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Selecting a Business Entity When There are Foreign Investors

Corporate/Business Checklist

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1. **Limited Liability.** Confirm limitations on investor liability – with non-US entities, this may require consultation with local counsel. Be aware that limited liability often requires (i) some form of public filing to create the entity, (ii) designation of a local agent for service of process, (iii) compliance with minimum capitalization rules, (iv) compliance with impairment of capital rules and (v) scrupulous observance of entity formalities. Also, consider “stacking” entities (e.g., a Delaware LLC qualifying as a disregarded entity) to achieve limited liability without jeopardizing tax planning objectives.
2. **Commerce Department Form BE-13.** Department of Commerce Form BE-13 required when (i) a non-US person (or a US affiliate of a non-US person) acquires at least a ten percent ownership interest in a US business enterprise that was not previously ten-percent or more foreign owned and (ii) the US enterprise has total assets of more than \$3,000,000 or 200 or more acres of US land. This is a survey and census form – it must be filed within 45 days after the investment occurs. Annual reporting can be required if total assets or revenues of the US enterprise exceed \$30,000,000 and non-US owners hold a majority stake. A US broker, intermediary or joint venture partner who assists in the investment may be required to file Form BE-14.
3. **Other Reporting Obligations** – AFIDA and Exon-Florio. There can be additional reporting requirements for a non-US person’s acquisition of US agricultural land (under the Agricultural Foreign Investment Disclosure Act, known as “AFIDA”) and for a company acquisition by a non-US person that could “threaten to impair” US national security (administered by the Treasury Department under the Exon-Florio law).
4. **Export Control.** The US regulates certain exports activities, and the Department of Commerce can require an exporter to obtain a license to export certain products to certain countries. Obtaining a license can be difficult if (i) the product being exported has potential military or security applications or (ii) the export’s destination is a country regarded as hostile to the US. The Department of Commerce publishes a “Commerce Country Chart” that provides guidance about which exports will require a license.
5. **Securities Compliance.** Generally, the law of the residence of the investor will apply. There will often be exemptions available in the US for issuances to non-US investors – but some US exemptions are based on aggregate size of an offering, including securities issued to non-US investors.
6. **Ease of Formation.** Speed and ease of formation can be a major issue in continental Europe. Caribbean jurisdictions have recently tightened their requirements. Corporate scandals and global crackdown on tax evasion and shelters have made it more difficult to form entities and to establish banking relationships. US tends to allow easy formation, but stricter rules on securities compliance.
7. **Local Directors.** A requirement for local directors is rare in the US, but common in other jurisdictions. Confirm availability of reputable custodial companies if local directors are required. This will create an added expense and administrative burden, but it may also help in establishing the bona fides of a company’s physical presence in its home jurisdiction.



8. **Minimum Capitalization.** The US is relatively lax about “par value” or minimum capitalization, but many non-US jurisdictions are very strict. Confirm local requirements through consultations with local counsel or custodial companies. And be aware that the minimum capitalization requirements can be quite high for certain kinds of entities.

9. **Payments and Distributions to Owners.** There can be significant non-tax limitations on dividend payments or profits distributions to owners. These are normally premised on preventing the impairment of the entity’s capital. These restrictions are much less common for entities that do not have limited liability, since one or more owners will remain liable for the entity’s obligations to its creditors. Some jurisdictions forbid a corporation from redeeming its own shares.

10. **Owner/Shareholder Anonymity.** Anonymity of owners is normal in the US. But many jurisdictions will require that the identity of some or all owners be a matter of public record. Consider the use of trust or LLC owners if the ultimate beneficial owners wish to remain anonymous.