

The background features a collage of office-related images including a keyboard, a clock, a spiral notebook, a telephone, and a pair of glasses. The Sullivan & Worcester logo is prominently displayed in the upper center, with the text 'SULLIVAN & WORCESTER' in white on a dark brown background. A large, stylized cross shape is formed by overlapping squares in various shades of brown and tan.

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*Doing Business  
in the  
United States*

AN EXECUTIVE SUMMARY OF LEGAL ISSUES

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## INTRODUCTION

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*The United States is often described as one of the easiest and most open countries in which to do business. However, it is also a highly legalistic society with a wide range of statutes and regulations that can entangle those trying to begin U.S. operations for the first time. This executive summary is intended to provide an overview of certain legal issues that should be considered when launching U.S. operations. It does not attempt to describe every applicable law of which non-U.S. businesses operating in the United States should be aware. In addition, the laws discussed here may be repealed or amended, and interpretations by courts and the application of various regulations may affect these laws at any time. When planning a specific U.S. transaction, one should consult experienced legal counsel familiar with federal law as well as the laws of all applicable states.*

## BASIC U.S. GOVERNMENTAL STRUCTURE

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The United States has a three-tiered system of government with various laws, rules and regulations at each level.

### FEDERAL

The U.S. Constitution and statutes enacted by the U.S. Congress and signed by the President create the foundation of federal law. Federal law applies everywhere in the United States and prevails over conflicting state or local law. However, federal and state laws often govern the same subject without conflicting. In these cases, both federal and state law may apply. Administrative agencies with the authority to adopt regulations implementing the underlying statutes usually administer the laws passed by the U.S. Congress. The United States also has a federal system of trial and appellate courts, which interpret and enforce U.S. laws as well as the laws of the states.

### STATE

In each of the fifty states, the state constitution and statutes enacted by the state's legislature and signed by the state's governor create the basis for state law. Each state's law applies only within its boundaries and is often administered by state administrative agencies, which frequently adopt regulations to implement the laws. Each state also has its own system of trial and appellate courts, which interpret and enforce the state's laws.

### LOCAL

In most states, statutes passed by the state legislature confer specific powers on counties, cities and towns. The laws of these municipalities usually take the form of by-laws, ordinances and regulations enacted based on the authority given to them by the state statute.

## U.S.-BASED OPERATIONS

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In order to penetrate the U.S. market, many companies decide to establish operations in the United States. The United States welcomes such foreign investment. U.S. Department of Commerce figures indicate that there was over \$800 billion of foreign investment in the United States in 2003. The most common vehicles used for commencing U.S.-based operations and some of their principal attributes are discussed below.

### U.S. BRANCH OPERATIONS

Some companies choose to commence U.S.-based operations by opening a U.S. branch.

- U.S. branches are easy to establish and administer. They are simply an extension of the non-U.S. company's home office.
- To create a U.S. branch, a non-U.S. company simply registers as a foreign corporation in the state(s) where the business is conducted. This typically involves filing a simple form and paying a modest fee.
- Using a U.S. branch office potentially permits U.S. start-up losses to be applied against home office income. However, U.S. tax laws generally impose a tax on U.S. branch profits in much the same manner as a corporate subsidiary is taxed; distributions of profits from the branch to its home office are also taxed as dividend distributions.
- A major disadvantage of establishing a U.S. branch is that the non-U.S. parent company becomes exposed to all of the liabilities of the U.S. branch, including the possibility of a full audit by the U.S. Internal Revenue Service.

### U.S. SUBSIDIARIES

Much more common than establishing a U.S. branch office is the creation of a U.S. subsidiary that is owned by the non-U.S. parent company.

Business in the United States is conducted using a variety of entities, including corporations, general partnerships, limited partnerships and limited liability companies, all of which can be (directly or indirectly) wholly owned, or alternatively can be owned by multiple parties.

**Corporations.** Corporations are the most common choice of entity.

- Incorporation is a simple and relatively inexpensive process. Incorporation fees usually run between \$500 and \$1,000, and in some jurisdictions the corporation can be formed by fax. There are no nationality requirements imposed on management.
- A major advantage of the corporation is that the non-U.S. parent is generally insulated from the liabilities of the U.S. subsidiary, provided that the U.S. subsidiary is adequately capitalized and corporate formalities are observed. However, the non-U.S. parent is probably not insulated from product liability claims. In the United States, corporations are usually taxed at both the federal and state levels as legal entities separate and apart from their stockholders.
- There is no federal system of corporations or corporate law; corporations are established under state law. Although all state corporate laws share certain fundamental principles and attributes, the details vary.

- Delaware is by far the most common choice of state in which to incorporate, for it has the most highly developed corporate law in the country, and its corporate principles and court decisions on matters of corporate law are widely followed throughout the United States. Delaware is also generally viewed as being pro-business and pro-management. Although the business and corporate offices of a Delaware corporation need not be located in Delaware, a Delaware corporation is required to establish an address for service of process in the state. Various service companies provide this service for a modest annual fee.

**General Partnerships.** A general partnership is formed when two or more parties enter into a written or oral agreement to engage in business activities. The relationships among the partners are determined by the terms of the partnership agreement, although state law governs the rights and obligations of partners to a certain extent. The tax consequences of the partnership's activities are passed through to the partners, and the partnership entity itself is not subject to taxation. However, if a non-U.S. corporation is a partner in the conduct of a U.S. business, the non-U.S. corporation is subject to tax in the U.S. on its share of partnership income and also taxed on distributed earnings from the partnership as though they were dividend distributions. The partners in a general partnership have a great deal of flexibility when determining how to assign the rights, responsibilities and economic benefits and burdens among themselves. It should be noted, however, that each partner is jointly and severally liable for all partnership obligations.

**Limited Partnerships and Limited Liability Companies.** Limited partnerships are created pursuant to state statutes and are used as a means for the limited partners to enjoy the pass-through tax treatment of general partnerships and the limited liability of corporations. A limited partnership includes one or more general partners who manage the limited partnership's affairs (and who have unlimited liability similar to that of a partner in a general partnership) and any number of limited partners who typically enjoy most of the economic benefits of the partnership but have almost no managerial authority (and correspondingly limited liability).

Limited liability companies, or "LLCs," are a relatively recent but popular entity choice and are being used with increasing frequency. LLCs have become popular because they have the limited liability characteristics of a corporation, the tax "flow-through" nature of partnerships, and can be structured from a managerial viewpoint much like a corporation.

**Joint Ventures.** "Joint venture" is a term that is used to describe an arrangement in which two or more parties decide to form a new business together or contribute portions of an existing business or other assets to a joint enterprise. The use of this term is somewhat confusing because the term does not describe a different form of legal entity; joint venture is a general term used to indicate a relationship between parties participating in a common enterprise. Joint ventures can be formed using any of the foregoing legal forms of organization. Issues to consider when forming a joint venture include the scope of the venture, required capital contributions (both initially and at later intervals), respective responsibilities of the venturers, sharing of profits and losses, decision-making and the breaking of deadlocks, and mechanisms for dissolution and distribution of assets.

## PROTECTION OF INTELLECTUAL PROPERTY

U.S. laws are highly protective of intellectual property, or "IP." The three main types of IP are patents, trademarks, and copyrights, although IP also includes designs and trade secrets, among others. Each form of IP is protected by different federal and/or state laws.

### PATENTS

A patent gives an inventor the right, for a limited period of time, to prevent others from making, using or selling his invention. Normally, this period extends for twenty years from the filing date of an application for patent. In the United States, patents are awarded to those persons who have timely filed a patent application that satisfies the statutory requirements (e.g., utility, novelty, non-obviousness, written description, and enablement) and can prove that they were the "first to invent" the claimed invention. Under U.S. patent law, an inventor has one year from the time his invention is first made public to file a patent application. Foreign countries, by contrast, generally have a "first to file" system and do not generally provide a grace period. The United States is a party to a number of major international treaties regarding patents, including the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the General Agreement on Tariffs and Trade (GATT), the Paris Convention for the Protection of Industrial Property (Paris Convention), and the Patent Cooperation Treaty (PCT).

### TRADEMARKS

A trademark distinguishes goods and services of one entity from those of another. Trademarks can be words or devices. It is advisable to conduct a trademark search for desired corporate or product names and devices to

ensure that there are no conflicting marks already in existence in the United States or other countries of interest. If the desired name or device is available, it is advisable to file trademark applications in order to secure their registration. Federal trademark registration may be commenced on an "intent to use" basis before the mark is in use but must be followed up by proof of use of the mark. The United States is a party to a number of major international treaties regarding trademarks, including the Paris Convention, the Madrid Agreement concerning the International Registration of Marks (Madrid Agreement), the Protocol Relating to the Madrid Agreement (Madrid Protocol), the Trademark Law Treaty, and the Pan-American Convention for Trademark and Commercial Protection, among others.

### **COPYRIGHTS**

Under U.S. law, copyright is a form of protection provided to the authors of "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works. Copyright protection exists from the time the work is created in fixed form. The copyright in a work of authorship immediately becomes the property of the author who created the work. Only the author, or those deriving their rights through the author, can rightfully claim copyright. In the case of "works made for hire," the employer and not the employee is considered to be the author. The basic rights of a copyright owner are not dependent upon federal registration, but registration does afford certain additional rights such as the ability to collect substantial damages in lawsuits to enforce copyright protections. The U.S. is party to a number of major international treaties regarding copyrights, including the Berne Convention, the Brussels Convention, and the WIPO Copyright Treaty (WCT), among others.

## **TAXATION SYSTEM**

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In the United States, businesses are often taxed at three levels: federal, state and local.

### **FEDERAL TAXATION**

Subject to a few exceptions, the federal tax on corporate net income is generally 34% on taxable income over \$75,000, with a 35% rate on taxable income over \$10 million.

**Branch Taxation.** There is usually a 30% withholding tax on branch profit distributions to the non-U.S. home office; however, for non-U.S. corporations in countries that have tax treaties with the U.S., the rate may be lower, for example, 5% for Canada, France, Germany and Ireland, and 15% for India. Allocation of income and loss between the non-U.S. home office and the

U.S. branch are often subject to challenge by the U.S. Internal Revenue Service. The non-U.S. home office is directly liable for the U.S. branch's taxes, and the home office's books are subject to audit by the U.S. Internal Revenue Service.

**Corporate Subsidiary Taxation.** The formation of a corporate subsidiary is not a taxable event. However, the corporate subsidiary will pay U.S. federal and state income taxes on its taxable income. There is a 30% withholding tax on dividends paid to the non-U.S. parent; however, this withholding rate may be reduced to as little as 5% or even 0% if the non-U.S. parent is a resident of a country that has an income tax treaty in effect with the United States. Dividends paid from the U.S. subsidiary to the non-U.S. parent are not deductible. The U.S. Internal Revenue Service has issued regulations on transfer pricing among corporate affiliates to help ensure "arms-length" pricing and to avoid profit-shifting. Transfer pricing is a complex area, which is subject to intense enforcement by the U.S. Internal Revenue Service. The U.S. Internal Revenue Service may also impose substantial penalties on any tax shortfall. It is important to develop a written policy that justifies transfer pricing among corporate affiliates.

### **STATE TAXATION**

States typically impose an income tax on allocable corporate net income and sometimes also impose a corporate excise tax based upon the value of tangible property located in the state or net worth allocable to the state. Massachusetts, for example, imposes a 9.5% tax on allocable corporate net income and a tax of \$2.60 per \$1,000 of tangible property or net worth. By contrast, New York imposes either a 7.5% tax on corporate net income or a tax of \$1.78 per \$1,000 of total business and investment capital (whichever is greater). Most states also impose a sales or use tax, which is typically their largest source of revenue. Massachusetts imposes a 5% sales tax, while New York has a 4.25% sales tax. In some states, there is an exemption for sales to wholesalers.

### **LOCAL TAXATION**

Local taxation often consists of a property tax based on the appraised value of real and personal property. Additionally, in some localities (such as New York City), there are local sales taxes and taxes on net income.

## **EMPLOYMENT LAW AND EMPLOYEE BENEFIT ISSUES**

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In order to maximize productivity without breaching employment regulations, it is important for anyone considering hiring employees in the United States to understand the fundamentals of human resources management, employee-related taxes and benefit plan design and administration.

## **AT WILL AND UNION EMPLOYEES**

The majority of U.S. workers are “employees at will,” a concept that gives employers wide latitude to terminate employees without notice and for no cause. This concept of “employment at will” is limited by various federal and state non-discrimination and other laws (discussed later) and by implied contracts (such as may be created by an employee manual). A minority of U.S. workers are members of labor unions, and the terms of their employment are subject to collective bargaining by their duly authorized labor organization. Collective bargaining is governed by federal laws and regulations and is overseen by the National Labor Relations Board.

## **LAWS PROHIBITING DISCRIMINATION AND SEXUAL HARASSMENT**

Federal law prohibits discrimination on the basis of race, color, religion, creed, sex, age, disability, national origin, ancestry or veteran status. State anti-discrimination laws may offer protection to additional categories, such as sexual orientation and marital status. Sexual harassment is a form of sex discrimination and is therefore prohibited by federal and state anti-discrimination laws. The law recognizes two categories of sexual harassment: (i) *quid pro quo* harassment, which involves the exchange of sexual favors for continued employment or employment-related benefits; and (ii) hostile environment harassment, which occurs when conduct of a sexual nature is so severe and pervasive that it creates an intimidating, hostile or sexually offensive work environment. Harassment on account of any of the other characteristics protected by law (e.g., race, religion, age, etc.) is also illegal. Finally, federal and state laws may require that certain employees be offered leaves of absence for maternity, treatment of a serious medical condition, and/or care of a seriously-ill family member.

## **PAYROLL TAXES**

In addition to withholding requirements for federal, state and, in some cases, local income taxes, employers are required to pay Social Security and Medicare tax on an employee’s wages (7.65% on wages of up to \$90,000 for 2005 plus 1.45% of the excess over \$90,000, with the employee paying an equivalent amount through withholding from his or her salary) and unemployment insurance contributions (e.g., as low as 0.6% and up to 9.3% on wages of up to \$14,000 in Massachusetts).

## **BENEFITS REGULATION**

The federal government closely regulates employee benefit plans under a regime known as “ERISA” and occupational health and safety under a regime known as “OSHA” (Occupational Health and Safety Administration). Workers compensation (a system that allows employees injured on the job

to be awarded damages regardless of any defense an employer may have) is governed on a state-by-state basis. Also, the federal government has enacted various wage and hours laws. Generally, employers in the United States are not obligated to provide health insurance to their employees; however, certain types of medical and family leave are mandated by federal law. Additionally, if health insurance is provided, there are federal laws governing the employer’s use of health information and the continuation of health insurance after an employee is terminated.

## **PLANT CLOSINGS AND LAYOFFS**

Federal law requires U.S. employers with 100 or more employees to give sixty days advance notice in the case of certain plant closings and large layoffs. Some states have more stringent requirements.

## **HIRING ALIENS**

Under federal law, it is unlawful for employers to hire illegal aliens. Employers must secure documentary proof of a new hire’s legal right to work in the United States within three days of the date of hire or they will face various civil fines and penalties and the possibility of criminal penalties.

## **OBTAINING WORK AUTHORIZATION FOR ALIENS**

Foreign nationals who are not lawful permanent residents of the United States must have authorization for employment from U.S. Citizenship and Immigration Services. A prospective employer may petition to classify an individual in one of a number of employment-based categories so that the individual may work in the United States either temporarily (as a nonimmigrant) or permanently (as an immigrant). Admission in an employment-based nonimmigrant category generally authorizes employment only for the sponsoring employer and for the position described. The non-immigrant visa categories frequently used are L1 and H1. The L1 category encompasses intercompany transferees with specialized knowledge of a company’s operations who have worked for the company abroad for at least one of these preceding years. The H1 category encompasses executive and managerial-level persons who have not previously worked for the U.S. company but do have relevant specialized knowledge.

## **PERMANENT RESIDENCE**

A permanent resident visa allows a foreign national to live and work in the United States indefinitely. The bases on which a visa is granted include a qualifying job offer from a U.S. employer and a qualifying investment in the U.S. (at least \$1,000,000; \$500,000 in certain economically disadvantaged areas) in a new venture expected to employ at least ten U.S. workers within two years.

## REAL ESTATE

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Although real estate is a complex and expansive topic, persons entering into business in the United States for the first time should consider a few major points. First, there is no such thing as a “standard” lease in the United States. Aside from a few real estate law conventions, one should view a lease as a contract to be negotiated like any other. A major consideration when buying or leasing real estate is potential liability for environmental contamination and remediation. Both the owners and the operators of real estate may face the possibility of environmental liability. In environmental litigation, fault is not an issue and clean-up costs can be enormous. For this reason, persons buying or leasing significant commercial real estate often commission environmental inspections prior to finalizing the purchase or lease.

Other considerations include zoning and permitting requirements. Various state laws and local ordinances regulate real estate by, for example, requiring that permits be obtained from state or local agencies before occupying and using each particular piece of real estate. Also, these state laws and local ordinances may regulate anything at the particular piece of real estate, from the permitted uses of the real estate, to the allowed size of the land and improvements of the real estate, to the aesthetics of the land and improvements.

Local transfer taxes are imposed upon the sale of real estate in the United States. The amount of the transfer tax and the party responsible for paying it, however, varies from state to state. In Massachusetts, the seller typically pays the transfer tax, which is assessed at a rate of \$4.56 per \$1,000 of consideration paid.

Finally, there is an income tax reporting requirement and a withholding tax on the sale of U.S. real estate owned by a foreign entity.

## ACQUISITION OF U.S. COMPANIES

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Acquisitions of U.S. companies are typically structured in one of three ways: asset purchases, stock acquisitions or mergers.

### ASSET PURCHASES

In an asset purchase, it is important to specify which assets are being bought and which liabilities are being assumed. Asset purchases often include indemnification provisions to protect the buyer from breach of the seller’s representations and warranties. Typically, buyers in an asset purchase receive a stepped-up basis in the assets for income tax purposes.

## STOCK ACQUISITIONS

In a stock acquisition, the buyer purchases all of the outstanding stock of the target company, thereby acquiring the assets of the target subject to all liabilities. Where indemnification is provided, it is from the selling shareholders. A step-up in the underlying assets’ income tax basis is subject to election.

### MERGERS

Mergers provide another form of stock acquisition. Often in a merger, the target company is merged with a wholly-owned subsidiary of the buyer, one that is either already existing or created for that specific purpose. The parent company may provide the stock or cash consideration for the merger. Where indemnification is provided, it is from the former shareholders. Mergers where 50% or more of the consideration is buyer stock can generally be accomplished on a tax-free basis.

## SECURITIES LAWS

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The capital markets in the United States are among the most efficient and liquid in the world. A wide array of methods exists for raising capital through the issuance of stock, debt or other securities. The U.S. capital markets and the sale of securities by issuers are regulated at both the federal and state levels to ensure full disclosure of material information so that investors have adequate information about an issuer of securities and to protect the integrity of the trading markets from manipulation. In the United States, offers and sales of securities must be registered with the U.S. Securities and Exchange Commission unless an exemption is available for the particular transaction or securities. Federal and state securities laws regarding the sale of securities are highly technical and complex.

## ANTITRUST LAWS AND TRADE REGULATIONS

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Antitrust laws are designed to preserve competition with the expectation that consumers will benefit from lower prices and greater choice. Three major areas covered by the antitrust laws are (i) acquisitions that are likely to lessen competition, (ii) contracts and understandings in restraint of trade, and (iii) monopolies. The principal U.S. antitrust and trade regulation laws are the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission (FTC) Act and the Hart-Scott-Rodino Act. The Sherman Act prohibits contracts and combinations in restraint of trade; the Clayton Act prohibits certain mergers and acquisitions that lessen competition and certain other specific anticompetitive activities including “tying”; and the Robinson-Patman Act

prohibits discrimination in the price charged for commodities of like grade and quality to competing buyers and certain other discriminatory practices in connection with the sale of goods. The FTC Act protects against unfair methods of competition and unfair deceptive acts and practices, while the Hart-Scott-Rodino Act (discussed in greater detail later) requires the reporting of proposed acquisitions. Public enforcement agencies may bring both civil and criminal actions for antitrust violations. Private parties who prove damage caused by antitrust violations under the Sherman Act, the Clayton Act, or the Robinson-Patman Act receive treble damages. Moreover, there is a broad regime of trade regulations at the federal and state levels governing business practices and methods of competing. The antitrust and trade regulation laws have wide application.

## THE GOVERNMENT AS A CUSTOMER

In the United States, the “government” (including federal agencies, state government agencies, local government entities, and commercial firms that resell to the government) can be the largest single customer for many goods and services. Selling to the government presents exciting opportunities for any business but, like all specialized markets, requires some specialized customer knowledge.

### GOVERNMENT PROCUREMENT

Generally, the government buys through various forms of tender. Contractors may either sell to the government directly, subcontract to other companies, or use channels of distribution, including resellers, dealers, and distributors. Many firms use all three types of business arrangements, depending on customer requirements.

### ELIGIBILITY TO SELL TO THE GOVERNMENT

While the government’s procurement regulations have various “buy American” incentives, the American government has entered into agreements with many other countries providing for open government markets. Many government procurements are open to vendors from any country, and a significant number of additional procurements, while not quite so wide open, are open to vendors from a group of approximately 45 countries.

### GOVERNMENT VERSUS NON-GOVERNMENT CUSTOMERS

The differences between government and non-government customers are significant but manageable. Government regulations mandate the steps the government will take in buying various products and services. There are regulations dealing with many issues that commercial transactions either

ignore or deal with through contract terms. These include allocation of intellectual property rights, payment issues, warranty claims, specifications, contract terminations and other business terms. There are also regulations governing standards of conduct in dealing with the government. While all of these regulations can be reasonably followed, it is highly recommended that expert advice be sought from a government contracts specialist in order to maximize commercial possibilities and avoid regulatory traps.

## U.S. REPORTING REQUIREMENTS

Conducting business in the United States legitimately requires vigilant adherence to a variety of federal regulations. It is essential, therefore, to have an awareness of the U.S. agencies that monitor corporate activity, an understanding of how to satisfy their reporting requirements, and an appreciation of the penalties incurred if reporting criteria are not sufficiently met.

### COMMERCE DEPARTMENT

The International Investment and Trade in Services Survey Act requires an initial report for all investments in U.S. business enterprises in which a foreign person owns a 10% or greater voting interest. The Act covers acquisitions of third parties as well as the formation of new U.S. branches or subsidiaries. The detailed reporting forms collect selected financial information about the U.S. business enterprise, the acquiring person and the cost of the investment. The reports are purely informational and remain confidential. Brokers, accountants or lawyers who assist in the transaction, or a joint venture partner, may also be required to file a separate report. Fines of up to \$10,000 may be levied for noncompliance. There is also the possibility of a like fine and criminal penalties for willful violations by corporate officers, directors, employees or agents.

### EXON-FLORIO NOTICE

The President, through a special interagency Committee on Foreign Investment in the United States, may suspend or prohibit any acquisition or merger by a non-U.S. person of a U.S. corporation if there is a finding that it would threaten U.S. national security. The filing of a notice of merger is voluntary, but failure to file creates the risk that the transaction may be ordered undone. If the Committee decides to investigate, it must make a determination within strict time limits as to whether the transaction should be disapproved.

### USA PATRIOT ACT

Enacted in the wake of the terrorist attacks on the United States in September 2001, the USA Patriot Act requires financial institutions to establish expanded anti-money laundering programs, to strengthen “know

your customer” procedures, and to conduct enhanced due diligence on all accounts belonging to non-U.S. persons. As a result, foreign investors, their family members and associates will have to report, in substantial detail, matters regarding both their ownership of particular accounts and their nonaffiliation with certain individuals and organizations.

#### **HART-SCOTT-RODINO ACT**

Under the Hart-Scott-Rodino Act, a premerger notice must be filed with the Federal Trade Commission and the U.S. Department of Justice for significant mergers and acquisitions. The acquiring party to the transaction must pay a filing fee of \$45,000 to \$280,000 (depending on the value of the transaction). The statute prohibits the closing of a transaction that exceeds certain size-of-the-party and size-of-the-transaction tests until the expiration or early termination of a thirty-day waiting period. A transaction is generally reportable if one party has at least \$100 million in annual sales or assets, the other party has at least \$10 million in annual sales or assets, and after the transaction the buyer holds assets or voting securities of the seller worth at least \$50 million. Transactions of more than \$200 million must be reported regardless of the size of the parties. Penalties in excess of \$1,000,000 have been collected for failure to file even where transactions did not raise antitrust concerns.

#### **PORTFOLIO INVESTMENT**

Portfolio investments in the U.S. by a foreign person must be reported by the U.S. entity to the Department of the Treasury on Form S if they involve long-term (lasting more than one year) marketable or private issues of debt or equity and aggregate over a specified minimum amount in a calendar month (currently \$50 million).

#### **SARBANES-OXLEY ACT**

The Sarbanes-Oxley Act and stock exchange listing requirements extend the reach of U.S. law and regulation to the internal affairs and governance of foreign companies whose securities are registered with the U.S. Securities and Exchange Commission or trade on a U.S. market as well as such companies’ auditors. As a result, these entities are in most instances subject to the same disclosure and corporate governance requirements as their public U.S. counterparts.

#### **AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT**

The Agricultural Foreign Investment Disclosure Act requires that foreign acquisitions or transfers of U.S. farm property be reported to the U.S. Department of Agriculture (USDA), with limited exceptions. Changes in the use of farm property (i.e., from agricultural to non-agricultural and vice

versa) must also be reported. Penalties of up to 25% of the fair market value of the foreign person’s interest in the agricultural land may be assessed for failure to submit a report or for submission of an incomplete or misleading report.

#### **EXPORT CONTROLS**

Under U.S. “deemed export” restrictions, an export license must be applied for and obtained in order to release controlled technology or software to a non-U.S. person in the United States. These restrictions usually apply in connection with employment of non-U.S. engineers in the United States.

#### **DIRECTORATE OF DEFENSE TRADE CONTROLS**

Any person who engages in the business of either manufacturing or exporting defense articles or furnishing defense services is required to register with the U.S. Directorate of Defense Trade Controls and disclose whether the registrant is owned or controlled by foreign persons. The registrant must give five days notice prior to the establishment, acquisition or divestment of a subsidiary or foreign affiliate. The registrant must also give sixty days notice before any sale or transfer to a foreign person of ownership or control of the registrant or any entity thereof. The purpose of registration is to provide the U.S. government with information regarding who is involved in certain manufacturing and export activities.

#### **INTERNAL REVENUE SERVICE**

As noted above, a non-U.S. corporation that has a U.S. branch is required to file a U.S. corporate income tax return for the branch. In addition, a non-U.S. corporation engaged in a trade or business in the United States (or a U.S. corporation that is at least 25% foreign-owned) is required to file an annual information return to report transactions with non-U.S. investors owning a 25% or greater interest (by vote or by value) in the corporation as well as transactions with certain related parties.

#### **U.S. IMPORT LAWS**

When importing of articles into the United States, a number of reporting requirements arise. First, the importer must provide to the Bureau of Customs and Border Protection (formerly known as the U.S. Customs Service) information pertaining to the classification, valuation and origin of the products so that the proper amount of duty is assessed. Where applicable, the importer must also submit documentation that meets the requirements of the USDA and maintain records that satisfy the requirements of the Food and Drug Administration under the Bioterrorism Act of 2002. Other agencies’ requirements may also have to be met.

If the importer (or exporter) participates in the recently formed Customs-Trade Partnership Against Terrorism (C-TPAT), it will be asked to submit a supply chain security profiled questionnaire. It will also be asked to disclose its security procedures for selecting international service providers and steps taken for ensuring that those companies employ adequate safeguards against terrorist activities.

## INVESTMENT INCENTIVES

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In the United States, though there is now an income tax incentive for those in the “manufacturing” sector, there are essentially no investment incentives at the federal level. Significant incentives, however, may be available at the state and local levels. These incentives include one-stop permitting, site selection services, investment tax credits, research and development tax credits, and job recruitment and training assistance. The availability of investment incentives varies widely by state and locality.

## CONCLUSION

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The many potentially applicable laws and overlapping jurisdictions of regulatory authorities create significant potential traps for the unwary. However, with advance planning and consultation with experienced professionals, the launching of an enterprise in the United States can be both efficient and worthwhile.

## ABOUT OUR FIRM

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Sullivan & Worcester has one goal: To help businesses thrive in a fast-changing and increasingly global marketplace. We combine the breadth and sophistication characteristic of large law firms with the flexible, hands-on relationships typically found at boutiques. We strive to be agile and quick - qualities today's markets demand.

Sullivan & Worcester LLP is a leading corporate law firm with over 180 attorneys in Boston, New York and Washington D.C. The firm offers a wide range of legal services to domestic and international clients ranging from Fortune 500 companies to emerging businesses. These include:

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| Banking   | Mergers & Acquisitions                                  |
| Bankruptcy, Reorganization<br>& Creditors' Rights | Private Equity, Venture Capital<br>& Emerging Companies |
| Corporate Governance                              | Real Estate   |
| Employment & Benefits                             | REITs   |
| Energy  | Securities & Corporate Finance                          |
| Entertainment & Media                             | Securitization  |
| Environmental                                     | Tax   |
| Government Contracts & Grants                     | Technology  |
| Investment Companies & Advisers                   | Trusts & Estates  |
| Intellectual Property                             |   |
| Legislative & Federal Affairs                     |   |
| Life Sciences                                     |   |
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