

DOING BUSINESS IN THE U.S.,
A Summary of Certain Important Legal Considerations

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I. INTRODUCTION

The United States offers significant opportunities to companies seeking to do business here, including a large and competitive marketplace, stable and liquid capital markets, a common language, a stable currency, low inflation, steady GDP growth, and a legal system that fosters and facilitates business activity. The U.S. is a large export market for many foreign companies. Also, foreign direct investment in the U.S. in 2004 was approximately \$1,526.3 billion, an 8.2 increase from 2003.² Furthermore, the North American Free Trade Agreement (NAFTA) provides a business established in the U.S. with an avenue to expand into both Canada and Mexico.

To assure a careful approach to doing business in the U.S., and to increase the likelihood of success, a foreign company will have to navigate numerous laws and regulations which, at first, may seem to present hurdles to smooth entry into the U.S. market. We believe that, with appropriate planning and legal advice, in most cases, such hurdles may be readily surmounted.

II. THE FEDERAL, STATE AND LOCAL SYSTEMS OF GOVERNMENT

The laws and regulations that affect the conduct of business in the U.S. flow from three basic sources: federal, state and local. The principal focus of this publication will be on federal law; however, periodic reference will be made to certain state laws, for example, in the context of choice of legal entity, which are formed under state laws. It should be noted that there are overlaps between state and federal regulation so that, for example, entities and individuals will be subject to taxation at the federal, state and in some instances, at the local level. While there are many similarities between the tax schemes at the Federal and state level, there are many dissimilarities and careful consideration needs to be given to the structuring of transactions.

Federal law derives from the U.S. constitution and from statutes enacted by the U.S. Congress and approved by the President. Federal law applies throughout the U.S. and generally prevails over conflicting state or local law (although in some instances Federal, state and local laws coexist without conflict, in which case both laws will apply). Most Federal statutes are administered by one or more administrative agencies, which often have the authority to adopt regulations interpreting or implementing those Federal statutes. For example, Federal administrative agencies include the Securities and Exchange Commission which regulates the securities markets and the Internal Revenue Service which regulates federal tax laws.

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² Direct Investment Positions for 2004, Country and Industry Detail, Jennifer L. Koncz and Daniel R. Yorgason (July 2005).

III. THE LEGAL PROFESSION

U.S. lawyers are licensed by each state and may be admitted to practice also by certain federal judicial districts. There is no distinction between branches of the profession, such as in certain jurisdiction. Most lawyers specialize in a particular area of the law. Certain areas of the law require special expertise and admission beyond the state or federal admission, such as the patent bar.

IV. FORMS OF DOING BUSINESS

A fundamental question you have to ask is “do I need to establish a presence in the U.S. in order to market and sell my products or services there?” With the advantages that technology provides, it is possible that the internet may enable you to penetrate the U.S. market without the need to form a trading company in the U.S. Alternatively, you may establish a strategic relationship with a distributor or manufacturer’s representative in the U.S. who knows the U.S. market to handle the marketing and distribution of your product, or it may be possible to franchise your business. These are issues that need to be carefully considered before committing to establishing a formal presence in the U.S.

Once a decision has been made to establish a presence in the U.S., the initial choice then is what form of legal presence is appropriate under the circumstances. The types of entity formed under state law and generally available throughout the U.S. include corporations, general partnerships, limited partnerships, business trusts, joint ventures, limited liability companies, branch offices and sole proprietorships. In most instances, a legal entity that is formed under the laws of one jurisdiction will be recognized under the laws of other states and can become qualified to do business in another state by registering as a foreign entity in that other state. For example, a corporation formed under the laws of the State of Delaware, a popular jurisdiction for incorporation, may apply for and qualify to do business in another state by filing an application for a certificate of authority (or similar), a certified copy of the company’s articles of incorporation, and by paying the applicable filing fee.

A. Main Considerations in Choice of Entity

The following factors should be considered in selecting the form of business entity:

1. Limited personal liability.
2. Form of management.
3. Capital and credit requirements.
4. Tax issues.
5. Transferability of ownership.
6. Continuity.
7. Foreign exchange control considerations of the country of origin.

B. Branch Office

One alternative for a business seeking to do business in the U.S. is to establish a branch of a foreign company. This can be achieved by registering the company as a foreign corporation

under the law of the state(s) in which the company is deemed to be doing business.

Under many double tax treaties certain activities can be conducted in the U.S. by a foreign company without creating a taxable presence. For example, certain treaties provide that a person will only be taxable in the U.S. if it is conducting its activities through a “permanent establishment.” A permanent establishment generally includes an office, branch, or factory operated by a foreign person or dependent agent who habitually exercises authority to conclude contracts on behalf of the foreign company. Permanent establishment status can be avoided if activities are limited to: (a) facilities solely used for storage, display or delivery of goods, (b) facilities used solely for purchasing goods, and (ii) facilities solely for collecting information. Permanent establishment status can be avoided if activities are conducted by an independent agent or broker in the ordinary course of his business.

If the branch is deemed a permanent establishment, it will become subject to U.S. tax. In addition and significantly, the foreign parent company will be subject to U.S. claims, possible lawsuits and direct liability in the U.S. for the acts of the branch. In contrast, when the foreign parent company establishes a separate corporation in the U.S. which is a subsidiary of the foreign parent, the subsidiary can serve to insulate the foreign parent company from liability for the subsidiary’s acts and business. For this reason, most foreign companies prefer to do business in the U.S. through a U.S. corporation or similar entity rather than through a branch.

A foreign company engaged in a U.S. trade or business through a branch is subject to U.S. tax at regular corporate income tax rates on its taxable income that is effectively connected with the trade or business. Engaging in a U.S. trade or business requires that the foreign corporation engage in substantial, continuous, and regular activities in the U.S. U.S. source fixed or determinable annual or periodic income (such as interest, royalties, annuities and so forth) and capital gains are effectively connected to the U.S. trade or business only where there is an actual connection between the income and the U.S. trade or business.

In addition to corporate income tax, foreign companies engaged through a branch in a U.S. trade or business may be subject to branch profits or branch interest taxes. These taxes are intended to place U.S. branches in a similar position to that of U.S. subsidiaries vis-à-vis U.S. withholding tax on dividends and payments of interest. The branch profits tax is imposed on the unreinvested after-tax earnings known as the dividend equivalent amount. The BPT treats the U.S. corporation as making a deemed distribution of the unreinvested after tax earnings subject to withholding each year and takes away the ability of the foreign corporate parent to control the timing of the shareholder level tax (i.e., upon declaration of a dividend). The U.S. also imposes a Branch Level Interest Tax on the excess of the interest deducted on the branch’s U.S. income tax return and the amount actually paid during the year. While the effect of this tax is similar to the tax burden imposed upon dividends distributed by a subsidiary corporation, a major difference exists in the branch situation since both the initial tax on the effectively connected income and the branch profits tax are imposed at the corporate level creating, in effect, double taxation at the corporate level. The effect of this tax is may be mitigated by a Double Tax Treaty which may exempt from the branch profits tax earnings that are repatriated.

C. Corporations

The most common form of legal entity in the U.S. used by foreign companies is the corporation. A foreign parent company can establish and own a new corporation in the U.S. or acquire an existing corporation, in which event the U.S. corporation will become a subsidiary of the foreign corporation.

A U.S. corporation is a legal entity created under the corporate laws of one of the 50 states or the laws of the District of Columbia and has a judicial existence separate from the persons who own, control, manage and operate it. The corporation may enter into contracts, acquire property, and can institute lawsuits and be sued in its own name. It issues shares of capital stock to persons who contribute money or business assets. It is ordinarily a separate taxpayer for U.S. tax purposes. The main reason businesses operate in the form of a corporation is to limit the liability of the owners for debts, taxes and other liabilities of the business. Ordinarily, the stockholders of the corporation are not personally liable for the liabilities of the corporation and their liability is limited to the amount of their capital contributions.

Management power is typically vested in the board of directors of a corporation and ownership of the corporation, represented by shares of capital stock, are transferable, subject to certain securities law restrictions and the terms of any agreement among the stockholders. Corporations generally have a perpetual existence.

State laws generally do not have a minimum capitalization requirement for corporations, except for those engaged in certain industries, such as banking, insurance or related activities, but most states require that the subscribed capital be fully paid before authorized shares are issued.

Corporations are formed by preparing and filing a certificate of incorporation with the appropriate state government authority, usually the Secretary of State. Incorporation fees are between \$100 and \$500 excluding legal fees. Legal fees for formation of a new corporation are in the range of \$3-4,000. Corporations can be formed quickly, generally within one or two days.

Following incorporation, the corporation holds an organizational meeting at which it adopts bylaws, elects a board of directors, and appoints officers, accepts capital subscriptions, authorizes the opening of bank accounts, and covers certain other procedural matters. The corporation may also be required to file an application as a foreign corporation to do business in certain other states. The test to determine "doing business" varies to a small degree from state to state.

The corporation is generally free to keep whatever documents and records for the day to day running of the business that it desires, however, as a practical matter, and for the purposes of handling audits, including tax audits, the corporation will want to keep formal books of account and should engage an accountant to assist in this. A corporation traded on a securities exchange is generally required to have its annual financial statements audited by an registered independent public accounting firm which must confirm that the statements are in conformity with U.S. Generally Accepted Accounting Principles. Audits of nonpublic companies may also be required by bankers or major creditors.

The corporation will have to file periodic tax returns and franchise tax reports in its state of incorporation as well as federal and local income tax returns. If the corporation has 25% foreign ownership, it may be required to file an annual report with its federal tax return regarding certain reportable transactions, including sales and purchases of inventory and other tangible and intangible property, rents and royalties, commissions, interest and insurance premiums paid and received, and amounts loaned and borrowed.

Corporations incorporated in the U.S. are subject to U.S. taxation on their worldwide income, although relief is provided from double taxation under any applicable double tax treaty and credits for foreign taxes.

The U.S. system of taxation taxes a corporation separately from its stockholders. Accordingly, income is taxed to the corporation and again to the stockholders of the corporation when distributed. A U.S. corporation's tax liability is based upon taxable income (gross income less deductions). The corporate tax rates are: 15% on taxable income up to \$50,000; 25% on taxable income between \$50,000 and \$75,000; 34% on taxable income between \$75,000 and \$100,000; 39% on taxable income between \$100,000 and \$335,000, with additional graduated rates of 34%, 35%, and 38%. Many states also impose either flat or graduated corporation taxes.

A corporation's tax accounting period is generally a twelve month calendar or fiscal period, which must be elected by the corporation with its first tax return. In general, accounting for tax purposes follows U.S. Generally Accepted Accounting Principles (USGAAP). Most corporations are required to use the accrual method of accounting.

Each U.S. corporation that is subject to U.S. income tax is required to file an annual income tax return, which is due the fifteenth day of the third month following the close of its taxable year.

As discussed above, U.S. tax law has a system of double taxation, which imposes tax on the corporation's taxable income and upon any dividends that the corporation distributes to its stockholders. Payments of interest, dividends, rents and royalties by a U.S. corporation to foreign persons are, generally, subject to 30% withholding, provided these items are not effectively connected to a business conducted by the recipient in the U.S. Double tax treaties frequently reduce the withholding rates applicable to dividends, interest and royalties.

A foreign corporation with a U.S. subsidiary will inevitably conduct a number of transactions with that subsidiary, such as loans, personal and real property transactions and the performance of services. Such transactions present the opportunity for U.S. tax avoidance through pricing schemes. For example, a foreign parent may try to sell inventory to its subsidiary in the U.S. at an artificially inflated price in order to minimize the subsidiary's U.S. tax liability upon disposition of the inventory. The U.S. has enacted transfer pricing rules to ensure that related parties conduct their transaction in a manner consistent with the practice of unrelated parties. These rules allow the U.S. Internal Revenue Service to reapportion income and deductions between the U.S. subsidiary and its foreign parent if it determines that arm's length prices have not been used.

D. Limited Liability Companies

A fairly recent creation of state law is the limited liability company or LLC. The LLC has become a popular vehicle primarily because it combines the advantages of limited liability with the flexibility of partnership operation.

A limited liability company is an unincorporated business entity formed under state law. It must have two or more members, although some states, such as Delaware, California and New York, permit one member to form an LLC. LLC members may be individuals or entities, including U.S. and non-U.S. persons. There is no limit on the number of members. Members are only liable to the extent of their capital contributions.

An LLC may be formed in a manner similar to a corporation. Articles of organization are filed with the Secretary of State, and the members enter into an operating agreement (or limited liability company agreement). The operating agreement generally covers the same matters as bylaws or a partnership agreement, typically covering the structure of management, elections, capital contributions, and profit and loss distributions, among other things. The state statutes permit LLCs to be managed by their members or by a separate manager elected by the members. Organization fees for an LLC are about \$300-400 excluding legal fees.

E. Partnerships

A partnership is formed by a contract among two or more prospective partners. A partner may be an individual or entity. The partnership is formed under state law. Although a partnership agreement is not required under most state laws, it is desirable to assure that the nature and scope of the partnership relationship is clearly documented. The partnership agreement generally covers such things as contributions, distributions of profits and losses, compensation, ownership interests and changes, and period of existence.

1. General Partnerships

A general partnership is an association of two or more general partners who operate a business for profit, are active in the business, and who have unlimited joint and several personal liability for debts, taxes and other claims against the partnership. If the partnership's assets are insufficient to pay creditors, the creditors can satisfy their claims out of the individual partners' personal assets.

2. Limited Partnerships

A limited partnership must have at least one general partner who is responsible for the day to day operations of the partnership and who is personally liable for the debts and other obligations of the partnership. Often in limited partnerships, a corporation serves as the general partner. In addition, a limited partnership must have one or more limited partners, who may not actively participate in the business of the partnership. The liability of limited partners is limited to their capital contributions.

Partnerships are not a common vehicle for setting up operations in the U.S., although they are quite commonly used for the purpose of holding specific assets, such as real estate or mining operations.

When business operations are conducted in the U.S., the U.S. tax consequences depend upon whether such operations are conducted through an entity which is treated as a corporation or as a partnership. LLCs may be treated as either corporations or partnerships for U.S. tax purposes depending on various factors. If a partnership or an LLC is treated as a partnership for U.S. federal tax purposes, its foreign partners or members will be treated as operating in the U.S. through a U.S. branch. Special care should be taken to assure partnership taxation if such status is desired.

The IRS issued regulation in 1996 (the check the box rules) that allow taxpayers to simply elect to treat domestic and certain foreign entities as either partnerships or corporations for federal tax purposes. Corporations established under state law are excluded from this rule. As a result, it is generally possible to create corporate like entities (like an LLC) that are treated as partnerships for tax purposes. The check the box rules also allow single member LLCs owned by one person or company to be treated as sole proprietorships for tax purposes.

U.S. partnerships are treated as conduits and are not subject to U.S. taxation. Instead, its partners are subject to U.S. taxation on their distributive share of the partnership's income whether or not actually distributed to them. No additional tax is imposed upon the distribution of previously undistributed income. Therefore, the partnership form of doing business in the U.S. subjects the business income to only one level of taxation, which is at the partnership level. The determination of a partner's taxable income is made at the partnership level. Partners are required to report their distributive share of the partnership's ordinary income.

F. Joint Ventures

A joint venture is generally a limited purpose and limited duration partnership which is formed pursuant to an agreement. The partnership will be subject to state partnership law, the venturers' liability is unlimited, and partnership tax law will apply. They are customarily formed by two or more corporations, although an individual or entity may be a joint venturer.

V. EMPLOYMENT LAWS

A. At-Will Employment

Most employees in the U.S. do not have a written employment contract. They are hired to work on an at-will basis, which means that they are not employed for any definite period of time, and either the employee or employer may terminate employment relations without prior notice at any time and for any reason or for no reason, as long as the reason for termination is not an unlawful one. The employment at will doctrine is a doctrine of state law. Some states have modified or limited the doctrine. Employers who want to employ a person on an at-will basis should ensure that their employment applications, offer letters, employee handbooks and personnel policies and procedures do not inadvertently create an employment contract.

Some employees, such as high level executives and specialists in high technology fields, may have written employment contracts that describe the terms and conditions of employment. Frequently, such agreements state that the employment is at-will, however, in a few cases the period for the employment will be set. The terms of such agreement are prepared or should be reviewed by U.S. counsel.

B. Proprietary Information Agreements/Non-Compete Agreements

Employers may (and probably should) require employees to sign written agreements as a condition to employment in order to protect the employer's trade secrets and confidential information, rights in intellectual property, or to prevent employees leaving their employ and unfairly competing against the employer. Agreements not to compete (restrictive covenants) must be reasonable in geographic scope and duration in order to be enforced. There is a strong state public policy encouraging the free mobility of workers unless they compete unfairly. Trade secrets are protected by state statutes and will be enforced even where there is not an employment agreement.

C. Protected Status

There are several restrictions on the procedures that can be used to hire employees. Employers may not ask for information regarding the prohibited bases of discrimination, such as race, sex, and national origin. Advertisements must avoid express preferences based upon these characteristics.

Employment relations in the U.S. are governed by various federal and state statutes and regulations as well as common law. A foreign company operating as a branch or through a subsidiary in the U.S. will be subject to a complex array of Federal, state and local laws governing the employment relationship, including laws that prohibit employers in the U.S. from discriminating against employees and applicants for employment in hiring, promotion, compensation, discharge and other terms and conditions of employment, based upon age, race, color, sex, national origin, religion, disability, and other characteristics. All but the very smallest employers will be subject to these laws.

Also, employers doing business with the federal government are required to comply with certain equal opportunity and affirmative action regulations which are administered by the Office of Federal Contract Compliance Programs. There are two basic requirements that are imposed upon government contractors and subcontractors. First, each (non-exempt) government contract must contain an equal opportunity clause which prohibits the contractor from discriminating against employees or applicants on the basis of race, color, religion, sex or national origin. Second, non-construction (supply and service) employers with 50 or more employees and, for example, government contracts or subcontracts worth \$50,000 or more must develop and maintain an affirmative action plan. The employer is required to analyze its employment practices and to affirmatively hire, retain and promote women and members of minority groups. There are similar acts that cover disabled Vietnam veterans and handicapped people.

D. Compensation and Benefits

An employer is free to determine the compensation and benefits of its employees without regulation by the states or federal government, subject to the Federal Fair Labor Standards Law which imposes a minimum hourly wage and overtime standards. Federal law does not require an employer to provide employees with either vacation time or vacation pay. However, employers commonly provide employees with one to four weeks paid vacation time, based upon longevity or position. Also, although not required, many employers provide various benefits in addition to compensation, such as health and hospitalization insurance, retirement plans, group life and disability insurance, stock purchase or option plans and other arrangements.

The Employment Retirement Income Security Act (ERISA) governs certain activities of most employers who have pension or welfare benefit plans. This Act preempts many state laws in this area. ERISA covered pension plans must meet a wide range of fiduciary and reporting and disclosure requirements. Under ERISA, welfare benefit plans also must meet a wide range of fiduciary, reporting, and disclosure requirements. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) enacted provisions for disclosure and notification requirements for the continuation of health care. These provisions cover group health plans of employers with 20 or more employees on a typical business day in the previous calendar year. COBRA gives separated participants and beneficiaries an election to maintain coverage under the employer's health plan at their own expense for a limited period of time.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides participants and beneficiaries of group health plans with improved portability and continuity of health insurance coverage. These provisions are also designed to improve access to insurance and protect against discrimination on the basis of health status. Moreover, HIPAA requires that health insurance coverage be renewable for small employers in certain circumstances.

E. Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA) regulates safety and health conditions in most private industry workplaces (except those in industries such as transportation and mining which are regulated under other statutes). OSHA sets safety and health standards by regulation and covers hazards such as falls, explosions, fires, and cave-ins, as well as machine and vehicle operation, and maintenance. Health standards regulate exposure to a variety of health hazards through engineering controls, the use of personal protective equipment (e.g., respirators or hearing protection), and work practices. The Act also contains prohibitions on employers discriminating or retaliating against employees who have filed complaints with OSHA.

F. Other Statutory Requirements

Additional statutory requirements, administered by the U.S. Department of Labor, include:

- The Family Medical Leave Act which requires employers of 50 or more employees (and all public agencies) to provide up to 12 weeks of unpaid, job protected leave to eligible employees for the birth and care of a child, for placement with the employee of a child for

adoption or foster care, or for the serious illness of the employee or an immediate family member.

- Veterans' reemployment rights are protected for National Guard and Reserve members who are called to active duty. The Uniformed Services Employment and Reemployment Rights Act addresses the rights and responsibilities of individuals and their employers.
- The Workers Adjustment and Retraining Notification Act (WARN) provides for early warning to employees of proposed layoffs or plant closings and generally covers employers with 100 or more employees. WARN protects workers, their families, and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs.
- The Employee Polygraph Protection Act (EPPA) prohibits most uses of lie detectors by employers on their employees and job applicants.
- The Labor-Management Reporting and Disclosure Act (LMRDA) (also known as the Landrum Griffin Act) addresses the relationship between a union and its members and seeks to ensure certain basic standards of democracy and fiscal responsibility in labor organizations.

G. U.S. Federal Taxation of Resident/Nonresident Aliens

U.S. residents are subject to U.S. Federal tax on their worldwide income just like U.S. citizens. Non-resident aliens are taxed only on their effectively connected income and their fixed and determinable income from U.S. sources. Intention to be resident or nonresident has no bearing on the analysis for U.S. tax purposes. Generally, aliens are U.S. residents for U.S. tax purposes if they are (a) lawful permanent residents at any time during the calendar year (i.e., hold a green card), or (b) meet a substantial presence test. This test is generally met if the alien is present in the U.S. for at least 31 days during the current calendar year and the total number of days present in the U.S. in the current and two immediately preceding years is at least 183.

Nonresident aliens are subject to tax on income that is connected with the U.S. The manner in which such income is taxed depends on the income type.

Individuals are required to file a personal tax return every year. The individual tax year is the same as the calendar year. Generally, individual tax returns must be filed by April 15 of the year following the applicable tax year. So that tax returns for 2005 must be filed by April 15, 2006.

H. Social Security Taxes

Foreign nationals working in the U.S. and the employers may be subject to U.S. social security taxes imposed under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA).

Social security numbers must be obtained by all citizens, resident aliens and nonresident aliens who earn income in the U.S. by performing personal services, and for any dependents.

FICA imposes social security and Medicare taxes on wages and taxes received by employees. Half are paid by the employee and half by the employer. (Rate=12.4%)(2.9% for Medicare). FUTA imposes on employers a tax on wages to provide temporary financial assistance to workers who become unemployed.

Many states also require employers to maintain workers' compensation insurance which provides assistance to workers who suffer loss of wages from work related injuries, disease or death. States also impose a state unemployment tax on employers.

VI. IMMIGRATION LAWS

A. Introduction

Foreign employers who wish to send personnel to the U.S. either for business meetings or to work for extended periods of time must obtain visas for their employees. U.S. immigration laws prohibit employers from employing persons who are not authorized to work in the U.S., require employers to maintain records concerning their compliance with immigration laws, and impose civil and criminal penalties on individuals who circumvent such laws.

There are two main types of visa categories:

1. Nonimmigrant visas, permitting a foreign national to enter the U.S. temporarily.
2. Immigrant visas, permitting a foreign national to live in the U.S. permanently.

Our discussion below focuses on nonimmigrant visas.

B. Nonimmigrant Visas

The majority of foreign nationals sent by foreign employers to the U.S. for business or employment enter on nonimmigrant visas. Depending on the type of visa, these may permit the individual to remain in the U.S. for anywhere from 30 days to many years. Immigration laws in the U.S. are administered by the U.S. Citizenship and Immigration Services ("USCIS") (a branch of the U.S. Department of Homeland Security). Visas are obtained from the U.S. embassy or consulate in the foreign country. However, depending on the type of visa requested, approvals may need to be obtained from other U.S. governmental departments and the USCIS before application may be made to the U.S. embassy or consulate abroad. Once an individual is granted a nonimmigrant visa, he must be admitted at the port of entry, which is governed by the U.S. Customs and Border Protection, an agency within the Department of Homeland Security,

The following are the principal types of nonimmigrant visas. Currently, many types of visas are under review in light of recent terrorist acts:

1. **B-1 (Temporary Business Visitor)**

The B-1 visa is available to individuals entering the U.S. as temporary visitors for business, provided they continue to be employed overseas, receive no compensation in the U.S., and are not working in the U.S. This visa permits the individual to attend business meeting, negotiate contracts, solicit orders, or seek investment opportunities. The initial period of admission is for no more than one year, although usually individuals will be only admitted for up to six months, with the possibility of obtaining an extension of up to six months.

2. **B-2 Visa (Pleasure)**

The B-2 visa is available to individuals who seek to enter the U.S. for pleasure. The initial period of admission is six months, with a maximum stay of one year. B-2 visa holders are not permitted to work in the U.S. It should be noted that a rule proposed by the INS would eliminate the standard six month minimum period for admission under the B-2 visa category. This will be replaced with a period of time that is fair and reasonable for the purposes of the visit. The individual entering on a B-2 visa will have to explain the reason for the visit and the inspector will determine how long the person must stay to accomplish the purpose. If the time period cannot be established, the inspector will grant 30 day permission to remain in the U.S.

3. **Visa Waiver Program**

The Visa Waiver Program allows individuals from certain countries, including the U.K., who would otherwise qualify for B-1 or B-2 visitor visas to enter the U.S. for a period of up to three months without obtaining a visa. To qualify, the individual must enter the U.S. with a return trip ticket, have an unabandoned foreign residence, not be entering the U.S. for purposes of employment, and not receive any compensation in the U.S. Visa Waiver Program participants may not extend their period of stay.

4. **E Visas**

E visas, known as treaty trader (E-1) or treaty investor (E-2) visas are available to certain U.K. nationals.

E-1 visas are available to an individual entering the U.S. as a manager, executive or employee with specialized knowledge of a company that carries on substantial trade principally between the U.S. and the foreign country of origin.

E-2 visas are available to an individual who is entering the U.S. as a manager, executive or employee with specialized knowledge of an enterprise in which the individual or the individual's employer has invested or is actively in the process of investing a substantial amount of capital.

A company wishing to send an employee to the U.S. in E visa status must file an application with the U.S. embassy in the foreign country to register as an organization eligible for the issuance of E visas. Individuals are customarily admitted to the U.S. for an initial period of up to one year, with two year incremental extensions, and no limit on the number of extensions. E-1 and E-2 visas are available to the spouse and minor children of E-1 and E-2 visa holders, and a

recent law has permitted the spouses of E-1 and E-2 visa holders to receive work authorization upon submission of an application.

5. H-1B Visas (Specialty Occupation)

H-1B visas are available to persons coming to work in the U.S. in a specialty occupation, ie, an occupation that requires the attainment of a bachelor's degree (or equivalent) in a body of specialized knowledge as a minimum requirement for entering the occupation in the U.S. This category requires a prearranged job in a professional field. The employer must also file an attestation with the Department of Labor that it will pay the foreign national the higher of the prevailing or actual wage for the job and provide adequate working conditions. The initial period of admission is three years, with a second three year renewal period. The spouse and minor children of H-1B visa holders may obtain H-4 visas.

6. L-1A and L-1B Visas

The L-1A and L-1B visas are nonimmigrant work visas for employees transferring from a foreign parent to a U.S. subsidiary, branch, affiliate or parent of the foreign company. The L-1A visa category is for employees in an executive or managerial position. The L-1B is for employees in a specialized knowledge capacity. The employee must have worked for the foreign employer abroad for one continuous year within the preceding three years and is entering the U.S. to work for the foreign employer or an affiliate of the foreign employer in an executive, managerial or specialized knowledge capacity. The U.S. employer must file a petition on behalf of the individual in the U.S. and, once approved, the individual must apply for a visa in the country of origin. L-1 visas are available for an initial period of three years and may be renewed for a maximum of seven years for an L-1A and five years for an L-1B. Spouses of unmarried children under 21 are permitted as dependents under an L-2 visa, and they may be allowed to live and study in the US without additional visas. The spouse may obtain a work authorization.

7. O-1 Visas

The O-1 visa is a non-immigrant work visa for foreign nationals of extraordinary ability in the sciences, arts, education, business, or athletics, certain individuals accompanying or assisting them, and their family members. The extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of a small percentage people who have risen to the very top of their field of endeavor. The individual must be coming to the U.S. to work in their area of extraordinary ability. There is no statutory limit on the period of time an individual may remain in the U.S. on an O-1 visa, however, the initial authorized period of stay will not be approved for more than three years. One year extensions of stay can be granted as long as the individual remains in the same position for which he was granted the visa. The spouse and unmarried children under 21 may apply for O-3 visa status in order to accompany the O-1 visa holder to the U.S. O-3 visa status does not confer authorization for employment in the U.S.

VII. REGULATION OF FOREIGN INVESTMENT

A. Introduction

The U.S. has traditionally encouraged foreign investment in the U.S. A foreign person can usually establish a U.S. subsidiary or branch without substantial control or review under state or federal law. Restrictions exist, however, in highly regulated businesses, such as aviation, banking, communications, defense, insurance, maritime, mineral leasing, and energy.

Generally, there is no need to obtain approval to set up a company in the U.S.; foreign exchange controls are generally absent; there are no requirements to register the investment of foreign equity capital or loans; U.K. owned U.S. enterprises may freely remit U.S. profits, repatriate capital, and pay dividends, interest and royalties subject to compliance with any double tax. treaty withholding requirements. Certain reporting requirements are imposed with respect to certain direct investment, including the establishment of a new enterprise. Under the International Investment and Trade in Services Survey Act, certain survey reports are required to be filed with the Bureau of Economic Analysis of the U.S. Commerce Department. Exceptions exist from these filing requirements where the assets of the new enterprise are less than \$1 million and the enterprise owns less than 200 acres of U.S. land. The act also requires certain annual and quarterly reports, but exemptions exist for most small concerns.

B. National Security Concerns

The U.S. Exon-Florio law permits the President to suspend or block foreign acquisition of a U.S. person if he finds the acquisition would threaten U.S. national security. Also, the U.S. Department of Defense and other federal government agencies have industrial security regulations designed to prevent access by foreigners to classified information. The regulations limit access by contractors and their employees to classified sites and information utilized in connection with a government contract. To perform such a contract, a facility security clearance and individual security clearances will be required for personnel that will have access to classified information. Generally, a facility or contractor under foreign ownership, control or interest is not eligible for a facility security clearance. The clearances are on a case by case basis and factors such as percentage of foreign ownership, nationality of directors and officers, percentage of income from foreign sources, and other matters are considered. Assuming that a foreign owner will be in a position to effectively control or have a dominant influence over the business management of the U.S. firm, the DOD may require that the foreign owner establish a voting trust agreement, proxy agreement, or special security agreement approved by the department and designed to preclude disclosure of classified information to the foreign owner.

VIII. FINANCING ISSUES

A. Introduction

The U.S. has become a significant source of financing for foreign businesses. The U.S. markets have traditionally been stable and liquid and offer an international profile to any non-U.S. company. Certain foreign companies may also have the opportunity to have their equity or debt listed or quoted on one of the exchanges or on the over-the-counter market in the U.S.

B. Types of Vehicles

There are no regulatory limits on the types of financing vehicles available to non-U.S. companies in the U.S. capital markets. The most common vehicles are equity and debt offering and bank loans.

A non-U.S. business can raise capital through the issuance and sale of equity securities either on a public or private basis. Most equity offerings involve common stock or American Depositary Receipts (ADRs). In addition, non-U.S. issuers may also offer preferred or preference shares. The terms of the preferred stock can vary widely, but can include certain rights, such as dividend, voting, redemption, conversion rights as well as rights upon liquidation or dissolution. Convertible preferred stock is usually convertible into common stock.

A non-U.S. business can also make public and private issuances of debt securities in the U.S. The offerings can involve securities with a wide range of features, including fixed and floating rates of interest, varying maturities, secured and non-secured, among others. These instruments include bonds, notes, or short-term commercial paper.

A non-U.S. business can also obtain financing from commercial banks, and the forms of financing can take many different forms, depending upon the nature and size of the financing, such as short to medium terms loans on a secured or unsecured basis, and revolving lines of credit.

A primary issue for non-U.S. businesses interested in raising money in the U.S. is whether to do so in the public markets or privately. Public offerings usually involve the issuance of equity or debt securities to the general public, with secondary trading on a national securities exchange or in the over the counter market. Most public offerings are underwritten by an investment bank on a firm commitment basis which requires the underwriters to purchase the securities offered. Private offerings can be structured in a number of ways most commonly as private placement with institutions or sophisticated investors, or on a retail basis through an investment banking firm that acts as a placement agent. All venture capital transactions are structured as private placements and are usually entered into with institutions, such as venture capital funds, pension funds, and other institutional investors. The terms of such transactions are usually highly negotiated, and result in some participation by the venture capital provider in the ongoing management oversight of the company, such as through board participation, and other approval rights.

C. Public Offerings

The public markets are highly regulated in the U.S. by the federal government and trigger a requirement to comply with ongoing public reporting obligations on the part of the issuer. Public offerings generally take about four to six months to complete. A private transaction is generally less expensive and less time consuming than a public transaction.

The offering and sale of securities in the U.S. is regulated by the Securities and Exchange Commission (SEC), which is headquartered in Washington, D.C. The regulation of public offerings is significant requiring the filing of a registration statement with the SEC that contains a statutory prospectus and complies with the applicable SEC registration form, including a requirement to include audited financial statements. The statutory prospectus is required to be delivered to

investors prior to or concurrently with the sale of the securities. Most public offerings of securities listed on a national securities exchange or on NASDAQ are not required to comply with certain registration requirements under state securities law. The securities cannot be offered or sold in the U.S. until the registration statement has been filed with the SEC. The issuer cannot consummate sales of securities until the registration statement has been declared effective by the SEC. The SEC reviews and comments on most registration statement, particularly first time registrants. This process may take several months. If the SEC issues comments on the registration statement the registrant will be required to file an amendment to respond to the SEC's comments. Once all comments have been cleared the SEC will, upon request, declare the registration statement effective. Provisions of Federal securities laws impose liability upon those persons who signed the registration statement, and certain professionals who certified the registration statement, if the registration statement at the time it became effective contained any false or misleading statement of material fact or material omission.

The issuer's registration of securities for offer and sale in a public offering will also trigger certain ongoing reporting obligations upon the issuer under the Securities Exchange Act of 1934. If the issuer has fewer than 300 holders record in the U.S. and meets the definition of foreign private issuer, it may be exempted from the requirements. If it has more than 300 holders of record in the U.S., the issuer may qualify to furnish to the SEC on a continuing basis copies of information which the issuer makes public in the its country of origin, files with a stock exchange on which its securities are traded and is made public by that exchange, or distributes to its stockholders. The Exchange Act also requires the filing of certain reports by major stockholders and compliance with the proxy and tender offer rules. Mergers and acquisitions involving public companies also must be registered with the SEC and comply with the proxy rules.

D. Private Offerings

A principal exemption from registration under the Securities Act is the so-called private offering exemption. The offerees in a private offering must generally be sophisticated and able to bear the risk of their investment, understand such risks, can afford to hold the securities for an unlimited period of time and afford the complete loss of their investment. Although the offering may be exempt from the registration requirements, the offer and sale will be subject to certain antifraud provisions of the Securities Exchange Act.

Rules promulgated by the SEC can provide safe harbors to help assure that the offering is not subject to the registration requirements and that the issuer is not engaged in a public offering.

E. Other Exemptions

The federal securities laws also provide exemptions from the registration requirements for offshore transactions. Offshore transactions are transactions that occur outside the U.S. The exemption covers initial issuances and, for non-U.S. issuers, the resale of such securities. Also, exemptions are available for re-sales of securities by certain qualified institutional buyers under Rule 144A, which is an exemption frequently used in connection with the institutional sales of debt by issuers and is a highly liquid market in the U.S.

IX. INTELLECTUAL PROPERTY

Most foreign businesses planning on operating in the U.S., but particularly high technology companies, will be concerned about protecting their intangible or intellectual property rights. Failure to do so will invite legal problems. The U.S. offers businesses the ability to protect aspects of their intellectual property through the registration of patents, trademarks, copyrights, and trade secret law.

A. Patents

Patents are issued by the U.S. government and grant patentees the exclusive right to manufacture, use and market their inventions. U.S. and non-U.S. citizens can seek a U.S. patent. Patents can be used to prevent competitors from making, using or selling a patented invention. To obtain a patent, a patent application is filed with the U.S. Patent and Trademark Office. The patent application will be reviewed by an examiner who will determine whether the application complies with statutory and formal requirements. Patent applications are prosecuted with the assistance of counsel registered to practice before the Patent and Trademark Office.

There are three basic forms of patent issued by the U.S. PTO. The most important is the utility patent which covers mechanical, electrical or chemical inventions. Utility patents are now granted for a period of 20 years from the date of original application. The second form of patent is the design patent which protects aesthetic or ornamental external appearance of articles of manufacture and has a 14 year term. Finally, the plant patent which is granted to someone who invents or discovers and reproduces certain new varieties of plant, such as trees and flowers. These have a 20 year life.

B. Trademarks

A trademark or service mark is any designation, such as a word, slogan, symbol, logo, sound, color smell, or package design, or combination of two or more, that is used by a manufacturer or service provider to identify itself as the origin of the goods or services. The common law provides certain protection to trademark users in the U.S. However, the common law rights will not necessarily be nationwide in scope and users therefore may wish to seek federal registration. Ownership of a federally registered trademark confers certain benefits: (i) they evidence the owners exclusive rights; (ii) federal as opposed to state courts will adjudicate claims of infringement, counterfeiting, and unfair competition; (iii) the ability to record the registration with the U.S. Customs Service to inhibit and prevent importation of infringing goods into the U.S.; (iv) provides a basis for foreign registration; (v) it serves to notice those conducting trademark searches; (vi) there are certain enhanced remedies in counterfeiting cases.

A trademark application may be filed on the basis of actual use in federally regulated commerce or based upon intended use. The trademark registration application is subject to an examination process by the PTO, and can take one or two years. Once rights have been granted they can be good indefinitely.

Anyone found to have infringed a trademark may be subject to considerable civil monetary penalties, possible criminal liability under state law, and other remedies such as an injunction, loss

of profits, damages, recall or destruction of infringing goods, and trebling of damages, costs and attorneys fees.

An important issue arises for any business incorporating a new subsidiary in the U.S. Not only should you assure that the name you are proposing to use is available for use in the state of incorporation, but you should assure that the name does not violate any other company's trademark rights, whether or not federally registered. So that, before you proceed with the incorporation process make sure you do a trademark search in the U.S. Also, once you have selected a name for the corporation or other entity, consider seeking protection for that name by filing a trademark registration application.

C. Copyrights

A copyright protects authors and creators against unauthorized reproduction or use of writings and other original works of authorship for the life of the author plus 50 years. Under the work made for hire doctrine, an employer may be deemed the author of an employee's work created within the scope of the employee's employment. Material that may be copyrighted includes literary, musical, and dramatic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; and sound recordings. The moment one creates a work and reduces it to a tangible form, federal statutory copyrights automatically attach to the work, whether or not published. The creator has exclusive rights to the work. Works or copies thereof do not require a copyright notice; but most authors affix a statutory copyright notice to publicly distributed copies of their work, since innocent infringers who rely upon the absence of a copyright notice will not be liable for actual or statutory damages prior to receiving actual notice of the copyright. A copyright may be registered, but is not required to be so registered. Registration provides certain benefits, including the right to recover certain statutory damages for infringements. Copyrights are good for the author's life plus 70 years, or if a work for hire 95 years from first publication or 120 years from the date of creation.

D. Trade Secrets

Companies may decide not to patent their inventions but try to keep their inventions and associated know-how secret. These are commonly referred to as trade secrets. Almost all of the states have adopted the Uniform Trade Secrets Act which provides protection against the misappropriation of a company's trade secrets. Trade secrets are information that has a commercial value, and may include formulas, designs, marketing information, customer lists and so forth. Most companies have trade secrets. However, the Uniform Act requires that the information not be generally known or reasonably ascertainable. Also, reasonable efforts must be used to maintain the secrecy of the trade secrets. A compilation of otherwise public information may be a trade secret. If disclosure is made to the general public, protection of the trade secret is lost. Companies should, therefore, implement a program to protect their trade secrets, including restricting employee access to certain trade secrets, requiring employees to enter an agreement not to disclose such secrets upon termination of employment. The uniform act provides remedies for violations of the act, including damages, punitive damages, attorneys' fees and injunctive relief.

If you have any question regarding any of the issues covered in this publication, please feel free to contact Neil R.E. Carr, Esq. at (202) 467-0916, or by email at ncarr@bvcpc.com.