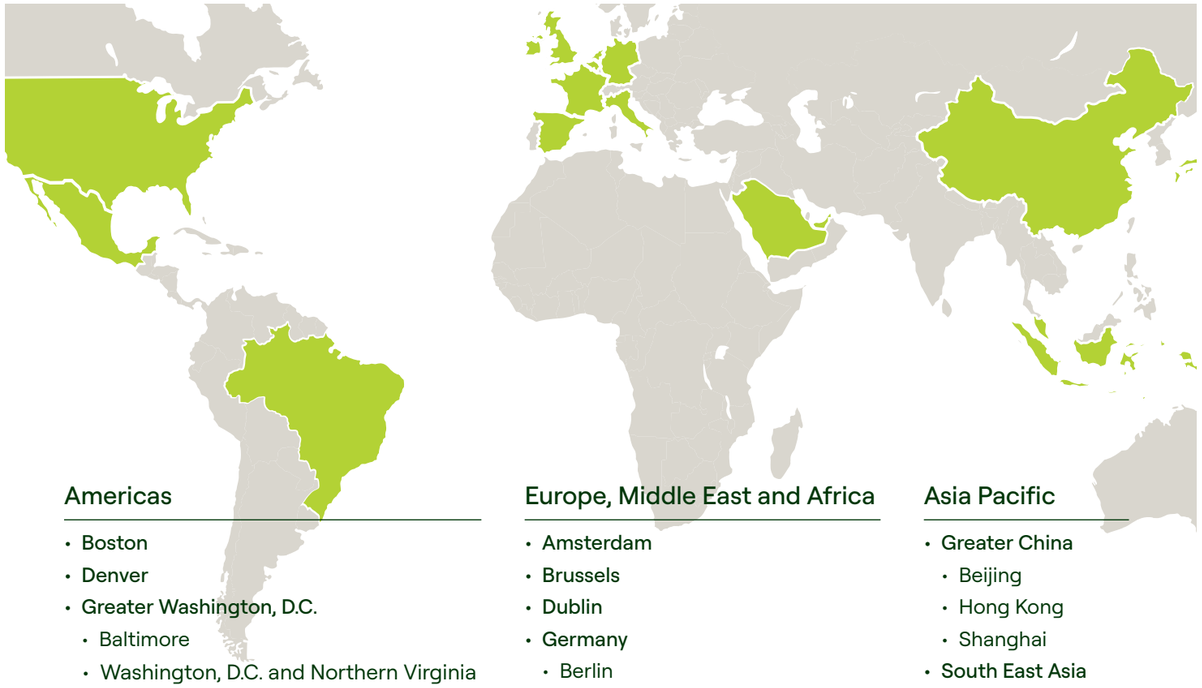

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Doing Business in the United States

2026

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Section I

Introduction

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

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

Openness of U.S. markets to foreign investment

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

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

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

CFIUS' mandatory filing programs are described below:

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

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

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

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

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

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

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

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

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

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

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

- **15-day Presidential review (as needed):** During the 15-day Presidential review period, the President may decide to approve, restrict, or block the transaction. The President's decisions are not subject to judicial review.

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

Section II

Direct or indirect market entry and choice of entity

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

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

If a company decides to do business in the U.S. through a distribution or agency arrangement, there are several things it should consider. Its products might be subject to licensing approval requirements or U.S. regulations.[11] Although U.S. laws are not as protective of distributors and agents as are the laws of many civil law jurisdictions, some states require, among other things, advance notice of termination.

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

Jurisdiction of formation

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

There is no requirement that an entity establish operations or maintain its principal place of business in the state of formation. Delaware has long been the most popular state of formation for a variety of reasons, including the state's flexible and modern corporations statute, the sophisticated judiciary system and extensive case law (which provides a predictability unmatched by other states), the efficiency with which the Delaware Secretary of State's Division of Corporations accepts and processes filings, and the fact that almost all U.S. lawyers study Delaware corporations law. More than 66% of the Fortune 500 companies, and 81% of companies that go public in the U.S., are formed in Delaware.[13]

Although Delaware is the most common choice for state of formation, it is not necessarily the best choice. In recent years, other states, such as Nevada, Wyoming, and South Dakota, have been chosen by increasing numbers of companies because such states offer favorable tax environments, strong privacy protections, and/or low regulatory burdens. A business organization must qualify to do business in each state in which it does business, and qualification typically costs several hundred dollars a year and requires an annual filing. This expense and administrative burden can be avoided if the entity is formed in the jurisdiction in which it has operations. In principle, the state of formation of the new entity will not generally affect the U.S. federal or state income tax consequences of its activities in the U.S. It is important to consult with counsel regarding the pros and cons of formation in a particular jurisdiction.

Publicly available information

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

Principal business structures

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

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

1. Corporations

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

(a) Ownership

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

(b) Capitalization

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

(c) Management

A corporation may have different classes of stock, each of which may have different voting and economic rights. The stockholders' primary responsibility is the election of the directors, although the stockholders also have rights to vote on fundamental matters such as dissolution, a sale of the company, or amendments to the charter. Management and control of a corporation are primarily through a board of directors. The number of directors and procedures for nomination, election, voting requirements, and other aspects of board governance are set forth in the corporation's bylaws, a document that is not required to be filed publicly. It is permissible under Delaware law to have a single director, which is not uncommon for wholly-owned subsidiary corporations. Directors must be natural persons of at least 18 years of age but need not be residents of the U.S. or the state of organization.[21] Under Delaware law, the officers, and not the directors, of a corporation manage day-to-day activities and are

authorized to enter into agreements and otherwise take action on behalf of the corporation. The directors act collectively, as a body, and appoint officers, who hold the titles and duties stated in the bylaws or in a resolution of the board of directors, and as may be necessary to enable the corporation to sign legal instruments and stock certificates.[22] The same natural person may hold any number of offices unless the certificate of incorporation or bylaws otherwise provide.[23]

(d) Limited liability

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

(e) Taxation

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

A U.S. corporation must apply for an Employer Identification Number ("EIN") and is generally subject to regular U.S. corporate income tax (at a current rate of 21%). Historically, U.S. corporations were subject to taxation on all of their worldwide net income (a foreign tax credit was sometimes available for income taxes paid to other jurisdictions on non-U.S. source income). Under the 2017 U.S. tax reform legislation, there was a move towards a partial territory-based tax system combined with new anti-base erosion provisions.[25] Significant provisions of the 2017 law were set to expire at the end of 2025. The One Big Beautiful Bill Act of 2025 made permanent the majority of the temporary provisions of the 2017 law. A U.S. corporation is required to file annual tax returns and make estimated tax payments. In addition, the gross amount of any dividends or distributions paid by a U.S. corporate subsidiary to a non-U.S. stockholder (as well as interest or royalty payments to any foreign person) is subject to U.S. taxation and a withholding tax of 30%. These two levels of taxation, at the corporate level and upon distribution, are referred to as "double taxation." Therefore, for U.S. federal income tax purposes, the combined effective tax rate of U.S. profits repatriated to a non-U.S. parent by a U.S. corporation, as of the date of this publication, could be as high as 44.7%, although the 30% withholding tax rate may be reduced or eliminated under a double tax treaty between the U.S. and the non-U.S. stockholder's jurisdiction of tax residence (provided that any applicable conditions, including a limitation on benefits provision, are satisfied).

Provided that a U.S. corporation does not hold a significant amount of U.S. real property,[26] the parent will not be subject to U.S. tax on any capital gains it realizes if it sells its shares in the U.S. corporation. A U.S. corporation may be subject to state or local taxes, depending on the tax rules applicable in the states or localities where it is considered to have a business nexus. A corporation that is at least 25% owned by a foreign entity must report all transactions with foreign related parties to the Internal Revenue Service ("IRS"). Intercompany prices for transfers of goods, intangible assets, services, and loans are required to meet the arm's length standard.[27]

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

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

(f) Naming requirements

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

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

(g) Formation mechanics

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

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

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

2. Limited Liability Companies

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

(a) Ownership

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

(b) Capitalization

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

(c) Management

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

(d) Limited liability

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

(e) Taxation

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

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

(f) Naming requirements

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

(g) Formation mechanics

Formation of an LLC requires the following steps:

- **Formation (1-5 days):** As with a corporation, the LLC is formed when the Secretary of State of the state of formation accepts the filing of the Certificate of Formation. For an additional fee, the registration can be completed in as little as an hour.

- **Adoption of LLC agreement:** Once the LLC is formed, the member(s) adopt a written LLC Agreement. This document may range in complexity from fairly simple, for a wholly-owned, single-member LLC, to extremely complex, for an LLC with multiple members, a complicated ownership structure, or other specialized requirements. Creating a wholly-owned, single-member LLC requires a simpler form of LLC Agreement, which can be prepared in a day or two, to be executed by the member(s) concurrently with, or shortly after, formation of the LLC.

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

3. Partnerships

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

(a) General partnerships

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

(b) Limited partnerships

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

(c) Limited liability partnerships

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

(d) Limited liability limited partnerships

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

4. Post-formation actions

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

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

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

Execution formalities

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

Section III

Commercial contracting

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

Formation of a commercial contract

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

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

The "four corners" doctrine

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

Exceptions to the "four corners" doctrine

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

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

Although, as stated above, the U.S. is a common law jurisdiction with no general statutory overlay, most U.S. states have adopted the Uniform Commercial Code ("UCC") or a local version thereof, which provides a uniform set of implied terms that are used in contracts for the sale of goods or services. UCC terms are not mandatory, and parties may agree to terms that are contrary to or different from the UCC's terms or agree to "opt out" of the UCC altogether. If a dispute arises for a commercial contract under the UCC, a court may fill in missing terms and provide an interpretation for an incomplete contract.

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

2. Principles of equity

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

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

- **Public policy.** U.S. courts will refuse to enforce any contract or contract term that is contrary to established public policy, such that enforcement of a contract or its terms would be offensive to society. Contracts that would be invalid due to public policy might include contracts that are illegal or immoral, such as contracts that exculpate a party even for gross negligence or intentional harm.

3. Bankruptcy

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

4. Other statutory terms

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

Choice of law and venue in commercial contracts

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

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

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

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

Section IV

Labor and employment law considerations

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

Establishing the employment relationship

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

The traditional U.S. rule is that in the absence of an employment contract or collective bargaining agreement,[40] employment is "at-will." This means that employment is terminable at the option of either party at any time. As such, a U.S. employer may generally discharge an employee for any lawful reason without notice, for good cause or no cause, and an employee may quit at any time without notice or cause. Various state laws and court decisions have eroded the "at-will" doctrine to some extent — most notably, under the public policy exception and theories of "implied contract" — but the doctrine is a fundamental principle of employment laws in most states.[41] Montana is the only state in the U.S. that has not officially adopted the "at-will" employment doctrine.

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

Employers may seek to have their employees sign restrictive covenants, such as non-competition agreements, which apply during and after employment. These have been subject to increased scrutiny under both federal and state law, with many states imposing increasing scrutiny over these agreements (including imposing advance notice requirements, prohibiting these agreements for employees who earn below a certain amount, or outlawing them altogether). In 2024, the Federal Trade Commission ("FTC") attempted to implement a rule that would have imposed a nationwide ban on non-competition agreements, subject to narrow exceptions; however, this rule was struck down and the FTC is no longer pursuing a nationwide ban on non-competition agreements. One exception to the trend of increasing scrutiny is Florida, which enacted the Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth ("CHOICE") Act in July 2025.[43] The CHOICE Act significantly strengthens employer protections by creating a presumption of enforceability for non-compete agreements with "covered employees"— those earning at least twice the annual mean wage for their county. Unlike most states, Florida now permits non-competes of up to four years, and courts are required to issue preliminary injunctions against violations unless the employee proves specific statutory defenses.

Equal employment opportunity laws

A number of federal statutes, some of which are described below, [44] govern equal employment opportunity in the private sector. Many states have analogs to these statutes that may impose different obligations, create broader protections, or provide different remedies than federal law.

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for a covered employer to discriminate with respect to any term or condition of employment based on race, color, sex (which includes gender identity and sexual orientation), religion, or national origin. Title VII also prohibits retaliation by a covered employer because an individual has engaged in "protected activity" under the statute, such as objecting to or opposing discrimination or participating in an investigation of a discrimination complaint. The statute covers employers with 15 or more employees. Foreign companies with offices and employees in the U.S. are also covered by Title VII.

Before a private action against an employer for discrimination may be brought under Title VII, an employee, applicant, or former employee must first file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC investigation will generally involve the employer responding to a lengthy set of written questions, a request for documents, and sometimes fact-finding conferences and interviews. Whether or not the EEOC finds probable cause, once the EEOC investigation has been completed, the EEOC may sue on the employee's behalf or the employee may bring a private cause of action.[45] A successful plaintiff in a Title VII action may be entitled to reinstatement, back pay, damages for future pecuniary loss (front pay), emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary loss, punitive damages, and attorneys' fees.

Efforts to increase workplace diversity, including through diversity, equity, and inclusion ("DEI") programs, have existed in various forms for decades, but beginning in the summer of 2020, employers faced heightened pressure to expand these initiatives. The Biden administration strongly supported this expansion, but legal challenges have since followed, with plaintiffs arguing that DEI practices violate federal anti-discrimination laws such as Title VII. These challenges intensified following the U.S. Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College ("SFFA")*, which held that the use of race in admissions at two higher education institutions was a violation of law. DEI programs also became a central issue in the 2024 presidential campaign and, shortly after assuming office, President Trump signaled that curtailing employer DEI programs would be a major focus of his administration.

On January 21, 2025, President Trump issued Executive Order 14173, which, among other things, directs federal agencies to investigate and enforce against "illegal DEI" in the private sector. Building on Executive Order 14173, the U.S. Department of Justice ("DOJ") and EEOC have released guidance reaffirming the longstanding principle that DEI practices may violate Title VII when employment decisions are influenced, whether in whole or in part, by race, sex, or other protected characteristics. The guidance also underscores that Title VII's prohibition against discrimination applies to all terms, conditions, or privileges of employment, including not only hiring, promotion, compensation, and termination decisions, but also fringe benefits; access to (or exclusion from) training; access to mentorship, sponsorship, and workplace networks; internships and fellowships; interview selection (including placement or exclusion from a candidate "slate" or pool); and job duties or work assignments.

1. Sexual harassment under Title VII

Sexual harassment is a form of sex discrimination under Title VII. Broadly defined by the EEOC, sexual harassment is any "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [...] when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment." Actionable forms of sexual harassment include:

(a) Quid pro quo

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

(b) Hostile work environment

This form of sexual harassment generally occurs when repeated, unwarranted, and unwelcome sexual advances are severe or pervasive enough to create a hostile or offensive work environment for an employee. For example, repeated lewd remarks, pinching and grabbing, the passing around of sexually explicit pictures or cartoons, or other similar sexually-oriented behavior may create a hostile work environment. Some jurisdictions have passed laws making it easier to bring hostile work environment claims, including by removing this "severe or pervasive" standard.[46]

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

A majority of states and many municipalities, especially large cities such as New York City, have also passed general employment anti-discrimination laws. In many cases, state and municipal anti-discrimination laws are more rigorous and broader than federal law and may prohibit discrimination on the basis of additional characteristics.[47] In any case, according to principles of federalism, federal law represents the minimum level of protection, and states cannot reduce protection below what is provided for under federal law.

(c) Sexual harassment and #MeToo

Since 2017, the #MeToo movement has, through a combination of victims' voices and media coverage, increased public focus on the issue of sexual misconduct in the workplace. In response to #MeToo, several states have passed legislation addressing sexual harassment training, mandatory arbitration, and non-disclosure agreements in harassment cases, and related issues.[48] Some employers have responded to the movement by re-examining their anti-harassment policies, employee training techniques, complaint procedures, and workplace culture overall.

Evaluation of employment policies, organizational structure, and reporting lines has become a central part of corporate risk assessment. In the context of mergers and acquisitions and investments, demands for so-called "#MeToo" or "Weinstein" representations from would-be sellers have become common.[49]

2. Affirmative action

Certain federal contractors and subcontractors were previously required to develop affirmative action programs ("AAPs") focused on race, ethnicity, and gender, pursuant to Executive Order 11246 and requirements imposed by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). Executive Order 14173 revoked Executive Order 11246 and directed OFCCP to immediately cease enforcing those requirements. However, federal contractors and subcontractors may still be obligated to develop AAPs for individuals with disabilities and protected veterans, which require, among other things, an annual assessment of outreach and recruitment efforts with respect to those groups. In some instances, affirmative action may be imposed as a judicial remedy for past discrimination or may be voluntary if certain narrow requirements have been met.

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

The ADEA is a federal law that prohibits employers with 20 or more employees from discriminating on the basis of age against employees and applicants who are 40 years of age or older. Although the ADEA applies to the terms and conditions of employment, some conditions are exempted from its provisions.[50] An employee may waive certain rights under the ADEA, but the waiver must be knowing and voluntary, and it is important that an employer obtain legal advice to ensure that the waiver is valid. Some rights, such as the right to revoke a termination agreement within seven days of execution of the agreement, are not waivable.

4. The Pregnancy Discrimination Act ("PDA")

The PDA, a federal law, requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same for all employment-related purposes as non-pregnant disabled workers. In essence, the law requires that pregnant women receive the same treatment with regard to medical benefits, leaves of absence, and reinstatement after leave as other employees.[51]

5. The Equal Pay Act ("EPA")

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

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

The ADA is a federal statute that applies to employers with 15 or more employees. It protects qualified individuals with a disability. A disability is defined as (i) a physical or mental impairment that substantially limits one or more of the major life activities of an individual, (ii) a record of such impairment, or (iii) being regarded as having such an impairment. [52] A qualified individual is "one who, with or without reasonable accommodation, can perform the essential functions of a job that he or she holds or desires." The "essential functions" of a job refer to "the desired results that are achieved by performing the duties of the position."[53]

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

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

The PWFA is a federal statute that applies to employers with 15 or more employees and requires that employers provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the employer's business. Similar to the ADA, the PWFA protects qualified individuals from discrimination, and an employer is required to offer such individuals a reasonable accommodation to perform the essential functions of that individual's position, unless such accommodation would cause an undue hardship for the employer.[54]

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

The PUMP Act provides nursing employees the right to receive break time to pump breastmilk and a private place for nursing mothers to pump at work. All employers covered by the Fair Labor Standards Act must comply with the PUMP Act.[55]

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

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

Wages, safety, labor, and leave laws

U.S. labor and employment law also covers employee wages and hours under the Fair Labor Standards Act ("FLSA"), workplace safety under the Occupational Safety and Health Act ("OSH Act") and state-based workers' compensation statutes, labor relations under the National Labor Relations Act ("NLRA") and the Railway Labor Act ("RLA"), and medical leave under the Family and Medical Leave Act ("FMLA").[56]

1. Wage and hour law

The FLSA does the following:

- Regulates the wages and hours of work for covered employees;
- Imposes limitations on the work and hours of employees under the age of 18;
- Establishes a federal minimum wage rate of US$7.25 per hour;
- Establishes a federal minimum wage rate for workers under 20 years of age of US$4.25 per hour during the first 90 consecutive calendar days of employment with an employer;
- Requires that overtime compensation at a rate of not less than one and one-half times the regular hourly wage be paid to employees who work in excess of 40 hours per week;
- Prohibits child labor;
- Bars employers from discriminating against employees with respect to wages on the basis of sex;
- Establishes break time requirements for nursing mothers; and
- Requires covered employers to make and retain records and reports on the number of hours worked by employees.[57]

Some employees are "exempt" from the overtime requirements of the FLSA. Whether an employee may be classified as exempt depends on a number of factors, including the employee's actual job duties, rather than just their title or job description. The most widely applicable exemptions are for management, professional, outside sales, and high-level administrative and information technology employees, who must meet technical "duties tests" to be considered exempt. Employees must also be paid above a certain salary threshold of $684 per week in order to be exempt.

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

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

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

As of 2025, workers may be eligible for new deductions for tax years 2025 through 2028 if they received qualified tips or overtime pay, subject to certain caps and earnings limits. For individuals who receive qualified overtime compensation, they may deduct the pay that exceeds their regular rate of pay (generally, the "half" portion of "time-and-a-half" compensation) that is required by the FLSA and reported as income, also subject to caps and earnings limits.

2. Occupational safety and health laws

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

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

3. Workers' compensation laws

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

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

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

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

The federal FMLA[58] provides temporary family and medical leave to "eligible employees"[59] under the following circumstances: (i) birth, adoption, or foster care placement of a child; (ii) caring for a spouse,[60] child, or parent with a "serious health condition" or who is called to active military duty; or (iii) the employee's own "serious health condition."

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

The FMLA also requires that the employee's medical benefits be continued during the period of leave. However, the FMLA does not require that the leave be paid. Instead, the employer's policies regarding paid time off and disability pay apply, unless provided otherwise by state or local law. Notably, in recent years, some states and localities have passed paid family leave programs, which may provide for partial or full pay for employees during otherwise-unpaid FMLA leave. This is generally paid for by employment taxes and paid to employees from the government upon an application by the employee. Upon returning to work, the employee must be restored to the same or equivalent position, with the same pay and benefits as the employee had before the leave was taken.[61] The FMLA does not apply to employers with fewer than 50 employees, but state and municipal laws may apply to smaller employers or provide greater leave benefits, including paid sick leave and parental leave in some jurisdictions.

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

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

Arbitration

Although employees may generally bring hiring, employment, or termination disputes in federal or state court, arbitration clauses in agreements between an employer and its employees are typically enforceable under U.S. law. Such arbitration clauses, when combined with class action waivers, may preclude employees from bringing or participating in class action lawsuits. U.S. Supreme Court decisions, particularly since 2018, have strengthened the ability of employers to enforce such waivers.[62] Recently, some employers have faced public criticism for the inclusion of mandatory arbitration clauses in employment agreements. However, such criticism is not yet widespread and the legal landscape still largely favors the enforceability of arbitration clauses under most circumstances.

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

Section V

Immigration laws

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

The Departments of State and Homeland Security oversee immigration matters in the U.S. Employers seeking to hire foreign workers should be aware of the various types of visas that are available for workers.[63] Two common types of visas for entrepreneurial ventures and other businesses are those qualifying as (i) non-immigrant visas, and (ii) employment-based immigrant visas. Non-immigrant visas cover workers who have a permanent residence outside of the U.S. but desire to come to the U.S. on a temporary basis for work, study, business, or other reasons. Employment-based immigrant visas are available to a limited number of qualified applicants seeking to permanently reside in the U.S. The lists provided below are not exhaustive; employers should consult with immigration attorneys to determine their best solutions.

Non-immigrant visa categories

1. B-1 visitor visa

B-1 visitor visas are non-immigrant visas for persons seeking to enter the U.S. temporarily for legitimate activities related to business or tourism for a period of six months or less. However, a B-1 visa is generally not a work visa that allows employment in the U.S. A holder of a B-1 visa may engage in related business activities such as attending tradeshows and conferences, visiting and negotiating contracts with clients and suppliers, consulting with business associates and attending board meetings, or settling an estate. Citizens of some countries may enter the U.S., for the same activities discussed above, for a period of 90 days or less without a visa through the Visa Waiver Program with an approved online Electronic System for Travel Authorization ("ESTA") registration.[64]

2. L-1 Intracompany Transferee visa

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

To qualify, a U.S. employer must (i) have a qualifying relationship[65] with a foreign company, and (ii) be doing business, presently or in the future, as an employer in the U.S. and in at least one other country, directly or through a qualifying organization, for the duration of the beneficiary's stay. The business must be viable, but does not have to be engaged in international trade. In addition, the employee is required to (i) have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding the employee's admission, and (ii) be seeking to enter the U.S. to provide services in a managerial or executive or specialized knowledge capacity to the same employer or one of its qualifying U.S. organizations.

3. H-1B Specialty Occupation visa

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

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

4. Current developments regarding H-1B Program

Since March 1, 2020, the U.S. Department of Homeland Security ("DHS") has required petitioners to first electronically register with U.S. Citizenship and Immigration Services ("USCIS") during a designated registration period (in March, although the exact time period may fluctuate from year to year) and provide basic information so that the random drawing lottery selection can be made before the employers have to file their H-1B petitions (both those subject to the regular cap and those eligible for the advanced degree cap). USCIS selects from among the registrations timely received a sufficient number projected as needed to meet the applicable H-1B allocations under the quota. Employers will then have the opportunity to submit the full H-1B petition for substantive adjudication, but only for cases selected through the lottery. Due to the increased number of registration (lottery) entries each year, statistical odds of getting selected through the lottery have steadily decreased in recent years. On September 24, 2025, the DHS has proposed a change to

introduce a "weighted" selection process for H-1Bs in lieu of a completely random lottery selection that would generally favor the allocation of H-1B visas to higher-skilled and higher-paid persons. If implemented, this new selection process may make it more difficult for certain employers to sponsor candidates for H-1B visas.

In addition, as a result of the Presidential Proclamation from September 19, 2025, a new US$100,000 fee payment has to accompany certain H-1B petitions filed after September 21, 2025 (the fee is per employee, when it applies). The new fee does not apply to: (a) H-1B petitions filed prior to September 21, 2025; (b) persons with previously issued and currently valid H-1B visas; and (c) H-1B petitions requesting change of status or amendment or extension of stay, and USCIS determines that the person is eligible for such a request. Although these exceptions, which are set forth in USCIS guidance, are helpful as they expand the number of situations in which the new fee does not apply, there are still a number of scenarios where the new US$150,000 fee would be required (such as when a U.S. employer wants to sponsor a candidate who is outside the U.S., without any valid U.S. visa status).

5. Canadian and Mexican TN visa

Through the North American Free Trade Agreement ("NAFTA"), and its successor, the U.S.-Mexico-Canada Agreement ("USMCA"), eligible professional[66] Canadian and Mexican citizens may seek temporary entry to the U.S. to engage in prearranged business activities for U.S. or foreign employers as a non-immigrant for a period of up to three years.[67] Mexican citizens have to apply for a TN visa at a U.S. embassy or consulate. Unlike Mexican citizens, Canadian citizens who qualify for a TN visa status need not apply at a U.S. embassy or consulate but apply for admission directly at a designated U.S. port of entry.

Employment based immigrants visas

Every year, the U.S. issues approximately 140,000 employment-based immigrant visas, which allow the holders to receive green cards once in the U.S., based on five employment-based preferences. This section will discuss the first three preferences, as they generally receive the highest rates of issuance.[68]

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

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

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

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

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

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

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

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

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

Tax considerations

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

Section VI

Intellectual property laws

The U.S. is considered one of the jurisdictions that are most protective of intellectual property.[69] Copyrights and patents are governed by federal laws, while trademarks are governed by federal, state, and common law. Trade secrets are governed by federal and state law.

Copyrights

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

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

Patents

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

- The U.S. Patent and Trademark Office ("USPTO") issues "utility" patents (useful process, machine, manufacture, or composition of matter), "design" patents (ornamental design of a functional item), and "plant" patents (for certain types of asexually reproduced varieties of plants).
- Utility and plant patents grant a 20-year monopoly (from the effective filing date of the application) to prevent others from making, using, offering to sell, selling, or importing the invention in the U.S. Design patents grant a 15-year monopoly (from the date of grant), 14 years for those filed before May 13, 2015.
- The patent application process makes inventions public once a patent is issued or published. This is the quid pro quo for the monopoly — the public gets full disclosure of the inventor's best ideas about how to make and use the invention. Of course, if another person or entity wants to use the invention as claimed in the patent, that may require authorization from the patent owner.
- Having a patent on an invention does not necessarily mean the patent owner can make, use, or sell its invention — only that the patent owner may prevent others from doing so (the so-called Exclusionary Right). Note also that an invention may rely on another's patent and therefore require a license to be commercialized.
- Obtaining a U.S. patent requires the submission of a patent application or a provisional patent application to the USPTO no later than one year after the invention has been publicly used, described, or commercialized. Therefore, it is important to keep track of one-year bar dates from first articles, presentations, website postings, disclosures not protected by a Non-Disclosure Agreement ("NDA"), offers for sale, and/or sales. For patents outside of the U.S., there is no one-year grace period, and thus public disclosures of inventions prior to filing for patent protection may cause the forfeiture of protection outside the U.S.
- The patent process can take three years or more, and obtaining a U.S. patent may cost from US$15,000 - US$25,000 or more in filing fees for complex inventions, such as in the biotech area. After the patent issues, maintenance fees must be paid on an ongoing basis to prevent the patent from expiring prematurely. This investment of time, effort, and resources secures what is perhaps the strongest type of intellectual property protection available.
- The patent claims define the invention, and thus the scope of protection afforded under the patent. Claim language must be sufficiently definite to persons of skill in the art so that they can determine whether a given product/process would infringe. Claims also must define an invention that does not merely reflect the prior art (what was available before the patent was filed), or obvious modifications of the prior art.
- The rest of a patent application supports the claims. The patent specification must teach one skill in the art of how to make and use the invention and the best way of performing the invention. The specification also must describe the invention sufficiently to show that the inventor was in possession of the full scope of the invention.
- Patents cannot claim laws of nature, natural phenomena, or abstract ideas. This issue with respect to patenting "abstract ideas" is coming up more often in connection with patents related to machine learning and other software technologies.
- Generally, applications for a U.S. patent are filed in the name of the inventor — even if the company owns the invention. Typically,

pursuant to the inventor's employment obligations, the inventor is obligated contractually to assign ownership of the invention to the company.

- Use proper notice: Use "Patent No. [#,###,###]" or "Patent Pending" on the products and/or in materials carrying or describing the subject of the invention.

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

- The benefits of a patent portfolio include excluding competitors from the best product features or most efficient processes; generating revenue by way of royalty payments; and obtaining bargaining chips to exchange with other companies for use of their patents.
- Patent owners can seek to enforce their patent rights and prevent others from making, using, offering for sale, selling or importing patent-infringing goods through the U.S. district courts or the U.S. International Trade Commission ("ITC"). District courts may award monetary damages or an injunction against an infringer's commercialization; the ITC can award no monetary damages, although it can exclude infringing products from entering the U.S.
- In the U.S., patent litigation is expensive and litigations are generally very long. The average cost of patent litigation is between US$3,000,000 and US$5,000,000, or more. Parties wait an average of two and a half years to reach trial.[70]

Trademarks

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

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

Trade secrets

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

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

To ensure adequate protection, a company should:

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

Section VII

Export control and economic sanction laws

Export Administration Regulations (EAR)

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

1. Scope of the EAR

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

The EAR applies to the following:

- All U.S.-origin items, regardless of their location;
- All non-U.S.-origin items located in the U.S.;
- Certain items manufactured outside the U.S. that contain greater than de minimis controlled U.S.-origin content;[71] and
- Certain items manufactured outside the U.S. that are derived from, and direct products of, U.S.-origin technology or software[72] or "direct products" of a complete plant or any major component of a plant as described in § 736.2(b)(3) of the EAR.[73] For exports to Russia and Belarus, as of February. 24, 2022, there are more stringent requirements when applying this so-called "foreign direct product" rule.

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

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

2. Licensing requirements - classification and destination controls

The EAR contains a list of controlled items called the CCL.[74] Items are divided into 10 categories and further subdivided into groups. Each group contains detailed entries describing the technical functions or characteristics of the commodities, software, and technology that are controlled. Items that match the described functions or characteristics in an entry are assigned a corresponding ECCN. Depending on an item's ECCN and related reason for control, a license may be required to export or re-export the item to certain countries. If an item is subject to the EAR and not specifically described in any ECCN, then the item is classified under the "basket category" referred to as "EAR99." Generally, no license is required for the export of EAR99 items, except to certain sanctioned countries and restricted parties, or to certain countries, such as Russia and Belarus, if destined for military end-use or military end-users.

As part of the effort to issue new export control restrictions on "emerging and foundational" technologies, the Commerce Department added controls in October 2021 on nucleic acid assembler and synthesizer "software" that is capable of designing and building functional genetic elements from digital sequence data.[75] The Commerce Department also sought comments in December 2022 on Brain-Computer Interface technology. It is anticipated that the Commerce Department will continue issuing new export control restrictions on "emerging and foundational" technologies. While the exact nature and extent of future controls are not known at this time, it is likely that they will impact items and technology related to sectors such as biotechnology, artificial intelligence, microprocessors, additive manufacturing, robotics, and other areas. These new controls could result in items that were previously subject to only a very low level of control being controlled for export to most countries. The scope of these new rules is also likely to have a significant impact on the scope of transactions of interest to CFIUS.

3. Licensing requirements - embargoed destination controls

In addition to the classification and destination controls, the U.S. government maintains trade embargoes against various countries. As of the date of this publication, the EAR generally prohibit (subject to very limited exceptions) exports and re-exports to Cuba, Iran, North Korea, Crimea (region of Ukraine/Russia), Syria (although OFAC sanctions on Syria were lifted as of July 1, 2025, and EAR amendments allow provision of certain items to Syria pursuant to a License Exceptions but most items on the Commerce Control List remain restricted for Syria), and the so-called Donetsk People's Republic and Luhansk People's Republic regions in Eastern Ukraine. These requirements are in addition to, and concurrent with, the economic sanctions imposed by OFAC described below.

4. Licensing requirements - restricted parties and end-uses

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

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

These lists are implemented by different government agencies, which update the lists frequently and without advance notice.[76] In recent years, the U.S. Government has used these lists as a significant foreign policy tool by adding a large number of major corporations and other institutions, particularly those in China, to the Entity List and SDN List.

While the policy of each agency differs, OFAC generally treats any entity that is directly or indirectly owned 50% or more (individually or in the aggregate) by a restricted party, even when that entity is not specifically identified on the relevant restricted party list, as a restricted party. (Effective September 29, 2025, BIS issued its "Affiliates Rule" that introduced restrictions on entities that are owned at 50% or greater level by certain restricted parties, but BIS suspended the rule as of November 10, 2025 for a one-year period as a result of the U.S.-China framework trade agreement). Companies should also confirm that contractual counterparties are not controlled by a restricted party, even when the 50% ownership threshold is not satisfied. While more limited restrictions apply to some of these lists, a license is generally required to export or re-export items to persons on these lists or provide services to persons on the lists, directly or indirectly. In most instances, license applications are subject to a policy of denial.

A license is also required for a transaction if it involves restricted end-uses, which include, for example, the proliferation of nuclear, chemical, and biological weapons or related missile systems. Pursuant to these restrictions, a license may be required to transfer even unsophisticated items classified as EAR99 for use in these (and other) restricted end-uses. Special restrictions also apply to exports or re-exports of certain items to Belarus, Burma (Myanmar), Cambodia, China, Russia, and Venezuela for military end-use or military end-users.[77]

International Traffic in Arms Regulations ("ITAR")

1. Scope of the ITAR

The ITAR regulates the export, re-export, transfer, temporary import, and brokering of defense articles, as well as technical data and defense services classified on the U.S. Munitions List ("USML").[78] U.S. persons engaged in manufacturing, exporting, or brokering defense articles or defense services are required to register with DDTC. Moreover, with limited exceptions, the ITAR requires exporters to obtain prior written authorization from DDTC before exporting or re-exporting defense articles (including technical data) or defense services.

The ITAR applies to the following:

- Exports, re-exports, and temporary imports of U.S.-origin "defense articles," which include goods, software, and technical data that are enumerated on the USML;[79]
- Exports of defense-related services to foreign persons located in the U.S. or abroad, including (i) furnishing assistance (including training) to foreign persons, whether in the U.S. or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles, (ii) the furnishing to foreign persons of any technical data controlled under the ITAR, whether in the U.S. or abroad, or (iii) military training of foreign units and forces; and
- Brokering activities in connection with transactions between third parties involving defense articles and defense services, regardless of their country of origin.

2. ITAR registration

Registration under the ITAR requires the completion of an electronic registration using the cloud-based Defense Export Control and Compliance System ("DECCS"), an electronic payment of a registration fee and payment confirmation, documentation issued or endorsed by a government authority enabling the registrant to engage in business in the U.S., and a complete organizational chart, among other supporting documentation.[80] The registration statement must be signed by a "Senior Officer" empowered by the registrant to do so. The ITAR registration does not constitute an authorization to export any items or services subject to the ITAR, but it is a pre-condition of applying for export authorizations or use of the ITAR license exemptions.[81]

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

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

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

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

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

3. Proscribed countries

The U.S. government maintains arms embargoes against certain foreign countries ("Proscribed Countries"). The prohibitions applicable to each of these countries vary somewhat in scope and severity. Among other restrictions, Section 126.1 of the ITAR generally prohibits sales of — and mere proposals to sell — defense articles and defense services, defined above, to the Proscribed Countries without prior authorization from DDTC.[82] DDTC generally maintains a policy of denying licenses and other approvals for exports and re-exports of defense articles and defense services to the Proscribed Countries. DDTC may grant exceptions to this general policy if the proposed transaction is otherwise in the foreign policy or national security interests of the U.S. License exemptions under the ITAR are not available for transactions involving Proscribed Countries.

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

Foreign Assets Control regulations

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

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

When reviewing transactions with potential sanctioned countries, companies should consider whether they made commitments in loan, credit, or other commercial agreements that further limit their ability to do business relating to such sanctioned countries.

As of the date of this publication, comprehensive sanctions that are territorial in nature are implemented only against Cuba, Iran, North Korea, Crimea (region of Ukraine/Russia), and the so-called Donetsk People's Republic and Luhansk People's Republic regions of Eastern Ukraine. Virtually all direct or indirect transactions involving these countries/regions are prohibited. As of July 1, 2025, OFAC revoked its comprehensive sanctions against Syria (including its government) so a more limited, list-based sanctions program is now in effect, targeting certain persons and entities in Syria. Significant restrictions are also currently imposed against Venezuela, including the entire Government of Venezuela and entities owned or controlled by the Government of Venezuela. Since February 24, 2022, OFAC has introduced numerous and complex new sanctions involving a variety of activities in or involving Russia, expanding the previously more limited sanctions that were in place against Russia (however, Russia is not yet subject to comprehensive OFAC sanctions that prohibit all dealings with anyone in that country but broad restrictions on the provision of various types of services and "new investment" in Russia have been introduced, and those are not limited to sanctioned parties). More limited sanctions are implemented against Afghanistan, Belarus, Burma (Myanmar), the Central African Republic, the Democratic Republic of Congo, Ethiopia, Iraq, Lebanon, Libya, Mali, Nicaragua, Somalia, South Sudan, Syria, Ukraine, Venezuela, Yemen, and Zimbabwe. Transactions with these countries are not widely prohibited. Rather, the sanctions programs are targeted at specific individuals, entities, organizations, and industries within these countries. As described above, OFAC also implements certain restricted party lists, including the SDN List, Foreign Sanctions Evaders ("FSE") List, SSI List, and the NS-MBS List.

Foreign direct investment reports required by the Bureau of Economic Analysis

Every foreign investment in a U.S. business that results in a foreign person or entity owning 10% or more of the voting securities of a U.S. business enterprise, or an equivalent interest of an unincorporated U.S. business enterprise, including a branch office or real estate (improved or unimproved) (a "U.S. Affiliate"), is subject to reporting requirements under the International Investment and Trade in Services Survey Act.[83] The reporting requirements include filing a new foreign direct investment ("FDI") survey, quarterly surveys, annual surveys, and five-year benchmark surveys with the Bureau of Economic Analysis ("BEA") of the U.S. Department of Commerce. Persons subject to the reporting requirements of the FDI survey (Form BE-13) and the benchmark survey (Form BE-12) (conducted every five years) are required to file, whether or not they have been notified by BEA. Persons not notified by BEA of their filing obligation under the quarterly (BE-605) and annual (BE-15) FDI surveys are not required to file.

The information included in BEA filings is confidential and may be used by BEA only for analytical or statistical purposes. U.S. Affiliates that fail to comply with mandatory BEA reporting requirements could be subject to civil penalties of up to US$59,114 or, in rare cases, criminal penalties.[84]

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

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

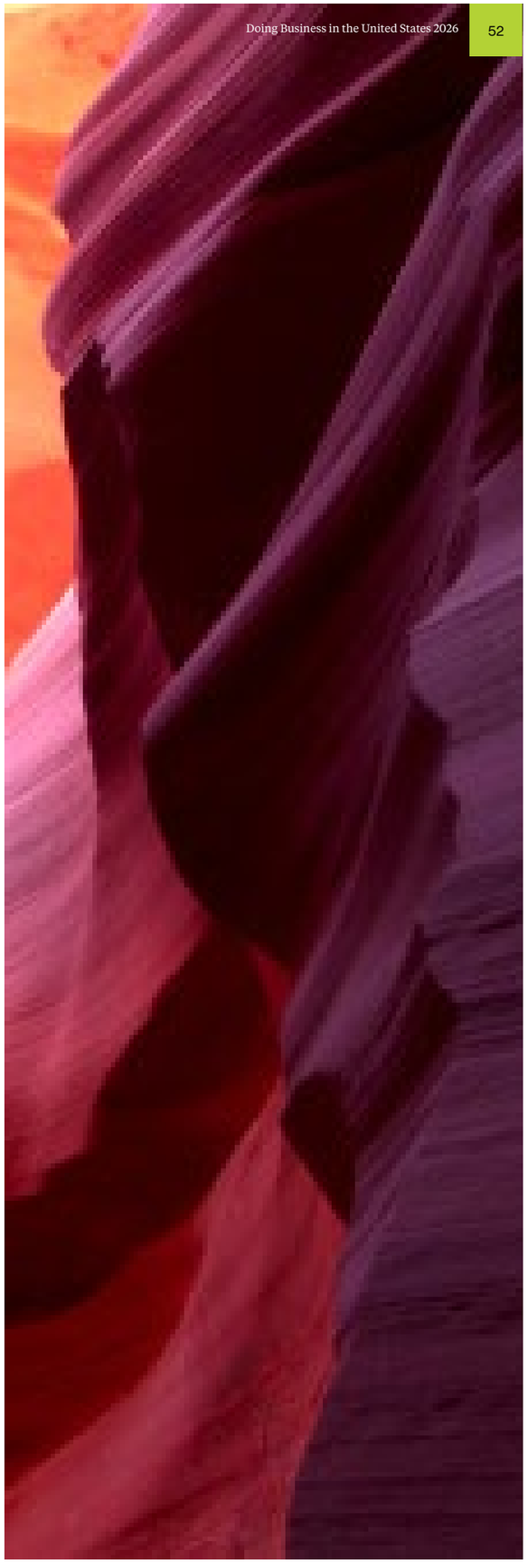
- **Form BE-13A —** report for a U.S. business enterprise when (i) a foreign entity acquires a voting interest (directly, or indirectly through an existing U.S. Affiliate) in that enterprise, segment, or operating unit; (ii) the total cost of acquisition is greater than US$3 million; and (iii) by this acquisition, at least 10% of the voting interest in the acquired entity is now held (directly or indirectly) by the foreign entity.
- **Form BE-13B —** report for a U.S. business enterprise when (i) a foreign entity, or an existing U.S. Affiliate of a foreign entity, establishes a new legal entity in the U.S.; (ii) the projected total cost to establish the new legal entity is greater than US$3 million; and (iii) the foreign entity owns 10% or more of the new business enterprise's voting interest (directly or indirectly).
- **Form BE-13D —** report for an existing U.S. Affiliate of a foreign parent that (i) expands its operations to include a new facility where business is conducted and (ii) the projected total cost of the expansion is greater than US$3 million.
- **Form BE-13E —** report for a U.S. business enterprise that previously filed a BE-13B or BE-13D indicating that the established or expanded entity is still under construction. This form will collect updated cost information and will be collected annually until construction is complete.
- **Form BE-13 Claim for Exemption —** report for a U.S. business enterprise that (i) was contacted by BEA but does not meet the requirements for filing forms BE-13A, BE-13B, or BE-13D or (ii) whether or not contacted by BEA, met all requirements for filing on Forms BE-13A, BE-13B, or BE-13D, except for the US$3 million reporting threshold.

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

Penalties for failure to comply with trade control laws

The U.S. trade control law regime with respect to export controls and economic sanctions is strict, providing for successor liability and the potential for significant penalties. For example, with respect to violations of the Export Administration Regulations, the U.S. government imposes criminal penalties of up to US$1 million per violation or 20 years in prison (or both) for certain willful or intentional violations. Maximum civil penalties may include a fine of not more than US$377,700 or twice the value of the transaction, whichever is greater, loss of export privileges, seizure or forfeiture of goods, debarment from government procurement, and mandatory remedial compliance actions. In addition, enforcement actions resulting in the imposition of penalties are a matter of public record, and the effects of negative publicity should be considered.

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



Import and other trade laws

1. Trade policy and trade remedies

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

The U.S. currently has bilateral and multilateral free trade agreements ("FTAs") with 20 countries, which provide for reduced or duty-free treatment for imports into the U.S. that meet specific origin rules.[85] The U.S. is also a party to several international sectoral agreements and conventions affecting trade and tariffs. Additionally, the U.S. is a party to the WTO General Agreement on Trade in Services 1994 ("GATS"), a treaty of the WTO that extends the multilateral trading system to service sectors.

2. Current trade environment

In 2025, U.S. international trade was subject to unprecedented disruptions arising out of the tariff policies of the second presidency of President Donald J. Trump. Citing the authority of the International Economic Emergency Powers Act ("IEEPA") to "regulate" imports, President Trump imposed multiple rounds of sweeping tariffs on all U.S. trading partners, including longstanding ones with which it has FTAs, such as Canada and Mexico. Tariffs on China, the third largest U.S. trading partner, briefly escalated to 145 percent. In addition, President Trump imposed Section 232 national security duties on sectors such as steel, aluminum, and automobiles. Statutory tariff exemptions, such as the de minimis program, were revoked by executive fiat. These tariffs not only directly raised the cost of U.S. imports but also indirectly created high compliance costs for importers, given their complexity. The sudden implementation of, and frequent changes to, the new tariffs exacerbated the difficulties. Despite some tariff exemptions that exempted important sectors of U.S. trade, such as semiconductors and pharmaceuticals, overall U.S. tariffs by the end of 2025 have reached levels not seen since the 1930s.

Looking ahead to 2026, several Section 232 investigations affecting sectors including pharmaceuticals, medical devices, semiconductors, and critical minerals that began earlier in 2025 are still ongoing. New tariffs may be imposed at the conclusion of these investigations. The Supreme Court is also expected to release its decision on the legality of President Trump's IEEPA tariffs in December 2025 or early 2026. It is possible the decision will uphold lower-court rulings that the IEEPA tariffs are illegal and that importers are due refunds (plus interest) on IEEPA tariff payments. However, this is by no means a foregone conclusion, and even if the Supreme Court finds the IEEPA tariffs illegal, it may limit the eligibility of the refunds to the original plaintiffs in the cases before it *(Learning Resources v. Trump* and *Trump v. V.O.S. Selections, Inc.)*. To prepare for this contingency, major importers are bringing lawsuits against the U.S. Customs and Border Protection to preserve their right to sue the U.S. government for tariff refunds.

While President Trump will retain considerable powers to impose tariffs on U.S. goods using other trade authorities even in the event of an unfavorable Supreme Cout ruling on IEEPA including the aforementioned Section 232, in addition to Section 301 (country-specific retaliation for unfair trade practices), Section 201 (safeguards), Section 122 (balance of payments tariffs), and Section 338 (retaliation for discrimination against U.S. commerce) — there are limitations on the rate or scope of tariffs that could be imposed by these measures, and some of them are legally untested. Nevertheless, President Trump may attempt to impose tariffs more using these authorities should the IEEPA tariffs be struck down, and that will likely create more uncertainty and compliance costs for importers.

The Administration is also using tariffs as leverage to extract trade concessions from U.S. trading partners. As of December 2025, the Administration has reached trade agreements with fifteen countries, including the European Union, Japan, Korea, the United Kingdom, and several Southeast Asian and Latin American countries. These trade agreements largely maintained U.S. tariffs on goods from those countries, while obliging the U.S. trading partner to open their market to U.S. goods and, in several cases, requiring companies from those trading partners to invest hundreds of billions of dollars in the U.S. in strategic industries, such as power generation and shipbuilding. Several agreements also included "national security" provisions that required those trading partners to align themselves with the U.S. on export controls, rules of origin, and technology regulations. The broad terms and the lack of specifics of these agreements are a major departure from the detailed U.S. FTAs of the past and suggest that they are still works in progress that will likely require additional negotiations to fully implement. Further, given the lack of Congressional authorization of these agreements, they are inherently fragile documents that could be changed at will by the Administration, or be overturned entirely by a future President.

Separately, the Administration and China agreed to a deal that lowered sky-high tariffs, suspended trade control measures (including some of China's rare earth controls), led to the resumption of Chinese purchase of U.S. soybeans, and placed restrictions on Chinese fentanyl precursor exports to the U.S. Tariffs on Chinese products nevertheless remain high, given that Section 301 tariffs from the first Trump Administration of up to 25 percent continue to apply to most Chinese-origin products, and Chinese exports to the U.S. declined in 2025 even as they have surged in the rest of the world. While underlying economic tensions between the U.S. and China remain high, the two countries may have reached a delicate détente going into 2026. With President Trump planning to make a state visit to China in early 2026 and General Secretary Xi Jinping of China planning to reciprocate by visiting the U.S. later that year, both countries have an incentive to keep trade relations relatively stable.

The Administration is also engaged in trade negotiations with Mexico and Canada as it eyes the renegotiation of the U.S.-Mexico-Canada Agreement ("USMCA") in 2026. The Administration granted a rare tariff-free exception for USMCA-origin goods from Mexico and Canada that are not separately subject to Section 232 tariffs. However, the automotive and steel industries of Mexico and Canada are severely affected by the tariffs, given their deep integration with their U.S. counterparts in the North American supply chain. Mexico and Canada reacted very differently to these tariffs. Mexico imposed no retaliatory tariffs against the U.S. and has recently passed tariffs of its own that primarily affect trading partners in Asia in an effort to align itself with the Trump Administration's supply chain independence priorities. Meanwhile, Canada retaliated with tariffs of its own and is attempting to deepen ties with other trading partners. The U.S. Trade Representative Jamieson Greer recently suggested that the U.S. could withdraw from the USMCA and instead enter into separate trade agreements with Mexico and Canada, which introduces additional uncertainties into the North American trade relationship.

In short, 2026 will likely be another year of active change and uncertainty for the U.S. trade environment, and more disruptions should be expected.

3. Import process

When a shipment reaches the U.S., the importer of record (i.e., the owner, purchaser, or licensed customs broker[86] designated by the owner, purchaser, or consignee) must file entry documents for the goods with Customs and Border Protection ("CBP" or "Customs") at the port of entry. Imported goods are not legally entered until after the shipment has arrived within the port of entry, delivery of the merchandise has been authorized by Customs, and estimated duties have been paid. It is the importer of record's responsibility to arrange for the examination and release of the goods by Customs. The entry process in the U.S. for commercial goods is a two-step procedure — the entry (CF 3461) must normally be filed within 15 days of arrival of the goods, followed by filing of a more detailed filing of the "Entry Summary" (CF 7501) within 10 working days thereafter, with deposit of any estimated duties.[87] Filing is ordinarily done through electronic submission with the assistance of a licensed Customs broker.

An importer of record must use "reasonable care" due diligence in making entry[88] — including in providing the correct tariff classification, customs value, quantity, country of origin, and tariff preference program eligibility for the goods at the time of importation. Goods may be entered "for consumption" (this is a general entry for products to be sold commercially in the U.S.), entered for warehouse at the port of arrival, or be transported in-bond to another port of entry and entered or exported there under the same conditions as at the port of arrival.

(a) Evidence of right to make entry

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

(b) Surety/bond

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

(c) Entry summary documentation

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

(d) Entries made by U.S. importers

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

The authority of an employee to make entry for his or her employer is also best established by a Customs power of attorney.

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

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

(f) Country of origin marking and other requirements and restrictions

With limited exceptions, every article of foreign origin imported into the U.S. must be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.[89] Certain goods are also subject to regulations imposed by other agencies such as the Food and Drug Administration, Department of Agriculture, Department of Energy, Consumer Products Safety Commission, and others, imposing specific product safety standards, labeling, or certification requirements. Failure to meet standards, labeling, or certification requirements can result in detention or denial of entry. Furthermore, merchandise produced wholly or in part by means of the use of convict labor, forced labor, or indentured labor is prohibited from importation. Relatedly, CBP has shifted its enforcement efforts with respect to the use of forced labor towards imports that are linked to China's Xinjiang region.

Entry documents

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

These documents include:

- CBP Form 7533 (Inward Cargo Manifest for Vessel Under Five Tons, Ferry, Train, Car, Vehicle, etc.), CBP Form 3461 (Entry/ Immediate Delivery for Automated Commercial Environment ("ACE")), or their electronic equivalent;
- Evidence of right to make entry;
- Commercial invoice or a pro forma invoice when the commercial invoice cannot be produced;
- Packing lists, if appropriate;
- Other documents necessary to determine merchandise admissibility; and
- If a trade preference is being claimed, such as duty-free treatment under a Free Trade Agreement, importers must ensure they meet any specific documentation requirements to comply with the particular trade preference program. For example, for imports under the USMCA, importers should ensure they have a Certificate of Origin for the items for which the duty preference is being claimed.

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

Entries are ordinarily "liquidated" by U.S. Customs within 314 days of entry and liquidated by operation of law one year after entry. If CBP makes no changes to the entry, it will be liquidated "as entered." If changes are made, the entry may be liquidated with duty advancement or other changes. Prior to liquidation, CBP may seek information or documentation to determine the proper origin, value, tariff classification, and rates of duty to be applied. Importers disagreeing with CBP's determinations may file an administrative "protest" with CBP within 180 days of liquidation and, if necessary, appeal to the U.S. Court of International Trade.

Section VIII

U.S. antitrust laws

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

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

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

Sherman Act

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

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

1. Section 1

Section 1 of the Sherman Act prohibits "[e]very contract, combination … or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations."[90] Although the text of Section 1 broadly prohibits all restraints of trade, courts have interpreted the statute as prohibiting only conduct that is "unreasonable." Some restraints are deemed so harmful to competition that they are considered "per se" illegal, meaning that the act or conduct is condemned without further inquiry into the particular harm that will result. For these per se violations, evidence of procompetitive justifications or effects is irrelevant. All other forms of alleged anticompetitive conduct are subject to a "rule of reason" analysis. Under this analysis, a plaintiff typically must prove anticompetitive harm, and the defendant may counter with evidence of procompetitive justifications or effects of the conduct. The court then balances the alleged harm and procompetitive justifications to determine whether the conduct violates the antitrust laws.

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

Agreements between firms not to hire or compete for each other's employees, referred to as no-poach agreements, and agreements between firms about employee compensation levels, known as wage-fixing agreements, are also horizontal agreements. No-poach agreements have become an enforcement priority for U.S. antitrust agencies. The DOJ has recently brought criminal charges against firms and individuals who enter into naked no-poach and wage-fixing agreements,[91] in addition to bringing a series of high-profile civil no-poach lawsuits against firms in various industries.[92]

Vertical agreements are agreements between firms that occupy different levels of distribution (e.g., a supplier and a distributor). Vertical agreements are usually not considered per se illegal and, therefore, are typically subject to a rule of reason analysis. Unlike agreements between horizontal competitors, vertical agreements often have procompetitive effects, and "per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."[93] As the U.S. Supreme Court has summarized, modern case law recognizes the "differences in economic effect between vertical and horizontal agreements."[94]

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

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

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

In 2021, the FTC withdrew its support for the "Vertical Merger Guidelines" issued jointly by the DOJ and FTC in 2020. In a statement announcing the withdrawal of the guidelines, the FTC questioned "the purported procompetitive benefits (i.e., efficiencies) of vertical mergers."[95] While the withdrawal of the guidelines relates directly to merger investigations, it may also signal the agency's view of vertical restraints more broadly. In December 2023, the FTC and DOJ released new merger guidelines that cover both vertical and horizontal transactions. The guidelines do not make any mention of the potential procompetitive benefits of vertical mergers.

2. Section 2

Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and "combin[ations] or conspir[acies] with any other person or persons ..."[96] to monopolize. "Market power" and "monopoly power" are important concepts when evaluating conduct under Section 2, as certain conduct can be lawful or unlawful depending on whether a firm has market or monopoly power. There is no bright line in the U.S. as to what constitutes such power, but market power can be found when shares are generally greater than 30% and monopoly power can be found when shares are generally greater than 60-70%. Under Section 2, a plaintiff must show that the defendant possesses monopoly power, while under Section 1, it is sufficient to show that a defendant possesses market power. Conduct that may not violate Section 1 might still violate Section 2 because a monopolist is often held to a higher standard.

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

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

Under U.S. law, being a monopolist is not itself illegal; rather, Section 2 has been interpreted by courts to prohibit certain conduct that creates or maintains a monopoly, or otherwise leverages a firm's monopoly position for economic gain. Conduct that could form the basis of a Section 2 claim includes the examples of vertical agreements discussed above, such as a tying arrangement where a company wants to exploit its monopoly over the tying product to monopolize the market for the tied product. A firm with monopoly power might also violate Section 2 if it refuses to deal with certain customers or suppliers. Such conduct by a firm with monopoly power may be found to violate Section 2 if the company unilaterally terminated a voluntary course of dealing and was willing to give up short-term profits for an anticompetitive end.[97] However, the conduct may be deemed lawful if the alleged monopolist has a legitimate business justification for the refusal to deal, such as eliminating free riding or protecting product quality. Another form of Section 2 violation is predatory pricing — pricing below costs in order to grow share and eliminate rivals in the short term. Because low prices benefit consumers, however, courts are often skeptical of predatory pricing claims. A plaintiff must show that the defendant's prices are below cost and that the firm is likely to recover any near-term losses by eventually raising prices after it has obtained monopoly power.

In October 2022, the DOJ announced that it had charged and resolved a criminal violation of Section 2 for the first time in almost 50 years.[98]

Hart-Scott-Rodino Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act")[99] requires parties to notify certain transactions, including joint ventures, mergers and acquisitions of assets, voting securities (those with rights to vote for directors), or controlling interests in partnerships/LLCs, with the FTC and DOJ prior to consummation. The types of transactions caught by the HSR Act include exclusive licensing arrangements, mergers, stock purchase agreements, tender offers, open market acquisitions, stock-based compensation awards to officers or directors, and certain redemptions, conversions, option exercises, and private placements. In October 2024, the FTC issued new rules modifying the HSR filing process. These rules took effect in February 2025 and have lengthened the time it takes parties to complete the HSR form. In addition to requiring parties to submit additional transactional documents and new ordinary course documents, the new form also asks parties to provide descriptions of overlapping products and services, supply relationships, and the strategic rationale for the transaction. The parties must also identify any related international antitrust filings, provide additional information about minority shareholders or interest holders, and disclose certain officer and director relationships, foreign subsidies, and defense contracts.

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

Whether an HSR notification is required depends principally on two threshold tests — the size of transaction test and the size of person test, values which change on an annual basis. The size of transaction threshold test is satisfied if the acquisition is valued in excess of US$126.4 million in 2025 under HSR valuation rules.[100]

In 2025, the size of person threshold test only applies if the HSR value of the transaction is between US$126.4 million and US$505.8 million. Generally, the size of person threshold test would be satisfied if the Ultimate Parent Entity ("UPE") of one party has at least US$252.9 million in annual net sales or total assets and the UPE of the other party has at least US$25.3 million in 2025 (as adjusted annually) in annual net sales or total assets. If the transaction has an HSR value in excess of US$505.8 million, the transaction is reportable unless a specific statutory exemption applies.[101] These values will be adjusted in early 2026.

A filing fee must also be paid with filing. Unless the parties agree otherwise, the acquiring person is responsible for paying the filing fee. The amount of the filing fee varies depending upon the HSR value of the transaction — the larger the transaction, the higher the filing fee. Filing fees currently range from US$30,000 to US$2,390,000.

As noted above, the HSR Act reaches more than mergers and acquisitions of control. Companies are often surprised to learn that the HSR Act's notification obligation extends to the receipt of stock-based compensation awards (including grants of Restricted Stock Units ("RSUs") and the exercise of stock options), redemptions and buybacks of voting securities,[102] back-end acquisitions (i.e., when a shareholder receives equity or assets above the HSR thresholds as consideration for selling its shares in a transaction), and IP licenses to patents or trademarks. Given the specific valuation and aggregation rules, it is important to consult experienced HSR counsel to determine whether a particular situation is HSR-reportable.

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

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

Clayton Act, Section 8

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

Over the past few years — and across administrations — the two U.S. federal antitrust agencies have signaled a renewed focus on enforcement of Section 8. Recently, the Director of the FTC's Bureau of Competition advised firms to review their board memberships to avoid any overlaps with competitors, including when new board members are added as a result of investments by private equity firms or other new shareholders.[103] In addition, a senior official at the DOJ Antitrust Division indicated that the agency remains "very committed" to continued enforcement of Section 8.[104]

Section IX

Anti-money laundering laws

Investments in the U.S. subject the investor to the provisions of U.S. anti-money laundering laws, including the Bank Secrecy Act ("BSA") and its various legislative updates such as the Currency and Foreign Transactions Reporting Act of 1970 and provisions in Title III of the USA Patriot Act of 2001, the Anti-Money Laundering Act of 2020, and their collective implementing regulations.[105]

These laws strengthen U.S. law enforcement's authority to detect and prosecute terrorism and terrorist financing by enabling the Secretary of the Treasury to enact regulations that require any "financial institution" (as defined by the BSA) to (i) file certain reports, including suspicious activity reports ("SARs") and currency transaction reports ("CTRs"); (ii) implement anti-money laundering programs; and (iii) maintain certain financial records, among other Anti-Money Laundering ("AML") requirements.[106] Under the authority granted to the Secretary of the Treasury, the Financial Crimes Enforcement Network of the U.S. Department of the Treasury ("FinCEN") has enacted regulations implementing such requirements for certain types of "financial institutions."[107]

Under the BSA, "financial institution" is broadly defined.[108] The regulations promulgated under the BSA[109] require many, but not all, "financial institutions" to follow AML requirements. Therefore, the regulations should be carefully analyzed with counsel before making any investment to determine whether the provisions of applicable AML-related laws and regulations have been satisfied and whether the enhanced AML requirements that apply to certain types of "financial institutions" will be triggered.

Certain covered financial institutions — federally regulated banks and credit unions, mutual funds, brokers or dealers in securities, registered investment advisers and registered exempt advisers, futures commission merchants and introducing brokers in commodities — are required to maintain procedures reasonably designed to obtain, verify, and record the identities of beneficial owners of legal entity customers.[110] Covered financial institutions must also use appropriate risk-based procedures for ongoing customer due diligence to understand the nature and purpose of customer relationships; to conduct ongoing monitoring to identify and report suspicious transactions; and, on a risk basis, to maintain and update customer information.[111]

Pursuant to a legislative change in January 2021, Congress passed significant reforms to the BSA and the U.S. government's anti-money laundering regime. Among other things, the legislation, known as the Corporate Transparency Act ("CTA"),[112] requires certain "reporting companies" (defined below) to report information about their "beneficial owners" and "company applicants" (i.e., the name, date of birth, address, and identification number of such persons) to FinCEN within a short period of time after the entity is created or registered to do business, if that action is taken on or after January 1, 2024. Any reporting company that had been formed or registered before January 1, 2024 was already required to disclose information about its "beneficial owners," and such entities do not need to disclose information about their "company applicants." Under the CTA, a "beneficial owner" is an individual who either directly or indirectly exercises substantial control over the reporting company or controls at least 25% of the reporting company's ownership interests. Every beneficial owner of a reporting company must be reported. With respect to "company applicants," only one or two may be reported for each reporting company. The "company applicant" is the individual who directly files the document that creates or registers the reporting company and, if more than one person is involved in the filing, the second "company applicant" is the individual who is primarily responsible for directing or controlling the filing. Civil and criminal penalties apply to false and incomplete reports.

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

In a major development and amidst many challenges to the constitutionality and implementation of the CTA, in March 2025, FinCEN published an interim final rule that removed the requirement for U.S. companies and U.S. persons to report beneficial ownership information to FinCEN under the CTA.[113] Therefore, though the statutory language of the CTA includes domestic reporting companies as a type of reporting company, FinCEN's regulations no longer include domestic reporting companies as a type of reporting company. Therefore, FinCEN only requires foreign reporting companies

(that are not otherwise exempt) to file beneficial ownership information under the CTA. Further, under the interim final rule, these foreign reporting companies are only required to report any non-U.S. persons who are beneficial owners and are not required to report any beneficial owners who are U.S. persons. Non-financial trades and businesses are also required to file certain transactional reports with the government. For instance, individuals and entities involved in a trade or business must file a FinCEN Form 8300 for receipt of more than US$10,000 in cash in a single transaction or in related transactions.[114] And persons must file a Form 105 Report of International Transportation of Currency or Monetary Instruments for transporting, mailing, or shipping more than US$10,000 in currency, traveler's checks, and certain other monetary instruments into or out of the U.S.[115]

Both individuals and entities (financial institutions and otherwise) are subject to the criminal anti-money laundering statutes in Title 18, United States Code. Generally speaking, those statutes prohibit not only actively committing money laundering (for instance, by concealing the origin, source, or control of illicit proceeds; by using illicit proceeds to commit further illegal activity; or engaging in transactions involving illicit proceeds through a financial institution), but also facilitating and conspiring to do so.[116] Companies involved in international trade should also be particularly sensitive to trade-based money laundering issues.[117]

The Financial Action Task Force ("FATF"), an intergovernmental organization that sets international standards to combat money laundering and the financing of terrorism, issued a report on trade-based money laundering issues,[118] describing various risks, typologies, and measures to address trade-based money laundering.

Anti-money laundering regulators have developed guidance regarding cryptocurrency in recent years. On June 30, 2021, FinCEN issued its first government-wide priorities policy for anti-money laundering.[119]

These priorities focus on threats to the U.S. financial system and national security and include, among others, cybercrime and virtual currency considerations. Additionally, the DOJ created the National Cryptocurrency Enforcement Team in November 2021 to investigate and support complex investigations and prosecutions of criminal misuses of cryptocurrency, including money laundering,[120] though this National Cryptocurrency Enforcement Team was disbanded in April 2025.[121] The U.S. Department of Treasury issued the 2022[122] and, later the 2024 National Illicit Finance Strategy,[123] which outlined U.S. priorities regarding anti-money laundering policies and the applicability of those policies to various industry sectors and developments, including "digital assets" such as cryptocurrencies, securities, commodities, and derivatives, though some priorities have shifted under the Trump Administration.

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

Section X

Foreign Corrupt Practices Act

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

The FCPA's anti-bribery provisions[124] make it a crime to offer, promise, or give anything of value to a foreign official with the purpose of obtaining or retaining business for or with any person, directing business to any person, or otherwise influencing the actions of such foreign official.[125] A "foreign official" includes any officer, employee, or person acting in an official capacity for or on behalf of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization.[126]

The person making or authorizing the payment must have a corrupt intent. Additionally, the payment must be intended to induce the foreign official to misuse his or her official position by wrongfully providing a business benefit to the person making or authorizing such payment or to any other person.[127] The FCPA does not require a corrupt act to be successful; the offer or promise of a corrupt payment can constitute a violation of the statute.[128]

Persons subject to the FCPA include the following: (i) "domestic concerns;" (ii) "issuers;" and (iii) foreign nationals or businesses who act in furtherance of a bribe in the U.S.[129] A "domestic concern" is any (a) individual who is a citizen, national, or resident of the U.S., (b) corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or (c) sole proprietorship that has its principal place of business in the U.S., or that is organized under the laws of a state of the U.S., or a territory, possession, or commonwealth of the U.S.[130] This would include a U.S. subsidiary of a foreign entity. An "issuer" is a corporation or other entity (including a foreign entity) that (a) has issued securities that have been registered in the U.S. or (b) is required to file periodic reports with the SEC.[131]

Issuers and domestic concerns are liable if they engage in a corrupt act within the territory of the U.S. or use the U.S. postal system or other means or instrumentalities of interstate commerce, including telephone calls, facsimile transmissions, wire transfers, and interstate or international travel, to commit such act.[132] In addition, a domestic company may be held liable for a corrupt payment authorized by employees or agents operating entirely outside of the U.S. using money from foreign bank accounts, even without any involvement by personnel located within the U.S. Companies should also ensure that any third parties they engage with do not violate the FCPA. The DOJ has taken the position that a third party's payment of a bribe does not eliminate the potential for liability against the company that engages the third party.[133]

U.S. citizens and residents employed by or acting on behalf of U.S. or foreign entities may be held liable for the acts of such U.S. or foreign entities when such citizens or residents authorized, directed, or controlled the activity in question. Although having operations in the U.S. is not a prerequisite to FCPA liability, entry into the U.S. market increases the chances of a non-U.S. company becoming subject to such liability. Thus, a non-U.S. company establishing a U.S. entity should create and implement an FCPA compliance program.

In addition to the anti-bribery provisions, the FCPA also has "accounting provisions" comprised of two major parts. The books-and-records provision requires issuers to make and keep accurate books, records, and accounts that accurately and fairly reflect the issuer's transactions and disposition of assets.[134] And, the FCPA's internal accounting controls provision requires that issuers devise and maintain reasonable internal accounting controls designed to prevent and detect FCPA violations.[135] Penalties for FCPA violations can be substantial. Under the anti-bribery provisions, corporations, and other business entities are subject to a criminal fine of up to US$2 million or twice the benefit that the defendant sought to obtain by making the corrupt payment.[136] Officers, directors, employees, and agents of business entities are subject to a criminal fine of up to US$250,000, or twice the benefit that the defendant sought to obtain by making the corrupt payment, and imprisonment for up to five years.[137] Fines imposed on individuals may not be paid by their employer or principal.[138]

In addition, the U.S. Attorney General or the SEC may bring a civil action for injunctive relief or impose a fine of up to US$10,000 against any business entity, as well as any officer, director, stockholder, employee, or agent of a business entity that violated the anti-bribery provisions of the FCPA.[139] An additional fine may be imposed by a court in an SEC enforcement action. This fine shall not exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation or (ii) a specified dollar limitation, as determined by the court.[140] The specified dollar limitations are based on the egregiousness of the violation and range from US$11,823 to US$236,451 for individuals and US$118,225 to US$1,182,251 for business entities.[141]

For willful violations of the accounting provisions (i.e., the books and records and internal control provisions), penalties can include a fine not to exceed US$25 million for entities.[142] For individuals, penalties can include a prison sentence of up to 20 years and/or a fine of up to US$5 million.[143]

In addition, it is important to be aware of the risk of successor liability under the FCPA. The DOJ and SEC take the position that a company subject to the FCPA may be held criminally liable for the unlawful conduct of an acquired company, regardless of the method of acquisition.[144] Unlike the UK Bribery Act, the FCPA does not provide a compliance or adequate procedures defense. In the U.S. government's view, an acquiring company may be liable for unlawful acts under the FCPA even if the acts took place pre-acquisition and were unknown to the acquiring company.[145] The FCPA does not specifically address successor liability, and no judicial opinions have tested the government's position. But the DOJ has updated its Justice Manual in March 2024 to state that acquiror companies will receive the presumption of a declination by (i) voluntarily self-disclosing misconduct by an acquired company discovered during due diligence related to a lawful, bona fide acquisition of another company, (ii) fully cooperating with the DOJ, and (iii) timely and appropriately remediating the misconduct.[146] The government continues to take a case-by-case approach in deciding whether to seek to impose successor liability under the FCPA.

Successor liability is not clearly defined under federal law. It has typically been an issue of state law that varies from state to state. Courts therefore look to state law to assess whether successor liability will be imposed, taking into account a complex analysis of factors, including the structure of the transaction. On May 12, 2025, the Criminal Division of the DOJ updated its Corporate Enforcement Policy, which applies to all corporate criminal matters handled by the Criminal Division.[147]

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

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

In order to prevent FCPA violations and mitigate violations if they do occur, companies should implement anti-corruption programs. In September 2024, the DOJ again updated its previous guidance on the "Evaluation of Corporate Compliance Programs."[148] It organizes its guidance around three questions.[149] First, is the program well-designed? Second, is the program being applied earnestly and in good faith (i.e., is it adequately resourced and empowered to function effectively)? And third, does the program work in practice? Though the guidance is aimed at prosecutors, it provides a roadmap for companies seeking to implement best practices.

The DOJ's position on imposing corporate monitors on companies that resolve FCPA cases with it has varied over recent years. The DOJ's current guidance, as set forth in Deputy Attorney General Lisa Monaco's September 2022 memorandum, is that prosecutors should decide whether to impose a monitor based on the merits of each individual matter, without holding any presumption for or against a monitor. The Corporate Enforcement policy discussed above builds on this guidance by providing that the DOJ shall not require a monitor, even if a self-report in good faith does not qualify as a voluntary self-disclosure or there are aggravating factors, if, by the time the case is resolved, the company has "fully cooperated and timely and appropriately remediated" misconduct.[150]

On June 9, 2025, the DOJ issued revised enforcement guidelines for the FCPA. The revised guidelines direct DOJ prosecutors to consider four non-exhaustive but key factors when deciding whether to initiate FCPA investigations or enforcement actions: (i) connection with narcotics trafficking cartels, Transnational Criminal Organizations ("TCOs"), and Foreign Terrorist Organizations ("FTOs"); (ii) how FCPA enforcement would affect the competitiveness of U.S. companies abroad; (iii) whether FCPA enforcement would focus on urgent threats to U.S. national security; and (iv) the scale and sophisticated nature of a bribery scheme.[151]

Section XI

Litigation

General considerations

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

Jurisdiction

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

1. General jurisdiction

General jurisdiction exists when a defendant's contacts with a particular state are so systematic and continuous that the court will have jurisdiction over the defendant regardless of whether the cause of action arises from those contacts.[152] In essence, general jurisdiction exists in a state where the defendant is "at home."[153] The burden for establishing general jurisdiction is high.[154] A state cannot exercise general jurisdiction over a foreign company just because the company's products traveled through the stream of commerce and wound up in the forum state.[155] Instead, barring an exceptional case, general jurisdiction will usually be found only where a corporation is incorporated or has its principal place of business.[156] Some states, however, have enacted laws requiring corporations to consent to the exercise of general jurisdiction as a condition of registering to do business in the state.[157] Some states have also enacted laws deeming a corporation's registration to do business in the state to constitute consent to suit in the state for certain kinds of suits.[158] The U.S. Supreme Court has held that consent-by-registration laws comply with the U.S. Constitution's Due Process Clause, but has left open whether consent-by-registration laws are consistent with other constitutional provisions.[159]

General jurisdiction over a parent corporation will generally not be found in a state simply because the corporation's wholly-owned subsidiary is incorporated in that state.[160] However, it is advisable to consult with counsel about actions that can be taken to minimize the risk that a parent company will be subject to the jurisdiction of U.S. courts.

2. Specific jurisdiction

Specific jurisdiction exists when a defendant "purposefully avails itself of the privilege of conducting activities within the forum [s]tate" and the injuries at issue in a lawsuit "aris[e] out of or [are] related to the defendant's contacts with the forum."[161] In deciding whether or not to exercise specific jurisdiction, a court will first determine whether the plaintiff's cause of action arose out of or resulted from an out-of-state defendant's contacts with the forum state or activities directed towards the forum state.[162] If so, the court will then ask whether the defendant purposefully directed its activities related to the plaintiff's claims toward the forum state and intentionally took advantage of the ability to conduct business in the state, thus invoking the benefits and protections of that state's laws.[163] In products liability cases where an in-state plaintiff is injured in the forum state by an out-of-state defendant's products, "a defendant's placing goods into the stream of commerce with the expectation that they will be purchased by consumers within the forum [s]tate may indicate purposeful availment."[164] Even contacts that are unrelated to the particular plaintiff's claim (e.g., the sale of products in the forum to someone other than the plaintiff) might provide a basis for the exercise of specific jurisdiction, particularly if the injuries occur in the state.[165]

The U.S. Supreme Court has significantly changed the personal jurisdiction analysis when a foreign defendant is sued in a U.S. federal court on federal-law claims, such as trademark, patent, or copyright infringement. A federal district court may exercise jurisdiction over a foreign defendant on a federal-law claim "consistent with the United States Constitution and laws."[166] Previously, courts believed that the U.S. Constitution required a foreign defendant to have minimum contacts with the U.S. as a whole and that the plaintiff's claims arise out of or relate to those contacts with the U.S.[167] The U.S. Supreme Court has held, however, that the constitutional limitations on state courts' jurisdiction cannot be "mechanistically import[ed]" into limitations on federal courts' jurisdiction.[168] But, although the Court stated that the usual constitutional restrictions on jurisdiction did not apply in federal court on federal-law claims, it declined to set out a comprehensive test for when a foreign party can be sued in federal court on federal-law claims. The Court said only that there must be "an assertion of jurisdiction to predicate conduct that in and of itself bears a meaningful relationship to the United States."[169] It will require additional litigation to determine the exact bounds of U.S. federal courts' jurisdiction over foreign corporations on federal-law claims.

Piercing the corporate veil and agency theories of jurisdiction

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

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

Under the agency theory, even when the corporate formalities are observed, a subsidiary's jurisdictional acts relating to the plaintiff's claim may be attributed to its corporate parent for purposes of specific jurisdiction[176] when (i) the subsidiary acts as the parent's agent and (ii) the parent exercises sufficient control over the subsidiary.[177]

Some courts have held, for example, that a subsidiary acts as the parent's agent for the purposes of this theory if the subsidiary's "only purpose is to conduct the business of the parent."[178] The amount of parental control over the subsidiary required under the agency theory is not as great as the control required under the piercing or alter-ego theory. Under either theory, "[c]ontrol that is consistent with investor status — that is, monitoring the subsidiary's performance, supervising the subsidiary's finance and capital budget decisions, and articulating general policies — does not rise to the level necessary to impute the subsidiary's jurisdictional contacts to the parent."[179]

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

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

Section XII

Bankruptcy

Bankruptcy law allows companies to discharge their debts and resolve disputes with creditors. All bankruptcy is governed by federal law, though the Bankruptcy Code sometimes requires courts to apply state laws. There are two main types of bankruptcy for businesses in the U.S.: reorganization under Chapter 11 and liquidation under Chapter 7. Neither require that the company be insolvent; rather, they require only that the company seek relief from its creditors in good faith.

Chapter 11 bankruptcy

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

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

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

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

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

Chapter 7 bankruptcy

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

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

Section XIII

Real estate

Foreign companies seeking to enter into commercial leases for space in the U.S. should be aware of certain unique aspects of commercial leases in the U.S., including the process of negotiating a lease, the team of professionals needed to do the same, the letter of intent for memorializing the business terms, security deposits and guaranties, government restrictions, and the ongoing landlord-tenant relationship.

U.S. market distinctions and restrictions

A commercial tenant's rights are governed almost entirely by the lease (whether for office, retail, or industrial space). While residential leases in many U.S. jurisdictions afford the residential tenants with protections under law (including the right to have repairs made by the landlord and requiring the landlord to provide heat), the tenant under a commercial lease in the U.S. must rely on the lease itself to set forth all of the rights and obligations of the parties. If a commercial lease does not specifically require the landlord to make repairs or provide heat, the tenant will need to do so itself. This is why it is critical to negotiate a commercial lease in the U.S. to ensure that it protects the tenant's interests.

The U.S. imposes national security, terrorism, and anti-money laundering restrictions on certain real estate transactions, including commercial leases. While most foreign companies will not be impacted by these restrictions, the most prevalent regulations to be aware of are the USA PATRIOT Act and the review authority of the Committee on Foreign Investment in the United States ("CFIUS").

Under the USA PATRIOT Act, U.S. companies are not allowed to enter into transactions with any foreign individuals and entities listed on a sanctions list maintained by the Office of Foreign Assets Control ("OFAC"). CFIUS has jurisdiction to review foreign persons' purchases or leases of real estate located within certain geographical proximities of U.S. military or other government sites identified by the U.S. Department of Defense.

In addition to federal tax and reporting requirements that will be imposed on a foreign company entering the U.S. market, U.S. states may require the company to be registered to do business in that state if the company's activities are sufficient to warrant such registration. Separately, a landlord may request that a foreign entity designate a U.S. recipient or agent for service of process.

Companies typically engage real estate professionals (such as brokers, attorneys, and contractors) to help guide them through the lease process to ensure that a protective lease is negotiated. These professionals can also assist with any U.S. regulatory and compliance issues (including CFIUS review) and help obtain any required approvals.

Professionals and letter of intent

Real estate brokers, typically paid by the landlord after a lease is signed, help tenants identify and evaluate space locations and rent. Attorneys help tenants negotiate protective leases and avoid costs that were not disclosed in the letter of intent.

Once a suitable space is identified for consideration by a foreign company, the landlord and tenant should negotiate a non-binding letter of intent. It serves as the building block for the lease agreement itself and lists the fundamental business terms. Importantly, the letter of intent ensures that there is an agreement between the parties as to business terms before spending the time and money required to negotiate a lease agreement.

The letter of intent identifies the landlord and the tenant, the building address, a description of the premises, the fixed rent and additional rent such as operating costs and taxes, the amount of any free rent, the delivery condition of the premises (including any alteration requirements or tenant improvement allowance), the use of the premises, the amount of any security deposit, and the identity of any lease guarantor. The letter of intent may also specify other key terms of the lease, such as extension rights, expansion options, contraction or termination rights, assignment and subletting terms, and whether the tenant is required to perform any work to restore the premises to a certain condition at the end of the lease term.

If the leased space requires substantial buildout or renovation, the foreign company will either perform the work itself or rely on the landlord to perform the construction. The decision of which party often impacts other aspects of the term sheet. For example, if the tenant will perform the construction, then the landlord will often provide a tenant improvement allowance to cover all or a portion of the cost of the work. In the event that the landlord performs the construction, the tenant will want to ensure that the design and buildout are performed to their satisfaction and completed by the time the tenant needs to move in.

An architect is needed if the foreign company is performing the construction itself. The architect will design the space and ensure compliance with legal requirements, including local building codes and zoning requirements. A project manager may also be needed to oversee the construction.

The choice of the corporate entity that a foreign company selects to sign a lease in the U.S. should be evaluated from both the landlord's and the tenant's perspectives. For the tenant, the critical item here is that the entity signing the lease will take on the liabilities of payment and performance under the lease. For the landlord, the entity signing the lease must have adequate financial wherewithal to fulfill the rent obligations.

It may be beneficial for the foreign company to sign the lease using a subsidiary entity to insulate the parent company from liability, and possibly to also facilitate a spinoff or sale of the business. Keep in mind that the entity signing the lease must have adequate financial wherewithal to fulfill the rent obligations, or else the landlord will require a larger security deposit and/or a lease guaranty to be signed by a creditworthy entity (such as the parent company). Security deposits and guaranties are discussed in the next section.

Security deposit and guaranty

If a foreign company does not satisfy the landlord's financial wherewithal requirements or chooses to enter into a lease using a subsidiary and bankruptcy-remote entity that lacks creditworthiness itself, the landlord will require a credit enhancement in the form of a security deposit and/or guaranty.

In the event of a lease default, a foreign company whose assets are outside of the U.S. will be more difficult and costly to pursue than a company whose assets reside in the U.S. Therefore, the landlord may request a higher security deposit from a foreign company than it would from a U.S. company.

A security deposit is either cash to be held by the landlord or a letter of credit issued by a bank naming the landlord as the beneficiary. The beneficiary of a letter of credit may withdraw from it in whole or in part, and because the funds that are drawn down in this manner come from the bank and not from the tenant, a letter of credit is preferred by landlords over cash in a bankruptcy scenario because its funds are generally viewed as outside of the purview of the bankruptcy court handling a tenant's insolvency.

Letters of credit typically require the tenant to maintain accounts of a certain value at the bank or otherwise offer collateral for the bank to hold as a condition to the bank's issuance of the letter of credit. If a foreign company has no relationships with U.S. banks, then it will either need to establish a new U.S. banking relationship or have its foreign bank enter into an agreement with a U.S. bank agreeing to honor any draw requests made by the landlord under the letter of credit.

A lease guaranty is a promise by another entity to pay and/or perform the obligations of the tenant under the lease. If the credit of the entity providing the guaranty (i.e., the guarantor) is very significant, the tenant has an argument that no security deposit is needed. Otherwise, the lease guaranty can supplement the security deposit.

There are two main forms of lease guaranty: (i) a full guaranty of payment and performance, and (ii) a guaranty that is limited in nature as to the scope of the guarantor's obligations and/or the duration of the guaranty's existence. A full guaranty obligates the guarantor to satisfy all monetary and non-monetary obligations of the tenant under the lease and is basically the same as the guarantor signing the lease itself, other than differences in the means of enforcement. A common limited guaranty is called a "good guy" guaranty, and customarily requires the guarantor to satisfy all monetary obligations of the tenant until the tenant vacates and turns the premises over to the landlord after having given the landlord a pre-determined period of advanced notice and satisfied all rent (and possibly other lease obligations) incurred up until the time that the space is returned to the landlord.

Landlord guaranty forms can be onerous, and because personal liability of principals may be at stake, should be carefully negotiated. For many foreign companies, a "good guy" guaranty effectively balances the landlord's goal to make a creditworthy party responsible for the lease obligations and the tenant's goal to limit its exposure to lease liabilities. If this is the case, the foreign company may have a bankruptcy-remote U.S. entity enter into the lease, and a parent or other creditworthy entity enter into the lease guaranty.

Key lease provisions and contingencies

While every tenant will have different sensitivities as to the business terms of a lease, foreign companies should pay particular attention to the use, alterations, restoration, transfers, subordination, and holdover provisions in the lease.

Use provisions set forth how the leased premises may be used. If there are any particular features or uses of the tenant that are not typical, it is important to specify in the use clause how the tenant may use the premises initially and in the future (including the tenant's successors and subtenants and other occupants).

Alterations clauses set forth the requirements for a tenant's initial and future construction needs. The lease will describe how and when the landlord, the tenant, or both will perform work needed for the initial delivery of the space to the tenant. If the landlord is performing the work, there will be a work letter describing its scope. If the tenant is performing the work, there is often a tenant improvement allowance set forth in the lease to reimburse the tenant for certain costs it incurs at the premises.

The alterations clause will also govern the consent process and requirements for future alterations that the tenant wishes to perform. If a foreign company is not familiar with the architectural and construction processes in the U.S., it should look to consultants (such as a project manager) who can help guide the company through those processes.

Leases generally require tenants to remove certain alterations that it installs in what is referred to as a restoration clause. It is critical to ensure that the lease does not require a tenant to restore or remove any alterations that were made prior to its occupancy. A foreign company must monitor the expiration date of its lease to ensure that it begins any required restoration and removal work sufficiently early so that it may complete the work before the lease's expiration date.

Transfer provisions set forth the tenant's ability to assign, sublet, or enter into other occupancy agreements (such as licenses). It is important to negotiate this provision to include sufficient flexibility for the company's future needs and to allow corporate acquisitions and mergers of restructurings without needing to obtain the landlord's consent. Unless the company is able to negotiate for early termination or contraction rights, it must rely on the transfer provision if it becomes necessary to find someone else to occupy the leased space.

The subordination clause governs the tenant's rights in the event of a foreclosure by a mortgage lender or other holder of an interest superior to the landlord's interest (such as a ground landlord or condominium board). If it is critical to the tenant for the lease to continue after a foreclosure, then it is necessary to obtain non-disturbance protection in this clause, ensuring that the lease will continue after a foreclosure, provided that the tenant is not in default of its lease. This protection is necessary if the tenant will be making a large investment in the premises.

A holdover clause penalizes a tenant who remains in the premises after the end of the lease term. The penalties for holding over may be very substantial in order to incentivize the tenant to vacate the premises in a timely manner. However, even if a tenant has made plans in advance for a move, unexpected delays in readying the new space can result in the tenant needing to hold over in its existing space. Because of this possibility, it is important to negotiate a holdover clause that allows the tenant to temporarily stay in the premises beyond the expiration date without facing excessive penalties.

The ongoing landlord-tenant relationship

Forming a good relationship between the landlord and tenant is important. However, relationships can fail, or the landlord may sell the building to another owner or lose control of it in a foreclosure. Therefore, it is critical for the tenant to have a lease that protects them if trouble arises.

A landlord who understands local regulations and businesses can be a strong ally for a foreign company, often providing valuable advice and connections as the company grows. If the landlord seeks to finance, refinance, bring in investors, or sell the building, it may need an estoppel certificate from the tenant confirming the existence of the lease, the payment of rent, and identifying any known issues. Likewise, if a tenant becomes a publicly traded company, merges, is acquired, undergoes a change of control, or seeks to assign the lease or sublet space to another company, the landlord will need to be notified and may also need to provide its consent. Maintaining a good relationship between the landlord and tenant will help in any of these events.

Section XIV

Data privacy and cybersecurity laws

Overview

The U.S. does not have a comprehensive federal data protection law. Instead, data privacy and cybersecurity are regulated through a complex and rapidly evolving patchwork of sector-specific federal statutes and state laws. As states continue to enact new privacy and cybersecurity statutes in response to the perceived lack of federal regulation, businesses entering the U.S. market must carefully assess which laws apply to their operations and take practical steps to achieve reasonable compliance. The following is a summary of some key U.S. data privacy and cybersecurity frameworks. This is not an exhaustive list, and businesses should consult counsel to assess all applicable laws.

U.S. Federal Trade Commission ("FTC") and Section 5 of the FTC Act

The Federal Trade Commission ("FTC") is the primary federal agency responsible for consumer privacy and cybersecurity enforcement. Under Section 5 of the FTC Act (15 U.S.C. § 45), the FTC prohibits "unfair or deceptive acts or practices." Deception occurs when a representation, omission, or practice is likely to mislead consumers acting reasonably under the circumstances, and the misleading element is material (i.e., likely to affect a consumer's conduct or decision). Unfairness occurs when a practice causes or is likely to cause substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition.

- **Deception example:** The FTC alleged that Facebook's privacy settings misled users by allowing broader sharing than promised in the company's privacy communications (In re Facebook, Inc., No. C 4365 (2012)).
- **Unfairness example:** The FTC alleged that Wyndham Worldwide's failure to implement reasonable security measures (e.g., weak password practices, lack of encryption) was an unfair practice that contributed to multiple data breaches (In re Wyndham Worldwide Corp., No. 102 3142 (2015)).

The FTC expects companies to implement "reasonable" security measures appropriate to the sensitivity of the data collected. Enforcement actions have addressed failures to protect personal data, misrepresentations about privacy practices, and inadequate cybersecurity controls.

State comprehensive privacy laws

In the absence of a federal omnibus privacy law, several states have enacted comprehensive consumer privacy statutes. The most notable is the California Consumer Privacy Act ("CCPA"), Cal. Civ. Code § 1798.100 et seq., as amended by the California Privacy Rights Act ("CPRA"). Other states include Colorado (Colo. Rev. Stat. § 6-1-1301 et seq.), Connecticut (Conn. Gen. Stat. § 42-515 et seq.), Utah (Utah Code Ann. § 13-61-101 et seq.), Virginia (Va. Code Ann. § 59.1-575 et seq.), Texas (Tex. Bus. & Com. Code ch. 541), and Oregon (Or. Rev. Stat. §§ 646A.570–646A.589).

Consumer rights commonly provided:

- **Right to know/access** personal information processed by a business.
- **Right to delete** personal information (subject to exceptions).
- **Right to correct** inaccurate personal information (e.g., CPRA).
- **Right to opt out** of the sale or **sharing** of personal information and, in many states, **targeted advertising** and certain forms of **profiling.**
- **Right to non-discrimination** for exercising privacy rights.

Data protection impact assessments (DPIAs/DPAs): Several states require controllers to conduct and document assessments for processing activities presenting "heightened risk," including targeted advertising, sale of personal data, sensitive data processing, and certain profiling. Examples include Colorado (C.R.S. § 6-1-1309 and rules), Virginia (§ 59.1-580), Oregon (ORS § 646A.586), and Connecticut (amendments in SB 1295 add impact assessment requirements applicable to certain activities created or generated on/after Aug. 1, 2026).

State breach notification and state reasonable security laws

All 50 states, the District of Columbia, and U.S. territories have enacted data breach notification laws (e.g., California: Cal. Civ. Code § 1798.82; New York: N.Y. Gen. Bus. Law § 899 aa). These laws require businesses to notify affected individuals — and, in some cases, regulators — of unauthorized access to certain categories of personal information. Examples of sensitive information commonly triggering notification include Social Security numbers, driver's license or state ID numbers, financial account numbers plus access codes, medical or health insurance information, biometric data, and passport numbers.

Many states also require "reasonable security procedures and practices" to protect personal information (e.g., Cal. Civ. Code § 1798.81.5). What constitutes "reasonable" varies by jurisdiction but often includes risk assessments, access controls, encryption, employee training, and incident response.

Financial privacy and cybersecurity laws

1. Federal

The Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. §§ 6801–6809, governs the privacy and security of consumer financial information held by "financial institutions." Requirements include: clear privacy notices, consumer opt-out of certain sharing with non-affiliates, and the Safeguards Rule (16 C.F.R. Part 314) obligating administrative, technical, and physical safeguards (e.g., risk assessments, employee training, access controls, encryption, incident response).

GLBA does not contain a general, standalone breach notification requirement for all financial institutions. However, under the GLBA Safeguards Rule (16 C.F.R. Part 314) and related regulatory guidance, financial institutions are required to have incident response programs that include procedures for notifying customers in the event of unauthorized access to sensitive customer information.

Federal banking regulators — including the Office of the Comptroller of the Currency ("OCC"), Federal Reserve, and FDIC — have issued interagency guidance requiring financial institutions to notify affected individuals and their primary federal regulator "as soon as possible" following a breach involving unencrypted customer information that could result in misuse or identity theft. The specific notification requirements and timelines may vary depending on the regulator and the nature of the incident.

2. State

Several states impose additional or stricter financial privacy requirements. Examples include California's Financial Information Privacy Act (Cal. Fin. Code § 4050 et seq.) and Vermont's financial privacy disclosures/data broker regime, which includes annual registration and specific disclosures for certain data practices.

The NYDFS Cybersecurity Regulation (23 NYCRR 500) requires covered financial services entities to implement a risk-based cybersecurity program, multi-factor authentication, and incident reporting, among other measures.

Health privacy and security laws

1. Federal

The Health Insurance Portability and Accountability Act ("HIPAA") governs the privacy and security of protected health information ("PHI") held by covered entities (health plans, health care providers, health care clearinghouses) and business associates. HIPAA's Privacy Rule and Security Rule set standards for use and disclosure of PHI and require administrative, physical, and technical safeguards to protect electronic PHI ("ePHI").

HIPAA Breach Notification Rule (45 C.F.R. §§ 164.400–414): Covered entities/business associates must notify affected individuals, HHS, and (for certain large breaches) the media following a breach of unsecured PHI, subject to specified timing and content requirements.

FTC Health Breach Notification Rule (16 C.F.R. Part 318): Vendors of personal health records, PHR-related entities, and certain third-party service providers (not covered by HIPAA) must notify consumers, the FTC, and sometimes the media following a breach of unsecured PHR identifiable health information; scope and requirements were amended and clarified in May 2024.

2. State

California's Confidentiality of Medical Information Act ("CMIA"), Cal. Civ. Code § 56 et seq., covers "medical information" held by health care providers, health plans, and contractors — and can extend beyond HIPAA entities — imposing restrictions on disclosure and security requirements.

Children's privacy and online safety laws

The Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501–6506; 16 C.F.R. Part 312, regulates the collection of personal information from children under 13 by online services (verifiable parental consent, clear notices, limits on use/disclosure).

State age-appropriate design/online safety laws:

- **California Age Appropriate Design Code Act ("CAADCA"), Cal. Civ. Code § 1798.99.28 et seq.:** Requires privacy by design, data protection impact assessments for services likely accessed by children, and restrictions on profiling/targeted advertising to minors.
- **Maryland Online Data Privacy Act of 2024:** Imposes similar protective defaults for minors, including restrictions on profiling and targeted advertising and age-appropriate privacy settings.

Consumer health data laws

A growing number of states regulate consumer health data outside HIPAA. Washington's My Health My Data Act ("MHMDA"), RCW 19.373, broadly defines consumer health data; requires notice and opt-in consent for collection and sharing; grants rights to access, delete, and withdraw consent; and prohibits geofencing around health care facilities. The Act is enforced under the state Consumer Protection Act and provides expansive individual rights.

Examples of individual rights in consumer health data laws:

- Rights to **access** and **delete** health data.
- Right to **withdraw consent** for processing.
- Right to know **third parties** (and affiliates with which health data is shared or sold).

State biometric privacy laws

- **Illinois BIPA (740 ILCS 14/1 et seq.):** Requires informed written consent before collecting biometric identifiers (e.g., fingerprints, face geometry), written retention/destruction policies, and provides a private right of action. BIPA has driven extensive class litigation, with courts holding that technical violations (e.g., failure to obtain written consent or provide required disclosures) can trigger statutory damages, resulting in multimillion-dollar settlements and judgments.
- **Texas Capture or Use of Biometric Identifier Act (Tex. Bus. & Com. Code § 503.001):** Requires consent and restricts disclosure of biometric identifiers; recent Attorney General settlements include a large tech company agreeing to pay approximately US$1.375 billion to resolve claims alleging unlawful collection of geolocation, certain browsing data, and biometrics, and a social media company settled allegations regarding unauthorized use of biometric data for US$1.4 billion.
- **Washington Biometric Law (RCW 19.375) and Colorado Privacy Act (C.R.S. § 6 1 1301 et seq.)** treat biometric data as sensitive, requiring notice/consent (WA) or opt-in (CO) for processing.

Video Privacy Protection Act ("VPPA")

The federal VPPA (18 U.S.C. § 2710) restricts disclosure of personally identifiable information relating to a consumer's video viewing history by a "video tape service provider." Courts have applied VPPA to modern websites/apps that host video content, and recent litigation challenges have targeted websites that share video viewing data (e.g., via pixels/cookies) with third-party analytics or advertising platforms without appropriate consent. There is active litigation and a developing circuit split on what constitutes a "consumer" and a covered "provider."

Litigation trend: cookies, pixels, and communications secrecy/ wiretap laws

Plaintiffs have increasingly alleged that third-party tracking via cookies and pixels unlawfully intercepts or discloses electronic communications in violation of the federal Wiretap Act (18 U.S.C. § 2511) and state analogs (e.g., Cal. Pen. Code § 631; Pa. Cons. Stat. § 5701 et seq.), and have paired these theories with VPPA claims for video contexts. In response, many companies have implemented cookie banners and consent management platforms that (i) provide clear notice, (ii) obtain consent for non-essential cookies/pixels (particularly third-party trackers), and (iii) honor user opt-out signals where required.

State data broker laws

Several states now regulate data brokers—entities that knowingly collect and sell personal information about consumers with whom they have no direct relationship.

- California's Delete Act (SB 362) amends the state's data broker regime to require registration with the California Privacy.
- Protection Agency ("CPPA") and establishes an accessible deletion mechanism — a one-stop platform through which California residents can submit a single, verifiable deletion request to all registered data brokers. CPPA maintains the registry (as of Jan. 1, 2024) and must stand up the deletion platform by Jan. 1, 2026.; beginning Aug. 1, 2026, data brokers must access the platform at least every 45 days to process deletion requests, including directing service providers/contractors to delete information, with per-request, per-day penalties for noncompliance.
- Vermont requires annual registration of data brokers, fees, and public disclosure of opt-out methods, security breaches, and certain practices; failure to register can trigger civil penalties, and the Attorney General may seek injunctive relief.

Marketing laws: CAN-SPAM, TCPA, and state telemarketing laws

- **CAN-SPAM (15 U.S.C. §§ 7701–7713):** Requires commercial email to include accurate header information, a clear identification of marketing content, a functional opt-out mechanism, and timely honoring of opt-out requests.
- **TCPA (47 U.S.C. § 227):** Restricts telemarketing calls/texts, use of autodialers/ prerecorded messages, requires prior express consent, and imposes time of day rules and Do Not Call obligations.
- **State telemarketing laws** (e.g., Florida Telemarketing Act, Fla. Stat. § 501.601 et seq.; California Business & Professions Code § 17590 et seq.) add registration, call time limits, and state Do Not Call compliance.

Types of sensitive information under U.S. privacy and cybersecurity laws

The following categories often receive heightened protection, trigger notification, or require opt-in consent:

- Social Security numbers; government issued IDs.
- Financial account numbers and payment card information (with access codes).
- Health and medical information (PHI under HIPAA; consumer health data under state laws).
- Genetic data and information about sensitive health conditions (e.g., reproductive or gender-affirming care) under certain state consumer health or comprehensive privacy laws.
- Biometric data (e.g., fingerprints, facial recognition, voiceprints).
- Precise geolocation data.
- Children's data (under 13 — and under 18 in some state laws).
- Contents of electronic communications (e.g., chat transcripts, session replay) under communications secrecy statutes.
- Video viewing history (VPPA).

Practical considerations

Given the fragmented and rapidly evolving landscape, businesses entering the U.S. market should:

- Map data flows and determine which federal/state laws apply based on activities, data types, and geography.
- Implement robust privacy/security programs (policies, technical safeguards, DPIAs, vendor contracts) tailored to data sensitivity.
- Monitor legislative/regulatory developments — especially state privacy, data broker, biometric, and health data laws.
- Use consent and preference tools (e.g., cookie banners; opt-out signals) that align with state requirements.
- Engage counsel early to mitigate regulatory and litigation risks and to plan for incident response (including sector-specific breach notification rules).

U.S. data privacy and cybersecurity regulation is dynamic, with new laws and enforcement priorities emerging regularly. Proactive compliance and ongoing risk management are essential to operating successfully in the U.S. market.

Section XV

Telecommunications laws

The U.S. does not have a single regulatory regime for communications, media, and digital and online services. The Communications Act of 1934 grants the Federal Communications Commission ("FCC") jurisdiction over wire and radio communications in the U.S. provided by domestic and foreign operators and devices that emit radiofrequency energy. The Federal Trade Commission ("FTC") enforces consumer protection laws that may apply to businesses operating in this sector. In addition, state laws may impose additional obligations.

FCC licensing

To provide communications services by the use of wire or radiofrequency spectrum in the U.S., entities often must obtain an FCC license. The major FCC license types and their associated compliance obligations are detailed to the right.

1. Domestic telecommunications services

Generally, entities that provide domestic telecommunications services are automatically authorized to provide such services after they register with the FCC and the Universal Service Administrative Company ("USAC").[183] Providers must obtain an FCC Registration Number ("FRN") and register with USAC by filing FCC Form 499-A before starting service.[184] Providers are also subject to ongoing Universal Service Fund ("USF") contribution obligations.[185] Domestic Section 214 authority generally may not be transferred or assigned without prior FCC approval.[186] Many states impose parallel requirements through public utility or public service commissions.[187]

2. International telecommunications services (between U.S. and foreign points)

Entities providing international telecommunications services between the U.S. and foreign points must obtain an international Section 214 authorization before offering service.[188] International 214 authorization holders must follow the same FCC and USAC registration and reporting requirements as domestic entities, including maintaining an FRN and complying with USF obligations. International Section 214 authorizations cannot be assigned or transferred without prior FCC approval,[189] and transactions involving foreign ownership undergo extensive review by the Committee for the Assessment of Foreign Participation in the U.S. Telecommunications Services Sector ("Team Telecom") for national security and law enforcement risks.[190]

3. Wireless and private radio services

Entities operating wireless, mobile, private radio, or other licensed spectrum services (e.g., commercial mobile networks, fixed microwave systems, and public safety communications) must obtain the appropriate FCC radio license before transmitting.[191] All operations must meet the license's technical and operational requirements to prevent harmful interference to other licensed users. Licenses have fixed terms and must be renewed,[193] and transfer or assignment of the spectrum may require prior FCC approval.[194]

4. Broadcast radio and television stations

Operators of broadcast radio or television facilities must obtain an FCC authorization[195] Applications for new stations are accepted only during FCC announced filing windows.[196] Broadcast operations must meet public interest, engineering, and interference standards.[197] Licenses must be renewed according to the FCC's state-based renewal schedule.[198]

5. Satellite Systems (Space and Earth Stations)

Entities operating satellite space or earth stations must obtain an FCC license before beginning service and comply with orbital, frequency, and international coordination requirements.[199] Transfers or assignments of these authorizations require prior FCC approval.[200]

6. Submarine cable systems

Entities constructing or operating submarine cable systems landing in the U.S. must obtain a submarine cable landing license before constructing or activating the system.[201] Any transfer or assignment of ownership or control requires prior FCC approval.[202]

7. Experimental use of radio spectrum

Entities developing or testing new radiofrequency technologies outside of the FCC's limits for unlicensed spectrum must obtain an experimental license through the FCC's Office of Engineering and Technology.[203] Transfers or assignments of these authorizations require prior FCC approval.

8. Individual Commercial Operator Licenses

In certain industries, including maritime and aviation, certain personnel must hold FCC-issued Commercial Operator Licenses.[204] Commercial Operator Licenses issued on or after May 20, 2013, are valid for life and do not need to be renewed.[205]

9. State-level requirements

Depending on the facts, a provider may need to comply with separate state requirements. For example, depending on the service type and location, entities may need state Certificates of Public Convenience and Necessity; registration or franchise approvals; tower siting, zoning, and construction permits; and/or state approvals for transfers or assignments.[206]

Universal Service Fund ("USF")

Pursuant to the Communications Act of 1934, as amended, the USF was created to:

- Promote the availability of quality services at just, reasonable, and affordable rates;
- Increase access to advanced telecommunications services throughout the U.S.;
- Advance the availability of such services to all consumers, including those with a low income and those living in rural, high-cost areas; and
- Increase access to telecommunications and advanced services in schools, libraries, and rural health care facilities.[207]

The FCC promulgates rules to manage the USF, including: (1) calculating how much telecommunications companies must pay to fund the USF; (2) designating which services may receive USF support; and (3) overseeing administration of the Fund.[208]

The FCC also established the Universal Service Administrative Company ("USAC"), an independent not-for-profit, to collect USF contributions and deliver funds to USF recipients through four programs:[209]

- The High Cost program supports certain qualifying companies that serve high-cost areas to make service more affordable for residents.
- The Lifeline program assists low-income customers by helping to pay for monthly telephone charges as well as connection charges to initiate telephone service.
- The Rural Health Care program allows rural health care providers to pay similar rates for telecommunications services as those paid by their urban counterparts.
- The Schools and Libraries program, also known as "E-Rate," provides telecommunication services, Internet access, and the equipment to deliver these services to eligible schools and libraries.

Communications companies providing service in the U.S. contribute to USF based on two regulatory obligations:

- **Contribution Obligations:** Telecommunications companies contribute to USF based on a specified percentage of their interstate and international end-user revenues generated from the sale of such services.[210] The FCC calculates the contribution factor quarterly. The contribution factor is based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the total end-user interstate and international telecommunications revenues.[211] Providers may pass on their contribution obligations to consumers by assessing a line-item charge on bills.[212]
- **Filing Obligations:** Telecommunications providers must submit an annual revenue reporting worksheet (Form 499-A) and, depending on the provider's revenues, quarterly reports (Form 499 Q).[213] With limited exceptions, all intrastate, interstate, and international providers of telecommunications operating in the U.S. (including Voice over Internet Protocol providers) must file the Form 499-A.[214] USAC uses the revenue forms to determine the amount of money that each provider must contribute each year to the USF, based on the contribution factor set by the FCC.[215] To file the revenue forms, companies must first obtain an FCC Registration Number ("FRN")[216] and then use that FRN to register for a Form 499 Filer ID[217] with USAC.

Team Telecom

The Committee for the Assessment of Foreign Participation in the U.S. Telecommunications Services Sector, commonly referred to as "Team Telecom," comprises representatives from the Department of Justice, Department of Defense, and Department of Homeland Security, among others.[218]

When an FCC application raises national security or law enforcement issues arising from potential foreign involvement in the U.S. telecommunications industry, the FCC refers the application to Team Telecom.[219] Team Telecom may also request that the FCC refer an application to Team Telecom for review. The kinds of applications generally referred to Team Telecom include:

- Applications for international Section 214 authorizations, which seek authority to provide international telecommunications service to or from the U.S.;[220]
- Applications to assign or transfer control of international Section 214 authorizations;[221]
- Submarine cable landing license applications, which seek to land and operate international undersea cables in the U.S.;[222]
- Applications to assign or transfer control of submarine cable landing licenses;[223] and
- Section 310(b)(4) applications or petitions, which seek authority to exceed statutory limits regarding foreign ownership in broadcast and common carrier wireless licensees.[224]

Although the FCC has informally referred applications with reportable foreign ownership to Team Telecom for over two decades, the process was formalized in 2020 by an Executive Order also designed to streamline Team Telecom's review.[225] FCC applicants with certain reportable foreign ownership must answer a standard set of questions.[226] Based on its review of the applicant's responses, Team Telecom may advise the FCC that the application: (1) does not raise national security or law enforcement risks; (2) should be granted subject to certain conditions; or (3) should be denied, revoked, or terminated.[227]

The FCC has discretion to adopt Team Telecom's recommendations, and it regularly does. Therefore, getting the FCC to grant an application referred to Team Telecom often requires negotiating with Team Telecom on mitigating conditions and agreeing to its requirements regarding reporting obligations, security practices, and other measures.[228]

FCC equipment authorizations

The Communications Act of 1934, as amended, prohibits the manufacture, import, sale, offer for sale, or shipping of radiofrequency ("RF") devices that do not comply with the FCC's technical rules (e.g., emission limits, power levels, safety requirements, spectrum coexistence obligations).[229] Accordingly, the FCC has established two equipment authorization ("EA") procedures – Certification and Supplier's Declaration of Conformity ("SDoC") – to help ensure that RF devices comply with its technical rules before such devices are marketed, advertised, offered for sale, imported, or operated in the U.S.

Certification is the FCC's more stringent EA procedure and is required for "intentional radiators" (e.g., Wi-Fi modules, Bluetooth devices, and wireless chargers). An FCC-recognized laboratory must perform testing, and a Telecommunication Certification Body ("TCB") reviews the test data and issues the certification.[230] Once approved, the certification and associated documentation are posted in the FCC's Equipment Authorization System.

SDoC is a manufacturer-performed authorization for many unintentional radiators (e.g., computing devices, digital electronics, and other products that intentionally generate RF energy for use within the device, such as through wiring, but do not generate RF energy by radiation or induction). Testing may be performed in any technically competent laboratory without a TCB's involvement. The U.S.-based responsible party must prepare and retain the required compliance documentation as well as make it available to the FCC upon request.

A "responsible party" must obtain the appropriate EA. For certifications, the responsible party is the grantee. For SDoCs, the responsible party must be the U.S.-based manufacturer/assembler, the U.S. importer (when the manufacturer is located abroad), or a retailer or original equipment manufacturer authorized by the U.S.-based manufacturer or importer. For both certifications and SDoCs, the responsible party must: (1) ensure that compliance testing is properly conducted, (2) maintain all required records, (3) respond to FCC inquiries, and (4) oversee all labeling and user-documentation obligations associated with the device.

Manufacturers should also be aware of applicable requirements under the Twenty-First Century Communications and Video Accessibility Act ("CVAA"), which establishes accessibility obligations for certain digital broadband and mobile services and equipment.

Covered List

Pursuant to Section 2(a) of the Secure and Trusted Communications Network Act of 2019, the FCC maintains a list of communications equipment and services that Congress, certain federal interagency bodies, the Department of Commerce, or other relevant national security agencies have determined pose an "unacceptable risk" to U.S. national security.[231] This list is known as the "Covered List."

The FCC publishes the Covered List on its website.[232] Placement on the Covered List or doing business with an entity on the Covered List poses significant operational risks related to:

- **Federal contracts** – With limited exceptions, federal contractors are prohibited from using equipment or services on the Covered List when providing services to the U.S. government.
- **Federal funding** – The FCC will not distribute federal subsidies to recipients for acquiring or maintaining equipment and services on the Covered List. The FCC also conditions participation in various funding programs on the recipient removing and replacing equipment and services on the Covered List from the recipient's network and operations.
- **Equipment authorizations** – Equipment on the Covered List is ineligible to receive FCC equipment authorizations, which are necessary for radiofrequency devices to be imported, marketed, or sold in the United States. The FCC is also poised to initiate proceedings that would limit the scope of previously granted equipment authorizations of equipment on the Covered List by prohibiting the continued importation and marketing of such equipment. The FCC also prohibits test labs and other certification bodies owned by, controlled by, or subject to the direction of entities on the Covered List from participating in its equipment authorization program.
- **FCC disclosures** – Entities on the Covered List must disclose their subsidiaries and affiliates to the FCC, and providers of certain communications services must disclose to the FCC whether their networks include equipment or services on the Covered List.

Digital media and online services

The U.S. regulates digital media and online services at the federal and state levels. These laws and regulations can affect a wide range of services, including but not limited to websites, Internet applications, web hosting, ecommerce, messaging and videoconferencing, social media, and video games.

Most of these laws and regulations have taken effect in the last few years, and some are subject to legal challenges in court, such as new online safety laws. Absent specific statutory requirements, the FTC and state attorneys general have enforced consumer protection laws for alleged unfair or deceptive practices associated with digital media and online services. Private litigants have also sued for alleged harms arising from the use of these services. Additionally, as discussed in other sections of this primer, the FCC regulates the means of transmission for digital media and online services.

In particular, the following categories have received attention from legislatures and regulators.

- **Content moderation.** Section 230 of the Communications Act of 1934, as amended, establishes limits on obligations to moderate user-generated content. Under this law, an interactive computer service may not be "treated as the publisher or speaker of any information provided by another information content provider."[233] However, there are exceptions. For example, Section 230 does not preempt intellectual property protections, federal criminal laws, or liability associated with sex trafficking.[234] State and federal laws require businesses to take certain actions regarding content that may be accessible on their online services. For example, federal law requires a business that qualifies as an "electronic communication service provider" or "remote computing service" to report child sexual abuse material ("CSAM") to the National Center for Missing & Exploited Children.[235] The newly enacted Take It Down Act will require covered platforms, starting in May 2026, to implement protocols to remove reported nonconsensual intimate imagery ("NCII") and keep it down.[236] A few state laws require limiting content for minors, such as content related to sex, suicide, or eating disorders.[237]
- **Safe design.** Some states impose (or are set to impose) "safe design" requirements for digital media and online services to promote online safety. These laws cover a range of issues, such as obtaining parental consent for minors, parental controls, protective default settings, restrictions on personalized recommendations, and limits on features that could prolong use.[238]
- **Age verification and assurance.** Some states require certain forms of digital media and online services to assess a user's age, such as providers of online content that is considered obscene for minors or social media platforms.[239] Some states have also enacted laws that will require app stores to assess a user's age and share that age information with app developers.[240]
- **Artificial intelligence.** Some states impose specific requirements on the use of artificial intelligence, such as restrictions on:
  - "Deepfakes" and digital replicas – These laws, which aim to prevent confusion and protect a person's right to likeness, can arise in the context of election integrity, intellectual property, CSAM, and NCII.[241]
  - Chatbots – Obligations may include requiring notices that the chatbot is not human, limiting harmful content, and referring suicidal users to support services.[242]

Section XVI

Other considerations

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

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

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

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

Section XVII

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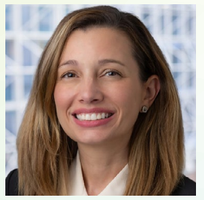

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Endnotes

1 Global Citizen Solutions, *Best Countries to Start a Business,* https://www.globalcitizensolutions.com/best-countries-to-start-a-business/ (last visited Dec. 15, 2025).

2 *United States is World's Top Destination for Foreign Direct Investment,* https://www.imf.org/en/Blogs/Articles/2022/12/07/united-states-is-worlds-top-destination-for-foreign-direct-investment (last visited Dec. 22, 2025).

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

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

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

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

7 U.S. Department of the Treasury, *CFIUS Excepted Foreign States*, available at https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states (last visited Dec. 22, 2025).

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

9 See CFIUS, *Annual Report to Congress CY 2023* (p. 18), U.S. Department of Treasury, available at https://home.treasury.gov/system/files/206/2023CFIUSAnnualReport.pdf (last visited Dec. 22, 2025).

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

11 Certain products are subject to quotas or require an import license or authorization. U.S. Customs & Border Prot., *Importing Into the United States,* available at https://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf (last visited Dec. 22, 2025).

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

13 Delaware Department of State, *Business*, available at https://sos.delaware.gov/department-state-responsibilities/business/ (last visited Dec. 22, 2025); *A Message from the Secretary of State – Charuni Patibanda-Sanchez*, available at https://corp.delaware.gov/stats/ (last visited Dec. 22, 2025).

14 States generally require the disclosure of directors and/or officers (for a corporation), or members and managers (for an LLC), or partners (for an LP or LLP) that do business in the state in annual reports that are publicly available. Those disclosures are made as of the date of filing and need not be updated between filings. A handful of states do not require the disclosure of managers or members of limited liability companies. Public disclosure of beneficial ownership information can be required by state and federal authorities in connection with litigation. *See* D.C. CODE § 29-10 2.11 (2020). It can also be required, on a confidential basis, by various state and federal authorities and can, in some circumstances, be shared among such authorities. Effective January 1, 2026, all limited liability companies formed or doing business in New York will have to file beneficial ownership information with the New York Department of State for maintenance of such information in a non-public database. N.Y. Ltd. Liab. Co. Law §§ 1100–1109 (McKinney 2024). Several other states are considering similar legislation.

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

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

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

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

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

20 *See* Section XI of this publication.

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

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

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

24 *See* Section XI of this publication.

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

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

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

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

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

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

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

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

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

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

35 *Id.*

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

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

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

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

40 In the U.S., express employment contracts are typically granted only to executives and key employees; they are uncommon for non-executive employees. Union membership is very low in the U.S., with only 5.9% of private sector employees participating in unions as of 2023. *Economic News Release,* U.S. Department of Labor, Bureau of Labor Statistics, available at https://www.bls.gov/news.release/pdf/union2.pdf (last visited Nov. 28, 2025). Within the private sector, the highest rates of union participation are found in the utilities, transportation and warehousing, and construction industries. *Id*.

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

42 29 U.S.C. § 2102.

43 Fla. Stat. §§ 542.41–542.45.

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

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

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

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

48 For example, both Maryland and New York enacted anti-sexual harassment laws in 2018. *See* Hogan Lovells, *Maryland's New Sexual Harassment Law*, available at https://www.jdsupra.com/legalnews/maryland-s-new-sexual-harassment-law-31116/ (last visited Nov. 28, 2025); Hogan Lovells, *New York Increases Its Efforts to End Sexual Harassment*, available at https://www.jdsupra.com/legalnews/new-york-increases-its-efforts-to-end-27832/ (last visited Nov. 28, 2025). Similarly, in 2019, New Jersey amended its Law Against Discrimination to ban agreements intended to conceal details of discrimination, which the New Jersey Appellate Division has recently held does not extend to non-disparagement clauses. *See* Hogan Lovells, *NJ Law Against Discrimination Does Not Bar Non-Disparagement Clauses,* available at https://www.hoganlovells.com/en/publications/nj-law-against-discrimination-does-not-bar-non-disparagement-clauses (last visited Nov. 28, 2025).

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

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

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

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

53 42 U.S.C. § 12111(8) (Section 101).

54 42 U.S.C. § 2000gg.

55 29 U.S.C. § 207(r).

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

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

58 29 U.S.C. §§ 2601–2654.

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

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

61 29 U.S.C. § 2614(a). The top 10% of salaried employees are exempted from the restoration requirement when reinstatement would cause "substantial economic injury" to the employer's business.

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

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

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

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

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

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

68 *See* U.S. Department of State, *Employment-Based Immigrant Visas*, Bureau of Consular Affairs, available at https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html (last visited Dec. 22, 2025).

69 According to the International Property Rights Index, the U.S. scored in the top 15 countries for protection of intellectual properties and was ranked first among countries in 2019, available at https://www.internationalpropertyrightsindex.org/country/united-states-of-america (last visited Jan. 7, 2026).

70 PwC, *2018 PwC Patent Litigation Study*, available at https://www.pwc.com/us/en/forensic-services/publications/assets/2018-pwc-patent-litigation-study.pdf (last visited Jan. 7, 2026).

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

72 *See* 15 C.F.R. § 734.3(a)(4).

73 *See* 15 C.F.R. § 736.2(b)(3).

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

75 U.S. Department of Commerce, Bureau of Indus. & Sec., Press Release, *Commerce Identifies Emerging Technology, Expands Controls on Exports of Software Capable of Contributing to Biological Weapons Proliferation*, available at bis.gov/press-release/commerce-identifies-emerging-technology-expands-controls-exports-software-capable-contributing-biological (last visited Dec. 16, 2025).

76 Updated lists may be found at https://legacy.export.gov/article?id=Consolidated-Screening-List (last visited Dec. 16, 2025).

77 15 C.F.R. § 744.21.

78 As set forth in 22 C.F.R. § 121.

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

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

81 Additional information on which entities and individuals are required to register is available at https://www.pmddtc.state.gov/ddtc_public/ddtc_public?id=ddtc_kb_article_page&sys_id=7110b98edbb8d30044f9ff621f96192d.

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

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

84 *See* 15 C.F.R. § 6.3(b) (2025).

85 The U.S. has FTAs with Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, and South Korea. *See* https://ustr.gov/trade-agreements/free-trade-agreements (last visited Jan. 7, 2026).

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

87 The process described here is for "formal" entry of goods. For goods valued at less than US$2,500 and certain other circumstances, a simpler "informal" entry process can be used. *See* 19 C.F.R Subpart C.

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

89 § 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304). *See also* Part 134, Customs Regulations (19 C.F.R. Part 134).

90 15 U.S.C. § 1.

91 *United States v. Jindal,* No. 4:20-CR-358, (E.D. Tex. Dec. 9, 2020); *United States v. Surgical Care Affiliates, LLC et al.,* No. 3:21-CR-00011 (N.D. Tex. Jan. 5, 2021); *United States v. DaVita, Inc.,* No. 1:21-cr-00229 (D. Colo. Nov. 3, 2021); *United States v. Manahe et al.* No. 2:22-CR-00013-JAW (D. Me. June 10, 2022).

92 *No-Poach Approach,* Department of Justice (Sept. 30, 2019), available at https://www.justice.gov/opa/pr/department-justice-antitrust-division-announces-agenda-and- panelists-joint-agency-workshop. *See also Antitrust Guidance for Human Resource Professionals,* Department of Justice (Oct. 2016), available at https://www.justice.gov/atr/file/903511/download (last visited Dec. 22, 2025).

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

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

95 *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines,* Federal Trade Commission (Sept. 15, 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf (last visited Dec. 22, 2025).

96 15 U.S.C. § 2.

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

98 *United States v. Nathan Nephi Zito,* Case No. 22-cr- 00113 (D. Mt. Sept. 19, 2022).

99 3 U.S.C. § 18(a).

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

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

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

103 *Three Directors Resign from Sevita Board of Directors in Response to the FTC's Ongoing Enforcement Efforts Against Interlocking Directorates,* Federal Trade Commission (Sept. 15, 2025), available at https://www.ftc.gov/news-events/news/press-releases/2025/09/three-directors-resign-sevita-board-directors-response-ftcs-ongoing-enforcement-efforts-against (last visited Dec. 9, 2025).

104 *US DOJ 'very committed' to enforcing Clayton Act Section 8, Kallay Says,* Mlex (June 25, 2025), available at https://plus.lexis.com/newsstand/mlex/article/2357154 (last visited Dec. 9, 2025).

105 31 C.F.R. Chapter X.

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

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

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

109 *See* FinCEN, *Resources: Statutes & Regulations—Chapter X,* available at https://www.fincen.gov/resources/statutes-regulations/chapter-x (last visited Nov. 18, 2025).

110 *See* FinCEN, *Customer Due Diligence Final Rule,* available at https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule (last visited Nov. 18, 2025).

111 *See id.*

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

113 *See* FinCEN, *FinCEN Removes Beneficial Ownership Reporting Requirements for U.S. Companies and U.S. Persons, Sets New Deadlines for Foreign Companies,* available at https://www.fincen.gov/news/news-releases/fincen-removes-beneficial-ownership-reporting-requirements-us-companies-and-us (last visited Nov. 18, 2025).

114 *See* IRS, *Form 8300: Report of Cash Payments Over $10,000 Received in a Trade or Business,* available at https://www.irs.gov/pub/irs-pdf/f8300.pdf (last visited Nov. 18, 2025).

115 *See* FinCEN, *FinCEN Form 105: Report of International Transportation of Currency or Monetary Instruments,* available at https://www.fincen.gov/sites/default/files/shared/fin105_cmir.pdf (last visited Nov. 18, 2025).

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

117 For a list of jurisdictions with anti-money laundering and combating terrorism "deficiencies," *See* FinCEN, *Financial Action Task Force Identifies Jurisdictions with Anti-Money Laundering, Countering the Financing of Terrorism, and Counter-Proliferation Finance Deficiencies,* available at https://www.fincen.gov/news/news-releases/financial-action-task-force-identifies-jurisdictions-anti-money-laundering-3 (last visited Nov. 18, 2025).

118 Financial Action Task Force, *Trade-Based Money Laundering: Risk Factors* (Mar. 2021), available at https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Trade-Based-Money-Laundering-Risk-Indicators.pdf (last visited Nov. 18, 2025).

119 *See* FinCEN, *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities,* available at https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf (last visited Nov. 18, 2025).

120 *See* Press Release, Department of Justice, *Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team* (Oct. 6, 2021), available at https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team (last visited Nov. 18, 2025).

121 *See* U.S. Department of Justice, Office of the Deputy Attorney General Memorandum, *Ending Regulation by Prosecution* (Apr. 7, 2025), available at https://www.justice.gov/dag/media/1395781/dl (last visited Nov. 18, 2025).

122 *See* U.S. Department of the Treasury, *2022 National Strategy for Combating Terrorist and Other Illicit Financing* (May 2022), available at https://home.treasury.gov/system/files/136/2022-National-Strategy-for-Combating-Terrorist-and-Other-Illicit-Financing.pdf (last visited Nov. 18, 2025).

123 *See* U.S. Department of the Treasury, *2024 National Strategy for Combating Terrorist and Other Illicit Financing* (May 2024), available at https://home.treasury.gov/system/files/136/2024-Illicit-Finance-Strategy.pdf (last visited Nov. 18, 2025).

124 15 U.S.C. §§ 78dd-1, et seq.

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

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

127 *See id* at 13.

128 *Id.*

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

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

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

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

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

134 18 U.S.C. § 78m(b)(2)(A) (2018).

135 18 U.S.C. § 78m(b)(2)(B) (2018).

136 15 U.S.C. § 78ff(c) (2018); 18 U.S.C. § 3571(e).

137 *Id.*

138 *Id.*

139 *Id.*

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

141 Section 21(B)(b) of the Exchange Act, 15 U.S.C. § 78u(d)(3); *see also* 17 C.F.R. § 201.1005 (providing adjustments for inflation), available at https://www.federalregister.gov/documents/2025/01/13/2025-00513/adjustments-to-civil-monetary-penalty-amounts (last visited Nov. 30, 2025).

142 15 U.S.C. § 78ff(a) (2018).

143 *Id.*

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

145 *See id.*

146 *See* Justice Manual, 9-28.900 - Voluntary Self-Disclosures, available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.900.

147 *See Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy*, available at https://www.justice.gov/criminal/media/1400031/dl?inline.

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

149 *See id.*

150 *See Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy,* available at https://www.justice.gov/criminal/media/1400031/dl?inline.

151 *See Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (FCPA),* available at https://www.justice.gov/dag/media/1403031/dl.

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

153 *Id.*

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

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

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

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

158 *See e.g.,* 735 ILCS 5/209(b)(5).

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

160 *Id.*

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

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

163 *Id.*

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

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

166 Fed. R. Civ. P. 4(k)(2).

167 *See e.g., Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico,* 563 F.3d 1285, 1295 (Fed. Cir. 2009).

168 *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 16 (2025).

169 *Id* at 23.

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

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

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

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

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

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

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

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

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

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

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

181 11 U.S.C. § 1182.

182 U.S. Department of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees* (Feb. 2020), available at https://www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download (last visited Dec. 22, 2025).

183 47 U.S.C. § 214; 47 C.F.R. §§ 63.01 (authority for domestic common carriers), 54.201 (eligible telecommunications carrier definition), Part 1 (general rules of practice and procedure for FCC filings, registrations, and authorizations).

184 USAC, *Register for a 499 ID*, https://www.usac.org/service-providers/contributing-to-the-usf/register-for-a-499-id/ (last visited Dec. 5, 2025). FCC Form 499-A reports the company's actual revenue billed during the prior calendar year and is due annually on April 1. *See* USAC, *Forms to File,* https://www.usac.org/service-providers/contributing-to-the-usf/forms-to-file/ (last visited Dec. 5, 2025).

185 *See* USAC, *Forms to File*, https://www.usac.org/service-providers/contributing-to-the-usf/forms-to-file/ (last visited Dec. 5, 2025). The FCC Form 499-Q forecasts revenue for the next calendar quarter and is due quarterly (Feb. 1, May 1, Aug. 1, and Nov. 1).

186 47 C.F.R. § 63.03 (procedures for domestic transfer of control applications).

187 *See, e.g.,* Cal. Pub. Util. Code § 1001 (requiring telecommunications companies to obtain a Certificate of Public Convenience and Necessity ("CPCN") from the California Public Utilities Commission before providing telecommunications services in the state); N.Y. Pub. Serv. L. § 99 (requiring telecommunications companies to obtain a CPCN from the New York Public Service Commission to provide service in the state).

188 47 C.F.R. § 63.18 (contents for international common carrier applications); *see also* FCC, *International Section 214 Application Filing Guidelines*, https://www.fcc.gov/research-reports/guides/international-section-214-application-filing-guidelines (last visited Dec. 5, 2025).

189 47 C.F.R. § 63.24 (assignments and transfers of control).

190 Exec. Order No. 13913, 85 F.R. 19643 (Apr. 4, 2020).

191 FCC, *Licensing,* https://www.fcc.gov/licensing-databases/licensing (last visited Dec. 5, 2025).

192 47 C.F.R. § 1.903 (authorization required).

193 *Id. § 1.*949 (application renewal).

194 *Id. §* 1.948 (assignment of authorization or transfer of control).

195 FCC, *Licensing,* https://www.fcc.gov/licensing-databases/licensing (last visited Dec. 5, 2025).

196 FCC, *How to Apply for a Radio or Television Broadcast Station,* https://www.fcc.gov/media/radio/how-to-apply (last visited Dec. 5, 2025).

197 47 U.S.C. § 309 (public interest standard for broadcast licensing).

198 FCC, *License Renewal Applications for Television Broadcast Stations,* https://www.fcc.gov/media/television/broadcast-television-license-renewal (last visited Dec. 5, 2025).

199 47 C.F.R. §§ 25.114 (applications for satellite space stations), 25.115 (applications for earth stations).

200 *Id.* § 25.119 (assignment or transfer of satellite space stations).

201 *Id.* § 1.767(a) (applications for cable landing licenses).

202 *Id.* § 1.767(g)(6) (cable landing license transfer restrictions).

203 *Id.* § 5.53 (experimental licenses).

204 *See, e.g., id.* §§ 13.9 (commercial radio operator license eligibility and applications), 13.201 (commercial operator license qualifications), 87.89 (aircraft station license requirements).

205 FCC, *Obtaining a License,* https://www.fcc.gov/obtaining-license (last visited Dec. 5, 2025).

206 See, *e.g.*, Cal. Pub. Util. Code § 1001; N.Y. Pub. Serv. L. § 99 (requiring telecommunications companies to obtain a CPCN from the New York Public Service Commission to provide service in the state).

207 *See* 47 U.S.C. § 254(b).

208 *See* 47 U.S.C. § 54.1 et seq.

209 47 C.F.R. § 54.701; *see also* USAC, *About USAC*, https://www.usac.org/about/ (last visited Dec. 5, 2025).

210 47 C.F.R. §§ 54.706, 54.708, 54.711.

211 47 C.F.R. § 54.709.

212 *See* 47 C.F.R. § 54.712.

213 47 C.F.R. § 54.711. Providers that meet the *de minimis* threshold are not required to submit quarterly reports. *See* USAC, *De Minimis*, https://www.usac.org/service-providers/contributing-to-the-usf/forms-to-file/de-minimis/ (last visited Dec. 5, 2025).

214 *See* USAC, *Who Must Contribute*, https://www.usac.org/service-providers/contributing-to-the-usf/who-must-contribute/ (last visited Dec. 5, 2025). Some companies that are exempt from the USF contribution requirement must still file a Form 499-A because they are required to contribute to other programs, such as the Telecommunications Relay Service ("TRS") Fund. *See id.*

215 *See* 47 C.F.R. § 54.709.

216 FCC, *FCC User Registration System,* https://apps2.fcc.gov/fccUserReg/pages/login.htm (last visited Dec. 5, 2025).

217 USAC, *Register for a 499 ID*, https://www.usac.org/service-providers/contributing-to-the-usf/register-for-a-499-id/ (last visited Dec. 5, 2025).

218 *See* U.S. Department of Justice, *Team Telecom*, https://www.justice.gov/nsd/team-telecom (last visited Dec. 5, 2025); U.S. Department of Justice, *The Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector - Frequently Asked Questions,* https://www.justice.gov/nsd/committee-assessment-foreign-participation-united-states-telecommunications-services-sector (last visited Dec. 5, 2025).

219 *See id.*

220 *See* 47 U.S.C. § 214.

221 *See id.*

222 *See* 47 U.S.C. §§ 34-39.

223 *See id.*

224 *See* 47 U.S.C. § 310(b).

225 *See In the Matter of Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership,* Report and Order, 35 FCC Rcd 10927 (2020) ("2020 Team Telecom Order"); Exec. Order No. 13913, 85 Fed. Reg. 19643 (Apr. 4, 2020); Michele C. Farquhar and Warren Alexander Kessler, *Remaining Team Telecom rules—including standard questions—now in effect at the FCC, Hogan Lovells* (Aug. 27, 2024), https://www.hoganlovells.com/en/publications/remaining-team-telecom-rulesincluding-standard-questionsnow-in-effect-at-the-fcc (last visited Dec. 5, 2025).

226 *See* FCC, *Requirements for Applications and Petitions Subject to Executive Branch Review,* https://www.fcc.gov/international-affairs/requirements-applications-and-petitions-subject-executive-branch-review (last visited Dec. 5, 2025).

227 *See* U.S. Department of Justice, *Team Telecom*, https://www.justice.gov/nsd/team-telecom (last visited Dec. 5, 2025).

228 *See id.*; 2020 Team Telecom Order at ¶ 6.

229 47 U.S.C. § 302a.

230 TCBs are FCC-recognized private entities authorized to review certification applications, grant FCC equipment certifications, post grants to the FCC's Equipment Authorization System, and approve certain "Class II" permissive changes. Practically speaking, TCBs function as the primary certification authorities — since the FCC no longer routinely issues grants directly — and must consult the FCC on specific applications and issues through the Pre-Approval Guidance process.

231 *See* Secure and Trusted Communications Networks Act of 2019, Public Law 116-124, 133 Stat. 158 (2020) (codified as amended at 47 U.S.C. §§ 1601–1609).

232 FCC, *List of Equipment and Services Covered by Section 2 of The Secure Networks Act,* https://www.fcc.gov/supplychain/coveredlist (last visited Dec. 5, 2025).

As of December 2025, the Covered List includes certain equipment and services produced and/or provided by the following "covered" entities, inclusive of their subsidiaries and affiliates: AO Kaspersky Lab; China Mobile International USA Inc.; China Telecom (Americas) Corp.; China Unicom (Americas) Operations Limited; Dahua Technology Company; Hangzhou Hikvision Digital Technology Company; Huawei Technologies Company; Hytera Communications Corporation; Kaspersky Lab, Inc.; Pacific Networks Corp and its wholly-owned subsidiary ComNet (USA) LLC; and ZTE Corporation.

233 47 U.S.C. § 230(c)(1).

234 *Id.* § 230(e).

235 18 U.S.C. § 2258A(a).

236 Public Law 119–12.

237 *See, e.g.,* Tex. Bus. & Com. Code § 509.001.

238 *See, e.g.,* California Senate Bill SB 976; Nebraska Legislative Bill 504.

239 *See, e.g.,* Tenn. Code. Ann. 47-18-5701 et seq.; Tex. Civ. Prac. & Rem. Code Ann. §129B.001 et seq.

240 *See, e.g.,* California Assembly Bill 1043; Texas Senate Bill 2420.

241 Fla. Stat. § 106.145; Tenn. Code Ann. § 47-25-1101 et seq.; Cal. Pen. Code § 311.2 et seq.

242 *See, e.g.,* California Senate Bill 243.