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**establishing a business in delaware (corporations and limited liability companies)**

This memorandum is intended to provide you with an overview of the key issues in establishing a business in Delaware in the Unites States.

1. **Forms of Businesses**

In Delaware, corporations and limited liability companies ("**LLC**") are the most prevalent business forms. Each has different characteristics that must be considered carefully because they may be an advantage to certain investors but not to others.

There are certain common features of corporations and LLCs. These are:

* **Limited liability**: Both corporations and LLCs shield their owners from personal liability. The stockholders of a corporation and the members of an LLC are not personally liable for the debts, obligations and liabilities of the entity.
* **Perpetual existence**: Delaware corporations and LLCs have a statutory right to exist perpetually and continue in existence even if the original principals depart.

 However, there are significant differences between the two business forms with respect to taxation and management:

* **Taxation**: A corporation’s income is subject to double taxation. A corporation must pay taxes on its income when earned, and the stockholders must pay taxes on any dividends or other distributions they receive from the corporation. In contrast, LLCs have the advantage of flow-through taxation. An LLC does not pay entity-level taxes on its income; instead, profits and losses pass through to the members, who report them on their personal tax returns. The members pay taxes on their share of the LLC’s income (even if that income is not distributed). One potential downside of the LLC is that if it is profitable but does not distribute any cash to the owners, the owners are still allocated and taxed on the income of the LLC. However, pass-through taxation can be advantageous if the owners can anticipate and take advantage of company losses on their own tax returns. There are other significant tax advantages specific to each business form over the other, and each must be considered and weighed carefully, on a case-by-case basis, ideally with the advice of tax counsel.
* **Management**: Corporations have mandatory centralized management. Control of the business and affairs of the corporation is vested in the corporation’s board of directors, and the stockholders are generally not involved in the day-to-day management of the affairs of the corporation. However, stockholder approval is required for certain significant transactions such as mergers. On the other hand, LLCs can be managed either by the members themselves or by managers appointed by the members.

Other forms of available business vehicles are general partnerships, limited liability partnerships, LPs and statutory trusts. Each business vehicle has its advantages and disadvantages which need to be reviewed in light of the requirements of the business objective and the investors.

1. **Establishing a presence from abroad**
	1. **Most Common Options**

 The most common option for an overseas company to establish a presence in the US is to incorporate a subsidiary in Delaware. The subsidiary can be a corporation or an LLC. A corporation offers limited liability and has centralized governance structures. Similarly, an LLC offers limited liability and can have centralized governance structures if the members so elect. While corporations have been and still are the first choice for foreign companies establishing a business presence in Delaware, LLCs are an acceptable alternative, but careful consideration should be given to the governance and tax aspects discussed above.

* 1. **How an Overseas Company Can Trade Directly in the US**

*Domestication*:

Any non-US entity can become domesticated as a corporation or LLC in Delaware by filing (i) a *certificate of corporate (or LLC) domestication*; and (ii) a *certificate of incorporation* (or a *certificate of formation*, for an LLC), with the Secretary of State of Delaware (8 Del. C. § 388; 6 Del. C. §18-212). It is also necessary to obtain a *State of Delaware Business License* from the Delaware Division of Revenue.

*Corporate Authority*:

Prior to filing, the domestication and the certificate of incorporation or formation to be filed in Delaware must be approved by the non-US entity in the manner provided for by its governing documents or the law of its jurisdiction of formation.

*Effect of Domestication*:

On domestication in Delaware, the entity is deemed to be the same entity as the domesticating non-US entity and the domestication is deemed to constitute a continuation of the existence of the domesticating non-US entity in the form of a Delaware corporation or LLC. From the effective time of the domestication, Delaware law applies to the non-US entity to the same extent as if the non-US entity had been formed as a Delaware entity on that date. However, the domestication of a non-US entity is not deemed to affect any obligations or liabilities that the entity incurred before its domestication or the personal liability of any person [for these].

*Use of Intermediary*:

It is also possible for an overseas company to do business through an intermediary such as a sales representative, distributor or branch office. However, these structures can expose the overseas entity to much more risk and liability in the US. Overseas companies electing to use one or more of these alternative business strategies should be mindful of the:

* Various qualification and registration requirements.
* Different contractual requirements.
* Various potential operational challenges.
* Nature and sources of dispute that can potentially arise.

*Brach Office, Agents and Representatives*:

A non-Delaware corporation cannot do business in Delaware through or by branch offices, agents or representatives located in Delaware before filing a *certificate of existence* from its jurisdiction of incorporation dated within six months before applying for qualification in Delaware, along with a *statement* executed by an authorized officer of the foreign corporation setting out:

* The name and jurisdiction of incorporation of the foreign company.
* The name and address of the foreign company’s registered agent in Delaware (which may be the foreign company itself, an individual resident in Delaware or a Delaware business entity).
* A statement of the assets and liabilities of the foreign company (the statement must be as of a date not earlier than six months prior to the filing date).
* A description of the business the foreign company proposes to conduct in Delaware, and a statement that it is authorized to conduct that business in the jurisdiction of its incorporation (in other words, a foreign company cannot conduct business in Delaware that it cannot conduct in its own jurisdiction of formation).

*Distributor and Sales Representatives*:

If a non-US company uses a distributor or sales representative to establish a presence in Delaware, it must comply with a number of state and federal laws, including US custom and import laws, and it may have to obtain licenses and permits required by any US legislation relating to the product it is selling. A foreign company operating in the US under any of these structures should work closely with US counsel to ensure that the contracts governing these arrangements minimize the risk of liability.

*Problems with Branch Offices*:

Use of a branch office is not ideal for the majority of foreign companies doing business in the US because the branch office would be deemed an extension of the non-US company’s home office, which would expose the overseas parent company to:

* Lawsuits and claims in the US against its assets.
* Liability for US taxes.
* Possible full audit by the US Internal Revenue Service.
	1. **Setting Up a Partnership**

In Delaware, partnerships are generally formed as limited partnerships ("**LP**"), general partnerships ("**GP**"), or limited liability partnerships ("**LLP**"). The primary advantage of partnerships is the ability to qualify for pass-through taxation for US federal and Delaware income tax purposes. The partners are taxed individually on their respective share of the partnership’s income, whether the income is distributed or not. The assets of a partnership belong solely to the partnership, and the partners have no direct ownership interest in the partnership assets.

*General Partnership*:

A general partnership is a business that has more than one owner and that has not filed papers with the state to create a specific entity such as a corporation or LLC. In a general partnership, each partner is an agent for the partnership with the power to legally bind the partnership and each partner is personally liable for the debts and obligations of the partnership.

*Limited Partnerships and Limited Liability Partnerships*:

LPs and LLPs, on the other hand, are both businesses with more than one owner, but unlike general partnerships, they can offer limited personal liability for business debts. They can be created by filing a *Certificate of Limited Partnership* or a *Statement of Qualification of Limited Liability Partnership* with the Delaware Division of Corporations.

Most partnerships (other than general partnerships) are formed as LPs rather than LLPs. A Delaware LP must have at least one general partner charged with the management of the LP and one or more limited partners. The person serving as general partner is personally liable for all obligations of the partnership incurred while such person is a general partner. In return for giving up management power, limited partners get the benefit of protection from personal liability. This means that a limited partner cannot be forced to pay off business debts or claims with personal assets, although a limited partner can be liable to a third party who believed the limited partner was a general partner based on the limited partner’s conduct, unless the conduct comes within the safe harbour activities a limited partner can engage in without losing limitation on liability (set out in section 17-303, Delaware Revised Uniform Limited Partnership Act).

A partnership can also be formed as an LLP in which all obligations incurred while the partnership is an LLP rest solely with the partnership. The LLP is required to register with the Delaware Secretary of State and maintain a specified amount of liability insurance. In return, partners are relieved of personal liability for obligations of the partnership. Partners remain personally liable for their own negligence or misconduct and that of persons under their direct supervision and control.

*Partnership Agreements*:

Delaware partnerships, which are separate legal entities, are governed by the Delaware Revised Uniform Partnership Act (for general partnerships and LLPs) and the Delaware Revised Uniform Limited Partnership Act (for LPs). Other than a few mandatory provisions, most provisions in these statutes can be varied through a partnership agreement.

A partnership agreement is not required to be filed with the Delaware Secretary of State or any other governmental agency. It is advisable, however, to have one to set out information such as:

* The names and addresses of the partners.
* The relative rights to management and profits of each partner.
* The nature of the partnership business.
* The duration of the partnership.
* The requirements for admission of new partners.
* Provisions concerning the dissolution of the partnership.
* Any other provision the partners wish to govern their relationship and the operations of the business.

A partnership must obtain a federal *Employer Identification Number* (EIN) from the Internal Revenue Service if it plans to hire employees or open a bank account in the partnership’s name.

* 1. **Setting Up a Joint Venture**

Joint ventures ("**JV**") between an overseas company and a US company can take the form of a corporation, LLC, partnership or LP. The choice of business structure should be informed by considerations regarding limitation of liability, centralized or decentralized management, tax treatment, etc.

Typically, the overseas company and the US party form a Delaware corporation or LLC to conduct the business activity or carry out the co-operation arrangement between the parties. The organization document of the chosen business vehicle would specify that the entity is formed to pursue a specific business venture and is limited in scope and duration.

Joint ventures for short-term projects can be established and documented through a simple *contract* with very few formalities. The contract should be carefully drafted to ensure that the relationship will not be interpreted by a court to be a de facto partnership creating a fiduciary duty to investors.

It is unclear how prevalent joint ventures are because the exact purpose of a company is usually not specified in its certificate of incorporation or formation. Instead, most entities include a declaration that they may carry on any lawful activity permitted by the enabling statute (that is, the statute under which the entity is formed).

1. **company formation**

*Regulatory Framework:*

The main statutes governing Delaware corporations and LLCs are the Delaware General Corporation Law (Title 8, Chapter 1, Delaware Code) and the Delaware Limited Liability Company Act (Title 6, Chapter 18, Delaware Code). Both statutes are available online.

The Delaware Division of Corporations ([www.corp.delaware.gov](http://www.corp.delaware.gov)) is the administrative agency responsible for accepting and processing all documents required to be filed to form and register any business entity in Delaware.

*Tailor-Made or Shelf Company:*

Delaware does not prohibit shelf entities, but they are generally viewed with suspicion. These entities are usually formed and then held onto by their incorporators for a certain period to establish some credit history before they are sold off. Because it is possible to form a basic Delaware company on an expedited basis and at relatively limited cost, buying a shelf company instead of forming a company from scratch does not necessarily provide any distinct advantage of speed. In addition, the following requirements can deter shelf corporations:

* The Delaware Code requires that a corporation’s annual report be signed by a director or officer. Failure to file a complete annual report and/or pay annual franchise taxes can result in the corporation being voided.
* Failure to have a registered agent can cause a corporation to be forfeited. Another entity may therefore register with the name of the void or forfeit corporation (8 Del. C. § 312(f)).To renew or revive a Delaware corporation that has been voided or forfeited, the renewal and revival must be approved by the corporation’s board of directors or stockholders.

A tailor-made company is a company created to the client’s requirements. Buying a tailor-made company is not necessary, given that it is possible to start with a basic company with standard documentation and to subsequently amend its organisational documents to accommodate other arrangements or specific features the company’s founders want.

* 1. **Formation Process**

A Delaware corporation is formed by filing a *certificate of incorporation* with the Secretary of State of Delaware. A Delaware LLC is formed by filing a *certificate of formation* with the Secretary of State of Delaware and entering into a *LLC agreement*. Filings can be faxed or mailed to the Delaware Division of Corporations. Once received and processed, all filings are stored electronically.

*Registered Agent:*

Delaware law requires every legal entity domiciled in the state to have and maintain a registered agent authorised to receive legal papers (such as notices of legal action) on behalf of the business. Although a Delaware entity physically located in Delaware may act as its own registered agent, most businesses opt to hire as their registered agent a third-party service company with expertise in managing the formation, compliance and record keeping requirements of Delaware business entities.

*Processing and Filing Time*:

Regular processing of filings takes on average between one and four business days (although they can take longer) and can cost from USD89 up to USD200, depending on the business entity being registered, but filing can also be completed on an expedited basis. The Division of Corporations offers a variety of services including "1-Hour", "2-Hour", "Same Day" and "24-Hour" expedited services. In terms of cost, the "2-Hour" service, for example, is available for a USD 500 fee, and the "24-Hour" service is available at a USD 50 to USD 100 fee, depending on the filing.

*Publicly Available Information*:

Once a company is formed, its entity status is publicly available on the website of the Division of Corporations. The publicly available information consists of the entity name, file number, incorporation/formation date, entity type, residency, and the registered agent’s name, address and phone number. Certificates of Incorporation or Formation filed with the Division of Corporations are publicly available documents and can be ordered by any person for a minimal fee. Detailed information, including current franchise tax assessment and current filing history and more, is also available for a fee. Other than making this information available online, the Division of Corporations does not publicise the formation of a company.

*Name*:

The first step in forming a company is to choose its name. The requirements for choosing a business name vary depending on the type of entity being registered. LLCs must contain, as the last words of the name, either "Limited Liability Company" or the abbreviations "LLC" or "L.L.C.". The name of a corporation must contain one of the words "association", "company", "corporation", "club", "foundation", "fund", "incorporated", "institute", "society", "union", "syndicate", or "limited" (or abbreviations of these, with or without punctuation), or words (or abbreviations of these, with or without punctuation) of like import of foreign countries or jurisdictions (provided they are written in roman characters or letters).

The name of every business entity must be distinguishable from the name of every other business entity registered or qualified to do business in Delaware, and the Division of Corporations has discretion to reject any name that it deems to be misleading, harmful or offensive. The Division of Corporations website provides a search tool that can be used to check the availability of a proposed name, and it is possible to reserve a name online for a fee of USD75.

*Name Amendment*:

Once an entity is formed and registered, it is possible to change its name by filing an amended Certificate of Incorporation or Formation with the Division of Corporations. A name amendment allows the company to keep the history that goes along with the original filing, including all contracts, accounting and tax records.

The company’s formation date will remain the date of original formation. The filing fee for a Certificate of Amendment is up to USD 200 and usually takes about a week to process.

*EIN*:

A company must obtain a federal *Employer Identification Number* (EIN) from the Internal Revenue Service if it plans to hire employees or open a bank account in the company’s name. There are no separate requirements or fees applicable solely to shelf companies.

* 1. **Company Constitution**

For corporations, the main governing documents are the *Certificate of Incorporation* and the *byelaws*. For LLCs, the main governing documents are the *Certificate of Formation* and the *LLC agreement* (also known as the operating agreement).

The Certificate of Incorporation (for a corporation) or the Certificate of Formation (for an LLC) must include:

* The name of the company.
* The address of the company’s registered office in Delaware and the name of its registered agent.
* In the case of corporations, the nature of the business or purposes to be conducted or promoted and information about the company’s securities (stock or membership interests).

The certificate may also include other common provisions such as:

* The right of directors to amend or repeal company byelaws or the LLC agreement.
* Director protections, including limitations on personal liability under certain circumstances.
* Any limitations on the duration of the company’s existence.
* The name and mailing address of the incorporator.

The byelaws (for a corporation) and limited liability company agreement (for an LLC) typically specify how the company is managed, the conduct and frequency of meetings, indemnification of directors or managers, and so on. They can contain any provision, not inconsistent with law or with the Certificate of incorporation or Formation, relating to:

* The business of the company.
* The conduct of the company’s affairs.
* The company’s rights or powers or the rights or powers of its stockholders or members, directors or managers, and officers or employees.

 A Delaware corporation’s byelaws may not contain any provision that would impose liability on a stockholder for the attorneys’ fees or expenses of the corporation or any other party in connection with an internal corporate claim.

Stockholders of a Delaware corporation may also enter into stockholder agreements that provide for rights beyond those set out in the Delaware General Corporation Law or in the entity’s organisational documents. These agreements are commonly used in connection with private equity and venture capital investments, joint ventures and other similar investment arrangements. Stockholder agreements may provide for special voting rights, information rights, restrictions on transfer of equity, rights with respect to nomination, election and removal of directors, limitations on board powers, and so on.

1. **financial reporting**

Delaware does not require corporations to file any financial reports. A basic annual franchise tax report must be filed annually on or before 1 March (with a fee of USD 50). All annual franchise tax reports must be filed electronically, and payment is accepted only in US dollars and drawn on US banks.

Foreign corporations must file an annual report on or before 30 June. The fee to file the annual report is USD 125, and a penalty of USD 125 applies if the annual report is not filed. There are no specific financial reporting obligations applicable to local branches of overseas companies. However, US tax laws require that foreign companies pay taxes on any earnings made in the US. Additionally, foreign corporations that operate businesses in the US must pay a branch profits tax in addition to paying the corporate income tax. However, certain foreign corporations may benefit from a comprehensive income tax treaty between their country of formation and the US and be exempt from certain taxes or pay reduced rates. Foreign corporations with US branches should consult tax experts to determine the appropriate filings to be made.

1. **trading disclosure**

Delaware does not require companies to display their registered name at their registered office, principal place of business or any other business locations. In addition, there are no specific requirements for any particulars to appear on the company’s business letters, business forms or websites. Deceptive trade practices and unfair trading practices may be actionable at common law or under Delaware statutes.

The identity and personal information of the directors and stockholders of a private corporation, or the members and managers of a private LLC are not public records. The only public information is the entity’s name and type, file number, formation date, and residency, as well as the name, address and phone number of its registered agent and any additional information included in the Certificate of Incorporation or Formation.

1. **membership**

There are no restrictions on the number of equity holders a Delaware company can have. A corporation can have one or more stockholders, and an LLC can have one or more members.

1. **minimum capital requirements and restriction on transfers**

There is no minimum investment amount or minimum share capital, but inadequate capitalisation can be alleged by a plaintiff seeking to pierce the corporate veil of limited liability and hold the parent entity liable for certain claims.

Stockholders of a Delaware corporation can freely sell or transfer their shares of the corporation’s stock. There is no statutory requirement for the transfer to be approved by the other stockholders, but restrictions on the transfer of shares may be imposed by the certificate of incorporation, the byelaws or other agreement in certain circumstances. The buyer or transferee of the stock becomes a stockholder of the corporation and assumes the financial, voting and other ownership rights and interests of the seller or transferor.

The transfer of membership interests in an LLC is not as free as the transfer of stock in a corporation. A member’s LLC interests (that is, the member’s financial interests) are assignable in whole or in part unless the LLC agreement provides otherwise. However, the default rule under the Delaware Limited Liability Company Act restricts the transfer of the right to participate in the management of the business and affairs of the LLC. A member who makes an assignment ceases to be a member. However, for an assignee to become a member of the LLC, the affirmative vote or written consent of all the members of the LLC is required unless the LLC agreement provides otherwise.

1. **stockholders and voting rights**
	1. **Minority Stockholder Protections**

Minority stockholders have limited but potentially significant protections under Delaware corporation law:

* **Information rights**: A minority stockholder has the right to examine the corporation’s stock ledger, a list of its stockholders, and other books and records, but only if the purpose for doing so is reasonably related to the stockholder’s interest as a stockholder. Delaware courts have construed this language broadly to provide stockholders with a reasonable means to protect their interests. The stockholder must make the request in a written demand made under oath. The right to inspect the books and records of a company is a significant right because a stockholder can use it to gather materials that can be used in preparing or substantiating a lawsuit against the company.
* **Appraisal rights**: In connection with a merger or consolidation involving a Delaware corporation, a corporation’s stockholder who believes the directors did not adequately price his shares can choose not to vote in favour of the merger or consolidation, but instead petition the Delaware Court of Chancery for an appraisal of the fair value of that stockholder’s shares. Section 262 of the Delaware General Corporation Law sets out the specific circumstances and requirements for exercising appraisal rights (8 Del. C. § 262).
* **Right to bring derivative lawsuits**: A stockholder of a Delaware corporation, even if a minority stockholder, can bring a lawsuit on behalf of the corporation (a derivative suit) if certain procedural requirements are met. Generally, a stockholder can only sue on behalf of a corporation when the corporation has a valid claim, but its board of directors has refused to lodge a complaint, or the stockholder can establish that requesting the board to lodge a complaint would be futile. This often occurs when the claim is against someone close to the corporation, such as a director or an officer. If a derivative suit is successful, the recovery belongs to the corporation, not to the stockholder who brought the suit.
* **Contesting validity of elections**: Any stockholder can challenge the validity of a director and the person’s right to hold such office and can also petition the court to determine the result of any stockholder vote other than the election of directors or officers. The court also has the discretionary authority to resolve deadlocks between directors.
* **Protection from Controlling Stockholders**: While not a statutory requirement, Delaware common law holds that when a stockholder presumes to exercise control over a corporation, that stockholder assumes a fiduciary duty similar to that owed by a director. A minority stockholder may thus bring a claim against a controlling stockholder for breach of fiduciary duty where, for example, the controlling stockholder has: forced the minority stockholder to sell their shares at a price below their fair market value; caused the corporation to issue additional shares of capital stock to the controlling stockholder at an inadequate price; or disproportionately reduced the economic value of the minority stockholder’s shares.

A Delaware LLC or corporation is responsible for the entire amount of debt and other liabilities of the business. The members of a Delaware LLC are not personally liable for the LLC’s debts, liabilities and obligations solely by reason of being a member of the LLC. The stockholders of a Delaware corporation are similarly not liable for the obligations of the corporation. Only the corporation’s assets, and not those of its stockholders, are available to pay any judgments against the corporation. However, there are limited instances when personal liability may be imposed on a stockholder if a court, in the exercise of its equitable powers, decides that is required.

* 1. **Stockholder Voting and Quorum**

While a corporation’s certificate of incorporation or byelaws can specify the quorum or voting requirements for stockholder meetings, the quorum for a meeting can never consist of less than one-third of the shares entitled to vote at that meeting, except that, where a separate vote by a class or series or classes or series is required, a quorum must consist of no less than one third of the shares of such class or series or classes or series. Where the certificate of incorporation or byelaws of the corporation are silent on quorum or voting requirements, a majority of the shares entitled to vote, present in person or represented by proxy, constitute a quorum at a meeting of stockholders.

Except as described above, a majority vote of the shares represented at the meeting and entitled to vote on the subject matter is required to approve any matter other than the election of directors. The directors are elected by a plurality of the votes present in person or represented by proxy, unless the corporation has adopted majority voting.

As a general rule, corporate actions submitted to a stockholder vote require the affirmative vote of the majority of a quorum. The requisite quorum may be specified in a corporation’s certificate of incorporation or byelaws but may not consist of less than one-third of the shares entitled to vote at a meeting. Certain actions, such as most amendments to the company’s certificate of incorporation, mergers, the sale of company assets and dissolution, require the affirmative vote of the majority of the outstanding shares entitled to vote.

These requirements apply only in the absence of voting provisions in the company’s organisational documents. A corporation can choose to specify different voting requirements in its certificate of incorporation or byelaws.

A company’s certificate of incorporation can establish more than one class of stock and provide for a dual tier voting structure, where holders of shares of one class have more voting rights than those of any other voting class (super-voting rights). This can give a minority stockholder holding the high-vote stock an effective majority of the voting power.

In addition, certain key decisions can be subject to the approval of a particular class or of the various classes voting separately. Such a requirement can give a minority stockholder holding a significant number of shares of any one class a veto power to block a proposed action, even if a required majority would approve it.

1. **sectoral restrictions**

There are generally no conditions or restrictions on establishing a business in any specific industry. However, LLCs and LPs cannot carry on the business of banking as defined in 8 Del. C. § 126. (6 Del. C. §17-106; 6 Del. C. §18-106).

1. **foreign investment restrictions**

There are no restrictions on foreign shareholders. All the stock or membership interests in a Delaware company can be owned by non-US nationals. There is no nationality or residency requirement to satisfy in order to own a stake in the company, and management of a Delaware company does not have to include a US citizen or permanent resident ("green card" holder).

Delaware has no exchange control or currency regulations.

Delaware does not impose state-level restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation.

1. **directors**

There are no general restrictions or requirements on the appointment of directors, except that they must be natural persons. Typically, the corporation’s initial directors consist of one or more of its founders, but there is no statutory requirement that a director be a stockholder. There is no requirement that the directors reside in Delaware or in the US. There is also no requirement that any number of directors be US citizens or permanent residents. All of the directors can be foreign citizens.

However, publicly traded companies must meet certain requirements, including, in certain circumstances, the requirement to have a certain number of independent directors (that is, they do not have a material relationship with the company or its management). In addition, certain restrictions imposed by the US Securities and Exchange Commission (SEC) may prohibit companies from raising capital through an offering of securities if one or more of its directors or officers are felons or so-called "bad actors". Further, publicly traded companies must disclose information about directors, including their business experiences, criminal records, holdings of company securities, and so on.

1. **board composition**

*Structure:*

A Delaware corporation can, but is not required to, have a staggered board, with up to three classes of directors. In such a case, the directors of one class, instead of all directors, are elected each year.

*Number of Directors or Members:*

The board of directors of a corporation can have one or more directors, each of whom must be a natural person. The number of directors is typically fixed by, or in the manner provided in, the byelaws, unless the certificate of incorporation fixes the number of directors (in which case a change in the number of directors can be made only by amendment of the certificate).

A LLC can have one or more members.

*Employees’ Representation:*

Employees have no statutory right to board representation.

1. **registering as a public company**

For a Delaware corporation to offer and sell securities to the public, it must register those securities with the US Securities and Exchange Commission ("**SEC**"), the regulator of the US securities markets.

The Securities Act of 1933 and rules and regulations promulgated under it by the SEC set out the registration requirements for an initial public offering. The company must file a registration statement on Form S-1, which includes extensive disclosures about the company and its business, the risk factors affecting the business or the industry in which the company operates, the company’s capitalization, and so on. Once the SEC declares the registration statement effective, the company’s securities can be publicly traded.

The initial public offering process is lengthy and complex and should not be conducted without the guidance of competent counsel.

*Membership:*

There is no minimum or maximum number of members or stockholders that a private company must have to register as a public company.

*Share Capital:*

There is no minimum number of shares required to be held by the public under Delaware law. The Delaware General Corporation Law requires the net asset value (that is, the quantity of consideration) for which a corporation can issue shares not to be less than the par value of the stock.

As long as the certificate of incorporation authorizes the issuance of shares, the company can choose to issue shares up to that amount or can authorize but not issue the shares until a later date.

1. **tax**
	1. **Main Taxes**

In Delaware, taxable business entities are only subject to Delaware income tax on Delaware source income, that is, the portion of their income allocated or apportioned to Delaware. There is no state corporate income tax on goods or services provided by Delaware corporations operating outside of Delaware. In addition, purchases in Delaware are not subject to sales tax, and Delaware has no value-added tax ("**VAT**").

*Corporations:*

Delaware corporations must file an annual franchise tax report and pay an annual corporate franchise tax up to a maximum of USD 250,000. The tax is assessed based on the number of shares authorized by the company using either the authorized shares method of computation or the assumed par value capital method.

Under the authorized shares method, a corporation pays a graduated tax based on the number of authorized shares, with a minimum tax of USD 175 (from tax year 2015). A corporation with 5,000 shares or less pays a USD 175 franchise tax. A corporation with 5,001 to 10,000 shares pays a USD 250 franchise tax. An additional USD75 is added for each additional 10,000 shares, up to USD 250,000.

Under the assumed par value capital method, the franchise tax is calculated based on the number of authorized shares and the company’s total gross assets. The tax rate is USD 450 per million or portion of a million, with a minimum tax of USD350.

In addition, a Delaware corporation is subject to the following taxes:

* **Corporate income tax**: Every domestic or foreign corporation doing business in Delaware that is not specifically exempt must file a Delaware corporate income tax return and must pay a Delaware corporate income tax of 8.7% on the corporation’s federal taxable income from Delaware sources, or income apportioned to Delaware. Delaware law does not require the payment of a minimum corporate income tax.
* **Gross receipts tax**: A corporation doing business in Delaware with receipts from Delaware sources is subject to Delaware gross receipts tax at various rates (currently ranging between .0945% and 1.9914%) depending on the nature of the business conducted in Delaware.

*Other Business Entities:*

LPs, LLCs and general partnerships formed in Delaware do not file an annual report and are not subject to Delaware income tax. However, they must pay an annual tax of USD 300. LLCs are, however, subject to Delaware gross receipts tax on receipts from Delaware sources.

* 1. **Tax Liability**

Every domestic or foreign corporation doing business in Delaware that is not specifically exempt is subject to Delaware corporate income tax.

*Tax Resident:*

Delaware imposes income tax on corporations and other taxable entities doing business in Delaware on the portion of their income allocated or apportioned to Delaware.

*Non-Tax Resident:*

Having properties or employees located in Delaware or conducting certain business activities in Delaware may cause a business to become subject to Delaware taxes.

*Remittances Abroad:*

Delaware does not impose a withholding requirement on corporations issuing dividends or other taxable entities distributing profits. However, remittance of profits abroad may be taxed at the federal level.

*Thin Capitalization:*

Any federal thin-capitalization rules and transfer pricing rules apply to Delaware entities. Delaware does not impose its own requirements in these areas. However, thin-capitalization can be a factor in piercing the corporate veil of limited liability.

1. **grants and tax incentives**

Delaware does not have grants or incentives specifically designed to attract foreign investment. Foreign investors may be eligible to apply for grants and other incentives available to investors generally, but the intended use of grant monies must be consistent with the state’s economic development strategies (for example, job creation, redevelopment of environmentally distressed sites within the state, and so on). The Delaware Strategic Fund, for example, provides low-interest loans and grants to businesses located or looking to relocate to the State of Delaware.

1. **employment**

The principal Delaware employment laws are the:

* Discrimination in Employment Act (19 Del. C. § 710 et seq.), applicable to employers of four or more persons within Delaware, which prohibits employment discrimination on the grounds of: race; colour; age; religion; sex (including pregnancy); sexual orientation; gender identity; national origin; genetic information; and marital status.
* Handicapped Persons Employment Protection Act (19 Del. C. § 720 et seq.), applicable to employers of 15 or more employees within Delaware, which prohibits discrimination against disabled persons.
* Wage Payment and Collection Act (19 Del. C. § 1100 et seq.), which regulates payment of wages and benefits and child labour laws.
* The Right to Inspect Personnel Files Act (19 Del. C. § 730 et seq.), which grants employees have a right to review personnel records used to determine the employee’s qualifications for the following: employment; promotion; additional compensation; termination; or disciplinary action.
* The Delaware Whistleblowers’ Protection Act (17 Del. C. § 1701 et seq.), which protects employees with respect to employer violations related to health, safety or environmental hazards or financial or accounting standards. An employer may not terminate, threaten or otherwise discriminate against an employee because he or she: reported or planned to report a violation to a public body; participated in an investigation held by a public body or in a court action in connection with a violation; refused to commit or assist in the commission of a violation; or reported a violation to the employer.

Employees and employers cannot contract out of mandatory state and federal laws that prohibit discrimination.

These employment laws apply to employees working in Delaware, but they generally do not apply to employees of Delaware entities who do not work in Delaware.

*Employment Permits:*

It is illegal for foreign nationals to accept employment in the US without a work visa. Permanent residents and certain categories of immigrants (such as refugees) have permission to work in the US. It is advisable to obtain legal counsel from a reputable immigration lawyer regarding compliance with the rules and regulations of the United States Citizenship and Immigration Services.

Yours sincerely

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Partner