

May 8, 2015

GUIDELINES FOR REPORTING UNDER COMMERCE DEPARTMENT'S BENCHMARK SURVEY OF U.S. DIRECT INVESTMENT ABROAD (BE-10)

To Our Clients and Friends:

On November 20, 2014, the U.S. Department of Commerce, Bureau of Economic Analysis ("BEA") published a final rule amending the Code of Federal Regulations, 15 C.F.R. Part 801, to reinstate requirements for U.S. companies with foreign affiliates to report various economic data related to their U.S. and foreign affiliate operations.^[1] Effective December 22, 2014, the final rule added 15 C.F.R. §801.8, which requires affected U.S. companies to file with BEA a report responding to the "BE-10, Benchmark Survey of U.S. Direct Investment Abroad – 2104" (BE-10 Survey).

As the deadlines for reporting approach--**May 29, 2015** or **June 30, 2015**, depending on the number of foreign affiliates involved (*see* Q&A #6 below)--many U.S. companies unfamiliar with this process (the last such survey was conducted in 2009) may be grappling with questions regarding the full scope and requirements of the BE-10 Survey.

Below is a high-level Q&A addressing some of the key threshold concerns companies may have at this stage in the process.

Question #1: What is the BE-10 Survey and why is BEA asking for this information?

According to the BEA, "[t]he benchmark survey covers the U.S. direct investment abroad universe and is BEA's most comprehensive survey of such investment in terms of subject matter.

....

The purpose of the benchmark survey is to obtain universe data on the financial and operating characteristics of, and on positions and transactions between, U.S. parent companies and their foreign affiliates. The data are needed to measure the size and economic significance of U.S. direct investment abroad, measure changes in such investment, and assess its impact on the U.S. and foreign economies. These data are used to derive current universe estimates of direct investment from sample data collected in other BEA surveys in non-benchmark years. In particular, they would serve as benchmarks for the quarterly direct investment estimates included in the U.S. international transactions, international investment position, and national income and product accounts, and for annual estimates of the operations of U.S. parent companies and their foreign affiliates."^[2]

Question #2: Is responding the BE-10 Survey mandatory?

Yes. The BE-10 Survey is being conducted pursuant to the International Investment and Trade in Services Survey Act ("the Act"),^[3] and the filing of reports is mandatory pursuant to Section 5(b)(2) of the Act.^[4] Thus, any "U.S. person"^[5] covered by 15 C.F.R. §801.8 must provide a response, whether they have been contacted by BEA directly or not.^[6]

Question #3: What are the penalties for failure to file a report?

Both civil and criminal penalties may be imposed for non-compliance with the requirements of the BE-10 Survey. While the monetary penalties are relatively small (\$2,500 to \$25,000 for civil fines, and up to \$10,000 for criminal fines), the criminal penalty for a willful failure to submit could also involve imprisonment for up to one year, and could be imposed against any "officer, director, employee, or agent of any corporation who knowingly participates" in the violation.^[7]

Question #4: Who is required to report?

Any U.S. person that had at least one foreign affiliate at any time during the U.S. person's 2014 fiscal year is required to report, even if that foreign affiliate has been dissolved, sold or otherwise disposed of.^[8] If a U.S. person had no foreign affiliates during the 2014 fiscal year, they may still need to file a "BE-10 Claim for Not Filing."^[9]

Question #5: What constitutes a "foreign affiliate" for purposes of reporting?

The determination of what constitutes a foreign affiliate turns on the U.S. person's ownership stake in that affiliate, as well as the characteristics of the affiliate's operations and relationship to the U.S. parent.

A foreign affiliate is only counted as such if the U.S. person has "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, including a branch."^[10] Note that indirect ownership, *i.e.*, through intermediaries, is included in the ownership calculation. Thus, for example, if a U.S. person owns 50% of a foreign affiliate that in turn owns 50% another foreign affiliate, both foreign affiliates will be counted (the U.S. person's indirect ownership stake in the second foreign affiliate totaling 25%).

In addition to the ownership threshold, guidance from BEA in the Form BE-10 instructions states that "[i]n general, a U.S. person's foreign operation or activity is considered a foreign affiliate if it is legally or functionally separable from the domestic operations or activities of the U.S. person," and the instructions then provide a series of sample characteristics that would or would not tend to indicate foreign affiliate status.^[11] For example, "foreign representative offices, agents and employees of a U.S. person are not considered to be foreign affiliates" for purposes of the BE-10 Survey, and "a foreign presence of a U.S. person is considered a foreign sales promotion or representative office," and hence not covered by the BE-10 requirements, if it meets certain defined characteristics.^[12]

U.S. companies will need to perform a good faith analysis of each possible foreign affiliate to determine whether the status will apply for purposes of the BE-10 Survey.

Question #6: What exactly is a covered U.S. person required to complete?

There are several forms that must be completed in response to the BE-10 Survey--one for the U.S. person (also referred to in BEA documentation as the "U.S. Reporter"), and one for each foreign affiliate. These forms ask for a variety of financial, business and operational data, and can each be found on the BEA website.[13]

U.S. Reporter

The U.S. Reporter must complete a Form BE-10A covering the "fully consolidated U.S. domestic business enterprise," or alternatively, an abbreviated Form BE-10A if the U.S. Reporter's total assets, sales and net income were all less than \$300 million (positive or negative) throughout the U.S. Reporter's 2014 fiscal year.[14]

The "fully consolidated U.S. domestic business enterprise" includes: "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." [15]

Foreign Affiliates

The U.S. person must also submit a separate form for each foreign affiliate. There are three possible forms for the foreign affiliate (Form BE-10B, Form BE-10C and Form BE-10D). The precise form that will need to be completed for each affiliate will depend on a combination of: a) the percentage ownership of the U.S. Reporter in the foreign affiliate (majority or minority); b) the size of the assets, sales and/or net income of the foreign affiliate; and c) whether that foreign affiliate owns another foreign affiliate for which a BE-10B or 10C needs to be filed.[16]

Question #7: What are the deadlines for covered U.S. persons to report?

The deadlines for submitting responses to the BE-10 Survey are May 29, 2015 if the U.S. reporter is submitting forms for less than 50 foreign affiliates, or June 30, 2015 if submitting forms for 50 or more foreign affiliates.[17] "Reasonable requests" for extensions will be considered by BEA if the request is received by the applicable original deadline.[18]

Question #8: Will the information provided be made available to the public?

No. The regulations state that "[i]nformation collected pursuant to [the Act] is confidential" and "[a]ccess to this information shall be available only to officials and employees (including consultants and contractors and their employees) of agencies designated by the President to perform functions under the Act. . . . Reports and copies of reports prepared pursuant to the Act are confidential and their

submission or disclosure shall not be compelled by any person without the prior written permission of the person filing the report and the customer of such person where the information supplied is identifiable as being derived from the records of such customer."^[19]

Question #9: Can I file a response to the BE-10 Survey electronically?

Yes. BEA offers the ability to eFile the BE-10 Survey report(s) online. More information on this process is available on the BEA website.^[20]

[1] 79 Fed. Reg. 69,041 (Nov. 20, 2014).

[2] *Id.*

[3] 22 U.S.C. 3101-3108.

[4] 22 U.S.C. 3104.

[5] "Person" includes any "individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including 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)," 15 C.F.R. §801.2(c), and "U.S. person" means "any person resident in the United States or subject to the jurisdiction of the United States.," 15 C.F.R. §801.2(d).

[6] 15 C.F.R. §801.8(a).

[7] 15 C.F.R. §801.6.

[8] 15 C.F.R. §801.8(b)(1) and (3).

[9] 15 C.F.R. §801.8(b)(2). Note the regulations are somewhat ambiguous in terms of whether *every* company with no foreign affiliates must file a "BE-10 Claim for Not Filing," as indicated by the plain language of §801.8(b)(2), or whether only those companies without foreign affiliates that were *contacted* by BEA must do so, as indicated by §801.8(a)(2).

[10] 15 C.F.R. §801.8(b)(1).

[11] *See* "2014 Benchmark Survey of U.S. Direct Investment Abroad Instructions" ("Instructions"), Section III(A), BEA website, *available at*: <http://www.bea.gov/surveys/pdf/be10/BE-10%20Instructions.pdf>.

[12] *Id.*, at Section III(F).

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[13] http://www.bea.gov/surveys/respondent_be10.htm.

[14] Instructions, Section I(B)(1)(a). Note also that the scope of required responses is also limited if the U.S. Reporter is and individual, estate, trust, or religious, charitable, or other nonprofit organization. Instructions, Section I(B)(1)(d).

[15] *Id.*, Section I(B)(1)(b).

[16] *See* Instructions, Section I(B)(2).

[17] 15 C.F.R. §801.8(d).

[18] Instructions, Section VI(B).

[19] 15 C.F.R. §801.5.

[20] http://www.bea.gov/surveys/respondent_be10.htm.



Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the authors of this alert:

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