



Time again to file Bureau of Economic Analysis survey Form BE-10 to report investments abroad



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Private Client & Offshore Services, USA

- ❖ **Introduction**
- ❖ **BE-10 deadline and filing online**
- ❖ **Receiving a letter from the BEA**
- ❖ **Penalties for failure to file and extension requests**
- ❖ **'US person' means US resident or person subject to US jurisdiction**
- ❖ **'Foreign affiliate' means 10% or more of voting stock of a foreign business enterprise**
- ❖ **Foreign affiliates that are private funds may be exempt from reporting**
- ❖ **Survey consists of Forms BE-10A, BE-10B, BE-10C and BE10-D**
- ❖ **Trusts considered to be intermediaries**
- ❖ **US reporters owned by foreign persons and BE-15 survey**
- ❖ **Comment**

Introduction

Using Form BE-10, the Bureau of Economic Analysis (BEA) conducts a survey on US direct investment abroad. The survey is conducted every five years and currently covers fiscal years ending in 2019. The gathered data is used to produce statistics on the scale and effects of US-owned business activities abroad. All US persons subject to the reporting requirements must file, even if they are not contacted by the BEA. Families and their advisers should not ignore correspondence from the BEA. A 2020 BE-10 survey is required of any US person that had a foreign affiliate in 2019, which may include US-based limited liability companies (LLCs) and trusts.

BE-10 deadline and filing online

For most US reporters, the BE-10 survey for 2019 is due on 29 May 2020. For US reporters with 50 or more foreign affiliates to be reported, the due date is 30 June 2020. (For details regarding the 2015 survey filing, please see "Bureau of Economic Analysis reporting – Form BE-10".)

The BEA recommends filing Form BE-10 through its secure eFile system. Alternatively, the completed survey can be faxed to the number listed on the survey cover page. The BE-10 instructions also include addresses for filing by mail and direct private delivery. However, the BEA BE-10 webpage notes that, at present, due to COVID-19 restrictions, the BEA has limited ability to receive physical copies of completed survey forms, extension requests or other documents via mail or courier.

A BE-10 survey must be filed by all US persons subject to the BE-10 reporting requirements, regardless of whether they are contacted by the BEA. BEA survey staff continue to be available to assist survey respondents and have been responsive to email. The BEA eFile system homepage acknowledges that the COVID-19 outbreak may have had profound effects on the ability of respondents to comply with survey requirements. US reporters are able to provide estimates if necessary as the BEA realises that the requested data may be unavailable at this time or access to required records may be limited.

Receiving a letter from the BEA

The BEA uses previous survey filings and other sources, such as external databases and news media reports, to identify entities that may be subject to the reporting requirements of the survey. The BEA is currently sending letters requesting participation in the 2019 survey and has noted that it may also contact survey respondents via email given the reduced capacity to send and receive paper mail as a result of COVID-19 restrictions.

If the US person receives a request for participation from the BEA, that person must file the BE-10 survey or a BE-10 Claim for Not Filing. If the US person is not requested in writing by the BEA to complete a BE-10 survey, and the US person does not meet the BE-10 filing requirements, no action is necessary.

Penalties for failure to file and extension requests

Failure to report may result in a civil penalty and injunctive relief commanding the US person to comply, or both. An individual who wilfully fails to report can also be imprisoned for up to one year. On conviction, any officer, director, employee or agent of any corporation who knowingly participates in such violations may be punished by a fine, imprisonment or both.

The BEA will consider reasonable requests for an extension of the filing deadline. Extension requests must be received by the BEA no later than the original due date of the report and enumerate substantive reasons necessitating the extension. Extension requests are to be submitted via the BEA eFile system. The BEA has not, as of the date of this article, posted an extension request form on its website, so an eFile account should be created and the extension requested via that platform. Back in 2015, the extension request form specifically noted that the requester was to consider the extension granted, unless the requester was contacted by the BEA (for further details please see "The latest on Bureau of Economic Analysis reporting – Form BE-10"). The updated 2020 BE-10 instructions now say that the BEA will provide a written response to extension requests.

'US person' means US resident or person subject to US jurisdiction

A 'US person' means any person resident in the United States or subject to the jurisdiction of the United States. The term 'person' is used in the broad legal sense and includes individuals, partnerships, estates, trusts, corporations and other organisations such as LLCs or S corporations, regardless of whether they are organised under the laws of a US state. The 'United States' means the several states, the District of Columbia, the Commonwealth of Puerto Rico and all territories and possessions of the United States, such as Guam and the US Virgin Islands.

Thus, the following must submit a Form BE-10 if they have a foreign affiliate:

- Delaware LLCs, even though disregarded for US tax purposes;
- trusts established under the laws of and administered in a US state such as Wyoming or South Dakota, even if classified as foreign for US tax purposes, if the trust has US beneficiaries or a US grantor (see below); and
- US Virgin Islands holding companies.

If the US person had any foreign affiliates at the end of its 2019 fiscal year, a BE-10 form is required. The US person is described as a US reporter in the survey.

'Foreign affiliate' means 10% or more of voting stock of a foreign business enterprise

A US person had a foreign affiliate in 2019 if it had ownership or control of at least 10% of the voting stock of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise, at the end of the US person's 2019 fiscal year. This ownership interest may be held directly, indirectly or both.

Business enterprises

A 'business enterprise' means any organisation, association, branch or venture which exists for profit-making purposes or to otherwise secure an economic advantage, and any ownership of any real estate. 'Foreign' means situated outside the United States or belonging to or characteristic of a country other than the United States. If the operation or activity is incorporated abroad, it is always considered a foreign affiliate.

Real estate

Ownership of foreign real estate is defined to be a business enterprise. If foreign real estate is owned by a US person, it is a foreign affiliate, with certain exceptions for personal use property:

- Residential real estate held exclusively by a US person for personal use and not for profit-making purposes is not subject to the BE-10 reporting requirements.
- 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 owners of the business enterprise, is considered to be real estate held for personal use and is therefore not subject to the BE-10 reporting requirements.
- A primary residence abroad that is leased to others while the owner is a US resident, but which the owner intends to reoccupy, is considered real estate held for personal use.

US ownership of a direct or indirect voting interest of 10% or more in a joint venture, partnership or similar that is formed to own and hold, develop or operate foreign real estate is a foreign affiliate and must be reported on the BE-10 survey.

Direct and indirect ownership interests

US persons must sum all direct and indirect lines of ownership interest in a foreign business enterprise to determine whether they hold a foreign business enterprise to the extent of 10% or more, directly or indirectly. For example, a Delaware LLC owns 50% of foreign business enterprise 'A' directly. A owns 75% of foreign business enterprise 'B' which, in turn, owns 80% of foreign business enterprise 'C'. The Delaware LLC's percentage of indirect ownership of B would be 37.5% (the product of the first two percentages). The Delaware LLC's indirect ownership of C would be 30% (the product of all three percentages). A, B and C would all be considered foreign affiliates of the Delaware LLC.

Foreign affiliates that are private funds may be exempt from reporting

A foreign affiliate is not required to be reported if all of the following apply:

- the foreign affiliate is a private fund;
- the private fund foreign affiliate does not own, directly or indirectly through another business enterprise, an operating company (ie, a business enterprise that is not a private fund or a holding company); and
- if the US reporter owns the private fund indirectly (ie, through one or more other business enterprises), there are no operating companies between the US reporter and the indirectly owned foreign private fund.

Private funds

'Private fund' means an 'investment company' as defined in Section 3 of the Investment Company Act 1940, but for Sections 3(c)(1) or 3(c)(7) of the act. This includes foreign companies engaged in investing, reinvesting, owning, holding or trading securities and which own investment securities with a value exceeding 40% of the value of the company's total assets, where:

- the company's outstanding securities are beneficially owned by:
 - no more than 100 persons; or
 - by persons who, at the time of acquisition of such securities, are qualified purchasers; and
- the company is not making and does not presently propose to make a public offering of its securities.

Holding companies

The BEA defines a 'holding company' as a business enterprise engaged in holding the securities or financial assets of companies and enterprises for the purpose of owning a controlling interest in them or influencing their management decisions. A holding company does not manage the day-to-day operations of the firms whose securities they hold.

To be considered a holding company, income from equity investments must be more than 50% of total income. A business that engages in holding company activities but generates more than 50% of its total income from other activities is not a holding company.

Thus, in the case of a succession planning structure consisting of an ownership chain that includes only private funds and holding companies, and no operating companies, there is no reportable foreign affiliate.

Survey consists of Forms BE-10A, BE-10B, BE-10C and BE10-D

The BE-10 survey comprises four forms:

- Form BE-10A – information regarding the US reporter.
- Form BE-10B – information regarding each majority-owned foreign affiliate, whether held directly or indirectly, for which any one of the following items is greater than \$80 million:
 - total assets;
 - sales or gross operating revenues excluding sales taxes; or
 - net income after provision for foreign income taxes.
- Form BE-10C – information regarding each:
 - majority-owned foreign affiliate, whether held directly or indirectly, for which any one of the above three items was greater than \$25 million, but none were greater than \$80 million;
 - minority-owned foreign affiliate for which any of the above three items was greater than \$25 million; and
 - foreign affiliate for which no one of the above three items was greater than \$25 million that is a foreign affiliate parent of another foreign affiliate being filed on Forms BE-10B or BE-10C.
- Form BE-10D – information regarding all foreign affiliates for which no one of the above three items was greater than \$25 million. However, if a foreign affiliate meeting 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.

Trusts considered to be intermediaries

A trust, either US or foreign, is a person but not a business enterprise. A trust is considered to be an intermediary for purposes of the BE-10 survey.

The beneficiaries of a trust are considered to be the owners of trust property for purposes of determining the existence of a reportable foreign affiliate, except in two specified cases. If there is a reversionary interest, the creator of the trust is deemed to be the owner of the investments of the trust. Likewise, in the case of a trust created by a corporation or other entity where its shareholders or members are the beneficiaries, the creator of the trust is deemed to be the owner of the trust's investments for purposes of determining the existence of a reportable foreign affiliate.

Thus, if the creator of a revocable trust is a non-US individual, the foreign business enterprise held by the trust does not have a US owner and a BE-10 survey is not required. This means that a trust created under the laws of a US state by a non-US individual who retained the power to revoke the trust does not have a BE-10 reporting obligation (for further details please see "Establishing 'foreign' trusts in the United States"). Similarly, if the trust is irrevocable but solely for the benefit of the non-US settlor and the settlor's non-US spouse, the foreign business enterprise held in the trust does not have a US owner and Form BE-10 is not required. If such a trust receives a letter from the BEA requesting participation in the BE-10 survey, the trust should file a BE-10 Claim for Not Filing.

In the case of a trust established and administered in a US state, which has US beneficiaries or a US grantor deemed to be the owner of the foreign affiliate, it is the trust that is responsible for submitting Form BE-10 as the US reporter.

Alternatively, the trust can instruct the deemed owner of the foreign affiliate to submit the required information. The trust

will be released from further liability to report only if it has informed the BEA of the date such instructions were given and the name and address of the deemed owner and has supplied the owner with information necessary to complete the survey.

If the trust owns a foreign affiliate directly, rather than through a US business enterprise, it must attach an explanatory note attesting to its status and complete only the following items of the BE-10A form:

- Item 1 – name and address of US reporter;
- Item 2 – form of organisation of US reporter (eg, trust); and
- Item 7 – number of foreign affiliate reports (BE-10B, BE-10C and BE-10D) to be filed.

If, instead, the trust owns more than 50% of a US business enterprise that, in turn, owns a foreign affiliate, the US reporter is deemed to be the US business enterprise and not the trust. That US business enterprise will have the BE-10 reporting obligation.

In the case of a trust that is not established and administered in the US state, but was created by a US person or has US person beneficiaries, the trustee should instruct the US settlor or US beneficiaries to submit the required BE-10 information. If a US person holds a foreign affiliate through a foreign intermediary, the US person is considered to own the foreign affiliate directly.

US reporters owned by foreign persons and BE-15 survey

A US business enterprise that is a US reporter for purposes of the BE-10 survey may also be a US affiliate of a foreign person that must report in the BE-15 2019 Annual Survey of Foreign Direct Investment in the United States. This could be the case if the US business enterprise owns foreign affiliates and is also owned 10% or more, directly or indirectly, by a foreign person. In such cases, the US business enterprise should provide details in the BE-10 survey on its foreign affiliates, but should not report other property of its foreign owner. Unlike the BE-10, entities not contacted by the BEA have no reporting responsibilities for the BE-15.

Comment

The BE-10 is described as a benchmark survey of US direct investment abroad, conducted to "secure current economic data on the operations of US parent companies and their foreign affiliates"; but the survey's reach is much broader than that. For advisers to families with succession planning structures that include trusts and companies, it represents yet another complicated set of US forms and instructions. The exemption of private funds from the reporting requirements was a welcome change. Advisers to trust structures with US beneficiaries or settlors and structures with a non-US settlor and non-US beneficiaries that utilise a US single-member disregarded LLC should take some time to determine whether there is a Form BE-10 filing obligation.

For further information on this topic please contact Jennie Cherry or Eric Dorsch at Kozusko Harris Duncan by telephone (+1 212 980 0010) or email (jcherry@kozlaw.com or edorsch@kozlaw.com). Please note, the authors are unable to provide legal advice to non-clients. The Kozusko Harris Duncan website can be accessed at www.kozlaw.com.

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