WILLIAMS MULLEN

Guide for Foreign Companies Establishing Operations in the United States

The Honorable Patrick O. Gottschalk
P: 804.420.6425 | F: 804.420.6507
pgottschalk@williamsmullen.com

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1. Introduction

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

This guide provides an introduction to the major business and legal issues to be considered by foreign companies in establishing business operations in the United States. It is intended as a starting point for analysis in this area but is not intended as a definitive analysis of these issues. If the reader has questions about the topics discussed, we would be pleased to provide additional information and you are invited to contact the author or any of the other attorneys at Williams Mullen.

2. Checklist for Setting Up an Office in the United States

We welcome you to our country and wish you prosperity and success in your business here.

A. Form U.S. entity, preferably with limited liability. In connection with the formation of a corporation:

- Adopt Articles of Incorporation; Bylaws; Organizational Minutes.
- Appoint board of directors (1 or more persons).
- Appoint officers (president, secretary, treasurer).
- Issue shares to owners or parent corporation.

B. Conduct trademark (name) search; verify that company name and important product names are not used by other parties; file trademark application to protect company name, logo and key product names.

C. Reserve and apply for internet domain names.

D. Apply to Internal Revenue Service to obtain Employer Identification Number; register with state tax authorities.

- Normally parties apply for the Employer Identification Number on IRS Form SS-4, Application For Employer Identification Number.
- If the signatory executing Form SS-4 does not have a social security number, however, such party must apply for an IRS Individual Taxpayer Identification Number on IRS Form W-7, Application For IRS Individual Taxpayer Identification Number.

E. File local company registrations.

- If a company is incorporated under the laws of one state (e.g., Delaware) and has offices in a second state, it must file registration documents in the second state referred to as "Qualification of Foreign Corporation To Conduct Business".
- Local city or county registration.

F. Execute lease for office space.

G. Open bank account.

H. Obtain visas for key foreign persons who will be working in the U.S. or will help in setting up the U.S. office; comply with I-9 and E-Verify procedures for verifying the identity and work authorization of each new hire.

Checklist - continued

I. Hire initial employees; begin process for federal and state tax withholding, FICA and similar items.

J. Arrange for employee health insurance and other insurance.

K. Have all employees execute employee confidentiality agreements.

L. Consider employee compensation incentives such as incentive stock options or similar benefits (common in U.S. technology companies); adopt qualified or non-qualified stock option plan.

M. Conform key contracts to U.S. law in state where office will be situated.

N. Consider filing for patent protection under business process patent laws for technology products and e-commerce processes (common in U.S. technology companies); file U.S. registrations for patents obtained in foreign countries.

3. Legal Forms of Conducting Business in the United States

One of the most important considerations for a foreign entity in establishing a business in the United States is the selection of the form of business entity. A variety of considerations must be addressed in making this determination, including the organizational structure of any existing business, tax concerns and the type of activity that the foreign investor intends to pursue in the U.S.

A. **Types of Entities.** There are numerous types of entities used by foreign companies to conduct business in the United States, including corporations, limited liability companies, partnerships, limited partnerships and branch office operations.

B. **Limited Liability Entity.** It is advisable for the foreign company to insulate itself from liabilities that might arise in the United States. To achieve this goal, we generally recommend that foreign companies conduct their operations in the United States through subsidiaries, such as corporations or limited liability companies. With such entities, liabilities that are incurred in the United States usually are retained at the subsidiary entity level and do not pass up to the parent company.

C. **Corporation.** The corporation is the most common form of business entity in the United States. It has a separate legal existence from its shareholders and therefore offers liability protection to them. A corporation is managed by a board of directors and officers. It is suitable for public or private ownership. Key organizational documents are the Articles of Incorporation and the Bylaws.

D. **Limited Liability Company.** The limited liability company has certain attributes of a corporation and certain attributes of a partnership. It is normally structured like a general partnership, but unlike a partnership its members have limited liability. In a general partnership the partners have full liability for all of the liabilities of the partnership. It is normally managed by a managing member (similar to a managing partner in a partnership), but it can also be structured to be managed by officers and directors. The fundamental documents of a limited liability company are the Articles of Organization and Operating Agreement.

E. **Preferred Type of Entity.** Corporations do not have "flow-through" tax treatment and hence are required to file tax returns. Limited liability companies, on the other hand, have "flow-through" tax treatment and are not required to file income tax returns; rather their parent companies must file income tax returns in the United States. Since most foreign companies do not want to file tax returns in the United States, the corporation is the preferred form of entity for U.S. operations of most foreign companies.

Legal Forms - continued

F. **Jurisdiction of Incorporation.** Corporations and limited liability companies can be formed under the laws of all 50 states. Many corporations are formed under Delaware law due to the low franchise tax and laws which are favorable to management. However, Virginia corporate law is favorable to management as well. A party can form a corporation under Delaware or Virginia law but establish its office and conduct its business in other locations.

G. **Qualification.** If a corporation is formed in one jurisdiction (e.g., Delaware) and has offices in another location (e.g., New York) the corporation must file a short registration in the jurisdiction where it conducts business (called "Qualification to Conduct Business").

H. **More Complex Operations in the United States.** Business operations can be expanded in the U.S. through a variety of means, including through the use of affiliated corporations (e.g., a second corporation in the U.S. owned by the foreign parent company), a second-tier subsidiary (a second U.S. corporation owned by the first-tier U.S. subsidiary) or similar arrangements.

Entity Selection Summary

	Partnership	Limited Partnership	Corporation	LLC Limited Liability Company
Legal Status	Separate legal entity	Separate legal entity	Separate legal entity	Separate legal entity
Liability of Ownership Partners	Unlimited liability for all partners	General partners have unlimited liability. Limited partners have limited liability.	Shareholders have Limited liability	Members have Limited liability
Disclosure of Identity of Owners	No disclosure	Limited partners must be disclosed in filing with Commission.	No disclosure	No disclosure
Incorporation/ Organizational Requirements	No filing required. Few other formalities with respect to documents.	Limited partnership must be registered by filing of certificate of limited partnership with the Commission.	Incorporated by filing with State Corporation Commission	Organized by filing with State Corporation Commission
Appointment of Registered Agent	No	Yes	Yes	Yes
No. of Members	Minimum of 2 persons; No maximum	Minimum of 2 persons; No maximum	Formed by 1 person; No maximum	Formed by 1 person; No maximum
Tax Treatment	Tax transparent	Tax transparent	Taxable entity	Tax transparent
Required Annual Disclosures	None	None. Certain information must be maintained for inspection by partners.	Annual report and accounts	Annual report and accounts

4. Taxes

Regardless of the form selected by a foreign company to conduct business in the United States, there are a range of taxes that will impact the operations. The following is a brief overview of some of the more important taxes. Upon the organization of a U.S. entity, that entity must apply to the Internal Revenue Service for an Employer Identification Number (EIN). In addition, any entity conducting business in Virginia must register with the Virginia Department of Taxation with respect to all taxes that may apply to such business.

A. **Income.** The revenue generated by the U.S. subsidiary or U.S. operations of a foreign business will be subject to taxation in the U.S. This tax is assessed at the federal and state levels.

Federal. The statutory federal corporate income tax rate is 21%.

State Tax. State income tax rates are set forth on a state by state basis. The current rate for corporate income tax in Virginia is 6%. This is lower than many other states, including California (8.84%) and New York (6.5%-9%).

B. **Sales Tax.** Retail sales and leases of tangible personal property in Virginia are subject to sales tax. The current rate for sales tax in Virginia is between 5.3% and 7%. This is lower than many other states. Virginia dealers must collect the tax at the time of the sale and remit the tax to the Virginia Department of Taxation. Many exemptions from the tax exist including purchases of property for resale and purchases of manufacturing equipment.

C. **Other Taxes.** Other taxes may apply to business operations depending upon the nature of the business, state of operation and other factors such as real property taxes, personal property/use taxes, withholding on dividends, interest and royalty payments, etc.

5. Protection of Intellectual Property

The United States has strong intellectual property laws that grant valuable legal rights to the owners of such property to restrict others from misappropriating it. These proprietary rights in technology, inventions, software, business processes, creative materials and other intangible assets can be valuable in operating a business, raising capital and pursuing exit strategies such as an IPO or acquisition. The benefits of such laws are available to foreign parties (such as foreign companies) as well as U.S. parties. These laws are highly technical, however, and special steps must be taken to register or otherwise comply with these laws or the owner will lose legal rights in the intellectual property.

A. **Trademarks.** Unlike civil law countries, trademark and service mark rights arise in the U.S. from using the mark as a designation of source in interstate commerce in the sale of goods or services in this country. Important additional rights are obtained by federally registering trademarks and service marks with the United States Patent and Trademark Office (USPTO). Checking the USPTO database of federal trademark registrations (www.uspto.gov) prior to introducing new trademarks or service marks is always prudent. It is important to remember, however, that many trademarks are never registered, so more comprehensive searching will be required to determine whether the proposed use of a mark may infringe a senior user's rights.

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

C. **Patents.** Foreign parties must apply for patent protection with the USPTO in order to obtain protection under U.S. patent laws, regardless of the existence of foreign patents. Failure to apply for patents in the U.S. could result in loss of valuable legal rights in company innovations. U.S. patent law has changed such that the "first to file" rule has replaced the "first to invent" rule. Foreign companies should consult competent patent counsel regarding any U.S. patent matters.

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

Protection of Intellectual Property - continued

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

Under other administrative process laws, trade secrets and certain other confidential business information can also be protected from public access in connection with many types of applications for permits for new operations, though in most cases these protections must be specifically requested as part of the application.

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

6. Immigration Laws

At the outset of any proposed project in the United States, it is critical to formulate an effective immigration strategy for non-U.S. nationals. The immigration strategy will vary depending on the nature of the project, the purpose of the entry of the non-U.S. nationals into the United States and other factors. The fundamental underlying immigration principles that should be observed are that (1) no person can enter the United States without appropriate documentation, and (2) no person may engage in employment in the United States without appropriate authorization or status. An effective immigration strategy will address both of these principles.

Set forth below are descriptions of various types of nonimmigrant visa categories which may be obtained to enable non-U.S. nationals to enter, and, in some circumstances, be employed in the United States and some basic information regarding seeking permanent residency. The list is not exhaustive and focuses primarily on "business visa" categories. Bear in mind that an effective immigration strategy may require the use of more than one type of visa category at different or successive times to ultimately accomplish the objectives for a given non-U.S. national.

A. **B-1 Visas (Visas for Business Visitors).** The B-1 visa is the most commonly issued visa for business visits of short duration to the United States. B-1 visas are typically issued by U.S. Consulates abroad and permit recipients to visit the United States temporarily for business purposes that do not involve gainful employment. Permissible activities include investigating possible business opportunities, negotiating contracts, attending conferences, consulting with colleagues and establishing initial contacts. The B-1 visa category is often used by persons seeking to visit the United States for purposes of assessing or investigating a prospective project opportunity or of coordinating the initial steps to establish an operation. Nationals of most major trading partners with the United States are permitted to enter the United States in B-1 Business Visitor status without first having to obtain a B-1 visa pursuant to a program called the "Visa Waiver Program." Under the Visa Waiver Program, non-U.S. nationals can enter the United States in B-1 status without a visa for a maximum of 90 days. Persons entering the U.S. using the Visa Waiver Program cannot change or extend their status and must depart at the end of their authorized stay. Canadians are the exception because they are visa exempt and can enter for periods of up to six months.

B. **L-1A and L-1B Visas (Visas for Intercompany Transferees).** The L-1 category of visas is used to facilitate the transfer of non-U.S. nationals from qualifying affiliates abroad to establish qualifying operations in the United States for periods ranging from five to a maximum of seven years. The L-1 visa category can also be used in limited circumstances to transfer staff from abroad to qualifying "new" offices in the United States. L-1 visas enable specialized knowledge employees, managers and

Immigration Laws - continued

executives of a non-U.S. company or operation abroad to transfer to the U.S. to be employed by the U.S. parent, subsidiary, branch, affiliate of the non-U.S. company or operation. To qualify for L-1 status, the employee being transferred must have been continuously employed by the foreign company abroad for at least one year within the previous three years and be transferred to serve either in a specialized knowledge, managerial or executive position. L-1 visas are typically issued at a U.S. Consulate abroad after a petition approval is first obtained from the United States Citizenship and Immigration Services (USCIS) in the United States. For certain larger organizations, an option known as the Blanket L-1 program can be used to expedite the process and lower costs by permitting direct filings with the U.S. Consulates. Spouses of L-1 visa holders receive L-2 visas and can work while in such status after obtaining proper work authorization.

C. **E-1 and E-2 Visas (Treaty Trader and Investor Visas).** The E visa category is often used by persons seeking to enter the United States to establish a new operation because the application process is initiated and completed directly at a U.S. Consulate abroad with no pre-approval from USCIS. An E visa permits the recipient to enter the U.S. for renewable incremental periods of between one and two years per entry under the provisions of a treaty between the United States and the foreign state of which they are a national (1) to trade principally between the United States and the foreign state (E-1); or (2) to develop and direct the operations of an enterprise in which a foreign national or enterprise has invested or is actively in the process of investing (E-2). Foreign nationals may be classified as treaty traders or investors only if they have the same nationality as the entity abroad and are engaged in an executive or supervisory capacity, or have special qualifications essential to the enterprise. The spouse of an E-1 or E-2 visa holder can obtain work authorization.

D. **H-1B Visas (Visas for Professional Workers and Workers in Specialty Occupations).** The H-1B visa category is frequently used to enable persons to enter the United States to be employed in professional or specialty occupations for periods of three years with a maximum of up to six years. Unlike the L-1 visa, no qualifying relationship need be established between the entity or operation abroad at which the non-U.S. national may be employed and the U.S. employer. To qualify for an H-1B visa, the beneficiary must have a U.S. bachelor's degree, a foreign equivalent or equivalent qualifying experience in a specific area of specialization and be coming to the U.S. to perform a position that requires a bachelor's degree in that area. For those seeking initial H-1B approvals, given that there is a quota on the H-1B visa classification, a beneficiary's petition must also be selected in a computer-generated lottery that is conducted once a year by USCIS. One notable holdover from the Trump Administration has been the streamlined registration process that

Immigration Laws - continued

sponsoring employers may use to enter the annual H-1B visa lottery. In those cases, if selected in the lottery and approved by the USCIS, the beneficiary's H-1B status begins on October 1 of the year of selection. The dependent spouse of an H-1B primary beneficiary is eligible to receive an H-4 visa to accompany his/her spouse and can only receive work authorization in very limited circumstances.

E. **Special Treaty Visas (TN, H-1B1 and E-3).** Citizens of Canada and Mexico are permitted to enter the U.S. to work in what is known as TN status for certain professional positions enumerated in the United States-Mexico-Canada Agreement (USMCA), formerly NAFTA. TN status is valid for up to three years and can be renewed. Canadians can apply directly at the border or pre-flight inspection post. Mexicans must apply at the U.S. Consulate for a TN visa. Similar favorable visa classifications are available for citizens of Chile and Singapore (H-1B1) and for citizens of Australia (E-3). When engaging in immigration planning, it is therefore helpful to explore all options, including those that are dependent on a beneficiary's citizenship.

F. **Permanent Resident Status (Also known as the "Green Card").** The visa categories discussed above are intended for "temporary" entries into the United States, even though "temporary" may mean a period of several years. U.S. immigration law also permits non-U.S. nationals to seek permanent resident status, if they qualify and if they navigate through the time-consuming process to obtain such status. Such status enables the beneficiary to reside and work permanently in the United States.

Permanent resident status is typically obtained through employer or family sponsorship. Employer-based cases are often initiated with the process of testing of the local labor market, known as a labor certification or PERM. An expedited process known as the EB-1(C) classification allows multinational managers or executives to avoid the recruitment or PERM process by filing petitions and applications directly with the USCIS, thereby shortening the waiting time for Green Cards for qualifying individuals.

Permanent resident status (EB-5 visa) may also be obtained by investing $1.8 million in a qualifying commercial enterprise in the United States (or $900,000 in certain geographic or high unemployment areas), provided with certain exceptions that the investment creates at least 10 full-time jobs. In addition, an annual "green card lottery" is available to nationals of countries that have low immigration levels to the U.S.

G. **Impact of the COVID-19 Pandemic.** The COVID-19 pandemic has had a dramatic impact on immigration planning since the imposition of travel bans in March of 2020. In addition to those travel bans, the pandemic has caused not only slowdowns in case processing within the United States but a reduction of embassy/consular services due to office shutdowns and fluctuating conditions in countries abroad. For the near term, it would be prudent for those seeking to invest and conduct business in the United States to build in additional time for petition processing and visa issuance for their foreign national work force.

7. Review of Important Contracts to be Enforceable Under U.S. Law

Prior to commencing business in the U.S., a foreign company should conduct a review of its existing contracts. Key contracts should be reviewed and amended in order to be in compliance with, and enforceable under, applicable U.S. laws. If such adjustments are not made, the foreign company could lose legal rights in the U.S. In the United States, the laws applicable to many business transactions are state laws rather than federal laws and many differ from state to state. Consequently, foreign companies must comply with the state laws in each state in which they conduct business. Williams Mullen has attorneys who are licensed to practice in multiple states throughout the country to address this issue.

Key contracts to be reviewed include the following:

- **Software and other License Agreements**. If the company is a recipient of a software license in a foreign country, it will need to review such contract to ensure that the license permits the company or its new U.S. subsidiary to continue using the software in the U.S. If the company has granted software licenses, it should ensure that the activities planned by its U.S. operations are not in violation of rights it has previously granted to third parties. If a contract includes the collection, use or storage of personal information, it shall comply with all applicable federal and state laws.

- **Sales Agreements**. The form of sales agreement used by a company in a foreign country may have to be amended to comply with U.S. law. Most states in the U.S. have adopted the Uniform Commercial Code which provides for the rights and obligations of parties to sales transactions. In order to ensure that the company is selling its goods on terms favorable to it, the company's standard form of sales contract should be revised to comply with the UCC.

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

Review of Important Contracts - continued

- **Stock Purchase and Other Investment Agreements.** These should be reviewed to ensure, among other things, that no third party has rights to acquire shares in the newly created U.S. subsidiary. Additionally, the company may need to address whether the commencement of its U.S. business may impact any covenants or negative covenants in prior acquisition agreements.
- **Financing Agreements**. Financing agreements entered into in the company's home jurisdiction should be reviewed to ensure that there is no restriction on the creation of a U.S. subsidiary or the use of corporate funds to finance such a subsidiary. In addition, if a prior financing agreement provides for the creation of security over the shares or assets of a company's subsidiaries, the company will need to create a security interest in assets of any new U.S. entity that complies with U.S. law. It is often desirable to establish new financing in the U.S. for a new U.S. subsidiary, but this must be achieved without violating the terms of existing financing arrangements.
- **Distribution and Agency Agreements.** The company should review any existing distribution and agency agreements to ensure that any newly created distribution network or agency relationship is not in violation of the terms of any existing contracts.
- **Employment Agreements**. The company may wish to review any existing employment contracts to ensure that there are no terms of those contracts that may be breached or that may be illegal following the transfer of an employee to the U.S. If employees are to be transferred from a foreign country and their contracts of employment are to continue, the company may wish to amend the terms to ensure that any disputes that arise will be handled in a favorable court. In addition, the company will want to assess the tax impact that the relocation may have on employees who will be deemed resident in the U.S.
- **Pension and other Benefit Plans**. The company may need to determine whether contributions can continue to be made to existing plans in foreign country by employees resident in the U.S. and whether the company wants to start a new U.S.-based program for its employees.

8. Import-Export Laws

Import Laws. The United States, like most other countries, imposes import tariffs on certain imported products. In addition, the U.S. imposes antidumping duties, countervailing duties and similar measures on certain imported products that have been determined to be manufactured at less than fair value, to have utilized government subsidies or based on other unfair trade practices.

Import tariffs are imposed by U.S. Customs and Border Protection (CBP), within the Department of Homeland Security. CBP also administers other U.S. laws as they apply to imported products, including food safety laws and intellectual property laws. Tariffs are listed in the Harmonized Tariff Schedule of the U.S. (USHTS) which is enacted by Congress and published by the U.S. International Trade Commission.

The USHTS is based upon the international Harmonized Commodity Description and Coding System (HS), administered by the World Customs Organization in Brussels. Classification of goods in this system must be done in accordance with the General and Additional U.S. Rules of Interpretation, starting at the 4-digit heading level to find the most specific provision and then moving to the subordinate categories.

Export Laws. The U.S. has a number of export laws, including the Export Administration Regulations administered by the U.S. Department of Commerce (which apply generally to commercial products), the International Traffic In Arms Regulations (ITAR) administered by the State Department (which apply generally to defense products) and the U.S. sanctions laws administered by the Office of Foreign Assets Control (OFAC) within the U.S. Department of the Treasury. The export control laws restrict exports of certain products, technologies and software and services, (i), determined to be adverse to U.S. national security and foreign policy interests; (ii) to certain prohibited countries; (iii) to certain prohibited parties; and (iv) for certain prohibited end users.

9. Other Relevant Areas of Law

Our experience in assisting foreign companies in establishing U.S. operations has highlighted the following additional areas of possible interest for such companies:

- **Consumer Protection Laws.** Companies selling to consumers (as compared to commercial customers) will be subject to consumer protection laws administered by the Federal Trade Commission and various state consumer protection agencies. Such laws provide, among other things, for certain mandatory documents to be provided to consumers and provide for recission rights under certain consumer contracts. In addition, it should be noted that federal rules provide consumers with a range of remedies that may be exercised where a dispute arises with respect to goods sold. Among other rights, consumers have a greater ability to withhold payment in such circumstances where payment was initially made with a credit or debit card.
- **Privacy Laws.** While the U.S. does not have comprehensive data protection/ privacy laws that are as wide ranging as the European Union, there are a number of privacy laws in effect. These range from special privacy requirements in the banking and health care industries, to state laws such as the California Consumer Privacy Act (CCPA), and numerous state data breach notification laws. Privacy law in the U.S. is changing rapidly, so companies need to be mindful of keeping current. It is also important for European companies to consider any restrictions imposed by the EU on the transfer from Europe to the U.S. of data pertaining to EU citizens. Requirements to transfer such personal data, include:
  - The purpose for which such data may be transferred must be permitted under the law applicable to the transferring entity and should not be incompatible with the purpose for which the data was first gathered.
  - There should be adequate restrictions upon onward transfer to other data processors.
  - The laws applicable to the company receiving the data must provide adequate protection for personal data.
  - The subject of the data must have rights to access, rectify, delete and object to the content of the data.

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

- **Securities Laws.** Companies that intend to raise capital through the issuance of securities (including stock, warrants, options and certain debt instruments) are subject to securities laws requirements such as registering the securities (unless a specific exemption applies). In particular, foreign investors should be aware that the U.S. federal and state securities laws are extensive and apply to even relatively small offerings to a very limited number of people. This is particularly important for many tech and biotech companies that issue small amounts of stock to a wide variety of

Other Relevant Areas of Law - continued

people during the start-up phase. The failure to comply with security laws during early rounds of financing may prejudice later larger public offerings.

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

  The HSR Act provides for a minimum "size of the transaction level" threshold which changes each year. For 2021, the minimum threshold is $92 million.

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

- **Environmental Laws.** Environmental laws and regulations protecting land, water, air quality and natural and cultural resources have been enacted by federal, state and local lawmakers. These laws and regulations set operational standards for many industrial and construction activities, require permits for many such activities, and create procedures for inspection and enforcement of these standards and permits. Regulatory agencies such as the Environmental Protection Agency and state analogue agencies also have powers to impose remediation obligations and penalties that are considerably more extensive than those available to similar national and supranational agencies in Europe. While many tech and biotech companies generally do not have to comply with the large number of environmental requirements that apply to brick and mortar businesses, tech and biotech companies should be aware of the environmental obligations that apply to their particular type of research or manufacturing.

  Given the potential complexities of the permitting process for regulated facility operations and facility construction, it is important to plan early and carefully for the permitting process and expected permit conditions on facility design and capacity and to account for related timelines and public comment procedures. With proper planning, business, research and manufacturing operations, as well as facility construction activities, can be designed and implemented to minimize the number of environmental regulations and permitting hurdles applicable to a particular facility. Indeed, many routine or smaller-scale industrial or construction activities can be permitted at the federal and state levels using a simplified "permit-by-rule" process that greatly reduces the burden and timeline for review and approval.

  Companies entering the U.S. market should also appreciate that liability for a prior owner or operator's contamination may be imposed on the current owner or operator of the business premises. As a result, an environmental assessment of property prior to acquisition or lease is recommended. Such assessments can be performed under

the attorney-client and other applicable privileges. However, federal and state legal liability "safe harbors" and other incentives may be available for redevelopment of existing or older industrial or commercial properties (also known as "brownfield" sites) that are often convenient to existing infrastructure. These safe harbors and incentives can help to minimize costs and risks associated with the purchase or lease and construction of new or expanded facilities at such properties.

- **Employment Laws.** The U.S. employment laws are generally more flexible than in the European Union. In many instances employers can terminate employees without cause and without termination compensation (assuming no employment contract exists); however, employers are prohibited from discriminating against employees on the basis of race, sex, age, religious belief and health conditions. Termination and other dealings with employees should be conducted on a consistent basis under the provisions of the company's personnel policies.

10. Business Strategies for Foreign Companies in the U.S.

The following are a number of strategies which can be employed by a foreign company establishing operations in the United States.

A. **Sales and Distribution.** Under this business strategy, parties manufacture their product in their home country and sell their products or services to U.S. customers, through direct sales or through sales agents, distributors, wholesalers, dealers or other intermediaries in the United States. The United States represents an enormous market for foreign companies to sell products, license software and perform services. There are numerous distributors, dealers and other sales intermediaries available in the U.S. to assist foreign companies in setting up marketing and distribution channels here.

B. **Joint Ventures and Teaming Agreements.** Under this business strategy, two or more parties conduct a collaborative effort to pursue a specific business purpose. In an "entity joint venture" the parties form a separate corporation or other entity to conduct the business of the venture. In a "non-entity joint venture" the parties contribute capital, personnel or other resources to conduct the business of the venture without the formation of a separate entity. Joint ventures and teaming agreements are a common form of business in the information technology industry for product development and major project management. These are extremely useful strategies for positioning foreign companies to become involved in major projects in the U.S. where they would otherwise not have access. In addition, U.S. companies frequently look to team with foreign companies in joint ventures to obtain access to business opportunities in Europe.

C. **Franchise and License Agreements.** Under a franchise arrangement, the franchisor grants the right to a franchisee to engage in a proprietary form of business. A franchise or license arrangement is a desirable way for a foreign

Business Strategies - continued

company to establish and expand its business throughout the United States in a limited period of time or with a limited capital investment.

D. **Sub-contracting.** Under this type of business arrangement, a party performing a contract hires a second party to perform a portion of the contract. Like teaming agreements and joint ventures, this is a proven method for foreign companies to obtain access to major business opportunities to which they would otherwise not have access.

E. **Manufacturing.** Under this strategy, the foreign company establishes manufacturing operations directly in the United States. This could range from final assembly of components sourced in the company's home country or other countries, to full-scale manufacturing operations in the U.S. Finished products can be sold throughout the United States and, under NAFTA, can be distributed on a reduced-tariff or tariff-free basis throughout Mexico and Canada.

F. **Government Contracts.** Under this type of business arrangement, a party sells a product or performs a service for a federal, state or local government entity. Under the Trade Agreements Act, foreign companies are now permitted to bid directly on most U.S. government contracts and to perform subcontracts thereunder. Government contracts are among the largest sources of opportunity for vendors in the information technology industry. The performance of government contracts are normally governed by specialized commercial laws, which are significantly different from normal U.S. commercial laws.

G. **Mergers and Acquisitions.** Acquisitions are a proven method of establishing a major business presence in a foreign country in a short time period. A party can acquire a company through the purchase of its stock, the purchase of its assets and liabilities or the statutory merger of the two entities. Foreign companies should consider the acquisition of a U.S. company as a strategy for entering the U.S. marketplace. While this usually involves a significant capital investment, such investment is often smaller than the ongoing capital investments required to grow a business from the start.

H. **Initial Public Offering.** The initial public offering, or "IPO," is the initial sale of stock to the public in a "public offering." An IPO requires the registration of a company's stock with the U.S. Securities and Exchange Commission. Public offerings are usually conducted through an "underwriting" by a registered broker-dealer. Foreign companies can list their securities on U.S. exchanges through ADRs. In addition, U.S. subsidiaries of foreign companies can issue securities directly in an IPO to be traded on all U.S. exchanges. An IPO provides an excellent liquidity event and "exit strategy" for founders and early investors to profit from their investment in the company. U.S. stock exchanges, particularly the NASDAQ, have provided some of the highest valuations in the world for emerging technology companies.

11. Incentives

Many states offer financial incentives to companies to locate their operations in such states. Incentives vary from state to state and include a range of incentives, from cash grants to state corporate income tax credits. Some states also provide grants in the form of a rebate of a percentage of the payroll taxes paid to the state that result from the jobs created by the project in question. If incentives are offered, a company should expect to have to sign a written performance agreement with specified targets, including the number of full-time jobs created, anticipated payroll and the amount of new capital investment. If cash grants are offered up-front at the beginning of the project, the company should expect to sign a performance agreement which provides for proportionate re-payment of the grants if performance targets (jobs and investment) are not met. Many states also offer job training grants for new workers that are hired as part of the project.

Localities (cities and counties) may also offer incentives, including cash grants based on jobs, payroll and investment. Other incentives may include reductions or abatements of local taxes (such as real estate tax, personal property tax, etc.) for a specified period of time.

Localities may also offer streamlined (“fast-track”) permitting processes; assistance with the extension of utilities to the site; waiver of the cost of building permits; and other creative ways to induce the prospect to make a decision for that locality.

The above description of incentives is merely representative and is not intended to be an exhaustive list.

Williams Mullen is a regional full-service law firm with approximately 240 attorneys in offices across North Carolina, South Carolina, Virginia and Washington D.C. Since our firm began in 1909, our goal has been to provide business and legal solutions to help our clients' businesses thrive.

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CHARLOTTESVILLE, VA
321 East Main Street
Suite 400
Charlottesville, VA 22902
T: 434.951.5700

COLUMBIA, SC
Wells Fargo Building
1441 Main Street
Suite 1250
Columbia, SC 29201
T: 803.567.4600

NORFOLK, VA
1700 Dominion Tower
999 Waterside Drive
Norfolk, VA 23510
T: 757.622.3366

RALEIGH, NC
301 Fayetteville Street
Suite 1700
Raleigh, NC 27601
T: 919.981.4000

RICHMOND, VA
Williams Mullen Center
200 South 10th Street
Suite 1600
Richmond, VA 23219
T: 804.420.6000

TYSONS, VA
8300 Greensboro Drive
Suite 1100
Tysons, VA 22102
T: 703.760.5200

VIRGINIA BEACH, VA
222 Central Park Avenue
Suite 1700
Virginia Beach, VA 23462
T: 757.499.8800

WASHINGTON, D.C.
1666 K Street N.W.
Suite 1200
Washington, DC 20006
T: 202.833.9200

The Honorable
Patrick O. Gottschalk

Partner

Richmond, VA
P: 804.420.6425
F: 804.420.6507
pgottschalk@williamsmullen.com

For companies seeking to locate or establish operations in the Mid-Atlantic and Southeastern United States, Pat Gottschalk offers broad experience to assist with the intricacies inherent in the process. As the former Secretary of Commerce and Trade for Virginia, Pat possesses insights on how to assist with economic development incentives, corporate law issues and project management.

Pat serves as the chair of the Williams Mullen Economic Development team and is a member of the firm's Corporate and Government Relations practice groups, where he focuses primarily on economic development projects, foreign inward investment transactions, joint ventures, multi-party agreements and business law issues, including mergers and acquisitions, general corporate law and financing transactions. Pat has substantial experience assisting clients in accessing federal, state and local business location incentives and organizing complex joint ventures and research consortia. He has also led and participated in numerous economic development foreign trade missions over the past 20 years.

From January 2006 to January 2010, Pat served as Virginia's Secretary of Commerce and Trade under Governor Timothy M. Kaine. During his tenure as Secretary, Virginia was recognized as the "Top State for Business" eight times, including four consecutive times by Forbes.com and twice by CNBC. As Secretary, he was responsible for the performance of 13 state agencies, including, among others, those involved with economic development, tourism and film promotion, housing and community development and small business assistance.

As Secretary of Commerce and Trade, Pat served as an ex officio member of the board of directors of the Virginia Economic Development Partnership, the Virginia Tourism Corporation, the Virginia Tobacco Indemnification and Community Revitalization Commission, the Virginia Biotechnology Research Park Authority, the Center for Innovative Technology, the Virginia National Defense Industrial Authority, the Virginia-Israel Advisory Board, the Virginia Workforce Council and the Virginia Commercial Spaceflight Authority. He currently is the chair of ChamberRVA and has served on its board of directors since 2011.

Pat's extensive knowledge of the complexities related to bringing economic development projects to fruition can benefit any company considering a location or expansion decision.

Pat is listed in *The Best Lawyers in America©* in Corporate Law and Business Organizations (including LLCs and Partnerships) Law (2013-present), and he was named the *Best Lawyers®* Richmond "Lawyer of the Year" for Business Organizations (including LLCs and Partnerships) Law in the 2019 edition. He is also listed in *Virginia Super Lawyers* magazine in the Business/Corporate Law category (2015-present).