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2018/2019

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Introduction

This booklet provides guidance for doing business in the United States (U.S.). In addition to background information on the U.S., it includes relevant information about business operations and taxation matters. This guide will assist organizations that are considering establishing a business in the U.S., either as a separate entity or as a subsidiary of an existing foreign company. It will also be helpful to anyone who is planning to work or live permanently in the U.S.

The U.S. has a number of external territories, which include Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa. These external territories have their own legal systems and tax codes, which are not covered in this guide. Please consult Internal Revenue Service (IRS) administrative guidance for additional information regarding tax matters in U.S. territories. Unless otherwise noted, this information is believed to be accurate as of December 31, 2018. Special rules govern tax advice in the U.S., particularly when a taxpayer seeks protection for relying on advice from professionals. We are required by IRS Circular 230 to advise you that general communications such as this booklet cannot be used, and are not intended to be used, for the purpose of avoiding penalties under United States federal tax laws.

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How to Use This Guide

This guide provides an overview of relevant U.S. information for your business or personal needs. It is not an authoritative guide and should not be relied on solely for tax research and analysis. It is essential that before any business is undertaken, advice should be obtained from local professionals, such as Certified Public Accountants (CPAs), Chartered Accountants (CAs), and lawyers.

It should also be noted that background information on the U.S. is available through U.S. government data. Details are available on the Internet, so we have provided the reader with a resource tool in Appendix A that contains a list and brief description of some of the most valuable and informative websites.

Acknowledgments

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1. The United States of America – A General Overview

The United States of America comprises 48 contiguous states and two noncontiguous states, Alaska and Hawaii. Washington, D.C., formally the District of Columbia and commonly referred to as Washington, "the District," or simply D.C., is the capital of the United States, located between the states of Maryland and Virginia.

Additionally, the U.S. includes several territories, namely the Commonwealth of Puerto Rico, the Virgin Islands of the U.S. in the Caribbean Sea, and the islands of American Samoa and Guam in the Pacific Ocean.
The U.S. Census Bureau estimated the country's population to be 325,719,178 as of July 1, 2017, making it the third most populous country, after China and India. This represents a 5.5 percent increase since 2010. Approximately 14 percent of the population is foreign-born.

The ten largest metropolitan areas, based on 2017 metropolitan staistical area (MSA) population estimates from the U.S. Census Bureau, were:

1. New York City, New York
2. Los Angeles, California
3. Chicago, Illinois
4. Dallas, Texas
5. Houston, Texas
6. Washington, D.C.
7. Miami, Florida
8. Philadelphia, Pennsylvania
9. Atlanta, Georgia
10. Boston, Massachusetts

America is both vast and dense. The continental United States, which excludes Alaska and Hawaii, is about the size of Australia. At the same time, the population of the New York City metropolitan area—also referred to as the "tri-state area" (50 miles radiating from the Empire State Building)—is approximately 21 million people.

English is the predominant language, although, as of 2010, about 8.6 percent of the population spoke little or no English.

Geography and Climate
The land mass is 9.6 million square kilometers, or 3.7 million square miles, and is third in size after Russia and Canada. The contiguous 48 states are bound on the west by the Pacific Ocean; on the north by Canada; on the east by the Atlantic Ocean; and on the south by Mexico and the Gulf of Mexico.

The climate is as diverse as the topography. Regions of the country, which include Hawaii and parts of Florida, are tropical. It is humid in the East and Southeast and arid in the West.

Government
The U.S. Constitution defines a federal system of government in which certain powers are delegated to the federal government, while others are reserved for the states. The federal government consists of the executive, judicial, and legislative branches. They are designed, through separation of powers and a system of checks and balances, to ensure that no branch of government is superior to the other two. All three branches are interrelated, each with overlapping, yet quite distinct, authority.

The federal government includes a number of independent administrative agencies that have been created by the legislative branch or by executive order. These agencies include the IRS, the U.S. Securities and Exchange Commission (SEC), and the U.S. Customs Service. The U.S. Customs Service is now part of the U.S. Department of Homeland Security. These agencies have generally been given the power to create and enforce rules and impose penalties for non-compliance.

The state governments have structures that closely parallel the structure of the federal government. Each state has a governor, a legislature, and a judiciary. The state government is usually housed in each state's capital city. Each state (and most cities, counties, and towns) has its own system to provide for local government services. States are subdivided into counties, cities, and towns, and each subdivision generally has its own form of local government.

Religion
The different religious beliefs in the U.S. outnumber the variety of ethnicities, nationalities, and races. Approximately 71 percent identify themselves as Christian, with the two largest subgroups being Catholics and Protestants. Another 6.7 percent are other religions, including Judaism, the second largest religion in the U.S., comprising 1.9 percent of the population; followed by Hinduism (1.2 percent) and Islam and Buddhism (each at 0.9 percent). Some 22.8 percent of the population is nonreligious, secular, atheist, agnostic, or have no known religious affiliation.

Education
American public education is primarily the responsibility of the states and individual school districts, unlike the nationally regulated and financed education systems of many other industrialized societies. In 2009, states contributed 47 percent of the elementary and secondary school revenues, and local school districts contributed 43.8 percent. The federal government provided 9.45 percent. Private sources contributed 0.5 percent.

The public system serves a large portion of the school-age population. In 2010, 87 percent of Americans age 25 and over had graduated from high school, 55 percent had completed some college, with 29 percent earning at least a bachelor's degree.

While the clear majority of Americans attend public schools, in 2009-2010, approximately 11 percent attended private elementary and private high schools. The majority of these private schools were Catholic schools.

Post-secondary education is not dominated by public institutions, but by a mix of public and private institutions, many of which have church and religious origins.

Communication and Information Technology
Personal and mass communications are pervasive in American culture. As of 2013, approximately 83 percent of American households owned at least one computer, 74% had high-speed internet service, and 91% of Americans one a mobile phone.

Times, Weights, and Measures

Most areas of the U.S. currently observe daylight savings time. The exceptions are Arizona and Hawaii, and the territories of Puerto Rico and the U.S. Virgin Islands.

The U.S. customary system of units is used for weights and measures, although many consumer goods must be labeled using the metric system as well. The U.S. Congress had enacted legislation that requires eventual transition to the metric system. Currently, there has been no action taken to make the transition.

Currency

The U.S. dollar ($) is the unit of currency. The smallest unit of currency is the penny or cent (¢). The dollar is equal to one hundred cents. The Federal Reserve System is the central banking system that manages the currency.

Inflation

The inflation rate was 2.5 percent as of April 2018. Other recent yearly inflation rates are as follows: 2017 – 2.1 percent; 2016 – 2.1 percent; 2015 – 0.7 percent; 2014 – 0.8 percent; 2013 – 1.5 percent; 2012 – 1.7 percent; 2011 – 3.0 percent; 2010 – 1.5 percent; 2009 – 2.7 percent, and; 2008 – 0.1 percent
Please refer to the resource tool in Appendix A of the guide for a list of websites, one or more of which contain updated information.

Gross Domestic Product

Gross domestic product (GDP) is the output of goods and services produced by labor and property located in the U.S. The GDP is measured on a quarterly basis, reporting the estimated percent change from the preceding period. Estimated GDP in Q2 2018 was $20.40 trillion. The GDP increased by an estimated 4.1 percent in the first quarter of 2018 and an estimated 2.1 percent in 2017.

2. Forms of Business Organization

Business can be conducted in the U.S. through:

- Unincorporated branches of foreign entities
- Corporations
- Limited liability companies (LLCs)
- General partnerships (GPs), limited partnerships (LPs), and joint ventures
- Trusts
- Sole proprietorships

Businesses are free to choose their preferred form of entity. Non-U.S. entities are viewed as corporations, branches/proprietorships, or partnership-like entities for U.S. tax purposes under guidelines similar to those governing U.S. entities. However, LLCs can elect to be treated as either a partnership or a corporation for U.S. tax purposes if the "default" characterization is undesirable.

Business entities, regardless of their statutory form, are treated for tax purposes as corporations, trusts, partnerships, or disregarded tax entities. Disregarded tax entities are wholly owned entities that take on the tax characteristics of their owner (i.e., they are considered a branch if the owner is a corporation or other business entity, or they are considered a sole proprietorship if the owner is an individual).

A corporation is a distinct legal entity created under state law. Delaware has historically been the most popular state in which to incorporate. However, most states have modified their corporate laws to mirror those of Delaware. Depending upon where the corporation will do business, and given Delaware's recent aggressive pursuit of escheat taxes, Delaware may no longer be the best choice.

LLCs are considered the most flexible type of entity for use in achieving both business and tax objectives. An LLC is a hybrid entity that provides corporate-style liability protection and partnership-style "flow through" tax treatment. "Flow through" means that the owners generally pay tax on their shares of the entity's income, rather than the entity paying the tax. A corporation's profits, on the other hand, are taxed twice — once at corporate level and again at the shareholder level when the profits are distributed. In addition, LLCs can elect to be treated as partnerships or corporations for U.S. tax purposes. This option is not available to U.S. corporations. The owners ("members") of an LLC have limited liability similar to corporate shareholders. Members may participate in the management of the company pursuant to the membership agreement.

GPs expose all partners to unlimited liability. General partners may participate in the management of the partnership. An LP requires at least one general partner who has unlimited liability. The limited partners' liability is limited to their capital contribution, but they may not participate in the management of the partnership.

Trusts include the estate of a decedent and specialized entities, which have aspects similar to that of partnerships (although not widely used). Trust use is generally limited to special purpose situations such as settlement funds.

Costs of Creating an Entity

The costs of creating an entity vary widely by state and by the type of entity chosen. Additional costs may be incurred in obtaining professional advice as to the proper structure and type of entity to be used.

Branch Operations

It is relatively easy to establish a branch operation in the U.S. Generally, the foreign entity must register with the state(s) and city or cities where the branch will operate, and obtain a license to do business in the state(s). The branch will be taxed on its income based on the classification of its parent. If the parent is a corporation, the branch will be taxed as a corporation. Branch profits are also subject to reduction under an applicable U.S. income tax treaty.

Representative Offices

Representative offices of a foreign entity may be established for planned activities limited to those activities that are allowed under an applicable U.S. income tax treaty. Generally, to avoid subjecting the foreign entity to U.S. income tax, such activities must not include any kind of activities that would be attributed to the foreign entity under the specific treaty. If a foreign entity would be subject to U.S. taxation absent an applicable U.S. income tax treaty, the entity generally must still file a U.S. income tax return. The U.S. tax return required in this case acts as a disclosure document, informing the IRS that the entity is relying on the applicable treaty to avoid U.S. taxation.

Registrations

Once formed, every business entity must obtain a unique U.S. federal employer identification number (EIN). This number identifies the entity and is required regardless of whether the entity expects to have employees. Most states require notification, and some states assign special state numbers.

If a business employs or expects to employ workers, it must obtain several additional registrations and insurance coverage for the benefit of its workers. The requirements vary for each state. The requirements sometimes vary for local jurisdictions.

A separate state registration is often required for sales and use tax.

Shelf Companies

The concept of acquiring shelf companies is not practiced in the U.S. Typically, a new corporation or LLC can be formed in 24 to 48 hours, and in some jurisdictions, online with a credit card.

3. Entity Formation and Statutory Requirements

Corporations

Share Capital

The amount of required minimum share capital varies by state. Such minimums are generally not substantial in amount. Capital contributions can be made in the form of cash, property, or in-kind services. The initial shares do not need to be fully paid up before registration. A U.S. corporation may be wholly owned and/or managed by foreign persons or companies.

Memorandum and Articles of Association

A foreign investor who intends to set up a subsidiary in the U.S. must form a new company or purchase the shares in an existing company already operating in the U.S.

Procedure for Formation

An incorporator, who files articles of incorporation with the applicable state authorities, generally forms the company. The incorporation is then ratified by the shareholders, and the directors are elected by the shareholders. Once a corporation is formed, it has the right to do business in its state of incorporation. A separate registration to do business as a "foreign" corporation should be filed in any other state in which the corporation does business. Note that "foreign" in this context means any other state of the U.S., not a foreign country.

Note also that many states take the position that U.S. income tax treaties are not applicable to state taxes. Thus, a foreign entity not subject to U.S. taxation under an income tax treaty may still be subject to state and local taxes in the U.S.

Information on Public Record

The state in which the corporation is organized determines what information must be filed on public record with the state. The information may include:

- Share capital
- Names and addresses of the board of directors and the managing director(s)
- Names and addresses of shareholders with voting powers of 5% or more
- Articles of Association

Financial statements for privately held entities are generally not considered public information.

Limited Liability Companies

Capital

The amount of minimum capital required by a member varies by state. Such minimums are generally not substantial in amount. Capital contributions can be made in the form of cash, property, or in-kind services. A U.S. LLC may be wholly in each instance owned by foreign persons or companies.

Procedure for Formation

An LLC generally must file its articles of organization with the state or local jurisdiction (e.g., county or city) in which it is located or intends to do business.

Liabilities of Members

The liability of each member of an LLC is generally limited to the member's capital contribution.

Information on Public Record

The state in which the LLC is organized determines what information must be filed on public record with the state. The information may include:

- Amount of each member's initial contribution to capital
- Names and addresses of each member
- Rights of each member to the LLC's profits

Partnerships

Capital

The amount of minimum capital required by a partner varies by state. Such minimums are generally not substantial in amount. Capital contributions can be made in the form of cash, property, or in-kind services. A U.S. partnership may be wholly owned by foreign persons or companies.

Procedure for Formation

A partnership can be created without a written document, although a written agreement is always highly recommended. A partnership is generally required to register with all states or local jurisdictions (e.g., county or city) in which it intends to do business.

Liabilities of Partners

Each partner in a GP is jointly liable for all debts and obligations of the partnership. To limit the partners' liabilities, the parties may instead want to consider using an LLC, a limited liability partnership (LLP) or an LP. Although taxed differently, a corporation can also be used to limit liability.

Information on Public Record

The state in which the partnership is organized determines what information must be filed on public record with the state. The information may include:

- Amount of each partner's initial contribution to capital
- Names and addresses of each partner
- Designation of each partner as either a general or limited partner
- Rights of each partner to the partnership's profits

4. Audit and Accounting

Financial Statements

Management of each business is generally responsible for the maintenance of accounting records and for the preparation of annual accounts covering each accounting period. In a corporation, officers are responsible for this role, and are elected by directors. In the case of a small privately held business, owners, officers, and directors are often the same individual(s). In the case of a partnership or LLC, the managing partner or managing member is generally the responsible party.

Generally, the annual accounts are presented and accepted by the owners (shareholders, partners, or members) at the annual general meeting.

The trustee of a trust—like a sole proprietor—has similar statutory responsibilities under the law to keep books and records.

As a general note, different states and/or jurisdictions have varying laws and requirements regarding retention of financial records. As such, please consider consulting with your accountant and attorney to make certain you are in full compliance with these laws and regulations.

Accounting Period

As a general rule, corporations may adopt any fiscal year-end. However, most businesses in the U.S. have year-ends that align with their tax year-end to avoid the extra effort of performing a separate financial statement closings process in any given year.

Financial Reporting

Companies are often required to provide their financial statements to outside parties (lenders, shareholders, investors, suppliers, customers, etc.) for various reasons, usually legal or regulatory in nature. Companies may engage CPA to provide the following levels of professional services relative to the company's financial statements:

Audit

An audit is the highest level of assurance service that a CPA performs, with the intention to obtain "reasonable assurance" about whether the financial statements are free from material misstatement. A CPA performing an audit must be independent from the Company. In addition to the American Institute of Certified Public Accountants (AICPA) rules on independence, auditors may be subject to the incremental rules associated with regulatory organizations such as the SEC, the Public Company Accounting Oversight Board (PCAOB), and the U.S. Department of Labor, among others.

Private companies are audited by CPAs under standards established by the Auditing Standards Board (ASB) of the AICPA.

Review

In lieu of an audit, private companies may engage a CPA to perform a review engagement, which consists of inquiries of company personnel and analytical procedures applied to financial data.

Reviews are substantially narrower in scope than an audit engagement and are designed to provide "limited assurance" on the financial statements. Similar to an audit engagement, a CPA must maintain their independence from the Company in order to perform this engagement.

Compilation

Another alternative for private companies is to engage a CPA to perform a compilation, which is limited to presenting in the form of financial statements information that is the representation of management.

Unlike audit and review engagements, a CPA performing a compilation may or may not necessarily be independent with respect to the client.

Audit – Public Companies

Publicly traded companies are required to file quarterly and annual reports with the SEC. The annual reports include financial statements audited by an independent CPA. The CPA firm must be registered with the PCAOB.

The interim financial statements of public companies included in the quarterly reports must be reviewed by an independent CPA.

In 2002, the U.S. Congress passed the Sarbanes-Oxley Act (SOX), which created the PCAOB and established internal control, governance, and other requirements for public companies.

The PCAOB establishes auditing and related attestation, quality control, ethics, and independence standards and rules to be used by registered CPA firms.

Accounting

Generally accepted accounting standards (U.S. GAAP) are principally established by the Financial Accounting Standards Board (FASB). Alternatively, private companies may prepare financial statements using alternative bases of accounting, collectively referred to as special purpose frameworks in authoritative literature. These frameworks, such as cash basis or income tax basis, may be utilized if deemed acceptable for the primary users of their financial statements.

The FASB has worked with the International Accounting Standards Board (IASB) to converge U.S. GAAP and International Financial Reporting Standards (IFRS) in a number of areas, most notably with the recently effective revenue recognition standard, and the upcoming lease standard. While work continues on projects already in existence, the convergence project is coming to an end and no new projects have been added at this time.

While the use of IFRS in the U.S. by public companies is not required, IFRS is relevant to many U.S. businesses. As the marketplace is becoming increasingly global in nature, more U.S. companies have ties to non-U.S. stakeholders. These stakeholders may require financial information prepared under varying financial accounting standards, and thus understanding differences between standards will lead to more informed decision-making and help minimize impacts which could ultimately cost time and money.

5. Labor Relations and Working Conditions

The Secretary of Labor, appointed by the president, has the administrative responsibility for the U.S. Department of Labor (DOL). The purpose of the DOL is to foster, promote and develop the welfare of wage earners in the U.S., to improve their working conditions, and to advance their opportunities for profitable employment.

Regulation by the DOL offers protection concerning work hours, minimum wages, benefits, and non-discrimination. Private industry is permitted to set individual work conditions within regulations. Federal and state labor relations laws guarantee to workers the right to free association in unions. Since the mid-1980s, however, the power of organized labor has decreased considerably. More and more people have become employed in service organizations rather than in manufacturing, which has reduced union membership. However, the current administration is focusing its efforts on returning manufacturing jobs to the U.S. and is engaged in trade discussions with many countries. This has resulted in an increase in jobs in the manufacturing sector. According to the Bureau of Labor Statistics, for the period February 2017-2018, 220,000 new manufacturing jobs were added in the U.S. The potential impact on union membership is unknown.

Employee Benefits

Information released in March 2018 by the DOL's Bureau of Labor Statistics (BLS) provides a helpful snapshot of today's benefits picture in private industry. Access to employer-provided benefits was greater in medium and large private industry establishments than in small establishments. For example, access or availability of a benefit was 55% for medical care benefits in small establishments (those with fewer than 100 employees), 83% for medium establishments (those employing between 100-499 employees), and 88% in large establishments (those with 500 or more employees). Access to medical benefits is higher for state and local employment reflecting 85% for small establishments, 86% in medium establishments, and 92% for large establishments.

Paid leave benefits followed a similar pattern. The difference was more pronounced in the availability of paid sick leave, which was offered to 62% of workers in small establishments and 79% in medium establishments, and 87% in large establishments. Paid holidays and paid vacations were available to 70% of workers in small establishments and 85 and 89%, respectively, to workers in large establishments.

Retirement benefits were available to 55% of workers in small establishments, 84% of workers in medium-size establishments (those employing between 100 and 499 workers), and 90% of workers in large establishments.

The following are typical paid holidays: New Year's Day, Memorial Day (last Monday in May), Independence Day (July 4 or the Monday closest to the 4th), Labor Day (first Monday in September), Thanksgiving Day (third Thursday in November), and Christmas Day. Depending on company policies, additional holidays include President's Day (third Monday in February), Good Friday, Columbus Day (October), and Veteran's Day (November). Many employers offer personal days for birthdays or floating holidays for religious observance that vary each year. Paid vacations vary and are usually based on an employee's length of service. Additional benefits being offered in the modern American workplace today include educational assistance benefits, subsidized commuting, child care, adoption assistance, long-term care insurance, wellness programs, meals and snacks, pet friendly, work-out facilities, and flexible workplace (allowing employees to work flexible hours and/or from home).

6. Income Taxation

There are two basic U.S. income tax regimes for business entities, the partnership flow-through regime and the corporate regime.

Under the partnership flow-through regime, the business entity is not subject to direct income taxation. Instead, the entity's profits "flow through" to its owners and are taxed in most ways as if earned directly by the owners. Partnerships and most LLCs are treated as flow-through entities for U.S. tax purposes. However, as previously noted, partnerships and LLCs can elect to be taxed as a C corporation for federal (and usually state and local) tax purposes. Nearly all owners, including foreign owners of a flow-through entity, must file a U.S. income tax return. There are exceptions for certain specialized investment partnerships.

A foreign person investing in the U.S. through a partnership is considered to be in the trade or business of the partnership and is subject to U.S. taxation. The partnership is generally required to remit withholding tax for income allocable to foreign partners at the highest applicable tax rate attributable to that partner. The foreign partner must file a U.S. tax return to report the income and claim any available refund of the withholding tax..

The corporate regime is often preferable for foreign owners because it isolates U.S. operations, and most foreign owners can either use tax credits for taxes paid by a U.S. corporation when dividends are remitted home, or exclude the dividend from local country taxation. Owners of entities taxed as corporations typically do not have to file U.S. tax returns. However, direct owners of U.S. corporations that reside in countries with which the U.S. has a tax treaty must provide proof of beneficial ownership (if the direct owner is a business entity) and treaty residence to reduce the standard 30% U.S. withholding tax on dividends and certain other payments, such as interest, to the applicable treaty rate.

The flow-through regime is generally more advantageous for U.S. non-corporate owners because income is only taxed once, at the ownership level, rather than twice (i.e., once when earned by the corporation, and again when distributed to the owner in the form of a dividend). Of course, each investor's tax strategy must be tailored to his or her individual circumstances, and other factors may apply in each particular investment situation.

Trusts, certain electing domestically owned corporations called "S corporations," and other special flow-through tax regimes exist. Some are industry-specific. Based on their complexity, circumstantial application, and limited use, these regimes are not discussed in this general guide.

Taxation of Foreign Income

The Tax Cuts and Jobs Act (TCJA), which was enacted into law on December 22, 2017, made major changes to the U.S. tax system. Several new provisions concerning the taxation of U.S. businesses' foreign income were implemented. Among these were two new taxes and a deduction.

Global Intangible Low-Taxed Income

A new category of subpart F income called "global intangible low-taxed income" (GILTI) was created by the TCJA. Subpart F income includes items of income of a foreign corporation that are currently taxable directly to the corporation's U.S. shareholders, regardless of whether the income is distributed. Under this new GILTI provision, a U.S. shareholder of a controlled foreign corporation (CFC) must currently include in income their proportionate share of certain intangible income of the foreign entity. The calculation is complex, but the includable amount is determined as the excess of the shareholder's "net CFC tested income" over the shareholder's "net deemed tangible income return." In general, the includable amount is the net income of the foreign corporation, less those items required to be currently taxed, in excess of 10% of the adjusted basis of the tangible property used in the production of that income.

Base Erosion Minimum Tax

The base erosion minimum tax (also known as the base erosion and anti-abuse tax, or BEAT) was designed to prevent U.S. corporations from shifting profits from the U.S. to a foreign jurisdiction through deductible payments made to a related foreign entity. Affected taxpayers are corporations with average annual gross receipts of $500 million or more over the prior three tax years, who have made payments to foreign related parties equaling at least 3% of total deductions. The BEAT is the amount by which 10% (5% for 2018) of modified taxable income exceeds the taxpayer's regular tax liability. Modified taxable income is essentially net income calculated without the inclusion of any base erosion tax benefit or base erosion percentage of any net operating loss (NOL) deduction, over the taxpayer's regular tax liability, net of most tax credits.

Deduction for Foreign Derived Intangible Income and Global Intangible Low-taxed Income

A U.S. corporate shareholder of a foreign corporation is allowed a deduction equal to 37.5% of "foreign derived intangible income" (FDII), plus 50% of GILTI (see above) included in income. FDII is the assumed foreign portion of a U.S. corporation's "deemed intangible income." The deemed intangible income is the excess of the net income of the foreign corporation, less those items required to be currently taxed, over 10% of the adjusted basis of the tangible property used in the production of that income. Fundamentally, FDII is a tax on the profit that a business receives from U.S.-based intangible assets used to generate income for U.S. firms. An example is the income that U.S. pharmaceutical companies receive from foreign sales attributable to patents held in the U.S. The purpose of FDII is to encourage U.S. multinational companies to report their intangible profits to the U.S. (and obtain a generous associated deduction) instead of to low-tax foreign countries.

7. Corporate and Business Taxes (Income and Franchise)

U.S. Federal Tax Rate

For 2018, taxable income, including capital gains, is subject to federal corporate income tax at a 21% flat rate.

A corporation organized in the U.S. is subject to federal corporate income tax on its U.S. income, but may elect to be taxed on its worldwide income. The foreign tax credit, subject to various limitations, is designed to minimize the effects of any "double" taxation by the U.S. and a foreign jurisdiction.

Various tax incentives are available under U.S. laws that have the effect of reducing the federal income tax rate. Many of these incentives are available only for specific industries (such as oil and gas extraction), while others are broadly available. For instance, a tax credit is available for qualifying expenditures made in research and development.

A foreign corporation that owns a U.S. branch, or all or a part of a flow-through entity, files and pays corporate income taxes. In most cases, a withholding or "branch profits" tax is also due (subject to applicable tax treaty provisions) when earnings are repatriated or deemed returned to a foreign parent company. An individual owner of a U.S. branch or flow-through entity files and pays individual income tax (see Section 11).

Withholding by Flow-Through Entities

If the U.S. entity is a partnership or LLC that does not elect to be taxed as a corporation, each partner or member is subject to U.S. income taxation on its share of the entity's profits. In some instances, the partnership or LLC is required to withhold and remit U.S. and state income taxes on a quarterly basis. These withholdings are based on profits allocated to foreign partners (not actual cash or property distributions) and typically are paid to the IRS for the account of the owner at the highest rate of tax. Accordingly, they are generally greater than the actual tax due, though a refund can normally be obtained by filing a tax return.

Filing of Tax Returns

Corporate tax returns must be filed annually. The federal tax return is due on the fifteenth day of the fourth month after the end of the tax year (i.e., April 15 for calendar year corporations). There is an exception where June year-end returns are due the 15th day of the third month. If the due date falls on a Saturday, Sunday, or federal holiday, then the due date becomes the next business day.

Although partnerships and LLCs are generally not directly subject to U.S. taxation, they must file informational federal returns that are due on the fifteenth day of the third month after the end of the tax year. Since these entities are flow-through entities, their owners are obligated to pay tax on their proportionate share of the entity's income. Owners must file and pay taxes based on their fiscal year and organization type (i.e., individual or corporate). While foreign owners are often subjected to a withholding tax on their share of earnings as discussed above, this is a tax deposit, not a payment of tax due, which can only be done by filing a tax return.

A corporation may request an automatic five-month extension to file its tax return. Payment of any corporate tax due with the return is required to be paid by the original due date of the return. Underpayments result in the imposition of interest and possible penalties from the original due date to the actual date of filing and payment. The federal tax return of a foreign corporation with no office or fixed place of business in the U.S. is due on the fifteenth day of the sixth month after the end of the tax year. An automatic six-month extension can be requested.

A partnership (including most domestic LLCs that are treated as partnerships) may request an automatic six-month extension to file its tax return (i.e., September 15 for calendar year-end entities).

Tax returns are due even if the entity had taxable losses. Informational tax filings are required which disclose ownership and transactions between the U.S. entity and the foreign parent. A failure to file these informational returns carries high penalties.

State and local income tax return due dates generally follow federal due dates, although in some cases, they lag the federal due dates by one month. Some states allow partnerships and LLCs to file a single "composite" income tax return on behalf of all the owners who are not residents of a particular state.

Payment and Collection

Corporate income tax is generally paid in advance, on a quarterly basis. Interest and penalties are typically charged on any underpaid or unpaid installments. The state and city income and franchise tax payment rules are similar to the federal rules.

Partnerships and LLCs taxed as partnerships are required to withhold and remit taxes on behalf of their partners and members in certain situations. Generally, they are required to remit tax based on the entity's earnings, not on actual distributions. These situations include earnings attributable to foreign partners or foreign members for U.S. federal income tax purposes, and earnings attributable to partners or members not resident in the entity's state for state income tax purposes. These rules, especially at the state level, evolve quickly. Thus, they must be actively monitored, since tax must often be withheld. However, certain exceptions and exemptions may be available.

Foreign partners in a U.S. partnership and foreign members of a U.S. LLC taxed as a partnership are generally required to file individual federal and state income tax returns and report their shares of the entity's profit or loss on a U.S. federal income tax return. The taxes withheld as described above are credited against the liability computed on the return, and the partner or member pays any additional taxes due or receives a refund of any overpayment of taxes.

State and Local Income Taxes

Almost all states (and some cities and counties) impose a corporate income or franchise tax.

State rates vary and can be as high as 12%. Generally, each state computes taxable income differently, but most of them begin with federal taxable income. Many states also tax capital, either as a separate tax or through an alternative tax base in which the business pays the higher of the income tax or the capital tax. The most common adjustments states make to federal taxable income to arrive at state taxable income involve add-backs for state income tax deductions, loss carryforwards, deductions related to certain related-party transactions, and adjustments for federal and state depreciation differences. Some states use a three-factor formula based on a percentage of sales, payroll, and property attributed to their state to apportion income for a corporation doing business in their state. In recent years, however, most states have moved to a single sales-based apportionment factor.

Also, some cities impose corporate income or franchise taxes (e.g., New York, Philadelphia, and several cities in Michigan and Ohio), after incorporating the state adjustments. Cities may also impose a personal property tax.

Grouping and Consolidated Returns

Certain affiliated corporations may elect to file a single, consolidated federal income tax return for all members of the affiliated group. The consolidated tax return is a tax computation mechanism, and it does not convert the group into a single corporation. Each member of the group is severally liable for the entire tax of the consolidated group.

Generally, only U.S. corporations are permitted to be included in a consolidated tax return. Under very limited conditions, Mexican and Canadian corporations can be included in the filing of a consolidated return. An affiliated group consists of a common U.S. parent corporation and at least one other U.S. corporation in which the parent owns at least 80% of the total voting power and total value of the stock. Any other U.S. corporations that are connected to each other or to the parent under the same percentage of ownership tests are to be included in the consolidated return. Brother-sister corporations, related through ownership by individuals, are not permitted to file a consolidated return.

A foreign corporation that controls several U.S. subsidiaries, some of which generate profits and others that sustain losses, will often derive tax advantages by establishing a U.S. holding company to hold the stock of its U.S. subsidiaries. This allows the group of U.S. companies to file a consolidated return to offset any operating losses of members against the taxable income of other members. If a consolidated return is not filed, a foreign corporation may find its profitable U.S. subsidiaries paying tax and its unprofitable U.S. subsidiaries deriving no current benefit from losses generated.

Most states tax each corporation separately. Some states allow consolidated or combined returns to be filed. Many states require an affiliated group of corporations that operate as a “unitary business” to report income on a combined basis. Although mechanically different, this has the same effect as filing a consolidated return.

Corporate Residence and Territoriality

A corporation is resident in the U.S. for tax purposes if it is incorporated in the U.S. A U.S. corporation is subject to corporate income tax on its U.S. profits, but can elect to be taxed on worldwide profits, including capital gains. A foreign tax credit mechanism, subject to various limitations, is available to alleviate the possibility of double taxation of income that is also taxed in a foreign jurisdiction.

Permanent Establishment

Nonresident companies conducting business in the U.S. through a permanent establishment (e.g., a branch) located in the U.S. are subject to income tax on all income attributable to or received from such permanent establishment. Nonresident companies from a country which has a bilateral tax treaty with the U.S. and that conduct business in the U.S., but do not have a permanent establishment, are not subject to tax in the U.S. They are, however, still required to file a corporate income tax return and still may be subject to state and local taxes.

The branch profits tax generally applies to a branch’s earnings (after income tax) that are deemed repatriated to the home office. The tax rate is generally 30%, unless modified or eliminated under an applicable U.S. income tax treaty. In addition, a branch is required to withhold 30% of the interest actually paid or deemed paid by the branch to the home office or a non-U.S. lender. This withholding tax may also be modified or eliminated under a U.S. income tax treaty.

MOORE

Investment in U.S. Real Property

All nonresidents, including individuals and corporations, are subject to U.S. income tax on income from real property situated in the U.S., whether the real property is owned directly or through a business entity, including a corporation. Nonresidents must file a U.S. tax return to declare such income when title to real property is transferred directly or indirectly through the sale of a U.S. business entity. There is a 30% withholding tax imposed on the gross rental income, unless an election is made for the tax to be computed on a net basis.

Multinational Corporations

In general, U.S. parent corporations are able to "defer" the earnings of their non-U.S. subsidiaries until these earnings are distributed as dividends to the U.S. parent.

However, the subpart F rules require a "deemed dividend" of earnings that have not yet been physically distributed to a U.S. parent in some cases (see page 38.) These rules, which have been a part of the U.S. tax system since 1962, are highly complex and are generally viewed as not in keeping with the ways in which multinational corporations operate.

Accordingly, when establishing a multinational corporation, strong consideration should be given to locating the parent company outside of the U.S. At the very least, the subpart F rules should be one of the many factors that are considered when a multinational structure is established that has U.S. operations.

Withholding Tax

Certain types of payments constituting U.S. source income made to nonresidents are subject to U.S. withholding tax, and other types of payments may be tax exempt if paid to a foreign person. The non-treaty withholding rate is 30%, which may be reduced under an applicable income tax treaty. Most new U.S. income tax treaties contain a "limitation on benefits" article, which is designed to limit treaty benefits to qualified residents of the two countries. A U.S. payer is required to obtain information for its files from the payee to support a treaty rate of withholding, or to explain that no withholding is due because of the foreign status of the entity to be paid. This information is generally provided through the use of the W-8 series of IRS forms. In addition, the payer may be required to report the payments to the IRS. The withholdings must be remitted to the IRS within a specified period of time (depending on the amount of the withholdings) or penalties and interest can be charged.

Dividends

All dividends paid by a corporation to its non-U.S. shareholders are subject to a 30% withholding tax, unless modified or eliminated under a U.S. income tax treaty.

Royalties

A 30% withholding tax is applicable to all royalty payments for the use—or the right to use—patents, trademarks, designs or models, plans, secret formulas, or processes, along with information concerning industrial, commercial, or scientific processes, unless modified or eliminated under a U.S. income tax treaty. Payments for the purchase of underlying intangible assets are generally not subject to withholding tax. However, payments for access to know-how may be deemed to be a license subject to withholding tax.

Interest

Interest payments made to nonresidents are generally subject to a 30% withholding tax, unless they are for bank interest, qualify as portfolio debt, or are modified or eliminated under a U.S. income tax treaty. See also the section entitled "Thin Capitalization."

Losses

Generally, a tax loss may be carried forward indefinitely to offset other taxable income. NOL deductions are limited to 80% of taxable income.

In corporate acquisitions, the use of the acquired company's tax loss carryforwards and certain other favorable tax attributes are generally limited or forfeited.

Start-Up and Organizational Costs

A taxpayer may elect to deduct up to $5,000 of start-up costs and $5,000 of organizational expenditures in the taxable year in which the trade or business begins. However, each $5,000 is reduced (but not below zero) by the amount the cumulative cost of start-up or organizational expenditures exceeds $50,000. Start-up and organizational expenditures that are not deductible in the year in which the trade or business begins are amortized over a 15-year period.

Costs associated with investigating a new business are considered start-up costs.

Costs associated with raising capital are not deductible, but are included in the investor's basis and used to decrease the gain (or increase the loss) upon sale or liquidation of the entity.

8. Payroll Taxes and Social Security

Payroll Taxes

Employers are subject to several types of employment taxes. In some cases, the employer is acting as the tax collector for the government. In other cases, the employer is paying its own tax costs. Employers are required to deduct and withhold federal, state, and local income taxes from the salaries and wages of their employees. The federal government also imposes Social Security taxes on both employees and employers (see below). There are also certain federal taxes, state and local taxes, and related insurance costs that are assessed and collected as part of the payroll process. These include payments for worker's compensation (on-the-job injuries) and unemployment insurance, which is charged at both the federal and state level.

Social Security Tax

The Social Security tax is imposed on employers and employees under the Federal Insurance Contributions Act (FICA). It is also imposed on self-employed individuals under the Self-Employment Contribution Act (SECA). The FICA tax is imposed at the same rate on both the employee and the employer. The employer is required to collect the employee's portion of the tax through a payroll deduction and then promptly remit the withholding along with the employer's portion of the tax to the government.

For 2019, employment income up to $132,900 is taxed at 15.3% (7.65% is paid by the employer and 7.65% is paid by the employee). Employment income in excess of $132,900 is taxed at 2.9% (1.45% is paid by the employer and 1.45% is paid by the employee). The base amount is indexed annually. In some instances, individual taxpayers could be subject to an additional 0.9% on wages above $200,000 (see below).

SECA is imposed on the self-employment income of self-employed individuals if their earnings equal or exceed $400 for the taxable year. The same annual FICA earnings ceiling limits (see above) apply to earnings subject to SECA, although the self-employed individual is responsible for both the employer and employee portions. One-half of this amount is generally deductible in arriving at federal taxable income.

For tax years after 2012, the Affordable Care Act (ACA) added an additional Medicare tax, which is imposed on employees and self-employed individuals. The tax rate is 0.9%. An individual is liable for tax if the individual's wages, compensation, or self-employment income exceed the threshold amount for the individual's filing status in the chart below:

Filing Status	Threshold Amount
Married Filing Jointly	$250,000
Married Filing Separate	$125,000
Single	$200,000
Head of Household	$200,000
Qualifying Widower	$200,000

Note that some foreign countries have Social Security totalization agreements with the U.S., which may reduce or eliminate the U.S. FICA tax and SECA tax (see the following).

Totalization Agreements

The U.S. currently has International Social Security "totalization" agreements with Australia, Austria, Belgium, Canada, the Czech Republic, Chile, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Poland, Portugal, Slovak Republic, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.

9. VAT / GST / Sales and Use Tax

The U.S. equivalent to VAT or GST is the sales and use tax. Sales and use taxes are imposed at the state and local level. Forty-five states, the District of Columbia, and many local jurisdictions impose sales and use taxes. The rules vary by jurisdiction and typically range from five to eight percent of the retail selling price.

Generally speaking, sales tax is imposed on the sale or purchase of tangible property and some services.

A business is responsible for collecting the sales or use tax on its sales to the extent that the business has "nexus" within the jurisdiction that imposes the tax. Sales tax nexus can be created in several ways:

First, sales tax nexus can be created by a having a "physical presence," temporarily or permanently, within the state. Some examples of activity that create this physical presence include an office, owning property, or traveling into a jurisdiction to solicit sales.

Second, sales tax nexus can be created by exceeding a certain level of economic activity in a state (often referred to as economic nexus or factor-presence economic nexus), even if a taxpayer does not have physical presence in the state. States that impose so-called economic nexus rules may have differing levels of economic activity required to create nexus. However, each state generally looks at sales activity measured by dollar value of total sales and number of individual transactions.

For example, the state of Hawaii imposes an economic nexus rule that asserts sales tax nexus when a taxpayer's sales to Hawaii customers exceeds $100,000 or if the taxpayer exceeds 200 individual transactions in the state. Exceeding either threshold will trigger nexus. As a second example, the state of Pennsylvania has asserted that sales tax nexus will exist for a certain period in cases where a taxpayer's sales into the state exceeded $10,000. Pennsylvania does not have a number of transactions test. Because of the varying rules from state-to-state, it is important to understand the rules in each state where sale activity is directed.

Once nexus is established, the business will need to determine if the product or service sold is subject to sales tax. The applicable state (and local, in some instances) laws need to be examined for the sales tax implications. States typically exempt occasional sales or sales for resale. Many states have exemptions for government entities, educational institutions, and non-profit entities. Typically, customers provide the vendor with an exemption certificate to claim an exempt status. If a sale is not exempt, sales tax should be charged as part of the transaction and remitted to the state.

If taxable property or services are purchased from a vendor and the vendor does not charge the corresponding sales tax, the purchaser is generally liable to pay use tax directly to the state or local jurisdiction. The use tax is a complementary tax to the sales tax and is intended to tax products or services when the vendor does not have nexus with the jurisdiction.

Several states have joined together to create a Streamlined Sales and Use Tax Agreement. The purpose of the agreement is to simplify and modernize sales and use tax administration in the member states to substantially reduce the burden of tax compliance. The agreement is intended to encourage sellers without a physical presence in the state to voluntarily register and begin collecting tax in response to the simplifications. Additional information on the agreement may be found at http://www.streamlinedsalestax.org.

Businesses that are required to collect and remit sales tax (or pay use tax) do so by filing separate sales tax returns, which can be audited by state authorities, generally within three years. If no returns are filed, there is no statute of limitations for auditing and collecting past due taxes.

10. Special Interest Issues

Transfer Pricing

The U.S., like most developed countries, has established rules and regulations regarding the ability of the IRS to allocate gross income, deductions, and credits between related taxpayers to the extent necessary to prevent evasion of taxes, or to clearly reflect the income of related taxpayers.

The U.S. regulations are based on the principle that transactions between related parties (controlled transactions) should be evaluated on an "arm's length basis." In other words, the pricing between related parties is evaluated against data supporting how unrelated parties would structure a similar transaction. Without these provisions, taxpayers could engage in abusive transactions with affiliates to minimize or eliminate taxes in higher-tax jurisdictions.

The transfer pricing regulations provide taxpayers with guidelines to follow and enumerate the permissible methods that can be used in supporting the transfer price. Failure to follow the transfer pricing guidelines can result in adjustments to taxable income and in some cases the imposition of substantial penalties. Obtaining evidence supporting a pricing position in advance of filing a tax return can be expensive, but it also can prevent penalties that can often be as much as 40% of the understated tax plus interest from the original due date.

Controlled Foreign Corporation Taxation

As stated above, the general rule is that income of a foreign subsidiary of a U.S. parent is not taxable (i.e., it is "deferred") until physically remitted to the U.S. However, the U.S. has had a CFC anti-deferral tax regime since 1962. Under this regime, certain income earned by a CFC, referred to as subpart F income, is taxed currently to the U.S. shareholders of the CFC, rather than at the time of distribution of such earnings. Undistributed taxed earnings are deemed to be distributed and re-contributed to capital, so the shareholder's basis is increased to the extent that income taxation is accelerated. Additionally, under these rules, the character of gains on the sale of CFC shares is often partly considered dividend income and partly capital gain.

A foreign corporation is a CFC if "U.S. shareholders" own more than 50% of the total combined voting power or value of the foreign corporation. A "U.S. shareholder" is a U.S. person (a U.S. citizen or resident individual, corporation, partnership, estate, or trust) owning at least 10% of the voting power or value of the foreign corporation. The ownership rules are complex and often consider related entities and families as a single owner. If an entity is a CFC, filing an IRS Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, may be required of the U.S. shareholders.

The four most common types of subpart F income are as follows:

1. Passive income, such as interest, dividends, rents, royalties, annuities, and net gains from the sale of assets producing the passive income. Rents and royalties are excepted if received from unrelated persons and derived in the active conduct of a trade or business. Interest and dividends are excepted if they are received from a related person located in the same country as the CFC;

2. Income from the manufacture and sale of goods outside the CFC's country of incorporation, if the goods are sold to or purchased by a related party;

3. Income from the performance of services for a related party, outside the CFC's country of incorporation; and
4. A CFC's earnings that are invested in U.S. assets.

Generally, income is not considered subpart F income if either: (1) the income is subject to a foreign tax rate of greater than 90% of the maximum U.S. tax rate; or (2) the CFC's subpart F income is less than the lesser of (a) 5% of the CFC's gross income, or (b) $1,000,000.

All calculations related to the CFC's activities are made using U.S. tax accounting principles in U.S. dollars. For example, depreciation must be recalculated using U.S. rules, and only 50% of meals and entertainment expenses are deductible under U.S. tax law. Thus, in many cases, the income computed under U.S. tax principles is greater than the income computed under local (foreign) law.

Strict annual disclosure rules apply to all CFC's and may apply to any greater-than-10% owner, director, or officer in a foreign corporation.

Passive Foreign Investment Companies
The passive foreign investment company (PFIC) rules apply to any U.S. shareholder of a PFIC, regardless of the total U.S. ownership percentage.

A PFIC is any foreign corporation that meets either an income test or an asset test. Under the income test, at least 75% of the corporation's income must be passive income (dividends, interest, rents, and royalties, as discussed above). Under the asset test, at least 50% of the corporation's assets must be held for the production of passive income.

If either test is met, regardless of their percentage ownership in a PFIC, the U.S. shareholders must either elect to include in income annually their share of the PFIC's earnings, or be charged interest on the amount of tax due when a large distribution is received or the shares of the PFIC are sold at a gain. All calculations are made using U.S. tax accounting principles in U.S. dollars.

Previously, a U.S. person who was a direct or indirect shareholder of a PFIC was not required to file additional information regarding the PFIC with the IRS unless the U.S. person: (1) recognized a gain on a direct or indirect disposition of PFIC stock; (2) received certain direct or indirect distributions from a PFIC; or (3) made an election to treat the PFIC as a Qualified Electing Fund (effectively a pass-through entity for U.S. tax purposes), in which case the U.S. person was required to file Form 8621, Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund, with the government.

However, Congress has enacted a law which now additionally requires a U.S. person who is a direct or indirect shareholder of a PFIC to annually file Form 8621 with the IRS.

Investing in U.S. Real Estate

Investors in U.S. real estate (e.g., U.S. real property) can utilize various investment entities, which can in turn change how those investors are taxed and how much tax they will pay in connection with their investment, sometimes regardless of results. LPs and GPs, corporations, and real estate investment trusts (REITs) are a few of popular options for making U.S. real estate investments. The choice of entity, including a special purpose entity interposed between the foreign investor and the U.S. real estate, is situation-specific.

The ultimate structure depends on factors such as the type of foreign investor (e.g., individual, corporation, trust, syndicate, etc.), the nature of the investment (e.g., long-term hold, net lease, development to sell, etc.), financing, the tax status of the investor, and whether widely-held public companies or simply private investors are involved. Projections and plans are essential, since conflicting structures often produce marginally or significantly better results based on the outcome. The flexibility of the U.S. tax and entity system makes the best structure a fact-driven decision. One thing that is virtually certain, however, is that a tax will be due when the property is sold to a third party at a profit due to special anti-avoidance legislation regarding dispositions of real estate. These rules from the Foreign Investment in Real Property Tax Act (FIRPTA) apply to all real property and its derivative forms, including mineral interests and most leaseholds and companies that own the property. The tax can be deferred, but sooner or later it will be due.

Like most countries, the U.S. also has special rules that both favor and manage tax avoidance in connection with foreign investment in real estate. Two are worth highlighting.

Gains from the sale of real estate can be deferred through so-called "like-kind exchanges," which are also known as 1031 exchanges, in reference to the section of the U.S. tax code that permits them. The process is regimented and investors must follow strict rules to never receive the cash from a sale. This is typically accomplished by using a qualified intermediary, such as title companies, trust companies, banks, or other special purpose entities that are in the business of accommodating like-kind exchanges on any sale that precedes a purchase. Cash received is taxed currently when sale proceeds are not fully re-invested through the intermediary. Strict timing and adherence to statutory form is essential, including identifying replacement property within 45 days following the sale of the relinquished property (or properties; exchanges involving multiple real estate interests are permissible), and the exchange for the replacement property must generally be completed within 180 days following the sale of the relinquished property. Through this technique, gain from successful investments in U.S. real estate can be deferred almost indefinitely. In some cases, the cash flow from operations and re-financing can be enjoyed tax-free for years.

In the anti-avoidance area, in addition to FIRPTA, the U.S. has strict anti-earnings stripping rules that apply to all but totally independent debt financing. Even if a foreign related person makes a special request of the domestic U.S. lender to provide any form of assurance of repayment, interest on the debt is only deductible to the extent of half the adjusted taxable income of the U.S. taxpayer.

Foreign Account Reporting

Each U.S. person who has a financial interest in or signature authority (or other authority) over any financial accounts, including bank, securities, or other types of financial accounts in a foreign country, must annually report details of the accounts to the U.S. Department of the Treasury if the aggregate value of the financial accounts exceeds $10,000 at any time during the calendar year. This information is reported on Form 114, Report of Foreign Bank and Financial Accounts, or FBAR, which must be filed annually if at any point during the calendar year a U.S. person had such ownership. The FBAR is due and must be received by the Financial Crimes Enforcement Network of the U.S. Department of the Treasury by April 15 of the year following the date that the requirements are met. An automatic extension to October 15 is available.

Failure to file the FBAR could result in civil and criminal penalties. The civil penalty for willful violations is the greater of $100,000 or 50% of the amount of the transaction, or the balance of the account, at the time of the offense. The maximum civil penalty for a non-willful failure to file is $10,000 per violation. If the amount of the transaction or the balance of the foreign account is reported on the taxpayer's Form 1040, U.S. Individual Income Tax Return, the penalty may be eliminated as a result of the "reasonable cause" exception. If the failure to file is deemed to be a criminal violation, the penalty can include a fine of up to $250,000, imprisonment for up to five years, or both. If the failure to file is deemed to be part of other criminal activity, the fine increases to $500,000, and the possibility of imprisonment increases to up to 10 years.

All U.S. citizens and residents, as well as all U.S. estates, trusts, partnerships, and corporations are subject to the FBAR rules, while nonresident aliens are not. There may be multiple FBARs required to be filed. The entity and individual shareholders or members may have filing requirements.

The "substantial presence" test may cause an individual to be required to file the FBAR. This test provides that an individual becomes a U.S. tax resident (regardless of immigration status), and thus a U.S. resident required to file the FBAR, if he or she is present in the U.S. during the current tax year for at least 31 days and for a total of 183 or more weighted average days over a three-year period that includes the two preceding calendar years. The weighted average is calculated by counting one day for each day in the current year, 1/3 of a day for the previous year, and 1/6 of a day in the second preceding year. Days of arrival and departure are counted as full days, no matter how brief the presence.

Any type of account that holds liquid assets or marketable securities meets the definition of "financial account" for reporting purposes. This includes everything from a cash account to a foreign mutual fund, along with certain foreign pension and insurance policies.

The ability to order the distribution or disbursement of funds by signing a document providing such direction qualifies the individual as having "signature authority" over the account. Individuals who can make investment decisions, but who do not have the ability or discretion to make disbursements, do not have an FBAR reporting requirement. For example, a director who does not operate or solely control management should not be required to file a form for an account on which he or she was not a signatory. Notably, an individual has a financial interest in every account for which the individual is the owner of record or has legal title.

Additionally, certain individuals, including those already filing the FBAR, may need to file IRS Form 8938, Statement of Specified Foreign Financial Assets. Filing requirements vary depending on the taxpayer's income tax filing status, the value of their foreign financial assets, and whether or not the taxpayer is domiciled within or outside the U.S.

Distributions and Dividends
Corporate distributions are first considered taxable dividends under U.S. tax principles to the extent of the corporation's "earnings and profits" (E&P). Distributions in excess of E&P are tax-free returns of capital to the extent of the shareholder's basis in the shares. Distributions in excess of basis are considered capital gains, which typically are not taxable to a foreign person. Earnings and profits reflect primarily the corporation's cumulative taxable income, plus certain adjustments. It is not identical to "earned surplus" or "retained earnings." There are special rules, discussed earlier, for companies that principally own U.S. real estate.

Thin Capitalization
The classification of a corporate obligation as debt or equity is of great importance in U.S. corporate taxation. Only interest is deductible against taxable income by the paying corporation. Dividends are not tax deductible by the payer. The retirement of a debt instrument is usually tax free, but the redemption of stock is generally taxable to the recipient. Treating an obligation as debt or equity is often critical in determining which of several provisions of U.S. tax law apply. While the form of the transaction executed by the taxpayer will typically prevail, U.S. tax law in this area provides broad authority for the IRS to re-cast a structure based on its economic substance over its self-serving form. Thus, in order to determine the federal tax implications, the substance of an obligation must be carefully evaluated in the planning stage before a transaction is consummated.

A U.S. tax deduction may be deferred for interest accrued by a corporation to a related person (generally a 50% or greater shareholder) that is not fully subject to U.S. income tax on the interest income. In order to receive a tax deduction, the interest must be paid to the related party. Additionally, there may be limitations on the deductibility of the interest for a U.S. corporation if the debt to equity ratio exceeds 1.5 to 1. This limitation can be calculated on IRS Form 8926, Disqualified Corporate Interest Expense Disallowed Under Section 163(j) and Related Information.

The deduction for interest paid to third parties may also need to be deferred if the indebtedness is guaranteed in any way, directly or indirectly, by a foreign related person. A deduction for interest that is so deferred is carried forward and may be deducted in future years. This "anti-earnings stripping" provision applies when a U.S. corporation realizes tax losses or insufficient amounts of taxable income prior to all interest charges, depreciation, and certain other adjustments, if the corporation's debt-to-equity ratio exceeds a prescribed ratio. Interest paid that is exempt from tax or subject to a treaty-reduced tax rate is subject to these deferral provisions. Finally, certain taxpayers are subject to a net interest expense deduction limitation of 30% of adjusted taxable income.

Corporate Liquidations
A corporate distribution to its shareholders in complete liquidation is generally treated as a sale or exchange by the shareholders of a capital asset. Except in the case of a U.S. real property interest, a foreign shareholder is generally not subject to U.S. taxation on the receipt of liquidating distributions, or any other capital gains.

The liquidating corporation generally recognizes a gain or loss on a distribution of its assets in complete liquidation, or on the sale of its assets in conjunction with a complete liquidation. An exception applies for the liquidation of subsidiaries, where the liquidating corporation and its 80% or greater corporate shareholder generally do not recognize gain or loss upon such a liquidating distribution. However, the liquidating corporation does generally recognize gain or loss if the parent corporate shareholder is foreign.

State and Local Governmental Incentives
State and local governments have historically provided various incentives to businesses in an attempt to induce them to locate their business in a particular area.

Some of these incentives are tied to the number of jobs a business will create and have taken the form of a reduction in the tax rate for a specified period of time, as well as tax credits, assistance in training the workforce, and property tax reductions or exemptions. These incentives may not be widely publicized. Learning about these incentives and securing them often involves contacting the appropriate state and local governments for details and negotiating with them to obtain the benefit.

Other recently emerging state and local incentives include "green programs" to promote energy efficient construction, as well as renewable energy projects.

Worker Classification
The proper classification of a worker as an employee or an independent contractor can have significant effects on a business and its workers. The determination of the proper classification of workers is a "facts and circumstances" test that has been the subject of much controversy and litigation. A worker is generally considered an employee when the employer has the right to control and direct the individual who performs the work. Control seems to be the most significant factor in distinguishing between the two classifications.

A plenitude of case law has identified six areas that the IRS focuses on when determining whether an individual is an employee or an independent contractor:

1. Details of the work performance;
2. Expenses of the work performance;
3. Compensation for the work performance;
4. Duration of the work position;
5. Structure of the work position; and
6. Location of the work performance

Even with all of this case law, the determination is often far from clear and is based on the facts and circumstances in each instance.

11. Personal Income Taxation

For 2018, the U.S. imposed a maximum individual income tax rate of 37% on ordinary income and a maximum capital gain rate of 20% in most instances. There is a deduction of 20% for flow-through entities in effect from 2018 to 2025

The 2018 graduated tax rates for single persons, excluding net long-term capital gains, are as follows:

Taxable Income Over:	But Not Over:	The Tax Is:	Of the Excess Over:
$0	$3,700	$0	$0
$3,700	$13,225	$0 plus 10%	$3,700
$13,225	$42,400	$952.50 plus 12%	$13,225
$42,400	$86,200	$4,453.50 plus 22%	$42,400
$86,200	$161,200	$14,089.50 plus 24%	$86,200
$161,200	$203,700	$32,089.50 plus 32%	$161,200
$203,700	$503,700	$45,689.50 plus 35%	$203,700
$503,700		$150,689.50 plus 37%	$503,700

The updated tax rates for 2019 are as follows:

Taxable Income Over:	But Not Over:	The Tax Is:	Of the Excess Over:
-	$9,700	- plus 10%	-
$9,700	$39,475	$970 plus 10%	$9,700
$39,475	$84,200	$4,543 plus 22%	$39,475
$84,200	$160,725	$14,382.50 plus 24%	$84,200
$160,725	$204,100	$32,748.50 plus 32%	$160,725
$204,100	$510,300	$46,628.50 plus 35%	$204,100
$510,300		$153,798.50 plus 37%	$510,300

Tax brackets are indexed for inflation. Please consult current information for the current tax rates.

There are separate tax rate tables for married persons filing jointly, married persons filing separately, and unmarried people with qualifying dependents (usually children), who are called "heads of household."

Special advantageous rules apply to long-term capital gains (assets held more than one year) and qualified dividends, which are generally taxed at 15%. High income taxpayers could be subject to a maximum 20% rate plus an additional net investment income tax of 3.8%.

An alternative minimum tax of 26% or 28% applies if a substantial amount of an individual's deductions or income excluded from current taxation is due to "preference items," such as a deduction for state and local income taxes, or the difference between the fair-market value and the amount paid for certain stock (i.e., "share") options.

State income taxes, if applicable, are in addition to the above federal income tax amounts.

Individual Income Tax

Individual income tax returns are almost always filed on a calendar-year basis, and the tax return is due on or before April 15 of the following year. An automatic six-month extension of time to file (not pay) can be requested, extending the filing date of the return to October 15. If there is estimated tax due, payment is required with the extension. Underpayments of tax may be subject to a penalty and interest is assessed from April 15 to the date of filing.

A special rule allows certain individuals who live abroad to file on June 15, but interest is charged on any underpayments from April 15 to the date of payment. An extension is available and must be filed by June 15 to extend the filing date of the return to October 15. If the due date falls on a Saturday, Sunday, or federal holiday, then the due date becomes the next business day.

Since U.S. tax is based on aggregated results of all activity, estimated tax payments may be required. Individuals generally make estimated tax payments if their income is not subject to withholding or if the withholding is not sufficient to cover the tax liability. An employer is required to withhold tax on wages, and this often satisfies the tax liability on the wages, unless an employee receives large lump sums like bonuses. The estimated tax payments are due on April 15, June 15, September 15, and January 15 of the next succeeding year. The payments can be equal installments based on the prior year's tax liability, or if the taxpayer has significant differences in income during the year, the payments can be based on the actual taxable income earned each quarter.

State Income Tax

State income taxes, if applicable, are in addition to federal income tax amounts. State and local income taxes vary by location. The state rates vary from zero (Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming) to more than 9% (California, Hawaii, New Jersey, Oregon, and Rhode Island). Some states replace income tax with wealth taxes, sales taxes, and/or other types of taxes. It is often important to evaluate the entire tax system of the state(s) in which the individual is located, or will be located, to quantify the tax costs of living and/or doing business in the U.S., and to perform effective tax planning. City income taxes also vary and can be as high as 4% (New York City).

The U.S. taxes its citizens and permanent residents (i.e., "green card" holders) on their worldwide income regardless where they reside. The foreign tax credit is designed to minimize the effects of any "double" taxation by the U.S. and a foreign jurisdiction.

In the year of arrival and the year of departure, the U.S. taxes foreign individuals who move to or from the U.S. as nonresidents, part-year residents, or full-year residents. Part-year residents and full-year residents are taxed on their worldwide income during the period of residency. Nonresidents are generally taxed only on their U.S. source income. Note, however, that U.S. source income includes all income from the performance of personal services in the U.S. if the income earned each year is more than $3,000, regardless of the residence of the payer. Thus, tax planning should occur before an individual moves to the U.S. In addition, the U.S. tax rules regarding trusts can be complex and the tax results can be surprising to foreign individuals. If applicable, the U.S. income tax rules regarding trusts should be addressed before an individual takes up U.S. residency. Special rules also apply in the year of departure, for three years thereafter, and for certain long-term permanent resident aliens, for up to 10 years post departure. Tax treaties with an individual's home country often reduce the exposure and complexity, but they must be considered for each particular set of facts. Knowing the rules regarding departure can prevent unexpected taxes or consequences in later years.

12. Estate and Gift Taxes

The estate and gift tax is not an income tax, but rather a wealth transfer tax. The transfer tax regime applies to taxable gifts of property made by an individual during his or her life and to taxable bequests made at death. The estate and gift tax regime is separate from the income tax regime. The U.S. estate and gift tax regime is assessed on the giver or transferor of the property (including the decedent, who is considered the transferor at the time of death). In general, the recipient is not taxed on the receipt of the property. The recipient is taxed under the income tax regime on the income earned by the property post-receipt, as well as the gain from the property's appreciation in the event of a future sale.

The federal estate tax was impacted by the TCJA, which is by far the most sweeping change to the U.S. tax code since 1986 and impacts practically every tax form that currently exists. The TCJA was passed in December 2017 and is effective as of January 1, 2018. The estate and gift tax has a maximum tax rate of 40%. For decedents dying and gifts made after December 31, 2017 and before January 1, 2026, the TCJA doubles the estate and gift exemption to $10 million (adjusted for inflation from the same 2010 base year). The 2019 indexed amount of the exemption is $11.4 million per person ($22.8 million per couple). On January 1, 2026, the exemption is scheduled to return to the 2010 base amount of $5 million per year, adjusted for inflation. This would mean the exemption would be approximately $6 million per person.

Estate Tax

For an estate of any decedent dying during calendar year 2019, the basic exclusion from estate tax is $11,400,000. On November 23, 2018, the IRS issued proposed regulations which clarify concerns of a future "claw-back" tax for taxpayers who take advantage of their increased lifetime exemption (also referred to as the "basic exclusion amount"). Commentators were concerned that if taxpayers took advantage of the increased gift exemption during 2018 through the end of 2025 and later died when the lifetime exemption returned to the 2010 base amount, the additional gifts could later be subject to estate tax. The proposed regulations ensure that a decedent's estate will not be inappropriately taxed with respect to gifts made during 2018 through 2025 that take advantage of the increased exemption.

There are two separate estate and gift tax regimes, one for U.S. citizens and U.S. residents, and a second regime for nonresident aliens. To further complicate matters, the definition of U.S. residency for estate and gift tax purposes is different from the definition for income tax purposes. A foreign citizen is considered a U.S. resident for estate and gift tax purposes if the individual's "domicile" is in the U.S. Domicile is defined as the place where the individual resides with an intention to remain indefinitely. A tax imposed upon long-standing resident aliens who permanently leave the U.S. has recently been enacted and should be reviewed. The tax impact of the resident's state and states in which taxable property resides also should be reviewed.

U.S. citizens and U.S. domiciled foreign citizens are taxed at death on the fair market value of all of the decedent's worldwide assets less certain deductions.

One of the deductions allowed is the marital deduction for transfers to the decedent's spouse, but only if the spouse is a U.S. citizen or if the property is transferred to a special trust for the benefit of the spouse who is a non-U.S. citizen. Otherwise, U.S. estate tax generally applies to any U.S. estate over $154,000.

Only certain property situated in the U.S. owned by a foreign citizen not domiciled in the U.S. at the time of death—and not a U.S. citizen—is subject to U.S. estate tax. Generally, stocks and bonds of U.S. corporations, U.S. real estate, and pensions (including deferred compensation accounts) are included in a U.S. estate. Deposits in a U.S. bank and proceeds from a life insurance policy are generally not included in a U.S. estate. Estate tax treaties (the U.S. has estate tax treaties with eight countries, and estate and gift tax treaties with another seven countries; these treaties are similar in some respects to income tax treaties) may mitigate the inclusion of certain U.S. situated assets in a nonresident alien's gross estate. For example, several treaties exclude stock and debt of U.S. corporations owned by nonresident aliens in treaty countries.

Gift Tax

U.S. citizens and U.S. domiciled foreign citizens are subject to gift tax on the fair market value of all gifts made during a lifetime, unless an exclusion exists. For example, an unlimited exclusion is available to pay for any third-party medical or educational expenses. For this exclusion to apply, the bills must be paid directly, not as reimbursements to a friend or a relative.

An individual can also make multiple gifts of $15,000 each in 2019 to separate recipients. These gifts are not included in the total amount of the donor's taxable gifts during that year. The annual exclusion amount is indexed annually for inflation. Married couples can treat the gift as if each made one-half of the gift.

Doing so can double the amount that can be transferred annually tax free to any one recipient. All gifts between spouses who are both U.S. citizens are tax free (similar rules apply to divorce settlements). For 2019, the annual limit on tax free gifts to a non-citizen spouse is $155,000. This exclusion amount is indexed for inflation each year and does not need to be reported.

Gifts made by foreign citizens, who are not domiciled in the U.S., are generally exempt from U.S. gift taxes. U.S. gift tax applies only to gifts of U.S. real property and tangible personal property. Gifts of U.S. tangible property, including cash, U.S. stocks and bonds, are generally not subject to U.S. tax, as long as the gift is not made in the U.S.

A recipient's basis in a gift for U.S. income tax purposes is generally equal to the transferor's basis in the item prior to the gift.

Gifts of less than $100,000 received by U.S. citizens and U.S. residents (as defined under the income tax regime) from foreign citizens are not taxable in the U.S. However, aggregate gifts of over $100,000 received during a calendar year must be reported to the IRS on Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts.

When a donor does not pay gift tax, the receiver may have "transference liability" in some cases. Failure to report gifts can be subject to a penalty of 5% of the gift for each month, up to a maximum of 25%.

For 2019, the unified rate schedule for the estate and gift tax is as follows:

Column A	Column B	Column C	Column D
Taxable Income	Taxable Amount	Tax on Amount	Rate of Tax on Excess Over Amount
Over:	Not Over:	In Column A:	In Column A (Percent):
$0	$10,000	$0	18
$10,000	$20,000	$1,800	20
$20,000	$40,000	$3,800	22
$40,000	$60,000	$8,200	24
$60,000	$80,000	$13,000	26
$80,000	$100,000	$18,200	28
$100,000	$150,000	$23,800	30
$150,000	$250,000	$38,800	32
$250,000	$500,000	$70,800	34
$500,000	$750,000	$155,800	37
$750,000	$1,000,000	$248,3000	39
Over $1,000,000		$345,800	40

APPENDIX A: A Select List of Useful Websites

Listed below are some websites that contain extensive information and further details on issues related to the U.S., particularly on matters of business, the economy, taxes, and commerce. Most of these sites contain multiple links to other sources that may be helpful. Several of the sites include information in more than one language as well. This is by no means intended to be the definitive list of websites related to U.S. information.

http://www.moore-na.com - Visit our website to find out more about Moore North America, Inc., including the services our member firms provide, and the locations of member firms.

http://www.moore-global.com - Visit the MGNL website to find out about our global services and the worldwide locations of our member firms.

http://www.fedstats.gov – Provides access to key statistical sources within the U.S. government (multiple bureaus and agencies). Also includes a statistical profile of each state.

- Economics and Statistics Administration – http://www.esa.doc.gov
- Bureau of Economic Analysis – http://www.bea.gov The BEA promotes a better understanding of the U.S. economy by providing timely, relevant, and accurate economic data in an objective and cost-effective manner.
- Bureau of Labor Statistics – http://www.bls.gov Principal fact-finding agency for the federal government in the broad field of labor economics and statistics.
- Census Bureau – http://www.census.gov Includes in-depth population figures, nationally, by state, ethnicity, etc. Includes data from most recent nationwide census (2010), as well as archived data. Also includes much economic and international trade data.
- International Trade Administration – trade.gov/index.asp Ensures fair trade through the rigorous enforcement of U.S. trade laws.

http://www.usa.gov – Provides information on many topics, including jobs and education, money and taxes, consumer protection, and environment and energy.

http://www.ustreas.gov – This is site for the U.S. Department of the Treasury. In addition to accounting and budget information, this site includes an international section with trade and market information.

http://www.irs.gov – Internal Revenue Service site includes a section on foreign tax information and guidance, including "Essential Concepts of International Taxation."

http://www.ssa.gov/international – Social Security Administration site contains information about the its Office of International Programs, including social security programs in other countries.

dir.yahoo.com/Government/U_S Government/Taxes/State_Tax_Agencies/ – Yahoo! maintains a list of websites with information for the various states.

http://www.dol.gov – Official site of the U.S. Department of Labor includes information on workforce issues.

http://www.sec.gov – The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

http://www.pcaob.com - The Public Company Accounting Oversight Board is a non-profit organization created to oversee the auditors of public companies and to protect the interest of investors and the general public.

http://www.fasb.org – The mission of the Financial Accounting Standards Board is to establish and improve standards of financial accounting and reporting for the guidance and education of the public, including issuers, auditors, and users of financial information.

http://www.aicpa.org - The mission of the American Institute of Certified Public Accountants is to provide members with the resources, information, and leadership that enable them to provide valuable services in the highest professional manner to benefit the public as well as employers and clients.

APPENDIX B: A Review of the U.S. Tax System for Incoming Foreign Executives

A Review of the U.S. Tax System for Incoming Foreign Executives
The following is a general outline of tax issues faced by foreign executives coming to the U.S. The U.S. tax law with respect to the taxation of foreign individuals is complex, and a competent tax advisor should be engaged to ensure full compliance with the tax laws.

Often, the type of tax is blurred because the terminology that is familiar to most Americans is confusing, vague, or unknown to the foreign executive. These topics should be reviewed with a tax professional familiar with local customs, since there are tens of thousands of taxing jurisdictions with separate rules throughout the U.S. Typically, only a few are visible to the taxpayer, but the person new to the system often needs to know about the taxes that are controllable and those that will affect the executive's family.

1. Income tax. Estimates to pay this tax are generally withheld from payroll by every employer whenever the company pays employee compensation. Compensation includes salary, bonus, and most fringe benefits, such as housing and the personal use of employer-owned automobiles.

   These taxes are subtracted from each paycheck, but these "withholdings" are not tax payments; they are deposits on account. These withholdings are reported to the government when the employee files an annual income tax return reporting wages and withholdings, along with all other forms of taxable income. Some types of income are subject to withholding and some are not. All income is taxable to residents, subject to special exceptions, exclusions, deductions, and credits.

   Accordingly, by filing an income tax return with the annual self-assessment of tax, the employee's taxes are officially "paid" by crediting the wage withholdings along with any quarterly estimated tax payments that are tendered by taxpayers who do not have sufficient overall withholdings to meet their expected tax liability. If the employee has overpaid the tax liability, a refund in cash can be requested or the employee can apply it to the next year. If the employee has underpaid the liability, the employee must pay the additional tax before April 15 to avoid expensive interest and underpayment penalties, even if an extension of time to file is requested.

   The adequacy of tax payments during the year is the employee's responsibility. If he or she under-contributed, modest underpayment penalties must be paid, which are based on market interest rates. A separate tax return and accounting is prepared and submitted to each government where the employee works, lives and/or has sources of income. This includes:

   a. Federal income tax;
   b. Resident state Income tax;
   c. Work/office state's income tax, if different from the employee's resident state; and
   d. Other states/city income taxes, where applicable

2. Payroll tax. A federal tax is paid by all employees based on wages and withheld from all compensation payments. The employer pays a matching amount. These taxes are paid and subtracted from each paycheck. This is a tax assessment and no further tax return is filed.

a. FICA tax, which is for the U.S. retirement system, generally referred to as Social Security tax, is normally charged at 6.2% of the first $132,900 for 2019, adjusted annually.

b. Medicare tax, which provides health care for elderly persons, disabled workers, and certain survivors (children and spouses) of wage earners, is charged at 1.45% of all compensation.

3. Real Property tax. Real property tax is commonly referred to as "real estate tax" and is charged to owners of real property, typically twice a year. For example, homeowners are taxed annually by the community they live in so that the local government can provide local services, such as schools, sanitation, fire, and police.

These taxes are prorated when a house is purchased or sold. Thereafter the owner receives a bill from the local community once or twice a year and must make the payment directly. Sometimes, the payments can be made quarterly. It is important to pay these bills on time as they are completely the homeowner's responsibility, even if the government forgets to send the bill or does not change its records from the old to the new owner. Each homeowner should actively monitor this, especially when changes occur.

Some mortgage companies take on the responsibility of paying real estate taxes because the government's lien for real estate taxes is superior to their claim. In such instances, the mortgage company collects payments from the homeowner, holds them in escrow, and pays the bills when due. Escrow statements should be reviewed annually when this system is being used to make sure transactions are being handled correctly, especially because paying the mortgage company may not relieve the homeowner of the liability (e.g., if the mortgage company does not pay the local government).

4. Personal property tax. Some states, such as Connecticut, have an annual personal property tax on some important, expensive items, such as automobiles. Often, states will mail out partially completed forms for taxpayers to self-assess. People in these states need to be aware of the tax and their responsibility.

5. Transfer tax. Transfer tax and mortgage recording taxes are common fees charged in connection with the purchase and sale of a home or other real property. These are calculated and paid as part of the purchase or sale transaction and should be reviewed with a representative in connection with the transaction.

6. Excise and other taxes. There are many of other minor taxes, customs duties, and transaction fees charged by the various governments that all coexist in the U.S. Generally, the responsibility for payment of these items lies with the manufacturer or merchant, and they are invisible to the consumer and require no other action other than paying the bill from the vendor. The vendor adds the charges for these items to the cost of the products, as is the case with any airline ticket or telephone bill. Others are not covered here because they are limited to very few jurisdictions.

APPENDIX C: Immigration Options for Assigning, Transferring, and Employing Foreign Nationals in the United States

By Kathleen M. Gaber[1]

The need for careful compliance with the U.S. immigration system has perhaps never been greater. U.S. immigration law has been likened in complexity to the Internal Revenue Code (i.e., the U.S. tax code). There are virtually daily changes to law, regulations, policies, and procedures particularly under our current administration. It must be kept in mind that in setting policy, the interests of both domestic and foreign corporations in obtaining visas for foreign born employees must be weighed against national security concerns and a desire to protect the American workforce.

The Buy American and Hire American (BAHA) Executive Order, which was signed into law on April 18, 2017, was issued with the intent to promote the hiring of American workers as opposed to the sponsorship of foreign workers for U.S. jobs, among other purposes. As it pertains to immigration, BAHA has required the U.S. Secretary of State, the U.S. Attorney General, the U.S. Secretary of Labor, and the U.S. Secretary of Homeland Security to propose new rules and issue new guidance, and to supersede or revise previous rules and guidance where appropriate, in order to protect American workers as well as to prevent visa fraud and abuse. At the time of this update, governmental agencies that are charged with the enforcement of the U.S. immigration laws are only now starting to issue new and revised guidance with regard to visa issues/processing. Consequently, all employment-based visa petitions as well as entries into the U.S. by foreign nationals are much more highly scrutinized than ever before. For these reasons, it is prudent for employers to use the services of experienced U.S. immigration lawyers to navigate the visa process, and to provide advice on the options available in any given situation.

This outline will provide general information on the most commonly used employment-based visa classifications in alphabetical order, with commentary on current issues which companies are encountering on a regular basis.

B-1 VISA: VISITOR FOR BUSINESS CLASSIFICATION

The B-1 Visitor for Business Non-immigrant Classification allows a foreign national to enter the U.S. to engage in legitimate business activities of a temporary nature which do not amount to productive employment. Individuals who are citizens of certain low-fraud countries who are eligible to come to the U.S. as a Business Visitor pursuant to the Visa Waiver Program, must demonstrate compliance with the B-1 requirements to the U.S. Customs and Border Protection (CBP) Officer when entering the U.S. at a port of entry.

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If entry under the visa waiver program is not possible, then the applicant must first demonstrate entitlement to the classification at a U.S. Embassy or Consulate in the home country in order to obtain the visa, and then again to the CBP Officer when entering the U.S. Permissible stated activities under this classification include the following:

- Conducting commercial transactions, such as a merchant who takes orders for goods which are manufactured abroad;
- Negotiation of contracts;
- Consultation with business associates;
- Litigation activities;
- Participation in a scientific, educational, professional or a business seminar, conference or convention; and
- Undertaking independent research.

It is also important to note that the period of time requested must be consistent with the purpose of the trip and should be of a limited duration. In addition, the applicant may not be paid a salary in the U.S. but may be provided incidental expenses from a U.S. source including costs of transportation/ travel, a per diem expense, and payment for lodging and meals.

B-1 Commentary: There is heightened scrutiny on individuals using the B-1/visa waiver program for short term assignments. A refusal at the port of entry can result in expedited removal which comes with a five-year bar and so the stakes are very high. In addition, a refusal makes the foreign applicant ineligible for further use of the visa waiver program and so there is a significant personal risk to the applicant in cases where U.S. activities could arguably be construed as employment. In addition to the more traditional employment-based visa categories referred to in this guide, a possible option could include a "B-1 in lieu of H-1B," which could provide limited employment for a short-term assignment. See the H-1B section below.

E-1/E-2 TREATY TRADER/INVESTOR CLASSIFICATION

The E-1/E-2 non-immigrant visa is intended to benefit companies and citizens of countries that have a Treaty of Friendship, Commerce and Navigation, or a Bilateral Investment with the U.S. Qualifications include the following:

Nationality. The U.S. entity must have the nationality of the treaty country meaning that at least 50% of the shares must be owned by individuals or organizations of the treaty country. Ownership must be traced back to the ultimate owners of the company and be documented by passport verification.

Substantial Trade or Substantial Investment. To qualify for an E, the U.S. enterprise must either: a) be engaged in substantial international trade between the U.S. and the treaty country (E-1 treaty trader); or b) represent a substantial investment in the U.S. by the treaty investors (E-2 treaty investor).

- Substantial Trade (E-1). "Trade" generally means goods, services or technology exchanged between the U.S. enterprise and the treaty country. The trade must be "substantial" and represent a continuous flow of items of trade as opposed to one high-value transaction. In addition, at least 50% of the total volume of international trade of the enterprise should be between the U.S. and the treaty country.

- Substantial Investment (E-2). The investor(s) of the treaty country must have made (or be in the process of making) a "substantial investment" in a U.S. enterprise. "Investment" must be capital at risk in the enterprise and must be subject to loss if not successful. However, there is no bright line indication of the amount of funds which is deemed substantial for visa issuance.

Individual Applicant. The principal applicant must have the same nationality as the treaty country and be qualified to render services to the U.S. enterprise in a position which can be classified as an executive, supervisor, or one which requires special qualifications that are essential to the company's operations.

E-1/E-2 Commentary: E-1/E-2 status can be revoked for publicly traded companies when more than 50% of their shareholders are not nationals of the treaty country. Shareholder information is frequently listed in the company's Annual Report and thus, foreign ownership may be readily available to the visa officer when reviewing the application. E-2 classification can be unpredictable because there are no concrete guidelines which clearly define what amount of money is considered as "substantial" in order to obtain the visa. However, advantages to this classification include the fact that there are no limitations on the amount of time that an applicant may remain in the U.S. in this category as long as the company and applicant continue to qualify for the classification.

E-3 AUSTRALIAN SPECIALTY OCCUPATION CLASSIFICATION
The E-3 visa is reserved specifically for Australian citizens who will be engaged in a specialty occupation in the U.S. It is similar to the H-1B classification discussed below and requires the filing of a Labor Condition Application (LCA) with the U.S. Department of Labor (DOL). Unlike the H-1B classification, the quota of 10,500 is far from being met and there are potentially unlimited extensions.

H-1B SPECIALTY OCCUPATION CLASSIFICATION
The H-1B visa classification is available to foreign nationals who will be performing duties in a "specialty occupation" for which they qualify. A "specialty occupation" is a profession which requires, at a minimum, the attainment of a Bachelor's Degree or its equivalent in a specific field in order to perform the duties. Examples of "specialty occupations" include actuaries, architects, engineers, and scientists, among others. In order to qualify, the foreign national must also possess a Bachelor's Degree or its equivalent in the field required by the occupation.

The process includes the electronic filing of an LCA with the DOL after the employer makes and internally posts various attestations including those relating to wages and working conditions. The wage attestation requires the employer to attest that the employee will be paid the higher of the actual wage or the prevailing wage as determined by governmental or private wage surveys specific to the metropolitan statistical area of employment and the minimum requirements of the position. That wage must also be paid to other employees who are in the same or similar position.

The H-1B classification is subject to a quota in any given fiscal year that runs from October 1 to September 30. There are two different pools of numbers under the quota. The U.S. Citizenship and Immigration Services (USCIS) may only approve 65,000 petitions in the general pool (minus 6,800 that are reserved under certain free trade agreements, with any excess numbers not used under those agreements returned to the general pool). There are an additional 20,000 numbers that exist for foreign nationals who have earned a U.S. Master's or higher degree. Employers may file H-1B petitions up to six months before the requested start date. In recent years, because the H-1B quota has been met within the first five business days beginning April 1st (which is six months prior to the start of the government's fiscal year commencing on October 1), the USCIS conducts a computer generated, random selection process (or lottery) to select applications.

This category also has a return transportation requirement which mandates the employer to provide the individual with the reasonable costs of return transportation to the home country or country of last residence in cases where the employee is terminated prior to the conclusion of the approved H-1B validity period.

H-1B Commentary: The H-1B visa is in high demand due to the fact that it is one of the few categories available for local hires. In addition, it does allow extensions beyond the maximum period of six years for those who are in the permanent residence or "green card" process. Furthermore, although this category is employer-specific, it is also portable to a new employer under certain circumstances upon the filing of the petition but prior to its approval. However, under the current administration this category has come under attack with Requests for Evidence questioning whether certain IT professions require a degree as the minimum entry level credential and also questioning wage levels by often linking them to the person's credentials as opposed to the requirements of the position. In addition, over the past several years, there has been talk of changes to the filing process which currently puts an immense burden on the system and has an adverse spill-over effect on the adjudication of other classifications due to the high number of H-1B applications filed and the processing burdens to select and review applications. The USCIS confirmed receipt of 199,000 applications for the 2018-2019 fiscal year.

Finally, under limited circumstance, there is a hybrid visa classification referred to as the "B-1 in lieu of H-1B" that can be used by foreign nationals who wish to enter the U.S. to engage in legitimate business activities of a temporary nature that also qualify as a specialty occupation. Similar to the B-1, the employee must be employed and salaried abroad. Similar to the H-1B, the activities in the U.S. must be classifiable as a specialty occupation and the employee must have corresponding credentials. The downside is that this classification is only approvable only when the duration of the U.S. assignment is 6 months or less.

H-3 TRAINEE CLASSIFICATION

An H-3 trainee is a non-immigrant classification allowing a foreign national to receive training in any discipline (other than graduate medical education training) which is not available in the home country. In addition, the individual should not be placed in the normal operation of the business and the training should not amount to productive employment that displaces U.S. workers. The H-3 status can be approved for up to two years as long as the training program can be documented over the entire period.

H-3 Commentary: Over the past years, H-3 petitions have been difficult to get approved in cases where the petitioning entity does not have a dedicated training facility/classroom and a dedicated trainer, although this is not stated in the regulations. The petitioning entity must include a detailed description of the training program, including the type of training and supervision the person will receive, and the proportion of time allocated to classroom instruction and on-the-job training. Companies that intend to use this category merely for on-the-job training should look to other alternatives.

J-1 EXCHANGE VISITOR CLASSIFICATION

The J-1 visa category can be used by foreign students, scholars, experts, and business trainees to enter the U.S. as "exchange visitors" in an approved U.S. State Department Exchange Visitor Program for the purpose of gaining experience, studying, or doing research in their respective fields. Trainees are not allowed to be placed in positions which are filled or could be filled by full-time or part-time U.S. employees. The vast majority of trainees are sponsored by an approved U.S. State Department designated Exchange Visitor Program, which is referred to an "umbrella organization" because although it is the official sponsor, it can place the trainee at a third party organization.

J-1 Commentary: Very few individual companies go through the registration process to become an official sponsor and so there are a number of Foreign Chambers of Commerce in the U.S., and other organizations that are available to act as an umbrella organization for a fee. Problems can arise when the third party organization wants to hire the trainee in the U.S., since that is typically not permitted by the Program Sponsor.

L-1 INTRACOMPANY TRANSFEREE CLASSIFICATION

The L-1 classification is available to certain executives, managers, and employees utilizing specialized knowledge in their positions who are being transferred to related subsidiaries, affiliates, branch offices, or parent companies in the U.S.. The L-1 requirements include the following:

- There must be a qualifying relationship of parent, subsidiary, branch office, or affiliate between the employee's foreign employer and the U.S. petitioner;
- The employee must have worked outside of the U.S. for a period of one year in the three years preceding the application for a qualifying entity;
- The employment abroad and the position in the U.S. must be classifiable as either executive, managerial, or one requiring specialized knowledge although the position can be different; and
- The U.S. company and the related company abroad must be doing business during the whole period of the transfer.

Meeting the definition of a subsidiary company requires elements of both ownership and control and it does not allow for significant deviation from a 50% interest unless control can clearly be documented for the minority owned company.

L Blanket Petitions

There are two filing variations to the L-1 category, a traditional petition or an L-1 blanket petition. The L-1 blanket is available to larger multinational companies that can demonstrate U.S. sales of at least $25 million, a total U.S. workforce of 1,000 employees, or at least 10 transfers in one year. If one of the requirements can be met, all qualifying Group companies can be preauthorized through the filing of a blanket petition with the USCIS. Subsequently, individual applicants apply directly for the L-1 visa at the U.S. Embassy or Consulate without having to first obtain a petition approval from USCIS. The applicant under a blanket petition must still fulfill the requirements of being a manager or executive. However the specialized knowledge prong requires that the employee be qualified as a specialized knowledge professional which connotes an academic degree or professional credential.

L-1 Commentary: The L-1 classification is a very desirable option for multinational companies, but current statistics confirm that traditional petitions have the lowest approval rate since the category was created in the 1970s. A traditional petition must be filed and approved by the USCIS before the employee can process for the visa at an embassy or consulate abroad. However, heightened scrutiny has been in place for the past several years in part because of the perceived abuse of the category by IT companies which have opened up offshore offices due to the unavailability of sufficient H-1 visas. In addition, it is particularly difficult to obtain approval for "New Offices," which are defined as an office doing business in the U.S. for less than one year. These petitions have additional requirements that must be met both at the initial filing stage as well as the extension stage. Finally, managers are also becoming more difficult to get approved as the USCIS takes the position that a manager should not be engaged in the day-to-day duties of the position.

O EXTRAORDINARY ABILITY CLASSIFICATION

The O category is available to those who can demonstrate sustained national or international acclaim and recognition for their achievements in the designated field of expertise. The criteria slightly varies between athletes, artists, and businesspersons, with the latter having to demonstrate "[a] level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor." Documentary evidence may include proof that the individual has received a major, internationally recognized prize or award, such as the Nobel Prize. In lieu of this, a person could document at least three of the following:

- Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

- The person's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their discipline;

- Published material in professional or major trade publications or major media about the person, relating to their work in the field of endeavor;

- The person's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization;

- The person's original scientific, scholarly, or business-related contributions of major significance in the field;

- The person's authorship of scholarly articles in the field, in professional journals, or other major media;

- Proof that the person has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or

- Evidence that the person has either commanded or will command a high salary or other remuneration for services.

This category also requires the attainment of a Consultation from a peer, labor, or management organization regarding the nature of the employment and judging the person's qualifications as extraordinary in the field prior to the Petition being granted.

O-1 Commentary: The O category can be overlooked when considering employment-based options due to the heavy documentary requirements, the subjective nature of the ultimate decision of whether the totality of the evidence demonstrates the requisite international acclaim, and the time required to properly document the case.

TN TRADE NAFTA CLASSIFICATION

The North American Free Trade Agreement (NAFTA) created the TN classification for citizens of Canada and Mexico who are engaged in certain specified "business activities at a professional level." In order to qualify for TN classification, the applicant's profession must be included in Appendix 1603.D.1 of the NAFTA. Most classifications require the applicant to possess at least a Bachelor's Degree or other appropriate credentials in order to evidence their status as a professional. Canadian applicants are visa-exempt and may apply for TN status directly at a port of entry. Mexican applicants are not visa exempt and still require a visa if entering from outside of the U.S.. If either a Canadian or Mexican applicant is maintaining status in the U.S., they may file for a change of status or change of employer without leaving the U.S.

TN Commentary: A TN employee must be able to document a residency abroad which they do not intend to abandon. Therefore, foreign nationals who have indicated to an immigration officer their desire to remain permanently in the U.S. (e.g., by intending to file, filing, or being the beneficiary of a labor certification or PERM application, or Form I-140, Immigrant Petition), may be denied entry to the U.S. since "Dual Intent" is not allowed. In addition, recent guidance was issued by the USCIS with regard to the position of economists, stating that economists must be engaged as economists and not as other financial/marketing research professionals. It is possible that this strict interpretation, a direct result of BAHA, could be extended to other listed professions at any time, thus severely limiting the practical use of the category.

PERMANENT RESIDENCY STATUS

Some individuals who are transferred to the U.S. or foreign nationals who are hired locally in the U.S. do wish to become permanent residents (aka "green card" holders or resident aliens). Most categories require employer sponsorship as opposed to self-sponsorship. There are pros and cons to employer sponsorship. Pros include that the status, once obtained: relieves the employee of the need of the constant filing of extensions and visa reissuances for him or herself and all dependent family members; reduces travel delays at the port of entry as a result of inquiring visa officers; and reduces the stress on an employee of knowing that an unexpected reorganization or reduction in force can result in a forced return to a home country without employment prospects on short notice. In addition, it allows for upward mobility within the company, the ability for family members including spouses and teenaged children to work in the U.S., and can pave the way to U.S. citizenship. The cons, however, include the costs (some of which must legally be borne by the employer), the amount of time necessary to complete the process (which can be more than ten years for individuals from certain countries, during which time their professional progression can be limited), and, most compellingly, that once the status is obtained, the individual is no longer bound to the sponsoring employer.

The complexity of the permanent residency process goes beyond the scope of this limited Appendix. In addition, there can also be significant tax considerations that should be discussed with tax advisors prior to embarking upon this process. A general summary of only the employment-based categories is provided below.

Some employment-based categories allow for the immediate filing of an Immigrant Petition with the USCIS. These categories include petitions for Aliens with Extraordinary Ability (similar to the O-1 non-immigrant category), certain Outstanding Professors and Researchers who are recognized internationally for their outstanding academic achievements in a particular field, and certain Multinational Executives and Managers who were employed outside the U.S. for at least one year within the three years prior to their transfer and who will be occupying a managerial or executive position with a U.S. branch, affiliate, or subsidiary of the same company (similar to the L-1 category).

However, the majority of the individuals will need to undergo a longer, three-stage process which is commenced by obtaining a permanent labor certification issued by the DOL through the "PERM" program, provided that the employer first demonstrates that there are no qualified U.S. workers who are able, willing, qualified, and available to accept the position offered by the U.S. employer at the prevailing wage for that occupation after going through recruitment. Recruitment steps include: the posting of an advertisement for the proposed position in two Sunday editions of a newspaper that circulates in the intended area of employment; the posting of the job opportunity on the appropriate state employment agency's job order website; and the posting of a notice about the position which includes a job description, the minimum requirements for the position, and salary or salary range for the position at the worksite.

For professional positions that require a Bachelor's or higher degree, employers must: conduct an additional three forms of recruitment/advertising such as posting on the employer's website; posting on a job search website; on-campus recruiting; posting in a trade or professional publication; using a private employment firm; using an employee referral program with incentives; local and ethnic newspapers; and radio and television advertisements.

If the DOL approves the labor certification, then the employer files it in conjunction with a Form I-140, Immigrant Petition for Alien Worker, for the next stage of the "green card" process. However, the third and final processing stage cannot be completed until there is an immigrant visa available to the employee based upon their nationality and the employment-based category which is determined by the minimum requirements of the position. Visa availability is subject to quotas and many employees, particularly those from India and China, wait up to 10 years and longer for their categories to be reached.

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