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## U.S. Department of Commerce Filing Requirements for Private Fund Managers

Pursuant to the International Investment and Trade in Services Survey Act, the U.S. Department of Commerce's Bureau of Economic Analysis ("BEA") gathers data on U.S. direct investment abroad, foreign direct investment in the U.S., and U.S. international services transactions.<sup>1</sup> The BEA collects such data through various surveys, including the Annual Survey of U.S. Direct Investment Abroad ("Form BE-11"). As discussed below, U.S. businesses, including private fund managers and their U.S. affiliates, should carefully evaluate whether they may need to file Form BE-11 reports, and they should do so quickly given that the current deadline for filing such Form BE-11 reports is **today, May 31, 2012**, unless an extension is requested and granted.

### Background on the Form BE-11 Report

The Form BE-11 report gathers current economic data on the operations of both the "U.S. Reporter" (as defined below) and its foreign affiliates, including income and balance sheet items, sales or gross operating revenues, number of employees and employee compensation, interest and taxes, expenditures for property, plant, and equipment, research and development expenditures, and U.S. exports and imports of goods. The forms that comprise a Form BE-11 report include: (1) Form BE-11A

(Report for U.S. Reporter); (2) Form BE-11B (Report for Majority-Owned Foreign Affiliate); (3) Form BE-11C (Report for Minority-Owned Foreign Affiliate); (4) Form BE-11D (Report for Established or Acquired Foreign Affiliate); and (5) Form BE-11E (Report for Foreign Affiliates Selected by BEA to Be Reported on this Form in lieu of Form BE-11B).

Each "U.S. Reporter" must file a Form BE-11 report for itself (Form BE-11A) and for each non-exempt foreign affiliate (Form BE-11B, C, D or E). The Form BE-11 report forms, as well as instructions for them, can be accessed at <http://www.bea.gov/surveys/diasurv.htm#be112011>.

### U.S. Persons Who Must File the Form BE-11 Report

The "U.S. Reporter" is the party that must submit the Form BE-11 report. For purposes of the Form BE-11 report, the "U.S. Reporter" is a "U.S. person" that owns or controls, directly or indirectly, at least 10 percent of the voting securities (or equivalent interest) of a foreign business enterprise (a "foreign affiliate").<sup>2</sup> It is important to note that the Form BE-11 makes a specific distinction between a "majority-owned foreign affiliate" and a "minority-owned foreign affiliate." A "majority-owned foreign affiliate" means a "foreign affiliate in which the combined direct and

<sup>1</sup> See 22 U.S.C §§ 3101-3108.

<sup>2</sup> See *BE-11 Instructions* at 5.

indirect ownership interest of all U.S. Reporters of the affiliate exceeds 50 percent.”<sup>3</sup> A “minority-owned foreign affiliate” is defined as a “foreign affiliate in which the combined direct and indirect ownership interest of at least one U.S. Reporter is 10 percent or more, but the combined direct and indirect ownership of all U.S. Reporters of the affiliate is 50 percent or less.”<sup>4</sup>

A “U.S. person” is defined as any “individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization resident in the United States or subject to the jurisdiction of the United States.”<sup>5</sup> If the “U.S. person” is an incorporated business enterprise, the U.S. Reporter is the “fully consolidated U.S. domestic enterprise.”<sup>6</sup> For purposes of the Form BE-11 Report, “fully consolidated U.S. domestic enterprise” is defined as:

1. the U.S. corporation whose voting securities are not owned more than 50 percent by another U.S. corporation; and
2. proceeding down the ownership chain from that U.S. corporation, the U.S. corporation (including Foreign Sales Corporations located in the United States) whose voting securities are more than 50 percent owned by the U.S. corporation above it, excluding foreign branches and all other foreign affiliates.<sup>7</sup>

It should be noted that a “U.S. Reporter” that is not a bank, but owns a majority interest in a U.S. bank, must consolidate its banking activities when filing its Form BE-11 report.

As the discussion above indicates, the definition of “U.S. person” would include, among other things, U.S. private fund managers, their U.S. affiliates, and U.S.-organized feeder funds. Accordingly, any such entity that owns or controls, directly or indirectly, at least 10 percent of the voting

securities (or equivalent interest) of a foreign affiliate, at the end of its most recent fiscal year must file the Form BE-11 for itself and its separately organized foreign affiliate, unless the foreign affiliate is exempt.

### **When a Foreign Affiliate May Be Exempt**

In determining whether a Form BE-11 report for a foreign affiliate must be filed, it is necessary to understand when a foreign affiliate is deemed to be exempt. For purposes of the Form BE-11, a foreign affiliate is exempt if:

1. none of the following exceeded \$60 million for the foreign affiliate’s most recent fiscal year: (a) total assets; (b) sales or gross operating revenues excluding sales taxes; or (c) net income (or loss) after provision for foreign income taxes (each hereinafter referred to as an “Exemption Level Item”); or
2. the U.S. person’s interest in the foreign affiliate was acquired or established in the most recent fiscal year, and none of the affiliate’s Exemption Level Items exceeded \$25 million for the foreign affiliate’s most recent fiscal year.

As indicated above, the \$60 million and \$25 million thresholds (“Reporting Thresholds”) are crucial.

### **Applicability of Form BE-11 Reporting Requirement**

U.S. private fund managers or their U.S. affiliates may be required to report non-U.S. master funds and possibly other non-U.S. funds as foreign affiliates on the Form BE-11, and U.S.-organized feeder funds also may be required to report on ownership of non-U.S. master funds. Whether U.S. private fund managers or U.S.-organized feeder funds are required to report depends upon the responses to the following questions.

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3 *Id.*

4 *Id.*

5 *See id.*

6 *See id.*

7 *Id.*



1. Does the U.S. entity own or control, directly or indirectly, 10 percent or more of a foreign entity's voting securities (or equivalent interests)?
2. Does foreign entity's (a) total assets, (b) sales or gross operating revenues excluding sales taxes, or (c) net income (or loss) after provision for foreign income taxes exceed either of the Reporting Thresholds?

If the answer to both above questions is Yes, then the Form BE-11 must be filed.

### **Penalties for Failing to File Form BE-11 Report**

Significant civil and criminal penalties can be imposed for failing to file a Form BE-11 report. Civil penalties can be as high as \$25,000, and/or injunctive relief commanding the person to comply. Criminal penalties include a fine of not more than \$10,000 and, for individuals, imprisonment for not more than one year, or both. Any officer, director, employee, or agent of any corporation who knowingly participates in such violations, upon conviction, may be punished by a like fine, imprisonment or both.

### **Filing the Form BE-11 Report or an Extension Request**

The deadline for filing the Form BE-11 report is May 31, 2012. The Form BE-11 Report may be filed either electronically through the BEA website: [www.bea.gov/efile](http://www.bea.gov/efile) or by mailing a hard copy to the BEA **by May 31, 2012**. Filers should retain a copy of the submitted Form BE-11 report

for at least three years after the report's original due date.

In the event that additional time is needed to complete the Form BE-11 Report, a U.S. Reporter can file a BE-11 Request for Extension for Filing Form ("Extension Request Form") with the BEA. The Extension Request Form can be accessed at <http://www.bea.gov/surveys/diasurv.htm>. Filers are able to complete the Extension Request Form online and e-mail it directly to the BEA at [be10/11@bea.gov](mailto:be10/11@bea.gov) via the link on the Extension Request Form. Alternatively, filers may download the form and e-mail it to [be10/11@bea.gov](mailto:be10/11@bea.gov) or can return the form to the BEA by fax at 202-606-5312. Such extension requests must be filed by close of business on **May 31, 2012**.

### **Questions or Assistance:**

If you have questions about these filing requirements or if you would like more information, please contact Geoff Goodale (202-469-7763 or [ggoodale@goodwin.com](mailto:ggoodale@goodwin.com)) or Peter Bilfield (203-324-8151 or [pbilfield@goodwin.com](mailto:pbilfield@goodwin.com)).

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