

A low-angle photograph of the Statue of Liberty, showing her head with the crown and her right arm raised holding the torch. The statue is set against a clear, bright blue sky. The image is partially obscured by a dark blue vertical bar on the right side of the page.

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“Doing Business in the United States” A Guide for Foreign Investors

By: Karen A. Monroe, Partner, Geneva, Switzerland
kmonroe@wilkauslander.com

DOING BUSINESS IN THE UNITED STATES

The following is a very brief description of the various forms of business organizations available for doing business in the United States and does not constitute legal advice. All these forms of doing business are subject to both federal and state law; and, therefore, requirements may vary from state to state. It is advisable to consult an attorney knowledgeable in cross-border corporate matters and tax to assist with determining the most appropriate business form. Seeking the advice of specialists is particularly important in the United States because the United States is generally more litigious than Switzerland and damage awards are potentially much higher than in Switzerland. It is also advisable to have all agreements in writing and preferably reviewed by an attorney before signing. It is also important to seek the advice of an expert in the area in which you want to do business because there might be specific rules in certain categories of businesses or products; namely, the requirement to obtain a license or an authorization from a governmental agency (for example, opening a restaurant or selling new pharmaceutical products).

STARTING A BUSINESS IN THE USA

In starting a business, a primary consideration is the legal structure of the entity that you will use to operate the business. There are several options to choose from, each of which has practical as well as legal advantages and disadvantages that should be carefully considered

in light of your particular circumstances. Before choosing a legal structure that is right for your business, it would be prudent for you to examine your goals for the business, both in the short and long term and consider each type of legal structure in light of the direction that you envision for your business. The discussion of each type of legal structure that follows will highlight the general distinct features that will play a role in your choice of entity. This type of initial strategic planning will enable you to maximize your business' potential as it grows and develops.

Sole Proprietorship

The first type of business structure for you to consider is a sole proprietorship. This is the simplest form of business structure and costs the least to maintain. This structure is largely informal and consists of just one individual who functions as owner and operator of the business. From a tax perspective, the advantage of a sole proprietorship is that business expenses and income are included in the sole proprietor's personal income tax, thereby allowing business losses to offset other income. This type of business structure is also less expensive when it comes to preparing tax returns because the business itself does not need to file separate tax returns. However, this advantage from a tax perspective may be realized in other business structures as will be discussed below. Thus, the basic advantage of a sole proprietorship is the ease in which a business may be formed and the relative inexpensive cost of starting the business. Unlike other types of business structures as

discussed below, the death of the sole proprietor means the death or the end of the business.

A significant disadvantage of a sole proprietorship is that the sole proprietor is personally liable for the business' liabilities. This means that your personal assets such as your car or real estate can be seized to satisfy the business' debts and obligations, including any judgments resulting from lawsuits. Although the impact of this disadvantage may be managed by purchasing insurance and other similar measures, this is an important factor to be considered in starting a business. In addition, banks and other sources of financing may be reluctant to provide funding to a sole proprietor because the individual may be viewed as having insufficient resources to satisfy obligations. Because of these reasons it is uncommon in the U.S. to utilize sole proprietorships.

Corporation

The next type of business structure to consider is the corporation. A corporation is a complex form of business structure that must be formally incorporated by filing various forms such as articles of incorporation and paying specified fees with the state of incorporation. Owners of a corporation are called stockholders or shareholders and their ownership interest in the business consists of shares of stock of the corporation. The corporation is managed by a board of directors that is elected by the shareholders and the board of directors appoints officers that manage the day-to-day affairs of the company.

Setting up the proper capital structure, including the number of shares to be authorized and issued and the number of shareholders is critical to the success of a corporation and requires professional advice and significant planning. The formation, governance, and operation of a corporation are subject to many rules and regulations at the state level, as well as the federal level in some cases. Because of the relative complexity that is involved in forming and operating a corporation, there are increased costs associated with the corporation which include accounting, tax, and legal services.

The distinguishing feature of a corporation is that it is a separate legal entity created under the laws of the state of incorporation. As a distinct legal entity, the corporation has rights and obligations that are in most cases separate from the shareholders. This means that the corporation may be sued, borrow money, and enter into agreements and do all other things wholly separate from its shareholders. A significant benefit that arises from this feature is that the corporation offers shareholders limited liability protection of personal assets, assuming that the corporation follows proper corporate form as provided under the law of the state of incorporation. In addition, the separate legal entity status of a corporation gives the business perpetual life whereby the death of a shareholder does not theoretically affect the business. The perpetual existence and perceived permanence of the corporation may make it somewhat easier for the business to secure funding.

Another significant feature of corporations is that income earned by corporations is potentially subject to a double tax. Corporations are subject to corporate income tax at the federal and state level, and the earnings that the corporation distributes to its shareholders as dividends are also taxed at individual tax rates on the shareholders' personal tax returns. There are, however, several ways to soften the impact and manage double taxation. One way to do this is to elect to have the corporation taxed under Subchapter S of the Internal Revenue Code. The C corporation is the regular corporate form that results in double taxation, allows an unlimited number of shareholders, and has all of the other characteristics of a corporation. The S corporation has much more restrictive ownership and structuring rules but offers significant tax benefits in that there is only one level of tax because the corporation itself is not subject to federal income taxation on its profits; rather its income flows through to shareholders in the same percentage as each shareholder's ownership interest, and each shareholder reports it on an individual return. However, some of the significant ownership restrictions of an S corporation are that ownership is restricted to no more than 100 shareholders and non-U.S. citizens may not be shareholders of an S corporation. Also, the taxation of S corporations varies among the different states and cities. There are, of course, other differences between S corporations and C corporations that may be relevant depending on individual circumstances.

Professional Corporation

Professional corporations are another type of entity that allows certain types of professionals to provide their services under the corporate business form. These professionals are the shareholders, and state law limits who may be a shareholder of a professional corporation. The professional corporation is a product of state law and is a distinct type of legal entity that must adhere to additional rules and regulations with respect to its corporate governance. Generally, the taxation of professional corporations is similar to that of corporations.

Limited Liability Company

Another attractive business structure that should be considered is the limited liability company or LLC. An LLC is a somewhat flexible form of business structure that offers many of the advantages of a corporation such as protection from individual liability while avoiding the ownership restrictions that are imposed on S corporations. Thus, the LLC form of business may be attractive to businesses which would prefer to form an S corporation but are not able to meet the requirements because they have too many shareholders or are not U.S. citizens. It is advisable however for non-US members of an LLC to hold the interest in the LLC through a C corporation to avoid the holder of the interest becoming subject to federal and state income tax.

Similar to a corporation, an LLC is a formal business entity that must be formed by filing forms and paying fees to the state of formation and is subject to rules and regulations regarding its formation and operation. The costs involved in

forming and operating an LLC may be comparable or exceed that of a corporation. In addition, some states require a formal publication of the formation of the LLC. This publication involves an additional expense that should be factored into cost considerations. The owners of an LLC are called members and own percentages of the LLC often referred to as units. Similar to the management structure of a corporation, an LLC can be managed by a board of managers that is elected by the members; and the board of managers can appoint officers to manage the day-to-day affairs of the LLC.

While in most cases existence is perpetual for a corporation, LLCs may have a limited life span depending on certain factors including the law of the state of formation and the formation documents. For example, the formation documents may contain a predetermined dissolution date for the entity. While these factors can be managed with proper drafting of the formation documents, there may be a benefit to choosing one form over another depending on individual needs and requirements. In addition, state law requires that corporations adhere to certain formalities of corporate governance such as keeping formal minutes and holding shareholder and board of directors meetings. LLCs are generally not required to adhere to such formalities although it may be prudent for the LLC to maintain such formalities anyway.

Similar to S corporations, the income of an LLC is passed through to its members who report it on their personal income tax returns. The LLC does not pay taxes on its own.

For tax purposes, a single member LLC (which is allowed in some states) is treated as a sole proprietorship and a multiple member LLC is treated as a partnership. The members of an LLC can allocate income and losses among themselves in any way that they agree, not necessarily based on their ownership interest.

General Partnership

Another less formal type of business structure is the general partnership. Similar to a sole proprietorship, a general partnership basically requires an agreement between two or more individuals or entities to own and operate a business. The partnership agreement does not have to be written or formal although good business practice dictates that the terms of such an arrangement should be properly documented. Profit, loss, and management of the business are shared equally by the partners; and each partner is personally liable for the partnership's liabilities. A partnership is taxed in much the same way as a multiple member LLC or an S corporation, whereby individual partners report their share of profits and losses on their individual tax returns and the partnership itself does not pay taxes.

Limited Partnership

A limited partnership is very similar to a general partnership except for one important difference with respect to the personal liability exposure of the limited partner. While a general partner in a limited partnership has no protection from personal liability, the limited partner's liability is limited to the

amount of his or her investment in the company. This business structure is attractive in that it enables an investor who does not play an active role in the partnership's operation to share in the company's profits without exposure to the company's liabilities. However, because a general partner is exposed to unlimited personal liability, limited partnerships are sometimes set up so that the general partner is a corporation or an LLC. Like a corporation or an LLC, a limited partnership is a product of state law and must be formally formed by filing forms and paying fees to the state of formation. The limited partnership is considered a separate legal entity and must file taxes separately. As in a general partnership, absent an election to the contrary, a limited partnership has pass-through taxation.

Limited Liability Partnership

A limited liability partnership is a relatively new form of business structure that is similar to that of a limited partnership except that it allows all partners to take an active role in the business of the partnership while enjoying limited liability. Limited liability partnerships offer the pass-through taxation of a partnership and the limited liability of a corporation or LLC. This type of business structure is common among professionals such as law and accounting firms which are not allowed to use the corporate form to limit personal liability.

Please note that special tax rules apply to non-U.S. persons that own a Limited Liability Company, Limited Partnership or General

Partnership entities and accordingly, these entities may not be appropriate for non-U.S. persons.

Reporting Requirement

The United States has special complex reporting rules that apply to transactions between U.S. entities and their non-U.S. affiliates. These rules are beyond the scope of this article.

BRIEF SUMMARY OF U.S. TAX SYSTEM

Basically, taxation in the United States involves payments by businesses and individuals at several different levels, including federal, state, and local government taxes. At the federal level, federal income tax is levied on income of U.S. citizens and resident aliens and on certain types of U.S. income of nonresidents. The federal income tax rules also apply to trusts, partnerships, corporations, and other types of entities. All individuals and businesses except partnerships must file an annual income tax return. Partnerships must file an informational return. The U.S. federal income tax is a "pay-as-you-go" tax which means that generally you must pay the tax as you earn or receive income during the year. The tax is also called a "progressive tax" because it is higher as a percentage of income for higher-income taxpayers. Depending on the legal structure of the business, the business itself may be subject to tax in addition to tax paid by the business' owners on their share of the business' profits. For example, as discussed above, the income tax assessed on regular C corporations results in double-taxation of the

dividends paid to shareholders because the corporation pays taxes on the profits earned and the shareholders pay taxes on the dividends received.

Federal payroll taxes owed by individual employees in the U.S. are primarily collected by employers and remitted to the Internal Revenue Service (IRS). Employers typically collect these taxes through a system of direct withholding. Employers pay a portion of a taxpayer's income tax directly from an employee's payroll. The amount of taxes so withheld is based on the employee's salary and other factors such as his or her marital status and number of dependents. Because the amount withheld typically does not perfectly amount to the tax owed by the employee each year, the difference between the amount withheld and the actual tax owed is either paid to the IRS or refunded by the IRS after the end of each year.

In addition to the payroll tax, another significant tax paid by employees is the Social Security tax. Half of this tax is paid by the employee and the other half is paid by the employer. Self-employed people are responsible for both halves of the Social Security tax. Social Security taxes are taken from wages but not from other sources of income such as interest or dividends and there are certain caps on the amount of Social Security taxes assessed. In addition, individuals are subject to Medicare taxes which are used to fund the Medicare program, a health insurance program for the elderly and disabled. Similar to the Social Security tax, half of the Medicare tax is paid by the employee and the

other half is paid by the employer. Unlike Social Security, there is no cap on the Medicare tax. Dividend and interest income is not subject to Medicare tax.

The foregoing summary regarding tax liability is also subject to applicable provisions of the U.S. Swiss tax treaty, as discussed below.

BRIEF SUMMARY OF U.S. SWISS TAX TREATIES

Double Taxation Treaty

The formal name of the U.S./Swiss tax treaty is the "Convention between the Swiss Confederation and the United States of America in view of avoiding double taxation in the matter of income taxes of October 2, 1996" (the Convention). For purposes of the Convention, a resident of a contracting state means a person who is subject to taxes according to the laws of that state. Criteria used to determine residency include substantial presence, permanent home or extended stay in a contracting state.

A person who does not have a permanent residency visa or "green card" but has a substantial presence in the United States may be deemed a resident of the United States for tax purposes, although that person is NOT a resident of the United States for immigration purposes.

Dividends received by a resident of the United States or Switzerland are taxable in the country of residence. Dividends are also subject to taxes in the country where they are distributed; however, the rate may not exceed 5 percent of

the amount of the dividend if the beneficiary is a company which owns at least 10 percent of the votes of the company that distributes the dividend, or in all other cases, 15 percent of the dividend.

In general, interest paid to a Swiss or a United States resident is only taxed in the country of residence. Gains derived from the sale of real estate property by a resident of the United States or Switzerland are taxable in the country where the property is located. Profits of American or Swiss enterprises are taxable in the State where they are generated. As a general rule, if a United States-based enterprise has a branch in Switzerland, the profits made in the United States will be taxed in the United States, and the profits made by the branch in Switzerland will be taxed in Switzerland.

Salaries are typically taxed in the country of residence. However, there is a different rule if the work is not performed in the country of residence. For example, in general, if a Swiss resident performs his/her work in the United States, his/her salary will be taxed in Switzerland if the worker stays in the United States for not more than 183 days per taxable year, the employer is not a resident of the United States and there is no stable establishment in the United States (for instance a branch office in the United States) for the employer bearing the financial charges for the salary. Conversely, if the salary is paid by a United States enterprise or the United States branch of a Swiss company, or the worker stays in the United States for more than 183 days, in general, the

salary will be taxed in the United States.

Social Security Treaty

The Social Security agreement between the United States and Switzerland (the "Agreement") eliminates the need for a person to pay Social Security taxes to both the United States and Switzerland on the same earnings. The Social Security coverage depends on employment circumstances. As a general rule, Social Security taxes are due in the country where the work is performed. For an employee hired in the United States, Social Security taxes will be paid in the United States while for an employee hired in Switzerland, Social Security taxes will be paid in Switzerland.

However, there is an exception to the rule if an employer in one country sends an employee to work in the other country for 5 years or less. In that case Social Security taxes will continue to be paid in the country from which the employee was sent and no Social Security taxes will be due in the other country. If the employer sends the employee to work in the other country for more than five years, Social Security taxes will generally be due in the other country.

For example, if a Swiss employer sends an employee to work to the United States for 3 years, Social Security taxes will continue to be paid in Switzerland, while if that employee is sent to work in the United States for 6 years, Social Security taxes will be paid in the United States; if that employee is sent to work in the United States for an undetermined period of time, the general rule applies and Social

Security taxes will be due in the United States.

The Agreement allows taking into consideration credits earned in the other country in order to qualify for retirement benefits. The respective laws of the United States and Switzerland provide for the allocation of Social Security credits on their respective territory. Each country pays its own benefits. A resident of the United States who paid social security taxes in Switzerland may apply for Swiss benefits at the social Security office in the United States where he/she resides and a Swiss resident who paid social security in the United States may apply for benefits from the United States at the Swiss Compensation Office where he/she resides. There is not an ability to collect concurrently under both systems.

WORK PERMITS/VISAS

A very important consideration in establishing a business in the U.S. is to enter and work in the U.S lawfully. All non-U.S. citizens or non-resident aliens must comply with visa entry requirements.

Visa Waiver

For someone who travels to the United States for less than 90 days, usually it is not necessary to obtain a visa, as Switzerland is among the countries having a convention with the United States that waives the visa requirement for visitors who stay in the United States for business or pleasure for up to 90 days. For people who intend to stay

for more than 90 days in the United States, it is mandatory to obtain a visa.

B-1/B-2

There are numerous categories of visas, depending on the purpose of the stay. The visitor's visa (for business, B-1 - or pleasure, B-2) is for short stays, and the time the person is authorized to stay in the United States is determined by the embassy which grants the visa; it may be granted for up to one year, depending on the purpose of the trip. The B-1 visa category may be used for relatively short periods of time to set up and staff a company, however, the person cannot be paid by the U.S. company.

E-1/E-2

There are visas for investors of countries which have signed a bilateral investment treaty or a treaty of commerce and navigation with the United States, under the E-1 (business trader) or E-2 (business investor) category. Because Switzerland signed a bilateral investment treaty with the United States, E visas may be used by, among others, Swiss entrepreneurs who set up a business in the United States. The E visa category may be used by many different types of companies. It may be a company owned by a single investor or a multinational corporation.

The E-1 visa is granted for business people who carry out substantial trade with the United States and the treaty country; for example, Switzerland. The trade may consist of goods or services. The business trader must be a Swiss citizen. There must be an

international exchange between the United States and Switzerland. More than 50% of the total volume of international trade must be between the United States and Switzerland. The trade must be continuous and involve numerous transactions, and there must be ongoing business. The revenue must be sufficient to support the business trader and his/her family.

The E-2 visa is granted for business people who make a substantial investment in the United States. The funds must be at personal risk and be committed to the investment. The business investor must show an actual transfer of funds to the United States. There is no minimum amount although most investments are over \$100,000.00. The investment must be made in an active and effective business.

In both categories (E-1 and E-2) the business may be owned jointly with a spouse or partner. In order to qualify under either the E-1 or the E-2 category, at least 50% of the stock of the company engaging in trade or investment in the United States must be owned by Swiss citizens who are not permanent residents of the United States. For example, 50% of the business could be owned by a Swiss citizen and the other 50% by an American citizen.

The E visa (E-1 or E-2) is granted to the principal owner of a business or a key employee in an executive or a managerial capacity, whose skills are essential to the business and that business is carrying on substantial trade in the United States (E-1) or has invested a substantial amount of money in the United States (E-2). Both the investor

and the key employee must be Swiss citizens. The employee does not need to have already worked for the company; he/she may be a new employee.

The E visa is generally issued for an initial period of 2 years; and, in general, it may be extended without limitations as long as the person runs the business or is employed by the company engaging in trade or investment in the United States. The spouse and children under 21 of the holder of an E-1 or E-2 visa also receive a visa in the same category. Once they reach the age of 21 or if they marry, children are no longer authorized to stay under the E status. Children who are still studying when they reach the age of 21 need to obtain a student visa (F category) on their own behalf. Spouses may apply for authorization to work in the United States. They cannot work as long as they have not received a work authorization.

In both categories (E-1 and E-2), the business must be effective and substantial. The visa is valid as long as the business continues and remains effective and viable. It is easier for an established business to obtain an E-visa than a new business, because it is easier to demonstrate that the business is effective. Consequently, people who want to do business in the United States might chose to purchase an existing business, or purchase stock to obtain a majority interest in that business. As long as the conditions of the chosen category (E-1 or E-2) are met, it is possible to use an existing business for a trader or an investor. However, it would be prudent to seek the advice of an expert before purchasing a business

or establishing a joint venture. In particular, it would be advisable to provide in the agreement that the purchase is contingent upon obtaining an E-1 or an E-2 visa.

L-1

The L-1 visa category may be used for intra-company transfers. A person employed by a company in Switzerland may use an L-1 visa to set up a business in the United States for that company. The person must have been employed continuously for one year by that company or its parent, branch, affiliate or subsidiary and intend to perform the same services. The employee must be an executive, a manager or have specialized knowledge regarding the products or services of the company. Under this visa the period of admission is for a total of 7 years for executive and managerial positions, 5 years for employees with specialized knowledge, and 1 year for an employee who sets up a new office in the United States.

H-1

The H-1 visa category may be used by established companies who seek to bring to the United States skilled professionals or business executives. These professionals must have specialized knowledge with at least a bachelor's degree or its equivalent. For example, architecture, engineering, mathematics, physical sciences, law, social sciences, medicine, business specialties, accounting, and the arts are occupations which generally would qualify for an H-1B visa. This visa is granted for a period of 3 years and may be renewed for another period of 3 years. The maximum stay under that category is 6 years.

Unlike the other visa categories, H-1 visas are subject to a quota for each fiscal year, which starts on October 1. If the quota has been reached, the employer needs to wait until the next fiscal year to file the H-1 visa application for its future employee. It is advisable to bear this issue in mind and apply as early as possible in the fiscal year.

Treaty Investor

As an investor, it is possible to get permanent residency under the EB-5 category (immigrant investors). The investment must be of at least \$1 million dollars, the applicant must demonstrate that the investment will benefit the U.S. economy, and it must create a requisite number of full-time jobs within the United States.

Permanent Residency/Green Card

Permanent residency may be obtained through employment by an established company for an employee the company seeks to employ permanently based on employment skills. The employee must have specialized education and skills and the employer must demonstrate that it cannot find an employee with the same or similar qualifications on the local market. In most cases the application has to be processed and approved by the Labor Department before being processed by immigration authorities. Permanent residency may also be obtained through other channels, for example through a U.S. family member or the U.S. spouse.

Once the appropriate work permit has been issued the visa holder may enter and work in the U.S. lawfully.

For more information on visas, please visit the website of the United States Citizenship and Immigration Service at <http://uscis.gov> or the site of the U.S. Embassy in Switzerland at <http://bern.usembassy.gov>.

EMPLOYMENT ISSUES

Equal Employment Opportunity/Anti-discrimination

When employing people in the United States, a number of issues need to be taken into consideration. In particular, businesses employing people in the U.S. need to be sure to comply with federal and state equal employment opportunity laws ("EEO laws"). In the U.S., an employee may not be discriminated against on the basis of race, sex, religion, color, national origin, age, marital status, or disability. Among other things, these laws prohibit (i) retaliation by an employer against employees who oppose job discrimination, file charges, or participate in proceedings under these laws; or (ii) wage discrimination between men and women for substantially equal work. Employers must treat pregnancy, child birth, and related medical conditions the same way as temporary illnesses or medical conditions. The only exception to these rules is when certain qualifications affect the employee's ability to perform the job; and, therefore, that qualification is necessary and it is established by a verifiable, rational basis (for example, a female model for women fashion or a male model for men fashion).

Employers must be aware of and comply with the EEO laws not only during employment but also in hiring and firing. For example, employers must comply with anti-discrimination laws in their job advertisements. The protected class for age discrimination is workers over 40 years of age. Therefore, job ads cannot contain an age preference, unless it is necessary to perform the job and is established by a verifiable, rational basis. For example, job ads with an age preference in positions such as secretary, clerk, associate, which are very common in Switzerland, are prohibited in the United States because being of a certain age range (for instance 25 to 40 years) is not a necessity to perform these jobs.

EEO laws apply to all employees, regardless of their nationality and immigration status. Employers must confirm in writing that all employees are legally authorized to work in the United States.

Visas

U.S. citizens and employees who are authorized to reside permanently in the United States do not need a specific work authorization because U.S. citizenship or permanent residency status authorizes employment anywhere in the United States. For other employees, the employer will need to obtain the necessary visa for that employee (see our Work Permits/Visas section). For those employees, there is a minimum wage requirement established by the Department of Labor for each occupation. The goal of these minimum wage requirements is to

avoid employers hiring foreign workers and paying them salaries lower than salaries paid to U.S. workers for the same occupation. For this reason, applications for work permits need to be pre-authorized by the Labor Department.

Written Employment Agreements

It is very common in the United States to hire employees without a written contract. Employees in the U.S. are typically hired "at will." As a result, employment may be terminated by either the employee or employer without notice and without any severance benefit. However, an employee cannot be fired for an unlawful reason, for example, pregnancy or age. Notwithstanding the general rule of "at will" employment, employment contracts are common. An employment contract not only sets forth the title, job duties, and salary but may be useful to protect trade secrets, confidentiality, and fix a term of employment.

INTELLECTUAL PROPERTY PROTECTION IN THE U.S.

Trademarks

A trademark is a sign that distinguishes the products or services of one particular entity or individual from the products or services of others. It may be a word, phrase, symbol or design or a combination of words, signs, symbols or designs. The trademark informs consumers of the source of the products or services. To obtain trademark protection in the United States, the mark may not be

descriptive. For instance, the mark "dairy fresh" would not be acceptable for fresh dairy products.

To be protected in all 50 states of the United States, a trademark application needs to be filed for the trademark with the U.S. Patent and Trademark Office in Alexandria, Virginia (near Washington D.C.). Trademark applications are reviewed by an examining attorney, who may either decide to publish the mark for opposition to verify that no one has a claim to prior rights in connection with the mark, or request additional information or a different description of the goods or services covered by the mark.

To obtain a U.S. registration, a mark needs to be used in interstate commerce. Nonetheless, if a mark is not yet in use, it is possible to file an application based on intent-to-use. Then the owner needs to start to use the mark within three (3) years from the time the examining attorney issues a notice of allowance, which is the approval by the examining attorney of the mark and the description of goods or services. Once the mark is registered, the registration lasts for a period of ten (10) years and may be renewed every ten (10) years as long as the mark is in use in commerce. Although it is not mandatory to file a trademark application with the assistance of an attorney it is highly recommended.

Madrid Protocol

If a mark is registered in Switzerland and the owner, who is based in Switzerland, wants to register the mark in the United States and additional countries, the owner may take advantage of the Madrid

Protocol, signed by the United States and numerous other countries. If a mark is registered in the United States and the owner is based in the United States, he can use the Madrid Protocol to register its mark in countries such as Switzerland which are signatories to the Madrid Protocol. The names of the countries which have signed the Protocol may be found at the Internet site of the World Intellectual Property Organization www.wipo.int.

The Madrid Protocol as well as the Madrid Agreement, which is an earlier convention with similar purposes, allows registration of a trademark in different countries which are signatories to these conventions with one single application filed from the country where the mark was originally registered. Therefore, if a Swiss owner, who registered its mark in Switzerland wants to register it in the United States, Australia, and Japan it is possible to file a single application with the Swiss Intellectual Property Office instead of filing a national application in each of these countries. This can be a substantial cost and time-saving advantage.

Copyrights

Copyright protects original works of authorship. It is the right of the author of a work to claim ownership of the work, reproduce the work, prepare derivative works based on the work, distribute copies of the work, and perform and display the work publicly. The author is entitled to the economic value derived from the work. Many categories of works may be subject to copyright; for example, paintings, sculptures, photographs, musical

and theatrical works, choreographic works, movies, television programs and series, books, reviews, articles, designs, computer programs, and web pages.

Although the author of the work benefits from copyright immediately upon creation of the work, it will be easier to enforce copyright rights if the work is filed with the United States Copyright Office at the Library of Congress in Washington D.C. Furthermore, works which are published are subject to mandatory registration with the United States Copyright Office. The duration of copyright protection is for the entire life of the author plus 70 years for individuals; if there are several authors, the protection lasts until the death of the last author plus 70 years. For works for hire (works prepared by employees within the scope of their employment or specially commissioned works), the period of protection is 95 years from publication or 120 years from creation, whichever is shorter.

Patents

Patents are used to protect inventions that contain a minimum of novelty. Patent protection ensures proprietary rights to the author. Unlike copyright or trademark, to benefit from patent protection it is necessary to file an application. The application needs to be filed with the U.S. Patent and Trademark Office in Alexandria, Virginia. The patent prevents others from using, selling or distributing the invention.

Patents may be granted for a variety of inventions, for instance a new machine, a new useful process, new chemical compounds, new

original and ornamental designs for an article of manufacture, new plant that was discovered or reproduced asexually. The duration of the protection is for 20 years from the date the application was filed, subject to the payment of maintenance fees.

Protecting patents, trademarks and copyrights is very important to protect the owner of the work, mark, or invention against use by third parties, in particular competitors.

Trade Secrets

Trade secrets are defined as confidential information related to a specific business and which the people in that business do not disclose because that information derives economic value from not being generally known. This information may be, for instance, a formula, a program device, a method, a technique, a process, or information such as customer lists, names of vendors, product pricing, company finances, or marketing strategies.

Some trade secrets are inventions which could be protected by a patent, for instance, new processes or technologies, new chemical components, or new machines. In order to be protected by a patent, these inventions need to be disclosed and the validity of a patent is limited to 20 years. After that period, the invention becomes part of the public domain. As an alternative to public disclosure of the invention through the patent application process, trade secret protection, if viable, should be considered.

A good way to protect a trade secret is to disclose it solely to a limited number of people, to inform these people that the information is confidential, and to have these individuals sign a confidentiality agreement. These people may be, for example, the employees of the owner of the confidential information, its distributors, or franchisees. The agreement should describe the nature of the confidential information so that the parties know accurately what information is confidential. The agreement should also mention whether and for how long the information should be kept confidential in case of termination of the employment, the distribution, or the franchise.

Owners of trade secrets are sometimes reluctant to file for a patent because they do not want confidential information disclosed through the patent registration process and ultimately become public information at the end of the period of protection. In that case a comprehensive confidentiality agreement may offer protection. Also, unlike patents, contractual protection need not be limited in time. The agreement may provide that the information needs to be kept confidential after an employee or a partner of a company leaves or after a distribution agreement or a franchise is terminated.

Inbound and Outbound Licensing

Intellectual property may be licensed, which means that if the owner uses third parties to distribute its products or provide its services, it may license the intellectual property

(trademark, copyright, patent) to these third parties. The third party may use the intellectual property in consideration for payment of a royalty to the owner of the intellectual property. The owner of a book or a computer program, for instance, may license its copyright to a third party who distributes its books or computer programs in consideration for payment of a royalty. A company may use a copyrighted character to identify its services. For example, a moving company in California obtained a license to use Walt Disney's Popeye character to identify its services. A third party may use a patented invention to manufacture goods with the process contained in the invention against the payment of a royalty to the author of the invention.

The most common form of trademark licensing is franchising. With franchising, it is possible to have one's own business which consists of selling someone else's goods, using the third party's trademark. The franchise may be a fast food franchise where a determined list of foods and beverages are served. The franchise may include a defined interior decoration and clothing for employees to ensure a uniformity of all franchises so that consumers may identify the source of production of the goods or services in each place where these goods or services are offered. Some examples of franchises are Mc Donald's, Dunkin' Donuts, Pizza Hut, and Kentucky Fried Chicken. Franchises may also be granted for other types of services, such as education. An example is Kumon North America, Inc., a company providing after-class

tutoring in reading and mathematics with a specific teaching method.

CONCLUSION

The foregoing summaries of corporate, tax, employment, immigration, and intellectual property are provided for informational purposes only and do not constitute legal advice. In any business venture it is always prudent to have an attorney on your team for advice and counsel.

**If international business relationships are important to you...
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Wilk Auslander LLP

NEW YORK | GENEVA

www.wilkauslander.com

NEW YORK OFFICE

675 Third Avenue
New York, NY 10017-5704
Tel: 212-421-2233
Fax: 212-752-6380

EUROPEAN OFFICE

5, rue Jean-Pécolat
1201 Geneva, Switzerland
Tel: +41 (0)22 322 20 10
Fax: +41 (0)22 322 20 19