Guide to Establishing a Business in the United States

WILLIAMS MULLEN

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Introduction

The United States is the most dynamic market in the world, with a free market system that affords almost unrestricted access to foreign companies looking to conduct business here. It has favorable employment, tax and trade laws. It has a reliable legal system which provides a sound foundation for foreign companies to sell products and services, raise capital, locate strategic partners, conduct mergers and acquisitions, and undertake public offerings. As a major technology center, it presents unrivaled opportunities for companies in the computer, software, telecommunications, media, e-commerce, biotech and other industries.

The US market offers particularly strong opportunities for European companies because of similarities in language, commercial and legal systems, Europe's close geographic proximity to the eastern United States, and the US demand for technology products and services. Long-standing cultural and commercial ties account for a strong history of successful commercial relationships between the United States and Europe.

This Guide provides an introduction to the major business and legal issues European companies should consider when seeking to establish business operations in the United States. It is intended as a starting point for planning, but is not intended as a definitive analysis of the issues discussed. The particular issues that will be of most concern to each foreign company entering the US market will be determined by the nature of its business and other facts and circumstances affecting that company. It is impossible to predict all issues that will affect each company or to determine those that will be material enough to warrant the engagement of professional assistance. This Guide attempts, however, to highlight a number of areas that are common to foreign companies commencing business in the United States and, hopefully, will encourage companies to reflect on their unique situation.

If you have questions about the topics discussed, we would be pleased to provide additional information and you are invited to contact the attorneys at Williams Mullen. We welcome you to our country and wish you prosperity and success in your business here.

This Guide is not intended to act as legal advice on the matters discussed herein. This Guide provides general guidance on the laws discussed herein and those laws may vary from state to state. Readers are advised to consult their advisors to obtain specific advice tailored to the facts and circumstances affecting the particular reader.

Preliminary Planning Considerations

Part 1

Choice of Entity For Conducting Business In The United States

One of the most important considerations for a foreign entity establishing a business in the United States is the selection of the form of business entity. There are numerous types of entities used by foreign companies to conduct business in the United States, including corporations, limited liability companies ("LLCs"), partnerships and limited partnerships. A variety of considerations must be addressed in making this determination, including the organizational structure of any existing business, tax concerns and the type of activity that the European investor intends to pursue in the United States.

Given the litigious nature of US society and the willingness of US courts to render damage awards substantially higher than those awarded in Europe, it is advisable for a foreign company to take steps to insulate itself from liabilities that might arise in the United States. To achieve this goal, we generally recommend, among other things, that foreign companies conduct their operations in the United States through subsidiaries which have limited liability such as corporations or limited liability companies. With such entities, most liabilities which are incurred in the United States may be contained at the US entity level so that they do not pass to a parent or affiliated company. The following are answers to frequently asked questions about entity formation.

Do I need to incorporate a new company in the United States? No. Incorporation is not required. It is possible for a foreign corporation to conduct business in the United States without incorporating a new US entity. Most states permit a foreign corporation (which includes corporations, LLCs and partnerships from other states and other countries) to file documentation that will qualify that foreign corporation to conduct business in the state. Such a structure, however, is not customarily recommended from a practical perspective. Many business people in the United States may not be familiar

with the form of the foreign corporation, the means by which actions of the foreign corporation are authorized, and the authority and titles of representatives of the foreign company. This may result in the foreign corporation having to provide additional documentation from its home country or additional legal comfort in connection with relatively simple actions like the opening of bank accounts or the execution of documents.

If I choose to create a subsidiary in the United States, what is the most common form of entity? The corporation is the most common form of business entity in the United States. It has a separate legal existence from its shareholders and provides limited liability for investors. Unlike many European countries, there is no distinction at the time of incorporation between private companies and public companies.

What documents are required to create a corporation? Corporations are formed by filing on a state-by-state basis. In general, a corporation is formed by the filing of Articles of Incorporation with a state's Secretary of State or Corporation Commission (the "Commission"). The Articles are similar to the initial corporate filings made by European companies and usually must set forth:

a) the corporate name of the corporation;
b) the number of shares the corporation is authorized to issue;
c) if there is more than one class of shares authorized, the number of authorized shares of each class and any distinguishing designation for each class;
d) the address of the corporation's initial registered office (which is the location at which official documents may be served on the corporation); and
e) the name of its initial registered agent at that office, who must be resident in the state where incorporation is taking place and either a director of the corporation, a member of the bar or a business entity authorized to transact business in that state.

The organizers of a corporation are free to include in the Articles other provisions relating to the corporation, such as the identification of the initial directors, any preemptive rights applicable to the shareholders and other matters which are normally included in the Bylaws. As a general rule, most corporations only include in their Articles of Incorporation the information required by applicable law.

What other actions are required to organize the company? Following the filing of the Articles, an organizational meeting must be held at which the board of directors is elected and the Bylaws adopted. This meeting need not take place in the state of incorporation. The Bylaws are substantially similar to the statute or articles of association adopted by a European company and provide for, among other matters, the conduct of meetings of shareholders and the board of directors, preemptive rights and the duties and obligations of the board of directors and the officers. We would be happy to provide an example of typical Bylaws for a corporation upon request.

Do I need to disclose a lot of information about the US company and its financial position? In many states, a corporation may have a single shareholder and there is generally no obligation to disclose the identity of any shareholder in a privately held company. Usually, there is no minimum capital requirement that must be met with respect to a corporation. In most states, a corporation is required to file an annual report with the Commission which discloses the current officers and directors and the location of the registered office. No financial information or information regarding shareholders need be disclosed in the annual report.

How is the management of a US company handled? The internal management structure of a typical corporation is slightly different than European companies. A corporation is typically managed by a board of directors and officers. The board of directors has the responsibility of managing and overseeing the company's business. Ultimately, the power of management and control rests with the board. In many states it is possible to have a single director, although most companies traditionally appoint more than one. The board selects corporate officers to execute the decisions of the board and to conduct

the business on a day-to-day basis. Traditional officers are a president, one or more vice presidents, a secretary and a treasurer, although all of those positions need not be filled. Frequently, the officers also serve on the board of directors.

What role does a registered agent serve for a corporation? A registered agent and the registered office of a corporation provide other parties with an officially listed person and an address that can be used for the purpose of serving certain documents on the corporation, such as documents summoning the corporation to appear for litigation or requesting that the corporation submit its annual report to the state. The role of registered agent is frequently fulfilled by a law firm appointed by the corporation.

What other forms of entity are available to me? Besides corporations, many states' laws permit the organization of limited liability companies ("LLCs"), general partnerships and limited partnerships.

What are the advantages of forming an LLC, rather than a corporation? The limited liability company combines the attributes of a corporation and a partnership. LLCs have become popular as investment vehicles, particularly in the "new economy" sectors such as IT, technology, telecom and biotech. An LLC is normally structured like a general partnership, but unlike a partnership its members have limited liability. In a general partnership the partners have unlimited liability. Corporations do not have "flowthrough" tax treatment and hence are required to file tax returns and pay tax on income which is then taxed again in the hands of the investors. LLCs, on the other hand, have "flowthrough" tax treatment and while they file income tax returns, they do not pay tax in their own name. Investors in LLCs must file income tax returns in the United States and pay tax based on their share of the LLC's income. Since most foreign companies do not want to file tax returns in the United States, this may make the LLC less attractive than a corporation.

What documents are required to form an LLC?

In order to organize an LLC, Articles of Organization must be filed with the Commission setting forth:

a) the name of the LLC;
b) the address of the LLC's registered office and the name of its initial registered agent; and
c) the post office address of the principal office of the LLC, which generally need not be in the state of organization.

The main document governing the rights and obligations of the members of an LLC is the Operating Agreement. The Operating Agreement does not need to be filed with the Commission. This document is substantially similar to the partnership agreement of a general partnership and covers areas such as:

a) the admission of new members;
b) the implications of defaults by members;
c) preemptive rights with respect to the issuance of additional membership interests;
d) the expulsion of members;
e) pre-emptive rights and put and call rights upon the sale of membership interests;
f) the division of profits and losses;
g) decision making among the members; and
h) the authority of the managing member or non-member manager.

What other restrictions affect an LLC?

Generally, there is no limitation on the number of members in an LLC and it is possible to have a single member LLC. In many states, the law does not require the public disclosure of the identity of the members of an LLC, and there are no requirements for a minimum amount of capital or that the capital be contributed prior to commencement of business. The management of an LLC is performed either by one or more members (a "member managed LLC") or a non-member manager (a "manager managed LLC"). The managing member exercises authority that is broadly similar to the managing partner in a general partnership.

What filings are required to create a general partnership? In many states, no filing is necessary in order to create a partnership, because this can be achieved by oral agreement. A filing must usually be made with the Commission if a partnership wishes to transact business under an assumed name. Due to the concerns of foreign investors to limit the liability arising from their US operations, it is unlikely that a foreign corporation will want to organize a general partnership or a limited partnership as its US subsidiary. The rights and obligations of the partners in a general partnership are substantially similar to those of an English or Scottish partnership. A partnership is viewed under most states' laws as a separate legal entity distinct from its members and there is no restriction on the number of partners.

What filings are required to create a limited partnership? Under most states' laws, a limited partnership is treated as a separate legal entity, distinct from its members and is created by the filing of a certificate of limited partnership with the Commission. This filing does not need to disclose the names of each limited partner although that information must be maintained at the registered office of the partnership. The rights and obligations of the partners in a limited partnership are similar to those of a UK limited partnership. Those limited partners that are not active in the business are afforded limited liability, whereas the general partners face unlimited liability. The general partner may be a corporation.

Am I required to create a corporation in a particular state, for example, the state where I intend to conduct most of my business? Corporations and LLCs can be formed under the laws of any of the 50 states. Many corporations are formed in Delaware. Since a large number of Fortune 500 companies are registered in Delaware, the Delaware courts have been called upon frequently to interpret the corporate laws of that state. This frequent review has provided a comprehensive and well-developed set of corporate laws. In addition, many corporations have benefited from the Delaware Chancery Court, which has provided a quick and effective forum for hearing disputes involving corporate entities. It should be noted that many other states have followed many of the interpretations and developments pioneered under

Delaware law and have adopted many similar laws, including many of the pro-management provisions adopted in Delaware. A corporation formed under the law of one state may establish its principal office and conduct substantially all of its business in other states. If a corporation is formed in one state (e.g., Delaware) and has offices in another location (e.g., Virginia) the corporation must file a short registration in the state where it conducts business called, a "Qualification to Conduct Business as a Foreign Corporation." It is usually most practical to incorporate in the state in which you will be conducting most of your business.

The foregoing is not intended to be a comprehensive review of all factors material to a foreign investor's choice of business organization. The decision will depend in large part upon the type of business to be conducted in the United States, the strategic plan that the investor is attempting to execute, the state or location in which the business will be conducted, and an appreciation of how the US entity will fit into the investor's larger organization. It is recommended that a detailed review be conducted with professional advisors with respect to the selection of the entity.

Entity Selection Summary

	General Partnership	Limited Partnership	Corporation	LLC
Legal Status	Separate legal entity	Separate legal entity	Separate legal entity	Separate legal entity
Liability of Members	Unlimited liability for all partners	General Partners have unlimited liability. Limited partners have limited liability	Limited liability	Limited liability
Disclosure of Identity of Member	No disclosure	Limited partners usually do not need to be disclosed in filing with the Commission	No disclosure	No disclosure
Formation Requirements	No filing required. Few other documentary formalities	Limited Partnership generally must be registered by filing a certificate with the Commission	Incorporated by filing Articles of Incorporation with the Commission	Organized by filing Certificate of Formation with the Commission
Appointment of Registered Agent	No	Yes	Yes	Yes
Number of Members	Minimum of two persons; No maximum	Minimum of two persons; No maximum	Sole shareholder possible; No maximum	Single members possible; No maximum
Tax Treatment	Tax transparent	Tax transparent	Taxable entity	Tax transparent
Required Annual Disclosures	None	None; certain information must be maintained for inspection by partners	Annual return and usually accounts	Annual return and usually accounts

Immigration Considerations and Planning

A critical first step to be taken at the outset of any proposed project in the United States is to formulate and implement an effective immigration strategy for all non-US nationals who are likely to be active in the business in the US. The optimal immigration strategy will vary depending on the nature of the project, the purpose of each person's entry into the United States, and several other factors. Careful and thorough immigration planning is especially important in light of processing delays and greater scrutiny of immigration cases.

Set forth below are questions and answers pertaining to the most common visa categories which enable non-US nationals to enter, and, in some circumstances, be employed in the United States. The list is not exhaustive and focuses primarily on "business visa" categories. Bear in mind that an effective immigration strategy may require the use of more than one visa category at different or successive times to accomplish the objectives of a given non-US national.

The fundamental underlying immigration principles which should be observed and considered in the planning process are that no person can: (1) enter the United States without appropriate documentation or status, or (2) engage in employment in the United States without appropriate authorization. An effective immigration strategy will address both of these basic principles. The following are answers to frequently asked immigration planning questions.

Do I need a visa to enter the United States?

Not necessarily. Persons from most European countries can enter the United States for limited business and tourist purposes for periods of up to 90 days pursuant to the Visa Waiver Program. Persons entering the United States using the Visa Waiver Program cannot change or extend their status and must depart at the end of their authorized stay. Canadians are also generally able to enter the United States without a visa except in certain circumstances because they are visa exempt.

Non-US nationals, who are not nationals of a Visa Waiver Program country or who are visa exempt, require a visa to enter the United States, which they must obtain by applying at a US Consulate abroad. Individuals who are required to obtain a visa

to enter the United States are required to undergo a visa interview with a Consular Official in almost all cases and face constantly changing visa application procedures. Consequently, applicants will likely experience increased processing times and scrutiny when applying for a visa and should seek professional assistance in this regard.

How long can I stay in the United States?
The duration of a person's stay in the United States will depend on that person's visa type and nonimmigrant status. As stated above, persons entering the United States under the Visa Waiver Program are permitted to stay for up to a maximum of 90 days. If one enters the United States pursuant to a Business Visitor visa, the maximum initial duration of stay is typically six months with permitted extensions of up to six months. If a person enters the United States to open a new office or operation, his or her initial duration of stay may range from one to two years depending on type and size of the new business and the type of visa used. If a person enters the United States pursuant to a corporate transfer or to serve in a professional specialty occupation, his or her initial duration of stay may be up to three years.

How can I come to the United States to initially investigate new business opportunities?
The most common nonimmigrant visa category used by persons to enter the United States for temporary business purposes is the "B-1" visa category. One can enter the United States as a business visitor either by entering for temporary business purposes under the Visa Waiver Program or pursuant to a B-1 visa. B-1 visas are issued by US Consulates abroad and permit recipients to visit the United States temporarily for business purposes which do not involve gainful employment.

In which activities can I engage as a "Business Visitor?" When you enter the United States, the permissible activities in which you may engage include: investigating possible business opportunities, negotiating contracts, attending conferences, consulting with colleagues, and establishing initial contacts. The B-1 visa category is often used by persons seeking to visit the United States for purposes of assessing or investigating a prospective business opportunity or to coordinate the initial establishment of operations.

What do I need to do to be allowed to work in the United States? In order to work in the United States, a non-US national must first obtain employment-authorized nonimmigrant status. This is accomplished by entering the United States in an appropriate employment-authorized visa category or by changing to an employment-authorized status after lawfully entering the United States. The typical nonimmigrant visa categories which permit employment include those for Intracompany Transferees (the "L" visa category), Treaty Traders and Investors (the "E" visa category), Professional Workers (the "H" visa category), and NAFTA Professionals (the "TN" category). These visa categories are discussed below.

Which visa categories are best suited for persons seeking to establish new offices or operations in the United States? Aside from the B visa category, which is well-suited for temporary visits to assess business opportunities, the two categories most often used by persons seeking to establish new offices or operations in the United States are the "L" visa category and the "E" visa category. The requirements for these two visa categories are discussed below.

What requirements must be met to obtain "L" visa status? The L visa category, which is known as the intracompany transferee visa category, is used to facilitate the transfer of non-US nationals from qualifying affiliates abroad to established qualifying operations in the United States for periods ranging from five to a maximum of seven years. The L visa category can also be used in limited circumstances to transfer staff from abroad to qualifying "new" operations in the United States. L visas enable specialized knowledge employees, managers and executives of non-US companies or operations abroad to be transferred to the United States to be employed by a subsidiary, branch, or affiliate. To qualify for L-1 status, the employee being transferred must have been continuously employed by the foreign company abroad for at least one year within the previous three years. L visas are typically issued at a US Consulate abroad after a petition approval is first obtained from US Citizenship and Immigration Services (the "USCIS") in the United States.

What requirements must be met to obtain "E" visa status? The E visa category is often used by persons seeking to enter the United States to establish a new operation because the application process is conducted at a US Consulate abroad, which requires no pre-approval from the USCIS. An E visa permits the recipient to enter the United States for renewable periods of two years under the provisions of a treaty between the United States and the foreign state of which the applicant is a national to (1) trade principally between the United States and the foreign state (E-1); or (2) develop and direct the operations of an enterprise in which he or she has invested, or is actively in the process of investing, a substantial amount of capital (E-2). Non-US nationals seeking to enter the United States in E status may be classified as treaty traders or investors only if they have the same nationality as the entity abroad, and are engaged in an executive or supervisory capacity or have special qualifications essential to the enterprise.

Which type of visa can be used where "L" and "E" visa requirements cannot be met? The H-1B visa category is frequently used to enable persons to enter the United States to be employed in professional or specialty occupations, particularly in cases of computer-related positions, for periods of up to six years. Unlike the L visa, no qualifying relationship need be established between the US employer and a foreign entity. Unlike the E visa, there is no common nationality requirement. To qualify for an H-1B visa, the beneficiary must have a US bachelor's degree, a foreign equivalent or equivalent qualifying experience in a specific area of study, and be coming to the United States to be employed in a position which requires the educational level of a bachelor's degree. Like the L visa category, the H-1B category serves as an effective springboard to obtain permanent resident status. Since the number of new H-1B approvals that the USCIS is permitted to issue each fiscal year is limited, careful planning is required to avoid the H-1B cap limitation.

Can my spouse and family members accompany me to the United States? Can they work? Spouses and dependent family members (unmarried children under 21) are permitted to accompany the principal visa beneficiary to the United States. They typically apply for and obtain dependent

family member visas at a US Consulate abroad when the principal visa beneficiary obtains his or her visa. Spouses of principal "E" and "L" visa holders may obtain employment authorization in the United States after they arrive.

If I establish an operation in the United States, can I recruit personnel under NAFTA? The North American Free Trade Agreement enables citizens of Canada and Mexico to enter the United States in what is known as "TN" nonimmigrant status to work in certain professional positions enumerated in NAFTA, and can significantly reduce processing times and costs. TN status is attractive because Canadian and Mexican citizens can present basic documentation at a border crossing or pre-flight inspection for immediate processing, and be permitted to live and work in the United States for a specific employer for renewable one to three year periods.

How can I obtain permanent resident or "green card" status? The visa categories discussed above are exclusively for "temporary" stays in the United States, even though "temporary" may mean a period of several years. US immigration law also permits non-US nationals to seek permanent resident status if they qualify and if they navigate through the often time-consuming process to obtain such status. Permanent resident status enables the beneficiary to reside and work permanently in the United States. Permanent resident status is typically obtained through employer or family sponsorship. Employment-based cases are often initiated by testing the local labor market, known as a labor certification, although strategies to avoid this step and streamline the process are sometimes available. Permanent resident status may also be obtained by investing $1 million in a qualifying commercial enterprise in the United States (or $500,000 in certain economically underdeveloped geographic areas) that creates at least ten full-time jobs in a business that must be sustained for not less than two years. Lastly, an annual "green card lottery" is available to nationals of countries that have a low level of immigration to the United States.

The foregoing is not intended to be a comprehensive review of all factors material to a foreign investor's formulation of a successful immigration strategy. As with the choice of entity, an optimal immigration strategy will depend in large part upon the type of business to be conducted in the United States, the strategic plan that the investor is attempting to execute, and the objectives and background of the non-US nationals involved. In addition, recent and ongoing changes which affect various aspects of US immigration laws and anti-terrorism measures should be considered in connection with the formulation and implementation of an effective immigration strategy. It is recommended that a detailed review be conducted with professional advisors with respect to the formulation and implementation of such a strategy.

Immigrant Visa Category Summary

	Business Visitor ("B")	Intracompany Transferee ("L")	Treaty Investor ("E")	Specialty Occupation ("H")
Employment Authorized	No	Yes	Yes	Yes
Duration of Stay	90 days if under Visa Waiver Program; otherwise an extendable six-month initial stay	Maximum of seven years for executives and managers; five years for specialized knowledge workers	Extendable increments of two years	Maximum of six years, with additional one year extensions available in limited circumstances
Basic Requirements	B Visa or Visa Waiver; intent to depart after temporary visit; requisite itinerary	Qualifying corporate relationship; at least one year of qualifying employment abroad	Requisite treaty; qualifying type of investment; same nationality	Position must require and employee must have a bachelor's degree or equivalent
How Status is Obtained	Visa obtained at a US Consulate abroad or Visa Waiver granted at point of entry	Petition with USCIS followed by visa application at a US Consulate abroad	Company registration and visa application at a US Consulate abroad	Petition with the USCIS followed by visa application at a US Consulate abroad
Immigrant Intent	Not permitted	Permitted	Not permitted	Permitted
Primary Purpose	Investigate business opportunities; limited business purposes	Facilitates corporate transfers and is a vehicle to establish new offices and operations	Facilitates investment; used to establish and staff new ventures	Facilitates staffing of established operations with professional employees

Laws Impacting United States Businesses

Part 2

Taxes

Irrespective of the form of entity selected by a European company to conduct business in the United States, there are a range of taxes that will impact its operations. The following is a brief overview of some of the more important types of taxes. Upon the organization of a US entity, that entity must apply to the Internal Revenue Service for an Employer Identification Number (EIN). In addition, any entity conducting business in a particular state must register with that state's department of taxation with respect to all taxes that may apply to such business.

Income Tax. The revenue generated by the US subsidiary or US operations of a European business will be subject to taxation in the United States. This tax is assessed at the federal and state levels. Some cities also assess an income tax.

Federal Tax. Federal income tax rates are set depending upon many factors. Federal corporate tax rates range between 15% and 39%; the average tax rate is typically 35%.

State Tax. State income tax rates are determined on a state-by-state basis. Some examples of the current rate for corporate income tax range from 6% in Virginia to 8.84% in California, 8.7% in Delaware, 8.25% in Maryland, 9.0% in New Jersey, 7.1% in New York and 9.99% in Pennsylvania. Some states have lower income tax rates. For example, Colorado has a 4.63% corporate income tax rate. All states change their corporate income tax rates periodically.

Sales Tax. Retail sales and leases of tangible personal property in many states are subject to sales tax. This tax is similar to value added tax in the European Union and rates vary between 2.9% and 7.5%. Businesses subject to sales tax must collect the tax at the time of the sale and remit the tax to the relevant state taxing authority. Many exemptions from the tax exist including purchases of property for resale, manufacturing equipment, software and raw materials.

Use Tax. Use tax generally applies to tangible personal property used, consumed or stored in a state but purchased outside the state, which would have generated sales tax had the sale taken place in the state.

Employee Withholding Tax. Where an employer pays wages to employees, the employer is required to withhold federal and state taxes from the gross pay and remit same to the Internal Revenue Service and the relevant state department of taxation. Since this liability remains with an employer, it is particularly important to ensure that an agent or distributor appointed in the U.S. is not dealt with in a manner that would cause such a person to be viewed as an employee.

Real and Personal Property Taxes. Counties and cities are authorized to assess property taxes on real and tangible personal property located within the county or city.

Business License Tax. Counties and cities in most states are also authorized to assess business license taxes upon locally operated businesses. The licenses that must be obtained and the cost of such licenses are set by each jurisdiction and are generally based on gross receipts.

Miscellaneous Taxes. A number of miscellaneous taxes apply to certain products exported from certain states or activities conducted in certain states. One example of such a tax is litter tax, which is imposed upon manufacturers, wholesalers, distributors and retailers of certain products (such as beer, wine, groceries, paper products, glass and metal containers). A complete list of taxes may be obtained from each state's taxing authorities.

The U.S. also imposes a federal withholding tax on outbound payments on royalties, dividends, interest, wages and other payments to nonresidents. The withholding tax is not in addition to the income tax, rather the withholding tax attempts to prevent income tax avoidance by nonresidents. The standard withholding tax rate is 30%, but the rate can be dramatically reduced or eliminated by tax treaties. The U.S.–U.K. tax treaty eliminates the withholding tax on dividends from the U.S. subsidiary to its U.K. parent.

Employment Laws

General. In the United States, management-labor relations are well regulated to ensure peaceful relations between employers, unions and employees. Unlike in Europe, US law does not provide workers representation through and by a work's council. In addition, labor unions in the United States have increasingly lost their influence with respect to management-labor relationships. The combined employment laws of the federal government and many states, including Virginia, are particularly favorable to employers and provide the employer much more discretion and flexibility with respect to the termination of employees. In addition, the state and federal laws do not generally require employers to grant the relatively extensive social fringe benefits often granted in Europe. State laws and legislation regulate those aspects of management-labor relations to the extent not otherwise governed by federal laws.

Federal Laws. The major federal laws governing management-labor relations include the Norris-La Guardia Act, the National Labor Relations Act, the Labor Management Relations Act, and the Labor Management Reporting and Disclosure Act. Those acts relate in principle to the creation of unions and govern the relationship and conduct between a company and its unionized employees.

- Title VII of the Civil Rights Act of 1964 prohibits any discrimination, including any termination of the employment relationship on the basis of race, color, religion, sex or national origin by a business employing 15 or more employees. Employers subject to this act may not fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to compensation, or the terms, conditions or privileges of employment.

- The Age Discrimination in Employment Act of 1967 prohibits discrimination, including termination, on the basis of age, (i.e., the act protects individuals who are at least 40 years of age) by an employer employing 20 or more employees.

- Similar protection exists in regard to other anti-discrimination statutes (e.g., disability, union membership, military or jury duty) or in regard to wrongful discharges violating "public policy."

State Laws. The laws of many states grant management a significant amount of flexibility to establish and maintain a close working relationship with all employees, but gives the employer the ability to preserve flexibility should economic changes necessitate a reduction of workforce.

- States like Virginia, for example, still apply the old common law "Employment-At-Will Doctrine." When an employer in an "at-will" state hires an employee to work for an indefinite period (which is generally the case), in the absence of a formal contract or union agreement, the employee can, with a few exceptions, be terminated at any time without legal liability for good cause, bad cause, or no cause at all, unless there is an express statutory prohibition.

- A number of states still maintain legislation that is similar to, but broader in scope than, Title VII which prohibits unlawful discriminatory practice in employment on the basis of race, color, religion, national origin, sex, age, marital status or disability.

Sexual Harassment. There has been a notable increase in the incidence of sexual harassment lawsuits in the United States over the last decade. In order to limit or even avoid potential exposure for their US operations, employers are well-advised to implement sexual harassment policies and guidelines, as well as to have regular training and awareness programs for their employees. An initial training session on this topic is particularly advisable for any executives or other employees who are relocating to the United States from countries where legal and cultural norms are generally not as sensitive to such issues. In addition, employers are well-advised to implement policies and procedures for dealing with such complaints and to designate a person to whom violations of the policies may be reported.

Employee Benefits. Neither federal law nor the laws of many states obligate an employer to provide benefits to its employees. In Europe, most employees are content to rely on national health services, which are relatively well-funded. Neither the federal government nor the states maintain a well-funded national health service and most employees in the United States expect coverage under private health care plans. It is common, therefore, for employers to voluntarily provide certain benefits to employees, such as medical and dental plans. In addition, many businesses will make investment plans available to employees, often with a matching funds features, and insurance plans. When an employer elects to provide benefits to its employees, the employer becomes subject to a number of federal and state requirements that may obligate the employer to continue coverage under those plans following an employee's termination. In addition, the provision of the benefits may impose certain reporting requirements on the employer. As a result of the administrative requirements that are imposed upon employers providing benefits, employers need to fully understand the cost of providing those benefits and the obligations that they will assume by putting such plans in place.

Non-Competition. The laws of most states will recognize and enforce non-competition covenants between the employer and employees, provided that the scope of the covenant is not overly broad. In Virginia, for example, courts have upheld covenants restricting competition within a clearly defined line of business and within a reasonable geographic area for up to two years. Such covenants can be enforced without the payment of further compensation by the former employer, which is not the case in many European countries, where up to 50% of the restricted party's former salary may need to be paid.

Protection of Intellectual Property

The intellectual property laws of the United States make important legal rights available to the owners of such property. These proprietary rights in technology inventions, software, business processes, creative materials and other intangible assets can be valuable in operating a business, raising capital, and pursuing exit strategies such as an IPO or acquisition. The benefits of such laws are available to foreign and US entities.

Trademarks. Unlike civil law countries, trademark and service mark rights arise in the United States from using the mark in commerce in this country. Important additional rights are obtained by federally registering trademarks and service marks with the US Patent and Trademark Office (the “PTO”). Checking the PTO database of federal trademark registrations (**www.uspto.gov**) prior to introducing new trademarks or service marks is always prudent. It is important to remember, however, that since many trademarks are not registered, more comprehensive searching will be required to determine whether the proposed use may infringe a senior user’s rights. In November 2003, the United States joined the Madrid Protocol, and now foreign trademark owners may apply for US trademark registrations through their domestic Trademark Office.

Copyright Interests. The United States, along with almost all other industrialized countries, is a party to the Berne Convention. Under the Berne Convention, copyright protection exists from the moment of creation. Works first published in the United States, or in another country that is also party to the Berne Convention, are protected under US copyright laws. Important additional rights can be obtained by registering the copyright with the US Copyright Office. For more information visit the US Copyright Office website at **www.copyright.gov**.

Patents. Foreign parties must apply for patent protection with the US Patent and Trademark Office in order to obtain protection under US patent laws, regardless of the existence of foreign patents. Failure to apply for patents in the United States could result in loss of valuable legal rights in company innovations. The US application must be filed by the earlier of one (1) year from when the invention was first publicly used or placed on

sale (e.g. displayed at a trade show) anywhere in the world, or one (1) year from the earliest filing date of a patent application filed in another country.

Business Process and Business Method Patents. The United States provides for broader patent protection than many foreign countries in the area of business processes, business methods, computer-aided business operations and certain types of software. Foreign companies should consider evaluating if their business processes or software programs can be patented in the United States, even if they cannot be patented in their home countries. Again, it is important to remember the filing deadlines outlined in the paragraph above.

Trade Secrets. Even if a technology or process cannot be protected under patent or copyright laws, it may be capable of being protected under trade secret laws. If proper steps are taken, the owner of the intellectual property can preclude others from using the relevant technology, designs, methods of operation or other "know how" and maintain a proprietary interest therein. The best example of this is the recipe for Coca-Cola, which remains a trade secret after more than 100 years. Obviously, know-how will only be treated as a trade secret by the law, if the owner treats it that way. Steps must be taken to keep the information secret. Such steps usually include utilizing confidentiality agreements, confidentiality provisions in employment agreements, limiting access to such materials through the use of passwords, physically secure areas, distribution only on a "need to know" basis, and marking materials as proprietary and confidential.

If companies coordinate their US and European patent and trademark filings and comply with international treaty requirements (including certain 12 month and 6 month time limits), then they may obtain improved priority claims for their patent and trademark rights in the United States. A thorough review of existing European rights is therefore recommended prior to arriving in the United States.

Import Laws

The United States is generally considered one of the most open market economies of the world, and US trade policy supports free trade and a strong world trading system. The United States maintains a number of trade programs that enhance exports and encourage minimal import restrictions. The few import restrictions that do exist consist mainly of tariffs and other special import programs discussed below.

Tariffs. The United States assesses tariffs on items imported into the United States. Under the recent World Trade Organization agreements, however, many US tariffs have been reduced or eliminated entirely. The collection of tariffs is administered by the US Customs Service, part of the US Department of the Treasury. The applicability of a tariff on an item to be imported can be determined by reviewing the Harmonized Tariff Schedule of the United States, or by consulting a customs broker. Tariffs are generally not applicable to the import of software or other intangible products or to the performance of services.

Preferential Trade Programs. The United States maintains several unilateral preferential trade programs under which certain items from eligible countries may enter the United States duty free. The programs are designed to benefit developing countries and are the source of considerable economic benefit to companies doing business in the United States.

Antidumping Duties. Items imported into the United States may be subject to additional duties under US antidumping and countervailing duty laws or other similar import relief statutes. Parties that intend to export to the United States should first determine whether antidumping or other similar duties may apply.

Registration of Foreign Food Facilities. Foreign facilities engaged in the manufacturing, processing, packaging or holding of food that will be consumed in the United States must register with the Food and Drug Administration before foods from such facilities may be admitted to the US.

These facilities must also maintain certain records relating to the sources of products used by the facilities and the recipients of the products produced by the facilities.

Prior Notice of Imports. Prior to the import of food or drink products to the United States, notice must be given to the FDA. The notice must be given no more than five days before the products arrive in the US and at least 2 to 8 hours before the products arrive, depending upon the method of shipment selected.

Other Relevant Areas of Law

Our experience in assisting foreign companies in establishing US operations has highlighted the following areas as regularly raising issues of concern:

Consumer Protection Laws. Companies selling to consumers (as compared to commercial customers) will be subject to consumer protection laws administered by the Federal Trade Commission and various state consumer protection agencies. Such laws provide for, among other things, certain mandatory documents to be provided to consumers, and for rescission rights under certain consumer contracts. In addition, it should be noted that federal rules provide consumers with a range of remedies that may be exercised where a dispute arises with respect to goods sold. Among other rights, consumers have a greater ability to withhold payment in circumstances where payment was initially made with a credit or debit card.

Privacy Laws. While the United States does not have privacy laws which are as wide-ranging as the European Union, there are a number of privacy laws in effect including a requirement that parties comply with their own posted privacy policies and special privacy requirements in the banking and health care industries. It is also important for European companies to be mindful of restrictions imposed by the European Union upon the transfer of data relating to European Union citizens from Europe to the United States. In order to be able to transfer such information, among other requirements:

- the purpose for the data transfer must be permitted under the law of the transferring entity and should not be incompatible with the purpose for which the data was first gathered;
- there should be adequate restrictions upon onward transfer to other data processors;
- the transferee country must provide adequate protection for personal data (which is not the situation in the US); and

- the subject of the data must have rights to access, rectify, delete and object to the content of the data.

In light of the foregoing, prior to the transfer of data to the US subsidiary, the transferring entity will have to undertake a detailed review of the circumstances under which the transfers will be made and the procedures that will be applicable to such information once transferred.

The US Department of Commerce, in consultation with the European Commission, has developed a "safe harbor" program to assist companies doing business in the United States to comply with the European Union Privacy Directive.

Securities Laws. Companies that intend to raise capital through the issuance of securities (including stock, warrants, options and certain debt instruments) are subject to securities law requirements such as registering the securities (unless a specific exemption applies). In addition to federal securities laws, many states have enacted their own securities or "Blue Sky" laws. In particular, foreign investors should be aware that the US federal and state securities laws are extensive and apply to even relatively small offerings to a very limited number of people. This is particularly important for many tech and biotech companies that issue small amounts of stock to a wide variety of people during the start-up phase. The failure to comply with securities laws during early rounds of financing may prejudice later larger public offerings.

Antitrust/Competition. The Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") is the primary US statute aimed at competition issues and applies where a company (foreign or domestic) acquires a business or assets. The HSR Act requires acquiring and acquired parties to file a report with the Federal Trade Commission and the Department of Justice prior to completing certain transactions.

The HSR Act provides for three filing thresholds:

1) No transaction valued less than $65.2 million requires a filing;

2) Transactions valued between $65.2 and $200 million require a filing if the traditional "size-of-person test" is met (essentially, if one side of a transaction has total assets or annual net sales of $130.3 million and the other $13 million); and

3) Transactions valued in excess of $200 million require a filing regardless of the size of the parties.

The HSR Act sets up a three-tiered fee structure, based on the size of the transaction: (1) $45,000 if the value of the transaction is valued in excess of $65.2 million; (2) $125,000 if the value is between $130.3 million and $651.7 million; and (3) $280,000 if the value is $651.7 million or more.

The HSR Act provides a 30-day waiting period for most transactions. Beyond that, either federal antitrust agency (the FTC or Antitrust Division of the Department of Justice) may extend the waiting period by requesting additional information from the parties, if the agency determines the proposed transaction raises competitive concerns.

Environmental Laws. Environmental laws protecting land, water and air quality have been enacted by both federal and state law makers. Regulatory agencies such as the Environmental Protection Agency and state environmental regulators have powers to impose remediation obligations and penalties that are considerably more extensive than those available to similar national and supranational agencies in Europe. While tech and biotech companies generally do not have to comply with the large number of environmental requirements that apply to brick and mortar businesses, tech and biotech companies should be aware of the environmental obligations that apply to their particular type of research or manufacturing.

Companies entering the US market should also appreciate that liability for a prior owner or operator's contamination may be imposed on the current owner or operator of the business premises. As a result, an environmental assessment of property prior to acquisition or lease is recommended. Such assessments can be performed under the attorney-client and other applicable privileges. In addition, with proper planning, business, research

and manufacturing operations can be structured to minimize the number of environmental regulations applicable to a particular facility.

Companies forced to obtain environmental permits have found that state level environmental enforcement agencies from whom those companies have requested permits will frequently undertake to obtain federal permits on behalf of such companies. In addition, those companies have found that the environmental agencies have made progress in reducing bureaucracy and improving the time within which permits are delivered. Finally, the environmental movement in the United States tends to be less active than its European counterparts, which enables environmental permitting issues to be handled on a shorter timeline than in many European countries.

Laws Affecting Sales. Most states have adopted Article 2 of the Uniform Commercial Code (the "UCC"), which governs rights and obligations between purchasers and sellers of goods. It is particularly important for businesses engaged in selling goods to understand these laws, which are familiar to all US purchasers. In particular, sellers should understand warranties regarding their products that will be deemed part of a sale, either expressly or impliedly. Sellers should understand that those warranties, and the remedies that sellers must make available to purchasers, can be limited through appropriate disclosure. Sellers must also be aware of liability that can be imposed as a result of selling inherently dangerous products or liability arising through personal injury. In addition to implementing programs to limit such liability, product liability insurance is recommended.

PRACTICAL CONSIDERATIONS — REVIEW OF KEY CONTRACTS

Prior to commencing business in the United States, a foreign company should conduct a review of its key contracts to ensure that such contracts comply with, and are enforceable under, applicable US laws. If adjustments to key contracts are not made, the foreign company could lose legal rights in the United States. In the United States, the laws applicable to many business transactions are state laws rather than federal laws and many differ from state to state. Consequently foreign companies must comply with the state laws in each state in which they conduct business.

Among the key questions that should be addressed are the following:

Software and Other License Agreements. If the company is the recipient of a software license in Europe, it should review the contract to ensure that the license permits the company or its new US subsidiary to continue using the software in the United States. If the company has granted software licenses, it should ensure that the activities planned by its US operations are not in violation of rights it has previously granted to third parties.

Sales Agreements. The form of sales agreement used by a company in Europe may have to be amended to comply with US law. Most states in the United States have adopted Article 2 of the UCC which provides for the rights and obligations of parties to sales transactions. In order to ensure that the company is selling its goods on terms favorable to it, the company's standard form of sales contract should be revised to comply with the UCC.

Non-Circumvention, Non-Compete Agreements. These agreements should be reviewed to ensure that they permit the company to carry out its planned activities in the United States and restrict potential competitors from competing. In particular, provisions that restrict competitors from certain actions within Europe may not be effective to limit competition in the United States.

Stock Purchase and Other Investment Agreements. These should be reviewed to ensure, among other things, that no third party has rights to acquire shares in the newly created US subsidiary. Additionally, the company may need to address whether the commencement of its US business may impact any covenants or negative covenants in prior acquisition agreements.

Financing Agreements. Financing agreements entered into in the company's home jurisdiction should be reviewed to ensure that there is no restriction on the creation of a US subsidiary or the use of corporate funds to finance such a subsidiary. In addition, if a prior financing agreement provides for the creation of security over the shares or assets of a company's subsidiaries, the company will need to create a security interest in assets of any new US entity that complies with US law. It is often desirable to establish new financing in the United States for a new US subsidiary, but this must be achieved without violating the terms of existing financing arrangements.

Distribution and Agency Agreements. The company should review any existing distribution and agency agreements to ensure that any newly created distribution network or agency relationship is not in violation of the terms of any existing contracts.

Employment Agreements. The company may wish to review any existing employment contracts to ensure that there are no terms of those contracts that may be breached or that may be illegal following the transfer of an employee to the United States. If employees are to be transferred from Europe and their contracts of employment are to continue, the company may wish to amend the terms to ensure that any disputes that arise will be handled in a favorable court. In addition, the company will want to assess the tax impact that the relocation may have on employees who will be deemed resident in the United States.

Pension and Other Benefit Plans. The company may need to determine whether contributions can continue to be made to existing plans in Europe by employees resident in the United States and whether the company wants to start a new US-based program for its employees.

The foregoing examples of potential issues are not intended to be comprehensive and a thorough audit of all existing contracts is recommended to identify all potential issues.

Part 3

Robert Dewar is a Scottish and English qualified solicitor and a Virginia and District of Columbia qualified attorney. During his 20-year legal career, Mr. Dewar has worked in the United States, Britain, Poland and Belgium. Mr. Dewar has been involved in a diverse array of transactions throughout Europe and the US on behalf of US and European clients involving mergers and acquisitions, joint ventures, corporate finance, venture capital, private equity and general commercial transactions. Mr. Dewar may be reached at **804.783.6935** or **rdewar@williamsmullen.com** .

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