British American Business

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Expanding Your Business into the United States:

A Legal Guide

British American Business

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Congratulations on Expanding Your Business into the United States

The prospect of conducting business in the U.S. can be exciting and nerve-wracking all at once. While your business' expansion can open up new avenues of growth and opportunity, it can also come with an overwhelming concern about unfamiliar laws and regulations and a desire to know the best structure and methods for operating your business in the U.S.

We intend for this particular guide to serve as a starting point and a road map through the areas of law and decisions that most businesses will likely want to consider for their organization. As you will see from the following sections, there is often overlap and interplay between these areas of law, with the choices made in one area necessarily affecting the determinations you must make in others. Within this guide, we discuss some of the more prominent topics as they relate to businesses in the U.S.:

Running a business in the U.S. requires legal compliance and vigilance in order to ensure a successful undertaking. This guide is meant to be an overview to get you started, as you explore the exciting opportunities that doing business in the U.S. can yield. As we are lawyers, we of course must caution you to seek specific advice that is tailored to your business' individual needs and circumstances as they may require a somewhat different outcome.

So go ahead and congratulate yourself. By reading this guide, you've already taken your very first step in your journey to doing business in the U.S.

Corporate Formation & Entity Selection

Your first step in establishing your company's operations in the U.S. is to create a business entity through which the company can conduct its operations. While you are not required to establish a U.S. entity, as discussed below, liability protection and tax treatment, as well as general acceptance in the business community, encourage most businesses to establish a separate U.S. entity. There are a variety of entity structures available, each with its own characteristics and considerations. The primary considerations in deciding what type of entity to use are: (i) the company's objectives regarding liability protection; (ii) ownership and management structure; and (iii) tax treatment of the entity, its owners, and the effect it may have on tax considerations in the home country. Once an entity type has been selected, you must decide in what state the entity will be incorporated (formed) and in what state(s) the entity will be legally qualified to do business. And, of course, you must choose a unique name for the new entity. After the entity has been created, one of the next steps is to open a bank account and to fund the initial operations of the business. Initially, the business is usually self-funded by the owners, and as it matures, additional financing (if needed) is raised through either equity financing (selling a stake in the company) or debt financing (borrowing a fixed sum from a lender).

Types of Entities & Considerations

Choosing the right corporate entity for your business starts by addressing two primary questions: (i) Is the entity to be an operating company or a holding company for a number of operating companies? (ii) Is the entity to provide the benefit of limited liability to the owner or is the owner going to do business directly in the U.S.? If the entity is to provide limited liability, then it is most commonly formed as either a limited liability company or a corporation. Regardless of what type of entity you choose, there are several considerations to keep in mind.

Limited Liability Company	Corporation
■ Consider setting up a corporation to own a de minimis interest in the entity so that it can be taxed as a partnership rather than a disregarded entity ■ Decide whether the company will be member-managed or manager-managed ■ Engage counsel to prepare an operating agreement (even if it's a single-member limited liability company)	■ Prepare a stockholders' agreement restricting the transfer of shares and providing for the election of directors (especially if the corporation intends to grant shares or stock options to its employees) ■ Note: There is rarely a need for a shareholders' agreement if there is to be only one shareholder

Limited Partnership	Not-For-Profit	Others
■ Although not as common, there may still be cases where this type of entity is desirable e.g., when forming investment entities where investors expect to purchase limited partnership interests ■ Formation requires a general partner (most often a corporation or limited liability company) and a written agreement of limited partnership	■ Details regarding the formation of not-for-profit corporations depend on the nature of the activity to be pursued ■ Federal and state tax considerations should be carefully evaluated	Includes: ■ An entity conducting a business that requires a specific type of license to operate (e.g., physician, architect, or certified public accountant) ■ An entity that is a public benefit or "B" corporation * For these examples, specific types of entities must be formed according to the applicable state statute

Corporate Formation & Entity Selection

Tax Considerations

Different legal entities are subject to different tax treatment in the United States. For example, limited liability companies are usually taxed as a partnership where profits are not taxed at the entity level, but at the owner level. Corporations are taxed at the corporate level and distributions to the shareholders are taxed again at the shareholder level. To complicate matters further, home country tax treatment may be inconsistent or unfavorable when paired with the U.S. tax treatment. It is important to understand that these tax issues exist and to consult a qualified advisor who can assess your company's particular circumstances when you make the entity selection. There are additional tax issues that will be encountered in the operation of the business, some of which are addressed in the sections below.

Where to Incorporate and Qualify

Because entity formations occur at a local level, the question of where to form can be complex and is informed by legal, income tax, and sales tax considerations. The two key concepts to note are:

1. Operating entities generally are formed in one state and then qualified as a foreign entity in another. Unless the entity is to be a holding company, there are at least two relevant U.S. states or jurisdictions to be considered. Certain jurisdictions are preferred as jurisdictions of formation, such as Delaware, where the law is relatively clear, the state systems are reliable and efficient, and the costs and taxes are low. We recommend that New York and California be avoided as jurisdictions of formation due to more stringent formation requirements and higher formation costs. It is also ***not*** necessary for a company to have an office or other business presence in its state of formation since a third-party vendor may be engaged as the company's agent in that state for the purposes of handling administrative matters and receiving papers in a legal action.

2. In general, if an entity has a physical presence in a state, it must qualify to do business in that state by filing an application with the Secretary of State. If the entity is other than a holding company, it will have one or more presences in the United States. Legal counsel typically is involved at this juncture to advise on the question of whether the entity's activities rise to the level of "doing business" and therefore require qualification. If so, counsel generally contacts a third-party vendor who obtains the proper forms and assists in filing the application. "Doing business" is a complex and evolving legal standard, particularly with employees who work from their homes or from shared office spaces.

Whether formation is effected by the filing of articles of formation (for a limited liability company) or a certificate of incorporation (for a corporation), the document to be filed is relatively brief. All that is generally required is an entity name. Matters that typically would be the subject of a memorandum and articles of incorporation are private documents and are not filed with state agencies. Competent counsel must prepare the other documents attendant to formation, such as the selection of the initial board of directors, election of corporate officers, issuance of shares, and opening of bank accounts.

Selecting a Name

The entity must select a name that is not being used by another entity in both the state of formation and the state(s) in which it will be qualified to do business. Name availability can be checked most efficiently by counsel's third-party vendor or directly by performing web searches on the office of the Secretary of State's website. It is often the case that the desired name is already in use, and a somewhat different name must be used. Sometimes it's as simple as adding words such as "International" or "(U.S.)" to the desired name. If the desired name is not available, in certain jurisdictions, there is a filing known as "doing business as" or "D/B/A" that may allow the use of a desired name. Choosing a name that won't be confused with the name of an existing business is critical, as the entity could otherwise become the subject of a legal proceeding commenced by the user of the name.

Corporate Formation & Entity Selection

Opening a Bank Account

Banks in the U.S. do not have a standard process for opening new accounts. In general, an applicant must provide evidence of formation i.e., a copy of the certificate of formation (in the case of a limited liability company or limited partnership) or a certificate of incorporation (in the case of a corporation), as well as a tax identification number (TIN) issued by the Internal Revenue Service (IRS). When the IRS issues the number, it generally does so by a letter sent to the applicant, and it is imperative to save the letter in the entity's files for future reference. Each bank has its own KYC (know your customer) process, which includes requirements for background checks, references, and information regarding sources and uses of the funds in the account. In most cases, a face-to-face visit with the banker is required.

Financing the Entity: Equity

FOR A CORPORATION

- Residual equity interests are referred to as "common shares" or "shares of common stock." Shares of common stock are issued either with a par value, meaning a minimum price for which the shares can be issued and sold, or without a par value.
- In certain states, such as Delaware, the use of no par value stock will result in significantly higher annual franchise taxes and par value stock.
- The standard par value is $0.01 or $0.001 per share. The amount paid for a share of common stock over the par value is reflected on the books of the entity as "capital in excess of par" and may limit the amount of dividends that can be paid to shareholders.
- Corporations also may issue one or more classes or series of preferred stock. Preferred shares may have such financial attributes—dividends rates and priority, priority of participation in the proceeds of liquidation, voting, redemption, etc.—as the entity and its investors agree.

FOR A LIMITED LIABILITY COMPANY

- Residual equity interests are referred to as "membership interests" and can be represented by units or shares. Each membership interest in a limited liability company is a share of the profits and losses of the company based on the agreement among the members.
- Since a limited liability company is a pass-through entity for tax purposes, the members are responsible for the federal and state taxes on their allocated share of the taxable income. The entity will usually agree in the operating agreement to distribute funds to the members for the payment of the imposed taxes.
- For example, if there are two members, the taxable profits and losses of the business could be allocated 50% to each member, as well as any cash that is distributed.
- Alternatively, the parties could agree that one member is to receive 100% of the amount of its investment before the second receives any amount, or that they will share on an 80%/20% basis from the first dollar of profit.

Financing the Entity: Debt

Although other jurisdictions impose strict limitations on the debt-to-equity ratio of an entity, there are no minimum capitalization requirements (other than the "par value" concept) or minimum ratios required by any state in the United States. Therefore, it is often advisable to structure the balance sheet of the entity to reflect that significantly all of the capital invested is debt which is repaid to the owner tax-free as a repayment of debt. When the entity borrows from a bank or other institutional lender, the owner may, if it agrees, subordinate the debt owed to it to the debt owed to the bank.

Employment

Once your entity has been set up, you will likely need employees (hired locally and/or transferred from affiliates) to help run your business in the United States. Employment laws in the U.S. are unique, ever-changing, and can often be highly technical. To add complexity, there are federal, state, and even local employment laws that affect your business. Employment-based claims are among some of the most prevalent types of litigation in the United States. An employer in the U.S. must also be cognizant of the many anti-discrimination laws that prevent the hiring and firing of employees on the basis of certain personal characteristics, such as race, age, and gender. The terms of the employer-employee relationship must balance the rights of both parties. While employers may define terms of employment (at-will, contract-based, independent contractor, etc.) and may enforce measures such as non-compete agreements, they must also be cognizant that any actions they take cannot infringe upon an employee's right to an equal opportunity workplace. While employer-employee disputes inevitably arise in any workplace, having the proper protocols in place helps limit the liability and risk posed to your business.

Hiring U.S. Employees

Companies looking to hire U.S. employees must be vigilant about anti-discrimination mandates in hiring.

Cannot base hiring on characteristics such as:

- ☒ Age
- ☒ Race
- ☒ National origin
- ☒ Sex or gender
- ☒ Marital or family status
- ☒ Religion
- ☒ Disability (even where accommodation could be required)

Should base hiring on neutral criteria such as:

- ☑ Education
- ☑ Experience
- ☑ Skills
- ☑ Job-related factors

A company also cannot question applicants about certain characteristics (including pregnancy) or possible disabilities during employment interviews. Employment decisions based upon the presence or absence of any of the characteristics noted above are prohibited by law. It is important to train employees such as supervisors or Human Resources professionals on best practices for interviewing U.S. applicants, and to have a trained employee or counsel review any job posting before it is distributed.

The Employment Relationship

U.S. employers have significant leeway in fashioning the employment relationship, whether it be to hire consultants or contractors rather than employees, or to use an employment contract rather than rely on the at-will employment relationship.

Unlike many other countries, at-will employment is the norm in the United States. This means that most employers in the U.S. hire their employees for an indefinite term, and in the absence of an agreement to the contrary, employment may be terminated by the employer or employee "at will," for any reason or no reason, with or without advance notice. If you intend to hire an employee on an at-will basis, language to that effect should be inserted somewhere in the on-boarding documents signed by the new hire. Also, in practical terms, the ability to terminate an employee "at-will" is constrained by that employee's ability to bring a lawsuit for discrimination, retaliation, whistleblowing, or harassment. In other words, an employer must be cautious that the circumstances of a termination do not easily give rise to needless litigation over the rationale behind the end of the employment relationship. A neutral, objective procedure for discipline and/or termination can be a useful tool to protect the company. If you intend to hire an employee on a contractual basis, any offer letter, term sheet, or employment contract should be reviewed to ensure that you have not limited your flexibility in unintended ways or unreasonably increased the likelihood of employment litigation.

Employment

Some companies, especially when hiring on a temporary basis or in the technology/IT sector, may wish to hire contractors rather than employees. However, failure to do this conscientiously, or large-scale use of this cost-saving mechanism, can cause major problems for the employer. A company should exercise caution and make sure that they fully understand the latest legal pronouncements governing the use of independent contractors.

Strict state and federal laws govern when and under what circumstances an individual can be treated as an independent contractor rather than an employee. In recent years, state governments and state and federal judicial bodies have increasingly trained their sights on illegitimate use of the independent contractor category, exposing companies to severe penalties for failure to provide benefits, pay overtime, or withhold payroll taxes. If you choose to use independent contractors in the U.S., it is beneficial to have a clear, detailed agreement in place that reflects the realities of the relationship. Such an agreement, while by no means a guarantee that a company will not face scrutiny for its use of independent contractors, may assist a company in persuading an investigatory agency or court that legal benchmarks have been met. It is important to keep in mind that in general, the touchstone of any investigation or legal dispute will be the level of control exerted by the employer over the contractor in reality rather than the stated terms of the relationship.

Non-Disclosure, Non-Compete, and Assignment Agreements

Depending on the industry, many companies wish to use non-disclosure, non-compete, non-solicitation, confidentiality, and/or assignment agreements to protect their clients, trade secrets, and intellectual property. Depending on the nature of your business, these agreements may be crucial to doing business in the United States. However, state law controlling the usage, enforcement, and validity of such agreements varies widely.

Discrimination Laws

As with hiring, once an employee works for you, federal (and likely state and local) laws prohibit an employer from discrimination on the basis of certain characteristics. In other words, a company cannot make employment decisions—such as whether to give raises or promotions— based upon such factors. These factors or the absence of these factors also cannot play a role in the decision to terminate an individual's employment. Some other important items to note are:

- In a lawsuit for discrimination, an employee may be entitled to economic damages (e.g., lost wages), damages for emotional distress or reputational harm, attorneys' fees, and even punitive damages. Defending a discrimination lawsuit can be very expensive, even if the suit is meritless.
- A company should be proactive in preventing and/or eliminating discrimination in the workplace and have a prompt and effective complaint and investigation procedure available to all employees.
- Companies should also periodically review their employment procedures in order to correct any potentially discriminatory practices and ensure the company's anti-discrimination policies are up to date.
- Foreign companies should be especially aware of the potential for complaints of discrimination by American employees on the basis of national origin, especially in hiring and promotions.

Employment

Harassment

Amidst the climate of the “Me Too” movement, prevention of sexual harassment should be at the top of any employer’s mind. Under the law, sexual harassment is a form of sex discrimination that includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature or based on gender. Though an employee would have to prove more in order to succeed on a legal claim, employers should be as proactive as possible in fostering a “zero tolerance” work environment. It should also be noted that while sexual harassment is a common form of harassment, harassment on the basis of any protected category is prohibited by law. Though many states and localities require that employers provide anti-harassment training to their employees, it is a good business practice even where not required.

Equal Employment Opportunity Policy

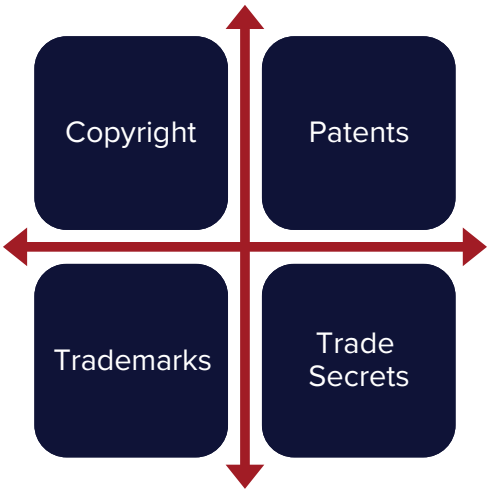
An equal employment opportunity policy should be posted at the workplace and included in any employee manual or handbook. The policy should reflect the company’s commitment to a discrimination- and retaliation-free work environment, including zero tolerance for harassment and discrimination. The policy should also contain a clear, well-defined policy or procedure for making and investigating complaints of discrimination. The presence of and compliance with this policy—along with training of employees and management—should aid the company in avoiding unlawful harassment and in defending against a discrimination or harassment lawsuit. State and local law will have different requirements for such a policy, as well as different guidelines for notifying employees of the policy.

Arbitration

A company may choose to require its employees to sign an arbitration agreement as a condition of hiring. An arbitration clause will permit an employer to avoid adjudicating disputes in an American court and instead allow disputes to be handled by a private dispute resolution forum. Arbitration will allow an employer to more quickly and affordably litigate employment disputes, with more limited discovery and avoidance of a jury trial. Arbitration can also be a more confidential process than public litigation in court. An arbitration agreement can also ask an employee to waive their right to bring class action claims with other employees. However, mandatory arbitration and class action waivers are another area of employment law that have come under scrutiny by American courts and lawmakers. An employer should make sure that the clause is neither too onerous on the employee, nor limits their ability to fully litigate a claim in arbitration. (See also ***Litigation***.)

Intellectual Property

As your company prepares to do business, there are likely several items of intellectual property that you'd like to protect from unlicensed usage. Intellectual property assets can come in many forms, such as a logo or a slogan (trademark); photos or graphics (copyright); invention or process (patent); and confidential information essential to the business (trade secret). After assessing your intellectual property cache, it becomes prudent to implement a course of action that will protect your IP investments globally, from both short-term and long-term perspectives. You will also need to make decisions regarding whether you plan to license in or license out certain property. Either way, protecting your IP assets gives your business the ability to remain competitive in the marketplace, while also preserving the integrity of your company's brand and reputation.



Identifying, Clearing, and Securing Intellectual Property Assets

Identifying: Non-U.S. entities should audit existing intellectual property assets and identify new ones that may be used in the United States. Each existing or new intellectual property asset must be evaluated individually and strategies for protection in the U.S. identified. It's important to keep it mind that assets may fall under multiple intellectual property categories. For example, a single product may be protected by utility or design patents; trademarks for associated product and brand names (or, potentially, a specific type of trademark called "trade dress" for the overall image or appearance of the product); copyright for certain associated designs; and trade secrets for other proprietary aspects.

The audit of intellectual property assets should also determine whether the non-U.S. entity owns the asset or has the right to use the asset by agreement e.g., through a license. Ensuring proper, documented ownership of intellectual property assets minimizes risk of future challenges to ownership. Where the right to use an asset is through a license, the applicable license agreements should be carefully evaluated to ensure sufficient rights to use the asset in the United States. Licenses generally identify a specific territory (or territories) where the Licensee has the right to use the asset, as well as limitations on distribution channels within the territory. Licenses also delineate and define important terms governing the assets, including indemnification for alleged intellectual property infringement by the Licensee, the right and responsibility to enforce intellectual protection, and the right or responsibility to obtain protection e.g., to prosecute applications and seek registrations before the United States Patent and Trademark Office (USPTO).

Clearing: Intellectual property rights such as patents and trademarks are territorial, although foreign copyright protection may be upheld under U.S. copyright law if certain conditions are satisfied. Even if assets are protected in other jurisdictions, it's important to ensure there is sufficient right to use those assets in the U.S., a process known as "clearance." Non-U.S. entities should conduct clearance activities to mitigate the risk that an intellectual property asset infringes rights possessed by a third party. The clearance process is not limited to the asset itself—the process should also include a review of associated print/digital advertisements and marketing, packaging, and social media activities. Advertising, marketing, packaging, and social media often include references to the asset (such as a brand name or trademark), claims or representations about the asset, and other references which may include the property (intellectual or otherwise) of others. Such items should be carefully reviewed for intellectual property compliance in order to mitigate the risk of third-party infringements and ensure proper use of trademark symbols (e.g., the "TM" versus the registration symbol).

Intellectual Property

These items should also be reviewed through the lens of non-intellectual property concerns such as compliance with Federal Trade Commission guidelines concerning endorsements, the enforcement of which is becoming more substantial as more companies use "influencers" to promote products on social media. Special attention should also be paid to regulations and guidance regarding product and consumer safety, product claims, and compliance with state and federal laws, such as California's Proposition 65 which requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer, birth defects, or other reproductive harm.

Securing: After establishing sufficient rights to use an asset in the U.S., those rights should be secured by registration with the United States Patent and Trademark Office or the United States Copyright Office. Rights that cannot be secured through registrations should be evaluated against other avenues of protection in order to maximize value.

Intellectual Property Developed by Employees or Contractors

Companies often hire employees or independent contractors who, through the course of their employment, develop certain intellectual property for and used by the company. Depending on the circumstances, it's not always certain that such intellectual property will be owned by the company. It's important to have a written agreement with the employee or contractor that specifically provides for the assignment or perpetual license of any intellectual property developed by them.

Protecting and Enforcing Intellectual Property Assets

Non-U.S. entities should also be prepared to protect and enforce intellectual property rights within the United States. Strategies should be tailored to fit the needs of the non-U.S. entity's goals and drivers, but also to fit the nature of the business models. For example, strategies for data and technology companies are different than those for consumer product companies. Strategies are also different for companies whose primary business models are online or ecommerce-based versus brick-and-mortar.

Intellectual Property Licensing

A non-U.S. entity may often license in or license out the right to use certain intellectual property. If the entity acts as Licensee, the entity should look to secure, protect, and identify the licensed intellectual property as if it were its own. Failure to do so could lead to a breach and termination of the license. If the non-U.S. entity acts as Licensor, it is imperative that it imposes such obligations on its Licensee so as to ensure protection of the goodwill value in its intellectual property.

Anti-Counterfeiting and the Gray Market

It is very common for manufacturers (especially in China) to make counterfeit products and sell them under the guise of being authentic goods, often through online platforms such as Amazon, eBay, and Wish. These platforms do not undertake to police these items, and it falls to the intellectual property rights holders to continually monitor these platforms and notify them when counterfeit goods are located. It's important that rights holders monitor for counterfeit items on a regular basis to ensure that counterfeit goods do not flood the market and diminish the goodwill value in the intellectual property. Similarly, for those companies who sell products through distributors and look to control which retail partners sell their products, it's important to make sure that distributors or other third parties are not offering products for resale outside of approved channels (i.e., the Gray Market), thus diminishing goodwill and market presence.

Financing Transactions, Mergers, & Acquisitions

As your company expands into a new market, you may also be considering a merger and/or acquisition as a viable growth strategy. There are several different methods for financing these transactions, each with its own risks and rewards. Depending on how the transaction is structured, the tax considerations will differ as well (see ***Tax Considerations***). For foreign investors, there is the added caveat of complying with the national security regulations set forth by the Committee on Foreign Investments in the United States. But structured properly, M&As can be integral components to your company's growth in the U.S.

Exchanging Stock – *See Figure A.*

In this type of financing technique, the Acquiror exchanges shares in its own company for the shares of the Target being purchased. This is typically used by large companies with strong balance sheets and highly liquid shares.

Benefits

- Both parties share the risks and rewards arising from the combined entities
- No additional debt burden

Risks

- Dissenting shareholders may attempt to block stock purchase or force the Acquiror to pay more for shares
- Share pricing may be subject to external economic forces that could distort the effective rate of the share exchange

Issuance of Debt (Stock Purchase) – *See Figure A.*

The buyer will issue debt pursuant to a bond offering or a bank credit facility and the proceeds of the financing will be used to purchase the shares of the Target. If secured debt is used, pre-closing, the debt will be secured by assets of the Acquiror. After closing, the debt will also be secured by the assets of the acquired Target and a stock pledge of the acquired Target's shares. This method is typically used when the Acquiror wants complete control of the Target but doesn't want to dilute current shareholders.

Benefits

- Post-acquisition, the Acquiror has complete control of the Target and flexibility with respect to its restructuring and/or ultimate consolidation with the Acquiror

Risks

- Dissenting shareholders may attempt to block stock purchase or force the Acquiror to pay more for shares
- Additional debt burden exposes the Acquiror to stressed debt service

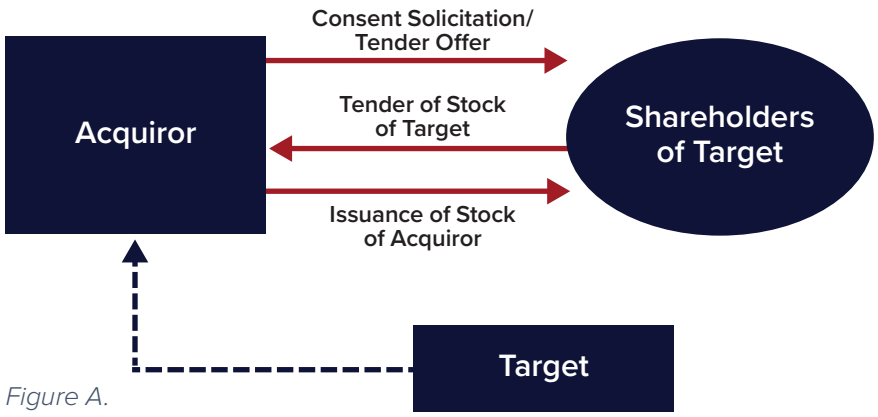


Figure A.

Financing Transactions, Mergers, & Acquisitions

Merger Structures

Various merger structures can be combined with a stock purchase depending on the circumstances of the situation. These accommodate cash and/or stock compensation.

Merger Type	Structure	Considerations
Straight Merger	Target merges into Buyer, with Buyer as the surviving corporation	Most likely requires shareholder approval of Acquiror and Target
Reverse Triangular Merger	Subsidiary of Acquiror merges into Target, with Target as the surviving corporation	Target shareholder approval threshold is likely to be lower than a straight merger's; preserves "branding" of Target
Forward Triangular Merger	Target merges into subsidiary of Acquiror, with the Acquiror's subsidiary as the surviving corporation	Target shareholder approval threshold is likely to be lower than a straight merger's; facilitates re-deployment of assets post-closing

Issuance of Debt (Asset Purchase) – *See Figure B.*

An Acquiror will issue debt pursuant to a bond offering or a bank credit facility. They will also form a subsidiary which will act as the purchaser of the assets. Proceeds of financing will be lent to the Acquiror Acquisition Subsidiary to purchase the Target's assets. If secured debt is used, pre-closing, the debt will be secured by the assets of the Acquiror. Post-closing, it will also be secured by (i) the assets in the acquisition subsidiary and (ii) a pledge of the shares of the acquisition subsidiary.

Benefits

- Post-acquisition, Acquiror holds the targeted assets in a separate subsidiary, providing flexibility as to deployment of assets within the corporate group
- Consent solicitation for asset sale may not require the same level of shareholder approval as a stock tender

Risks

- Completion of the asset purchase may require extensive third-party consents, resulting in a protracted sale period
- Additional debt burden exposes Acquiror to stressed debt service

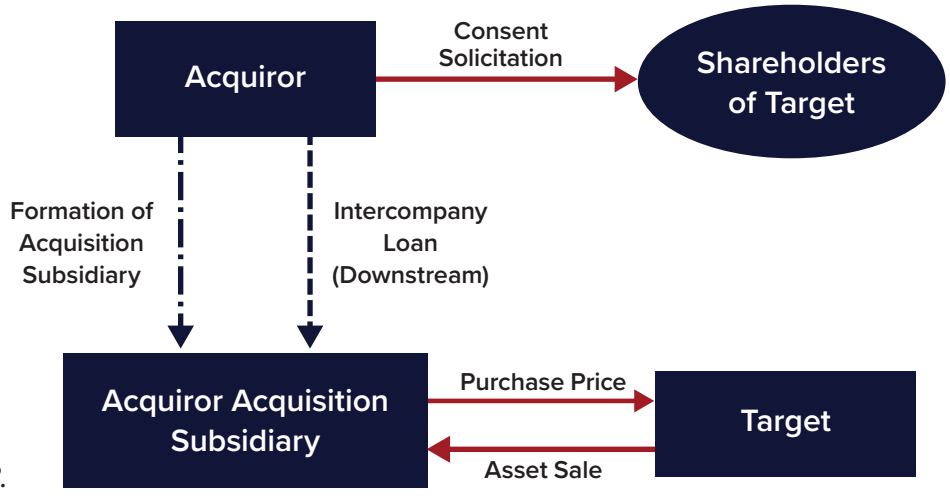


Figure B.

Financing Transactions, Mergers, & Acquisitions

Issuance of Mezzanine or Subordinated Debt (Asset Purchase) – *See Figure B.*

The Acquiror will issue debt pursuant to a bond offering or a bank credit facility. They will also form a subsidiary which will act as the purchaser of the assets. Proceeds of financing will be lent to the Acquiror Acquisition Subsidiary to purchase the Target's assets. If secured debt is used, the debt will be secured by the assets of the Acquiror on a subordinated basis, both pre- and post-closing. Types of subordinated debt may include high yield bonds, mezzanine debt, and warrants.

Benefits

- Use of subordinated debt may enhance the return on equity at the Acquiror
- Post-acquisition, the Acquiror holds the targeted assets in a separate subsidiary, providing flexibility as to deployment of assets within the corporate group and/or partial sale of assets to reduce leverage

Risks

- Completion of the asset purchase may require extensive third-party consents, resulting in a protracted sale period
- Additional debt burden exposes Acquiror to stressed debt service
- If warrants or other conversion rights are part of the subordinate debt, the Acquiror's equity may be diluted

CFIUS & Acquisitions

Regulatory action by the Committee on Foreign Investment in the United States (CFIUS) has widened the scope of transactions by foreign lenders with U.S. borrowers that are or may become subject to CFIUS review. Acquisitions of U.S. businesses that present threats to the national security of the United States are subject to review by CFIUS, an inter-agency panel that operates under the leadership of the U.S. Treasury Department. Submission of transactions for review is optional, but the failure to obtain clearance from CFIUS allows the committee to rescind the transaction at a later date if it finds an adverse effect on U.S. national security. Some other important items to note are:

- Acquisitions by private equity funds with foreign LPs and acquisitions by U.K., Canadian, and Australian buyers are exempt if structured according to CFIUS regulations.
- Investments in certain U.S. businesses, when joined with certain investor rights, also are subject to CFIUS review, as is the acquisition of real property within certain proximity to U.S. military installations.
- Investments in certain businesses deemed critical technologies or critical infrastructure require CFIUS clearance if made during a particular period of time.
- Investments in businesses that maintain or collect, directly or indirectly, sensitive personal data of U.S. citizens' information also require CFIUS clearance.
- Loans by foreign lenders to finance acquisitions of U.S. businesses are subject to CFIUS review, in most cases at the time the lender seeks to exercise its remedies.

Tax Considerations

Tax considerations are integrated with and dependent upon almost every single area present in this guide. Adhering to not only federal, but also state and local tax codes can become a virtual quagmire for foreign businesses expanding into the United States. In the ***Corporate Formation & Entity Selection*** section, we touched on the different tax treatments accorded to different legal entities. In this section, we touch on the import of state and local taxes, as well as taxes as they relate to business operations, mergers and acquisitions, and real estate. Keep in mind, however, that this is merely an overview—the tax considerations for your business will be highly specific to the state and locality in which you are doing business and holding property.

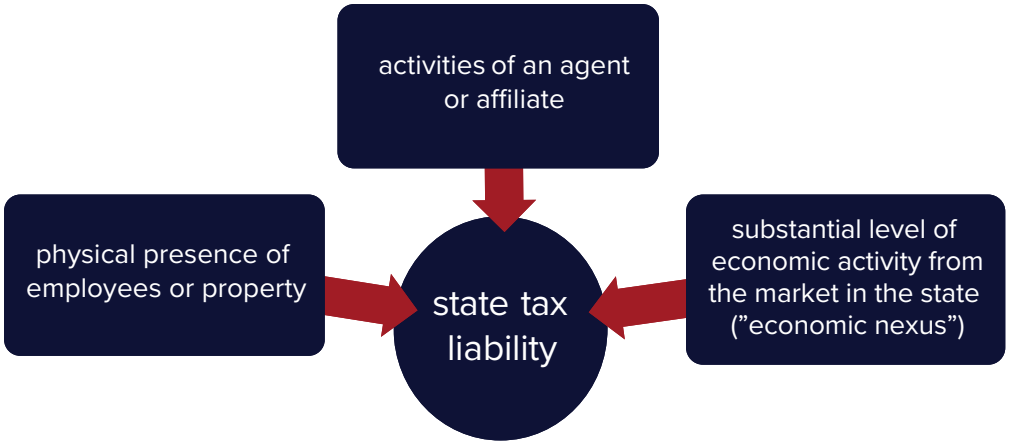
Federal Tax Considerations

Foreign investment in and operation of U.S. businesses require careful tax planning. For passive investments, federal income tax withholding may be required on payments of interest, dividends, royalties, and other payments relating to intangibles. Properly structured, the payments may qualify for exemptions or treaty relief. Many treaties contain reductions or elimination of income tax withholding rates. Special care is required when a foreign party is both a lender and equity holder in the borrower.

If a foreign party owns an equity interest in a business operating in the U.S., the rules relating to effectively connected income (ECI) may apply. In many cases, this will require the foreign party to file tax returns and pay taxes in the United States. There are several specialized provisions dealing with ECI, including the branch profits tax, specific rules relating to the use of partnerships and limited liability companies, and foreign investments in U.S. real property interests. The impact of these rules can be mitigated (or eliminated) by using tax efficient U.S. ownership chains, utilizing available foreign tax credit procedures, or operating through jurisdictions with favorable income tax treaty provisions.

State & Local Considerations

Non-U.S. companies contemplating doing business in the U.S. must not overlook state and local issues. Due to the concept of Federalism, while the states ceded certain powers to the national government, they retained the power to tax. A common error is to assume that because there is a tax treaty between a foreign country and the U.S. exempting income from taxation, it will shield the income from state taxation as well. In fact, the income may still be subject to state taxation because the states are not signatories to the treaties, unless specifically mentioned in the treaty or unless the state voluntarily follows a treaty provision. In order for a federal income tax to be imposed, the foreign entity must be engaged in a trade or business or have a "permanent establishment" in the United States. State nexus (a taxable connection) throws a broader net such that state tax liability can be triggered by:



Tax Considerations

In addition to state corporate income taxes, there are a myriad of other taxes, primarily transaction taxes. These include: sales and use taxes, real estate transfer taxes, withholding income taxes, public utility taxes, motor vehicle taxes, gross receipts taxes, and special industry taxes such as those for banks, insurance companies, and, of course, those on personal income. Not to be overlooked are many credits and incentives at both the state and local levels as well as compliance responsibilities for abandoned and unclaimed property. Consultation with a state and local attorney is critical because the rules vary amongst the 50 states and the District of Columbia.

Mergers & Acquisitions

For U.S. federal income tax purposes, M&A transactions are divided into two broad categories: "taxable" and "tax-free." In the case of a tax-free transaction, the Target generally receives tax-free treatment and the Target's shareholders avoid taxation on gain attributable to their exchange of the Target's shares for shares of the Acquiror. Acquisitions which involve stock only (i.e., no cash or other consideration for the share exchange) are generally referred to as "tax-free reorganizations."

Tax-Free Reorganizations. Assuming that the Acquiror will hold the Target's business in a U.S. subsidiary (which is generally the case), the typical structure of a tax-free reorganization includes, without limitation, any of the following:

Forward Statutory Merger	The Target merges into a U.S. subsidiary of the Acquiror. For tax-free treatment to apply, the share exchange generally must be at least 50% of the Target's shares for shares of the Acquiror.
Reverse Statutory Merger	A U.S. subsidiary of the Acquiror merges into the Target with the Target shareholders exchanging no less than 80% of the Target's shares for voting shares of the Acquiror.
Share Exchange	Direct acquisition of shares of the Target by the Acquiror in exchange for shares of the Acquiror. For tax-free treatment to apply, the consideration for the acquisition must consist solely of voting stock of the Acquiror.
Stock Acquisition	The U.S. subsidiary of the Acquiror acquires the assets of the Target solely in exchange for the voting stock of the Acquiror.

Taxable Transactions. If the transaction does not meet the requirements for the tax-free transactions, the transaction will be taxable to the U.S. non-corporate shareholders, usually at capital gains tax. Set forth below is a general overview of typical tax structures:

Cash Merger Where the Surviving Company is the U.S. Subsidiary of the Acquiror	Sale of Assets by U.S. Target to U.S. Acquiror	Sale of Target Shares by U.S. Shareholders of U.S. Corporations to a Non-U.S. Corporation in Exchange For Cash
The U.S. Target will recognize gain or loss measured by the difference between the consideration received and its tax basis in the assets transferred. If a gain is recognized, the Target will be subject to corporate tax at a federal rate of 21%.	The Target will recognize gain or loss. If net gain is recognized, the Target will be subject to corporate income tax at a federal rate of 21%.	Target does not recognize any gain or loss.

Tax Considerations

Real Estate

Because of the tax implications of foreign investment in U.S real estate, it is crucial for a foreign investor to focus on tax structuring when forming an entity to own U.S. real estate. The goals for a foreign investor should be:

- to qualify for non-recognition treatment of gains when transferring appreciated U.S. real property interest to the entity
- to avoid non-recognition treatment when transferring assets other than U.S. real property interest to the entity
- to avoid exposing the operating income from the real estate enterprise to U.S. taxation at both the entity and owner level (the only pass-through entity available for foreign persons to use in conducting a U.S. enterprise is a partnership)
- to reduce, where possible, the U.S. income tax base of operating income by making payments to entity owners that are deductible at the entity level, but are not includable in the U.S. tax base of the recipient owner
- to avoid or reduce U.S. income tax on termination of the enterprise by restricting U.S. taxation to tax at the entry level
- to avoid U.S. estate, gift, and generation-skipping tax on the direct or indirect gratuitous transfer of U.S. real property interests

It should be noted that tax structuring for an investment in U.S. real estate is highly fact specific and depends on many factors, including: the nature of the underlying real estate; the anticipated holding period for the real estate; the existence of tax treaties between the non-U.S. investor's home jurisdiction and the U.S.; the tax treatment of income repatriated to the non-U.S. investor's home jurisdiction; the organizational structure of the non-U.S. investor and such investor's sensitivity to filing U.S. tax returns; as well as U.S. state tax considerations.

When real property is transferred, transfer taxes are imposed by many states, as well as by many counties and municipalities. This does not normally present any special issue with respect to transfers by foreign persons or entities, as the tax is imposed on the stated consideration in the deed or on the value of the property. However, the investor should be aware that this is a cost to most real estate transactions on acquisition and/or eventual sale or transfer.

While payment of such obligations may be dictated by state and local law with respect to which party is liable for payment, in many locations the parties are jointly and severally liable, and the parties can follow the custom and practice in the location or negotiate payment of the transfer tax obligation. For income tax purposes, the nexus for U.S. transfer taxes is the site of the property. The stock of a foreign corporation has a foreign situs, even if the foreign corporation owns only U.S. real estate and the shareholder is not treated as owning any part of the real estate's assets.

Real Estate

If your business is interested in owning property in the U.S., you will need to contend with the U.S. real estate market. Each step of a real estate transaction life cycle, from acquisition and financing, to management of the property, to the eventual sale of the property, comes with its own considerations. Due diligence is especially critical when you're looking at buying property in the United States, whether it be researching the property's title, inspecting the physical locale, or checking for records of any pre-existing issues with the property. Once these have been cleared, a variety of financing vehicles are at your disposal to help your business raise the capital it needs to augment its physical presence in the U.S.

Organization of Investing Entity

It is always recommended that the investor acquire real estate interests in some type of company entity. This serves two purposes: (i) the limitation of liability and (ii) the navigation of tax issues. Individual direct ownership is the most cost-effective form of ownership, but provides the fewest long-term benefits and exposes the investor to personal liability for any damages that may result from that real estate (notwithstanding insurance coverage), tax reporting requirements, estate taxes, and withholding tax upon eventual sale or transfer. If the property is rented out, the investor will have to file a U.S. income tax return reporting the U.S. income. (For more, see ***Tax Considerations***.)

Next to tax structuring aspects, the investor is advised to form an entity to own U.S. real estate with a corporate entity so that liability issues are minimized. Some common forms of ownership interest are:

Fee Simple Absolute	Long-Term Ground Leases	Condominium Ownership	Cooperative Ownership
Passes to the buyer the entire "bundle of rights" to possess and dispose of the land and any improvements on the land.	The buyer acquires fee title to the improvements for the term of the ground lease, but only gets a possessory interest in the land through the term of the ground lease.	Allows fee ownership of a self-contained unit within a commercial or residential building with non-exclusive rights to common areas of the building with other condominium owners.	A not-for-profit corporation is established to hold title to the real property, and the residents of the building own shares in the corporation.

*Note: As a general rule, it is not advisable for an investor to use a foreign corporation to invest in U.S. real estate. This is because it will be subject to corporate income taxes and also branch profit taxes (i.e., a second tax on "deemed" distributions of the corporation's U.S. income to its shareholders even if the dividend was not distributed).

Acquisition of U.S. Real Estate Interest

The purchaser of property becomes owner upon payment of the purchase price in exchange for written title to the property. Any commercial property, whether a building on land, a commercial condominium, or a house, is transferred by written deed signed before a notary public by the seller, and thereupon filed in the appropriate government office. Purchase of a cooperative apartment is by transfer of equity in the form of stock certificate and a proprietary lease from the cooperative building owner to the shareholder.

In the United States, it is customary to purchase title insurance, which is insurance against undisclosed encumbrances and defects in the chain of title on the particular parcel of property. The title insurer will conduct an independent search and will provide a report and an insurance policy upon closing. This policy insures the purchaser's interest in the property subject only to the liens and encumbrances discovered by the title insurer during its search and still remaining after closing.

Real Estate

Additionally, transfer taxes are imposed on the transfer of real property by many states, counties, and municipalities. This does not normally present any special issues with respect to transfers by foreign persons or entities, as the tax is imposed on the stated consideration in the deed or on the value of the property. The investor should be aware that this is a cost to most real estate transactions on acquisition and/or eventual sale or transfer.

The investor should negotiate contracts with and by its professional representatives, who will perform due diligence. This includes review of the title report which will show official records concerning the chain of title to the property, what mortgages or financings have been recorded as secured interests on the property, and any other recorded writings impacting title. Due diligence should also entail:

- having an architect and/or engineer inspect the physical condition of the property
- a licensed reputable survey company certifying as to the existing structures, metes, and bounds (this will also be required by any secured lender)
- a search of appropriate records pertaining to any environmental issues, ordered remediation, or hazardous conditions on, in, or near the property
- a review of any lease or license affecting use or occupancy of the property

Financing

Property financings in the U.S. may be done (i) on a "non-recourse" basis, where the lender only has recourse to property (not the borrower) if the loan is not repaid, or (ii) with recourse against the borrower. Generally, lenders will secure loans by obtaining a lien on the real property. This is usually accomplished through the recordation of a mortgage (some states call them a "deed of trust") against the particular property. The borrower still owns the property during the term of the loan, but the borrower, through the mortgage/deed of trust, grants the lender a security interest in its ownership interest in the property. The borrower also typically agrees to restrictions on its ability to transfer or further lien the property, lease the property, alter the property, or even rebuild the property in the event of a fire or casualty. If the loan is not timely paid, the lender can take steps to foreclose the mortgage/deed of trust and acquire ownership of the property.

Financing structures can be very complicated, especially if the debt is to be securitized, and may take the form of one or more mortgages on the property and/or mezzanine financing secured by a pledge of ownership interest in the title-holding entity. Another method of financing real estate and facilities is through lease finance. This method of financing can be used for acquisition or construction financings and for refinancing. A lease finance transaction in the U.S. can be structured as a long-term leveraged lease or as a short-term "synthetic" lease:

Long-Term Lease Financing	Short-term Lease Financing
■ typically has a term of 15-25 years ■ provides benefits of long-term, fixed rate financing of real property assets ■ typically structured as "true leases" ■ the tax benefits of ownership of the asset are held by the equity investor, and the lessee has effectively realized a portion of the value of such tax benefits in the effective lease rate	■ typically has a term of 5-10 years ■ intended to satisfy U.S. GAAP requirements to be treated as an operating (off-balance sheet) lease ■ commonly structured with short-term, floating rate debt (usually based upon LIBOR) ■ for U.S. federal income tax purposes, the transaction would typically be treated as a financing, with the lessee retaining the tax benefits of ownership

Real Estate

There may also be advantages derived from use of a Real Estate Mortgage Investment Conduit (REMIC) to finance real property. Historically, REMICs have been the primary approach through which Collateralized Mortgage Backed Securities are formed. REMICs are not used to finance real estate directly, but rather to pool existing or newly originated real estate mortgage loans to create certificates which may be sold and traded in the secondary mortgage market. Certificates may be issued in public offerings or private placements (including United Sates Rule 144A offerings). A REMIC is not a vehicle, but rather a tax classification under the U.S. federal income tax code. A vehicle satisfying the REMIC requirements and electing REMIC classification is treated as a pass-through entity for U.S. federal income tax purposes and is not subject to entry level tax. Thus, REMICs have been the preferred method of securitization of United States real estate mortgage loans.

Management of Holdings

Once a real estate transaction has been completed, the management and operation of the property, especially in a commercial setting, need to be attended to by the investor. This usually is through a management (often also a real estate brokerage) company. This should be in writing, spelling out what the company will do (limiting delegation of these services to any third parties); detailing the basis of compensation for such services and any leasing brokerage commissions; and setting forth when and how the agreement can be terminated. The investor will want a termination right upon short notice, as any eventual sale or transfer will need such termination so that the purchaser or transferee can have its own representatives operate and manage the property.

Disposition—Eventual Sale or Transfer

The sale or transfer of investor real estate interests requires a contract and will oftentimes entail state and local transfer taxes. The disposing of a specific real estate ownership should take into account the Foreign Investment Property Tax Act (FIRPTA), a law which seeks to make sure a foreign investor pays taxes and that imposes a withholding requirement to effectuate dispositions of a foreign investor's property interests. In general, FIRPTA treats the gain or loss of an international investor or a foreign entity from the disposition of a U.S. Real Property Interest (USRPI) as income or loss effectively connected with a U.S. trade or business. Consequently, such gain or loss will be included with the international investor's other effectively connected income (if any) and subject to U.S. income tax on a net basis.

Data Privacy & Protection

Data privacy is becoming an ever-more pressing concern as governments around the world crack down on lapses in safeguard measures. If you have done any business in Europe, then you are most likely familiar with the General Data Protection Regulation which sets a strict standard for data privacy and protection for companies doing business in or with the European Union. The U.S. has also bolstered its data protection regime in recent years, through national and state legislation both. As a business, the trust of your customers is paramount and their expectations regarding the safeguarding of their personal data are high. If you retain that trust and meet the data security expectations of your customers, you'll have the opportunity to garner business from clients seeking companies they can trust with their personal data.

Federal Law

Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA is the most comprehensive data protection law in the U.S. and the law that most closely resembles European Union laws such as General Data Protection Regulation (GDPR). HIPAA comprises data protection in its Privacy Rule and its Security Rule, respectively in effect since 2001 and 2003. These regulations mandate documentation of and workforce training about safeguards and controls for Protected Health Information (PHI). PHI is defined to include information about past, present, or future medical or mental health treatment or conditions traceable to an identifiable patient through one of eighteen enumerated identifiers. Included within these identifiers are digital likeness (photograph or video), geolocation data, IP address, and a "catch-all" identifier that comprises data that, in combination with other data, can lead to the identification of a patient.

Within the jurisdiction of HIPAA are two categories of entities: "Covered Entities," which include healthcare providers and health insurance plans, and "Business Associates," who are individuals or organizations that access PHI to perform a service for a Covered Entity. Business Associates are obligated to meet virtually all the privacy and security safeguards applicable to Covered Entities. A written agreement is required between the Business Associate and the Covered Entity warranting that the Business Associate meet the applicable HIPAA requirements. A non-U.S. organization that wishes to provide services to U.S. Covered Entities then must put in place a documented program to comply with HIPAA, as well as controls to verify ongoing compliance.

Financial Services. The data protection regime for public corporations is most prescriptive under the Securities and Exchange Commission's (SEC) Regulation S-P. These safeguards require registrants to maintain written policies and procedures, as well as administrative, technical, and physical safeguards for consumer information. These include encryption of individually identifiable financial information, incident response plans, access controls, malware defenses, and breach notifications. Drilling down further, 17 CFR (Code of Federal Regulations) Subpart A § 248 prescribes privacy policies at the inception of the relationship with the consumer and thereafter annually, as well as notices regarding opt-outs. The SEC's Office of Compliance, Investigations, and Enforcement (OCIE) includes data protection questions in its audit questionnaires to registrants. The Sarbanes-Oxley Act in its Section 404 comprises requirements that publicly traded corporations annually certify the existence and maintenance of internal controls of assets, including information assets. In addition, data breaches that may have a material impact upon an investor's decision to purchase securities must be reported within the company's period filings with the SEC. A process is necessary to determine the criteria for when to include a data breach in these reports and how to respond to inquiries from the SEC and investors.

Data Privacy & Protection

Additional federal laws and regulations that impact private as well as public non-U.S. organizations are, for the most part, segmented by industry and information use categories. These include the Federal Education Rights and Privacy Act (FERPA); the Federal Privacy Act (for organizations that perform services for or products to the federal government); and the Children's Online Privacy Protection Act (provides safeguards for information of children under the age of thirteen). The Federal Trade Commission (FTC) has jurisdiction to bring proceedings contending unfair or deceptive trade practices against organizations that falsely represent their data protection safeguards or fail to live up to their own data protection representations. And the penalties can often be severe—in 2019, a proceeding by the FTC resulted in a settlement for a penalty of $5 billion USD and monitoring by the FTC for twenty years.

As if this maze were not complex enough, other federal laws restrict uses of information if those uses result in discrimination or disadvantage to certain groups. These laws include the Federal Credit Reporting Act (FCRA); the Fair Housing Act (under which Facebook was recently fined for allegedly targeting real estate advertisements to certain ethnic and other demographic groups to the exclusion of others); and various federal laws proscribing discrimination in employment (e.g., using artificial intelligence to filter out applicants by gender, sexual orientation, race, religion, or other proscribed grounds. See ***Employment***.)

The Alphabet Soup of Data Privacy

HIPAA	Health Insurance Portability and Accountability Act of 1996	**OCIE**	Office of Compliance, Investigations, and Enforcement
GDPR	General Data Protection Regulation	**FERPA**	Federal Education Rights and Privacy Act
PHI	Protected Health Information	**FTC**	Federal Trade Commission
SEC	Securities and Exchange Commission	**FCRA**	Federal Credit Reporting Act

U.S. State Laws

In the absence of a generalized national data protection law, a number of U.S. states have enacted data protection provisions, which can vary wildly. Generally, organizations that access personal information (defined differently among the states) in order to market or sell goods/services within the state are subject to that state's data protection laws. The threshold for jurisdiction varies as well, from California's $25,000,000 USD annual revenues to New York's $3,000,000 USD for its SHIELD Act.[1] Regulations applicable to financial services organizations are subject to additional cybersecurity regulations in New York, and also in Colorado and Vermont without regard to annual revenue levels. Similarly, Illinois' Biometric Information Privacy Act restricts disclosures of biometric identifiers such as fingerprints, regardless of the size of the organization. It is imperative that a non-U.S. organization seeking to commence or expand its business in the U.S. obtain advice as to the regulations and laws of these states in which it does or seeks to do business. If the organization touts its data protection prowess but, in fact, fails to meet the state requirements, it may be subject to litigation brought by the Attorney General of that state alleging a violation of the state's consumer fraud laws. These laws, providing state attorneys general with authority to pursue actions on grounds that resemble those of the Federal Trade Commission for unfair or deceptive trade practices, can result in a court decision in which the actual damages awarded are tripled by the court ("treble damages") and an order requiring the offending company to pay attorneys' fees (contrary to prevailing U.S. practice).

1 The California Consumer Privacy Act of 2019 (CCPA) applies also to companies that access the personal information (defined broadly as "Personal Data" under GDPR) of 50,000 California residents of California households or derive more than fifty percent of annual revenue from "sale" of personal information. Yet, amendments to CCPA signed into law in November 2019 limited the application of CCPA to employee data and to most forms of business-to-business information. This latter provision, however, expires in 2021.

Data Privacy & Protection

Steps for Data Protection Compliance

CREATE A DATA MAP

Where will the company do business? What information that is collected is covered by laws of the U.S. federal and state government? To the laws of which states is the organization subject? How is that information used, disclosed, stored, and eventually deleted?

ANALYZE CURRENT DATA PROTECTION PROCESSES

Even if the organization has already implemented data protection protocols under such laws as GDPR, Canada's Personal Information Protection Act, or the laws of other nations deemed by the European Union to meet its data protection standards, relatively small adjustments to the data protection program may be necessary to meet the U.S. requirements.

DOCUMENT NEW POLICIES

Determine which applicable U.S. standards the company does not yet meet and make those a priority. Most U.S. state laws follow common principles, such as notice to data subjects, encryption of information, security risk assessments, access controls, and incident response procedures. Document protocols with appendices for provisions peculiar to one or more states. Under most U.S. data protection laws, if a data protection regime is not in writing, these laws will consider that the regime does not exist.

MANAGE LEGISLATIVE & REGULATORY CHANGES

As of the time of this writing, several U.S. states are considering data protection laws. Prepare a process to become aware of these laws and how they will affect the organization.

TRAIN THE WORKFORCE

The best data protection policies and procedures are useless if no one understands them or if the workforce doesn't know they exist. Revisit the protocols as per a review process when business and technology changes indicate and provide updated training.

IMPLEMENT AUDIT CONTROLS

Required by a number of states and by HIPAA, these controls comprise requirements for internal audits to ascertain whether the data protection processes are working. These audits are often most effective when conducted by third parties whose personnel are not known to employees.

FIND THE RIGHT ADVISORS

In general, attorneys well-versed in data protection spearhead the program and bring in forensic consults as necessary. But most importantly, the data protection tone must be set from the top as a priority for protection of the company's most valuable asset, information.

Insurance Coverage

You've gone to great lengths to ensure that your business can operate in the U.S., investing large amounts of time, money, and resources in the process. It therefore only makes sense to take steps to protect this investment. The U.S. has the largest insurance market in the world, with almost 6,000 insurers and over 25,000 insurance brokerages. For businesses operating in the U.S., insurance costs often are the second largest business costs behind payroll—and for good reason. Reducing the risk and limiting the liability posed to your business can prove invaluable in the event of negative exposure. Insurance coverage can help to mitigate damages caused by the mundane to the catastrophic.

Risk Mitigation and Cost

For non-U.S. companies engaging in business in the U.S., the two greatest considerations should be:

1. **The risk faced in the U.S. for monetary damages, particularly with respect to liability for negligence**
2. **The cost for insurance coverage in the U.S.**

The U.S. legal system allows for a broad spectrum of monetary recoveries. The U.S. is also generally regarded as a more litigious jurisdiction than jurisdictions elsewhere in the world. Complicating insurance determinations, there is not one U.S. legal standard which establishes the monetary exposures existing for different risks sought to be insured. Rather, the 50 U.S. states have 50 different legal frameworks. The laws can be venue-specific, impacting legal theories that affect risk, monetary exposure, statutes of limitations (prescriptive periods), and likelihood of litigation. (See ***Litigation***.) Because of the disparity in laws across the 50 states, the cost for insurance coverage may vary significantly for the same insurance coverage in different U.S. jurisdictions. Analyzing these insurance considerations is not only helpful in risk mitigation, but also in controlling what can be substantial differences in cost for insurance coverage obtained.

Insurance Policy Interpretation

The meaning of insurance policy language is usually interpreted under the laws of the state in which the policy is issued, rather than under a single U.S. national regime. Insurance policy interpretations under those laws are generally made like those for contracts, except that exceptions, exclusions, and limitations in insurance policies are often construed against the insurer and in favor of the insured. Many U.S. states also hold that an insurance policy is a contract of adhesion drafted by the insurer which can be construed against the insurer and in favor of the insured as to coverage. The result of a 50 state-based insurance policy interpretation approach is that interpretations can vary across different states. Two major points to note are:

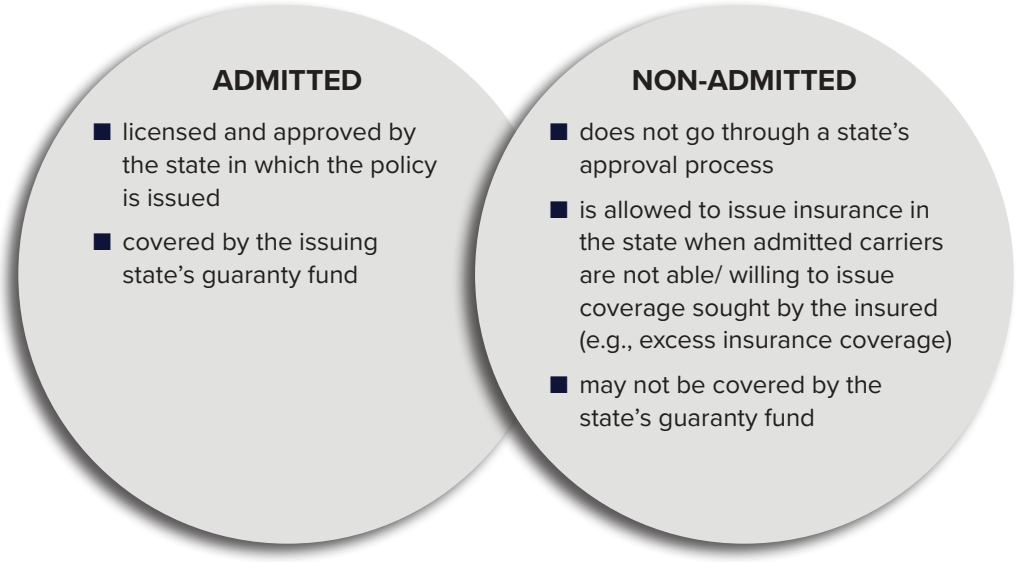
1. **Identical words in an insurance policy can be interpreted differently depending on the state whose regulations, statutes, and court rulings are controlling of the policy interpretation.**
2. **Some states will have interpretations that can be more favorable to insurance companies, while other states can have interpretations more favorable to insurance policyholders.**

Legal treatises that discuss insurance policy interpretation, such as *Couch on Insurance* or *New Appleman on Insurance*, can be very helpful, but they are not binding on the courts of the different states unless made the law of that jurisdiction through court decision or legislation. Analysis of the law of the U.S. state applicable to the interpretation of the insurance policy is required to determine the scope of coverage existing under the policy.

Insurance Coverage

"Admitted" Vs. "Non-Admitted" Insurance Carriers

With respect to who can issue a policy of insurance in a particular state, there are "admitted" and "non-admitted" insurance carriers. What insurance coverage is necessary can lead to the determination of which type of insurer is appropriate. Differences between the two types of carriers include:



Single Policy Vs. Multiple Policy

Another determination for companies seeking to enter the U.S. is whether insurance for multi-country operations will be under one policy covering its activities worldwide or under different policies covering its disparate operations geographically. Having one policy to cover operations throughout the world can certainly appear easier than obtaining multiple policies. A factor affecting this analysis is whether the company's experience with legal claims at one location causes the total cost of insurance to increase. For example, if an English company has low claims experience in its operations in the U.K. and wants to open an operation in the U.S., it may elect to utilize the data from the U.K. location under a single policy to cover both locations. Conversely, it may elect to obtain a different policy solely for U.S. operations if doing so can result in less total insurance cost while still covering both locations.

Workers' Compensation

Despite similarities in the intent behind their workers' compensation systems, workers' compensation coverage for employees in the U.S. and U.K. differs in several ways. In the United States, the employer provides workers' compensation to its employees through a private insurance company, of which there are many that offer such coverage. In the U.K., as in most of Europe, workers' compensation coverage is administered by public organizations. Additionally, in the U.S., liability for tort exposure to an employee can be very difficult to prove and is available in very limited circumstances; however, potential exposure in tort is more available in the U.K. as the "exclusive remedy doctrine" applicable under the U.S. system is not the same in England.

Litigation

While litigation is rarely the desired first resort when dealing with business disputes, it is sometimes unavoidable. Litigation in the U.S. operates differently than it does elsewhere, and there are several key components to be aware of. As a business operating in the U.S., you will be subject to the jurisdiction of its state and often federal courts, as well as various administrative bodies. The landscape of substantive issues that are resolved in the courts is vast and will cover most of your business interactions. These include contract disputes; intellectual property disputes and enforcement; employment claims and disputes; real estate lease claims; and so on. Some business-related claims are handled by administrative proceedings or in arbitration. As highlighted previously, the best protections against a litigation claim are having a properly formed legal entity, solid contracts, defensible practices and procedures (including employment training), and insurance.

Rather than devote this entire guide to U.S. litigation, we use the section below to highlight two unique circumstances where a foreign company can make use of or be involved in litigation: (i) judgment enforcement and (ii) Section 1782 discovery. If used correctly, these tools can allow for the enforcement of foreign judgments or arbitration awards domestically and can grant litigants in non-U.S. legal proceedings the ability to use "American-style" discovery.

Judgment Enforcement in the U.S.

The U.S. is an attractive forum for enforcing judgments. New York in particular has adopted a permissive judgment enforcement regime that provides judgment-creditors with powerful tools for determining where a judgment-debtor's assets are located and procedures for collecting money based on those assets to satisfy a judgment.

Non-U.S. Court Judgment Enforcement: New York's Recognition of Foreign Country Money Judgments law, codified by the New York Civil Practice Law and Rules Article 53, is among the most favorable laws in the U.S. for enforcing foreign judgments, whether obtained in a court or through arbitration. Unless one of the below defenses is present, the legislature states that:

> *"a foreign country judgment [which is final, conclusive, and enforceable where rendered] is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense."*

Notably, where a business is the judgment-debtor, there are defenses to a non-U.S. judgment that was improperly obtained, but those defenses are rather limited. Defenses include that the non-U.S. judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" and "the foreign court did not have personal jurisdiction over the defendant," among several others. While both judgment-debtors and judgment-creditors should consider the potential defenses that may apply in the action, they are difficult to prove given the high burden of proof required to show that a non-U.S. jurisdiction's entire system does not provide impartial tribunals or procedures compatible with due process.

Litigation

Arbitration Award Enforcement: With respect to treaties and conventions, the U.S. is ***not*** a signatory to any treaty—whether bilateral or multilateral—that requires U.S. courts to enforce judgments entered by non-U.S. courts. However, the U.S. ***is*** a party to several multinational conventions that empower U.S. courts to enforce foreign arbitration awards domestically, including in the State of New York. The U.S. is a party to the "New York Convention" (the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958) and the "Panama Convention" (the Inter-American Convention on International Commercial Arbitration of 1979). Both afford a judgment-creditor or arbitral award creditor ample powers to have a judgment obtained abroad recognized and enforced in the United States. However, it's important to note that recognition of judgments and arbitration awards varies by state as there are no nationally recognized methods or parameters for enforcing judgments.

Discovery for Use in Foreign Proceedings

The U.S. Federal Rules of Civil Procedure have a unique feature—known as Section 1782—that allows litigants in non-U.S. legal proceedings to obtain "American-style" discovery:

- Section 1782 permits for discovery of the same type and extent as that allowable by the United States' broad and permissive discovery standards. The U.S. Federal Rules of Civil Procedure permit discovery of any non-privileged information relating to any party's "claim or defense," as long as such discovery is "proportional to the needs of the case."
- Section 1782 discovery is available from persons "to be found" within the United States. However, Section 1782 discovery is only available in connection with a foreign proceeding that is either filed or "within reasonable contemplation." To obtain discovery through Section 1782, a U.S. lawyer will file a petition for discovery in the district in which the person or entity is most likely "to be found."
- There are defenses available to the respondent against a Section 1782 petition for discovery. Defenses include those that are available to any litigant in a typical U.S. federal litigation. Two possible defenses are that the respondent is not to be "found" in the given district and that the foreign proceedings are not properly within "reasonable contemplation" if they have not been yet commenced.

Personal Jurisdiction Over a Non-U.S. Defendant

The U.S. Constitution generally permits personal jurisdiction to be exercised over a non-U.S. person or entity pursuant to two broad theories: (i) general personal jurisdiction and (ii) specific personal jurisdiction. General personal jurisdiction over a business applies *only* in the jurisdiction in which the business is either (i) incorporated or (ii) has its principal place of business. Specific personal jurisdiction may be exercised pursuant to a state's long-arm jurisdiction statute, but such jurisdiction must be in accordance with due process and the "minimum contacts" analysis. Generally, to satisfy "minimum contacts," a non-U.S. defendant must have "purposefully availed" itself of the benefits of operating within the U.S. forum by engaging in some sort of specifically directed activity toward the U.S. and/or a specific state forum. Accordingly, any non-U.S. company doing business with U.S. customers must be aware of the risk of being haled into courts in jurisdictions where they have intentionally directed activity by, among other things, advertising to residents in the forum, sending product into the forum, regularly visiting the jurisdiction, or maintaining a substantial physical presence in the forum.

"Growth is never by mere chance; it is the result of forces working together."

– James Cash Penney
Businessman & Entrepreneur

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