BIERCE & KENERSON P.C.

Doing Business in the U.S.: Startups, Subsidiaries and Growth Ventures

Table of contents

1. **EXECUTIVE SUMMARY** 5

2. **CORE PLANNING ISSUES** 6

2.1 ROLE OF U.S. OPERATIONS IN GLOBALIZATION STRATEGY 6
2.1.1 Integration into Global Enterprise, with Global Supply and Value Chains 6
2.1.2 Marketing and Sales 6
2.1.3 Product Research and Development 6
2.1.4 Manufacturing 6
2.1.5 Business Services 7
2.1.6 Investment in Securities 7
2.1.7 Investment in Real Estate 7
2.1.8 Back-Office Operations 7
2.1.9 Force Majeure and Supply Chain Management: BCP and DR 7
2.2 FORMS OF BUSINESS ENTITIES 8
2.2.1 Choice of Law 8
2.2.2 Corporations 8
2.2.3 Limited Liability Companies 8
2.2.4 Benefit Corporations and Flexible Purpose Corporations 8
2.2.5 Corporate Social Responsibility in Lieu of "Benefit Corporations" 9
2.2.6 Other Forms 9
2.3 CORPORATE FINANCE 9
2.3.1 Founders and Self-Generated Capital 9
2.3.2 Private Investors: Angels, Venture Capital and Private Equity 9
2.3.3 Avoiding Parent Company Guarantees 10
2.3.4 Securities Law Compliance for Private Offerings of Securities 10
2.4 TAX EFFICIENCY 13
2.4.1 Tax-Free Acquisitions 13
2.4.2 Income Tax from Operations 14
2.4.3 Income Tax on Sale 14
2.4.4 Value Added Tax 15
2.5 EXIT STRATEGY 15
2.5.1 Planning for an Exit 15
2.5.2 Sale to a Strategic Acquirer 15
2.5.3 Sale to a Financial Investor 15
2.5.4 Sale to Employees 15
2.5.5 Initial Public Offering 15
2.5.1 Inversions (Merger into Foreign Company) 16

3. **CORE OPERATIONAL ISSUES** 16

3.1 BUSINESS MODELS 16
3.1.1 Online Business 16
3.1.2 Franchising vs. Licensing 16
3.1.3 Strategic Alliances 17
3.2 SELECTION OF FORM OF JURIDICAL ENTITY 17
3.2.1 Corporations 17
3.2.2 Limited Liability Company 17
3.2.3 Special-Regime Entities 17
3.3 CORPORATE GOVERNANCE 17
3.3.1 Corporate Charter 17

3.3.2 Shareholder Agreements *18*
3.3.3 Joint Ventures *18*
3.3.4 Common Planning Issues in New Venture Formation *18*
3.3.5 Common Mistakes in Governance *18*
3.3.6 Shareholder Disputes and Corporate Divorce *19*
3.4 TAX PLANNING 19
3.4.1 Partnership Tax Treatment *19*
3.4.2 Corporate Tax Treatment *19*
3.4.3 Choice of Jurisdiction for IP Holdings *20*
3.4.4 Choice of Jurisdiction of Operational Entity *20*
3.5 EMPLOYMENT AND HUMAN RESOURCES PLANNING 21
3.5.1 Initial Employees *21*
3.5.2 Limitations on Rule of Employment "At Will" *21*
3.5.3 Whistleblower Rights: The Employee as Policeman *21*
3.5.4 Notices to Employees; Employee Manuals *22*
3.5.5 Compliance Requirements *22*
3.5.6 Termination Procedures *23*
3.5.7 Post-Termination Restrictions *23*
3.5.8 Incentive Compensation: Capitalism at Work *23*
3.5.9 Federal Healthcare Law: "ObamaCare" *24*
3.5.10 Potential Abuses in "Independent Contractor" Relationships *26*
3.5.11 Pensions *26*
3.6 INTELLECTUAL PROPERTY 26
3.6.1 Types of Intellectual Property *26*
3.6.2 Sources of Intellectual Property *28*
3.6.3 Life Cycle Management of IP Rights *28*
3.7 INFORMATION TECHNOLOGY AND TELECOM MANAGEMENT 28
3.7.1 Enterprise Resource Planning: In-house vs. Outsourcing *28*
PRIVACY AND DATA PROTECTION 28
3.8 28
3.8.1 "Deceptive Trade Practices" *29*
3.8.2 Internet of Things *29*
3.8.1 Identity Theft and Security Breach Notification Acts *29*
3.8.2 Child Online Pornography Protection Act *29*
3.8.3 Privacy Policies *29*
3.8.4 Cybersecurity: Critical Infrastructures, Cloud Computing, BYOD, etc. *30*
3.8.5 Document Retention and Destruction; E-Discovery *30*
3.8.6 Cross-Border Transactions with EU, Swiss and Canadian Individuals *30*
3.9 INSURANCE 32
3.10 CONSUMER PROTECTION 32
3.10.1 Complex Legal Structure *32*
3.10.2 Consumer Product Warranties *32*
3.10.3 "Class Action" Litigation *32*
3.10.4 Tort Law *32*
SELLING TO U.S. PUBLICLY TRADED 33
3.11 COMPANIES 33
3.11.1 Supply Chain Management: Business Continuity / Disaster Recovery *33*
3.11.2 Small Business Dependent on a Single Big Business Customer *33*
3.12 CREDIT RISK MANAGEMENT 34
3.12.1 Non-Payment for Services *34*
3.12.2 Non-Payment for Goods *34*

4. SPECIAL INTERNATIONAL ISSUES FOR FOREIGN OWNERS 34

4.1 DISCLOSURE AND REPORTING OF FOREIGN OWNERSHIP 34
4.1.1 Statistical Reporting for Economic Analysis *34*
4.1.2 U.S. Tax Reporting *34*

4.1.3 "National Security" Reporting of Foreign Ownership or Control: CFIUS 35
4.1.4 Clandestine Investigations for U.S. National Security 35
4.2 NATIONALITY AND RESIDENCE OF DIRECTORS AND OFFICERS OF U.S. BUSINESSES 35
4.3 BUSINESS VISAS FOR FOREIGN OWNERS AND MANAGERS 35
4.3.1 Intra-Company Transferee (L-1) 36
4.3.2 Treaty Investors (E-2) 37
4.3.3 Specialty Occupation (H1-B) 37
4.3.4 Extraordinary Ability (O) 38
4.3.5 Short-Term Visits (B-1/B2) 38
4.3.6 "Lawful Permanent Resident" 38
4.3.1 EB-5 Permanent Resident 39
4.3.2 Immigration Law Reforms 39
4.4 CUSTOMS LAWS 39
4.4.1 Importation 39
4.4.2 Exportation 39
4.5 EXTRATERRITORIAL APPLICATION OF U.S. LAWS 39
4.5.1 Foreign Activities 40
4.5.2 Code of Conduct 40

5. TAX PLANNING ISSUES FOR FOREIGN OWNERS 40

5.1 FOREIGN TAXATION 40
5.2 U.S INCOME TAXATION ON THE ENTITY 40
5.2.1 Federal Income Taxes 40
5.2.2 State Income Taxes 41
5.2.3 Local Income Taxes 41
5.2.4 Social Security Taxes and Equalization Treaties 41
5.3 SALES AND USE TAXES 41
5.4 PERSONAL TAXES 41

6. ACCOUNTING 42

6.1 FINANCIAL ACCOUNTING 42
6.2 TAX ACCOUNTING 42
6.3 FIDUCIARY ACCOUNTING: CUSTOMER FUNDS 42
6.3.1 Abandoned Property Laws Generally 42
6.3.2 Abandoned Property Laws Applicable to Delaware Corporations 43

7. ATTORNEY-CLIENT RELATIONSHIP 43

7.1 ENGAGEMENT LETTER 43
7.2 CONFIDENTIALITY; CONFLICTS OF INTEREST 43
7.3 COMPLIANCE AND ONGOING OPERATIONS 43

8. CONTACT US 43

APPENDICES 44

A. DIAGRAM: NEW U.S. VENTURE (FAMILY OWNED) 45

B. DIAGRAM: NEW U.S. VENTURE (FOUNDERS AND PRIVATE EQUITY INVESTORS) 46

C. DIAGRAM: ACQUISITION OF A U.S. PRIVATELY-OWNED BUSINESS (ONE STEP) 47

D. DIAGRAM: ACQUISITION OF A U.S. PRIVATELY-OWNED BUSINESS (TWO STEPS) 48

E. TABLE: COMPARISON OF JURIDICAL ENTITIES 49

F: E-2 TREATY INVESTOR VISA (SAMPLE) 52

1. Executive Summary

The United States has long been the land of opportunity for startup ventures, entrepreneurship andinnovation. Subject to protection of "national interests," the United States is generally very open to foreign direct investment in the U.S. stock markets, in new privately owned ventures and U.S. real estate. Under U.S. federal laws and WTO agreements on trade in goods, services, intellectual property and investment measures, foreign entrepreneurs can enjoy the same opportunities as Americans. They can create, buy and operate U.S. companies and sell foreign goods and services in the U.S. Of course, they must comply with applicable laws, including immigration laws.[1]

After eight years of President Obama's Democratic administration, President Donald Trump and the Republican majority in both houses of Congress will bring many legal changes this year and for the next three years. While campaign rhetoric was somewhat xenophobic and nationalistic, we anticipate changes promoting localization of business operations in the U.S, less burdensome employment rules favoring employer flexibility, deregulation (especially in financial and environmental industries) and stimulation of both technologies and small businesses.

Setting up a U.S. company responds to several business and personal needs of companies, their owners and managers:

- For foreign multinationals and foreign SMB's, the extension of product and servce lines into American markets;
- For startups:
    - Access to venture capital and private equity markets, which are well-developed compared to many foreign private funding alternatives; and
    - Access to subject matter experts and other managerial talent capable of directing the design of new technologies for development by a multinational develpoment team;
- For managers of foreign SMB's, a chance to obtain a work visa and, if desired, tax residence in the USA;
- For IT and telecom companies, Internet e-businesses or foreign tech services companies, access to legal sructures for joint ventures and incentive compensation for American co-owners and employees; and
- For consumer goods and luxury products, or for regulated industries, a structure for centralizing and manageing the functions of supply chain management, importation, marketing, sales, regulatory compliance and, to some extent, limitation of liability.

Single-owner entities owned by U.S. tax residents can be established without requiring separate income tax returns.

Building a business is no "picnic." Success in a new business requires careful planning and methodologies for management of risks to operations, security, customer relations, legal and regulatory compliance and ultimately brand value.

[1] This brochure constitutes "attorney advertising." It is not intended, and cannot be relied on, as legal advice or tax advice directed at the particular facts and circumstances of any person. Each business situation is unique and requires evaluation of all relevant factors. Changes in laws or other factors could affect, on a prospective or retroactive basis, the information contained herein. The views expressed herein may not be attributed to Bierce & Kenerson, P.C., its attorneys or its clients. Prior results are no guarantee of future results. Please consult a lawyer on your particular needs. Bierce & Kenerson, P.C. is a law firm based in New York City. Revision date: January 15, 2017.

Established in 1990, Bierce & Kenerson, P.C. has been advisor to new ventures, innovators, entrepreneurs and globalizing enterprises involving many countries. We represent companies of all sizes and their owners, managers across the enterprise's life cycles. Our clients are involved in technologies (goods, services and software), Internet businesses, consumer products (low-tech, regulated and/or luxury goods), industrial products, manufacturing and licensing industries. Our focus is in using legal compliance and operating structures ("infrastructures") as tools for strategic growth. We seek to develop durable business transactions and shareholder value.

We believe that our key differentiators are:

- personal attention of senior lawyers;
- an appreciation of the globalization process, which affects all enterprise from startup to multinational;
- a holistic perspective for practical solutions based on extensive experience across many industries;
- relatively modest cost structure;
- a focus on mid-market clientele that understands value in legal services; and
- recognition in the industry as business-savvy lawyers;
- a network of related services industry professionsals and foreign law firms.

This White Paper offers several graphical appendices to illustrate key concepts.

2. Core Planning Issues

2.1 Role of U.S. Operations in Globalization Strategy

2.1.1 Integration into Global Enterprise, with Global Supply and Value Chains

A U.S. business is an essential piece for a globalizing enterprise. The U.S. market includes over 330 million people. The economic, legal and cultural environments underscore a high degree of relative openness to the international products, services and talent. For purposes of limitation of liability and local identification, having a U.S. entity becomes an essential link for the globalizing enterprise. As lawyers, we promote rapid development of a global enterprise, with focus on presence in the U.S., Europe and Asia as well as certain key Latin American markets.

2.1.2 Marketing and Sales

Many foreign businesses establish U.S. subsidiaries to market and sell their foreign goods or services. Having a local U.S. presence enables the foreign business to gain a better understanding of American local demand. Minor adjustments for localization of foreign goods and services can open up the market.

2.1.3 Product Research and Development

Product research and development drives innovation and sustainable business. American universities frequently develop technologies in general research and then spin out new companies licensed to used the new technologies. Such spinoffs may include both local American managers and foreign investors and licensees for rapid globalization of emerging technologies. Federal tax laws provide limited tax credits for R&D.

2.1.4 Manufacturing

Much of American manufacturing has shifted to lower wage countries. Under President Trump, wage arbitrage alone does not create "fair" free trade. Foreign manufacturers should explore the possibility of having a local U.S. manufacturing presence to avoid possible trade regulation and import taxation and to achieve flexibility and economies. As transportation costs increase, bulky, heavy and high-value goods can be manufactured in the United States.

2.1.5 Business Services

The U.S. faces a shortage of skilled tech labor but also a need to perform with high tech efficiencies. All business services involve some level of outsourcing. Supply chains for business process services are global. Thus, U.S. enterprises are both buyers, sellers and integrators of a global supply chain of business services. This openness creates business opportunities for imports and exports, though the U.S. has a chronic trade deficit as consumer of foreign goods and services.

2.1.6 Investment in Securities

Based on the Foreign Investors Tax Act of 1963, the U.S. tax law has favored foreign direct investment in U.S. stocks and bonds for more than 45 years. Generally, such investments are exempt from U.S. federal income tax unless the investments are real estate holding companies.

2.1.7 Investment in Real Estate

With the decline of the U.S. Dollar, the price of acquiring U.S. real estate has declined for foreign investors. Certain markets, such as New York City, remain strong due to their unique attractions for both Americans and foreign investors.

2.1.8 Back-Office Operations

In the United States, service industries have sprouted up to perform virtually all of the “back office” administrative and operational services of a generic enterprise. Such services can be rendered directly by a foreign affiliate, or they can be hired in the United States.

- Office space can be rented to include a shared receptionist who answers with your company name, a shared conference room, shared copying and mailroom facilities, mail forwarding (for “letterbox companies”) and even a “hotel”-type space using a “corporate identity package.”

- Specialized services can prepare payrolls and administer tax and regulatory filings relating to employees, employee health insurance, employee stock options, pension and profit-sharing funds and human resources administration. For tax purposes, some such organizations (“professional employer organizations”) also are legally deemed to be “co-employers” of their client companies’ employees, so that the administration can be managed as if the functions were managed “in house.”

2.1.9 E-Business

In an increasingly mobile and application-driven global economy, e-businesses and “free” shipping have threatened the viability of traditional retailing. Now, both “virtual” and “bricks and mortar” sellers have focused on logistics management, sales-tax optimization and being “close to the customer” even though based in a distant location. E-business has become normal business, and vice versa. But consumer protection laws on privacy, data protection, banking, and interstate sales require greater focus on compliance and loss prevention. Hence, companies should adopt compliance policies in their other policies affecting employees, suppliers and customers. At the same time, they need to resolve conflicts of law where some European data protection authorities might disagree with the viability of voluntary compliance with the 2016 US-EU Privacy Shield. Intercompany “binding corporate rules,” encryption and selecting suitable locations for computer servers need to be considered for effective compliance.

2.1.10 Force Majeure and Supply Chain Management: BCP and DR

Given cyber-security risks, American enterprise customers expect all suppliers to provide adequate assurances of effective supply chain management across borders. Foreign-owned U.S. enterprises may be expected to provide business contingency / continuity planning and disaster recovery planning. New market entrants should develop and manage such plans and be ready to demonstrate they function. Specialized audits by independent auditors may be helpful in giving confidence to U.S. customers.

2.2 Forms of Business Entities

2.2.1 Choice of Law

In considering any new venture, the choice of the state of formation is critical. The state of incorporation governs the internal relationships among the shareholders, directors, officers, other "managers" and, in some cases, employees. A company's external commercial operations are governed by the jurisdictions where they conduct business.

2.2.2 Corporations

Every U.S. state (and possession) has a form of legal entity that is a joint stock corporation, where a board of directors is responsible for management and appoints officers to implement policies. Federal tax law provides special relief for "S Corporations" that are 100% owned by U.S. citizens or lawful permanent resident aliens, but only if there is just one class of shares and other conditions are satisfied.

2.2.3 Limited Liability Companies

Since Wyoming adopted the first LLC law in 1987, now all U.S. states have enacted statutes for LLC's. Federal tax law generally taxes these entities as if they did not exist, but taxes the owners on their allocable share of profits, losses, deductions and credits. A single-owner LLC is a "disregarded entity," and the sole owner transposes the LLC's tax accounting directly into its own tax returns. An LLC may elect to be taxed as a corporation.

2.2.4 Benefit Corporations and Flexible Purpose Corporations

"Social impact" is now an important social value for many company founders and customers. This new landscape reflects an increased consumer brand-recognition and loyalty of customers, employees and other community stakeholders to serving mixed goals of shareholder profits and positive social impact. "Benefit" corporations and LLC's do not qualify for income tax exclusions or deductibility of contributions because they have shareholders entitled to dividends and liquidation preferences. Thus, some 31 states have enacted new forms of "social impact" legal entities that meet a growing interest by entrepreneurs (and even public companies) to "do good" in addition to making money:

- A "benefit corporation" (for example, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Virginia, Vermont and Washington, D.C.);
- A "social purpose" corporation, formerly known as a "flexible purpose" corporation (California, Washington and Florida); and
- A "low-income limited liability company" (for example, Illinois, Michigan, Utah, Vermont and Wyoming). ("L3C").

The "benefit" and "flexible purpose" entities are ordinary corporations. By decision of shareholders (who can revoke the decision), they make special elections to publicly declare that they have adopted special socially- or environmentally-directed purposes in addition to making a profit. Such entities can operate anywhere in the United States so long as they choose to incorporate in an appropriate jurisdiction. For such special corporations, the enacting legislation imposes rules for "social impact" accountability and reporting.

Such laws permit easy commencement and easy termination of the special status. The shareholders can elect to adopt or terminate such special "social impact" framework at any time. Structuring the certificate of incorporation or By-Laws should define a high-majority vote to protect the mission.

Where should you incorporate a Benefit ("B") Corporation (or LLC)? The Delaware "public benefit corporation" (PBC) statute appears to be the most balanced of all. It offers a choice between subjective flexibility (such as in a California "social purpose" corporation) and objective third-party metrics for transparency and accountability. Delaware gives dissenting minority shareholders (who do not want to adopt a "public benefit" regime) to get cashed out under an "appraisal right." Delaware's PBC statute defines a PBC as "a for-profit corporation … that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, *the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits* identified in its certificate of incorporation." We invite inquiries to support businesses desiring "social impact," but caution that this may make it harder to find like-minded equity investors (including business angels and venture capitalists), find lenders or sell the business because of the mandates for annual mission reports and the ability of shareholders to sue directors to enforce the mission**.**

2.2.5 Corporate Social Responsibility in Lieu of "Social Benefit Corporations"

Governance disputes for "benefit corporations" remain largely untested in the courts. Instead of structuring the entity as a "social benefit corporation," business owners and managers can focus on corporate social responsibility ("CSR") and environmental, social and governance ("ESG") principles have become popular with consumers, international businesses confronting bribery demands and "social impact" investors seeking a "double bottom line" benefit for social as well as economic goals. CSR and ESG principles are embedded in community banking regulations but are not otherwise mandatory. Founders can elect to adopt such principles under special corporate laws for "benefit corporations" and "benefit LLC's." Most American consumers and businesses expect some form of declaration of leadership principles on websites. Once an enterprise declares such principles, failure to honor such principles could lead to claims of fraud or other embarrassment impairing goodwill and sales.

2.2.6 Other Forms

Various states have special laws allowing for business trusts, "real estate investment trusts," personal trusts, general partnerships, limited partnerships, limited liability partnerships, mutual funds and not-for-profit corporations.

2.3 Corporate Finance

2.3.1 Founders and Self-Generated Capital

For small to mid-sized business ("SMB"), most foreign direct investment is self-financed or may enjoy special funding conditions sponsored by a host foreign government. The costs of setting up a sales office can be quite small. The largest expenses are salaries and rent. Some expenses can be shared in office suites at prestigious locations for limited use. Self-funding avoids dilution of ownership but may retard high growth.

2.3.2 Private Investors: Angels, Venture Capital and Private Equity

Angel investors are wealthy individuals interested in making early-stage investments in promising new ventures. Typically, their terms of investment reflect a contingency on future valuation of the company when a large investment is made by a venture capital firm ("VC").

American VC's are eager to support globalizing business, particularly SMB's, for significant growth opportunities. For each type and event of financing (whether debt or equity), the VC's expect financial benefits. They also expect the portfolio company to pay the VC's legal fees. For foreign-controlled SMB's, some U.S. VC's require that the jurisdiction of incorporation be changed to the United States in order to avoid little-known and potentially adverse foreign legal and tax regimes. Such transfers of jurisdiction can be achieved without a U.S. tax on accrued gains.

Private equity investors normally structure their investments as convertible preferred shares or convertible debt. This enables them to avoid dilution and retain a priority in liquidation if the company falls into distress. Other elements of private equity investment include a seat on the board of directors, observer rights on the board of directors, the right of first refusal to provide additional funding if needed, warrants, tag along, drag along and co-sale rights in case of a private sale of the company and other exit strategies including registration rights for an initial public offering, a sale to a strategic investor and a sale to a financial investor.

Savvy private equity investors seek to invest in multiple companies that can service each other's supply chain requirements. They may acquire shares in companies that can service this strategic tool for building shareholder value.

Planning and executing a private equity investment requires careful planning, extensive documentation across phases of due diligence, negotiation and post-closing. Such investment documentation typically includes a founders' agreement, a private placement memorandum or business plan, non-disclosure agreements, "due diligence" disclosures of company information, an investor eligibility questionnaire, employment contracts, an employee stock option plans and option awards, a management incentive compensation plan, a stock purchase agreement, a complex shareholder agreement (with investor rights of first refusal and scenario planning), a complex certificate of incorporation, a registration rights agreement, warrants and other equity "sweeteners," resolutions of the shareholders and the board of directors, reporting to securities regulators, legal opinions, indemnity agreements and insurance coverage.

2.3.3 Avoiding Parent Company Guarantees

Americans dealing with foreign businesses frequently insist upon obtaining financial guarantees of performance by the U.S. subsidiaries. For accounting purposes, such guarantees represent a liability on the parent's balance sheet, and thus may reduce the parent's ability to borrow. An adequately capitalized American subsidiary may be able to avoid having to deliver a parent's guarantee.

2.3.4 Securities Law Compliance for Private Offerings of Securities

2.3.4.1 Genera Rules on Fund-Raising for Private Businesses

Federal and state laws regulate the issuance of securities to investors. Generally, it is illegal to advertise the offering of securities to U.S. residents. Such laws generally mandate reporting of material information, auditing under "generally accepted accounting principles", internal controls and other requirements. Exceptions apply under Securities and Exchange Commission Regulation D (for small investments and investments by "accredited investors"), SEC Regulation "A+" under the 2012 JOBS Act (for general solicitations), SEC Rule 144A (for soliciting foreign investors) and other distributions that are "not a public offering" of securities. Generally, "accredited investors" are individuals with the requisite income ($250,000 currently and expected for the future) or assets ($1.0 million+ excluding the home).[1]

Issuers need consider several factors in selecting offering method for fundraising through issuance of unregistered securities. Such factors may include preemption of state securities laws, the ability to advertise and make "pitches" to prospective investors, the ability of non-accredited investors to participate, limits to the amount of capital that can be raised, geographical constraints, and level of required initial and ongoing disclosure to investors. In turn, such factors may impact fundraising costs and the existence (or absence) of investor protections (e.g., additional oversight by state securities regulators).

2.3.4.2 State Regulation of Securities; Federal Pre-emption

Virtually every state regulates the solicitation of investor for private companies. SEC Rules 506(b) and 506(c) and Reg A+ (as to Tier 2 funding) preempt certain aspects of state regulations (notably, solicitation rules). Such SEC rules give investors substantial protections and limits investors to either accredited investors or those with sufficient knowledge and experience in financial and business matters to make the investor capable of evaluating the merits and risks of the prospective investment.

[1] See generally, S. Bauguess, R, Gullapalli and V. Ivanov, SEC Division of Economic and Risk Analysis, *Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2014,* https://www.sec.gov/dera/staff-papers/white-papers/unregistered-offering10-2015.pdf.

2.3.4.3 SEC Regulation D

Regulation D has been in effect from 1982. Under Reg D, the issuer files Form D with the SEC to identify the type of offering and the basis for the exemption being claimed. The filing must be completed no later than 15 calendar days after the first sale of securities in the offering (with an extension if the deadline is on a weekend).

In addition, the issuer chooses one of four categories that govern:

- Rule 504 (generally, raising not more than $1.0 million in any 12 months);
- Rule 505 (no more than 35 investors, raising not more than $5.0 million in any 12 months;
- Rule 506(b) (no more than 35 investors, all of whom are either accredited investors or have such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment); and
- Rule 506(c) (eliminated the ban on general solicitation but imposed other requirements (over $1.0 million) where (i) all investors are either “accredited investors” or “qualified institutional buyers, and (ii) the securities issuer takes reasonable steps to ensure they are not collecting money from non-qualified investors).

According to the SEC, in 2014, the estimated amount of capital (including both equity and debt) reported as being raised under Regulation D was $133 billion, not including hedge funds ($338 billion), private equity funds ($318 billion) and financial issuers that are not pooled investment funds ($375 billion).

The SEC reports further that Rule 506 accounts for 99% of the amounts reported sold through Regulation D, including 97% of capital raised below the Rule 504 or Rule 505 offering limit thresholds, suggesting that issuers continue to value the preemption of state securities laws provided for offerings conducted pursuant to Rule 506. Since Rule 506(c) became effective on September 23, 2013, only a small proportion (2%; $33 billion) of the capital raised in Regulation D offerings was raised in offerings conducted pursuant to Rule 506(c).

2.3.4.4 Regulation A+

In 2016, the SEC amended Regulation A, which exempts issuers from the requirement of filing a registration statement. Reg A applies to Tier 1 (up to $20 million) or Tier 2 (up to $50 million). The issuer may not sell any securities until the offering statement has been filed and qualified with the SEC. Reg A is effective for allowing earlier investors to exit without an IPO, subject to limitations. As to Tier 2 offerings, state regulation is preempted. As to Tier 1, on December 16, 2016, the North American Securities Administrators’ Association proposed model rules and legislation to exempt Tier 1 offerings under certain conditions.

2.3.4.5 “Emerging Growth Companies” under JOBS Act (2012)

On April 3, 2012, President Obama signed the “Jumpstart Our Business Startups [JOBS] Act,” H.R. 3606 (112th Cong., 2nd Sess.). This new law defines an "emerging growth company" (ECG) as a company with a total annual gross revenues of less than $1 billion during its most recently completed fiscal year. The “JOBS” Act provides temporary regulatory relief to small companies in the field of securing private equity investments. In theory, this will promote job creation and encourage them to go public in the U.S. It offers an alternative route for small investments in startups, in the hope that they will grow and eventually go “mainstream” and eventually comply with regulatory requirements as they grow larger. So far, the SEC has not opened the floodgates.

The JOBS Act substantially changes prior federal securities laws affecting startups, early-stage and rapid-growth companies generally, including:

- Startups based in the U.S., regardless of the location of their global operations;

- Existing small-to-mid sized businesses seeking expansion capital up to $1.0 million in any 12 months;

- Foreign or domestic investors (particularly "angel" investors) seeking to invest in U.S. private companies, whether or not this involves acquisition of control ("M&A") or minority investment (venture capital and private equity);

- Financial advisors introducing investors and earning "finder's fees" and brokerage commission;

- Small public companies or private companies seeking to increase to 2,000 the number of investors presently capped at 500 before being required to file an IPO.

2.3.4.6 Crowdfunding to Unaccredited Investors

One portion of the JOBS Act is captioned the "Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012," popularly known by the acronym as the "CROWDFUND Act." Under a new Section 4(6) of the '33 Act, no SEC registration is required for transactions involving the offer or sale of securities by an issuer (including all entities controlled by or under common control with the issuer). Such transactions are limited to:

(A) a maximum fundraising of $1.0 million under this Section 4(6) during any 12-month period;

(B) subscriptions by any single investor during any the 12-month period not exceeding (i) the greater of $2,000 or 5 percent of the annual income or net worth of such investor, as applicable, if either the annual income or the net worth of the investor is less than $100,000; and (ii) 10 percent of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount sold of $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000.

Such exempt transactions must be conducted through a broker-dealer or "funding portal" that complies with specific requirements and is a member Financial Industry Regulatory Authority (FINRA), the self-regulatory organization, and the issuer must comply with certain specific requirements. There would be no exemption from liability for securities fraud. A "funding portal" is a new concept intended to serve in lieu of a broker-dealer.

In soliciting such "*crowdfunding*" investors, the brokers or "funding portals" must provide any disclosures (including disclosures related to risks and other investor education materials) that the SEC might require. Since the investors would be "at risk," the broker and "funding portals" will need to "ensure that each investor:

(A) reviews investor-education information, in accordance with standards established by the Commission, by rule;

(B) positively affirms that the investor understands that the investor is risking the loss of the entire investment, and that the investor could bear such a loss; and

(C) answers questions demonstrating--
   (i) an understanding of the level of risk generally applicable to investments in startups, emerging businesses, and small issuers;
   (ii) an understanding of the risk of illiquidity; and
   (iii) an understanding of such other matters as the Commission determines appropriate, by rule.

The JOBS Act includes substantial protections against abuses and frauds in the solicitation of "crowdfunding" investors. Such investors need not be "accredited investors" or "institutional investors." As guardians, the brokers and "funding portals" will bear the burdens to:

- take measures to reduce the risk of fraud under new SEC rules, including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20 percent of the outstanding equity of every issuer whose securities are offered by such person;

- disclose to the SEC and prospective investors information provided by the issuer at least 21 days prior to the first day on which securities are sold to any investor (or such other period required by the SEC);

- ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, and allow all investors to cancel their commitments to invest, as the SEC may require by rule;

- protect privacy as required by any new SEC rule;

- not compensate promoters, finders, or lead generators for providing the broker or funding portal with the personal identifying information of any potential investor;

- prohibit its directors, officers, or partners (or any person occupying a similar status or performing a similar function) from having any financial interest in an issuer using its services.

The JOBS Act requires EGCs to make certain filings with the SEC, both as to solicitations and annually. Audited financial statements are required for solicitation of more than $500,000, but unaudited financial statements will be sufficient for solicitation of investments of between $100,000 and $500,000 in any twelve month period.

The EGC may not advertise the terms of the offering, except for notices which direct investors to the funding portal or broker. Nor may the EGC compensate or commit to compensate, directly or indirectly, any person to promote its offerings through communication channels provided by a broker or funding portal, without taking such steps under an SEC rule, require to ensure that such person clearly discloses the receipt, past or prospective, of such compensation, upon each instance of such promotional communication.

Crowdfunding under the JOBS Act can create many problems, including a large number of small investors, managing relationships with shareholders, and possible conflicts with alternative fundraising methods.

2.3.4.7 "Simple Agreement*s* for Future Equity*" ("SAFE" Agreements)*

A "simple agreement for future equity" ("SAFE") has been proposed as a contract for the issuance of securities in the future. Typically, such future securities are usually equity, but have an uncertain conversion ratio, which in turn reflects a future issuance of equity at a fixed rate. SAFE agreements are a contractual obligation, not securities, and are simpler than convertible debt.

2.4 Tax Efficiency

Under the Republican Congress, federal income tax laws are targeted for revision in 2017-2018.

2.4.1 Tax-Free Acquisitions

Acquisitions can be structured as asset acquisitions or a merger of companies. In a cross-border context, tax-free mergers are not permitted, though use of U.S. special purpose vehicles can avoid taxable transactions..

The most common alternative involves the merger of the target company into a newly formed U.S. corporation. This enables the acquirer to escape impairment of its assets with the liabilities of the target.

A multi-tiered structure might be more complex but attempts to overcome some restrictions imposed by commercial relationships and regulatory regimes. First, "change of control" clauses in loan agreements, supply chain agreements, customer agreements and other commercial contracts could result in termination of valuable commercial contracts. Second, contractual prohibitions on “assignment” may be triggered by a simple merger. Third, allowing the operating company to be the survivor in the merger may also reduce the risk of loss of regulatory permits and licenses and maintenance of ownership of legal title to equipment and real property.

In the appendix on mergers and acquisitions, the arrows point to the surviving corporation. The acquirer forms a new holding company as its first-tier subsidiary, and then the acquirer merges with MergerSub1 that had been established by the new holding company. The target then merges with the second of the second-tier subsidiaries. The result is a new holding company and two operating subsidiaries. The former shareholders of the acquirer and the target receive shares in the new holding company.

2.4.2 Income Tax from Operations

U.S. corporate income tax rates are among the highest in the world. Tax planning can minimize U.S. taxes but the business must have a plan as to where to operate its business and its personnel, separation of functions into specialized legal entities and transaction-based plan. As of February 1, 2017, the new Trump administration would like to “reform” the tax code, inviting a variety of proposals.

2.4.2.1 Federal Income Taxation

The regime for U.S. taxation of U.S. corporate subsidiaries is based on the OECD model income tax convention. Where there is a U.S. income tax convention, the foreign company’s activities in the United States can be clearly excluded from U.S. taxation when the U.S. subsidiary is not a “permanent establishment” of a foreign affiliate.

Corporate Taxable Income	***Federal income tax rate***
Up to $50,000	15%
$50,000.01 to $75,000	25%
$75,000.01 to $10,000,000	34%
over $10 million	35%

If the U.S. subsidiary disregards corporate formalities or otherwise acts as agent for a foreign affiliate, the U.S. may tax the income effectively connected with the conduct of the foreign affiliate’s trade or business.

Where there is no income tax convention between the U.S. and the foreign country, a U.S. subsidiary or branch is subject to a 30% withholding tax on the gross amount of profits distributed to its foreign parent.

Also, the U.S. does not tax foreign-source income of foreign businesses where such income is not effectively connected with U.S. operations.

2.4.2.2 State Income Taxation

State income taxes are a deductible expense for purposes of computing federal income tax.

Most states (including New York) adopt the federal tax code as the basis for classifying and computing elements of gross income, deduction and taxable income, but each state has its own rules governing deductibility, inclusion of certain classes of income and income tax rates.

Unlike most other states, California adopts a “water’s-edge” system of global taxation. Thus, where the California subsidiary is an integral part of a global business, California may look to the global business’ revenues allocable to the value generated in California.

2.4.3 Income Tax on Sale of Shares

In general, federal and state tax laws enable foreigners to avoid U.S. corporate income tax on the sale of stock in a U.S. corporation. However, foreigners cannot avoid income taxation on the sale of a U.S. entity that is a real-property holding company under the Foreign Investors Tax Act.

2.4.4 Value Added Tax

As of February 1, 2017, the U.S. does not impose any value added tax. However, the Trump Republicans could adopt VAT on imports (thus, a tariff) in retaliation against countries that manipulate currency exchange rates or otherwise discriminate against American sellers of American goods in such countries. President Donald Trump has proposed a "border adjustment" tax that would be a tariff on imports and an exoneration of tax on exports.

2.5 Exit Strategy

2.5.1 Planning for an Exit

Owners planning to sell the business should anticipate a pre-sale period of about a year for achieving high levels of profitability, "housekeeping" to clean up incomplete internal documentation, solicitations of interest, term sheet negotiations, definitive agreements, due diligence and closing. Preparations for due diligence begin immediately to get the housekeeping in order.

2.5.2 Sale to a Strategic Acquirer

Exit strategies depend on the growth plan and the competitive landscape. SMB's frequently sell to strategic acquirers upon the retirement of the founder. Preserving value for such a sale requires compliance with applicable U.S. laws throughout the business operations as well as identifying and preserving value that can be transferred. Acquisition agreements typically require extensive "representations and warranties" by the sellers that, if breached, can result in price reduction or even cancellation of the sale.

Any breakup fees should be carefully structured. In 2016, the IRS ruled that certain "breakup fees," payable upon non-closing of an equity transaction in M&A, are treated as expenses associated with capital assets under Code Section 1234A, and thus are deductible as capital losses or includible as capital gains.[1] Such breakup fees may still be deductible as ordinary expenses (and includible as ordinary income) to the extent they constitute expectancy damages for lost profits as the loss of negotiated benefits of the bargain.[2]

2.5.3 Sale to a Financial Investor

Typically, financial investors purchase companies to build or consolidate a national or international platform for business growth. Many skilled financial investors look for basically strong companies that are in distress, in the hope of rehabilitation and resale. Private equity investors may seek niche companies to supply goods or services to other portfolio companies as a tool for building shareholder value in the constellation of portfolio companies.

2.5.4 Sale to Employees

Sales to employees can be achieved by simple sale or by transfer to an Employee Stock Ownership Trust ("ESOT") under an Employee Stock Ownership Plan ("ESOP"). (This is not the same as an incentive stock option plan, which typically covers no more than 20% of the entire issued capital.) ESOP's offer certain tax advantages in special cases.

2.5.5 Initial Public Offering

An IPO takes about a year to plan. This exit strategy requires careful planning across all operations of the enterprise. Many of the preparations involve ensuring the company has good business practices and a

[1] IRS Internal Legal Memorandum (ILM 201642035) (Feb. 9, 2016 date, Oct. 14, 2016 actual release).

[2] IRS Private Letter Ruling 200823012, released June 6, 2008, ref. PLR-140872-07, available at https://www.irs.gov/pub/irs-wd/0823012.pdf.

deep and experienced management team, audited financial statement, internal corporate audit and control procedures, business continuity planning and disaster recovery management, management of the extended supply chain, contract management, product development and delivery, privacy, data security, physical security and information technology procedures and risk management. For tax considerations, interested parties should remember that the favorable U.S. long-term capital gains income tax rates are available only if the securities being sold are held for more than one year.

2.5.1 Inversions (Merger into Foreign Company)

In an inversion, a U.S. corporation changes its corporate domicile and thus primary tax jurisdiction by merging with a foreign entity. Such transactions can result in substantial loss of U.S. income tax revenues, the loss of U.S. jobs and the transfer of R&D and/or production to foreign locations. In October 2016, the Treasury Department adopted new rules under Code Section 385 to reduce the use of excessively leveraged intercompany borrowings to strip interest income from the U.S. companies.[1]

3. Core Operational issues

3.1 Business Models

Your business model will define the scope of operations, which laws apply, the impact on the organization and the compliance functions. Most new ventures include the traditional business models of sales and services. The following discussion covers emerging variations.

3.1.1 Online Business

Online businesses conduct operations electronically. They compete with “bricks and mortar” stores and services. Legally, they require careful attention to development, protection and licensing of intellectual property, privacy rights, data security breach notification procedures, supply chain integration, terms and conditions of service and the other legal issues.

3.1.1.1 Collection of Taxes by Online Sellers

Pending federal legislation would, if enacted, require all virtually Internet sellers (with over $1.0 million in gross revenues) to collect and pay over sales taxes in all of the approximately 9,600 taxing jurisdictions in the U.S. This would mirror the fact that currently online sales to customers in the European Union are subject to collection of foreign value added taxes.

3.1.2 Franchising vs. Licensing

Many states regulate the business of franchising. Generally, franchising consists of the licensing of a trademark (and possible other intellectual property) for a royalty where the licensee must comply with a method of conducting business. However, new ventures should be aware that New York law can apply franchise regulations to a simple license.[2]

[1] See TD 9790, “*Treatment of Certain Interests in Corporations as Stock or Indebtedness,”* adopting Treas. Reg. 1.385-1 *et seq*., 81 Fed. Reg. 72858, 72949 (Oct. 21, 2016). Reasonable levels of properly documented “earnings stripping” is an advantage of foreign ownership of U.S. entities.

[2] New York law defines “franchise” as “a contract or agreement, either expressed or implied, whether oral or written, … by which: (a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and the franchisee is required to pay, directly or indirectly, a franchise fee, or (b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate, and the franchisee is required to pay, directly or indirectly, a franchise fee.” NY Gen. Bus. Law, §681(3).

3.1.3 Strategic Alliances

New ventures are often built upon strategic alliances with "business partners." Such arrangements may consist of a joint research and development agreement, an exclusive distribution agreement for one party's product or a jointly developed product, an exclusive license, a teaming agreement for going to market as a team (where each provides different services or goods), an outsourcing contract or a joint venture. The essential elements of such agreements normally include (i) parties who are not competitive at the current stage of development, (ii) a narrowly defined scope of joint operations, (iii) financial commitments (which could include an equity contribution or loan) (iv) relationship governance protocols and (v) exit plans.

3.2 Selection of Form of Juridical Entity

3.2.1 Corporations

Corporations generally are well-suited for large enterprises, owned by a large number of owners, where the enterprise will be accumulating and redeploying capital in business operations. Corporate structures are generally adopted when financial investors contribute capital with an exit strategy that includes a possible initial public offering.

3.2.2 Limited Liability Company

LLC's are the entity of choice for entrepreneurs and joint ventures between large enterprises. Their disadvantages are not considered significant for founders who anticipate immediate profitability, such as for a sales subsidiary promoting goods or services of an established foreign business.

3.2.3 Special-Regime Entities

Other special-regime entities exist under either tax or corporate law to serve real-estate investors, employee-owned companies and licensed professionals. The federal tax code eliminates the double taxation for real estate investment trusts ("REIT's"), cooperative corporations owning buildings or that distribute "patronage dividends" to members, and for registered investment companies ("mutual funds"). Professionals such as accountants, attorneys, engineers and architects may use other corporate or partnership forms to do business, such as a professional corporation ("PC"), a limited liability partnership ("LLP").

3.3 Corporate Governance

3.3.1 Corporate Charter

The "corporate charter" generally consists of two documents.

For a stock corporation, the certificate of incorporation is filed as a public record with a Secretary of State of the state of incorporation. The incorporator or the board of directors may adopt non-public internal "by-laws" to define internal corporate governance procedures for voting by shareholders, the management and administration of the Board of Directors and share transfers. Stock certificates are issued upon subscription to the shares, approval by the Board of Directors and receipt of the capital contribution. The ownership records are maintained in a share register in the "minute book" that includes a corporate seal and blank stock certificates.

For a limited liability company, the certificate of formation is filed as a public record with a Secretary of State of the state of formation. As a non-public record, the Operating Agreement sets forth procedures typically included in corporate by-laws and, in addition, establishes limitations on transferability of shares and procedures for buying and selling shares between "members." No stock certificates are required, though they are permitted in many states if the parties want them. The Operating Agreement usually serves as the share register.

3.3.2 Shareholder Agreements

In corporations, shareholder agreements define any special conditions relating to buying, selling or transferring shares, voting agreements to ensure election of desired board members, and rules governing voting and actions in case of various contingencies. In corporations, the operating agreement performs the same function. Such agreements are not public records with a limited exception in Vermont for 3L LLC's.

3.3.3 Joint Ventures

Joint ventures can take several forms:

- a limited liability company;
- a corporation;
- a limited partnership with a general partner.

Such entities can be owned directly by the joint venturers or indirectly by their wholly-owned subsidiaries. For tax reasons, a LLC or limited partnership may be the preferred structure. See Appendix E.

3.3.4 Common Planning Issues in New Venture Formation

In addition to tax considerations, key operational issues in any co-owned entity must be handled from the beginning. These include:

- Allocation of ownership of common shares (focusing on voting rights), and events that may or shall cause a re-adjustment in such allocation;
- Rights of founders to manage the enterprise;
- Rights of employees to acquire shares under tax-deferred "qualified" stock option plans or taxable "non-qualified" stock option plans;
- Financial impact of business stagnation, high growth or simple volatility;
- Funding obligations; and
- Rights of financial investors, usually structured as preference shares, which shift the risk of loss to the common stockholders who have the lowest rank in a liquidation, including:
    - conversion ratios,
    - conversion events (mandatory and optional),
    - voting rights,
    - liquidation preferences,
    - dividend preferences and cumulative dividends,
    - a preferred "hurdle" rate of return on investment upon sale or IPO,
    - veto rights on certain major transactions, and
    - designation and compensation of one or more members of the Board of Directors.

3.3.5 Common Mistakes in Governance

3.3.5.1 Piercing the Corporate Veil

The genius of modern corporation law is the principle of limited liability of the owners of a juridical entity such as a corporation, limited liability company, limited partnership or trust. In designing the ownership and governance structure of such entities, the owners must take care to comply with the fundamental principles of good corporate governance. This includes adoption of decisions by duly authorized decision makers (board of directors or LLC managers / LLC managing members), adequate initial capitalization, exercise of independent judgment by the board members, respect for corporate formalities and other considerations. Hence, corporate governance is an ongoing task to limit the personal liability of shareholders.

3.3.5.2 Breach of Fiduciary Duty; Self-Dealing

Unless absolved by governing documents, directors, officers and managers must put the interests of the business ahead of their own personal interests. They have a duty of loyalty to not engage in self-dealing.

3.3.6 Shareholder Disputes and Corporate Divorce

Occasionally, founders disagree on the evolution of the enterprise. Tensions become acute when one party loses confidence in the others or when new investors or new business plans are needed. The corporation laws provide for dissolution and liquidation in the case of irreconcilable differences. Accordingly methods for avoiding deadlock need to be considered. Such methods include unequal ownership of control (not based upon 50-50 structures), mutually agreed exit scenarios, neutral third-party directors and mediation.

3.4 Tax Planning

3.4.1 Partnership Tax Treatment

A partnership, or an LLC taxable as a partnership, offers a tax-efficient business structure. There is only one level of income taxation. The character and amount of each type of business income is determined at the level of the partnership, and each partner (as defined for tax purposes) is taxable on the partner's share of income. Exceptions apply where the allocation of partnership income has a meaningful "substantial economic effect" and is not skewed arbitrarily to shift income.

This one-tier tax approach has some disadvantages.

- There is no tax benefit to non-resident partners when the partnership is losing money, unless the partner has other U.S.-source income that can be offset against such losses.

- The losses in one year cannot be used to offset gains in a future year.

- Partnerships do not enjoy statutory privileges for "qualified" incentive stock option plans.

- Losses cannot be used to offset gains from other income sources when the cumulative losses have exceeded the partner's tax "basis," or capital investment, in the partnership.

- The partnership needs to plan to distribute at least sufficient cash to cover the partners' tax liabilities on their share of the income. Otherwise, the partnership can be a drain on cash, even though the operations make money.

3.4.2 Corporate Tax Treatment

3.4.2.1 "C" vs. "S" Classification

Corporations are subject to two levels of income taxation: a corporate income tax and a dividend tax on shareholders. Such corporations are under the "C Corporation" tax regime. An exception applies where all shareholders are U.S. citizens or resident aliens, where the corporation elects "S Corporation" status and is effectively taxed as a partnership (subject to certain limitations).

3.4.2.2 Employee Stock Option Plans

Tax incentives exist to promote equity ownership of new ventures, but the rules depend on choice of the entity and compliance with different technical limitations. The most favorable treatment is reserved for "qualifying" stock option plans adopted by corporations. This treatment allows entrepreneurs to attract talent using "qualifying" stock options that allow both deferral of income tax and the enjoyment of capital gains tax rates, subject to certain conditions. No such tax benefits are allowed for LLC's or other entities taxable as a partnership, so alternative option plans must be used that put the employee at risk of making the full investment but, under conditions specified in an employment agreement or option plan, forfeiting the entire value of the exercised equity option upon separation from employment.

3.4.2.3 Consolidation

Federal tax law permits consolidation of tax accounts by related U.S. companies in an affiliated group. This can help corporations achieve tax efficiency but requires 80% common ownership in a single affiliated group. (Partnerships can achieve this without needing an 80% common ownership threshold). Consolidation is generally not available between U.S. and foreign affiliates.

3.4.2.4 Tax Treaties

The U.S. has an extensive network of income tax treaties, not to mention tax treaties governing decedent's estates, gifts and social security. The income tax treaties reduce double taxation on U.S.-source income such as commercial profits, royalties, interest, dividends and special-purpose activities that do not fit in the category of "permanent establishment." Tax planning is important for any foreign entrepreneur contemplating becoming a U.S. permanent resident to legally reduce overall commercial and personal income taxes.

3.4.2.5 Anti-Avoidance Tax Treatment

Many federal and state tax laws seek to prevent techniques that would artificially delay "recognition" and taxation of income, or that would artificially restructure operations without a substantial economic effect. Corporations are subject to many special complex tax rules intended to ensure that they are not used to accumulate "earnings and profits" without being taxed, unless such amounts are earmarked for corporate uses. Thus, special taxes apply to a "personal holding company" or a "personal foreign investment company."

3.4.3 Choice of Jurisdiction for IP Holdings

Special U.S. taxes apply on the transfer abroad of intellectual property ("IP") owned by a U.S. entity to a foreign entity. Accordingly, foreign investors should not use the U.S. entity to own U.S. intellectual property unless the tax impact has been considered. An offshore holding company owning foreign IP rights could license such rights to the U.S. operating entity.

3.4.4 Choice of Jurisdiction of Operational Entity

Any new venture in the United States can be established in any state or territory. The choice of jurisdiction for the operational entity should take into account the benefits of the particular jurisdiction's legal framework for the protection of shareholders, management and employees. Once established, an entity can become "qualified" (i.e., registered) to do business in another state through a local office. Qualification to do business also results in a duty to file income tax returns in that state, which could result in some double taxation depending on the allocation formulae used by the various states.

- New York corporation law imposes liability on the ten largest shareholders for the unpaid wages of employees during the termination of employment when the company is in distress.

- California adopts internal corporate governance regimes for non-California companies that are owned by California residents.

- Delaware grants no preemptive rights for any shareholder to subscribe to additional capital, but New York does (unless eliminated in the certificate of incorporation). Delaware corporate law has been a leader in flexibility and balanced governance priorities.

In all cases, shareholders must take care to avoid using a large number of authorized shares without proper planning for state franchise taxation. By authorizing ten million shares, the corporation could have to pay an annual franchise tax of $30,000! By authorizing only 3,000 shares, the minimum annual tax of a few hundred dollars might apply. Delaware provides an alternative method (assume par value), but that depends upon the value of the company's assets as well as its par value.

3.5 Employment and Human Resources Planning

3.5.1 Initial Employees

The initial employees in any business set the tone for business operations. Typically, the initial employees are entrepreneurs or are experienced managers "seconded" by a parent company. Proper procedures for hiring, training, promotion, discipline and termination need to be in place for all employees, even from the start.

In either event, if they are not resident aliens or U.S. citizens, they will need work visas. If a local person is being hired, the company's owners should take into consideration the feasibility of obtaining a visa. Transfers of existing managers with at least a year's prior employment can facilitate visas and avoid complicated visa applications based on "treaty investor" or "treaty trader" requirements.

3.5.2 Limitations on Rule of Employment "At Will"

American labor law is based on the principle that either employer or employee can terminate the employment "at will" by simply giving notice of termination. There is no requirement of two weeks' notice, but such notice is customary for resigning employees.

The "at will" employment doctrine is limited by civil rights laws. Termination or discipline cannot be imposed for a reason that violates federal or state constitutions or federal or state employment laws. Wrongful termination of persons in "protected" classes can lead to civil rights litigation, in which the employer can be held liable for "back pay," "front pay" and attorneys' fees. Where the abuses are part of a pattern of employee misconduct, the employer may be subject to liability under "class action" litigation.

Classification of employees for civil rights protection includes a long list, for example:

- Age over 40 (Age Discrimination in Employment Act);
- Sex or sexual orientation;
- National origin;
- Race;
- Religion;
- Disability (such as a temporary disability like pregnancy) or handicapped status;
- Genetic composition;
- Military veteran status; or
- "Whistleblowers" who report certain types of illegal employer conduct (particularly civil rights violations and criminal activity) to competent governmental authorities.

Accordingly, new companies should take measures to limit exposure to unnecessary civil rights claims through training, procedures and other actions to avoid mistakes. All employee complaints should be investigated and appropriate remediation taken.

3.5.3 Whistleblower Rights: The Employee as Policeman

To help in enforcing the laws, American employment laws encourage employees to report to governmental authorities the violations of law that they observe on the job. Federal "whistleblower protection" rules exist for employees of manufacturers, private labelers, distributors, or retailers (15 USC 2087(a)), public companies (under the Sarbanes-Oxley Act of 2002), regulated financial services companies (Dodd-Frank Consumer Financial Protection Act), and any employer subject to ObamaCare. Certain state laws adopt a similar approach.

Employers cannot "discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee)" has engaged in protected activities.[1] As a matter of public policy, statutes provide that whistleblower protection rights are, in effect, inalienable civil rights that cannot be waived by contract.

An employee who proves wrongful discrimination under a whistleblower statute may obtain damages. The employee's burden is relatively light, only being required to show that the employer's illegal discriminatory action was "a contributing factor" in the unfavorable personnel action. The employer may defeat such whistleblower claims if it demonstrates by "clear and convincing evidence" that the employer would have taken the same unfavorable personnel action in the absence of that discriminatory behavior. 15 USC 2087(b)(2)(iii) and (iv).

Generally, the remedies are either administrative or judicial, and can include (A) reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

3.5.4 Notices to Employees; Employee Manuals

Each state and federal law mandates certain notices to employees. Such notices relate to minimum wage laws, civil rights, healthcare and other issues. Some states require certain notices required upon hiring and others annually. In New York, the employer must notify new employees and, in January each year, about hourly wage rates and overtime rates under the "Employee Wage Theft Protection Act," intended to ensure that "non-exempt" employees get 150 % of the normal pay rate for hours worked in excess of 40 hours per week under the federal Fair Labor Standards Act.

Employee manuals can be used to avoid claims of sexual harassment, a hostile work environment, wrongful termination and liability for violations of wage and hour laws. New employees should be given the employee manual and should acknowledge receipt in writing.

3.5.5 Compliance Requirements

Labor law compliance is less onerous in the United States than in many countries. Nonetheless, compliance procedures and programs should be a normal part of every new venture.

[1] For example, under ObamaCare, Section 18C(a), No employer may discharge or discriminate against an employee where the employee or his agent:

(1) received a credit under section 36B of the Internal Revenue Code of 1986 or a subsidy under section 1402 of this Act;
(2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title);\
(3) testified or is about to testify in a proceeding concerning such violation;
(4) assisted or participated, or is about to assist or participate, in such a proceeding; or
(5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).

ObamaCare may be repealed or replaced in 2017.

3.5.6 Termination Procedures

Termination of employment is subject to the rules governing the right of termination.

Upon termination, the employer is responsible to offer continuation of group medical and health insurance coverage for the terminated employee for a period of 18 months. However, the employee must pay the premiums. A proper notice is required.

Also the employer remains responsible for the administration of any pension or profit sharing plan.

Severance compensation is not required by law. However, many employers offer severance compensation in exchange for a general release of claims.

3.5.7 Post-Termination Restrictions

Post-termination restrictive covenants should be considered in employment and shareholder agreements. Such restrictions may relate to solicitation and hiring of employees, solicitation of customers and non-competition in a narrow industry segment. Public policy frowns upon restrictions that effectively prevent the former employer from finding employment or from using general skills and knowledge separate from particular trade secrets.

Most states permit an employer to enter into an agreement with an employee to prohibit the employee from competing with the employer after termination of employment. In general, common law principles require that the restrictions be reasonably related to the employer's business requirements and limited in duration and geography. In the Internet age, the requirement of a geographical restriction may be omitted upon proof that the business's operations are global.

Each state has different public policy.

- *California.* For example, California prohibits post-employment non-competition covenants unless they are given as part of the sale of the employee's shares in a business, since that involves protection of the goodwill of the enterprise being sold. California will nonetheless protect against a former employee's abuse of trade secrets or intellectual property or defamatory disparage the former employer's good name.

- *New York.* New York permits all such restrictive covenants but applies a rule of reason (as to duration, scope and territory), based on the employee's particular access to competitive information) to determine legal validity.

3.5.8 Incentive Compensation: Capitalism at Work

The federal tax code offers employers many ways to provide incentive compensation to employees. The core of American capitalism is the opportunity for employees to invest in their employer's securities. This discussion will consider only a few alternatives, with a focus on startups.

3.5.8.1 Qualifying Incentive Stock Options

The qualifying stock option plan is the most popular, particularly among "startups," and has generated enormous wealth in Silicon Valley and elsewhere. Under a "qualifying incentive stock option" plan, an employee can become owner of the employer's securities (usually common stock) without having to pay any tax on the receipt or exercise of a qualifying stock option, and income tax is paid only upon the sale of the resulting option shares. The tax is payable at the favorable "capital gains" tax rate, which is 15% to 20% (plus a 3.8% tax on high-income capital gains). Several rules must be followed:

- Such incentive stock options are valid only for employers taxable as a corporation. A limited liability company cannot qualify, unless it elects to be so taxable.
- The stock option plan must be adopted by the board and approved by the stockholders and is valid only for 10 years.

- The vesting of the legal right to exercise the options may be delayed for a period of up to 10 years from the date when the option is granted.
- The option price must be not less than the fair market value of the stock at the time when the option is granted.
- When the option is granted, the individual cannot own more than 10% of the total combined voting power of all classes of stock (unless the options are not exercisable for at least 5 years and the exercise price is at least 110% of the fair market value when granted).
- The individual must hold the shares for two years after the option grant and one year after the transfer to him or her of the option shares.
- The individual must be an employee when the option is granted and at least three months before the date when the option is exercised.
- The employer may impose other conditions on the option, if consistent with the tax law.

3.5.8.2 Non-qualifying Incentive Stock Grants

Incentive compensation in the form of stock grants can be used. Such grants can be used to tie down the valued employee for a period of years and defer taxation on the value of the stock so granted.

3.5.8.3 Property Received for Services

An individual (who need not be an employee) who receives property for services is taxable on the value of the property at the income tax rates applicable to services income, and when the property is sold, it is taxable at the same rate structure. This is very hostile to the grant of corporate stock options (or membership interest options for LLC's).

Exceptionally, the individual can convert the property from ordinary property to a capital asset by filing a tax election, within 30 days after the transfer of the property, to be taxed on the value of the property immediately. However, the magical conversion to capital asset does not occur without some risk. The individual must pay the tax on the full fair market value of the asset today, but must be at substantial risk of forfeiture for a significant time.

3.5.8.4 Performance-Based Compensation and "Golden Parachutes"

For publicly held corporations, compensation to the CEO and the next four top paid employees that exceeds $1.0 million per year is not deductible from corporate taxable income unless it is designed to be contingent upon financial criteria for achieving target performance. Privately held companies can choose to adopt a similar reward structure.

3.5.9 Federal Healthcare Law: "ObamaCare"

3.5.9.1 Overview

The 2010 federal Patient Protection and Affordable Care Act ("ObamaCare") requires every individual to be covered by some form of medical insurance. Its provisions become effective over the course of several years, up to 2018. By a 5-4 decision, the U.S. Supreme Court ruled in 2012 that the law is constitutional. As of January 2017, President-Elect Trump has vowed to repeal and replace it.

- *Individual Mandate.* To give individuals an incentive to obtain insurance, as of January 1, 2014, the law will impose on individuals (except for certain low-income individuals, members of Indian tribes, "hardship" cases, illegal aliens, religious objectors and incarcerated criminals) a duty to obtain medical coverage or pay a $2,000 tax.

- *Subsidy for Small Businesses.* To give employers an incentive to pay for medical coverage for employees, the healthcare law will allow "small businesses" (under 50 full-time employees) to obtain a two-year federal subsidy for health insurance premiums in the form of a tax credit to cover 50% of employee health care coverage expenses, but there is no assurance the premiums will fully offset the costs and the employer must have no more than 25 employees whose average annual compensation does not exceed $50,000.[1]

- *Employer Mandate; Penalty Taxes.* For employers with 50 or more full-time employees, the law will impose penalty taxes for not providing medical insurance coverage to its full-time employees. Such penalties are $2,000 per employee for each uninsured full-time employee (after the first 30 employees).

- *Large-Employer Mandate.* For large employers (with over 200 full-time employees), regulations will enforce mandatory employer-provided medical insurance coverage as of January 1, 2014.

To prevent subsidization of luxury coverage insurance plans for highly compensated employees, the law imposes a 40% excise tax on health insurance annual premiums in excess of $10,200 for an individual's coverage or $27,500 for a family's coverage.

3.5.9.2 Health Insurance Exchanges

The Affordable Care Act contemplates establishment of health insurance "exchanges" (including a "Small Business Health Options exchange) that will serve as marketplaces for affordable medical insurance policies. The law allows an employer to select a level of coverage to be made available to employees through an Exchange. It also allows employees to choose to enroll in any qualified health plan that offers that level of coverage. All employers must give written notices to their new employees of the availability of access to an Exchange.

3.5.9.3 Small Businesses under "ObamaCare"

Small businesses can escape the penalties by having 49 or fewer "full-time employees. The "full-time employee" means an employee who is employed on average at least 30 "hours of service" per week. This alone is not sufficient, since regulation will provide rules on how to determine "the hours of service" of an employee, including rules for employees who are not compensated on an hourly basis. As a result, small employers have forced employees to work part-time (less than 30 hours per week) and kept their size at below 50 employees.

Computing the number of "full-time employees" requires careful planning. The measuring periods can be either as of a particular date or as of a six-month period, or (in the case of Simple Cafeteria Plans as a new employee benefit plan for employers with fewer than 100 employees) a two year period.

Many small businesses have concluded that the "optimal" solution is to increase compensation to enable employees to pay for some form of health insurance on an Exchange or through private insurance.

3.5.9.4 Administration and Compliance.

All employers will need careful attention to the administration of reporting and compliance with these healthcare mandates. All employers must provide to current employees, and to each new employee at the time of hiring, a written notice about medical insurance. [2]

[1] Two years of tax credits will be offered to qualified small businesses. In order to receive the full benefit of a 50% premium subsidy, the small business must have an average payroll per full-time equivalent ("FTE") employee of no more than $25,000 and have no more than 10 FTEs. For the purposes of the calculation of FTEs, seasonal employees, and owners and their relations, are not considered. The subsidy is reduced by 3.35 percentage points per additional employee and 2 percentage points per additional $1,000 of average compensation. As an example, a 16 FTE firm with a $35,000 average salary would be entitled to a 10% premium subsidy.

[2] This notice must inform the employee of (1) the existence of an Exchange, including a description of the services provided by such Exchange, and the manner in which the employee may contact the Exchange to request assistance; (2) if the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs, that the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986 and a cost sharing reduction

3.5.9.5 How ObamaCare Promotes Independent Contracting, Outsourcing, Offshoring, Automation and e-Business

Small businesses with fewer than 50 full-time employees thus escape the complexity, administrative headaches and cost burdens of the ObamaCare health insurance law. As a result, entrepreneurial business owners are looking for ways to avoid hiring 50 or more full-time employees. For a growth business, that means outsourcing and automation of business processes through information technology and Internet-provided services. Innovators (foreign or domestic) who provide such outsourced or automated solutions should expect a welcome customer in the SMB markets.

Perversely, the healthcare law intended to ensure that all lawful U.S. residents obtain healthcare insurance incentivizes more entrepreneurship and less mandatory insurance coverage for small businesses and their employees. Outsourcing will grow in all areas of administrative support, such as human resources, finance, accounting, legal and regulatory compliance and real estate management.

3.5.10 Potential Abuses in "Independent Contractor" Relationships

Many businesses hire consultants, sales representatives and other "independent contractors" to support their business operations. The "independent" status of such persons will be increasingly scrutinized by regulators to avoid abuses by employers that seek to avoid such persons from being counted as full-time employees. Such perceived abuse include undercounting of "full-time employees" to avoid $2,000 per-employee penalties in lieu of offering a health insurance plan and undercounting to avoid becoming mandated to offer such a plan (businesses with more than 200 full-time employees).

Whether a person is an independent contactor or an employee is a question of fact under all relevant circumstances. The factors include the degree of control, the basis for payment for services and the existence of a business operation serving multiple clients. Since this distinction is critical to other employment laws, new ventures should understand the nature and risks of "hiring" "independent contractors."

3.5.11 Pensions

Employer-sponsored pensions are not legally required. However, if an employer offers a pension plan, it must comply with the non-discrimination, fiduciary duty, vesting, accounting and other requirements of the Employee Retirement Income Security Act (ERISA) of 1974.

3.6 Intellectual Property

3.6.1 Types of Intellectual Property

The United States is a party to many international conventions on intellectual property. These include the Paris Convention, the Madrid Convention, the Berne Convention and the World Trade Organization ("WTO") agreements on trade-related intellectual property rights.

3.6.1.1 Patents

U.S. patent law protect inventions of ideas that are novel, useful and not obvious to one who is skilled in the relevant technical "art." Key issues in patent protection are the identification of the inventors and filing of the application not later than a year after the invention is reduced to practice. Informal applications can precede a more complete application. Foreign applications based on the U.S. invention, or a U.S.

under section 1402 of the Patient Protection and Affordable Care Act if the employee purchases a qualified health plan through the Exchange; and (3) if the employee purchases a qualified health plan through the Exchange, the employee will lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

application based on a foreign invention, require compliance with the applicable statutory or convention for mutual patent recognition.

Under the 2011 America Invents Act, major changes were adopted to the procedures for patent applications, patent review and opposition proceedings. Effective March 16, 2013, priority is to be based on “first inventor to file,” not “first inventor to invent.” Patents that reflect information publicly available anywhere in the world may be invalid because of such “prior art.” Under new procedures, proceedings to oppose an application will be easier to commence.

3.6.1.2 Trademarks

Trademarks identify the origin of goods or services. Trademarks can only be registered if the mark is used in U.S. interstate or international commerce of the United States. A trademark can be applied for prior to actual use, but no registration can be granted prior to a certification of actual use in such commerce. New ventures should conduct appropriate trademark searches and file trademark applications at the earliest possible time. Once issued, a trademark is valid for 10 years but is subject to renewals.

Minor risks in US trademarks:

- In addition to a Federal trademark law, each state generally has its own local trademark law that can be used for local internal state business. So a search of federal trademarks will not disclose such state trademarks.
- Registration of a trademark also depends on whether the applicant is the first user. If someone else has been using the mark in interstate or international commerce of the US, the mark cannot be registered by the applicant. So you might wish to check URL’s and Online usage of the same word.

3.6.1.3 Copyrights

U.S. adherence to the Berne Convention in 1988 came with some unique twists. Copyright in a work of authorship is valid and subsisting from the time of creation of the work. However, unless the work is registered with the Library of Congress, the copyright holder can not obtain statutory damages or actual damages for infringement by a third party. Instead, the copyright holder’s right is limited to suing for a court order enjoining any further infringement. It is therefore vital to register copyrights.

Software developers have certain challenges and possible benefits:

- *Copyright Registration without Loss of Trade Secret.* Registration of copyrights comes at the price of disclosure of the work’s contents. In the case of software, copyright owners can limit the risk of disclosing trade secrets by conforming to special rules relating to the deposit of copies of the source code and object code and the number of pages of code. In special situations, the author (or the author’s employer) may file a copyright registration without disclosing the trade secrets of a software or other confidential technology. Such procedures are relatively simple but require careful attention to details.

- *Patenting.* Copyright for software (including “Software as a Service”) became more important in the U.S. while patenting became more difficult as of March 16, 2013, when the “first to file” rule of priority and the broadened definition of “prior art” under America Invents Act of 2011 (AIA) went into effect. The AIA raised the threshold for determining whether software is patentable. As a result patent protection is expected to become more difficult to obtain, leaving copyright as a meaningful protection.

3.6.1.4 Trade Secrets

Trade secrets are a right created by common law to enable the “owner” to sue an infringer to enjoin infringement and to seek damages. There is no requirement of registration. Rather, the venture must ensure that it takes reasonable steps to preserve the secrecy of the information. Again, employee manuals and agreements with employees and third parties are useful to protect such IP rights.

3.6.2 Sources of Intellectual Property

3.6.2.1 Employees

Every employee is a potential source of new product design. New businesses need to ensure that employee-developed inventions are owned by the enterprise and communicated to management for evaluation, development and commercial exploitation.

3.6.2.2 Third Party Licensors

Every enterprise licenses intellectual property from third parties. Conditions of licensing should reflect the enterprise's life cycle in the usage and enjoyment of benefits. Licensing should be structured to allow the enterprise to develop its own IPR free of infringement claims by third parties, unless the enterprise is copying such third-party IPR.

3.6.2.3 Corporate Acquisition

Mergers and acquisitions offer opportunities and risks in IPR. Acquirers need to consider whether the target company infringes the rights of third party IPR.

3.6.2.4 IP Acquisition

Occasionally companies purchase intellectual property rights separate from acquiring the developer of such rights. This is common for large software companies extending their product line. Payment may be in cash or shares.

3.6.3 Life Cycle Management of IP Rights

IP rights management is an essential business function for every venture. Developing, acquiring and managing intellectual property rights require an ongoing maintenance program.

- *Training and Follow-Up.* Procedures must be adopted and followed. Employees must be trained in R&D program methodology covering all forms of intellectual property. Employees need to see sample forms of "record of invention" and be required to document and deliver to management all new ideas and innovations susceptible of being patented Periodic reviews are useful.

- *Provisional and Definitive Applications.* Management should oversee a program of filing provisional patent applications as early as possible, to be followed by the definitive applications within 12 months thereafter.

- *Ongoing Analysis.* Appropriate due diligence and analysis of licensing and IP rights will help manage the risks and create future flexibility for change management and termination or restructuring.

3.7 Information Technology and Telecom Management

3.7.1 Enterprise Resource Planning: In-house vs. Outsourcing

Outsourcing of back-office operations permits a new business to devote its resources to value creation in its niche. Outsourcing services can be purchased for virtually any type of business process, from product development and design to information technology administration, software development, human resources administration, finance and accounting, warehousing and logistics and various forms of legal compliance. For details on outsourcing law, please ask for our "Introduction to Outsourcing and Offshoring" pamphlet or consult our website.

3.8 Privacy and Data Protection

Data protection and personal privacy in the U.S. reflects the disjointed, multifarious jurisdictional competencies under a federal constitution. This results in overlapping and confusing rules and an ad hoc, context-specific regulatory approach by state and federal governmental agencies. Further, it is evolving rapidly as federal and state governments target abuses and try to adapt to the European Union's leadership in privacy protection.

3.8.1 "Deceptive Trade Practices"

Federal law does not regulate privacy generally, but there are common law rights, civil rights laws and "unfair and deceptive practices" rules. The Federal Trade Commission has adopted de facto principles for consumer protection in privacy, personal identity theft and data security. The FTC warns consumers to require that Internet devices provide encryption, strong passwords and security updates to the application.

3.8.2 Internet of Things

The Internet of Things ("IoT") will innovate in legal liability, not merely in connectivity and services. Drones are regulated. Likewise, home security cameras and other sensors are regulated under common law and administrative enforcement.

To protect consumers, in January 2017 the FTC ordered one IoT device seller to stop falsely advertising that the devices were "easy to secure" and part of an "advanced security network." The FTC noted that the company (a U.S. sales company for a foreign manufacturer) failed to take steps to address well-known and easily preventable security flaws, such as:

- "hard-coded" login credentials integrated into company's camera software -- such as the username "guest" and the password "guest" -- that could allow unauthorized access to the cameras' live feed;
- a software flaw known as "command injection" that could enable remote attackers to take control of consumers' routers by sending them unauthorized commands over the Internet;
- the mishandling of a private key code used to sign into company's software, such that it was openly available on a public website for six months; and
- leaving users' login credentials for the company's mobile application unsecured in clear, readable text on their mobile devices, even though there is free software available to secure the information.

3.8.1 Identity Theft and Security Breach Notification Acts

The regulation of privacy is shared by both federal and state governments. Started by California, the states have adopted "security breach notification" laws that are generally identical. Under such laws generally, if a custodian of personal identifiable information ("PII") suffers the unauthorized access to the PII of at least 5,000 individuals residing in a state, the custodian must notify the affected individuals, state government officials and the press. As a remedy, the custodian generally must take action to assist the affected individuals in obtaining new credit and in recreating new bank and credit accounts to prevent identity theft.

Identity theft occurs regularly, leaving banks and credit card companies with heavy losses each year. For this reason, merchants must devote considerable resources to privacy protection. The security breach notification laws target large companies with, for example, 250,000 customers nationwide (i.e., 5,000 customers for each of 50 states). In practice, every information technology contract needs to address compliance issues under privacy laws.

3.8.2 Child Online Pornography Protection Act

Children under 13 are protected from online pornography.

3.8.3 Privacy Policies

Anyone managing a U.S. business should consider some key principles for a privacy policy. Failure to adopt them could result in enforcement by the FTC.

- If you adopt a privacy policy, follow it. Failure to do so is an unfair trade practice.
- Among other things, special statutory legal regimes apply to:

  - Information on medical records, health insurance, and financial transactions involving healthcare;
  - Accounts maintained by banks, broker-dealers and insurance companies;
  - Employment records;
  - Tax information; and
  - “Technical data” that can be used for military or national security applications.
- If you lose or suffer a breach of personally identifiable data, you may be required to disclose and publicize security breaches to state and federal authorities and invest in remedial actions.
- You should limit the types of data you collect and store.
- You should adopt a life-cycle approach to data management.

Commercial contracts and corporate policies should address data security and privacy issues.

3.8.4 Cybersecurity: Critical Infrastructures, Cloud Computing, BYOD, etc.

The Homeland Security Act establishes the right of the government to investigate and protect against threats to “critical infrastructure” such as government agencies, private companies doing business for or with the government, electricity grids, transportation facilities and the banking system.

Cybersecurity is an emerging concern for all enterprises. The federal government has adopted a program to audit and certify cloud computing services provided by its contractors and subcontractors. “Bring your own device” (“BYOD”) security issues require enterprises to identify and adopt policies (technical, physical, legal and administrative) for managing and mitigating cybersecurity risks.

3.8.5 Document Retention and Destruction; E-Discovery

Federal and state court rules mandate that litigants disclose confidential information to each other before a trial so that the courts can decide on disputed facts, not on uncontroverted facts. The explosion of data has led to careful attention to document retention policies that permit data destruction unless litigation is pending or threatened. Any new business should develop appropriate policies for data life-cycle management, “litigation holds” (to preserve litigation-related data from “spoliation” or inadvertent destruction), confidentiality and other controls.

3.8.6 Cross-Border Transactions with EU, Swiss and Canadian Individuals

American companies doing business globally must comply with foreign laws, subject to applicable rules on jurisdiction and conflicts of law.

3.8.6.1 EU, Swiss and Canadian Laws on Personal Information

American privacy law does not provide “adequate protection” of privacy of personally identifiable information (“PII”) under the European Union’s directives and regulations or under Canada’s PIPEDA law. Effective 25 May 2018, the existing EU Data Protection Directive of 1995 will be replaced by the EU General Regulation on Data Protection (“GRDP”) (Reg. 2016/879 adopted 27 April 2016). The GRDP contains penalties of up to 4% of global revenues for breach.

“Personal Data.” According to the European Commission "personal data is any information relating to an individual, whether it relates to his or her private, professional or public life. It can be anything from a name, a photo, an email address, bank details, posts on social networking websites, medical information, or a computer’s IP address."

Jurisdiction of EU over US Companies. The EU GRDP extends the scope of the EU data protection law to all foreign companies processing data of EU residents. The EU GDPR regulation applies if (i) the data controller or processor (organization) or the data subject (person) is based in the EU and (ii) if organizations based outside the European Union process personal data of EU residents.

Rights Granted to EU Citizens. The new GRDP grants to EU citizens as data subjects the rights to (i) question and contest any automated individual decision-making, including profiling and other purely algorithmic decisions, that affect them, (ii) require "erasure" of their PII, and (iii) obtain "portability" of their PII from one data system to another.

Compliance Requirements. The GRDP specifies how companies must operate their data processing of EU personal data. Data protection must be designed by default into the development of business processes for products and services. Privacy settings must be set at a high level by default. For businesses that engage in regular and systematic monitoring of 5,000 EU citizens per 12 month period, management should appoint a "data protection officer," a person with expert knowledge of data protection law and practices, to assist the controller or processor to monitor internal compliance with this Regulation. The DPO provides both compliance functions and technology management services for IT processes, data security (including dealing with cyber-attacks) and other critical business continuity issues relating to holding and processing personal and sensitive data. Opt-in consents are required, and may be withdrawn. Children are protected specially.

Risk Management. Data Protection Impact Assessments (Article 35) have to be conducted when specific risks occur to the rights and freedoms of data subjects. Risk assessment and mitigation is required and a prior approval of the Data Protection Authorities (DPA) for high risks.

Breach Notification. Under the GDPR, the independent Data Protection Officer (DPO) will be under a legal obligation to notify the governing national Supervisory Authority without undue delay. Affected EU individuals must be notified if adverse impact is determined.

Choices for U.S. Companies. U.S. companies that are affiliated with EU companies have three basic choices: (i) plan to self-certify under the U.S.-EU (and U.S.-Swiss) Privacy Shield frameworks, or (ii) establish U.S. data centers and segregate data processing facilities to avoid receiving EU personal data, or (iii) use EU data only if encrypted with no decryption code in the U.S. If there is no use of personal data of EU citizens, then the U.S. business is not covered by this Regulation.

3.8.6.2 Self-Certification to EU and Swiss Privacy Shields

Following a 15-year period of voluntary compliance by U.S. companies with the 1995 directive, in 2016 the U.S. and the EU signed an agreement for the "Privacy Shield" "framework" to replace a poorly enforced 2001 intergovernmental "safe harbor" agreement. U.S. companies that collect or process data from European nationals may elect to have the U.S. government enforce the E.U. GRDP.

The EU-U.S. and Swiss-U.S. Privacy Shield Frameworks were designed by the U.S. Department of Commerce and the European Commission and Swiss Administration to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union and Switzerland to the United States in support of transatlantic commerce.

On July 12, 2016, the European Commission deemed the EU-U.S. Privacy Shield Framework adequate to enable data transfers under EU law. On January 12, 2017, the Swiss Government announced the approval of the Swiss-U.S. Privacy Shield Framework as a valid legal mechanism to comply with Swiss requirements when transferring personal data from Switzerland to the United States.

The Privacy Shield program, which is administered by the International Trade Administration (ITA) within the U.S. Department of Commerce, enables U.S.-based organizations to join one or both of the Privacy Shield Frameworks in order to benefit from the "adequate protection" determinations. To join either Privacy Shield Framework, a U.S.-based organization will be required to self-certify to the Department of Commerce and publicly commit to comply with the Framework's requirements. While joining is voluntary, once an eligible organization makes such public commitment, the commitment will become enforceable under U.S. law.

When a participant's privacy policy is available online, it must include a link to the Department of Commerce's Privacy Shield website and a link to the website or complaint submission form of the independent recourse mechanisms that is available to investigate individual complaints. A participant must inform individuals of their rights to access their personal data, the requirement to disclose personal information in response to lawful request by public authorities, which enforcement authority has jurisdiction over the organization's compliance with the Framework, and the organization's liability in cases of "onward transfer" of data from the authorized data process to third parties unknown to the data subject.

3.9 Insurance

Some form of insurance is mandatory for all businesses. Other insurance may be purchased to mitigate emerging risks that cannot be shifted or mitigated under commercial contracts.

Employment laws mandate an employer's purchase of insurance to cover bodily injury to employees injured on the job. Costs of worker's compensation insurance are based on actual losses.

Commercial contracts may mandate an enterprise to purchase insurance for general liability, automobile accidents and other losses.

New insurance products are becoming available to support risk management in the extended enterprise, particularly for failures in the supply chain. Insurance is essential to ensure indemnification in case the service provider falls to deliver the services and cannot "make whole" the losses caused by such failure. Insurance can also be used to cover risks that are not allocable under the contract, such as force majeure, supply chain failures and "cyber-risks" such as hacking and identity theft.

3.10 Consumer Protection

3.10.1 Complex Legal Structure

A complex web of consumer protection laws and the common law principles of "tort law" (civil responsibility) impose substantial risks on providers of goods and services to American consumers. These laws are enforced by the federal Consumer Products Safety Commission, Federal Trade Commission (which adopts consumer protection regulations), Federal Food & Drug Administration, Federal Department of Justice, other federal agencies and state Attorneys General and agencies. Manufacturers and sellers of goods to U.S. consumers risk general common law liability for putting into the stream of commerce products that are inherently dangerous, or have concealed defects and dangers, or that were defectively designed or defectively manufactured, or falsely advertised as "safe" or falsely labeled.

3.10.2 Consumer Product Warranties

If the seller makes any written warranties to a consumer purchaser for consumer products (such as automobiles, bicycles, computers and gadgets), the warranty must comply with federal law. The written warranty must fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Disclosures must identify whom and when to contact, how to make a warranty claim, and legal remedies for asserting rights.

3.10.3 "Class Action" Litigation

Where a large number of consumers suffer similar damages from the same product, the manufacturer and seller can become defendants in a "class action" that may result in damages awarded to the class of consumers. Class action litigation occurs frequently in claims involving securities frauds. Defendants typically include the members of the board of directors and the responsible officers alleged to have neglected their legal obligations.

3.10.4 Tort Law

Negligence principles may render any business liable for personal injury and property damage where the business neglected to act in a prudent business manner. A court may impose punitive damages for gross negligence as a means of punishing reckless behavior. Under a Supreme Court decision, punitive damages may not be more than 9 times actual damages.

Under the principle of negligence, the seller is liable for failure to use reasonable prudence and care in putting the product or services into the stream of U.S. commerce, where damages occur due to such failure. Under the principle of gross negligence, the seller is liable for damages if it does not care about the existence of prudent standards of care, and the damage occurs.

Certain products require compliance with technical standards. Consumer electrical products must be certified by the Underwriters Laboratories. The Federal Drug Administration regulates cosmetics, pharmaceuticals and medical devices.

Tort law applies three core concepts: defective design, defective manufacture and failure to warn of a non-obvious defect. Each concept is defined according to judicial precedent under common law in the state where the injured party chooses to sue.

These tort principles apply to any supplier in the supply chain of goods or services that cause damages in the United States. Consequently, foreign manufacturers are subject to the jurisdiction of U.S. courts under "long arm" statutes so long as they knew or should have known that the products were destined for delivery to or use in the United States. As a result, all sellers should obtain comprehensive liability insurance to cover [tortious] "acts and omissions" relating to their business.

These risks are normally managed by a number of practical solutions:

- Identification of compliance mandates and adoption of internal and external processes, procedures, training, monitoring and continuous process improvement.
- Incorporation of a U.S. sales subsidiary (but this does not completely insulate the manufacturers or indeed the individual managers responsible for torts.
- Insurance.
- Adoption of quality inspection procedures and enforcement of such procedures through the supply chain of manufacturers of components and assembled products, with flow-down indemnification and insurance provisions.
- Warnings to consumers.
- Terms and conditions of sale that include limitations of liability and disclaimers of warranties.
- Product recall and return policies to handle dissatisfied customers.
- Internet blog reviewing and public relations responses about customer complaints.

3.11 Selling to U.S. Publicly Traded Companies

3.11.1 Supply Chain Management: Business Continuity / Disaster Recovery

Events of force majeure are predictable in business. The Uniform Commercial Code (a uniform law adopted by the 50 states that covers goods but not services) requires suppliers to allocate goods to all customers when a supplier is impeded by an event of force majeure. For both goods and services, as a securities law regulating public companies, the Sarbanes-Oxley Act of 2002 ("SOX") and implementing SEC regulations require public companies to disclose to shareholders the major risks that occur in their supply chains. As a result, before being considered as an eligible vendor, suppliers to U.S. public companies need to disclose confidentially their business continuity and disaster recovery plans. Such plans should define how the supplier, and remote suppliers in its own supply chain, will be able to perform their contractual obligations under various extreme risk scenarios.

Given the risk management required under the EU General Regulation on Data Protection, business continuity planning and disaster recovery planning for global businesses have become the norm.

3.11.2 Small Business Dependent on a Single Big Business Customer

When a publicly traded company buys goods or services from a supplier that is financially dependent on the public company's business, the supplier's dependency becomes a liability for the enterprise customer that would normally require public disclosure to shareholders. As a result, under SOX, U.S. public companies may decide at the last minute that the supplier is unqualified even though it has all the necessary qualifications. While regulations under SOX are not specific, as a rule of thumb, your customer's auditor might find there is a disqualifying financial dependency if your supplier receives about 40% to 60% of its revenues from that public company customer.

3.12 Credit Risk Management

3.12.1 Non-Payment for Services

Service providers have no effective legal remedy for a client's non-payment unless the services involve some form of transfer of intellectual property in the work product delivered. Service contracts may be structured to protect collection rights in case of non-payment or dispute relating to the services.

3.12.2 Non-Payment for Goods

Sellers of goods on credit terms have no right to "retention of title" as security for payment under U.S. states' "Uniform Commercial Code" ("UCC"). Instead, a statutory "security interest" is in lieu of retention of title until paid. The UCC does not apply once the goods are delivered outside the U.S. However, it is important to keep this text for U.S. customers. This "security interest" does not exist unless a form UCC-1 financing statement is signed by or for the customer and is recorded with the relevant state official of the U.S. state to which the Product is shipped. (If the Product is moved out of a state, a new UCC-1 must be filed in the new State of location to notify creditors of the purchaser of the retained security interest).

For sales from a U.S. seller to a foreign buyer, the only retention of ownership available appears to be a consignment sale as to which the foreign buyer does not take title (or assume risk of loss) until a sale by the consignee to a third party. For such sales, any "security" provisions would likely be governed by the law of the buyer's jurisdiction.

4. Special International Issues for Foreign Owners

4.1 Disclosure and Reporting of Foreign Ownership

Various federal and state laws require disclosure of foreign investment, control and communications with U.S. persons.

4.1.1 Statistical Reporting for Economic Analysis

The federal Bureau of Economic Analysis, a branch of the Department of Commerce, requires foreign-owned companies to provide ownership and operating information for statistical purposes. The confidential disclosures are done on forms BE-12 and BE-13. See www.bea.gov.

4.1.2 U.S. Tax Reporting

The Internal Revenue Service requires the filing of forms disclosing ownership by Americans in foreign enterprises (and bank accounts in excess of $10,000) and ownership by foreigners of U.S. enterprises. See IRS Form 5471 (U.S. ownership of foreign corporations) and form 5472 (foreign direct or indirect ownership of 25% or more of a U.S. business). www.irs.gov

The tax reporting forms permit easier audit of intercompany transactions among affiliates. Form 5472 contains information regarding financial and non-financial transactions with foreign corporations, such as asset information, monetary transactions; intercompany sales; sales of inventory; rents; royalties; license royalties and sale prices involving intellectual property; payments for technology; managerial services; engineering; construction, scientific or similar services; interest payments and insurance premiums. Transactions that are non-monetary and for less than full consideration must also be reported.

A separate Form 5472 must be filed for each foreign or domestic related party with which the tax reporting corporation had a transaction during the tax year. The reporting corporation must maintain "permanent" books of account or other records required by law.

4.1.3 “National Security” Reporting of Foreign Ownership or Control: CFIUS

Under the Exon-Florio amendment to another law, foreign acquisitions of control of operations that affect “national security” are subject to prior inter-agency review by the “Committee on Foreign Investment in the United States.” There is no deadline for obtaining such a review, but failure to obtain such a review could jeopardize the business operation and impose civil liabilities. This process has applied to reject investments by a Chinese oil company in a U.S. oil company and a Dubai-controlled English company seeking to acquire control of U.S. company engaged in administration services for safety and security of U.S. harbors and ports. Before making an acquisition in the United States, foreign investors should consult with an attorney on whether to obtain agency review.

4.1.4 Clandestine Investigations for U.S. National Security

The USA PATRIOT Act and the Homeland Security Act, as amended, allow the federal government to conduct spying on international terrorism and other security threats. Under FISA legislation, judicial review is limited and may be confidential. Ordinary business communications, including communications that are normally entitled to attorney-client privilege and confidential communications under non-disclosure agreements, are subject to governmental wiretapping.

4.2 Nationality and Residence of Directors and Officers of U.S. Businesses

Most U.S. state laws permit non-resident aliens to be owners, directors, officers and managers of U.S. corporations and U.S. LLC’s for non-regulated commercial transactions. Under federal law, certain industries, such as airlines and railroads and “national security” industries (government contractors) require U.S. control. In such cases, a foreign company owning a U.S. business must grant authority to a U.S. individual to make decisions and comply with U.S. national security concerns.

4.3 Business Visas for Foreign Owners and Managers

Non-Immigrant Visas. U.S. businesses enjoy several choices for temporary visas (for a period under six years) to permit key foreign citizens to live and work for them under::

• L-1	“intra-company transferee,” whether as managerial or executive employee (L-1A) or an employee with specialized knowledge (L-1B)
• H1-B	alien with specialized occupation
• E-1/E-2	treaty trader/ treaty investor
• J-1	trainee for 18 months
• O	Persons with extraordinary ability in sciences, arts, education, business, or athletics and motion picture or TV production.
• B-2	business visitor (working only for foreign enterprise)
• Visa waiver	90 days to conduct business for a foreign employer.

With the advent of Trump's administration, several legislature proposals have been proposed and re-introduced in the House and Senate to reform abuses in the H1-B visa and L-1 visa programs. Some elements of these proposals would not allow the displacement of U.S. workers by these visa holders, raise the prevailing wages paid for foreign workers and replace the current lottery system. One proposal also sets aside 20% of the annual allocation of H-1B visas for small and start-up employers (those with 50 or fewer employees).

Entrepreneur Visa Waiver. Three days before the inauguration of President Trump, in January 2017, the USCIS approved a new form of “visa waiver” for foreign entrepreneurs that would be equivalent to a 30 month non-immigrant visa renewable for up to a total duration of five years. This final regulation will be effective July 17, 2017. Stringent requirements must be met by applicants and approvals are on a discretionary basis by the USCIS. See our blog, bierceonbusiness, for more information.

Immigrant Visas. About 140,000 employment-based visas are granted each year: For some visa categories, before the U.S. employer can submit an immigration petition to USCIS, the employer must obtain an approved labor certification ("LCA") from the U.S. Department of Labor (DOL) that verifies (i) there are insufficient available, qualified, and willing U.S. workers to fill the position being offered at the prevailing wage, and (ii) hiring a foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

- EB-1 Persons of extraordinary ability in the sciences, arts, education, business, or athletics; outstanding professors or researchers; and multinational executives and managers.

- EB-2 Persons who are members of the professions holding advanced degrees or for persons with exceptional ability in the arts, sciences, or business. LCA required (unless waived in "national interest").

- EB-3 Professionals, skilled workers, and other workers. LCA required.

- EB-4 "Special immigrants," which includes certain religious workers, employees of U.S. foreign service posts, retired employees of international organizations, alien minors who are wards of courts in the United States, and other classes of aliens. LCA not required.

- EB-5 Business investors who invest $1 million or $500,000 (if the investment is made in a targeted employment area or TEA) in a new commercial enterprise that employs at least 10 full-time U.S. workers. LCA not required.

For 2017, a recent proposed Rule by the Department of Homeland Security may amend the EB-5 program in areas in need of reform. It seeks to raise the $1 million to $1.8 million and $500,000 to $1.35 million in a TEA (in line with inflation) among other changes.

Obtaining visas requires careful planning and procurement of educational and official records. Some visas, such as L-1's from India, involve significant administrative delays.

4.3.1 Intra-Company Transferee (L-1)

4.3.1.1 Manager or Executive (L-1A)

The L-1A nonimmigrant classification enables a U.S. employer to transfer an executive or manager from one of its affiliated foreign offices to one of its offices in the United States. This classification also enables a foreign company which does not yet have an affiliated U.S. office to send an executive or manager to the United States with the purpose of establishing one. The employer must file the application.

4.3.1.2 Specialized Knowledge (L-1B)

The L-1B nonimmigrant classification enables a U.S. employer to transfer a professional employee with specialized knowledge relating to the organization's interests from one of its affiliated foreign offices to one of its offices in the United States. This classification also enables a foreign company which does not yet have an affiliated U.S. office to send a specialized knowledge employee to the United States to help establish one.

4.3.1.3 General Requirements for Intra-Company Transferees

The L-1 visa has requirements applicable to the employer and the employee. The U.S. employer must:

- Have a qualifying relationship with a foreign company (parent company, branch, subsidiary, or affiliate, collectively referred to as *qualifying organizations*); and

- Currently be, or will be, *doing business* as an employer in the United States and in at least one other country directly or through a qualifying organization for the duration of the beneficiary's stay in the United States as an L-1. While the business must be viable, there is no requirement that it be engaged in international trade.

"Doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

Where the foreign national employee will be stationed primarily at the worksite of an employer *other than* the petitioning employer or its affiliate, subsidiary, or parent, the petitioning employer must show that:

- The employee will not be principally controlled or supervised by such an unaffiliated employer; and
- The work being provided by the employee is not considered to be labor for hire by such an unaffiliated employer.

To qualify, the named employee must also:

- Generally have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding his or her admission to the United States; and
- Be seeking to enter the United States to provide service in an executive or managerial capacity for a branch of the same employer or one of its qualifying organizations.

"Executive capacity" generally refers to the employee's ability to make decisions of wide latitude without much oversight.

"Managerial capacity" generally refers to the ability of the employee to supervise and control the work of professional employees and to manage the organization, or a department, subdivision, function, or component of the organization. It may also refer to the employee's ability to manage an essential function of the organization at a high level, without direct supervision of others.

4.3.2 Treaty Investors (E-2)

To qualify for E-2 classification, the treaty investor must:

- Be a national of a country with which the United States maintains a treaty of commerce and navigation
- Have invested, or be actively in the process of investing, a substantial amount of capital in a bona fide enterprise in the United States
- Be seeking to enter the United States solely to develop and direct the investment enterprise. This is established by showing at least 50% ownership of the enterprise or possession of operational control through a managerial position or other corporate device.

An *investment* is the treaty investor's placing of capital, including funds and/or other assets, at risk in the commercial sense with the objective of generating a profit. The capital must be subject to partial or total loss if the investment fails. The treaty investor must show that the funds have not been obtained, directly or indirectly, from criminal activity.

4.3.3 Specialty Occupation (H1-B)

An H1-B visa is available to people who wish to perform services in a specialty occupation, services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project, or services as a fashion model of distinguished merit or ability. The job description must require a university bachelor's degree or more advanced degree. The applicant must show that such a degree or its equivalent is normally the minimum entry requirement for the position, or is common to the industry, or the job is so complex or unique that it can be performed only by an individual with a degree. Or the applicant may show that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree.

There is an annual limitation of 65,000 such visas per fiscal year, with an additional 20,000 annual limitation for others who have advanced degrees. The maximum stay on an H1-B is six years.

President Trump has expressed a desire to limit H1-B visas due to alleged abuses by foreign-based outsourcing service providers. In contrast, the technology industry is fighting to expand H1-Bs,

4.3.4 Extraordinary Ability (O)

O-1 visas are available for up to three years (extendible for periods of up to a year each) based on demonstrated extraordinary ability by sustained national or international acclaim and must be coming temporarily to the United States to continue work in the area of extraordinary ability. An O-1A is for all such individuals, except that an O-1B visa is available for those in the arts, motion pictures or television industry.

Extraordinary ability in the fields of science, education, business or athletics means a level of expertise indicating that the person is one of the small percentage who has risen to the very top of the field of endeavor.

Extraordinary ability in the field of arts means distinction, i.e., a high level of achievement in the field of the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

To qualify for an O-1 visa in the motion picture or television industry, the beneficiary must demonstrate extraordinary achievement evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent the person is recognized as outstanding, notable or leading in the motion picture and/or television field.

Support staff may obtain an O-2 visa. The O-2 is for a worker has critical skills and experience with the O-1 that cannot be readily performed by a U.S. worker and which are essential to the successful performance of the O-1

4.3.5 Short-Term Visits (B-1/B2)

For a short initial period, under a B-1 or B-2 visa, a member of the board of directors or an officer of the U.S. company may visit to train American employees or to assist in market surveys. Such visas do not permit receipt of any salary or other compensation from the U.S. enterprise for services. This rule does not prevent payments to such person for the performance for services on behalf of the U.S. corporation done outside the United States (such as an international space) or an intercompany payment by the U.S. company to a foreign company, which then pays the foreign individual, for services by the foreign affiliate.

4.3.6 "Lawful Permanent Resident"

Long-term residency in the U.S. (over six years) involves immigration rules on lawful permanent residency. A key potential barrier to foreign citizen residency based on employment is the requirement of "labor condition certification," so that no American citizens or lawful permanent residents can fill the proposed immigrant's job.

4.3.1 EB-5 Permanent Resident

The EB-5 visa provides a conditional "Green Card" (permanent resident status) as an "EB-5 Immigrant Investor." The Green Card is revocable if the conditions are not continuously satisfied in two years. This visa comes under a USCIS administered Immigrant Investor Program, also known as "Employment Based visa- 5." This program was created to stimulate the U.S. economy through job creation and capital investment by foreign investors, and some visas are targeted for economic areas needing jobs.

- *New Enterprise.* All EB-5 investors must invest in a "new [for-profit] commercial enterprise," This can be either entirely new or a restructured or reorganized existing (pre-Nov. 29, 1990) existing business. This can be structured as one company or multiple companies under a holding company.
- *Job Creation.* An EB-5 investor must create or preserve at least 10 full-time jobs for qualifying U.S. workers within two years (or under certain circumstances, within a reasonable time after the two-year period) of the immigrant investor's admission to the United States as a Conditional Permanent Resident.
- *Capital Investment Requirements.* The EB-5 investor must invest either $1.0 million in the "new" US business, but the minimum is only $500,000 for investments within a high-unemployment area or a rural area of the U.S. Capital means cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. [Proposed Rule on January13, 2017 may amend these amounts and program elements]

4.3.2 Immigration Law Reforms

Immigration law reform has been pending for several years. According to Bloomberg news, who is in receipt of a copy of a draft of an executive order on immigration reform by President Trump, the order covers select visa programs, including H-1B, L-1, E-2 and B1.

4.4 Customs Laws

4.4.1 Importation

The importation of foreign goods requires appointment of a U.S. customs broker to assist in the formalities of customs clearance, declarations and proper classification of the goods. To facilitate experimental market entry and enable foreign re-sale of imported goods that fail to sell in the U.S., 99% of U.S. customs duties may be refunded, under "drawback," upon re-export within one year. Countervailing duties may be imposed against goods that enjoy foreign subsidies. Anti-dumping duties may be imposed to prevent the sale in the U.S. of foreign goods at "less than fair value."

Non-discriminatory access to U.S. markets based on "national treatment" is guaranteed under free trade agreements ("FTA's"), including the Uruguay Round multilateral agreements. However, customs laws and FTA's may be modified under the Trump administration to impose some form of political retaliation for foreign governments that discriminate against American goods and services, that disregard trade secrets and intellectual property or that force local partners to participate in new American ventures abroad. In addition, President Trump has proposed a "border adjustment" tax on imports which would not be imposed on exports.

4.4.2 Exportation

Exports of goods and "technical data" are regulated under the Export Administration Act, to prevent loss of government secrets and protect against proliferation of certain weapons. An export can occur by merely disclosing technical data to a foreign citizen who is visiting the U.S. Exporters should become familiar with the various agencies and their different roles.

4.5 Extraterritorial Application of U.S. Laws

4.5.1 Foreign Activities

Foreign investors and foreign business executives need to understand that U.S. laws on unfair competition extends to foreign activities that have a direct impact in U.S. markets.

- This is a more general application of the principle of "long-arm" jurisdiction where U.S. courts have statutory jurisdiction over events outside their borders that cause injuries inside their borders.

- The Foreign Corrupt Practices Act prohibits U.S. businesses from corruptly bribing foreign governmental officials.

- U.S. entities may not participate in secondary boycotts of Israel.

- Under the Export Administration Act and the U.S. International Trade in Arms Regulations, U.S companies exporting U.S.-origin "technical data" must obtain export licenses if there is no generally applicable export license. An "export" is defined as a disclosure to a foreign person, even if that person is lawfully in the United States.

4.5.2 Code of Conduct

Accordingly, U.S. companies and their foreign affiliates should adopt a "code of conduct" for governance, risk management and compliance ("GRC") with U.S. laws, regardless whether they are local or extraterritorial.

5. Tax Planning Issues for Foreign Owners

5.1 Foreign Taxation

Income tax planning for foreign owners depends on tax treaties and business planning. Ownership structures for tax planning can be is either simple or complicated.

- In simple structures, establishment of a U.S. juridical entity serves to focus U.S. taxation on the U.S. operations conducted by the U.S. entity, and helps maintain foreign assets free of most claims by U.S. parties.

- In complex structures, specialized companies in a global enterprise group can be engaging in intercompany transactions such as corporate finance, technology and trademark licensing, shared administrative services such as accounting, billing, collections, purchasing and human resources administration. All intercompany transactions are subject to tax audit in all countries involved.

5.2 U.S Income Taxation on the Entity

5.2.1 Federal Income Taxes

The Internal Revenue Code of 1986, as amended (the "Code") defines the rules governing business taxation. Under the Code, U.S. taxpayers (U.S. citizens, U.S. resident aliens, some non-resident aliens depending on the duration of their stays in the U.S., and businesses) are taxed on their worldwide income from all sources. This rule can be avoided by limiting U.S. business income to U.S. business operations, with transactions with affiliated companies being subject to intercompany transfer pricing rules and other "anti-avoidance" rules such as those governing "controlled foreign corporations," "personal holding companies" and "foreign personal investment companies."

The Code adopts two measures of taxable income: regular and "alternative minimum tax taxable income." The AMT regime eliminates a number of deductions that were considered unnecessary tax preferences for high-end income earners, but is now generally affecting a large segment of taxpayers.

Credits are allowed for foreign income taxes paid on the same slices of income that are taxed outside the United States. Limitations on foreign tax credits apply where the foreign tax rates are higher than U.S. rates.

5.2.2 State Income Taxes

States tax the income from operations in their borders. They provide the equivalent of a "foreign tax credit" by apportioning income between offices of the same company in different states. The apportionment formula generally considers factors relating to proportionate sales, wages and assets among the different branch offices. The U.S. Supreme Court will allow a state to apportion such income as it sees appropriate unless the taxpayer sustained the burden of showing that, based on relevant facts, the formula resulted in unconstitutional taxation of extraterritorial values or produced an arbitrary or unreasonable result.

5.2.3 Local Income Taxes

Many cities, such as New York and Philadelphia, impose their own income taxes on individuals and businesses.

5.2.4 Social Security Taxes and Equalization Treaties

The federal Social Security regime requires that employers deduct and withhold, and pay to the Social Security Administration, federal social security taxes including Medicare and Medicaid contributions. Each of the employer and the employee pays 7.65% of wages (up to an ever-increasing maximum wage threshold) for such taxes. Such withholding is payable by foreigners who work in the United States under work visas. If the foreigner returns to the foreign country before the minimum period for reciprocal treatment under a U.S.-foreign country "equalization" treaty, the foreigner loses the benefit of such contributions and cannot rely on their U.S. payments as a contribution towards any foreign Social Security regime. This issue has become a thorn in U.S.-Indian bilateral relations since the minimum period for equalization exceeds the maximum period for an H1-B visa. Foreigners should inquire about this issue if they plan to stay in the U.S. for more than two or three years.

5.3 Sales and Use Taxes

Each state has the right to impose a sales tax on local sales of goods and services. Generally, the "sales tax" is collected by the seller if the seller is local, and the "use tax" is collected from the customer if the customer does not pay tax at the point of sale. In the Internet-based economy of online sales and remote shipping, sellers and customers must be aware of the law, establish compliance procedures and anticipate eventual audit.

A seller of products must have a sales tax user number and report and pay sales taxes collected from customers. A buyer of products must maintain accounting records and pay use taxes to the State (in lieu of sales taxes) on products shipped from an out-of-state seller (e.g., Amazon or a warehouse seller) that does not withhold sales tax in the State where the seller's office is located. In the absence of records evidencing payments of taxes, a business (and its owners) could be assessed the tax, penalties and interest upon audit.

5.4 Personal Taxes

All visa planning and international business planning should include some personal tax planning concerning U.S. income, gift, estate and generation-skipping taxes and foreign taxes. Generally, the planning depends on timing, characterization, rates, taxability, tax residence and business strategy.

6. Accounting

6.1 Financial Accounting

There is no requirement that a privately-owned U.S. company hire a Certified Public Accountant, or have its financial statements audited in accordance with U.S. “generally accepted accounting principles” (“GAAP”). However, there are many reasons to do so. A CPA can provide audited financial statements to give some assurances to investors about where invested funds are being deployed and the financial results of operations. A CPA can also provide income tax advice and representation in disputes with taxing authorities.

When hiring an accountant, a startup should consider its financial accounting requirements. A GAAP “audit” is expensive and consumes management time. A “review” of company-provided financial statements does not test the accuracy of numbers but seeks to properly categorize the numbers. A “compilation” is the result of the CPA’s review of company-provided financial records and discloses information in a format for U.S. accounting purposes.

Under accounting standards adopted in 2001, the “pooling-of-interest” method of accounting was replaced by the “purchase method.” Under the purchase method, the target must write up its good will to the extent that the purchase price exceeds the fair value of the target’s assets. Later, such goodwill is subject to impairment write-offs. This accounting highlights any losses arising after merger.

Accounting treatment should be reviewed in any acquisition.

6.2 Tax Accounting

Tax accounting rules differ from financial accounting rules. Examples can be seen in the deductibility of certain expenses for meals and entertainment and different depreciation and amortization rates for capital expenses. Most states adopt federal tax accounting principles, but there is no federal constitutional requirement to do so.

6.3 Fiduciary Accounting: Customer Funds

6.3.1 Abandoned Property Laws Generally

Many business owners do not understand that they have a fiduciary responsibility to maintain and pay to the State government any “abandoned,” “unclaimed” or “dormant” customer accounts. Under “abandoned” or “unclaimed” property laws, businesses holding property (usually cash or equivalents) belonging to third parties must transfer such property to the State if the account is “dormant” for more than a few years.

Unclaimed property comes under this category if the business cannot refund the property due to an inability to locate the property owner and deliver the property. Abandoned or unclaimed property can take many forms, including dormant securities accounts with stocks or bonds and dividends and interest, dormant checking or savings bank accounts, cash advances on account of a purchase price before the seller delivers products, refunds due to customers, unused gift certificates and gift [debit] cards and uncollected salary checks, uncashed money orders or cashiers checks, unclaimed insurance benefits, mineral royalty payments, safe depository contents and customer security deposits or refunds owed.

For accounting purposes, as with any “fiduciary” assets, such property should be segregated from the business’s operating accounts and put into separate accounts, and the customers should be contacted annually to ensure they can be located and intend to assert their rights to the property. Such accounting avoids inclusion of such amounts in the business’s income and preserves the property from being commingled and absorbed into the business’s operations.

In a typical scenario, for property, the State sells the property and collects the cash proceeds. For cash accounts, the State retains the cash under the common law principle of escheat. By statute, if the property owner appears and makes a claim, the State makes a refund. The State may publish the claims and then seek to convert the abandoned property to its own uses.

6.3.2 Abandoned Property Laws Applicable to Delaware Corporations

Audits under abandoned property laws can result in big surprises, especially for legal entities organized under Delaware law. Delaware's abandoned property law imposes a personal liability on the business owners for failing to collect or pay over to the State "property" of third parties they the businesses should have collected, segregated and paid. Ordinary business corporations must file an Abandoned Property Report annually by March 1 in respect of the prior calendar year. Delaware law permits audits going back as early as 1981. Abandoned securities and dividends must be paid over after three years, while other classes of property (such as gift certificates), must be paid over after five years. Delaware reportedly collects approximately $550 million per year under this category, an amount that exceeds only corporate franchise taxes and income taxes as the source of funding for State operations.

7. Attorney-Client Relationship

7.1 Engagement Letter

An attorney's engagement letter will identify the client(s), the scope and terms of services. This engagement letter creates an attorney-client relationship that is confidential and privileged between the law firm and the entity and/or entrepreneur who will be the client.

7.2 Confidentiality; Conflicts of Interest

Communications between an attorney and the client's representatives relating to the entity's business are privileged. Such communications are subject to confidentiality under applicable common law and judicial procedures. To avoid conflicts of interest, founders and affiliates are not normally listed as "the client" and thus are not normally entitled to claim such attorney-client privilege unless agreed in the engagement letter. If shareholders have a dispute, an entity's attorneys may wish to remain neutral.

Ideally, you should add "PRIVILEGED" to the subject header in e-mails for sorting in case of any future litigation that might cover the subject matter of your communications.

7.3 Compliance and Ongoing Operations

Once your new company is organized and operating, you will need ongoing compliance services. To avoid surprises, your engagement letter or other instruction should clarify that your new business is engaging your lawyer to manage corporate housekeeping and other specific compliance matters. If you prefer to conduct such compliance matters on your own, you may wish to keep your lawyer up to date so that you can have a discussion on emerging legal issues.

8. Contact Us

We hope this information has been enjoyable as well as educational. Bierce & Kenerson, PC has experience in the dealings described to help create and grow your business. We invite your questions. For further information, please contact:

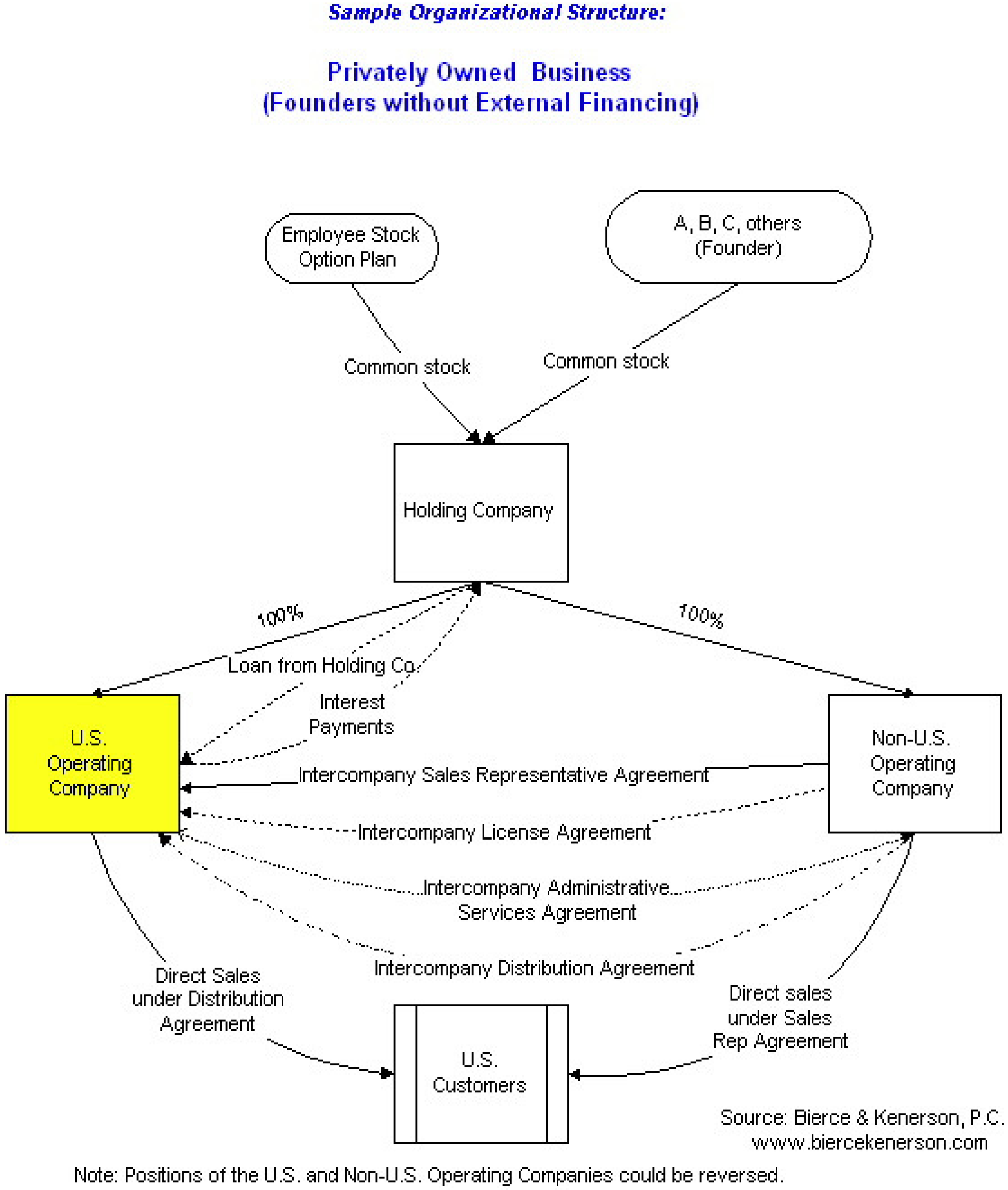
William Bierce
Bierce & Kenerson, P.C.
420 Lexington Avenue, Suite 2920
New York, New York 10170
wbierce@biercekenerson.com
212 840 0080 / Mobile 917 882 3300

DISCLAIMER: This information does not constitute legal advice. Consult a lawyer!

Appendices

A. New U.S. Venture (Family Owned)
B. New U.S. Venture (Founders and Private Equity Investors)
C. Acquisition of a U.S. Privately-Owned Business (One Step)
D. Acquisition of a U.S. Privately-Owned Business (Two Steps)
E. Comparison of Juridical Entities
F. E-2 Visa structure (sample)

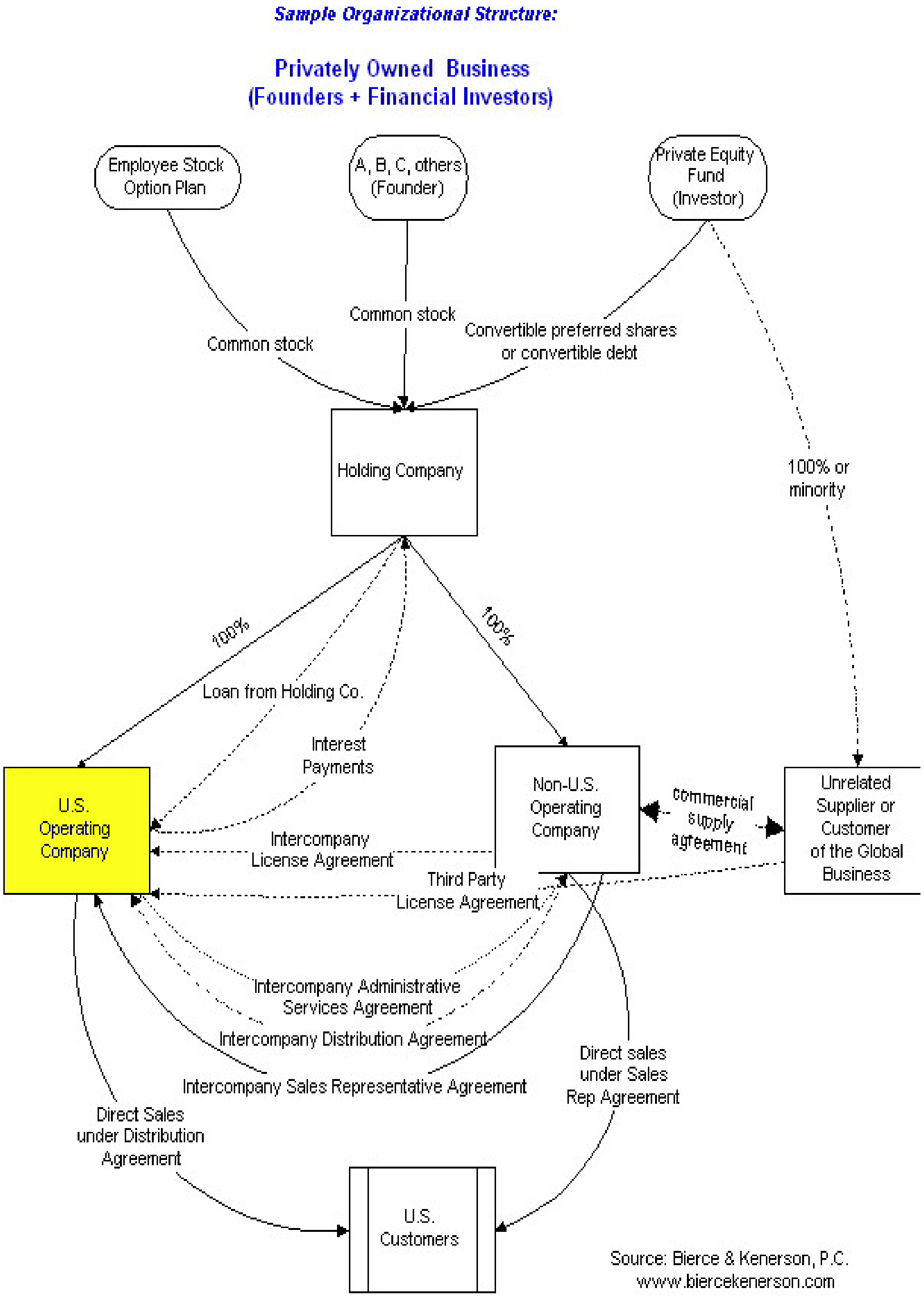
A. Diagram: New U.S. Venture (Family Owned)


Sample Organizational Structure:
Privately Owned Business
(Founders without External Financing)
Employee Stock Option Plan
A, B, C, others (Founder)
Common stock
Common stock
Holding Company
100%
100%
Loan from Holding Co.
Interest Payments
U.S. Operating Company
Non-U.S. Operating Company
Intercompany Sales Representative Agreement
Intercompany License Agreement
Intercompany Administrative Services Agreement
Intercompany Distribution Agreement
Direct Sales under Distribution Agreement
Direct sales under Sales Rep Agreement
U.S. Customers

Source: Bierce & Kenerson, P.C.
www.biercekenerson.com

Note: Positions of the U.S. and Non-U.S. Operating Companies could be reversed.

B. Diagram: New U.S. Venture (Founders and Private Equity Investors)



Sample Organizational Structure:

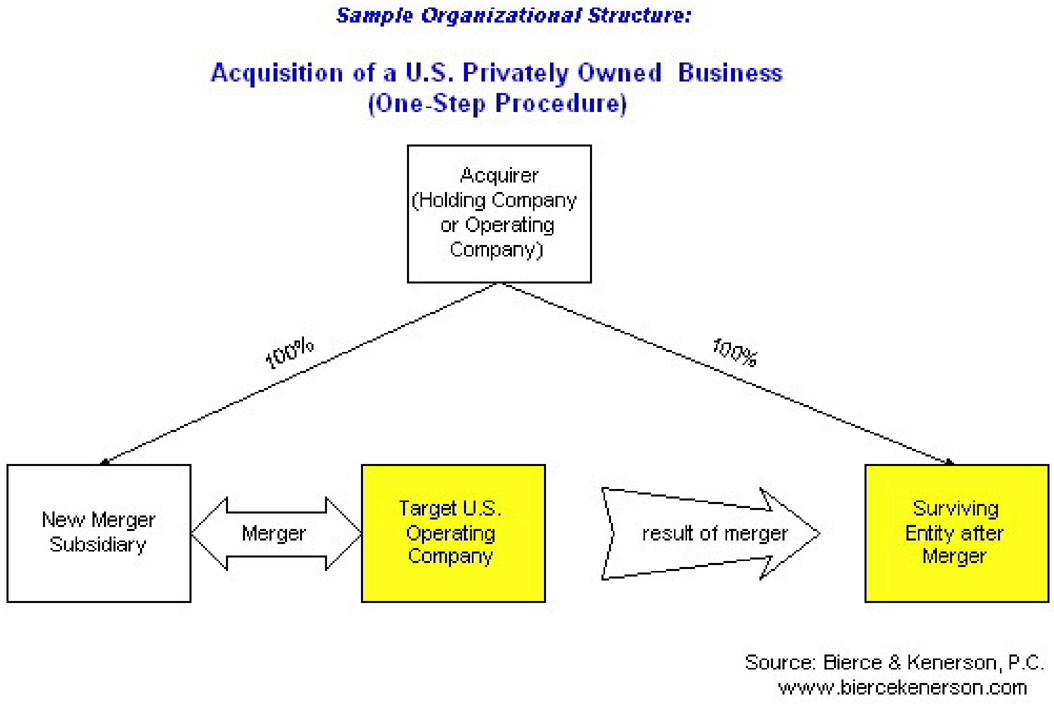
Privately Owned Business
(Founders + Financial Investors)

Employee Stock Option Plan
A, B, C, others (Founder)
Private Equity Fund (Investor)
Common stock
Common stock
Convertible preferred shares or convertible debt
Holding Company
100% or minority
100%
100%
Loan from Holding Co.
Interest Payments
U.S. Operating Company
Non-U.S. Operating Company
commercial supply agreement
Unrelated Supplier or Customer of the Global Business
Intercompany License Agreement
Third Party License Agreement
Intercompany Administrative Services Agreement
Intercompany Distribution Agreement
Intercompany Sales Representative Agreement
Direct sales under Sales Rep Agreement
Direct Sales under Distribution Agreement
U.S. Customers

Source: Bierce & Kenerson, P.C.
www.biercekenerson.com

Note: Positions of the U.S. and Non-U.S. Operating Companies could be reversed.

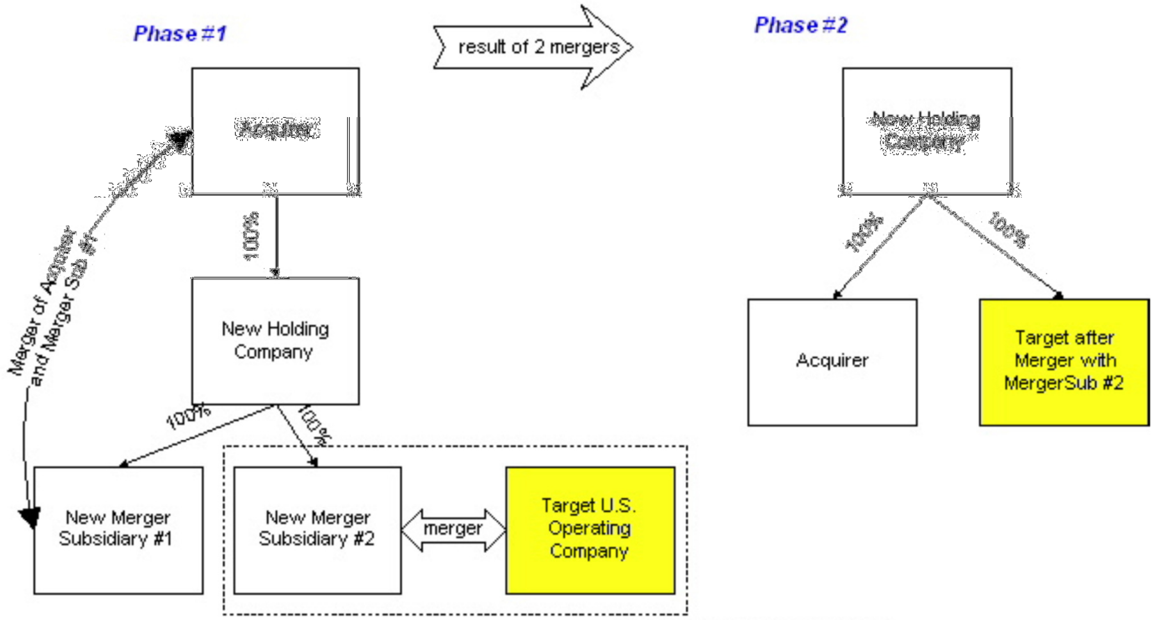
C. Diagram: Acquisition of a U.S. Privately-Owned Business (One Step)


Sample Organizational Structure:
Acquisition of a U.S. Privately Owned Business
(One-Step Procedure)
Acquirer (Holding Company or Operating Company)
100%
100%
New Merger Subsidiary
Merger
Target U.S. Operating Company
result of merger
Surviving Entity after Merger
Source: Bierce & Kenerson, P.C.
www.biercekenerson.com

D. Diagram: Acquisition of a U.S. Privately-Owned Business (Two Steps)

Sample Organizational Structure:

Acquisition of a U.S. Privately Owned Business
(Two-Step Procedure)


Phase #1
result of 2 mergers
Phase #2
Acquirer
100%
Merger of Acquirer and Merger Sub #1
New Holding Company
100%
100%
New Merger Subsidiary #1
New Merger Subsidiary #2
merger
Target U.S. Operating Company
New Holding Company
100%
100%
Acquirer
Target after Merger with MergerSub #2

Source: Bierce & Kenerson, P.C.
www.biercekenerson.com

E. Table: Comparison of Juridical Entities

This table has an overview of significant considerations in the selection of the form of entity for doing business.

- The "yes" and "no" answers below all require some degree of explanation. Special conditions apply in certain cases. Under "common law" exceptions apply.
- This table does not consider highly specialized entities such as business trusts, real estate investment trusts (REIT's), and contingent registrations in Delaware of foreign companies migrating from another "home" jurisdiction upon the occurrence of a defined event or simply by choice for a "reincorporation."

Characteristics	**Corporation including "benefit corporation" or "flexible purpose" corp.**	**Limited Liability Company**	**Partnership**			**Not-for-Profit Corporation**	**Trust**
			General	**Limited**	**Limited Liability Partnership**		
Limited liability for owners	Yes	Yes, unless Operating Agreement specifies otherwise	No. But yes if interpose a holding company	Yes for limited partners, no for general partner	Yes for all partners	No owners. Public trust	Yes (but "no" in case of "business trust")
Who may be an owner (assuming the entity and owners comply with normal registration and compliance rules)	"C" corporations: Any person or legal entity "S" corporations: only U.S. citizens, resident aliens and certain estates and trusts	Any person or legal entity	Any person or legal entity	Any person or legal entity	Any person or legal entity that is licensed as a professional to render services (e.g., accountants, attorneys, doctors, dentists, engineers, etc.)	Not applicable. Members have voting rights but no ownership rights (except for subvention certificates that evidence capital contributions). Not-for-profit corporation may have no members.	Any person may be grantor. Any person may be a trustee, but trustee's residence is a basis for applying local U.S. law.
Minimum number of owners	One shareholder	One member	One general partners	One limited partner	Two partners with limited liability	None.	One grantor, one trustee and one beneficiary
Maximum number of owners	"C" – unlimited. "S" – 100 shareholders.	None	Unlimited	Unlimited	Unlimited	Not applicable	Potentially multiple grantors, multiple trustees, multiple beneficiaries or classes

Characteristics	**Corporation including “benefit corporation” or “flexible purpose” corp.**	**Limited Liability Company**	**Partnership**			**Not-for-Profit Corporation**	**Trust**
			General	**Limited**	**Limited Liability Partnership**		
Unlimited duration of entity	Yes	Yes, unless otherwise agreed	Yes, unless otherwise agreed			Yes	No, unless law permits
Managers may be non-owners	Yes	Yes	No	Yes (General Partner)	No	Yes	Yes. Trustee
Who is taxable on entity’s income (general principle, subject to exceptions and conditions)	“C” – corporation. Also, shareholders are taxed on dividend distributions. “S”- the shareholders	The shareholders (assuming they elect to be taxable as partnership)	Partners	Partners	Partners	No tax, except for “unincorporated business taxable income” from non-exempt activities	The trust or beneficiaries as distributes (if irrevocable trust); the grantor (if revocable trust)
Owner has right to know about company’s business	Yes, subject to valid corporate purpose for knowing.	Yes, except as provided in Operating Agreement and except (in Delaware) for confidential business information	Yes. Fiduciary duty	Yes, but limited partner may not manage the business.	Yes, and ethical duties apply under relevant code of ethics of the regulated profession.	Yes, and subject to audit by judges and attorneys general or other regulatory enforcement in the public interest.	Yes, but depends on the trust instrument.
Minority owner can be squeezed out by a merger that gives only the right to cash value under “appraisal rights.”	Yes	No. (Possibly, yes, but Depends on Operating Agreement)	No. Depends on partnership agreement.	No. Depends on partnership agreement.	No. Depends on partnership agreement.	Not applicable. No private ownership.	No.

Characteristics	Corporation including "benefit corporation" or "flexible purpose" corp.	Limited Liability Company	Partnership			Not-for-Profit Corporation	Trust
			General	Limited	Limited Liability Partnership		
Payment of U.S. Tax on Distribution of Profits	Yes, unless S corporation (100% owned by U.S. residents, other criteria). Tax rate is 30% unless reduced by Tax Treaty. IRC 882.	Yes, under Branch Profits Tax for distributions paid to foreign corporation shareholders (30% unless reduced by Tax Treaty). IRC 884.	Generally, U.S. does not tax partnerships but taxes the partners on their proportionate share of income and expenses, as characterized at the partnership level. A foreign corporation or non-resident alien is deemed engaged in local operations if partnership is engaged in U.S. trade or business. Branch profits taxes will apply to "dividend equivalent amount" paid to foreign corporation. IRC 884(b).			No, but distributions cannot benefit individuals or entities unless paid for non-profit purposes	Depends on complex factors of residence of grantor, beneficiaries, trustee, and source of income. Consult a tax advisor.
Incentive compensation through "sweat equity" (stock for services)	Yes. Most favorable tax regime that allows deferral of income tax until sale of the shares obtained after exercise of the stock option. Requires a "qualifying" stock option plan.	Yes but limited. Not eligible for qualifying stock option plan. Eligible for tax election to defer taxable income on the gain over initial value. Involves a substantial risk of forfeiture of the option interests.	Same rules as for LLC's			Not applicable	Not applicable
Short-term capital loss (for individual shareholders or partnerships), up to $50,000 per individual	Yes. IRC Section 1244 (for "small business corporations" with less than $1.0 million capitalization and receiving more than 50% of revenues from active operations)	No.	No.			No.	No.

Exh

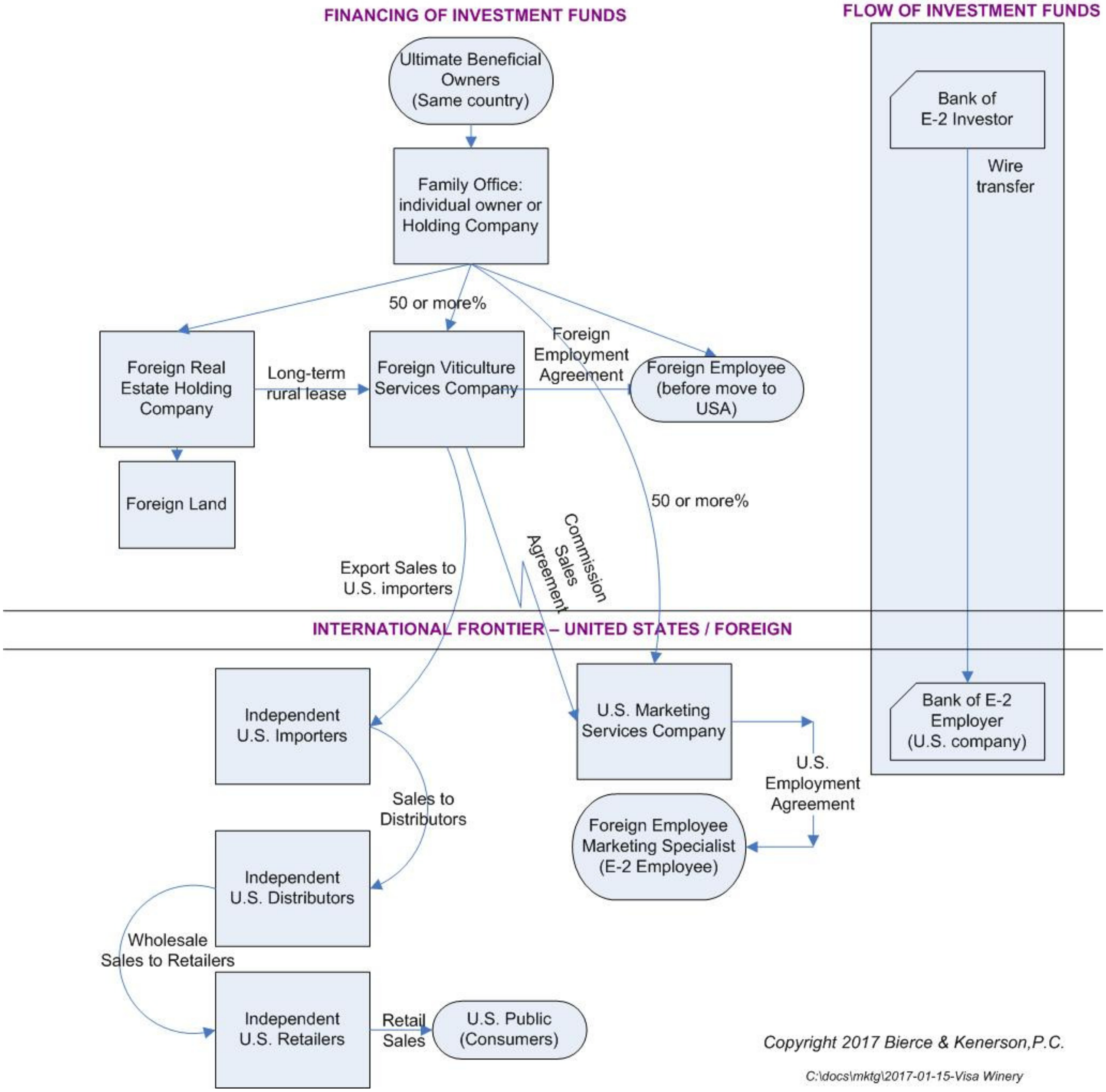
SAMPLE ONLY; FOR DISCUSSION

Ownership and Capitalization Structure for E-2 Treaty Investor Visa

for Foreign-Citizen Employee of Foreign-Controlled U.S. Marketing Service Business

U.S. REGULATIONS ON E-2 TREATY INVESTOR'S INVESTMENT FUNDS ("AT RISK")

8 CFR 214.2(e)(12): Investment is the treaty investor's placing of capital … at risk in the commercial sense with the objective of generating a profit. The treaty investor must be in possession of and have control over the capital invested or being invested. The capital must be subject to partial or total loss if investment fortunes reverse. Such investment capital must be the investor's unsecured personal business assets. Capital in the process of being invested must be irrevocably committed to the enterprise. The alien may use any legal mechanism available, such as the placement of invested funds in escrow pending admission in, or approval of, E classification…."


FINANCING OF INVESTMENT FUNDS
FLOW OF INVESTMENT FUNDS
Ultimate Beneficial Owners (Same country)
Family Office: individual owner or Holding Company
50 or more%
Foreign Real Estate Holding Company
Long-term rural lease
Foreign Viticulture Services Company
Foreign Employment Agreement
Foreign Employee (before move to USA)
Foreign Land
50 or more%
Commission Sales Agreement
Export Sales to U.S. importers
INTERNATIONAL FRONTIER – UNITED STATES / FOREIGN
Independent U.S. Importers
U.S. Marketing Services Company
U.S. Employment Agreement
Sales to Distributors
Foreign Employee Marketing Specialist (E-2 Employee)
Independent U.S. Distributors
Wholesale Sales to Retailers
Independent U.S. Retailers
Retail Sales
U.S. Public (Consumers)
Bank of E-2 Investor
Wire transfer
Bank of E-2 Employer (U.S. company)

Copyright 2017 Bierce & Kenerson,P.C.

C:\docs\mktg\2017-01-15-Visa Winery