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Womble Bond Dickinson's

Legal Guide to Starting a Business in the United States

Introduction

Starting a business in the United States can open doors for massive opportunity and success. Along the way, however, businesses will encounter a number of legal and regulatory hurdles.

This "Guide to Starting Business in the U.S." reflects the incalculable number of personal, legislative, health and safety and business changes that have resulted from the COVID-19 pandemic. While many of the fundamental components of starting a business in the United States have not changed (e.g., choice of entity, entity formation and registering IP), a multitude of policies, protocols and legislative changes have impacted various practical, financial and risk considerations international businesses must consider when starting a business in the U.S. (e.g., immigration, tax, employment, privacy and security and economic incentives for certain industries).

While COVID-19 has resulted in a significant number of changes to doing business in the U.S. and disruption in everyone's business and personal lives, as of this writing in May 2021, we are seeing what we hope is a substantial recovery and significant opportunity in Q3/Q4 of 2021 and in 2022.

To help guide you along this journey, lawyers from across Womble Bond Dickinson's multidisciplinary global business team have developed this comprehensive guide.

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Entry into the U.S. Market

The United States is one of the easiest countries to start a business and is a very open market. There is no requirement that a U.S. citizen own any equity in the U.S. entity or be an officer, manager or director.

There are generally few restrictions on foreign investment in the U.S. and the vast majority of foreign investors are subject to the same restrictions as U.S. investors. The limited (but important) exception to this rule are investments that may implicate U.S. national security concerns. The U.S. has established an interagency committee named the "Committee on Foreign Investment in the United States" (CFIUS), which is tasked with reviewing foreign investment in critical technologies or infrastructure or businesses collecting sensitive personal data of U.S. citizens. There are also restrictions on purchasing or leasing real property near certain ports or sensitive facilities. If a transaction falls (or might fall) under CFIUS's jurisdiction, the parties must, among other things, submit a declaration or notice to CFIUS for review and approval of the transaction.

While there are a number of additional factors and details to consider if a transaction is subject to CFIUS's review and approval that are beyond the scope of this outline, it is important to point out CFIUS's jurisdiction covers not only transactions in the defense, aerospace, telecommunications and energy sectors but also sectors such as cyber security, critical supply chain (e.g., food and medical supplies), personal data collection (e.g., TikTok), critical infrastructure (e.g., medical supplies and semiconductors) and others designated by CFIUS. Given the above, as well as the number of cyber security and supply chain vulnerabilities exposed during the COVID-19 pandemic, it is expected that the number of transactions subject to CFIUS and other governmental agencies will increase in the future, which will almost certainly give rise to increased enforcement and litigation.

Your entry into the U.S. may involve a merger with an existing U.S. business or the purchase of the assets or equity of an existing U.S. business. The cross-border mergers and acquisitions (M&A) process can range from massively complex to relatively straightforward. The details of what that process may involve are beyond the scope of this outline, but these are some high-level issues to keep in mind:

- M&A transactions in the U.S. typically involve multiple advisors (e.g., lawyers, tax advisors and investment bankers/financial advisors/brokers);
- Transactions are usually heavily negotiated and involve a significant amount of diligence and back-and-forth among the various parties, advisors, stakeholders and counsel;
- State and federal regulations may come into play depending on the size and/or nature of the transaction;
- Litigation and post-closing disputes are considered to be more common in the U.S. than most other countries;
- The M&A process (from the beginning of diligence to closing) can take several months (this is especially the case during COVID-19 and/or if third-party financing is expected);
- Acquiring a distressed or bankrupt target adds additional complexity to an M&A process; and
- The post-closing integration and transition process can oftentimes be just as important and time consuming as the deal itself.

In addition, if the foreign investor or U.S. target is (or was) participating in a COVI9-19 related entitlement, stimulus or government entitlement program (e.g., the Paycheck Protection Program (PPP)), it is important to understand if and how a M&A transaction may impact those benefits. For instance, many U.S. and foreign programs are based on various size standards (e.g., the number of global employees or total global revenue) or government loans and grants, any of which could be impacted by an M&A transaction.

Finally, if an M&A transaction or investment involves a transfer of assets or equity with a value of more than $92 million (as of 2021) and either party satisfies the "size-of-person" test of having either at least $184 million (as of 2021) in annual net sales or total assets or $18.4 million (as of 2021) in total assets, the parties should consider whether a Hart-Scott-Rodino (HSR) filing is required prior to closing the transaction.

Determination of U.S. Business Model

Many of the factors to be considered in starting your U.S. operations depend on your business model. Your business model may involve:

- Relationships with U.S. vendors, contract manufacturers, logistics providers and other supply chain partners;
- Office, manufacturing, warehouse and/or sales locations in the U.S.;
- E-commerce activities;
- Direct sales and services to U.S. customers; and/or
- Sales to U.S. customers through third-party intermediaries such as agents and distributors.

Ownership Structure and Choice of U.S. Entity

Prior to 2021, the primary factor when deciding upon a U.S. subsidiary's ownership structure and choice of entity was determining the most tax efficient structure. However, with the passage of the Corporate Transparency Act ("CTA") on January 1, 2021, foreign investors must now consider under what circumstances the "personally identifiable information" of its "beneficial owners" may have to be provided to the U.S. government and whether providing such information is an issue for the foreign investor (and its ownership group). While the CTA is U.S. law, the earliest any disclosure will be required is January 1, 2022, which is the deadline for the U.S. government to provide guidance on the details surrounding the implementation of the legislation. Beginning on that date, there will be different disclosure requirements for new and existing U.S. entities owned by foreign investors. It is expected that the disclosures will be a condition to forming a new entity and existing entities will have two years to make the disclosures.

The CTA is meant to combat the use of shell companies by foreign investors to evade anti-money laundering and other laws. While the disclosures will not be public (unlike many foreign jurisdictions), the U.S. government will be permitted to share information with U.S. states and agencies, many foreign governments and, subject to the entity's consent, lenders and other financial institutions.

Assuming the CTA is less of a concern or, more likely, evaluated to be a new "cost of doing business" in the U.S., it will often be most advantageous for tax, liability, commercial and other reasons to form a separate U.S. entity (typically a wholly-owned subsidiary of a foreign parent). Conducting business in the U.S. without forming a separate U.S. entity may result in the creation of a "branch office" in the U.S., and the foreign parent will, among other things, be subject to U.S. federal and state tax jurisdictions and be required to file U.S. tax returns. For foreign owners concerned about CTA disclosures, the creation of "branch offices" or other entities outside the scope of the CTA (this is still to be determined but could include limited partnership, limited liability limited partnerships or trusts), the benefit of not having to make the required disclosures may outweigh the tax impact of not forming a new U.S. entity.

The two initial "choice of entity" decisions are (1) what type of legal entity to form; and (2) in what state to form the entity. These decisions, as well as international tax planning and bilateral investment treaty structuring issues, should be made with the advice of your U.S. lawyers, your U.S. accounting firm and your parent company tax advisors.

- A C corporation (or C-corp) is the most common entity type for foreign ownership, particularly for enterprises that wish to better insulate their non-U.S. activities from U.S. taxation, but other possibilities exist.
- You may form your legal entity in any U.S. state. The state of formation may be entirely different from the state(s) in which your U.S. entity will conduct business. Your legal entity will be governed by the laws of the state where it is formed. Delaware is a common choice for state of formation because Delaware has well- developed corporate laws and favorable treatment of business entities.
- The name selected for your legal entity, if intended to be used in a public-facing manner, should be cleared to confirm it does not infringe on the rights of other parties. See the U.S. trademark discussion in this guide for more information on this topic.

Your U.S. legal entity will be established by filing documents in the state of formation and paying a filing fee.

Initial Entity Setup Tasks

For your U.S. entity to be ready to commence operations, you will also need to:

- Determine your accounting year end.
- Obtain a Federal Employer Identification Number (FEIN) from the Internal Revenue Service. Your U.S. entity will need a FEIN to establish a U.S. bank account.
- Obtain any appropriate state and/or local tax identification numbers, in consultation with a U.S. multistate tax advisor.
- Open a U.S. bank account. Among other requirements to open a U.S. bank account, your U.S. entity will need to have a U.S. physical address and a FEIN and complete certain "Know Your Customer" (KYC) requirements.
- Prepare additional governing documents such as organizational consents and bylaws for a corporation or an operating agreement for a limited liability company.
- Qualify to do business in states in which you will conduct business. We can help you determine the states in which qualification is necessary, based primarily on the business activities that you will conduct in certain state(s) and multistate tax considerations. You will qualify by filing documents in those states and paying filing fees.
- Determine what insurance is necessary to protect the business and its assets, workforce and executive team, officers and/or board of directors.
- Obtain any required business licenses and permits.
- Capitalize the U.S. entity. Some states require a certain minimum paid-in capital. Delaware does not have a capital requirement. You may decide to capitalize your U.S. entity with equity and/or debt.

As mentioned above, 2022 is the earliest any "personally identifiable information" of a U.S. entity's "beneficial owners" is required to be submitted to the U.S. government.

Tax

Preparation for U.S. Tax Compliance

Your U.S. operations likely will be subject to federal U.S. income tax, as well as state and local taxes. Most states have many different types of taxes, some of which are industry-specific, but many of which generally apply to all industries, such as income, gross receipts, franchise/net worth, sales and use, payroll and property taxes.

State and local taxes are generally not covered by, or preempted by, international tax treaties. Income and sales/use tax compliance can be particularly complex, requiring careful planning. This will typically include consideration of the taxes imposed by multiple states and local jurisdictions.

It is important that you understand the tax implications of transacting multistate or multijurisdictional business. The types and amounts of taxes to which the U.S. entity will become subject, and the number of jurisdictions with authority to impose those taxes, will be dictated in large part by how and where the U.S. entity chooses to own or lease property, employ workers (employees and independent contractors), store assets and sell goods and services.

You will need to review anticipated intercompany transactions to determine withholding tax and transfer pricing considerations.

In addition to considering tax liabilities, businesses entering the U.S. market should also consider if they are eligible for any tax credits, tax exemptions or other tax or financial incentives specific to their business sector, location or employees. Some of the more common credits include:

- Foreign tax credits;
- Research and Development (R&D) tax credits (the scope of these credits are quite broad and can be significant);

- Family and sick leave tax credits related to the COVID-19 pandemic under the Families First Medical Leave Act (as of this writing, these are only available through September 30, 2021);
- Employee retention tax credits (extended through December 31, 2021);
- Paid family and medical leave credits for certain family and medical leave benefits to employees (extended through December 31, 2025);
- State tax credits or cash grants for job creation and investments;
- Property tax abatements, credits and other incentives offered by local governments;
- Economic development incentives offered by utility providers, ports authorities or other potential stakeholders;
- Work Opportunity Tax Credits (extended through December 31, 2025);
- Empowerment zone credits (for investing in certain communities) (extended through December 31, 2025);
- Opportunity zone credits (similar concept to empowerment zone credits but less generous and a wider number of communities are eligible);
- New Markets Tax Credits (similar to empowerment and opportunity zone credits but subject to annual renewals from Congress) (extended through December 31, 2025);
- Section 179D energy efficient commercial building deduction (permanent and will not expire);
- Second generation biofuel producer credits (extended through December 31, 2021);
- Biodiesel and renewable diesel fuels credits;
- Nonbusiness energy property credit (extended through December 31, 2021)
- Orphan drug tax credits;
- Renewable energy and green technology investment credits and incentives (credit phase outs and construction deadlines extended by at least one year and longer in some instances (e.g., offshore wind));
- Various energy efficient, alternative motor vehicle and fuel efficient credits (several of these credits extended through December 31, 2021); and
- Agricultural chemicals security credits.

Withholding requirements may apply to dividends and distributions to the foreign parent company.

In consultation with your U.S. accounting firm, we can help you determine your tax compliance obligations and processes.

Consideration of Available Incentives

Depending on the scope and types of your anticipated U.S. business activities, you may be eligible for tax, cash grant and/or other incentives in connection with establishing U.S. operations.

Various incentives and related issues to consider include:

- If you will engage in a real estate site selection process, as you begin that process, determine if economic development incentives may be available to support your project. It is important that this analysis happens before your real estate site selection process is complete. Ideally, the analysis begins when your real estate site selection process is still underway in more than one state in the U.S.;
- Based on your anticipated capital investment in your project within the first five years and the estimated number of new full time jobs you expect to create at your new location within the first five years, financial incentives may be available to support your project at both the local and state level in the states where you are considering locating;
- The value of these incentives may be significant, so it is important to engage in this process early in the site selection process; and
- The incentives may come in the form of cash grants, significantly reduced property taxes on both real and personal property, credits for certain employee-related taxes, grants to support certain infrastructure improvements at the site, reductions in utility costs and other financial incentives.

Real Property Considerations

The disposition of a U.S. real property interest by a foreign person (the transferor) is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding. Therefore, when a foreign person sells or transfers U.S. real estate, there are additional IRS processes and procedures the parties must go through to ensure tax compliance.

In any FIRPTA transaction you must plan ahead. Generally, the buyer holds the cards. When FIRPTA is involved, it can delay the sale due to the time it can take to secure the withholding certificate. Unless the seller is able to obtain a withholding certificate, the US government will require that 15% of the sale price is withheld, which is why it is so important. In most cases, the transferee/buyer is the withholding agent. If you are the transferee/buyer, you must find out if the transferor is a foreign person. If the transferor is a foreign person and you fail to withhold, you may be held liable for the tax. There are other filing considerations, from the application of IRS forms to timely filing strategies. However, with proper planning and obtaining the necessary withholding certificate, the tax impact can be minimized.

Employment / Immigration

Consideration of Employment and Immigration Needs

Employment

Employment laws in the U.S. may differ significantly from employment laws in your home jurisdiction. Employment laws in the U.S. are highly technical and cover such activities as recruiting, interviewing, hiring, background checks, compensation, employee benefits, anti-discrimination and termination. Employment in the U.S. is governed not only by federal law, but also by state and local law. You will need to become familiar with these laws and develop practices and procedures to comply with U.S. employment laws.

A key issue almost all international businesses are grappling with during the COVID-19 pandemic is where their international employees will work and, if the employee is expected to move to the U.S., how best to transfer those employees. Generally, compensation paid to employees working outside the U.S. for services performed in the U.S. is subject to U.S. payroll tax. Advance consideration should be given to how these arrangements are structured to ensure they are in compliance with U.S. and local tax laws.

An additional consideration for employers participating in any COVID-19 entitlement, stimulus or other government assistance program is determining (1) when a particular employee might be eligible to participate in a program; and (2) when an employer can "count" a particular person as an employee under a specific program.

When hiring individuals for a U.S. entity, you should consider:

- What benefits the company will offer to employees (e.g., health, dental, vision and 401k);
- Creating an employee handbook that contains the employment policies applicable to your U.S. employees;
- Providing onboarding procedures and documents to all employees;
- Providing employment agreements to key executives;
- Creating a standard offer letter for employees other than key executives;
- Requiring employees to enter into non-disclosure and/or non-compete and IP assignment agreements at the outset of employment;
- Evaluating the income, franchise, sales/use, payroll and other tax implications of having employees work within a particular U.S. jurisdiction;
- Determining those employees who qualify as "exempt" from overtime and/or minimum wage requirements;
- Ensuring the company's executive and HR teams have an adequate understanding of state and federal wage and hour, health and safety, workers' compensation and family and medical leave laws; and
- If hiring an international employee to either work in the U.S. or work remotely overseas for a U.S. entity, determine how best to structure the arrangement from an employment and tax perspective.

If you decide to utilize independent contractors, you must be careful to correctly classify individuals as independent contractors rather than "employees." It is also important that you put an independent contractor agreement in place to reflect that relationship.

In some situations, seconding an employee for a short period of time from a foreign entity to the U.S. entity may be an option to consider as well.

Some of the more difficult issues many employers and employees have had to face as a result of the COVID-19 pandemic have been related to terminating or furloughing employees, reductions in force, reducing hours or wages and navigating the various unemployment (and shared-work) programs. While these issues are beyond the scope of this guide, it is worth mentioning the federal and state regulations and guidance have changed significantly since early 2020. Given how complex and sensitive these issues may be for both employers and employees, we generally recommend working with legal counsel before taking any of the above actions.

Immigration

COVID-19's greatest impact has been the restrictions the virus has placed on the actions and movement of people. This is the case for individuals and businesses around the globe. Since early 2020, thousands of travelers and expatriates have been stranded overseas, waiting for various immigration or travel restrictions to be lifted. In addition to cross-border restrictions, there have also been local quarantining rules in certain U.S. states during COVID-19 peaks.

As of this writing in March 2021, most of the blanket travel restrictions have been lifted (most notably the "Immigrant Visa Ban" imposed in early 2020), but there remain a number of restrictions on entry and exit to/from the U.S.

In addition, there remains a significant backlog of visa applications with the U.S. immigration office, which has added further delays to the visa application and approval process.

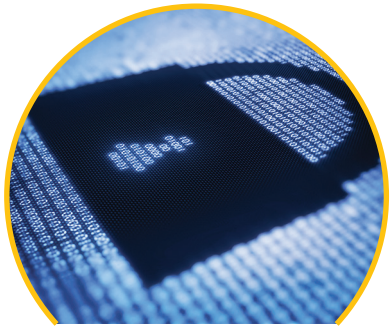
Assuming the above restrictions are not applicable or are lifted in the future, a number of visa options exist under U.S. immigration law. The best option may depend on a number of factors including, but not limited to: timing, availability, job type and employee education and experience.

Subject to the above-mentioned travel restrictions or any other COVID-19 related restrictions then in place, prior to establishing a presence in the U.S., certain employees of the foreign parent company may enter the U.S. as business visitors to explore investment opportunities, attend conferences and seminars, negotiate contracts and disputes and to observe activities at a related company. It is notable to observe, however, the important but elusive distinction between employment, which is not allowed, and doing business on behalf of a foreign employer, which is allowed.

When determining whether to employ a foreign national worker in the U.S.:

- Confirm which COVID-19 restrictions may be in place and how those might impact the employer and the employee and his/her family members (to the extent they will move to the U.S.).
- Ensure the position offered to the employee meets immigration law requirements.
- Determine a reasonable start date, with contingencies in the event a visa application is delayed or COVID-19 restrictions are in place in the U.S. or the employee's home country.
- Understand the short- and long-term immigration benefits available to the foreign national employee and his/her family members.
- Acknowledge that the best immigration strategy may not always be the fastest, especially in the current environment.
- Allow immigration counsel to coordinate directly with the foreign national employee.
- Maintain required immigration records to ensure compliance with U.S. immigration laws.

Intellectual Property Matters



IP and Data Privacy Considerations

You will need to consider how your U.S. operations, manufacturing (if applicable), and sales may affect intellectual property rights of third parties and how your own intellectual property rights, including patents, copyrights and trade secrets, can be protected in the U.S. We can assist you with developing and implementing a U.S. strategy to evaluate intellectual property landscapes of third-party rights relevant to your industry/products/services and protect/enforce your intellectual property rights.

Distinct from many countries where personal data is governed by a single, comprehensive data protection law, the U.S. has a patchwork of state and federal laws that govern the privacy and security of personal information throughout the lifecycle of data processing, including: collection, use, disclosure, retention and destruction. Many federal privacy laws are sector-specific yet requirements may vary by data type, even within a given industry. In addition, since the passage of the General Data Protection Regulation (GDPR) in the European Union, many U.S. states, including California, Virginia and Nevada, have been increasingly focused on consumer data rights and regulating information treatment by companies. Other states are already following this trend with proposed legislation. Nonetheless, on the whole, U.S. data management laws can be less restrictive than those of other countries, which may allow you to utilize more analytics, expand your marketing, and increase profits. You will need to identify the data types relevant to your company (e.g., employee data, health or biometric data, payment card information or consumer or customer data) in order to determine your compliance obligations, which, in turn, may influence business strategy.

Issues to consider include:

- Whether special state law requirements apply to a U.S. website and those requirements should be addressed in both the online privacy policy and the website's terms of use;
- Whether you will use the same website accessible all over the world or creating separate sites for the U.S. and other countries and regions;
- Whether you plan on treating customers or consumers differently across jurisdictions to address the varied regulatory requirements (note also that distinctions may apply post-Brexit under the UK GDPR in addition to cross-border transfer considerations under the EU GDPR);
- Whether you will enter into any outsourcing arrangements to assist with compliance to help balance risk and delegate obligations to specialized service providers. For example, websites with ecommerce functionality entail more regulation and complexity, leading many online retailers and service providers to retain a third-party payment platform vendor to handle transactions; and
- What protective language should be added to contracts with vendors who handle certain transactions and/or personal data.

In addition, all U.S. states and most U.S. territories have data breach notice laws with a wide range of notification requirements. Many state laws also include minimum data security requirements for protecting personal data. Consequently, information security and data exposing incidents must be treated seriously to minimize reputational damage, regulatory enforcement and associated loss and liabilities.

Our privacy and cybersecurity team can assist you in identifying legal risk and requirements related to your data processing activities and help you implement a compliance strategy to reduce exposure while optimizing the value and use of your company's data assets.

U.S. Trademark Registration

You may desire to file U.S. trademark registrations for marks that are registered in foreign jurisdictions and/or other marks that you will use in connection with your U.S. operations.

- A trademark registration in the U.S. helps to protect your trademark rights when doing business in the U.S. and confers exclusive rights in the particular mark nationwide, meaning that third parties will be unable to start using your mark on similar goods or services after your registration.

- Conduct a trademark clearance search for your company name and proposed product and service brands. A search will reveal potential conflicts with existing U.S. marks and allow you to develop a strategy in advance regarding selection of and protection for your marks for use in association with your goods/services. U.S. law also recognizes common law trademark rights (i.e., rights without a registration). A comprehensive trademark clearance search can also help show any use of unregistered marks that may conflict with the use of your marks.
- You may file a trademark application before you have sales of products or services within the U.S. We recommend filing early to reserve your rights in the trademarks that will be used within the U.S. By filing early, your mark may be protected even before you enter the U.S. market.

Consider setting up a watch service for your core brands so that you can be aware in advance of any third parties using or attempting to use or register confusingly similar marks.

U.S. Import / Export and Security Compliance

In the U.S., the Department of Homeland Security (DHS) administers and enforces customs laws and regulations primarily through the U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). CBP and ICE enforce various laws restricting the importation of goods, collecting duty and tariff revenue, protecting the public health and enforcing specific product restrictions, anti-dumping laws, quotas and country of origin representations.

U.S. International Traffic in Arms Regulations (ITAR) require a license or other authorization for exports from the U.S. and the transfer to foreign persons of defense articles and related technology and defense services. U.S. persons and entities involved in manufacturing or exporting items subject to ITAR must register with the Department of State. Non-defense items of U.S. origin, not subject to the ITAR, are controlled under the Export Administration Regulations (EAR). Disclosure of technical data subject to ITAR or EAR to a foreign person, through visual inspection or otherwise, even if the foreign person is in the U.S., is considered a deemed export to the foreign person's country of permanent residence or nationality.

In addition, if your U.S. business will be involved in work for the U.S. government, various government procurement issues may be raised. Substantial security clearances may be required for a foreign-owned business to engage in Department of Defense or other federal work. In addition, in certain circumstances, the U.S. government's view of the foreign owner(s) from a national security standpoint can eliminate or restrict opportunities to obtain government contracts.

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Womble Bond Dickinson's Global Business and Cross-Border Capabilities

Internationally based businesses coming to the United States require experienced American legal representation. Our attorneys have strong, long-lasting relationships with key prospective American business partners and governmental agencies. With relevant industry knowledge and well-developed practice groups in areas integral to establishing and managing a business abroad, Womble Bond Dickinson helps international businesses find the connections and partners they need to succeed in the American market. Our Global Business lawyers are adept at working with foreign counsel to understand and interpret foreign legal requirements for United States based clients, as well as in explaining American legal requirements to foreign entities doing business in the United States, making investments, or interfacing with United States federal, state or local governments. We provide practical guidance on bridging the divide between different business and legal cultures. Understanding and respecting differing cultures defines our approach to cross-border matters.

Learn more.