

Private Funds May Be Subject to the BEA's Reporting Requirement

MAY 2015

The United States Bureau of Economic Analysis (BEA) has expanded the reach of its BE-10 benchmark survey of U.S. investments abroad to include all U.S. persons and entities with "foreign affiliates" during their 2014 fiscal year. The survey is conducted every five years and previously a U.S. person or entity only had to file if they were notified by the BEA. By removing the prior notice requirement, many private funds and some investment advisers may be required to report.

Deadline

U.S. reporters with fewer than 50 forms to file must file by May 29, 2015, and those with more than 50 forms to file must do so before June 30, 2015.

Extensions

The BEA understands the burden this survey places on U.S. reporters and will grant 30-day extensions upon request. Requests for extensions can easily be made over the phone at (202) 606-5566 using a written form submitted through the eFile system or faxed to (202) 606-5312. The BEA has also indicated it will grant additional extensions, particularly for first-time filers, if needed.

Who Must File

Any U.S. person (an individual or entity) who had a "foreign affiliate" during their 2014 fiscal year is deemed a "U.S. reporter." A "foreign affiliate" is an incorporated or unincorporated foreign business enterprise in which a U.S. person had direct or indirect ownership or control of at least ten percent (10%) of the voting stock or equivalent interest. The party responsible for filing is the highest individual or entity on the ownership "chain." For example, where a parent company is the owner of a subsidiary that has a foreign affiliate, the parent company will be the U.S. reporter and file the BE-10A on behalf of themselves and the subsidiary.

Implications for Private Funds

Domestic private funds sponsors that have offshore funds in their fund structures (such as an offshore parallel fund or an offshore master fund) are covered by the BE-10 filing requirement, as are domestic funds that have foreign investments. The BEA has issued guidance providing that, in most cases, the limited partners of a partnership will not be deemed to have any “voting” interest. Instead, the general partner(s) are assumed to own 100% of the partnership. Where the offshore fund is controlled by a board of directors, if a U.S. person, such as a general partner, controls the board of directors by appointing and directing a majority of the members, then the general partner will have to file. If a majority of the board of directors is comprised of independent directors, they will not need to file.

The BEA has also acknowledged that not all questions on the BE-10 forms may apply to traditional private fund structures. Accordingly, it may be appropriate to respond “n/a” to any questions that do not apply and provide clarification in the remarks section of the forms as needed. The BEA has attempted to anticipate and address additional areas of concern to private funds in an online FAQ.

Implications for Investment Managers

The BEA takes the position that, in most scenarios, the investment manager does not have actual control of the offshore fund and therefore would not be the U.S. reporter with respect to such fund for purposes of the BEA survey. Under a customary investment management agreement, the general partner of the offshore fund contractually cedes a certain amount of control to the investment manager to allow them to advise the fund. However, in this situation, the general partner retains the actual control of the entity and would be responsible for the BE-10 filings, assuming they are a U.S. person.

BE-10 Forms

Form BE-10A for the U.S. Reporter

The Form BE-10A is filed by the U.S. reporter. The Form BE-10A collects information about the U.S. reporter’s business, financial and operating data, and exports and imports. If any of the following items of the fully consolidated U.S. domestic business enterprise was in excess of \$300 million (positive or negative) at any time during the U.S. reporter’s 2014 fiscal year, the U.S. reporter must respond to all items on the Form BE-10A:

1. total assets,
2. sales or gross operating revenues excluding sales taxes, or
3. net income after provision for U.S. income taxes.

If none of the previous three items exceeded \$300 million (positive or negative) during the 2014 fiscal year, the U.S. reporter may skip items 43-96 on the Form BE-10A.

Forms BE-10B-D for each Foreign Affiliate

The Forms BE-10B, BE-10C and BE-10D concern the foreign affiliate. The U.S. reporter must file either a BE-10B, C or D for each of their foreign affiliates. The criteria to determine which form is appropriate is below.

Form BE-10B

A BE-10B must be filed for each foreign affiliate of a U.S. Reporter, for which any one of the following three items was greater than \$80 million (positive or negative) at any time during the affiliate’s 2014 fiscal year:

1. total assets,

2. sales or gross operating revenues excluding sales taxes, or
3. net income after provision for foreign income taxes

Form BE-10C

A BE-10C must be filed for:

1. each majority-owned foreign affiliate of a U.S. reporter, whether held directly or indirectly, for which any one of the three items listed in *Form BE-10B* above was greater than \$25 million (positive or negative), but for which no one of these items was greater than \$80 million (positive or negative) at any time during the affiliate's 2014 fiscal year;
2. each minority-owned foreign affiliate of a U.S. reporter for which any one of the three items listed in *Form BE-10B* above was greater than \$25 million (positive or negative) at any time during the affiliate's 2014 fiscal year; and
3. each foreign affiliate of a U.S. reporter for which no one of the three items listed in *Form BE-10B* above was greater than \$25 million (positive or negative) at any time during the affiliate's 2014 fiscal year that is a foreign affiliate parent of another foreign affiliate being filed on Form BE-10B or BE-10C.

Form BE-10D

A BE-10D must be filed for foreign affiliate(s) of a U.S. Reporter for which none of the three items listed in *Form BE-10B* above was greater than \$25 million (positive or negative) at any time during the affiliate's 2014 fiscal year, and is not a foreign affiliate parent of another foreign affiliate being filed on Form BE-10B or BE-10C. See *Reporting More than One Foreign Affiliate in Chain of Ownership* below.

Reporting More than One Foreign Affiliate in Chain of Ownership

A Form BE-10B, BE-10C, or BE-10D must be filed for a foreign affiliate of the U.S. Reporter that owns another foreign affiliate of that U.S. Reporter. 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.

Confidentiality

All information reported on the BE-10 forms will be kept confidential and only used for analytical and statistical purposes.

Penalties

Failure to file a BE-10 form may result in civil penalties up to \$25,000 and willful failure to report may result in fines of up to \$10,000 and imprisonment for not more than one year, if an individual.

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