The SelectUSA Investor Guide

May 2021

Introduction

As the U.S. federal-level program dedicated to facilitating and promoting high-impact business investment into the United States, SelectUSA is pleased to welcome you to the Investor Guide. This is intended to be a first-step resource for companies interested in making business investments in the United States.

There are many factors to consider when investing in the United States, and we hope this guide will help answer at least a few of your initial questions on some of the most common topics we address in our day-to-day work at SelectUSA. To provide guidance on these topics, qualified service providers who regularly work with investors have drafted the following chapters of this guide.

Important considerations while reading this guide:

The size of the United States

The United States is made up of 50 states, five territories, and the District of Columbia – each with their own unique opportunities for investors. While reading this guide, it is important to appreciate the diverse array of potential investment locations while recognizing how that variety may differently impact each state and city. While this may seem daunting, it means that the right U.S. investment landscape is there for your business.

Our nation is incredibly diverse, with the world's most attractive consumer market, a thriving culture of innovation, and one of the most productive workforces in the world. Companies of all sizes – from start-ups to multinationals – find the ideas, resources, and market they need to be competitive. As a result, the United States is the world's number-one destination for foreign direct investment, and we hope you will select it as the destination for your next investment as well.

Levels of governance: federal, state, and local

The United States is governed at different levels, from the federal government down to the state, county, and local levels. Many of the topics discussed in this guide are affected by national laws and by regulations at the state, county, or city level. It is important to remember that much of the information in this guide is presented at the national level, but that specific details may change based on location – especially for some of the most granular subjects that govern your day-to-day business.

This is just one of the reasons why we suggest that any company engage legal counsel and conduct further research, as applicable, to ensure compliance with applicable federal and state regulations and to optimize its business operations in the United States. These topics are often very technical and challenging, but there are many qualified professionals who can help your business make the right decisions.

SelectUSA is here to help you!

This guide is intended as a starting point for your business investment in the United States, and we expect that you will have questions remaining after you finish reading the guide. SelectUSA is happy to help you continue to pursue your investment with our variety of free services for firms, which include:

- Information on the competitive and regulatory landscape in the United States, industry and workforce data, and how to establish and operate a business in the United States.
- Information on federal business incentives, grants, loans, and other programs.
- Introductions to economic development organizations.
- Ombudsman services to help investors address issues involving federal rules, regulations, programs, or activities related to existing, pending, and potential investments.

In addition, our website, SelectUSA.gov, provides a wealth of information on our services, as well as other information related to foreign direct investment in the United States. It also contains contact information so we can discuss how we can best help you!

We hope this guide will be a useful first step to explore business investment in the United States.

Acronym Guide

A	
ACA	Affordable Care Act
ALEC	American Legislative Council
AOS	Adjustment of Status
APM	Alternative Payment Method
B	
BACS	Bankers Automated Clearing Services
BIS	Bureau of Industry and Security
BLS	Bureau of Labor Statistics
BPT	Branch Profits Tax
C	
CBP	U.S. Customs and Border Protection
CDD	Customer Due Diligence Requirements for Financial Institutions Rule
CFIUS	Committee on Foreign Investment in the United States
D	
DBA	“Doing Business As" name
DFC	U.S. International Development Finance Corporation
DMCA	Digital Millennium Copyright Act
DOC	U.S. Department of Commerce
DOD	U.S. Department of Defense
DOL	U.S. Department of Labor
DOT	U.S. Department of Transportation
DTSA	Defend Trade Secrets Act
E	
ECI	Effectively Connected Income
EDA	Economic Development Administration
EDO	Economic Development Organization
EEA	Economic Espionage Act
EEOC	Equal Employment Opportunity Commission
EIA	Energy Information Administration
ESTA	Electronic System for Travel Authorization
ETCA	Export Trade Company Act
F	
FAA	Federal Aviation Administration
FDAP	Fixed, Determinable, Annual or Periodic income
FDI	Foreign Direct Investment
FDIC	U.S. Federal Deposit Insurance Corporation
FEIN	Federal Employer Identification Number
FFMLA	Federal Family Medical Leave Act
FinCEN	U.S. Financial Crimes Enforcement Network
FIRRMA	Foreign Investment Risk Review Modernization Act
G	
GINA	Genetic Information Nondiscrimination Act
GSA	General Services Administration
H	
HIPAA	Health Insurance Portability and Accountability Act
I	
IP	Intellectual Property
IPO	Initial Public Offering
IRC	Internal Revenue Code
ITU	"Intention to Use" application
L	
LCA	Labor Condition Application
LLC	Limited Liability Company
LOA	Leave of Absence
LPR	Lawful Permanent Resident
M	
M&A	Mergers and Acquisitions
MSA	Metropolitan Statistical Area
N	
NAFTA	North American Free Trade Agreement
NRC	U.S. Nuclear Regulatory Commission
NYSE	New York Stock Exchange

O	
OCCIC	Office of the Chief Counsel for International Commerce
OSP	Online Service Provider
P	
PaaS	Payment-as-a-Service
PE	Permanent Establishment
PERM	Program Electronic Review Management
POE	Port of Entry
R	
R&D	Research and Development
S	
SEC	U.S. Securities and Exchange Commission
SRP	Standard Review Plan
STEM	Science, Technology, Engineering, and Mathematics fields

T	
TIF	Tax Increment Financing
U	
USCIS	U.S. Citizenship and Immigration Services
USD	U.S. Dollars
USMCA	Agreement Between the United States, Canada, and Mexico
USPTO	U.S. Patent and Trademark Office
UTSA	Uniform Trade Secrets Act
V	
VAT	Value-Added Tax
VWP	Visa Waiver Program

Table of Contents

SelectUSA is here to help guide you whenever you are ready.

Overall Investment Checklist

Key Considerations for Foreign Investors in the United States

Robert Calafell, National Credits & Incentives Leader

Matt Dollard, Global Expansion Advisory Leader

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The United States business market is competitive. It generally allows for a relatively short period to establish new business operations. However, it is important to be mindful of the regulatory environment when setting up a company in the United States. This checklist is designed to provide an efficient and concise summary of the key issues and considerations when investing in the United States. Your U.S. advisors should be able to elaborate on many of the issues listed below.

Key Questions for Establishing Your Business in the United States

What is your strategy?

Because the United States market is large, doing your due diligence before entering will significantly enhance your success. The temptation for many businesses is to execute first, then plan later. Instead, you should, as the saying goes, plan your work, then work your plan. In other words, start by creating a plan that includes input from a steering team of leaders from across your organization. Set to deliver that plan but remain open-minded and flexible about new opportunities. The ability to adapt to changing or unforeseen circumstances will help your business prosper.

What are your goals?

Leading practices of successful United States market entrants demand you begin by defining your business goals and aspirations. Specifically, what financial and non-financial objectives do you care about? What do you aim to become to your customers? What do you want your brand to represent? What type of relationships do you want with suppliers or partners? What do you want the new venture to mean to your employees? Writing down brief, specific, measurable goals around these topics builds alignment and consensus among the team, allowing them to communicate clear intentions throughout your organization.

Where will you focus?

Most businesses are unable to master the enormous, complex U.S. market within their first year. Therefore, it is crucial to prioritize where the business spends its precious time and resources. Where are your most profitable current or future customers going to come from? Which markets represent the greatest opportunity? Where will you segment by customer, geography, product, or channel? Define this with specificity; do your research and put realistic figures to it; and then allocate the vast majority of your resources to the top tier of opportunities.

How will your product or service succeed?

Taking your product or service to a new market requires you to be an open-minded skeptic about its prospects in a new country. What is your unique selling proposition? Will you compete on speed, agility, service, cost, quality, or innovation? Have you talked to your current and future customers to understand what they like and do not like about your product or service? What sources of defensible advantages do you have? Will you need partnerships with other businesses to succeed? What is your target business model, and should it differ from your home market, or be localized in some way to succeed? Answering these questions informs how best to organize your new business operations.

How will you configure business operations to meet your goals?

Once you have decided what your business must look like, evaluate the capabilities it must have to meet the goals that your steering team developed. If you sell products, where do you need to transform or develop your supply networks? What technological systems must be put in place? What type of skill sets will you need? How will you attract, hire, and retain the talent to grow your business? What must you have in place to meet customer expectations? Getting to these answers is iterative and is informed by the aforementioned work of goal setting, determining where you will establish, and what and how you will offer your product or service.

What is your plan?

In your plan, identify key work streams, break them down into tasks, set start and end dates, assign owners, and do research to identify the requisite budget. Make a business case that shows initial cost, payback period, return on investment, and cash flow over time. Evaluate if you have the right people on your team and if they have the bandwidth to execute; then build a hiring strategy into your plan. Your strategic execution plan does not assume you have learned everything you need to know during your earlier discovery work. Instead, your plan is an iterative set of activities that builds your knowledge, which, in turn, illuminates what actions you should take.

Take the time to develop your strategy before you begin the investor checklist.

Key Considerations for Investing in the United States

Investment Planning

Proper planning is critical to the successful establishment of business operations in the United States. This can include market and customer analysis, trade and tariff issues, as well as development of expansion and growth financial models and projections. The early inclusion of advisors can expedite and streamline the expansion.

Your U.S. professional services team can include:

- An international tax professional for the most effective structure for the foreign parent company/owners
- A U.S. tax professional to analyze U.S. federal and state tax issues
- A corporate lawyer to incorporate the entity and draft legal contracts and agreements
- An insurance professional to obtain business liability and workers' compensation coverage
- A banker for financing and banking needs
- A trade and tariff advisor
- A location selection consultant
- A real estate professional
- A visa attorney

Investment Strategy Development

Developing a data-driven strategy that aligns with the needs of the business and company stakeholders – and is adaptable to change as the business grows – can focus activity toward agreed-upon benchmarks, targets, and results. It is also important that the top tier of the organization be responsible for setting these strategies. Determine the key questions that must be answered and tactics that must be developed. Consider hiring advisors to conduct rapid research to develop the strategy. An efficient strategic development process should not require more than eight to 12 weeks for most startup projects.

Site Selection

Location will affect many components of your business, not to mention its overall success. Choosing where to establish should be a multi-faceted process. Consider the following steps and questions:

- **Goal setting:** What factors drive your company's success? Apply those you laid out in the planning stage. Consider how important it is for you to be close to your customers.

- **Labor analysis:** How important is gaining access to specific skill sets (labor and talent), and what is the competition, cost, and availability of the required skill sets?
- **Supply chain analysis:** How far can you be from your sources of supply?
- **Location cost analysis:** Narrow a preliminary list to a smaller one and study the best options in further detail. Build a business case to evaluate the cost models utilizing the data you have collected on multiple sites, and weigh the financial and non-financial factors.
- **Credits and incentives**: Evaluate credits and incentives of your investment options. Build these into your business and cost model.
- **Site visits:** Visit a few location options for a first-person analysis of the area and space.

Tax and Entity Planning

Determine the type of legal entity best suited to your unique situation, and determine the date of your accounting year-end.

> **Note:** A business corporation is the most common entity type for foreign investors, but other possibilities exist, such as limited liability companies, partnerships, and unincorporated branches. The selection of entity type and the accounting year-end should be made with the advice of your U.S. tax accountant and corporate lawyer, and as well as your home country advisors.

Select the jurisdiction where you will establish your business entity. A company may register in any state.

> **Note:** Your business entity will be governed by the laws of the state where it is established. Choice of jurisdiction should be made with the advice of your tax professional and corporate lawyer.

Submit paperwork to establish your legal entity. Use an expedited service if needed.

> **Note:** You may pay filing fees and franchise taxes as applicable in the state of registration. These may often total more than $500. You may also need to name or appoint a registered agent located in the state in which the entity is formed.

- Capitalize the new entity. State law determines the minimum paid-in capital requirement. A common minimum is $1,000.
- Register with the Internal Revenue Service (IRS) for a Federal Employer Identification Number (FEIN).
- File with the state government for a certificate of assumed name or doing business as (DBA) name, if needed.
- Obtain any appropriate state tax and/or local identification numbers.

Discuss federal, state, and local tax issues with your advisor.

- Prepare for U.S. income tax compliance. Operations will likely be subject to U.S. income tax. Withholding requirements may apply to payments to the foreign parent.
- Assess whether the foreign parent company has had a U.S. income tax presence ("permanent establishment" in the United States) and if there may be delinquent U.S. tax and/or U.S. tax reporting that need to be addressed.
- Consider a capital investment strategy.
- Review anticipated intercompany transactions to determine potential withholding tax and transfer pricing considerations.
- Identify state and local credits and incentives that may be available.

Plan for state and local tax compliance.

Note: Do not overlook state and local taxes. There are important, complex, and significant variations between each jurisdiction. State and local taxes generally are not covered under international tax treaties. Common state and local taxes include property tax, sales/use tax, payroll taxes, and income tax.

- Prepare for employment taxes and contributions. You need to determine the cost and impact of employment taxes and contributions required by state, local and federal law.

Human Resource Planning

Employers must comply with state and federal laws and regulations controlling the hiring, treatment, compensation, and termination of employees. The following considerations and steps should help you ensure compliance and a productive workforce.

Social Security in the United States does not provide health or similar benefits to employees. Instead, it is a retirement income and health benefits program for the elderly and disabled. It is funded by mandatory employer and employee contributions.

Consulting with your professional services team will help you understand the potential impact for your organization of the Affordable Care Act (ACA), the comprehensive health care reform law that passed in 2010. Understand the necessary proactive steps to comply with ACA regulations. Also, ensure proper visas are secured for non-U.S. employees. Be sure to address the family needs of those employees.

Accounting and Financial Reporting

Select an accounting system or provider that is scalable and can grow with your business. The utilization of virtual solutions can be an economical choice for many.

- Select an accounting system and outsource to a provider, if needed.
- Set up your accounting system and financial reporting.
- Address banking, Bankers Automated Clearing Services (BACS), and credit card setup.
- Develop invoicing and bill-pay processing procedures.

Determine the nature and frequency of financial reporting to the parent company, including monthly close and reconciliation processes. (**Note:** There is no mandatory chart of accounts in the United States.)

Determine whether the parent company needs an audit or other attest procedures in the United States. (**Note:** There is no statutory audit requirement for private companies.)

Facility Considerations

Work with identified real estate and facility providers to secure needed space. Utilization of a shared space, such as a co-working location, is not an uncommon solution for initial operations. As operations grow, a lease or more permanent location can be secured.

- Evaluate facility options in conjunction with your real estate advisor.
- Apply for required state or local business licenses or permits.
- Consult with an insurance advisor regarding any potential employers' liability insurance that may be required.
- Determine the technology and IT needs for the location once acquired.

Key Checklist for Foreign Investment in the United States

Investment Planning	Notes
Create business and expansion strategic plan	
Select advisors	
Analyze tariff issues	
Conduct tax analysis	
Develop implementation plan	

Expansion Strategy Development	Notes
Analyze location, labor, and site selection analysis	
Evaluate tax credits, incentives, and grants	
Conduct operational analysis	

Tax and Entity Planning	Notes
Determine entity type and structure	
Determine jurisdiction (state) location	
Obtain FEIN and state tax ID – tax registration	
Register with the Secretary of State	
Complete federal and international tax planning	
Complete state and local tax planning	
Calculate employment tax and withholdings	

Human Resources Planning	Notes
Review social security and other employee benefits	
Assess Affordable Care Act and employers' liability	
Secure visas for non-U.S. employees	

Accounting and Financial Reporting	Notes
Select accounting software/provider	
Determine accounting and reporting procedures	
Determine financial audit requirements	

Facility Considerations	Notes
Secure real estate	
Obtain required permits / licenses	
Establish technology / IT needs	

About RSM

RSM's foreign direct investment (FDI) team helps bring your worlds together via our bicultural, bi-technical professionals who are experienced advising foreign-owned companies understand conducting business in the U.S.

RSM advises companies developing operations in the United States, providing informed multidisciplinary guidance to FDIs investing and building operations in new markets, including:

- Planning needs
- Ongoing operations and exit needs
- Remote selling needs
- Initial entry needs
- Navigating and negotiating local and state credits and incentives
- Maximizing complex international for tax and cash flow efficiencies, as well as, domestic tax structuring and compliance
- Outsourcing services including global finance, accounting, and reporting functions

When information about the United States is critical to your success, RSM FDI team possess the extensive local knowledge and experience to be your guide. RSM professionals leverage their multilingual language skills, and business and cultural understanding to provide audit, tax and consulting services to middle market companies focused on international growth and expansion. Learn more by visiting rsmus.com/international.

Disclaimer

This chapter was prepared by Robert Calafell, Matt Dollard, and Goran Lukic with RSM US LLP. Views expressed in this chapter are the authors' own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

Immigration

Section One

Visa Overview

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SELECTUSA

Section Two

U.S. Immigration Pathways: Which is Right for Your Investment Project?

Andrew Greenfield, Partner

FRAGOMEN

Section One: Visa Overview

Most foreign citizens need to obtain a visa in order to visit or work in the United States. The U.S. Department of State, in conjunction with the Department of Homeland Security, oversees the U.S. visa process. The purpose of your intended travel and other facts will determine what type of visa is required under U.S. immigration law. Below is a description of the visa types available for business and employment purposes. For information on the U.S. visa process, including updates to visa policy, please refer to the Department of State's travel website.

A visa does not guarantee entry into the United States, but allows a foreign citizen coming from abroad to travel to a United States port of entry (generally an airport or land border) and request permission to enter the United States. The Department of Homeland Security, U.S. Customs and Border Protection (CBP) officials have authority to permit or deny admission to the United States, as well as determine how long a traveler may stay. For more information about admission to the United States, please refer to the CBP website.

Temporary Business Visitor Visas

The **B-1 visa** is generally for foreign nationals who wish to consult with business associates, negotiate a contract, settle an estate, or attend an educational, professional, or business convention or conference. For more information on the B-1 visa and the application process, please visit the Department of State's travel website.

Temporary Worker Visas (Nonimmigrant)

E-2: Treaty Investors

The **E-2 visa** is for foreign nationals who have invested or are actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States and are seeking to enter the United States solely to develop and direct the investment enterprise. This visa is available to citizens of all countries that maintain the relevant treaty with the United States or have been accorded such status by the enactment of legislation. Additional information on the E-2 visa can be found on the U.S. Citizenship and Immigration Services (USCIS) website.

L-1A and L-1B: Intracompany Transferees

The **L visa** category is a temporary work visa for employees transferred from abroad to a branch, parent, affiliate, or subsidiary in the United States. The **L-1A** visa is for intracompany transferees who will work in a managerial or executive position in the United States. The **L-1B** visa is for intracompany transferees who will work in a position that requires specialized knowledge in the United States. Additional details on the requirements for L-1A and L-1B visas as well as information on blanket petitions may be found on the USCIS website.

H-1B: Specialty Occupations

The **H-1B visa for specialty occupations** applies to applicants who may perform the services of a specialty occupation. Their position is considered a specialty occupation when it meets at least one of the following criteria:

1. A position that requires a minimum of a bachelor's degree or equivalent degree;
2. The degree requirement for the job is common to the industry or the job is so complex that it can be performed only by an individual with a degree;
3. The employer requires a degree or equivalent for the position; or
4. The nature of the duties for the position are so specialized or complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree.

The holder of an H-1B is permitted to work within the United States for a maximum of three years, with a possible extension of up to six years. Spouses and children (unmarried and under 21 years old) may be eligible to accompany the H-1B holder if they are found eligible for an H-4 visa.

Each fiscal year, the United States grants a maximum of 65,000 H-1B visas. However, applicants employed at an institution of higher education, a nonprofit research organization, or a government research organization are not subject to this limit. Additionally, the first 20,000 petitions filed on behalf of beneficiaries with a master's degree are exempt from this limit.

For additional details on the application process of the H-1B visa, please visit the USCIS H-1B webpage.

O-1: Individuals with Extraordinary Ability or Achievement

The **O-1** is a temporary work visa for individuals who possess an extraordinary ability. The **O-1A** is for individuals with extraordinary ability in the sciences, education, business, or athletics. The **O-1B** is for individuals with extraordinary ability in the arts, motion picture, or television industries. Under an O visa, the applicant may reside in the United States for a maximum of three years, with an opportunity to extend one additional year.

To be eligible for an O-1 visa, the applicant must be coming to the United States on a temporary basis and must demonstrate their extraordinary ability through sustained national or international acclaim. More specifically, for the fields of science, education, business, and athletics, the applicant must show that they have a level of expertise indicating that they are part of a small percentage who has risen to the very top of the field of endeavor. In the arts, motion picture, and TV industries, the applicant must demonstrate distinction in their field. Distinction means a high level of achievement in the field of the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The **O-2 visa** is available for individuals who will accompany O-1 visa holders in order to assist them in their work. The O-2 worker must have critical skills and experience with the O-1 carrier that cannot be readily performed by a U.S. worker. Additionally, he or she must be petitioned for in conjunction with the O-1 alien to whom he or she provides support and is not entitled to work separate and apart from the O-1 alien. The **O-3 visa** is available for individuals who are the spouse or children of carriers of the O-1 or O-2 visas.

For more information on the O visa category, please visit the USCIS webpage on O visas.

Permanent Worker Visas (Employment-Based Immigration)

The **EB visa** category is for employment-based immigration. The United States issues approximately 140,000 EB visas each year, split into five different types. The EB-1 visa is for applicants who either possess an extraordinary ability, are an outstanding professor or researcher, or are a multinational executive. The EB-2 visa is for applicants who possess an advanced degree or its equivalent or who possess an exceptional ability. The EB-3 visa is designated for applicants who are skilled workers or professionals. The EB-4 is for specified sets of immigrants, including religious workers, Afghan and Iraqi translators, broadcasters, and others. The EB-5 visa is reserved for candidates who intend on investing a minimum amount of capital that will create a minimum number of jobs in the United States.

For further information on any employment-based visa programs, including additional requirements, stipulations for spouses and children, or necessary forms, please visit the USCIS webpage for EB visas.

About SelectUSA

SelectUSA is a U.S. government-wide program housed in the International Trade Administration at the United States Department of Commerce. Our mission is to facilitate job-creating business investment into the United States and raise awareness of the critical role that economic development plays in the U.S. economy.

Disclaimer

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Section Two: U.S. Immigration Pathways: Which One is Right for Your Investment Project?

In an environment of fluid markets and changing policies, understanding the immigration options available to investors and their workforces is an essential – but sometimes overlooked – aspect of investing in the United States. Investors need to make sure that their employees have the correct U.S. visa(s) and an immigration advisor to ensure the visas are secured as seamlessly as possible. This chapter details the immigration options available to business investors and their prospective U.S. employees, including information on visa requirements, timeframes, and considerations for families.

The table at the end of this chapter summarizes key aspects of each of the visa categories discussed and includes additional hyperlinks to relevant government websites.

Temporary Visitors

The **B-1** (business visitor) visa allows individuals to enter the United States temporarily to conduct certain types of business activities on behalf of a foreign entity or investor. Under a B-1 visa, the individual may establish an investment and plan for relocation, including incorporating a business, meeting with business and financial advisors and contracting for their services, opening accounts, securing premises, and searching for housing and schools.

The B-1 visa does not, however, permit employment on behalf of a U.S. business. Thus, if the foreign investor wants to direct, manage, or perform services in the United States for the new U.S. business, then he or she must first obtain a U.S. work permit. This is true even if the investor will be paid for his services by a foreign company.

Once obtained, the B-1 visa will be valid for as little as one month to as long as 10 years depending on the nationality of the visa holder. Some B-1 visas may be used for only one entry into the United States while others may be used for multiple entries, again based on nationality. Officers at the U.S. border decide how long a business visitor may stay for each visit. The officer may grant a stay for the time necessary to conduct the business, but not more than six months. If the business visitor requires additional time in the United States to complete his or her business activities, then it is possible to request an extension of stay from the government, but extension requests will only be granted if the government is convinced that the visitor will not engage in unauthorized employment.

An alternative to the B-1 visa is the **Visa Waiver Program (VWP)**, under which citizens of designated countries can apply to enter the United States as business visitors for 90 days or less without the need to obtain a visa from a U.S. consulate. VWP travelers are required to obtain an online pre-approval from the Department of Homeland Security's Electronic System for Travel Authorization (ESTA) at least 72 hours before departing for the United States. Those who enter the United States under the VWP may only engage in activities that are permissible for those who enter with a B-1 visa. The law does not permit VWP travelers to extend their stay beyond 90 days.

Family members of the investor may also apply for B-1 visas or travel under the VWP, provided they, like the investor, will not be employed in the United States and intend to return to their home country after a temporary visit. The B-1 visa and VWP may not be used for the purpose of attending school in the United States.

Treaty Traders and Investors

The **E-1** (Treaty Trader) and **E-2** (Treaty Investor) visa categories allow individuals to enter the United States to work for a U.S. business that is majority owned by citizens of a country with which the United States has a commercial treaty. The E visa applicant must be a citizen of the treaty country who will direct and manage the U.S. business or provide essential skills. Generally, "E-1 treaties" require the U.S. business to engage in substantial trade with the other treaty signatory. "E-2 treaties" require a substantial investment in the U.S. business. The United States has treaty relationships with many major economies. There is no such treaty with India or China.

Qualifying U.S. businesses must apply for and be deemed eligible by a U.S. consulate in order to support E visa applications. This process can be complex. Once the business is deemed eligible, qualified citizens of the treaty country may apply for E visas at a U.S. consulate. These may be the principal investor(s) in the U.S. business or other citizens of the treaty country whose skills and experience are required by the U.S. business.

There is no maximum number of years an individual may be employed in the United States as an E treaty trader or investor, so long as they continue to provide management or essential skills services to the U.S. treaty business and the business remains at least 50 percent owned by citizens of the treaty country. Spouses and unmarried children under age 21 may accompany the principal E visa holder and attend school. Spouses of principal E visa holders can apply for authorization to work in the United States for any employer without the need for separate sponsorship.

Note: there is no requirement that the E visa applicant be employed outside the United States by a foreign parent or affiliated company prior to his or her U.S. assignment. This is an important distinction from the L-1 visa category discussed below.

Intracompany Transferees

The **L-1** visa category is for foreign nationals who will be assigned to work in the United States for an organization that is related to their home country employer. Employees who have worked outside the United States for at least one continuous year in an executive, managerial, or specialized knowledge capacity for a parent, branch, subsidiary, or other affiliate of the U.S. employer may be eligible for L-1 classification. The employer must seek to transfer the employee to the United States to assume an executive, managerial, or specialized knowledge position, although it does not need to be the very same position the employee held abroad. Newly established U.S. businesses may sponsor foreign employees for L-1 visas, but work authorization is initially granted for one year, and the employer must subsequently renew sponsorship with evidence of business viability.

Ordinarily, the employer must obtain U.S. Citizenship and Immigration Services (USCIS) approval for each prospective L-1 transferee before the transferee can apply for an L-1 visa at a U.S. consulate. However, there is a streamlined process, known as the L-1 "blanket program," that does not require USCIS processing and permits the U.S. consulate to handle the entire adjudication process. The blanket program is available for large multinational organizations who frequently transfer employees to the United States. To qualify for the blanket program, the U.S. employer must have been doing business in the United States for at least one year and meet at least one of the following criteria: 1) at least ten L-1 approvals from USCIS in the prior year; 2) U.S. sales of at least $25 million; or 3) at least 1,000 U.S. employees. USCIS processing for individual L-1 filings and/or initial approval for the corporate blanket program can take several months unless the employer pays for 15-day Premium Processing. Once the initial corporate blanket petition is approved by USCIS, individual L-1 visa requests may be made entirely at the consulate, as stated above.

L-1 work authorization is available for up to seven years if the U.S. role is executive or managerial (L-1A) or up to five years if the U.S. role requires specialized knowledge (L-1B). L-1A executives or managers who also served as executives or managers for their foreign affiliated employers before transferring to the United States may be eligible to apply for U.S. permanent residency (the "green card") without the need for the U.S. labor market test that is typically a prerequisite for green card applications.

Spouses and unmarried children under age 21 may accompany the principal L-1 visa holder and attend school in the United States. Spouses of principal L-1 foreign nationals can apply for authorization to work in the United States for any employer without the need for separate sponsorship.

Note: unlike the E-1 and E-2 visa categories discussed above, the L-1 visa is available to those of any nationality so long as they have been employed abroad by an affiliated company for at least one year in a qualifying capacity.

Specialty Occupation Professionals

The **H-1B** visa category is available to persons who will be employed in "specialty occupations." Specialty occupations are defined by USCIS as occupations for which a bachelor's degree or equivalent in a specific academic field of study is required to perform the job. The H-1B candidate must in turn possess at least a bachelor's degree, or equivalent education and/or experience, in the specified field of study.

The H-1B visa is one of the most sought-after U.S. employment visas, but it presents two key challenges for employers. Unlike other temporary U.S. work visas, the H-1B visa category is subject to an annual quota of 65,000, plus an additional 20,000 quota numbers for those holding a U.S. advanced degree. Each year, the demand for H-1B visas far exceeds the quota. This restricts the H-1B option for most of the year. Quota exemptions are available for certain nonprofits and existing H-1B visa holders, who may change employers during their H-1B tenure in the United States, subject to successful sponsorship by a subsequent employer sponsor.

The H-1B visa program is also regulated by the U.S. Department of Labor (DOL), which requires employers to obtain approval of a "Labor Condition Application" (LCA) before filing an H-1B petition with USCIS. Among other things, the LCA requires employers to attest they will pay the H-1B worker competitive wages and provide notice to local U.S. employees of the H-1B sponsorship. DOL may investigate employers' compliance with LCA attestations and violators may be subject to significant monetary penalties and debarment from the H-1B and other immigration programs.

The employer must have USCIS approval before the H-1B candidate can apply for an H-1B visa at a U.S. consulate. USCIS processing is several months unless the employer pays for two-week Premium Processing.

H-1B employment authorization is available for up to six years and may be granted in up to three-year increments. Extensions beyond six years may be permitted where the worker is sponsored for U.S. permanent residency.

Spouses and unmarried children under age 21 may accompany the principal H-1B visa holder to the United States and attend school. Spouses are not eligible for work authorization as dependents unless the principal H-1B employee is being sponsored for an employment-based green card and is well along in that process.

Canadian and Mexican Professionals

The **TN** visa category was created pursuant to the North American Free Trade Agreement (NAFTA) and permits certain Canadian and Mexican citizens to accept temporary employment in the United States. To qualify for TN classification, a U.S. employer must be offering a temporary position in an occupation that is listed in the NAFTA. The listed occupations generally require the individual to possess a bachelor's degree (or a Canadian or Mexican degree that is equivalent to a U.S. bachelor's degree) in a field related to the occupation. This type of work authorization is also included in the recently negotiated U.S.-Mexico-Canada Agreement.

Canadians may apply for TN classification at a U.S. border with a sponsorship letter from the U.S. employer and supporting documentation; they are not required to obtain a TN visa stamp at a U.S. consulate as Canadian citizens are generally exempt from the U.S. visa requirement. Citizens of Mexico must apply for a TN visa at a U.S. consulate before proceeding to the United States.

TN employment authorization is granted in up to three-year increments with no limitation on the maximum period of stay. However, an individual in TN status must maintain the intent to remain in the U.S. temporarily.

Spouses and unmarried children under age 21 may accompany the principal TN employee and attend school but are not eligible to work in the United States unless they obtain separate sponsorship.

Persons of Extraordinary Ability

The **O-1 visa** is available to individuals who can demonstrate "extraordinary ability" in the sciences, education, business, athletics, or the arts. USCIS regulations provide that these individuals are among the small percentage who have risen to the very top of their field of endeavor and have achieved national or international recognition for their achievements in their field. In addition to these overarching requirements, O-1 petitions must include evidence, including letters of reference, that meets at least three categories of evidence listed in the regulations.

While the standard for the O-1 visa is high, one does not need to have a Nobel Prize or Olympic medal or be widely known to the public. Rather, evidence must show that the candidate is highly respected and distinguished within his or her specialized sphere of expertise.

Employers must seek USCIS approval before a foreign national can apply for an O-1 visa. USCIS processing takes several months unless the employer pays for 15-day Premium Processing.

O-1 visas are initially granted for three years and then in one-year increments, with no limitation on the maximum period of stay. Spouses and unmarried children under age 21 may accompany the principal O-1 visa holder and attend school but are not eligible to work in the United States unless they obtain separate sponsorship.

Employment-Based U.S. Residency (the "Green Card")

A U.S. employer may sponsor an employee for U.S. residency and in some cases an employee may self-sponsor his or her green card application. In most cases, a residency application sponsored by a U.S. employer requires the DOL to certify that U.S. workers are not available for the sponsored role after the employer completes a U.S. labor market test. The labor market test requirement – known as PERM – requires employers to place ads in newspapers, publicize the job announcement on recruitment sites, and demonstrate that any U.S. applicants were considered for the role in good faith, but none met the employer's minimum requirements.

Exceptions to the labor market test requirement include foreign nationals who qualify as persons of extraordinary ability, outstanding professors or researchers, multinational executives and managers, those whose work serves the U.S. national interest, and residency applications made through the EB-5 investor program.

Once DOL certifies the employer's labor market test, or where the labor market test is waived, the employer (or the employee where self-sponsorship is permitted) must file a petition with USCIS seeking classification in one of five employment-based green card categories, often referred to as "EB" categories, i.e., "EB-1" through "EB-5." Eligibility for the EB-1, EB-2, and EB-3 categories is generally based on the education, experience, and specialized skills required for the sponsored role and possessed by the sponsored employee, among other factors. The EB-4 category comprises a broad range of foreign nationals, including certain religious workers, translators, and retirees of international organizations, each with their own eligibility requirements.

Finally, the EB-5 category is a special type of employment-based green card category designed for investors. To qualify for the EB-5 program, the investor must make an investment of personal funds in a new commercial enterprise or troubled business, either directly or via a government-approved Regional Center. The required investment is US$1.8 million. However, if the business is in a location designated by the U.S. government as a high unemployment area, the required investment decreases to US$900,000.

Once classified in the appropriate green card category, the employee and dependents can complete the green card process by filing an application for residency status in the United States or by filing for an immigrant visa at a U.S. consulate. Because employment-based green cards are limited by an annual quota, some applicants, depending on their classification category and country of birth, may need to wait many years before they can complete the process and become residents. As a result, the entire green card process can take as little as two years (sometimes less) to a decade or longer.

Spouses and unmarried children under age 21 may apply for residency with the principal applicant in order to live, attend school, and work in the United States.

Except for the EB-5 category, once an individual is granted U.S. permanent residency status, he or she and eligible dependents may work for any U.S. employer and live in the United States indefinitely. In the case of EB-5 sponsorship, the investor and dependents are granted U.S. residency initially for two years. If the investment creates or preserves 10 jobs for U.S. workers within two years, then the investor and dependents may apply for indefinite residency.

In order to preserve residency status, a permanent resident must maintain his or her primary residence in the United States and abide by all tax and other laws applicable to U.S. residents.

Which Option Is Right for Your Organization?

There is an array of immigration options for foreign investors and their employees. Choosing the right immigration pathway is an important decision that should be made with competent immigration counsel, preferably at the early planning stages of your U.S. venture.

Please see the attached table, which summarizes the visa categories discussed above and provides additional hyperlinks to government websites.

Visa Type	Permitted Activities	Prohibited Activities	Eligibility Criteria	Length of Stay	Dependents	Process and Timeframe	Special Considerations
B-1 Business Visitor **Visa Waiver Program**	Establish an investment and plan for relocation, including: • Incorporate a business • Open accounts • Secure premises • Search for housing and schools	• Direct, manage, or provide services to a U.S. business • Receive compensation from a U.S. employer • Attend school	Must have a residence outside the United States and intend to remain in the United States temporarily and only for permitted activities.	Up to six months with a B-1 visa stamp, or up to 90 days under the Visa Waiver Program with approved ESTA.	Yes, provided they will not engage in prohibited activities and they meet eligibility criteria.	Immediate if already have B-1 visa; a few days to secure on-line ESTA approval; Appointment waiting times at U.S. consulate to apply for B-1 visa range from days to weeks.	While a stay of up to 6 months is permitted under the rules for those with a visa, U.S. border officers will typically only permit entry for a shorter period, depending on the reasons for the visit. Entrants under the Visa Waiver Program/ESTA will almost always be granted a 90-day stay.
E Treaty Trader/ Investor	Invest in, direct, and/or manage a U.S. business that is majority owned by citizens of a country with which the United States has a commercial treaty.	U.S. employment with an organization other than the one sponsoring the E visa business.	The U.S. business must be majority owned by citizens of a treaty country and the E visa applicant must also be a citizen of that country. The applicant must also be entering the United States to direct and manage the investment or provide essential skills.	Visa validity varies by country. Two- year stay typically granted each entry. No maximum period of stay.	Yes. Spouses and unmarried children under age 21 may accompany principal visa-holder and attend school. Spouses can apply for work authorization.	Qualifying U.S. businesses must request eligibility from U.S. consulate in order to support E visa applications. Once eligible, qualified citizens of treaty country may apply for E visas at U.S. consulate. Appointment waiting times at U.S. consulate to apply for E visa range from days to weeks.	E-1 visas require U.S. business to engage in substantial trade with the other treaty signatory. E-2 visas require a substantial investment in U.S. business.
L-1 Intracompany Transferee	L-1A: Employment as executive, manager for a U.S. entity with foreign affiliates L-1B: Employment based on specialized knowledge for a U.S. entity with foreign affiliates	U.S. employment other than with sponsoring L-1 organization	Must be employed outside U.S. for at least one year in an executive, managerial, or specialized knowledge capacity for a parent, subsidiary, affiliate, or branch of U.S. entity.	Up to 7 years if U.S. role is executive or managerial (L-1A) Up to 5 years if U.S. role is specialized knowledge (L-1B)	Yes. Spouses and unmarried children under age 21 may accompany the principal visa-holder and attend school. Spouses can apply for work authorization.	USCIS approval required before applying for visa unless employer has an approved "blanket" petition covering the U.S. and foreign employers. USCIS processing is several months unless employer pays for two-week Premium Processing. Appointment waiting times at U.S. consulates to apply for L-1 visa range from days to weeks.	Newly established U.S. businesses may sponsor foreign employees for L-1 visas, but work authorization is initially granted for one year, then sponsorship must be renewed with evidence of continued business viability.

Visa Type	Permitted Activities	Prohibited Activities	Eligibility Criteria	Length of Stay	Dependents	Process and Timeframe	Special Considerations
H-1B Professionals	Employment by U.S. sponsor in a "specialty occupation".	U.S. employment other than with sponsoring H-1B employer.	The U.S. job must require, and the foreign worker must possess, at least a bachelor's degree or equivalent in a particular and closely related course of study.	Up to six years. Extensions beyond six years may be permitted where worker is sponsored for U.S. residency.	Yes. Spouses and unmarried children under age 21 may accompany the principal visa holder and attend school. Spouses can apply for work authorization in certain circumstances.	USCIS approval required prior to visa application. USCIS processing is several months unless employer pays for two-week Premium Processing. Appointment waiting times at U.S. consulate to apply for H-1B visa range from days to weeks.	An annual quota restricts H-1B option for most of the year. Quota exceptions for certain nonprofits and existing H-1B workers may apply. Regulated by the U.S. Department of Labor, which requires payment of competitive wages and notice of sponsorship to local U.S. employees.
TN Professionals	Employment by a U.S. sponsor in an occupation specified in NAFTA (not materially changed by USMCA).	U.S. employment other than with sponsoring TN employer.	Citizens of Canada and Mexico. U.S. job must match occupation on NAFTA list. Must have education and/ or experience required for occupation by NAFTA, which is typically a bachelor's degree or foreign equivalent degree.	Up to three-year increments. No maximum period of stay. Must have intent to stay in the United States temporarily.	Yes. Spouses and unmarried children under age 21 may accompany the principal visa holder and attend school but may not work as dependents.	Canadians apply at U.S. border with sponsorship letter from U.S. employer and supporting documentation. Citizens of Mexico must apply for a TN visa at U.S. consulate. Appointment waiting times at U.S. consulate to apply for TN visa range from days to weeks.	Dependents do not need to be citizens of Canada or Mexico, but dependents must apply for a visa unless they are citizens of Canada.
O-1 Persons of Extraordinary Ability	Employment by a U.S. sponsor in job related to expertise.	U.S. employment other than with the sponsoring O-1 employer.	Individuals who are nationally or internationally renowned and acclaimed for achievements in their field.	Initially for three years, and then in one-year increments. No maximum stay.	Yes. Spouses and unmarried children under age 21 may accompany the principal visa holder and attend school but may not work as dependents.	USCIS approval required prior to visa application. USCIS processing is several months unless employer pays for two- week Premium Processing. Appointment waiting times at U.S. consulate to apply for O-1 visa range from days to weeks.	Substantial evidence required, including letters of reference, as well as other specific evidence required by regulation.
U.S. residency (the "green card"), other than the EB-5 Investor Program	Live and work in the U.S. indefinitely. May work for any U.S. employer once	Failure to maintain primary residence in the United States. Violation of tax and other laws	A U.S. employer sponsor and labor market test are generally required, unless the labor market test is waived.	Indefinite.	Yes. Spouses and unmarried children under age 21 may apply for residency and	U.S. Department of Labor approves labor market test, unless waived. File immigrant petition in proper green card category based on	Labor market test is waived for persons of extraordinary ability, outstanding professors and researchers,

Visa Type	Permitted Activities	Prohibited Activities	Eligibility Criteria	Length of Stay	Dependents	Process and Timeframe	Special Considerations
	residency is granted.	applicable to U.S. residents.	Employee and sponsored job must also meet requirements for sponsorship category, based on education, experience, and skills.		also live and work in the United States indefinitely.	education, experience, and skills. Employee and dependents can then file to complete U.S. residency process. One- to two-year processing. Depending on country of birth and sponsorship category, annual quota may delay case by several years.	certain multinational managers and executives, and those working in the national interest. The EB-5 investor program also does not require a labor market test. See below.
U.S. residency (the "green card"): the EB-5 Investor Program	Live and work in the U.S. indefinitely.	Failure to maintain primary residence in the United States. Violation of tax and other laws applicable to U.S. residents.	Investment of personal funds in a new commercial enterprise or troubled business. Required investment is US$1.8 million, or US$900,000 where the business is in a designated high unemployment area.	Residency granted conditionally for 2 years, then indefinitely once certain criteria are met.	Yes. Spouses and unmarried children under age 21 may apply for residency and also live and work in the United States conditionally and then indefinitely.	File petition with USCIS to establish eligibility and apply for residency status, which is granted conditionally for two years. If the investment creates or preserves 10 jobs for U.S. workers within two years, the investor may apply for indefinite residency, subject to an annual quota.	Some EB-5 investments can be made through government-approved Regional Centers that sponsor EB-5 capital investment projects. Investing in a regional center permits showing indirect job creation when applying to remove conditional residency.

Glossary

Adjustment of Status (AOS): An option for the final stage of the permanent residence process. The AOS application, Form I-485, can be filed with USCIS if the priority date is current and certain other requirements are met.

B-1 Business Visitor: Visa category for business visitors to the United States. The B-1 visa does not confer the ability to work and B-1 visa holders cannot receive compensation from a U.S. source or work on a project where services are being billed to a client. Business visitors from certain countries can enter the United States without a B-1 visa stamp under the Visa Waiver Program (VWP); these individuals are admitted for a maximum of 90 days and are not eligible for extensions of their status except in extremely limited circumstances. B-1 visitors who have visa stamps in their passports can be admitted for up to six months and are eligible for extensions of their status.

B-2 Tourist Visitor: Visa category for tourists visiting the United States. Tourists from some countries are able to enter the U.S. without a B-2 visa stamp under the Visa Waiver Program (VWP); these individuals are admitted for a maximum of 90 days and are not eligible for extensions of their status except in extremely limited circumstances. B-2 visitors who have visa stamps in their passports can be admitted for up to six months and are eligible for extensions of their status.

Department of Labor (DOL): U.S. federal agency that includes the Office of Foreign Labor Certification, which oversees prevailing wage determinations, Labor Condition Applications (LCAs), and labor certifications/PERM.

Green Card: The informal name for the Permanent Resident Card, which is evidence that an individual has been granted status to live and work in the United States indefinitely.

H-1B: Visa category for temporary workers engaged in an occupation which requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific field for entry into the occupation. Maximum period of stay is six years, with certain exceptions.

H-4: Visa category for spouses and unmarried children under 21 years of age who are accompanying H-1B visa holders. H-4s are not eligible for work authorization except in limited circumstances.

I-129 Form: Form I-129, Petition for a Nonimmigrant Worker, is the government form filed by the employer with USCIS to request E, H, L, O, or TN visa classification on behalf of a foreign national.

I-140 Form: Form I-140, Immigrant Petition for Alien Worker, is a government form filed by an employer with USCIS in U.S. permanent residency cases. The filing of this form is the second stage of the permanent residence process for employment-based cases requiring PERM and the first stage where PERM is not required.

I-485 Form: Form I-485, Application to Register Permanent Residence or Adjust Status, is the government form filed with USCIS by a foreign national who is in the United States and seeks to finalize the permanent residence process.

L-1: Visa category for an Intracompany Transferee. The employee must have worked outside the United States for at least one year for a parent, subsidiary, affiliate or branch office of the U.S. employer in a specialized knowledge (L-1B), or executive or managerial (L-1A) capacity. Individual L-1 petitions are submitted to USCIS in the United States for adjudication and approval before the visa stamp can be issued. This is in contrast to the Blanket L procedure where the application is submitted directly to the U.S. Consulate abroad. Maximum period of stay is five years (L-1B) or seven years (L-1A).

L-2: Visa category for spouses and unmarried children under 21 years of age who are accompanying L-1 visa holders. L-2 spouses may apply for work authorization.

Labor Certification: A certification by the U.S. Department of Labor (DOL) that there is no able, willing, qualified, and available American worker (generally, this means a U.S. citizen or lawful permanent resident) available for a particular position, in a particular geographic area, at a prevailing wage. The labor certification relates to a particular position, not an employee. In order to obtain an approved labor certification, the employer must show that it tested the local job market and made a good faith effort to recruit for the position, and that employment of a foreign national employee does not adversely affect the wages or working conditions of similarly employed U.S. workers.

Labor Condition Application (LCA): The LCA is a prerequisite to filing an E-3, H-1B or H-1B1 petition. In the LCA, the employer attests to certain wage, working conditions, and notice obligations. The LCA must be approved by the U.S. Department of Labor (DOL).

Lawful Permanent Resident (LPR): A person who has been granted authorization to live and work in the United States on an indefinite basis. Also known as an immigrant, green card holder, or permanent resident.

O-1: Visa category for a Person of Extraordinary Ability. U.S. employers may sponsor foreign nationals for O-1 employment for an initial period of three years, and then in one-year increments.

Passport: Travel and identity document issued to foreign nationals by their country of citizenship. Must be unexpired in order to enter the United States. The U.S. Consulate will place nonimmigrant visa stamps in the foreign national's passport. The passport must be valid for at least 6 months at the time of entry.

Program Electronic Review Management (PERM): The attestation and audit system under which employers obtain permanent labor certification for certain employment-based immigrant cases. Under PERM, employers conduct recruitment and advertising before filing a labor certification application. Applications are submitted electronically or by mail and are subject to audit by Certifying Officers of the Department of Labor.

Permanent Residence: A legal status that permits an individual to live and work in the United States indefinitely. When this legal status is granted, the government issues a Permanent Resident Card, often referred to informally as a “green card.”

Port of Entry (POE): The port of entry is the air, land, or sea port through which the foreign national travels to the United States.

Priority Date: The date a U.S. employer files a PERM application with DOL on behalf of a foreign national. Where a PERM application is not required, then the date Form I-140 is filed with USCIS. This date secures a place in the queue for the foreign national under the green card quota system.

United States Citizenship and Immigration Services (USCIS): USCIS is the agency that processes applications and petitions for immigration benefits. Formerly known as the Bureau of Citizenship and Immigration Services (BCIS) and the Immigration and Naturalization Service (INS).

Visa Stamp: This is the stamp embossed in a foreign national's passport by a U.S. consulate abroad, which indicates the foreign national's specific visa category. In order to enter the U.S., most foreign nationals must have a currently valid visa stamp in their passport (except Canadian citizens and persons entering in B-1/B-2 status under the visa waiver program). A foreign national who presents a visa stamp to the inspector at the port-of-entry may be admitted in that visa category and be issued an entry/departure record, Form I-94, showing the immigration status and length of time allowed to stay in the U.S.

Visa Waiver Program (VWP): The VWP permits citizens of designated countries to apply for admission to the United States for 90 days or less as nonimmigrant visitors for business or tourism without first obtaining a B-1 or B-2 visa stamp from a U.S. Consulate. Visits are generally short-term and, with very limited exceptions, cannot involve employment in the U.S. or the undertaking of an academic study program.

About Fragomen

Fragomen is a leading firm dedicated to immigration services worldwide. The firm has more than 4,400 professionals and staff—including over 500 lawyers and equivalent professionals—in 52 offices located in the Americas, Asia Pacific and EMEA. Each location is established either as a law firm or an immigration consultancy, in accordance with applicable local laws and regulations. In total, Fragomen offers support in more than 170 countries.

Fragomen's professionals are respected thought leaders in the immigration field, as recognized year after year by Chambers, Best Lawyers and Who's Who. They contribute to conferences and seminars around the world, and author books and other publications that are relied on as standard references by other immigration professionals. Many of Fragomen's professionals have prior experience working in government agencies and in-house corporate immigration departments, allowing Fragomen to advance strategies for world-class immigration program management.

Fragomen is structured to support all aspects of global immigration, including strategic planning, efficiency, quality management, compliance, government relations, reporting, and case management and processing. These capabilities allow the firm to represent a broad range of companies, organizations, and individuals, working in partnership with clients to facilitate the transfer of employees worldwide. For detailed information about Fragomen, please visit www.fragomen.com.

Disclaimer

This chapter was prepared by Andrew Greenfield with Fragomen, Del Rey, Bernsen & Loewy, LLP. Views expressed in this chapter are the author's own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

Business Structure

An Overview of Common Business Structures for Foreign Investors

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Choosing the right type of business structure is a critical first step for foreign persons planning to conduct business in the United States. There are several types of entities available, each with its own unique benefits and limitations. The "right" choice depends on a foreign person's specific interests and needs. There is no "one-size fits-all" structure. The purpose of this chapter is to provide a high-level comparison of some common business structures used by foreign persons to conduct their U.S. operations and what impact that structure might have on the company's business and financing opportunities.

I. General Considerations

(1) Citizenship/Residency Requirements

The procedure for a foreign person (be that a foreign entity or foreign individual) to establish and form a business entity in the United States is essentially the same as it is for a U.S. person. U.S. citizenship, permanent residency (also known as a green card), or a work visa are not required in order for foreign persons to be owners of a U.S. business entity, nor are they required in order for a foreign individual to serve on the board of directors of a corporation in the United States. However, it should be noted that simply being an owner, stockholder, board member, or employee of a U.S. business entity does not in itself permit a foreign individual to work in the United States. There are very specific immigration and customs requirements that apply to non-U.S. citizens who wish to work and earn income in the United States. These requirements are not covered in this chapter (please refer to the Immigration Chapter for more information), but they should be investigated fully in connection with any plan by a foreign person to establish a U.S. business operation.

(2) Formation Timing and Disclosure Requirements

Once the appropriate type of entity has been determined, it must be formed. The appropriate jurisdiction of formation is a factor that must be carefully considered. There are 50 states, one federal district, and five territories in the United States. Each has its own rules and regulations regarding business entity formation. The approach of most states has been to make the incorporation or formation process as simple and streamlined as possible. In many cases, an entity can be formed in just a few days, and sometimes even the same day, depending on its complexity and the jurisdiction in which it is being established.

The information required by most states to be disclosed publicly by a company in its formation documents is quite limited and will generally include: (i) the name of the company, (ii) the names and addresses of its officers and directors, (iii) the location of the company's registered office, and (iv) in some cases, a summary of the total number and classes of shares (or units) issued. Unlike many foreign jurisdictions, where detailed stockholder information is required to be filed and maintained in companies houses or other public registries, details of stockholdings are not generally required to be disclosed publicly by private (non-public) companies in the United States. It should be noted, however, that, apart from the relatively minimal disclosure requirements of most states as they relate to the formation and maintenance of a business entity in that state, foreign owners of U.S. businesses may be subject to other state or federal disclosure and filing requirements depending on the classification of business they operate; the types of products they manufacture, distribute, or sell; and the percentage of the U.S. entity that is owned or controlled by foreign persons. This is particularly applicable to businesses operating in the agricultural, banking, communications, defense, energy, and transportation industries.

(3) Cost of Formation

(a) Filing Fees (State of Formation). The fees charged by a jurisdiction for the filing and acceptance of a business entity formed in that jurisdiction generally range from a few hundred to a few thousand dollars, depending on the jurisdiction and the type of business structure being formed. In addition, all states require entities formed or qualified in that state to file an annual report (or its equivalent) each year to update the information on record for that entity and to maintain the entity in good standing. A relatively small annual fee (generally between $100 and $500) is charged for this annual update. Some states calculate this annual fee for corporations based on the number of shares that have been authorized to be issued by the company. For companies that have authorized large numbers of shares, this calculation can result in significant annual fees. Thus, it is important for companies formed in these jurisdictions to take this into consideration when determining share structure and capitalization.

(b) Filing Fees (Other States). When calculating formation and maintenance costs for U.S. entities, it is also important to consider not only the jurisdiction where the entity will be incorporated, but also whether it will be carrying on business in other jurisdictions. For a company registering its business in one state while maintaining its actual business operations in other states, this company would be required to file as a "foreign" entity in those other states ("foreign" meaning it is not originally formed in those other states). Each such other state will charge the company an application fee and annual reporting fees (usually a few hundred dollars per year). The specific definition of "carrying on business" differs between jurisdictions, but generally, entities will be deemed to be carrying on business in a state if they have an office in the state, hold assets in the state, employ significant numbers or types of employees in the state, or engage in the construction of structures in the state.

(c) Registered Agent Fees. Companies are also required to appoint and retain a registered agent in any state in which they conduct business. The role of the registered agent is to accept service of legal process, such as lawsuits or other legal documents, on behalf of the company in that state. If the company has a physical address or office in a state, in most cases it is permitted to use that address as its resident agent address in the state. If a company does not have a physical address in a state where it is registered to do business, it will need to appoint a third-party to act as its registered agent in that state. There are a number of regional and national corporate services companies that act in this capacity. The cost ranges between $100 and $350 per year for this service in most cases.

II. Types of Business Structures

(1) Corporation

A corporation is an entirely separate and distinct business entity from its owners, whose ownership is represented by shares of stock in the corporation (hence they are also known as “stockholders” or “shareholders”). A corporation may have a sole shareholder, a few, or a large number of shareholders. Corporations may issue different classes of shares and designate different series of shares within a class, thereby allowing a corporation to grant different rights to different shareholders.

Corporations are created and regulated by the corporate laws of their state of incorporation as well as corporate laws (both statutory and common-law) in any other jurisdictions in which they are qualified to conduct business.

The day-to-day activities of a corporation are managed by officers who are appointed by the board of directors, the members of which are elected by shareholders to oversee their interests as owners of the corporation. In essence, the shareholders own the corporation; the board of directors is elected to oversee the operation of the corporation for the shareholders; and the officers are the operators of the corporation. Both the officers and the directors of a corporation have a fiduciary duty to act in the best interests of the shareholders.

One of the main advantages of incorporation is that personal assets of the shareholders, directors, and officers are protected from creditors of the corporation if certain corporate formalities are observed, such as keeping corporate funds separate from personal funds, holding regular meetings of directors and shareholders, keeping minutes of the meetings, and maintaining detailed financial records. Additionally, if the corporation is a subsidiary of a foreign parent, creating a U.S. corporation can act as a shield for the assets of the foreign parent company and mitigate to some extent the rights of creditors of the U.S. company to bring actions against the parent.

(a) Formation

Corporations are formed through the filing of a Certificate of Incorporation or Articles of Incorporation (commonly called the "charter"), depending on the state, with the appropriate state authority.

The incorporator is the person responsible for establishing the corporation and filing the charter with the appropriate state authority. The incorporator also will appoint the initial board of directors and adopt the bylaws (which are the governing rules by which the corporation operates) by a written consent, executed after the corporation has been formed. Once done, the incorporator will relinquish his or her duties as the incorporator. The board of directors then ratifies the actions of the incorporator, appoints officers, approves the issuance of shares to the shareholders, and approves other matters necessary for the initial stages of the corporation (such as opening a bank account).

(b) U.S. Federal Income Tax Implications [1]

Foreign investors [2] need to consider whether the nature of their activities or investments in the United States is such that they could be treated as engaged in a U.S.

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[1] This summary does not contain a comprehensive discussion of all U.S. federal income tax consequences that may be relevant to a foreign investor in view of that investor's particular circumstances, nor does it address any state, local, estate, foreign or other tax consequences of an investment in the United States by foreign investors. Foreign investors are urged to consult with their own tax counsel as to the U.S. federal income tax consequences to such investor as a result of an investment in the United States.

[2] Individuals who are neither U.S. citizens nor residents of the United States for tax purposes (nonresident aliens) and entities treated as foreign corporations for U.S. tax purposes.

trade or business for purposes of U.S. federal income taxation. Foreign investors are taxable on a net basis on any income that is "effectively connected" with the conduct of a U.S. trade or business (effectively connected income, or ECI).[3]

Foreign investors may opt to invest in a U.S. corporation to "block" or avoid realizing ECI. The blocker corporation incurs and pays U.S. federal income tax on its operating income (ECI) and thus blocks such income from reaching the foreign investor. The corporation pays U.S. federal income tax on a net basis (21 percent maximum corporate tax rate for tax years beginning after December 31, 2017 pursuant to the enactment of the Tax Cuts and Jobs Act of 2017). Any net after-tax proceeds distributed by the corporation to the foreign investor generally will not be treated as ECI, but rather will be U.S. source dividend income subject to withholding tax. The foreign investor generally will not have to file income tax returns with the U.S. Internal Revenue Service (IRS) with respect to its investment in the corporation.

Provided that a foreign investor (individual or corporation) undertakes no activities in the United States that would cause the investor to be engaged in the conduct of a U.S. trade or business, the U.S. federal income tax liability of such foreign investor generally will be limited to tax (payable through withholding) at a flat rate of 30 percent (or lower tax treaty rate) on certain gross income from U.S. sources, such as dividends and interest.[4] This type of income is non-ECI and is commonly referred to as "FDAP" (fixed, determinable, annual or periodic) income. The foreign investor may be eligible for benefits (an exemption from, or a reduced rate of withholding) for certain FDAP items under an income tax treaty in effect between the United States and the investor's country of residence.

Accordingly, foreign corporations and individuals that are shareholders in a U.S. corporation are subject to a flat tax rate on U.S. source dividends received from the corporation. If the U.S. payor corporation withholds and remits the proper amounts to the IRS, foreign investors[5] that are individuals or corporations will not be required to file U.S. federal income tax returns or pay additional U.S. federal income taxes solely as a result of their investment in the U.S. corporation.

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[3] The tax issues associated with investments by foreign investors in U.S. real property interests are beyond the scope of this article.

[4] This article does not address withholding tax relating to foreign accounts under Sections 1471 through 1474 (FATCA) of the Internal Revenue Code of 1986, as amended. FATCA generally imposes a withholding tax of 30 percent on certain gross amounts of income not effectively connected with a U.S. trade or business paid to certain "foreign financial institutions" and certain other U.S.-owned "non-financial foreign entities," unless various information reporting requirements are satisfied.

[5] Foreign investors treated as trusts for U.S. federal income tax purposes are subject to special rules.

Certain types of income are specifically exempted from the 30 percent tax and thus withholding is not required on payments of such income to foreign investors. The 30 percent tax does not apply to U.S. source capital gains (whether long- or short-term) or to interest paid to a foreign investor on its deposits with U.S. banks. The 30 percent tax also does not apply to interest that qualifies as "portfolio interest" (certain U.S. source interest received by a nonresident alien or foreign corporation with respect to qualifying debt obligations).

(c) Financing Options

Compared to other business structures, corporations have access to a broader range of financing options, including the issuance of equity and the incurrence of debt to fund corporate activities.

In the United States, the default requirement to issue securities (debt and equity instruments) to investors involves registration of such transaction with the U.S. Securities and Exchange Commission (SEC). However, there are various exceptions to this rule, and many business entities choose to raise capital in the form of debt or equity pursuant to certain exceptions from registration. The most common of these exemptions is the "Regulation D" exemption promulgated under the Securities Act of 1933, as amended. While a Regulation D offering allows a corporation to raise capital without the cumbersome registration process required for a public offering, its major drawback is that the securities issued typically will be illiquid, as there will be no public marketplace for the securities of a corporation that is not "public." If a corporation elects to register its securities and conduct a public offering, its securities may then be listed on a public market or stock exchange (such as a tier on the OTC Markets, Nasdaq, or New York Stock Exchange (NYSE)).

Traditional financing options from banks, such as term loans with fixed interest rates and long-term repayment plans, small business loans, and secured and unsecured lines of credit, are also available to corporations.

Under certain circumstances, a foreign parent entity may be able to provide a cross-border guarantee or security arrangement for a debt incurred in the United States by the U.S. subsidiary corporation. For example, in 2014, China adopted rules allowing "guarantees and security arrangements provided by Chinese entities of offshore indebtedness" ("nei bao wai dai" in Chinese). This is normally accomplished through a Chinese parent company providing guarantee or security over its assets in China to a bank in China with operations in the United States, which provides a loan through the bank's U.S. branch to the U.S. subsidiary of the Chinese company.

In addition, it is not uncommon for a foreign parent entity to make a loan to the U.S. subsidiary to fund its various stages of operation.

Other fairly traditional ways to access capital for a corporation would include the use of a small business credit card (based on both the owner and the company's credit score, which also requires the owner to be personally responsible for repaying debt on the card) and a corporate credit card (based on the company's credit history and financial performance).

(2) General or Limited Partnership

A general partnership is a business entity managed and operated by at least two people (the partners) who contribute money, property, labor, or skill and expect to share the profits and losses of the business. Each partner in a general partnership has unlimited liability for the partnership's debts and obligations, meaning that each general partner can be sued for the full amount of the partnership's debts and obligations. Each general partner contributes to the day-to-day management of the business and has the authority to make business decisions and legally bind the partnership in entering into contracts. The contributions, responsibilities and liabilities of the general partners are often equal, unless stated otherwise in a partnership agreement signed by all partners.

A limited partnership consists of one or more general partners with unlimited liability who manage the business, and one or more limited partners with limited liability (meaning that limited partners are not responsible for the payment of the partnership's debts with their personal assets) who do not play an active role in the management of the business and have no authority to bind the partnership in entering into contracts.

(a) Formation

There is no filing requirement in most states to form a general partnership. The legal name of a general partnership is based on the names of the partners. Some general partnerships may choose to adopt a fictitious, assumed, or "doing business as" (DBA) name by filing with the relevant state authority.

A limited partnership is formed through the filing of a "certificate of limited partnership" (which name may vary from state to state) with the appropriate state authority. A limited partnership agreement signed by all partners sets the rules of managing the business and defines the rights, responsibilities, and liabilities among the partners.

(b) U.S. Federal Income Tax Implications

A partnership files an annual income tax return with the IRS to report the income, deductions, gains, and losses from its operations, but it does not pay U.S. federal income taxes. Instead, the partnership "passes through" any profits or losses to its partners. Each partner is required to report that partner's distributive share (whether or not the partnership distributes cash to the partner) of the partnership's income, gains, losses, deductions, and credits. Thus, it is possible that partners could incur U.S. federal income tax liabilities without receiving from the partnership sufficient cash distributions to defray such tax liabilities. This situation is commonly referred to as "phantom income." After the end of each fiscal or calendar year, the partnership generally delivers tax information on a Schedule K-1 to the partners necessary for the completion of each partner's income tax return.

If a foreign investor invests in a partnership that is engaged in a U.S. trade or business, the foreign investor will be treated as engaged in a U.S. trade or business. Thus the U.S. trade or business activities of a partnership are attributed to its foreign partners, regardless of how many intermediate partnerships separate the foreign partner from the underlying partnership that is engaged in a U.S. trade or business. Treaty protection is generally not available to foreign partners of a partnership engaged in a U.S. trade or business because most such partnerships have a permanent establishment in the United States. Furthermore, a partnership engaged in a U.S. trade or business must withhold U.S. income tax on any ECI of the partnership allocable to its foreign partners, regardless of whether the foreign partner has actually received a cash distribution.

Generally, gain recognized by a foreign partner from the sale of an interest in a partnership that does business in the United States is ECI. Thus, the foreign transferor partner will be subject to U.S. tax on their gain. The ECI gain will also be subject to 10 percent withholding tax on the amount realized on the sale. The purchaser (transferee) of the partnership interest must withhold tax from the sales proceeds, but if it fails to do so the partnership is required to withhold the amount of the tax plus interest from future distributions to the transferee (purchaser).

Subject to certain exceptions, U.S. federal income tax law imposes a 30 percent tax on interest, dividends, rents, royalties, and other FDAP income derived by a foreign person from U.S. sources. A U.S. (domestic) partnership with FDAP income must collect and remit the tax on behalf of the foreign partner.

(c) Financing Options

Forms of financing options available to partnerships are similar to corporations, although with some limitations. For example, partnerships typically are not publicly traded, and they will normally convert into corporations prior to an initial public offering (IPO). Moreover, when a partnership applies for a loan or line of credit from a bank, the personal credit history and financials of the partners will be reviewed by the bank in addition to those of the partnership.

When a partnership raises funds through a private offering of securities, it offers its partnership interests for sale. It may permit some or all of the existing partners to invest more capital into the partnership, or bring in new partners with new capital, which has the effect of diluting the percentages of ownership of the existing partners.

(3) Limited Liability Company

A Limited Liability Company (LLC) is a business structure combining structural elements of a corporation with the tax benefits of a partnership. Rules and regulations pertaining to LLCs vary by state.

Owners of an LLC are called members, whose ownership of the LLC is represented by their holding of a certain percentage of membership interests or a certain number of membership units (which are similar to shares of a corporation) of the LLC. An LLC is allowed to have different classes of membership interests or membership units, providing the flexibility to distribute voting rights and profits in different ways. Most states allow members to include U.S. and foreign individuals, corporations, and other LLCs.

LLCs may comprise a single member or multiple members. LLCs can be either member-managed, in which all members participate in the day-to-day operation and decision-making process of the LLC, or manager-managed, in which one or more managers are appointed by members as agents of the company to manage the business. A manager may be a member but does not have to be.

Like corporations, members of LLCs are not personally liable for the LLC's obligations, debts, or liabilities. Although the maintenance of company formalities is not as stringent for LLCs as it is for corporations, it is generally considered good practice to follow similar guidelines and observe such formalities as corporations.

(a) Formation

LLCs are formed by filing a certificate of formation or articles of organization, depending on the state, with the appropriate state authority. Most states require that names of LLCs end with a certain designator, such as "Limited Liability Company" or "LLC." Some states may have additional requirements for setting up an LLC.

An organizer, who does not have to be a member, is the person who files the certificate of formation or articles of organization to form the LLC. After formation, the organizer executes organizer resolutions (similar to incorporator resolutions), which list the members and/or managers of the LLC, and thereupon relinquishes the duties of the organizer.

Similar to bylaws of a corporation, the operating agreement of an LLC, signed by all members of the LLC, governs the internal operations of the LLC. While many states do not require operating agreements (without which state default rules apply), it is generally considered good practice for members of an LLC to have an operating agreement to delineate the rights, obligations, and rules pursuant to which the members will own and operate the LLC.

(b) U.S. Federal Income Tax Implications

An LLC may be treated by the IRS as either a corporation, partnership, or a "disregarded entity" (meaning an entity disregarded as separate from its owner for federal income tax purposes), depending on the number of members and any elections filed by the LLC with the IRS.

An LLC with at least two members is classified as a partnership for federal income tax purposes, unless it affirmatively elects to be treated as a corporation. The U.S. federal income tax implications of foreign investors investing in partnerships is discussed above (in "General or Limited Partnership"). An LLC with only one member is treated as a disregarded entity and the LLC's income, gains, losses, credits, and deductions are reported on the owner's income tax return, unless it elects to be treated as a corporation.

For LLCs treated as partnerships for U.S. federal income tax purposes, a foreign investor must pay tax on its share of the ECI generated by the LLC, regardless of whether the member has actually received a cash distribution from the LLC. Many foreign investors in LLCs prefer the LLC to file an election with the IRS to be taxed as a corporation to avoid having to file income tax returns with the IRS and paying U.S. income tax on its share of ECI (as would be the case if the LLC were treated as a partnership or a disregarded entity for U.S. federal income tax purposes). Alternatively, many foreign investors opt to invest in a corporation to avoid having to file income tax returns with the IRS and paying U.S. income tax.

(c) Financing Options

LLCs have similar financing options as those available to partnerships, as well as limitations. When an LLC raises funds through a private offering of securities, it offers its membership interests for sale.

(4) Branch Office

A foreign company is not required to set up a separate U.S. entity in order to do business in the United States and could instead do so through a branch office. A branch office is an extension of the foreign company that conducts business directly in the United States and does not have its separate legal existence from the foreign company. This exposes the foreign company itself to U.S. tax and legal liabilities with respect to the branch office's operations.

(a) Formation

It is not necessary to form a new entity in order to set up a branch office. The foreign company will need to be registered as a "foreign corporation" (as defined under state law) by filing a certificate of authority to do business in the state where business will be conducted through the branch office.

(b) U.S. Federal Income Tax Implications

A foreign corporation that operates directly in the United States through its branch office will be subject to income tax on the income attributable to its U.S. operations. If the activities of the foreign corporation constitute a U.S. trade or business, the corporation would be subject to U.S. federal income tax on a net basis (21 percent maximum corporate tax rate for tax years beginning after December 31, 2017) and the 30 percent "branch profits" tax.

Foreign corporations are subject to U.S. tax on any income that is ECI. They are also subject to branch profits tax at a 30 percent rate on any deemed repatriations of ECI (generally, earnings and profits generated by the U.S. operations of the foreign corporation to the extent not reinvested in a U.S. trade or business). However, depending upon its country of residence and its ability to qualify for treaty benefits, the corporation might be eligible for an exemption from, or reduced rate of, branch profits tax pursuant to a treaty. Without treaty relief, foreign corporate investors could be subject to tax on ECI at an effective tax rate of 44.7 percent (54.5 percent for tax years beginning before January 1, 2018).

A foreign corporation that does not conduct a U.S. trade or business is nonetheless subject to tax at a flat rate of 30 percent (or a lower tax treaty rate) on the gross amount of certain U.S. source income that is not effectively connected with a U.S. trade or business, generally payable through withholding. Income subject to such a flat tax rate includes, but is not limited to, dividends and certain interest income.

Certain types of income are specifically exempted from the 30 percent tax, and thus withholding is not required on payments of such income to a foreign corporation. The 30 percent tax does not apply to U.S. source capital gains (whether long- or short-term) or to interest paid to a foreign corporation on its deposits with U.S. banks. The 30 percent tax also does not apply to interest that qualifies as "portfolio interest."

(c) Financing Options

Because it is not a separate legal entity, a branch office does not have the option to raise capital from private or public offerings.

Compared to a U.S. entity, a branch of a foreign company may experience additional scrutiny by a bank when trying to open a U.S. bank account.

II. Conclusion

The choice of structure for a particular business depends on many factors. This chapter touches briefly on a few important factors to consider and does not discuss all the factors that may be relevant, such as immigration laws, estate planning considerations, and tax implications for the foreign investors in their home countries. Foreign investors are strongly encouraged to consult with their legal, financial, and tax consultants in both the United States and their home countries to choose a business structure that best suits their business needs.

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Disclaimer

This chapter was prepared by Anna Jinhua Wang, Jeffrey J. White, J. Michael Wirvin, and Michael J. Kearney with Robinson & Cole LLP. Views expressed in this chapter are the authors' own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

Taxes

An Overview of Key U.S. Tax Considerations for Inbound Investment

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As the world's largest economy, the United States provides tremendous operating and investment opportunities, with an innovative and productive workforce, robust infrastructure, and lucrative markets. However, foreign businesses interested in investing in the United States can find it daunting to navigate the U.S. federal tax code and regulations, as well as state and local taxes. Inadequate preparation can create undue risk, result in increased and unanticipated tax costs, and ultimately impact the overall success of U.S. operations. In addition, overlooking potentially valuable tax and financial benefits, including federal, state, and local credits and incentives, can result in missed opportunities to reduce tax costs and benefit from capital and operational cost offsets. [*]

This chapter is intended to provide businesses interested in investing in the United States with some general guidance about various levels of U.S. tax imposed on non-U.S. investors, as well as available government incentives. It is critical to consult with a qualified advisor before making any business or tax-related decisions to more fully understand the impact of those decisions on the specific facts of the investment.

The Fundamentals of U.S. Federal Tax

Who must pay?

U.S. tax-resident individuals, citizens, corporations, and their foreign branches are subject to U.S. federal tax (and potentially state and local taxes) on their worldwide income. Conversely, non-U.S. tax resident individuals and non-U.S. corporations and partnerships are generally only subject to U.S. tax on income that is "effectively connected to a U.S. trade or business" (referred to as ECI) and U.S. source income that is "fixed, determinable, annual, or periodical" (FDAP). FDAP income generally includes U.S. source interest, dividends, rents, and royalties.

ECI must be associated with U.S.-based activity that rises to the level of a U.S. trade or business. Although the U.S. tax code does not define a U.S. trade or business, case law generally frames it as activity in pursuit of profit that is "considerable, continuous, regular, and substantial." If the foreign parent or subsidiary is resident in a country that has an income tax treaty with the United States, business profits are subject to U.S. federal income tax only to the extent that the income is attributable to a U.S. permanent establishment (PE). In general, a PE requires a more permanent business connection with the United States, so it is possible that a non-U.S. company could carry on a U.S. trade or business that does not rise to the level of a U.S. PE (and therefore is not liable for federal income tax).

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[*] The views expressed are those of the authors and do not necessarily represent the views of Ernst & Young LLP or any other member firm of the global EY organization.

How much is the tax?

For non-U.S. corporations, ECI is subject to federal tax at the same rate as applies to U.S. domestic corporations.

In addition to federal taxes, there may also be applicable state and local taxes on a non-U.S. corporation's U.S. business income, discussed further below. A deduction is generally available on the federal income tax return for all state and local taxes; thus, despite the addition of state and local taxes, it is not unusual for a corporation to have a U.S. effective marginal tax rate of approximately 25 percent.

Tax on FDAP is withheld by the payor on a gross basis at a 30 percent rate, though this rate can be reduced (potentially to zero) under an applicable U.S. income tax treaty if the income recipient is eligible for treaty benefits. Certain exceptions to FDAP withholding tax may also be available under federal law.

Corporate tax rates at a glance

Nature of tax	***Rate***
Corporate income tax	21%
Capital gains	21%
State and local income taxes	Varies by state from 0% to 13%, but generally deductible against federal income tax
FDAP withholding taxes, including dividends, interest, rents, royalties	30% (applicable to non-U.S. recipients) - note this may be reduced under an applicable treaty
Branch profits tax	30% (applicable to non-U.S. recipients) - note this may be reduced under an applicable treaty

**Additional taxes, including federal payroll taxes, duties and customs and a variety of other state and local taxes, may apply.*

Choice of Entity

There are various ways a non-U.S. company can structure its U.S. business. The choice may be driven by customer requirements, business and commercial needs, though U.S. and non-U.S. taxes can also play a role. Typical business models include a representative office, branch office, or wholly owned subsidiary. Each has its own implications and compliance requirements for U.S. tax purposes; this discussion focuses on tax considerations associated with the models.

A representative office is the easiest option for a company just starting to do business in the U.S., and it may not trigger U.S. federal corporate income tax if the U.S. activities are very limited. A representative office may be appropriate for the very early stages of a company's U.S. expansion but will likely need to be transitioned into a branch or subsidiary as the U.S. business grows.

A branch structure is similar to a representative office in that it does not require incorporating a separate legal entity, but a branch can perform a substantially broader range of activities than a representative office. A branch will, however, constitute a taxable presence in the U.S., which means that the business must annually account for and file U.S. federal income tax on the branch's profits. The parent company of the branch will be considered the U.S. taxpayer, and, as such, the parent company's other operating income could potentially be pulled into the U.S. tax net in certain circumstances. It is important that all related party transactions between the U.S. branch and the parent company are based on arm's length U.S. transfer pricing principles.

Non-U.S. companies that intend to have people or property in the United States often choose to incorporate a wholly owned U.S. subsidiary to "ring fence" the U.S.-based activities. A subsidiary does not have to necessarily be incorporated in the state in which it is primarily doing business. It is common to incorporate in a state with flexible incorporation laws and then operate in many other states, which may require registering the corporation to do business in those other states and applying for a certificate of authority to do business there. As with branch structures, it is important that all related party transactions with the U.S. subsidiary are based on arm's length U.S. transfer pricing principles to control the amount of profits subject to U.S. tax.

Considerations associated with typical U.S. operating models

Considerations	*U.S. representative office*	*U.S. branch*	*U.S. corporate subsidiary*
Allowed functions	Activities are limited to ancillary and support activities such as advertising and market research.	No specific restrictions apply to U.S. branch operations.	No specific restrictions apply to corporate subsidiaries, though all related party cross-border activities should use U.S. transfer pricing arm's length principles.
U.S. federal income tax	If activities are sufficiently limited, the representative office should not be subject to U.S. federal income tax.	Branch profits that are ECI are taxed at the 21 percent corporate tax rate.	Taxed at the 21 percent corporate tax rate.

Dividends	The representative office should not be able to pay dividends.	A 30 percent branch profits tax on deemed withdrawals from the branch (potentially reduced/eliminated under treaty).	30 percent dividends withholding tax (potentially reduced/eliminated under treaty).
State and local taxation	Varies depending on state tax nexus profile.	Varies depending on state tax nexus profile.	Varies depending on state tax nexus profile.

Alternatively, some non-U.S. companies choose to operate through a U.S. limited liability company (LLC). For U.S. federal income tax purposes an LLC can elect different tax classifications. For example, an LLC with a single owner is, by default, classified as a disregarded entity (the equivalent of being classified as a branch) for U.S. tax purposes, unless the owner elects to treat it as a corporation. Likewise, an LLC with more than one owner is classified as a partnership, unless the owners elect to treat it as a corporation. These rules are commonly referred to as the "check-the-box" rules. Before choosing to use an LLC for U.S. business purposes, the non-U.S. company should carefully consider local country treatment of the LLC (such as whether it could be considered a hybrid entity).

Financing U.S. Operations

U.S. operations can be funded via debt, equity, or a mix of debt and equity, though it is recommended that U.S. operations not be fully funded by debt. Although interest expense is generally deductible, the U.S. tax code imposes various restrictions on deductibility. In addition, the Internal Revenue Service (IRS) can recharacterize purported debt as equity for U.S. tax purposes, which could potentially lead to disallowed interest deductions and/or additional withholding tax liability.

Interest paid to a non-U.S. creditor is generally subject to a 30 percent rate of U.S. federal tax through the application of the FDAP withholding regime described above. This rate may be reduced (potentially to zero) if the creditor is eligible for benefits under an applicable U.S. income tax treaty. Certain exceptions to withholding are also available under federal law. Note that most U.S. tax treaties contain a "limitation on benefits" article (an anti-treaty shopping provision) that limits treaty benefits to persons that have a measurable business nexus to their country of incorporation (for example, the country of residence of the ultimate owners, or the conduct of an active trade or business in the country where the non-U.S. company is resident). Eligibility for a reduced rate of federal tax on interest payments, whether the reduction is based on federal law or a tax treaty, should be confirmed prior to entering into any financing arrangements.

Repatriation of U.S. Earnings

Once U.S. operations become profitable, consideration should be given to how best to repatriate the cash to the home office. If a U.S. corporate subsidiary is established, dividends paid to the non-U.S. parent company are generally subject to a 30 percent rate of U.S. federal tax under the FDAP withholding regime described above. The 30 percent rate may be reduced (potentially to zero) under an applicable U.S. income tax treaty if the recipient is eligible for treaty benefits. For non-U.S. companies that are operating in branch form in the U.S., a federal branch profits tax imposes similar withholding (and relief from branch profits tax may also be available under a U.S. income tax treaty).

In some cases, a non-U.S. company may choose to utilize debt to fund U.S. operations to repatriate cash back to the home country office if the federal withholding tax rate on interest is less than the federal withholding tax rate on dividends.

State, Local, and Other Taxes

In addition to the activities and structures that generate U.S. federal income tax liability, inbound companies (depending upon where they locate, how they conduct their business, and to whom they sell their products) can also be subject to subnational state and local income taxes, as well as certain non-income taxes, such as sales and use taxes, gross receipts taxes, real and personal property taxes, unemployment and payroll taxes, among others.

State income taxes

Non-U.S. companies expanding into the United States may be surprised to learn that they may be subject to state income taxes not only in their state of incorporation, but in other states as well. States generally impose tax when a company creates state tax "nexus" in the state. Nexus is generally formed when a company has people or property in a state, even temporarily (and increasingly, some states also have economic nexus rules whereby a liability could exist even without people or property in that state so long as the company has made a threshold level of sales to the state). As such, it is possible for a non-U.S. company to create state tax nexus in multiple states.

Although most states use federal taxable income as a starting point for calculating the state tax liability, each state may provide significant additions to, or subtractions from, that amount to determine state taxable income. States typically do not allow the same amount of depreciation and usually will add back state and local taxes, among other items, to determine the state tax base. Thus, the state income tax base could vary widely from state to state. In addition, and quite unusual compared to other countries around the globe, the states rely upon formulary apportionment to divide the tax base of a multi-state business. In the past, most states used a blended factor comparing the ratio of property, payroll, and sales in the state compared to everywhere the taxpayer was engaged in business. Now, increasingly the states rely solely upon a sales factor to apportion the tax base among the states. In some cases, certain types of income, such as income from the sale of real property located in the state or from certain intangible income, is allocated entirely to one state, although these rules vary from state to state. In theory, there should not be double taxation amongst the states as the total income of a company should be allocated and apportioned amongst the states where the company has created nexus, but because there is no mechanism among the states to settle double taxation disputes, it is possible that a single stream of income could be subject to taxation by more than one state.

In general, states may choose whether to conform to the federal Internal Revenue Code (IRC) and may even pick and choose which parts of the IRC to which they wish to conform. Some states opt for "fixed date" conformity, which means that they follow the IRC as of a certain date. Some states choose "selective" conformity and adopt only certain IRC provisions or conform to those provisions at different times compared to their original date of adoption for federal income tax purposes. Others practice "rolling" conformity, automatically updating their reference to the IRC on a continual basis and thus conforming to the most recent version of the IRC as it is amended.

In addition, it is possible to create state tax nexus (and thus a state tax liability) even if there is no federal tax due, such as when a treaty eliminates the federal tax liability, because U.S. tax treaties are limited by their terms solely to the U.S. federal income tax (other than the non-discrimination provisions). Thus, non-U.S. companies should be aware that if they believe they do not have a U.S. PE and are thus not subject to U.S. federal income tax, they may still have sufficient state nexus to be subject to state income taxation. These rules governing tax presence vary widely from state to state and, notably, even with respect to particular state or local taxes within a single state.

Sales and use taxes

Unlike many other countries, the United States does not impose a national sales tax or value-added tax (VAT). Instead, such consumption-based taxes, known as sales and use taxes [but which may go by other names such as a "general excise tax" (in Hawaii) or a "transaction privilege tax" (in Arizona)], are levied in all but five states. In most states, in addition to the state-wide sales tax, counties, cities, and other local regional authorities are entitled to levy their own sales and use taxes. Fortunately, in most states, these additional local jurisdictional sales and use taxes are merely imposed as an incremental addition to the existing state sales tax base and collected by the same state taxing authority. However, in certain states, some local "home" rule jurisdictions are granted the authority to administer their own sales and use taxes separately from the state, meaning that they may have a tax base that is different from the state's and may require taxpayers to file and report such local taxes separately as well. Sales taxes are typically assessed on the final consumer purchase, with wholesale transactions usually exempted. Generally, all sales of tangible personal property occurring within a state are subject to sales tax unless specifically exempted by statute. In most states, sales of services and intangible property (such as electronically delivered software) are usually excluded from sales tax unless specifically taxable. It is the seller's responsibility to collect and remit sales tax, although state and local law typically allows the cost to be transferred to the consumer.

Prior to the 2018 U.S. Supreme Court ruling in *South Dakota vs. Wayfair, Inc.* (*Wayfair*),[6] a company generally needed to have a physical presence in a state to trigger an obligation to levy and remit sales tax on sales within a state. The *Wayfair* ruling eliminated the physical presence standard, meaning sellers may be required to collect sales tax on transactions with remote consumers that previously were not subject to sales tax. After the *Wayfair* ruling, many states enacted presence thresholds for sales and use tax purposes that apply depending on the dollar amount of sales and/or number of transactions within the state (typically either $100,000 or more of revenues derived from sales to consumers in the state, or 200 or more transactions with consumers located in the state, although these thresholds vary from state to state). Moreover, in response to the rapid development of online retailers who allow third-party retailers to sell through their internet portals, nearly every state now imposes a sales tax collection responsibility on the operators of the internet sales portals.

Non-U.S. companies selling into the United States (including those without a physical presence in the United States) should assess their potential sales tax obligations following the *Wayfair* ruling and the ongoing changes in state and local tax laws in response to that ruling, and ensure they have compliance and reporting processes in place to satisfy any obligations. Even though the state and local taxing authorities may not have an immediate ability to enforce collection, the failure to file returns means that the statute of limitations for sales tax collection assessments remains open indefinitely. Non-U.S. companies that do

[6] *South Dakota v. Wayfair, Inc.*, 585 U.S. __, 138 S.Ct. 2080 (2018).

not comply may later be surprised to learn they have significant state and local sales tax liabilities.

Employment taxes

Human capital is an area that can become quite challenging for an inbound company, especially if the home country headquarters is left to deal with the diverse and often complex requirements of federal and multistate taxing jurisdictions. Many businesses coming to the United States decide to outsource some or all of their human resource management activities such as payroll and benefits administration since these areas require considerable local knowledge.

1. Social security tax

Under the Federal Insurance Contributions Act (FICA), social security tax is imposed on wages or salaries received by individual employees to fund retirement benefits paid by the federal government. For 2020, the social security tax is 15.3 percent. Half of the tax (7.65 percent) is withheld from the employee's wages and half (7.65 percent) is paid by the employer. The portion relating to the social security portion of the federal tax is subject to a wage limitation that periodically changes while the portion relating to the federal Medicare program (1.45 percent imposed on each of the employer and the employee) is not subject to any such limitation.

2. Federal unemployment tax

Federal unemployment tax (FUTA) is imposed on the wage payments that employers make to their employees for services performed within the United States regardless of the citizenship or residency of the employer or employee. The 2020 projected tax rate is 6 percent on the first $7,000 of wages of each employee. Connected to this federal unemployment insurance program, most states also impose their own unemployment taxes that are creditable against FUTA tax when paid; rates vary from state to state as well as on the historic unemployment performance of each particular employer.

3. Employer reporting and withholding

An employer (whether a domestic or foreign United States employer) is responsible for withholding and remitting United States federal, state, and local income and social security taxes from the wages of resident and nonresident alien employees. The employer is also responsible for reporting the compensation income of its employees working in the United States.

Federal, state, and local credits and incentives

Although the U.S. network of federal, state, and local taxes can be complex to navigate, there are also federal, state, and local incentives available for inbound investors where the investment involves material capital investment, research and innovation, or leads to job creation. These can include tax credits, abatements, cash grants, land grants, low interest loans, and other benefits. Companies should consider a strategy for identifying and securing these investment incentives as they can help mitigate upfront costs and ongoing operational costs associated with investing in the United States, as well as strengthen the inbound investor's relationship with the U.S. communities in which it does business.

Glossary

Branch profits tax (BPT): The branch profits tax, which simulates the tax treatment of a corporation that issues dividends, is a 30 percent U.S. federal tax on deemed withdrawals from a branch. The tax base for the branch profits tax is the dividend equivalent amount, which is essentially the branch earnings for the year less the amounts reinvested in the United States. In some cases, the 30 percent branch profits tax can be reduced or eliminated by treaty.

C corporation: Under U.S. law, most corporations are established in accordance with the law of the state of incorporation. Although the corporate laws of most states are similar, those of certain states are more flexible than others. A corporation has a separate legal identity distinct from its shareholders. This can be used to cap any risks that may be inherent in a branch or partnership. A "C corporation" is a reference to the United States federal income tax treatment of a corporation under Subchapter C of the IRC. Most corporations are treated as "C corporations" unless special elections or qualifications apply. Use of a C corporation also prevents United States profits and losses from flowing up to the shareholders. The profits earned by a C corporation are subject to a 21 percent federal income tax rate (plus any applicable state and local taxes) in the United States.

Effectively connected income (ECI): Income that is effectively connected to a U.S. trade or business associated with activity that is considerable, continuous, regular, and substantial. ECI is generally used to determine what foreign corporations and their U.S. branches and partnerships are subject to U.S. tax.

Fixed, determinable, annual, or periodic income (**FDAP):** Includes dividends, interest, rents, and royalties; generally excludes gains from the sale of real or personal property.

Federal Insurance Contributions Act (FICA): A social tax imposed on wages or salaries received by individual employees to fund retirement benefits paid by the U.S. federal government.

Federal unemployment tax (FUTA): Imposed on the wage payments employers make to their employees, regardless of the citizenship or residency, for services performed within the United States.

Internal Revenue Code (IRC) of 1986, as amended: The basic federal income tax law for the United States.

Internal Revenue Service (IRS): The agency of the U.S. federal government responsible for enforcing U.S. federal tax laws, collecting taxes, processing tax returns, and issuing tax refunds.

Limited liability company (LLC): An entity created under state law. From a U.S. federal income tax perspective, an LLC is an eligible entity that can be treated as either a partnership, a corporation, or a disregarded entity. An LLC may be disregarded only if it has a single member (i.e., owner). If it has two or more members, unless it elects to be treated as a corporation, an LLC is treated as a partnership for U.S. federal income tax purposes (provided it does not engage in certain businesses for which such an election is not permitted). From a state business law perspective, LLCs provide their members with liability protection similar to that offered to shareholders by being organized in corporate form.

Permanent establishment (PE): A fixed place of business through which the business of an enterprise is wholly or partly carried on, which most U.S. double tax treaties say includes a place of management, a branch, an office, or a factory.

Sales and use tax: Sales and use taxes in the United States are generally assessed at the state and/or local level and are usually assessed on the final consumer purchase, with wholesale transactions remaining tax exempt. As a general rule, all sales of tangible personal property are subject to sales or use tax unless specifically exempted by statute (sales of services and intangible property vary by state). Use taxes are imposed on the use, storage, or consumption of tangible personal property by a business itself, within a state's borders.

State tax nexus: Generally refers to the requisite business activity in a state or local taxing jurisdiction sufficient to allow a state to impose an obligation to pay or collect and remit a tax. Based on U.S. Supreme Court rulings, state tax nexus can be limited by provisions of the U.S. Constitution. Moreover, state laws may also establish the thresholds by which a taxpayer may have sufficient connections to the state to be subject to a state tax payment or collection obligation [generally based upon physical presence, such as the presence (even on a temporary basis) of employees or independent contractors in the state, leased property in the state, or based on the dollar amount or number of transactions occurring in the state]. Such rules vary from state to state and also, even within the same state, based upon the type of tax. As indicated elsewhere, U.S. income tax treaties by their very terms do not apply to the states. Consequently, even though a non-U.S. company may not have a PE in the United States due to the invocation of treaty protection, it may still have "state tax nexus" and an obligation to pay or remit certain state or local taxes.

U.S. trade or business: There is no comprehensive definition of a U.S. trade or business; it is largely defined by case law. In order to make a determination of whether a trade or business exists, the owner's level of activity must be measured. Activity in pursuit of profit that is "considerable, continuous, and regular" is necessary to establish a trade or business.

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This chapter was prepared by Jillian Symes, Julia Tonkovich, and Steve Wlodychak with EY. Views expressed in this chapter are the authors' own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

Workforce

Creating Employment Success in the United States

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The key to any organization is people, and any company doing business in the United States will have to recruit, interview, hire, and manage a workforce. The process of hiring and managing a U.S.-based workforce may differ greatly from those practices customary in other countries. In the United States, employers are regulated by (1) federal laws that apply to all companies regardless of location; (2) state laws, for the individual state(s) where the employees are physically working; and, (3) local- or city-based ordinances in some larger cities. Also, the law may be shaped by "public policy" considerations and court decisions. Employers are generally afforded great latitude in structuring their workplace policies and practices. This freedom, however, is not without limits, as federal, state, and local laws regulate such areas as minimum wage and other issues relating to the payment of wages and prohibit workplace decisions taken for discriminatory reasons. There are also other types of protections, including those for disabled or pregnant workers.

This chapter is designed to provide a general overview of federal, state, and local laws; how these laws work to protect employers and employees; and how the United States works to provide safeguards against discrimination through the classification of people into "Protected Classes." In fact, these protected classes should be some of the most important considerations for employers as they delve into the laws governing the workplace. *Title VII of the Civil Rights Act of 1964* and corresponding federal civil rights statutes define who is protected. In the United States, employment laws prohibit discrimination based on these protected characteristics, which Federal law identifies as age, race, sex and gender, national origin, disability, color, and religion. Several U.S. states and some local governmental entities have added to these categories to provide broader protections.

Section 1 – The Employment Relationship

Recruitment

In a nutshell, recruitment cannot show a preference for a class of people or discourage someone from applying because they are in a protected class. This is true whether an employer recruits through job postings, recruiters, or word of mouth. For example, job postings cannot seek "females" or "recent college graduates," since the first would show a preference for women and discourage males from applying, and the second would discourage people over 40 from applying. Likewise, employers cannot direct their recruiters to only interview people inside or outside protected categories or recruit in a way that will only yield members outside the protected categories. Therefore, employers should review job postings for potential issues to ensure neutral language and impact and review directions given to recruiters. There are also some state-specific restrictions on what employers may inquire about pre-hire, such as salary histories.

Employee benefits are an essential part of U.S. recruitment and compensation. While benefits vary by size of the business, geographic region, and sector of the economy, the most common are health care (medical, dental, and vision), retirement plans, and paid time off. Some less common, but still popular, benefits include incentive programs, education reimbursement, and discounts on some products. Employee benefits are constantly evolving to incorporate new concepts and new expectations from employees. Many companies are reassessing their benefits in light of the priorities of the workforce they are looking to attract and retain. Each employer is free to choose the types of benefits they offer and how these benefits are provided. However, some benefits must be offered uniformly to all similarly situated employees. There are also some selected benefits that can be tailored for specific employees or potential employees. A key point to remember is that the legal requirements and restrictions are changing as fast as the benefits.

Interviews

Like recruitment, employers should not inquire into, or make decisions based upon, an applicant's disability, race, color, gender, sex, national origin, age, or religion. Employers should avoid asking questions about family or marital status and club or union membership. Instead, interview questions should be limited to determining if a person is qualified for the job. For example, if a job requires an employee to lift 50 pounds, the interviewer can ask if the applicant meets all the required qualifications. On the other hand, the interviewer should not ask, "I see you are in a wheelchair. Can you still lift 50 pounds?" Similarly, if an employer requires applicants to take a test as part of the hiring process, the test must be related to the job and may not exclude people because of their membership in a protected category.

Ban the Box Laws

Multiple states (14 at the time this chapter was drafted) have implemented so-called "Ban the Box" laws. These laws are designed to limit or eliminate employers' ability to inquire into past criminal convictions or use past convictions in hiring decisions. While these laws vary between states (and localities), they generally: restrict the type of conviction that can be asked about; limit the ability to use past convictions in hiring decisions; delay background checks; and require that employees be notified when criminal information is used in hiring decisions. Several localities within these states have additional requirements on what information can be sought or used. Some states require a detailed analysis be undertaken before rejecting a candidate based on a criminal conviction.

Pre-Hiring Drug Testing

Pre-hiring drug testing is another area where the laws and requirements vary dramatically between various states and localities. Some states have no restrictions on pre-hiring drug testing; others have some limited restrictions. Certain localities go even further by eliminating the ability to require pre-hiring drug testing, except under very limited situations, or by restricting employers from testing for certain drugs such as cannabis, except in certain narrow circumstances. Some states that permit the use of medical marijuana have revised testing procedures to accommodate the use of cannabis outside of work. There is some tension between federal and state law on the issue of drug testing. Some employers who have federal contracts, federal grants, or are subject to Department of Transportation (DOT) or Department of Defense (DOD) guidelines, may have more expansive drug testing requirements than those permitted under state law.

Managing the Workforce

Employers have great latitude about decisions on promotions, pay increases, discipline, or termination. However, employers must be mindful to follow Equal Pay Act laws and other non-discrimination laws in making these important workplace decisions. Again, employers must consult federal, state, and local laws on these topics. (Refer to Section 4: Compliance) In general, employers are free to design pay policies based on merit, performance metrics, client development, or other important considerations without being lock-stepped solely by tenure or the position level.

Section 2 – At-Will Employment

Almost every state in the United States applies some version of the “at-will” employment doctrine. Generally, the at-will doctrine means that either the employee or employer may terminate the relationship at any time, without notice or “cause.” Any employment decision, even taken in a state that follows a broad application of the at-will employment doctrine, must still comply with all federal, state, and local laws regulating employment decisions, including protected classes.

The at-will doctrine may be a new concept for international business investors, who may be accustomed to hiring through employment contracts with a fixed term (duration) that may restrict the ability to terminate employees. Under the at-will doctrine, there is no set term of employment, no standard affecting employment decisions, and, as a result, each party can end the employment relationship at any time. In short, the doctrine does not require a long-term commitment by either party. In an at-will situation, an employee who simply wishes to stop working can end the employment relationship at any time, as can the employer. Indeed, since 1888, Texas has held that employers can terminate an employee for good cause, bad cause, or no cause at all. Most other states have court decisions that contain similar holdings.

Employers and employees can disregard the at-will doctrine by entering into contracts that specify the length of employment and the conditions for, and consequences of, termination. Even without an express written contract, however, the doctrine does have some limitations. Even though the at-will employment doctrine presents a straightforward approach to the employment relationship—both parties will continue to work together if each party desires to continue the relationship—the application of federal and state law supersede the doctrine. The most obvious exception is that an employment decision cannot be based on an act or reason that has been deemed "illegal," and for purposes of this chapter any hiring or firing practices where the decision is based on the employee's identification with any protected class is illegal.

In addition to non-discrimination limits, several states provide protection against "retaliation," such as termination because an employee has engaged in whistleblower activities (such as reporting illegal or fraudulent conduct; filing a complaint about discrimination or unpaid wages; seeking workers' compensation benefits; or engaging in some other protected action).

Moreover, when applying the at-will employment doctrine, some states exercise an amended version of the doctrine. For example, some states apply an implied contract exemption to the doctrine, meaning employers can establish a "just cause" standard for employment decisions through a contract, an employee handbook, or other employment policies. Further, some states applying the doctrine also exercise a good faith exemption. In these states, even though the at-will doctrine applies, an employer may only terminate employees for "just cause."

While the at-will doctrine provides employers with a fair amount of flexibility, there are limits based on federal, state, or local law that must be considered. Employers should take care that internal personnel policies do not create contractual expectations. As a practical matter, most employers use caution when terminating employees. The expense of hiring and training and the impact on employee morale are all important considerations that practical employers evaluate before terminating employment.

In addition, unemployment insurance is an important consideration. Most states require that employers contribute monies into a state unemployment insurance fund administered by the state government. Employees who are terminated are often eligible to make a claim for unemployment benefits, which is a partial wage replacement for a period to assist the employee until he or she can locate new employment. The amount the employer is required to contribute to the fund is determined by several factors, including the total amount of the payroll dollars and the employer's claims experience. If an employer has high turnover of its employees, and many former employees file for unemployment benefits, the employer is likely to receive a risky rating and may be required to contribute a higher percentage based on its adverse claims experience. Employers and employees can submit information relating to the termination and claim; employers can object; and there are limited appeal rights if either employee or employer disagree with the findings of the unemployment claims examiner.

As a practical matter, employees who do not understand why they are terminated are more likely to file an administrative or court claim against their employer alleging discrimination or wrongful termination. As such, most employers attempt to resolve performance problems and terminate only where the problems are unsolvable, the employee is unsuitable, or there are financial issues compelling the termination.

Section 3 – Use of Employment Agreements

An employer may decide that it is useful to have employment agreements for its executives or key employees. This type of agreement is helpful to cover such essential terms as: (1) length of employment; (2) expanded notice upon resignation; (3) compensation and bonus structures; (4) equity participation; (5) termination for cause or without cause; (6) severance; (7) post-employment restrictions, such as non-competition, non-solicitation, and nondisclosure covenants; (8) detailed performance expectations; (9) housing, car, or entertainment stipends or allowances; and (10) relocation benefits and expectations. If the business is a start-up or encountering financial difficulties, the agreement may cover a "stay bonus" or otherwise incentivize remaining with the employer for a period. Severance provisions can be important as a method of pre-negotiating the end of the employment agreement, minimizing the consequences of any

potential emotions. Often, severance agreements are conditioned on the employee giving up the right to make a post-employment claim for damages, where permitted.

In addition to executives, employment agreements are useful for employees who have access to, and work with, trade secrets and confidential information; who are hired to invent or work on research and development (R&D) activities; or where the employee will be responsible for developing good will (sales). There is federal and state statutory protection for some of an employer's intellectual property rights; however, in the absence of a written agreement and affirmative steps to safeguard proprietary information, an employer's rights may be unsettled or result in shared ownership of an intellectual property asset. Employers may wish to impose post-employment restrictions on working for a competitor, soliciting employees or customers, or disclosing confidential information. Invention agreements detail ownership rights in intellectual property conceived or developed by the employee with the employer's time or resources. An employer may elect to have stand-alone agreements covering the protection of trade secrets, good will, non-competition, or intellectual property rights. Employers may instead include these post-employment restrictions in a general employment agreement covering the topics identified in the preceding paragraph.

State law varies on the requirements for such agreements and their ultimate enforceability. All agreements must be supported by "consideration." In legal terms, consideration is a bargained-for exchange of something of value for something else of value. The parties of the agreement can decide if what they are exchanging is valuable enough to be part of the agreement. Sometimes, continued employment can be deemed sufficiently valuable and therefore enough "consideration" to uphold the agreement. The agreements themselves must be reasonable in scope, duration, and geographic area subject to the post-employment restraints. In addition, they must support legitimate interests, such as protection of trade secrets or goodwill. Under no circumstance can they be created for the sole purpose of limiting competition between similar goods or services. Lastly, the agreement cannot violate public policy, be injurious to the public interest, or unduly burdensome to the employee. Courts enforce these agreements to varying degrees; if this is of importance, employers should consult with employment counsel in their specific geography and/or their specific industry, as specialized aspects to these negotiations might exist.

Section 4 – Compliance

Employment Laws

U.S. federal and state employment laws generally prohibit discrimination, harassment, and retaliation based on protected classes, characteristics, and conduct. Most federal employment laws cover employers with 15 or more employees. Federal laws prohibit discrimination based on race, color, national origin, religion, sex, disability, familial status, genetic information, citizenship, pregnancy, veteran or military status, and age (federal law protects employees who are over age 40, Oregon and the District of Columbia protect employees 18 and older, and Michigan and New Jersey protect employees of all ages). Federal law does not include sexual orientation as a protected class; however, at the time of publication, 24 states protect sexual orientation and/or gender identity/expression.

State employment laws expand coverage to smaller businesses or provide additional protection, such as:

- Height and weight: Michigan and Washington
- Possession of a driver's license: California
- Exercise of free speech rights: Connecticut
- Reproductive health decisions: Delaware, Hawaii
- Family responsibilities: Delaware, the District of Columbia
- Personal appearance, matriculation, or political affiliation: The District of Columbia
- Credit history: The District of Columbia, Hawaii, Illinois, Oregon
- Breastfeeding: The District of Columbia, Illinois
- AIDS and HIV status: Florida, Missouri, Nebraska, Vermont
- Sickle cell trait: Florida, Louisiana, North Carolina, New Jersey
- Arrest record and sealed/expunged convictions: Hawaii, Illinois, New York
- Protective order status: Illinois
- Choice of a Sabbath: Kentucky
- Status as a smoker or non-smoker: Kentucky, Louisiana, Mississippi, New Hampshire, New Jersey, Nevada, Oklahoma, Oregon
- Exercise of right to bear arms: North Dakota

Medical and recreational marijuana users are protected in Arizona and to a lesser extent in Colorado, Connecticut, and Illinois. New Jersey and New York also prohibit hairstyle discrimination.

Wage & Hour Laws

The Federal Fair Labor Standards Act (FLSA) and the related wage and hour law enacted by individual states require that employers comply with minimum wage requirements. Where the state and federal rules differ, states can enact a higher minimum wage rule, but cannot go below the minimum threshold wage set by the federal government. Generally, federal and the various state wage and hour laws require that employers comply with minimum wage requirements; properly classify workers as exempt or non-exempt from overtime pay; and impose recordkeeping obligations, child labor restrictions, and posting requirements. The Federal Equal Pay Act requires that employers pay similarly situated employees the same wage, regardless of gender, if they perform jobs that require substantially equal skill, effort, and responsibilities. There are some exceptions for compensation plans based on seniority or merit. Most states have enacted their own equal pay laws, and at least seven states have greatly expanded coverage to require equal pay on the basis of all protected characteristics.)

Leave of Absence (LOA) Laws

Federal and state LOA laws require employee LOAs in specific circumstances and prohibit retaliation against employees who exercise their LOA rights. The Federal Family Medical Leave Act (FFMLA) requires employers with 50 or more employees who work in a 75-mile (120-kilometer) radius to provide 12 weeks of unpaid leave for eligible employees' own serious medical condition or the care of a covered family member. Other federal and state LOA laws require unpaid leave for military service; jury and witness duty; voting; victims of domestic violence or criminal activity; blood, bone marrow, and organ donation; school activity; pregnancy and nursing mothers; and voluntary firefighter, first responder, or civil air patrol. Although federal LOA laws require only unpaid leave, 13 states and various municipalities now require paid sick leave. Some companies may elect to exceed federal and state mandated requirements by offering incentives like paid leave as a benefit to employees.

Required Harassment Prevention Training

Federal law does not require that employers provide sexual harassment prevention training; however, it is required in California, Connecticut, Delaware, Illinois, Maine, and New York state, as well as some large cities. It is also recommended by the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor, as well as state agencies serving a similar purpose.

Posters, Notices, and Filings

U.S. employers must post conspicuous summaries of applicable federal and state employment laws. The Department of Labor (DOL) e-Laws Poster Advisor helps employers determine which federal law posters must be posted. States require additional posters for unemployment insurance, worker's compensation, workplace safety, and wage laws. More information on employment law poster requirements by state can be found on a state-by-state basis.

Work Eligibility Concerns

All employers are required to have employees complete I-9 Forms and provide appropriate documentation that the employee is eligible to work in the United States. Employers are required to maintain such records and provide access to these completed forms if audited.

"Right-To-Work"

In the United States, workers in many industries have unions that are designed to help employees in bargaining for wages and benefits with employers. Unions are not necessarily present in all industries, and some unions are more powerful than others, but where unions exist, members pay dues. The "Taft-Hartley Act" (better known as *The Labor Management Relations Act of 1947*) implemented the right-to-work concept at the federal level by putting into law that employees can choose to join a union or not, pay dues or not, and cannot be forced out of their job if they choose not to join a union. In addition, employees who do not join the union can still benefit from the services offered by the union because the union exists to represent all employees. This relationship is so ingrained that employees who are not union members and/or do not pay dues can sue the union if they feel they were not well represented in their case against their employer. In addition to the federal-level regulation, 27 states and Guam have right-to-work laws currently in effect.

Section 5 – Privacy Laws

Employee privacy in the United States does not consist of a unified privacy law, but rather a series of laws at the local, state, and federal level, many of which apply only to specific aspects of privacy or certain sectors of the economy. At the federal level, there are several prominent laws dealing with privacy, three of which often come into consideration with hiring and employment matters.

First is the Federal Trade Commission Act (FTC Act), which governs the collection of personal information on websites. Most importantly, the FTC Act requires those collecting personal information from a website to specify what information is collected and how it will be used. This is critical to keep in mind when hiring individuals or seeking qualified candidates for a position through a website, even if a third party or add-in is used to do so. The FTC Act will apply if the information is collected by employers or for their benefit.

The second applicable federal law is the Health Insurance Portability and Accountability Act (HIPAA), which covers health benefits provided to employees once employed. HIPAA requires certain disclosures to employees and prohibits disclosure of protected health information without express authorization. Employers must also set up HIPAA-specific procedures and practices, conduct a risk assessment, and enter into agreements with third parties that may receive information subject to HIPAA on the employer's behalf.

The third important privacy regulation is the Genetic Information Nondiscrimination Act (GINA), which prohibits employers from using genetic information to make most decisions about employees.

At the state level, almost every state and the District of Columbia has passed laws protecting their residents. While these laws differ greatly and are being revised and expanded regularly, a few key components are common and applicable to employment. First, in the event personal information is used in a way that violates the law or is used contrary to its intended purpose, the individual must be notified about what happened, advised on how to prevent the risk of identity theft, and, in many cases, the employer must contact the state or federal government. Second, many states have passed laws prohibiting employers from requesting or otherwise accessing personal accounts of employees, especially social media. Third, individuals, including employees, must receive notice of their rights regarding their personal information and how their personal information is being used. This often goes well beyond what is required to comply with the FTC Act described above. Specifically, in some states, notices must be provided about where information is obtained, how long it is stored, who it is shared with, and whether it is sold as part of a dataset. Fourth, states are increasingly restricting when and how very sensitive information, such as biometric information, can be collected and used.

In all cases, employers must carefully monitor their data collection and maintain employee privacy, keeping such information well contained. Meeting these standards at the state and federal level requires the assistance of knowledgeable professionals. If data is exchanged outside of the United States in countries that have their own data protection laws, U.S.-based employers must comply with those laws as well.

Section 6 – Employee Recourse

If employers run afoul of federal, state, or local employment laws, aggrieved employees have several avenues to vindicate their rights. First, if the employer has workplace policies, the employee can use the employer's internal resources, such as their manager or human rights manager, to address the departure from a workplace rule or law. Employees are not required to do this, but this is a viable option. An employee may file a complaint with either a federal or state civil rights agency, such as the EEOC or the state's department of labor. Some laws require that the employee first file a complaint with such an administrative agency (called "exhaustion of administrative remedies"). Other laws do not require exhaustion and an employee can file a complaint with any court that has jurisdiction to hear the controversy – typically the state or federal court where the employee works or lives. Lastly, by agreement, an employer may compel the employee to pursue claims through an alternative dispute mechanism, such as arbitration.

Conclusion

The United States provides great investment opportunities and a well-educated diverse workforce. There is a substantial amount of freedom to recruit, manage, and retain a productive workforce. This chapter has sought to provide a high-level review of these key areas of flexibility as well as the restrictions that employers need to know. However, it is strongly encouraged that any business consult legal advisors for more specific information about the legal requirements where the new business will operate.

Glossary

Arbitration: Arbitration is a private method of resolving a dispute without either party having to file a complaint with an administrative agency or court. The parties can use the rules established by a recognized arbitration association, set their own rules by contract, or refer to the federal or state arbitration act. The purported benefits to using arbitration are confidentiality (no public filing in an agency or court), shorter time to resolve the dispute, and a smaller expense of attorneys' fees. There are downsides to arbitration, such as no judge to make decisions, no jury to hear the dispute, and limited appeal rights.

At-Will Employment: At-will employment is a policy that provides employee or employer with the freedom to end the employment relationship at any time, for any reason (except for an unlawful reason), without advance notice. In the absence of an employment agreement, or a specific federal or state statute, employers need not pay any separation pay, severance pay, or notice pay. Employers must comply with the law in terms of paying wages and accrued but unused benefits (such as vacation or sick time); otherwise, employers are free to create employment policies addressing what is payable at the time of termination.

Employee Benefits: Employee benefits typically refer to the accoutrements or emollients of employment, such as paid time off, health insurance, retirement plans, and flexible benefit plans. Most states do not require provision of paid time off, except for sick time. But most employers routinely provide time off not only for sickness, but personal reasons or vacation as well. Most states do not requirement payment of unused paid time off at the time of termination, but some do. If the employment policies or practices require such payment, then the employer must follow those policies or practices.

Consideration: Consideration" is a bargained-for exchange of something of value for something else of value (for example, the promise to work in exchange for payment).

Exhaustion of Administrative Remedies: A federal or state law may require that an employee file a complaint with a specific administrative agency before he or she can file the complaint in court. The idea behind exhaustion is that the specific administrative agency is charged with the responsibility to enforce the law and has expertise in interpreting the law, an interest in deterring violation of the law, and expertise and authority to issue a remedy, including a public-facing remedy. For example, if an employee wants to file a claim under Title VII of the Civil Rights Act alleging she was fired because she was a woman, she will first have to file the complaint with the EEOC and provide them with an opportunity to resolve the dispute before she can file a complaint with a federal or state court of law and submit her dispute to a jury.

Federal Law: Federal law refers to the United States Constitution and its Amendments, and the Acts passed by the United States Congress and signed by the sitting President. Various federal agencies having oversight or enforcement responsibilities for certain laws may publish regulations that interpret federal law and provide more detail on the scope of the law. Also, federal agencies may publish guidelines that provide interpretative guidance to regulatory bodies, employers, employees, and the courts. In this paper, all these sources are considered federal law.

State Law: The United States is comprised of 50 sovereign states, each with its own executive branch, legislative branch, and judicial system. Instead of a president, states have governors. States are permitted to pass laws if the state law does not conflict with or override federal law. For example, the states can establish their own minimum wage which may differ from the federal law but cannot be a lesser amount than the federal minimum wage law. The states can enact more generous rules of law, but not more restrictive. Many states augment federal employment law by provider greater employment rights or benefits; however, some do not. The law of some states closely mirrors that of federal law. One approach is not better than the other. It is simply something to be aware of when conducting business in the United States. Business activities need to comply with federal and state law, and even local law, such as that enacted by larger cities.

About Clark Hill

Clark Hill is a multidisciplinary, international law firm that draws on our attorneys' comprehensive industry and policy knowledge and a global network of industry advisors and subject-matter experts to provide innovative legal solutions and client-service excellence worldwide. Our work is guided by our deeply held shared values, including practicality, entrepreneurship, mutual respect, diversity, ethical behavior and a commitment to client and community service.

With more than 650 attorneys and professionals in 25 offices, spanning the United States as well as Dublin and Mexico City, we are a committed partner to a diverse range of leading brands, forward-thinking businesses, public entities, nonprofit organizations, and individuals. Our significant presence in Washington, DC, and our deep government relations and public affairs experience at every level help ensure that our clients' voices are heard in the development of federal and state regulatory policy and legislation.

Disclaimer

This chapter was prepared by Michael Sachs, Adam Boland, Vanessa Kelly, Paul Starkman, and Charles Russman with Clark Hill. Views expressed in this chapter are the author's own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

FDI Restrictions

Limitations on Foreign Investment into the United States

SELECTUSA®

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I. Introduction

The United States has consistently ranked as a top destination for foreign direct investment (FDI). The United States boasts a high Ease of Doing Business ranking, a population of over 325 million people, the world's largest economy, and one of the best educated, most productive, and most innovative workforces in the world. The benefits of an open investment regime, based, to the extent possible, on the principle of national treatment, have been noted for decades. National treatment strives to ensure that foreign-owned companies in the United States are treated the same as domestically owned firms. This principle and its benefits were eloquently expressed in a policy statement issued by President Ronald Reagan in 1983.[7] That policy statement emphasized further liberalization of trade, protection of intellectual property rights around the world, and the importance of national treatment as a principle. Subsequent U.S. Presidents have also emphasized the importance and benefits of the United States' liberal and open investment regime.

Given the openness of the United States investment regime and the vast amount of FDI that the country continues to attract, it may seem unnecessary to consider the limitations foreign investors may face. Indeed, these limitations are few and far between, but foreign investors and their legal counsel need to be aware of them. This chapter describes the most important limitations by sector and does not cover, nor is it meant to cover, authorities and activities of the Committee on Foreign Investment in the United States (CFIUS). This chapter reflects the views of the author and is intended as a starting point to understanding the limitations on investing into the United States.

Topics Covered:
- Energy Sector
- Transportation Sector
- Financial Services Sector
- Miscellaneous (Including Radiocommunications and Tech)
- State and Local Restrictions

II. Energy

A. Atomic Energy

Commercial nuclear power and atomic energy are governed by the Atomic Energy Act of 1954.[8] Under the Atomic Energy Act, a license issued by the United States Nuclear Regulatory Commission (NRC) is required for any person in the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, use, import, or export any

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[7] Statement on International Investment Policy, National Archives, reaganlibrary.gov/research/speeches/90983b.

[8] 42 U.S.C. §§ 2011 et seq.

nuclear "utilization or production facilities" for commercial or industrial purposes.[9] These licenses cannot be issued to "an alien or any alien corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."[10]

An NRC-issued license is also required for nuclear use in medical therapy, industrial and commercial purposes, and research and development (R&D) activities.[11] This second category of licenses has a restriction nearly identical to the commercial licenses previously discussed.[12] The legal limits on issuing licenses to foreign entities are implemented by 10 CFR 50.38, which provides that "Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license."

The NRC has therefore established a "foreign owned, controlled, or dominated" test (FOCD) for the purpose of determining if an investment into the United States civil nuclear sector may fall under this prohibition.[13] The NRC has issued a Final Standard Review Plan (SRP) on Foreign Ownership, Control, or Domination, which details some of the complexities that go into making an FOCD determination.[14] For example, in some situations a license can be granted where there is 100 percent indirect ownership by a foreign parent company if that foreign parent company's stock in turn is "largely" owned by U.S. citizens.[15] On the other hand, the analysis under the "domination" principle may render an applicant ineligible for the license if its corporate structure makes a foreign company or foreign citizen appear to be dominant.[16]

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[9] 42 U.S.C. § 2133.

[10] 42 U.S.C. § 2133(d).

[11] 42 U.S.C. § 2134.

[12] *Compare* 42 U.S.C. § 2134(d) *with* 42 U.S.C. § 2133(d) (using nearly identical language in describing limitations on granting licenses to foreign persons or foreign companies).

[13] The NRC also has FOCD information on its website regarding nuclear reactors, which can be found at: nrc.gov/reactors/focd.html

[14] 64 Fed. Reg. 52355-01, 52358 (Sep. 28, 1999).

[15] Id. (This treatment may reflect a view that in such case the firm is not really foreign owned since it is ultimately, albeit very indirectly, owned by U.S. citizens).

[16] Id.

B. Oil, Gas, and Certain Mineral Rights

The limits on investment in the oil and gas sector by citizens of other countries and foreign corporations are found in the Mineral Lands Leasing Act of 1920.[17] Under that law, there are limitations on the acquisition of rights-of-way for oil or gas pipelines, or pipelines carrying products refined from oil and gas, across onshore federal lands. These restrictions also apply to acquiring leases or interests in certain minerals (including coal and oil) on onshore federal lands. Citizens of other countries and foreign corporations may have up to a 100 percent stock ownership in a domestic company that owns such rights, interests, or leases, provided that the foreign investor's home country reciprocates with rights to U.S. companies.[18]

III. Transportation

A. Land Transport

There are two primary restrictions on investment in land transportation in the United States. The first is for transportation within the United States (cabotage), which is limited to persons of the United States using U.S.-registered and either U.S.-built, or duty-paid trucks or buses.[19] The second restriction is cross-border bus or truck services, which require operating authority from the Department of Transportation (DOT).[20]

B. Maritime Transport

The occasional complexity of the limitations on foreign investment into the United States is perhaps best illustrated by U.S. cargo preference laws and obligations stemming from the Military Cargo Preference Act of 1904 and the Cargo Preference Act of 1954. Military cargoes must be carried exclusively on U.S.-flag vessels.[21] At least 50 percent of all government-generated (procured, furnished, or financed by) cargo tonnage must be carried by privately- owned U.S.-flag commercial vessels (provided those are available at

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[17] 30 U.S.C. §§ 181, et seq.

[18] 30 U.S.C. §§ 181, 185(a) (This requirement of reciprocity applies to deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite, gas, and federal lands containing such deposits).

[19] *See,* "Guidelines For Compliance of Commercial Motor Vehicles (CMV) and CMV Drivers Engaged in Cross-Border Traffic," Homeland Security, May 2012 at: https://www.dhs.gov/xlibrary/assets/policy/dhs-cross-border-trucking-guidelines.pdf; *see also*, "How do I enter the United States as a commercial trucker," U.S. Customs and Border Protection, at: https://www.cbp.gov/border-security/ports-entry/cargo-security/carriers/land-carriers/how.

[20] These regulatory requirements can be found in 49 C.F.R. Subtitle B, Chapter III.

[21] 10 U.S.C. § 2631.

fair and reasonable rates).[22] This requirement includes agricultural cargo,[23] but cargo generated under Export-Import Bank loan guarantees must be exclusively carried on U.S.-flag vessels (provided that the guarantee amount is over $20 million or the term of the loan is over seven years).[24] In turn, a U.S.-flagged vessel must be owned and crewed by U.S. citizens (with certain limited exception),[25] but the entity that owns the vessel may have a foreign parent company. Finally, it is worth noting that the cargo preference laws and regulations do not apply to non-military and non-government agency commercial goods.

There are several limitations on the transportation of goods and people within the United States (cabotage) by vessel. Cabotage of passengers is generally not allowed by foreign-flagged vessels.[26] In order for a vessel to engage in cabotage services of goods or passengers, it must meet at least one of three essential requirements qualifying it as eligible to engage in "coastwise trade."[27] The coastwise trade requirements for a vessel are (1) ownership by a U.S. citizen and documentation as coastwise under U.S. law (which requires the vessel to have been built in the United States); (2) ownership by a U.S. citizen, exempt from documentation, and otherwise entitled to documentation with a coastwise endorsement but for tonnage (because vessels measuring less than five net tons are excluded from documentation altogether); or (3) ownership by a partnership or association in which at least 75 percent interest is owned by a U.S. citizen, exempt from documentation, and otherwise entitled to documentation with a coastwise endorsement but for tonnage (because vessels measuring less than five net tons are excluded from documentation altogether), citizenship of owner, or both.[28]

The catching and transport of fish in U.S. waters is similarly limited to vessels built in the United States and either owned by a U.S. citizen or owned by an entity in which there is at

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[22] 46 U.S.C. § 55305; 46 CFR 381.

[23] Id.

[24] Id.

[25] *See* 46 U.S.C. § 8103.

[26] 46 U.S.C. § 289.

[27] 19 CFR § 4.80.

[28] 46 U.S.C. § 289.

least 75 percent ownership and control by U.S. citizens. Control, for the purpose of this provision, means either having the right to direct the business of the entity; possessing the ability to limit actions of or to replace CEOs; holding a majority of the board of directors, general partners, persons serving in management capacities; or being able to direct the transfer, operation, or manning of the vessel. Control does not include certain financial rights or simply the ability to participate in the previously listed actions.

The limitations in the maritime transportation sector listed above are by no means exhaustive. The United States maintains an extensive list of reservations in its international trade agreements regarding this sector.[29]

C. Air Transportation

Air carriers must be U.S. citizens in order to engage in domestic air service (cabotage) and to provide international air service as U.S. air carriers.[30] Foreign Civil Aircraft, as defined by U.S. law, require authority from the Department of Transportation (DOT) in order to operate in the United States.[31] Non-U.S. citizens also require authority to engage in indirect air transportation activities such as air freight forwarding and passenger charter activities.[32] The grant of such authority is determined by the DOT, which takes into consideration, among other things, the reciprocity granted to U.S. investors by the foreign investor's home country. Under the Aviation Programs statutes, 49 U.S.C. Subtitle VII, a U.S. citizen is defined as an individual who is a U.S. citizen; a partnership in which each member is a U.S. citizen; or a U.S. corporation where at least two thirds of the board of directors are U.S. citizens, the president and other managing officers are U.S. citizens, and at least 75 percent of voting interests are owned or controlled by U.S. citizens. A foreign company may therefore own up to a 25 percent voting interest in a U.S. air carrier or a company engaged in indirect air transportation activities without a DOT grant of authority.

IV. Financial Services

The United States has a number of restrictions on foreign investment in the financial services sector, via both mergers and acquisitions (M&A) and greenfield investment. This

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[29] *See* United States-Korea Free Trade Agreement (KORUS), signed June 30, 2007, Annex II, pp 4-7 (listing maritime transport sector non-conforming measures); Agreement Between the United States, Canada, and Mexico (USMCA), December 12, 2019 text, Annex II, pp 5-7 (listing maritime transport sector non-conforming measures). The text of the KORUS agreement can be found at: https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta; The text of the USMCA can be found at: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between

[30] 49 U.S.C. Subtitle VII.

[31] Id.

[32] Id.

section provides a brief overview of some of these restrictions. At both the national level and state level, there may be citizenship requirements for banking. For example, all directors of a national bank are required to have U.S. citizenship, a requirement that the Comptroller of the Currency can waive only for a minority of the total number of directors of a given national bank.[33] The varying requirements imposed by different states operating with different banking regulations add an additional level of complexity at the sub-federal level. Some U.S. states do not account for foreign banks in their licensing process and requirements. This may limit a foreign bank's ability to enter into that state's financial sector or create additional steps and requirements for that foreign bank to enter that state's financial sector, which are not applicable to U.S. banks. Some states also impose citizenship requirements on members of the boards of directors of state-chartered depository institutions. There are also similar requirements for insurance companies, which are generally regulated at the state level. Various states also regulate insurance at a more local level of government, and such regulations may include citizenship requirements for their board of directors, citizenship requirements for incorporators, and residency requirements for various organizational structures.

There are also limitations on what foreign banking corporations and branches of foreign banks can do in the United States. Corporations organized under a foreign country's laws cannot establish thrift institutions (credit unions, savings banks, or savings associations).[34] Foreign non-bank firms cannot own Edge Act corporations, which are corporations that either take deposits from and make loans to companies doing business internationally or invest in foreign companies. This limitation does not apply to foreign banks and their U.S. subsidiaries.[35] Foreign banks cannot engage in securities advisory and investment services without first registering as an investment adviser under the *Investment Advisers Act of 1940*.[36] Foreign banks cannot be members of the Federal Reserve System (and relatedly cannot vote for directors of the Federal Reserve Bank).[37]

Finally, there are a number of financial services activities that are limited by reciprocity conditions, and likely require an analysis of the foreign investor's home country's laws. These limitations include acting as a sole trustee of an indenture for a bond offering in the

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[33] 12 U.S.C. § 72.

[34] 12 U.S.C §§ 1463 *et seq.*, 12 U.S.C §§ 1751 *et seq.*

[35] 12 U.S.C. § 619.

[36] 15 U.S.C. §§ 80b-2, 80b-3.

[37] 12 U.S.C. §§ 221, 302, 321 (this restriction does not apply to U.S. bank subsidiaries of a foreign bank).

United States and being designated as a primary dealer in U.S. government debt securities.[38] Similar reciprocity requirements may also exist at the state and local level.

V. Additional Limitation – Highlights (Including Technology Transfers and Radiocommunications)

There are various other limitations on investing in the United States that do not fit neatly in any of the other categories in this chapter. Many of these are not so much restrictions on investment, but rather conditions on doing business in the United States that are not applicable to U.S. investors. The largest group of such limitations is on business and export promotion services provided by the U.S. government. Foreign persons and foreign corporations cannot apply for a certificate of review under the Export Trade Company Act (ETCA) of 1982, which limits liability under federal and state antitrust laws when engaging in the certified export conduct.[39] Foreign nationals and foreign companies can still receive the benefits of such a certificate by becoming members of a qualified applicant.[40] U.S. International Development Finance Corporation (DFC) programs are administered preferentially for U.S. citizens or entities controlled by U.S. citizens, and their availability to foreign-owned or -controlled U.S. enterprises may depend on the extent of U.S. ownership or participation.[41]

A key restriction for foreign investors that falls into the miscellaneous section are the regulations surrounding controlled technologies, such as lasers and sensors, nuclear materials, and chemicals. Release of a controlled technology to a foreign national in the United States, which may be a foreign investor or part of a foreign investor, is deemed to be an export to the home country of the foreign national, and as such requires written authorization from the Bureau of Industry and Security (BIS) at the U.S. Department of Commerce (DOC).[42]

There are also requirements surrounding practicing before the U.S. Patent and Trademark Office. U.S. patent attorneys must be U.S. citizens or lawful residents, and U.S. patent agents must be U.S. citizens or lawful residents or registered to practice in a country that

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[38] 15 U.S.C. § 77jjj(a)(1); 22 U.S.C. §§ 5341, 5342.

[39] 15 U.S.C. §§ 4011-4021; 15 CFR Part 325.

[40] Id.

[41] 22 U.S.C §§ 2191. The DFC maintains a useful website which can be found at: dfc.gov on what programs and resources it offers as well as some of the eligibility requirements for projects.

[42] 15 CFR Parts 730-774. BIS maintains guidelines for foreign national license applications, which can be found here: bis.doc.gov/index.php/licensing/14-policy-guidance/deemed-export/109-guidelines-for-foreign-national-licenses

allows for U.S. patent agents to practice there (for the limited purpose of patent prosecuting applications of applicants located in another country).

Lastly, there are limitations on foreign investment in the radiocommunications sector. The United States prohibits the granting of a station license to a foreign government or representative thereof.[43] The United States also prohibits the granting of broadcast, common carrier, aeronautical en route, or aeronautical fixed station licenses to foreign citizens or their representatives, corporations organized under foreign laws, and corporations with more than one fifth of their capital stock being foreign owned.[44] There are also additional limitations on the ownership of the stock of companies that own radiocommunication company stock that are too detailed to address in this chapter.[45]

VI. State-Level Restrictions (Primarily Real Estate)

This section addresses sub-federal restrictions on investment, which are primarily found in insurance and real estate sectors at the state level. Since the restrictions on insurance are highlighted briefly in Section IV above covering financial services, this section will focus on real estate. Some states have established restrictions on the purchase of agricultural land and may require that foreign entities comply with reporting requirements and /or establish residency in the United States. In addition, some states have limited the purchase of agricultural land by any entity (foreign or domestic) or placed restrictions on how many acres of agricultural land may be acquired by non-U.S. residents. Similarly, a few states have residency requirements for owning real estate. For example, Oklahoma allows non-U.S. citizens to own real estate only if they fall within certain exceptions (which include residency).[46] Several states also have various preference systems for either U.S. citizens or residents to own land, placing limits on how long non-resident non-U.S. citizens can own real estate without changing their status to

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[43] 47 U.S.C § 310(a).

[44] 47 U.S.C § 310(b); Foreign Participation Order 12 FCC Rcd 23891, paras 97-118 (1997).

[45] 47 U.S.C. § 310(c). The Federal Communications Commission, which regulates this sector, maintains guidelines on foreign ownership, which can be found here: fcc.gov/document/foreign-ownership-guidelines-fcc-common-carrier-and-aeronautical-radio

[46] Okla. Const. art. XII §§ 1,2 (restricting the purchase of real estate by non-U.S. citizens); Okla. Stat. tit. 60, § 121 (creating an exception if the right is guaranteed by a U.S. treaty or if the person's country of origin affords such rights to U.S. citizens); Okla. Stat. tit. 60, § 122 (creating an exception for resident aliens or aliens who intend to become residents).

become a U.S. resident or U.S. citizen. Ultimately, there are not outright restrictions on foreign investors owning real estate, but instead conditions and limitations at the state level.

VII. Conclusion

The previous sections have covered the sectors and subsectors where the United States has the most extensive limitations on foreign investment. While a few of these limitations are stringent in nature, many allow for high levels of indirect ownership, for investment based on corporate structure, and for investment where the home country of the foreign investor reciprocates. The volume of FDI into the United States remains the highest in the world and stands as a testament to the nation's friendly investment environment. The United States ultimately welcomes foreign investment even in the sectors where there are limitations and has made a variety of resources available to foreign investors seeking to invest into the United States, including the SelectUSA program. In that same light, this chapter will hopefully prove a useful addition to foreign investors looking to navigate the U.S. investment regime.

Disclaimer

This chapter was prepared by Edward S. Rivera with the Office of the Chief Counsel for International Commerce (OCCIC). Views expressed in this chapter are the author's own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

The Committee on Foreign Investment in the United States (CFIUS)

Considerations for Foreign Direct Investment

Office of the Chief Counsel for International Commerce

Office of Investment Security

U.S. Department of Commerce

What is CFIUS?

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that is authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on U.S. national security. CFIUS is exclusively focused on national security risk and takes action only when other provisions of law do not provide adequate authority to address the risk. CFIUS operates within the broader context of the U.S. open investment environment.

In addition to the summary below, information on the CFIUS process, frequently asked questions, and other resources are available at: http://www.treasury.gov/cfius

FIRRMA Regulations and the U.S. Investment Climate

In August 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) was enacted to strengthen and modernize CFIUS. FIRRMA provides authorities to the President and CFIUS to address national security concerns more effectively, including the ability to review and take action to address any national security concern arising from certain non-controlling investments and real estate transactions involving foreign persons. New regulations published by the U.S. Department of the Treasury to implement FIRRMA became effective in 2020.

Open Investment Policy:

In FIRRMA, Congress acknowledged the important role of foreign investment in the U.S. economy and reaffirmed the United States' open investment policy, consistent with the protection of national security.

The United States is one of the most open countries in the world to foreign investors. The United States is also one of the best places to invest, with strong economic growth policies, a strong innovation ecosystem, and a large and highly developed market. The United States maintains a transparent regulatory environment and unparalleled rule of law.

The CFIUS statute and regulations provide clarity to the business and investment communities with respect to the types of transactions that are subject to CFIUS review and the benefits of such review. The CFIUS process, as modernized and strengthened by FIRRMA, enhances investor confidence in our nation's longstanding open investment policy.

Expanded CFIUS Authority:

Prior to the enactment of FIRRMA, CFIUS had the authority to review the potential national security effects of any transaction that could result in foreign control of any U.S. business. FIRRMA expanded CFIUS's jurisdiction to allow CFIUS to also review certain non-controlling investments and certain real estate transactions.

Non-Controlling Investments:

Under FIRRMA, CFIUS is authorized to review certain non-controlling investments (called "covered investments" in the CFIUS regulations), but only if such investment affords a foreign person specified access to information in the possession of, board membership or observer rights in, or involvement in the substantive decision-making of, certain U.S. businesses related to critical technologies, critical infrastructure, or sensitive personal data, each as defined in the CFIUS regulations.

- **Critical technologies:** CFIUS may review certain transactions involving U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies. "Critical technologies" is defined to include certain items subject to export controls and other regulatory regimes, as well as emerging and foundational technologies controlled pursuant to the Export Control Reform Act of 2018.
- **Critical infrastructure:** CFIUS may review certain transactions involving U.S. businesses that perform specified functions—owning, operating, manufacturing, supplying, or servicing—with respect to critical infrastructure across subsectors such as telecommunications, utilities, energy, and transportation, each as identified in an appendix to the regulations.
- **Sensitive personal data:** CFIUS may review certain transactions involving U.S. businesses that maintain or collect sensitive personal data of U.S. citizens that may be exploited in a manner that threatens national security. "Sensitive personal data" is defined to include ten categories of data maintained or collected by U.S. businesses that (i) target or tailor products or services to certain populations, including U.S. military members and employees of federal agencies with national security responsibilities, (ii) collect or maintain such data on at least one million individuals, or (iii) have a demonstrated business objective to maintain or collect such data on greater than one million individuals and such data is an integrated part of the U.S. business's primary products or services. The categories of data include types of financial, geolocation, health, and identifiable genetic data, among others.

Real Estate Transactions:

FIRRMA also authorizes CFIUS to review certain real estate transactions involving the purchase or lease by, or a concession to, a foreign person of U.S. real estate that is in and/or around specific airports, maritime ports, and military installations. The relevant airports, maritime ports, and military installations are described in the CFIUS real estate regulations with additional guidance on the Department of the Treasury's CFIUS website. The CFIUS real estate regulations include certain exceptions, for example, real estate that is a "single housing unit" and real estate located in certain "urbanized areas" or "urban clusters," in each case as defined in the CFIUS real estate regulations.

Other Topics:

Foreign Person and Excepted Investor:

FIRRMA does not prohibit investments from any particular country, and investments from all foreign persons remain subject to CFIUS jurisdiction where a transaction could result in foreign control of a U.S. business. As required by FIRRMA, however, the CFIUS regulations create exceptions with respect to covered investments that do not result in control and certain real estate transactions by certain foreign persons, defined as "excepted investors" (or "excepted real estate investors") from certain "excepted foreign states" (or "excepted real estate foreign states') as identified on the Department of the Treasury's CFIUS website. Any such excepted investor must meet specific criteria to qualify for this status.

Declarations:

FIRRMA modernized CFIUS's processes to better enable timely and effective reviews of transactions falling under its jurisdiction, including by introducing the concept of a declaration—an abbreviated notification to which CFIUS must respond within a 30-day assessment period—as an alternative to a voluntary notice, which has been the traditional means of filing a transaction with CFIUS. Instructions are available on the Department of the Treasury's CFIUS website.

Process Remains Largely Voluntary:

The CFIUS process remains largely voluntary, where parties may file a notice or submit a short-form declaration notifying CFIUS of a transaction in order to receive a potential "safe harbor" letter (which prevents CFIUS from subsequently initiating a review of a transaction except in limited circumstances).

In some circumstances, filing a declaration or notice for a transaction is mandatory. In particular, the regulations require submission of a declaration for covered transactions where a foreign government is acquiring a "substantial interest" in a U.S. business that is involved in specified ways with critical technologies, critical infrastructure, or sensitive personal data. Additionally, the regulations require filings for certain covered transactions involving U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies.

There is no mandatory filing requirement for real estate transactions under the real estate regulations. Parties may file a notice or submit a short-form declaration notifying CFIUS of a real estate transaction in order to potentially qualify for a "safe harbor" letter.

Disclaimer:

This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

Intellectual Property

An Overview of Intellectual Property For Foreign Investors

Trademarks and Copyrights

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Introduction to Intellectual Property (IP) for Foreign Investors

For foreign investors, like other business owners, the most valuable assets of a business are its Intellectual Property (IP). The heart of the IP are four categories of assets: trademarks, copyrights, patents, and trade secrets. Each of these assets is the basis upon which a business is built and thrives. All four categories have unique legal systems that invest ownership in the creator and enable lawful control and exploitation. Generally, IP is managed on a national basis, with a common set of international principles developed over more than a century of bilateral and multilateral treaties.

For all creators, protection starts in one's home country and then extends to the target of foreign investment, which is the United States for the purposes of this chapter. Therefore, foreign investors should always start by first protecting their IP in their home country. Then, once a decision is made to conduct business in the United States, the investors need to take effective steps to protect their IP in the United States.

The U.S. legal system provides one of the most expansive sets of protections for IP assets of any nation. It starts with core, constitutional principles, which are clarified and implemented by federal and state statutes, administrative regulations, and judicial determinations. Some IP, like trademarks and patents, should be identified, cleared as available for exclusive ownership, and protected as early as possible. Other IP, like copyrights and trade secrets, once created, should be protected formally, by registration or contract. Failure to analyze the availability of IP assets for exclusive ownership and to secure full legal protections can place in jeopardy both the assets and the financial investment made to create them.

In the United States, there are limitless options to promote and utilize an investor's product via sale and licensing through traditional channels, online, and through apps. When it comes time to seek additional capital or sell a company, IP assets are the bedrock of the business's value. Protecting an investor's IP and enforcing subsequent rights against infringers requires knowledge of the applicable laws and the ability to react quickly to an ever-changing landscape. This is a basic guide for all foreign investors.

Trademarks and Servicemarks

What Is a Trademark/Servicemark?

Trademarks (for goods) and servicemarks (for services) are the words, phrases, symbols, designs, product configurations, and even colors and smells, that stand for a business in the eyes of the consumer and in the minds of competitors. They are the shorthand expression that defines the goodwill a company has built over time. The central basis for trademark protection in the United States is "use in commerce," and the law protects against the "likelihood of confusion" between a business's mark and a competitor's mark. Trademark rights are exclusive to the proprietor; therefore, it is critical that a business protects its brand as soon as plans to enter the United States are formalized.

How Do Investors Protect Their Trademarks?

In the United States, there are both state (local) and federal (national) ways of protecting a trademark. On the local level, merely using a mark gains *common law rights* and enables a business to carve out protection in the state or states where it operates. An investor can also register a trademark with the state-level Secretary of State (not to be confused with the federal role of the same name). However, common law/state protection will not necessarily prevent someone in a distant state from using the same mark competitively. To best protect against this challenge, investors should plan to secure *federal rights* and take advantage of the benefits of registering with the U.S. Patent and Trademark Office (USPTO). Federal rights are protected under the Lanham Act (15 USC §1051 *et seq*.), which is the federal trademark statute.

The USPTO offers two options for trademark owners. First, before a business begins use, the company can claim a mark by filing an "Intention to Use" application (ITU). An ITU filing can be submitted even before entering the U.S. market, and it is strongly recommended. The ITU is a formal reservation of rights to the mark, which, once allowed by the USPTO, must be perfected by using the mark in commerce. Critically, if someone else (Company B) uses the same mark for the first time after another company's (Company A's) ITU filing, the original company (Company A) can force them to stop that use. However, without the filing, the original company's (Company A's) mark may be restricted instead.

Second, if a company has not filed an ITU, but its mark is in use in the United States, the company can submit a standard application. While not required to secure common law trademark rights, the importance of filing and securing federal registration cannot be overstated. Once a mark is registered, it acquires national protection, and the trademark owner has a virtual monopoly on the right to use the mark for those products or services. That monopoly can be enforced in any federal court in the United States. Also, by international treaties, a registrant can extend protection to other countries.

How Should Investors Select a Trademark for Their Business?

If a company has a brand in its home market or is selecting a new mark for its U.S. business, the company should strive to develop a distinctive mark that will stand up against competitors. The hallmark legal issue in trademark law is "likelihood of confusion," so a company should have a mark that will withstand a claim that it confuses the consumer as to the source of the good or service.

Additionally, trademarks can be characterized by their strength in the public's mind as follows (from strongest and most protectable to weakest or not protectable):

- *Fanciful* marks: these have no dictionary meaning or connection with the business, like Qorvo for technology or radio frequency solutions.
- *Arbitrary* marks: these are dictionary words but have no connection to the goods or services, like Apple for computers.
- *Suggestive* marks: these creatively hint at a feature of the goods or services, like Federal Express for national overnight package delivery.
- *Descriptive* marks: these describe a feature of the good or service, and some are protectable, some not. If, with the investment of time and money, the mark gains public recognition and stands as a unique source, like ChapStick for lip balm, it can be exclusively owned; however, if the description is needed by all competitors to describe the product, like "sun block" for sunscreen, it is not protectable.
- *Generic* terms: these are not trademarks but rather words or phrases that stand for the genus of the product or service, like dry ice or cell phone.

To avoid investing in a brand that would later have to be abandoned (or leave a company vulnerable to charges of infringing another's mark), businesses should conduct a search to determine the availability of the mark in the United States and be assured that it would not create a likelihood of confusion with another's mark. Searches can be cursory or detailed, and the extent of a search depends on such factors as where the mark fits on the strength continuum and how much will be invested to promote the brand. Because of the importance of the internet to marketing, you should also quickly *secure the mark's domain name* as well.

How Does a Business Get Federal Protection for Its Trademark?

Once a mark is "cleared," the next step is to file an application with the USPTO. It is important to file an ITU application before a company commences business in the United States, as well as a standard application once use in the United States commences. There are also treaties, such as the Paris Convention, which allow a foreign entity to claim U.S.

trademark rights based on first use at home. All options for registration should be carefully considered.

The time between filing an application and registration can vary, but typically the process takes about a year. An Examining Attorney reviews the application for technical formalities and to assess whether the mark applied for is confusingly similar to a registered mark. An important note for foreign investors: the Examining Attorney will translate foreign words to assess the meaning and "strength" of the mark.

A letter or "office action" informs the applicant of any issues and must be answered within six months. If approved, the mark is published in the USPTO's Official Gazette, which allows for public comment, including opposition. Assuming no challenge, the application will proceed to registration or, for ITUs, to allowance. Marks allowed by ITU must be in use within three years. A registration is granted for ten years and may be renewed indefinitely as long as it is in use. Nevertheless, every registered owner *must* file an affidavit of continued use in the fifth year after initial registration to get the full ten-year benefit. Failure to file that affidavit will result in registration being canceled. Before registration, a trademark owner can use the informal symbol TM adjacent to the mark to indicate a trademark claim. Once the mark is registered (and only after registration), an owner should adopt the statutory notice symbol, ®.

Special considerations apply to trademarks that might be considered disparaging in the United States or that involve federally banned products (such as cannabis), so early legal help is essential for producers in these cases.

How Does a Business Protect Its Trademark After Registration?

Once a mark is registered, it is important to monitor the marketplace to identify any third party uses that may create confusion. Failure to monitor a trademark and to act on infringements can create cracks in a company's IP claims and open the brand to a claim of abandonment. Trademark "watch services" help monitor USPTO records and provide the opportunity to intervene early to protect a mark.

Copyrights

What Is a Copyright?

Copyright is a bundle of exclusive rights that is accorded authors of creative works, such as movies, books, music, software, or photos. A copyrighted work must be original; have a modicum of creativity; and be fixed in a tangible medium of expression. The law protects expressions, but not facts or ideas, which are an essential part of free speech and the flow of information.

The U.S. Constitution (Article I, Section 8, Clause 8) empowers Congress to grant to "authors" the exclusive right to their writings "for limited times." This power is implemented through the Copyright Act, 17 USC §101 *et seq*. Through copyright law reform, the "limited times" has been extended to nearly a century. Once the term of copyright expires, the work falls into the public domain, which means that it is free to be copied and used by anyone without prior approval.

The exclusive rights granted to a copyright owner are these: the right to reproduce (copy) the work; the right to prepare derivative works based on the original; the right to distribute copies to the public; the right to perform the work publicly; the right to display the work publicly; and the right to perform sound recordings publicly by means of digital audio transmission. These rights can be sold, licensed, loaned, or given away and can pass from one generation to the next.

Importantly, copyright law balances the grant of exclusive rights to owners with a set of limitations designed to permit certain public uses either without consent or subject to a compulsory license. The most prominent limitation is fair use, which defends against a charge of copyright infringement by establishing that the use is permitted, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. Fair use and other limitations, as well as the compulsory licenses for software and music, are complex and require careful analysis to assure compliance with the statutory requirements.

How Does a Business Protect Its Copyrights?

Copyright rights attach to a work as soon as it is fixed in a tangible form. By treaty (The Berne Convention), there are no "formalities" needed to gain rights; however, federal registration and copyright notice (© NAME and YEAR CREATED), while not mandatory, are essential to enjoy full rights available to copyright owners in the United States. Before filing a case for infringement, the copyright must be registered. If the work is registered before infringement, the U.S. system provides for recovery of actual losses, or alternatively minimum statutory damages ($750-$30,000 per work up to $150,000 in cases of willful infringement), plus recovery of reasonable attorneys' fees. Criminal penalties are possible for certain types of willful copyright infringement. Copyright registration is a simpler and less expensive process than trademark registration. For certain classes of works (such as photographs), group registrations are possible. Further, there are special procedures when registering software programs to maintain trade secrets embodied in code.

What is the Digital Millennium Copyright Act (DMCA)?

In 1998, copyright law entered the internet's digital age with the adoption of the DMCA. The DMCA is an elaborate set of rules dealing with content online; content shared by websites and online service providers (OSPs); and protection of copyright management information. Registration of a DMCA agent with the U.S. Copyright Office is now advisable for OSPs and interactive websites. Given the importance and ubiquity of online websites for businesses today, entities entering the U.S. market should learn and follow DMCA rules of the digital road.

What is a Work for Hire Agreement?

If an employee creates materials for their company within the scope of their employment, the employer owns the copyright. However, if an *independent contractor* (for example, a software engineer or a website designer) creates materials that fall within certain statutory categories (for example, a contribution to a collective work or a motion picture), then unless there is a written "work made for hire" agreement that defines ownership, the contractor may claim copyright. In short, absent specific work for hire language appearing in a written contract, a business risks discovering it does not own clear title to the copyrights it paid for and needs to succeed. If the materials created fall outside the statutory categories, then a written assignment of copyright is required. In any event, a written assignment is an advisable back up to a "work made for hire" provision.

Patents

What Is A Patent?

The United States Constitution grants Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." (Article I, Section 8, Clause 8.) Pursuant to that grant, Congress has enacted patent laws, and created a patent office that issues patents to inventors. A patent is a document granting an inventor, or the inventor's assignee, the right for a limited time (currently about 20 years from the date the patent application was filed) to file a complaint in federal court seeking a reasonable royalty and other compensation and relief, including an injunction, against persons and companies practicing the patented invention without authorization, and to file a complaint with the U.S. International Trade Commission for an order barring the importation of goods that infringe the patent.

Who Can Get A Patent?

Inventors can get patents on their inventions. Assignees of inventors can get patents on the inventors' inventions. U.S. patent law authorizes inventors to transfer to any person or company, by written assignment, their rights to patent their inventions, and their rights to any patents already issued. The law provides: "Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing." (35 USC § 261.) In accordance with that law, employees often assign in writing their patent rights to their employers.

In some states within the United States, and some countries outside the United States, statutes provide that employers own any patentable inventions made by their employees as part of their employment. For example, Nevada Revised Statute 600.500 provides that "an employer is the sole owner of any patentable invention or trade secret developed by his or her employee during the course and scope of the employment that relates directly to work ...." (N.R.S. 600.500).

How Does One Get A Patent?

For employers, start by obtaining in advance from employees a written assignment of any employee inventions and a written nondisclosure agreement obligating them to keep company inventions confidential.

Then, identify potential inventions. Many companies create incentives for employees to create inventions, identify them as potentially valuable, and submit summaries of them to management. These companies also create systems for management to regularly review the summaries and determine whether they merit a patent application. Patent lawyers often assist individuals and companies in identifying and evaluating potentially patentable inventions, obtaining written assignments of inventions from employees, and creating systems for receiving and reviewing invention summaries from employees.

After a potential invention is identified, keep it confidential, and do not sell products embodying it, until an application to patent it is filed or a decision is made to not patent it. *Nondisclosure agreements* can help keep inventions confidential. Public disclosure of the invention (for example in articles or presentations or in sales of products embodying the invention) prior to the filing of an application can result in the loss of patent rights. Patent lawyers routinely advise individuals and companies on how to keep potentially patentable inventions confidential and when to file a patent application.

Finally, file a patent application with the USPTO and prosecute the application through issuance of the patent. Often it is best to file an initial patent application early, to preserve rights in the invention as initially conceived, and then file a second application later after the invention has been more fully developed. Patent rights generally may extend for up to 20 years from the filing of the application.

Why Get A Patent?

Patents can keep out competition over use of one's patented inventions and provide grounds for seeking a reasonable royalty for use of the inventions, for the life of the patents. If an invention that gives a significant competitive advantage is patented, or a patent application is pending, potential competitors may decide not to copy it to avoid the risks of patent litigation. If they do copy it, a successful patent lawsuit may result in a court order prohibiting further copying for the life of the patent; awarding a reasonable royalty; or, in some cases, lost profits and treble damages.

Patents are valuable assets that increase the sale value of a company and its product lines. Potential purchasers of a company or product line often expect the company's products to be protected from wholesale copying by competitors by a substantial patent portfolio. Patents can be valuable assets in negotiating cross-license agreements with competitors. Patents can be a valuable source of income through licensing, litigation, and sale of the patents. The process of identifying, keeping confidential, and seeking to patent inventions can provide a company with incentives to be more inventive.

What Can Be Patented?

U.S. law provides for three different types of patents: a utility patent, design patent, and plant patent. These patents cover three distinct types of patentable subject matter:

- Utility Patent: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor..." (35 USC § 101);
- Design Patent: "Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor…." (35 USC § 171);
- Plant Patent: "Whoever invents or discovers and asexually reproduces any distinct and new variety of plant … may obtain a patent therefor…." (35 USC § 161).

The U.S. Supreme Court has placed some limits on patentable subject matter, holding that laws of nature, physical phenomena, and abstract ideas are not patentable. (*Diamond v. Chakrabarty*, 447 U.S. 303 (1980).) Patent lawyers advise businesses on which of their inventions and discoveries are patentable and the best type of patent protection to seek for them.

Trade Secrets

What Is A Trade Secret?

A trade secret is information that is (a) valuable in a trade or business, (b) secret, and (c) protected by the owner's reasonable steps to keep it secret. The federal Defend Trade Secrets Act of 2016 (DTSA) defines "trade secret" as follows (18 U.S.C. § 1839(3)):

"the term 'trade secret' means all forms and types of financial, business, scientific, technical, economic, or engineering information, … if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information;…"

The Uniform Trade Secrets Act (UTSA) defines "trade secret" similarly (Section 1(4)):

"(4) 'Trade secret' means information … that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Who Can Own A Trade Secret?

Anyone can own a trade secret. Anyone who develops the trade secret, or obtains knowledge of it by proper means, may own it. Trade secrets may be acquired by written assignment. For example, part of the acquisition of a company or its assets often includes a written assignment of trade secrets. Employers often require employees to assign to their employer in advance trade secrets they develop or discover during their employment. Some states and countries have statutes that provide that trade secrets discovered by employees are owned by their employers.

How Does One Protect A Trade Secret?

As with patents, employers can start by obtaining in advance from employees a written assignment of any trade secrets developed or discovered by employees and a written nondisclosure agreement obligating them to keep company trade secrets confidential.

Then, companies identify potential trade secrets. A company can offer incentives for employees to identify potentially valuable trade secrets and put in place systems for management to regularly review and determine whether they merit special protection.

When a company identifies a potential trade secret, it should keep it confidential. Public disclosure of the trade secret can result in the loss of legal rights for the secret.

Unlike patents, there is no government office for submitting trade secrets for approval or protection. The owner of the trade secret maintains legal rights in it by taking reasonable steps to keep the information secret. These steps may include labelling documents "secret," segregating them from ordinary business information in a secure location, such as a safe or password-protected computer in a locked room, requiring people with access to the information to sign nondisclosure agreements, minimizing the number of copies of documents that contain the secret, and promptly taking steps to minimize any public disclosure of the secrets.

Why Make the Effort to Maintain Information as Trade Secrets?

For valuable information that is not generally known, establishing them as trade secrets by taking reasonable steps to maintain their secrecy gives them substantial protection under both state and federal laws throughout the United States. Since 1981, almost all states have enacted a version of the UTSA, which is a model Act drafted in 1979 (and amended in 1985) by the Uniform Law Commission, a state-supported organization of lawyers established in 1892 to provide states with non-partisan model laws.

In 2016, the federal government enacted the DTSA (18 U.S. Code § 1836). It is based on the UTSA, but with some changes. It provides a single law against theft of trade secrets related to a product or service used in interstate or foreign commerce. The DTSA applies throughout the United States; can apply to some trade secret theft outside the United States; can be enforced in federal courts and state courts throughout the United States; and can be enforced by the owners of the trade secrets in civil actions and by federal prosecutors in criminal and civil actions.

State laws based on the UTSA and the DTSA create a private cause of action, which authorizes trade secret owners to bring civil suits for theft seeking damages and other relief.

In 1996, the federal government enacted the Economic Espionage Act of 1996 (EEA). It authorizes federal prosecutors to bring criminal actions, and civil actions to enjoin violations, in federal court against persons and companies accused of trade secret theft. Unlike the DTSA and state trade secret laws, the EEA does not create a private cause of action. The EEA contains two separate provisions that criminalize the theft or misappropriation of trade secrets. The first provision (18 U.S.C. § 1831) is directed towards foreign economic espionage and requires that the theft of the trade secret be done to benefit a foreign government, instrumentality, or agent. The second provision (18 U.S.C. § 1832) makes criminal the more common commercial theft of trade secrets, regardless of who benefits. The EEA provides for the criminal forfeiture of any property or proceeds derived from a violation. The EEA covers conduct occurring outside the United States where the offender is a citizen or permanent resident alien of the United States or where an act in furtherance of the offense was committed in the United States (18 U.S.C. § 1837).

A trade secret owner may also file a complaint for theft of trade secrets with the U.S. International Trade Commission (pursuant to Section 337 of the Tariff Act, 19 U.S.C. § 1337), seeking an order excluding from importation into the U.S. products that incorporate misappropriated trade secrets.

These and other state and federal laws offer substantial remedies for the theft of trade secrets. Like patents, trade secrets can help keep out unfair competition. If confidential information is protected as a trade secret, by taking reasonable steps to maintain its secrecy, potential competitors may decide not to try to obtain it to avoid the risks of trade secret litigation. If they do obtain it through theft or other improper means, a successful trade secret lawsuit may result in a court order prohibiting them from using it and awarding substantial monetary damages.

Trade secrets, like patents and other intellectual property, can be valuable assets that increase the sale value of a company and its product lines. Potential purchasers of a company or product line often expect the company's confidential information to be protected as trade secrets by taking reasonable steps to maintain its secrecy. Trade secrets can be valuable assets in negotiating agreements with competitors and a valuable source of income through licensing and sale. Unlike patent protection, which expires after a limited time, trade secrets may be protected for as long as the owner takes reasonable steps to maintain their secrecy.

What Is Considered A Trade Secret?

Almost any information can be a trade secret if it is valuable to a business and not generally known. The DTSA gives as examples: "patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing." (18 U.S.C. § 1839(3).) The UTSA gives as examples "a formula, pattern, compilation, program, device, method, technique, or process...." (Section 1(4).)

Conclusion

Foreign investors should take steps early to protect their intellectual property in the U.S. Talk to an intellectual property attorney to identify valuable IP and agree on a plan to protect it. Delay may result in the loss of valuable rights. Basic steps include: registering trademarks with the USPTO; using trademarks correctly on products, websites and advertising; registering copyrights with the U.S. Copyright Office; timely applying to patent inventions with the USPTO; documenting steps taken to maintain the secrecy of trade secrets, including nondisclosure agreements with employees and business partners; and obtaining and granting necessary IP licenses and assignments.

Further information on how to protect intellectual property in the U.S. can be found at the USPTO website, which provides basic information on patents, trademarks, copyrights and trade secrets, and at the U.S. Copyright Office website, which provides basic information on copyrights.

About Klarquist Sparkman, LLP (Authors of IP Section on Patents and Trade Secrets)

Klarquist Sparkman, LLP was founded in 1941, and is one of the oldest and largest full-service intellectual property boutique firms in the Northwest United States. Based in Portland, Oregon, its clients are at the cutting edge of technology and innovation. The firm includes more than 60 attorneys and patent agents who represent a broad range of clients, including solo inventors, mid-size companies, large corporations and major research institutions. The firm provides the technical and legal experience needed to preserve, protect, and defend in litigation all intellectual property rights. Klarquist Sparkman is a proud member of INBLF. Learn more by visiting www.klarquist.com.

About Lutzker & Lutzker LLP (Authors of IP Sections on Trademarks/Copyright) and INBLF

Lutzker & Lutzker LLP is a boutique firm focused on intellectual property, entertainment, high tech, and privacy issues. The firm provides counseling, transactional and litigation services to traditional businesses, educators, and creative professionals. Lutzker & Lutzker LLP is a proud member of INBLF, and Arnold Lutzker serves as the president of the law firm network.

INBLF is a network of hundreds of boutique law firms in nearly 40 jurisdictions throughout the U.S. and Canada, and dozens of full-service law firms in more than 30 countries around the globe. INBLF law firms stand ready to assist foreign investors with all legal services needed to realize their dreams of investment in the United States.

Disclaimer

The sections on trademarks and copyrights in this chapter were prepared by Arnold Lutzker and Susan Lutzker of Lutzker & Lutzker LLP. The sections on patents and trade secrets in this chapter were prepared by Jeffrey Love and Ramon A. Klitzke II of Klarquist Sparkman, LLP. Views expressed in this chapter are the author's own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

A Checklist for Foreign Companies Opening a Bank Account in the United States

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CliftonLarsonAllen

For a foreign company establishing business operations in the United States, is there a right way to open a bank account? Consider the what, why, when, where, and how.

What do you want from the banking relationship?

A bank that offers tailored services to support your specific business needs can be a game-changer. Your banking relationship should go beyond providing transactional activities and lending options to offer you the support, services, and flexibility you need to help your business grow. Convenience and security are crucial, especially if your company leadership is located outside the United States.

When choosing a bank, consider its experience and resources. Banks with specialized financial teams that regularly work with various business models, growth plans, and operational challenges can offer valuable insights. Your banking professional can also be a significant resource for client referrals, warm leads, and networking opportunities. Additionally, your bank may offer tools and services to help streamline your business operations, such as integrating with your accounting software, restructuring payroll and bill payments, improving cash flow management, and aligning your banking and tax goals.

Why you might need a bank account in the United States

There are many reasons why you many need a U.S. bank account. Consider the following:

1. Will you need assistance with investments or business loans? This could include asset management or a high-yield savings accounts. Eligibility for select federal government programs require a company to have a U.S. bank account in place for two years.

2. Will you need a line of credit? If your business has not been operating long enough in the United States to establish credit or has a low credit score, it could be difficult to secure credit lines or business loans.

3. Do you require merchant services, financial consulting, or notary assistance? For example, you may need the assistance of a notary public if you are a retail business. While renewing local businesses tax licenses, you will be required to provide your investor and sales valuations, which must be notarized.

4. How often will you visit the bank? For example, will you need to withdraw cash regularly, have access to ATMs, access a safety deposit box, or need bank-certified checks?
5. Do you need to process U.S. payroll? Nearly all U.S. payroll providers require a U.S. bank account to process U.S. payroll.

If the only reason you need a U.S. bank account is to collect payments from your U.S. customers, there are other convenient options, like alternative payment methods (APMs).

APMs can be categorized as any form of payment that is not cash or a credit card issued by a major bank, such as PayPal.

Additionally, the cloud-based Payments-as-a-Service (PaaS) model allows businesses to utilize various payment options through a single interface, whether consumers are using prepaid debit cards, global bank transfers, international APMs, or local APMs.

Where should your U.S. bank account be located?

When establishing business operations in the United States, investors typically look to open an account with a brick-and-mortar U.S. bank. However, in cases where establishing that type of account may be especially challenging or where your company does not have a significant need for a traditional banking platform, you may find it worthwhile to consider certain banking alternatives.

- **In your home country** — If you sell to the United States or pay suppliers in U.S. dollars (USD), opening a foreign currency/USD account with a local bank in your home country could be an option. A foreign currency account allows you to send and receive funds in multiple currencies, and you could save time (due to streamlined bank transfers) and money (by avoiding short-term currency fluctuations and high fees).

  You can also open a merchant account, which links your customers' bank accounts and your company's bank account in order to process electronic payments, including credit card transactions.

- **Online** — Millions of people in the United States use mobile banking. Online banks tend to offer lower fees and higher interest rates on deposit accounts, because they do not incur costs to open and operate a network of physical branches. Like most brick and mortar banks, many online

banks are insured by the U.S. Federal Deposit Insurance Corporation (FDIC). Before engaging with a bank, use the FDIC's online database BankFind to make sure you are working with a legitimate FDIC-insured bank.

- **Multi-currency digital bank accounts** — These digital accounts are offered by both bank and non-bank services and are available in multiple currencies, including USD. Fees under this option may be less than the fees for currency exchange services charged by most players in the online marketplace.

When should you apply for a U.S. business bank account, and how long will the process take?

- The first step is to create a U.S. entity at the state level. This procedure is generally straightforward and completed documents can be processed within 24 to 48 hours.
- Once the entity is formed, you must file for a Federal Employer Identification Number (FEIN) (Form SS-4). This is the number you will use on your federal tax return. If the company officer who signs Form SS-4 is a U.S. citizen, you can apply for and obtain an FEIN immediately. If not, it could take two to three weeks.
- Once your FEIN is received, you can apply for a U.S. bank account.
- A bank account normally takes around three weeks to open, and in some cases requires an in-person meeting with the bank. A U.S. officer of the business, as designated in company documents, typically attends these meetings and has the authority to make decisions regarding a bank account.

How does a non-U.S. company open a bank account in the United States?

Banks undergo extensive customer due diligence procedures, not only to comply with anti-money laundering and anti-terrorism requirements, but also to guard against reputational, operational, legal, and concentration risks.

The Financial Crimes Enforcement Network (FinCEN) issued "Customer Due Diligence Requirements for Financial Institutions" (the CDD Rule) in 2018 to amend the Bank Secrecy Act regulations. Under the CDD rule, financial institutions act almost as proxies for law enforcement. Banks must now collect information on client companies' beneficial owners and provide it to law enforcement agencies upon request.

Consider this representative list of documents you may need.

- **FEIN confirmation letter** — An FEIN confirmation letter (or Form SS-4) is required by banks for tax reporting purposes.

- **Corporate documents** — As proof of your entity's creation and how it will operate and conduct its business, required documents may include Articles of Incorporation or Certificate of Incorporation, operating agreements, organizational minutes and bylaws, Certificates of Good Standing, or Certificates of Incumbency.
- **Beneficial ownership information** — Banks must identify any individual who owns 25 percent or more of a legal entity, and any individual who controls the legal entity.
- **Photo identification** — Banks generally require two forms of identification for the beneficial owners and the company representative opening the account; at least one of these must have a photo.
- **Proof of address** — Banks require the company representative to submit a personal proof of address. Foreign bank account statements are usually preferred, although utility bills may also be accepted.
- **U.S. business address** — Most U.S. banks will not open a business account without a physical U.S. address. However, banks may accept the street address of a registered agent or a virtual mailbox service, especially if your business is one in which having a physical branch is impractical (such as purely online sales).

Watch for common pitfalls when opening a U.S. bank account

- **Incorrect or missing information** — This can delay the account opening process by weeks. Communicate with your bank to understand exactly what you need to provide.
- **Check-signing authorities** — Will your checks require one signature or two? Is this for all checks or only for amounts over a specified dollar limit? Set up a system of internal controls and make these decisions before opening your account.
- **DBA versus legal name** — Printing a doing-business-as (DBA) name instead of your company's legal name on checks could pose a problem. Due to increasing online banking fraud, most credit card merchant processors are required to match the entity's legal name to the one on the check.
- **Apostille requirements** — An Apostille is a specialized certificate that verifies a document as legitimate and authentic so it will be accepted in countries that are members of the Hague Convention Treaty. This is not a typical requirement but may arise in specific cases.
- **Minimum deposit** — As this may vary from bank to bank, it is good to verify your bank's minimum deposit requirements for foreign clients.

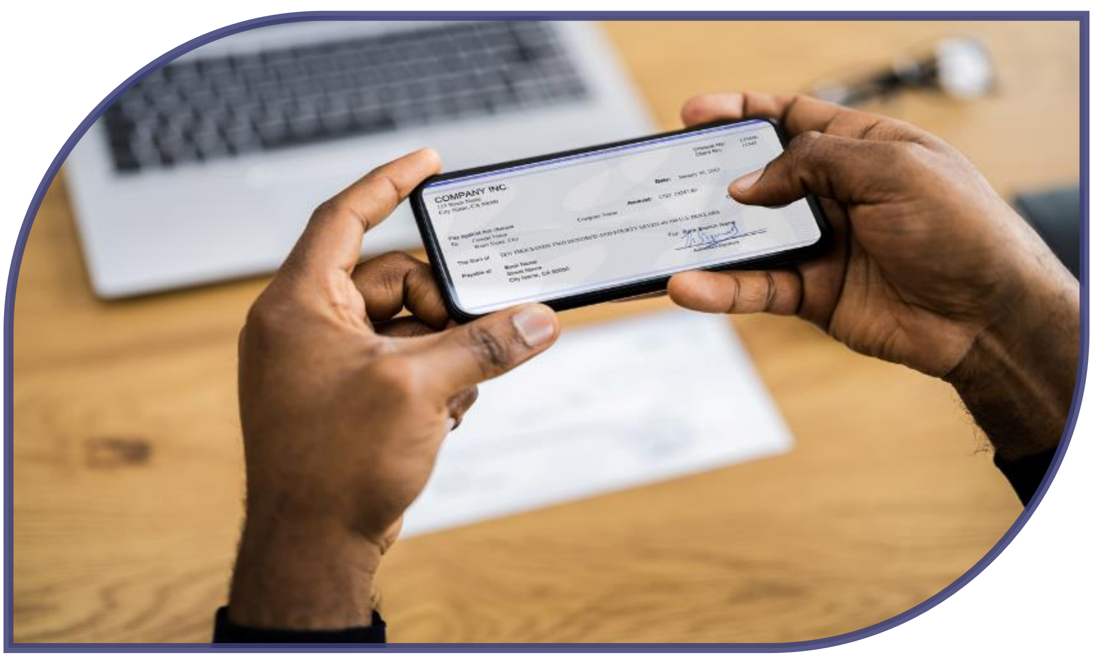
Whether you are thinking of starting a business, are in the early stages of launching a startup, or have been running a business for several years in the United States, look for a bank that meets the specific needs of your company — not just in the short-term, but for years to come.

About CliftonLarsonAllen

CliftonLarsonAllen exists to create opportunities for our clients, our people, and our communities through industry-focused wealth advisory, outsourcing, audit, tax, and consulting services. A member firm of the Nexia International network, CliftonLarsonAllen acts as a one-stop-shop, providing Global Concierge Services for our clients. With 7,400 people and more than 120 U.S. locations, we promise to know you and help you. Investment advisory services are offered through CliftonLarsonAllen Wealth Advisors, LLC, an SEC-registered investment advisor.

Disclaimer

This chapter was prepared by Kirthi Mani with CliftonLarsonAllen. Views expressed in this chapter are the author's own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.



Site Selection in the United States

Key Variables, Processes, and Technologies

SELECTUSA®

Gregory C. Burkart, Managing Director & Practice Leader, Site Selection & Incentive Advisory Service
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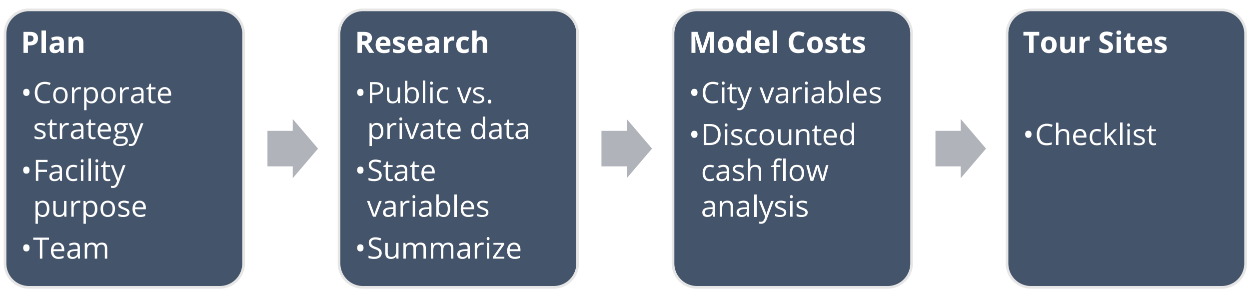
SITE SELECTOR™

Overview of Site Selection in the United States

Site selection is a process of identifying a state, region, and local community to locate a new corporate facility. When investing in the United States of America, private companies take responsibility for researching, analyzing, and selecting their locations. Different levels of government and economic development organizations may facilitate the corporate decision by providing the company with information, making available prepared sites, fast-tracking permits, and offering cost reductions such as economic development incentives.[47] The decision of where and when to locate resides with the company, its advisors, and executives.

Site Selection Process



Plan

The process begins with planning. When undertaking a new project, foreign investors should consider three items initially: corporate strategy, purpose of their facility, and advice from stakeholders.

Corporate Strategy

Companies invest in the United States for a variety of reasons.[48] The most common reason is accessing new markets and customers. In addition, because the shipping distances are shorter, companies find that their logistical costs are lower if they produce in the United States and ship to customers in the region, thus freeing working capital for other uses.

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[47] The concept of economic development incentives are discussed in depth in SelectUSA Investor Guide, Chapter 11: "Economic Development Incentives." This chapter on site selection will incorporate incentives as part of a suggested cost model for evaluating potential locations.

[48] For a more thorough discussion of corporate strategy, please see SelectUSA Investor Guide, Chapter 1: "Overall Investment Checklist."

Others find that they can improve their intellectual property and enhance their products by hiring U.S. engineers.

Foreign investors typically open the following types of facilities. A sales office is usually opened to establish a customer base in the United States. A development and engineering office permits companies to tailor their products to the needs of the U.S. market. After securing sales contracts, foreign investors typically open a warehouse or distribution facility where they can inventory products manufactured in their home country. Because of the lead time associated with overseas production, investors need a place to hold their goods until required by the customer. Some companies choose to build manufacturing facilities in the United States as the U.S.-based production reduces lead time for delivering product to U.S. customers and frees up working capital otherwise tied up in inventory. To manage the various resources required to operate a manufacturing plant and serve their growing customer base, foreign investors establish a facility for their corporate staff where sales, engineering, finance, human relations, procurement, logistics, legal, and executive leadership can work together.

Facility Purpose

There are several general factors that affect selecting a state and local community. These factors include workforce, logistics, real estate, business and tax climate, and utilities.

i) ***Logistics:*** includes accessibility to major customers, proximity to transportation infrastructure (such as water ports, railroads, and airports), and costs of inbound/outbound shipping. Generally, the further a facility is from the primary transportation node, the higher the freight costs.

ii) ***Workforce:*** includes labor availability, skills, costs, and unionization.

iii) ***Real Estate:*** includes availability of existing buildings, the time to obtain a certificate of occupancy, and the cost to construct improvements to an existing building or a new building on a greenfield site. Generally, the cost of construction varies widely across the United States.

iv) ***Business and Tax Climate:*** includes operating restrictions, (such as COVID-19 Executive Orders), environmental regulations, tax rates, and permits required (conditions and processing time).

v) ***Utilities:*** includes available capacity, the cost of adding capacity, generation and disposal sources, rates, and time to extend/tap.

The priority of these factors usually depends on the type of facility being planned. For example, the most important site selection factor for distribution facilities is logistics. In this case, the cost of in-bound and out-bound freight will typically be the single biggest driver of competitiveness. For manufacturing, labor availability and cost are the major drivers in selecting a site. For office operations, as the average age of the U.S. workforce is rising and nearing retirement, access to a large pool of younger workers would be critical to business continuity.

Team of Key Stakeholders

The last step in the planning phase is to assemble a site search team. Failing to cover all of the disciplines and roles on a company's site selection team usually causes problems during the actual search, yielding inefficiencies as the search may have to begin afresh, or after the project is complete, leading to operational issues and cost overruns. If there are any gaps on the internal team, a company may consider filling the gap with an outside professional who is a subject matter expert in the particular field. As a best practice, the following disciplines should be included on a site search team.

The most critical corporate functions requiring full-time participation are:

i) ***Human Resources:*** Given the importance of workforce to site searches, the human resources department is the most knowledgeable about types of labor, required skills, and number of associates required for a project.

ii) ***Real Estate:*** The real estate team is usually tasked with aligning the physical footprint of the company to the business operations, analyzing the attributes of each site, and coordinating with brokers, engineers, and architects.

iii) ***Operations:*** The operations colleagues, with experience from previous investment projects, are usually the most knowledgeable about timelines required to meet customer commitments, placement of equipment in a new facility, and labor required to efficiently operate such equipment. In addition, the operations team will operate the new facility after the site is selected.

iv) ***Supply Chain:*** The supply chain colleagues analyze the suppliers, assess risks, and estimate costs to bring inbound materials and transportation charges for shipping finished products to customers.

v) ***Finance:*** The finance team can help the team quantify the decision and measure its performance by modeling the upfront and operating costs, analyzing key site selection variables, and assessing risks.

To be successful, there are other functional areas that are required but not necessarily on a full-time basis:

vi) ***Communications:*** In some states, incentives are awarded as an inducement to create jobs or commit investments to the location for a minimum period of time. These inducements are referred to in site selection as "but for" requirements ("but for" the incentive, the company would not commit to creating jobs or making the investment in the location). A company could violate a "but for" requirement by publicly announcing its intention to locate a project before entering into an incentives agreement with a state or community. Since the timing of any announcements about a project is critical to incentives, the site selection team must coordinate with the communications team about timing and content of any announcements about a project.

vii) ***Government Relations/Public Affairs:*** Project success could also involve contacts with government agencies for tasks, such as expediting permits, as well as monitoring community support for a project.

viii) ***Legal:*** The legal department is usually involved in several aspects of a project, including real estate contracts, permit applications and resulting conditions, incentive agreements, legal entity formation, and qualifications to do business in a new jurisdiction.

ix) ***Tax:*** The tax team is the best-suited to evaluate tax climate and estimate the tax liability, including whether there are any planning strategies that could be affected by an incentive agreement, such as not being able to utilize non-refundable credits due to lack of a tax liability.

When working with such a large team, it is important to establish the goals and potential benefits of such an investment project in order to ensure buy-in from company leadership and team members. Before recruiting colleagues to your site selection team, investors and/or their professional advisors should estimate a range of potential benefits. An investment such as this is a long-term project that will require many people to stay motivated over the course of months or years.

Research

Goal: Narrow to a few states

After planning, the next step is research. While identifying variables for their site search, the site selection team should also agree upon the data to define and measure those variables. There is little value in using variables that do not have readily available, or costly, data sets. Once a site search team decides on its key variables and data sets, the rest of research is essentially a process of elimination, using data to advance from a long list of considered locations to a shorter list with narrower criteria until the search team eventually agrees upon a state.

Data – Public versus Private

For data sets, there are two sources of information: public and private. Public data is generally collected, analyzed, and published by federal and state agencies, such as the U.S. Census Bureau, the Bureau of Labor Statistics (BLS), and the Energy Information Administration (EIA). SelectUSA Stats and Google Public Data Explorer each compile and aggregate a variety of U.S. and international public data resources as well. The advantage of public sources is that the information is free. The drawback, however, is the latency of the data: some sources have lags of 24 to 48 months.

For private sources, data is available to purchase, but the databases are generally user-friendly, relatively current, and often comes with analysis and insights from the providers. There are several private data providers with information available at the state, county, and/or city level.

Narrowing the Search Area to a Few States

Selecting a group of eligible states to consider is a challenge in a country as vast and varied as the United States. An international company seeking to grow its revenue in the North America may want to start its analysis by identifying the locations of its potential customers. To identify customers, the U.S. Census Bureau maintains a database called the Statistics of U.S. Businesses, which provides data by industry sector at the state and metropolitan statistical area (MSA) level. To estimate the size of a potential consumer base, the information is further categorized by number of establishments as well as payroll and employees per establishment.

In addition to customers, some companies may require a location that is close to their suppliers or critical infrastructure. For example, some companies require large amounts of natural gas or electricity. EIA provides publicly available maps of electric transmission lines and natural gas pipelines across the United States.

To continue narrowing the search to specific states, companies should focus on a few more general variables. These variables are best analyzed with independent rankings.

Business climate is a large umbrella that includes several sub-factors such as environmental permitting requirements, state liability system, and debt as a percentage of tax revenues. One of the most comprehensive and longest running resource for Business Climate is "Rich State Poor State," which is published by the American Legislative Council (ALEC). This resource publishes a score card for each state ranking their prior performance versus the other states and forecasting their future economic outlook.

Other factors may influence a location's business climate. For example, at the time of authorship, an area of concern is COVID-19 state level executive orders limiting economic activity. For current information on the COVID-19 restrictions in the United States, Kroll maintains a global heat map forecasting the impacts by country and by industry. As part of the heat map, there is a benchmark on the effectiveness of each state's COVID-19 orders.

Another important consideration in site selection is the tax structure for each state. It is important to analyze costs and burdens associated with corporate income, franchise, excise, sales/use, and property taxes. A comprehensive resource is the Tax Foundation. Each year the Tax Foundation analyzes the tax structures in each of the 50 states and publishes a comprehensive explanation and ranking of each state's competitiveness. Another resource available for in-depth technical information on state and local taxes is the Council on State Taxation.

After mapping the locations for its customers and suppliers and ranking the other indices, the search team will have a range of states to look for the rest of their data points and further refine the search to a county or city.

Modeling Costs: Refining the Search from States to Cities

Goal: Narrow the search to a local community

To select a specific location from a short list of options, a discounted cash flow analysis may be most helpful as a means of directly comparing potential communities in quantifiable terms based on the company's specific requirements.

Workforce

As discussed above, the most common variable across all types of operations is workforce. Using workforce to further refine the search has two benefits. First, with workforce data being available at the county and city level, it is one of the most efficient ways to narrow your search from states to a local community in each state. Second, finding enough workers with the right skills and the lowest cost is key to the success of many site searches.

To start the analysis, the site selection team should create a staffing plan focusing on at least three areas: worker availability, skill levels, and costs.

Availability: To measure availability, a site selection team should consider several factors, such as:

- **Population**: absolute and forecasted statistics further categorized by age, race, sex, income, can be found via the U.S. Census Bureau.
- **Employment**: the numbers of workers employed by industry and by occupation including absolute and trending rates can be found via the Bureau of Labor Statistics (BLS).
- **Unemployment**: information by state and region is also available via BLS.
- **Location Quotient**: measuring the concentration of workers in a certain NAICS code as compared to the U.S. national average can be found via BLS.
- **Commuting Patterns**: mapping where potential employees live and their expected travel time to/from the anticipated facility can be found via the U.S. Census Bureau.

To quantify the "availability" of a workforce in a region, a site selection team should build a model that considers its current and future labor requirements. For such data points as retention rates and the number of students at each stage of their studies, the search team will need to request this information from the economic development organizations (EDOs) who represent the local communities as these data points are not publicly available. Below is a simple model.

Example Workforce Analysis of a Single Location

Workforce	Total / Percentage in Location A
Working-Age Population (Civilian Population 20 Years and Older)	310,860
Current Unemployment Rate	5%
Full Employment Rate	4%
Population Available to Join Workforce	3,109

Local University Students Graduating This Year	Undergraduate (Bachelor)	Graduate (Master or Ph.D.)	Total Graduating
Total Students	5,500	1,500	7,000
Undeclared	1,100	0	1,100
Science, Technology, Engineering, Mathematics (STEM) Fields	1,100	375	1,475
Arts & Science	1,925	563	2,488
Business & Finance	1,375	563	1,938
Of All Graduates in STEM, Arts & Science, or Business & Finance Programs			
Hypothetical Retention Rate of Local Universities	50%	75%	90%
University Students Expected to Join Workforce	2,950	4,425	5,310

Local Community College Students Graduating This Year	Associate Degree		
Total Students	2,500		
Technical	1,250		
Business & Finance	1,250		
Of All Graduates in Technical or Business & Finance Programs			
Hypothetical Retention Rate of Local Community Colleges	60%	80%	95%
Community College Students Expected to Join Workforce	1,500	2,000	2,375

Range of Estimates of Potential Available Workforce (Based on Possible Retention Rates)

Total Available Workforce for Project	Low Estimate	Middle Estimate	High Estimate
Potential Workforce (Existing Available Workforce Plus Graduating University and Community College Students)	7,559	9,534	10,794

Skills: While precise skill levels are difficult to determine without one-on-one interviews, there are a few data points that generally characterize the types of labor skills inherent in a community, including:

- Education attainment, segmented by high school, some college (which includes community colleges and other two-year institutions), bachelor and post-graduate degrees, can be found via the U.S. Census Bureau. In addition to education attainment, the U.S. Census also reports on school financing from state and local governments.

- Union membership and participation by occupation, industry and state is available via BLS, as is information regarding work stoppages.

Cost: Evaluating this factor is difficult given the latency of publicly available data. To develop a more accurate picture of the current and future labor costs, the site selection team should request the data from the EDOs or, if not available, from private sources.

- Wages by occupation are available by industry sector and at the state, county, and city level via BLS.
- BLS also provides experimental data on labor productivity. Even though it is only available at the state level for a limited number of years, this data set includes granular details on labor productivity, number of employees, number of hours, output, real hourly labor compensation and costs, unit labor cost, and value of production.

Below is a simple model to compare labor costs in multiple local communities in a single state.

Occupation	State A, County W	State A, County X	State A, County Y	State A, County Z
First Line Supervisors of Production and Operating Workers	$26.88	$28.20	$27.92	$26.93
Structural Metal Fabricators and Fitters	$17.02	$17.74	$18.27	$19.47
Computer Control Programmers and Operators	$19.40	$21.77	$18.11	$17.42
Machine Tool Cutting Setters, Operators, and Tenders, Metal and Plastic	$14.49	$16.48	$15.81	$15.64
Welding, Soldering, and Brazing Workers	$17.03	$17.45	$17.64	$19.33
Critical Occupations	$19.50	$21.68	$22.92	$20.29

Additional Factors Specific to the Investment Project

After analyzing the workforce in several communities in each state, a search team can begin the process of analyzing additional factors that are more specific to the project. To highlight a state's strengths and challenges, a project team should prepare a cross-state cost model. Since many of the costs and the incentives occur annually over a period of years, the incentives and costs should be discounted to the present value.

A good cost model should account for upfront costs as well as on-going operating costs and net incentives against their relevant counterparts.

Upfront Investments
Real Property
Land Purchase
Site Improvements
Walkways
Parking Lots
Utility Extensions and Upgrades
Roads and Driveways
Building
New Construction
Purchase Existing Building
Renovations
Annual Lease Payments
Leasehold/Tenant Improvements
Personal Property
Machinery & Equipment
Pollution Control
Furniture & Fixtures
Computers
Office Equipment

Operating Costs
Labor
Wages & Salary
Direct Labor
Indirect Labor
Salaried
Unemployment Insurance
Workers' Compensation
Benefits
Relocation & Recruitment
Utilities
Electric
Natural Gas
Water
Sewer
Telecom / Fiber
Transportation
Inbound
Outbound
Taxes
Corporate
Income
Franchise/Excise
Gross Receipts
Property tax
Real Property
Personal Property
Sales/Use Tax

Economic Development Incentives
Cash Grants
Training
Recruiting
Deal Closing
Job Creation
Infrastructure
In Kind Contributions
Free Land
Training
Recruiting
Tax Credits / Exemptions
Investment Tax Credits
Payroll Tax Credits
Property Tax Exemptions
Sales/Use Tax Exemptions
Financing
Favorable Lease
Infrastructure

The upfront costs usually include acquiring, constructing, and equipping a facility. If a facility will be leased, the analysis also considers leasehold improvements and/or renovations. The responsibility to estimate the cost of a new facility in each community usually resides with the real estate team. For land prices, the real estate colleagues obtain quotes from brokers in each community. To estimate the cost of construction in each city, the real estate members could reference private resources that compile construction data.

To obtain estimates of equipping a facility, supply chain members should have this information. The supply chain colleagues, through their supplier network, should be able to determine the acquisition, shipping, and installation costs of machinery and equipment, furniture and fixtures, and computers. While the cost of the equipment may be the same for each location, shipping and installation costs will likely vary.

With respect to operating costs, analysis usually includes labor, utilities, logistics, and taxes. Labor costs are pulled from previous research using BLS Occupational Employment Surveys for states and metropolitan areas. In addition to wage rates, the human resources team analyze incidental costs associated with workforce. For unemployment insurance, tax colleagues can pull the rates and the salary thresholds from each state's UI Commission web page. The U.S. Department of Labor's website has a convenient map with a link to each state's unemployment insurance agency. For workers' compensation, ALEC or Cerity are examples of two resources with human resource data. The real estate colleagues can obtain a quote to relocate associates from national moving firms. For relocation costs, there are several online resources, such as the Relocation Center's online estimation tool.

For utilities, the supply chain team should have information regarding the production requirements for water, sewer, electricity, and natural gas, if required. For electrical rates, EIA provides rates by state and likely utility provider.

To estimate logistics costs, the project team should consider transportation of raw materials and finished goods, as relevant. For example, for a company that plans to utilize trucking services, several companies offer online quotes for truck loads and less than full truckloads on expedited and non-expedited basis, including Freight Quote and Freight Center. For a more comprehensive decision model regarding transportation methods and costs, there are several online software tools available, such as Llamasoft and AnyLogistix.

In addition, for international investors, the project team should consider travel time and associated costs for executives, suppliers, and customers traveling between international offices and the U.S. facilities. Cities containing larger hub airports with more international flights may have a higher cost of living, while those containing smaller regional airports with few or no international connections may have a lower overall cost of living. To better understand the size of U.S. airports and their international connections, the Federal Aviation Administration (FAA) maintains a database of the number of passengers per U.S. airport, and the Department of Transportation provides a database of international routes offered to or from U.S. airports.

When analyzing locations, the site selections team should consider state and local taxes. The model should consider corporate taxes, such as income, gross receipts and franchise taxes, sales and use taxes, and property taxes on building, land, machinery, and equipment. These taxes can vary considerably between jurisdictions. For example, in some states, sales/use taxes are levied at both the state and local level. Moreover, some states offer tax exemptions for pollution control and industrial processing equipment.[49] Finally, with respect to property taxes, differences can be driven by multiplier tables, assessment ratios, and millage rates.

After reviewing each section of the cost model, the site selection team sums the total costs by year, discounts the cash flows, and ranks the locations. These rankings may change when the project team nets the value of incentives against the relevant costs.

Tour Sites

Goal: Select a preferred site.

With the cross-state cost model complete, a site selection team should be ready to visit local communities. Touring communities allows a search team to confirm the costs in its model, determine a community's interest in their project, and ascertain whether there is a good fit. In preparation for site tours, the search team should prepare a checklist so that it can methodically evaluate the characteristics of each community and site. For a list of items to consider for the checklist, the U.S. General Services Administration (GSA) provides an exhaustive list that it uses for its facilities. Companies can tailor this checklist for their own projects.

Site Selection Technology

Advancements in technology in recent years have truly transformed corporate site selection. The rise of technology presents opportunities in the field of site selection from virtual site tours to online marketplaces to data analysis. As demonstrated in previous sections, a modern site search analyzes mountains of information on every county and major city in the United States.

Leveraging Digital Resources

Fortunately, today there is a database for almost every conceivable location factor in the United States. Whether researching taxes, regulations, workforce, or wages, there is a useful database a few clicks away. Many of these resources are government funded, free to the public, and often paired with Interactive search tools and maps that can make your search more productive.

[49] For a comprehensive discussion of state and local taxes, please see SelectUSA Investor Guide, Chapter 4: Taxes.

Getting Started

The most common data resources used to begin a search often come from government agencies, such as BLS or the U.S. Department of Labor. Resources like the U.S. Census, state and local governmental data, and other free online resources can also be helpful.

As the search for suitable locations deepens, companies will likely require a variety of resources as they move through the process. It is important to note useful government resources employed when identifying potential geographic areas (such as at the state, regional, or metro area level) are rarely the same resources needed to conduct thorough site due diligence or to find available economic incentives.

Digital Challenges

Given the availability of so much data, it would appear that making an informed location decision would be easy; however, there are two practical problems most companies face. The first problem relates to how information is presented and stored during a search. Unfortunately, most resources present their data independently from any other location factor, thus creating a silo effect. The problem with having data organized in silos is that it becomes difficult, if not impossible to compare different locations on the same terms.

The second problem that is commonly encountered by companies with access to a seemingly endless amount of data is simply information overload. Many firms collect enormous amounts of data but then struggle to makes sense of what all the data means. Depending on the how unique the requirements for a given search are, a company could easily find itself needing to simultaneously evaluate dozens if not hundreds of sites across the country. In fact, it is not uncommon for a search to generate over 10 gigabytes of data that need be analyzed.

One method that can be used to minimize the impact of information overload is to begin the search looking for communities that best match the needs of the company as opposed to considering specific sites in depth too early in the process. Only after narrowing the list of communities that meet the company's primary location decision drivers (such as labor availability, labor costs, or average wages) should the project team begin the evaluation of specific sites. Finally, preparing detailed pro forma financial models for each site will allow for accurate comparisons between sites.

Conclusion

With fifty states, five territories, a federal district, and hundreds of diverse metropolitan areas, selecting new locations in the United States is best approached as a data-driven process. Equally important steps include planning, researching, modeling, and touring. It is critical to begin the site selection process with a solid understanding of why the company is investing in the United States. Then, selecting data points and reliable sources helps foreign investors identify a short list of states and communities to run cost models and quantify their decisions. Finally, armed with the data and cost comparisons, personally visiting each location permits the site selection team to assess whether a community will support the company and its employees for the long-term future. Communities in the United States have a long legacy of welcoming foreign direct investment with open arms. Dedicating time and resources to the site selection process will help a company identify the best U.S. location for its long-term success.

About Duff & Phelps and StageXchange

Duff & Phelps, LLC is a Kroll Business specializing in site selection and incentive advisory services. Our team of professionals has 100+ years of collective experience drawn from serving previously in the public sector, big four accounting firms, global law firms and in-house corporate suites. Having advised on more than 400 capital projects involving $16 billion of investment, we teamed with StageXchange to create the first digital marketplace, The SITE Selector™, where companies looking for new sites connect directly with 2,300+ communities across the United States. SITE Selector™ has a suite of tools to help companies identify, organize, and analyze thousands of pieces of data into a harmonized dashboard to facilitate decision making from an executive's desktop.

StageXchange is a private commercial real estate tech platform that leverages Artificial Intelligence and its own proprietary tools to streamline the due diligence process. Our custom Dashboards and integrated pro forma models make it easy to analyze hundreds of potential sites simultaneously.

Disclaimer

This chapter was prepared by Gregory C. Burkart with Duff & Phelps LLC and Keith Hopkins with StageXchange, LLC. Views expressed in this chapter are the author's own, not that of the International Trade Administration. This chapter does not constitute legal advice. Readers interested in investing in the United States should consult legal counsel.

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Economic Development Incentives

An Introduction to Incentives in the United States

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HICKEY
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INCENTIVES

As businesses consider investing in the United States, there are many factors to assess when evaluating where to locate facilities and operations. Economic development incentives (also commonly referred to as business incentives) may be one of those factors because such incentives have the potential to provide financial support to minimize upfront costs and speed up the timeline to profitability. However, economic development incentives are typically tied to specific projects, and incentives are not necessarily offered for all projects.

If offered, incentives can vary widely by type and amount, the terms and restrictions on incentive packages, and the level of government administering the program, among others. These programs can help a foreign-owned company establish operations in the dynamic U.S. economy and facilitate key partnerships, but navigating the process can be challenging. Economic development incentives are typically the result of an ongoing conversation with a particular location, and companies interested in exploring options for incentives packages will likely get the most useful information after narrowing potential location options to a short list.

When companies first enter the United States, they should manage their expectations for incentives, as the value varies based on the scope and size of a project, the location, and other mitigating factors. As businesses evaluate their investment projects, it is important to assess incentive opportunities accordingly. Although incentives can be of significant value, it is critical to remember that incentives themselves should not lead the location decision process but remain a necessary part of the overall criteria utilized when making a final site selection decision.

"Economic development incentives" is a term that describes an array of financial tools and technical resources available to government agencies, economic development organizations, and utilities, along with other similar entities. These incentives can be utilized to support the recruitment and retention of businesses in U.S. communities in exchange for the job creation and financial investment that those businesses will bring. These incentives may come in different forms to deliver assistance for businesses, including credits, rebates, and exemptions for certain tax liabilities; direct grants in the form of cash and forgivable loans; financing and aid for infrastructure and site development; loan support; and funding for job training initiatives and programs such as green technologies and sustainable practices.

To effectively evaluate and secure economic development incentives, businesses must conduct proper research and due diligence to identify and understand the true value of relevant incentives (and the requirements of the associated commitments going forward). Just as the value, structure, and nature of economic development incentives vary across the country, so too do the rules and regulations which guide them. Having a strategic approach and action plan is vital to ensure the best outcome for the business in both the near and long term.

When evaluating these opportunities, it is also important to review whether the investment is in an urban or rural community. As economic developers develop their tools and resources for businesses, the approach, commitments, and value opportunity changes.

The following chapter will guide businesses through the economic development incentives process and discuss many of the related best practices that companies deploy in the United States to secure and optimize such incentives.

The Partners

Economic development incentives in the United States are typically delivered through the creation of public-private partnerships that create bilateral or multilateral legal relationships between the recipient business and other prospective stakeholders. While the U.S. federal government offers some business incentives, incentives are most prominently managed by state-level government agencies, local-level jurisdictions, and the providers of utility services (together referred to as economic development organizations, or EDOs). EDOs seek to attract and retain businesses within their jurisdictions. Typically, but not always, EDOs will collaborate to create a comprehensive incentives package to deliver a solution best fit for the prospective company.

State Governments

State governments are a common partner for business incentives, as state legislators frequently adapt existing programs to implement policies and programs that support economic development within their borders. State incentives programs are typically in the form of tax incentives, discretionary cash grants, and financing assistance.

Local Governments

Counties and municipalities have varying authority and discretion across the United States when it comes to incentives. Because these jurisdictions are the ones most directly impacted by job creation and capital investment, the incentives offered at the county and municipality level typically leverage the ability to offer consumption tax exemptions, property tax abatements, tax increment financing, and job training funding.

Utility Providers

As a key resource for economic development in their area of jurisdiction, utility providers are increasingly deploying incentives to support growth and retention, particularly for industrial, logistics, and data center projects. These programs, as discussed later in the chapter, are likely delivered through direct infrastructure assistance, rebates on energy efficiency, renewable energy, and sustainability investments, as well as reduced power rates for certain users.

Federal Government

The federal government can provide support for businesses through funding and financing support, which is typically delivered in conjunction with incentives offered by a state, county, or local jurisdiction. These programs range from financing for small businesses, grants for infrastructure and economic development purposes, and workforce training and targeted employment programs, among others.

Types of Economic Development Incentives

It can be overwhelming for a business to consider all potential opportunities for economic development incentives in the United States. Although not intended to be an exhaustive directory of every incentive option, this section provides a summary of the most common types of incentives that may be available for businesses. As companies work with the respective EDOs, the organizations will propose a tailored incentives package based on discussion and negotiation with the company tied to the specific nature of the proposed project. These proposals are developed and designed by EDOs to optimize an incentives solution for the business. The ultimate mission for incentives is to deliver the right support for a company to have the confidence and business case to make an investment.

Corporate Income Tax Incentives

Each state and local government approaches corporate income taxes in its own way (for more information on taxes in the United States, see SelectUSA Investor Guide, Chapter 4: Taxes), and accordingly, many states and communities may also provide credits, rebates, and refunds of the effective taxes that a company may owe. These types of corporate income tax incentives are often tied to a commitment by the company to create a certain number of jobs and/or make a significant capital investment.

When assessing a corporate income tax incentive, critical factors to evaluate include the tax liabilities created by the project and the company's operation in that particular taxing jurisdiction, the time period of the incentive, whether the tax credit can be carried forward, and whether the incentive is refundable. On the latter, when a tax credit is considered refundable, the company will be able to capture the value of the incentive regardless of whether the company has an actual tax liability. For example, if the tax credit is worth $100, and the business only has $50 in tax liability, the remaining $50 will be provided in another form, which is typically in cash. If the program is non-refundable, in contrast, the business would need to have $100 of effective tax liabilities in order to capture the full incentive value.

Consumption Tax Incentives

Throughout the United States, government entities often levy varying consumption taxes, commonly referred to as a sales and use tax. Depending on the state and local community, these taxes can differ significantly – not only on the tax rate, but also with respect to the types of goods and services that are taxed.

To recruit businesses and drive investment, economic developers may leverage exemptions of these taxes through incentives. It is therefore vital for businesses to understand the specifics of their investments, particularly equipment, to effectively evaluate the opportunity. Some states may also provide exemptions for certain expenditures, such as industrial machinery. Businesses should understand which goods and services are taxable in the respective jurisdiction, the timing of the investments, depreciation schedules, and filing requirements, among other considerations in order to effectively evaluate the true value of these types of incentives.

Workforce Tax Incentives

Many state and local governments levy taxes on employment, primarily through payroll taxes. In those jurisdictions, EDOs may be able to offer incentives that would reduce and/or eliminate this tax burden on businesses. These programs can also be delivered as a post-performance incentive, whereby the respective tax jurisdiction provides a refund of the payroll taxes paid by the business as long as the company has met agreed-upon project commitments.

Grants

Businesses may be awarded grants for economic development projects in many jurisdictions. Grants come in many different forms and from a variety of entities, including the federal government, state agencies, local communities, and other regional economic development stakeholders.

Historically, grants would often come at the outset of a project to drive the investment forward. Today, these programs have transitioned to the post-performance model to reduce the upfront cost to the taxpayer. A post-performance grant also poses less of a risk to the business concerning “clawbacks” (repayment) if the project does not fully develop as committed.

Infrastructure

Investing in critical infrastructure is a vital aspect of successful economic development strategy. EDOs often have tools to encourage infrastructure buildout, such as support for site work, water and wastewater, transportation, electricity, and broadband.

To support a project, economic developers may be able to leverage resources and funding from federal and state government sources, such as Community Development Block Grants and the Economic Development Administration (EDA). While these programs often do not provide direct financial support for the business, this indirect funding may be used to support and assure the availability of the vital infrastructure needed for a project, as well as for future development.

Utility and Energy Incentives

To help drive investment into their respective jurisdictions, many electric, gas, and other utility companies have established their own internal economic development programs. Utilities commonly partner directly with businesses and state- and local-level EDOs to provide assistance for investment projects. The tools and resources used to do so may include electric and gas infrastructure support, such as transmission and extensions, as well as industry rate riders. Rate riders are incentives which provide a reduced power rate for economic development projects, delivering extensive cost savings over the near and long term.

Many government agencies and utilities also leverage programs to support green and sustainable investments. These programs may include rebates for investments in energy efficiency, such as lighting upgrades, and incentives for the deployment of renewable energy technologies.

Lending and Finance

Adequate and qualified financing is crucial for businesses investing in the United States, especially during initial market entry. Through federal, state, and local EDOs, businesses may be able to access zero-to-low interest loan financing for certain projects.

The lending support can be leveraged by small and mid-size businesses, as well as by large companies. In this context, it is always critical for businesses to evaluate the opportunity for financing support alongside traditional lending options because terms and commitments can vary depending on the location, project scope, and financial need.

Job Training

Job training incentives are designed to benefit both the community and the investing business. Not only does the business receive vital financial resources and technical support for training its employees, but the community is also able to develop its workforce by introducing and deploying new skills.

These workforce development programs are typically designed to either reimburse businesses for eligible training activities or to channel such training through a local academic institution. Companies will need to develop a training strategy and evaluate how the business can capture support for their specific skill requirements. As with all incentives, tracking the training activities and relevant expenditures is critical to capture reimbursements.

Complex Incentives

From the federal government to municipalities, there are additional incentive opportunities that can be leveraged by businesses to support development and financing. Referred to as complex incentives, these programs typically require additional due diligence and legal structuring to be effectively utilized.

Examples of these incentives include Opportunity Zones and New Markets Tax Credits, which may be leveraged in certain qualifying federally-designated census tracts that have been targeted for economic development. Investors in these respective zones can capture significant federal tax savings for eligible projects. Businesses can either directly participate in the investment or work with the existing investors in the zone to lower the cost of development and secure critical project financing.

Another complex incentive used for economic development purposes, commonly found at the municipal level, is tax increment financing (TIF). This development tool leverages anticipated future property tax revenues to support the financing of a project. Depending upon the location, these monies can be deployed in a variety of ways for project assistance, including financing, site, and infrastructure support, and even workforce development training.

Process to Secure Incentives

With such a wide range of possible business incentives, a company must take a strategic approach to economic development incentives in order to ensure project success and reduce risk to the business. Part of that strategic approach requires an understanding of the processes by which a business may secure such incentives and how that fits into the overall site selection. Below are the key steps and best practices of the dynamic economic development incentives process.

Research and Model

The first critical step to pursuing economic development incentives is to define the project scope and the key criteria for the ultimate location decision. Economic development incentives are just one element of site selection. In order to realistically compare potential economic development incentives, companies must evaluate locations based on a wide variety of factors in order to narrow down their potential project destinations to a short list (for additional resources, please reference SelectUSA Investor Guide, Chapter 10: Site Selection).

The company will also need to conduct research and due diligence on the various incentives opportunities and risks presented in each jurisdiction. While this can commence through desktop research using resources such as databases available on SelectUSA's website, a complete evaluation of the programs, rules, timing, and commitments will be required. Working closely with the respective parties, along with qualified service providers, is vital throughout the process. One best practice is to develop a financial model to assess the true impact of the incentives, particularly as different project scenarios may be under consideration.

Economic Development Engagement

Once the project scope is defined and the location decision process narrows to a short list of communities, direct engagement with economic development officials is critical. Ensuring confidentiality is vital in this stage. To do so, the first step is to secure non-disclosure agreements with the various stakeholders that will be involved in the conversation, which typically includes state, regional, local, and utility EDOs. Most EDOs will offer to provide these confidentiality agreements, but procedures and coverage vary across the country. In many cases, the company, or a qualified service provider, may instead directly develop the respective confidentiality agreements.

Information and Data Disclosure

Ensuring confidentiality and protection of proprietary information is critical in the economic development incentives process because there will be certain steps throughout the process that will require the company to disclose information related to its business and the project itself. This typically includes the number and type of jobs that will be created by the project, anticipated wages and benefits, the amount and nature of capital investments, and anticipated tax generation, among others. When data is requested, companies should be sure to work closely with advisors and economic development partners to understand exactly what might be required.

Negotiation

Throughout the economic development incentives process, a company will have a series of direct discussions with its EDO partners. Negotiation is a critical element to ensure the programs are best fit for the business and the project, while also meeting the mission of the various economic development stakeholders. Based on the business' requests and available economic development programs, the involved EDOs will generally make a formal offer combining multiple options and programs into an incentives package. Although all such EDOs are constrained by the laws and regulations governing their programs, there may be room for negotiating the value of the incentives to the business and tailoring them to best fit the unique requirements of the business and project over the near and long term.

Legal Documentation

Once an offer of economic development incentives has been made and accepted, a company will complete the process by formalizing the agreement and the commitments set forth by all parties involved through legal documentation. It is vital to have proper legal representation to assess and complete the associated applications, contracts, and agreements to make certain the business understands the commitments set forth.

Project Announcement

When businesses create jobs and make significant investment commitments, political officials and economic development leaders are excited to tell the world. Coordinating with the various partners will be important to ensure the public announcement of the project is appropriate for the message and mission of the business. Not only can this be a great opportunity to discuss the exciting project, but this is also a valuable chance to begin the talent recruitment process.

Incentive Compliance & Aftercare

Once the project commences, the vital phase of compliance begins. In order to receive the economic development incentives, the business will have a prescribed set of reporting requirements for the various stakeholders to demonstrate and document project performance. In this context, it is absolutely critical to develop a strategy and identify resources to lead this phase because missteps (especially failure to meet technical performance standards or failure to provide required reports, for example) may compromise the receipt of the incentives, even if commitments and milestones are met by the company.

Important to Know!

Incentives are a Partnership

First and foremost, it is important to consider economic development incentives as a partnership between the business and the community. While vital to ensure the business meets their goals through this process, the community will have its own metrics and mission as well. Economic development officials should, therefore, be treated as allies and collaborators, not as adversaries.

Develop an Aftercare Plan

As previously mentioned, even after incentives have been secured, compliance and aftercare remain critical to assure the monies and benefits are ultimately received by the business. By developing a sound aftercare plan, businesses will find themselves in a strong position as the project commences. If those resources do not exist internally, including legal counsel to assess legal risks associated with non-compliance with incentive agreements, it is important for the company to find and engage a qualified service provider to provide support for this phase.

Coordinate Messaging

Ahead of any public announcements, it is a best practice to always coordinate messaging with economic development partners. Being on the same page with a strong message about the project can drive more than just a news article, such as buzz for job recruitment and business development.

Incentives Are Just One Factor

When evaluating where in the United States to locate operations, there is a long list of core factors to assess. Economic development incentives are only one part of the larger decision process, which should also include labor, logistics and supply chain, operating costs, and customer proximity, among others.

When to Work with Third Parties

The economic development incentives process in the United States requires due diligence, financial modeling, paperwork, legal construction, and negotiations. Bringing in trusted and qualified service providers will help reduce the time cost and burden on the business, while providing a specialized knowledge base that may not be present within most companies.

Conclusion

Business incentives are designed to catalyze economic development in American communities by providing various forms of direct and indirect financial support to businesses. In return, the governments that provide such support expect that the businesses will reciprocate by creating jobs and making investments in infrastructure, facilities, and equipment that ultimately enhance the local economic climate. Consequently, these public-private partnerships create real opportunities and can provide substantial value for foreign businesses that are entering or growing in the United States market.

About HICKEY

HICKEY is a global leader in site selection, credits and incentives advisory, labor analytics, and supply chain solutions with active projects in the Americas, Asia, Europe, Australia, and Africa. Utilizing state-of-the-art tools and proven methodologies, HICKEY leverages nearly 40 years of experience to support its clients and provide the professional services needed to identify optimal locations anywhere in the world.

By having a presence in key global markets, HICKEY ensures our services are always aligned with each unique local environment and provides our clients with an unparalleled level of support. HICKEY has offices strategically located across the country and around the globe. As the largest independent location strategy firm globally, HICKEY advises companies ranging from Fortune 500 to fast-growing startup businesses serving an expansive list of industry sectors.

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