

BE-10 Filing Deadline Nears for U.S. Companies With Foreign Subsidiaries and Other Affiliates

May 6, 2015

U.S. companies with foreign subsidiaries and other affiliates are required to report detailed information to the Bureau of Economic Analysis by May 29 or June 30, depending on the number and size of foreign affiliates. Companies may be able to obtain an extension.

The Bureau of Economic Analysis (BEA) of the U.S. Department of Commerce produces statistics on U.S. investment abroad derived from annual and “benchmark” surveys. Every five years, BEA conducts the BE-10 Benchmark Survey. In the past, companies participating in the benchmark survey were contacted by BEA.

This year, any U.S. company (whether public or privately held) with a “foreign affiliate” during its 2014 fiscal year must file a BE-10 report.

- A “foreign affiliate” is a foreign business enterprise (whether or not incorporated, and including a branch) in which a U.S. company has direct or indirect ownership or control of 10% or more of the voting stock or equivalent interest. A “business enterprise” includes any organization, association, branch or venture that exists for profit-making purposes or otherwise to secure economic advantage, and any ownership of real estate.

U.S. companies with foreign affiliates, and who are therefore required to file BE-10 reports, are called “U.S. reporters.” For a U.S. public company, the “U.S. reporter” is the “fully consolidated U.S. domestic enterprise.”

- The “fully consolidated U.S. domestic business enterprise” is the U.S. company whose voting securities are not more than 50% owned by another U.S. company, and continuing down the ownership chain from that U.S. company, any U.S. company whose voting securities are more than 50% owned by the U.S. company above it. The fully consolidated U.S. domestic business enterprise excludes foreign branches and all other foreign affiliates.

There is ambiguity in the rules over whether a U.S. company with no foreign affiliates during its 2014 fiscal year must nevertheless file a **BE-10 Claim for Not Filing**. Although the **BE-10 Instructions** appear to suggest that any U.S. company that is not required to file a BE-10 report must then file a BE-10 Claim for Not Filing, an **instructional video** recently posted on BEA’s website suggests that the BE-10 Claim for Not Filing is required only for a U.S. company that is **notified** by BEA to file a BE-10 report, but had **no** foreign affiliates during its 2014 fiscal year (emphasis in original). Absent additional clarifying advice from BEA, we don’t expect many companies without foreign affiliates to file a BE-10 Claim for Not Filing unless they are contacted by BEA.

A company organized outside of the United States will not need to file the BE-10 report unless it has a U.S.-organized subsidiary that in turn owns a 10% equity interest in a foreign affiliate (in which case the U.S. subsidiary will need to file). We would expect that most foreign private issuers will not have such a corporate structure and therefore will not be required to file the BE-10 report, although a U.S. subsidiary would still be required to file a BE-10 Claim for Not Filing at BEA’s request.

Deadlines and Extension Requests

The BE-10 report is due by May 29, 2015 for U.S. reporters required to file fewer than 50 Forms BE-10B, BE-10C and BE-10D, as described below, and June 30, 2015 for U.S. reporters required to file 50 or more such forms. (Note that because Form BE-10D is designed for reporting information on multiple

foreign affiliates, the number of forms a U.S. reporter is required to file may not match the number of its foreign affiliates.) The BE-10 Claim for Not Filing is due by May 29, 2015.

BEA is willing to consider “reasonable requests” to extend the filing deadline, as long as the request is made no later than the original due date and the U.S. reporter explains why the extension is necessary. U.S. reporters with fewer than 50 forms may request an extension to June 30; those with between 50 and 100 forms may request an extension to July 31; and those with more than 100 forms may request an extension to August 31.

Extension requests should be made by completing a [Request for Extension for Filing](#) and submitting it through BEA’s [eFile](#) system, or by faxing the completed request form to 202-606-5312. BEA intends to respond to each request in writing.

BE-10 Report

The BE-10 report consists of Form [BE-10A](#), and one or more of Forms [BE-10B](#), [BE-10C](#) and [BE-10D](#), each of which is required to be completed according to the [BE-10 Instructions](#). Along with the BE-10 report, any U.S. reporter (such as a public company) that issues annual reports to stockholders should furnish its 2014 annual report.

- Form [BE-10A](#) – a U.S. reporter must file a full Form BE-10A if any one of the following three items of the fully consolidated U.S. domestic business enterprise was greater than \$300 million (positive or negative) at any time during the U.S. reporter’s 2014 fiscal year:
 - total assets,
 - sales or gross operating revenues excluding sales taxes, or
 - net income after provision for U.S. income taxes.

If none of these thresholds is met, the U.S. reporter need only complete a partial Form BE-10A, as specified in the instructions.

Among other things, Form BE-10A asks for breakdowns about the U.S. reporter’s products and services, including revenues and associated employee headcount; information about contract manufacturing; detailed financial information prepared on a consolidated basis but excluding foreign affiliates; data on employee compensation; and data on imports and exports.

The form must be signed by an “authorized official,” who must certify that the BE-10 report has been prepared in accordance with the applicable instructions, is complete, and is substantially accurate except where estimates have been used in accordance with the instructions. The instructions acknowledge that some of the required data may not be maintained in customary accounting records, and explain that where actual data are not available, or only partial data are available, estimates labeled as such are acceptable.

Forms BE-10B, BE-10C and BE-10D are tiered according to the size of the foreign affiliate, and seek substantially more information about larger affiliates (Form BE-10B) than about smaller affiliates (Form BE-10D). Nevertheless, the information required is quite detailed and likely to be burdensome to compile. Depending on the form, information may be sought about such things as the foreign affiliate’s equity ownership structure; industry classification and revenue by industry; detailed U.S. dollar-based financial and operating data; employee compensation and headcount; R&D expenditures; intercompany transactions; and exports to and imports from the United States.

- Form [BE-10B](#) – this form must be filed for each foreign affiliate of the 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:
 - total assets,
 - sales or gross operating revenues excluding sales taxes, or
 - net income after provision for foreign income taxes.

- Form **BE-10C** – this form must be filed for:
 - each majority-owned foreign affiliate of the U.S. reporter for which any one of the three BE-10B items 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;
 - each minority-owned foreign affiliate of the U.S. reporter for which any one of the three BE-10B items was greater than \$25 million (positive or negative) at any time during the affiliate's 2014 fiscal year; and
 - each foreign affiliate of the U.S. reporter for which no one of the three BE-10B items was greater than \$25 million (positive or negative) at any time during the affiliate's 2014 fiscal year that is a parent of another foreign affiliate reported on Form BE-10B or BE-10C.
- Form **BE-10D** – this form must be filed for all foreign affiliates of the U.S. reporter for which no one of the three BE-10B items 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 reported on Form BE-10B or BE-10C.

Confidentiality

BE-10 information may only be used for analytical and statistical purposes. BEA is forbidden from publishing the information in a manner specifically identifying the reporting company.

Penalties for Noncompliance

According to BEA, failure to file a BE-10 report can subject the offender to civil penalties of between \$2,500 and \$25,000, as well as to injunctive relief. Willful failure to report can result in criminal penalties for the U.S. reporter and any officer, director, employee or agent who knowingly participates in the violation.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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