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# Legal Considerations for Establishing Operations in the United States

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## BUSINESS AND LEGAL CLIMATE IN THE UNITED STATES

The business climate in the United States, though subject to business cycles, is the largest, most dynamic and durable in the world. The freedom to compete gives would-be entrants the greatest opportunity to succeed and entrenched players the greatest risk of failure. Central to the business climate is the virtual absence of political risk and the stability and predictability of the legal system.

Although stories of runaway punitive damage verdicts give many business executives pause about investing or doing business in the United States, it is estimated that plaintiffs prevail in civil cases less than 60 percent of the time. In cases where the plaintiff both sought punitive damages and won at trial, punitive damages were awarded 36 percent of

the time. Within those rare awards, so-called “blockbuster” verdicts are exceedingly rare; only 137 punitive damage awards exceeding $100 million were imposed between 1981 and 2013. Instead, as of 2005, the median overall punitive damage amount awarded to plaintiff winners in civil cases was $64,000. On the other hand, courts follow prior decisions in determining the outcome of a lawsuit, and that gives businesses the ability to predict the likely outcome of a particular course of conduct and comfort in the sanctity of contracts.

The U.S. tax system, although very complex, is generally less burdensome than most countries’ when you consider income, VAT, employment and property taxes combined. Moreover, the United States is party to myriad bilateral tax treaties that reduce or eliminate many of the duplicate tax burdens between countries.

## Limitations on Conducting Business in the United States

### *Restrictions on Foreign Investment and Control*

Generally, the United States has proven to be a desirable location for foreign investment. Few controls are imposed on investment by foreign entities that are not imposed on domestic entities. However, federal law does restrict and regulate permissible levels of foreign ownership and control in certain key industries.
*National Security and Defense.* Established in 1975, the Committee on Foreign Investment in the United States (CFIUS) is an interagency panel that screens transactions involving foreign investment in the United States for potential security risks. Members of the State, Defense, Justice, Commerce, Energy, Homeland Security and Treasury Departments send CFIUS’s recommendation to the president, who has the power to suspend or prohibit a deal. CFIUS has been strengthened over time with legislation, including the Exon-Florio amendment to the Omnibus Trade and Competitiveness Act of 1988, the Foreign Investment and National Security Act of 2007, and the Foreign Investment Risk Review Modernization Act of 2018. The jurisdiction of CFIUS review includes not just mergers, acquisitions or takeovers resulting in foreign control of commerce but also investment in U.S. companies involved in critical technology or other sensitive sectors. For transactions involving certain industries for which the U.S. government deemed that “strategically motivated foreign investment could pose a threat to U.S. technological superiority and national security,” mandatory

declarations are required. Factors considered in CFIUS review include whether a transaction presents national security risks and whether other provisions of law provide adequate authority to address the risks. While CFIUS's review has been broadening, the trend of increased regulatory scrutiny of national security-sensitive transactions appears to be reflected across many countries globally.

*Nuclear Power.* The Nuclear Regulatory Commission (NRC) issues licenses for the use of nuclear material for medical, industrial and commercial purposes, including research and development. The NRC is prohibited from issuing licenses for the production and handling of atomic energy to any individual, corporation or entity that is owned, controlled or dominated by a foreign corporation or foreign government. The policy rationale behind this is the protection of domestic defense, security, health and safety. The NRC may enter any nuclear facility to recapture nuclear material and operate the facility to assure proper use, preservation and safeguarding of the material in order to promote the common defense and security of the United States.

Generally, foreign investors may participate in NRC-licensed activities if the foreign entity does not hold a majority interest in the venture and the licensed activities are controlled by U.S. citizens. In the past, the NRC has imposed the following licensing conditions on foreign participation in the applicant's licensed activities: (1) the foreign entity cannot hold more than a 50 percent ownership interest in the venture; (2) the directors, officers and managers of the licensed entity must be U.S. citizens who are not controlled by, or under the influence of, a foreign entity or person; (3) officers and employees of the venture responsible for the custody and control of nuclear materials must be U.S. citizens; and (4) only persons with security clearances and permits may have access to restricted data involving plant technology. These factors may not be the only conditions the NRC will impose on a foreign investor seeking to own a portion of a U.S. domestic nuclear power plant. In addition, the NRC always considers the form of the venture and the nature and extent of foreign participation.

Recently, major legislation was enacted governing this sector. The Nuclear Energy Innovation Capabilities Act of 2018 updates the mission and objectives of the Department of Energy's civilian nuclear energy programs, and the Nuclear Energy Innovation and Modernization Act of 2019 creates a new licensing framework for advanced reactors and adjusts the fee structure as it applies to both traditional nuclear power plants and innovative reactors. On September 25, 2018, an additional piece of legislation passed the U.S. House of Representatives and was referred to the U.S. Senate's Committee

on Environment and Public Affairs. If enacted, the bill, H.R.1320 - Nuclear Utilization of Keynote Energy Act, would require a report to Congress "containing the results of a study on the feasibility and implications of repealing restrictions . . . on issuing licenses for certain nuclear facilities to an alien or an entity owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." Due to the rapidly changing legislative and regulatory framework governing nuclear power, readers interested in establishing U.S. operations in this area are advised to discuss further with their legal counsel.

*Public Utilities.* Under the Energy Policy Act of 2005, a "holding company" is defined as "any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company" or "any person . . . [who] exercises directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a controlling influence over the management or policies of any public-utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates . . . ." Holding companies are subject to the oversight of the Federal Energy Regulatory Commission (FERC). However, foreign utility companies are exempted from the definition of holding companies because FERC's "main regulatory interest is to monitor the costs incurred by traditional utilities providing monopoly service in order to ensure reasonable rates." Accordingly, foreign entities seeking to acquire an interest in a U.S. utility may be able to avoid certain FERC requirements by qualifying as exempt. Recent legislative reforms are predicted to result in nontraditional investment in the U.S. public utility sector, including by diversified foreign investors and certain foreign banks and pension funds.

*Maritime Industries.* Based on the same national security rationale, federal law requires that all merchant marine vessels must be owned and operated privately by citizens of the United States. The merchant marine fleet serves as a military auxiliary in times of war and national emergency and is essential to foreign and domestic commerce. Accordingly, all merchandise to be transported by water, or by land and water, between points in the United States must be carried by vessels built in and documented under the laws of the United States, and owned by U.S. citizens. Additionally, a U.S. owner is prohibited from selling any interest in a vessel to a non-U.S. citizen without the approval of the Department of Transportation. (This does not apply to certain pleasure and fishing vessels.)

***Federal Regulation of Foreign Investment and Control***

Federal law limits or regulates foreign ownership and investment in the following industries:

*Airlines.* U.S. citizens must own 75 percent of the voting shares of an air carrier, as well as constitute at least two-thirds of the board of directors and managing officers, and the carrier must be under the actual control of U.S. citizens. In addition, the president of the air carrier must be a U.S. citizen. The Department of Transportation is primarily concerned with voting equity, but extensive foreign equity ownership absent voting power may result in a denial of participation. A foreign airline is permitted to own up to 49 percent of the total equity, but the limit of 25 percent of the voting equity remains.
*Media and Communications.* The laws governing the communication industry are the key area of federal foreign investment regulation. These laws are intended to promote competition and reduce regulation to encourage quality services at low prices and rapid development of new technology. The Telecommunications Act of 1996 gives the Federal Communications Commission (FCC) the discretion to refuse to license (television, radio, common carrier, broadcasting, aeronautical services, cellular, and microwave and satellite communication) any corporation directly or indirectly controlled by any other corporation of which more than 25 percent of the capital stock is owned of record or voted by foreign persons, their representatives, a foreign government or any corporation organized under the laws of a foreign country. The FCC presumes that indirect foreign ownership of common carrier radio licensees up to 100 percent is consistent with the public interest when the foreign investor is from a World Trade Organization (WTO) member country, absent compelling evidence to the contrary. When the foreign investor is not from a WTO member country, the FCC applies a four-prong Effective Competitive Opportunities (ECO) analysis to authorizations of foreign investors seeking to acquire either a controlling interest or more than a 25 percent interest in a U.S. communications carrier. The ECO test examines whether a foreign market is open by considering the following: (1) the presence of legal barriers to market entry by entities foreign to that market; (2) whether interconnection is permitted under reasonable and nondiscriminatory charges, terms and conditions; (3) the presence of competitive safeguards (i.e., rules against cross-subsidization); and (4) the existence of a regulatory agency to protect the competitor.

*Banking.* The International Banking Act of 1978, as amended, mandated that the Federal Reserve must approve the establishment of U.S. offices by foreign banks if the bank is under comprehensive and consolidated regulation by its home country's authority.

*Mineral Leases and Timber Rights.* Deposits of natural resources and the lands containing them owned in the United States are available for exploitation by U.S. citizens, but not to foreigners, unless their home country grants comparable rights to Americans. Foreigners may hold mineral leases through their interests in U.S. corporations, provided that their home country does not deny similar rights to Americans. Aliens who are bona fide residents of the United States may obtain access to timber on federal lands.

*Outer Continental Shelf Activities.* Federal regulations govern the outer continental shelf and offshore leases. Foreign access is not prohibited because there is no citizenship requirement. Statutory provisions limit manning outer continental shelf rigs, vessels and platforms to U.S. citizens, with some exceptions.

## State Restrictions on Foreign Ownership and Control

Many states impose additional restrictions on foreign ownership of businesses. Under Pennsylvania law, for example, an alien who is not a resident of a state or territory of the United States or of the District of Columbia, or a foreign government cannot acquire an interest in agricultural land exceeding 100 acres, except such as may be acquired by devise or inheritance, and such as may be held as security for indebtedness. This law does not apply to citizens, foreign governments or subjects of a foreign country whose rights to hold land are secured by treaty.

***Choice of Form of Business Enterprise.*** The choice of the state in which to organize or incorporate an entity is similarly important. Business entities are creatures of state law, not federal law. A business entity can incorporate or form in any state it chooses, and its internal affairs are governed by the law of that state, even if the entity does not do business in that state. These laws can vary substantially from state to state. Federal laws, however, are uniformly applicable to business entities throughout the United States. With the help of legal counsel, you should determine which state may be preferable for forming your business entity and for compliance with state requirements. Issues to consider in these decisions include state requirements for various forms of business structure, corporate governance, stock and other securities requirements, labor and employment requirements beyond federal law, tax issues, and environmental laws. Let's briefly examine some of these critical issues for businesses.

Under the Delaware General Corporation Law (DGCL), the law applicable in the state most commonly chosen for incorporation, foreign investors can do business in the state by (1) forming a joint venture with an existing business enterprise; (2) acquiring

an existing enterprise or subsidiary of another corporation; or (3) creating an enterprise owned by the foreign investor's company, such as a new subsidiary, or a more informal structure, such as a liaison office or branch office of the foreign investor's company.

*Joint Ventures.* Joint ventures can take the form of any legal vehicle, but usually are either (1) a simple contractual relationship, (2) a partnership or (3) a joint corporation. Advantages and disadvantages apply to each form. Factors to consider in choosing one of these forms include the size and complexity of the proposed venture, the anticipated length of the joint venture, the relationship among the parties, tax burdens and benefits, and cash flow.

Simple contractual relationships are flexible, easily terminated and generally can be kept far more secret than other forms of joint ventures. However, the contract for these ventures must be carefully drafted to avoid problems down the road, and a court could hold the contractual joint venture to be a *de facto* partnership, obliging the investors to the fiduciary duties of that form of entity. In general, contractual joint ventures should be used for short-term, specific activities, such as an agreement between two companies to jointly develop a new product or service. If the contractual arrangement includes the sharing of profits or losses, the arrangement may create a partnership for U.S. tax purposes, even if it is not formed as an entity. See below for tax consequences.

*Partnerships.* Partnerships generally are characterized by unlimited joint and several liability of the partners and restrictions on the assignment of partnership interest, particularly to non-partners. There are three types of partnership agreements: (1) general partnerships, (2) limited partnerships and (3) limited liability partnerships. General and limited liability partnerships are particularly common joint venture vehicles for commercial real estate and construction activities, and when a small group of trusting and familiar investors want to take advantage of tax transparency. Limited partnerships are rarely used as joint venture vehicles because they usually are structured with one general partner and several passive investors, with greatly limited ability to be involved in the operations as limited partners, but this form may be ideal if one party wants total control over the joint venture and the others only want to share in the profits.

*Corporations.* A jointly owned corporation is the standard form of joint venture used when the venture has any economic significance and when the parties want the venture to be disclosed to the public. The preferred corporate forms are the business corporation and the limited liability company. The business corporation often is used by companies that

want the venture to be publicly listed on a stock exchange, to gain more shareholders and then progress independently of the shareholders. This form also is often a precursor to a merger of the companies involved in the joint venture. Limited liability companies usually are not used when the parties want the venture publicly listed; rather, they are used for investments or opportunities that will grow organically and not as acquisition vehicles. Limited liability companies allow for "pass-through" taxation, where profits are not taxed on the company level, but are taxed at the member level while providing the same liability protection as afforded to a limited partner in a limited partnership.

***Acquiring an Existing Business Enterprise or Subsidiary of a Foreign Corporation.*** Foreign investors can acquire these types of entities by acquiring the assets of the business or acquiring enough stock to assert *de facto* control. Asset acquisitions of going business concerns carry important tax and legal consequences. The purchase price of the assets will become the new tax basis for those assets, usually resulting in a higher tax basis and higher tax depreciation deductions than purchasing stock in a business corporation. Purchasers in asset acquisitions usually can avoid the liabilities of the seller, including liabilities for back income taxes.

In an asset acquisition, the buyer also is not obliged to assume any collective bargaining agreement with the seller's employees and can set initial terms of employment with the seller's workforce (with certain important limitations). Foreign investors should consult with counsel about other important tax and legal consequences of an asset acquisition.

Stock acquisitions also carry important tax and labor consequences. By purchasing equity interest in a business that is taxed as a corporation, the buyer inherits all tax attributes (such as basis) of the equity, as well as all tax liabilities and other liabilities, although normally tax loss benefits are limited or eliminated. In a stock acquisition, unlike an asset acquisition, the buyer must assume any preexisting collective bargaining agreements. Again, foreign investors should consult with legal counsel about other important consequences of stock acquisitions.

A third way to acquire a going concern is a merger. Again, important tax and legal consequences apply. Presumably, the foreign entity would incorporate a U.S. wholly owned subsidiary just for the merger. The subsidiary would merge with the target company, which would be the "surviving" business entity of the merger. The foreign entity would own all the stock of the surviving entity, which would retain all of its assets and liabilities, and maintain a separate corporate existence from the foreign entity.

Certain mergers can be completed tax-free, depending on the amount of voting stock, cash or other consideration exchanged in the merger. Analysis of significant tax filing and other obligations must be considered before deciding on such a transaction. As with stock acquisitions, the merged entity must assume any preexisting collective bargaining agreements. As the concept of a merger does not have an equivalent in many foreign jurisdictions, it is essential to have experienced counsel who can harmonize the often conflicting systems.

Acquiring an existing business entity can trigger certain foreign investment control laws. Beyond the complex federal laws that apply to any securities transaction, foreign investors may be subject to special federal acquisition review procedures where the acquisition affects a certain share of the U.S. market. Many states also have “anti-takeover” provisions that can help publicly traded corporations resist “hostile” takeover bids.

Key federal laws include the Securities Exchange Act of 1934, the Hart-Scott-Rodino Antitrust Improvements Act, and the International Investment and Trade in Services Survey Act. The Securities Exchange Act requires investors acquiring more than 5 percent of a business entity’s publicly traded stock to file certain personal and financial information with the SEC. The Securities Exchange Act also governs tender offers (public offers to pay more than the current market price for publicly traded shares of a company the offeror wants to control). The Hart-Scott-Rodino Act requires federal review of mergers or acquisitions when certain market share thresholds are crossed. The required filings, fees and negotiations with the federal government in the event of objections can be onerous. The International Investment and Trade in Services Survey Act requires reporting of all foreign investment in U.S. business enterprises when a foreign entity acquires 10 percent or more of the ownership of a U.S. business in an acquisition the cost of which exceeds $3 million. Several categories of forms must be filed for these investments, depending on the type of business involved.

Anti-takeover laws of many states include a fair price provision, which gives shareholders the right to receive “fair value” for their stock in the event of an acquisition by a shareholder with 20 percent voting power (fair value usually being the price at least equal to the greater of the current fair market value per share of the stock and the highest price paid by the controlling shareholder for shares it previously acquired). These laws also often allow publicly held companies to bar acquisitions or combinations by an interested shareholder (generally the owner of at least 20 percent of outstanding stock), unless the

transaction is approved by the board of directors and a majority of shareholders within strict deadlines. Other provisions allow publicly held companies to limit the voting power acquired in certain stock acquisitions and to disgorge profits realized by controlling shareholders following attempts to gain control of the company. The latter provision is designed to prevent controlling shareholders from putting the company "in play," then profiting from being bought out by a third party or the company itself.

***Creation of an Enterprise Owned by the Foreign Investor's Company.*** Instead of acquiring an existing business, the foreign investor's company could create a new subsidiary, liaison office or branch office.

A subsidiary can be any type of business entity. Forming a subsidiary triggers a number of legal and tax obligations, as outlined above. Let's assume that the subsidiary will be a business corporation. Before starting operations, the subsidiary must:

- draft a certificate of incorporation and bylaws
- capitalize the company
- form a board of directors
- choose corporate officers
- sign the certificate of incorporation and file it with the secretary of state of the state selected for incorporation.

The certificate of incorporation and bylaws must be carefully crafted, as they establish the business name, ownership and voting rights of certain classes of stock, terms, conditions and scope of power for directors and corporate officers, and other critical aspects of business operations. Depending on the capital structure of the corporation, a number of complex securities issues may need to be addressed. Legal counsel should be sought for all of these matters.

## Corporate Governance

U.S. federal law also requires ongoing compliance with certain corporate governance regimes as outlined below:

***Sarbanes-Oxley:*** The Sarbanes-Oxley Act, enacted in response to accounting fraud scandals in the early 2000s, has created significant reporting and other compliance requirements for any company, foreign or domestic, that is publicly traded in the United States. Among other requirements, a company must observe certain practices designed to preserve auditor independence and disclose certain financial information and information regarding conflicts of interest. Accounting firms must register with the Public Company Accounting Oversight Board and retain certain records for up to seven years, subject to civil and criminal penalties.

***Foreign Corrupt Practices Act:*** In addition to the laws of nearly all U.S. states, which make it illegal to bribe any U.S. official, there is a comprehensive federal statutory regime that prohibits the willful use of any means to pay, or promise to pay, any official of a foreign government for the purpose of buying his or her influence in his or her official capacity. Violations of the Act come with both civil and criminal penalties.

***Regulations for Financial Institutions:*** Financial institutions in the United States must comply with certain federal laws (in addition to numerous state laws on chartering and lending behavior).

The Dodd-Frank Wall Street Reform and Consumer Protection Act regulates all domestic and foreign companies “predominantly engaged in financial activities,” other than bank holding companies and certain other types of firms. The Act created the Financial Stability Oversight Council and Orderly Liquidation Authority (FSOC), which is granted broad powers to determine whether a nonbank financial company or financial market utility poses a threat to the stability of the U.S. financial system and should therefore be subject to heightened regulation by the Federal Reserve. Acting through the Office of Financial Research, the council can collect financial data from companies and recommend heightened regulation. The FSOC was the subject of a Presidential Memorandum issued April 21, 2017 and responsive Department of the Treasury Report dated November 17, 2017, which contained a number of recommendations regarding FSOC processes. Companies that feel they may be considered systemically important should therefore closely follow any legislative or regulatory updates.

Reforms to the Bank Secrecy Act under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT) require that U.S. financial institutions develop and implement anti-money laundering programs (AML programs). The purpose of the program is to identify funds that may go to criminal and terrorist enterprises. The programs must include the following: (1) internal policies, procedures and controls; (2) a designated compliance officer; (3) ongoing training for compliance personnel; and (4) an independent audit to test the program. In addition, financial institutions must have policies and procedures in place that will help them verify the identity of their customers.

## Tax Overview

***Federal Taxation.*** There is no federal VAT in the United States — the federal tax is generally based on the income of the business operation.

Subject to modification by tax treaties, a non-U.S. corporation that conducts business operations in the United States will be taxed under the following regime.

***Branch Operations.*** A non-U.S. corporation that engages in business in the United States is generally subject to a corporate income tax on its income that is effectively connected to a U.S. business. The tax is levied on "taxable income," which is U.S.-connected gross income less applicable deductions, and the maximum federal tax rate as of 2018 is 21 percent. The non-U.S. corporation is required to file an annual tax return on Form 1120F that reports the income and deductions of the U.S. operations. It is important to note that, if a non-U.S. corporation is uncertain if it is engaged in a business in the United States, it may be well advised to file a "protective" U.S. tax return. If the non-U.S. corporation does not timely file a U.S. tax return and the IRS later determines the company was engaged in a U.S. business, the 21 percent tax is imposed on gross income, without the benefit of any deductions.

In addition to the 21 percent corporate tax, the non-U.S. corporation that does business in the U.S. is subject to a "branch profits tax." The branch profits tax is a substitute for a dividend withholding tax because a branch does not pay dividends to its headquarters. In general, unless modified by an applicable tax treaty, the branch profits tax is levied at 30 percent on the net after tax earnings of the non-U.S. corporation that is not re-invested in the U.S. business. Because the branch profits tax is payable even if there has not been a cash repatriation to the non-U.S. corporation, a U.S. corporate subsidiary is frequently preferred over a branch because the dividend withholding tax can be controlled by managing the timing of cash repatriations.

The sale of a U.S. branch gives rise to a U.S. tax charge for the non-U.S. corporation because it is selling assets located in the United States.

***Subsidiary Operations.*** If a non-U.S. corporation forms a wholly owned U.S. corporate subsidiary (or an LLC that is taxed as a corporation), the subsidiary is subject to tax as a U.S. corporation — its worldwide income is taxable on a net basis at a maximum rate of 21 percent. The non-U.S. corporation does not need to file a U.S. tax return, but the U.S. subsidiary will file its own U.S. tax return and may need to file an IRS Form 5472 on which the foreign ownership is identified.

Dividends paid by the U.S. subsidiary to the non-U.S. shareholder are subject to a 30 percent withholding tax, unless modified by an applicable tax treaty. The United States has very few tax treaties that do not contain a “limitation of benefits” (LOB) article. The LOB provisions are very effective at denying treaty benefits to non-U.S. corporations that are not the intended beneficiary of the tax treaty, and preclude most treaty shopping. The United States has not adopted the Multi-Lateral Instrument, and relies only on its tax treaties to determine the tax treatment on non-U.S. persons.

The payment of the dividend withholding tax is generally managed by managing dividend payments. It is noted that, if earnings are unreasonably retained to avoid the dividend withholding tax, the IRS may assert a penalty against the company.

Generally, the sale of the stock of the U.S. subsidiary by the non-U.S. corporation should not result in a U.S. tax charge to the non-U.S. corporate shareholder, unless the U.S. subsidiary is a U.S. real property-holding company.

***Joint Ventures.*** A U.S. venture partner will frequently suggest that a U.S.-based joint venture be housed in a U.S. limited liability company or a U.S. partnership. For U.S. tax purposes, both the LLC and the partnership are pass-through entities (unless they have elected to be taxed as corporations). As a result, if the joint venture is an operating business, the non-U.S. corporate venturer is taxed as described above under branch operations.

The LLC or partnership has an obligation to pre-pay the 21 percent tax of the non-U.S. corporate venture partner on a quarterly basis.

As of December 2017, the sale of the LLC or partnership interest by a non-U.S. corporate venturer is treated as a sale of the underlying assets, and the non-U.S. corporate venturer is subject to U.S. tax on the income that is effectively connected to the U.S. operating business. The disposition of the interest is subject to a 10 percent withholding tax, unless there is an applicable exception, and the taxes withheld are a pre-payment of the actual, final tax imposed.

***Disregarded Entity.*** If a non-U.S. corporation forms a wholly owned U.S. limited liability company and the LLC undertakes the business of the non-U.S. corporation, unless the LLC elects to be treated as a corporation, the non-U.S. corporation will be deemed to undertake whatever the LLC does. So, if the LLC engages in business in the United States, the non-U.S. corporation is deemed to have a U.S. branch. If the non-U.S. corporation is a treaty-qualified entity and the LLC undertakes solely preparatory and ancillary activities, the non-U.S. corporation will not have a permanent establishment in the United States (although it needs to file Form 1120F, described above in branch operations, and Form 8833 to claim the benefits of the treaty).

***State Taxation.*** While the United States does not have a federal VAT, most states levy their own sales and use tax and income or franchise taxes. The threshold for triggering state taxation may be much lower than that for triggering federal taxation. Generally, the U.S. tax treaties do not cover state taxes and thus the prerequisite for a permanent establishment to tax a non-U.S. corporation does not exist.

Before planning sales into a state, the manner of the marketing and sales should be reviewed for state tax exposure. Under a recent Supreme Court case, known as *"Wayfair,"* the states have expanded power to impose sales tax on persons who sell into the state, even if they have no physical presence in the state.

## Antitrust, Unfair Trade and Consumer Protection

Like many other countries, the United States has a regulatory system to deal with antitrust violations, unfair trade practices and consumer protection. U.S. antitrust and unfair practice laws are designed to help keep prices reasonable while deregulating the economy by lifting price controls on most goods and services. Antitrust issues may arise in the acquisition of a U.S. company, and the United States has laws that act as merger and acquisition control procedures. The goal of this merger review is to attempt to prohibit mergers and acquisitions that will have a serious anticompetitive effect on

the U.S. economy in relation to any benefits from the transaction. Investors planning to acquire a U.S. company need to structure the acquisition to avoid prohibition and to comply with all notification and filing requirements.

## Intellectual Property

Intellectual property rights in the United States for inventions conceived outside of the United States generally are covered by U.S. patent, trademark and copyright law. The foreign investor must meet all proper filing requirements, preserve the rights to intellectual property, and avoid infringing on other parties' intellectual property rights.

## Labor Law

Federal and state law prohibit discrimination in employment because of an individual's race, age, gender, national origin, color, religion, disability status or genetic information. State and/or federal laws also govern employee wage payment, including minimum wage and overtime for certain employees, health and safety, and employee benefits. Federal government applicants and employees are protected from discrimination in personnel based on race, color, sex, religion, national origin, age, disability, marital status, political affiliation, or conduct that does not adversely affect the performance of the applicant or employee — which can include sexual orientation or gender identity.

The National Labor Relations Act gives employees the right to bargain collectively with employers. The law is enforced by the National Labor Relations Board. State law can impose additional requirements on employers. Union membership in the United States has fallen from 20 percent of the workforce in 1983 to 10.5 percent in 2018.

The Patient Protection and Affordable Care Act requires that U.S. businesses employing at least 50 full-time employees provide health insurance to at least 95 percent of their full-time employees. Businesses that fail to provide coverage, or that provide inadequate coverage, to employees will be liable to the IRS for a penalty of up to $3,480 per employee as of 2018.

## Litigation and Discovery

Many of our clients are concerned about the burden, cost and risk of U.S. litigation when they consider conducting business in the United States. Like all court systems, the U.S. system has both benefits and risks. As explained at the beginning of this article, the benefits include predictability, stability and fairness. These risks include burden, costs and sometimes high stakes.

When entering into business in the United States, companies can develop strategies for minimizing those risks. We suggest three primary strategies. First, the corporate structure itself can greatly impact the amount of exposure to owners, investors, parents and affiliates. Second, contractual relationships with business partners, including suppliers, purchasers and investors, can contain clauses that explicitly limit liability, and thus total exposure. Third, contracts can also contain international arbitration clauses that may be able to completely exclude certain disputes from the U.S. courts. These clauses, if properly drafted, are generally respected by U.S. courts. International arbitration is often preferred by our international clients because awards are honored internationally by most countries in the world through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, generally known as the New York Convention, and because there is generally more limited, and thus less expensive, discovery.

If you do become involved in U.S. litigation, it must, of course, be taken quite seriously. It is important to assess the overall risk of your case early on, and to develop strategies for early dismissal of the case. The United States has two court systems — one federal and one state. It is important to work with counsel who is familiar with the type of dispute that you need to defend. You might also need to avail yourself of some of the strengths of the U.S. court system if you have any business disputes that cannot be amicably resolved. The United States is a signatory to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which are both Conventions of the Hague Conference. Membership in these Hague Conventions allows for cross-border service of process and evidence gathering.

Litigation risk, of course, can also be minimized through good governance, general compliance with the law, and good and ethical business practices.

## Conclusion

This article touches briefly on some of the most important issues to be considered by a foreign company or individual interested in investing or establishing business operations in the United States. Legal counsel familiar with these issues at the federal and state level play a critical role in ensuring the success of such investments and operations.

While government regulation, legal issues and tax issues may seem daunting to a new investor, the regulatory and legal framework is actually less complex than in many countries, and the rules and procedures establish a stable basis for making investment

and business operation decisions. Because of this, as well as the size and dynamic nature of the market, the United States remains extremely attractive to foreign investors interested in new or expanding business opportunities.

*Associates Kirk Dungca and Jennifer Lang contributed to this article. The author thanks them for their assistance.*