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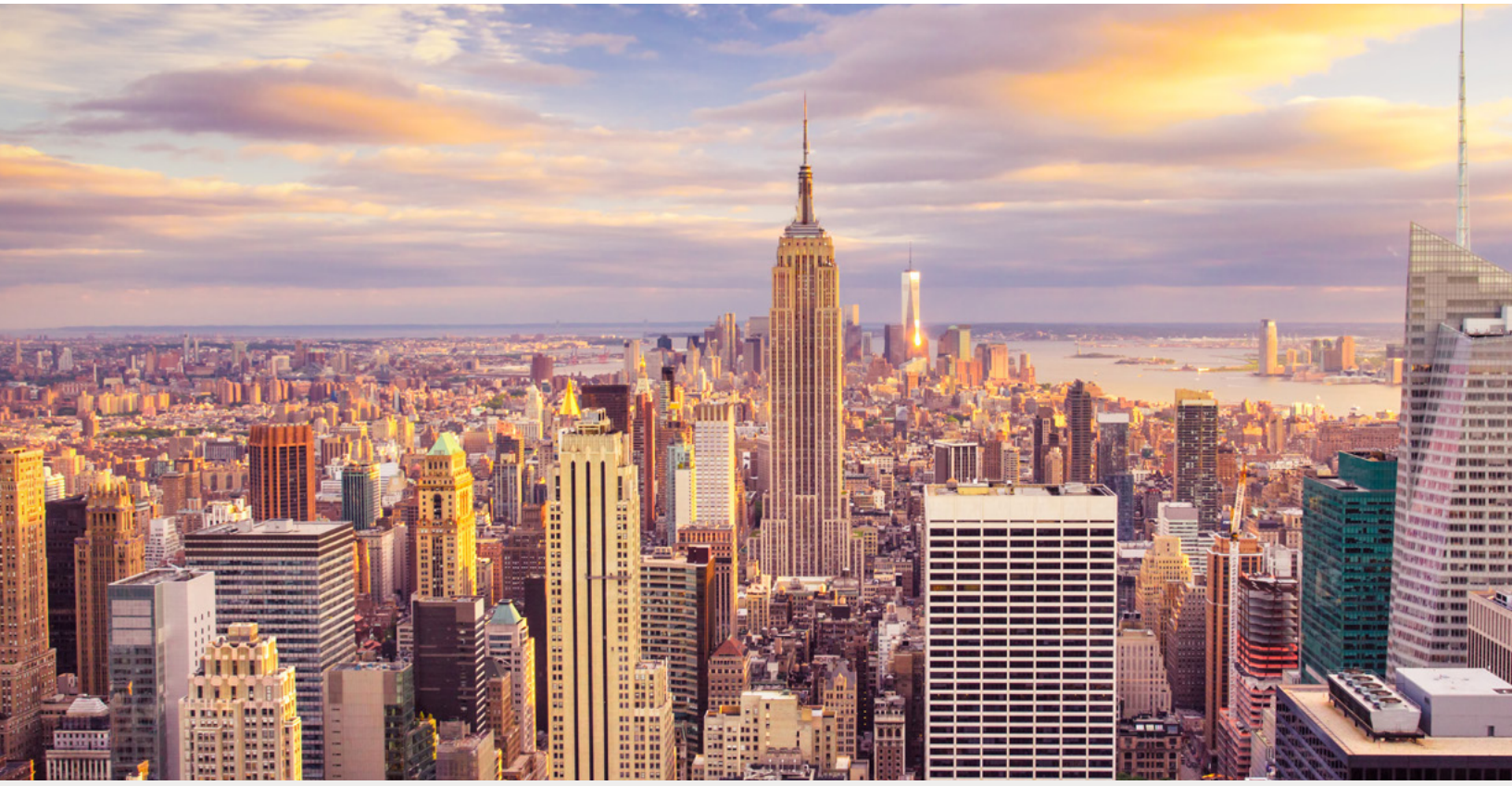


DOING *business* IN THE U.S.

A GUIDE FOR FOREIGN COMPANIES OPERATING IN THE U.S.

Table of Contents

section ONE

INTRODUCTION

1. INTRODUCTION

Successfully establishing and growing a business in the U.S. comes with a wealth of opportunities, but it also requires navigating a complex legal, regulatory, and operational landscape. The United States offers a business-friendly environment with strong legal protections, access to capital, and a dynamic consumer base, but success depends on careful planning and compliance with local laws.

The team at Shumaker, Loop and Kendrick, LLP has prepared this guide to provide foreign investors and businesses with a comprehensive overview of the key considerations for doing business in the U.S., including entry strategies, corporate structures, tax implications, labor laws, intellectual property protections, dispute resolution mechanisms, and immigration options. However, we understand that every business has unique circumstances and objectives.

Our team is available to assess your specific needs and support you in developing and implementing the best strategy for your expansion into the U.S. market.

Whether you are launching a new venture, acquiring an existing company, or expanding operations, understanding the legal and practical aspects of the U.S. business environment is crucial. Throughout this guide, we outline essential steps, best practices, and potential pitfalls, ensuring that businesses are well-positioned for success in one of the world's most competitive markets.

section TWO

ENTRY STRATEGIES: SHOULD YOU FORM A U.S. ENTITY?

2. ENTRY STRATEGIES: SHOULD YOU FORM A U.S. ENTITY?

Expanding into the U.S. market is a significant decision for any foreign business, requiring careful consideration of the most effective market entry strategy. Each approach carries unique advantages and challenges related to taxation, liability, regulatory requirements, and operational flexibility. The right choice depends on factors such as the level of control desired, the industry in which the business operates, and the long-term goals of expansion.

Foreign businesses have several options to enter the U.S. market, each offering different levels of involvement, risk, and complexity. Whether establishing a legal entity or partnering with an existing U.S. firm, understanding these options is crucial for making an informed decision.

2.1 Direct Market Entry: Operating Through a Branch, Agent, or Distributor

Direct market entry allows foreign businesses to sell their products or services in the U.S. without setting up a separate legal entity. This is commonly done through a branch office, an independent sales agent, or a distribution agreement. A branch office represents the parent company directly and can be subject to U.S. taxation and regulatory requirements. Agents and distributors, on the other hand, facilitate sales on behalf of the foreign company, helping navigate local market conditions while minimizing operational risks. However, reliance on third-party entities may limit control over pricing, branding, and customer relationships. Additionally, some states, such as California, New York, and Florida, require foreign businesses engaging in direct market activities to register and obtain business licenses, depending on the industry and scale of operations.

2.2 Establishing a U.S. Entity: Setting Up a Wholly Owned Subsidiary

Creating a U.S. entity, such as a corporation or a limited liability company (LLC), provides a foreign business with full control over operations while shielding the parent company from direct liability. A subsidiary is treated as a separate legal entity, subject to U.S. corporate taxation and compliance regulations. This approach is ideal for businesses looking to establish a long-term presence, hire employees, and build brand identity in the U.S. market. Choosing between a corporation and an LLC depends on tax and governance considerations—corporations provide better access to external investment, while LLCs offer tax flexibility through pass-through taxation. However, forming a U.S. entity requires compliance with state and federal registration processes, ongoing reporting obligations, and adherence to employment and business regulations.

2.3 Acquiring an Existing Business: Buying Assets or Shares of a U.S. Company

Acquiring an existing business can be an efficient way to enter the U.S. market, providing immediate access to an established customer base, operational infrastructure, and local expertise. Foreign investors can acquire a company by purchasing its assets or shares. An asset purchase allows buyers to select specific parts of a business, such as intellectual property, equipment, or contracts, while minimizing liabilities tied to the previous owner.

A stock purchase involves taking over an entire company, including its existing liabilities, employees, and operational structure. Due diligence is crucial to assess financial health, legal compliance, and potential risks before completing a transaction. Additionally, foreign investments in certain industries may require regulatory approval, particularly if they involve critical infrastructure, defense, or technology sectors.

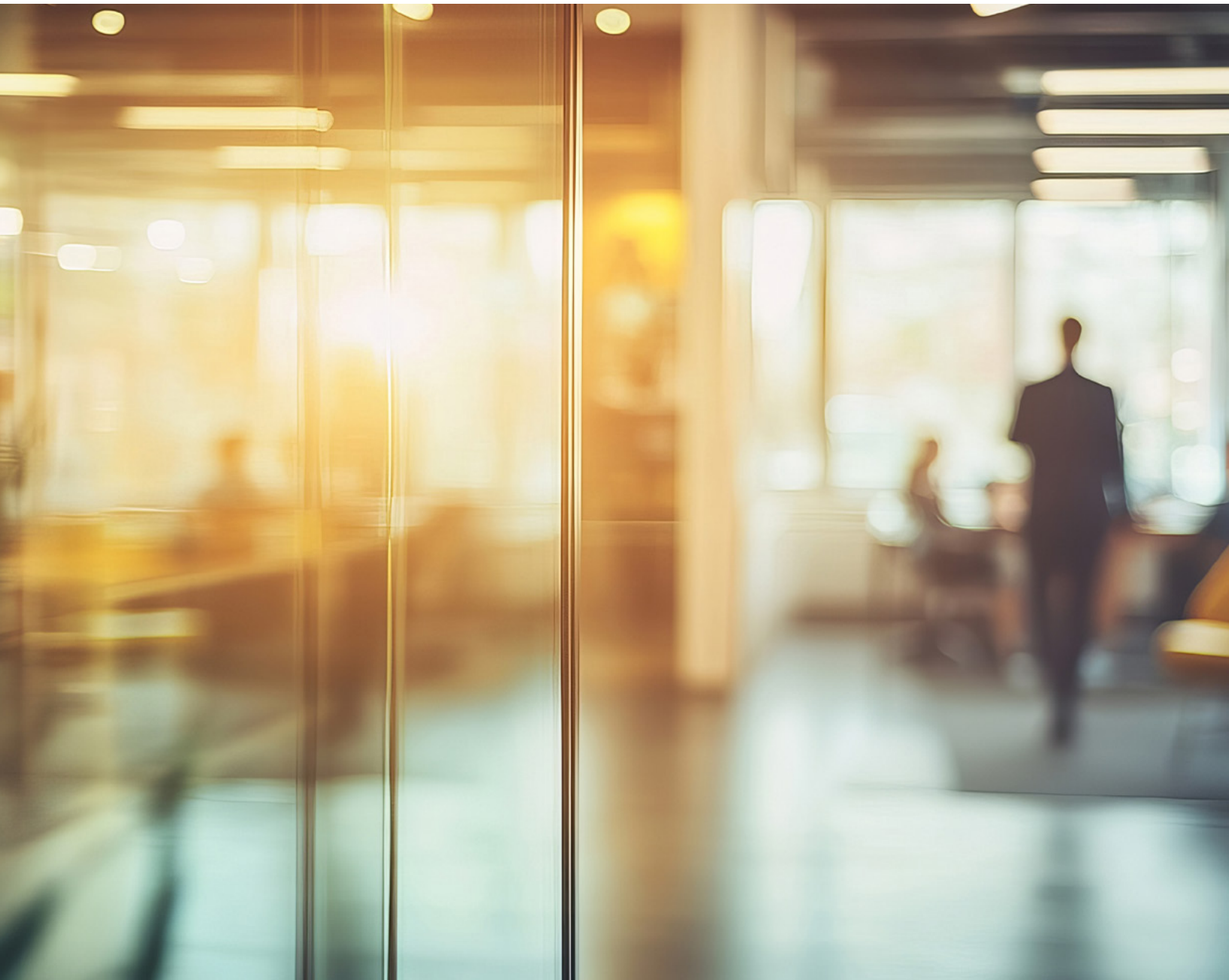
2.4 Licensing or Franchising: Partnering With a U.S. Company Without Direct Presence

Licensing and franchising provide foreign businesses with a way to generate revenue in the U.S. without direct ownership or operational control. Licensing agreements allow U.S. companies to use foreign intellectual property, trademarks, or proprietary technology in exchange for royalties. This model reduces financial risk and regulatory burden while expanding brand presence in the market. Franchising, on the other hand, involves a structured business model where franchisees operate under the brand and guidelines of the foreign business, paying fees or royalties in return. While both options can provide rapid market penetration, they also require strong contractual agreements to ensure brand consistency, intellectual property protection, and compliance with U.S. franchise laws.

Each entry strategy presents unique benefits and challenges. Foreign businesses must assess their risk tolerance, level of operational control, tax exposure, and long-term business objectives before deciding on the best approach for entering the U.S. market. This guide will further explore key aspects of these options, helping businesses make well-informed decisions.

section THREE

DIRECT MARKET ENTRY: OPERATING THROUGH A BRANCH, AGENT, OR DISTRIBUTOR



3. DIRECT MARKET ENTRY: OPERATING THROUGH A BRANCH, AGENT, OR DISTRIBUTOR

Foreign businesses seeking to sell products or services in the U.S. without establishing a separate legal entity can explore direct market entry through a branch office, independent sales agent, or distributor. Each option has distinct legal, tax, and operational considerations, making it essential for companies to evaluate the best approach based on their business model and industry.

3.1. Branch Office

A branch office is an extension of the foreign parent company operating directly in the U.S. It is not a separate legal entity but rather a foreign company's local presence in the market.

3.1.1 Formation Requirements

(i) Register as a foreign entity with the Secretary of State in each state where business is conducted.

(ii) Obtain an Employer Identification Number (EIN) from the Internal Revenue Service (IRS) for tax purposes.

(iii) Designate a registered agent for receiving legal and tax documents.

(iv) Comply with state and local business license requirements (varies by state; California, New York, and Florida have stringent rules).

(v) File for Foreign Qualification if operating across multiple states.

3.1.2 Advantages

(i) Full control over business operations, branding, and pricing.

(ii) Direct management of customer relationships and market strategy.

3.1.3 Disadvantages

(i) Subject to U.S. taxation on income generated in the country.

(ii) May trigger permanent establishment (PE) status, leading to additional compliance burdens.

(iii) Required to register with state and local authorities where it conducts business, often necessitating a business license in states like California, New York, and Florida.

3.2 Independent Sales Agent

An independent sales agent is a third-party representative who facilitates sales for a foreign company without assuming ownership of goods or services. The agent earns a commission on sales but does not bear inventory or operational risks.

3.2.1 Formation Requirements

(i) Draft a Sales Agency Agreement outlining commission structure, exclusivity terms, and termination clauses.

(ii) Ensure compliance with Federal Trade Commission (FTC) regulations regarding fair trade practices.

(iii) Verify state-specific sales and business licensing requirements for independent agents.

3.2.2 Advantages

(i) Lower upfront costs compared to establishing a branch or subsidiary.

(ii) Reduces administrative and tax burdens since the agent is responsible for its own tax filings.

3.2.3 Disadvantages

(i) Less control over pricing, branding, and customer relationships.

(ii) Success depends on the agent's commitment and market expertise.

(iii) Contractual agreements must clearly define exclusivity, commission structures, and performance expectations.

3.3 Distributor Agreements

A distributor purchases products from the foreign company and resells them in the U.S. market, often handling marketing, warehousing, and customer service.

3.3.1 Formation Requirements

(i) Negotiate and execute a Distributor Agreement specifying pricing, territorial rights, and branding terms.

(ii) Ensure compliance with Uniform Commercial Code (UCC) regulations governing commercial sales in the U.S.

(iii) Assess potential antitrust laws to avoid exclusivity clauses that may violate competition laws.

3.3.2 Advantages

(i) Provides rapid access to established distribution networks.

(ii) Reduces regulatory, tax, and operational responsibilities for the foreign company.

3.3.3 Disadvantages

(i) Foreign businesses relinquish direct control over sales and marketing.

(ii) Distributor agreements may limit pricing flexibility and brand positioning.

(iii) Contractual restrictions may affect termination rights or the ability to change distribution strategies.

3.4 Regulatory and Licensing Considerations

Many states require foreign businesses conducting direct market activities to register and obtain a business license or file for foreign qualification with the state's Secretary of State. Additionally, businesses may need to:

(i) Register with the Department of Revenue for state tax obligations.

(ii) Obtain federal product approvals if selling regulated goods (e.g., FDA approval for pharmaceuticals, FCC compliance for telecommunications products).

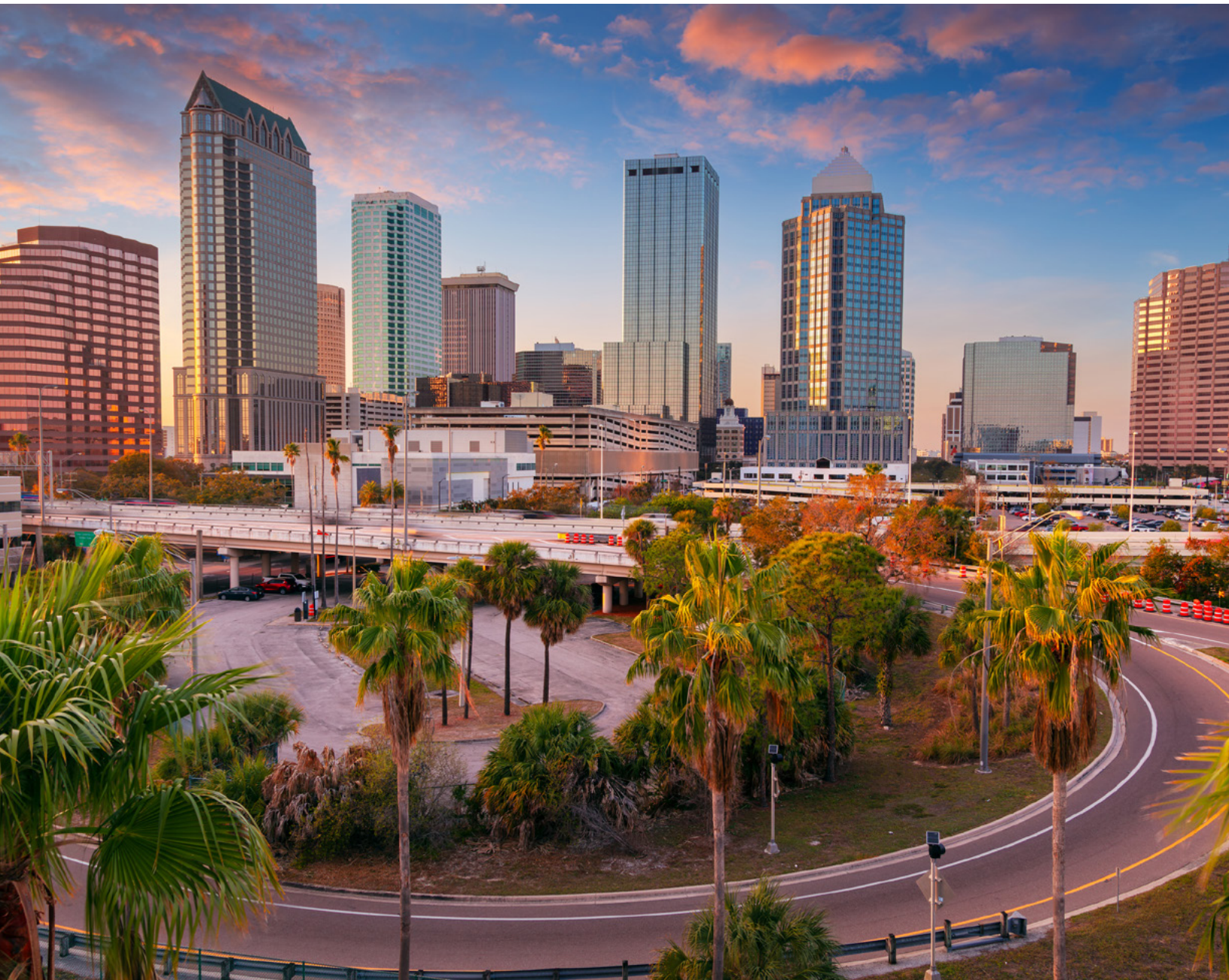
(iii) Adhere to intellectual property protections by registering trademarks with the United States Patent and Trademark Office (USPTO).

3.5 Comparison to Establishing a U.S. Entity

Businesses considering direct market entry should compare this approach with establishing a separate U.S. entity (discussed in the Establishing a U.S. Entity chapter). While direct market entry minimizes initial costs and administrative burdens, it may limit growth potential and expose the foreign company to greater tax and liability risks. Companies planning long-term operations in the U.S. may find forming a subsidiary (LLC or Corporation) more advantageous in terms of legal protections and scalability.

section FOUR

ESTABLISHING A U.S. ENTITY



4. ESTABLISHING A U.S. ENTITY

Once a foreign business decides to set up a U.S. entity, several key factors must be considered. Establishing a legal entity in the U.S. provides operational control, limits liability, and allows access to the local banking system and workforce. However, it also requires compliance with tax laws, corporate governance rules, and state regulations. The following sections outline essential aspects of forming and operating a U.S. entity.

4.1 Types of Business Entities

Choosing the appropriate business entity is one of the most critical decisions when establishing a U.S. company. The entity type determines liability protection, taxation, governance structure, and investor appeal. Each structure offers unique benefits and potential drawbacks, depending on business goals, ownership structure, and regulatory considerations. Below are the primary business entity types available in the U.S., along with their key characteristics.

4.1.1 C Corporation (C Corp)

A C Corporation is a separate legal entity from its owners, providing limited liability protection to shareholders. This structure is commonly used by businesses seeking outside investment, particularly venture capital and public offerings. One notable aspect of a C Corp is the double taxation system: the corporation pays corporate income tax (currently 21% at the federal level), and shareholders are taxed again on dividends. However, retained earnings within the company are not immediately taxed at the shareholder level, allowing reinvestment without immediate additional tax burdens. C Corps also offer flexibility in ownership, as there are no restrictions on the number or type of shareholders, making them ideal for large-scale operations and multinational business expansion.

4.1.2 S Corporation (S Corp)

An S Corporation is a special tax designation available to qualifying small businesses. Unlike C Corps, S Corps are pass-through entities, meaning business income, deductions, and credits pass through to shareholders, who report them on their individual tax returns. This structure avoids double taxation while still providing limited liability protection. However, there are strict requirements: an S Corp can have no more than 100 shareholders, all of whom must be U.S. citizens or residents. Additionally, it can issue only one class of stock, which may limit investment opportunities. Despite these restrictions, S Corps are often a preferred option for small to mid-sized businesses looking for tax efficiencies while maintaining a corporate structure.

4.1.3 Limited Liability Company (LLC)

A Limited Liability Company (LLC) is one of the most flexible business entities in the U.S., combining elements of both corporations and partnerships. LLCs provide limited liability protection to their owners (members) while offering the option to be taxed as a

sole proprietorship, partnership, or corporation. By default, an LLC is treated as a pass-through entity, meaning profits and losses flow directly to members without entity level taxation. However, an LLC can elect to be taxed as a C Corporation if desired. Unlike corporations, LLCs do not have strict management requirements—members can manage the company themselves or appoint managers. This structure is particularly attractive for small and medium-sized businesses, real estate ventures, and professional service firms due to its operational flexibility and simplified compliance requirements.

4.1.4 Partnerships

Partnerships are business structures in which two or more individuals or entities share ownership, profits, and liabilities. There are several types of partnerships, each with different levels of liability and management control:

(i) **General Partnership (GP):** In a GP, all partners share equal responsibility for management and liabilities. This structure is easy to form and offers tax simplicity but provides no liability protection—each partner is personally responsible for business debts and obligations.

(ii) **Limited Partnership (LP):** An LP consists of at least one general partner (who manages the business and assumes full liability) and one or more limited partners (who invest in the business but have limited liability). LPs are commonly used for investment funds and real estate projects.

(iii) **Limited Liability Partnership (LLP):** LLPs are typically used by professional service firms, such as law and accounting firms. All partners have limited liability, meaning they are not personally responsible for the actions of other partners.

(iv) **Limited Liability Limited Partnership (LLLP):** An LLLP is an extension of an LP, offering limited liability protection to both general and limited partners. This structure is not available in all states but is useful for businesses seeking to limit liability exposure for all partners.

4.2 Incorporation Process and Legal Requirements

Establishing a business entity in the U.S. requires compliance with both state and federal regulations. Each business structure—C Corporation, S Corporation, Limited Liability Company (LLC), and Partnerships—follows a distinct incorporation process with varying legal requirements. Below is an overview of the incorporation steps and governance considerations for each entity type.

4.2.1 Filing Incorporation Documents with the Secretary of State

The first step in forming a business entity is filing the appropriate formation documents with the Secretary of State in the chosen jurisdiction:

(i) **Corporation and S Corporation:** Must file Articles of Incorporation (or Certificate of Incorporation in some states). These documents outline essential

company details, including the corporate name, number of authorized shares, registered agent information, and business purpose.

(ii) **LLC:** Must file Articles of Organization (or Certificate of Formation). This document sets out the company's name, registered agent, and management structure (member-managed or manager-managed).

(iii) **Partnerships:**

a) **General Partnership (GP):** Typically, does not require formal filing, but partners may choose to file a Partnership Agreement.

b) **Limited Partnership (LP):** Must file a Certificate of Limited Partnership, designating at least one general partner and one limited partner.

c) **Limited Liability Partnership (LLP) and Limited Liability Limited Partnership (LLLP):** Must file registration documents with the state to obtain limited liability protection for partners.

4.2.2 Registered Agent Requirement

A registered agent is a designated person or service authorized to receive legal and tax documents on behalf of the company. The registered agent must have a physical address in the state of incorporation and be available during regular business hours.

(i) **Corporations (C and S Corps):** Required in all states; typically, businesses hire professional registered agent services to ensure compliance.

a) **LLCs:** Required in most states; can be an individual or a professional service provider.

b) **Partnerships:** Required for LLPs and LLLPs, but not typically required for GPs and LPs unless mandated by state law.

4.2.3 Capitalization Requirements

Unlike some other countries, the U.S. does not impose a minimum capital requirement for business entities. However, proper capitalization is essential to maintain financial stability and reinforce liability protections.

(i) **C and S Corporations:** While there is no minimum requirement, corporations must issue shares to shareholders. Delaware and some other states require corporations to define a par value for their shares.

(ii) **LLCs:** No formal capitalization requirements exist, but members contribute capital based on their ownership agreements.

(iii) **Partnerships:** Partners contribute capital in cash, property, or services as outlined in the partnership agreement. Limited partners in an LP or LLLP are only liable for debts up to their contributed amount.

4.2.4 Corporate Governance and Compliance Requirements

Corporate governance refers to the structure, policies, and procedures that guide the management and decision-making processes of a business entity. Compliance involves adhering to state and federal regulations, ensuring transparency, accountability, and legal protection for stakeholders. Each entity type has different governance and compliance obligations:

(i) **Corporations (C and S Corps).** Corporations must follow formal governance structures, requiring a Board of Directors to oversee operations and officers (such as CEO, CFO, and Secretary) to manage daily activities. They must hold an annual shareholders meeting and regular board meetings, document meeting minutes, and maintain corporate records. Failure to comply can lead to loss of liability protections. Additionally, publicly traded corporations face strict Securities and Exchange Commission (SEC) reporting requirements, while privately held corporations have fewer disclosure obligations but may still need to file annual reports with the state.

(ii) **Limited Liability Companies (LLCs).** LLCs offer greater flexibility in governance. They can be managed by members (owners) or appointed managers, as specified in the Operating Agreement. Unlike corporations, LLCs are not required to hold formal meetings or maintain extensive records, though it is advisable to do so to reinforce liability protection. Some states mandate periodic filings, such as an Annual Report, but LLCs generally have fewer compliance requirements than corporations.

(iii) **Partnerships (GPs, LPs, LLPs, LLLPs).** Governance in partnerships is dictated by the Partnership Agreement, which defines each partner's rights, responsibilities, and profit-sharing arrangements. General Partnerships (GPs) do not require formal governance structures, but Limited Partnerships (LPs) and Limited Liability Partnerships (LLPs) must file periodic reports with state agencies. Limited Liability Limited Partnerships (LLLPs) provide liability protection for general partners but require additional compliance filings.

4.2.5 Taxation and Filings

Taxation in the U.S. varies by business entity type, impacting how income is reported, taxed, and distributed to owners. Businesses must comply with federal, state, and sometimes local tax regulations. Certain entities, like corporations, are subject to direct taxation, while others, like LLCs and S Corporations, allow income to pass through to owners' personal tax returns. Additionally, businesses must adhere to ongoing filing obligations, including income tax returns, payroll tax reporting, and regulatory compliance filings.

(i) **Corporate Taxation (C Corporations).** C Corporations are subject to a 21% federal corporate tax rate, plus applicable state and local taxes, which vary by jurisdiction. Unlike pass-through entities, C Corps experience double taxation, where profits are taxed at the corporate level and again when distributed to shareholders as dividends. However, retained earnings within the corporation

are not immediately taxed at the shareholder level, allowing businesses to reinvest profits without incurring additional tax burdens.

(ii) **Pass-Through Taxation (S Corporations, LLCs, and Partnerships).** S Corporations, LLCs, and Partnerships benefit from pass-through taxation, meaning business profits and losses are reported on the owners' personal tax returns rather than being taxed at the entity level. This avoids double taxation and can lead to tax savings for small to mid-sized businesses.

a) S Corporations must meet specific IRS eligibility requirements, including a cap of 100 shareholders, all of whom must be U.S. citizens or residents. They file Form 1120-S, and shareholders report their portion of profits or losses on Schedule K-1.

b) LLCs are taxed as sole proprietorships (if single-member) or partnerships (if multi-member) by default but may elect to be taxed as an S Corp or C Corp for strategic tax planning. Multi-member LLCs file Form 1065, and members report their earnings on Schedule K-1.

c) Partnerships (General, Limited, LLPs, and LLLPs) do not pay corporate taxes. Instead, income is passed through to partners, who report it on their personal tax returns. Partnerships must file Form 1065 and issue Schedule K-1 to each partner, detailing their share of profits and losses. Certain partnership types, such as LLPs and LLLPs, may have additional state tax filing requirements.

(iii) **Annual Tax Filings and Payroll Obligations.** All business entities must file annual tax returns with the IRS and applicable state agencies. Corporations submit Form 1120 (C Corps) or Form 1120-S (S Corps), while LLCs and partnerships typically file Form 1065 unless they elect corporate taxation. Additionally, businesses with employees must withhold and remit payroll taxes, including Social Security, Medicare, and unemployment taxes, filing quarterly payroll reports (Form 941) and annual wage statements (Form W-2 and Form 1099 for contractors).

(iv) **Foreign Shareholder Tax Considerations.** Foreign shareholders receiving dividends from a U.S. corporation may be subject to a 30% withholding tax unless reduced or eliminated under a tax treaty between the U.S. and the shareholder's country of residence. The specific treaty terms dictate the final withholding rate, and foreign owners must file IRS Form W-8BEN to claim treaty benefits. Foreign partners in a U.S. partnership are subject to effectively connected income (ECI) taxation, meaning they must file U.S. tax returns and may have federal withholding obligations under Section 1446 of the Internal Revenue Code. Partnerships with foreign partners are required to withhold and remit estimated tax payments on behalf of non-U.S. partners.

4.2.6 Physical and Virtual Presence Requirements

When establishing a business in the U.S., companies must meet certain physical and administrative presence requirements. While some states have strict regulations regarding a registered office and corporate officers, others allow businesses to operate with minimal physical presence, leveraging third-party services for compliance. Below are key considerations regarding registered offices, corporate secretaries, banking requirements, and legal representation.

(i) **Registered Office Requirement.** A registered office is a physical location within the state of incorporation where official documents, such as legal notices and government correspondence, are sent. This address must be a physical location and cannot be a post-office box or other virtual location. Many businesses use third-party registered agents to fulfill this requirement, especially when they do not have a physical office in the state.

(ii) **Corporate Secretary Requirements.** A corporate secretary is responsible for maintaining company records, ensuring compliance with corporate laws, and handling governance matters such as preparing meeting minutes and filing required documents. While most states do not mandate a corporate secretary, as Delaware, some, such as California, require corporations to appoint one. Even when not legally required, appointing a corporate secretary is considered a best practice for corporate governance.

(iii) **Banking Requirements: Employer Identification Number (EIN) and KYC Compliance.** To open a U.S. bank account, businesses must obtain an Employer Identification Number (EIN) from the IRS. The EIN serves as a unique identifier for tax and banking purposes, similar to a Social Security Number, but for businesses. Additionally, banks require compliance with Know Your Customer (KYC) regulations, which involve verifying the business's identity, ownership structure, and financial activities. This process ensures that businesses are not engaged in fraudulent or illegal activities and typically requires submission of formation documents, proof of business operations, and identification of company owners. It may also include screening the business and its owners against government-issued restricted party lists, such as those maintained by the Office of Foreign Assets Control (OFAC).

(iv) **Third-Party Registered Agents and Legal Representation.** Most states allow businesses to use third-party registered agents to fulfill legal representation requirements. These agents receive and forward legal documents, helping businesses maintain compliance without requiring a physical office in the state. Registered agent services are offered by specialized firms, law firms, and corporate service providers. This service is particularly useful for foreign-owned businesses or companies incorporated in states where they do not have a physical presence.

4.2.7 Licensing and Regulatory Compliance

Operating a business in the U.S. requires adherence to various licensing and regulatory requirements, which vary depending on industry, location, and business activities. Companies must ensure they obtain the necessary permits to operate legally and comply with federal, state, and local regulations. Below are key areas of licensing and regulatory compliance that businesses must consider.

(i) **Business Licenses and Permits.** The types of licenses and permits required depend on the nature of the business and where it operates. Some of the most commonly required licenses include:

a) **General Business Licenses:** Many cities and states require businesses to obtain a general operating license to conduct commercial activities within their jurisdiction.

b) **Professional Licenses:** Certain professions, such as legal services, accounting, real estate, and healthcare, require state-issued professional licenses.

c) **Health and Safety Permits:** Businesses in food service, manufacturing, and construction must obtain health department permits, fire safety approvals, and OSHA (Occupational Safety and Health Administration) compliance certifications.

d) **Environmental Permits:** Companies involved in manufacturing, waste disposal, or industries that impact the environment may need permits from the Environmental Protection Agency (EPA) or state environmental agencies.

e) **Sales Tax Permits:** Businesses selling goods or taxable services must register for a sales tax permit with state tax authorities.

4.2.8 Regulated Industries and Compliance Requirements

Certain industries are highly regulated due to the nature of their operations and potential risks to consumers and national security. Businesses in these sectors must comply with industry-specific laws and may require additional federal and state oversight:

(i) **Finance and Banking:** Subject to regulations from the Securities and Exchange Commission (SEC), the Financial Crimes Enforcement Network (FinCEN), and the Federal Reserve. Compliance includes anti-money laundering (AML) laws, financial reporting obligations, and capital requirements.

(ii) **Healthcare and Pharmaceuticals:** Regulated by agencies such as the Food and Drug Administration (FDA) and the Department of Health and Human Services (HHS). Businesses must comply with the Health Insurance Portability and Accountability Act (HIPAA) and drug safety regulations.

(iii) **Telecommunications:** Overseen by the Federal Communications Commission (FCC), ensuring compliance with broadcasting, internet service, and wireless communication standards.

(iv) **Defense and Aerospace:** Subject to Department of Defense (DoD) and International Traffic in Arms Regulations (ITAR), requiring special approvals for handling military-grade technology and defense-related exports.

4.2.9 Export Controls and Economic Sanctions

U.S. businesses engaged in international trade must comply with export control laws and economic sanctions that restrict transactions with certain foreign entities, individuals, and countries. These regulations help protect national security and foreign policy interests.

(i) **Export Administration Regulations (EAR):** Governed by the Bureau of Industry and Security (BIS), EAR controls the export of commercial and dual-use technologies that may have military applications.

(ii) **International Traffic in Arms Regulations (ITAR):** Administered by the U.S. Department of State, ITAR regulates the export of defense articles, services, and technical data.

(iii) **Office of Foreign Assets Control (OFAC) Sanctions:** Enforced by the U.S. Treasury, OFAC maintains a list of sanctioned countries, entities, and individuals with whom U.S. businesses cannot engage in financial or trade transactions. Companies must verify potential business partners and transactions against restricted party lists, which can be accessed through government websites such as the BIS Consolidated Screening List and the OFAC Sanctions List. Failure to comply with export and sanctions regulations can result in severe penalties, including fines and criminal liability.

4.3 Execution Formalities and Legal Documentation

Executing legal documents in the U.S. involves specific formalities depending on the type of agreement, jurisdiction, and intended use. While many documents can be signed without additional formalities, certain transactions require notarization, apostille certification, or adherence to electronic signature regulations. Understanding these requirements helps businesses ensure the enforceability and validity of their legal documents.

4.3.1 Document Signing and Electronic Signatures

In most cases, documents can be signed in any ink color, though black or blue ink is generally preferred for clarity in scanned copies. The U.S. widely accepts electronic signatures (e-signatures) under the Electronic Signatures in Global and National Commerce Act (ESIGN Act) and the Uniform Electronic Transactions Act (UETA). These laws grant electronic signatures the same legal effect as handwritten

signatures, provided they meet security and authentication requirements. Facsimile (faxed) signatures are also accepted in many contractual agreements unless a physical signature is explicitly required.

4.3.2 Notarization Requirements

Notarization is the process of having a notary public verify the identity of a signer and witness the signing of a document. The notary adds a seal and signature to confirm the document's authenticity. Notarization is rarely required for most business transactions but is necessary for certain legal documents, including real estate deeds, affidavits, powers of attorney, and some government filings. Unlike civil law jurisdictions where notaries may draft documents, U.S. notaries primarily serve a verification role and do not provide legal advice.

4.3.3 Apostille Certification and International Recognition

When legal documents need to be recognized in foreign jurisdictions, they may require apostille certification under the Hague Convention of 1961. An apostille is an official certificate issued by a designated authority (such as the Secretary of State) that authenticates the validity of a document for use in another member country. Documents commonly requiring an apostille include corporate formation certificates, powers of attorney, and notarized agreements intended for international transactions.

section FIVE

INVESTING IN AN EXISTING U.S. BUSINESS

5. INVESTING IN AN EXISTING U.S. BUSINESS

Investing in an established U.S. business can be an attractive option for foreign investors seeking to enter the American market. It provides immediate access to an existing customer base, operational infrastructure, and brand recognition. However, investors must carefully navigate regulatory requirements, liabilities, and financial considerations before proceeding. Below are key aspects to consider when investing in a U.S. business.

5.1 Advantages and Disadvantages of Investing in a U.S. Business

Investing in an existing business can be a faster and less risky approach compared to starting a company from scratch. Benefits include:

5.1.1 Established Market Presence

Avoids the challenges of brand-building and gaining market recognition.

5.1.2 Proven Business Model

Reduces uncertainty, as the business has a track record of revenue and operational performance.

5.1.3 Easier Access to Financing

Banks and investors are more willing to finance businesses with an established financial history.

However, there are potential downsides:

5.1.4 Higher Upfront Costs

Purchasing an existing business often requires significant capital, especially for profitable enterprises.

5.1.5 Inherited Liabilities

Buyers may assume legal, tax, or contractual obligations tied to the previous ownership.

5.1.6 Regulatory and Compliance Risks

Foreign investors must comply with Committee on Foreign Investment in the United States (CFIUS) regulations if the business operates in a sensitive industry.

5.2 Equity vs. Asset Purchases

Foreign investors can acquire a U.S. business through either an equity purchase or an asset purchase, each with distinct advantages and challenges. The allocation of liabilities and obligations largely depends on the terms negotiated in the Acquisition Agreement, making legal due diligence and strong negotiation essential to minimizing risks.

5.2.1 Equity Purchase

Involves acquiring the equity of the business, through a merger, direct purchase of shares, or similar transaction, effectively taking over ownership. Depending on the contractual terms, the investor may or may not inherit liabilities along with the business.

(i) **Advantages:** Provides a streamlined transition, maintains existing contracts and business relationships, and often simplifies the transfer of necessary licenses and regulatory approvals.

(ii) **Disadvantages:** Unless explicitly excluded in the M&A contract, the buyer may assume pre-existing liabilities, lawsuits, and tax obligations, making thorough due diligence essential.

5.2.2 Asset Purchase

Involves acquiring specific business assets such as equipment, intellectual property, or customer lists, without taking over the company entity itself. However, depending on state laws and contract terms, certain liabilities (such as environmental obligations or product liability) may still transfer to the buyer.

(i) **Advantages:** Provides the opportunity to select specific assets while minimizing exposure to past debts and obligations, subject to contract terms.

(ii) **Disadvantages:** May require new business licenses, supplier agreements, and renegotiation of contracts, potentially leading to operational disruptions. Additionally, some liabilities may still transfer depending on the structure of the deal and governing laws.

Since liability allocation depends heavily on contract negotiation, buyers should work closely with legal and financial advisors to structure the transaction in a way that aligns with their risk tolerance and business objectives.

5.3 Franchise and Licensing Agreements

Foreign investors who wish to enter the U.S. market without full ownership of a business can consider franchising or licensing. These options provide a structured approach to leveraging established brands while potentially reducing regulatory burdens. However, restrictions and requirements may vary depending on the industry, the franchisor, and applicable U.S. regulations.

5.3.1 Franchising

A franchise agreement allows an investor to operate a business under an established brand's name, utilizing its business model, trademarks, and operational framework. In return, the franchisee pays initial franchise fees and ongoing royalties to the franchisor.

(i) **Advantages**

a) Lower entry barriers compared to building a brand from scratch.

b) Access to franchisor support, including training, marketing, and operational guidance.

c) Proven business model with brand recognition, reducing market entry risks.

(ii) **Disadvantages**

a) Limited operational control, as franchisees must adhere to franchisor policies and procedures.

b) Ongoing fees, including royalties and advertising fund contributions, which can reduce profit margins.

c) Contractual obligations may restrict decision-making regarding pricing, suppliers, and business operations.

(iii) **Restrictions for Foreign Investors:** While franchising is generally open to foreign investors, some franchisors may impose residency or financial requirements. Additionally, securing a visa (such as an E-2 Investor Visa) may be necessary for those planning to manage the franchise directly.

5.3.2 Licensing Agreements

A licensing agreement grants permission to use a company's intellectual property (IP), such as brand names, proprietary technology, or patents, in exchange for a licensing fee. Unlike franchising, licensing does not involve a standardized business model, giving the licensee more flexibility.

(i) **Advantages**

a) Greater flexibility in adapting the brand or product to local market needs.

b) Fewer regulatory requirements and operational restrictions compared to franchising.

c) No requirement to follow a rigid operational structure set by the licensor.

(ii) **Disadvantages**

a) Typically does not include business training, marketing, or operational support from the licensor.

b) Limited exclusivity, as the licensor may grant rights to multiple licensees within the same market.

c) Dependency on the licensor's brand reputation and continued success.

(iii) **Restrictions for Foreign Investors:** Licensing agreements tend to be more negotiable and flexible, but some licensors may require local partnerships or operational oversight to ensure brand consistency and compliance.

5.4 Regulatory Requirements and Qualified Investors

Foreign investors must comply with U.S. legal and financial requirements when acquiring a business. Some industries impose restrictions on foreign ownership, particularly in sectors like telecommunications, defense, and energy, due to national security concerns. Additionally, certain investment opportunities—such as venture capital and private equity deals—require investors to meet specific financial criteria.

5.4.1 Accredited Investor Status

Under Securities and Exchange Commission (SEC) regulations, investors must qualify as accredited investors to participate in private securities offerings. To meet this status, an investor must have:

(i) A net worth of at least $1 million (excluding their primary residence); or

(ii) An annual income of $200,000 ($300,000 for joint filers) for the past two years, with the expectation of maintaining this level.

5.4.2 State-Specific Regulations

Some states impose additional financial or residency requirements for foreign investors:

(i) **California:** Foreign investors seeking to purchase certain businesses, such as those in professional services (law firms, medical practices), may be required to have a U.S. resident partner or meet additional licensing requirements.

(ii) **Florida:** Imposes restrictions on foreign ownership of agricultural land, requiring disclosures for investments exceeding a certain threshold.

(iii) **Texas:** Limits foreign ownership in critical infrastructure industries, such as energy and telecommunications, requiring state-level approval for certain transactions.

5.4.3 CFIUS Review and National Security Considerations

The Committee on Foreign Investment in the United States (CFIUS) is a U.S. government agency that reviews foreign investments for national security risks. CFIUS examines transactions where a foreign entity acquires substantial control over a U.S. business involved in:

(i) **Critical Technology:** Businesses developing sensitive technologies, including AI, semiconductors, and cybersecurity.

(ii) **Critical Infrastructure:** Companies operating in sectors such as energy, transportation, or telecommunications.

(iii) **Personal Data Collection:** Businesses that handle large-scale personal data, such as financial services, healthcare, and online platforms.

CFIUS has the authority to block or impose conditions on transactions deemed a risk to national security. In some cases, filings with CFIUS are mandatory, especially when foreign investors acquire controlling stakes in defense-related or high-tech businesses. Investors should assess whether their transaction falls under CFIUS jurisdiction and, if necessary, file for a voluntary or mandatory review to avoid legal complications.

section SIX

INTELLECTUAL PROPERTY CONSIDERATIONS

6. INTELLECTUAL PROPERTY CONSIDERATIONS

Protecting intellectual property (IP) is a crucial aspect of doing business in the U.S., especially for foreign companies expanding into the market. The U.S. legal system provides robust protections for patents, trademarks, copyrights, and trade secrets, but businesses must take proactive steps to secure their rights. Failure to properly register IP in the U.S. can lead to legal vulnerabilities, including counterfeiting, trademark squatting, and infringement disputes.

Several government agencies oversee different aspects of IP protection in the U.S.:

(i) The United States Patent and Trademark Office (USPTO) handles the registration of patents and trademarks.

(ii) The U.S. Copyright Office administers copyright registrations, ensuring protection for creative works.

(iii) The International Trade Commission (ITC) enforces IP rights in cases involving the importation of counterfeit goods, regardless of whether the issue concerns patents, trademarks, or copyrights. U.S. courts also play a role in the enforcement of IP rights.

While business owners can file IP applications on their own, it is generally not advisable due to the complexity of the process. Each type of IP protection involves strict legal requirements, deadlines, and potential challenges from third parties. Errors in the application process can lead to rejections, delays, or weak protections, making enforcement difficult in case of infringement. An experienced IP attorney can help ensure:

(iv) Proper classification and filing strategies to maximize protection.

(v) Compliance with U.S. legal standards and international treaties.

(vi) Defense against potential opposition or objections from other rights holders.

Proper IP protection is essential for maintaining competitive advantages, preventing legal disputes, and securing brand reputation. Businesses should consult an IP attorney to ensure compliance with U.S. registration requirements and enforcement mechanisms.

6.1 International IP Protection and U.S. Market Entry

Foreign companies should not assume that international IP protections automatically apply in the U.S. Businesses entering the U.S. market should conduct IP due diligence to identify risks and secure necessary registrations before launching products or services.

For example, the Madrid Protocol, an international treaty administered by the World Intellectual Property Organization (WIPO), allows businesses to file a single trademark application that can be extended to multiple member countries, including the U.S. This simplifies the application process for businesses operating across multiple jurisdictions.

However, while the Madrid Protocol provides a streamlined filing mechanism, it does not guarantee trademark protection under U.S. law. The USPTO still conducts an independent review, and additional U.S. filing is often recommended to ensure compliance with local trademark laws and enforcement mechanisms.

As another example, the Patent Cooperation Treaty (PCT), also administered by WIPO, provides a centralized process for filing international patent applications. It allows inventors to submit a single international patent application, which can then be recognized by over 150 participating countries, including the U.S.

The PCT does not grant an international patent but simplifies the process by deferring the need to file separate applications in multiple jurisdictions. After filing a PCT application, businesses have up to 30 months to pursue patent protection in individual countries.

The PCT system helps companies secure early filing dates while assessing the commercial viability of their inventions before committing to full national phase filings.

6.2 Patent Protection

Patents grant exclusive rights to inventors for new and useful inventions, protecting against unauthorized use or reproduction. The United States Patent and Trademark Office (USPTO) oversees patent registration.

The U.S. follows a first-to-file system, meaning that the first entity to file a patent application will receive protection, regardless of who originally invented it.

Types of patents include:

(i) Utility Patents (protect functional inventions, valid for 20 years from the earliest filing date).

(ii) Design Patents (cover ornamental designs, valid for 15 years).

(iii) Plant Patents (for new plant varieties, valid for 20 years).

The average timeline for patent approval is 1 to 3 years, with attorneys' fees ranging from $5,000 to $15,000, depending on complexity.

6.3 Trademark Registration

A trademark protects brand names, logos, slogans, and other identifiers. Trade dress refers to the total image and visual appearance or features of a product or its packaging that signifies the source of the product and can be protected in the same way as trademarks.

Foreign businesses should register their trademarks in the U.S., even if they hold trademarks in other countries, to prevent local competitors from registering similar marks and blocking their use.

The USPTO handles U.S. trademark registrations, granting exclusive rights for 10 years, with unlimited 10-year renewal periods. The process typically takes 12 to 18 months, and government filing application costs range from $250 to $750 per class of goods/services.

A trademark must be used in U.S. commerce before final registration is granted unless the applicant is filing based on a foreign registration or application. Foreign applicants can file in the U.S. under Section 44(e) based on a prior registration in their country of origin and do not have to show use in the U.S. until the renewal period between the 5th and 6th year of the

U.S. registration. Additionally, if a foreign company has recently filed an application for the mark in their home country, they can file in the U.S. under Section 44(d) and claim priority based on the foreign application filing date. This type of application must be filed within six months of filing the foreign application.

6.4 Copyrights

Copyrights cover original works of authorship, including books, music, films, software, and artistic creations. Unlike patents and trademarks, copyright protection exists automatically upon creation of the work, meaning registration is not required for protection. However, filing with the U.S. Copyright Office strengthens legal claims and is necessary to enforce rights in court.

Protection lasts for the life of the author plus 70 years, or 95 years for works created by corporations. Registration fees start at $45 to $125, with approval timelines averaging 3 to 9 months. Additional costs may apply, depending on the specifics of the registration process or any supplementary services required.

6.5 Trade Secrets and Confidential Information

Trade secrets include proprietary business information, such as formulas, customer lists, manufacturing processes, and business strategies that derive economic value from not being generally known. Unlike patents, trade secrets do not require registration but must be actively protected through confidentiality agreements, internal security measures, and limited access policies.

To qualify as a trade secret under the Defend Trade Secrets Act (DTSA) and state laws, information must meet three key criteria: (i) It must provide economic value from not being publicly known. (ii) The business must take reasonable steps to keep it secret, such as using NDAs (non-disclosure agreements), restricted access, and security protocols. (iii) It must not be readily ascertainable by proper means (e.g., through public records or reverse engineering).

The DTSA allows businesses to enforce trade secret rights in federal courts, providing a uniform legal framework across the U.S.

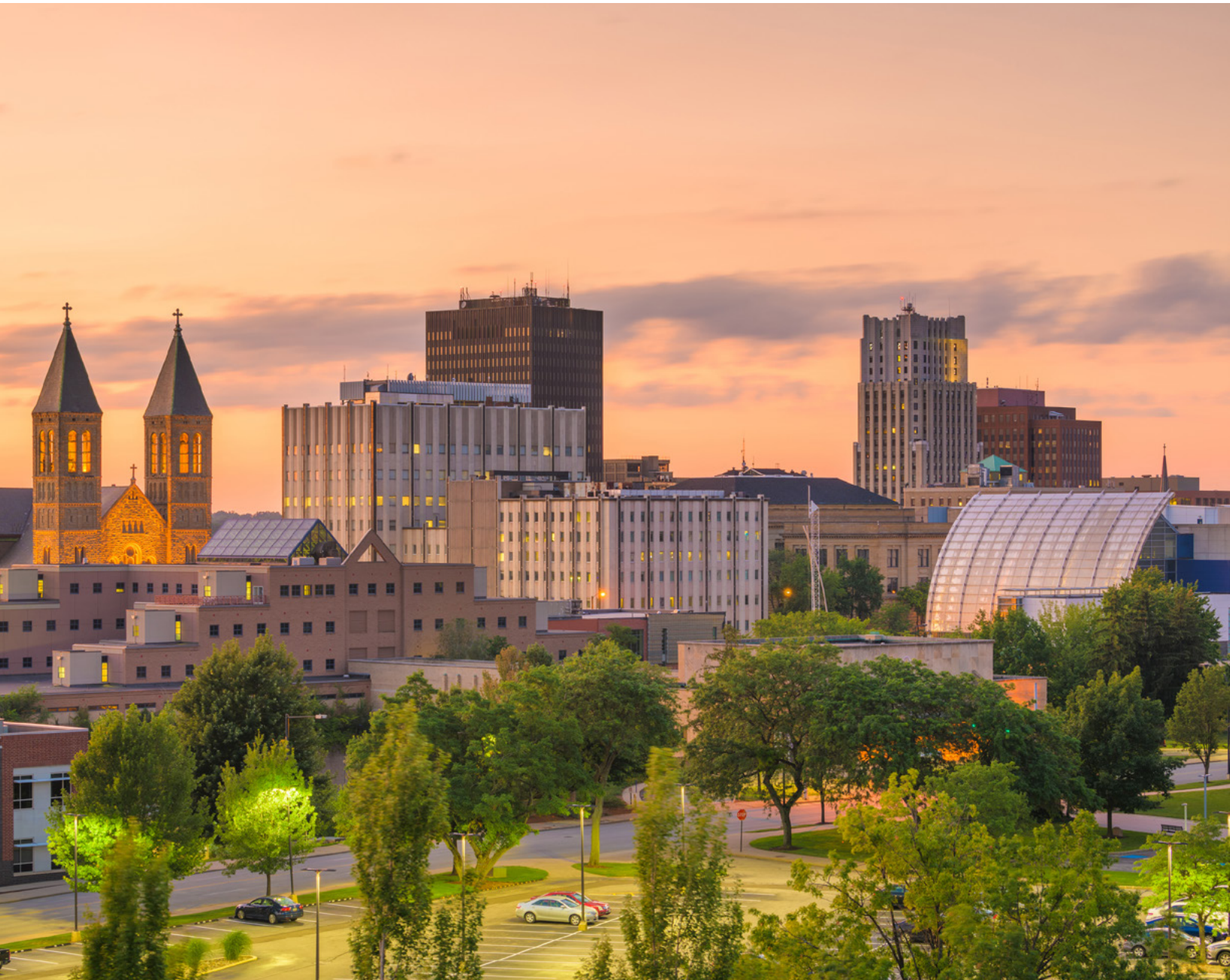
On the other hand, confidential information refers to any non-public business information that a company wishes to keep private but may not necessarily meet the legal definition of a trade secret.

While all trade secrets are considered confidential information, not all confidential information qualifies as a trade secret. Examples of confidential information that may not qualify as trade secrets include employee salary data, internal reports, and supplier agreements.

Businesses should distinguish between the two and implement proper contractual and security measures to prevent unauthorized disclosure.

section SEVEN

LABOR LAW CONSIDERATIONS



7. LABOR LAW CONSIDERATIONS

Understanding U.S. labor laws is essential for foreign investors and international business owners looking to hire employees, comply with workplace regulations, and mitigate legal risks. While federal labor laws provide a baseline, many employment regulations vary by state and local jurisdiction, and international employers may face additional compliance challenges related to work authorization, tax obligations, and regulatory filings. Below are key labor law considerations and where to find applicable regulations.

7.1 Wage and Hour Laws

In addition to federal laws, employers should check state-specific wage laws through the U.S. Department of Labor (DOL) Wage and Hour Division or the labor department of the relevant state.

(i) The Fair Labor Standards Act (FLSA) establishes federal requirements for minimum wage, overtime pay, and child labor protections.

(ii) The current federal minimum wage is $7.25 per hour, but many states and cities have higher minimum wage rates.

(iii) Overtime pay is generally required at 1.5 times the regular hourly rate for non-exempt employees who work more than 40 hours per week.

7.2 Worker Protections and Anti-Discrimination Laws

International employers should be particularly mindful of cultural differences and local hiring practices to ensure compliance with U.S. equal employment laws.

(i) The Equal Employment Opportunity Commission (EEOC) enforces federal laws prohibiting discrimination based on race, gender, religion, national origin, disability, age, or genetic information.

(ii) The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations for employees with disabilities.

(iii) The Occupational Safety and Health Administration (OSHA) sets and enforces workplace health and safety standards.

(iv) Many states offer additional worker protections beyond federal requirements, such as broader anti-discrimination laws or paid sick leave policies.

7.3 Health Insurance and Employee Benefits

(i) Under the Affordable Care Act (ACA), businesses with 50 or more full-time employees must provide affordable health insurance that meets minimum essential coverage requirements. Smaller businesses are not required to offer health insurance but may qualify for tax incentives if they do. Foreign employers unfamiliar with U.S. healthcare regulations should consult an HR or legal professional to ensure compliance with health insurance mandates.

(ii) Employers must comply with federal retirement benefits regulations, such as Social Security and Medicare contributions, and may also offer 401(k) retirement plans.

7.4 Employment Contracts and At-Will Employment

(i) Generally, the U.S. follows an at-will employment doctrine, meaning that employers can terminate employees without cause, except in cases of discrimination or retaliation.

(ii) Some states (e.g., Montana) and industries (e.g., healthcare, entertainment, finance, and technology) require written employment contracts outlining job responsibilities, compensation, and termination conditions.

(iii) Non-compete, non-solicitation, and confidentiality agreements may be enforceable in some states but restricted in others (e.g., California bans most non-compete agreements).

(iv) Foreign employers accustomed to stricter employment protections in their home countries should adjust their contract policies accordingly.

7.5 Worker Classification: Employees vs. Independent Contractors

Misclassifying workers can result in legal and tax penalties. Employers must distinguish between employees and independent contractors based on the degree of control over work performed.

7.5.1 Employees

Typically work under the employer's direct supervision, follow set schedules, and use company resources. Employers withhold payroll taxes, provide benefits (where applicable), and comply with wage and hour laws.

7.5.2 Independent Contractors

Operate with more autonomy, often set their own schedules, and use their own equipment. They are responsible for their own taxes and do not receive employer-provided benefits.

(i) The IRS and DOL provide guidelines for classification, and some states have stricter tests (e.g., California's ABC test for independent contractors).

(ii) Foreign businesses hiring U.S.-based remote workers should carefully classify them to avoid unexpected tax liabilities.

section EIGHT

LEGAL SYSTEM AND LITIGATION CONSIDERATIONS IN THE U.S.

8. LEGAL SYSTEM AND LITIGATION CONSIDERATIONS

Understanding the U.S. legal system is crucial for foreign investors and international businesses operating in the country. The U.S. has a common law system, meaning that judicial decisions set precedents that influence future rulings. The legal framework is divided into federal and state jurisdictions, each with its own courts, rules, and procedures. This structure affects how businesses can be sued, where disputes are resolved, and the potential costs involved in litigation or alternative dispute resolution.

Foreign investors and international businesses must carefully structure their U.S. operations to minimize legal risks and control dispute resolution costs. By leveraging contractual protections, alternative dispute resolution methods, and proper legal counsel, businesses can better navigate the complexities of the U.S. legal system, as further explained below.

8.1 Can Foreign Businesses Be Sued in the U.S.?

Yes, foreign entities can be sued in the U.S. if they have sufficient business ties (minimum contacts) with a state or if they enter into contracts governed by U.S. law. Courts will analyze whether it is reasonable and fair to bring a foreign company into litigation under the Due Process Clause of the U.S. Constitution.

A company with offices, employees, sales, or contracts in the U.S. may be subject to jurisdiction in multiple states, and also on the federal level.

8.2 U.S. Court System: Federal vs. State Jurisdiction

The U.S. has a dual court system, meaning that cases can be heard in either federal or state courts, depending on the nature of the dispute. Understanding which court has jurisdiction is critical for businesses operating in the U.S., as different courts apply different procedural rules, timelines, and costs.

Cases can be initiated in state or federal court depending on the subject matter of the claim, the amount in controversy, and the parties involved.

(i) The federal court system has jurisdiction over cases involving federal law, constitutional issues, disputes between states, and lawsuits involving foreign entities where jurisdiction applies. The federal court system also has jurisdiction over parties from different states where the amount in controversy exceeds $75,000; this is often referred to as diversity jurisdiction.

(ii) State courts handle most business disputes, contract claims, employment matters, and civil litigation unless diversity jurisdiction or a federal issue exists.

Unlike some jurisdictions that have specialized commercial courts, most U.S. business disputes are handled in general state or federal courts, except in a few states like Delaware, which has a specialized Court of Chancery focused exclusively on business and corporate law.

8.2.1 Delaware Court of Chancery: A Key Advantage for Businesses

Delaware is widely recognized as the most business-friendly jurisdiction in the U.S., with more than 60% of Fortune 500 companies and a vast majority of publicly traded companies choosing to incorporate there. This is largely due to its well-developed business statutes, specialized courts, and extensive case law, which provide predictability and efficiency in resolving corporate disputes.

(i) The Delaware Court of Chancery is a non-jury trial court that exclusively hears business disputes, shareholder litigation, and corporate governance matters.

(ii) Judges (chancellors) in this court are experienced corporate law specialists, leading to faster resolutions and more predictable rulings compared to general state courts.

(iii) Delaware's business laws, including the Delaware General Corporation Law (DGCL), are considered flexible and pro-business, offering companies significant protections and legal clarity.

Choosing Delaware as the state of incorporation can be particularly beneficial for foreign investors and multinational corporations seeking a stable and sophisticated legal environment for dispute resolution.

8.2.2 Labor and Employment Disputes: Federal and State Considerations

Labor and employment disputes are typically handled by federal courts or administrative agencies such as the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC) at the federal level.

Some states, like California and New York, have specialized labor courts or tribunals to address employment matters more efficiently, ensuring that employee rights are upheld under state labor laws.

8.3 Choice of Forum and Governing Law in Contracts

When drafting contracts with U.S. parties, it is essential to include choice of forum and governing law clauses. These provisions determine which state's laws apply in the event of a dispute and where any legal proceedings will take place. Including these clauses can significantly impact litigation outcomes, costs, and procedural efficiency.

If a contract does not specify governing law or forum selection, the parties may face uncertainty as courts will determine which state's laws should apply, potentially leading to unfavorable or unpredictable legal interpretations. As a result, litigation may be initiated in a jurisdiction that is inconvenient or costly for one party, increasing legal expenses and procedural complexities.

Additionally, the dispute resolution process could become prolonged, as courts may need to conduct additional analysis to determine the applicable laws before addressing substantive legal issues.

Regarding choice of law clauses, Delaware and New York are commonly chosen due to their well-developed business laws, which provide clear guidance and protections for commercial transactions. Companies also frequently choose the applicable law of the state where their business operations are located.

On another note, forum selection clauses dictate where disputes will be litigated. Selecting a favorable forum—one with predictable legal precedents, experienced judges, business-friendly statutes, and/or one in a convenient location for the parties involved, with procedural advantages such as limited discovery requirements or streamlined litigation timelines—can impact case outcomes, costs, and procedural rules, helping parties avoid litigation in unpredictable or unfavorable jurisdictions.

U.S. courts generally uphold choice of forum and governing law clauses unless they are found to be unfair, unreasonable, or contrary to public policy.

8.4 Litigation Costs and Timelines

Litigation in the U.S. can be time-consuming and costly, making it a significant consideration for businesses engaged in commercial disputes. Unlike in some other jurisdictions, U.S. courts do not follow a "loser pays" model, meaning that each party is typically responsible for its own legal costs unless specified otherwise by contract or statute.

Business disputes can take months to several years to resolve, particularly if appeals are involved. Discovery procedures, including document production and depositions, can be lengthy and expensive, often requiring substantial financial and human resources.

Given the high costs and uncertainty of litigation, businesses may benefit from including alternative dispute resolution (ADR) clauses in contracts, such as arbitration or mediation, to control expenses and expedite dispute resolution. These options are explored in the following section.

8.5 Alternative Dispute Resolution (ADR): Arbitration and Mediation

For international businesses, resolving disputes through litigation can be costly, time-consuming, and uncertain. Alternative dispute resolution (ADR) methods, such as arbitration and mediation, provide a way to settle disputes more efficiently. The choice between arbitration and mediation depends on factors such as enforceability, costs, and the nature of the dispute.

The key difference between arbitration and mediation is that arbitration results in a binding decision, while mediation is a non-binding negotiation process. Businesses should carefully review contract provisions to ensure that their dispute resolution mechanisms align with their strategic interests and jurisdictional requirements.

8.5.1 Arbitration

(i) A private process where a neutral arbitrator hears evidence and makes a binding decision.

(ii) Often faster and less expensive than litigation, but still costly (average costs range from $50,000 to several hundred thousand dollars for complex cases).

(iii) The Federal Arbitration Act (FAA) enforces arbitration agreements in commercial contracts.

(iv) Institutions such as the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) are options to administer arbitration proceedings.

8.5.2 Mediation

(i) A non-binding negotiation process facilitated by a neutral third party.

(ii) Less formal and significantly cheaper than litigation or arbitration.

(iii) Typically costs between $3,000 and $10,000 for a one-day session.

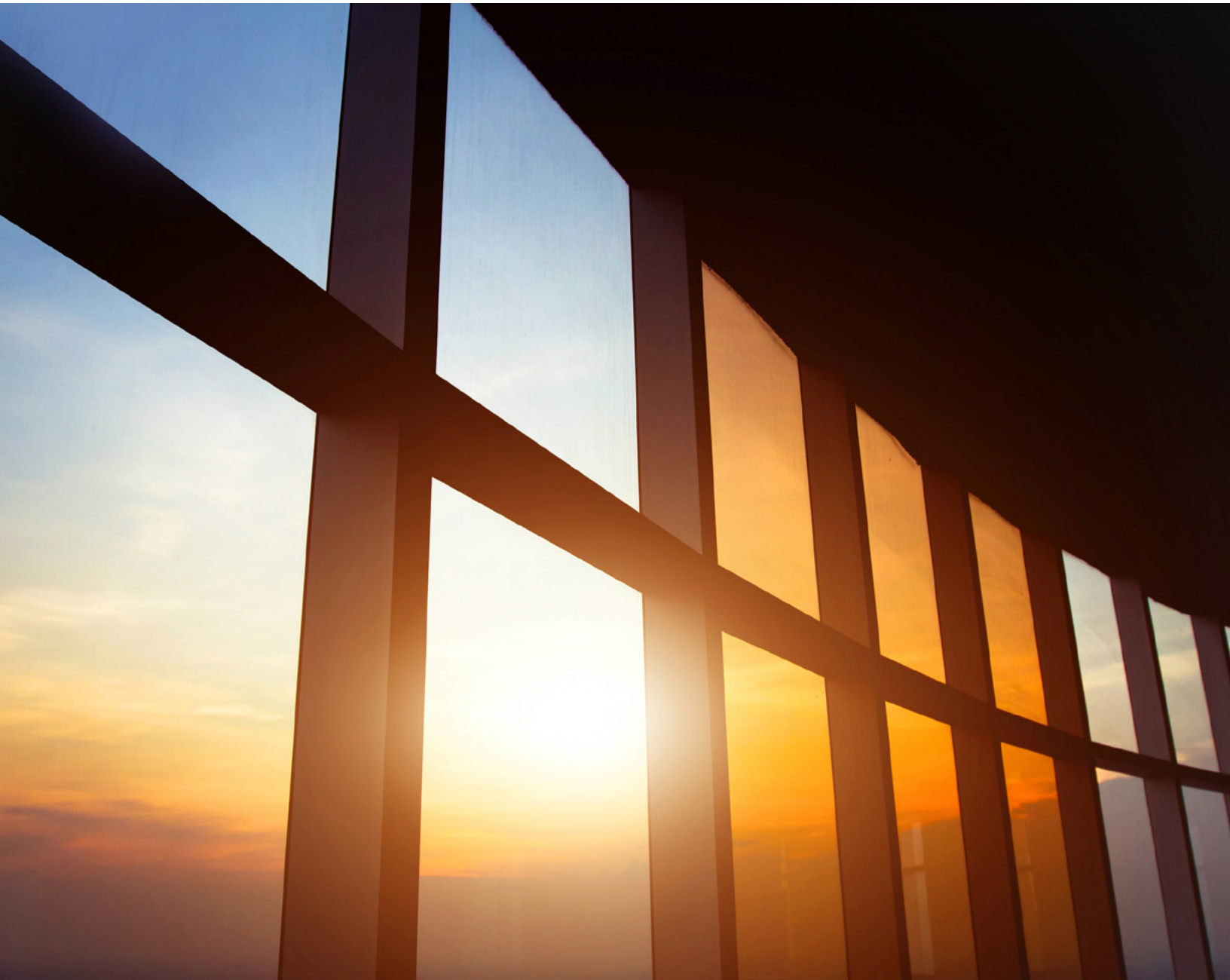
(iv) Often used in business disputes, employment conflicts, and contract negotiations.

(v) May not result in final resolution of dispute if the parties cannot reach an agreement.

Businesses should proactively include well-drafted ADR clauses in their contracts to ensure that disputes can be resolved efficiently and in a jurisdiction that best serves their interests. A careful balance between arbitration and mediation provisions can help minimize legal expenses while maintaining enforceability and flexibility.

section NINE

FOREIGN INVESTMENT RESTRICTIONS AND COMPLIANCE



9. FOREIGN INVESTMENT RESTRICTIONS AND COMPLIANCE

Foreign investors looking to establish or expand businesses in the U.S. must navigate a range of regulatory requirements designed to protect national security and economic interests. While the U.S. is generally open to foreign investment, certain restrictions and compliance obligations apply, particularly in sensitive industries. Below are key considerations for foreign investors.

9.1 Real Estate Ownership Restrictions

Foreign individuals and entities can purchase real estate in the U.S., including commercial and residential properties. However, restrictions apply to specific asset types:

9.1.1 Agricultural Land

The Agricultural Foreign Investment Disclosure Act (AFIDA) requires foreign investors to report purchases of farmland to the U.S. Department of Agriculture.

9.1.2 Critical Infrastructure

Investments in properties near military bases, airports, and energy facilities may face heightened scrutiny due to national security concerns. Some states impose additional restrictions on foreign ownership of land deemed strategically important.

9.2 OFAC and Sanctions Compliance

The Office of Foreign Assets Control (OFAC) enforces U.S. sanctions and trade restrictions, limiting business activities with individuals, companies, and countries on sanctioned lists. Foreign investors must conduct due diligence to ensure they are not engaging with restricted parties, as violations can result in severe fines, asset freezes, and legal action. The Specially Designated Nationals (SDN) List, maintained by OFAC, provides a database of entities barred from U.S. business transactions.

9.3 Committee on Foreign Investment in the U.S. (CFIUS) Review

The Committee on Foreign Investment in the United States (CFIUS) reviews foreign investments in businesses operating in sensitive sectors, such as:

9.3.1 Defense and Aerospace

Investments in companies involved in military or intelligence-related technologies.

Telecommunications and Technology

Deals involving critical communications infrastructure or advanced technologies.

9.3.2 Energy and Critical Resources

Transactions affecting the supply of energy resources, such as nuclear power or rare earth minerals.

Foreign investors acquiring substantial control or ownership in these industries may be required to submit a voluntary or mandatory filing to CFIUS for review. If a transaction is deemed a national security risk, the U.S. government can block or require modifications to the deal.

9.4 Nationality and Residency Requirements for Business Owners

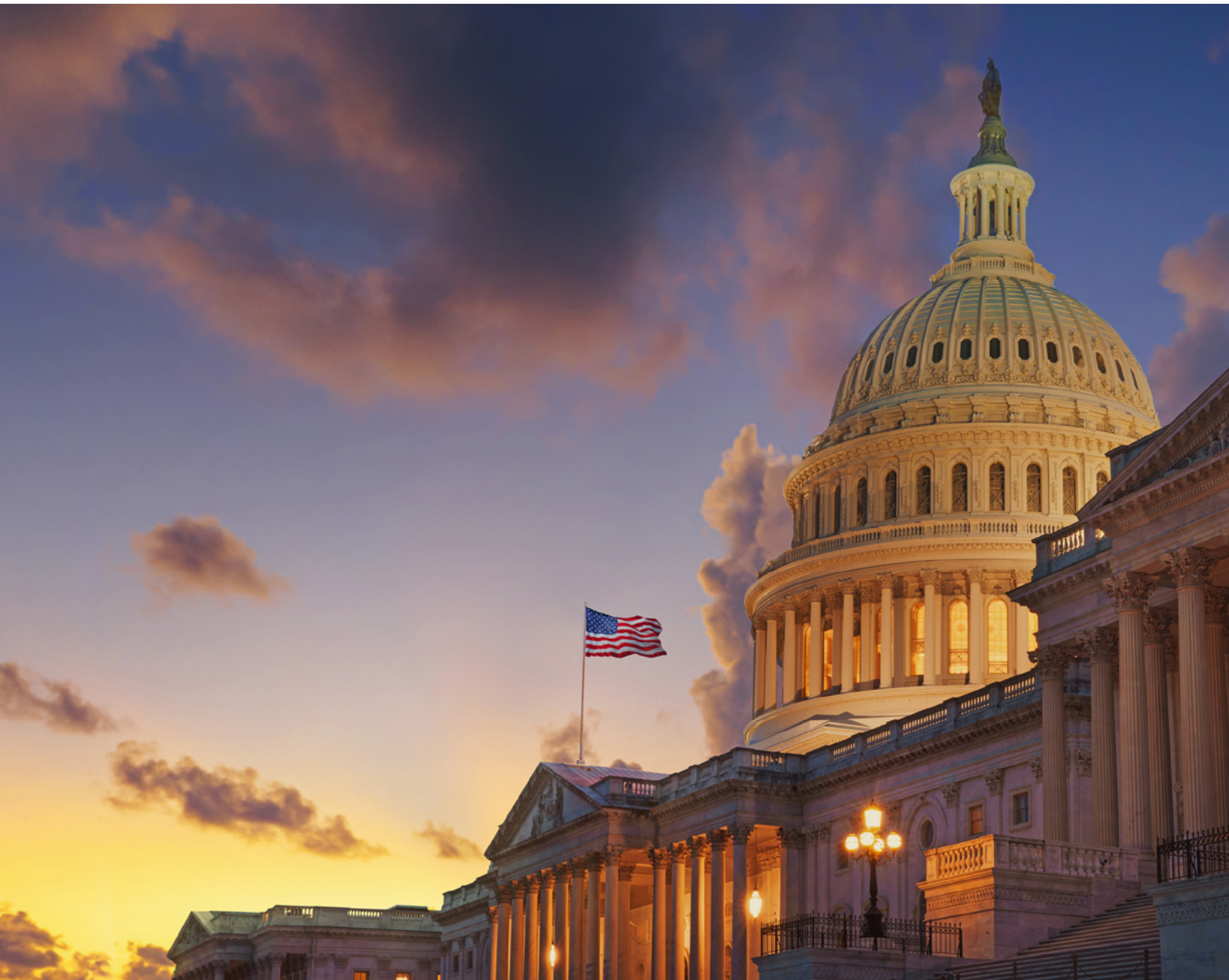
Unlike some countries, most U.S. states do not impose nationality or residency requirements on business owners, directors, or shareholders. Foreign nationals can own and operate U.S. businesses without needing to reside in the country. However, certain industries—such as banking, defense contracting, and media—may impose ownership restrictions based on citizenship.

9.5 Public Disclosure and Reporting Obligations

Private companies in the U.S. have minimal public disclosure requirements, but they may still need to file reports listing directors, officers, and beneficial owners. Many states require corporations and LLCs to submit annual or biennial reports, which become part of the public record. Additionally, under the Corporate Transparency Act (CTA), certain entities must disclose their ultimate beneficial owners to the Financial Crimes Enforcement Network (FinCEN) to enhance transparency and combat illicit financial activities.

section TEN

IMMIGRATION OPTIONS FOR INVESTORS, EMPLOYERS, AND EMPLOYEES



10. IMMIGRATION OPTIONS FOR INVESTORS, EMPLOYERS, AND EMPLOYEES

For foreign investors looking to expand into the U.S., securing the appropriate visa for themselves and their employees is a critical factor in ensuring business success, legal compliance, and long-term stability. Whether an individual is investing in a business, launching a new venture, or hiring foreign workers, understanding U.S. immigration requirements is essential to structuring a viable operation.

Beyond choosing the right business entity, foreign business owners must also navigate immigration laws and work authorization requirements, which impact their ability to actively manage their company or employ international talent. These requirements include:

(i) Ensuring proper visa sponsorship procedures for employees.

(ii) Complying with wage and labor laws when hiring foreign workers.

(iii) Maintaining the corporate structure and operational requirements for investor and self-employment visas.

Choosing the most suitable visa strategy depends on business objectives, investment levels, and long-term residency plans. Some visas allow for temporary business activity, while others lead to permanent residency for the investor and their family. Additionally, visa requirements vary based on factors such as the investor's nationality, the industry of operation, and whether the company will employ U.S. workers.

Shumaker's dedicated immigration team specializes in guiding foreign investors, business owners, and employers through the complexities of U.S. visa applications. From assessing eligibility and structuring visa petitions to ensuring full compliance with immigration regulations, our team provides comprehensive support at every stage of the process.

Below, we outline some of the most common visa options available for investors, business owners, and employees. However, the best immigration strategy is highly case-specific, requiring careful planning and legal guidance to align with the investor's business structure and long-term goals.

10.1 Investor Visas

Foreign investors seeking to start or acquire a U.S. business may qualify for specific visa categories that allow them to live and operate in the U.S. while managing their investments. Below are some of the most common options:

10.1.1 E-2 Treaty Investor Visa

(i) Available to nationals of countries that have a treaty of commerce with the U.S. Examples of countries that have an E-2 treaty with the U.S. in 2025 include Germany, Canada, Mexico, Switzerland, and the United Kingdom.

(ii) Requires a substantial investment in a U.S. business, though no minimum amount is specified (generally $100,000+ is advisable).

(iii) The investor must actively develop and direct the business.

(iv) Granted for up to two years, with indefinite renewals as long as the business remains operational.

(v) Spouses and dependents can accompany the investor, and spouses may apply for work authorization.

10.1.2 EB-5 Immigrant Investor Visa (Green Card)

(i) Requires a minimum investment of $1.05 million (or $800,000 in a Targeted Employment Area).

(ii) Must create or preserve at least 10 full-time jobs for U.S. workers.

(iii) Leads to a permanent residency (green card) for the investor, spouse, and children under 21.

(iv) The investor is not required to manage daily business operations but must be involved in policy formation.

10.2 Employment-Based Visas for Business Owners and Self-Employed Individuals

Entrepreneurs and professionals looking to work for their own business in the U.S. may consider these visa options:

10.2.1 L-1 Intracompany Transferee Visa

(i) Allows a foreign company to transfer an executive, manager, or specialized knowledge employee to a U.S. subsidiary or affiliate.

(ii) The foreign company must be actively operating, and the individual must have worked there for at least one year in the past three years.

(iii) Initially granted for one year for new businesses (or up to three years for existing operations), extendable to a maximum of seven years (L-1A) or five years (L-1B).

(iv) Ideal for entrepreneurs looking to open a U.S. branch of an established foreign company.

10.2.2 O-1 Visa for Extraordinary Ability

(i) Available to individuals with extraordinary ability in business, science, arts, or athletics.

(ii) Requires proof of sustained national or international acclaim.

(iii) Self-employed individuals may qualify if they set up a U.S. entity to sponsor their visa.

10.2.3 H-1B Visa for Specialty Occupations

(i) Allows U.S. businesses to hire foreign professionals in specialized fields such as finance, engineering, IT, and medicine.

(ii) Requires a bachelor's degree or equivalent experience.

(iii) Subject to an annual cap (except for cap-exempt employers like universities and research institutions).

(iv) Self-sponsorship is difficult but possible through a U.S. entity structured to control employment terms.

10.3 Employment-Based Visas for Companies Hiring Foreign Workers

U.S. businesses expanding operations may need to sponsor foreign employees to work legally in the U.S. The most common employment-based visas include:

10.3.1 H-1B Visa (as Employer-Sponsored)

Requires employer sponsorship and approval from the U.S. Citizenship and Immigration Services (USCIS). The company must submit a Labor Condition Application (LCA) to the Department of Labor (DOL) to confirm that hiring the foreign worker does not negatively impact U.S. wages and conditions.

10.3.2 TN Visa (for Canadian and Mexican Professionals)

(i) Available under the United States-Mexico-Canada Agreement (USMCA, formerly NAFTA).

(ii) Allows professionals in specified fields (e.g., accountants, engineers, scientists) to work in the U.S. for a sponsoring employer.

(iii) Easier and faster processing than H-1B, with no annual cap.

10.3.3 PERM Labor Certification and Employment-Based Green Cards (EB-2 and EB-3 Visas)

(i) EB-2: For professionals with advanced degrees or exceptional ability in business, sciences, or arts.

(ii) EB-3: For skilled workers, professionals, and other workers with at least two years of training or experience.

(iii) Requires the PERM labor certification process, demonstrating that no qualified U.S. workers are available for the role.

10.4 Immigration and Work Authorization

Employers must verify work eligibility by completing Form I-9 for all employees. International companies setting up a U.S. presence should ensure compliance with work authorization rules to avoid penalties and potential visa issues.

(i) Hiring foreign workers requires proper visa sponsorship, such as H-1B, L-1, or TN visas (discussed in the *Immigration Options* chapter).

(ii) The E-Verify system is a federal tool that some states require for employment eligibility verification.

10.5 Termination, Severance, and Unemployment Insurance

Foreign companies new to U.S. labor laws should familiarize themselves with termination procedures to prevent wrongful termination claims and ensure smooth workforce transitions.

(i) Severance pay refers to compensation provided to employees upon termination, often based on length of service or company policy. While severance pay is not mandatory under federal law, employers must comply with state requirements and employment contracts that specify severance obligations.

(ii) Employers must provide terminated employees with information about continuing health coverage (COBRA) and unemployment benefits.

(iii) State unemployment insurance (UI) laws govern employer contributions and benefits for displaced workers.

(iv) Wrongful termination claims occur when an employee alleges, they were fired in violation of anti-discrimination laws, employment contracts, or public policy. To mitigate risks, employers should:

(a) Maintain clear documentation of performance issues and termination reasons.

(b) Ensure compliance with state and federal termination laws.

(c) Provide proper notice and severance (if applicable).

(d) Avoid terminating employees in a manner that could be perceived as discriminatory or retaliatory.

10.6 Key Resources for Employers

To ensure compliance with U.S. labor laws, international employers should refer to the following agencies and resources:

10.6.1 U.S. Department of Labor (DOL)

www.dol.gov

10.6.2 Equal Employment Opportunity Commission (EEOC)

www.eeoc.gov

10.6.3 Occupational Safety and Health Administration (OSHA)

www.osha.gov

10.6.4 State Labor Departments

Each state has its own labor agency with additional regulations.

Navigating U.S. labor laws requires a thorough understanding of both federal and state regulations. Foreign business owners and international employers should pay special attention to work authorization, wage laws, and state-specific employment protections. Consulting legal professionals and staying updated on local employment laws will help business owners operate smoothly while minimizing legal risks.

section ELEVEN

CLOSING A BUSINESS AND EXIT STRATEGIES

11. CLOSING A BUSINESS AND EXIT STRATEGIES

Closing a business in the U.S. involves several legal, financial, and tax considerations. Whether a business is shutting down due to financial reasons, strategic realignment, or acquisition, following the proper exit procedures ensures compliance with state and federal regulations while mitigating potential liabilities. Below are key aspects of the business dissolution and exit process.

11.1 Dissolution Process

The formal dissolution of a business requires filing termination documents with the Secretary of State in the entity's state of organization. This typically includes Articles of Dissolution (for corporations) or a Certificate of Cancellation (for LLCs). Some states may require businesses to obtain tax clearance before allowing dissolution. Partnerships must follow their Partnership Agreement for proper termination procedures, including notifying partners and creditors.

11.2 Asset Liquidation and Tax Filings

Before closing, businesses must liquidate assets and settle outstanding liabilities. This includes selling company property, collecting accounts receivable, and repaying creditors. Any remaining funds are distributed to owners or shareholders according to the entity's governing documents. Businesses must also file final federal and state tax returns (Form 1120 for corporations, Form 1065 for partnerships, and final payroll tax reports). Employers must ensure that all employee wages, benefits, and unemployment obligations are paid before dissolution. Additionally, businesses with 100 or more employees may be subject to the Worker Adjustment and Retraining Notification (WARN) Act, which requires advance notice of mass layoffs or plant closings.

11.3 Repatriation of Funds and Regulatory Considerations

If the business has foreign owners, the repatriation of remaining capital must comply with U.S. tax laws and international regulations. Repatriation may be subject to withholding taxes, foreign exchange controls, and reporting requirements under the IRS and the U.S. Treasury Department. Additionally, businesses involved in regulated industries (such as finance, healthcare, or defense) may need to seek regulatory approval before closing operations.

Proper planning and legal guidance are essential for a smooth business exit. Ensuring compliance with dissolution procedures, tax obligations, and financial settlements can help business owners minimize risks and successfully close operations.

section TWELVE

RESTRUCTURING AND BANKRUPTCY CONSIDERATIONS

12. RESTRUCTURING AND BANKRUPTCY CONSIDERATIONS

Understanding the U.S. bankruptcy and restructuring framework is essential for foreign investors operating in the U.S. market. Bankruptcy law in the U.S. is governed at the federal level under the U.S. Bankruptcy Code (Title 11 of the U.S. Code), ensuring uniformity across all states. The U.S. has one of the most investor-friendly bankruptcy systems, offering structured ways for businesses to reorganize, liquidate, or restructure debt obligations while continuing operations or winding down in an orderly manner. Foreign investors must understand how U.S. laws apply to their assets, liabilities, and cross-border operations.

The U.S. Bankruptcy Code provides several types of bankruptcy filings, each designed for specific circumstances:

12.1 Chapter 7 (Liquidation)

Used primarily by individuals and businesses seeking to liquidate assets and discharge debts when restructuring is not viable.

12.2 Chapter 11 (Reorganization)

Allows businesses to restructure debts and continue operating under court supervision while negotiating repayment plans with creditors.

12.3 Chapter 13 (Wage Earner's Plan)

Designed for individuals with regular income to reorganize debts into manageable repayment plans.

12.4 Chapter 15 (Cross-Border Insolvency)

Facilitates cooperation between U.S. and foreign courts in cases involving international insolvency proceedings.

By leveraging U.S. bankruptcy laws effectively, foreign investors can protect their business interests, restructure obligations, and potentially benefit from stronger debtor protections than in their home jurisdictions. Seeking legal guidance on cross-border insolvency strategies ensures compliance with both U.S. and international regulations.

12.5 Can Foreign Investors File for Bankruptcy or Restructuring in the U.S.?

Yes, foreign investors and companies can file for bankruptcy or restructuring in the U.S. if they have assets, operations, or financial obligations within the country.

(i) There is no strict residency or citizenship requirement to file for bankruptcy in the U.S.; however, the debtor must have a domicile, place of business, or assets in the country.

The most common restructuring mechanism is Chapter 11 bankruptcy, which allows businesses to continue operations while restructuring debt under court supervision.

(ii) Foreign investors can also file for Chapter 7 bankruptcy for full liquidation if they decide to exit the market entirely.

12.6 Advantages of Filing for Bankruptcy in the U.S.

(i) Debtor-Friendly System: U.S. bankruptcy law offers significant protections to businesses seeking restructuring, including automatic stays, which immediately halt creditor collection actions upon filing.

(ii) Chapter 11 Flexibility: Businesses can restructure their debt while maintaining operations, negotiating with creditors, and securing new financing. U.S. Bankruptcy Courts frequently expedite restructurings by approving pre-packaged, pre-arranged or other expedited procedures.

(iii) Cross-Border Creditor Protections: The U.S. system provides transparency and strong legal protections that may not exist in other jurisdictions.

(iv) Asset Protection Strategies: Investors can use U.S. bankruptcy courts to protect and restructure international business holdings under certain conditions.

(v) Free and Clear Asset Sales: Businesses can sell substantially all of their assets free and clear of liens, including on an expedited basis.

12.7 Does a U.S. Bankruptcy Filing Have Effects in Other Countries?

A bankruptcy filing in the U.S. does not automatically extend to other countries, but debtors can seek recognition under international treaties and agreements.

(i) The UNCITRAL Model Law on Cross-Border Insolvency, adopted by the U.S. through Chapter 15 of the Bankruptcy Code, allows foreign bankruptcy proceedings to be recognized in the U.S. and vice versa.

(ii) Many countries have reciprocal agreements or similar frameworks that facilitate cross-border enforcement of bankruptcy rulings, including the United Kingdom, Canada, Australia, Germany, and Singapore.

12.8 Can Foreign Assets Be Included in a U.S. Bankruptcy Filing?

U.S. bankruptcy courts have broad jurisdiction and can include foreign assets in a bankruptcy case if they are owned by the debtor. However, the effectiveness of this inclusion depends on cooperation from foreign jurisdictions, as U.S. court rulings do not automatically apply abroad.

Creditors may attempt to enforce U.S. bankruptcy rulings internationally, but this requires recognition by foreign courts, which varies by country.

12.9 What If a Foreign Investor Files for Bankruptcy in Another Country? Will the U.S. Recognize It?

The U.S. may recognize foreign bankruptcy proceedings through Chapter 15 of the Bankruptcy Code, which governs cross-border insolvencies. Chapter 15 allows a foreign representative to petition a U.S. court to recognize and assist in the enforcement of a foreign bankruptcy.

Recognition under Chapter 15 does not automatically apply but is granted if the foreign proceedings meet criteria for fairness, transparency, and creditor protection. If granted, Chapter 15 can help prevent creditor actions against U.S.-based assets and facilitate cooperation between jurisdictions.

section THIRTEEN

CONCLUSION

13. CONCLUSION

Entering and operating in the U.S. market requires a strategic approach that balances regulatory compliance, operational efficiency, and risk management. While the U.S. legal and business framework offers significant advantages, including strong investor protections and a well-developed financial system, navigating its complexities requires careful planning and professional guidance.

By understanding corporate structures, tax obligations, labor laws, and dispute resolution mechanisms, foreign businesses can mitigate risks and maximize opportunities. Additionally, securing the appropriate visa for investors, business owners, and employees is a critical component of a successful expansion strategy.

The Shumaker, Loop and Kendrick, LLP team is equipped to assist with every stage of establishing and running a business in the U.S., from entity formation and compliance to dispute resolution and restructuring. Whether you are considering market entry, investment, or operational expansion, we are here to provide tailored legal solutions to support your business goals.

With thorough preparation and the right professional support, foreign businesses can confidently navigate the U.S. business landscape and position themselves for long-term success.

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For more than a century, Shumaker has delivered more than just legal counsel—we've been a strategic partner in both law and public policy . Our refreshed brand and website now reflect that evolution, showcasing a team of 300+ attorneys and advisors across 13 locations . From navigating complex legal challenges to advancing government relations and building coalitions, we offer steady support and forward-thinking guidance to help you thrive in a rapidly changing world . Wherever you're headed, we're here to help you move forward with confidence .

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