

Deadline for Filing BE-10 Approaches for Private Funds and Private Fund Managers

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Most private funds or their managers will be required to file a BE-10 with the US Department of Commerce by May 29th.

This year marks the return of the BE-10, the five-year benchmark survey of US direct investment abroad. The **US Department of Commerce Bureau of Economic Analysis (BEA)** prepares official US economic statistics on investment in and by US companies based on data that it collects through mandatory surveys. For the previous survey—conducted by the BEA for 2009—a filing was required only by US persons^[1] that received notices from the BEA. For the current survey, all US persons meeting the applicable reporting thresholds will be required to make a BE-10 filing by either May 29 or June 30, 2015 (depending on the number of foreign affiliates that the US person has).

Last week, the BEA issued its answers to Frequently Asked Questions (FAQs) concerning the application of the BE-10 report for private funds and private fund managers to understand if they are required to file a BE-10 and, if so, which forms are required.^[2] Accordingly, we have prepared this LawFlash to help private funds and private fund managers understand what is required when filing a BE-10.

Who Must Report?

A US person, including individuals, private funds,^[3] and private fund managers, must file the BE-10 with the US Department of Commerce if, at any point during the US person's fiscal year ending in 2014, it had direct or indirect ownership or control of at least 10% of the voting interest of an incorporated foreign enterprise or an equivalent interest in an unincorporated foreign enterprise (a "US Reporter").^[4] Note that, in the private fund context, a "foreign enterprise" includes (among other things) offshore private funds, foreign portfolio companies, foreign holding vehicles, foreign subsidiaries, and foreign subadvisers.^[5]

With respect to indirect ownership, a US Reporter must "look through" all intervening foreign enterprises in its organizational chain to determine whether it indirectly has a 10% or more voting interest in one or more foreign enterprises. Because private funds and private fund managers

domiciled in the United States are included in the definition of a US person, their ownership and management of offshore investments and enterprises may trigger BE-10 filing requirements.

BE-10 Reporting Triggers for Private Funds and Private Fund Managers

Private funds can trigger BE-10 filing requirements in a number of ways. For example, if a US feeder fund holds voting shares or partnership interests in an offshore master fund, then the feeder fund or its manager/general partner will likely have a BE-10 reporting obligation. Typically, a limited partner interest in an offshore limited partnership does not require reporting because the limited partnership's voting interests are controlled by the general partner. However, if the general partner is a US person, then it would need to file a BE-10 report with respect to the offshore limited partnership. If the general partner is domiciled offshore, but is controlled by a US manager, then the manager would report with respect to the general partner and with respect to the limited partnership (because the manager would control the limited partnership indirectly through its control of the general partner).

Other BE-10 reporting triggers that are common in the private fund context include, but are not limited to, the following:

- Ownership of at least 10% of the voting interests^[6] in a foreign portfolio company, foreign holding company, or other vehicle (whether held directly by a US fund or by non-US funds that are ultimately controlled by a US person)
- Ownership by a US investment manager of management shares in an offshore fund formed as a corporation
- Serving as the sole shareholder of non-US general partner of an offshore limited partnership
- Control of an offshore subsidiary or an offshore subadviser
- Ownership by a US holding company or special purpose vehicle of at least 10% of the voting interest in a foreign subsidiary or other foreign enterprise

A private fund's organizational documents should be examined on a case-by-case basis to determine if reporting is necessary. In addition, certain investors in feeder funds may be required to make a BE-10 filing. For example, if a US person owned or controlled at least 10% of the voting stock of an incorporated foreign fund during 2014, it will be required to file. Fund sponsors that do not want to impose reporting obligations on US persons investing directly into offshore funds or investing into feeder funds organized in the United States should consider issuing only non-voting shares/interests to the US person investors.

Which Form(s) Must a US Person File?

A complete BE-10 is composed of multiple reports that cover a US Reporter and its majority- and minority-owned foreign enterprises. Each US Reporter is required to file at least two forms: (1) a Form BE-10A with respect to itself and (2) a Form BE-10B, 10C and/or 10D (as applicable) for each reportable foreign enterprise (Foreign Affiliate).

Whether the US Reporter files Form BE-10B, 10C, or 10D for a particular Foreign Affiliate depends generally on (1) whether the Foreign Affiliate is majority- or minority-owned by the US Reporter and

(2) the amount of assets, sales, or net income of such Foreign Affiliate during 2014 (the applicable thresholds being less than \$25 million, \$25 million–\$80 million, and more than \$80 million, respectively, either positive or negative).

Form BE-10A: A US Reporter must file a complete Form BE-10A if its total assets, sales, or gross operating revenues (excluding sales taxes) or net income (after provision for income taxes), when consolidated with its majority-owned domestic subsidiaries, was greater than \$300 million (positive or negative) at any time during the 2014 fiscal year. If this amount is less than \$300 million, the US Reporter is only required to respond to items 1–42 and 97–114 of Form BE 10-A.

Form BE-10B: This form must be submitted for each majority-owned Foreign Affiliate of a US Reporter whose total assets, sales, or gross operating revenues (excluding sales taxes) or net income (after foreign income taxes) was greater than \$80 million at any time during the affiliate's 2014 fiscal year.

Form BE-10C: This is required for (1) each majority-owned Foreign Affiliate that had total assets, sales, or gross operating revenues (excluding sales taxes) or net income (after foreign income taxes) greater than \$25 million (positive or negative) but less than \$80 million (positive or negative) at any time during the Foreign Affiliate's 2014 fiscal year; (2) each minority-owned Foreign Affiliate that had total assets, sales, or gross operating revenues (excluding sales taxes) or net income (after foreign income taxes) that was greater than \$25 million (positive or negative) at any time during the Foreign Affiliate's 2014 fiscal year; and (3) each Foreign Affiliate that had neither total assets, nor sales or gross operating revenues, nor net income that was greater than \$25 million (positive or negative) at any time during the Foreign Affiliate's 2014 fiscal year and that is a parent of another Foreign Affiliate being filed on Forms BE-10B or BE-10C.

Form BE-10D: This is required for all Foreign Affiliates that had neither total assets, nor sales or gross operating revenues, nor net income that was greater than \$25 million (positive or negative) at any time during the affiliate's 2014 fiscal year and that is not a parent of another foreign affiliate being filed on Forms BE-10B or BE-10C.

Filing Deadline and Extension Requests

US Reporters with fewer than 50 Foreign Affiliates must file a fully completed BE-10 no later than May 29, 2015. The deadline is extended to June 30, 2015 for US Reporters with 50 or more Foreign Affiliates. If a US Reporter has only recently discovered that it is subject to BE-10 reporting requirements and does not believe that it can meet the applicable deadline, it shouldn't panic; we have found that the BEA generally will grant reasonable requests for filing extensions if it receives such requests in a reasonable amount of time prior to the original deadline.

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