

SINGLE-MEMBER FOREIGN-OWNED LLC REPORTING OBLIGATIONS

Summary

The United States Treasury Department and Internal Revenue Service (IRS) issued final regulations in December of 2016 that now subject foreign-owned single-member limited liability companies (LLCs) that are disregarded for U.S. income tax purposes (i.e., LLCs that have not elected to be classified as corporations) to the informational reporting requirements established under Internal Revenue Code (IRC) Section 6038A for 25% foreign-owned United States corporations. The new regulations now generally require foreign-owned single-member LLCs to obtain a U.S. employer identification number (EIN) and annually file a pro forma Form 1120 corporate income tax return together with Form 5472 identifying each 25% or greater direct and ultimate indirect foreign owner. The first filings pursuant to the new regulations will generally be due as early as April 17, 2018, covering tax years starting in 2017. The IRS will assess a penalty of \$10,000 for each year the new reporting requirement is not timely satisfied.

Background

Prior to the enactment of the new regulations, single-member foreign-owned LLCs that were disregarded for tax purposes were generally not required to file tax returns or make informational filings with the IRS except with respect to their interests in non-U.S. financial accounts. Unlike with U.S. partnerships and corporations, these LLCs were also generally not subject to federal record-keeping requirements or obligated to disclose their beneficial ownership to the IRS. Non-U.S. persons have commonly used LLCs for various types of activities and investments, including for the acquisition of real estate and as holding vehicles for various types of U.S. and non-U.S. investments.

The new regulations come in the context of the global push toward greater tax transparency and exchange of information through initiatives such as the Foreign Account Tax Compliance Act (FATCA) and Common Reporting Standard (CRS). They seek to address a perceived deficiency in the United States' compliance with international standards of transparency that permitted foreign persons in certain states such as Delaware to organize an LLC without ever having to disclose to a government authority the beneficial owner of the LLC.

The new regulations subject foreign-owned single-member LLCs that are disregarded for U.S. tax purposes to the Form 1120 and Form 5472 informational reporting requirements for each year starting in 2017 in which an LLC has a "reportable transaction". The definition of reportable transaction is very broad and appears intended to include any type of activity between a direct or indirect foreign owner and the LLC. Reportable transactions include:

- Capital contributions and capital reductions
- The use of LLC property (e.g., real estate) by a direct or indirect foreign owner or related party
- Payments by an LLC to or for the benefit of a direct or indirect foreign owner or related party
- Payments by a direct or indirect foreign owner or related party for the benefit of an LLC
- Loans and/or payments of interest between an LLC and a direct or indirect foreign owner or related party

Importantly, the new regulations do not establish any de minimis thresholds. For example, even \$1 contributed by a foreign owner to a single-member disregarded LLC would be sufficient to trigger the new reporting requirement.

Next Steps

We recommend that non-U.S. owners of single-member disregarded LLCs prepare for the new reporting requirement by taking immediate steps to determine and comply with their reporting obligations. Grant, Herrmann, Schwartz & Klinger is actively assisting clients to comply with the new reporting obligations and would be pleased to assist.

For more information, please contact:

David M. Sahargun
(212) 682-1800 ext. 321
dsahargun@ghsklaw.com