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International Law Firm Alliance
COMPENDIUM 2013

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United States

Bierce & Kenerson, P.C. is an award-winning, internationally recognized technology and business law firm. We have earned outstanding recognitions in the fields of international business, information technology, human capital management and outsourcing. We focus on building sustainable stakeholder value for clients. We remain dedicated to quality and value in client support in dealing with the tradeoffs and synergies involving people, process, technology and capital investment.

Founded in 1990, Bierce & Kenerson, P.C. started as a spin-out of partners with both in-house and law firm legal experience. Initially, the founders served a clientele focused on technology and licensing transactions, private investment, new ventures for U.S. subsidiaries of global industrial and commercial companies, software developers and technology-based entrepreneurship. A decade later, we witnessed a dramatic shift in deal flow, involving emerging offshore contractors and service providers, as well as increasing use of process-driven businesses. We then focused our attention on process improvement, outsourcing, licensing, joint ventures and alliances involving people, process, technology and capital investment.

Today, as corporate and business lawyers, we focus on a select core of practice areas in corporate and commercial transactions, business process management, digital economy, and human capital transactional support. This core capitalizes on our extensive legal and business experience and offers clients in-depth knowledge and know-how.

Our Business Segments

The law firm provides legal services to a broad range of business segments. Our clients are engaged in banking and financial services, insurance, investment management, manufacturing, consumer goods and services, industrial goods and services, information and Internet technology, health care and life sciences, energy management services, management

consulting, executive search, advertising and non-profit operations. Our clients range in size from individual entrepreneurs and mid-market enterprises to global 100 industrial and commercial companies.

Our Profile

Clients hire us for our commitment to quality, creativity and ability to leverage our business and legal experience to solve critical legal issues, build asset value, and help mitigate risks in client business relationships.

- BUSINESS-ORIENTED FOCUS. Our approach to each legal services assignment is a collaborative one in which communication is the key component. We listen carefully to a client's objectives and goals and work together to effectively design and implement strategies to arrive at practical real-world solutions for today's challenging business environment.

- KNOWLEDGE AND EXPERIENCE. Our business model relies upon a team of senior lawyers who have been partners in larger firms and in-house-counsel in global companies. Our team of attorneys offers extensive legal skills and deep industry experience, enabling them to deliver sophisticated business advisory skills to resolve the legal issues facing clients in today's challenging business climate.

- FORWARD LOOK. We advise on policies and procedures for compliance and long-term operational effectiveness and help clients understand these implications in the context of regulatory trends, corporate social responsibility (CSR), environmental, social and governance (ESG) initiatives.

- CROSS-BORDER VIEWS. Our attorneys have developed networks of informal working relationships with correspondent law firms abroad, with whom we regularly interact. Many clients are foreign owned and we also interact regularly with their foreign law firms when necessary. Through our training and experience with civil law and common law, we can help clients bridge cultural and regulatory environments and better understand American laws for business and investment.

- INTERDISCIPLINARY APPROACH. In business, connections help. For a holistic approach, we work with other professionals in accounting, finance, real estate, insurance, marketing, sales and other specialized services.

- THOUGHT LEADERSHIP. We are recognized thought leaders in outsourcing law which governs supply chains and global operations. We edit the #1 (Google) website on the subject, http://www.outsourcing-law.com. Our attorneys have published and blogged across many disciplines in outsourcing, technology and business law and have taught CLE courses as well as in law and business schools.

- Creativity. Throughout the life cycle of each client operation, we are constantly re-examining all alternatives to find the best solution to the evolving needs and requirements of every transaction.

- Personal Commitment and Attention. Clients hire people when they hire Bierce & Kenerson, P.C. Client satisfaction is our highest priority. When we commit to take on a client, we make sure that the client has our personal attention and that we are responsive to its needs on a timely basis. Some clients have been with us for over twenty years.

Our Added Value

Clients hire Bierce & Kenerson, P.C. for our ability to advise on, develop and implement projects for practical, cost-effective legal resolutions to their business objectives. Whether for large or small clients, we provide sophisticated legal experience at reasonable billing rates. As an award-winning boutique, we offer a cost-effective alternative to the "fee fatigue" that clients experience with increasingly monolithic, mega-institutional business models of national and global law firms.

→ Corporate Law

The United States has long been the land of opportunity for startup ventures and foreign direct investment in the U.S. stock markets, in new privately owned ventures and U.S. real estate. Under U.S. federal laws and WTO agreements on trade in goods, services, intellectual property and investment measures, foreign entrepreneurs can enjoy the same opportunities as Americans. Foreigners can obtain a variety of related business visas, such as for "treaty investors," "treaty traders," "intercompany transferees" and others.

Selection of the State of Incorporation or Formation

Planning for a new business venture requires the founders to decide where to incorporate or form the new business entity. Each state has its own laws on company formation, with different presumptions and default rules governing rights and responsibilities of owners and managers and the rights among the owners themselves. These differences can affect voting procedures, merger procedures and pre-emptive rights (to maintain their proportionate ownership) and the limitations of personal liability of owners. The choice of state of formation is important for overall planning to minimize the costs of entering or exiting a given state location. This situation promotes the choice of a Delaware corporation but not necessarily a Delaware LLC. Generally, an entity formed in one U.S. state can merge with a different form of entity from that state or another state. Only a few states explicitly invite a non-U.S. corporation or entity to merge into a U.S. entity.

Key Forms

Sartups and subsidiaries may adopt one of several juridical forms, the most common of these forms are:

- Limited partnership
- Corporation
- Limited liability company

The corporation is the simplest, but may result in the highest taxes.

Limited Partnership

The "limited partnership" (LP) separates the ownership of the entity into two classes: managers (general partners, or GP's) and non-managers (limited partners). Under various versions of a uniform limited partnership law, the states require that the general partner have unlimited liablity for its actions or omissions as a manager, while the limited partners' liability is limited by law to the amount of their capital contributions plus their duty to pay additional calls on capital under the partnership agreement.

The limited partnership format pre-existed the limited liability company but continues for certain reasons. Professional investment managers establish limited partnerships as vehicles for private equity investment funds for wealthy individuals providing capital for "alternative investments" outside the stock market, such as real estate, commodiites, derivatives, oil and gas leases, Venture capital managers often use LP's as vehicles for investing in new ventures and startups that promise rapid growth and domination market positioning in new technologies such as information technology, biotech, pharmaceuticals and telecom Tax advisers use limited partnerships for family wealth transfers through annual gifting of LP interests (where the wealth transferor lacks actual control over the GP's operations).

State laws authorizing partnerships impose few basic requirements. Unlike certificates of incorporation and corporate by-laws, partnership agreements require extensive legal and tax analysis and design for achieving the goals of owners and managers. In some situations, a partner's share of profits may be disproportionate to the share of capital. For substantially disproportionate allocation of profits and losses that have no "substantial economic effect" or rationale, the taxing authorities may re-write the tax impact to reflect actual allocations of economic risks and rewards. Similarly, careful drafting is required to allocate preferences in distribution of profits from different revenue sources or at different levels, special distributions to enable partners to cover their share of taxes on income earned by the partnership, prefereces in liquidation and other financial engineering.

Taxation in Partnerships

Federal income taxation of partnerships is based on the "flow-through" concept. First, all items of income, expense, deduction, credit and assets with tax attributes are characterized at the partnership level, and the partnership files an income tax return showing all such items. Then, the taxes are paid by the partners (not the partnership) based on the partner's allocable share of profits and losses. To participate in such a regime, the "partner" must own a "capital account." Thus, if the partnership earns money, the partners must pay taxes, and if the partnership has a loss, the partners may deduct such losses. The tax code limits the deductibility of losses, depending on whether the partner is actively engaged in the business or is merely a passive investor. Such limitations can result in the loss of tax benefits that might otherwise not be lost if the business had been formed as a corporation.

As partners in a U.S. partnership (or an LLC taxable as a partnership), non-resident foreigners must file income tax returns in the U.S. For tax classification, they are deemed to be engaged in the U.S. business and thus enjoy the pass-through of deductions. Such non-resident foreigners should identify the availability and impact of any benefits under an applicable income tax treaty with the U.S.

Under the "branch profits tax," foreigners investing in a U.S. partnership (or an LLC taxable as a partnership) are subject to a withholding tax of 30% of the gross profits payable to them from such U.S. partnership or LLC. This tax can be avoided if the foreign investor is an individual and reduced if the foreigner can benefit from an applicable income tax treaty.

Corporations

Every U.S. state (and possession) has a form of legal entity that is a joint stock corporation, where a board of directors is responsible for management and appoints officers to implement policies. In these cases, the corporation is established by filing a certificate of incorporation in the state of incorporation, and the board of directors adopts by-laws outlining the responsibilities and rights of all shareholders, directors and officers. The corporation is managed by a Board of Directors, elected by the shareholders of the Company. The board of directors then appoints officers for the company, who are responsible for overseeing the day to day activities of the company. These officers do not all have to be American citizens, but rather can be foreign unless national security or other foreign investment laws govern.

Liability in Corporations

A primary benefit to establishing a corporation in the United States is the limited liability such an entity grants its shareholders and, to some extent, directors and officers. . This limitation in liability however is not all encompassing, as directors and officers of a corporation have certain fiduciary duties and compliance requirements they are responsible for. In these situations

insurance can be purchased to mitigate the risk of loss to directors and officers of a corporation. Also, shareholders may be adjudged to be personally liable for debts or other obligations incurred while the corporation is insolvent, or if the corporation is used for fraud, or if the corporate legal formalities are neglected.

Insurance against Liability

Various laws impose on business managers (whether corporate directors or officers or LLC managers) civil and criminal liability. Such laws typically involve disregard for the civil rights of employees and consumers, unfair and deceptive practices, frauds, bribery and interference with law enforcement. Insurance exists for various types of liability: "directors' and officers' liability ("D&O"), "errors and omissions" ("E&O"), general liability, intellectual property infringement liability and "employment practices" liability. Such insurance should be considered as part of the costs of doing business in the U.S. Some shareholders, as plaintiffs against managers, have sought to strip business managers of the rights of coverage under theories of breach of fiduciary duty.

Limited Liability Companies

Limited Liability Companies, or LLCs, were first authorized by Wyoming in 1988. They combine the partnership approach to management, governance and rewards and a corporation approach to limitation of liability for owners. The LLC's highly flexible structure can involve extensive time and cost in establishment and operations. The owners are "members." Members of an LLC can be an individual, another LLC, a corporation or a foreign entity. There is no limit on the number of members of an LLC. An LLC comes into existence upon the filing of a certificate of formation.

Its governance is set forth in an Operating Agreement, which can be as simple as a designation of a single manager or as complex as a limited partnership agreement. The LLC Operating Agreement typically addresses capital structure, capital calls, the classes and rights of members, whether (optionally) there will be elections of officers (similar to a corporation), and governance procedures for meetings of members and managers. Assuming no role in management, an LLC's member enjoys a limited liability capped at the amount of the capital contributions and obligatory calls on capital.

Taxation of LLC's

Unless it elects to be taxable as a corporation, a LLC is taxable as a partnership, with pass-through taxation, where the profits of the LLC get transferred to the members and taxed as income of the members personally. See "Taxation of Partnerships."

Management of LLC's

When an LLC is formed, the Operating Agreement must define is its management structure. There are two main management structures for LLCs: member-managed and manager-managed LLC's. A member-managed LLC is usually an entity with a small number of members who all have an active role in the company. Unless otherwise specified in an Operating Agreement, each managing member (or each manager) has the full authority to act on the company's behalf. In the simplest types of LLCs, there is only one class of members, with each member having voting rights. In a manager-managed LLC, the members of the LLC elect the manager (or multiple managers, or a board of managers) to act on behalf of the members and represent the company. Where an LLC is manager-managed, the Operating Agreement will define the roles and responsibilities of each manager or all managers. An LLC can be structured like a corporation, with a board of managers and officers, but any such "board" and "officers" are optional.

Special "Benefit" Entities as Forms of Business Enterprises for Social Responsibility and Environmental Protection

Several states have enacted laws allowing an enterprise (either a corporation or an LLC) to pursue a "double" or "triple" bottom line:

- financial returns on investment for shareholders;
- social benefits to individuals and communities who are "stakeholders" (such as employees, the local community or the global community) but not owners; and
- environmental protection or conservation.

Such organizations are similar to non-profit corporations and charitable trusts, but are owned by shareholders. Such "corporate social responsibility" (CSR) entities are still new. The rules and practices are complex and continue to expose business managers to claims of improper conduct in the exercise of their roles and responsibilities.

Common Planning Issues in New Venture Formation

Wholly-owned subsidiaries and other one-owner entities can be formed and operated with minimal documentation. However, key operational issues in any co-owned entity must be handled from the beginning. These include:

- Allocation of ownership of common shares (focusing on voting rights), and events that may or shall cause a re-adjustment in such allocation;
- Rights of founders to manage the enterprise;
- Rights of financial investors, usually structured as preference shares, which shift the risk of loss to the common stockholders who have the lowest rank in a liquidation, including

- conversion ratios,
- conversion events (mandatory and optional),
- voting rights,
- liquidation preferences,
- dividend preferences and cumulative dividends,
- a preferred "hurdle" rate of return on investment upon sale or IPO,
- veto rights on certain major transactions, and
- designation and compensation of one or more members of the Board of Directors.
- Rights of employees to acquire shares under tax-deferred "qualified" stock option plans or taxable "non-qualified" stock option plans; and
- Funding obligations.

"Corporate Housekeeping"

The enjoyment of limitations of liability and other corporate attributes depends on fulfillment of corporate formalities, including annual proceedings for governance and for filing of annual reports and tax declarations. Such housekeeping should be accompanied by an annual checkup of the sufficiency of legal documentation, procedures, compliance and training of employees in best practices.

Labor Law

Definition of "Employment"

Each state adopts its own labor laws. In addition, federal labor laws exist to protect workers' civil rights under the federal constitution and implementing federal laws. Employment can arise from any kind of contractual relationship for services. Statutes protecting civil rights apply to both full-time and part-time employees, and even to temporary employees.

An "employment" relationship is defined according to state and federal statutes, regulations and judicial precedents. The definitions vary according to the particular law, and sometimes an administrative or judicial balancing is applied to decide whether the relationship involves an independent contractor or an employee. In general, employment exists when services are rendered by an individual, the "employer" has the right to control the manner or method of performance, payment is made on the basis of hours or time spent and the individual works for only one "employer". In general, an independent contractor operates under his or her own business name, has multiple clients and invoices the client company for work provided based on deliverables. The documentation between the parties is an indication of their mutual intent, but regulators and tax authorities have consistently taken the position that the documentation does not define the legal relationship. Accordingly, careful analysis, planning,

documentation and monitoring are required to design and implement the intended legal structure for service delivery.

Federal Labor Laws

Civil Rights. Federal and state civil rights legislation prohibits discrimination (or retaliation) by employers on the basis of sex, sexual orientation, nationality, national origin, race, religion, age over 40 years, war veteran status and handicapped status. Violations can be found in any stage of employment, including evaluation and selection of a candidate for untenable discriminatory reasons (such as criminal history or low credit score), promotion, changes in compensation, discipline or termination. Remedies for violation include "back" pay for lost wages, "front" pay to overcome the impact of past discrimination, as well as liability to pay attorneys' fees and potential civil fines imposed by government agencies.

Federal Contractors. Federal Executive Order 11246 prohibits federal contractors and federally-assisted construction contractors and subcontractors, who earn over $10,000 in Government business in one year, from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. The Executive Order also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.

Overtime Wages. The federal Fair Labor Standards Act (FLSA) requires employers to classify each employee as "non-exempt" or "exempt" from that law. Non-exempt employees are entitled to receive 150% of the hourly rate for time worked in excess of 40 hours in one week, and 200% of hourly rate for work on holidays. Exempt employees are considered to be adequately protected because their salaries are above the threshold where legislators care about "excess" work and because the "exempt" employee has managerial or supervisory responsibilities.

Family Medical Leave Act and Americans with Disabilities Act. These federal laws require employers to allow an employee to be absent, for legally specified periods, for family medical or personal medical or personal disability reasons. The ADA requires the employer to make a "reasonable accommodation" for a medical disability, including mental health problems that may be difficult to observe. Where the employer is engaged in a "pattern or practice" of neglecting its duties under these laws, punitive damages can be awarded.

Whistleblower Protections. Beginning in 2002 with the Sarbanes-Oxley Act, federal and state laws have increasingly adopted "whistleblower protection" rights for employees whose employment is terminated (or adversely affected) because they complain to their managers about violations of law or company policies. An employer may not retaliate against an employee's assertion of legal rights.

State Labor Laws

State laws adopt the "common law" framework that authorizes an employer and employee to enter into employment agreements.

Enforcement of Employment Laws

Regulators. Federal and state labor departments enforce the labor laws directly, or, if they choose not to do so, they allow the claimant to sue directly. Federal labor agencies include the Equal Employment Opportunity Commission, the Department of Labor, the Office of Federal Contract Compliance Programs, the Occupational Safety and Health Administration, the National Labor Relations Board.

Litigation. The American judicial system provides unique incentives for litigation by employees (or ex-employees). Lawyers are entitled to negotiate with clients a contingency fee, which can be in the range of 25% to 40% of the amount collected. Injured persons can sue for themselves and a class of "similarly situated" victims of the same wrongful actions by an employer. Rules of judicial procedure entitle a litigating party to demand to receive copies of voluminous documentary evidence before a trial. Such rules also authorize litigants to conduct "depositions" of potential witnesses before trial to examine evidence. Pre-trial "discovery" can be very intrusive and costly for any litigant. If foreign parent company is deemed to be "controlling" the local company's operations, it could be sued for employment law violations.

Prevention and Defense of Employment Claims. The extensive web of employee rights underscores the need for an up-to-date employee procedures manual that defines permissible and impermissible conduct by an employee (including a manager) and gives the employee a third-party ombudsman to complain to. Concomitantly, all employees should be trained in employment laws and violators should be punished, or the victims of their breaches will be entitled to claim that management did not care about respecting employees' rights.

Prudent employers manage their legal risks through proper training of employees, keeping records of all HR events as evidence, adopting policies and practices in employment manuals and performance reviews, using statistical analysis on a routine basis to monitor employment practices for possible discrimination arising simply from a "disparate impact" of otherwise lawful policies and "employment practices" insurance.

Employers also use arbitration clauses, possibly with waivers of the right to sue in a class, and litigation techniques to defeat claims that the plaintiffs are "typical" of the class of victims, or that the injuries of each employee are unique and not common as a group. The bottom line: each individual employee must be treated individually, except for general policies that are for purposes of legal compliance.

Further, in a "reduction in force" (RIF), employers need to anticipate the impact on the various protected classes and identify the business need and reasonableness of the criteria used for selection of individuals and classes of individuals whose employment is terminated.

Special Considerations for Foreign Companies Operating in the U.S. and Foreign Nationals Employed in the U.S. Foreign nationals employed in the U.S. may be "seconded" from a foreign entity. Such nationals may be entitled to the protections of both U.S. and foreign labor laws. Managers who are foreign nationals need training to understand the legal and cultural differences in employment, the role of litigation in enforcement and the administrative and litigation procedures. Multinational companies should also implement global initiatives against corruption and bribery through policies, training and employment contract provisions. While many administrative or clerical functions in HR can be outsourced, the foreign manager cannot delegate the duty to manage human resources.

Foreign Investment

The United States is the main source of foreign direct investment and also the leading host country for foreign direct investment (FDI).

Anti-Competition Laws

The U.S Department of Justice and Federal Trade Commission each has jurisdiction to review and challenge all acquisitions (regardless of nationality of ownership) for potential violations of antitrust (anti-competition) laws under the Sherman and Clayton Acts. Under the Hart-Scott-Rodino Antitrust Act, pre-merger notification and federal review are mandatory where there is a risk of impairing competition. The review process can result in negotiated restructuring of the acquisition, such as the divestiture of certain operations that would result in "excessive" concentrations such as oligopolies or monopolies.

National Security Review Process

Like many other countries, the U.S. prohibits foreign control of U.S. businesses in certain sectors (particularly banking, aviation, railroads and energy). Unlike other countries, the U.S. does not review every foreign investment, but rather adopts a "voluntary" disclosure and review process. If the foreign investment is not disclosed, but should have been disclosed because of its impact on "national security," the President has authority to order the retroactive divestiture of the foreign investment. In addition, foreign investment in real property must be disclosed.

The Exon-Florio amendment to the Defense Production Act, as amended by the Foreign Investment and National Security Act of 2007 ("FINSA"), authorizes the President to suspend

or prohibit transactions that could result in foreign control of U.S. companies if the transaction threatens to impair national security. The review of individual transactions has been delegated to a federal interagency committee, the Committee on Foreign Investment in the United States (CFIUS).

CFIUS Procedures

While application to CFIUS for review is voluntary, firms subject to an Exon-Florio review that do not notify CFIUS remain indefinitely subject to Exon-Florio and appropriate actions by the President. However, Exon-Florio applies only when a transaction is related to national security, which is the case in a small percentage of the overall number of foreign direct investments in the United States.

Particular transactions may be approved by CFIUS without conditions, or may be approved on the condition that the investor adheres to certain mitigation agreements, sometimes called "national security agreements." For example, a mitigation agreement could involve the transfer of national security-related operations to U.S. nationals and to control by U.S. citizens. The President can, based on the advice of the committee, exercise his authority under the Exon-Florio provision to suspend or prohibit a foreign acquisition of a U.S. company only if he finds that there is credible evidence that the foreign entity exercising control might take action that threatens national security, and that laws (other than Exon-Florio and the International Emergency Economic Powers Act) do not provide adequate and appropriate authority to protect national security.

Under FINSA, CFIUS and the President must consider, as appropriate, the following additional factors including the potential national security-related effects on "U. S. critical infrastructure, including major energy assets" and "U.S. critical technologies," as well as "energy and other critical resources and materials." Issues include whether the transaction is a foreign government-controlled transaction, non-proliferation, counter-terrorism, military applications, foreign export controls and military threats.

Timing of CFIUS Review Process

The CFIUS review process invites foreign companies to have informal discussions with the Federal government before completing a major acquisition. This informality allows companies to make proposals and respond informally to concerns expressed by CFIUS. Without such informal review, the foreign investor would face a choice between "near-automatic" rejection and a risk of post-acquisition divestiture ordered by the President. Thus, the CFIUS review process has four steps: (1) notice of the transaction to CFIUS (either by voluntary disclosure or at CFIUS's request); (2) a 30-day CFIUS review to determine whether the transaction raises national security concerns; (3) if so, a 45-day investigation period to determine whether such concerns require remedial action by the foreign investor to mitigate and address them; (4) and

if such action is required, a 15-day period for the to decide to permit, suspend, or prohibit the transaction.

Suspension or Blocking of the Acquisition

The CFIUS is granted authority to suspend or block transactions deemed to threaten national security on a finding that there is "credible evidence" that the foreign entity exercising control might take action that threatens national security. For completed transactions, the President (on CFIUS recommendation) may order divestment.

Reporting

Foreign investors in the U.S. must report their investments to the U.S. Bureau of Economic Analysis for statistical compilations.

The USA PATRIOT Act

The USA PATRIOT Act and the Homeland Security Act establish procedures for policing threats to national security. Among other things, they include provisions that prohibit a law firm from disclosing to its foreign client the existence of governmental inquiries into attorney-client privileged communications. While there are judicial safeguards, they are minor.

The Foreign Assets Control Act

In support of a policy of imposing political sanctions on certain foreign individuals, organizations and governments, the U.S. may require the sequestration of U.S. assets owned by such listed foreign owners. Sanctions currently apply to assets owned by Iran, North Korea and Syria.

Real Estate Law

Types of transactions

Foreign nationals may engage in many types of real estate transactions. They may invest in individual properties (such as land, office buildings, retail, multifamily, industrial, or hotels), engage in joint ventures to invest equity into existing properties or to invest in the development of new projects, sell and leaseback the property, invest in real estate investment companies (public or private), borrow, lend or restructure loans based on mortgages in U.S. real property; commercial development of real property and leasing of offices and retail space. Under current cultural and economic norms for "corporate social responsibility," emerging legal issues include the introduction of environmental sustainability clauses.

Overview. Foreign investors in U.S. real estate must comply with many special rules governing taxation, disclosure and reporting and other regulations. Some rules relate only to real estate. Other rules apply to foreigners generally.

Foreign Investment

Generally, the rules governing foreign investment apply to acquisition of U.S. real property. See Foreign Direct Investment. In addition, for agricultural land, the federal Agricultural Foreign Investment Disclosure Act ("AFIDA") of 1978 authorizes the U.S. Department of Agriculture's Natural Resources Analysis Group, by regulations, to create a nationwide system for the collection of information pertaining to foreign ownership in U.S. agricultural land. The regulations require foreign investors who acquire, transfer or hold an interest in U.S. agricultural land to report such holdings and transactions to the Secretary of Agriculture on an AFIDA Report Form FSA-153.

→ Tax Law

Foreign individuals and companies can reduce or avoid certain U.S. taxes through advance planning and should consult a U.S. attorney on U.S. and international tax issues, as well as corporate structuring and governance issues, before establishing investments, businesses or residency in the U.S.

Multiple Taxing Jurisdictions

The U.S. tax system allows taxation by all levels of government (including cities, counties, state and the federal government). In addition, special taxing districts exist for sewer, water, mass transit, airports and other regional benefits, increasing the complexity, burdens and cost of compliance.

Taxation by States

Most states adopt the general tax accounting rules of federal income taxation. State taxes are in addition to federal taxes, but can be claimed as deductions from federal income taxable income.

Capital Gains Taxation

All taxpayers enjoy a lower income tax on long-term "capital gains" for "capital assets" held at least one year.

Dividends Received Taxation

Qualifying dividends are subject to a maximum 15% federal income tax rate.

Taxation of Individuals

Income, gift and estate taxes are payable by individuals. The impact on foreign nationals is reduced by the existence of U.S. law allowing foreign tax credits (subject to limitation) and many treaties on the avoidance of double taxation of income, gifts and estates (successions). There is no value added tax.

Foreign Individuals

The tax regime for foreign nationals depends on their residency for tax purposes as well as their immigration visa status. U.S. citizens and "tax residents" pay federal income taxes on their worldwide income, U.S. gift taxes on inter vivos gifts and U.S. estate taxes upon the value of their worldwide assets upon death.

Tax Residency

Every taxing jurisdiction has its own definition of "residency." For federal income tax, a non-resident alien does not become a tax resident if he or she stays inside the U.S. (including airline stopovers) for up to 121 days per year on average or for less than 183 days in one year. For New York income tax purposes, a non-resident becomes taxable if he or she has a place of abode in New York and spends at least 30 days in New York.

Visa Status

Foreign nationals who live in the U.S. as "lawful permanent resident" (green card holders) are taxed as if they were U.S. citizens. Non-resident aliens intending to reside in the United States should consider a number of important tax planning steps before acquiring residency.

Federal Income Tax Rates; Regular and "AMT" Taxation

Individual income tax rates are deceptively complex. Individuals must compute their taxes using ordinary methods and then under an "alternative minimum tax" ("AMT") that eliminates many of the biggest taxable deductions. Tax rates can vary from year to year. Maximum rates are deceiving because of AMT and the elimination of certain deductions are forfeited by high-income taxpayers. Individual rates depend on one's status: individual, head of household, married filing jointly or married filing separately. For married taxpayers filing jointly in 2012 (and does not allow certain deductions), federal income tax rates ranged from 10 % for incomes of up to $17,400 to a maximum of 35% for married taxpayers filing jointly. For 2013, changes are

anticipated due to Presidential elections in November 2012. The federal "Alternative Minimum Tax" (AMT) is computed and, if higher than the "ordinary" tax rate, the AMT applies.

State and City Income Taxes

States and some cities impose income taxes too. For simplicity, they follow the "federal" definitions of taxable income, but perhaps with minor exceptions. State and city income taxes are deductible as expenses that reduce taxable income for federal income purposes.

Real Property Taxes

Multiple non-federal taxing jurisdictions impose real property taxes on the value of real property. Taxpayers may challenge the assessed valuations to reduce the overall taxes.

Intangible Property Taxes

Florida taxes its residents on the value of their investment portfolio in securities and other intangible assets, but it does not tax their personal income.

Taxation of Businesses

U.S. taxation of businesses is based on nationality of the business entity, whether foreign-source income is "effectively connected" with the conduct of a U.S. trade or business, and whether the business entity is structured and taxable as a "partnership" or as a "corporation." If the legal entity is incorporated or established under the laws of a U.S. state, then its worldwide income will be subject to U.S. income taxes, regardless of the actual situs of business operations or management decision-making.

"C" Corporations

Normally, corporations are subject to two levels of income taxation: a corporate income tax at the corporate rate and a dividend tax on shareholders at the shareholder's tax rate. Such corporations fit within the "C Corporation" tax regime. "C" Corporations can carry forward any losses from one year to the next 15 years, and future losses can be carried back for two prior years upon filing an amended tax return. Intercompany dividends from an 80% controlled subsidiary to its U.S. parent are not taxable in consolidated groups.

"S" Corporations

Only one level of income taxation applies where all corporate shareholders are individual U.S. citizens or resident aliens (or eligible trusts or holding entities), there are not more than 100 shareholders, there is only one class of stock and the corporation files a tax election for "S

Corporation" status. "S" corporations are effectively taxed as a partnership (subject to certain limitations).

Partnership-Type Entities

There are no income taxes imposed on business entities that are taxable as partnerships, but their owners are taxed regardless whether the entity distributes income sufficient to pay the taxes due. Unless it elects to be taxable as a corporation, a limited liability company, a limited liability partnership, a limited partnership and a general partnership are taxable as partnerships. Foreign owners of partnership entities are considered to be engaged in the business in the U.S. directly, so that they are taxable (and must file income tax returns) on their allocable share of business net profits. However, foreign corporations that own a U.S. partnership entity must pay a withholding tax ("branch profits tax") of 30% of the "deemed dividend" paid from the U.S. entity, which is then eligible for reduction under the terms of the applicable double income tax agreement.

Entities taxable as partnerships lack some of the benefits enjoyed by corporations

Partnerships cannot carry back or forward any current year's taxable losses. For startups, this means that a tax loss is not recovered in future years to offset future profits. Also, a partner's share of the entity's tax losses is not deductible to the extent the loss exceeds the partner's adjusted tax cost of his or her share of equity ownership.

Anti-Abuse Provisions

U.S. laws and treaties contain special anti-abuse provisions designed to prevent the establishment of dummy companies, dummy transactions and other artificial or hidden structures that evade tax.

- RECHARACTERIZATION. The IRS may recharacterize any transaction in order to "properly" reflect its tax accounting status. As applicable the IRS must use caution and consult with foreign taxing authorities under an income tax treaty to avoid double taxation.

- ACCUMULATED EARNINGS TAX. The dual-level of taxation of "C" corporations encourages corporations to accumulate income and to pay owners by other methods, such as license royalties, salaries, bonuses, benefits and other operating expenses. To combat abuses in the accumulation of earnings, federal income tax law imposes an "accumulated earnings" tax on income that is not held for reasonably anticipated uses in the business operations. Such uses include planning for mergers and acquisitions and simple risk management in a volatile or challenging economy. A minimum 25% tax applies to "S" corporations earning 25% or more gross income from passive investment income.

■ CFC. The "controlled foreign corporation" tax provisions impose a tax payable by U.S. tax residents on "deemed" dividends from foreign corporations that are interposed between the U.S. company and its foreign business customers.

■ PFIC. The "passive foreign investment company" provisions prevent U.S. tax residents from deferring income taxes of offshore holding companies.

■ FBAR's. Treasury regulations require U.S. taxpayers to declare their foreign bank accounts. Since interest payments are deductible, tax authorities can challenge "excessive" levels of debt of "thinly capitalized" corporations.

Corporate Tax Rates

Corporation income tax rates start at 15% for corporate income not over $50,000, with the maximum rate being 35% for income slices in excess of $18,333,333.00. Corporations may consolidate their income tax returns so that only the U.S. parent entity files and pays taxes.

Mergers and Acquisitions

Federal income taxes can be avoided by structuring a merger or an acquisition as a change in form without any transfer of cash to the "seller." Depending on the structure, a merger or acquisition can therefore be tax-free, partially tax-free or totally taxable for the "sellers."

Cash vs. Accrual Methods of Accounting

Generally, federal tax law prohibits the use of the "cash receipts" method of accounting for two purposes. An exception applies for corporation and partnerships with annual gross receipts under $5 million for the three years ending with the current year.

Taxation of Foreign Investors, Employees, Visitors and Foreign-Owned Businesses

The U.S. tax system is based upon the taxpayer's nationality and the character of the taxpayer's activity in relation to the U.S.

■ FOREIGN VISITORS CONDUCTING BUSINESS WITH THE U.S. The U.S. does not tax foreign visitors who are not U.S. tax residents. However, if the visitor has a U.S. place of business, a branch office or a warehouse, or a "dependent" agent, income from such operations is taxable. Foreign business executives should obtain advice on how to comply with U.S. business visitor visas (B-1, E-1, H1-B, L-1, O) and the taxation of working in the U.S. for a foreign company and/or its U.S. affiliates.

FOREIGN-OWNED U.S. BUSINESSES. Taxation of foreign-owned businesses follows several principles.

- Passive Investment Income. Non-resident aliens and foreign corporations who do not have a U.S. trade or business are taxable only on their U.S. income that is either (i) "effectively connected" with a trade or business conducted in the U.S. or passive income. Passive income (including interest, dividends, rents, royalties and other "fixed and determinable, annual or periodical income") is normally subject to a U.S. withholding tax under rates of 30% or lower rate under an applicable tax treaty.

- Business Operations. Foreign-owned businesses are generally taxed as local businesses. The rules governing "effectively connected" income tax more broadly than the rules governing a U.S. "permanent establishment" under a U.S. tax treaty.

- Intercompany Transactions. Foreign companies normally provide administrative support for the operations of their U.S. subsidiaries. Regulations seek to apply "arm's length" pricing principles to determine whether payments by a U.S. subsidiary are excessive (and thus subject to dividend treatment). Generally, "back office" administrative functions such as accounting, billing, collections and records management are not considered to generate substantial income in an arm's length deal, while product design and sales activities are considered higher value activities. Foreign companies normally enter into administrative services agreements and other contracts to support the validity of such transactions for income tax purposes.

FOREIGN-OWNED PASSIVE INVESTMENTS IN THE U.S. Non-resident alien investors are subject to a U.S. withholding tax of 30% of the gross amount of passive income from U.S. sources. "Passive" income means "fixed or determinable, annual or periodical income" such as rents, royalties, dividends and interest. Income tax treaties reduce such withholding taxes to lower rates such as 5% or 15%, depending on the percentage of the U.S. business entity owned by the foreign 'investor."

FOREIGN-OWNED U.S. REAL PROPERTY INTERESTS. Under the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA"), a U.S. federal income tax is collected upon the "disposition" by a foreign owner of U.S. real property interests ("US RPI"). A taxable "disposition" includes, a sale, exchange, capital contribution, redemption, distribution or gift. Such tax applies to the sale of the real property or to an entity at least 50% of whose value consists of U.S. real property. On IRS Forms 8288 and 8288-A, the buyer from a foreign seller must withhold and pay to the IRS 10% of the purchase price. All sellers of US RPI must identify themselves as either U.S. or foreign. The seller must report and pay taxes on the sale by filing a U.S. Federal Tax Form 1040-NR or Form 1120-F. The withholding and tax maybe reduced or eliminated in certain circumstances, such as where (i) the disposition qualifies as a tax-free exchange of similar property or a tax-free contribution to the equity of a corporation, LLC, partnership or other entity, (ii) the transferor's maximum tax liability is less than the amount that would normally

be withheld, (iii) the payments are made in installments in more than one year, (iv) the IRS approves the reduced withholding in an agreement, secured by a letter of credit or surety bond) with the transferor or transferee, or other agreement with the IRS (such as a "blanket withholding certificate" for multiple properties or other non-standard situation).

■ Foreign-Owned Intellectual Property. A special expatriation tax (or "toll charge") applies when a U.S. taxpayer (such as a U.S. subsidiary) transfers intellectual property to a foreign corporation. Foreign businesses that intend to develop intellectual property in the U.S. should structure their U.S. investments in a manner that avoids the impact of this rule. Such structuring can only be valid if implemented before the development of the U.S. intellectual property.

■ FOREIGN EMPLOYEES OF U.S. COMPANIES. Federal income tax laws give special deferrals of income tax liability for U.S. tax residents and employees of U.S. employers. Foreign national employees can enjoy such benefits if they are U.S. tax residents during the relevant periods, and upon return to their home countries they could lose some benefits if they fail to take precautionary plans.

- Pension Plans. The Employee Retirement Income Security Act of 1974 allows employers to establish "ERISA" plans that defer the date when qualifying employee wages will be taxed. Foreign nationals who are U.S. tax residents and employed by such a plan can enjoy such tax deferrals. However, if the foreign national changes tax residency, the U.S. tax rules will follow, and U.S. taxes will be due in the future.

- Social Security Equalization Treaties. Foreign nationals working for many years in the U.S. are entitled to return to their home countries and receive local social security coverage in the foreign country by reason of U.S. withholding of U.S. Social Security taxes during their former employment in the U.S. Such mutual recognition by foreign countries is based on foreign local law or on a Social Security Equalization Treaty. The period of working in the U.S. as a condition for eligibility may vary from five to ten years, depending on the country.

■ EXPATRIATION TO AVOID U.S. TAXATION. Foreign nationals who become "long-term U.S. residents" (including U.S. "lawful permanent residents" ("green card holders")) will be treated as if they were U.S. citizens. For such individuals who leave the U.S. to avoid the application of U.S. income, gift and/or estate taxes, U.S. tax authorities may collect taxes on their worldwide income for 10 years after they have left the U.S. This rule applies only if average annual income for 5 years exceeds an inflation-adjusted amount ($151,000 for 2012), net worth exceeds $2.0 million, or upon exit, the individual has failed to certify tax compliance for the previous five years. As in any foreseeable change of personal circumstances, careful preliminary tax planning can minimize the impact of such rules.

■ TAXATION OF "STARTUPS" AND NEW VENTURES. Special incentives exist to encourage individuals to work for comparatively low salaries for innovative startups and other new ventures. These tax rules help convert their "sweat" into "equity" through stock options and other incentive compensation.

- Qualified Stock Option Plans. If a corporate employee receives stock options under a "qualifying stock option plan," the employee does not pay U.S. income tax on the value of the option, or on the profits from the future sale of the stock purchased by exercising the option, UNTIL the stock is actually sold.

- Election to Pay Tax Early on Property Received in Payment for Services. Similarly, an employee or consultant of a corporation or LLC can receive equity ownership rights (such as stock options or shares) in consideration of personal services performed. Such individual can elect to convert such rights into a capital asset and pay future taxes only on sale at capital gains rates, if he or she pays tax currently on the value of the rights (options or shares) and the rights, when received by the individual, are subject to a substantial risk of forfeiture.

Intellectual Property

Intellectual property rights ("IPR") consist of patents, trademarks and copyrights. The Constitution authorizes federal regulation of IPR. Under the common law of all U.S. states, trade secrets are eligible for judicial protection as well, provided that the "owner" has actually taken reasonable steps to prevent unauthorized disclosure. Domain names and Universal Resource Locators ("URL's") are also eligible for various protections.

Patents

U.S. patents may be granted only if an inventor "invents or discovers any new and useful process, machine, manufacture, or composition of matter [including plant varieties], or any new and useful improvement thereof." A patent may not be obtained though the invention is not identically disclosed, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having "ordinary skill" in "the art" to which said subject matter pertains. The duration of a U.S. patent commences with the date on which the patent issues and ends 20 years after the date when such the application (or earlier application referenced in the application) was filed in the United States.

Patent applicants must remember some cardinal principles. Before filing an application, the inventor must not to disclose patentable information without an appropriate non-disclosure agreement. Foreign applicants must file a U.S. application within twelve months from the earliest date on which such foreign application was filed. However, no U.S. patent may be granted on any application for an invention which had been patented or described in a printed

publication in any country more than one year before the date of the actual filing of the application in the U.S., or which had been in public use or on sale in this country more than one year prior to such filing.

Patent litigation is reportedly a $29 billion industry in the U.S. To reduce such costs and procedures, the America Invents Act of 2011 adopted a "first-to-file" priority rule and modified the litigation rules and made it more difficult for patent owners (particularly "patent trolls," or "non-practicing entities") to sue alleged infringers as a common group in a single lawsuit. Settlement may be accelerated by a "Markman" hearing in which the court and parties construe the patent claims to see whether any probable infringement exists.

Trademarks

A trademark is a brand name. A trademark or service mark includes any word, name, symbol, device [which can be a simple color or a complex logo], or any combination, used or intended to be used to identify and distinguish the goods/services of one seller or provider from those of others, and to indicate the source of the goods/services. Although federal registration of a mark is not mandatory, it has several advantages, including notice to the public of the registrant's claim of ownership of the mark, legal presumption of ownership nationwide, and exclusive right to use the mark on or in connection with the goods/services listed in the registration and the right to claim damages. Federal trademark applications must allege an actual or intended use of the mark in interstate or international commerce of the U.S. States also issue local trademark registrations, but they only apply within such states and may be superseded by a federal trademark.

Filing procedures permit foreign applicants to file a U.S. trademark application and rely upon the foreign trademark application as the "priority date" for purposes of conflicts with other applications for U.S. trademarks. A foreign applicant must file a claim of priority within six months of the filing date of the foreign application.

The duration of a U.S. trademark is ten years, and is renewable. However, the mark will be deemed abandoned if, between the fifth and sixth anniversaries of the date of registration, the owner fails to file a certificate of use.

Copyrights

The duration of a U.S. copyright for works created on or after January 1, 1978 commences on the date of creation and endures for the life of the author and 70 years after the author's death (or, for joint authorship where the work is not "for hire," the life of the last surviving author and 70 years after such author's death. In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.

Unlike other countries, the U.S. requires a copyright registration with the U.S. Copyright Office before any damages for infringement can be demanded.

Copyright has limited value for business operations. However, business owners can obtain substantial benefits by registering U.S. copyrights for software, business catalogs and non-confidential business documents.

Foreign Ownership

Foreigners are guaranteed equal and "non-discriminatory" "national treatment" with U.S. nationals under World Trade Organization and other conventions. Thus, foreign patent applicants who are domiciled in WTO countries enjoy the same priority as American patent applicants. A few surprises might arise even under this standard. For example, regardless of the nationality of the inventor, where a patent application is likely to have an impact on national security, federal law permits the government to indefinitely suspend publication.

Export Controls

U.S. "high-tech" businesses are subject to regulations on the export of U.S. technical data. An "export" can occur within the U.S. by mere verbal disclosure. Sanctions and fines are imposed for failure to obtain a valid license for the export of items on the "commodity control list" to restricted countries. Each export thus requires a separate analysis by target customer and type of goods or services.

Privacy and Data Protection

Based on large number of narrow laws and regulations, U.S. law on privacy and data protection has suffered from a piecemeal process. There is no equivalent to the European Union Directive on Data Protection. Privacy law requires special attention, regardless of the location of the business operations, if the business targets U.S. customers.

- CHILDREN PORNOGRAPHY. The Children's Online Pornography Protection Act bans displays of pornography to children under the age of 13.

- DECEPTIVE TRADE PRACTICES. The Federal Trade Commission and state attorneys general enforce federal and state laws against "deceptive trade practices." These agencies have adopted regulations and enforcement proceedings to ensure that companies honor their commitments in online privacy statements.

- PRIVACY BREACH NOTIFICATION STATUTES. Virtually all states have adopted laws that require companies to disclose to local governmental officials and customers the existence of a security breach of personally identifiable information. Generally, such laws do not apply unless

at least 5,000 individuals in that state are affected. Companies suffering such security breaches normally have to hire specialists in making the appropriate notifications and taking steps to mitigate the impact of potential identity theft.

■ PRIVACY NOTICES. Anyone publishing information online needs a privacy notice to identify their level of protections. Appropriate warnings can be published, but that may scare away customers.

Litigation in U.S. Courts

■ EXTRATERRITORIAL JURISDICTION. The "long arm" of U.S. law can be felt across the world. Generally, U.S. laws are applicable (and U.S. courts have judicial jurisdiction to enforce such laws) regarding any activities (foreign or domestic) that have an impact, or a reasonably foreseeable impact, within the U.S. Thus, U.S. courts can assert jurisdiction over foreign participants in foreign cartels and foreign "torts" such as frauds and conspiracies, where there is an actual or threatened violation of a protected legal right in the U.S.

■ DISCOVERY. In general, American judicial procedure involves mandatory pre-trial disclosure to the adverse party of all information that is either admissible evidence or leads to potential admissible evidence. If information is "privileged" (such as attorney-client communications and attorney work product), it is exempt from disclosure. The burden and costs of disclosure (and making objections to disclosure) sit with the party who is requested to disclose such information, unless the disclosure would be excessively burdensome (as determined by a judge).

■ "HOLDS" TO PREVENT "SPOLIATION OF EVIDENCE." Every defendant in the U.S. must take immediate steps to preserve disclosable information from inadvertent destruction. Normally, a company's lawyer sends a notice to the Chief Information Officer to preserve backup tapes, and to erasure. If this step is ignored, the company risks a sanction: the jury may be directed by the judge to presume that the destroyed evidence was adverse to the company. In short, spoliation of evidence can lead to loss on the merits of the dispute.

■ E-DISCOVERY. Given the enormous amount of electronic documentation that must be reviewed, U.S. courts have adopted rules that require adversaries to meet and review the procedure for disclosure of pre-trial information. In 2012, courts began approving the use of computers ("big data analytics"), not humans, to do the initial search for "relevant" evidence or information leading to potential evidence.

■ ATTORNEYS' FEES. U.S. common law and statutes do not generally award attorneys' fees of the winner as damages payable by the loser. Exceptions exist in the field of antitrust (anti-competition) law, the Foreign Corrupt Practices Act, civil rights violations and certain employment rights. Arbitrators do not automatically have the authority to award attorneys' fees as damages, but this can be changed by contract.