

US LLC owned by non-US person has US reporting obligation from calendar year 2017

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Introduction

Limited liability companies (LLCs) established under the law of a US state are classified by default as disregarded entities if they have only one owner. As such, these LLCs have generally not been required to file a US tax return or obtain a tax identification number. Beginning with tax year 2017, US domestic LLCs that are wholly owned, directly or indirectly, by one foreign person, are now required to obtain a US tax identification number and file an annual return, on Form 5472, reporting transactions between the LLC and its foreign owner. The LLC is still considered a disregarded entity for US tax purposes, but the information collected from foreign-owned LLCs will be available to the Internal Revenue Service (IRS) as it seeks to satisfy US obligations under its Foreign Account Tax Compliance Act (FATCA) intergovernmental agreements and, potentially, to be considered a Common Reporting Standard participating jurisdiction.

Foreign-owned single-member LLCs

Recently released final regulations treat a US domestic, disregarded entity wholly owned by a foreign person as a domestic corporation separate from its owner for the limited purposes of reporting, record maintenance and associated compliance requirements. A foreign person includes:

- an individual who is not a citizen or income tax resident of the United States;
- any partnership, association, company or corporation that is not created or organised in the United States; and
- a trust that is classified as foreign under either the control test or the court test in Section 7701(a)(31) of the Internal Revenue Code.

Ownership by the non-US person may be direct or indirect. Indirect sole ownership means ownership by one person entirely through one or more entities disregarded as separate from their owners or through trusts that are classified as 'grantor trusts' under the US grantor trust rules, regardless of whether any such disregarded entity or grantor trust is domestic or foreign (for further details please see the [Overview \(May 2014\)](#)).

The result is that the following US LLCs, among others, may be required to file Form 5472:

- an LLC with a single non-US owner, which may be a foreign individual, company, partnership or non-grantor trust;
- an LLC owned by another LLC which is owned by a single non-US owner, in which case both LLCs may have a filing requirement;
- an LLC owned by a grantor trust (whether domestic or foreign), the grantor of which is foreign;

AUTHORS

[Jennie Cherry](#)



[Eric Dorsch](#)



[Rashad Wareh](#)



and

- an LLC owned by a non-US company that has made an election to be disregarded for US income tax purposes and is owned by a single non-US individual, company, partnership or trust.

An LLC that has more than one owner, foreign or otherwise, is not covered by the new regulations. However, if the multi-member LLC has not made an election to be taxed as a corporation, it is classified as a partnership for US income tax purposes. An LLC taxed as a partnership is required to file Form 1065 (US Return of Partnership Income) annually with the IRS, unless the LLC neither receives income nor incurs any expenditures treated as deductions or credits for federal income tax purposes.

Form 5472

Form 5472 must be filed at such time and in such manner as the IRS will prescribe in a revised form and instructions. For US corporations, the existing Form 5472 is due with its income tax return, generally by March 15. The LLC must maintain permanent books of account or records sufficient to establish the accuracy of the return. Penalties for failure to file the required return and failure to maintain records will apply.

The current instructions to Form 5472 specifically provide that the reporting entity is not required to file Form 5472 if it had no reportable transactions with the foreign related party. A revised Form 5472 has not yet been released, but the foreign-owned single-member LLC will likely be required to report identifying information for the LLC and its single owner, including:

- the name, address and tax identification number, if any, of its non-US owner;
- each country in which the owner is tax resident;
- places where the owner conducts its business; and
- the country or countries of organisation, citizenship or incorporation of the owner.

In addition, the LLC will report any sale, assignment, lease, licence, loan advance, contribution or other transfer of any interest in or a right to use any property or money, as well as the performance of any services for the benefit of, or on behalf of, another taxpayer. Contributions to and distributions from the LLC are considered reportable transactions.

Impact on succession planning structures

The new reporting requirement will affect the foreign trust structure often used for succession planning purposes where the matriarch and patriarch are non-US persons but children or grandchildren are US persons. A typical structure involves a non-US settlor who establishes a trust in an offshore jurisdiction (eg, Bermuda or the Bahamas) or under the law of a US state (eg, South Dakota or Delaware) that is classified as a foreign trust for US tax purposes. The trustee then establishes a single-member LLC, which owns an offshore holding company or other non-US investments. Neither the trust nor the LLC need file a US income tax return provided that the investments do not generate US source income during the taxable year.

Under the new reporting requirements, if there is any transaction between the LLC and the trust, the LLC will report on Form 5472 information regarding:

- the trust, in the case of an LLC wholly owned by a foreign non-grantor trust; or
- the foreign grantor of the trust, in the case of an LLC owned by a grantor trust.

The new rules have been made effective to taxable years of entities beginning after December 31 2016. Thus, even if a client decides to liquidate a foreign-owned single-member LLC in 2017, it will be necessary to file Form 5472 for 2017, due March 15 2018. If the existing LLC has no reportable transactions between it and its foreign owner – that is, no dividends or other distributions are made from the LLC to the trust and no further contributions are made to the LLC by the trust in 2017 – then the LLC should not have to file Form 5472 in 2018.

Other reporting still required

The LLC subject to the new Form 5472 reporting requirement will still need to file an annual foreign bank account report (FBAR) if it maintains foreign financial accounts with a maximum aggregate balance of more than \$10,000. Regardless of their US tax status, corporations, partnerships, LLCs and trusts formed or organised under US laws all fall within the definition of a US person required to file an FBAR. This is the case even if the owner of the LLC or a grantor trust is foreign (for further details please see the [Overview \(May 2014\)](#)).

Comment

Data collection continues to be uppermost in the minds of revenue agents worldwide. The IRS commented that these new regulations would primarily affect a small number of foreign-owned domestic entities that do not themselves otherwise have a US return filing requirement and that the requirement to file a return for these entities will not impose a significant burden on them. However, when combined with numerous additional due diligence and reporting obligations being imposed on all entities, just managing compliance for a well-thought-out succession planning structure is becoming increasingly burdensome for family members and their advisers.

For further information on this topic please contact [Jennie Cherry](#), [Eric Dorsch](#) or [Rashad Wareh](#) at Kozusko Harris Duncan by telephone (+1 212 980 0010) or email (jcherry@kozlaw.com, edorsch@kozlaw.com or rwareh@kozlaw.com). The Kozusko Harris Duncan website can be accessed at www.kozlaw.com.

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