Hogan Lovells

Doing Business in the United States

2025

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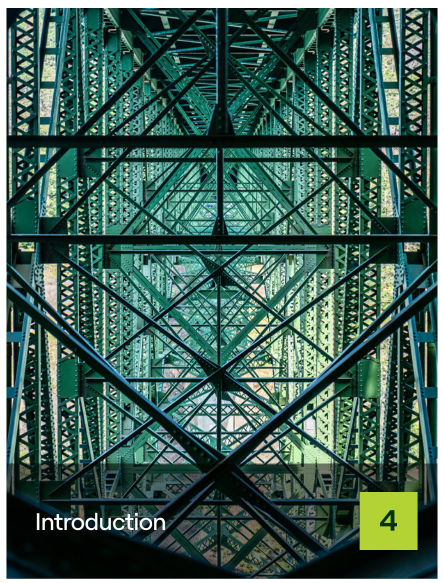
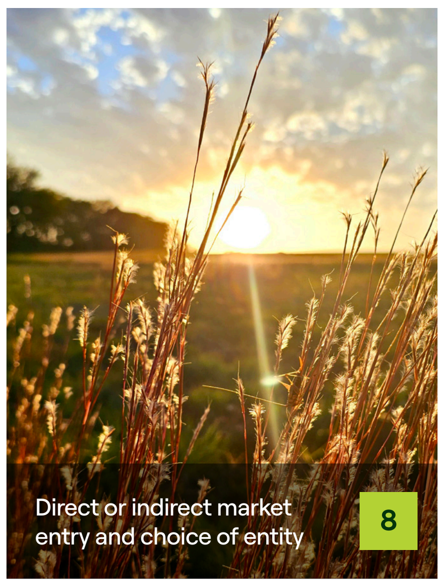
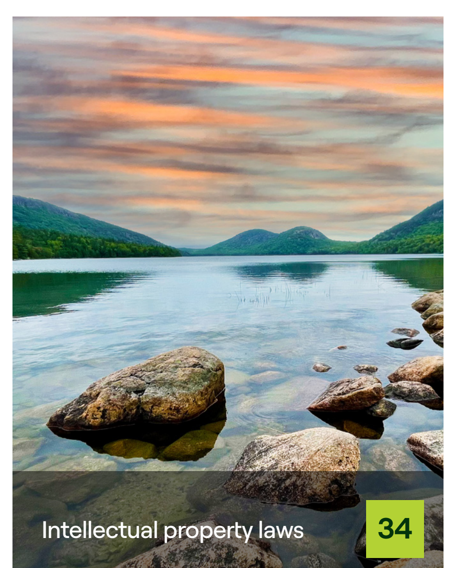
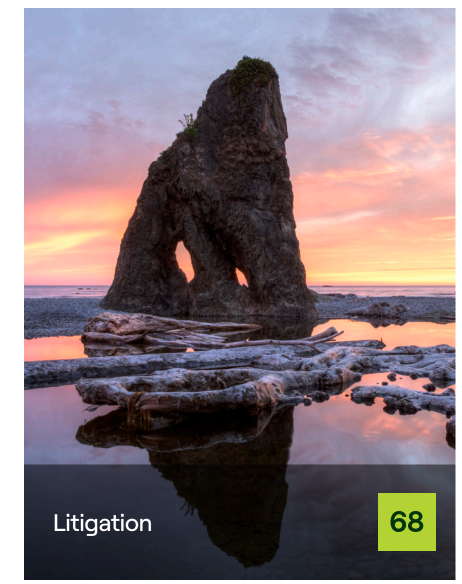
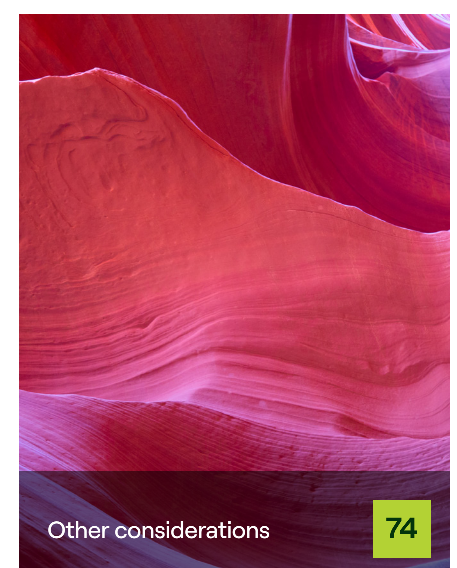
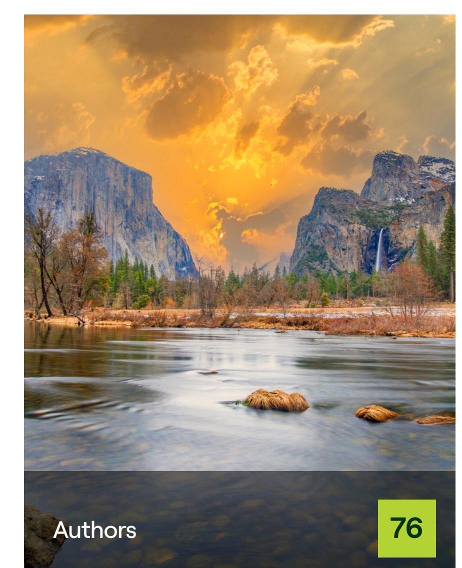












Introduction

The U.S. is one of the easiest jurisdictions in the world in which to do business[1] and continues to be the world's top destination for foreign direct investment.[2] Regulatory barriers are generally low, establishing a branch or business entity is quick and easy, labor and employment laws are much more employer-friendly than in most other developed economies, and the legal system is well-developed and transparent. However, there are certain barriers to entry and challenges to doing business that should be taken into account before investing or establishing operations in the U.S.

This publication provides an overview of trade control issues that could limit a non-U.S. person's ability to enter the U.S. market or conduct its business once it has established U.S. operations, as well as corporate, commercial, labor and employment, immigration, intellectual property, export control, antitrust, transparency and anti-money laundering, anticorruption, litigation, bankruptcy and other laws and practices important to foreign investors. This publication is not intended to be a comprehensive guide, but to provide an overview of some of the important issues that investors should consider and discuss with counsel.

Openness of U.S. markets to foreign investment

Investors can generally acquire or establish a business in the U.S. without partnering with a local company or individual. However, in the interest of national security, the U.S. government imposes some limitations on investments by non-U.S. persons.

U.S. federal law affords the President of the U.S. broad powers to block or restrict certain types of foreign investment in the U.S., particularly investments that adversely impact national security.[3] These powers can include the ability to impose conditions — so-called mitigation measures — on a transaction, to block a non-U.S. person from investing in or acquiring a U.S. business, or to force the divestiture of a non-U.S. person's investment in or acquisition of a U.S. business. The Committee on Foreign Investment in the United States ("CFIUS"), a U.S. government interagency committee, has jurisdiction over (i.e., the power to review) so-called "covered transactions": (i) transactions that "could result in control of a U.S. business by a foreign person[4]; (ii) non-controlling foreign investments in a so-called "TID U.S. business" — namely, a U.S. business involved in "critical technologies," "covered investment critical infrastructure," or "sensitive personal data" of U.S. citizens — *if* the foreign investor obtains certain investor rights; and (iii) purchases or leases by, or concessions to, a foreign person of certain U.S. real estate in close proximity to certain ports or identified sensitive facilities (e.g., U.S. military training installations).[5] There are no size of transaction thresholds, and CFIUS' jurisdiction is not subject to any statute of limitations.

Under the CFIUS regulations, parties are legally required to submit a filing to CFIUS if their transactions are subject to CFIUS' jurisdiction and meet the criteria of either of CFIUS' two mandatory filing programs, described below. To satisfy this mandatory filing requirement, parties may submit a declaration (a short-form filing) or a notice (a long-form filing). The parties must submit the filing 30 days before completion of the transaction. Failure to file a required filing is punishable by a civil penalty of up to US$5,000,000 per violation, increased from US$250,000, or the value of the covered transaction.[6]

CFIUS' mandatory filing programs are described below:

- *Critical technologies mandatory filing program*. Under the CFIUS critical technologies mandatory filing program, the foreign investor and the U.S. business are legally obligated to submit a filing to CFIUS 30 days prior to closing if:
  - The U.S. business produces, designs, tests, manufactures, fabricates, or develops "critical technologies," as defined in the CFIUS regulations; and
  - The investment affords the foreign investor (i) directly or indirectly, control/veto rights over the U.S. business or (ii) one or more of these investor rights — namely, (A) membership or observer rights on, or the right to nominate an individual to a position on, the board of directors of the U.S. business, (B) access to material nonpublic technical information in the possession of the U.S. business, or (C) involvement in certain substantive decision-making of the U.S. business (including access to certain decision-makers of the U.S. business).

A U.S. regulatory authorization would be required for the hypothetical export of the critical technologies to (i) the foreign investor or (ii) any person with a voting interest, held directly or indirectly, of 25 percent or more in the foreign investor.

- *Foreign government-backed mandatory filing program*. The CFIUS regulations mandate that parties submit a filing to CFIUS for certain foreign investments in a U.S. business if (i) the foreign investor will acquire a 25% or greater voting interest in a "TID U.S. business" and (ii) a foreign government holds a 49% or greater voting interest in the foreign investor.

The CFIUS regulations exclude certain non-controlling foreign investments by "excepted investors" from CFIUS' jurisdiction if certain criteria are met. Many of the criteria relate to the foreign investor's nexus to certain "excepted foreign states." Investments by "excepted investors" are also not subject to either of CFIUS' mandatory filing programs. To date, CFIUS has identified Australia, the United Kingdom, Canada, and New Zealand as "excepted foreign states."[7]

For declaration filings, CFIUS has 30 days to conduct its assessment. At the end of the 30-day assessment period, CFIUS may (i) ask the parties to file a notice, (ii) inform the parties that CFIUS lacks sufficient information to complete its work based on the declaration and that they may submit a notice, (iii) initiate a unilateral review (an option CFIUS typically would choose only if the parties declined a CFIUS request to file a notice), or (iv) clear the transaction.[8]

Outside of the context of the two mandatory filing requirements detailed above, filings to CFIUS are not required. However, CFIUS has jurisdiction to review all of the "covered transactions" described above. Because there are potentially serious consequences of an adverse CFIUS determination or a prolonged review, when an investment raises potential national security concerns, parties often opt to voluntarily submit a declaration or a joint notice to CFIUS prior to closing to seek approval of the transaction. If CFIUS clears a transaction, the parties receive so-called "safe harbor," prohibiting CFIUS from revisiting the national security implications of the transaction, except in limited circumstances.

Factors considered by CFIUS in determining the effects of foreign investment on national security include:

- Whether the U.S. business is involved with "critical infrastructure" or "critical technologies;"
- Whether the U.S. business collects or maintains sensitive personal data of U.S. citizens;
- Whether the U.S. business directly or indirectly supports U.S. government agencies;
- Whether the U.S. business has classified U.S. government contracts or subcontracts;
- Whether the U.S. business falls within an industrial sector that is considered sensitive from a national security perspective;
- Whether the U.S. business is located in proximity to any U.S. national security assets (e.g., a U.S. military training facility);
- Whether the foreign buyer has foreign government ownership; and
- The foreign buyer's plans for the U.S. business (e.g., plans to shut down or move U.S. facilities abroad).

Certain sectors, including semiconductors and microelectronics, telecommunications, biotechnology, quantum computing, artificial intelligence, autonomous driving or flight, defense and aerospace, information technology, cybersecurity, and energy, remain of keen interest to CFIUS due to the national security sensitivity of the underlying businesses. Other sectors, such as the financial, insurance, and consumer sectors, receive scrutiny because many businesses in that sector hold sensitive personal data of U.S. citizens. While CFIUS scrutiny of investments by Chinese and Russian companies continues to garner the most press attention (despite the significant decrease in Chinese investment in the U.S.), investments in U.S. businesses by any non-U.S. person, regardless of country of organization or nationality, are potentially subject to CFIUS' review.

A CFIUS review of a notice might have multiple stages, as described below:

- **Draft notice:** CFIUS prefers that parties submit a draft notice (preferably at least two to three weeks in advance of the planned submission of the formal notice). Submitting a draft notice gives CFIUS additional time to review the transaction, and this review is conducted "off the clock" (without the time constraints of the formal review process). Submission of a draft notice is not required.
- **Initial 45-day review:** CFIUS reviews formally begin with CFIUS' acceptance of a complete notice, which begins a review period. During this initial review, CFIUS will either (i) clear the transaction, (ii) initiate a second-stage investigation, or (iii) determine that it does not have jurisdiction.
- **Second 45-day investigation (as needed):** If CFIUS is unable to resolve any relevant national security issues within the initial 45-day review period, it will undertake a second-stage investigation, which may last up to an additional 45 days. CFIUS also may extend the investigation by a further 15 days in "extraordinary circumstances." An investigation is generally initiated if the transaction would result in (a) control of the acquired U.S. entity by a foreign government or (b) control by a foreign person of "critical infrastructure" and CFIUS determines that "the transaction could impair the national security and such impairment has not been mitigated." In 2023, for approximately 55% of the notices filed with CFIUS, CFIUS proceeded to an investigation.[9] If, during this investigation stage, CFIUS agrees that all national security issues have been resolved, including as a result of the imposition of mitigation measures agreed to by CFIUS and the parties, it will clear the transaction. However, if CFIUS has not cleared the transaction by the end of this investigation stage — and if the parties have not requested, or CFIUS has not granted, a request to withdraw their notice — CFIUS must refer the transaction to the President of the U.S. to make a decision.
- **15-day presidential review (as needed):** During the 15-day Presidential review period, the president may decide to approve, restrict or block the transaction. The President's decisions are not subject to judicial review.

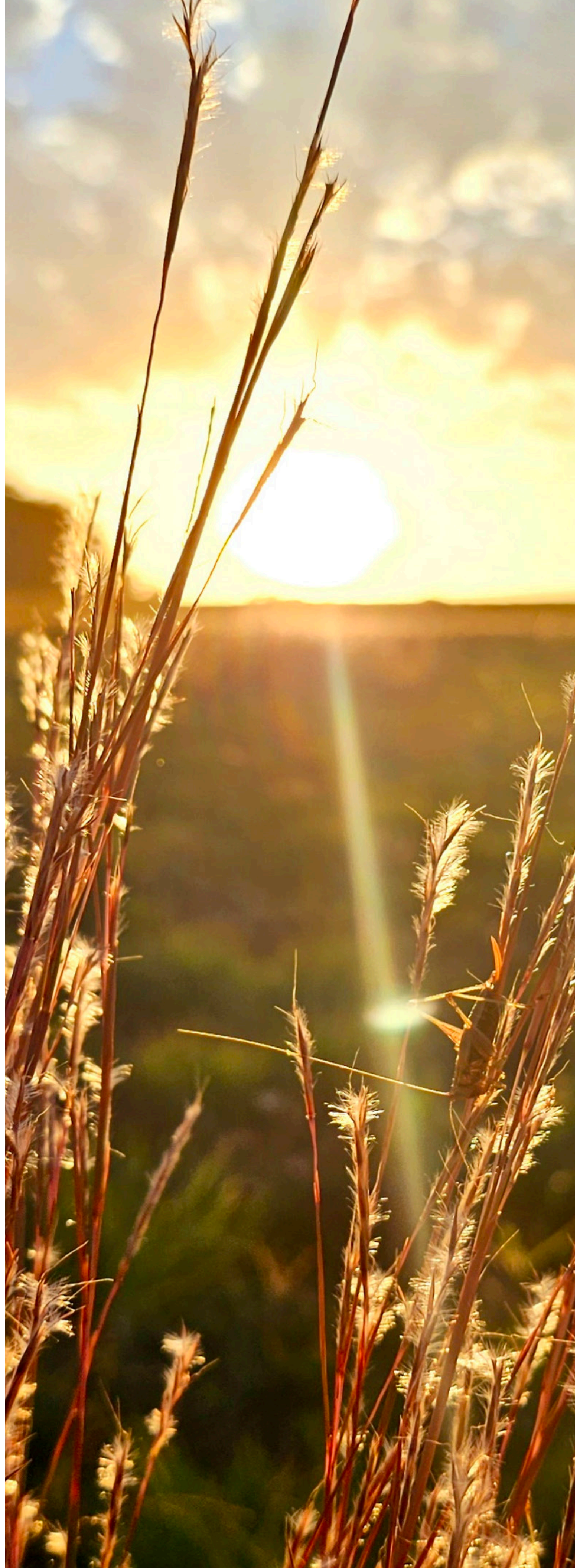
Due to the breadth of CFIUS' jurisdiction and the potentially serious consequences of the President blocking a transaction, parties to a transaction involving foreign investment in the U.S. should seek outside counsel's advice to (i) determine whether their transaction is subject to CFIUS' mandatory filing programs, (ii) determine whether their transaction is otherwise subject to CFIUS' review, (iii) assess the potential national security issues arising out of the transaction, (iv) assist with the drafting and submission of a filing to CFIUS, if the parties choose or are legally required to submit one, and (v) develop a political and public relations strategy, as necessary, if the transaction is likely to face heightened attention.

Direct or indirect market entry and choice of entity

An important structural consideration for a non-U.S. entity wishing to do business in the U.S. is whether to do business directly or to form a U.S. entity.

The decision of whether to form an entity, register a branch, or do business through a distributor or agent is generally driven by tax and liability concerns. A company that conducts business activities in the U.S. directly (including through a branch or through a fiscally transparent entity) may be considered, by virtue of these activities, to be engaged in a U.S. trade or business, which means it will be (i) subject to U.S. tax jurisdiction, (ii) subject to U.S. federal and any applicable state/local income tax, (iii) required to pay a U.S. "branch profits" tax, and (iv) required to file U.S. tax returns. There is not a bright line rule for what constitutes doing business in the U.S., but having employees or a physical location can be sufficient. Because non-U.S. clients typically do not want their principal non-U.S. business organizations to be considered engaged in a U.S. trade or business, non-U.S. clients frequently opt instead to form corporate entities, which are treated as opaque for tax purposes. Forming a U.S. subsidiary entity can provide limited liability protection and protection of the parent entity from the jurisdiction of U.S. courts.[10]

If a company decides to do business in the U.S. through a distribution or agency arrangement, there are several things it should consider. Its products might be subject to licensing approval requirements or U.S. regulations.[11] Although U.S. laws are not as protective of distributors and agents



as are the laws of many civil law jurisdictions, some states require, among other things, advance notice of termination.

Additionally, care must be taken so that the foreign entity does not become subject to franchise laws. A company distributing into the U.S. should also consider appropriate intellectual property protections.

Jurisdiction of formation

Once the decision to form a subsidiary has been made, an investor must choose the jurisdiction of formation of the subsidiary. The legal framework governing the formation, structure, and governance of a U.S. business association is determined by state statutes and common law. With no federal legal framework governing U.S. entities, there is no uniform U.S. corporate law. Rather, the laws of any of the 50 states or the District of Columbia may apply, depending on where the entity is formed. The state of formation can have consequences on the law applied to litigation regarding an entity's internal decisions and workings, such as shareholder rights.[12]

There is no requirement that an entity establish operations or maintain its principal place of business in the state of formation. Delaware has long been the most popular state of formation for a variety of reasons, including the state's flexible and modern corporations statute, the sophisticated judiciary system and extensive case law (which provides a predictability unmatched by other states), the efficiency with which the Delaware Secretary of State's Division of Corporations accepts and processes filings, and the fact that almost all U.S. lawyers study Delaware corporations law. 67.6% of the Fortune 500 companies, and 80% of companies that go public in the U.S., are formed in Delaware.[13]

Although Delaware is the most common choice for state of formation, it is not necessarily the best choice, particularly for private business entities that do not have operations in Delaware. A business organization must qualify to do business in each state in which it does business, and qualification typically costs several hundred dollars a year and requires an annual filing. This expense and administrative burden can be avoided if the entity is formed in the jurisdiction in which it has operations. In principle, the state of formation of the new entity will not generally affect the U.S. federal or state income tax consequences of its activities in the U.S. It is important to consult with counsel regarding the pros and cons of formation in a particular jurisdiction.

Publicly available information

Relative to non-U.S. jurisdictions, U.S. state laws offer a high degree of confidentiality regarding ownership, governance, and financial results of privately held entities. Although a publicly owned U.S. company is subject to federal securities disclosure laws and must file quarterly financial statements and disclose extensive information about its business and governance, a review of the public records of a private company will typically reveal no more than the name of the corporation, a general statement of purposes, and the number of authorized shares.[14] Any bylaws, governance or voting agreements and minutes of meetings of the owners or directors are private, as are the stockholders' ledger (or similar ownership records) and the annual financial statements. Even the identities of directors and officers generally remain private and can be verified only through review of a company's private books and records or certification by an officer of the company or an opinion of the company's outside counsel. Although a company's Certificate of Incorporation[15] requires disclosure of the registered agent, incorporator, and principal address in the jurisdiction of incorporation, there are commercial services that act as registered agents and provide an address for service of process, and outside lawyers typically act as incorporators.

Principal business structures

The principal types of entities available in the U.S. are the corporation, limited liability company, partnership, limited partnership, limited liability partnership, and limited liability limited partnership.

	Corporation	Limited Liability Company (LLC)
Formation	Filing a Certificate of Incorporation with the Secretary of State.	Filing a Certificate of Formation with the Secretary of State.
Liability of owners	Stockholders are generally not liable for the obligations of the corporation. The most common exception to this principle is piercing the corporate veil/alter ego.[16]	Members are generally not liable for the obligations of the business. The most common exception to this is piercing the corporate veil/alter ego.
Ownership rules	Generally no limit on number of stockholders or classes of stock, but there must be at least one stockholder. Stockholders may be entities or natural persons and need not be domiciled in the U.S.[17]	No limit on number of members or classes of membership interests, but there must be at least one member. Members may be entities or natural persons and need not be domiciled in the U.S.
Management	Stockholders appoint directors, who act collectively to exercise overall management responsibility and appoint officers. Officers have responsibility for management of day-to-day activities. Directors and officers must be natural persons and need not be U.S. citizens or residents.	Operating Agreement sets forth how the business is to be managed. An LLC might or might not have directors and officers. Operating Agreement might provide for management by (i) one or more members, (ii) a board of directors, (iii) officers or (iv) a manager. Directors and officers are typically natural persons, but need not be U.S. citizens or residents. Managers may be entities or natural persons and need not be U.S. citizens or residents or domiciled in the U.S.
Form of capital contributions	Stockholders may contribute assets or services to the corporation in exchange for stock.	Members may contribute assets or services to the LLC in exchange for membership interests.
Capitalization requirements	No minimum capital requirement, but courts will consider undercapitalization as a factor in determining whether to pierce the corporate veil and hold stockholders liable for the corporation's liabilities. Multiple classes of stock permitted.	No minimum capital requirement, but courts will consider undercapitalization as a factor in determining whether to pierce the corporate veil and hold members liable for the LLC's liabilities. Multiple classes of membership interests permitted.
Tax treatment	A corporation (and an LLC that elects to be taxed as a corporation) is taxed on its earnings at the corporate level, and the stockholders are further taxed upon payment of any dividends or distribution (i.e., double taxation). The controlling stockholder(s) can control the timing and amount of distributions.	An LLC is not federally taxed (unless it elects to be taxed as a corporation). The profits and losses are passed through to the members. No double taxation for U.S. members, but a foreign corporation member may owe branch profits tax in addition to corporate income tax.[18]
Relative cost to form and maintain	Lowest cost of formation assuming no special features.	Slightly more expensive to form than a corporation. Costs depend on complexity of structure.

1. Corporations

A corporation is a legal entity that exists separate from its stockholders. It is an entity frequently used by foreign investors.

a) Ownership

The minimum number of owners, or "stockholders," of a corporation is one. This permits a parent entity to wholly own a subsidiary by being the sole, 100% owner of the subsidiary entity. A stockholder may be a natural or juridical person and, if a natural person, need not be a U.S. citizen or resident.

b) Capitalization

Unlike in many foreign jurisdictions, there is no minimum capital requirement for a corporation in the U.S. The Certificate of Incorporation must indicate the number of shares of each class of stock that the corporation is authorized to issue, but there is no minimum value requirement (par value) for shares of stock in a Delaware corporation.[19] The capitalization of a corporation depends upon the actual issuance of these authorized shares to the stockholder(s) and the consideration paid for these shares. Capital contributions may be made in the form of cash or non-cash consideration. It is important that a corporation have sufficient capital to reasonably run its business. Failure to capitalize a business in a manner that is adequate, given the nature of its business and the attendant risks, can be a factor in a court's decision to find that an entity is an alter ego of another entity or pierce the corporate veil, and in so doing, impose direct liability on stockholders.[20]

c) Management

A corporation may have different classes of stock, each of which may have different voting and economic rights. The stockholders' primary responsibility is the election of the directors, although the stockholders also have rights to vote on fundamental matters such as dissolution, a sale of the company, or amendments to the charter. Management and control of a corporation are primarily through a board of directors. The number of directors and procedures for nomination, election, voting requirements, and other aspects of board governance are set forth in the corporation's bylaws, a document that is not required to be filed publicly. It is permissible under Delaware law to have a single director, which is not uncommon for wholly-owned subsidiary corporations. Directors must be natural persons of at least 18 years of age, but need not be residents of the U.S. or the state of organization.[21] Under Delaware law the officers, and not the directors, of a corporation manage day-to-day activities and are authorized to enter into agreements and otherwise take action on behalf of the corporation. The directors act collectively, as a body, and appoint officers, who hold the titles and duties stated in the bylaws or in a resolution of the board of directors, and as may be necessary to enable the corporation to sign legal instruments and stock certificates.[22] The same natural person may hold any number of offices unless the certificate of incorporation or bylaws otherwise provide.[23]

d) Limited liability

Corporations are legal entities separate from their members. They can sue, be sued, and can enter into contracts. Stockholders are liable only to the extent of their respective investments in the corporation, and not for the corporation's obligations beyond that amount. Subsidiaries that fail to comply with basic corporate formalities, such as the appointment of officers or directors or maintenance of books and records, can be subject to claims seeking to "pierce the corporate veil" or otherwise hold the subsidiary's parent liable for the obligations of the subsidiary.[24]

e) Taxation

If a parent corporation conducts business in the U.S. only through a U.S. corporate subsidiary (i.e., the parent itself does not establish an office or other business presence within the U.S.), the parent will not generally be subject to corporate net income tax in the U.S. and will not generally be required to file U.S. tax returns.

A U.S. corporation must apply for an Employer Identification Number ("EIN") and is generally subject to regular U.S. corporate income tax (at a current rate of 21%). Historically, U.S. corporations were subject to taxation on all of their worldwide net income (a foreign tax credit was sometimes available for income taxes paid to other jurisdictions on non-U.S. source income). Under the 2017 U.S. tax reform legislation, there was a move towards a partial territory-based tax system combined with new anti-base erosion provisions.[25] Significant provisions of the 2017 law are set to expire at the end of 2025, setting the stage for major tax legislation in the U.S. in 2025.

A U.S. corporation is required to file annual tax returns and make estimated tax payments. In addition, the gross amount of any dividends or distributions paid by a U.S. corporate subsidiary to a non-U.S. stockholder (as well as interest or royalty payments to any foreign person) is subject to a U.S. taxation and a withholding tax of 30%. These two levels of taxation, at the corporate level and upon distribution, are referred to as "double taxation." Therefore, for U.S. federal income tax purposes, the combined effective tax rate of U.S. profits repatriated to a non-U.S. parent by a U.S. corporation, as of the date of this publication, could be as high as 44.7%, although the 30% withholding tax rate may be reduced or eliminated under a double tax treaty between the U.S. and the non-U.S. stockholder's jurisdiction of tax residence (provided that any applicable conditions, including a limitation on benefits provision, are satisfied).

Provided that a U.S. corporation does not hold a significant amount of U.S. real property,[26] the parent will not be subject to U.S. tax on any capital gains it realizes if it sells its shares in the U.S. corporation. A U.S. corporation may be subject to state or local taxes, depending on the tax rules applicable in the states or localities where it is considered to have a business nexus.

A corporation that is at least 25% owned by a foreign entity must report all transactions with foreign related parties to the Internal Revenue Service ("IRS"). Intercompany prices for transfers of goods, intangible assets, services, and loans are required to meet the arms' length standard.[27]

The U.S. does not impose indirect taxes such as sales tax, value-added tax ("VAT"), or goods and services tax ("GST") at the federal level, although these taxes may be imposed at the state and local levels.

As noted above, a non-U.S. company will generally choose to do business in the U.S. through a wholly-owned U.S. corporate subsidiary rather than directly through a branch or through a fiscally transparent entity.

f) Naming requirements

The name of a corporation must contain the word "association," "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate," or "limited," (or abbreviations thereof, with or without punctuation), or words (or abbreviations thereof, with or without punctuation) of like import of foreign countries or jurisdictions (provided they are written in the Roman alphabet).

In addition, the name of a company must be distinguishable from that of any other entity already registered in the state of formation (or approval of the owner of the already-registered name must be provided). When forming an entity, a critical first step in that process is a determination of whether the same or similar name of the entity is already being used in that jurisdiction. If so, the formation application can be rejected on that basis.[28]

g) Formation mechanics

For a corporation, the basic formation steps are as follows:

- **Incorporation (1-5 days):** Under Delaware law, a corporation is incorporated once the Certificate of Incorporation is filed with the Division of Corporations in the Delaware Secretary of State's office. The Secretary of State must approve the incorporation, including the name selected for the new entity. This process takes no more than 3-5 business days and, for an additional fee, the timing can be completed in as little as an hour.
- **Action of incorporator or stockholder(s):** After confirmation of incorporation is received, the incorporator or the stockholder(s) (through an Action by Written Consent) approves and adopts the Certificate of Incorporation, establishes the number of initial directors, and designates the persons to serve as initial directors until the first meeting of the stockholder(s) is held or until successors are elected. If this action is taken by an incorporator, the incorporator then resigns as incorporator of the company.
- **Board of Directors organizational meeting:** Subsequently (and this can occur immediately following Action by Written Consent by the incorporator or the stockholder(s)), the Board of Directors holds an organizational meeting, or executes a unanimous written consent in lieu of a meeting, to ratify the actions taken by the incorporator or the stockholder(s), to adopt the bylaws, to elect officers, and to adopt other organizational resolutions related to formation of the company.

The documentation associated with formation of a wholly-owned corporation is (i) Certificate of Incorporation (as noted, this may be called different things in different states), (ii) bylaws, (iii) an Action by Written Consent of Sole Incorporator or Stockholder(s), (iv) a Unanimous Written Consent of the Board of Directors in lieu of an Organizational Meeting, (v) a subscription agreement for the issued shares, and (vi) a share certificate representing these shares.

2. Limited Liability Companies

Limited liability companies are hybrid entities that afford the limited liability protection of a corporation, a flexible management structure, and the option of being treated as a fiscally transparent entity for tax purposes.

a) Ownership

For a limited liability company or "LLC," the minimum number of owners, or "members," is one. A member may be an entity or a natural person and, if a natural person, need not be a citizen or resident of the U.S.

b) Capitalization

There is no minimal capital requirement for an LLC. Requirements for initial or subsequent capital contributions to an LLC are governed by the LLC Agreement. As with a corporation, the actual capitalization of the LLC is determined by the amounts actually contributed (in cash or in kind) by the members. It is important that a subsidiary LLC have sufficient capital to reasonably run its business. Failure to capitalize a business in a manner that is adequate, given the nature of its business and the attendant risks, can be a factor in a court's decision to find that an entity is an alter ego of another entity or to pierce the corporate veil, and in so doing, impose direct liability on members.

c) Management

LLCs allow greater flexibility than corporations with respect to structure and operation. As is the case with shares of corporations, membership interests may be split into different classes (such as common and preferred) with different rights and preferences. An LLC may be operated as either a "member-managed" or a "manager-managed" LLC. In a member-managed LLC, each member of the LLC has the authority to bind the company and to act on its behalf. In a manager-managed LLC, the members appoint one or more persons or entities to act on behalf of the company. The governance structure of an LLC can resemble that of a corporation, a partnership, or a limited partnership. Subject to certain minimum requirements of applicable state law, all aspects of control, authority and management of an LLC may be governed by and set forth in the LLC Agreement. The LLC Agreement does not have to be filed or registered with the state of organization, and it can be amended by the member(s), as set forth in the LLC Agreement.

d) Limited liability

As with corporations, LLCs are legal entities separate from their members. A member is liable only to the extent of its investment in the LLC and not for the LLC's obligations beyond that amount. As with a corporation, however, failure to observe organizational formalities and other requirements may lead to claims seeking to "pierce the veil" of an LLC or otherwise hold members liable for the obligations of the LLC.

e) Taxation

LLCs offer greater flexibility than corporations with regard to taxation because the members can choose whether an LLC will be taxed as a fiscally transparent entity or as an opaque entity. By electing to be taxed as a partnership (if it has more than one member) or as a disregarded entity (if it has a sole member), an LLC is transparent for tax purposes and can avoid double taxation for its U.S. members. However, a foreign parent of such an LLC would be considered to be engaged in the U.S. trade or business of the LLC and, as a consequence, would be subject to U.S. corporate income tax, U.S. tax return filing obligations, and the 30% branch profits tax, subject to an applicable tax treaty. State or local tax and tax return filing obligations may also apply. Under an applicable double tax treaty between the U.S. and the foreign parent's jurisdiction of tax residence, the foreign parent might be exempt from the corporate income tax if its U.S. business activities do not give rise to a "permanent establishment" or, if it does have a U.S. permanent establishment, the 30% branch profits tax rate might be reduced or eliminated. A U.S. LLC that is wholly-owned by a foreign person is treated as a domestic corporation for purposes of the reporting and record-keeping requirements that otherwise apply to 25% foreign-owned U.S. corporations and must obtain a U.S. EIN to complete these filing obligations.

A foreign parent is generally subject to double taxation on its business activities in the U.S., whether it establishes a corporate entity (corporate income tax and dividend withholding tax) or a transparent entity (corporate income tax and branch profits tax). As noted previously, non-U.S. clients typically do not want their principal non-U.S. business organizations to be directly subject to U.S. taxation or to U.S. tax return filing obligations and instead opt to conduct their U.S. business activities through a U.S. corporate subsidiary. On the other hand, it is conceivable that, for non-U.S. tax planning purposes, a parent might want to utilize a U.S. entity that could be regarded as fiscally transparent (e.g., a partnership) under non-U.S. tax law if it expected its U.S. operations to produce losses for the next several years. A foreign parent's choice between operating in the U.S. as a branch or transparent entity or as a corporate subsidiary should be considered on a case-by-case basis based on the applicable facts.

f) Naming requirements

The name of a limited liability company must contain the words "limited liability company," "L.L.C.," or "LLC" at the end of the company name. In addition, the name of the company must be distinguishable from any other entity already registered in the state of formation (or approval of the owner of the already-registered name must be provided).

g) Formation mechanics

Formation of an LLC requires the following steps:

- **Formation (1-5 days):** As with a corporation, the LLC is formed when the Secretary of State of the state of formation accepts the filing of the Certificate of Formation. For an additional fee, the registration can be completed in as little as an hour.
- **Adoption of LLC agreement:** Once the LLC is formed, the member(s) adopts a written LLC Agreement. This document may range in complexity from fairly simple, for a wholly-owned, single-member LLC, to extremely complex, for an LLC with multiple members, a complicated ownership structure or other specialized requirements. Creating a wholly-owned, single-member LLC requires a simpler form of LLC Agreement, which can be prepared in a day or two, to be executed by the member(s) concurrently with, or shortly after, formation of the LLC.

  Formation of an LLC typically entails the drafting of two documents — a Certificate of Formation and an LLC Agreement — and the filing of the Certificate of Formation.

3. Partnerships

Partnerships are associations of persons or entities that may carry on a business purpose or other purpose, depending on the type of partnership. In the absence of an election to be taxed at the partnership level, partnerships are treated as non-taxable entities, and income and losses "pass through" the partnership to the partners, who are subject to taxation for their respective shares of the partnership's income.[29] Up to four types of partnerships are available in the U.S., depending on the state: general partnerships; limited partnerships; limited liability partnerships; and limited liability limited partnerships.

a) General partnerships
A general partnership ("GP") is an association of two or more persons to carry on a business for profit, regardless of whether they intend to form a partnership. The partnership is governed by the terms of its partnership agreement (if one exists) and state law. In a GP, all of the partners are jointly and severally liable for the partnership's obligations. The GP form is not often used intentionally in the U.S. because it does not offer any limited liability protection to its partners. The general partners may delegate management and may (but need not) designate officers to manage day-to-day operations.

b) Limited partnerships
A limited partnership ("LP") is an association of two or more persons or entities where at least one of those persons or entities is a general partner. The LP may conduct any lawful business for profit or not for profit. An LP is formed by the general partners' execution and filing of a Certificate of Limited Partnership with the Secretary of State. The general partner(s) of an LP have unlimited liability for the obligations of the partnership. The LP may also include limited partners, whose liability is limited to their respective investments in the partnership. Limited partners should not participate in the management of the partnership's business, or else they may lose their limited liability status. Only general partners are permitted to manage an LP's affairs. Often, an LP will have a corporation serve as the general partner. Individuals can serve as the limited partners. If the individuals who are limited partners of a LP are also officers of the corporation serving as general partner, they may manage the LP's affairs through their roles as officers of the general partner without losing their status as limited partners.

c) Limited liability partnerships
The creation of limited liability partnerships ("LLPs") is subject to restrictions in several states, which limit LLP registration to certain types of professional associations, such as law, medical, and accounting practices. LLPs are general partnerships in which none of the partners are personally liable for the partnership's obligations. An LLP is formed by stating in the partnership agreement that the partnership is an LLP and by filing a statement of qualification with the Secretary of State. LLPs are most often used by professional services providers, such as law firms and accounting firms. State LLP statutes are not uniform, and several states may impose specific requirements on LLPs.

d) Limited liability limited partnerships
Most states, including Delaware, allow for the creation of limited liability limited partnerships ("LLLPs"). LLLPs are limited partnerships in which the general partner also has limited liability. LLLPs are formed by filing a Statement of Qualification with the Secretary of State of the relevant state and by either allowing for LLLP status in the partnership agreement or by obtaining approval from all general partners and limited partners.

4. Post-formation actions

Once the entity is formed, it must apply for an EIN from the IRS to be used for tax reporting purposes. The EIN may be obtained by filing a Form SS-4 with the IRS. This can be done by fax, generally resulting in an EIN within a couple of weeks, or by phone or online (only for a U.S. entity if the person applying has a valid Taxpayer Identification Number), resulting in an immediate assignment of an EIN. The EIN is required for the company to hire employees but may also be used for establishing bank accounts or for other identification requirements. Note that even if the entity is a single-member LLC that is disregarded for tax purposes, it must still obtain an EIN if it has employees and will be responsible for collecting, reporting, and paying employment tax obligations. As noted above, a disregarded LLC that is wholly-owned by a foreign person must also obtain an EIN and comply with certain information reporting and record-keeping requirements.

Other issues and steps to consider after the entity is formed include the following:

- Obtaining any necessary licenses and permits to do business (including qualification to do business in the state where the main office is located if it is not the state of formation);
- Setting up bank accounts;
- Determining and funding initial working capital requirements;
- Identifying a location for the main office and leasing office space; and
- Obtaining insurance policies, including umbrella liability insurance, property and casualty insurance, and directors and officers insurance.

Execution formalities

The requirements for valid execution of legal documents in the U.S. are relatively minimal. Documents to which a legal entity is a party must be duly authorized (either specifically or through a delegation of authority to an officer or other representative) by the appropriate governing body (i.e., the board of directors or the board of managers) and must be validly executed by a person authorized to sign the document on behalf of the entity. Documents may be executed in counterparts, and facsimile signatures are sufficient even for some governmental filings. There are no laws or conventions regarding the color ink used to execute documents or the initialing of each page of a document.[30] Notarization is rarely required; when it is, it is a simple and ministerial process performed by administrative staff, not attorneys. Unlike notaries in civil law jurisdictions, U.S. notaries are usually not lawyers and only verify that they have viewed documents or identification or witnessed the execution of documents. They do not pass upon the validity of documents or transactions under applicable law. Documents can be notarized quickly, without an appointment and for a nominal fee. The U.S. is a party to the 1961 Hague Convention Treaty. The process for obtaining an apostille varies from state to state and can take several days to more than a week.

Commercial contracting

The U.S. is a litigious jurisdiction, and companies entering into commercial agreements in the U.S. should be aware that it is not unusual for disputes arising from commercial contracts to be litigated.[31] Because the U.S. is a common law jurisdiction, these disputes will likely be argued based upon case law, rather than a statutory framework. Litigation can be time consuming and expensive. Therefore, particular care should be taken in the drafting, negotiation, and management of any U.S. commercial contract.

Formation of a commercial contract

The essential elements of a legally enforceable contract in the U.S. are (i) an offer, (ii) acceptance of an offer, and (iii) consideration.[32] An offer occurs when there is reasonable expectation that the offeror will enter into a contract in accordance with the offered terms. Acceptance occurs when the offeree indicates to the offeror that it accepts the offered terms. Whether the value or amount of consideration exchanged is sufficient is a subjective question, and there is no minimum value threshold for what constitutes sufficient consideration. U.S. courts will generally not question the adequacy of consideration, provided that some consideration is given.[33]

In addition to the elements of offer, acceptance, and consideration, a court will generally look at whether the parties "intended to be bound" and whether the terms of the contract are sufficiently definite.[34] Whether the parties to a contract "intended to be bound" (i.e., whether there was valid offer and acceptance) is a fact-intensive and objective test in which overt manifestations of assent, not subjective intent, control the analysis.[35] The existence of signed writing will strongly suggest that the parties intended to be bound, but evidence to the contrary (i.e., signing documents labeled "draft" or containing blanks) may cut against that conclusion.[36] A court will determine that the terms of a contract are "sufficiently definite" when the court can understand what the parties have agreed to based on the contract's terms and apply "the proper rules of construction and principles of equity."[37]

The "four corners" doctrine

In general, U.S. commercial contracts will be interpreted and enforced solely in accordance with their terms. This means that if a contractual dispute arises and is litigated in a U.S. court, the court generally will not look beyond the "four corners" of the contract (i.e., the pages of the written contract) to determine its meaning. Evidence of prior oral or written agreements that contradict or modify the terms of a binding written agreement generally will have no bearing on the interpretation or meaning of that agreement, nor will evidence of contemporaneous oral or written agreements (unless the contemporaneous written agreement is clearly incorporated by reference).

Exceptions to the "four corners" doctrine

There are certain exceptions to the "four corners" doctrine. These exceptions include:

1. The Uniform Commercial Code and U.N. Convention for the International Sale of Goods

Although, as stated above, the U.S. is a common law jurisdiction with no general statutory overlay, most U.S. states have adopted the Uniform Commercial Code ("UCC") or a local version thereof, which provides a uniform set of implied terms that are used in contracts for the sale of goods or services.

UCC terms are not mandatory, and parties may agree to terms that are contrary to or different from the UCC's terms or agree to "opt out" of the UCC altogether. If a dispute arises for a commercial contract under the UCC, a court may fill in missing terms and provide an interpretation for an incomplete contract.

The U.S. is a contracting state under the U.N. Convention for the International Sale of Goods ("CISG") and, if both parties do not explicitly opt out of the CISG, CISG terms will be implied in a contract between a U.S. party and a party from another contracting state.

2. Principles of equity

All U.S. commercial contracts are constrained by certain equitable principles. Application of these principles may, in certain circumstances, result in a U.S. court refusing to enforce certain contract terms or alternatively enforcing a promise between parties even if no written contract exists between them, although courts will look first to the written agreement between the parties. The following, while not exclusive, are examples of equitable principles that apply to U.S. commercial contracts:

- **Unconscionability.** A U.S. court may refuse to enforce a contract if it finds the contract or certain of its terms to be "unconscionable," meaning that at the time of contracting, there was such a disparity in bargaining power between the parties that the more powerful party was able to force unfavorable terms on the weaker party, or if the contract terms are overly harsh or unfairly one-sided. This principle often arises in the context of commercial contracts.
- **Promissory estoppel/detrimental reliance.** Even if no enforceable contract exists, a court may find that a promise between parties may be enforced if it was reasonable for the promisee to take action in reliance on that promise, and the promisee's action on that promise was to its own detriment.
- **Good faith and fair dealing.** In the U.S., commercial contracts include an "implied covenant of good faith and fair dealing" (i.e., an inescapable term of every agreement). The covenant imposes an obligation on parties to act in good faith and deal fairly with the other parties to the contract, even though this duty is not specifically stated in the contract. As between merchants, good faith is defined under the UCC as "honesty in fact and the observance of reasonable commercial standards of fair dealing in trade."[38]
- **Public policy.** U.S. courts will refuse to enforce any contract or contract term which is contrary to established public policy such that enforcement of a contract or its terms would be offensive to society. Contracts that would be invalid due to public policy might include contracts which are illegal or immoral, such as contracts that exculpate a party even for gross negligence or intentional harm.

3. Bankruptcy

A commercial contract may not be enforced exclusively in accordance with its terms if a contracting party declares bankruptcy. In the event of a bankruptcy, the bankrupt party may be absolved, in full or in part, of its obligations under the commercial contract. For further information on bankruptcy proceedings in the U.S., see Section XII of this publication.

4. Other statutory terms

State statutes (particularly in the consumer arena) and federal regulations will also govern some contractual matters, although the U.S. statutory overlay is significantly more limited than in civil law jurisdictions.

Choice of law and venue in commercial contracts

Parties to a U.S. commercial contract are generally permitted to choose the law that will govern the contract and the venue in which any disputes arising from the contract will be heard. There is no requirement that the laws of a particular state govern a commercial contract, nor is there any requirement that disputes be resolved in a specific location. The only limitation on the parties' choice of law and venue selections is that the transaction must generally bear some nexus to the chosen state. Whether an adequate nexus exists is a fact-specific analysis, but the organization of one contracting party or the presence of its headquarters in a state will generally be sufficient.

New York provides an exception to the nexus rule by allowing contracting parties to choose New York governing law, so long as the obligation or consideration contemplated by the transaction is at least US$250,000.

So long as the New York courts obligations or consideration contemplated by the transaction amounts to at least US$1,000,000, and the parties have selected New York law as the governing law, then each case, regardless of the underlying transaction, is deemed to bear a reasonable relation to New York.[39] As a practical matter, New York is an attractive venue for commercial contract disputes because of its well-developed case law, a reasonably short docket, and a judicial bench that is experienced with commercial matters.

If a dispute arises from a U.S. commercial contract and a claim is brought against a non-U.S. company in a U.S. court, the court must establish personal jurisdiction over the non-U.S. company in order to hear the case. Personal jurisdiction is the authority of a U.S. court to hear a case against a defendant based on the extent and nature of the defendant's contacts with the jurisdiction in which the court is located. Personal jurisdiction can be found in a variety of ways, including volunteer submission to jurisdiction, and may be difficult to avoid if entering into a U.S. commercial contract. For more information about jurisdiction of U.S. courts over non-U.S. entities, see pages 68-71 of this publication.

Labor and employment law considerations

U.S. labor and employment laws are generally more employer-friendly than the laws of other jurisdictions. In the U.S., most employees do not have written employment agreements, pensions are rare, and employees are usually not entitled to severance upon the termination of employment.

Establishing the employment relationship

With few exceptions, employment relationships in the U.S. are governed by the laws of the state in which the employee works. Employment relationships may be created by express or implied contract or without any contract at all.

The traditional U.S. rule is that in the absence of an employment contract or collective bargaining agreement,[40] employment is "at-will." This means that employment is terminable at the option of either party at any time. As such, a U.S. employer may generally discharge an employee without notice, for good cause or no cause, and an employee may quit at any time without notice or cause. Various state laws and court decisions have eroded the "at-will" doctrine to some extent — most notably, under the public policy exception and theories of "implied contract" — but the doctrine is a fundamental principle of employment laws in most states.[41] Employment-related litigation is less prevalent in the U.S. than in many other jurisdictions.

Federal law imposes limited notice requirements on employers making large-scale terminations. Under the Worker Adjustment and Retraining Notification Act (the "WARN Act"),[42] an employer making a mass layoff of employees or closing a plant may be required to provide 60 days prior notice of termination, or provide pay and benefits for 60 days when no notice is given. "Mass layoff" and "plant closing" are defined terms under the WARN Act, and not every plant closing or group layoff falls under these definitions. The WARN Act applies only to employers with 100 or more employees. State equivalents of the WARN Act, referred to as "Mini-WARNs," may impose different, sometimes more stringent, obligations; or they may apply more broadly to cover smaller employers not covered by the federal WARN Act. Several states have enacted or updated their Mini-WARNs in recent years, with one mandating statutory severance in the event of a covered termination or qualifying event.

Employers may seek to have their employees sign restrictive covenants such as non-competition agreements which apply during and after employment. These have been subject to increased scrutiny under both federal and state law, with states imposing increasing scrutiny over these agreements (including imposing advance notice requirements, prohibiting these agreements for employees who earn below a certain amount, or outlawing them altogether), and the Federal Trade Commission ("FTC") attempting to implement a rule that would impose a nationwide ban on non-competition agreements, subject to narrow exceptions. Ultimately, a federal court in Texas[43] struck down the FTC's rule. In the wake of the 2024 U.S. Presidential Election and a shift to a Republican administration, it is unlikely that the federal government will pursue a ban on non-competes; however, states may continue to apply increasing scrutiny to them.

Equal employment opportunity laws

A number of federal statutes, some of which are described below[44], govern equal employment opportunity in the private sector. Note that many states have analogs to these statutes which may have different requirements, impose different remedies, or apply to a broader number of employees than federal law.

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for a covered employer to discriminate with respect to any condition of employment because of an employee's race, color, sex (which includes gender identity and sexual orientation), religion, or national origin.[45]

The statute covers employers with 15 or more employees. Foreign companies with offices and employees in the U.S. are also covered by Title VII.

Before a private action against an employer for discrimination may be brought under Title VII, an employee, applicant, or former employee must first file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC investigation will generally involve the employer responding to a lengthy set of written questions, a request for documents and sometimes fact-finding conferences, and interviews. Whether or not the EEOC finds probable cause, once the EEOC investigation has been completed, the EEOC may sue on the employee's behalf or the employee may bring a private cause of action.[46] A successful plaintiff in a Title VII action may be entitled to reinstatement, back pay, damages for future pecuniary loss (front pay), emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary loss, punitive damages, and attorneys' fees.

Following increased public attention on the issue in the summer of 2020, many employers in the U.S. have taken actions intended to increase the diversity of their workplaces. In fact, some companies' shareholders and other constituents have urged the organizations to implement certain diversity and inclusion (D&I) initiatives. While some actions intended to increase diversity are generally lawful (e.g., broadly advertising positions to diverse audiences), other actions (e.g., establishing hiring or promotion quotas, or using race, sex, or another protected characteristic as the basis for employment decisions) can violate U.S. anti-discrimination laws, even if these decisions favor a minority group over a majority group.[47] Recently, following the U.S. Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College,* which held that the use of race in admissions at two higher education institutions was a violation of law, private plaintiffs have increasingly pursued claims against employers that limit certain job benefits on the basis of protected class status (e.g., fellowships only available to racial minorities).

1. Sexual harassment under Title VII

Sexual harassment is a form of sex discrimination under Title VII. Broadly defined by the EEOC, sexual harassment is any "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Actionable forms of sexual harassment include:

a) Quid pro quo
This Latin term means "this for that" or "something for something." In the employment context, quid pro quo sexual harassment occurs when, for example, employment benefits are made contingent upon submitting to sexual advances, or an employee faces employment detriments for failing to submit.

b) Hostile work environment
This form of sexual harassment occurs when repeated, unwarranted, and unwelcome sexual advances are severe or pervasive enough to create a hostile or offensive work environment for an employee. For example, repeated lewd remarks, pinching and grabbing, the passing around of sexually explicit pictures or cartoons, or other similar sexually-oriented behavior may create a hostile work environment. Some jurisdictions have passed laws making it easier to bring hostile work environment claims, including by removing this "severe or pervasive" standard.[48]

It is more likely that an employer will be held liable for sexual harassment if it has actual knowledge of the unlawful harassment, or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials. U.S. employers typically take care to establish strong policies against sexual harassment and implement procedures specifically designed to promptly and effectively resolve sexual harassment claims.

A majority of states and many municipalities, especially large cities such as New York City, have also passed general employment anti-discrimination laws. In many cases, state and municipal anti-discrimination laws are more rigorous and broader than federal law and may prohibit discrimination on the basis of additional characteristics.[49] In any case, according to principles of federalism, federal law represents the minimum level of protection, and states cannot reduce protection below what is provided for under federal law.

c) Sexual harassment and #MeToo
Since 2017, the #MeToo movement has, through a combination of victims' voices and media coverage, increased public focus on the issue of sexual misconduct in the workplace. In response to #MeToo, several states have passed legislation addressing sexual harassment training, mandatory arbitration and non-disclosure agreements in harassment cases, and related issues.[50] Some employers have responded to the movement by re-examining their anti-harassment policies, employee training techniques, complaint procedures, and workplace culture overall.

Evaluation of employment policies, organizational structure, and reporting lines has become a central part of corporate risk assessment. In the context of mergers and acquisitions and investments, demands for so-called "#MeToo" or "Weinstein" representations from would-be sellers have become common.[51]

2. Affirmative action

Federal contractors and subcontractors may be required to develop affirmative action plans, pursuant to requirements imposed by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), which typically require regular assessment of the workforce to determine whether potential disparities exist on the basis of characteristics such as race, gender, and disability status. In some instances, affirmative action may be imposed as a judicial remedy for past discrimination, or may be voluntary if certain requirements have been met. Under the Biden administration, the OFCCP has taken an aggressive approach in enforcing these regulations and ensuring that federal contractors are in compliance, such as providing shorter or no advance notice of audits, shorter time to respond to requests, and refusing to grant extensions except in extreme circumstances; however, the incoming Trump administration may change course.

3. The Age Discrimination in Employment Act ("ADEA")

The ADEA is a federal law that prohibits employers with 20 or more employees from discriminating on the basis of age against employees and applicants who are 40 years of age or older. Although the ADEA applies to the terms and conditions of employment, some conditions are exempted from its provisions.[52] An employee may waive certain rights under the ADEA, but the waiver must be knowing and voluntary and it is important that an employer obtain legal advice to ensure that a waiver is valid. Other rights, such as the right to revoke a termination agreement within seven days of execution of the agreement, are not waivable.

4. The Pregnancy Discrimination Act ("PDA")

The PDA, a federal law, requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same for all employment-related purposes as non-pregnant disabled workers. In essence, the law requires that pregnant women receive the same treatment with regard to medical benefits, leaves of absence, and reinstatement after leaves as other employees.[53]

5. The Equal Pay Act ("EPA")

The EPA is another federal law which prohibits wage discrimination on the basis of sex against employees performing equal work in the same establishment under similar working conditions. "Equal work" means work that is substantially equal, but not necessarily identical. Under the EPA, different wages may be paid for otherwise equal work if based on a legitimately established seniority system, a merit system, an incentive system that compensates employees according to the quantity or quality of production, or a differential based on any additional factors other than sex.

6. The Americans with Disabilities Act ("ADA")

The ADA is a federal statute that applies to employers with 15 or more employees. It protects qualified individuals with a disability. A disability is defined as (i) a physical or mental impairment that substantially limits one or more of the major life activities of an individual, (ii) a record of such impairment, or (iii) being regarded as having such an impairment.[54] A qualified individual is "one who, with or without reasonable accommodation, can perform the essential functions of a job that he or she holds or desires." The "essential functions" of a job refer to "the desired results that are achieved by performing the duties of the position."[55]

If an individual is a qualified individual with a disability, he or she is not only protected from discrimination on the basis of that disability, but an employer is required to offer such individual reasonable accommodation to perform the essential functions of that individual's position, unless such accommodations would cause undue hardship for the employer. The ADA's obligations apply not only to employees but also to applicants for employment.

7. The Pregnant Workers Fairness Act ("PWFA")

The PWFA is a federal statute that applies to employers with 15 or more employees, and requires that employers provide reasonable accommodations to qualified employees or applicants with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. Similar to the ADA, the PWFA protects qualified individuals from discrimination, and an employer is required to offer such individuals a reasonable accommodation to perform the essential functions of that individual's position, unless such accommodation would cause an undue hardship for the employer.[56]

8. The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act")

The PUMP Act provides nursing employees the right to receive break time to pump breastmilk, and a private place for nursing mothers to pump at work. All employers covered by the Fair Labor Standards Act must comply with the PUMP Act.[57]

Covered employers must provide a reasonable amount of break time for nursing employees to express milk in the workplace, for up to one year following the birth of the child. If the nursing employee is not completely relieved from duty during the break time, the break time must be paid. If the employer provides paid breaks to employees for other reasons, then an employee expressing milk during a break must be paid in a similar way.

Covered employers must also provide a private space for nursing employees to express milk. This can be either a permanent place, or a temporary place converted for the purposes of a nursing employee to use to express milk, or otherwise make a space available. The space must be private and shielded from view and free from intrusion from other employees or the public. The PUMP Act specifically states that a bathroom is not sufficient for these purposes.

Wages, safety, labor, and leave laws

U.S. labor and employment law also covers employee wages and hours under the Fair Labor Standards Act ("FLSA"), workplace safety under the Occupational Safety and Health Act ("OSH Act") and state-based workers' compensation statutes, labor relations under the National Labor Relations Act ("NLRA") and the Railway Labor Act ("RLA"), and medical leave under the Family and Medical Leave Act ("FMLA").[58]

1. Wage and hour law

The FLSA does the following:

- Regulates the wages and hours of work for covered employees;
- Imposes limitations on the work and hours of employees under the age of 18;
- Establishes a federal minimum wage rate of US$7.25 per hour;
- Establishes a federal minimum wage rate for workers under 20 years of age of US$4.25 per hour during the first 90 consecutive calendar days of employment with an employer;
- Requires that overtime compensation at a rate of not less than one and one-half times the regular hourly wage be paid to employees who work in excess of 40 hours per week;
- Prohibits child labor;
- Bars employers from discriminating against employees with respect to wages on the basis of sex;
- Establishes break time requirements for nursing mothers; and
- Requires covered employers to make and retain records and reports on the number of hours worked by employees.[59]

Some employees are "exempt" from the overtime requirements of the FLSA. Whether an employee may be classified as exempt depends on a number of factors, including the employee's actual job duties, rather than just their title or job description. The most widely applicable exemptions are for management, professional, outside sales, and high-level administrative and information technology employees, who must meet technical "duties tests" to be considered exempt. Employees must also be paid above a certain salary threshold in order to be exempt. In 2024, the Department of Labor attempted to raise the salary threshold to be considered an exempt employee from $684 per week to $844 per week on July 1, 2024, and $1,128 per week on January 1, 2025; however, a federal court in Texas vacated the proposed rule.[60] The incoming administration will also likely pursue changes to the proposed rule, potentially favoring more business-friendly policies.[61]

Actions for unpaid minimum wages, overtime compensation, or liquidated damages may be brought by an employee in either federal or state court, or the Secretary of Labor may initiate enforcement proceedings against an employer on behalf of employees.

Many states and municipalities set higher minimum wage rates and may cover employers exempted by federal law. Many jurisdictions have also enacted laws increasing the minimum wage, with several jurisdictions setting their minimum wages at US$15 per hour.

State laws may also regulate overtime pay and impose further restrictions with regard to work and hour limitations for employees under the age of 18. Class action lawsuits for failure to comply with state and federal overtime laws are common and can be costly for employers.

2. Occupational safety and health laws

The OSH Act empowers the Secretary of Labor to promulgate specific health and safety standards for employers. The Secretary has delegated this authority to the Occupational Safety and Health Administration (the "OSHA"). In addition to promulgating rules, OSHA enforces compliance with the OSH Act through on-site inspections and the issuance of citations for discovered violations.

The Act imposes a "general duty" on any employer who is engaged in a business affecting commerce to provide a workplace free from recognized safety hazards and diseases, including COVID-19. Federal and state governments, as well as employers with 10 or fewer employees, are exempted from certain requirements. The OSH Act also imposes detailed recordkeeping and reporting requirements on employers, including when an employee is injured, is infected, or dies in the workplace.

U.S. employers face various rules and guidance regarding COVID-19 and the workplace. As a general matter, the federal government (OSHA and the U.S. Centers for Disease Control and Prevention ("CDC")) has issued only guidance, and states and localities have enacted laws or regulations that include binding requirements. The guidance and requirements cover topics such as facial coverings, social distancing, maximum occupancy requirements, quarantine procedures, reporting infections in the workplace, temperature checks and screening, and contact tracing. Employers who fail to comply can be subject to enforcement actions, and the failure to comply can also serve as the factual basis for a lawsuit by a private plaintiff.

Significantly, in attempting to comply with COVID-19 safety requirements, employers must continue to comply with anti-discrimination and privacy requirements, such as the ADA, which generally limits an employer's ability to ask an employee medical-related inquiries and to share an employee's medical information with others.

3. Workers' compensation laws

Workers' compensation statutes are a creation of state law and create a no-fault system to provide employees injured within the course and scope of employment with speedy and efficient systems to obtain medical treatment and compensation for lost wages. In exchange for funding state-administered benefits for injured employees, employers receive immunity from additional suits under the statutory exclusivity provisions. This may be a significant benefit to employers, in light of the large judgments that may be awarded by courts. In some states, workers' compensation will be the exclusive means by which employees can recover from COVID-19-related illnesses and death.

4. The National Labor Relations Act ("NLRA")

The NLRA is the principal federal law governing the relationship of most employers, employees, and unions. The NLRA prohibits employers from engaging in unfair labor practices (e.g., interfering with employees' right to organize) and protects employees engaged in a protected concerted activity (e.g., working together to bring work-related grievances), even in non-unionized workplaces. Employee bargaining representatives can be certified only under the specific rules of the NLRA. Bargaining committees such as works councils are not used in the U.S. Though unions still have little presence in private workplaces, they have been gaining more of a foothold in the past few years in places where they had previously been unsuccessful. For example, since 2020 there has been a rise in nonprofit workplaces opting for union representation. Unions are also gaining more traction in major retailers like Amazon. com Inc. and Starbucks. The National Labor Relations Board ("NLRB") is the federal agency responsible for the administration and enforcement of the NLRA. It's important to note that the NLRA's interpretation of the law varies widely between administrations because NLRB members are appointed by the President. Currently, labor law has been interpreted to be very favorable toward employees and unions; however, this may change under the incoming administration of President Donald Trump.

5. The Family and Medical Leave Act ("FMLA")

The federal FMLA[62] provides temporary family and medical leave to "eligible employees"[63] under the following circumstances: (i) birth, adoption, or foster care placement of a child; (ii) caring for a spouse[64], child, or parent with a "serious health condition" or who is called to active military duty; or (iii) the employee's own "serious health condition."

Eligible employees under the FMLA are entitled to up to a total of 12 weeks of unpaid leave during any 12-month period. Additionally, up to 26 weeks of leave is permitted to care for a spouse, child, or parent who suffers a serious illness or injury in the course of military service.

The FMLA also requires that the employee's medical benefits be continued during the period of leave. However, the FMLA does not require that the leave be paid. Instead, the employer's policies regarding paid time off and disability pay apply, unless provided otherwise by state or local law. Notably, in recent years, some states and localities have passed paid family leave programs which may provide for partial or full pay for employees during otherwise-unpaid FMLA leave. This is generally paid for by employment taxes, and paid to employees from the government upon an application by the employee. Upon returning to work, the employee must be restored to the same or equivalent position, with the same pay and benefits as the employee had before the leave was taken.[65] The FMLA does not apply to employers with fewer than 50 employees, but state and municipal laws may apply to smaller employers or provide greater leave benefits, including paid sick leave and parental leave in some jurisdictions.

An employee is not required to specifically request leave under the FMLA. Instead, the statute places the burden on employers to inform employees that certain types of requests may qualify as FMLA leave. Also, employers are required to make, keep, and preserve records certifying their compliance with the FMLA. Failure to educate employees on their rights or to keep accurate records regarding requests may constitute a violation of the law and subject an employer to civil penalties.

Employees who are improperly denied FMLA leave may be entitled to damages such as wages, salary, employment benefits, or other compensation denied or lost due to the violation of the statute. Other forms of relief are also available. The FMLA does not supplant an employer's sick leave and personal leave policies. Instead, its purpose is to help employees balance the conflicting demands for the workplace and their personal lives because of less common and more time-consuming events.

Arbitration

Although employees may generally bring hiring, employment, or termination disputes in federal or state court, arbitration clauses in agreements between an employer and its employees are typically enforceable under U.S. law. Such arbitration clauses, when combined with class action waivers, may preclude employees from bringing or participating in class action lawsuits.[66] Recent U.S. Supreme Court decisions have strengthened the ability of employers to enforce such waivers.[67] Recently, some employers have faced public criticism for the inclusion of mandatory arbitration clauses in employment agreements. However, such criticism is not yet widespread and the legal landscape still largely favors the enforceability of arbitration clauses under most circumstances.

In February 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFASASHA") was passed into law. EFASASHA bars the enforcement of most mandatory arbitration provisions in cases alleging sexual assault or sexual harassment.

Immigration laws

This section outlines some of the conditions under which a foreign worker may travel or remain in the U.S. to perform remunerated or non-remunerated business activities.

The Departments of State and Homeland Security oversee immigration matters in the U.S. Employers seeking to hire foreign workers should be aware of the various types of visas that are available for workers.[68] Two common types of visas for entrepreneurial ventures and other businesses are those qualifying as (i) non-immigrant visas and (ii) employment-based immigrant visas. Non-immigrant visas cover workers who have a permanent residence outside of the U.S. but desire to come to the U.S. on a temporary basis for work, study, business, or other reasons. Employment-based immigrant visas are available to a limited number of qualified applicants seeking to permanently reside in the U.S. The lists provided below are not exhaustive; employers should consult with immigration attorneys to determine their best solutions.

Non-immigrant visa categories

1. B-1 visitor visa

B-1 visitor visas are non-immigrant visas for persons seeking to enter the U.S. temporarily for legitimate activities related to business or tourism for a period of six months or less. However, a B-1 visa is generally not a work visa that allows employment in the U.S. A holder of a B-1 visa may engage in related business activities such as attending tradeshows and conferences, visiting and negotiating contracts with clients and suppliers, consulting with business associates and attending board meetings, or settling an estate. Citizens of some countries may enter the U.S., for the same activities discussed above, for a period of 90 days or less without a visa through the Visa Wavier Program with an approved online Electronic System for Travel Authorization (ESTA) registration.[69]

2. L-1 Intracompany Transferee visa

The L-1 visa is for the temporary transfer of foreign workers in a managerial, executive, or specialized knowledge capacity to the U.S. to continue employment with an office of the same employer or the same employer's parent, branch, subsidiary, or affiliate. There are two types of L-1 visa categories: (i) the L-1A Intracompany Transferee as executive or manager; and (ii) the L-1B Intracompany Transferee in specialized knowledge capacity. The L-1A visa enables a U.S. employer to transfer an executive or a manager from its foreign-affiliated offices or enables a foreign company to send an executive or manager to establish a U.S. office. Participants may stay for an initial maximum of three years (for a "new office" L-1 visa, the initial maximum is one year), but may request extensions of stay in increments of up to an additional two years, for a total stay of seven years in L-1A status and five years in L-1B status.

To qualify, a U.S. employer must (i) have a qualifying relationship[70] with a foreign company, and (ii) be doing business, presently or in the future, as an employer in the U.S. and in at least one other country, directly or through a qualifying organization, for the duration of the beneficiary's stay. The business must be viable but does not have to be engaged in international trade. In addition, the employee is required to (i) have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding the employee's admission, and (ii) be seeking to enter the U.S. to provide services in a managerial or executive or specialized knowledge capacity to the same employer or one of its qualifying U.S. organizations.

3. H-1B Specialty Occupation visa

The H-1B visa is for individuals with college or advanced degrees or with professional experience that is equivalent to a four-year college degree who wish to work in a "specialty occupation." The maximum validity of an H-1B visa is generally three years, although the person's stay may be extended not beyond a total of six years, subject to two limited exceptions involving those pursuing U.S. permanent residency ("green card") when certain conditions are met. The visa has an annual numerical cap for each fiscal year, and due to a high demand for several years in a row, the U.S. government is conducting a random drawing (lottery) each year of cases that will be selected for processing. As such, there is no guarantee that an employer will be able to obtain this visa for the desired employee. Unlike the L-I visa, the H-1B visa has a wage obligation that requires the U.S. employer to pay the higher of the "actual wage" or the "prevailing wage" for the designated position.

The proposed position must meet one of the following criteria to qualify: (i) a bachelor's or higher degree in a given specialty field is normally the minimum entry requirement for the position; (ii) the degree requirement for the job is common to the industry, or the job is so complex or distinctive that it can be performed only by an individual with a degree; (iii) the employer normally requires a degree in a specific field for the position; or (iv) the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties usually is associated with the attainment of a bachelor's or higher degree. In addition, the foreign employee must meet any one of the following requirements: (i) completed a U.S. bachelor's or higher degree required by the specific specialty occupation; (ii) hold a foreign degree that is the equivalent to a four-year U.S. bachelor's or higher degree in the specialty occupation; (iii) hold an unrestricted state license, registration, or certification which authorizes the applicant to fully practice and be engaged in the state of intended employment (if such licensing or certification is required for the role); or (iv) have education, training or progressively responsible experience in the specialty that is equivalent to the completion of such a degree, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

4. Current developments regarding H-1B Program

Since March 1, 2020, the U.S. Department of Homeland Security ("DHS") has required petitioners to first electronically register with U.S. Citizenship and Immigration Services ("USCIS") during a designated registration period (in March, although the exact time period may fluctuate from year to year) and provide basic information so that the random drawing "lottery" selection can be made before the employers have to file their H-1B petitions (both those subject to the regular cap and those eligible for the advanced degree cap). USCIS selects from among the registrations timely received a sufficient number projected as needed to meet the applicable H-1B allocations under the quota. Employers will then have the opportunity to submit the full H-1B petition for substantive adjudication, but only for cases selected through the lottery. Due to increased number of registration (lottery) entries each year, statistical odds of getting selected through the lottery have been steadily decreased in recent years.

5. Canadian and Mexican TN visa

Through the North American Free Trade Agreement ("NAFTA"), and its successor, the US-Mexico-Canada Agreement ("USMCA"), eligible professional[71] Canadian and Mexican citizens may seek temporary entry to the U.S. to engage in prearranged business activities for U.S. or foreign employers as a non-immigrant for a period of up to three years.[72] Mexican citizens have to apply for a TN visa at a U.S. embassy or consulate. Unlike Mexican citizens, Canadian citizens who qualify for a TN visa status need not apply at a U.S. embassy or consulate but apply for admission directly at a designated U.S. port of entry.

Employment-based immigrants visas

Every year, the U.S. issues approximately 140,000 employment-based immigrant visas, which allow the holders to receive green cards once in the U.S., based on five employment-based preferences. This section will discuss the first three preferences, as they generally receive the highest rates of issuance.[73]

1. Employment First preference (EB-1): priority workers

a) Persons with extraordinary ability in the sciences, arts, education, business, or athletics

Applicants in this category must have extensive documentation showing sustained national or international acclaim and recognition as being among the select few considered to be at the top of their field. Such applicants are not required to have specific job offers, so long as they are entering the U.S. to continue work in the fields in which they have extraordinary ability.

b) Multinational managers or executives who have been employed for at least one of the three preceding years by the overseas affiliate, parent, subsidiary, or branch of the U.S. employer

This category is similar to L-1A non-immigrant visas described above, but it is only reserved for executives/managers and not for specialized knowledge employees. The applicant's employment outside of the U.S. must have been in a managerial or executive capacity, and the applicant must be coming to work in a managerial or executive capacity.

2. Employment Second Preference (EB-2): professionals holding advanced degrees and persons of exceptional ability

This category may be impacted by quota-related delays for certain nationalities due to high demand and per-country limits imposed by the statute. Currently, nationals of China and India are subject to delays in this EB-2 category. Applicants must be one of the following: (i) a professional holding an advanced degree; (ii) a professional with a baccalaureate degree and at least five years of progressive experience in the profession; or (iii) a person with exceptional ability in the sciences, arts, or business. This category generally requires the U.S. employer to recruit (i.e., test the labor market) and then seek certification from the U.S. Department of Labor that no U.S. worker who is minimally qualified for the advertised job is willing, able, and available for the position for which a foreign national is being sponsored.

2. Employment Third Preference (EB-3): skilled workers, professionals, and unskilled workers

Similar to EB-2, this category also requires U.S. employers to test the labor market and then seek certification for the unavailability of minimally qualified U.S. workers. Applicants must be one of the following: (i) a skilled worker whose job requires a minimum of two years of training or work experience that is not temporary or seasonal; (ii) a professional whose job requires at least a baccalaureate degree from a U.S. university or college or its foreign equivalent; or (iii) an unskilled worker capable of filling positions that require less than two years training or experience that are not temporary or seasonal. Due to annual quotas and lower priority for allocation of immigrant visas in this category compared to EB-1 and EB-2, there are typically longer quota-related delays impacting those being sponsored in this category. Currently, such delays for Indian nationals exceed nine years and for Chinese nationals exceed three years.

Tax considerations

Foreign workers who reside in the U.S. for an extended period or who obtain permanent residency status become U.S. tax residents. These employees and their employers should consult with a U.S. tax advisor regarding their respective U.S. tax payments and compliance obligations, including for U.S. Social Security, Medicare, and Federal Insurance Contribution Act ("FICA") taxes, under these circumstances.

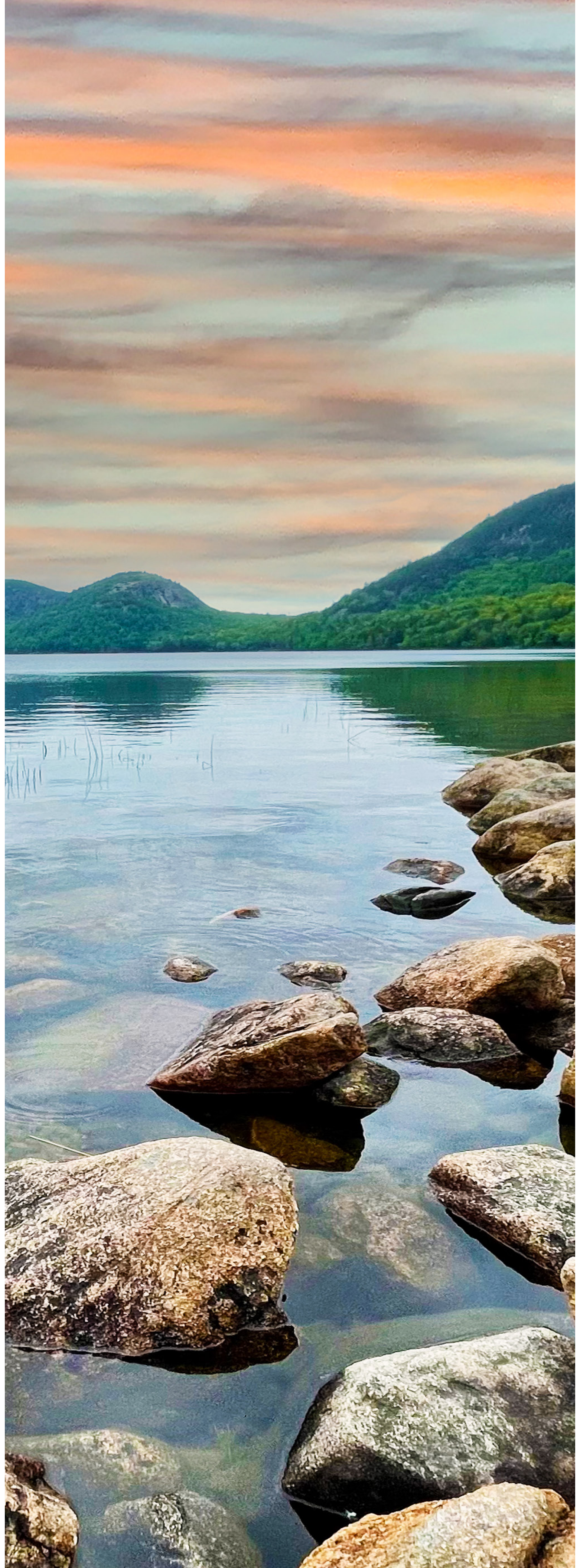
Intellectual property laws

The U.S. is considered one of the jurisdictions that are most protective of intellectual property.[74] Copyrights and patents are governed by federal laws, while trademarks are governed by federal, state, and common law. Trade secrets are governed by federal and state law.

Copyrights

Copyrights protect works of authorship (e.g., text, photographs, audio, video, graphics, computer programming in source code and object code form) from, among other things, unauthorized copying.

- Unlike patent protection, copyright affords no protection for ideas, concepts, or inventions. It protects only the expression of ideas and concepts.
- Copyright rights exist upon "fixation" in a "tangible medium," such as a writing or drawing, not registration; however, registration is beneficial because it provides the possibility of statutory damages and attorneys' fees and is required to pursue enforcement actions in federal court.
- The author of a copyrightable work owns the copyright, unless and until the author assigns the rights in writing.
- The employer is considered the author of works its employees create, but only if creation was within the scope of the employee's job responsibilities.
- Contractors are authors and owners of works they create, unless a written agreement says otherwise. Even if the parties have used a written agreement carefully identifying a contractor's work as work-made-for-hire, any resulting copyrights will still be owned by the contractor unless the work falls within one of the nine relatively narrow statutory categories. Thus, all such consulting agreements also should include a catch-all present assignment provision.
- In order for copyright rights to apply, the author of a work must be a human. Works created by AI without sufficient human involvement are not protectable by copyright.
- Duration of copyright protection for new works authored by an individual is the author's life plus 70 years; for new works authored by a company, the duration is the shorter of 95 years from first publication or 120 years from creation. The duration of protection for older works varies.
- Use of a copyright notice is advised but not required, whether or not the work is registered. An example of such notice includes: © *[year of publication]* . *[Name of copyright owner]. All rights reserved.*
- Fair use is a defense to copyright infringement that allows some use of another's works without permission. The test weighs four factors, including the reason for and manner of the use, the type and portion of the work copied, and the impact, if any, on the value of the work copied. Fair use is a highly fact-specific analysis.



Patents

Patents protect novel, useful and non-obvious designs, processes, procedures, or business methods.

- The U.S. Patent and Trademark Office ("USPTO") issues "utility" patents (useful process, machine, manufacture, or composition of matter),"design" patents (ornamental design of a functional item), and "plant" patents (for certain types of asexually reproduced varieties of plants).
- Utility and plant patents grant a 20-year monopoly (from the effective filing date of the application) to prevent others from making, using, offering to sell, selling, or importing the invention in the U.S. Design patents grant a 15-year monopoly (from the date of grant), 14 years for those filed before May 13, 2015.
- The patent application process makes inventions public once a patent is issued or published. This is the quid pro quo for the monopoly — the public gets full disclosure of the inventor's best ideas about how to make and use the invention. Of course if another person or entity wants to use the invention as claimed in the patent, that may require authorization from the patent owner.
- Having a patent on an invention does not necessarily mean the patent owner can make, use, or sell its invention — only that the patent owner may prevent others from doing so (the so-called Exclusionary Right). Note also that an invention may rely on another's patent and therefore require a license to be commercialized.
- Obtaining a U.S. patent requires the submission of a patent application or a provisional patent application to the USPTO no later than one year after the invention has been publicly used, described, or commercialized. Therefore, it is important to keep track of one-year bar dates from first

articles, presentations, website postings, disclosures not protected by a Non-Disclosure Agreement ("NDA"), offers for sale, and/or sales. For patents outside of the U.S. there is no one-year grace period, and thus public disclosures of inventions prior to filing for patent protection may cause the forfeiture of protection outside the U.S.

- The patent process can take three years or more, and obtaining a U.S. patent may cost from US$15,000 — US$25,000 or more in filing fees for complex inventions, such as in the biotech area. After the patent issues, maintenance fees must be paid on an ongoing basis to prevent the patent from expiring prematurely. This investment of time, effort, and resources secure what is perhaps the strongest type of intellectual property protection available.
- The patent claims define the invention, and thus the scope of protection afforded under the patent. Claim language must be sufficiently definite to persons of skill in the art so that they can determine whether a given product/process would infringe. Claims also must define an invention that does not merely reflect the prior art (what was available before the patent was filed), or obvious modifications of the prior art.
- The rest of a patent application supports the claims. The patent specification must teach one skill in the art of how to make and use the invention and the best way of performing the invention. The specification also must describe the invention sufficiently to show that the inventor was in possession of the full scope of the invention.
- Patents cannot claim laws of nature, natural phenomena, or abstract ideas.
- Generally, applications for a U.S. patent are filed in the name of the inventor — even if the company owns the invention. Typically, pursuant to the inventor's employment obligations, the inventor is obligated contractually to assign ownership of the invention to the company.
- Use proper notice: Use "Patent No. [#,###,###]" or "Patent Pending" on the products and/or in materials carrying or describing the subject of the invention.

Such marking can assist in obtaining damages if the patent is enforced against others and damages may be limited if there is a failure to mark patented products with the applicable patent number.

- The benefits of a patent portfolio include excluding competitors from the best product features or most efficient processes; generating revenue by way of royalty payments; and obtaining bargaining chips to exchange with other companies for use of their patents.
- Patent owners can seek to enforce their patent rights and prevent others from making, using, offering for sale, selling or importing patent-infringing goods through the U.S. district courts or the U.S. International Trade Commission ("ITC"). District courts may award monetary damages or an injunction against an infringer's commercialization; the ITC can award no monetary damages, although it can exclude infringing products from entering the U.S.
- In the U.S., patent litigation is expensive and litigations are generally very long. The average cost of patent litigation is between US$3,000,000 and US$5,000,000, or more. Parties wait an average of two and half years to reach trial.[75]

Trademarks

Trademarks and service marks (marks) are words, symbols, sounds, scents, and other indicia of origin that create a link between a good or service and the source of that good or service.

- Unlike other jurisdictions, in the U.S. trademark rights are created by use of the mark in commerce in connection with the goods and/or services sold under a given mark, not by registration; however, federal registration with the USPTO provides additional rights and remedies for a mark.
- Trademark rights give their owner exclusive rights to use a mark for a particular product or service, so that the public will not be confused as to the source of a product or service.
- Marks may be registered with the USPTO and/or with various U.S. states. Rights in a mark are limited geographically, but federal registration can expand the geographic scope of rights of the trademark owner.
- It is important to use proper notice with the trademark:
  - Before a federal registration issues, the trademark owner should use the TM symbol (or the SM symbol for a service mark) to the right of the mark. This notice is not required, but provides potential infringers with notice that the term is used as a mark.
  - The trademark owner should use the ® symbol whenever a federally registered trademark or service mark is used in commerce in connection with the goods or services for which it has been registered.
- It is important never to use a mark in a descriptive or generic sense. Repeated use of a mark in a descriptive or generic manner may make the mark interchangeable for the product name (generic) and result in loss of trademark rights or the exclusive right to use the mark.
  - A mark should never be used as a noun. Rather, it should be used alone or as an adjective.
  - Trademark owners should avoid using testimonials of others when the testimonials include the use of a mark as a noun.
  - What to avoid: "E-CENTIVES are on-line awards..."
  - Proper usage: "E-CENTIVES® on-line awards are available only from e-centives..."

Trade secrets

A trade secret is any information that gives a company a competitive advantage, that is unknown to others, and that the company has taken reasonable steps to keep secret. Unlike patents and copyrights, which are only protected by federal law, trade secrets are protected by federal and state law, so levels of protection may differ from state to state.

Trade secrets protect against others' misappropriation of trade secrets, but they do not necessarily give the owner an exclusive monopoly if others independently develop or lawfully reverse engineer the same trade secrets. A trade secret is (i) information (ii) which derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public and (iii) which has been the subject of reasonable measures to keep the information secret. So long as the above elements are met, there are no subject matter constraints imposed on trade secret protection. Both technical and non-technical information can be protected. Trade secrets may be information that would otherwise satisfy patentability criteria, but that a company instead chooses to keep secret, or trade secrets may be confidential information that is not sufficiently inventive to satisfy patentability criteria (for example, pricing and customer information).

To ensure adequate protection, a company should:

- Identify what important information it possesses that qualifies as a trade secret,

- Determine what steps should be taken to protect it,
- Use nondisclosure agreements and/or other contractual obligations, and establish employee policies that require the recipient of information to keep that information secret. (Everyone to whom confidential information is disclosed (e.g., employees, independent contractors, prospective investors and others) should (i) acknowledge that the information they will receive is owned by the company and confidential and (ii) promise not to disclose the information or to use the information for any purpose other than the purpose(s) for which it was disclosed),
- Restrict and/or control access to confidential information. (Consider implementing firewall and/or password protection for the company's computer system or particular subsystems, controlling access to the company's business facilities or particular units or departments, numbering copies of confidential documents and using a log to identify all recipients of those documents and the current location of each copy),
- Use confidentiality notices and legends such as a "CONFIDENTIAL INFORMATION" stamp,
- Train employees to follow the implemented trade secret protection policies,
- Implement procedures for new hires (including acknowledgment of obligation not to bring another's trade secrets to the company) and departing employees (including acknowledgment of continuing confidentiality obligations and prompt steps to monitor and prevent the taking of any trade secrets), and
- Implement policies for disposal and/or return of confidential information once no longer needed by an employee or third party.

Export control and economic sanction laws

Export Administration Regulations ("EAR")

U.S. trade control laws include the (i) export controls implemented by the Bureau of Industry and Security ("BIS") under the Export Administration Regulations ("EAR"), (ii) export controls implemented by the State Department's Directorate of Defense Trade Controls ("DDTC") under the International Traffic in Arms Regulations ("ITAR"), and (iii) economic sanctions implemented by the Treasury Department's Office of Foreign Assets Control (OFAC) under the Foreign Assets Control Regulations. These laws often overlap and should be carefully considered before the decision is taken to enter the U.S. market.

1. Scope of the EAR

The EAR control the export, re-export (i.e., exports from a destination outside the U.S. to a third country), and transfer of commercial, "dual use," and certain defense-related hardware, software, and technology. "Technology" here refers to the "[i]nformation necessary for the 'development,' production,' 'use,' operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in [Export Control Classification Numbers ("ECCNs")] on the [Commerce Control List ("CCL")] that control `technology') of an item." Such technology is "controlled according to the provisions in each Category" of the CCL. Dual use items are items that can be used for both civil and military applications.

The EAR apply to the following:

- All U.S.-origin items, regardless of their location;
- All non-U.S.-origin items located in the U.S.;
- Certain items manufactured outside the U.S. that contain greater than de minimis controlled U.S.-origin content;[76] and
- Certain items manufactured outside the U.S. that are derived from, and direct products of, U.S.-origin technology or software[77] or "direct products" of a complete plant or any major component of a plant as described in § 736.2(b)(3) of the EAR.[78] For exports to Russia and Belarus, as of Feb. 24, 2022, there are more stringent requirements when applying this so-called "foreign direct product" rule.

The EAR also control transfers of technology to non-U.S. persons, wherever located. For example, the transfer of controlled technology from a U.S. entity to a Chinese national employee of the entity, or one of its affiliates, is "deemed" an export to China even when the relevant individual is located within the geographical territory of the U.S.

Not all items that are subject to the EAR require a license for export or re-export. Licensing requirements depend on various factors, including (i) how the item is classified, (ii) the destination country, (iii) the end-user, and (iv) the end-use.

2. Licensing requirements - classification and destination controls

The EAR contain a list of controlled items called the CCL.[79] Items are divided into 10 categories and further subdivided into groups. Each group contains detailed entries describing the technical functions or characteristics of the commodities, software, and technology that are controlled. Items that match the described functions or characteristics in an entry are assigned a corresponding ECCN. Depending on an item's ECCN and related reason for control, a license may be required to export or re-export the item to certain countries. If an item is subject to the EAR and not specifically described in any ECCN, then the item is classified under the "basket category" referred to as "EAR99." Generally, no license is required for the export of EAR99 items, except to certain sanctioned countries and restricted parties, or to certain countries, such as Russia and Belarus, if destined for military end-use or military end-users.

As part of the effort to issue new export control restrictions on "emerging and foundational" technologies, the Commerce Department added controls in October 2021 on nucleic acid assembler and synthesizer "software" that is capable of designing and building functional genetic elements from digital sequence data.[80] The Commerce Department also sought comments in December 2022 on Brain-Computer Interface technology. It is anticipated that the Commerce Department will continue issuing new export control restrictions on "emerging and foundational" technologies. While the exact nature and extent of future controls are not known at this time, it is likely that they will impact items and technology related to sectors such as biotechnology, artificial intelligence, microprocessors, additive manufacturing, robotics, and other areas. These new controls could result in items that were previously subject to only a very low level of control being controlled for export to most countries. The scope of these new rules is also likely to have a significant impact on the scope of transactions of interest to CFIUS.

3. Licensing requirements - embargoed destination controls

In addition to the classification and destination controls, the U.S. government maintains trade embargoes against various countries. As of the date of this publication, the EAR generally prohibit (subject to very limited exceptions) exports and re-exports to Cuba, Iran, North Korea, Crimea (region of Ukraine/Russia), Syria, and the so-called Donetsk People's Republic and

Luhansk People's Republic regions in Eastern Ukraine. These requirements are in addition to, and concurrent with, the economic sanctions imposed by OFAC described below.

4. Licensing requirements - restricted parties and end-uses

Under the EAR, a license may be required for transactions involving a prohibited or restricted end-user or end-use. The U.S. government maintains sanctions against certain individuals, entities, and organizations that have violated U.S. export control laws, have participated in proliferation activities, or have been determined to be terrorists, terrorist organizations affiliated with certain sanctioned governments, and for other reasons. Companies subject to U.S. law should establish procedures to screen contractual partners in transactions against the following restricted party lists:

- BIS's Entity List;
- BIS's Unverified List;
- BIS's Denied Persons List;
- BIS's Military End User ("MEU") List;
- DDTC's Debarred Parties List;
- State Department's Nonproliferation Sanctions Lists;
- OFAC's Specially Designated Nationals ("SDN") List;
- OFAC's Foreign Sanctions Evaders List;
- OFAC's Sectoral Sanctions Identifications ("SSI") List;
- OFAC's Palestinian Legislative Council ("PLC") List;
- OFAC's Correspondent Account or Payable-Through Account Sanctions ("CAPTA") List;
- OFAC's Non-SDN Menu-Based Sanctions List ("NS-MBS List"); and
- OFAC's Non-SDN Chinese Military-Industrial Complex Companies ("NS-CMIC") List.

These lists are implemented by different government agencies, which update the lists frequently and without advance notice.[81] In recent years, the U.S. Government has used these lists as a significant foreign policy tool by adding a large number of major corporations and other institutions, particularly those in China, to the Entity List and SDN List.

While the policy of each agency differs, OFAC generally treats any entity that is directly or indirectly owned 50% or more (individually or in the aggregate) by a restricted party, even when that entity is not specifically identified on the relevant restricted party list, as a restricted party. Companies should also confirm that contractual counterparties are not controlled by a restricted party even when the 50% ownership threshold is not satisfied. While more limited restrictions apply to some of these lists, a license is generally required to export or re-export items to persons on these lists or provide services to persons on the lists, directly or indirectly. In most instances, license applications are subject to a policy of denial.

A license is also required for a transaction if it involves restricted end-uses, which include, for example, the proliferation of nuclear, chemical, and biological weapons or related missile systems. Pursuant to these restrictions, a license may be required to transfer even unsophisticated items classified as EAR99 for use in these (and other) restricted end-uses. Special restrictions also apply to exports or re-exports of certain items to Belarus, Burma (Myanmar), Cambodia, China, Russia, and Venezuela for military end-use or military end-users.[82]

International Traffic in Arms Regulations ("ITAR")

1. Scope of the ITAR

The ITAR regulate the export, re-export, transfer, temporary import, and brokering of defense articles, as well as technical data and defense services classified on the U.S. Munitions List ("USML").[83] U.S. persons engaged in manufacturing, exporting, or brokering defense articles or defense services are required to register with DDTC. Moreover, with limited exceptions, the ITAR require exporters to obtain prior written authorization from DDTC before exporting or re-exporting defense articles (including technical data) or defense services.

The ITAR apply to the following:

- Exports, re-exports, and temporary imports of U.S.-origin "defense articles," which include goods, software, and technical data that are enumerated on the USML;[84]
- Exports of defense-related services to foreign persons located in the U.S. or abroad, including (i) furnishing assistance (including training) to foreign persons, whether in the U.S. or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles, (ii) the furnishing to foreign persons of any technical data controlled under the ITAR, whether in the U.S. or abroad, or (iii) military training of foreign units and forces; and
- Brokering activities in connection with transactions between third parties involving defense articles and defense services, regardless of their country of origin.

2. ITAR registration

Registration under the ITAR requires the completion of an electronic registration using the cloud-based Defense Export Control and Compliance System (DECCS), an electronic payment of a registration fee and payment confirmation, documentation issued or endorsed by a government authority enabling the registrant to engage in business in the U.S., and a complete organizational chart, among other supporting documentation.[85] The registration statement must be signed by a "Senior Officer" empowered by the registrant to do so. The ITAR registration does not constitute an authorization to export any items or services subject to the ITAR, but it is a pre-condition of applying for export authorizations or use of the ITAR license exemptions.[86]

Once DDTC has reviewed and approved a company's ITAR registration, it will issue a unique registration code to that company. Registrations are valid for one year and must be renewed on an annual basis as long as the company continues to manufacture, export, or broker defense articles or defense services.

Certain changes to the information provided to DDTC as part of the ITAR registration submission must be updated within five days of the relevant change. In particular, Section 122.4(a) of the ITAR requires the submission of a notice to DDTC within five days after a change in any of the following information contained on an ITAR registration:

- Registrant's name;
- Registrant's address;
- Registrant's legal organization structure;
- Ownership or control;
- The establishment, acquisition, or divestment of a U.S. or foreign subsidiary or other affiliate who is engaged in manufacturing defense articles, or exporting defense articles or defense services; or

- Board of directors, senior officers, partners, or owners.

All other changes in the Statement of Registration under ITAR must be provided as part of annual registration renewal.

Significantly, an entity registered under the ITAR must notify DDTC at least 60 days in advance of "any intended sale or transfer to a foreign person of ownership or control of the registrant or any entity thereof." The practical result of this requirement is that a detailed filing to DDTC is required at least 60 days prior to the closing date of the sale of an interest in an ITAR registrant to any foreign company, including a U.S. company that ultimately is owned or controlled by a foreign company. A so-called "60-Day Notice" requires detailed information about both the buyer and seller, including a description of the transaction, copies of the ITAR compliance policies, procedures, and training, before and after organizational charts, names of the officers of the buyer and its parent companies, and other information. Careful coordination between the buyer and seller is required to confirm that all necessary information is submitted to DDTC either in a joint filing or separate but coordinated filings by the buyer and seller. This filing requirement should also be considered when assessing whether to submit a CFIUS filing given that the State Department is a member of CFIUS.

3. Proscribed countries

The U.S. government maintains arms embargoes against certain foreign countries ("Proscribed Countries"). The prohibitions applicable to each of these countries vary somewhat in scope and severity. Among other restrictions, Section 126.1 of the ITAR generally prohibits sales of — and mere proposals to sell — defense articles and defense services, defined above, to the Proscribed Countries without prior authorization from DDTC.[87] DDTC generally maintains a policy of denying licenses and other approvals for exports and re-exports of defense articles and defense services to the Proscribed Countries.

DDTC may grant exceptions to this general policy if the proposed transaction is otherwise in the foreign policy or national security interests of the U.S. License exemptions under the ITAR are not available for transactions involving Proscribed Countries.

In addition to the broad prohibition of the sale or mere proposal to sell defense articles and defense services to Proscribed Countries, the ITAR include a mandatory notification requirement in relation to certain types of activities involving these countries. Specifically, Section 126.1(e)(2) of the ITAR provides that "[a] ny person who knows or has reason to know of a proposed, final, or actual sale, export, transfer, reexport, or retransfer of articles, services, or data ... must immediately inform" the Office of Defense Trade Controls Compliance within DDTC. Failure to provide such notification is a violation of the ITAR. The implication of this requirement is that potential violations of the ITAR involving Proscribed Countries must be reported to DDTC, while DDTC strongly encourages voluntary disclosures in relation to potential violations involving other countries.

Foreign Assets Control regulations

For foreign policy and national security reasons, OFAC imposes economic sanctions against various countries, entities, individuals, and organizations. The sanctions can be either territory-based or targeted to specific individuals, entities, or government organizations. These sanctions prohibit certain dealings with targeted countries and persons and may require blocking or "freezing" of assets in which the targeted country or person has an interest.

All "U.S. Persons" are required to comply with the sanctions. For purposes of these sanctions programs, "U.S. Persons" in most cases means (i) U.S. citizens; (ii) U.S. permanent residents; (iii) entities incorporated in the U.S. and their foreign branch offices; and (iv) persons physically located in the U.S. In the case of the U.S. economic sanctions against Cuba and Iran, foreign incorporated entities owned or controlled by U.S. Persons (i.e., foreign subsidiaries of U.S. companies) are also directly subject to these sanctions programs. Even wholly non-U.S. entities must also be aware of and confirm compliance with U.S. economic sanctions programs. For example, these sanctions programs can be triggered if a transaction including a sanctioned country involves: (i) review or approval by individual U.S. Persons (e.g., as a senior executive or board member); (ii) goods subject to U.S. law; (iii) U.S. dollar-denominated transfers (as virtually all such transfers have to clear through the U.S. financial system); and (iv) use of U.S.-based servers/systems to process such transaction. In addition, the U.S. government implements "secondary" sanctions, which specifically are intended to broaden the reach of U.S. sanctions programs to impact foreign persons acting in certain sectors or engaging in certain activities. Separately, entities traded on a U.S. stock exchange must be aware of the Securities and Exchange Commission's ("SEC") reporting requirements for transactions involving certain sanctioned countries and restricted parties. When reviewing transactions with potential sanctioned countries, companies should consider whether they made commitments in loan, credit, or other commercial agreements that further limit their ability to do business relating to such sanctioned countries.

As of the date of this publication, comprehensive sanctions that are territorial in nature are implemented only against Cuba, Iran, North Korea, Syria, Crimea (region of Ukraine/Russia), and the so-called Donetsk People's Republic and Luhansk People's Republic regions of Eastern Ukraine. Virtually all direct or indirect transactions involving these countries/regions are prohibited. Significant restrictions are also currently imposed against Venezuela, including the entire Government of Venezuela and entities owned or controlled by the Government of Venezuela. Since February 24, 2022, OFAC has introduced numerous and complex new sanctions involving a variety of activities in or involving Russia, expanding the previously more limited sanctions that were in place against Russia (however, Russia is not yet subject to comprehensive OFAC sanctions that prohibit all dealings with anyone in that country but broad restrictions on the provision of various types of services and "new investment" in Russia have been introduced, and those are not limited to sanctioned parties). More limited sanctions are implemented against Afghanistan, Belarus, Burma (Myanmar), Central African Republic, Democratic Republic of Congo, Ethiopia, Iraq, Lebanon, Libya, Mali, Nicaragua, Somalia, South Sudan, Ukraine, Venezuela, Yemen, and Zimbabwe. Transactions with these countries are not widely prohibited. Rather, the sanctions programs are targeted at specific individuals, entities, organizations, and industries within these countries. As described above, OFAC also implements certain restricted party lists, including the SDN List, Foreign Sanctions Evaders (FSE) List, SSI List, and the NS-MBS List.

Foreign direct investment reports required by the Bureau of Economic Analysis

Every foreign investment in a U.S. business that results in a foreign person or entity owning 10% or more of the voting securities of a U.S. business enterprise, or an equivalent interest of an unincorporated U.S. business enterprise, including a branch office or real estate (improved or unimproved) (a "U.S. Affiliate"), is subject to reporting requirements under the International Investment and Trade in Services Survey Act.[88] The reporting requirements include filing a new foreign direct investment ("FDI") survey, quarterly surveys, annual surveys, and five-year benchmark surveys with the Bureau of Economic Analysis ("BEA") of the U.S. Department of Commerce. Persons subject to the reporting requirements of the FDI survey (Form BE-13) and the benchmark survey (Form BE-12) (conducted every five years) are required to file whether or not they have been notified by BEA. Persons not notified by BEA of their filing obligation under the quarterly (BE-605) and annual (BE-15) FDI surveys are not required to file.

The information included in BEA filings is confidential and may be used by BEA only for analytical or statistical purposes. U.S. Affiliates that fail to comply with mandatory BEA reporting requirements could be subject to civil penalties of up to US$59,114 or, in rare cases, criminal penalties.[89]

The key FDI survey is Form BE-13, which collects survey data on the initial acquisition, establishment, or expansion of U.S. businesses by foreign investors. The obligation to submit Form BE-13 applies to the U.S. Affiliate, not to the foreign investor. The filing must include information regarding some of the U.S. Affiliate's business's subsidiaries and regarding its ultimate beneficial owner. The U.S. Affiliate must file Form BE-13 within 45 days of the effective date of the reportable transaction.

The new FDI transaction is to be reported on the applicable BE-13 form listed below:

- **Form BE-13A** — report for a U.S. business enterprise when (i) a foreign entity acquires a voting interest (directly, or indirectly through an existing U.S. Affiliate) in that enterprise, segment, or operating unit; (ii) the total cost of acquisition is greater than US$3 million; and (iii) by this acquisition, at least 10% of the voting interest in the acquired entity is now held (directly or indirectly) by the foreign entity.
- **Form BE-13B** — report for a U.S. business enterprise when (i) a foreign entity, or an existing U.S. Affiliate of a foreign entity, establishes a new legal entity in the U.S.; (ii) the projected total cost to establish the new legal entity is greater than US$3 million; and (iii) the foreign entity owns 10% or more of the new business enterprise's voting interest (directly or indirectly).

- **Form BE-13D** — report for an existing U.S. Affiliate of a foreign parent that (i) expands its operations to include a new facility where business is conducted, and (ii) the projected total cost of the expansion is greater than US$3 million.
- **Form BE-13E** — report for a U.S. business enterprise that previously filed a BE-13B or BE-13D indicating that the established or expanded entity is still under construction. This form will collect updated cost information and will be collected annually until construction is complete.
- **Form BE-13 Claim for Exemption** — report for a U.S. business enterprise that (i) was contacted by BEA but does not meet the requirements for filing forms BE-13A, BE-13B, or BE-13D or (ii) whether or not contacted by BEA, met all requirements for filing on Forms BE-13A, BE-13B, or BE-13D, except for the US$3 million reporting threshold.

Many BEA FDI surveys are difficult to interpret, so familiarity with BEA's interpretations and informal guidance is often critical to ensure that a company's filings are accurate.

Penalties for failure to comply with trade control laws

The U.S. trade control law regime with respect to export controls and economic sanctions is strict, providing for successor liability and the potential for significant penalties. For example, with respect to violations of the Export Administration Regulations, the U.S. government imposes criminal penalties of up to US$1 million per violation or 20 years in prison (or both) for certain willful or intentional violations. Maximum civil penalties may include a fine of not more than US$374,474 or twice the value of the transaction, whichever is greater, loss of export privileges, seizure or forfeiture of goods, debarment from government procurement, and mandatory remedial compliance actions. In addition, enforcement actions resulting in the imposition of penalties are a matter of public record, and the effects of negative publicity should be considered.

It is important to note that this type of liability may be avoided. BIS, DDTC, and OFAC expect companies to implement risk-based compliance programs to confirm compliance with applicable trade control laws. The agencies publish guidance to assist companies in developing written policies and procedures, which ultimately should be customized to a company's business operations and risk areas. Implementation of effective policies and procedures would also be considered a strong mitigating factor in the event of a compliance exception. Therefore, companies seeking to invest in or enter the U.S. market should consider implementing programs to mitigate risk.

Import and other trade laws

1. Trade policy and trade remedies

The U.S. was a founding member of the General Agreement on Tariffs and Trade (GAIT), which established global fair trading rules, and has been a member of its successor, the World Trade Organization ("WTO"), since its inception in 1995. Accordingly, the U.S. has committed to abide by the global trading rules established under the WTO, including rules for imposing duties, the administration of tariffs, determining the origin and valuation of imported goods, and rules for applying trade measures including antidumping duties, countervailing duties, and safeguards duties. Such rules apply in the U.S. to the extent that they have been implemented by legislation. The U.S. is also a party to the World Customs Organization ("WCO") and has adopted and implements its tariff schedule in conformity with the WCO Harmonized Tariff Nomenclature (HTS).

The U.S. currently has bilateral and multilateral free trade agreements (FTAs) with 20 countries, which provide for reduced or duty-free treatment for imports into the U.S. that meet specific origin rules.[90] The U.S. is also a party to several international sectoral agreements and conventions affecting trade and tariffs, has tariff preference programs which provide for duty-free treatment of goods imported from developing countries, and is taking part in negotiations of the Trade in Services Agreement (TiSA), a proposed international trade treaty aimed at liberalizing the worldwide trade of services such as banking, healthcare, and transportation. Additionally, the U.S. is a party to the WTO General Agreement on Trade in Services 1994 (GATS), a treaty of the WTO that extends the multilateral trading system to service sectors.

2. Current trade environment

For many decades, the U.S. was a leader in the push for trade liberalization and the development of global trading rules. The presidency of Donald J. Trump ushered in an era of aggressive trade policy, unilaterally driven and largely protectionist in aim. Through the exercise of certain presidential trade regulatory authorities, the Trump administration embarked on a series of actions to dismantle or significantly revise several significant multilateral trade agreements, starting with the U.S. withdrawal from the Trans-Pacific Partnership (TPP) in 2017 and the re-negotiation of NAFTA under the threat of U.S. withdrawal, which concluded with the U.S., Mexico, and Canada entering into the USMCA, which went into effect in 2020.

Starting in 2018, the Trump administration also imposed sweeping duties on approximately two-thirds of all imports of products originating in China, in response to Chinese policies on intellectual property under Section 301 of Trade Act of 1974.[91] That same year, the Trump Administration also imposed additional tariffs on virtually all global imports of steel and aluminum products for reasons of national security under Section 232 of the Trade Expansion Act of 1962.[92] The Administration also imposed safeguards (Section 201) duties on washing machines and solar products.[93] Several countries retaliated and imposed duties on U.S. exports and others negotiated removal of the aluminum and steel duties. China and the U.S. agreed at the end of 2019 to a reduction in some of the U.S. tariffs on Chinese imports and postponement of additional tariffs in a so-called "Phase 1" trade accord, yet a large amount of imports from China remain subject to additional duties and the accord is subject to China meeting certain requirements involving increased purchases of U.S. goods. The Trump administration also imposed tariffs on wine, spirits, food, and luxury goods from Europe in escalating disputes concerning automobiles and automotive parts, digital taxes, and alleged unfair trade in aircraft and, as a response to the Covid-19 pandemic, banned certain exports of Personal Protective Equipment (PPE), with limited exceptions, and moved to enhance Buy American local sourcing requirements for certain pharmaceutical sales to U.S. government agencies.

While President Joseph Biden has largely maintained, and in some cases (notably, with respect to electric vehicles, batteries, solar-related, and other products) significantly increased, tariffs on products from China, the Biden administration also brought more predictability to international trade and a less confrontational approach to trade issues with its trading partners. For example, in 2022 the Biden administration established the U.S.-EU Trade and Technology Council (ITC) with the European Union (the "EU"), announced the plan to develop a comprehensive Indo-Pacific Economic Framework to work with trading partners in the region, and reached an agreement on steel and aluminum with the EU. On the other hand, the U.S. adopted strengthened authorities against imports of products manufactured using forced labor, notably under the authority of the 2021 Uyghur Forced Labor Prevention Act (UFLPA) that targets imports of Chinese products and has led to widespread detentions and denials of admission.

The election of President Trump for a second term promises to bring a renewed focus on aggressive trade policy. In public statements during the campaign, President-elect Trump has suggested he will aggressively use increased tariffs as a foreign economic policy tool. President-elect Trump has proposed a universal tariff on all imports of between 10 and 20 percent and tariffs on China of 60 percent. He has also suggested that additional tariffs may be applied on a targeted basis, such as imports by U.S. companies that move manufacturing offshore or against Mexico to force changes in immigration policy.

It remains to be seen whether and to what extent the new Administration will act on these proposals or take other trade restrictive actions. It is noteworthy, however, that most of these proposals can likely be acted on unilaterally by the President without Congressional approval under existing authorities such as the International Emergency Economic Powers Act (IEEPA), Section 301 and Section 232 (discussed above), Section 338 of the Tariff Act of 1930, and other authorities. Such actions are expected to provoke corresponding retaliatory measures by countries most impacted such as China, the European Union, Canada, and Mexico.

3. Import process

When a shipment reaches the U.S., the importer of record (i.e., the owner, purchaser, or licensed customs broker[94] designated by the owner, purchaser, or consignee) must file entry documents for the goods with Customs and Border Protection (CBP or Customs) at the port of entry. Imported goods are not legally entered until after the shipment has arrived within the port of entry, delivery of the merchandise has been authorized by Customs, and estimated duties have been paid. It is the importer of record's responsibility to arrange for examination and release of the goods by Customs. The entry process in the U.S. is a two-step procedure — the entry (CF 3461) must normally be filed within 15 days of arrival of the goods, followed by filing of a more detailed filing of the "Entry Summary" (CF 7501) within 10 working days thereafter, with deposit of any estimated duties. Filing is ordinarily done through electronic submission with the assistance of a licensed Customs broker.

An importer of record must use "reasonable care" due diligence in making entry[95] — including in providing the correct tariff classification, customs value, quantity, country of origin, and tariff preference program eligibility for the goods at the time of importation. Goods may be entered "for consumption" (this is a general entry for products to be sold commercially in the U.S.), entered for warehouse at the port of arrival, or be transported in-bond to another port of entry and entered there under the same conditions as at the port of arrival.

a) Evidence of right to make entry

Goods may only be entered by their owner, purchaser, or a licensed customs broker. When the goods are consigned "to order," the bill of lading, properly endorsed by the consignor, may serve as evidence of the right to make entry. In most instances, entry is made by a person or firm certified by the carrier bringing the goods to the port of entry.

b) Surety/bond

The entry of goods into the U.S. must be accompanied by evidence that a bond has been posted with Customs to cover any potential duties, taxes, and charges that may accrue. Bonds may be secured through a resident U.S. surety company and may be posted in the form of U.S. currency or certain U.S. government obligations. If a customs broker is employed for the purpose of making entry, the customs broker may permit the use of its bond to provide the required coverage.

c) Entry summary documentation

Following the presentation of the entry, the shipment may be examined, or examination may be waived by Customs. The shipment is then released if no legal or regulatory violations have occurred. Entry summary documentation is filed, and estimated duties are deposited, within 10 working days of the entry of the merchandise at a designated customhouse.

d) Entries made by U.S. importers

Merchandise arriving in the U.S. by commercial carrier must be entered by the owner, purchaser, his or her authorized regular employee, or by the licensed customs broker designated by the owner, purchaser, or consignee. Every entry must be supported by one of the forms of evidence of the right to make entry. When a customs broker makes entry, a Customs power of attorney is made in the name of the customs broker. This power of attorney is given by the person or firm for whom the customs broker is acting as agent. The authority of an employee to make entry for his or her employer is also best established by a Customs power of attorney.

e) Entries made by non-U.S. importers

Entry of goods may be made by a nonresident individual or partnership, or by a foreign corporation, through a U.S. agent or representative of the exporter, a member of the partnership, or an officer of the corporation. The surety on any Customs bond required from a nonresident individual or organization must be incorporated in the U.S. In addition, a foreign corporation in whose name merchandise is entered must have a resident agent in the state where the port of entry is located who is authorized to accept service of process on the foreign corporation's behalf. A licensed customs broker named in a Customs power of attorney may make entry on behalf of the exporter or his representative.

f) Country of origin marking and other requirements and restrictions

With limited exceptions, every article of foreign origin imported into the U.S. must be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.[96] Certain goods are also subject to regulations imposed by other agencies such as the Food and Drug Administration, Department Agriculture, Department of Energy, Consumer Products Safety Commission, and others, imposing specific product safety standards, labeling or certification requirements. Failure to meet standards, labeling, or certification requirements can result detention or denial of entry. Furthermore, as discussed above, merchandise produced wholly or in part by means of the use of convict labor, forced labor, or indentured labor is prohibited from importation. Relatedly, U.S. Customs and Border Protection has shifted its enforcements efforts with respect to the use of forced labor towards imports that are linked to China's Xinjiang region.

Entry Documents

Within 15 calendar days of the date that a shipment arrives at a U.S. port of entry, entry documents must be filed at a location specified by the Customs port director.

These documents include:

- CBP Form 7533 (Inward Cargo Manifest for Vessel Under Five Tons, Ferry, Train, Car, Vehicle, etc.), CBP Form 3461 (Entry/ Immediate Delivery for Automated Commercial Environment (ACE)), or their electronic equivalent;
- Evidence of right to make entry;

- Commercial invoice or a pro forma invoice when the commercial invoice cannot be produced;
- Packing lists, if appropriate;
- other documents necessary to determine merchandise admissibility; and
- If a trade preference is being claimed, such as duty-free treatment under a Free Trade Agreement, importers must ensure they meet any specific documentation requirements to comply with the particular trade preference program. For example, for imports under the U.S.-Mexico-Canada free trade agreement (“USMCA”) importers should ensure they have a Certificate of Origin for the items for which the duty preference is being claimed.

Within 10 calendar days of entry, the importer must file/electronically transmit the Entry Summary (CF 7501) with additional import data and make deposit of estimated duties.

Entries are ordinarily “liquidated” by U.S. Customs within 214 days of entry. If CBP makes no changes to the entry it will be liquidated “as entered”. If changes are made, the entry may be liquidated with duty advancement or other changes. Prior to liquidation CBP may seek information or documentation to determine the proper origin, value, tariff classification, and rates of duty to be applied. Importers disagreeing with CBP’s determinations may file an administrative “protest” with CBP within 180 days of liquidation and, if necessary, appeal to the U.S. Court of International Trade.

U.S. antitrust laws

Companies doing business in the U.S. are subject to both federal and state antitrust laws and regulations which seek to promote competition and protect consumers. These laws differ from the competition laws in other jurisdictions — some conduct that is permitted elsewhere may run afoul of the antitrust laws in the U.S., while other types of conduct proscribed in other jurisdictions may be permitted in the U.S. Although most state antitrust laws follow federal laws, there are some differences, and companies must be careful to structure their conduct so as not to violate state or federal laws.

In addition, companies seeking to invest in the U.S. or U.S. businesses may need to obtain approval from the U.S. antitrust enforcement agencies before they may close the proposed transaction. In the U.S., premerger notification reports are required to be filed for transactions that are above certain dollar thresholds, revised annually, unless a statutory exemption applies. This is contrary to pre-merger notification requirements in other jurisdictions that focus on the parties' market shares or whether an acquiring person will be obtaining control of the other entity.

Although this section will provide an overview of the U.S. antitrust laws, companies should consult experienced antitrust counsel before engaging in conduct that may have antitrust implications or when considering a transaction with a U.S. nexus.

Sherman Act

The Sherman Act is the primary federal antitrust statute and regulates a wide variety of potentially anticompetitive conduct. Section 1 of the Sherman Act proscribes agreements in restraint of trade, while Section 2 addresses monopolization and attempted monopolization. A violation of the Sherman Act can lead to both civil and criminal liability. Although both the U.S. Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC"), the two U.S. federal antitrust agencies, can pursue civil actions for violations of federal antitrust laws, only the DOJ can obtain criminal sanctions, which it generally pursues only for the most egregious conduct.

In addition, the Clayton Act gives private plaintiffs a cause of action for violations of the antitrust laws, including the Sherman Act, and most U.S. states have their own antitrust laws, often mirroring federal antitrust laws, enabling them to pursue civil and criminal liability for conduct within their borders.

1. Section 1

Section 1 of the Sherman Act prohibits "[e]very contract, combination … or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations."[97] Although the text of Section 1 broadly prohibits all restraints of trade, courts have interpreted the statute as prohibiting only conduct that is "unreasonable." Some restraints are deemed so harmful to competition that they are considered "per se" illegal, meaning that the act or conduct is condemned without further inquiry into the particular harm that will result. For these per se violations, evidence of procompetitive justifications or effects is irrelevant. All other forms of alleged anticompetitive conduct are subject to a "rule of reason" analysis. Under this analysis, a plaintiff typically must prove anticompetitive harm, and the defendant may counter with evidence of procompetitive justifications or effects of the conduct. The court then balances the alleged harm and procompetitive justifications to determine whether the conduct violates the antitrust laws.

Agreements between firms that violate Section 1 are categorized as either "horizontal" or "vertical." Horizontal agreements are agreements between direct competitors and generally are subject to greater scrutiny than vertical agreements. Horizontal agreements include agreements between competitors to fix prices, agreements to allocate customers or geographic markets among firms, and agreements to rig a bidding process. These agreements are all considered per se violations and could potentially lead to criminal penalties.

Agreements between firms not to hire or compete for each other's employees, referred to as no-poach agreements, and agreements between firms about employee compensation levels, known as wage-fixing agreements, are also horizontal agreements. No-poach agreements have become an enforcement priority for U.S. antitrust agencies. The DOJ has recently brought criminal charges against firms and individuals who enter into naked no-poach and wage-fixing agreements,[98] in addition to bringing a series of high-profile civil no-poach lawsuits against firms in various industries.[99]

Vertical agreements are agreements between firms that occupy different levels of distribution (e.g., a supplier and a distributor). Vertical agreements are usually not considered per se illegal and, therefore, are typically subject to a rule of reason analysis. Unlike agreements between horizontal competitors, vertical agreements often have procompetitive effects, and "per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."[100] As the U.S. Supreme Court has summarized, modern case law recognizes the "differences in economic effect between vertical and horizontal agreements."[101]

Vertical agreements include intrabrand restraints and interbrand restraints. Intrabrand restraints are agreements that restrict a firm's downstream distribution of products. The antitrust laws are less concerned with intrabrand restraints because they more narrowly concern a firm's management of its own business and products, and courts consistently recognize how such restraints can promote interbrand competition between firms. Interbrand restrictions, on the other hand, may directly impact the ability of a company's competitors to compete or access inputs needed to compete.

In addition, vertical restraints are categorized as price or non-price restraints. Historically, price restraints have engendered greater concern under the antitrust laws than non-price restraints, although the distinction is less pronounced today. For example, under federal law, an agreement between a manufacturer and a distributor regarding the resale price of a product to consumers (resale price maintenance or "RPM") will be scrutinized under the rule of reason but is not per se unlawful, as courts recognize that RPM can promote interbrand competition by reducing intrabrand competition, thereby encouraging retailers to invest in service offerings, promotional efforts, etc. Under certain state laws, however, RPM is still considered per se unlawful, so even this type of restraint can carry risks. A common example of a non-price restraint is a manufacturer-imposed restriction on the geographic markets in which particular distributors can sell a manufacturer's product; such restraints are evaluated under the rule of reason and are unlikely to be found unlawful because, by constraining intrabrand competition, they foster interbrand competition.

On the other hand, where the vertical restraint constrains interbrand competition or is exclusionary in nature, the restraint may be more likely to be deemed anticompetitive. For example, in some cases, tying arrangements — an agreement that a producer will only sell a desired (tying) product to a customer if the customer also purchases another (tied) product — may be unlawful if a plaintiff can demonstrate harm to competition (i.e., it excludes others from being able to compete) that is not rebutted by a legitimate business justification. Another commonly challenged vertical interbrand restraint is exclusive dealing — a purchaser agrees to purchase all of a certain good or service from one seller — which can also have an exclusionary effect on competition but is not automatically unlawful in the U.S. because of potential procompetitive justifications.

In 2021, the FTC withdrew its support for the "Vertical Merger Guidelines" issued jointly by the DOJ and FTC in 2020. In a statement announcing the withdrawal of the guidelines, the FTC questioned "the purported procompetitive benefits (i.e., efficiencies) of vertical mergers."[102] While the withdrawal of the guidelines relates directly to merger investigations, it may also signal the agency's view of vertical restraints more broadly. In December 2023, the FTC and DOJ released new merger guidelines that cover both vertical and horizontal transactions. The guidelines do not make any mention of the potential procompetitive benefits of vertical mergers.

2. Section 2

Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and "combin[ations] or conspir[acies] with any other person or persons ..."[103] to monopolize. "Market power" and "monopoly power" are important concepts when evaluating conduct under Section 2, as certain conduct can be lawful or unlawful depending on whether a firm has market or monopoly power. There is no bright line in the U.S. as to what constitutes such power, but market power can be found when shares are generally greater than 30% and monopoly power can be found when shares are generally greater than 60-70%. Under Section 2, a plaintiff must show that the defendant possesses monopoly power, while under Section 1, it is sufficient to show that a defendant possesses market power. Conduct that may not violate Section 1 might still violate Section 2 because a monopolist is often held to a higher standard.

When relying on market share as proof of monopoly power, plaintiffs often will also look to evidence of high barriers to entry into the market or any unique structural or regulatory characteristics of the market.

Whether through direct or indirect evidence, establishing that a firm has, or likely will have, monopoly power in a given market is a necessary element of a Section 2 claim; thus, defining a relevant product and geographic market is often heavily litigated in Section 2 cases, often requiring testimony from economic experts.

Under U.S. law, being a monopolist is not itself illegal; rather, Section 2 has been interpreted by courts to prohibit certain conduct that creates or maintains a monopoly, or otherwise leverages a firm's monopoly position for economic gain. Conduct that could form the basis of a Section 2 claim includes the examples of vertical agreements discussed above, such as a tying arrangement where a company wants to exploit its monopoly over the tying product to monopolize the market for the tied product. A firm with monopoly power might also violate Section 2 if it refuses to deal with certain customers or suppliers. Such conduct by a firm with monopoly power may be found to violate Section 2 if the company unilaterally terminated a voluntary course of dealing and was willing to give up short-term profits for an anticompetitive end.[104] However, the conduct may be deemed lawful if the alleged monopolist has a legitimate business justification for the refusal to deal, such as eliminating free riding or protecting product quality. Another form of Section 2 violation is predatory pricing — pricing below costs in order to grow share and eliminate rivals in the short term. Because low prices benefit consumers, however, courts are often skeptical of predatory pricing claims. A plaintiff must show that the defendant's prices are below cost and that the firm is likely to recover any near-term losses by eventually raising prices after it has obtained monopoly power.

In October 2022, the DOJ announced that it had charged and resolved a criminal violation of Section 2 for the first time in almost 50 years.[105]

Hart-Scott-Rodino Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act")[106] requires parties to notify certain transactions, including joint ventures, mergers and acquisitions of assets, voting securities (those with rights to vote for directors), or controlling interests in partnerships/LLCs, with the FTC and DOJ prior to consummation. The types of transactions caught by the HSR Act include exclusive licensing arrangements, mergers, stock purchase agreements, tender offers, open market acquisitions, stock-based compensation awards to officers or directors, and certain redemptions, conversions, option exercises, and private placements. In October 2024, the FTC issued new rules modifying the HSR filing process. These rules will take effect in February 2025. The new form will require parties to submit more documents and information about the transaction, and it will require more time to complete than the current HSR form.

Unlike in other jurisdictions, no change of control is required for the Act to potentially apply. If a transaction is notifiable, the parties are subject to a 30-day initial waiting period, which can be extended by an investigation into substantive issues through the issuance of what is known as a "Second Request," before closing.

Whether an HSR notification is required depends principally on two threshold tests — the size of transaction test and the size of person test, values which change on an annual basis. The size of transaction threshold test is satisfied if the acquisition is valued in excess of US$101 million in 2022 under HSR valuation rules.[107]

In 2024, the size of person threshold test only applies if the HSR value of the transaction is between US$119.5 million and US$478 million. Generally, the size of person threshold test would be satisfied if the Ultimate Parent Entity ("UPE") of one party has at least US$239 million in annual net sales or total assets and the UPE of the other party has at least US$23.9 million in 2024 (as adjusted

annually) in annual net sales or total assets. If the transaction has an HSR value in excess of US$478 million, the transaction is reportable unless a specific statutory exemption applies.[108] These values will be adjusted in early 2025.

A filing fee must also be paid with filing. Unless the parties agree otherwise, the acquiring person is responsible for paying the filing fee. The amount of the filing fee varies depending upon the HSR value of the transaction — the larger the transaction, the higher the filing fee. Filing fees currently range from US$30,000 to US$2,250,000.

As noted above, the HSR Act reaches more than mergers and acquisitions of control. Companies are often surprised to learn that the HSR Act's notification obligation extends to the receipt of stock-based compensation awards (including grants of Restricted Stock Units ("RSUs") and the exercise of stock options), redemptions and buybacks of voting securities,[109] back-end acquisitions (i.e., when a shareholder receives equity or assets above the HSR thresholds as consideration for selling its shares in a transaction), and IP licenses to patents or trademarks. Given the specific valuation and aggregation rules, it is important to consult experienced HSR counsel to determine whether a particular situation is HSR-reportable.

Even if a transaction meets the relevant thresholds, certain exemptions may apply to render an otherwise reportable transaction non-reportable. For example, acquisitions of 10% or less of an issuer that are made "solely for the purpose of investment" are exempt, as are acquisitions of 15% or less by specified types of institutional investors. Intraperson acquisitions — i.e., those in which the acquired and acquiring entities are controlled by the same person — also are exempt. These include asset transfers between wholly-owned subsidiaries or a company's redemption of its own shares. A number of other exemptions exist, all of which require analysis of the specific facts presented. Experienced HSR counsel can guide you through this process to determine if an exemption applies in a particular context.

As noted above, DOJ and FTC issued new merger guidelines in 2023. The 2023 guidelines enable enhanced scrutiny by the antitrust agencies of mergers across the board, including those that (i) negatively affect the labor markets, (ii) could eliminate potential or perceived new entrants into the relevant market, (iii) involved merging parties that are engaged in "serial acquisitions" deemed part of a "pattern of strategy of multiple acquisitions, and (iv) involved multi-sided platforms connecting buyers and sellers. The revised guidelines should be considered in conjunction with the changes to the HSR notification requirements issued by the FTC and DOJ in 2023. These changes provide the agencies with additional information about proposed mergers that the agencies may use to support the theories enumerated in the 2023 guidelines.

Clayton Act, Section 8

Section 8 of the Clayton Act prohibits "interlocking directorates," meaning it prohibits any person from simultaneously serving as an officer or on the board of directors of competing corporations. This issue does not arise all that often, but Section 8 violations are per se illegal, so companies must proactively take steps to avoid creating an interlock. Interlocks occasionally are inadvertently created when companies make minority investments in competing firms or enter new product markets which introduces new competitors against whom they previously did not compete.

The two U.S. federal antitrust agencies have recently signaled a renewed focus on enforcement of Section 8. The Assistant Attorney General for the DOJ's antitrust division recently spoke publicly about the possibility of applying Section 8 to non-corporate entities such as LLCs,[110] and the FTC issued a public reminder about Section 8 in mid-2019.[111]

Anti-money laundering laws

Investments in the U.S. subject the investor to the provisions of U.S. anti-money laundering laws, including the Bank Secrecy Act ("BSA") and its various legislative updates such as the Currency and Foreign Transactions Reporting Act of 1970 and provisions in Title III of the USA Patriot Act of 2001, the Anti-Money Laundering Act of 2020, and their collective implementing regulations.[112] These laws strengthen U.S. law enforcement's authority to detect and prosecute terrorism and terrorist financing by enabling the Secretary of the Treasury to enact regulations that require any "financial institution" (as defined by the BSA) to (i) file certain reports, including suspicious activity reports ("SARs") and currency transaction reports ("CTRs") (ii) implement anti-money laundering programs; and (iii) maintain certain financial records, among other Anti-Money Laundering ("AML") requirements.[113] Under the authority granted to the Secretary of the Treasury, the Financial Crimes Enforcement Network of the U.S. Department of the Treasury ("FinCEN") has enacted regulations implementing such requirements for certain types of "financial institutions."[114]

Under the BSA, "financial institution" is broadly defined.[115] The regulations promulgated under the BSA[116] require many, but not all, "financial institutions" to follow AML requirements. Therefore, the regulations should be carefully analyzed with counsel before making any investment to determine whether the provisions of the Patriot Act have been satisfied and whether the enhanced AML requirements that apply to certain types of "financial institutions" will be triggered.

Certain covered financial institutions — federally regulated banks and credit unions, mutual funds, brokers or dealers in securities, registered investment advisers and registered exempt advisers, futures commission merchants and introducing brokers in commodities — are required to maintain procedures reasonably designed to obtain, verify, and record the identities of beneficial owners of legal entity customers.[117] Covered financial institutions must also use appropriate risk-based procedures for ongoing customer due diligence to understand the nature and purpose of customer relationships; to conduct ongoing monitoring to identify and report suspicious transactions; and, on a risk basis, to maintain and update customer information.[118]

Pursuant to a recent legislative change in January 2021, Congress passed significant reforms to the BSA and the U.S. Government's anti-money laundering regime. Among other things, the legislation, known as the Corporate Transparency Act ("CTA"),[119] requires certain "reporting companies" (defined below) to report information about their "beneficial owners" and "company applicants" (i.e., the name, date of birth, address, and identification number of such persons) to FinCEN within a short period of time after the entity is created or registered to do business, if that action is taken on or after January 1, 2024. Any reporting company that had been formed or registered before January 1, 2024 was required to disclose information about its "beneficial owners" by January 1, 2025, and such entities do not need to disclose information about their "company applicants." The CTA is undergoing a legal challenge and review for constitutionality. We are advising clients to continue to analyze the potential filing obligations of their "reporting companies" to remain ready in the event the filing deadline is reinstated.

Under the CTA, a "beneficial owner" is an individual who either directly or indirectly exercises substantial control over the reporting company or controls at least 25% of the reporting company's ownership interests. Every beneficial owner of a reporting company must be reported.

With respect to "company applicants," only one or two may be reported for each reporting company. The "company applicant" is the individual who directly files the document that creates or registers the reporting company and, if more than one person is involved in the filing, the second "company applicant" is the individual who is primarily responsible for directing or controlling the filing. Civil and criminal penalties apply to false and incomplete reports.

FinCEN's September 2022 final regulations broadly define a "reporting company" to include two types of companies: (1) "domestic reporting companies" (i.e., a corporation, a limited liability company, or any entity created under state or tribal law by filing a document with a secretary of state or similar office); and (2) foreign reporting companies (i.e., a corporation, a limited liability company, or other entity that is formed under a foreign country's law and is registered to do business in any U.S. state or tribal jurisdiction by filing a document with a secretary of state or similar office). However, the final regulations exempt 23 categories of entities from the definition of a reporting company, including but not limited to the following: certain types of registered entities (e.g., various companies registered under federal securities laws and the Commodity Exchange Act, FinCEN-registered money services businesses, and registered public accounting firms); banks, credit unions, bank holding companies, savings and loan holding companies; certain public utilities; certain pooled investment vehicles and tax exempt 501(c)(3) organizations. Additionally, "large operating companies" are exempt if they employ more than 20 full-time employees in the U.S., filed U.S. federal income tax returns in the previous year demonstrating more than US$5 million in aggregate U.S. gross receipts or sales, and have an operating presence at a physical office within the U.S., clearly evidencing Congressional intent to avoid placing additional burden on companies with large active operations. Wholly-owned subsidiaries of various types of exempt entities are also themselves exempt from the reporting requirements. Exempt companies are not required to file any report with FinCEN under these beneficial ownership reporting regulations.

Non-financial trades and businesses are also required to file certain transactional reports with the government. For instance, individuals and entities involved in a trade or business must file a FinCEN Form 8300 for receipt of more than US$10,000 in cash in a single transaction or in related transactions.[120] And persons must file a Form 105 Report of International Transportation of Currency or Monetary Instruments for transporting, mailing, or shipping more than US$10,000 in currency, traveler's checks, and certain other monetary instruments into or out of the U.S.[121]

Both individuals and entities (financial institutions and otherwise) are subject to the criminal anti-money laundering statutes in Title 18, United States Code. Generally speaking, those statutes prohibit not only actively committing money laundering (for instance, by concealing the origin, source, or control of illicit proceeds; by using illicit proceeds to commit further illegal activity; or engaging in transactions involving illicit proceeds through a financial institution), but facilitating and conspiring to do so.[122] Companies involved in international trade should also be particularly sensitive to trade-based money laundering issues.[123]

Recently, the Financial Action Task Force ("FATF"), an intergovernmental organization that sets international standards to combat money laundering and the financing of terrorism, issued a report on trade-based money laundering issues,[124] describing various risks, typologies, and measures to address trade-based money laundering.

Anti-money laundering regulators have recently developed guidance regarding cryptocurrency. On June 30, 2021, FinCEN issued its first government-wide priorities policy for anti-money laundering.[125] These priorities focus on threats to the U.S. financial system and national security and include, among others, cybercrime and virtual currency considerations. Additionally, the DOJ created the National Cryptocurrency Enforcement Team in November 2021 to investigate and support complex investigations and prosecutions of criminal misuses of cryptocurrency, including money laundering.[126] The U.S. Department of Treasury issued the 2022 National Illicit Finance Strategy[127] which outlines current U.S. priorities regarding anti-money laundering policies and the applicability of those policies to various industry sectors and developments, including "digital assets" such as cryptocurrencies, securities, commodities and derivatives.

As financial institutions and markets evolve, FinCEN and the other financial regulators — as well as criminal law enforcement authorities — have proposed various changes to the rules addressing money laundering and other illicit finance issues. Given the rapid pace of changing conditions, it is best to consult counsel to ensure compliance with the most recent anti-money laundering requirements.

Foreign Corrupt Practices Act

The reach of the Foreign Corrupt Practices Act ("FCPA") is extremely long. The involvement of a U.S. national (even if acting outside of the U.S.) or the transmission of emails routed through the U.S. can be sufficient to establish jurisdiction for FCPA enforcement.

The FCPA's anti-bribery provisions[128] make it a crime to offer, promise, or give anything of value to a foreign official with the purpose of obtaining or retaining business for, or with, or directing business to, any person, or otherwise influencing such foreign official.[129] A "foreign official" includes any officer, employee, or person acting in an official capacity for or on behalf of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization.[130]

The person making or authorizing the payment must have a corrupt intent. Additionally, the payment must be intended to induce the foreign official to misuse his or her official position by wrongfully directing business to the person making or authorizing such payment or to any other person.[131] The FCPA does not require a corrupt act to be successful; the offer or promise of a corrupt payment can constitute a violation of the statute.[132]

In addition to the anti-bribery provisions, the FCPA also has "accounting provisions" comprising of two major parts. The books-and-records provision requires issuers to make and keep accurate books, records, and accounts that accurately and fairly reflect the issuer's transactions and disposition of assets.[133] And, the FCPA's internal accounting controls provision requires that issuers devise and maintain reasonable internal accounting controls designed to prevent and detect FCPA violations.[134]

Persons subject to the FCPA include the following: (i) "domestic concerns;" (ii) "issuers;" and (iii) foreign nationals or businesses who act in furtherance of a bribe in the U.S.[135] A "domestic concern" is any (a) individual who is a citizen, national, or resident of the U.S., (b) corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or (c) sole proprietorship that has its principal place of business in the U.S., or that is organized under the laws of a state of the U.S., or a territory, possession, or commonwealth of the U.S.[136] This would include a U.S. subsidiary of a foreign entity. An "issuer" is a corporation or other entity (including a foreign entity) that (a) has issued securities that have been registered in the U.S. or (b) is required to file periodic reports with the SEC.[137]

Issuers and domestic concerns are liable if they engage in a corrupt act within the territory of the U.S. or use the U.S. postal system or other means or instrumentalities of interstate commerce, including telephone calls, facsimile transmissions, wire transfers and interstate or international travel, to commit such act.[138] In addition, a domestic company may be held liable for a corrupt payment authorized by employees or agents operating entirely outside of the U.S. using money from foreign bank accounts, even without any involvement by personnel located within the U.S. Companies should also ensure that any third parties they engage with do not violate the FCPA. The DOJ has taken the position that a third party's payment of a bribe does not eliminate the potential for liability against the company that engages the third party.[139]

U.S. citizens and residents employed by or acting on behalf of U.S. or foreign entities may be held liable for the acts of such U.S. or foreign entities when such citizens or residents authorized, directed, or controlled the activity in question. Although having operations in the U.S. is not a prerequisite to FCPA liability, entry into the U.S. market increases

the chances of a non-U.S. company becoming subject to such liability. Thus, a non-U.S. company establishing a U.S. entity should create and implement an FCPA compliance program.

Penalties for FCPA violations can be substantial. Under the anti-bribery provisions, corporations, and other business entities are subject to a criminal fine of up to US$2 million or twice the benefit that the defendant sought to obtain by making the corrupt payment.[140] Officers, directors, employees, and agents of business entities are subject to a criminal fine of up to US$250,000, or twice the benefit that the defendant sought to obtain by making the corrupt payment, and imprisonment for up to five years.[141] Fines imposed on individuals may not be paid by their employer or principal.[142]

In addition, the U.S. Attorney General or the SEC may bring a civil action for injunctive relief or impose a fine of up to US$10,000 against any business entity, as well as any officer, director, stockholder, employee, or agent of a business entity that violated the anti-bribery provisions of the FCPA.[143] An additional fine may be imposed by a court in an SEC enforcement action. This fine shall not exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation or (ii) a specified dollar limitation, as determined by the court.[144] The specified dollar limitations are based on the egregiousness of the violation and range from US$11,524 to US$230,464 for individuals and US$115,231 to US$1,152,314 for business entities.[145]

For willful violations of the accounting provisions (i.e., the books and records and internal control provisions), penalties can include a fine not to exceed US$25 million for entities.[146] For individuals, penalties can include a prison sentence of up to 20 years and/or a fine up to US$5 million.[147]

In addition, it is important to be aware of the risk of successor liability under the FCPA. The DOJ and SEC take the position that a company subject to the FCPA may be held criminally liable for the unlawful conduct of an acquired company, regardless of the method of acquisition.[148] Unlike the UK Bribery Act, the FCPA does not provide a compliance or adequate procedures defense. In the U.S. government's view, an acquiring company may be liable for unlawful acts under the FCPA even if the acts took place pre-acquisition and were unknown to the acquiring company.[149] The FCPA does not specifically address successor liability, and no judicial opinions have tested the government's position. But the government has suggested that companies may avoid liability by (i) demonstrating proper pre-acquisition due diligence, (ii) providing voluntary disclosure or self-reporting of any uncovered violations to the government, and (iii) taking immediate remedial measures to redress any violations.[150] Despite this guidance, the government continues to take a case-by-case approach in deciding whether to seek to impose successor liability under the FCPA.

Successor liability is not clearly defined under federal law. It has typically been an issue of state law that varies from state to state. Courts therefore look to state law to assess whether successor liability will be imposed, taking into account a complex analysis of factors including the structure of the transaction. In July 2020, the DOJ and SEC issued the second edition of its FCPA Resource Guide,[151] which includes further guidance on successor liability. The FCPA Resource Guide clarified that the government often will not take action against acquiring companies that voluntarily disclose and remediate problematic conduct and cooperate with the government. In such cases, the government is likely to take action only against the predecessor company.[152]

On January 17, 2023, the Criminal Division of the DOJ updated its Corporate Enforcement Policy, which was previously known as the FCPA Corporate Enforcement Policy. The new Corporate Enforcement Policy was expanded to all corporate criminal matters handled by the Criminal Division.[153]

The revisions are intended to incentivize companies to build and maintain effective corporate compliance programs, to promptly self-disclose suspected corporate misconduct, to cooperate fully with government investigations, and to remediate misconduct promptly and completely.

The DOJ has continued its focus on charging individuals along with corporate entities. In 2019, the DOJ charged more individuals in a single year than ever before, and in recent years the priority on individual prosecutions continues to be illustrated in enforcement statistics. In the September 2022 Monaco Memorandum, the DOJ implemented additional guidance requiring prosecutors to evaluate criminal charges against individuals in every corporate charging memorandum, with a priority on bringing cases against individuals before or at the same time as the corporate case. In addition, other countries have stepped up their enforcement efforts against companies, with global settlements involving Airbus (US$3.9 billion) and Goldman Sachs (US$2.9 billion) breaking records.

In order to prevent FCPA violations and mitigate violations if they do occur, companies should implement anti-corruption programs. In September 2024, the DOJ again updated its previous guidance on the "Evaluation of Corporate Compliance Programs."[154] It organizes its guidance around three questions.[155] First, is the program well-designed? Second, is the program being applied earnestly a nd in good faith (i.e., is it adequately resourced and empowered to function effectively)? And third, does the program work in practice? Though the guidance is aimed at prosecutors, it provides a roadmap for companies seeking to implement best practices.

The DOJ's position on imposing corporate monitors on companies that resolve FCPA cases with it has varied over recent years. The DOJ's current guidance, as set forth in Deputy Attorney General Lisa Monaco's September 2022 memorandum, is that prosecutors should decide whether to impose a monitor based on the merits of each individual matter, without holding any presumption for or against a monitor. The Corporate Enforcement policy discussed above builds on this guidance by providing that the DOJ need not impose a monitor in voluntary disclosure cases if, by the time the case is resolved, the company "has implemented and tested an effective compliance program and remediated the root cause of the misconduct."[156]

Litigation

General considerations

Non-U.S. companies entering the U.S. market should be aware that they are entering a litigious environment. Companies that sell products or enter into commercial agreements in the U.S. face a relatively high risk of private legal action. In the U.S., the cost of filing a lawsuit is low. Contingent fee arrangements (particularly in the consumer arena) can shift the cost of bringing an unsuccessful suit from the plaintiffs to the law firms that represent them. Although there are rules against the filing of frivolous lawsuits, there is no "loser pays" rule established by law and, even when the cost of litigation is governed by contract, it is more common that each party pays its own legal expenses. Pre-litigation discovery is much more involved than in most jurisdictions, with burdensome document production requests and questioning of witnesses by the opposing party. Except for contractual disputes in which the parties have waived the right to a jury trial, juries, not judges, most often are the finders of fact. The cost of defense is high and, depending on the jurisdiction, cases can go on for years. U.S. judgments, particularly for product liability, can be very high.

Jurisdiction

For a foreign company to be subject to liability in the U.S., it must first be subject to "personal jurisdiction" in the forum in which it has been sued. "Personal jurisdiction" refers generally to the power of a U.S. court over a particular defendant and can take the form of general jurisdiction or specific jurisdiction.

1. General jurisdiction

General jurisdiction exists when a defendant's contacts with a particular state are so systematic and continuous that the court will have jurisdiction over the defendant regardless of whether the cause of action arises from those contacts.[157] In essence, general jurisdiction exists in a state where the defendant is "at home."[158] The burden for establishing general jurisdiction is high.[159] A state cannot exercise general jurisdiction over a foreign company just because the company's products traveled through the stream of commerce and wound up in the forum state.[160] Instead, barring an exceptional case, general jurisdiction will usually be found only where a corporation is incorporated or has its principal place of business.[161] Some states, however, have enacted laws requiring corporations to consent to the exercise of general jurisdiction as a condition of registering to do business in the state.[162] The U.S. Supreme Court has held that consent-by-registration laws comply with the U.S. Constitution's Due Process Clause, but has left open whether consent-by-registration laws are consistent with other constitutional provisions.[163]

General jurisdiction over a parent corporation will generally not be found in a state simply because the corporation's wholly-owned subsidiary is incorporated in that state.[164] However, it is advisable to consult with counsel about actions that can be taken to minimize the risk that a parent company will be subject to the jurisdiction of U.S. courts.

2. Specific jurisdiction

Specific jurisdiction exists when a defendant "purposefully avails itself of the privilege of conducting activities within the forum [s]tate" and the injuries at issue in a lawsuit "aris[e] out of or [are] related to the defendant's contacts with the forum."[165] In deciding whether or not to exercise specific jurisdiction, a court will first determine whether the plaintiff's cause of action arose out of or resulted from an out-of-state defendant's contacts with the forum state or activities directed towards the forum state.[166] If so, the court will then ask whether the defendant purposefully directed its activities related to the plaintiffs claims toward the forum state and intentionally took advantage of the ability to conduct business in the state, thus invoking the benefits and protections of that state's laws.[167] In products liability cases where an in-state plaintiff is injured in the forum state by an out-of-state defendant's products, "a defendant's placing goods into the stream of commerce with the expectation that they will be purchased by consumers within the forum [s]tate may indicate purposeful availment."[168] Even contacts that are unrelated to the particular plaintiffs claim (e.g., the sale of products in the forum to someone other than the plaintiff) might provide a basis for the exercise of specific jurisdiction, particularly if the injuries occur in the state.[169]

Piercing the corporate veil and agency theories of jurisdiction

As a general matter, the "jurisdictional contacts of a subsidiary corporation are not imputed to its parent corporation."[170] Thus, in order for a U.S. court to have jurisdiction over a non-U.S. parent corporation, the court must have general or specific jurisdiction over the non-U.S. parent corporation, not just over the U.S. subsidiary. However, courts may "pierce the corporate veil" and exercise personal jurisdiction over parent corporations based on their subsidiaries' contacts with U.S. jurisdictions under two theories: (i) piercing the corporate veil or alter ego theory[171] and (ii) the agency theory.

Although the precise rules vary across U.S. jurisdictions, under the veil-piercing theory, "a separate legal existence will not be recognized when a corporation is so organized and controlled and its business conducted in such a manner as to make it merely an instrumentality of another,"[172] or when it is the "alter ego" of the person owning and controlling it.[173] Factors that can lead to piercing the corporate veil or a finding that a subsidiary is a mere alter ego include (i) the failure to observe corporate formalities, (ii) insolvency of the subsidiary, (iii) insufficient capitalization of the subsidiary, (iv) the parent's treatment of the subsidiary's assets and employees as if they were the parent's, (v) the subsidiary simply functioning as a façade for the parent corporation, and (vi) conduct by the subsidiary that is misleading or tantamount to fraud.[174] Essentially, "the alter ego status is said to exist when there is such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist."[175]

Under the agency theory, even when the corporate formalities are observed, a subsidiary's jurisdictional acts relating to the plaintiffs claim may be attributed to its corporate parent for purposes of specific jurisdiction[176] when (i) the subsidiary acts as the parent's agent and (ii) the parent exercises sufficient control over the subsidiary.[177] Some courts have held, for example, that a subsidiary acts as the parent's agent for the purposes of this theory if the subsidiary's "only purpose is to conduct the business of the parent."[178] The amount of parental control over the subsidiary required under the agency theory is not as great as the control required under the piercing or alter-ego theory. Under either theory, "[c]ontrol that is consistent with investor status — that is, monitoring the subsidiary's performance, supervising the subsidiary's finance and capital budget decisions, and articulating general policies — does not rise to the level necessary to impute the subsidiary's jurisdictional contacts to the parent."[179]

U.S. courts are reluctant to pierce the corporate veil or find the existence of agency relationships, but fighting such a claim can be costly and time-consuming.[180]

Although a non-U.S. company establishing operations in the U.S. cannot completely eliminate the risk of litigation, there are certain steps it can take to limit the exposure of upstream subsidiaries and the parent corporation. First, it can form a U.S. entity. As discussed in Section II of this publication, corporations, limited liability companies, and certain partnerships provide limited liability, meaning that the owners can lose the value of their investments but are not otherwise at risk for the liabilities of the entity. The U.S. subsidiary should have different officers and directors than the parent company (although there can be some overlap), great care should be taken to maintain the financial and managerial separateness of the entities, and the U.S. subsidiary should have adequate capital to fund its anticipated operations and expected obligations. Although some oversight of a U.S. subsidiary by a parent corporation is not problematic, the parent company should seek advice in structuring its relationship with, and control over, the U.S. subsidiary in a way that does not materially increase the risk of the parent becoming subject to U.S. jurisdiction and liability.

Bankruptcy

Bankruptcy law allows companies to discharge their debts and resolve disputes with creditors. All bankruptcy is governed by federal law, though the Bankruptcy Code sometimes requires courts to apply state laws. There are two main types of bankruptcy for businesses in the U.S.: reorganization under Chapter 11 and liquidation under Chapter 7. Nether require that the company be insolvent; rather, they require only that the company seek relief from its creditors in good faith.

Chapter 11 Bankruptcy

A Chapter 11 bankruptcy allows a distressed company to continue operating its business while it pursues either (a) a going-concern sale of all of its assets in a "soft-landing" liquidation or (b) a restructuring of its debt and equity pursuant to a court-approved plan of reorganization. Critically, except in cases involving management fraud or malfeasance, management will remain in place to operate the company through Chapter 11.

Successful Chapter 11 bankruptcies entail a significant amount of preplanning, and the most successful will propose an exit strategy at the very outset of the case. The formal bankruptcy process begins with the filing of a petition, which can be voluntary (i.e., filed by the company) or involuntary (i.e., filed by creditors, though these are rare because there can be consequential damages if initiated inappropriately). Along with the petition, the company will often seek "first day" relief to facilitate a "soft landing" into bankruptcy. This relief often includes requests to pay certain critical pre-bankruptcy obligations and to obtain "debtor-in-possession financing" — i.e., new financing that often primes existing secured debt — to operate its business through a sale or reorganization process. Chapter 11 is an involved process because the company is required to disclose detailed financial information and must get approval from the bankruptcy court for all actions outside of the ordinary course of business.

Numerous parties participate in Chapter 11 bankruptcy cases including companies seeking relief (often referred to as "debtors"), United States Trustees (representatives of the DOJ that oversee bankruptcy cases), general unsecured creditors' committees (appointed by the United States Trustee and comprised of a debtor's top creditors), secured lenders, ad hoc lender groups, and individual creditors, just to name a few.

As noted, companies may pursue going-concern sales or reorganizations in Chapter 11. Regardless of the path, the ultimate goal of all companies is to propose a plan of reorganization providing for the payment of creditors. This plan, which is unique in every case and often heavily negotiated between a company and its creditors, will classify claims against a company into discrete "classes," each of which may be treated differently in accordance with the claim's priority. Classes whose claims will receive some — but not full—payment are permitted to vote on the plan. Generally, a plan must be approved by two-thirds in (dollar) amount and half in number of the creditors voting in each class, though the court can "cram-down" a plan that falls short of votes if it meets other requirements. If a plan receives sufficient votes, it will be put before the bankruptcy court for confirmation. For a plan to be confirmed, the company must demonstrate that it (i) is proposed in good faith, (ii) is feasible, and (iii) provides dissenting parties with at least the value they would receive in a Chapter 7 liquidation. If the plan is confirmed, all debts that arose before the bankruptcy filing are discharged pursuant to the terms of the plan, the company is required to make plan payments, and the company, its creditors, and its equity holders are bound by the provisions of the plan.

Companies with total noncontingent liquidated debts of no more than US$3,024,725 may utilize Subchapter V — or the small business provisions — of the Bankruptcy Code.[181] Filing under Subchapter V can be advantageous because it (i) provides for accelerated deadlines and faster plan confirmation, (ii) only allows the appointment of a creditors' committee (which can increase bankruptcy costs) upon a showing of cause, (iii) relaxes plan confirmation requirements, and (iv) causes a trustee to be appointed to oversee the company's bankruptcy rather than the U.S. Trustee.[182]

Chapter 7 Bankruptcy

A Chapter 7 bankruptcy liquidates the company's assets and distributes them to creditors in full satisfaction of the company's claims. A trustee is appointed by the court to oversee the liquidation. A Chapter 7 bankruptcy is normally a last resort for a company because it ends the company's business and because, even if a company is seeking liquidation, it can generally liquidate in a more organized fashion under a Chapter 11 bankruptcy. Chapter 7 bankruptcy is typically only invoked where there is no cash left to operate the business and no borrowing is available.

An increasingly common alternative to Chapter 7 bankruptcy for companies is an assignment for the benefit of creditors. An assignment for the benefit of creditors is a state law insolvency proceeding whereby an assignee, who is usually selected by the company but who acts as a fiduciary to all creditors, will liquidate the company's assets for the benefits of creditors. Because this is a liquidation, the company does not continue to operate afterwards. This can be preferable to a Chapter 7 because it is generally much faster and cheaper. However, a significant downside compared to bankruptcy is that this method does not provide for the discharge of any debts. Additionally, it does not (i) provide the protections of the automatic stay, (ii) affect any of the company's contractual obligations (in fact, it may breach them), or (iii) cap the recovery of a landlord's claims. Assignment of the benefit of creditors is most commonly used in California and where the assets are primarily intangible ones, such as intellectual property, as opposed to tangible assets, such as real estate or equipment.

Other considerations

This guide does not provide a comprehensive summary of U.S. laws and regulations affecting investment in the U.S. A non-U.S. person should also consider the following prior to investing or commencing operations in the U.S.: (i) laws and regulations applicable to the particular industry sector in which the investment will be made or operations will be commenced; (ii) U.S. antidumping and countervailing duty laws; and (iii) state and local laws.

States and municipalities often offer economic development incentives such as tax increment financing, job training and job creation grants, public financing for infrastructure improvements, corporate income tax credits, investment tax credits, real estate tax abatements, and utility tax exemptions.

Laws and regulations affecting non-U.S. persons seeking to invest in the U.S. are continuously changing, and this guide is updated annually. This guide does not consider all factors that should be taken into account in making an investment decision. You should consult with legal counsel before making any investment or commencing operations in the U.S.

These materials do not constitute and should not be relied upon as legal advice.

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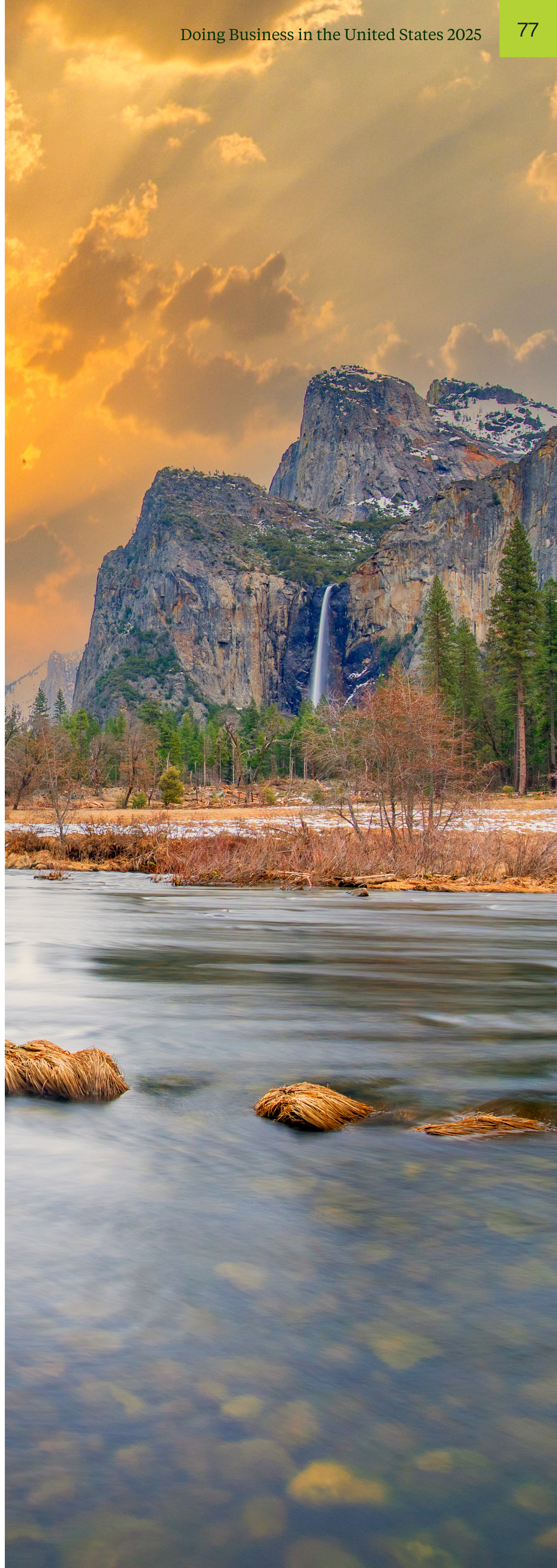
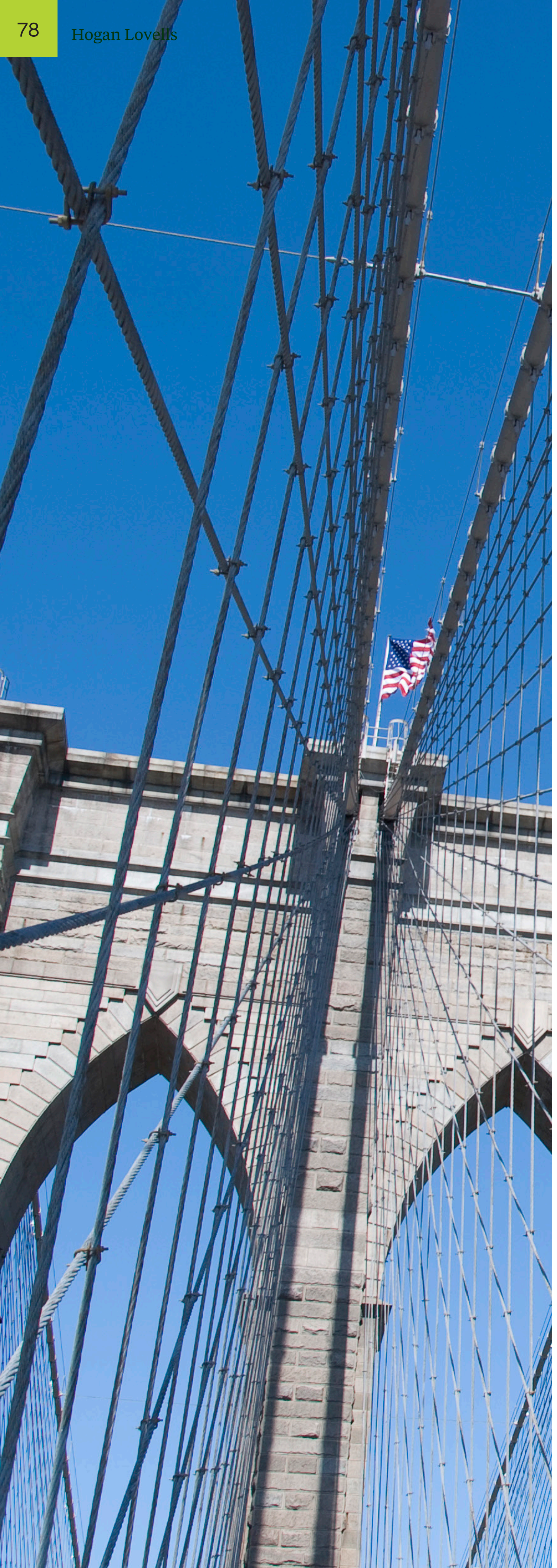




Endnotes

1. *Doing Business: Economy Rankings*, World Bank Group, *https://archive.doingbusiness.org/en/rankings* (last visited Dec. 9, 2024) (ranking the U.S. as 6th out of 190 for "ease of doing business" in 2020 report.) In October 2024, the World Bank Group released the inaugural Business Ready (B-READY) 2024 report to replace Doing Business project. The U.S. was not included in this initial B-READY report.

2. *United States is World's Top Destination for Foreign Investment*, *https://www.imf.org/en/Blogs/Articles/2022/12/07/united-states-is-worlds-top-destination-for-foreign-direct-investment* (last visited Dec. 9, 2024).

3. *See* § 721 of the Defense Production Act of 1950 (the "DPA"). In particular, the president has power to block a transaction if "(A) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair national security; and (B) provisions of law, other than ... [the DPA] ... and the International Emergency Economic Powers Act ... do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President." 50 U.S.C. § 4565(d)(4).

4. The term "control" is broadly defined to mean the power, directly or indirectly, whether or not actually exercised, through the ownership of "a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity." 31 C.F.R. § 800.208(a).

5. 31 C.F.R. § 800.901(b) (2024). The U.S. Department of the Treasury released a final rule amending certain civil penalties, effective December 26, 2024. *See* Penalty Provisions, Provision of Information, Negotiation of Mitigation Agreements, and Other Procedures Pertaining to Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States, 89 Fed. Reg. 93179 (Nov. 26, 2024).

6. 31 C.F.R. §§ 800, 802 (2024). The U.S. Department of the Treasury released a final rule amending the Civil Monetary Penalty Regulations, effective December 26, 2024.

7. U.S. Department of the Treasury, *CFIUS Excepted Foreign States*, available at *https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states* (last visited Dec. 11, 2024).

8. Declarations do not require filing fees. Filing fees for notices range from US$0 (transactions of less than US$500,000) to US$300,000 (transactions of US$750 million or more).

9. *See* CFIUS, *Annual Report to Congress CY 2023* (p. 18) U.S. Department of Treasury, available at *https://home.treasury.gov/system/files/206/2023CFIUSAnnualReport.pdf* (last visited Dec. 24, 2024).

10. Limited liability means that the entity, and not its owners, is legally responsible for the activities and omissions of the entity, and the owners are only at risk to the extent that they can lose the value of their investments in the entity. *See* pages 68-71 of this publication.

11. Certain products are subject to quotas or require an import license or authorization. U.S. Customs & Border Prot., *Importing Into the United States*, available at *https://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf* (last visited Dec. 9, 2024).

12. Under the "internal affairs" doctrine, U.S. courts will generally apply the laws of a corporation's state of incorporation to disputes that arise regarding matters "peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *JUUL Labs, Inc. v. Grove*, 2020 Del. Ch. LEXIS 264 (Del .Ch. Aug 13, 2020) (citing *Edgar V. MITE Corp.*, 457 U.S. 624, 645 (1982)).

13. *A Message from the Secretary of State – Jeffrey W. Bullock*, available at *https://corp.delaware.gov/stats/* (last visited Dec. 9, 2024).

14. States generally require the disclosure of directors and/or officers (for a corporation), or members and managers (for an LLC), or partners (for an LP or LLP) that do business in the state in annual reports that are publicly available. Those disclosures are made as of the date of filing and need not be updated between filings. A handful of states do not require the disclosure of managers or members of limited liability companies. Public disclosure of beneficial ownership information can be required by state and federal authorities in connection with litigation. *See* D.C. CODE § 29-10 2.11 (2020). It can also be required, on a confidential basis, by various state and federal authorities and can, in some circumstances, be shared among such authorities.

15. The formation documents of various entities have different names in different states. Delaware entities are formed by filing a Certificate (e.g., Certificate of Incorporation or Certificate of Formation). In some other states, the formation document is called "Articles of Incorporation" or "Articles of Organization." A Certificate of Incorporation or the Articles of Incorporation is also referred to as a "charter" or "charter document." This publication uses terms applicable to Delaware entities and assumes formation in Delaware.

16. Courts in the U.S. have considered several factors in deciding whether to pierce the veil, or find that an entity is an alter ego of another, including the stockholder's failure to observe corporate formalities, the intermingling of the assets of the entity and its owners, undercapitalization of the entity, use of the entity as a cover for the owners' personal dealings, and fraud. *See* pages 68-71 of this publication.

17. Special rules apply to ownership of "S corporations." An S corporation is a corporation that has elected, only for income tax purposes, to be treated as a pass-through entity. An S corporation may have no more than one class of stock and no more than 100 stockholders, all of which must be individuals or qualified trusts or estates or tax-exempt organizations, and none of which may be non-resident aliens. Because of the limitations on the types of persons or entities that may be stockholders of an S corporation, an S corporation is generally not a good option for non-U.S. investors. For this reason, S corporations are not discussed further in this publication.

18. The tax treatment of LLCs under most state laws are consistent with federal law, but local law advice should be sought.

19. Par value is largely a historical concept but in Delaware it determines franchise taxes, which are annual taxes paid to the State of Delaware by entities incorporated in the state.

20. *See* pages 68-71 of this publication.

21. The composition of the board of directors is a factor in the determination of whether to pierce the veil or find that an entity is an alter ego of its parent entity. *See* pages 68-71 of this publication.

22. Officers need not be residents or citizens of the state in which the corporation is formed or of the U.S.

23. Delaware General Corporation Law § 142(a), DEL. CODE tit. 8, § 142(a) (2018). Although a single individual may hold all offices, it is advisable to name at least two individuals as officers to avoid difficulties (e.g., if the only officer becomes unavailable and because banks, landlords, and certain other entities often require an attestation by a second officer). Unlike in civil law jurisdictions, officers typically sign legal instruments and the use of powers of attorney in domestic transactions is rare.

24. *See* pages 68-71 of this publication.

25. A goal of the 2017 tax reform legislation was to enact new rules that curb the erosion of the U.S. tax base by discouraging U.S. taxpayers from holding intangible assets offshore and shifting the resulting income to foreign jurisdictions. These rules include (1) the global intangible low-taxed income ("GILTI") provision, which requires current taxation to a 10% or greater U.S. shareholder of certain income of a controlled foreign corporation above a 10% return on specified assets, (2) the base erosion and anti-abuse tax ("BEAT"), which effectively imposes a minimum tax on certain U.S. corporate taxpayers by limiting the deductibility of certain payments to a foreign related party, and (3) the foreign derived intangible income ("FDII") provision, which reduces the effective corporate tax rate to 13.125% through 2025 (16.406% thereafter) on certain income earned by a U.S. corporate taxpayer from foreign sales and services.

26. Generally, if U.S. real estate represents 50% or more of the fair market value of the entire U.S. subsidiary's assets, the corporation will be deemed to hold a significant amount of U.S. real property.

27. The arm's length standard is used by the U.S. Internal Revenue Service and the tax authorities of numerous other jurisdictions to price intercompany transactions involving related parties and allocate the income and expenses among the participants to properly reflect income. In general, under the arm's length standard, the results of a related party transaction must be consistent with the results that would have been realized if unrelated taxpayers had engaged in a comparable transaction under comparable circumstances.

28. Note that forming an entity in a particular state is not the same as performing due diligence on the availability of a trademark in the U.S., as discussed in Section VI of this publication. The state of formation determines whether the name an entity has requested is distinguishable from one that is already registered in that state. Similarly, formation of an entity and use of a name provides a minimal level of protection of the name insofar as it puts a trade name into usage, but, as described below, it does not provide any comprehensive or nationwide intellectual property protection for the name, as (for example) filing a trademark registration with the U.S. Patent and Trademark Office does.

29. Partnerships may elect to be treated as corporations for tax purposes. This is called a "check the box" election. In the absence of such an election, partnerships may not control the timing of U.S. source income in the way that corporations do, and income earned by the partnership automatically passes through to the partners, whether or not any cash is distributed. The same treatment applies to limited liability companies, which are discussed above.

30. Traditionally the use of a corporate seal to stamp on a document or printing of the word "seal" on a document served to authenticate the document. Even today, affixing of a seal or printing the word "seal" can serve to extend the statute of limitations applicable to a document. The use of seals is now relatively rare.

31. This section does not deal with employment contracts and agreements, which are considered in Section IV of this publication.

32. Oral contracts can be binding, but certain contracts must be written to be legally enforceable. These include contracts relating to (i) agreements that cannot be completed within one year in accordance with their terms, (ii) the transfer of real estate, (iii) the sale of goods worth US$500 or more (with certain exceptions), and (iv) suretyship. *See generally* U.C.C. § 2-201 (AM. LAW INST. 2012). Most states have adopted provisions similar to those of the U.C.C., but given variation among some states, it is best to seek local advice.

33. However, neither compensation for a benefit that has already been received (past consideration) nor a promise to perform a pre-existing legal obligation constitutes sufficient legal consideration.

34. *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209 (Del. 2018) (citing *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010)).

35. *Id*.

36. Draft U.S. commercial contracts or contracts that remain subject to review will often include a header at the top of each page of the contract indicating that the document is in draft form or is for discussion purposes only.

37. *Eagle Force Holdings, LLC*, 187 A.3d 1209 (citing Restatement (Second) of Contracts § 33(2)).

38. U.C.C. §§ 1-304, 2-103(1)(b) (2012).

39. *See* N.Y. Gen. Oblig. Law § 1401; N.Y. Gen. Oblig. Law § 5-1402.

40. In the U.S., express employment contracts are typically granted only to executives and key employees; they are uncommon for non-executive employees. Union membership is very low in the U.S., with only 6.0% of private sector employees participating in unions as of 2023. *Economic News Release*, U.S. Department of Labor, Bureau of Labor Statistics, available at *https://www.bls.gov/news.release/pdf/union2.pdf* (last visited Dec. 11, 2024). Within the private sector, the highest rates of union participation are found in the utilities, transportation and warehousing, and construction industries. *Id*.

41. The public policy exception varies by state, but generally covers situations in which an employee is terminated for refusing to perform prohibited acts, reporting a violation of law, engaging in acts that are in the public interest or exercising a statutory right. Under the theory of "implied contract," courts may infer that contractual duties exist, even in the absence of a written contract, based on the parties' overall conduct. Such implied-in-fact employment agreements usually arise from oral representations regarding job security, employee handbooks or manuals, implied covenants of good faith and fair dealing between the employer and employee, or quasi-contractual theories such as promissory estoppel.

42. 29 U.S.C. § 2102.

43. *Ryan LLC v. Federal Trade Commission*, No. 3:24-cv-00986-E (N.D. Tex. Aug. 20, 2024).

44. Title VII of the Civil Rights Act of 1964 ("Title VII") (prohibits discrimination based upon race, color, sex, religion, and national origin); the Age Discrimination in Employment Act of 1967 (protects individuals who are age 40 and older); Title I and Title V of the Americans with Disabilities Act of 1990 (prohibits employment discrimination against qualified individuals with disabilities in the private sector and in state and local governments); the Civil Rights Act of 1991 (provides monetary damages where there has been intentional employment discrimination).

45. *See* U.S. Equal Emp. Opportunity Comm'n, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC, available at *https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender* (last visited Dec. 9, 2024).

46. If the EEOC issues a "cause" determination, the agency has the right to bring the lawsuit on behalf of the individual. The latter scenario is unusual and typically is reserved for cases involving systemic discrimination within a workplace.

47. In fact, the state of California passed Senate Bill No. 286 and Assembly Bill 979, which respectively required that publicly held corporations with executives located in California have a minimum amount of women and "underrepresented communities" on their boards. *See* Ca SB-826, Ca AB-979. Both bills were later held to violate the California Constitution. *See Crest v. Padilla*, Case No. 19STCV27561; *Crest v. Padilla*, Case No. 20STCV 37513.

48. For example, New York amended its New York Human Rights Law to allow discrimination claims so long as the individual was subject to "inferior terms, conditions or privileges of employment," without regard for the prior severe or pervasive standard (s. 6577 § 2(h)). Similarly, California Government Code Section 12923, while not binding on courts, encourages courts to disregard the "severe and pervasive" standard by providing that a single incident of harassment will suffice.

49. These characteristics might include personal appearance, political affiliation, family responsibility, and other grounds.

50. For example, both Maryland and New York enacted anti-sexual harassment laws in 2018. *See* Hogan Lovells, *Maryland's New Sexual Harassment Law*, available at *https://www.jdsupra.com/legalnews/maryland-s-new-sexual-harassment-law-31116/* (last visited Jan. 14, 2025); Hogan Lovells, *New York Increases Its Efforts to End Sexual Harassment*, available at *https://www.jdsupra.com/legalnews/new-york-increases-its-efforts-to-end-27832/* (last visited Jan. 14, 2025). Similarly, in 2019, New Jersey amended its Law Against Discrimination to ban agreements intended to conceal details of discrimination, which the New Jersey Appellate Division has recently held does not extend to non-disparagement clauses. *See* Hogan Lovells, *NJ Law Against Discrimination Does Not Bar Non-Disparagement Clauses,* available at *https://www.hoganlovells.com/en/publications/nj-law-against-discrimination-does-not-bar-non-disparagement-clauses* (last visited Dec. 9, 2024).

51. Movie producer Harvey Weinstein was the subject of a *New York Times* story that brought the #MeToo movement to the forefront of public consciousness.

52. Such conditions include (i) when age is a bona fide occupational qualification, (ii) the action is based on reasonable factors other than age, (iii) the employer is observing the terms of either a bona fide seniority system or age-related entry requirements under a bona fide apprenticeship program, or (iv) the employer is disciplining an employee for good cause.

53. An action based on the PDA must adhere to the Title VII framework, and successful plaintiffs are entitled to all of the remedies discussed earlier in this section.

54. The ADA explicitly excludes several conditions from the definition of disability, including compulsive gambling, kleptomania, pyromania, or illegal drug use. However, a person who is enrolled in or who has successfully completed a drug treatment program might be protected by the ADA.

55. 42 U.S.C. § 12111(8) (Section 101).

56. 42 U.S.C. § 2000gg.

57. 29 U.S.C. § 207(r).

58. *See* 29 U.S.C. §§ 201–219 (FLSA); 29 U.S.C. §§ 151–169 (NLRA); 29 U.S.C. §§ 2601–2654 (FMLA).

59. Other federal laws that establish wage and hour standards are the Davis-Bacon Act, the Walsh-Healey Act, and the Service Contract Act. But these apply only to employers who have contracts with the federal government or the District of Columbia.

60. *Texas v. U.S. Department of Labor et al.*, No. 4:24-cv-00499 (E.D. Tex. Nov. 15, 2024).

61. *See* Reuters, *What Can US Employers Expect From a Second Trump Term?*, available at *https://www.reuters.com/legal/legalindustry/what-can-us-employers-expect-second-trump-term-2024-12-13/* (last visited Dec. 20, 2024).

62. 29 U.S.C. §§ 2601–2654.

63. An "eligible employee" is defined as "an employee who has worked at least 1,250 hours in the 12 months preceding a leave request."

64. In recent years, the law has become clear that eligible employees in legal same-sex marriages may take FMLA leave to care for their spouses or family members.

65. 29 U.S.C. § 2614(a). The top 10% of salaried employees are exempted from the restoration requirement when reinstatement would cause "substantial economic injury" to the employer's business.

66. *U.S. Congressional Research Service, An Epic Decision from the Supreme Court: The Supreme Court Rules Employee Class Action Waivers Are Enforceable* (Mar. 31, 2018), available at *https://crsreports.congress.gov/product/pdf/LSB/LSB10142* (last visited Jan. 14, 2025).

67. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

68. The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101, imposes significant monetary penalties upon any employer who knowingly hires illegal aliens.

69. Participating countries in the Visa Waiver Program can be found at *https://travel.state.gov/content/travel/en/us-visas/tourism-visit/ visa-waiver-program.html*. The ESTA website can be found at *https://esta.cbp.dhs.gov/esta*.

70. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(1) (defining "qualifying relationship").

71. Eligible professionals include, but are not limited to, accountants, engineers, lawyers, pharmacists, scientists, and teachers. The NAFTA list of professions can be found in 8 C.F.R. § 214.6.

72. Canadian and Mexican citizens may seek to extend the initial period while in the U.S. or depart the U.S. before the expiry of the initial period and seek TN renewal by applying in person at the border/pre-flight clearance (for Canadian citizens) or at the U.S. embassy or consulate for a new TN visa (for Mexican citizens).

73. *See* U.S. Department of State, *Employment-Based Immigrant Visas*, Bureau of Consular Affairs, available at *https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html* (last visited Dec. 9, 2024).

74. According to the International Property Rights Index, the U.S. scored in the top 15 countries for protection of intellectual properties and was ranked the first among countries in 2019, available at *https://www.internationalpropertyrightsindex.org/country/united-states-of-america* (last visited Dec. 9, 2024).

75. PwC, *2018 PwC Patent Litigation Study*, available at *https://www.pwc.com/us/en/forensic-services/publications/assets/2018-pwc-patent-litigation-study.pdf* (last visited Dec. 24, 2024).

76. In general, the EAR do not control items produced outside the U.S. that have less than de minimis U.S. content, if the items are not located in the U.S. For exports or re-exports to Iran, North Korea, Sudan, and Syria, the applicable de minimis threshold is 10%. For all other destinations, the generally applicable de minimis threshold is 25%. 15 C.F.R. § 734.4. However, special de minimis rules apply to "9x515 series" and "600 series" items, and the applicable de minimis level for such items can vary between 0%, 10% and 25% depending on the country of destination. There also are special de minimis rules for encryption items. The rules for calculating de minimis levels are especially complex, and a de minimis analysis is time-consuming. Furthermore, in certain circumstances, the calculations must first be submitted to the U.S. government for review before the exporter or re-exporter may rely on the de minimis rule. Accordingly, counsel should be consulted when determining whether a de minimis rule exception applies.

77. *See* 15 C.F.R. § 734.3(a)(4).

78. *See* 15 C.F.R. § 736.2(b)(3).

79. Set forth in Supplement No. 1 to 15 C.F.R § 774.

80. U.S. Department of Commerce, Bureau of Indus. & Sec., Press Release, *Commerce Identifies Emerging Technology, Expands Controls on Exports of Software Capable of Contributing to Biological Weapons Proliferation* (Oct. 4, 2021), available at *https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/2848-2021-10-04-bis-press-release/file* (last visited Dec. 12, 2024).

81. Updated lists may be found at *https://legacy.export.gov/article?id=Consolidated-Screening-List* (last visited Dec 9, 2024).

82. 15 C.F.R. § 744.21.

83. As set forth in 22 C.F.R. § 121.

84. *See* 22 C.F.R. Part 121.

85. We also typically include a cover letter with the registration (particularly for first-time registrants) describing the reason the company is registering and any unusual corporate structure issues that DDTC should be aware of as it reviews the registration materials.

86. Additional information on which entities and individuals are required to register is available at *Article - DDTC Public Portal (state.gov)*.

87. The following is the list of Proscribed Countries, as of the date of this publication: Afghanistan, Belarus, Burma (Myanmar), Cambodia, Central African Republic, China, Cuba, Cyprus, Democratic Republic of Congo, Eritrea, Ethiopia, Haiti, Iran, Iraq, Lebanon, Libya, Nicaragua, North Korea, Russia, Somalia, South Sudan, Sudan, Syria, Venezuela, and Zimbabwe.

88. Foreign investments in residential real estate held exclusively for personal use and not-for-profit-making purposes do not trigger a BE-13 filing requirement.

89. *See* 15 C.F.R. § 6.3(b) (2025).

90. The U.S. has FTAs with Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, and South Korea. *See https://ustr.gov/trade-agreements/free-trade-agreements*.

91. The Trump administration took other executive actions to impose (i) safeguard duties (Under § 201 of the Trade Act of 1974, as amended) on imports of washing machines and solar products; (ii) significant tariffs on imported steel (25%)

and aluminum (10%) under the national security provisions of § 232 (of the Trade Expansion Act of 1962, as amended); and (iii) 10% and 25% tariffs on about half of all Chinese imports under § 301 (of the Trade Act of 1974, as amended), to punish China for alleged unreasonable trade policies toward U.S. business interests; including policies in the area of intellectual property and investment.

92. *See* U.S. Department of Commerce, Bureau of Industry and Security, *Section 232 Investigation of the Effect of Aluminum Imports on the U.S. National Security*, available at https://www.bis.doc.gov/index.php/232-aluminum (last visited Dec. 24, 2024); U.S. Department of Commerce, Bureau of Industry and Security, *Section 232 Investigation of the Effect of Imports of Steel on the U.S. National Security*, available at https://www.commerce.gov/issues/trade-enforcement/section-232-steel (last visited Dec. 24, 2024).

93. United States Trade Representative, *Section 201 Investigations*, available at https://ustr.gov/issue-areas/enforcement/section-201-investigations (last visited Dec. 24, 2024).

94. Customs brokers are private individuals or firms licensed by Customs to prepare and file the necessary customs entries, arrange for the payment of duties found due, take steps to effect the release of the goods in Customs custody, and otherwise represent their principals in customs matters. The fees charged for these services may vary according to the customs broker and the extent of services performed.

95. Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (also known as the Customs Modernization or "Mod" Act), provides a clear requirement that importers exercise "reasonable care" due diligence in importing products into the U.S. § 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), requires an importer of record to use "reasonable care" to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met.

96. § 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304). *See also* Part 134, Customs Regulations (19 C.F.R. Part 134).

97. 15 U.S.C. § 1.

98. *United States v. Jindal*, No. 4:20-CR-358, (E.D. Tex. Dec. 09, 2020); *United States vs. Surgical Care Affiliates, LLC et al.*, No. 3:21- CR-00011 (N.D. Tex. Jan. 05, 2021); *United States v. DaVita Inc*, No. 1:21-cr-00229 (D. Colo. Nov. 3, 2021); *United States v. Manahe et al*. No. 2:22-CR-00013-JAW (D. Me. June 10, 2022).

99. *No-Poach Approach*, Department of Justice (Sept. 30, 2019), available at https://www.justice.gov/opa/pr/department-justice-antitrust-division-announces-agenda-and- panelists-joint-agency-workshop. *See also Antitrust Guidance for Human Resource Professionals*, Department of Justice (Oct. 2016), available at https://www.justice.gov/atr/file/903511/download (last visited Dec. 24, 2024).

100. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977).

101. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007).

102. *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, Federal Trade Commission (Sept. 15, 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf (last visited Dec. 24, 2024).

103. 15 U.S.C. § 2.

104. *See Novell v. Microsoft*, 731 F.3d 1064, 1074- 75 (10th Cir. 2013).

105. *U.S. v. Nathan Nephi Zito*, Case No. 22-cr- 00113 (D. Mt. Sept. 19, 2022).

106. 3 U.S.C. § 18(a).

107. Note that in addition to special HSR valuation rules, which vary depending on whether the transaction involves the acquisition of assets, voting securities, or partnership/LLC interests, there are also special aggregation rules that must be considered in valuing a transaction.

108. The exemptions are found in 16 C.F.R. § 802.2 and in the HSR Act, 15 U.S.C. § 18a(c).

109. Under the HSR Act, "voting securities" are those with present rights to vote for directors (or obtain such a right upon conversion).

110. *Assistant Attorney General Makan Delrahim Delivers Remarks at Fordham University School of Law*, Department of Justice (May 1, 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law (last visited Dec. 9, 2024).

111. Michael E. Blaisdell, *Interlocking Mindfulness,* Federal Trade Commission (June 26, 2019), available at https://www.ftc.gov/enforcement/competition-matters/2019/06/interlocking-mindfulness (last visited Dec. 9, 2024).

112. 31 C.F.R. Chapter X.

113. Pub. L. No 107-56, 115 Stat. 322 (2001).

114. *See* 31 C.F.R. Chapter X.

115. The following is a partial list of "financial institutions" included in the definition of "financial institution" under the BSA: (i) an insured bank; (ii) a commercial bank; (iii) a trust company or private banker; (iv) an agency or branch of a foreign bank in the U.S.; (v) any credit union; (vi) a thrift institution; (vii) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934; (viii) a broker dealer in securities or commodities; (ix) an investment banker or investment company; (x) a currency exchange; (xi) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments; (xii) an operator of a credit card system; (xiii) an insurance company; (xiv) a dealer in precious metals, stones or jewels; (xv) a pawnbroker; (xvi) a loan or finance company; (xvii) a travel agency; (xviii) a licensed sender of money or any other person who engages as a business in a transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system; (xix) a telegraph company; (xx) a business engaged in vehicle sales, including automobile, airplane and boat sales; (xxi) persons involved in real estate closings and settlements; (xxii) the United States Postal Service; (xxiii) an agency of the United States Government or of a State or local government carrying out a duty of power of a business described in this paragraph; (xxiv) certain casinos and gaming establishments; (xxv) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to or a substitute for any activity in which any financial institution is authorized to engage; and (xxvi) any other business designated by the Secretary of the Treasury whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters. *See* 31 U.S.C. § 5312(a)(2) (2018).

116. *See* FinCEN, *Resources: Statutes & Regulations—Chapter X*, available at https://www.fincen.gov/resources/statutes-regulations/chapter-x (last visited Dec. 9, 2024)Document2.

117. *See* FinCEN, *Customer Due Diligence Final Rule*, available at https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule (last visited Dec. 9, 2024).

118. *See id*.

119. The CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283 (January 1, 2021) (the "NDAA"). Division F of the NDAA is the Anti-Money Laundering Act of 2020, which includes the CTA. Section 6403 of the CTA, among other things, amends the BSA by adding a new Section 5336, Beneficial Ownership Information Reporting Requirements, to Subchapter 11 of Chapter 53 of Title 31, United States Code.

120. *See* IRS, *Form 8300: Report of Cash Payments Over $10,000 Received in a Trade or Business*, available at https://www.irs.gov/pub/irs-pdf/f8300.pdf (last visited Dec. 9, 2024).

121. *See* FinCEN, *FinCEN Form 105: Report of International Transportation of Currency or Monetary Instruments*, available at https://www.fincen.gov/sites/default/files/shared/fin105_cmir.pdf (last visited Dec. 9, 2024).

122. *See* e.g., 18 U.S.C. § 1956 (2018).

123. For a list of jurisdictions with anti-money laundering and combating terrorism "deficiencies," *See* FinCEN, *Financial Action Task Force Identifies Jurisdictions with Anti-Money Laundering Deficiencies*, available at https://www.fincen.gov/news/news-releases/financial-action-task-force-identifies-jurisdictions-anti-money-laundering-1 (last visited Dec. 9, 2024).

124. Financial Action Task Force, *Trade-Based Money Laundering: Risk Factors* (Mar. 2021), available at *https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Trade-Based-Money-Laundering-Risk-Indicators.pdf* (last visited Dec. 9, 2024).

125. *See* FinCEN, *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities*, available at *https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf* (last visited Dec. 9, 2024).

126. *See* Press Release, Department of Justice, *Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team* (Oct. 6, 2021), available at *https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team* (last visited Dec. 9, 2024).

127. *See* U.S. Department of the Treasury, *2022 National Strategy for Combating Terrorist and Other Illicit Financing* (May 2022), available at *https://home.treasury.gov/system/files/136/2022-National-Strategy-for-Combating-Terrorist-and-Other-Illicit-Financing.pdf* (last visited Dec. 9, 2024).

128. 15 U.S.C. §§ 78dd-1, et seq.

129. *See* 18 U.S.C. § 78dd – 1(a) (2018).

130. Criminal Division of the U.S. Department of Justice & Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act 19* (2nd ed. 2020), available at *https://www.justice.gov/criminal-fraud/file/1292051/download*.

131. *See id*. at 13.

132. *d*.

133. 18 U.S.C. § 78m(b)(2)(A) (2018).

134. 18 U.S.C. § 78m(b)(2)(B) (2018).

135. *See* 18 U.S.C. §§ 78dd – 1-3 (2018).

136. *See* 18 U.S.C. § 78dd – 1(h) (2018).

137. Unlike the FCPA's anti-bribery provisions, its accounting provisions do not apply to "domestic concerns" that are not "issuers." *See* 15 U.S.C. § 78m(b)(2).

138. *See e.g.,* 18 U.S.C. § 78dd – 1(a) (2018).

139. *See* Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices* (p. 22), available at *https://www.justice.gov/criminal-fraud/file/1292051/download*.

140. 15 U.S.C. § 78ff(c) (2018); 18 U.S.C. § 3571(e).

141. *Id.*

142. *Id.*

143. *Id.*

144. *See generally* Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices*, available at *https://www.justice.gov/criminal-fraud/file/1292051/download*.

145. Section 21(B)(b) of the Exchange Act, 15 U.S.C. § 78u(d)(3); *see also* 17 C.F.R. § 201.1004 (providing adjustments for inflation), available at *https://www.sec.gov/enforce/civil-penalties-inflation-adjustments (last visited Dec. 24, 2024)*.

146. 15 U.S.C. § 78ff(a) (2018).

147. *Id.*

148. *See* Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices* (p. 29), available at *https://www.justice.gov/criminal-fraud/file/1292051/download*

149. *See id.*

150. *See id*. at 29-30.

151. *See id.*

152. *See id.*

153. *See Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy*, available at *https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl*.

154. *See Evaluation of Corporate Compliance Programs*, available at *https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl*.

155. *See id.*

156. *See Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy*, available at *https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl*.

157. For general jurisdiction to lie, the foreign defendant's "affiliations with the State [must be] so continuous and systematic as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (citation and quotation marks omitted).

158. *Id.*

159. *See ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997) ("[T]he threshold level of minimum contacts to confer general jurisdiction is significantly higher than for specific jurisdiction.").

160. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856-57 (2011).

161. *See Daimler*, 571 U.S. at 138.

162. *See e.g.*, 415 Pa. Cons. Stat §411(a) (2014).

163. *See Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023) (finding Pennsylvania statute did not violate the Due Process Clause of the Fourteenth Amendment but expressly leaving undecided whether the statute violated the dormant Commerce Clause).

164. *Id.*

165. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (citations omitted); *Tamburo v. Dworkin*, 601 F.3d 693, 702 (7th Cir. 2010).

166. Wright, Miller, Kane, & Marcus, 4A Federal Practice and Procedure § 1069.

167. *Id.*

168. *Nicastro*, 564 U.S. at 881-82 (quotation marks omitted).

169. *See Ford Motor Co. v. Montana Eighth Judicial District Court,* 141 S. Ct. 1017 (2021). *But see Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017).

170. *Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.2d 773, 778 n.17 (7th Cir. 2003).

171. Piercing the corporate veil and alter ego are legally distinct theories, but courts often fail to distinguish between the two and apply the same factors.

172. *Forest Hill Corp. v. Latter & Blum, Inc.*, 249 Ala. 23, 28 (Ala. 1947) (internal quotation marks and citation omitted).

173. *See Dietel v. Day*, 492 P.2d 455, 457 (Ariz. 1972).

174. *See United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988).

175. *See Dietel*, 492 P.2d at 457.

176. *See Daimler*, 517 U.S. at 135, n.13 (rejecting use of a broad agency theory to establish general jurisdiction, but noting that agency relationships may still be relevant to an analysis of specific jurisdiction).

177. Whether a parent is liable for the acts of a subsidiary under an alter ego or agency theory is typically an issue of state law and varies from state-to-state. Thus, some jurisdictions will treat the requirements for alter ego and agency relationships differently than others.

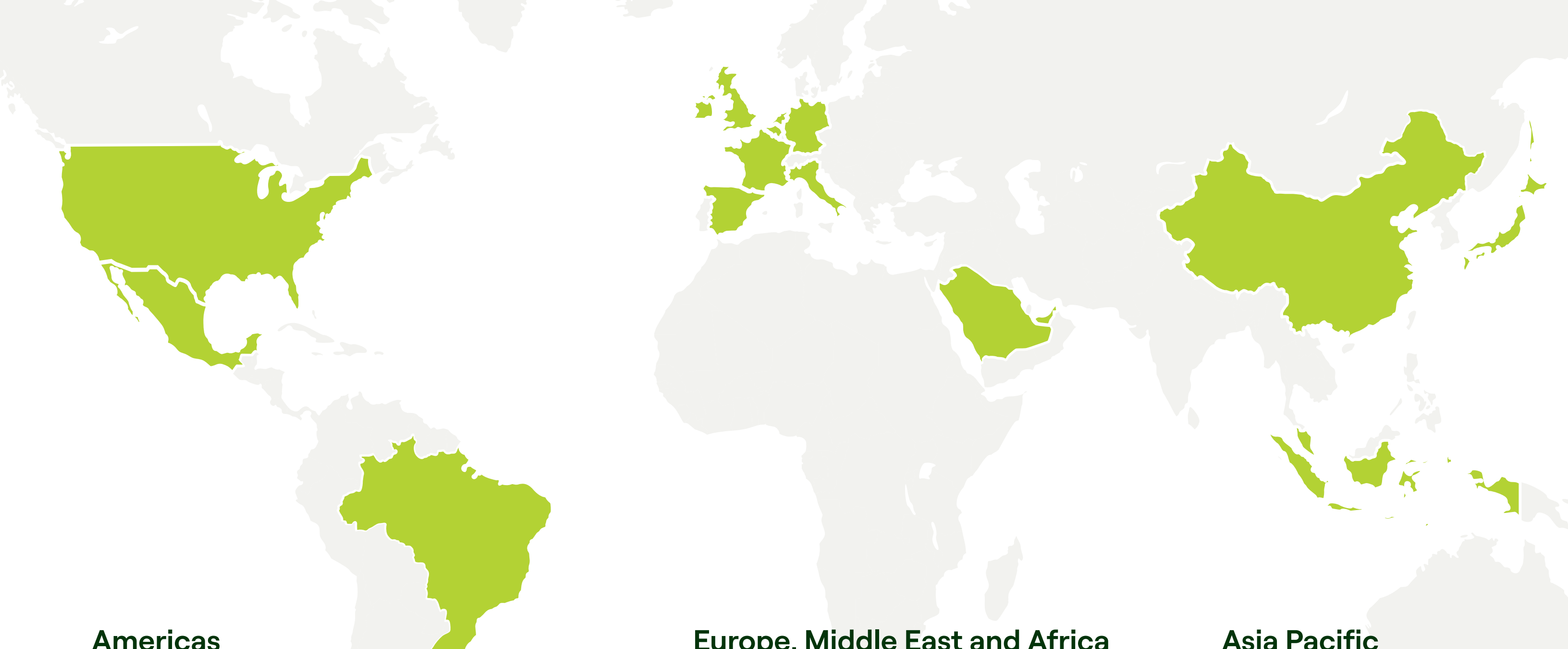
178. *Central States v. Feiner Express World Corp.*, 230 F.3d 934, 940 (7th Cir. 2000).

179. *City of Greenville v. Syngenta Crop Protection*, 830 F. Supp. 2d 550, 555-56 (S.D. Ill. 2011).

180. *See* Harvey Gelb, *Limited Liability Policy and Veil Piercing*, 9 WYO. L. REV. 551, 567 (2009); *see also Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 732 (S.D.N.Y. 1986); *see also De Witt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976).

181. 11 U.S.C. § 1182.

182. U.S. Department of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees* (Feb. 2020), available at *https://www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download* (last visited Dec. 9, 2024).



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