



# Completing and filing Form 5472 for foreign-owned US LLC



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## Introduction

Beginning in 2018 a limited liability company (LLC) created under the laws of a US state that is wholly owned by a single non-US person (a foreign-owned LLC) will be required to report transactions with its non-US owner and related parties to the Internal Revenue Service (IRS). The IRS has revised Form 5472 for this purpose. A single-member LLC is a disregarded entity for US tax purposes but, when foreign owned, is treated as a corporation solely for the purposes of the Form 5472 filing obligation. Advisers to families using LLCs in the context of a family succession planning structure should begin reviewing all distributions from and contributions to the foreign-owned LLC as many, if not all, will be reportable. A penalty of \$10,000 will be assessed for failure to file Form 5472 when due and in the manner prescribed.

## Who must file

Every foreign-owned LLC will be required to file Form 5472, unless the LLC had no reportable transactions (as described below) during the reporting year. The *de minimus* exceptions from filing applicable to corporations do not apply to foreign-owned LLCs. The first reporting is required for tax years beginning on or after January 1 2017, and ending on or after December 13 2017. If an LLC filed a certificate of dissolution with the appropriate state before December 13 2017 so that its tax year ended before that date, then the LLC, which is no longer in existence, is not required to file Form 5472 in 2018.

As mentioned above, single-member LLCs are disregarded entities for US tax purposes and, if foreign-owned, are now required to report transactions with that foreign owner and related parties. An LLC with more than one member is treated as a partnership for US tax purposes, unless it has made an election to be treated as a corporation. US partnerships are already required to report information regarding non-US partners and withhold US income tax. Likewise, foreign-owned US corporations have been filing Form 5472 for years. The change to Form 5472 reporting closes the gap on previously uncollected information from foreign-owned LLCs.

## How and when to file

A foreign-owned LLC does not otherwise have a US income tax return filing requirement. Nevertheless, it is required to file a *pro forma* Form 1120 with Form 5472 attached. All forms referred to in this update are available at [www.irs.gov](http://www.irs.gov). The only information to be completed on Form 1120 is the name and address of the foreign-owned LLC, its employer identification number and the date of formation. The legend "Foreign-owned U.S. DE" is to be written across the top of Form 1120. The Form 1120 with Form 5472 attached is to be mailed or faxed to the IRS. Foreign-owned LLCs are not permitted to file electronically.

If the foreign owner has no US return filing obligation, then the IRS regulations provide that the taxable year of the reporting LLC is the calendar year. Form 1120 is due by the 15th day of the fourth month after the end of the reporting entity's tax year – or more simply put, April 15.

### **Obtaining US employer identification number**

In order to file Form 5472, the foreign-owned LLC must apply for a US employer identification number. The application is made on Form SS-4. There are several different ways to submit the form.

#### ***Online***

A foreign-owned LLC, because the office of its registered agent is in the United States, can apply for an employer identification number online, but only if the LLC's responsible party has a valid US taxpayer identification number. The individual identified as the responsible party should have a level of control over, or entitlement to, the funds or assets in the entity that, as a practical matter, enables the individual, directly or indirectly, to control, manage or direct the entity and the disposition of its funds and assets. Usually this responsible party is the manager of the LLC.

#### ***Telephone***

Only applicants that have no legal residence, principal place of business or principal office or agency in the United States or a US possession may apply for an employer identification number via telephone. Therefore, it will likely not be possible to obtain an employer identification number by telephone for any foreign-owned LLC, given that the registered agent is in the United States. The person making the call must be authorised to receive the number and answer questions concerning Form SS-4, which should be completed in advance of the call.

#### ***Fax or mail***

The LLC can receive an employer identification number by fax generally within four business days by completing and faxing Form SS-4 to the IRS using the appropriate fax number. Long distance charges apply and a return fax number must be provided. The applicant must wait four business days, and if the number has not been received by return fax, may then telephone the IRS to obtain the number. Alternatively, the Form SS-4 can be mailed to the IRS and the LLC will receive the employer identification number in approximately four weeks. If the responsible party is a non-US person who does not have and is ineligible to obtain a social security number or individual taxpayer identification number, because he or she is not authorised to work in the US and has no federal tax reporting or filing obligations, this question on the Form SS-4 may be left blank when submitting via fax or mail. Generally, the street address shown on the Form SS-4 will be that of the state registered agent and the mailing address will be the address where the member or manager of the LLC receives correspondence.

### **Information to be reported**

The Form 5472 can be difficult to interpret given the continued references to corporation. The instructions to the form should be consulted in conjunction with completing the form.

#### ***Part I – information identifying LLC***

All reporting LLCs must complete Part I to report the name, address and employer identification number of the LLC. The address may be a foreign address and should be the same address used on Form SS-4. The address should be one where the member or manager of the LLC will be sure to receive written notifications from the IRS. The LLC must also provide a description of its principal business activity and corresponding code, which can be found in the instructions to Form 1120. Generally, a foreign-owned LLC that holds passive investment assets will use the 'offices of other holding companies'

description and code. Line 3 of Part I will be checked to indicate that the reporting LLC is a foreign-owned domestic disregarded entity. Lines 1f to 1l of Part I may not be relevant to foreign-owned LLCs used in family succession planning structures, but care should be taken to review the instructions and complete any lines that apply, especially if the LLC has had transactions with more than one related party.

### ***Part II – information identifying foreign owner***

Foreign-owned LLCs are also required to complete Part II, which references 25% foreign shareholders, with the name and address of the LLC's single foreign owner. This foreign owner may be:

- an individual who is not a citizen or resident of the United States;
- any partnership, association, company or corporation that is not created or organised in the United States; or
- any foreign estate or foreign trust (for further details on when a trust is considered foreign for US tax purposes please see the Overview (April 2017)).

If a foreign-owned LLC has a foreign disregarded entity as its direct owner, the LLC must report that foreign disregarded entity as its direct owner. It is unnecessary to include a US tax identification number for the foreign owner if the owner does not have one. However, the form must include the owner's foreign tax identification number. If the owner, in fact, does not have a foreign tax identification number, then 'none' or 'n/a' should be noted on Line 1(b)(3). Such notation should not be used merely because the return preparer does not know the foreign tax identification number. Given that the owner's address is reported, the IRS is well aware of what countries use tax identification numbers and their format.

When no US identification number is entered for the foreign owner, Part II requires a reference identification number. This is a number established by the reporting LLC and does not require application to the IRS. The reference identification number is limited to 50 characters that may be alphabetical, numeric or any combination of the two, but cannot include special characters or spaces. The same reference identification number must be used consistently from tax year to tax year with respect to the foreign owner.

### ***Part III – information identifying related party***

Foreign-owned LLCs must also complete Part III. Part III refers to the related party with which the LLC had reportable transactions during the tax year. In a simple situation, this related party will be the foreign owner. However, the definition of 'related party' is broad and includes IRS constructive ownership and attribution rules. For example, in the case of a single member LLC owned by a foreign company, a related party may include another company in the same controlled group. If owned by a foreign trust, a related party may include the trust's settlor and beneficiary. If owned by a non-US individual, a related party may include members of that individual's family.

The foreign-owned LLC is to report in Part III the name and address of the related party (domestic or foreign) with which the LLC had reportable transactions during the tax year, including the foreign owner already reported in Part II. Again, a reference identification number is required for the related party when no US tax identification number is reported. If the related party is an individual, references to business activity are not applicable. Part III also requires the name of the country under whose laws the related party files an income tax return as a resident. A separate Form 5472 must be filed for each foreign or domestic related party with which the reporting LLC had a reportable transaction.

### ***Parts IV, V and VI – reportable transactions***

For LLCs used within family succession planning structures, most of the transactions enumerated in Part IV of Form 5472 are not the types of transaction that occur between a foreign-owned LLC and its non-US owner (which may be a foreign company, foreign trust or non-US individual), with the exception of loans and interest paid or received on such borrowings. Nevertheless, the foreign-owned LLC must check a box in Part V if it had any transactions with its owner or other related party that are not listed in Part IV. Reportable transactions in the context of a foreign-owned LLC have been expanded to include amounts paid or received in connection with the formation, dissolution, acquisition and disposition of the LLC, including contributions to and distributions from the LLC. Such transactions are to be described on an attached statement. Part VI asks whether any non-monetary or less-than-full consideration transactions occurred between the LLC and its foreign owner and, if so, those are detailed on an attached statement.

In addition to transactions with the LLC's non-US owner, the LLC must also report transactions with a related party. As mentioned above, the definition of 'related party' is very broad and includes IRS constructive ownership and attribution rules. For example, a single-member LLC owned by a foreign company may be required to report a transaction with another foreign company in the same controlled group. If owned by a foreign trust, the LLC may have to report a transaction with the trust's settlor or beneficiary. If owned by a non-US individual, the LLC may need to report transactions with members of that individual's family. There are many other possible related parties under the very complex constructive ownership and attribution rules. The IRS final regulations include examples involving foreign-owned LLCs that form another LLC that does not elect to be treated as a corporation, in which case all transactions involving the other LLC are also reportable. Advisers to families using LLCs in the context of a family succession planning structure should review all distributions from and contributions to the foreign-owned LLC as many, if not all, will be reportable.

### **Part VII – additional information**

All reporting entities must complete the questions in Part VII, the answers to which will generally be 'no' for LLCs used within family succession planning structures.

### **Record maintenance requirements**

The LLC must keep in its permanent books information or records that might be relevant to determine the correct treatment of transactions with related parties.

### **Penalties**

As noted above, foreign-owned LLCs generally do not have US tax or reporting obligations. This new Form 5472 reporting requirement may be the first time that the manager of the LLC has had to tackle IRS forms. The world is aware that the IRS is overwhelmed with recent US tax law changes. It is unclear how the IRS will detect the absence of a Form 5472 filing by a foreign-owned LLC not conducting a business in the United States. Nevertheless, the LLC is governed by the law of a US state and must comply with US law.

A penalty of \$10,000 will be assessed for failure to file Form 5472 when due and in the manner prescribed. The penalty also applies for failure to maintain required books and records. Filing a substantially incomplete Form 5472 constitutes a failure to file Form 5472. Criminal penalties may also apply for failure to submit information or for filing false or fraudulent information.

### **Comment**

April 15 is right around the corner. Advisers to families with succession planning structures that use US foreign-owned LLCs should familiarise themselves with Form 5472 and its instructions and determine whether the LLC has had any reportable transactions with its sole non-US owner or a related party. If the answer is affirmative, an employer identification number for the LLC should be applied for as soon as possible.

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

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