

Be Prepared for the BEA's Increased Reporting Requirements and Upcoming Deadlines

Private equity firms are subject to new mandatory BEA reporting requirements on US direct investment abroad and foreign direct investment in the US.

The Bureau of Economic Analysis (BEA) of the US Department of Commerce recently modified the reporting requirements for two surveys covering direct investment abroad by US companies and direct investment in the US by foreign companies. As a result of the new rules, US companies will be required to respond to the BE-10 Benchmark Survey of US Direct Investment Abroad and the BE-13 Survey of New Foreign Direct Investment in the US, if applicable, regardless of whether a company receives a direct request from the BEA to complete either survey. Prior to this modification of the rules, domestic businesses were only required to complete the BE-10 or BE-13 report upon direct request by the BEA.

Information the BEA collects will be used to create statistical reports for use in evaluating and setting US economic policy. Information will be kept confidential and accessible solely to selected government officials and employees of agencies authorized by the President. US companies (as well as their officers, directors, employees or agents) that fail to submit the applicable BE-10 or BE-13 forms may incur civil penalties of up to \$25,000 per violation and willful violations may result in fines of up to \$10,000 and imprisonment for up to one year (for individuals).

BE-10 Benchmark Survey – Direct Investment Abroad

The BE-10 benchmark survey — conducted every five years — is intended to collect comprehensive economic data on US resident companies and their foreign investments. Companies required to file a BE-10 report may need to make all applicable filings as early as **May 29, 2015**.

- **Who Must File:** A BE-10 report is required of any US person that had direct or indirect ownership or control of at least 10 percent of the voting stock of a foreign business enterprise at any time during its 2014 fiscal year. The BEA has expressly stated that US-based private investment funds and investment managers must file a BE-10 report to the extent they otherwise meet the reporting requirements.
- **Form BE-10A for the “US Reporter”:** Each US person subject to the reporting requirements must file a Form BE-10A, which requires extensive information regarding the US person’s identity, sales and employment, financial and operating data, as well as imports and exports. The US person filing the Form BE-10A should be the fully consolidated US domestic business enterprise. This is defined as the US business whose voting securities are not owned more than 50 percent by another US

business and, proceeding down each ownership chain from that US business, any US business whose voting securities are more than 50 percent owned by the US business above it. If a US business enterprise cannot consolidate all of its domestic subsidiaries in its BE-10A form, it must request permission to file on an unconsolidated basis prior to submitting the BE-10 filing.

- **Form BE-10B, BE-10C or BE-10D for each Foreign Affiliate:** Each foreign affiliate of a US person filing a Form BE-10A, for which the 10 percent ownership threshold is satisfied, must file one of three forms (either a BE-10B, BE-10C or BE-10D). The determination of which form to file is based upon whether the foreign affiliate is majority or minority-owned by the US person and the extent of the foreign affiliate's assets, sales and net income. Similar to the Form BE-10A, Forms BE-10B, BE-10C and BE-10D collect certain financial and operating data information regarding the foreign affiliates as well as information regarding transactions between each foreign affiliate and its US owner. In relation to private equity funds and investment managers, offshore parallel funds, holding companies and operating portfolio companies, among other offshore fund vehicles, would constitute foreign affiliates of the domestic private equity firm if the 10 percent control test is met.
- **Deadlines and Extensions:** Companies required to file fewer than 50 forms must submit all applicable filings no later than **May 29, 2015**. Companies filing 50 or more forms in respect of their foreign affiliates will have until **June 30, 2015** to submit their filings. The BEA may grant reasonable requests for extensions, so long as parties submit such requests prior to the applicable filing deadline.

BE-13 Survey – New Foreign Direct Investment in the United States

The BE-13 Survey of New Foreign Direct Investments in the United States is intended to collect information on new investments in the US by foreign entities, including when a foreign business first acquires 10 percent or more of the voting interests of a US affiliate and when an existing US affiliate establishes a new legal entity, expands its operations or acquires a US business enterprise.

- **Who Must File:** Any US entity must submit a BE-13 filing if (i) a foreign person acquires direct or indirect control of 10 percent or more of the voting securities of such US entity, and (ii) the cost of such acquisition exceeds \$3 million. The filing requirement would not be triggered by a non-US investor acquiring a passive investment interest in a domestic private fund, as limited partner interests are not considered voting interests for purposes of the BEA rules. However, acquisition of a US portfolio company or intermediate fund vehicle by any non-US fund or fund vehicle would trigger the BE-13 filing requirement if the transaction otherwise met the reporting requirements.
- **Required Filings:** The specific Form BE-13 to be filed depends on whether the foreign investment in the US (i) was an acquisition of an existing US entity, (ii) involved the establishment of a new US entity, (iii) resulted in a merger between the foreign parent and a US entity or (iv) results in the US entity expanding its operations to include new facilities. If the cost of the foreign investment was otherwise reportable but did not exceed \$3 million, the US entity must file a claim for exemption.
- **Deadlines:** For reportable transactions occurring between January 1, 2014 and November 26, 2014, the deadline for completing the applicable Form BE-13 was **January 12, 2015**, subject to extensions based on reasonable requests. The BEA has indicated, however, that they will not penalize entities that have missed the deadline and submit surveys after the January deadline. For reportable transactions occurring after **November 26, 2014**, the US entity must file the applicable Form BE-13 within 45 days of the effective date of completing any such transaction. Upon making an initial BE-13 filing, the US entity is required to make quarterly, annual and five-year benchmark filings.

Other BEA Forms and Reporting Requirements

The following table summarizes the other BEA surveys to which certain private equity firms may be subject in addition to the BE-10 and BE-13 surveys. With the exception of the BE-12 survey — which will be conducted next in 2017 — all of the below filings are non-mandatory for a US firm, unless the BEA directly contacts the firm.

Survey	Description	Who Must File
BE-577	Quarterly Survey of US Direct Investment Abroad - Collects data on US persons that own 10% or more of the voting interests of a foreign business enterprise.	Only entities contacted directly by BEA must file.
BE-11	Annual Survey of US Direct Investment Abroad - Collects data on US persons that own 10% or more of the voting interests of a foreign business enterprise.	Only entities contacted directly by BEA must file.
BE-605	Quarterly Survey of Foreign Direct Investment in the US - Collects data on transactions (i) between US affiliates and their respective foreign parent(s) and foreign affiliates and (ii) in which a US business owned 10% or more by a foreign affiliate is established, acquired, liquidated, sold or becomes inactive.	Only entities contacted directly by BEA must file.
BE-15	Annual Survey of Foreign Direct Investment in the US - Collects financial and operating information on US businesses in which foreign persons own at least 10 percent of the voting interests of the US business.	Only entities contacted directly by BEA must file.
BE-12	Benchmark Survey of Foreign Direct Investment in the US - Conducted every five years; collects comprehensive data regarding US entities in which foreign investors hold at least 10% of the voting interests, and where the total revenue, assets or net income of such US entities exceeds \$60 million.	Entities are required to complete the survey regardless of whether or not contacted by the BEA. The next BE-12 survey will be conducted in 2017 .

Conclusion

As US regulatory agencies continue to increase monitoring of cross-border investments, private equity firms and investment funds will need to prepare to report additional information. While penalties may not be enforced in the short term, fund managers should consult with their counsel regarding which reporting requirements may apply to their activities, in order to prepare for tougher enforcement and avoid penalties or even imprisonment.

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