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Seyfarth Shaw's Inbound International Team: Key Considerations For Doing Business in the U.S.

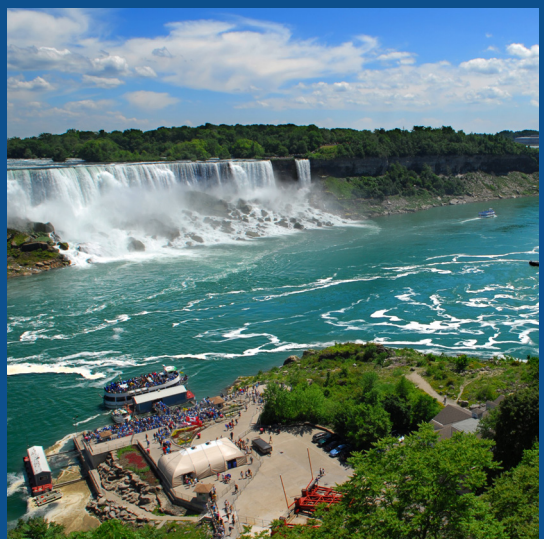

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Table of Contents

Corporate, Contract and Tax Law Considerations 2

Dispute Resolution 9

Real Estate Transactions 15

Construction 22

Labor and Human Resources 23

Employee Benefits 29

Immigration 35

Intellectual Property Rights 42

Corporate, Contract and Tax Law Considerations

Coordination of Legal, Tax and Accounting Teams. To properly assist a foreign investor in structuring its business or investment in the United States, its U.S. and non-U.S. lawyers and accountants need to understand the foreign investor's goals and coordinate with each other, especially in the early planning stages, in order to develop tax-efficient structures (from both a local and global perspective) consistent with the foreign investor's business, legal, regulatory, and accounting requirements. Also, depending upon the location or type of the business, various economic incentives may be provided by the city, state and federal government.

There are legal issues in addition to the tax and accounting treatment to be considered. Different structures provide varying levels of protection from liability to the other parts of the overall business and its owners. Many large enterprises intentionally break their holdings into many subsidiaries, to protect each asset from claimants against other assets. There are tradeoffs between simplicity and complexity, and lower cost and limitation of liability.

General Considerations. In determining the appropriate structure for its businesses and investments in the United States, a foreign investor will need to consider, among others, the following issues:

> ***Formation of an Entity*.** The investor must decide on the form of entity through which to conduct business and/or hold investments and the choice of law for such formation. This determination should be made carefully as it has legal, tax, risk and operational consequences. It is recommended that a foreign investor consult with professionals, including lawyers and accountants, who are experienced in advising foreign investors and multinational companies in connection with such determination. Please refer to "Choice of Entity Considerations" below, for additional information.
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> ***Complying with Regulatory/Reporting/Licensing Requirements*.** With input from its advisors, the investor must understand different regulatory, reporting and licensing requirements on the city, county, state and federal levels that may apply (e.g., antitrust; securities; product liability; licensing; financial reporting) depending upon the type of business or investment and the type of structure through which such business or investment is to be conducted or held.[1]
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> ***Limiting Liability Exposure*.** The business or investment must be structured in legally permitted ways to insulate such foreign investor's non-U.S. businesses, investments and assets from the liabilities, debts and obligations of the U.S. businesses and investments. Another issue is how best to insulate each such business and investment from the liabilities, debts and obligations of each other business and investment. In addition, it is advisable for a foreign investor to evaluate

[1] For example, the U.S. Government has traditionally welcomed foreign direct investment in the U.S. and has sought to provide foreign investors fair, equitable and nondiscriminatory treatment. However, a few limited exceptions designed to protect national security exist. For example, certain types of foreign direct investment in the U.S. are subject to a review by the Committee on Foreign Investment in the United States (CFIUS) in order to determine whether the sale or merger of a U.S. corporation to (or into) a foreign owner threatens to impair U.S. national security. In a post-9/11 world, this review can be significant for certain businesses.

and determine legally available ways to insulate such businesses and investments from liability for the foreign investor's acts outside of the United States.

***Optimizing Tax Efficiency*.** With its advisors, an investor must determine the appropriate way to own and operate, and to repatriate the income and gains from (and from the sale of), such businesses and investments in a tax-efficient manner—that is, in a manner that results in the lowest possible taxation consistent with the investor's non-tax goals, from both a local and global perspective, including the optimal use of local tax incentives and applicable tax treaty provisions. In addition to federal, state and local income taxes and federal withholding taxes on payments to non-U.S. persons, other taxes that may need to be considered include estate and inheritance taxes; gift taxes; payroll/withholding/unemployment insurance taxes (in the case where such business will have its own employees); sales and use taxes (generally, if such business were to involve the retail sale of tangible personal property or certain services); personal property taxes; real property transfer taxes; and other miscellaneous state and local (e.g., county and city) taxes.

***Protecting the Business from Competitors' Attention*.** The investor should evaluate whether or not to pay special attention to protect information about its business and investments. For example, if heavy competition exists, potential competitors may attempt to use the land use proceedings and other legal processes to keep a foreign investor from acquiring sites and/or entering into the U.S. market. Use of corporate or limited liability company entities with neutral or property-location specific names can be a good way to acquire property without drawing unnecessary attention to the investor's plans and property acquisitions.

***Obtaining Debt and/or Equity Financing for Business/Investment*.** The investor's business or investment should be structured to allow for equity and/or debt financing on as favorable terms as possible. To this end, even though a U.S. subsidiary (*e.g.*, corporation, limited liability company, or limited partnership) may be able to obtain financing for its U.S. operations and investments based upon the strength of and relationships held by the parent company, it may not be easy, especially in today's economic and financial conditions, for a newly created U.S. entity to secure debt financing because of its lack of operating and credit history. Potential lenders will likely require some form of credit support and/or confirmation of creditworthiness (*e.g.*, parent company guaranty; bank letter of credit).

***Maximizing Flexibility/Minimizing Administrative Costs*.** An investor should establish a cost-effective and efficient structure that affords maximum flexibility in terms of management, operations, raising capital (equity or debt) for its business/investment, and implementing its "end-game/exit" strategy, etc.

Choice of Entity Considerations—Non-Corporate Foreign Investors. A non-corporate foreign investor desiring to conduct business and/or hold an investment in the United States can choose from a number of vehicles and structures through which to conduct such business and/or hold such investment. Each state in the U.S. has its own laws and requirements for choice of entity, formation and operation, and a foreign investor must learn about the applicable laws and requirements of each state in which business is to be conducted or investment is to be held. Following are the structures available:

***Corporation*.** Conducting a business or holding an investment through or in a corporation (typically one formed under Delaware law)[2] is often favored by foreign investors (for tax and other

[2] A corporation is an entity created under state law and requires a formal filing to be created. Depending on the particular situation, a corporation formed under another state's law might be more advantageous.

reasons).[3] Among other benefits, the corporation's shareholders are generally not liable for the liabilities, debts and other obligations of the corporation. For foreign shareholders in particular, it allows them to conduct a U.S. business and/or hold a U.S. investment without having to file U.S. federal income tax returns or U.S. state and local franchise (that is, income) tax returns with respect to their non-U.S. businesses to report the income and gains derived therefrom. Instead, an investor's U.S. corporation would: (i) report such income and gains on its own U.S. income/franchise tax returns; and (ii) separately pay any resulting U.S. income/franchise taxes on such income and gains, with the repatriation of the corporation's net after-tax income and gains by the foreign shareholder then being potentially subject to an additional U.S. withholding tax (although such tax may be reduced or eliminated under an applicable tax treaty).

***Limited Liability Company*.** The limited liability company (LLC) is another type of entity through which to conduct a U.S. business and hold U.S. investments. Like a corporation, an LLC is created by a filing under state law. Among other benefits, the LLC permits "partnership-like" flexibility of ownership and control and "partnership-like" tax treatment, while affording its owners (referred to as "members") "corporate-like" protection against entity liabilities, debts and other obligations. Unless an LLC elects to be taxed as a corporation, an LLC is not subject to U.S. income/franchise entity-level tax on its income and gains. Instead, the LLC reports its income and gains to its member or members, with each member (including each foreign member) being required to report separately (i.e., file U.S. income/franchise tax returns), and pay (including through withholdings) U.S. income/franchise tax on, its allocable share of such income and gains.

***General Partnership/Limited Partnerships*.** In a general partnership, the owners of the general partnership (generally referred to as its "partners" or "general partners") not only have unlimited liability for the liabilities, debts and other obligations of the general partnership, but are also generally bound by the acts of the other partners. In a limited partnership, the owners of the limited partnership include both the limited partners and one or more general partners, with the limited partners generally providing capital for, but having little-to-no management control over, the limited partnership. Instead, the general partner(s) would have such control. Also, the limited partners would not have any personal liability for the limited partnership's liabilities, debts and other obligations, though their capital contributions to the limited partnership would be subject to creditors' claims. A limited partnership (like a corporation and LLC, but unlike a general partnership) is a creature of state law and requires a formal filing to be created. For U.S. income/franchise tax purposes, general and limited partnerships are "pass through" entities, with the taxes imposed at the partner level only.

***Joint Venture*.** A joint venture is an enterprise between two parties to engage in a business arrangement and share the profits of a particular project. The participants are referred to as joint venturers. In many instances, this type of relationship has the tax attributes of a partnership, and will be taxable as such, as discussed above. However, a joint venture can consist of merely the co-ownership of shares in a corporation. A domestic corporation with one or more foreign shareholders would be taxed as discussed above.

Direct Investment. Rather than conduct the U.S. business or hold a U.S. investment through a separately-formed entity, a foreign investor can simply conduct the business or hold the investment directly. Depending upon the nature of its operations, the foreign investor will likely need to register in each state in which the business is conducted or the investment is held and become subject to such state's laws and requirements. For U.S. income/franchise tax purposes,

[3] Delaware's corporate law is well developed and therefore more predictable than that of many other states. In addition, the Delaware courts have generally been favorable to corporations, recognizing a large measure of corporate freedom to act.

a foreign investor directly conducting business in the U.S. would be required to report (i.e., file U.S. income/franchise tax returns), and pay U.S. income/franchise tax on, the income and gains from such business.

Choice of Entity Considerations—Foreign Corporate Investors. A foreign corporate investor desiring to conduct business and/or hold an investment in the United States can choose from the same vehicles and structures discussed above for non-corporate foreign investors. However, a foreign corporation that invests in the United States directly will be subject to the "branch profits tax" regime. The branch profits tax may be imposed on the profits of a foreign corporation that are attributable to income that is effectively connected with the conduct of a U.S. trade or business. Such profits, if generally not reinvested in the United States, will be deemed repatriated from the United States and subject (notwithstanding the absence of actual dividend payments) to a 30% tax, which (like U.S. federal withholding taxes on dividends actually paid to foreign shareholders) may be reduced or eliminated by an applicable U.S. income tax treaty. A branch-level interest tax may also be imposed as a surrogate for the U.S. federal withholding tax payable on interest received by a foreign lender from a domestic borrower.

U.S. Taxation of Nonresident Alien Individuals and Foreign Corporations—In General. A thorough analysis of the goals and existing structure of a business or investor seeking to do business in the U.S. is needed to plan appropriately for taxes. A discussion of state and local income tax considerations is outside the scope of these materials. However, an overview of certain potentially relevant U.S. federal income tax issues follows.

The United States asserts taxing jurisdiction over nonresident alien individuals and foreign corporations ("foreign persons") only with respect to income that has a sufficient nexus to the United States. Foreign persons are subject to net-basis U.S. tax on income that is "effectively connected" with the conduct of a trade or business in the United States. Effectively connected income generally is taxed in the same manner and at the same rates as the income of a U.S. person.

Foreign persons are also subject to a gross-basis U.S. tax at a 30-percent rate on certain categories of non-effectively-connected income derived from U.S. sources (interest, dividends, rents, royalties and other types of income), subject to exceptions (such as for capital gains, interest on bank deposits in the U.S., and interest on certain loans made by lenders that are neither banks nor persons related to the borrower). The tax generally is collected by means of withholding by the person making the payment to the foreign person receiving the income. If the foreign person is entitled to the benefits of an applicable tax treaty, the withholding tax may be reduced or eliminated.

Special Rules for Investment in U.S. Real Property. Generally, a foreign investor is not taxed in the U.S. on gains from the disposition of U.S. investment property. However, gain of a foreign investor from the sale of U.S. real property, or from the sale of stock in a domestic corporation in which U.S. real property has accounted for half or more of the value of its assets within five years before the sale, is subject to regular U.S. income taxes. Foreign individuals often invest in U.S. commercial real property through a foreign corporation (to avoid U.S. estate taxes) that owns a domestic corporation (to avoid branch profits taxes) that owns the property. Other structures may be appropriate, depending on the context.

Employer's Payroll Withholding Taxes (Income Tax and Social Security). A corporate employer generally must withhold both income and social security tax from an employee's taxable wages. Willful failure on the part of an employer to collect, account for and pay withholding taxes subjects the employer to a significant monetary penalty. Also, officers of the corporation or others responsible for remitting the withholding tax may be held personally liable for failure to remit withheld employment taxes.

The amount the corporation owes as a result of withholding and social security taxes should be deposited at an authorized commercial bank depository or a Federal Reserve Bank. Deposits are generally required to be made on a semi-monthly, monthly, or quarterly basis, depending on the amount of the deposit. A federal withholding tax return generally must be filed on or before the end of the month following each calendar quarter. Before January 31 of each year, an employer must furnish each employee with a combined federal and state withholding statement for the preceding year. If an employee has been terminated, this form must be furnished at an earlier time.

Other Related Considerations. There are many other considerations an investor or business must evaluate in order to comply with applicable laws and regulations and to reduce business and operational risks. Professional advisors, including lawyers, accountants, tax advisors, real estate brokers, insurance brokers/consultants and bankers, are typically used to help ensure a new business or investment is properly structured to meet its goals. Examples of such considerations include the following:

***Federal and State Securities Laws and Regulations*.** Shares in a corporation and interests in other entities, such as a limited liability company or a limited partnership, are generally securities under federal and state law. Both the federal government and the states regulate the offering, issuance, sale and transfers of securities and their rules must be obeyed in order to avoid civil and criminal consequences and penalties. There are ongoing compliance requirements, depending upon the laws by which the company is bound. Securities regulation is an extremely complex area of law, and is beyond the scope of this overview, as its application to a specific business must be tailored to the facts and circumstances facing that business.

***Preserving Limited Liability*.** By maintaining and respecting the formalities of separate legal entity and by complying with the laws and regulations applicable to such legal entity, the owners of the company, such as shareholders in a corporation or members in a limited liability company, may be shielded from personal liability for the acts and debts of the corporation or the limited liability company. Such limitations of liability are permitted only if the entity is and remains properly organized, adequately capitalized, and completely separate as a legal entity. If a court finds that an entity has disregarded the applicable laws and regulations and has abused its privilege granted by law, the court may disregard the separate legal entity to remedy the specific abuses, and the owners of the entity may be held liable for the entity's acts and debts. Therefore, in selecting the form of entity in which to conduct business, it is necessary to seek the advice of counsel in order to understand the legal and regulatory requirements of operating a business in such form.

For example, an individual seeking to hold the shareholders of a corporation personally liable for the acts and debts of the corporation will try to prove that the corporation was not operated as a separate entity. To attack the corporate status of a corporation, an individual must generally prove (1) that the corporation and the shareholders are no longer treating themselves as separate entities, and that the shareholders are treating the corporation as their own and are not respecting the corporation as a separate legal entity, and (2) that an injustice or fraud will occur if the corporation's actions are treated solely as the acts of the corporation (and not as the acts of the shareholders). A corporation may reduce the possibility that its shareholders will be subjected to liability for the corporation's actions by following prudent and careful business practices, including the following guidelines:

- The corporation should ensure that it is adequately capitalized from its inception to enable it to carry on its business.

- The corporation should obtain adequate insurance to cover its foreseeable liabilities. Typically, a corporation will carry general liability insurance, fire and casualty insurance, life

and disability insurance for key personnel, business interruption insurance, and workers' compensation insurance, as well as any special types of insurance required due to the nature of its business. Please also refer to the additional discussions on insurance below.

- The corporation should observe all post-formation corporation formalities, including holding annual shareholders' meetings and holding regular directors' meetings; keeping minutes of such meetings and clear records of all corporate activities; maintaining up-to-date bylaws at the corporate executive offices; maintaining separateness and arm's-length dealings between the corporation and the directors and/or the shareholders and requiring full disclosure of any competing interests; and assuring approval of the corporation's transactions by the directors and the shareholders as appropriate.

- The officers and other authorized persons at the company should execute all letters, contracts or other documents for the corporation in the corporation's correct and complete legal name rather than the simplified or other fictitious or assumed names used by the company. In addition, those individuals signing the documents for the company should insert their title/position in the signature block and should not sign any document for the corporation in their individual capacities. To reflect this properly, a signature on behalf of the corporation should give the name of the company and the officer's signature, name, and title.

- The corporate funds should not be commingled with the funds of any individual or any other entity involved or affiliated with the corporation. Further, the corporation should maintain separate operations and records from its shareholders and also from those of other entities or subsidiaries/affiliates.

- The corporation should comply with all applicable tax filing and payment obligations and requirements in a timely manner.

- An investor or business must consult with its professional advisors regarding the legal and regulatory requirements in maintaining, and operating in the form of, the legal entity selected for your business.

State and Local Business Licenses. Most states and localities regulate the conduct of certain trades, professions, businesses and occupations. Generally, each state requires that corporations meet various qualifications before granting certain certificates of registration or business licenses. Many cities also require that corporations doing business within their city limits obtain a local business license. For information regarding licensing, an investor or its lawyer should contact the office which handles business licenses in the cities where its corporation will be doing business.

***Contracts in General*.** Neither federal nor local law spells out the substantive terms of contracts, such as agreements with vendors, entered into by businesses. Instead, U.S. law generally allows corporations and other entities to enter into contracts on terms and conditions that are specifically negotiated by or among the parties to particular transactions (provided that such contracts do not violate applicable laws, such as laws forbidding the sale of illicit drugs). The types of contracts necessary for a particular business, and the typical or customary terms for a business, vary widely between businesses. Consultation with experienced legal counsel about the particulars of your business is highly recommended.

Although certain contracts can be enforceable even if they are made orally, it is prudent to establish a company policy and requirement of entering into only written contracts and to delineate in the company's records the scope of the contracting authority delegated to specific

employees, for example, specific officers or managers. Legal counsel should be involved in negotiating and documenting contracts. Also, it may be advisable to create standardized forms of vendor contracts that can be used repeatedly for customers, suppliers and vendors. Experienced counsel can help business executives to understand and to address legal and practical implications of any planned arrangement or transaction before entering into and signing contracts in order to minimize the risks and potential liability to the business, to the extent possible.

***Foreign Qualification*.** The company may need to qualify in states other than the state of its formation. For example, if the company formed is a Delaware corporation (i.e., a corporation formed under the laws of the State of Delaware), such company may need to be qualified as a foreign corporation in other states if the company transacts intrastate business in other states. A foreign investor must determine in its proposed business plans its desired jurisdictions, including the location in which it may have offices and employees, consultants, customers and other participants, and the foreign investor must consult with and obtain the advice of the professionals, including lawyers and accountants, in order to comply with applicable laws and regulations. Failure to comply with applicable laws could subject the company to civil liability and other legal consequences, including being unable to enforce its contractual rights.

***Casualty, Public Liability and Other Business Insurance*.** Generally, your company should obtain adequate insurance to cover all of its foreseeable liabilities and risks, including a fire and extended peril insurance on all property for which the company either is responsible or is the owner or lessee. A comprehensive public liability insurance policy may be required and should be obtained, especially if the company's premises are open to the general public. Such a policy should insure the corporation against liability imposed by law for the operation of its business, its automobiles and the maintenance of its property. Product liability insurance may be available and may be a prudent investment, depending upon the business conducted by the company.

There are other types of insurance that may be desirable, such as general comprehensive business insurance, directors and officers liability insurance, plate glass insurance, use and occupancy insurance, business interruption insurance, and life and disability insurance for key executives/personnel, depending on the nature of the company's business and related risks. An insurance broker who has expertise in representing foreign investors and in covering risks for multinational companies should be consulted to evaluate the insurance needs and to procure appropriate insurance coverage. The company should evaluate its insurance coverage from time to time to make certain that it has sufficient and adequate insurance to protect its business and assets and to reduce its risks.

Dispute Resolution

The United States is known to be a litigious society. While resort to litigation to resolve a business dispute would be considered a failure in many countries, resort to the courts carries much less stigma in the United States. American businesses tend to sue or threaten legal actions as a strategic device in business dealings with much greater frequency than companies abroad. This may be explained, in part, by the fact that lawyers tend to be more involved in the day-to-day operations of business than do their non-U.S. counterparts. Most commercial lawsuits are settled before a decision by a court or arbitration panel. The cost of such litigation is, however, still expensive and the process time-consuming. This is particularly true given the broad scope of discovery (during which the parties are allowed to probe each other for relevant facts) in U.S. court litigation. Further, unless there is a contract between the litigating entities providing that the losing party pays or the case falls within a narrow set of statutory exceptions, legal fees cannot be recovered for the litigation. Accordingly, when doing business in the United States, one should have an understanding of this country's dispute resolution processes.

Federal Legal System

Sources of Law. While many non-U.S. businesses engaging in commerce in the United States come from common law or Islamic law jurisdictions, most are from civil law countries. The laws governing commercial activities in civil law jurisdictions are derived primarily from detailed statutory codes. Trade custom and usage can also play a significant role in resolving business disputes. The United States is a common law jurisdiction, with its origins in the English legal system. There are two notable exceptions – the legal systems of the state of Louisiana and the Commonwealth of Puerto Rico, both of which continue to be rooted in the French and Spanish civil codes, but now heavily influenced by U.S. common law traditions. The common law places greater emphasis on historical judicial decisions and legal doctrines that have evolved over centuries of court rulings. Although legal statutes tend to be more general than civil law codes, they also have great importance in resolving may commercial disputes. The differences between civil and common law systems are often overstated. Under both systems, judges seek to decide like cases alike and are required to apply legislatively enacted statutory norms.

Because the United States functions under a "federal" system, laws and regulations governing business activities are generated at both the federal (national) government level and at the state level. Some legal rules may also be generated at a sub-state level, through municipal or county governments, primarily on issues impacting land-use and public safety. Federal laws are derived from the U.S. Constitution, statutes enacted by the U.S. Congress, and regulations promulgated by a broad range of federal governmental agencies. The U.S. Constitution provides that, except for a very limited set of subjects over which the federal government has exclusive authority, the 50 states are free to enact their own laws on commercial issues. This results in a system of overlapping and sometimes contradictory laws on related subjects, creating an uneasy balance of federal and state laws. Sometimes federal law will preempt a state law, but often they coexist. Thus, on many subjects there will likely be one position adopted by the legislators and/or courts of a majority of states, with a differing position in a minority of states, and some number of states that have not yet established a position on an issue.

Given the overlapping laws of the American federal legal system and the application of common law traditions, business people from abroad often find increased ambiguity in the legal rules applicable to the conduct of commercial activity in the United States. Conducting business in the United States, therefore, may require a greater level of tolerance for uncertainty and inconsistency.

Court Litigation. The structure of the United States court system is also derived from principles of federalism, with a federal court system and a separate court structure in each of the 50 states. Often, jurisdiction of federal courts is parallel and overlapping. On a limited number of subjects, the federal

courts have exclusive jurisdiction, while other times federal courts have no jurisdiction at all. Of the criminal and non-criminal (referred to as "civil") cases filed each year, approximately one million are in federal courts and more than 30 million are in state courts. This disparity exists because the federal courts have limited jurisdiction, while state courts have broad authority to hear almost any type of legal dispute, ranging from divorce to motor vehicle violation. Even for business disputes, the vast majority of court cases take place at the state level.

Federal Courts. Article III of the United States Constitution established the federal judiciary as a separate branch of government. The jurisdiction of the federal courts is limited - they are responsible for cases interpreting the United States Constitution, all federal laws, federal regulations, treaties of the United States, and controversies between states or between the United States and a foreign government. Congress has also authorized the federal courts to hear cases between plaintiffs who are citizens of states (including foreign countries) that are different from those of the defendants and involve an amount in controversy exceeding $75,000, which is known as "diversity" jurisdiction. When hearing a case through its diversity jurisdiction, a federal court may exercise discretion to also rule on related state law claims over which it would not otherwise have authority to hear, to avoid the need for two separate court proceedings on related issues.

The federal courts are organized in a three level hierarchy. There are 94 federal district courts, which are the trial courts for criminal and civil matters. Each district also includes a bankruptcy court. The district courts are organized within geographic regions, some covering all of one state and others covering a portion of a state. For example, the United States District Court for the Southern District of New York is the court used for cases arising in Manhattan. The United States Congress has also created two specialized trial courts with nationwide jurisdiction over international trade and customs issues – the Court of International Trade and the Court of Federal Claims – which deal with most claims for money damages against the United States, disputes over federal contracts and property disputes involving federal government "takings."

A district court's ruling on an issue of law may be appealed as a matter of right to an intermediate appellate court – the United States Court of Appeal. The 94 district courts are organized into 12 regional appellate courts known as "circuits." There is also a specialized appellate court, the United States Court of Appeals for the Federal Circuit, which hears appeals from the Court of Internal Trade, the Court of Federal Claims and cases on a limited set of issues such as patents.

The United States Supreme Court is the court of final appeal on questions involving the interpretation of the United States Constitution or federal laws and treaties. Cases may begin in either the federal or state courts. The United States Supreme Court has discretionary authority to decline review of cases from the lower courts. Typically the United States Supreme Court accepts approximately 30 cases per year.

Federal judges at the district court, court of appeals and Supreme Court level are all appointed for life terms. They are nominated for appointment by the President of the United States and must be confirmed by the United States Senate. Bankruptcy judges and magistrate judges are appointed for limited terms.

State Courts. All of the 50 states have their own court systems, which derive their authority from their respective state constitutions. Each has at least one trial level court and a court of appeals. There are, however, many variations. Many states have an intermediate court of appeals. Some have two levels of trial courts – one for misdemeanor crimes and civil cases involving claims under a specified dollar value, and another trial court for felony crimes and larger money value

civil cases. Over the last 25 years, many states have established specialized courts to hear complex commercial cases.

The process of appointing state court judges also differs from state to state. Many are appointed for life. In some states, judges are appointed to terms of limited duration by the legislature. There are still many states in which judges are elected to limited terms by popular vote.

At both the federal and state level, judges are usually only selected after spending many years as practicing attorneys. Unlike in many civil law countries, it is very rare for people to enter the judiciary directly after the completion of legal studies.

Limiting Uncertainty Through Choice of Law and Choice of Venue. Commercial disputes in the United States often implicate the concurrent jurisdiction of multiple state and/or federal courts. Parties may choose to decrease the resulting uncertainty by including in their contract a choice of law provision. A choice of law clause specifies that the law of a specific state applies to interpreting the contract between the parties. More broadly, such a provision can provide that a specific state's laws apply to all disputes between the parties. Likewise, a choice of law provision can also be used to require the law of a foreign country to be applied. Choice of law provisions are generally enforceable in the United States so long as the selected law is reasonably related to the applicable issues and not inconsistent with the public policy selected state (typically as expressed in that state's statutes).

Different courts may be viewed as more or less favorable to a particular party. Therefore, uncertainty about the court to be used to settle disputes may be addressed by including a choice of forum clause in a contract. Typically, these provisions specify that the state or federal courts of a specific jurisdiction will be used to resolve any disputes between the contracting parties. The selected forum could also be in a non-U.S. jurisdiction. Again, the forum would need to be reasonably related to the parties and issues in dispute to be enforced. A forum selection clause is a useful way to avoid the possibility of litigation in more than one state court. It can also be used to waive the right to remove a case from state court to federal court under diversity jurisdiction or to mandate that a federal court must be used if federal jurisdiction exists. A forum selection clause cannot, however, be used to create federal jurisdiction over a dispute that would not otherwise be eligible to resolution in a federal court.

As an alternative for a forum selection clause, parties may instead choose to avoid court litigation in favor of arbitration through the use of a pre-dispute arbitration provision.

The Process Of Court Litigation

Notice Pleading. The civil litigation process is initiated by filing a complaint with the Court. The federal courts and the vast majority of states permit "notice pleading," meaning that the plaintiff need only state the basic elements of the asserted causes of action and provide a minimal statement of facts sufficient to give the other side notice of the general claims. However, some cause of action, such as fraud, must be pleaded with particularity. In response, a defendant may either move to dismiss a complaint as legally insufficient or file an answer which admits or denies the complaint's allegations and generally states legal defenses to be asserted. Rather than require detailed factual statements in the complaint and answer, the parties are instead permitted to obtain information from the other side, and from non-party witnesses, through the discovery process.

Discovery. The discovery process in civil cases is notoriously expensive. The theory behind the United States' approach is that the parties should be allowed to broadly probe for facts that are related to the subject matter of the lawsuit or reasonably calculated to lead to the discovery of admissible evidence. Discovery is conducted by the parties themselves with only minimal court involvement. Through this process, the parties are to narrow the issues of fact in dispute that need to be resolved by the judge or

jury. There are four methods of obtaining discovery from another party: (1) request for production of documents, which allows a party to require its opponent to produce documents (including electronically stored information) for review; (2) interrogatories, which are written questions to be answered in writing under oath by the opposing party; (3) depositions, which are pre-trial sworn testimony under oath, transcribed verbatim by a stenographer; and (4) requests for admissions, which are written declarations, similar to interrogatories, primarily for the purpose of identifying issues that may be submitted to the court as undisputed. Pre-trial discovery can also be obtained from non-parties through depositions or by issuing document subpoenas, a procedure much like requests for production of documents.

In complex commercial cases, the discovery process can last years, involve the production of hundreds of thousands of documents and permit the opposing side to probe into many subjects of questionable relevance. The time and expense of discovery is now significantly increased by the need to address the vast amounts of electronically stored data such as e-mail. Preservation of such data must be addressed at the outset of a case, and the failure to do so can result in severe sanctions against parties and their attorneys. In a complex business dispute, it is not unusual for the preservation, collection, processing and review of electronically stored information to account for more than one-third of the total cost of litigation.

In addition to the expense of discovery, the process can create unique problems for companies that operate outside of the United States. For example, the provision of information about non-U.S. employees can violate a foreign country's privacy laws, such as the European Union's privacy directive and the related implementing laws, and may even breach criminal codes in some countries. Avoidance of discovery is another reason that many non-U.S. entities favor the use of arbitration to resolve legal disputes in the United States.

Of course, there are also advantages to the discovery process. It can eliminate information disparities and prevent the other side from concealing damaging facts. For a company with sufficient financial resources, the discovery process can also be used to assert significant pressure on a less well-financed opponent to enter into a settlement.

Trans-National Litigation Issues

Service Of Process. After filing a complaint, a plaintiff is required to formally serve on each defendant the complaint and other papers used to initiate a lawsuit such as a summons. Within the United States, this is usually a relatively simple ministerial process. However, when a defendant does not have a presence in the United States, the judicial authorities of other jurisdictions must be relied upon to provide assistance. The United States is a signatory to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") as well as the Inter-American Convention on Letters Rogatory (service provisions only). Either convention can be relied upon in obtaining judicial assistance in other countries for purposes of serving a complaint or other formal legal process. Service of process abroad may also be achieved through other means as approved by the court in the United States.

Likewise, these treaties may be used by litigants in other countries to obtain assistance for service of process from United States federal judicial authorities. For countries that are not a party to these treaties, courts in the United States will render assistance with service of process for foreign proceedings based on general principles of judicial courtesy.

Taking Of Evidence. The United States has adopted the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"). Through this Convention, litigants in other countries may transmit letters rogatory to obtain evidence through the federal judicial authorities in the United States. The letters rogatory may be used to obtain documents or

deposition testimony from individuals or entities in the United States. The Hague Evidence Convention may also be used by litigants in the United States to obtain evidence abroad for use in an American lawsuit. Efforts to obtain evidence that involves a country that has not signed the Hague Evidence Convention may, instead, utilize the Vienna Convention on Article 5 of the Vienna Convention of Consular Relations or general principles of judicial courtesy.

Recognition and Enforcement of Foreign Country Monetary Judgments. The United States is not a party to any bilateral or multilateral international convention on the recognition and enforcement of foreign country judgments. Reasons for the absence of such agreements include the perception of many other countries that U.S. money judgments are excessive and an objection to the extraterritorial jurisdiction asserted by courts in the United States. As a consequence, the recognition and enforcement of monetary judgments issued by non-U.S. courts is governed by the laws of each of the 50 American states. Thus, a separate legal action must be filed in an appropriate jurisdiction in the United States and that court will rule on the recognition and enforcement of the foreign judgment. "Recognition" is when the court concludes that a particular claim has been adjudicated by a foreign court and that the claim will not be further litigated. In determining whether to recognize an award, most courts in the United States will examine the following factors concerning the foreign proceeding and judgment: (1) if the foreign court had proper jurisdiction (personal and subject matter); (2) whether the defendant received proper notice of the proceeding and was given an opportunity to be heard; (3) if the foreign proceeding was tainted by fraud; (4) whether the foreign judgment is a final and binding judgment; and (5) if enforcement of the judgment would violate public policy. The U.S. court will also require that it has jurisdiction over the defendant or the defendant's property, that the plaintiff is the proper party to assert the claim, and that the defendant was properly served with notice of the new case. After recognition, a court will issue an order permitting enforcement of the foreign country monetary judgment within its jurisdiction.

Alternative Dispute Resolution

Arbitration. In the United States, there is a strong policy favoring resolution of commercial disputes through private arbitration. Under the Federal Arbitration Act ("FAA"), when a binding arbitration clause exists, courts must stay court litigation and compel arbitration. The United States Supreme Court has repeatedly emphasized that courts should vigorously enforce agreements to arbitrate and that every doubt is to be resolved in favor of arbitration. Most, but not all, states have statutes that are equivalent to the FAA. There are some limitations on the application of pre-dispute arbitration agreements in the context of consumer sales and employee relations.

Enforcement of foreign arbitration awards is also strongly supported under United States law. Arbitration awards are enforceable under two international treaties, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the "New York Convention") and the Inter-American Convention on International Commercial Arbitration Awards.

Mediation. Mediation (sometimes referred to as "conciliation" in other countries) is another form of alternative dispute resolution that is used extensively in the United States. Mediation is a form of informal negotiation conducted by a trained neutral selected by the parties. Contracts sometimes contain a dispute resolution provision that requires the parties to engage in mediation before proceeding with arbitration or court litigation. Litigants frequently utilize mediation on an *ad hoc* basis to assist parties in reaching a settlement after the initiation of a lawsuit. In fact, many federal and state courts either require, or strongly advise, litigants to pursue mediation early in a case. Many courts also have mediation services available, either through court personnel or volunteer attorneys. Private mediation services are available through many of the providers of arbitration services, including the American Arbitration Association, organizations specializing in mediation, and private attorneys who include mediation as part of their legal practice.

The increasing use of mediation has had a significant and positive impact on the early resolution of disputes in the United States. It is used less frequently in the context of international commercial disputes. This may be due to a lack of familiarity and logistical difficulties. The use of mediation in the international context does seem to be growing, as reflected by the fact that the International Chamber of Commerce ("ICC") has established its own mediation program. A businessperson from outside of the United States should give serious consideration to the advantages of mediation in terms of early case resolution, decreased cost, avoidance of the uncertainty of litigation and arbitration, and confidentiality of a resolution.

Real Estate Transactions

Real estate is a large component of many types of businesses. For some companies, it is their primary business. For others, it is an asset that supports vital objectives or it is the security for the loans that are a core component of the finance industry. Wherever a business falls on this spectrum, however, a thorough understanding of legal issues surrounding the acquisition, use and disposition of real estate can often save significant amounts of time and money. While a full explanation of the numerous issues surrounding the ownership and utilization of real estate is beyond the scope of this brochure, a brief overview of certain issues which frequently arise in connection with such ownership and use is provided below.

Establishing a Presence in the United States—Acquisitions, Dispositions and Development. A business locating in the United States typically needs one or more sites in which to conduct its operations. Depending on the uses planned, and the plans and needs of the business, this may either be owned or leased land or a combination.

Typically, land in urban areas (and much of the surrounding region) is in high demand, and a good location can be challenging to find. Usually, a commercial real estate broker is used to assist in finding a new entrant into the market several potential sites in which it can do business. Obviously, the more sites that are acceptable possibilities, the more leverage the incoming company has to negotiate a good deal for its real estate lease or purchase. As real estate deals can be heavily negotiated in the United States, and pricing varies considerably from one site to another, it is vital to preserve as much leverage as possible all the way through the deal until it is closed, never indicating to the seller or landlord how intensely the acquiring company wants that particular site. Brokers, site consultants, and property owners can vary widely in their aggressiveness regarding price negotiations.

It is prudent to involve an experienced real estate lawyer when searching for a site. The lawyer can help a company define its goals and structure the transaction to make it as cost-efficient as possible. Often, initial negotiations over real property purchases or leases are done with a lawyer behind the scenes, so that the principals can have the benefit of the lawyer's advice while negotiating the major deal points and risks more informally. In the United States, most commercial land transactions are not binding on the parties unless and until they are placed into a signed contract, and, in the case of a sale, until certain documents are recorded in the public records of the county where the land is located. Also, the apportionment of risks and costs between seller and buyer, or landlord and tenant, often can be detailed and heavily negotiated.

Choice of Land Acquisition Transaction Type. The planned use of the property, and the availability of suitable land, typically limits the choice of transaction type. Many landowners are unwilling to sell their land, but will lease or "ground lease" it. If many sites are needed by a business entering the market, often a mix of deal types is most effective for speed. Here are some of the most common types of transactions:

- Acquisitions and Project Development
- Ground Leases (Essentially, these are long-term lease arrangements in which the tenant typically leases the land only, and builds its own facilities.)
- Leases of space in established buildings

Information Needed

- Access to information concerning competitive pricing and typical terms for acquisitions is vital to determining whether the owner/landlord or the user/purchaser/tenant has leverage to negotiate in any given real estate transaction. Relevant data sources for pricing and terms include brokers and market-aware counsel.

- Timing for development approvals can be long, depending upon the market; longer for "hot button" issues, such as the following:

  - Uses, such as hotels, restaurants or grocery stores, requiring liquor licenses

  - Uses that generate high amounts of traffic, especially if they are located near residential areas or schools

  - 24-hour operations

  - Drive-through retail facilities

  - Industrial uses in residential-adjacent areas, or any operations that raise nuisance issues such as noise or hazard

  - Truck route access

  - The availability, reliability or cost of utilities (sufficient water service, for example)

Typical Real Estate Transaction Steps. A typical commercial real estate acquisition of space for a company entering the United States market involves, among others, the following issues:

Initial Issues

- Each real estate purchase or lease must be entered into by a specific entity. Tax and other considerations often are significantly affected by choice of entity. Early planning for the vehicles through which a business will hold its interests is critical. Late selection or changes to a structure can create significant costs, including avoidable tax liabilities.

- US commercial site acquisition transactions (whether by purchase or lease) typically are launched by a "non-binding" term sheet or letter of intent. This is followed by negotiating and then signing a binding purchase and sale agreement or lease, and at the time the property is "under contract," paying an "earnest money" deposit for a purchase into an escrow account held by a third party, or a "security deposit" for a lease to the landlord.

Acquisition of Developed or Undeveloped Real Estate

- Once the property is under contract, a "due diligence" period begins. During this time the prospective purchaser or tenant and its lawyers must complete inspections for condition (physical and environmental[4]) and suitability for its purpose, and must confirm that its team

[4] U.S. law imposes strict liability on owners and operators of real properties from which hazardous materials have been released into the environment, whether or not such entities caused such releases. Such liabilities can usually be avoided by taking specific steps to investigate the environmental condition of the property prior to purchase or lease. If such investigation is handled and documented in compliance

can obtain, if not already in place, all needed entitlements and governmental permissions. These typically include local-jurisdiction property use and zoning approvals, which are a very local matter and subject to the idiosyncrasies of the city or district in question. Often local entitlement specialists (sometimes lawyers, sometimes other expediters) with local influence can be employed for maximum cost-efficiency.

- While the economic crisis has caused a disruption and severe curtailment in lending activities, financing for real estate transactions has historically been widely available in the U.S., though the costs and terms vary widely depending upon the creditworthiness and experience of the borrower and other factors. Most real estate purchases are accomplished with financing from a bank, insurance company or other institutional lender, and are secured by a mortgage or deed of trust, depending upon the location of the real estate. In many instances, transactions may require payment of the purchase price on an all-cash basis, and are not contingent upon financing. However, if financing is needed, the process for obtaining and negotiating the terms should be started at the same time as the site search, as typically it will take at least 60-90 days (and longer in the current market) to negotiate and close financing with a lender. During that time period, a lender will do diligence to confirm the value of the real property collateral for the loan. Also, loan assumptions may be an alternative, which is discussed later in this presentation.

- A business' proposed site(s) may create significant new local employment or sales tax revenue. In some cases, economic development location incentives may be available to offset expansion costs.

- Development of a site with one or more buildings also will most likely require (among other things) compliance with local environmental regulations in order to obtain entitlements (planning permission) to build any project. These regulations often require that extensive written disclosures about the projected impact of any new project be provided to the governmental agency charged with approving or disapproving the entitlements for the project. The impacts of the project on the environment are often defined to include such items as increases in traffic, impact on neighborhood parking, noise, air pollution, effect on native species, impact on any archaeological remains in the area, hazardous materials likely to be used in the construction or operation of the project being built, community concerns and many other issues.

- The process of complying with environmental regulations can, depending on the jurisdiction, be difficult, expensive and time-consuming, and it has not been unusual for large projects to take 1-2 years or more to get through this process. Often the process is highly politicized, and public relations efforts, including outreach to neighborhood groups, is advisable to explain and build support for new projects. Many companies choose to lease space that has already been developed solely to avoid having to go through such environmental processes. The other major problem often caused by environmental regulations is that, because they often impose very open-ended requirements, competitors, unions and local homeowners' groups have often found ways to delay development for their own reasons. This can add significantly to the cost and time required to establish operations. As counsel can oftentimes address problems in their infancy before much time is invested in the project, it is generally prudent to involve counsel early in the site selection process.

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with certain highly technical rules, a buyer or tenant then is considered an "innocent purchaser," and generally is protected from future liabilities arising from prior owners' unknown hazardous materials releases from the property.

- If purchasing undeveloped land, once the land is obtained, your facilities must be constructed or made ready. Usually a business doing its own real estate development must have a site design plan that complies with local building codes in hand, in order to apply for and obtain its entitlements. In the case of substantial construction, once entitlements have been obtained for the project, if not before, the company needs to enter into a contract with a builder who will build its building. Typically, this construction company will obtain building permits after the entitlements have been approved, then will build the project. Construction contracts, bonds, completion and subcontractor arrangements in the United States are usually very detailed.

Acquiring Space Through Leasing

- Financing isn't just available for real estate purchases. Many large leases can be financed as well, through a leasehold mortgage, sale-leaseback or other structure. Procedures for closing a leasehold mortgage are generally similar to closing mortgages secured by land owned by a borrower; the only difference is the nature of the collateral. Lenders will generally attempt to reduce the additional risks inherent in making a loan on a leasehold property by requiring landlord consent to the transaction and by negotiating various notice and cure rights with the landlord in the event of a tenant default. Lenders will also generally focus on the term of the lease, wanting the term to expire far enough in the future that the tenant will reasonably be able to place "takeout" financing in place when the lender's loan expires.

- In the case of leased space already built out, a business' lease will specify the terms under which the "tenant improvement" modifications can and will be built, and by whom and at whose cost. These also can be heavily negotiated terms. The degree to which landlords retain control varies.

- Other issues that can be central to lease negotiations include arrangement for insurance coverage (by landlord and tenant); responsibility for payment of build-out of the leased space; restrictions on competing uses (such as radius clauses); permitted and prohibited types of adjacent business; minimum operating days requirements; and parking facilities.

- Depending upon the planned use of the business' site, the company may need or want to utilize a property that comes with ancillary tenants whose leaseholds (and their own financiers, subtenants, etc.) may require some attention.

General

The range and length of the purchase agreement and lease negotiations vary. Regardless, implementing a company's site acquisition strategy in a cost-effective manner requires a strategic process. Especially if many sites are needed, a systematic process is recommended, using standardized templates, deadlines and a collaboratively-developed plan for the smart deployment of multiple resources.

The range and length of negotiations can vary widely, depending on the parties' priorities and negotiating strength. Many U.S. principals give their brokers or counsel wide discretion to negotiate real estate transactions. This can result in significant expense, as such agents, left to their own initiative, may value sharpening the deal over practicality and speed, slowing the negotiations. The best way to avoid runaway costs and extensive negotiating is to thoroughly prepare, so that your company's executive negotiating the real estate deal (and your lawyers, brokers and other service providers) thoroughly understand your "must have" and your

"would like to have" priorities. In addition, preparing your team so that they don't give away negotiating leverage during the transaction is critically important to its ultimate success.

Third Party Services / Outsourcing. For each acquisition or lease, you'll need certain third party services, title insurance, escrow, survey, environmental, insurance, entitlement consultants in some areas, local counsel where needed, construction, architecture, and engineering service providers. The best price and best service almost always comes from negotiating your deals (with specific staffing and standards for work product) in advance with providers.

- Up to a point, the more deals your business provides, the better the service and rates your company will obtain.

- In the long run, quality of service and consistency are more important than marginal price breaks, as the quality of the work often will affect the timing of your closings and whether they occur. Closings frequently fail due to simple errors, so competent vendors who provide good service from a consistent team are a key commodity, as is robust, efficient supervision at the coordinating point.

- Experienced counsel are familiar with a broad range of service providers' track records and pricing issues, and should be able to assist your business here.

Leasing Space to Third Parties. Not surprisingly, leasing concerns often arise in real estate transactions. After businesses have developed a vacant parcel, acquired existing real estate or entered into a lease for space, they determine that their needs have changed and they need more or less space than originally deemed necessary. In any event, businesses often find themselves dealing with leases, subleases or other, similar agreements, whether they planned to or not. Among the items to consider when looking to lease or sublease commercial space to third parties:

Brokers. It is a rare deal that does not involve a broker. Be prepared to enter into a brokerage agreement for the lease of your space. The agreement can be exclusive or non-exclusive, long term or short term and as detailed as you wish it to be, with broker's fees often negotiated.

Financial Stability. When entering into a lease, it is important to know that the tenant is financially stable and its intended operations have a high probability of success. Prudent landlords therefore require that prospective tenants deliver financial information with respect to the tenant and any guarantors. A prudent landlord will also gain an understanding of the prospective tenant's business plan and will assess for itself the likelihood of success in the proposed location, the experience of the tenant and related matters.

Security Deposit and Guarantees. Two methods employed by landlords to mitigate the risk of tenant defaults are requiring security deposits from the borrower and requiring guarantees from third parties. Security deposits are often in the form of cash deposits, with local law typically governing how the deposits are to be maintained by the landlord (*e.g.*, in an interest bearing account, in a segregated account, etc.). Larger security deposits may be delivered in the form of a letter of credit. While landlords can often obtain third party guarantees, the type of guaranty is usually dependent upon the relative leverage of the two parties. Landlords with leverage can sometimes obtain guarantees of full or partial performance. Other landlords will only receive a "good guy" guaranty, whereby the guarantor guarantees performance by the tenant only until such time as the tenant re-delivers the space to the landlord.

Rent. Rent may be payable and calculated in many forms under leases. Some leases provide for a monthly payment of rent throughout the period, with rent increases occurring at regular

intervals. Other leases require tenants to pay minimum rent and additional rent based on a formula calculating a percentage of the tenants' sales. Still others require tenants to pay base rent and a percentage of the operating expenses for the property (such as for common area maintenance, utility service, etc.). Ultimately, landlord and tenant can have great flexibility in structuring their deal as they think best.

Build-out. Landlords sometimes see fit to share some or all of the tenant's costs to alter the leased premises for the tenant's use. Special care should be taken in negotiating the scope of the work, the party responsible for payment or reimbursement, the timeline for construction and the date upon which rent commences.

Environmental and Permitting Issues. Most, if not all, jurisdictions require space offered for lease to meet certain minimum requirements. Landlords should be familiar with the requirements of the local jurisdiction, or should rely on lawyers who are. Some municipalities require the performance of certain environmental reviews and the remediation of environmental issues (such as asbestos) before a tenant can take possession of the space. Most municipalities require inspections and certificates of occupancy to be granted for leased space. As these inspections and governmental sign-offs can take some time to finalize, they need to be addressed early in the leasing process so as to prevent closing delays.

Financeability of Lease. Since most property owners either have mortgage financing in place on the property, or will seek to place mortgage financing on the property in the future, it is prudent for an owner to structure the lease in such a manner as to best appeal to lenders. If there is a mortgage currently on the property, the mortgage documents will often dictate the material business terms of the new lease. Where this is not the case, the landlord should note that lenders generally prefer to see longer term leases (provided, of course, that market rent is payable over the term) with few rent abatement periods and few tenant termination rights (e.g., no going dark or co-tenancy provisions). Property owners can also increase the attractiveness of leases to lenders (and decrease financing transactional costs) by providing for automatic subordination of the lease to the terms of current and future mortgages and by eliminating rights of first refusal to purchase and purchase options from leases.

Other Means of Investing in or Acquiring United States Real Estate

Joint Ventures. Values exist in the current market environment, particularly on the equity side. With the large number of distressed properties and approaching maturity date defaults, investors with available funding can more readily obtain interests in real property than in past years. Among other items to focus on when contemplating investing time and money in a joint venture relationship are the following:

Decision Making. Any joint venture agreement should clearly delineate how day-to-day and strategic property decisions are to be made. If dealing with an experienced partner, an investor may only wish to be consulted in connection with major property decisions such as leasing, certain management decisions, refinancings and sales of the real property. If dealing with an inexperienced partner, an investor may wish to retain more control over the day-to-day activities of the property.

Payment of Distributions and Making of Capital Contributions. Any joint venture agreement should clearly delineate the means in which distributions among the joint venturers are to be apportioned. Special care should be taken in addressing the circumstances in which there is a possibility of the dilution of an investor's interests in the joint venture entity in the event additional capital contributions are required. Additionally, a financially weak partner may not be able to meet its monetary obligations, requiring additional capital investments by the investor.

Due Diligence. Since the ultimate asset of any real estate joint venture is the real property owned by the joint venture entity, any investor contemplating an investment must perform its due diligence on the property as though the investor were buying the entire property. A physical examination should be made of the property. Title and surveys should be reviewed, and all required permits for the operation of the property should be confirmed. The property owner should provide copies of financial statements, leases and service contracts for review. The investor's insurance consultant should review the insurance in place on the property to confirm adequate coverage is available.

Property Management and Experience. An investor should take care to objectively analyze the strengths and weaknesses of a potential joint venture partner prior to entering into the joint venture. A partner with limited experience in managing properties similar to the investment property may require that the investor demand day-to-day control of the property or the hiring of a reputable property manager.

Transfer Tax Issues. The investor and its counsel should carefully examine any and all taxes which may be applicable in connection with the transfer of real property or the transfer of interest in the property-owning entity. Many states have transfer taxes, which make taking title to a property with a joint venture partner more expensive than simply acquiring an interest in an existing real property-owning entity (and potentially subjecting the investor's investment to liabilities incurred before the investor came into the deal). In other states, certain transfers of ownership interests in entities owning real property can result in transfer tax liability. Often tax liabilities can be minimized if the deal is properly planned and structured at an early stage.

Loan Documents. The investor should review copies of any and all loan documents directly or indirectly relating to the property. Since the investor will be an owner of real property, its interests will be subject and subordinate to any mortgages and other liens affecting the property.

Loan Assumptions. Given the general lack of financing opportunities for real estate in the current market and the relatively attractive terms of many existing mortgages, many buyers and sellers are opting to have the buyer assume the mortgage financing currently in place on the property instead of acquiring the property with a new loan. Such assumptions have the advantage of providing a buyer with in-place financing and a lender that already knows the property, but generally lock the buyer into the terms of a loan negotiated by a third party in a different market environment, for better or for worse.

A buyer's ability to negotiate the loan documents is generally quite limited when assuming a loan that has been "securitized" because servicers of the loan are often limited by law and servicing agreements as to the types of loan document modifications which can be made. The buyer must therefore review, understand and become comfortable with the current loan documents and its ability to perform under them. Of particular concern are restrictions on additional mortgage and mezzanine financing contained in the loan documents if the buyer needs additional capital for the acquisition of the property or during the term of the loan. When assuming a non-securitized loan, a strong buyer's ability to negotiate the loan documents will generally be greater than if it were assuming a securitized loan.

Construction

Overview of Project Delivery Systems. Private construction projects can be built in the United States using any number of "project delivery systems" – methods that owners use to have their projects designed and built. Which system a company chooses depends on its type of business, its specific needs and goals, and the type of project. Though the range of options is virtually endless, a few of the more distinct options are briefly summarized below. Owners usually find that the most beneficial and cost-effective way to maximize the benefits of a particular option is to hire experienced construction attorneys to draft the design and construction documents for the particular option selected.

Design-Bid-Build. This option is the most traditional project delivery system and involves an owner hiring an architect to design the project and prepare the construction documents, which are then submitted to contractors for pricing and ultimately construction. Pricing is usually accomplished by bidding, but sometimes by negotiation, and other times by a combination of the two. Although the most traditional, this option is often criticized for producing adversarial and confrontational construction projects.

Design Assist. This option is a variation on the design-bid-build option and involves an owner hiring an architect to design the project, but then also hiring a contractor early in the design process to work with the architect to provide the contractor's perspective on potential conflicts, omissions, and discrepancies in the construction documents, constructability of the design, value engineering, construction schedule, and construction price. Once the construction documents are complete, they are submitted to contractors for pricing in the same manner as for design-bid-build. The early involvement of the contractor is intended to alleviate many of the problems that cause the adversarial and confrontational nature of traditional design-bid-build.

Design-Build. In design-build, the owner hires one entity to both design and build the project, with the goal of eliminating the usual conflicts between the architect and the contractor on traditional design-bid-build projects that can create an adversarial atmosphere and lead to controversy, claims, and disputes. This option has gained popularity in recent years but has its own set of issues that must be carefully considered. It is not a panacea for all of the problems on a construction project, but it is a good candidate for many types of projects.

Innovative New Project Delivery Systems. In some regions of the United States, the construction industry is renowned for its adversarial and confrontational environment, and many owners are searching for ways to change that environment. Those owners are experimenting with new project delivery systems such as "lean construction" and "integrated project delivery," each of which is premised on intense collaboration between the owner, architect, and contractor from the earliest design stage to final completion of construction. That collaboration involves the owner, architect, and contractor working together as a cooperative team to design, schedule, price, and build the project, sharing risks and rewards from the earliest design stage through final completion of construction. For many reasons, these innovative systems are the antithesis of traditional design-bid-build – which is the whole intent – and must be carefully analyzed and understood before being implemented by an owner.

Master Agreements. An owner with a large construction program involving many different projects may want to consider using a master agreement system, in which an architect or contractor signs a master contract establishing all of the necessary contract terms and conditions and then provides services when it is issued a work authorization that provides the details for the particular project. The master agreement system can incorporate almost any type of project delivery system.

Labor and Human Resources

From a human resources perspective, a key step in opening any business in the United States is hiring the right employees and complying with the various federal and state hiring and employment laws. The most efficient and cost-effective representation in the area of employment law is preventative, and can be addressed by planning and processes. Good initial design of these processes, together with coherent ongoing implementation by management (with ongoing advice of counsel), helps minimize the cost of employment issues and negative impacts on employee morale.

Employment Law. The employment practices of employers operating in the United States must comply with both federal and, where applicable, state law.[5] Most laws generally apply both to U.S. employees as well as foreign employees working on American soil.[6] Similarly, most large employers are covered under both federal and state laws, where state laws may provide protections applicable only to smaller employers. Ultimately, all employment decisions must be based on legitimate business reasons and not on the basis of some legally protected category. Examples of the various types of actions prohibited by federal and state laws include:

Employment Discrimination. Federal and state statutes require employers to provide equal employment opportunities to employees without regard to age, sex, pregnancy, race, color, national origin, religion, disability, sexual preference and military status. For example:

- Title VII of the Civil Rights Act of 1991, the Civil Rights Act of 1866 ("§ 1981"), and state laws prohibit racial discrimination. Title VII covers all forms of racial discrimination in employment including racial harassment, adverse employment actions based on race, and discrimination based on a facially neutral policy that has an adverse impact on a certain race.

- The Age Discrimination in Employment Act (ADEA) protects workers who are over the age of 40.

- The Americans with Disability Act (ADA) protects workers who have physical or mental disability that substantially limits a "major life activity" (such as seeing, walking, communicating), and in certain circumstances, the employer is required to provide a reasonable accommodation to that employee.

- Similarly, some state fair employment statutes include broader categories, such as weight (Michigan), sexual orientation (Illinois), etc.

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[5] Businesses also must comply with the employment laws, if any, of the local jurisdictions in which they are located. For example, a number of cities and counties have "living wage ordinances," and San Francisco requires employers to provide health insurance benefits to employees who work in that city.

[6] California employment law requires special mention. California employment law is generally more favorable to employees than is federal law in virtually every category, so if a business is operating in compliance with California requirements, then it is likely to be complying with federal law as well. California employment law also is more favorable to employees than is the employment law of most other states in the U.S. As a result, for simplicity of administration, some businesses that operate in California as well as other states simply apply their California-compliant employment practices in those other states. However, uniformity of employment practices across different states is not required. For cost reasons, many businesses apply different employment practices in the different states in which they operate.

Workplace Harassment. Federal and State laws mandate that businesses provide a workplace that is free from all verbal, physical and visual forms of harassment. Harassment can be loosely defined as negative threatening or stereotyping, intimidating, or hostile acts that denigrate or show hostility or aversion toward any legally protected category. Federal and State laws also prohibit sexual harassment (e.g., vulgar or sexual jokes, unwelcome sexual advances, direct or subtle pressure for sexual activity, and the implied or express promise (or threat) of some type of work place benefit (or detriment) for engaging in sexual activity). In certain states, like California, an employee who proves harassment can recover unlimited damages, and, unlike federal law, an employer can be held liable even if it has an anti-harassment policy and an effective complaint procedure in place. It is highly recommended that all employers provide periodic anti-harassment training of supervisors and managers as well as employees.

Employee Leaves of Absence. The Family and Medical Leave Act ("FMLA") provides certain employees up to 12 weeks of leave to care for a newborn child, themselves, or an immediate family member who becomes ill. The FMLA was recently amended to also apply to individuals who are required to care for family members affected by military service (for example, an injured service person or the family of a service person called up for active duty). The FMLA Act applies only to employers with at least 50 employees in a specific geographic area. To be eligible for FMLA leave, employees must have worked for the employer for at least one year and for at least 1,250 hours in that past year. While FMLA leaves are typically unpaid, employers may ask employees to substitute paid time off (such as vacation time, sick leave or short-term disability) for unpaid leave time. Certain states also have more generous leave policies that do not impose service restrictions prior to eligibility. Certain states also have other types of protected leave time (voting, school visitations, domestic abuse protection) with which an employer must comply.

Wage and Hour Laws. The Fair Labor Standards Act ("FLSA") prescribes standards for the basic minimum wage and overtime pay, and affects most private employment. The FLSA requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. Employees who are "exempt" may be paid a salary (without entitlement to overtime). State laws are also almost always present as well, and some states mandate a higher minimum wage than the federal minimum wage. Moreover, the definition of who is an "exempt" employee has been widely debated, resulting in a huge wave of very costly wage and hour class action lawsuits against employers in almost every state (particularly California).

Covenants Not to Compete. Most states are considered "at-will" employers and do not require an "employment contract" between employer and employee. However, in certain circumstances, employers may attempt to restrict or impose limitations on departing employees to prevent them from directly competing against the company. For example, employers may attempt to limit the disclosure of company trade secrets, confidential information, or competitive customer information, or attempt to restrict how long the former employee must refrain from calling on customers or industries. These "covenants not to compete" are governed by state law and vary widely in their application and enforceability. We strongly recommend that before an employer asks an employee to sign such an agreement that counsel review the agreement to make sure it is enforceable and to ensure that the document is not deemed void for being against the public policy of the state in which the employee works. Certain states (California, in particular) make such agreements either illegal and/or impossible to enforce, except for the limited purpose of protecting the employer's trade secrets.

Arbitration Agreements. Some employers have employees sign arbitration agreements at the time of hire. This agreement states that rather than suing an employer in state or federal court (with the possibility of a jury trial) for a perceived workplace violation, that the parties will submit their dispute to binding arbitration. The enforceability of these arbitration agreements, also, vary

widely by state. We recommend that employers consult with counsel before requiring all employees to sign such an agreement.

Federal Labor Law. The rights of employees to form or support a labor union, or to refrain from doing so, and the related rights and obligations of employers and unions are governed by federal law, specifically the National Labor Relations Act and the Labor Management Relations Act. In fact, these laws "pre-empt" most state laws dealing with these topics, and, therefore, the rules that apply to employer-union relations are virtually the same in every state in the U.S. In general, these rules include the following:

- Employers cannot discriminate against employees because of the employees' lawful activities in support of a labor union.

- Employers must recognize and bargain in good faith with labor unions which a majority of the employers' employees vote for in a secret ballot election conducted by the National Labor Relations Board (NLRB).

- Before any such secret ballot election, employers do have the right to educate their employees and to try to convince them not to vote for a labor union, provided that the employers do not make unlawful promises to the employees, threaten them, interrogate them, or spy on them.

- Employers who acquire operations in which a labor union already represents employees must recognize and bargain with that union if it does not change the acquired operations and if it hires most of the acquired operations' employees who were represented by the union.

The NLRB secret ballot election process referred to in the second and third bullet points above is the traditional method by which labor unions have tried to "organize" employees. In recent years, however, labor unions have used other methods, including "corporate campaigns" and "neutrality/card-check agreements" to try to unionize employees without having to go through an election. The term "corporate campaigns" refers to coordinated efforts by unions, affiliated organizations, politicians, and other groups, which generally include negative publicity about an employer, activities to appeal to an employer's shareholders and/or to personally annoy an employer's owners and executives, and court and administrative litigation (such as actions before safety agencies) designed to create bad publicity and/or legal liability for the employer, all for the purpose of forcing the employer to "recognize" the union without a secret ballot election. "Neutrality/card check agreements" are agreements that unions try to force employers to accept, under which the employers agree not to exercise their right to educate their employees or to encourage them to reject union representation, and under which the employers agree to recognize the unions as the representative of their employees if the unions simply present cards or petitions signed by a majority of the employers' employees that indicate that those employees want to be represented by the unions.[7] Currently, new legislation is being considered that would make card-checking more widespread, and would limit the use of secret ballot elections.

Practical Suggestions. None of the foregoing is intended to state or imply that employers in the United States are without rights, or that the problems that the various state and federal employment laws or federal labor laws can create are unavoidable. Advance planning, preparation, and consistent implementation of lawful employment practices are key to minimizing the chance of litigation and

[7] In some jurisdictions – San Francisco, for example – agencies will not issue building permits for the construction of new hotels unless the hotel operators first agree to a neutrality/card check agreement with UNITE H.E.R.E., the primary union that represents hotel workers.

promoting a positive working environment. Among the areas in which this can be most helpful are the following:

Employment/Organizational Structure. One of the first steps a domestic employer must take is to determine the number of employees it needs and the duties it needs them to perform. Then it should write an accurate job description for each position it needs to fill. This will help in at least three ways. First, it will help the employer recruit, evaluate and hire qualified employees. Second, it will help the employer correctly classify each position as "exempt" or "non-exempt," and thereby avoid liability for misclassifying a "non-exempt" employee as being "exempt" and then failing to pay him or her overtime pay. Third, it will help the employer defeat claims for disability discrimination by employees who cannot perform the "essential job functions" set forth in the job description. A new employer (i.e., a non-U.S. company that is taking over an existing U.S. operation) may still take these steps, and it may establish its own employment and organizational structure, but the extent of the changes it may decide to make could be limited by operational and/or employee relations considerations. If a labor union represents the employees in the existing operation that a new employer is taking over, then the new employer very likely will be required to bargain with the union before it can make any changes to terms and conditions of employment.

Wages, Hours and Benefits. Federal law sets a minimum hourly rate of pay that increases periodically. An employer may pay employees above this rate, of course, and the wage rates that an employer actually pays usually are determined by the "market" (i.e., what employees with similar duties, responsibilities and qualifications are getting paid by the employer's competitors or other employers in its industry or near its geographic location). State laws and corresponding state law regulations often establish other requirements, for example, for the payment of overtime premium pay to "non-exempt" employees, for reporting time pay, for the provision of meal and rest periods, for vacation pay, and for recordkeeping. Federal law does not require employers to provide benefits over and above wages for work performed, but most employers do. Such benefits include, but are not limited to, health insurance, life insurance, retirement programs, severance packages, accidental death and dismemberment benefits, short-term and long-term disability insurance, education assistance and dependent care assistance.

Individual Employment Contracts. Absent an agreement to employ an employee for a specified term or to terminate an employee only for specified reasons or for "good cause" (including a collective bargaining agreement that requires "good cause" for discharge), employees in almost every state are presumed to be employed on an "at-will" basis. This means that they may quit their jobs, and their employers may terminate their employment, at any time, for any reason not prohibited by law. However, certain states (California, Illinois, Michigan, etc.) recognize the concept of "implied contract," and the courts have held that an employee's at-will status may be changed by an employer's statements or actions at the outset of, or during, the employee's employment. As a result, to avoid such "implied contract" claims, some employers have entered into individual employment contracts with their employees, especially with their executive level employees. Although such a contract may require the employer to have "good cause" to discharge the contracted-for employee, it does provide predictability and certainty, and it gives the employer the option of simply not renewing the contract when it expires rather than having to explain to the employee the reasons why the employer is terminating his or her employment. As noted above, it is difficult to enforce covenants-not-to-compete in certain states against certain employees even if such covenants are incorporated in individual employment agreements with executives, but it is possible to prevent an employee from using or disclosing the employer's trade secrets.

Hiring Process. State and federal employment laws impose a number of limitations on the questions that an employer may ask prospective employees during the hiring process (such as

whether they are married or have children; whether or where their spouses work; how they will handle childcare issues; and questions that would reveal whether they are in a group that is protected against discrimination, due to their race, color, religion, sex, national origin, age, disability, sexual orientation, or another characteristic or status). Thus, before each interview, employers are well-advised to determine the requirements of the position to be filled, how best to determine whether interviewees meet those requirements, and to prepare the interview questions that will lawfully reveal that information. Representations made during a job interview by enthusiastic interviewers in order to "sell" a position can create unintended "implied contract," and careful scripting and preparation is advisable to avoid this risk as well. There also are a number of state and federal laws regarding background checks and pre-employment drug tests with which employers must comply if they want to conduct them after they extend employment offers.

Verification of Employment Eligibility. Employers are required by the Immigration Reform and Control Act of 1986 and later amendments to verify the identity and work authorization of each person hired, whether the individual is a U.S. citizen, lawful permanent resident or foreign citizen with time-limited employment authorization and whether a temporary, part-time or full-time worker. On the first day of employment, the new hire must attest to their legal status and sign Department of Homeland Security Form I-9 (Employment Eligibility Verification). Within three business days of the date of hire, the new employee must present original document(s) verifying identity and employment eligibility and the employer must complete, sign and maintain Form I-9 for all employees. The employer must also refrain from discriminating on the basis of citizenship status or national origin, and from engaging in "document abuse" by requesting more or different documents of identification and employment authorization than the employee chooses to provide.

Employee Handbooks. Most employers distribute to employees their relevant employment policies and procedures, usually in the form of an "Employee Handbook," so that employees know what is expected of them and so the employers can defeat later claims that they made promises or representations contrary to their policies and procedures. Because the language used to describe the policies and procedures, or the omission or inclusion of certain policies and procedures, may create legal liability, it is common for employers to use legal counsel to draft or review their Handbooks.

Human Resources Department. It is preferable that each worksite with a substantial number of employees have a fully staffed Human Resources (HR) Department; but it is especially important to have at least one Human Resources professional on premises. The primary responsibility of these professionals is to monitor employee relations and to ensure the fair, consistent, non-discriminatory, and lawful application of all of the employer's employment policies and procedures. The local HR professional should work very closely with the employer's payroll function (whether internal or external) to be sure that all pay and recordkeeping practices comply with applicable policies and legal requirements.

Internal Training. Employment litigation is common throughout the United States. In addition to the preventative actions that we recommend above, we have found that one of the most effective ways for employers to try to avoid such litigation is to provide training to all of their employees regarding workplace harassment and discrimination, and to provide training to their managers and supervisors regarding "managing within the law" with respect to hiring practices, wrongful termination, creating and maintaining positive employee relations, and leaves of absence, among other labor and employment law topics. Certain states (particularly California and Connecticut) specifically require employers to provide sexual harassment avoidance training to all of their supervisors.

Insurance. U.S. employers are required to obtain workers' compensation insurance (or to qualify to self-insure against workers' compensation claims). They must also contribute to the state

unemployment and state disability insurance funds. Employers investing in the U.S. also should obtain standard business general liability, directors and officers liability, errors and omissions and excess or umbrella insurance policies. Some employers may also want to consider Employment Practices Liability ("EPL") insurance, which covers some of the more common employment litigation claims. Factors such as the employer's financial resources, the nature of its business, its organizational structure and its claims history, among others, will affect the number of different insurance policies it purchases, and the terms (coverage, deductible, etc.) of those policies.

Workers' Compensation. Almost every employer is subject to its state's Workers' Compensation laws. These laws subject an employer to liability for industrial accidents, regardless of the employer's negligence, while at the same time precluding employee lawsuits which might result in large damage awards (note, however, that in certain narrow situations, the employer may also be liable for damages in a civil suit). The workers' compensation laws provide a schedule of benefits to be paid to the disabled employee for injuries or, if the employee is killed, to the employee's dependents or heirs. The company should obtain sufficient workers' compensation liability insurance from an authorized private carrier of workers' compensation insurance or from the local office of the State Compensation Insurance Fund. The company may also choose to self-insure. This procedure may be accomplished by obtaining a certificate of consent to self-insure from the appropriate State Workers' compensation agency, who certifies the company's ability to pay any compensation that may be found due to an employee. If the corporation fails to follow the Workers' Compensation laws, it will be subject to penalties and legal action by the injured employee or the employee's dependents.

These and many more issues should be considered as part of your strategic planning for your new business. As suggested above, careful planning in advance about your business' policies towards its employees, in consultation with experienced labor lawyers, will provide your business with the maximum protection against employee claims, and the best opportunity to make them easy to defeat as quickly and inexpensively as possible.

Employee Benefits

Employee benefits in the United States typically are a significant part of an employee's total compensation package. In return for receiving the favorable income tax treatment these plans enjoy (including a current deduction by the employer which does not trigger income to the employee), employers must provide generally uniform benefits for all employees and satisfy other complex requirements imposed by U.S. federal law. However, with careful planning and knowledgeable advisors (usually a law firm and a benefits consulting firm), employee benefit programs can be established to provide competitive benefits to employees at the lowest possible cost to the employer and in full compliance with the law. A full explanation of the various legal issues surrounding the offering of employee benefit programs is beyond the scope of this brochure, but this particular section does provide a brief overview of the most common types of employee benefits offered by U.S. employees.

U.S. federal law does not require an employer to provide any particular retirement or health and welfare benefits to its employees. However, if an employer decides to provide such benefits, the benefits must be provided in accordance with the Employee Retirement Income Security Act of 1974, as amended (ERISA), the Internal Revenue Code of 1986, as amended (the "Code") and other federal laws. In addition, certain state and local municipalities require employers to provide a minimum amount of healthcare coverage to individuals employed in that state or municipality.

Employee benefit programs or "plans" in the United States can be divided into four broad categories:

> ***Qualified Retirement Plans.*** These plans provide general retirement benefits to all employees, but are designed to provide the greatest benefit to rank-and-file employees.
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> ***Executive Compensation and Nonqualified Retirement Plans.*** These plans are designed to provide retirement benefits and additional compensation arrangements for senior management and executive level employees. These arrangements are often exempt from ERISA (although not completely), but must otherwise meet stringent requirements under the Code.
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> ***Health and Welfare Plans.*** These plans generally provide medical; surgical or hospital care; dental care and benefits in the event of sickness, accident, disability or death. They are generally designed to cover employees at all levels. There are also plans known as "cafeteria plans," which allow employees to make an annual election to defer a portion of their compensation for the purpose of paying for benefits such as certain medical expenses.
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> ***Miscellaneous Fringe Benefit Plans.*** This category includes a variety of plans which employers sometimes offer to employees and which are usually subject to little, if any, federal or state regulation. These would include, for example, vacation plans, relocation plans (to cover moving expenses for new employees), certain kinds of severance plans (providing benefits when an employee leaves the company), club memberships, bonus plans, commission plans, and tuition assistance. Given the variation in these plans from employer to employer, and the fact that none of them are required by law, we are not providing a detailed discussion of these plans in this brochure.

Qualified Retirement Plans. A qualified retirement plan is a plan that meets certain tax qualification requirements under ERISA and the Code. Those requirements include that the plan be in writing, that plan assets be held in trust and that the plan not provide a greater level of benefits to highly paid employees than those who are non-highly paid (called "nondiscrimination"). In qualified retirement plans, the employer receives an income tax deduction for amounts contributed to the plan and employees do not

pay income tax on the contributions until they actually receive the retirement benefits. Qualified retirement plans may also permit or require employees to contribute.

Qualified retirement plans receive the utmost protection under ERISA and the Code. When assets of a qualified retirement plan are placed in a qualified trust, the anti-alienation rules and anti-assignment rules come into play, making it virtually impossible to ever pull those benefits back once they are allocated to an employee. The rules of the qualified retirement plan impose restrictions on participants (or a participant's creditors) from readily accessing these monies.

There are two basic types of qualified retirement plans: (i) defined contribution plans, and (ii) defined benefit plans.

Defined Contribution Plans. In a defined contribution plan, the plan assigns each participant an account. The plan then allocates employer and (if allowed) employee contributions to each employee's individual account. Typically, employees can receive the total amount contributed to their account (plus investment earnings), when they (i) retire, (ii) die or (iii) terminate employment. Profit sharing, stock bonus, 401(k) and money purchase plans are common forms of defined contribution plans.

> ***Profit Sharing Plans.*** In a profit sharing plan, the employer contributes an annual amount of cash to each employee's account based on a contribution formula. An employer can provide a profit sharing plan as an incentive to employees to contribute towards the success of the employer and a method by which to reward employees if the company is successful. However, the contribution formula is entirely discretionary and is not required to be tied to profits.
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> ***Stock Bonus Plans and ESOPs.*** A stock bonus plan is similar to a profit sharing plan except that benefits are generally distributed in employer stock. The most common type of stock bonus plan is an "employee stock ownership" or ESOP plan. ESOPs are stock bonus plans or combined stock bonus plans and money purchase plans that are designed to invest primarily in employer stock and have very specific rules surrounding their maintenance and compliance.
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> ***401(k) Plans.*** A profit sharing plan may also permit employees to contribute a portion of their salary to the plan. Profit sharing plans that allow employees to contribute are called "401(k) plans" because they were created under Section 401(k) of the Code. Instead of a profit sharing contribution, employers that provide 401(k) plans can "match" employee contributions. Providing a match encourages employees to save for retirement and increases the likelihood that the plan will pass the Code's nondiscrimination rules. 401(k) plans are relatively inexpensive for an employer to establish and operate and, thus, are a popular retirement plan choice among U.S. employers.
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> ***Money Purchase Plans.*** Under a money purchase plan, the employer has a fixed obligation to make contributions to the employees' accounts. Typically, the contributions are based on a certain percentage of an employee's compensation. Money purchase plans must also meet specific funding and distribution requirements that do not apply to profit sharing and 401(k) plans and, thus, they are much less popular with employers given the greater restrictions.

Defined Benefit Pension Plan. Defined benefit pension plans guarantee employees a certain benefit upon retirement based on a number of design factors and desired objectives. Typically, this benefit is paid in a series of monthly payments (called an "annuity") from the date the employee retires until his or her death.

Defined benefit plans can be either "traditional" type plans, in which the benefit is commonly stated as an annuity beginning at retirement age; or a newer form of plan called a "cash balance" plan, in which the

benefit may be stated as a hypothetical account balance. In either case, the assets that fund the benefit accrued under a defined benefit pension plan may consist of employer contributions, employee contributions or a combination of both.

> ***Traditional Defined Benefit Plans.*** A "traditional" defined benefit pension plan provides a fixed benefit to an employee payable at early or normal retirement age. In contrast to a defined contribution plan, a traditional defined benefit plan does not consider factors such as investment gains and losses to set the benefit amount. Instead, benefits are accrued each year.
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> ***Cash Balance Plans.*** A cash balance plan is a defined benefit plan that exhibits some of the features of a defined contribution plan. That is why these plans are sometimes referred to as "hybrid" plans. The benefit is typically stated as a hypothetical account balance for each participant.

Nonqualified Retirement Plans. The more stringent limits on qualified retirement plans make it difficult for most employers to provide executives with enough retirement income to maintain their standard of living after retirement. Consequently, many employers adopt nonqualified deferred compensation arrangements to supplement the qualified retirement plan income the executives will receive. These nonqualified plans can either operate in conjunction with a tax-qualified plan, in which case they are often referred to as "supplemental" plans, supplemental employee retirement plans (SERPs), "wrap" plans, or "mirror" plans. They also can be stand-alone arrangements.

Nonqualified plans are not subject to any of the nondiscrimination rules that apply to qualified plans, and therefore can be tailored to each executive's individual situation. However, to be exempt from the qualified plan rules, the nonqualified plans can only be offered to a "select group or management or highly compensated employees," otherwise typically referred to as a top-hat group. Although the US Department of Labor has not published regulations defining what constitutes a "select group of management" for purposes of top-hat plans, it can be detected from the Department of Labor opinions issued that a "select group" must be exactly that — a "select group."

A nonqualified plan which extends coverage beyond a select group of management or highly compensated employees would not constitute a top-hat nonqualified plan for purposes of Parts 2, 3 and 4 of Title I of ERISA. As a result, it appears that the Department of Labor believes that top-hat participants should be of a position or class within a company where they are considered to be somewhat savvy in business, able to make independent investment decisions, and not in need of ERISA's protection (i.e., management). If the composition of participants under a nonqualified plan includes individuals outside this category, the nonqualified plan will not constitute a top-hat plan and will be fully subject to the requirements of ERISA.

Unlike qualified retirement plans, the nonqualified plan and its assets are subject to the claims of the employer's general creditors. The participants must not have any ownership rights in the nonqualified plan's assets. One point worth mentioning is that most of the top-hat court cases which specifically addressed the unfunded nature of a nonqualified plan dealt specifically with the use of life insurance. The nonqualified plans which typically ran into trouble in court had the participants as owners of the relevant life insurance policies on their respective lives. Once a participant's specific ownership to nonqualified plan assets is established, the nonqualified plan will lose its unfunded nature.

Code Section 409A applies to all deferred compensation plans and arrangements, with some exceptions, under which the service provider (employee, director, consultant) has a legally binding right to compensation which has not been actively or constructively received and will be payable in a later tax year of the individual. Generally, among other things, Code Section 409A revises the requirements regarding the specific timing of elections of deferred compensation, the form and timing of payment of

deferred compensation, prohibits acceleration of payments, and imposes a six (6) month delay in the payment of deferred compensation for key employees.

Plans and arrangements which are subject to Code Section 409A include: SERP (supplemental executive retirement plan); nonqualified 401(k) plan; nonqualified "excess" plan; phantom stock units or shares (whether paid in cash or actual stock); discounted stock options, stock units or SARs; salary or consulting fee deferral; offer letter or agreement promising to grant bonus or other compensation in future year(s); employment or severance agreement providing for severance; annual or long-term bonus deferral; and split-dollar life insurance (endorsement method).

Plans and arrangements which are NOT Subject to 409A include: qualified plans (401(k), defined benefit, etc.); employee stock purchase plans under Code section 423; 403(b) and 457(b) plans (non-profit retirement plans); bona fide sick leave, vacation and compensatory time off; stock options and SARs (at fair market value or higher); restricted stock awards (whether vesting under time or performance criteria); disability pay; and death benefit plans.

A number of exceptions to Code Section 409A exist for severance compensation payments. Arrangements under which an employee is paid compensation (cash, in-kind or benefits) on account of a separation from service is considered deferred compensation under Code Section 409A unless the arrangement (when aggregated with all other separation pay arrangements) meets one of the following four exceptions:

- Short-term deferral exception;
- Limited severance pay plan exception;
- Limited reimbursements exception; or
- Collectively bargained arrangement

Compliance and non-compliance with Code Section 409A is fundamentally determined from the perspective of the individual employee, director, or consultant. Non-compliance with Code Section 409A results in taxation of the non-complying compensation as income to the individual. The taxation incurred on non-compliance with Code Section 409A has 3 components:

- All compensation deferred under the plan category for the taxable year and all preceding taxable years is included in income in the year of violation.
- Interest at the IRS underpayment rate on all vested amounts for all prior years that are taken into income in the year of violation
- 20% excise tax on the amount of compensation required to be included in income

Employers have reporting requirements on Form W-2 in both compliant and non-compliance years. IRS guidance is still yet to be fully issued on how to determine and report these amounts.

Executive Arrangements Other Than Nonqualified Retirement Plans. As noted above, executive compensation arrangements typically are established by employers for key executives or management-level employees. Although the qualified plan rules do not apply to these arrangements, some executive compensation arrangements may be subject to more adverse tax consequences. Besides nonqualified deferred compensation plans, there are a number of different executive compensation arrangements including:

Stock Options. In a stock option plan, a company will grant options to purchase its common stock to key employees. Generally, companies use two types of options, incentive stock options ("ISOs") and nonstatutory or non-qualified stock options ("NSOs"). ISO plans must meet certain requirements in the Code that restrict when an employee can exercise the options. If the plan meets these requirements and the employee remains in employment until the time of exercise, he or she generally will not have to pay income tax until the shares are sold. NSOs are not subject to any design restrictions. Generally, the employee pays income tax at the time he or she exercises the option. (That income is characterized as ordinary income and is subject to a higher tax rate than ISOs.)

Other Stock-Based Compensation. Companies also use a variety of other vehicles such as phantom shares, stock appreciation rights ("SARs") and restricted stock. Phantom shares and SARs are not real equity; they simply use stock price as a measure of value. Employers use these compensation devices when they do not want to provide actual stock to their employees and dilute ownership of the company. Upon exercise of a phantom share or an SAR, the employee is entitled to the value of a full share or the amount of the share appreciation since the grant (and can be paid in cash or actual stock). These amounts are taxed as ordinary income.

Employment Agreements. In addition to the compensation arrangements described above, executives often use employment agreements to structure the nature of the employment relationship. These agreements often contain provisions that specify the types of retirement benefits or deferred compensation the executive will receive, including any special perquisites.

Health and Welfare Benefit Plans. Employers may offer a variety of health and welfare benefits to their employees, such as medical, surgical or hospital care; dental care; benefits in the event of sickness, accident, disability or death; dependent care or severance pay. While employers may offer a variety of these benefits, health care benefits are the most common type of benefit provided. Typical health and welfare benefit plans include the following:

Self-Funded Plans. Employers are permitted to use a self-funded health care plan wherein the employer directly pays the cost of employee medical care. The employer may or may not charge its employees a premium and co-pays for this coverage. To fund for these benefits, the employer generally pays money out of its general assets into a separate trust on a periodic basis. The trust pays the required benefits to plan participants. In order to protect the employer against losses from very large and unexpected claims, the trust often buys a policy of "stop loss" insurance (which might provide, for example, that the insurance company pays when a particular claim reaches some minimum number. A typical stop loss policy might provide for coverage of claims which hit $100,000.). Self-funded plans have the advantage of generally being cheaper than insurance (since the employer is not paying for the administrative overhead and profit of an insurance company). In addition, self-funded plans are not subject to state and federal regulation as "insurance" and the employer generally has a bit more freedom to decide on plan design and coverage issues. Self-funded plans are, as a rule, more challenging to administer for an employer. In addition, self funding generally makes sense only for larger employers (for example, with several thousand employees).

Insured Arrangements. Employers of all sizes often provide health and welfare benefits through traditional insurance arrangements with large providers. In these arrangements, the employer typically pays a per-employee premium for the coverage which may or may not be charged back to the employee. The insurance company takes care of all of the administrative details and claims processing.

Managed Care Programs. In an effort to reduce the cost of providing health care benefits and increase the effectiveness of the health care delivery system, many employers participate in a managed care program. Managed care is generally a process by which a purchaser of health care controls or influences the delivery and utilization of health care services, with the goal of achieving high quality, appropriate, and cost-effective health care services. Types of managed care programs include health maintenance organizations (HMOs such as Kaiser, Pacificare or Health Net) and preferred provider organizations (PPOs such as Blue Cross/Blue Shield), and typically offer employees the choice between in-network and out-of-network providers, required second opinions prior to elective surgery and pre-admission review of inpatient hospital care.

Group Term Life Insurance. An employer may purchase group term life insurance for the benefit of its employees. The cost of the first $50,000 of this insurance coverage will not be included in the employees' gross income. An employer's group term life insurance policy must cover at least 10 full-time employees, unless the employer has fewer than 10 full-time employees and the policy covers all employees.

Cafeteria Plans. Cafeteria plans allow employers to manage benefit costs by offering employees the opportunity to make before-tax contributions towards their welfare benefits. Cafeteria plans may also permit employees to choose among a "menu" of benefits so that each employee can tailor the benefit package that suits his or her specific needs.

Fiduciary Responsibilities in the Employee Benefit Plan Context. ERISA fiduciary duties impose personal liability for any losses resulting from their breach. ERISA fiduciary duties apply to (i) qualified plans; (ii) ERISA welfare benefit plans; (iii) medical plans; (iv) life insurance plans; (v) long-term disability plans; and (vi) severance plans. ERISA fiduciary duties do not apply to: (A) nonqualified plans; (B) deferred compensation plans; (C) equity compensation plans; (D) annual bonus plans; and (E) plans not subject to ERISA (most short-term disability policies, educational assistance plans, fringe benefits and employment practices).

In applying ERISA's fiduciary duties, the federal courts and the Department of Labor focus on the procedural aspects of a fiduciary's decision-making process rather than any substantive decision itself. Thus, the process by which a fiduciary decision was made will be examined in determining whether a plan properly carried out its fiduciary obligations or whether a breach of such duty has occurred.

A person is a plan fiduciary if he or she is the "named fiduciary" under the plan, exercises any discretionary authority or discretionary control regarding the administration of the plan, exercises any authority or control over the management or disposition of the plan's assets, renders investment advice for a fee, or has any discretionary authority or discretionary responsibility in the administration of the plan. As noted, if a fiduciary fails to meet ERISA's standard of conduct, the fiduciary is personally liable for any losses resulting from the breach of fiduciary duty. The Department of Labor, the plan administrator, and participants or their beneficiaries are permitted to bring an action against the fiduciary. Civil and criminal penalties may also apply.

Consequently, compliance with the US ERISA and Code requirements is essential in order to offer any U.S. employee benefit plan and in order to avoid fiduciary liability down the road.

Immigration

Obtaining visas, work permits, entry documents and permanent resident (green card) status for key executive, managerial, and specialist personnel (and their immediate family members) from the federal government can be challenging. The challenge is greater still when business needs require an accelerated timeline. Moving key personnel seamlessly demands advance planning, attention to detail and collaboration with a subject matter expert (a lawyer with competence in immigration law) who understands the various immigration options available and who has the experience to implement practical and timely solutions.

In addition to the need for visas and work permits for foreign personnel who will transfer to the U.S. operation, a company must address significant immigration compliance issues. Federal law imposes regulatory requirements to ensure that all company personnel are authorized to be employed in the United States, except for business visitors, who may enter for temporary periods to engage in legitimate purposes other than employment and may not be paid but may receive reasonable reimbursement of expenses. Given the recent and widely publicized enforcement crackdown by government agencies against employers who hire unlawful workers knowing of their unlawful status, the issue of workforce authorization is an important one for all employers and, in particular, for those businesses that rely on low-skilled or unskilled workers or who place workers at or near “critical infrastructure” sites such as airports, train stations, power plants and government offices.

This summary provides a “big picture” overview of U.S. business immigration rules and processes and suggests best practices that will help your company maintain full compliance with the immigration laws while using these laws as opportunities to hire the “best and the brightest” workers without regard to their nationality or country of residence.

General Framework. Identifying and lawfully employing workers who are not U.S. citizens or green card holders calls for special immigration training, appropriate and consistent policies, and a trusted, reliable outside immigration legal provider. Experienced immigration counsel should assist your business in establishing the most appropriate, non-discriminatory means to identify whether a job applicant is an authorized U.S. worker and to determine what, if any, immigration sponsorship might be required. Your executives, chief legal officer and human resources (HR) personnel should work with immigration counsel to develop effective recruitment and hiring policies that will help your company strike the right balance between compliance and competitiveness.

Business Visitor Activities. It is appropriate to use the B-1 “Business Visitor” visa and its counterpart under the visa waiver permanent program, the WB (Waiver-Business) classification, for individuals coming to the U.S. for a short-term period in order to attend meetings and seminars, exchange information, and, if controlled and paid solely by an affiliated entity abroad, provide a limited range of professional services. It is illegal, however, for a B-1 or WB business visitor to engage in productive work, even if for a short duration. Experienced immigration lawyers can assist you in identifying the right situations in which to use the B-1 and WB business visitor categories and help with the drafting of appropriate letters that business travelers may need to present to the U.S. embassies and consulates abroad and at American border or pre-flight inspection posts in order to gain lawful entry to the United States.

Work Visa Options. When an individual needs to come to the U.S. for a longer-term assignment or to perform productive work, it is necessary to obtain a work visa. The following are common work visa categories. They are all “nonimmigrant visas” and are temporary in nature, although they may be granted or extended for many years:

E-1 (Treaty Trader) and E-2 (Treaty Investor) Visas. Certain countries have entered into Bilateral Investment Treaties (BITs) or Treaties of Friendship, Commerce and Navigation (FCN Treaties) with the United States. These countries include most countries in Western Europe as well as Japan, Australia and the Republic of China (Taiwan), and surprisingly, Iran, but do not include India or China.

The E-1 visa is for **traders** and key employees who are citizens of the treaty country coming to the U.S. to work in an executive, managerial or supervisory position or to use essential skills on behalf of the same treaty country enterprise which trades internationally in goods or services principally (at least 50%) between the U.S. and the treaty country.

The E-2 visa is for **investors** and key employees who are citizens of the treaty country coming to the U.S. to work in an executive, managerial or supervisory position or to use essential skills on behalf of the same treaty country enterprise which has made a substantial investment in a U.S. business enterprise. The E-2 visa may also be granted for start-up workers on temporary duty in order to allow a new business such as a manufacturing operation to become established or engage in a model changeover. The spouse of an E-1 or E-2 worker may apply for and receive a work permit, known as an Employment Authorization Document (EAD).

For both E-1 and E-2 treaty companies, the ownership of the enterprise must be traced to the very top of the ownership hierarchy, i.e., through intervening layers of legal entities, and the ownership must be held by individuals who are non-residents in the United States and who have the nationality of the company owners. In the case of publicly traded companies, the treaty nationality is considered to be the nationality of the country on whose stock exchange the company's stock is principally listed.

L-1 Managers, Executives and Specialists. The L-1 category is for employees who have been employed outside the U.S. by an office of your company or an affiliate or subsidiary for at least one year out of the past three years and who are coming to the U.S. on an "intracompany-transferee" assignment. The L-1 category consists of L-1A managers and executives and L-1B individuals with "specialized knowledge." L-1A "executives" may include either (a) traditional executives of larger companies (e.g. President, Vice President, Corporate Secretary or Treasurer), or (b) a senior project manager who is not required to manage personnel. An L-1A "manager" must manage (a) two layers of subordinate or a single layer of professional personnel (workers with relevant bachelor's degrees or the work experience equivalent of a degree) and must have authority to recommend or make such decisions as hiring, promotion or termination, or (b) manage an essential function or component of the company. The L-1B category for "specialized knowledge" refers to knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests, and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

L-1 employees may either remain on the home-country payroll or shift to the U.S. payroll. This provides more flexibility for a company with respect to pay and benefits packages. The spouse of an L-1A or L-1B worker may apply for and receive a work permit, also known as the EAD.

In addition to obtaining L-1 visas for employees coming to the U.S., immigration counsel can also prepare and file an "L-1 Blanket Petition" with the United States Citizenship and Immigration Services (a branch of the U.S. Department of Homeland Security). A blanket L-1 visa is available if your company is engaged in commercial trade or services, has an office in the U.S., has been doing business for at least one year, has three or more domestic and foreign branches, subsidiaries, or affiliates, and the group of affiliated entities satisfies one of the following: (a)

obtained approval of petitions for at least 10 L-1 executives, managers, or specialized knowledge professionals during the previous 12 months; or (b) achieved combined annual sales of at least $25,000,000; or (c) employs a U.S. work force of at least 1,000 workers. The approval of an L-1 Blanket Petition will ensure that the process goes as quickly as possible, creating the opportunity for your company to identify a transfer candidate and have the employee in the U.S. and working in a matter of only 2 to 3 weeks time.

FTA Nationalities. Certain "special nationalities" are eligible for specified work visas in the U.S. under various free trade agreements (FTAs). Generally, persons eligible for such FTA work permits include Canadian, Mexican, Chilean, and Singaporean nationals. Many of these work permits apply only to specific occupations (including hotel managers, interior designers, landscape architects, engineers, computer systems analysts, accountants, and architects). These people may present opportunities for the growth and success of your business in the United States. Although not based on an FTA, there is also the two-year E-3 visa, a special visa category for Australian professionals only.

H-1B Professionals. The H-1B visa is a quota-based category set aside for individuals whose jobs require a minimum of a bachelor's degree or equivalent work experience in a specific field of study. Individuals may be eligible for H-1B status when they possess an educational background or equivalent work experience in that specific field. The Department of Labor exercises substantial control through regulations and enforcement oversight over this visa category, which means that the sponsoring employer is obligated to pay the prevailing wage for the occupation in the geographic market and must also make various attestations (formal promises to the government) as to pay scale and workplace conditions.

Unlike other U.S. work visa categories, there is a "cap" or limit placed on the number of H-1B visas that may be granted during a given government fiscal year. (The U.S. government fiscal year runs from October 1st to the following September 30th.) For this reason, many individuals who are otherwise eligible for an H-1B visa are not able to obtain one because of the annual limit. For the current fiscal year, there are still H-1B work permits available, although the supply is rapidly diminishing.

Individuals who already have valid H-1B status and who are "transferring" from another company in the U.S. to a position with a new employer are not considered subject to the cap and are eligible to complete the process. Spouses of H-1B visa holders are not eligible for work permission in the U.S., although minor children of H-1B visa holders are eligible to study in the U.S. either at a private or public school.

Workers who lack a Bachelor's Degree or Equivalent Experience. U.S. visa regulations tend to favor professional positions requiring a minimum of a Bachelor's degree, or equivalent experience relevant to the same field of study as the required job duties. As a result, many jobs for such positions as trainees, interns, seasonal workers, low-skilled industrial or construction workers, chefs and related hotel and resort workers can present immigration difficulties for prospective employers and foreign workers. Additional care must be taken in connection with obtaining visas for non-professional positions. In some situations, for example, the L-1B and E-1 or E-2 visa categories may be available. In other cases (for example, specialty chefs), qualified candidates may be brought into the U.S. through a J-1 exchange visitor program or through an H-2B seasonal worker or H-3 trainee program. In addition, certain student visa holders (F-1, M-1 and J-1 students) may be eligible for a period of employment authorization known as optional or curricular practical training.

Note that unless workers are qualified under the foregoing visa categories, obtaining lawful U.S. work visas or green cards for junior, non-professional positions can range from challenging to perhaps impossible.

Practical Issues

We highlight below a number of practical issues that may arise when foreign managers, executives and specialist personnel seek to enter the United States.

Time Required to Process Visa Papers. Obtaining the work visa and corresponding entry document can be time-consuming. Thus, early planning is always helpful. Many work permit categories (such as the H and L visas) involve a two-step process: first, securing approval of the visa petition in the United States and second, applying at the U.S. consular post in the home foreign country for a visa stamp. The first part of the process generally requires more than three weeks, followed by an approximate two-week processing period for obtaining the required visa entry document. Thus, in most cases a lead time of five to six weeks is required. This lead time assumes that the employer will pay an additional $1,000 government filing fee known as Premium Processing Service in order to get a decision on an expedited basis.

In certain cases the lead time may be shorter. For example, for FTA work permits for Canadian, Mexican or Australian citizens there is no requirement of visa petition approval, and thus the processing time for such FTA cases is about two to three weeks (the time required to book and attend a visa appointment at the U.S. consular post and to receive back the passport containing the visa). Further, hiring someone in the United States who is already working under work-visa status (such as an H-1B) is generally a faster process, requiring about a week or two to prepare and file the paperwork, at which point the H-1B worker may be employed. NOTE: Immigration processing times may vary widely depending on the resources that federal government agencies make available at any given time. Backlogs and delays can develop, sometimes without any forewarning.

Visiting the U.S. Before Work Permit Approval. If the foreign national employee must travel to the United States after the work permit application has been filed but before it has been approved, he or she may be eligible to enter the United States using the B-1 or WB business visitor categories, although there can be some risk of denial of entry in that situation. Generally, the foreign national would need to provide evidence at the port of entry to substantiate that he or she remains employed by the foreign employer and that the applicant will return to the foreign country to apply for the actual work-authorizing visa once the petition has been approved.

Family Members. Most work permit categories have dependent classifications that allow spouses as well as unmarried children under the age of 21 to enter the United States to accompany and live with the principal worker. Generally, the family members apply for entry documents at the U.S. consular post in the home country. Some visa categories (such as the L-1 and the E-1, E-2 and E-3) allow the spouse to apply for a work permit or EAD once the spouse has entered the United States in dependent visa status.

Social Security Numbers. Work permit holders are allowed to obtain a Social Security Number ("SSN") from the Social Security Administration. The SSN may be used for a variety of purposes, including federal and state income tax reporting, establishing bank accounts, obtaining a driver's license, registering a motor vehicle, and applying for credit cards. Family members who are not authorized to work are not eligible to obtain an SSN.

To apply for the SSN, proof of age, identity, and lawful nonimmigrant work visa status is required. Thus, a passport and I-94 Departure Record to confirm valid visa status (and thus to confirm employment authorization in the United States) will be required when applying for a SSN. The applicant for a SSN

should wait at least 10 days after entry into the United States to apply for a SSN to allow enough time for the Department of Homeland Security to transmit notice of that person's entry into the United States to the necessary database for retrieval by the SSA when processing the application. Information about the location of the closest local office of the Social Security Administration ("SSA") may be obtained by calling 1-800-772-1213 or by visiting the social security website at www.ssa.gov.

Best Practices. Given the critical need to permit key personnel to enter and work in the United States on a timely and lawful basis and in view of the increasing enforcement activities of government agencies regarding worker authorization, employers in the United States must develop strong immigration and workforce authorization compliance programs. The best practices suggested below will assist employers in developing such compliance programs.

I-9 Training and Compliance. The company should arrange for in-depth training of its HR personnel, who will be responsible for the I-9 employment eligibility verification process – this is the deceptively simple one-page document that an employer must complete for each new hire to prove that the employee is an authorized worker. In addition, the employer should consider whether to acquire a self-correcting electronic I-9 software package. Such systems largely eliminate errors in completion of the form and allow for electronic storage and retrieval of I-9 forms and related documents. Finally, the employer should assess from the outset whether as a policy matter it will make photocopies of the documents that the employee offers to prove identity and work authorization.

E-Verify. The E-Verify system is an electronic system (used in addition to the I-9 process above) that is accessed through an internet browser to confirm through federal government databases whether or not new hires are authorized for employment in the United States. Some states require employers to use E-Verify. Access to the E-Verify system may be integrated with the I-9 software package that the employer uses. Although an employer's use of E-Verify does not protect the employer from liability for employing unlawful workers, a properly administered E-Verify program can assist the employer in achieving workforce authorization compliance. Seyfarth Shaw's Immigration Group can assist your company in determining the risks and merits of enrollment in the E-Verify program and can also assist you through enrollment and training to use the program.

Immigration Enforcement. Increasingly, federal and state law enforcement authorities are investigating and prosecuting violations of the immigration laws by individuals and business entities. The immigration police are visiting employer worksites, interviewing management and employees, auditing required immigration paperwork, issuing administrative subpoenas or obtaining judicial subpoenas that require the surrender of business and personal records, and imposing fines and other civil penalties (fines, back wage orders, debarment from federal contracts or debarment from use of the employment-based immigration system in the future) or – in some cases – initiating criminal prosecution. The sponsorship of immigration benefits such as work visas, work permits or green cards requires employers to sign formal statements under penalty of perjury confirming the terms and conditions of employment and the business activities of the enterprise. In addition, violations of certain criminal laws, certain "white-collar" business crimes, as well as serious motor vehicle violations while intoxicated or causing bodily injury or cases of domestic abuse can lead to deportation in aggravated circumstances or prevent an individual from returning to the U.S. after travel abroad. Businesses and individuals can also be victimized by unscrupulous individuals who claim expertise in immigration but are unlicensed and engage in the unauthorized practice of immigration law. Newcomers are forewarned that they should follow all laws, not just immigration laws, and seek guidance on immigration benefits and compliance requirements only from duly licensed attorneys with competence in immigration law and procedure.

Immigration Case Tracking. The employer should maintain a case database system to enable tracking and monitoring of critical work permit and entry document expiration dates. Employees under work visa status or their family members who stay in the United States beyond the expiration date listed in their entry document (known as the Form I-94) face serious difficulties. Depending on the length of an "overstay," the individual, after leaving the U.S., may be barred from returning for three to ten years and may be required for the rest of his or her life to apply for a U.S. visa only at a U.S. Embassy or Consulate in his or her home country or country of last residence. The employer must therefore obtain and maintain a reliable calendaring system to track and monitor those critical expiration dates and to take appropriate action (arranging the individual's timely departure from the U.S. or applying for extension of lawful immigration status).

Seyfarth Shaw's proprietary ImmSTAR® database, accessible to clients through a password-protected link, is designed to perform just this task. For our immigration clients, Seyfarth's Immigration Group populates ImmSTAR® with all of your existing U.S. and global immigration cases, and we train your in-house professionals to use the database as a tool to track employees' cases as well as run reports, all at no extra charge. More information can be found at www.immstar.com.

Employment-based Green Card Sponsorship. In many situations, temporary work permits reach a maximum limit; to work beyond that limit, the employer must take steps to obtain employment-based permanent residence (also called "green card" status) through immigration sponsorship for the employee. The employer should thus consider developing a formal green-card sponsorship policy. A strong green-card policy sends the message to prospective hires that the employer invests in its employees and is dedicated to a long-term relationship with the talented people it hires. A foreign citizen seeking or considering permanent residency in the United States may be attracted by the green card policy and by the predictability that a clear policy offers. Seyfarth Shaw regularly assists employers in the employment-based sponsorship process, whether that involves a recruitment test of the local labor market, known as PERM labor certification, to see if U.S. workers are in theory available for the sponsored occupation; or using special procedures that exempt the application from the labor certification requirement. In some situations, a foreign citizen may be able to obtain conditional and permanent green-card benefits through a family relationship such as a good-faith marriage to a U.S. citizen in which the husband and wife genuinely intend to make a life together. Whether a green card is sought through the employment-based process or through a family relationship, each case presents unique issues. Advance planning is highly recommended. The hiring of a competent attorney or law firm with competence and experience in immigration law is essential.

"EB-5" Green Card Eligibility through Cash Investment and Job Creation. For many individuals, particularly entrepreneurs, investors and retirees, employment-based green card sponsorship may be unavailable or otherwise inappropriate. An increasingly popular alternative is the Employment-Creation green card category for foreign investors, known as the EB-5 program.

There are two types of EB-5 investments: (1) the "Individual Investor" program, and (2) the "Regional Center" program. The two programs share certain common features. In each case, an investment of a qualifying amount of cash into a commercial enterprise is required. The qualifying amount depends on the location where the investor's EB-5 business enterprise will be located. Investments in businesses generally require an investment of at least $1 million, unless the business is or will be located in a Targeted Employment Area ("TEA"), i.e., an area that has an unemployment rate (as determined by state government authorities) which is at least 150 percent of the national average unemployment rate or a rural area as designated by the U.S. Office of Management and Budget. For businesses located in a TEA, the minimum amount of investment is $500,000. The amount invested, whether $1 million or $500,000, must be from lawfully

acquired funds such as savings, earnings, gifts, interest or dividend payments and the funds invested must be placed "at risk" of total loss if the business fails.

Aside from the similarity in the amount of investment required, however, the Individual Investor and Regional Center programs differ in two key ways. Under the Individual Investor program, the foreign investor must also (1) use the invested funds to form a new business (or in limited situations, purchase an existing or "troubled" business) that will promptly lead to the direct hiring by the enterprise of at least 10 full-time U.S. workers (not including the investor's relatives); and (2) the investor must be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, and not merely hold a passive investment. The Regional Center program was developed to relax these two requirements. A regional center is a for-profit business, a nonprofit organization or a governmental entity that has been formally approved by the USCIS in order to accept investment funds in a defined geographic area of the country for the purpose of promoting economic growth through increased export sales, improved regional productivity, the creation of new jobs, and increased domestic capital investment. If a foreign citizen makes the required investment through a USCIS-approved regional center, then the job-creation requirement is satisfied if the investment results in the hiring, directly or indirectly, of 10 full-time U.S. workers. Moreover, the investor in a regional center will be treated as having a role in the management of the investment enterprise merely by holding a limited partner interest in the investment enterprise. Thus, day-to-day management or policy formulation is not required of a foreign citizen investing through a regional center.

Under both EB-5 investment programs, the foreign investor must request "conditional" permanent resident designation on his or her own behalf (and for a spouse and minor children under 21) by first submitting an immigrant visa petition along with evidence of the qualifying investment and the actual or imminent creation of 10 jobs for U.S. workers. Once the petition is approved by USCIS, the investor can obtain a conditional green card in one of two ways: either by applying to adjust status in the U.S., or applying for an immigrant visa at a U.S. embassy or consular post abroad. Two years after conditional green card status is granted, the conditional residents must then apply to "remove the conditions on residence" (and convert a conditional green card to a truly permanent one) by re-petitioning USCIS. The petition to remove conditions must show that the investor "sustained" the investment in the business enterprise and maintained at least the required 10 jobs for U.S. workers in the commercial enterprise or through a regional center.

Note: The EB-5 investor category is complicated and risky. A foreign citizen considering a possible EB-5 investment should be sure to hire qualified professional help, including a business analyst, certified public accountant or corporate lawyer as well as an immigration lawyer with experience in EB-5 cases.

Intellectual Property Rights

United States law offers a robust system of protection for trademarks, copyrights, patents, and certain other types of intellectual property under federal law and the laws of various states. This section briefly summarizes those rights.

Trademarks. Trademark protection in the United States generally arises from actual prior use of a trademark or service mark in commerce. Federal registration is available and valuable, as it confers certain important benefits on the registrant when enforcing a mark, but unlike in many countries, the act of registration does not itself create the right or the trademark.

Because trademark rights are territorial, a non-U.S. company cannot rely on its rights abroad to assure itself that it can use and register its previously existing marks in the United States safely. Because rights in the United States derive from use, not registration, it is generally important to conduct an investigation of the availability of a mark for use and registration in the United States. An availability search and legal assessment enable the prospective user to assess the risks of proceeding with use and registration of a mark in the United States.

The United States Trademark Act prohibits the registration of a number of types of marks, including marks consisting of generic terms; descriptive marks; geographically descriptive or deceptive marks; marks that are primarily merely a surname; marks that falsely suggest an association with a person or institution; scandalous or immoral marks; marks that are functional; and marks that are confusingly similar, as applied to the goods in the application, to previously registered marks. An application for a federal trademark registration is examined in the United States Patent and Trademark Office by an examining attorney, who determines whether the application complies with applicable formalities and whether the subject mark is registrable in the face of these prohibitions.

When a mark is approved by the examining attorney for registration, it is published in a government publication for possible opposition by third parties who believe that they may be damaged by registration of the mark, typically because it is confusingly similar to another mark or is merely descriptive. A proceeding called an opposition may be filed against the application. An opposition is similar to a civil suit regarding the mark, although it pertains only to the right to register, not to use, the subject mark, and is generally shorter and less expensive than a civil suit.

A federal trademark registration has a 10-year term and may be renewed for successive 10-years terms upon proof of continuing use. A registration must be maintained during its first 10-year term through the filing of a declaration of use between the fifth and sixth anniversary dates of the issuance of the registration, or within a grace period thereafter. A registration is vulnerable to a proceeding called a cancellation, in which a challenger seeks to cancel an issued registration on one of the grounds for opposition, or on additional grounds such as abandonment of the mark or fraud in obtaining or maintaining the registration. Certain grounds for cancellation may be asserted only during the first five years of a registration.

Non-U.S. companies/registrants may register their marks in the United States on the basis of their home country registrations without proving use of the subject mark in commerce, but such registrations cannot be enforced against others in the absence of prior actual use in the United States and are vulnerable to cancellation if actual use does not begin within a reasonable time following registration.

Marks can be enforced against uses of the same or similar marks for the same or related goods where such uses create a likelihood of confusion as to the source or sponsorship of goods. Famous marks, those with widespread familiarity to the general public in the United States, can also be protected under

federal and state law against dilution, the gradual loss of distinctiveness or association with unsavory images. Such protection is rare.

Domain names are the subject of a portion of the United States Trademark Act directed to cybersquatting, the registration and use of a domain name with the bad faith intent to profit from its similarity to a trademark.

In infringement, dilution, and cybersquatting litigation, a wide variety of remedies are available, including injunctions, seizure orders, turnover orders, damages, profits, statutory damages in certain instances, attorneys' fees, and costs. As a practical matter, however, it is comparatively rare to receive a monetary recovery in most forms of trademark litigation.

Copyrights. The United States Copyright Act provides protection for a variety of copyrightable works, including literary works (extending to software), audiovisual works, various forms of artistic works, architectural works, and other types of subject matter. Copyright exists from the moment of fixation of copyrightable subject matter in a tangible medium of expression. In most instances, this means that copyright exists when a work is created. Copyright registration is advisable for all works, and is necessary in order to enforce United States works. Non-United States works need not be registered prior to enforcement.

Copyright is initially owned by its author. Typically this is one or more human authors, but works created by an employee within the scope of his or her employer belong automatically to the employer. This principle of "works made for hire," which does not exist in many other countries, also extends outside the employment context to a few specified types of works where a written agreement exists between the "employer for hire" and the creator. Many types of works created by compensated independent contractors under written agreements do not fall within this rule, however, and in those instances it is necessary to provide for an assignment of the work from its creator to his or her contract partner, preferably before the creation of the work begins.

Copyright consists of the exclusive right to reproduce, distribute, publicly display, adapt, publicly perform a copyrighted work, and to authorize others to do the same. These rights are "divisible," and can be granted to multiple persons. These exclusive rights are subject to various exceptions, including the fair use of a work for purposes such as criticism and scholarship and the right of a person to distribute a particular copy of a work to another. Copyrights can be assigned, licensed, and generally treated as property.

Copyright exists for a term of the life of its author plus 70 years or, in the case of a work made for hire, 120 years from the date of creation or 95 years from first publication of the work, whichever is shorter.

A copyright is infringed when any of the exclusive rights of its owner are exercised without the consent of the owner and the exercise of that right does not fall within one of the exceptions to exclusivity. In infringement litigation, a wide variety of remedies are available. A monetary recovery is more common in copyright infringement litigation than in trademark litigation.

Patents. The United States Patent Act permits the patenting of a variety of subject matter where the subject matter of the invention is useful, new, and non-obvious. Designs are also patentable with certain different requirements.

An application for patent is examined in the United States Patent and Trademark Office for compliance with the statutory requirements for patentability. Prior art (similar patents and other materials) is compared to the claimed invention in the course of examining. An application for patent must be filed within one year of the first sale of a device practicing the patent or of the public disclosure of the

invention, or the invention is ineligible for patenting, so it is important to act quickly when a patentable invention is developed.

Patents currently exist for a term of 20 years from filing. Should your company have an invention and wish to obtain a patent for it, then your company will need patent counsel to work with you to apply for the patent. Since the specifics of obtaining a patent vary widely from one invention to another, a detailed discussion of this issue is outside the scope of this memo.

Patent infringement litigation has grown exponentially over the past 15 years. In Los Angeles, over 400 patent litigation actions are instituted in the Los Angeles district courts every year. These actions cover a wide variety of industries and technologies. The remedies for a patent infringement action are monetary damages and an injunction preventing the sale of the accused product. Patent litigation trials are often before a jury. Once a party is put on notice of patent litigation, several considerations immediately arise and a company should quickly seek competent counsel that specializes in this type of litigation.

In addition to the threat of an injunction and monetary damages, a company can also be found to have willfully infringed a patent, in which case the damages may be trebled and the court might also award attorneys' fees. Given the potential cost and liabilities that can arise from these cases, it is important to obtain very experienced attorneys that are highly specialized in patent infringement litigation to defend or prosecute a company's patent case.