



## U.S. entities and individuals are obligated to report their interests in foreign businesses and real estate by May 29, 2020

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The bureaucracy does not stand still amidst the current crisis. U.S. persons, including corporations, private funds, trusts, estates, and individuals, with interests in foreign businesses or real estate in 2019 should carefully review whether they need to report these to the Bureau of Economic Analysis (BEA). The BEA is an agency of the U.S. Department of Commerce that provides closely watched data about the U.S. economy, including U.S. investment abroad. Filing a *BE-10 Benchmark Survey of U.S. Direct Investment Abroad* is generally mandatory for U.S. persons that owned or controlled, directly or indirectly, at least 10% of the voting stock of a foreign business enterprise at the end of the U.S. person's 2019 fiscal year. The term "foreign business enterprise" includes ownership of commercial or residential real estate outside the United States (more on that below). Failure to file can trigger penalties, including fines of up to \$48,192.

This filing is not new. The BE-10 is a benchmark survey that is conducted every five years. The last filing for the 2019 fiscal year was due in 2015. A BE-10 report consists of different BE-10 forms as explained below. The BEA also uses other reports to collect data on U.S. direct investment abroad, specifically, an annual (Form BE-11) and a quarterly report (Form BE-577). However, different from the annual and quarterly reports, the five-year BE-10 survey is mandatory, regardless of whether or not one has been contacted by the BEA.<sup>1</sup>

### Who needs to file?

A U.S. person must file a BE-10 report, if it directly or indirectly owned or controlled 10% or more of:

- the voting securities of an incorporated foreign "business enterprise" or
- an equivalent interest in an unincorporated foreign "business enterprise"

at the end of the U.S. person's 2019 fiscal year. The term "business enterprise" is broadly defined and includes any organization, association, branch, or venture that exists for profit-making purposes or

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<sup>1</sup> A U.S. person that has been contacted by BEA must file a BE-10 report (if it meets the filing requirements) or a Form BE-10 Claim for Not Filing (if it does not meet the filing requirements).

to otherwise secure economic advantage, and any ownership of any real estate (see below). Different from the 2015 BE-10 survey, reports are no longer required if the foreign business enterprise was sold or liquidated (and no longer in existence) during the U.S. person's 2019 fiscal year. For example, if a U.S. company sold its French subsidiary in the course of 2019 and no longer owned it by the end of its 2019 fiscal year, it would not need to file a BE-10 report for that entity.

### **Is the filing requirement triggered by a specific dollar threshold?**

No. There is no dollar threshold that would trigger or exclude a filing. However, a foreign affiliate's total assets, sales, and net income determine the type of form that needs to be filed for that specific foreign affiliate (specifically, a Form BE-10B, BE-10C, or BE-10D). For example, U.S. filers generally only need to complete a Form BE-10D for a foreign affiliate whose (a) total assets, (b) sales or gross operating revenues excluding sales taxes, and (c) net income, after provision for foreign income taxes, were \$25 million or less (positive or negative) at the end of, or for, the affiliate's 2019 fiscal year.<sup>2</sup>

### **Does this filing requirement also apply to entities that are disregarded for U.S. tax purposes?**

Yes. Form BE-10 is not a tax form. It applies regardless of the U.S. tax status of the affected entities.

### **Do private funds with foreign investments have to file?**

Generally yes, if they directly or indirectly owned or controlled 10% or more of the voting securities<sup>3</sup> of an incorporated foreign business enterprise (or an equivalent interest in an unincorporated foreign business enterprise) at the end of their 2019 fiscal year. However, under changes implemented in 2017, U.S. persons that own a 10% or more voting interest in a foreign private fund are no longer required to file a Form BE-10 for that private fund, if (a) that private fund foreign affiliate does not own, directly or indirectly through another business enterprise, an "operating company"—i.e., a business enterprise that is not a private fund or a holding company—in which the U.S. person owns at least 10 percent of the voting interest, and (b) the U.S. person owns the private fund indirectly (through one or more other business enterprises), and there are no "operating companies" between the consolidated U.S. reporter and the indirectly owned foreign private fund.

### **What or who is a U.S. person?**

A U.S. person under the BE-10 survey is any person resident in the United States or subject to the jurisdiction of the United States. The BEA defines the term "person" broadly to include individuals, branches, partnerships, associated groups, associations, estates, trusts, corporations, or other organizations (whether or not organized under the laws of any state), and any government. For BE-10 purposes, the term government includes a foreign government, the United States government, a state or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency.

The BEA has issued some clarifications on how to determine the country of residence or jurisdiction of individuals. As a general rule, individuals who reside or expect to reside, outside their

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<sup>2</sup> If a foreign affiliate that meets 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.

<sup>3</sup> A general partner interest is considered a voting interest. Limited partner interests are not considered voting interests.

country of citizenship for less than one year are considered to be residents of their country of citizenship. Individuals who reside, or expect to reside, outside their country of citizenship for one year or more are considered to be residents of the country in which they are residing. For example, a German citizen who resides in the U.S. for more than a year is a U.S. person under Form BE-10. Likewise, a U.S. citizen living abroad for more than a year generally is not a U.S. person for this purpose. Some exceptions apply, most notably for individuals living abroad and working for a U.S. company, as a U.S. consular officer or member of the armed forces, or working in other governmental capacities.

### **Does this apply to individuals?**

Yes, individuals who qualify as U.S. persons must file if they have reportable interests in foreign businesses or real estate. U.S. individuals also must directly report interests held in foreign trusts, and, in some cases, U.S. trusts.

### **Do estates and trusts have to file Form BE-10?**

The BEA distinguishes between estates and trusts. U.S. estates are required to file Form BE-10 through their administrator or executor. The beneficiary does not have a filing requirement. By contrast, trusts are considered to be intermediaries. Intermediaries that hold, exercise, administer, or manage U.S. direct investment abroad must either (1) report the required information for, and in the name of, their principal, or (2) instruct the principal to submit the required information. Once the intermediary instructs the principal, the intermediary is released from further liability to report, provided it has informed the BEA of the date such instructions were given and the name and address of the principal, and it has supplied the principal with any information in the possession of, or which can be secured by, the intermediary that is necessary to permit the principal to complete the required reports. When acting in the capacity of an intermediary, the accounts or transactions of the U.S. intermediary with the foreign affiliate are considered to be accounts or transactions of the U.S. principal with the foreign affiliate. To the extent such transactions or accounts are unavailable to the principal, they may be required to be reported by the intermediary.

### **What do airlines and ship operators need to consider?**

The BEA has clarified that U.S. airlines' and ship operators' foreign stations, ticket offices, and terminal and port facilities that provide services *only* to their own operations are not foreign affiliates and are not subject to the reporting requirements. A BE-10 report is required when such facilities produce significant revenues from services provided to unaffiliated persons.

### **Are all real estate investments outside the U.S. reportable?**

Generally, yes. Ownership of foreign real estate is viewed to be a business enterprise for purposes of Form BE-10. There are three exceptions:

- Real estate that is normally included in the property, plant, and equipment account of a foreign affiliate is not to be reported as a *separate* affiliate. In other words, the U.S. person would file a Form BE-10 (generally, a Form BE-10B, BE-10C, or BE-10D—see below) for the foreign affiliate that owns the real estate (e.g., a UK subsidiary). That form would include financial and operating data about the foreign affiliate. A separate form for the real estate owned by the foreign affiliate would not be filed.
- 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. Moreover, a *primary*

residence abroad that is leased to others while the owner resides in the U.S., but which the owner intends to reoccupy, is considered real estate held for personal use.

- Ownership of foreign residential real estate by a business enterprise, the sole purpose of which is to hold the real estate for the personal use of the owner(s) of the business enterprise, is considered to be real estate held for personal use. It is, therefore, not subject to the reporting requirements.

If a U.S. person has a direct or indirect voting ownership interest of 10 percent or more in a joint venture, partnership, etc., that is formed to own and hold, develop, or operate real estate, the joint venture, partnership etc., in its entirety, not just the U.S. person's share, is a foreign affiliate and must be reported.

## **How is a BE-10 report filed?**

A BE-10 report consists of various forms: Form BE-10A for the U.S. person, and a separate report for *each* foreign affiliate. For example, a U.S. person that owned a 10% interest in only one foreign affiliate would file two BE-10 forms—a Form BE-10A for itself as the U.S. reporter and a separate Form BE-10 form for the foreign affiliate. While Form BE-10A is filed on a fully consolidated basis for the consolidated U.S. domestic business enterprise, the consolidation generally stops at the U.S. level. The foreign affiliates are generally not reported in one form on a consolidated basis. The BEA does not make this “easy”—it has not simplified the filing requirements. Some exceptions apply, including for U.S. filers that have participated in the BEA's BE-577 Quarterly Survey of U.S. Direct Investment Abroad, for foreign affiliates located in the same country, and for foreign affiliates that meet the Form BE-10D thresholds and are thus reported on Form BE-10D (see below).

Which BE-10 form must be filed for each foreign affiliate depends on various factors, including whether the foreign affiliate is majority- or minority-owned, and the foreign affiliate's total assets, sales, or net income. Specifically, U.S. filers must report each foreign affiliate through one of the following three forms (as applicable):

### ***Form BE-10B***

Report for majority-owned foreign affiliates of U.S. parents with assets, sales, or net income greater than \$80 million (positive or negative).

### ***Form BE-10C***

Report for majority-owned foreign affiliates of U.S. parents with assets, sales, or net income greater than \$25 million (positive or negative) but no one of these items was greater than \$80 million (positive or negative); for minority-owned foreign affiliates of U.S. parents with assets, sales, or net income greater than \$25 million (positive or negative); and for foreign affiliates for which no one of the items: assets, sales, and net income was 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***

Report for foreign affiliates for which no one of the items: assets, sales, and net income was greater than \$25 million (positive or negative), and is not a foreign affiliate parent of another foreign affiliate being filed on Form BE-10B or BE-10C.

If the foreign affiliate is owned directly and/or indirectly by more than one U.S. filer, the U.S. filer with the highest percentage of ownership in the foreign affiliate (direct and indirect combined) must file a complete Form BE-10B, BE-10C, or BE-10D on which all parts have been completed.

The other U.S. filer(s) with total direct and indirect ownership of 10 percent or more must file a partial report.

The individual forms are on the BEA's BE-10 [website](#).

A fully completed and certified BE-10 report comprising Form BE-10A, and Form(s) BE-10B, BE-10C, or BE-10D is due no later than May 29, 2020, for U.S. reporters required to file fewer than 50 forms, and June 30, 2020, for U.S. reporters required to file 50 or more forms.

In the past, it has been possible to obtain extensions from the BEA for filing the BE-10 report. The BEA has indicated that by providing an extra month to file for U.S. reporters submitting more than 50 forms, requests for extensions should no longer be necessary. However, the BEA has also clarified that it will consider "reasonable" requests for an extension. Filers that require an extension must submit the extension request no later than May 29, 2020 (or June 30, 2020, if they are required to file 50 or more forms).

We note that for the last benchmark filing in 2015, the BEA eventually granted an automatic extension to new filers. Whether the BEA will grant the same automatic extension here in light of the current crisis would not be surprising, but remains to be seen.

The BE-10 forms can be filed electronically via the BEA web site, as well as via regular mail, or through a courier. Filers must obtain a Reporter ID from the BEA via telephone in advance of the deadline. Copies of a submitted BE-10 report should be retained for at least three years.

For more information on the BE-10 survey or the other BEA filing requirements, please contact your Nixon Peabody attorney or:

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