

September 17, 2015

BEA Releases New BE-180 Form and Related Guidance in Advance of Upcoming Deadline

The U.S. Department of Commerce, through the Bureau of Economic Analysis (the “BEA”), requires U.S. financial services providers (including investment advisers, funds and their general partners) that had certain financial services transactions with foreign persons in excess of \$3 million during their 2014 fiscal year to file a report on Form BE-180 (a “BE-180 Filing”). In late August, the BEA released the new BE-180 form and instructions for the 2014 survey, which is due as early as November 1, 2015 (subject to certain extensions). BE-180 is a 5-year benchmark survey. At the time of the prior survey for 2009, a BE-180 Filing was required only upon request by the BEA. Similar to recent changes impacting other BEA surveys, including the BE-10 and BE-13 surveys, the BEA announced in a rule published in the Federal Register earlier this year that, in addition to those contacted by the BEA, any U.S. person that satisfies the reporting threshold (referred to as a “U.S. Reporter”) will be required to make a BE-180 Filing, regardless of whether the BEA has contacted such person. Accordingly, investment advisers and the funds they advise will now be required to make a BE-180 Filing if they meet the reporting thresholds discussed in further detail below.

Reporting Threshold

A U.S. person (including an individual or an entity) is required to make a BE-180 Filing if the U.S. person is (1) a “Financial Services Provider”, which includes, among others, “investment advisors and managers and funds, trusts, and other financial vehicles (including mutual funds, pension funds, real estate investment trusts, investors, stock quotation services, etc.)”¹ and (2) had transactions (either in sales or purchases) directly with “Foreign Persons”² in all “Financial Services” in excess of \$3 million during its 2014 fiscal year.³ In addition, any Financial Services Provider that has received a request for a BE-180 Filing but is below the \$3 million threshold for both sales and purchases of Financial Services is required to make a partial BE-180 Filing. The BEA’s definition of “Financial Services” is very broad and includes sales and purchases in the form of fees, commissions, and other charges for financial management services, brokerage services, private placement services, financial advisory and custody services,⁴ and certain other financial services.⁵ As a result, the definitions of Financial Services Provider and Financial Services contemplate reporting by investment advisers and funds.

¹ A “Financial Services Provider” also includes any U.S. person engaged in the following industries: depository credit intermediation and related activities; non-depository credit intermediation; securities, commodity contracts, and other financial investments and related activities; and insurance carriers and related activities.

² “Foreign Person” is defined as any person (including an individual or an entity) resident outside the United States or subject to the jurisdiction of a country other than the United States.

³ The BEA has indicated that the determination of whether a U.S. person has a BE-180 Filing obligation may be based on the “judgment of knowledgeable persons in a company who can identify reportable transactions on a recall basis, with a reasonable degree of certainty, without conducting a detailed manual records search.”

⁴ The BEA includes “financial advisory services on mergers and acquisitions” in its description of financial advisory and custody services, which may capture services provided to foreign portfolio companies of private funds.

⁵ As the amounts to be reported are limited to “fees, commissions, and other charges” for Financial Services, this would not include the value of any securities purchased or sold in such Financial Services transactions.

A Financial Services Provider will meet the reporting threshold if it had either aggregate sales to or aggregate purchases from Foreign Persons in excess of \$3 million.⁶ Accordingly, a Financial Services Provider is required to complete a BE-180 Filing even if it had only low-value Financial Services transactions with multiple Foreign Persons so long as the aggregate value of such sales or purchases exceeds \$3 million. In determining whether the \$3 million threshold is exceeded, the U.S. Reporter must include in its calculation all Financial Services transactions of the “consolidated U.S. enterprise” of which it is a part (and is permitted, but not required, to file on a consolidated basis).⁷ The form does not provide for any exemptions or exclusions for transactions with affiliates, and transactions should be reported regardless of whether the service was performed in the United States or abroad.

Practical Implications for Asset Managers

The activities of investment advisers and the funds they advise, both private and registered, may constitute reportable Financial Services transactions in several scenarios, including but not limited to the following: (1) a U.S. investment adviser to a non-U.S. fund or separate account has sales of Financial Services when it earns advisory fees from such non-U.S. fund or separate account;⁸ (2) a U.S. general partner (or managing member or similar) to a non-U.S. fund has sales of Financial Services when it earns carried interest or other performance allocations or incentive fees from such non-U.S. fund;⁹ and (3) a U.S. fund has purchases of Financial Services when it owes fees to a non-U.S. investment adviser, custodian, or broker-dealer.

Content of Form BE-180

U.S. Reporters will be required to provide data on total sales and/or purchases of each of the covered types of Financial Services transactions and must disaggregate the totals by country, by relationship to the Foreign Person and by type of Financial Service provided.¹⁰ The BEA reports are kept confidential and used for statistical analysis. The 2014 BE-180 form and related guidance are available [here](#).

Reporting Deadline

While the BEA encourages reporting by October 1, 2015, the BEA has granted automatic extensions (1) to November 1, 2015 for a U.S. Reporter that (a) has received a request for a BE-180 Filing and has a BE-180 identification number below 140012490 or (b) has not received a request and does not have a BE-180 identification number; and (2) to December 1, 2015 for a U.S. Reporter that has received a request for a BE-180 Filing and has a BE-180 identification number above 140012490. U.S. Reporters may request an additional (1) 30 day extension if the U.S. Reporter received a request for the BE-180 survey or (2) 60 day extension if the U.S. Reporter did not receive a request for the BE-180 survey, in each case so long as the extension request is submitted to the BEA prior to November 1, 2015.

⁶ The threshold applies separately to sales and purchases, and the reporting requirement may apply only to sales, only to purchases, or to both. Therefore, when calculating whether the \$3 million threshold has been exceeded, a U.S. Reporter should neither net sales against purchases, nor aggregate sales and purchases.

⁷ Consistent with other BEA forms, a Financial Service Provider’s “consolidated U.S. enterprise” includes any U.S. corporation, proceeding up the Financial Services Provider’s ownership chain, that owns more than 50 percent of the voting securities of the corporation below it, and any U.S. corporation, proceeding down the ownership chain(s) of each of these corporations, whose voting securities are more than 50 percent owned by the U.S. corporation above it. This consolidation applies to both incorporated and unincorporated entities.

⁸ Note that fees charged by a U.S. adviser to a U.S. fund would not need to be reported solely because that U.S. fund has non-U.S. investors unless the fee is charged *directly* to the foreign investor and not to the fund itself.

⁹ The BEA has clarified in an FAQ that profit allocations are reportable because they represent compensation due to fund performance.

¹⁰ If actual figures are not available, the BEA permits U.S. Reporters to supply estimated figures, so long as they are labeled as such.

Consequences for Failure to File

While the BEA has the ability to impose civil and, for willful violations, criminal penalties, the BEA has informally indicated that the most likely response to a missed filing is, in the first instance, notification of failure to file and a request for a filing.

If you have questions regarding the application of these filing requirements, please contact your usual Ropes & Gray advisor.