Client Update
BE-10 Reporting by U.S. Persons Regarding Non-U.S. Business Holdings

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On November 20, 2014, the U.S. Commerce Department's Bureau of Economic Analysis (the "BEA") adopted regulations requiring all U.S. persons (including individuals, public and private companies, private investment funds, and other entities) that at any time during 2014 owned or controlled 10% or more of the voting securities of any non-U.S. business enterprise to report such investments with the BEA on Form BE-10. At the close of business yesterday, May 12, 2015, the BEA issued answers to Frequently Asked Questions (FAQs) relating to such regulations. Although the FAQs add some clarity to the application of the BE-10 reporting requirements to private funds, they do not provide any hoped-for relief from the filing obligations or extend the filing deadlines.[1]

BE-10 filings are required as part of a five-year benchmark survey of U.S. direct investment abroad conducted by the BEA. During the previous survey conducted by the BEA in 2009, a filing was required only of U.S. persons specifically contacted by the BEA. Under the new rules, any U.S. person meeting the applicable reporting thresholds will be required to make a BE-10 filing, whether or not such person has been contacted by the BEA.[2]

BE-10 reports are due by May 29, 2015 or June 30, 2015, depending on the number of foreign investments to be reported. As discussed below, the reports require extensive financial information about the filer and its non-U.S. holdings. BE-10 filings are confidential.

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1 The FAQs are available on the BEA's website at http://www.bea.gov/surveys/pdf/be10/faqprivatefunds.pdf

2 Form BE-10 is part of a broader set of reports required by the BEA. However, with certain exceptions, these other reports must be filed only if the entity has been contacted by the BEA. One notable exception is Form BE-13, which is required to be filed if a non-U.S. entity acquires direct or indirect ownership or control of 10% or more of the voting securities of a U.S. entity and the transaction value exceeds $3 million.

WHO NEEDS TO FILE

The BEA rules require a U.S. person to make a BE-10 filing if at any time during 2014 the U.S. person (a "U.S. Reporter") directly or indirectly held 10% or more of the voting securities of any non-U.S. business enterprise (a "Foreign Affiliate"). Investments meeting the 10% ownership test must be reported regardless of size; there are no *de minimis* exceptions.

WHAT REPORTS ARE REQUIRED TO BE FILED

Each U.S. 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 of its Foreign Affiliates.[3]

Form BE-10A requires reporting of operational and financial information regarding the U.S. Reporter itself (on a consolidated basis with certain of its controlled U.S. affiliates), including, among other information, gross revenues, net income, total assets and liabilities, number of employees, total employee compensation, and taxes paid.[4]

Form BE-10B/C/D requires reporting of operational and financial information regarding each applicable Foreign Affiliate, including information on the U.S. Reporter's ownership of the Foreign Affiliate. A separate Form BE-10B, 10C or 10D, as applicable, is generally required for each Foreign Affiliate,[5] although multiple Foreign Affiliates may be reported on a single Form BE-10B/C/D in certain limited circumstances.[6]

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3 The forms are available on the BEA's website at http://www.bea.gov/surveys/respondent_be10.htm

4 A full Form BE-10A must be filed if the U.S. Reporter's assets, sales of gross operating revenues or net income were greater than $300 million (positive or negative) at any time during 2014. Otherwise, an abbreviated Form BE-10A may be filed.

5 Whether the U.S. 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 U.S. 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 to $80 million, and more than $80 million, in each case, either positive or negative).

6 Filing a single form for multiple Foreign Affiliates is allowed only if the Foreign Affiliates are formed in the same jurisdiction, operate in the same industry and either are owned by the same immediate parent or one of them is 100% owned by the other.

BE-10 reports are entitled to confidential treatment and in particular are protected from disclosure in response to Freedom of Information Act requests. The information may be used by the BEA only for aggregate analytical and statistical purposes.

FILING DEADLINES

BE-10 reports are due on May 29, 2015 for those U.S. Reporters filing for fewer than 50 Foreign Affiliates, and on June 30, 2015 for those filing for 50 or more Foreign Affiliates. Extensions may be granted by the BEA upon request.

PENALTIES FOR FAILURE TO FILE

Failure to file BE-10 reports may result in civil and criminal penalties. The BEA may pursue civil penalties up to $25,000 and seek injunctive relief. Willful violations may result in criminal penalties of up to $10,000 and imprisonment for up to one year.

IMPLICATIONS FOR PRIVATE FUNDS

Private fund structures can trigger the BE10 filing requirements in a number of scenarios. These include: (1) investments in non-U.S. portfolio companies (whether by U.S. funds or by non-U.S. funds ultimately controlled by a U.S. person); (2) ownership interests in non-U.S. holding vehicles; (3) general partner interests in non-U.S. funds;[7] and (4) non-U.S. sub-advisory entities owned by a U.S. parent. While the May 12, 2015 FAQs leave unanswered a number of important questions, they do acknowledge that some portions of the forms may not apply to certain domestic or foreign entities in a private fund structure. In those cases, the BEA invites reporters to mark those as non-applicable and provide explanations about the nature of such entities and their operations.

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Please do not hesitate to contact us with any questions.

[7] Limited partner interests are not considered voting securities unless otherwise specified in the limited partnership agreement. The BEA has not provided guidance on what provisions might be significant enough to cause limited partner interests to be treated as voting securities.