be filed; July 31, if between 50 and 100 forms; and August 31, if more than 100 forms.

An extension request can be made over the phone (202-606-5566), by fax (202-606-5312), or through the BEA’s eFile System. The BEA’s extension request form is available [here](#). Please let us know if you need any assistance.

### Resources for Additional Information

An instruction booklet and copies of the various forms comprising the BE-10 series, as well as online video tutorials, are available on the BEA’s website and by clicking [here](#). In addition, the BEA’s website has information on how to register for webinars on BE-10, with two webinars scheduled for May 12 and May 14.

Assistance on BE-10 is also available by e-mailing BEA staff at [be10/11@bea.gov](mailto:be10/11@bea.gov) or calling them at 202-606-5566.

For private funds, the BEA has released a set of FAQs, which are available [here](#).

Apart from the BE-10, the BEA has a guide to other forms comprising the U.S. Direct Investment Abroad grouping of surveys, which is available [here](#).

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For further information about BE-10 or other BEA or TIC surveys, please contact one of the following members of the Firm's Corporate Department.

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