Parker Poe

Legal Aspects

Investing and Doing Business in the United States

February 2012

Attorneys & Counselors at Law

Parker Poe Adams & Bernstein LLP

Parker Poe

Table of Contents

Parker Poe

INTRODUCTION

Parker Poe Adams & Bernstein LLP is pleased to provide you this guide on the Legal Aspects of Investing and Doing Business in the United States. From offices in North Carolina and South Carolina, we have for over 25 years assisted foreign-owned companies with their United States investment and business needs. We have extensive experience and capability in international investments and transactions, and we offer creative, responsive and aggressive legal strategies and services to our clients.

This guide provides a base of useful information on various issues which should be considered as part of the investment process. It is not intended, however, to be an exhaustive discussion of these topics, and it is not an alternative to specific advice relating to the facts and circumstances of each particular investment and business need. There is also a vast array of resources available to aid a foreign investor when making legal and business decisions in establishing operations in the United States. These resources include the State Departments of Commerce, local Chambers of Commerce and private service professionals. With the assistance of our firm and other resources, a foreign investor can address the various issues that may arise when doing business in the United States.

FORMS OF DOING BUSINESS IN THE UNITED STATES

One of the first issues faced by a foreign investor is choosing the most appropriate structure for its United States operation. Although the foreign investor could establish a branch operation in the United States, it is advisable to organize a new entity because a branch does not provide the foreign investor with "limited liability."

In organizing a new United States operation, there are several types of entities that can be chosen by a foreign investor. The most common include subchapter C corporations and limited liability companies ("LLC"). Each form of business entity has its advantages and disadvantages which are discussed in the following pages.

CORPORATIONS

A significant advantage of the corporate form of doing business is the limited liability of the shareholders which can be achieved if the corporation is adequately capitalized and is operated as a separate and distinct legal entity from the shareholders. If properly formed and operated, the shareholders are generally shielded from lawsuits against the corporation and their potential loss is limited to their investment. In addition, the members of the Board of Directors, which set policy and business strategy for the corporation, are also exempt from personal liability if they meet their fiduciary duties through good faith, reasonable business decisions. The corporation is often set up as a wholly-owned subsidiary of the foreign parent company or it is directly owned by the private owners of the foreign company. Joint ventures and other mixed ownership scenarios are also possible.

Formation

Formation of corporations in the United States is governed by state law and not federal law. Many states have modern corporate statutes so the decision on where to incorporate often depends on the location of the investment and related state tax aspects. In most states, the procedure for organizing a corporation is relatively simple. First, a short document often entitled the "Articles of Incorporation" is filed with the Secretary of State of the State. The Articles of Incorporation state the name of the corporation, the type of shares of stock, the authorized number of shares of stock, and the name and address of the registered agent of the corporation for service of process.

Various other documents must be executed in order to complete the establishment of a U.S. corporation. These other documents include "bylaws" which regulate the internal management of the corporation and organizational resolutions which, among other things, elect the directors of the corporation, appoint the officers, select the fiscal year and establish bank accounts in the United States.

Minimum Capital

There is no legally required minimum capital contribution for the establishment of a corporation. The capital paid in, however, must be reasonable in order to obtain "limited liability" (discussed below) of the shareholders. The determination of reasonableness depends on the nature and scope of the corporation's intended business operations. The capital contribution to the corporation can take many forms, including cash, promissory notes, services performed and contracts for services to be performed.

Control

A U.S. corporation has three levels of control. These include (i) the shareholders; (ii) the directors; and (iii) the officers. The shareholders own the corporation and exercise indirect control by electing the Board of Directors and by voting on certain fundamental matters of corporate policy. The Board of Directors establishes the general policies of the corporation and approves certain actions of the corporation. In addition, the Board of Directors appoints officers. The officers are responsible for implementing the policies of the Board of Directors and overseeing the day to day operations of the corporation. A corporation usually has as its officers a president, a secretary and a treasurer (and may have one or more vice presidents and an assistant secretary). The same person can function in the capacity of a shareholder, a director and an officer, and the same person can hold more than one position as an officer. It is common, nevertheless, for there to be at least two separate individuals who act as officers in order to execute certain contracts and perform other functions.

Tax Issues

The foreign investor should consider the tax aspects relating to the formation and operation of its United States corporation. The corporation will be subject to federal and applicable state income taxes. As a general rule, both federal and state taxes are applied on a graduated rate. The maximum federal corporate income tax rate in 2012 is 35%. State corporate income tax rates vary from state to state with 5%-8% being a common range.

The main disadvantage of the corporate form of doing business in the U.S. – particularly as compared to an LLC, discussed below – is the "double taxation" of income. Any taxable net income of the corporation will be taxed at the federal and state corporate income tax rates. In addition, when the after-tax profits of the corporation are distributed to its shareholders, the shareholders are also taxed at the federal and state levels on these distributions. The tax imposed on distributions will depend on the location of the shareholder. If the shareholder is a foreign entity or an individual residing outside the United States, the distributions will generally be taxed at a flat 30% rate. This 30% rate may be reduced to 5%-15% if the United States has a tax treaty with the foreign investor's home country. In addition, under some treaties the dividend withholding may be reduced to 0% if a foreign corporation owns at least 80% of the U.S. Corporation and meets certain criteria

Example: Dividends paid by a United States corporation engaged in an active trade or business, and which is at least 10% owned by a corporate investor from the following countries, would be taxed in the United States at the following reduced rates (note: some reduced rates apply after owning the required amount of stock for a 12-month period):

Country	Treaty withholding rate on dividends to a Foreign Corporate Stockholder with over 10% stock
Austria	5%
Belgium	5%
Canada	10%
China	10%
Denmark	5%
Finland	5%
France	5%
Germany	5%
India	15%
Italy	5%
Japan	5%
Mexico	5%
Netherlands	5%
Spain	10%
Sweden	5%
Switzerland	5%
United Kingdom	5%

Each treaty should, however, be analyzed for specific application to each investment and situation.

In addition, the foreign shareholder may be entitled to a credit for some or all of the tax imposed on such distributions, and this aspect should be considered with the foreign investor's tax advisor in its home country. In some countries no further tax is imposed on intercorporate distributions.

Although a U.S. corporation owned by foreign investors has the disadvantage of "double taxation," it has the advantage that the foreign shareholder could avoid any requirement to file U.S. income tax returns. This is a significant advantage of the corporate form of doing business in the U.S. If the U.S. corporation is owned by an individual foreign investor, however, the value of such United States corporate stock will be subjected to U.S. estate tax upon the investor's death unless a treaty exemption applies (e.g. Germany).

LIMITED LIABILITY COMPANIES

An LLC is a hybrid of a corporation and a partnership. It is conceptually similar to the SARL in France, the Limitada in Italy, the S. de R.L. in Mexico and the S.L. in Spain. If structured correctly, the LLC provides its owners (called "members") with the limited liability enjoyed by the shareholders of a corporation and a single level of federal and state taxation in the United States. The profits, losses and deductions are passed directly through the LLC to the members because the LLC is considered a partnership for tax purposes (although some states tax all LLCs as corporations). Thus, the members pay tax only on the taxable income of the LLC and "double taxation" is avoided. This may offer significant savings on U.S. taxes in comparison to operating through a corporation; the amount of savings depends on the plans for distributing profits, the U.S. tax rate on distributions to a particular foreign investor, and other considerations.

The disadvantage of an LLC from a U.S. tax perspective is that the foreign member of an LLC must pay tax on its income from the LLC and must file U.S. tax returns. In addition, a U.S. "branch profits" tax may be imposed if the investor is a foreign corporation. This exposes the foreign investor to, among other things, audits by the U.S. Internal Revenue Service. Finally, if the foreign investor is an individual, the value of the investor's interest in the LLC will be subject to U.S. estate tax upon the investor's death, unless a treaty exemption applies.

There are ways to structure a U.S. investment so that the foreign investor's main operating company is not exposed to U.S. taxation through an LLC. Much of this structuring involves tax issues in the foreign investor's home country. For instance, the foreign investor could establish a wholly-owned subsidiary in its home country and this foreign subsidiary could be the member of the United States LLC. Thus, the foreign subsidiary would act as a holding company through which the investment in the United States would be made; this foreign subsidiary would then have the U.S. tax obligations described above. This structure should insulate the assets of the main operating company from the taxing jurisdiction of the United States.

In deciding between doing business in the United States through an LLC or a corporation, the tax laws of the foreign investor's home country should also be considered so the structure with the maximum overall benefit can be established.

An LLC is formed by filing "Articles of Organization." Instead of adopting bylaws as in a corporation, an "Operating Agreement" is adopted by the members of an LLC to govern the relationships among the members. The operating agreement provides much more flexibility than the bylaws in a corporation. The operating agreement allocates the income, gain, losses, deductions and credits among the members, and governs the distribution of cash and other property among the members. The use of the LLC form is also particularly useful because the operating agreement can expressly delineate the management responsibilities of each member.

LLCs can be member-managed and manager-managed. The distinction between the two is analogous to the distinction between a general partnership and a limited partnership (described below). In a member-managed LLC, all of the members can influence the day-to-day operation of the LLC, subject to the terms of the operating agreement. In a manager-managed LLC, the members have an economic interest in the LLC but generally do not control the management of the LLC. The management is controlled by non-members who are appointed by the members pursuant to the operating agreement. The duties of a manager are often included in the Operating Agreement.

OTHER ENTITIES

Other forms of business entities available to a foreign investor include general partnerships and limited partnerships. Foreign investors generally do not choose a general partnership because each partner's potential liability is unlimited. A general partnership is an association of two or more persons to carry on a business for profit. A written partnership agreement is not legally required, but is highly recommended. In fact, a general partnership can be created unintentionally by the parties. The partners of a general partnership are jointly and severally liable for all debts and obligations of the partnership.

A limited partnership may be selected in certain circumstances. A limited partnership has two classes of partners. The general partner(s) manages the day-to-day operations of the partnership and has unlimited liability for all debts and obligations of the limited partnership. In contrast, the limited partners are similar to shareholders in a corporation in that they have limited liability and their losses are limited to the value of their investment in the limited partnership. In exchange for this limited liability, the limited partners generally lack the ability to control the affairs of the limited partnership. If the limited partners exert too much control over the partnership, they risk being held liable for all debts and obligations of the partnership as a general partner. A limited partnership is formed by filing a Certificate of Limited Partnership, and while a partnership agreement is not required, it is recommended.

HYBRID ENTITIES

A hybrid entity is an entity which is taxed in one country as a corporation but in another country as a partnership. This form of taxation may create significant tax advantages. For example, the foreign members of a U.S.-LLC can "check the box," thereby electing to have the LLC taxed in the United States as a corporation. Depending on the tax system in the foreign country of the members, the LLC may nevertheless be taxed in the foreign country as a partnership.

Whether the advantage of this hybrid tax treatment is available will depend, for example, on the respective income tax treaty between the United States and the foreign country. Hybrid entities are very sophisticated and complex. Investors should consult with their United States and foreign tax advisors who know the applicable tax laws of their respective countries.

LEGAL ISSUES

A foreign company must consider various legal issues as part of its “business plan” for doing business in the United States. The actual issues will often depend on such things as the company’s size, field of business and business goals. Also, as the company expands, new issues may need to be addressed. This section provides an overview of many, but not all, of the issues a company should be aware of as it plans its investment and operations in the United States.

VISA AND IMMIGRATION ISSUES

Immigration Practice Area Summary

As an integral part of International Business, the attorneys in the immigration practice are well versed in all aspects of business-related U.S. immigration and visa law. Our immigration attorneys have more than 30 years of experience representing companies, universities and nonprofit organizations before the U.S. Department of Homeland Security, the Department of State, the Department of Labor and the Department of Justice. Our immigration clients include multinational, foreign and domestic corporations based throughout the world in a wide variety of industry sectors including manufacturing, energy, telecommunications, biomedical, software development, ecommerce, retail and financial services.

We work closely with our clients to understand their businesses, goals and structures in order to obtain temporary work visas, U.S. permanent residence status and U.S. citizenship for their key personnel, while effectively and efficiently navigating the constantly changing immigration laws and procedures. We can respond rapidly, effectively and creatively to a broad array of immigration issues or problems. We also counsel a number of private and public companies regarding the immigration consequences of mergers and acquisitions on their employees in nonimmigrant status or pursuing permanent residency. For companies that are heavily engaged in mergers and acquisition activity, this is a critical aspect which is often overlooked but is vitally important to preserving the status of foreign employees.

The Basics of Immigration: What You Need to Know

U.S. immigration laws are very complex and can cause problems and delays for those who fail to plan ahead. U.S. immigration laws distinguish between two types of persons: nonimmigrants (persons coming to the United States for a limited temporary period of time for business or pleasure) and immigrants (persons intending to remain in the United States permanently). Generally, petitions or applications for immigration benefits are submitted either directly to a U.S. embassy or consulate abroad or to U.S. Citizenship and Immigration Services (CIS). Lawful Permanent Residency (LPR or more commonly known as the green card) may be obtained in a number of ways, principally through employment or a family relationship. We assist companies in obtaining LPR for their employees, whether through the straight I-140 process or through the Labor Certification (PERM) process. We work with state and federal agencies to make the process as quick and painless as possible for both the employee and employer. The permanent residency process can take several years, so foreign nationals and employers should consider long-term plans as soon as possible.

Most foreign employees work in the United States pursuant to a short-term, nonimmigrant visa. There are six commonly used nonimmigrant business visas: the B-1, L-1, E, H-1B, O-1 and TN (or NAFTA) visas.

B-1 Business visitor visas – The B-1 business visitor visa enables a business traveler to visit the United States for a short period of time (normally six months or less) with extensions possible in some cases. During that time he or she may, among other things, solicit sales (under certain restrictions) for the foreign company, negotiate contracts and attend business meetings. He or she may not, however, work for a U.S. company or be paid in the United States.

Visa Waiver Program – Similar to the B-1 visa, citizens of most European nations, Japan and certain other countries may take advantage of the Visa Waiver Program to enter the United States for a period of 90 days, provided they are not paid in the United States and meet certain other requirements, including having a machine-readable passport. Foreign nationals entering the United States with the visa waiver must plan on departing by the expiration of this 90-day period.

L-1 intracompany transferee visas – Available for managers, executives and individuals with "specialized knowledge" of the company's business or products who have worked abroad for at least one year within the preceding three years with a related company. Regulations limit the initial issuance of an L-1 visa to one year for those being transferred to newly-formed United States businesses (businesses

that have been in operation for less than one year; so called "new office" L-1 petitions). All other L-1 visas may be issued for an initial period of three years. Managers or executives in L-1A status may stay for a maximum consecutive period of up to seven years; those transferred in the specialized knowledge capacity may remain in the United States for up to five years.

E visas – Provided for by a treaty between the United States and many foreign countries, the E visa authorizes the employment by U.S. companies of executives, managers or those individuals who hold essential skills. An E-1 visa application requires proof that "substantial trade" between the United States and the treaty country is being carried out by the U.S. company. An E-2 visa application requires a showing that a "substantial investment" has been made by an overseas company or by foreign nationals in the United States. The E applicant must be of the same nationality as the foreign owner(s) of the U.S. company by which he will be employed. Unlike L-1, H-1B or O-1 visas, petitions for E status on behalf of companies and individuals may be made directly at the U.S. embassy abroad, without having to file a petition with CIS. E visas are generally issued in increments of up to five years. However, they can be reissued indefinitely, as long as the investment or trade and nationality requirements for eligibility continue to be met.

H-1B visas – Available to individuals coming to the United States to be employed in specialty occupations. Specialty occupations include those which require the services of a professional, usually with a university degree, such as scientists, engineers, computer systems analysts, and some marketing specialists. Employers sponsoring H-1B aliens must obtain approval of a labor condition application from the U.S. Department of Labor in which the employer must attest, among other things, that it will pay the H-1B nonimmigrant the higher of the actual or the prevailing wage for the job. H-1B visas may be issued for an initial three-year period and may be extended for an additional three years, for a maximum consecutive period of six years. (Note: This maximum period may be extended if a green card application has been filed at least 365 days prior to the end of the foreign national's sixth year of H eligibility.) There is an annual cap on the number of new H-1B visas that are granted each fiscal year. In recent years the cap has been reached early in the filing season, so advance planning for H needs is critical.

O-1 visas – Available to aliens of extraordinary ability, including exceptional ability in business. To obtain O-1 classification, he or she must establish that he or she has achieved national or international acclaim. An O-1 petition may be approved for an initial period of three years, and extensions may be granted in one-year increments.

TN or NAFTA visa – Permits citizens of Canada or Mexico to work in the United States in certain specialty occupations, such as lawyers, accountants or engineers. Canadian TN applicants may apply directly at pre-flight inspection or a port-of-entry, and Mexican TN applicants may apply directly with the U.S. consulate in Mexico for the visa, in either case without having to file a petition with CIS. Canadian TN applicants may be granted a three year visa, and Mexican TN applicants may be granted a one year visa. The visas may be extended indefinitely so long as the foreign national has non-immigrant intent.

Accompanying family members in the L-1, H-1B, E, O-1 and TN categories will be given nonimmigrant visas which are generally valid for the same period of time as the visa of the principal beneficiary. However, family members, except spouses in the L or E categories, may not engage in employment in the United States while in dependent nonimmigrant visa status.

Count on Us to Solve Your Immigration Problems

Our Immigration team is committed to obtaining swift and effective results with minimal time and inconvenience to the employer and the individual foreign employee. Through our experience, a web of worldwide contacts and creative and aggressive strategies, you can count on us to get the job done.

PRODUCT LIABILITY

There has been much publicity worldwide about U.S. product liability laws. Most states follow the doctrine of "strict liability." This means that if an individual is injured by a defective product, someone along the chain of distribution is liable to the individual regardless of the degree of care used in the testing, marketing, sale or maintenance of the product. Although not always the case, liability most often rests with the manufacturer. Product liability is a fact of life in the United States, and there is no way to eliminate this risk. There are, however, many ways to minimize the risk. Obviously, both domestic and foreign companies would not continue selling in the United States if they were not able to manage this risk. The most effective way is to build well-designed, quality products with appropriate safety devices and warning labels. Also, promotional materials and instruction manuals on operation, use and safety should be carefully drafted. Importantly, most entities doing business in the United States should obtain product liability insurance. A good product liability insurance policy should protect the entity against claims for the defective manufacture of products and should cover the cost of defending product liability claims for personal injury or property damage. Product liability insurance, however, should be viewed as a complement, not an alternative, to the other ways of minimizing the risk of product liability. Finally, a periodic safety audit of a company's practices and procedures is a good method of keeping current on the duties imposed by law and a good investment against future liability.

TERMS AND CONDITIONS

The U.S. business will need terms of sale and delivery which comply with U.S. law. Literal English translations of foreign terms are not sufficient and may not be enforceable in the United States because the legal principles involved are different. Most states have adopted the Uniform Commercial Code, a uniform set of statutes governing the sale of goods that is slightly modified from state to state. The rules codified in these state statutes must be followed precisely when selling in the United States.

Terms and conditions of sale form the basic terms of each sale transaction. Terms and conditions usually address such important issues as limitation of warranties and exclusion of certain damages. The terms and conditions do not alleviate the need to carefully draft the terms specific to a particular sale, including the product being sold, any special operating or performance standards, payment terms and delivery dates. Appropriate sales documentation procedures are also important to maximize the likelihood that the entity's terms and conditions apply to the transaction.

The U.S. business should also use terms and conditions of purchase when purchasing products or materials. These are particularly useful for frequent purchases of sophisticated products or materials used in the entity's operations or production.

CORPORATE PREMISES

The U.S. business will, of course, need premises from which to operate. Office space for lease and land on which to build are generally abundant throughout the United States. The State Departments of Commerce, local Chambers of Commerce, and local real estate brokers will work with a foreign company to find the location best suited for its particular needs.

Leases for office space or manufacturing, warehouse or retail facilities will often be lengthy documents containing many legal provisions. Landlords will typically provide the first draft of a commercial lease; however, the landlord's form will often be drafted heavily in its favor. Landlords are sometimes reluctant to make extensive revisions to their form depending on the market and bargaining positions. Thus, it is important for the prospective tenant to understand which lease provisions should be focused upon in a lease negotiation. Prospective tenants should closely review business terms of the lease such as rent,

term, the tenant's right to expand its leased premises, early termination rights, tenant renewal options, rent concessions, upfit allowances, and the tenant's required contribution toward the landlord's insurance, real property tax, and common area maintenance expenses. Important legal issues to consider in the lease negotiation include the allocation of various risks between landlord and tenant in the insurance and indemnity provisions, the tenant's sublease and assignment rights, authorized uses of the premises, and landlord remedies upon a tenant default under the lease.

If a company decides to purchase developed or undeveloped land in the United States, it will enter into a contract with the seller to purchase and sell real property. The contract will not only dictate the purchase price, but will also govern the relationship between the prospective purchaser and seller during the due diligence period prior to closing and may include seller warranties which survive the closing. Due diligence activities may include a title search, property survey, phase I environmental study, feasibility study, property appraisal, obtaining financing commitments, and, if it is an income-producing property, a review of rent rolls and other historic financial information. It is important that the contract provide that the prospective purchaser is only required to close on the sale if the due diligence inquiry yields results satisfactory to the purchaser.

FINANCING SOURCES AND INCENTIVES

Financing Sources

There are several potential sources of funds for foreign investors including banks, leasing companies and factoring companies. In addition, the issuance of industrial revenue bonds is a viable source of financing for certain manufacturing businesses.

Banks are available to provide short-, medium- and long-term financing. Short-term financing can be arranged through loans or the use of a "line of credit." Pursuant to a line of credit, the customer is permitted to draw down sums of money from time to time up to a specified maximum. Medium- and long-term financings usually take the form of loans with interest rates that "float" according to some market indicators. The most common market indicators used by banks are the "prime lending rate" and the London Interbank Offering Rate ("LIBOR").

Leasing companies generally finance personal property and equipment. A leasing company will purchase equipment for the investor and then lease it to the investor for a specified periodic payment. The leasing company retains actual title to the equipment and can depreciate the equipment on its financial statements. For true leases, the lessee could treat the rental payments as a current expense on its financial statements, thus reducing net taxable income. In addition, many times the lease agreement will provide for a purchase option at the end of the term. The foreign investor should consult with a U.S. tax advisor to determine whether a lease or a purchase of equipment would be most beneficial.

Factoring companies provide funds by purchasing accounts receivable at a discount. The customer is notified that his account has been assigned and then remits payments directly to the factoring company. The factoring company occasionally (but not often) assumes the risk of non-payment and performs bookkeeping and collection functions. The advantage to the seller is the access to immediate cash, although at a reduced value.

Industrial revenue bonds are a form of long-term, low-interest financing used to finance the establishment or expansion of manufacturing facilities. The low interest rate is available because the interest earned by the bondholder is exempt from federal income taxes. Generally, industrial revenue bonds may be issued in amounts up to $10 million, subject to certain conditions.

Industrial revenue bonds may be issued in many states. The focus of the industrial revenue bond program is the creation of jobs in the manufacturing sector which will raise the average manufacturing wage level in the community and reduce unemployment.

The industrial revenue bond financing program begins with the entity's application to the county Fiscal Authority (the "Authority") for "inducement." The inducement represents a letter of intent by the Authority to issue industrial revenue bonds for the benefit of the company. Only costs incurred by the company after the "inducement" or 60 days prior to the inducement date may be paid out of bond proceeds. Thus, the company should not enter into binding contracts for the purchase of land or other assets prior to being induced or prior to speaking further with legal counsel. So long as the company has been induced, it may incur costs relating to the project prior to issuance of the bonds and thereafter generally be reimbursed for these costs out of bond proceeds, so long as the bonds are issued within one year after the project is placed in service. This enables the company to proceed with the development of the project even though the bonds have not yet been issued.

Incentives

A wide variety of state and local financial and tax incentives are available for new, expanding and in some cases, retained businesses. The amount of these incentives generally relates to the number of new jobs created or retained, the amount of the wages paid, the location of the project, the amount of capital to be invested and the future viability of the business.

State and local incentives can range from individually tailored legislative incentive packages for large projects to statutory incentives for smaller projects. Non-refundable and refundable tax credits, tax abatements, grants, low interest loans and bond financing, training assistance and research and development support may be offered depending on the project and the policies of the respective state and local governments.

Parker Poe routinely assists both domestic and foreign companies with the negotiation of incentives for projects targeting locations in the Carolinas and across the United States, Canada and Mexico. We have also assisted one international manufacturer in evaluating proposals in Central Europe. We provide companies with a comparative analysis of negotiated incentive proposals, reflecting the true and current value of these packages to our clients. In addition, we set out in detail the performance goals and compliance steps required to qualify for these funds. Lastly, we assist many of our clients with compliance once the incentives have been finalized and the project announced.

In addition to negotiating incentives, we also work with company site teams to evaluate the legal aspects of various sites, including a preliminary review of relative real estate, infrastructure, labor, environmental and regulatory issues. This preliminary legal review saves our clients valuable time and money. We can often swiftly spot unusual environmental conditions and local regulations which might, in comparison to other sites, cause additional project delay and generate additional costs. Once a short list of desirable sites has been identified, Parker Poe also prepares a project management timeline capturing the steps necessary to efficiently execute the legal aspects of the project.

Finally, we assist clients with the preparation of either a non-binding Memorandum of Understanding (MOU) or a binding Development and Location Agreement memorializing all significant state and local economic development incentive agreements and promises made to the client by governmental representatives and third parties. We would also work to obtain all necessary state and local government approval of promised project incentives.

EMPLOYMENT ISSUES

The U.S. laws regarding the employment of workers are generally less restrictive than in most foreign countries. Laws regulating employment come from both the federal and individual state governments. Companies doing business in a particular state (especially California) need to carefully review local legal requirements. However, a few generalizations regarding U.S. employment requirements can be made. Some states are "right to work" states which means that the right of a person to work for a particular company cannot be denied solely because of the employee's membership or non-membership in any labor union, organization or association. This is beneficial to employers because it discourages the formation of labor unions and helps to keep labor costs down. Other states allow agreements with unions to confirm employment or union membership.

Legal issues should be considered when hiring and terminating employees in the United States. Most states follow the "employment at will" doctrine. This means that without an agreement as to the term or length of employment, an employee can be terminated by the employer, with or without cause, at any time, except for certain illegal reasons. Employers often require their executive employees, however, to sign a written employment agreement, which may include provisions such as salary, benefits, length of employment, notice period for termination, covenants not to compete, and covenants not to use or disclose confidential and proprietary information of the employer. Employment agreements with non-executive employees are rarer.

A covenant not to compete is an agreement by an employee not to compete with its employer in certain ways for a period of time after the employment relationship ends. These types of covenants are strictly construed by the courts, but can be enforced in most states if they are in writing, supported by consideration, reasonable as to the duration of the restriction and the territory, and do not violate a public policy of the state. In a number of States, if the covenant not to compete is signed by the employee prior to beginning employment, the hiring of the employee generally is adequate consideration for the covenant not to compete. If the covenant not to compete is executed after the employment relationship has begun, the employer must provide new consideration in most states, such as specific additional salary or benefits or other compensation. The terms of the covenant not to compete should be carefully drafted, with the assistance of legal counsel, to address the requirements for enforceability pursuant to specific state law.

Every U.S. state also has a trade secret protection act that prohibits employees from using or disclosing information of its employer which is confidential and proprietary. Many employers require their employees, however, to sign a written confidentiality agreement. It is preferable to have this type of agreement signed at the time the employee begins employment, and it can be incorporated into an employee handbook (discussed below).

Employers also need to be aware of various federal and state employment discrimination laws that protect employees (and prospective employees) from discrimination based on factors such as age, race, gender, religion, national origin, and physical or mental disabilities. These laws include the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, and selected state laws. With an understanding of these laws, a foreign-owned entity should not have particular difficulty adjusting its policies and procedures to operate in accordance with the applicable laws.

Other employment issues that arise include the payment of wages, the granting of employee benefits and the adoption of an employee handbook. The amount of wages to be paid to an employee is established by the employer, normally based on market and industry practices (although state and federal laws set a minimum wage that is consistently applied to all industries). For employees who do not fall under a specific exemption, overtime must be paid after 40 hours of work in a given week, at a rate of one and one-half times the employee's regular rate. The employer should determine at the beginning of employment whether the employee is exempt or non-exempt for overtime. In addition, the employer must withhold a certain percentage of the employee's income to pay certain federal and state taxes and make

periodic filings to government agencies regarding the wages of each employee. An accountant or tax advisor can easily guide the foreign entity through the various requirements.

In most states, employers are not required to grant employees any specific benefits. In practice, however, employers may offer certain benefit packages as an incentive for employees to work for them. These benefits may include one or more of the following: medical insurance, dental insurance, disability insurance, and profit sharing and retirement plans. Larger employers may be required to offer eligible employees unpaid job-protected leave from work due to childbirth or serious illness. The details of the benefits can be discussed with the employer's legal and financial advisors to determine the most appropriate benefits to offer employees.

Finally, many employers adopt an employee handbook to govern the behavior of their employees and to describe the benefits being offered by the employer. An employee handbook is not a complicated document to prepare, but is a useful tool for an employer since it establishes consistent work-related standards which the employer and employee will follow. It should be carefully drafted to avoid unintended obligations on the employer. It will cover important aspects of employment and will inform employees what standards of performance and codes of conduct are acceptable in the workplace.

ENVIRONMENTAL ISSUES

Regulation of activities that impact the environment tends to be more detailed in the United States than in other countries. In large part, the federal government creates environmental regulatory programs which are then implemented by the states if the state meets federal standards. (The federal government regulates businesses directly in those states not meeting its standards.) A number of states have adopted the federal government's program standards and, in turn, directly implements the federal Clean Water Act and Clean Air Act as well as other statutory programs aimed at the regulation of activities generating or storing hazardous waste or the underground tank storage of hazardous substances.

Businesses locating in the United States need to understand their obligations under applicable federal and state environmental laws. One aspect of these laws is whether permits are required by environmental authorities before beginning construction. For example, air emissions permits need to be obtained before starting construction if the potential emissions from the facility exceed certain regulatory thresholds. Similarly, spill prevention plans need to be prepared and in place before beginning operations at facilities that use or store petroleum or any other type of oil in excess of certain threshold amounts if there is a chance of an oil spill reaching streams or other surface waters. Special pre-construction permits may also be required in coastal counties under the Coastal Area Management Act. Other land use or zoning restrictions may apply in certain localities. Permitting issues should be considered at the beginning of the planning process. The time for getting a permit can vary from weeks for a simple sedimentation control permit to many months if a complicated air emissions permit or wetlands permit is needed.

For businesses buying existing operations, environmental permits can sometimes be transferred to the new owner. The permits needed to continue operations, however, should be identified and the transfer procedures initiated well in advance of the purchase so that permit transfers can be concluded at closing. Operating with a permit in the former owner's name can lead to significant liability. In addition, certain permits cannot be transferred, requiring a new owner to obtain a new permit prior to operation.

Pre-purchase environmental reviews are also necessary to cover legal issues that extend beyond permitting. For example, the United States has a strict liability scheme applicable to owners of property contaminated with hazardous substances. Innocent purchasers are exempt from liability only if they perform investigations that meet statutory standards and do not uncover contamination. If contamination is uncovered, the potential liability needs to be assessed prior to purchase and measures to protect against that liability, such as indemnity agreements, brownfields agreements, or insurance, should be

considered. In addition to uncovering contamination, pre-purchase environmental reviews can help determine if there is some prohibition on development. For example, Clean Water Act rules prohibit construction activities without approval from the United States Army Corps of Engineers if those activities disturb certain "wetlands." It often requires expertise to determine what land constitutes a "wetland".

We work with companies to identify pre-purchase or pre-development environmental permitting and investigation issues and to help address them. Some purchasers elect to purchase environmental insurance to reduce the risk of environmental liabilities associated with real property.

Once properly permitted activities are commenced, companies also need to be aware of the environmental regulations governing their activities that extend beyond the requirements of any environmental permit. For instance, manufacturing companies that generate waste typically do not need a permit for that activity, but they are obligated to determine which of their waste streams meet the definition of "hazardous waste" and to follow complex rules for storing, transporting and disposing of such waste. Spills of oil or hazardous substances may need to be permitted or even reported depending on the amount spilled, but if certain thresholds are exceeded, stringent reporting requirements apply. In addition, the use of certain chemicals which are not bound into the company's products may need to be reported if regulatory thresholds are exceeded. To keep up with the variety of complex regulations, Companies sometimes prepare environmental management manuals and institute training programs. We work with companies and their consultants to indentify and manage these types of compliance issues.

OTHER GOVERNMENT REGULATION

There are other federal, state, and local laws and regulations that directly and indirectly regulate the conduct of business in the United States. The foreign investor should work with its legal counsel and other advisors to understand and address the particular laws and regulations that apply to its business and activities.

OTHER LEGAL ISSUES

There are many other legal issues beyond the scope of this summary which may be of interest to a particular entity as it plans its strategy for investing and doing business in the United States. These include, for instance, patent and trademark laws and U.S. trade laws, as well as the legal aspects of other investment structures such as mergers and acquisitions, joint ventures and licensing transactions.

CONCLUSION

A Parker Poe team of experienced professionals can be assembled quickly to work with and advise companies considering doing business or investing in the United States. The Parker Poe team is committed to working with clients so they can achieve success in the United States.

FIRM PROFILE

Parker Poe Adams & Bernstein LLP, through planned and steady growth over the years, has become a prominent law firm with approximately 210 attorneys. As one of the largest firms in the Carolinas, we have North Carolina offices in Charlotte, the financial center of the region, and in Raleigh, the North Carolina state capital and an important and expanding business center. In South Carolina, our Spartanburg office serves a rapidly growing region recognized worldwide as an emerging center for business and industry and our Columbia office is located in the state capital and in the center of economic development for the state. Our Charleston office serves a thriving port and commercial center in South Carolina. The firm's newest office in Myrtle Beach services the needs of clients in the rapidly expanding resort, hospitality and planned development industries. From these offices, we assist clients with their business activities in the Carolinas and throughout the United States and various parts of the world.

Parker Poe's lawyers practice in such diverse areas as antitrust and trade regulation, banking, bankruptcy and reorganization, capital markets, commercial real estate, corporate and commercial law, employee benefits, employment relations, entertainment law, environmental law, estate planning, foreign investment and trade, health care, immigration and naturalization, insurance, intellectual property, international, legislative and administrative representation, mergers and acquisitions, partnerships and joint ventures, products liability, professional malpractice, real estate and construction litigation and arbitration, securities, tax planning for businesses and partnerships, technology management and licensing, telecommunications, transportation and zoning.

The International Business Team has substantial experience in representing European and Asian enterprises in connection with their U.S. business activities and representing U.S. enterprises in Europe, Latin America and Asia. Several members of the International Business Team speak German, Spanish, French and Mandarin

The firm's underlying philosophy is to provide efficient and effective solutions to our clients' problems in a responsive manner which inspires trust and confidence. This statement summarizes our goal as practicing attorneys and constitutes a service commitment to our clients, one which we take very seriously.

Parker Poe

INTERNATIONAL BUSINESS

Parker Poe is a leader in the Carolinas representing international companies competing in the world market. Since forming our international practice in the early 1980s, we have seen global business change along with the needs of our clients. Parker Poe's International Business attorneys provide clients, both in the Carolinas and beyond, with quality and effective legal advice based on years of experience and a local and worldwide network of corporate, financial, political and professional relationships, clients and contacts. As a member of the TerraLex network of law firms, we have access to more than 150 law firms worldwide which enable us to provide prompt and effective service around the globe.

Our clients include a variety of multinational, foreign and domestic clients, both public and private. We are equipped to serve a wide range of industries including automotive, advanced manufacturing, energy, biotechnology, chemicals, technology, telecommunications and pharmaceuticals. We offer our clients creative, responsive and aggressive legal strategies as well as a broad portfolio of legal services.

Although the speed and technology of business have changed, the values we bring to our clients have not. From small, private companies investing in the Carolinas to public companies making acquisitions abroad, our clients benefit from our comprehensive legal services, extensive contacts and depth of knowledge in the international business world.

Parker Poe's International Business Attorneys Have Experience in Areas Such as:

- Business investments into the United States and, in cooperation with foreign law firms, into other countries
- Mergers and acquisitions and other cross-border transactions, including joint ventures and partnerships
- Economic development and site selection, including services for developing, constructing and financing manufacturing, research and other facilities
- Immigration services for all aspects of business-related immigration and visa law
- International tax services for business investments and transactions, including coordinating with foreign tax advisors to provide effective global tax advice
- Corporate counseling on corporate, commercial and contract issues including intellectual property issues
- International trade and U.S. customs matters in connection with the import and export of products and technology
- Transnational litigation and arbitration to protect and defend the rights of our clients

Parker Poe

INTERNATIONAL BUSINESS ATTORNEY CONTACT LIST

NORTH CAROLINA

Charlotte

Three Wells Fargo Center
401 South Tryon Street, Suite 3000
Charlotte, NC 28202
Tel: 704-372-9000
Fax: 704-334-4706

Albert E. Guarnieri
International Business
704-335-9888
alguarnieri@parkerpoe.com

Stephen R. Hunting
Corporate
704-335-9492
stevehunting@parkerpoe.com

George H. Pretty II
International Business
704-335-9073
georgepretty@parkerpoe.com

James N. Greene III
Tax & Investment
704-335-9896
jimmygreene@parkerpoe.com

Hector G. Ibarra
International Business
704-335-9078
hectoribarra@parkerpoe.com

Kevin W. Chapman
Corporate
704-335-6625
kevinchapman@parkerpoe.com

Michael A. Almond
International Business
704-335-9866
malmond@parkerpoe.com

Raleigh

Wells Fargo Capitol Center
150 Fayetteville Street, Suite 1400
Raleigh, NC 27601
Tel: 919-828-0564
Fax: 919-834-4564

Henry C. Campen, Jr.
International Business and Energy
919-890-4145
henrycampen@parkerpoe.com

William G. Pappas
International Business
919-890-4164
billpappas@parkerpoe.com

Todd M. Rubin
Immigration
919-835-4598
toddrubin@parkerpoe.com

R. Bruce Thompson, II
Government & Public Policy
919-890-4147
brucethompson@parkerpoe.com

Jennifer L. Ma
International Business
919-835-4681
jenniferma@parkerpoe.com

Parker Poe

INTERNATIONAL BUSINESS ATTORNEY CONTACT LIST

SOUTH CAROLINA

Charleston
200 Meeting Street, Suite 301
Charleston, SC 2940
Tel: 843-727-2656
Fax: 843-727-2680

David B. Summer, Jr.
Government and Public Policy
803-253-8910
davidsummer@parkerpoe.com

L. Elizabeth Gibbes
Corporate & Immigration
864-253-6128
elizabethgibbes@parkerpoe.com

Columbia
1201 Main Street, Suite 1450
Columbia, SC 29201
Tel: 803-255-8000
Fax: 803-255-8017

Sam C. Moses
International Business
803-253-6842
sammoses@parkerpoe.com

Ray E. Jones
Public Finance
803-253-8917
rayjones@parkerpoe.com

Michael E. Kozlarek
Banking & Finance
803-253-8924
michaelkozlarek@parkerpoe.com

Spartanburg
100 Dunbar Street, Suite 206
Spartanburg, SC 29306
Tel: 864-591-2030
Fax: 864-591-2050

T. Alexander Evins
Corporate
864-253-6101
alexevins@parkerpoe.com

Elizabeth J. Brady
Corporate
864-253-6109
elizabethbrady@parkerpoe.com