Proskauer

Due Date Approaching for BE-10 Filing for Certain Hedge Fund, Private Equity and Other Private Fund Managers

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I. Introduction

The BE-10 benchmark survey of U.S. Direct Investment Abroad is a survey conducted every five years by the Bureau of Economic Analysis (the "BEA") of the U.S. Department of Commerce in order to obtain current economic data on the operations of U.S. parent companies and their foreign affiliates. Any U.S. person that had a foreign affiliate (as defined below) at the end of the U.S. person's 2019 fiscal year is required to file the survey **regardless of whether they are contacted by the BEA**. There is no minimum dollar threshold.

II. Who Must report?

General

Any U.S. person that had a foreign affiliate at the end of the U.S. person's 2019 fiscal year is required to file the appropriate BE-10 forms.

"Foreign affiliate" is defined as a business enterprise in which the U.S. person has ownership or control of at least 10% of the voting stock (or an equivalent interest in an unincorporated foreign business enterprise). "Business enterprise" means any organization, association, branch, or venture which exists for profit-making purposes or to otherwise secure economic advantage, and any ownership of any real estate.

If a U.S. person has been contacted by the BEA but had no foreign affiliates during its 2019 fiscal year, it must file a "BE-10 Claim for Not Filing."

New Exemption for Foreign Private Funds

In 2017, the BEA amended the BE-10 filing requirement to provide that an investment in a foreign affiliate that is a private fund is exempt if (i) the private fund foreign affiliate does not own, directly or indirectly through another business enterprise, an "operating company" — i.e., a business enterprise that is not a private fund or a holding company — in which the U.S. person owns at least 10% of the voting interest, and (ii) if the U.S. person owns the private fund indirectly (through one or more other business enterprises), there are no "operating companies" between the consolidated U.S. person and the indirectly-owned foreign private fund. "Private funds" for this purpose means an issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of the Act. It should be noted that if an investment meets the requirements of the private fund exemption, such investment may nevertheless need to be reported through the Treasury International Capital ("TIC") reporting system of the U.S. Department of the Treasury.[1]

III. Which Form to File?

Each "fully consolidated U.S. domestic business enterprise" must file a Form BE-10A if such business enterprise had any foreign affiliates at the end of the 2019 fiscal year. The term "fully consolidated U.S. domestic business enterprise" is defined as: (1) the U.S. business enterprise whose voting securities are not owned more than 50% by another U.S. business enterprise, and (2) proceeding down each ownership chain from that U.S. business enterprise, any U.S. business enterprise (including foreign sales corporations located in the United States) whose voting securities are more than 50% owned by the U.S. business enterprise above it. Foreign branches and all other foreign affiliates are excluded from the consolidation rules.

Depending on the size of the foreign affiliate, a separate Form BE-10B, BE-10C or BE-10D will need to be filed for each foreign affiliate — where a foreign affiliate's total assets, sales or gross operating revenues (excluding sales taxes), or net income (after provision for foreign income taxes)(positive or negative) at the end of, or for, the U.S. person's 2019 fiscal year:

- was more than $80 million:
    - the U.S. person must file Form BE-10B for each majority-owned foreign affiliate;

- was more than $25 million but less than $80 million:

    - the U.S. person must file Form BE-10C for each majority-owned foreign affiliate;

- was greater than $25 million:
    - the U.S. person must file Form BE-10C for each minority-owned foreign affiliate;

- was less than or equal to $25 million:
    - the U.S. person must file Form BE-10C for each foreign affiliate that is also a foreign affiliate parent of another foreign affiliate being filed on Form BE-10B or BE-10C; and
    - the U.S. person must file Form BE-10D for each majority- or minority-owned foreign affiliate that is not a foreign affiliate parent of another foreign affiliate being filed on Form BE-10B or BE-10C.

IV. When is the BE-10 Report Due?

The BEA initially announced that U.S. reporters filing fewer than 50 forms must file by May 29, 2020 and U.S. reporters filing 50 or more forms must file by June 30, 2020. However, due to the recent novel coronavirus pandemic, the BEA has informally advised that a U.S. person has until August 31, 2020 to file the BE-10 forms, provided that a U.S. person that is: (i) contacted by BEA regarding the survey must request an extension prior to the applicable initial deadline; and (ii) not contacted by BEA is part of a blanket (no-name) extension given to its representative (e.g., its law firm) or contacts the BEA prior to the applicable initial deadline to request its extension.

V. What are the Penalties for Non-Filing?

Failure to report may result in civil penalties, and in the case of willful violations, criminal penalties of a fine and imprisonment up to one year.

If you have any questions, please feel free to contact any of the authors of this alert.

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[1] TIC reporting system is beyond the scope of this posting, but generally collects data on capital flows into and out of the United States, excluding direct investment, and the resulting levels of cross-border claims and liabilities.

- **Stephen T. Mears**
  Partner