SQUIRE SANDERS

DOING BUSINESS IN THE UNITED STATES OF AMERICA

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Introduction

This guide aims to answer the general questions you may have about doing business in the United States of America – from the initial considerations to matters concerning the on-going operations of your business. It is intended as an introductory guide to doing business in the US and answers preliminary questions frequently asked by those unfamiliar with the American business environment. Our guide presents the law at September 2013.

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We are Here to Help

If you have any questions, please do not hesitate to contact us. We would be very pleased to advise further on the general matters discussed in this guide as well as on any specific points relating to your particular circumstances or industry sector.

This guide has been prepared with great care and diligence. However, any liability as to the accuracy, correctness and completeness of the guide is explicitly excluded. This guide is not intended to serve as legal or business advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

Do You Need a Business Presence in the US?

Analyze Trading Options

When entering the US market, a non-US business can choose to pursue one or more of the following options:

- Sell directly to US customers from outside the United States
- Hire a sales agent in the United States
- Contract with a US distributor or reseller to purchase and resell the business' products
- Establish a subsidiary or other controlled entity in the US through which to conduct business in the United States
- Form a joint venture or strategic partnership with an existing US company

Establishing a US Trading Company or Business – Key Advantages

When properly established and managed, a US trading company or subsidiary provides the following advantages:

- Good local contact with US customers
- Credibility with US customers
- Maximum control over how the brand name and image are established in the United States
- Good forecasting regarding production and delivery of products

Establishing a US Trading Company or Business – Key Disadvantages

A US trading company or subsidiary entails the following disadvantages:

- Establishing and staffing a company or business in the United States requires a major investment of time and capital
- Profits from a US company or business will be subject to US federal, state and local taxes
- The cost of renting offices, hiring employees, obtaining adequate insurance, acquiring immigration visas and complying with all US trading regulations is substantial
- With the long distances and different time zones involved, managing a US company or business from outside the United States can be a major challenge

Carefully Research the US Market

Before deciding whether to establish a company or business in the United States, carefully research the following issues:

- Who and where are your potential customers and how do they currently purchase similar products?
- Who and where are your major competitors and how do they market their products?
- Have you designed the products so that they will be accepted in the US market?
- Will your US customers require you to have a US presence before taking your products seriously?
- Can the US market for your products be managed from overseas either with or without the assistance of US sales agents or distributors?
- Can you effectively manage employees or subcontractors in the United States?
- Do you have or can you afford to acquire internal and external professional expertise to manage a US business?
- How will you offer effective customer service for your products in the United States?
- Have you established a home market strong enough to absorb the costs of expanding sales into the United States?
- Is your home market strong enough to support the cost of establishing a new company or business in the United States?
- Have you researched or sought professional advice on all of the legal and regulatory requirements for your products to be introduced into the US market?

Consider a Combination of Trading Options

The United States is a huge market. The country consists of 50 states and several territories, such as Guam and Puerto Rico, each of which has its own corporate and business laws applicable to businesses established or operating in that state or territory.

Frequently, non-US businesses establish a US operation in a single location within the United States. That operation then acts as a beachhead, coordinating the business' distribution channels such as sales agents, distributors and strategic partners.

The US Legal System

"Private Attorney General" Lawsuits

Unlike many other countries, the United States regulates its private industry by giving private citizens the right to challenge some violations of civil law in the civil courts. This can result in large-scale "class action" and other lawsuits not seen in other countries.

Contingency Fees

The contingency fee is the most important mechanism by which the less wealthy in the United States pay for legal assistance in connection with claims and other disputes. In a contingency fee arrangement, the lawyer enters into an agreement with the client pursuant to which the client has to pay the lawyer a fee only if the client wins the case or the client receives a payment in settlement of the case. Since the party bringing the case does not have to pay any legal fees unless the lawsuit is concluded successfully, contingency fee arrangements make it possible for more parties to bring lawsuits.

The US "Discovery" System

The US legal system requires all litigants to participate in a sometimes costly pretrial "discovery" system designed to ascertain the evidence available to support each side's view of the case.

As soon as a lawsuit is filed and served, and long before the case ever reaches a courtroom, parties and witnesses can be subjected to hours, days and sometimes weeks of questioning under oath by the opponent's lawyers, with every word being recorded and transcribed by a court reporter.

In addition, in the United States every document in the custody of both litigants and third parties that might be pertinent to the case can be sought by notice or subpoena and then inspected and copied.

In recent years, discovery in civil litigation has been made even more complex and expensive by the advent of electronic discovery, whereby companies are required to divulge all of the email and electronic transmissions of the business that may be pertinent to the case.

The US Civil Jury

In most common law countries only special cases such as libel and slander are tried before a civil jury. In the United States, the parties in civil litigation frequently have a constitutional right to a jury trial. Although the US judge plays an important role in deciding what evidence the jury is allowed to hear, in many civil cases decisions as to whether a defendant is actually liable for the harm suffered by the plaintiff, and the award of damages for the harm, are left to the jury. The decisions made and the damages awarded by a US jury can both be highly unpredictable.

Lawyers' Fees – Not Usually Awarded to the Winner

In non-US legal jurisdictions, the successful party usually is able to recover its lawyers' fees as "court costs" from the loser, at the judge's discretion.

In the United States, lawyers' fees generally are not considered court costs and therefore generally are not recoverable by the winning party in a lawsuit, unless there is a contract at issue or a special statute provides for their recovery.

In the absence of an agreement or a statute providing for the recovery of lawyers' fees, only out-of-pocket costs paid to the court (such as filing fees) may be recoverable by the winning party.

Importance of Adequate Insurance Coverage to Cover US Liabilities

Due to the high cost and unpredictability of the US litigation system, the insurance coverage that a non-US company traditionally purchases for its operations outside the United States may be inadequate to cover the potential exposure of the US business operation.

Insurance for the US business should be purchased from an experienced US business insurance broker or a non-US broker specializing in providing coverage for business risk in the US market.

Several types of insurance coverage may be available through the purchase of a comprehensive business liability policy. However, depending on the special risks associated with your business, advice regarding the purchase of specialized insurance should be sought for risks not covered by the comprehensive business liability policy.

This insurance may include:

- Director and officer liability
- Employer practices liability
- Products liability
- Patent, trademark and copyright infringement liability
- Electronic errors and omissions

Mandatory Arbitration and Mediation Agreements

In an attempt to avoid the costs and expenses of the US civil litigation system, many business contracts include mandatory arbitration and/or mediation clauses.

Mandatory arbitration clauses can require that certain disputes between the parties be decided before either a single arbitrator or a panel of arbitrators instead of the civil courts.

In addition, many US business contracts now include a requirement that the parties try to resolve their differences by voluntarily "mediating" the dispute before they resort to arbitration or the filing of a lawsuit.

Some court decisions and proposed new legislation have raised considerable doubt regarding the long-term enforceability of mandatory arbitration agreements for certain disputes.

Lawyers' Fees Clauses

As noted previously, the prevailing party in a US civil lawsuit is not automatically entitled to an award for lawyers' fees as part of the costs. Therefore, if a company wishes to receive reimbursement of its lawyers' fees as part of a remedy, the company should consider the pros and cons of adding a properly drafted lawyers' fees clause into its business agreements.

In some situations, lawyers' fees clauses have been known to create an environment that triggers or prolongs litigation. In these situations, in the absence of a lawyers' fees clause, the parties may have been less inclined to resort to litigation – or perhaps would have been willing to settle their dispute.

Establishing a Business Presence

Registration and Business location

The choice of state in which to incorporate the US corporate entity may be the same or different from the choice of where to locate the corporation's offices. For example, corporations in the United States frequently choose to incorporate in a particular state, such as Delaware, not because their owners intend to operate in Delaware but because of Delaware's flexible and well-developed corporate laws. At the same time, they may decide to locate the main business office in a different state for proximity to customers and suppliers.

Where to Locate the Headquarters

The following are some of the factors that you may want to take into consideration:

Where are your customers located?

- Where will your sales, service and research and development (R&D) employees be located?
- Are there any tax credits or other incentives available that make one location more attractive than another?
- Would your operations be more heavily taxed in one state than in another?
- What are the cost implications of registering your business, establishing an office or hiring employees within the state?
- Will you save on costs in the long term if the main offices, employees and operations are located in a different state from your customers?

If the state where the corporate entity is incorporated is different from where the corporation has based its headquarters, the corporation must qualify to do business in the state in which the headquarters is located and all other states where it establishes "minimum contacts" for tax purposes.

Office Space

Businesses can rent office space on a month to month basis or for a specific term. Renting month to month can be an attractive option for new startup businesses because it is flexible and does not require large cash outlays up front.

Newly formed businesses may want to keep their overhead costs low by first renting from executive office suites, business incubators or other similar office-share lease arrangements. However, the following are some of the special issues to consider before embarking upon an office-share arrangement:

- What is the office suite's business reputation?
- Is the office suite in good standing with the underlying lessor?
- Would your business have to change its telephone and fax numbers if it moves out of the office-share arrangement?
- Can your business maintain confidentiality if office suite employees handle telephone and fax messages?

To fully understand any lease arrangement and its obligations, it is advisable to seek independent advice from a local real estate lawyer.

The Selection of a Business Entity

The most advantageous corporate structure for a business entity will depend upon, among other items, the individual nature of the business, future plans for expansion or investment, desired capital structure and tax considerations.

The characteristics and taxation of business entities vary from state to state. Therefore, the discussion that follows is limited to the US federal tax considerations affecting the corporate form of the US entity. Non-US businesses are advised to seek local advice in the United States as to the state and local tax implications of any proposed corporate structure for a US entity.

The following are the most common "for profit" corporate structures for business entities in the United States.

C Corporation

The C corporation is the oldest form of business entity in the United States that is required to be registered and that provides limited liability. Under US law, the C corporation is treated as a separate entity for both liability and tax purposes.

Under the C corporate structure, shareholders are protected against liabilities over and above their investment, provided that all of the statutory requirements of the C corporate structure are met.

The C corporate structure allows an entity to offer different classes of shares to investors, providing the type of liquidity options necessary for a fast-emerging growth company in the technology and other sectors to attract investors.

The C corporation also allows for tax-favorable treatment of employee stock option plans and future acquisition strategies.

The C corporate structure is generally the preferred choice for a US business entity that plans to expand rapidly, have many shareholders and eventually be listed as a publicly traded company.

S Corporation

An S corporation is similar to a C corporation, except that an S corporation can elect to be taxed as if it were a partnership, thereby avoiding tax at the entity level.

In the corporation that has made an S election for tax purposes, all profits and losses are deemed to pass through to the shareholders in proportion to their percentage ownership interest. However, the right to make this S election is restricted to certain corporations. For example, the S election can be made only if the corporation has 35 or fewer shareholders, all of the shareholders are individuals and US residents, and the corporation has only one class of stock outstanding.

As is the case with a C corporation, the shareholders of an S corporation are protected against liabilities over and above their investments in the entity, provided that all of the statutory requirements of the S corporate structure are met.

The S corporation is not appropriate for a business entity that wishes to offer different classes of shares to its investors, or permit non-US residents or other entities (such as a venture capital fund) to invest or have more than 35 shareholders.

Limited Liability Company

The limited liability company (LLC) is a relatively new corporate structure that has existed in the United States for only the last 25 years.

The LLC structure is commonly used for small businesses – such as consulting firms and other businesses – that desire to offer more flexibility to the business owners for tax-planning purposes than is offered by a corporation.

The "limited liability" name may be misleading if it is read to imply that the LLC is the only corporate structure that limits liability for shareholders. As stated above, both the C and S corporation entities also offer limited liability to their shareholders.

Like a corporation, the LLC is a separate entity for liability purposes and the liability of the LLC owners (known as "members") is limited to their capital investment in the LLC. An LLC is classified as a partnership for US federal tax purposes, similar to an S corporation.

Unlike the S corporation, an LLC may have an operating agreement (the document that establishes the terms and conditions for governing the LLC) that allows for profits and losses to be allocated among the members other than in proportion to their member interests in the LLC.

Because the LLC is a pass-through entity for tax purposes, each member must file a US federal tax return. For this reason, many non-US companies and non-US investors prefer not to invest in an LLC.

Branch Office of a Non-US Corporation

Sometimes non-US corporations decide to set up a "branch" office in the United States without establishing a separate US entity.Under certain circumstances, the US branch office will be subject to the same US federal and local taxes as if it were a separate US business entity. For example, if the activities of the branch office establish "minimum contacts" for tax purposes, the non-US company will be liable for US federal and applicable state and local income taxes. The US branch office of the non-US entity also will incur the same employee payroll tax liabilities with respect to any employee working within a given US state and the same sales taxes on any goods sold within the state as a US entity would incur.

Because the non-US company will in any case be required to register and pay a fee to do business within the state in which the branch office is located, the actual cost of operating through a branch office may not be significantly less than that of establishing a separate US entity and may expose the foreign parent company to greater tax and other liabilities.

A branch office provides no "corporate shield" protection to the upstream non-US business entity against liabilities incurred through the US activities.

Therefore, the branch office's operations may expose the non-US business entity and its directors to US civil and criminal liabilities incurred from business activities conducted within the United States and the particular state or states in which the branch office operates or in which its activities are sufficient to meet the "minimum contacts" test.

Another important practical consideration is that some US corporate insurance packages are unavailable to the US branch office of a non-US business because the branch office is not a US business entity.

Sole Proprietorship

A sole proprietorship is a noncorporate business owned by one individual. The individual incurs personal liability for the business' liabilities and incurs personal tax liability for its profits.

General Partnership

A general partnership is a noncorporate business owned by two or more individuals. The individual partners are personally liable for liabilities of the business and for taxes on its profits.

Limited Partnership

A limited partnership is a business entity managed by one or more general partners and owned in part by one or more limited partners.

The main difference between a limited partnership and a general partnership is that the limited partners in a limited partnership are liable for business liabilities only up to the amount of their investment, while general partners are potentially liable for all the liabilities of the limited partnership in the same way as the partners in a general partnership. Under the limited partnership statutes of some states, limited partners cannot participate in the management of a limited partnership.

Before deciding upon the formation of any corporate or business entity within the United States, the non-US business is advised to seek professional legal and tax advice from US lawyers and tax advisers regarding the advantages and disadvantages of each of the above business structures.

US Business Rules

Taxation

Federal Government

The US federal government regulates interstate commerce and can levy a variety of taxes on US businesses, non-US businesses trading in the United States, and business owners and their employees.

Depending upon the business structure, examples of such taxes include corporate franchise tax, income tax, capital gains tax on long-term sales, income tax on dividends and interest, income tax on partnership profits and employee payroll taxes.

Under some international treaties, non-US companies can be exempt from federal income taxes if they do not create a "permanent establishment" in the United States. However, once a company takes certain steps to establish a business in the United States, such as paying office rent, hiring US employees or contractors, sending non-US employees to the United States to set up and manage the business or hiring a US agent with authority to bind the non-US company, it may lose this exemption. It will be deemed under US law to have created a permanent business establishment in the United States.

State and Local Government

In addition to the federal government, the 50 states and local county and city governments play an important role in taxing and regulating business activity within their respective jurisdictions.

For example, business activities within a state may be subject to the state's business and personal income tax, payroll tax, sales tax, value-added tax (VAT), franchise tax and other taxes. In addition, some local governments, such as counties and cities, may impose their own similar taxes. Note that if a business has sales or employees in more than one location, these state and local taxes generally will be prorated depending on the percentage of income, number of employees and other factors associated with each location.

Although US treaties may exempt some overseas companies from paying US federal taxes, the same treaties may not apply to similar state and local taxes.

Individual Tax Exposure

An employee of a non-US company who spends long periods of time in the United States may unwittingly establish US residency for personal tax purposes and may be subject personally to US federal, state and local income taxes.

Registration and Regulation

There is no such thing as a "US corporation." Instead, corporations in the United States are registered and organized in one of the 50 states. In addition to its legal formation in a particular state, a corporation that does business in more than one state may need to qualify or register to do business in other states if its activities establish "minimum contacts" for tax purposes in those states.

Like the laws of individual nations in the European Union, individual state laws apply to business transactions occurring in each state, unless these laws conflict with, or are superseded by, US federal law. For this reason, US businesses frequently must comply with separate federal, state and local regulations.

Antidumping Regulations

The US federal government prohibits unfair global competition by prohibiting non-US entities from selling products in the United States for unreasonably low prices. The usual test is whether the goods are being sold in the United States for less than they are sold for in the home market. If a company is found to be violating these regulations, US customs can impose additional duties on the imported goods.

Transfer Pricing Rules

The US federal government prohibits non-US entities from avoiding income tax on US-generated profits by overcharging their US subsidiaries for foreign-made products. In the event that this occurs, the US federal tax authorities will "readjust" the prices charged by the non-US entity to its wholly owned US subsidiary.

To avoid this readjustment, the non-US company should seek accounting and tax advice as to the proper establishment of a transfer pricing method with respect to the sale of products between the two commonly controlled entities and the proper documentation of its application of the selected method.

Before setting up a business entity within the United States, the non-US business is advised to seek professional legal and tax advice from US lawyers and tax advisers regarding the specific US federal, state and local tax and registration requirements that will apply to the proposed entity.

Intellectual Property

US businesses are very serious about protecting their patents, copyrights, trademarks and trade secrets. Merely having used a name or developed a product outside the United States does not give a company the right to use the name or sell the product in the United States. A non-US business expanding into the United States will first need to conduct due diligence to ensure that its proposed name and products do not infringe upon any existing intellectual property rights within the United States. Second, the non-US business will need to take steps to protect its own intellectual property rights in the United States.

When reserving the name of any new corporate entity, a company expanding into the United States should conduct a comprehensive trademark search to ensure that its business name and products do not violate existing trademark rights of another business or person. Similarly, the business should conduct patent and copyright searches to ensure that its products do not violate the rights of others.

In determining a strategy for protecting its own intellectual property while expanding operations into the United States, the non-US business should ask itself the following questions:

- What intellectual property does your business rely upon to distinguish itself in the marketplace?
- Which intellectual property assets have you already protected in your home country?

- What additional steps do you need to take to protect these intellectual property assets in the United States?
- Which of your intellectual property assets, if any, do you need to license to others to enable you to sell products in the United States?

Copyright

A copyright is a set of exclusive rights granted by the US federal government to the creator of an original work, fixed in tangible form.

Examples of US copyrights include literary works, musical compositions, dramatic works, motion pictures and sound recordings.

A US copyright must meet the following criteria:

- Must cover the **expression** of an idea – not the underlying idea
- Cannot be just **utilitarian**
- Must be an **original** work

Patent

A patent is a set of exclusive rights granted by the US federal government to the owner of an invention for a number of years in exchange for the owner's disclosure of the invention. In the United States, patents are issued only for new, useful and non-obvious inventions and must fall within one of the following statutory classes:

- **Utility patent**: a utility patent must be one of the following: a machine, a process, an article of manufacture or a composition of matter.

Examples of utility patents include the telephone, a new metal alloy, new tools or business methods.

- **Design patent**: a design patent is issued for a new design for articles of manufacture.

An example of a design patent would be a bicycle helmet.

- **Plant patent**: a plant patent is issued for certain distinct and new varieties of plants that can be duplicated through asexual reproduction.

Examples of plant patents includes a living plant organism, algae, macro fungi.

Trademarks and Service Marks

A mark is the use of words, a name, a symbol, a logo or a device by a company to identify and distinguish its goods and services from those of other companies. If the mark is used for goods, it is known as a trademark.

Examples of trademarks:

- **Words**: "Coca-Cola"
- **Symbol**: Nike's "swish"
- **Unique shape of product**: Coca-Cola bottle
- **Stylized text**: "IBM"

If the mark is used in connection with providing services, it is known as a service mark.

Examples of service marks include Visa or MileagePlus.

US trademarks and service marks generally must meet all of the following criteria:

- Must be **different** from prior marks
- Cannot be **generic**
- Cannot be **descriptive**
- Cannot be **immoral**

Trade Secrets and Confidential Information

A trade secret is business information that is maintained as confidential and is generally unknown to members of the public or other members of the same industry.

Examples of US trade secrets include designs and patterns, formulae, recipes, customer lists and business plans.

In the United States, the owner must maintain trade secret information as confidential. For example, it is advisable to require nondisclosure agreements from all employees, customers, contractors and others who are given access to information that is a trade secret of the business.

The non-US company should not assume that intellectual property legal advice obtained outside the United States is accurate or complete regarding the appropriate measures for protecting intellectual property within the United States. Instead, the non-US business is advised to seek professional advice from intellectual property lawyers in the United States about protecting the business' patents, trademarks, copyrights and trade secrets in the United States including the use of license agreements.

Employment Issues

Laws Prohibiting Discrimination

Some states – such as California – have "at will" employment laws that permit the employer or the employee to terminate the employment relationship with or without cause and with or without prior notice. However, these laws can be a trap for the unwary because numerous federal, state and local laws impose exceptions to the basic "at will" nature of the employment relationship.

For example, under US federal law it is illegal to discriminate against a qualified applicant or employee with respect to any term or condition of employment – including any decision to discipline an employee or terminate the employment relationship – based on certain employee characteristics such as race, skin color, national origin, ancestry, gender, pregnancy, childbirth or related medical conditions, age, religion, disability, marital status or veteran status.

As part of the prohibition against sex discrimination, federal law also prohibits sexual harassment against employees. Sexual harassment may occur if job continuance, benefits, promotions or other job-related matters are conditioned on the employee's providing sexual favors or if an employee is subjected to unwelcome sexual comments, touching or visual displays by a supervisor or co-worker that create a hostile work environment.

In addition to federal law, many states and local city governments have their own broader statutes prohibiting discrimination, harassment and other conduct that they consider to be against public policy.

In the United States, employees have the right to bring employment-related lawsuits in civil courts, and US civil juries have been known to award multimillion dollar verdicts against employers.

Employment Inquiries

The bellwether state of California regularly publishes useful materials including guidelines on what employers can – and cannot – lawfully ask job applicants and employees. These guidelines provide a useful overview of current California state law and may predict the future adoption of new laws by other states or the US federal government.

To access and download California's Employment Inquiries Fact Sheet (currently DFEH Form 161), visit the California Department of Fair Employment and Housing website at www.dfeh.ca.gov and click on "Pubs & Docs."

Wage and Hour Laws

Under US federal, state and local law, employers are required to adhere to strict laws and regulations regarding employee working conditions, such as maximum hours of work, compensation for hours worked, rest and meal breaks, and time and method of payment. Some state and local laws are stricter than US federal law and provide for harsher penalties.

For example, both US federal law and California law require all non-exempt employees to be paid overtime for all time worked in excess of 40 hours in a work week. California state law also generally requires (subject to various industry-specific exceptions) that all non-exempt employees be paid overtime for all time worked in excess of eight hours in a single workday or for the seventh consecutive day worked in a single work week.

Employee v. Independent Contractor

Some employers attempt to illegally circumvent the laws relating to employment by categorizing their employees as independent contractors. Incorrect classification of employees as independent contractors can expose the employer to civil penalties for failing to pay payroll taxes and unemployment insurance and for failing to provide benefits required by law.

The employer can be exposed to costly litigation by individuals who claim they are employees misclassified as independent contractors.

Employee Retirement Income Security Act (ERISA)

Providing employee benefits under US federal law (primarily ERISA) is quite different from providing employee benefits in Europe or elsewhere. Extremely complex and technical requirements apply in the United States, even to straightforward benefit arrangements that are common in other countries. These laws must be followed carefully to avoid unexpected income, penalty or payroll taxes for the employer as well as for employees. The requirements can make it difficult or even impossible for an employer to provide identical benefits to its employees working inside the United States compared with those working outside the United States.

If an employer has more than one US subsidiary, the benefits for all its US employees may have to be considered on a combined basis for certain purposes.

For example, a non-US parent company with two US subsidiaries must often combine the retirement plan benefits for employees of both subsidiaries to meet certain annual testing requirements. This may be the case even if the US subsidiaries are located in two different states and have unrelated business operations.

Additional complexities can occur when non-US employees transfer to the United States. Careful consideration must be given to the benefits structure for these employees to ensure that their US employment does not inadvertently cause either unexpected US tax consequences for the transferred employees or legal compliance problems for the benefit plans that cover the business' US employees.

By providing certain types of benefits to its US employees, an employer often assumes fiduciary responsibilities under US federal law. These responsibilities may be unfamiliar to a non-US employer. Further, in the United States both employees and former employees have the right to bring benefits-related lawsuits when they believe an employer has violated US federal legal requirements for employee benefits.

The non-US company would be ill-advised to simply adopt employment policies and practices in the United States in conformance with practices or requirements in its home country – even if the home-country laws are very strict. All employers are advised to seek professional advice from US employment lawyers and other human resources consultants regarding the adoption and maintenance of employment policies and practices in the United States.

Immigration

Many people traveling to the United States can avoid the need to obtain a visa under a 90-day visa waiver scheme provided by the US government under the terms of certain international bilateral treaties.

However, when an overseas visitor stays beyond 90 days or does more business in the United States than merely attending meetings, trainings or trade shows, he or she will be required to obtain a work visa.

US business visas include the following:

- **Business visitor** visa, for the visitor who is not eligible for the 90-day visa waiver or who will seek to stay beyond the 90 days (B-1).
- **Intercompany transferee** visa, for an employee transferring from a non-US company to another related company based in the United States (L-1).
- **Treaty traders and investors** visas, for people who seek to invest in the United States (E-1, E-2, EB-5).
- **Professional** visas, for people with particular professional qualifications (H-1B, H-2A/B, TN, O, P, Q, R).
- **Trainees** (J-1, H-3).
- **Students on practical training** (F-1).

The non-US company should obtain legal advice from a US immigration lawyer concerning the different characteristics and availability of each business visa.

Some types of business visa allow an employee to eventually apply for and acquire a permanent resident "green card," while others do not.

Some visas require annual renewal and some do not.

Some visas can be acquired for only a limited number of years, after which the businessperson must leave the United States.

The US government places restrictions on the number of particular types of business visas that it will issue in any one year.

The non-US company should carefully select the type of business visa to be obtained for each employee it seeks to bring into the United States based on long-term plans for the business and the specific employee. Non-US companies are cautioned that US legislation on immigration issues is constantly changing and regulations in effect today may change tomorrow. Given all of these considerations, overseas companies are advised to seek up-to-date advice from a US immigration lawyer before applying for any visa.

CFIUS Review

The Committee on Foreign Investment in the United States (CFIUS) is an entity consisting of representatives from 16 US government agencies, chaired by the United States Treasury Department, which reviews the US national security implications of acquisitions of US businesses by foreign entities. Generally, a CFIUS filing is relevant when a transaction results in the transfer of a controlling interest in a company – defined not solely as ownership of greater than 50 percent, but also circumstances in which the acquiring party secures effective control of the US business by means of a majority of board seats, the ability to transfer a majority of the acquired company's assets, or other similar "de facto" control. In addition, CFIUS filings are frequently recommended in circumstances where the business of the seller implicates national security considerations.

The CFIUS Process

CFIUS filings are typically jointly submitted by both buyer and seller. Prior to filing a voluntary notice, parties are required to consult with CFIUS and submit a draft notice to ensure that the review will proceed as efficiently as possible. Once a complete formal filing is submitted to Treasury, CFIUS is required to complete an initial review within 30 days. At the close of this initial period, Treasury may elect to clear the transaction, or extend the review to a 45-day "investigation" period. Extending a review to 45 days requires the preparation of a report on the transaction to the President of the US.

In recent years, 45-day investigations have become increasingly more common, due in part to a change in the rules that allows just a single member agency's objection to require an investigation. . Following the 45 day investigation, CFIUS must make a recommendation to the President, who then has another 15 days to either allow or block the transaction. Such action by the President is extremely rare as parties generally either enter into mitigation agreements to resolve CFIUS' concerns or simply abandon the transactions.

It is possible that a CFIUS filing may take a longer period of time to be reviewed. In the event that CFIUS is unable to complete its review within the initial 30 days, but does not wish to extend to the formal "investigation" process, it may allow the parties to withdraw the initial application and refile in order to restart the review clock. This practice typically occurs when there are questions related to the transaction, but CFIUS believes that they can be resolved without formal investigation. Amid a climate of increased focus on foreign investment into the US and enhanced Congressional awareness of the CFIUS process, CFIUS agencies, and the Treasury staff in particular, have adopted a more cautious approach to reviewing transactions that would have been considered "routine" in prior years. The heightened scrutiny of the CFIUS process has also resulted in an increased volume of applications, which has led to a larger number of reviews taking the full 30 days to complete.

Scope of the CFIUS Review

The central question for a CFIUS review is to identify any potential national security impacts of a proposed transaction. Accordingly, required disclosures typically include virtually all aspects of a contemplated transaction, including information about the current and anticipated future business operations of the target company (pre- and post-closing), terms of the deal structure, and information about the acquiring business or investors. Treasury also requires personal information about the directors, senior executives, and shareholders with 5 percent or greater ownership in the foreign acquirer. In some circumstances, CFIUS review has included similar requests for information with respect to entities that own 5 percent or greater of those shareholders (if they are corporate). The detailed information required from executives and investors (known as personal identifier information, or PII), is formally required by the regulations and must include biographical information (i.e., full name, date of birth, place of birth, Social Security Number (if applicable), nationality, national identity number (if a foreign national), passport number, information about any US visas held by the foreign national and any prior military or government service of each individual).

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How Can We Help?

We hope that you have found this guide informative and that you now have an overview of the general guidelines in 2013 surrounding doing business in the United States. We have explained that more detailed information may on occasion be required and we are here to assist when you need our advice.

Squire Sanders is a full service law firm with offices across the United States. Squire Sanders has one of the strongest integrated global platforms. With our longstanding "one-firm firm" philosophy, Squire Sanders provides seamless legal counsel worldwide. Ranked among the top 10 global law firms by Law 360 for having the largest global presence and being involved in the biggest, most complex and most diverse array of cross-border matters over the past year.

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