



AbdulJaami, PLLC

International Commercial Transactions

Buying a U.S. Small Business

Foreign Direct Investment in USA

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International Commercial Transactions

Acquiring a U.S. Small Business

- Foreign Direct Investment (FDI) in USA - Statistics
- Entering the USA – Non-Immigrant Visa
- Entering the USA – Permanent Residency
- U.S. FDI Restrictions
- Other Restrictions
- U.S. Merger and Acquisition (M&A) Legal Framework
- Legal Structure of U.S. M&A Transaction
- U.S. M&A Transaction Process
- Protecting Funds – Hedging Currency Risk
- Financing the Acquisition
- Touching on Federal Taxation
- Conclusion



FDI in USA – by Region of Origin

Foreign Direct Investment in U.S. (US\$ billions)

	2001	2002	2003	2004	2005
Canada	92	93	96	126	144
Europe	999	958	1,001	1,067	1,144
United Kingdom	198	212	218	251	282
Latin America	65	75	84	87	83
Africa	2.3	2.2	2.2	1.7	2.6
Middle East	6.1	6.8	7.2	7.9	10
Asia and Pacific	179	192	205	232	253
All Regions	1,344	1,327	1,395	1,521	1,635



FDI in USA – by Sector

Foreign Direct Investment in U.S. (US\$ billions)

	2001	2002	2003	2004	2005
Manufacturing	476	452	465	486	538
Wholesale Trade	185	190	188	219	230
Retail Trade	23	22	26	26	30
Information	147	136	136	138	143
Depository Institutions	67	73	85	122	131
Finance and Insurance	174	163	183	194	208
Real Estate, Rental, Leasing	44	42	37	39	41
Professional, Scientific, Technical	31	35	38	38	42
Other	196	214	237	258	273
All Sectors	1,344	1,327	1,395	1,521	1,635

Entering the USA: Non-Immigrant Visa

- Most Suitable Non-Immigrant Visas
 - E-2 “Treaty Investor” Visa (in ’05: 28,290 issued; 5,821 denied)
 - L-1 “Intra-Company Transfer” Visa (65,458 issued; 6,372 denied)
- E-2 “Treaty Investor Visa”
 - Granted for up to 5 years; apply at local consulate
 - Renewable as long as original investment exists
 - Individuals may apply; prior business experience not required
- L-1A “Intra-Company Transferee” Visa
 - Granted for up to 7 years (new office: 1 yr; two 3 yr extensions)
 - May be extended
 - U.S. or Foreign employer with U.S. business must file I-129



E-2 Non-Immigrant Visa

- Applicant Requirements
 - National of a country that USA has commercial treaty with
 - Investment in or actively investing in US business
 - Investment is “substantial” (US\$100,000+)
 - Applicant will direct or develop the business
 - Applicant “controls” or will control the business
 - Applicant intends to depart upon expiration of the E-2 Visa
 - Business will generate sufficient income and benefit US (employ)
 - Applicant is investing own funds or assets
- Ability to employ family members in business



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E-2 Visa: Treaty Countries

Albania	Canada	Georgia	Latvia	Panama	Switzerland
Argentina	Chile	Germany	Liberia	Paraguay	Taiwan
Armenia	Colombia	Grenada	Lithuania	Philippines	Thailand
Australia	Congo	Honduras	Luxembourg	Poland	Togo
Austria	Costa Rica	Iran	Macedonia	Romania	Trinidad
Azerbaijan	Croatia	Ireland	Mexico	Senegal	Tunisia
Bahrain	Czech Rep.	Italy	Moldova	Singapore	Turkey
Bangladesh	Ecuador	Jamaica	Mongolia	Slovak Rep.	Ukraine
Belgium	Egypt	Japan	Morocco	Slovenia	UK
Bolivia	Estonia	Jordan	Netherlands	Spain	Yugoslavia
Bosnia	Ethiopia	Kazakhstan	Norway	Sri Lanka	
Bulgaria	Finland	Korea (So.)	Oman	Suriname	
Cameroon	France	Kyrgyzstan	Pakistan	Sweden	



L-1A Intra-Company Transferee Visa

- Applicant Requirements
 - Work for a company that has U.S. parent, sub., branch, affiliate
 - Sponsoring entity must be a viable business throughout visa period
 - Employed full-time by entity outside U.S. for 1 continuous yr in past 3 yrs
 - Will perform services as a manager or executive
 - Premises to house new business have been secured
 - Business will generate sufficient income w/in 1 yr of approval
- Ability to Convert to Permanent Status
 - Business must be in operation for at least 1 year
 - Manager or Executive can qualify for a first preference employment-based permanent resident visa

Entering the USA: Permanent Residency

- EB-5 “Immigrant Investor” Visa
 - 10,000 available annually; 5,000 for “Regional Center” applicants
- Applicant Requirements
 - Must Establish New Commercial Enterprise
 - Must Invest in the Enterprise (\$1 million+; in some cases \$500K)
 - Enterprise must benefit U.S. Economy/Create Jobs (10+)
- Process
 - Immigrant Investor Status: Form I-526 + documentation
 - Conditional Resident Status: Form I-485 after I-526 approved
 - Permanent Residency: Form I-829

U.S. Foreign Direct Investment Restrictions

- Few Restrictions
 - National Security
 - Industry Specific Restrictions
 - Some State Real Estate Restrictions
- National Security
 - Exon-Florio Regulations and CFIUS review
 - President can investigate and suspend or prohibit transactions leading to control of US firms by foreign person
 - Transactions with potential concerns should be reported; government can investigate on its own
 - Committee on Foreign Investment in the US (CFIUS) review opaque
 - CFIUS review process being “strengthened” after Dubai Ports

U.S. Foreign Direct Investment Restrictions

- Industry Specific Restrictions
 - Strict Federal Prohibitions
 - Nuclear Power
 - Ownership and operation of merchant marine vessels
 - Federal Limitations or Regulations
 - Airlines (even Richard Branson has difficulties!)
 - Banking
 - Communications (television, wireless, satellite, etc.)
 - Mineral Leases and Timber Rights
 - Outer-Continental Shelf activities and Off-Shore Leases



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U.S. Foreign Direct Investment Restrictions

- Land Ownership Restrictions
 - Federal
 - Focused on few countries USA has limited or no diplomatic relations
 - State
 - Real Estate is governed locally; State law must be reviewed
- Other Concerns
 - State non-Real Estate investment restrictions generally unconstitutional
 - However State restrictions may exist; can be litigated
 - A State restriction may be meant to delay and discourage
- U.S. FDI Reporting Requirements
 - Download US Investment Reporting from www.shajlaw.com



Other Restrictions

- Financial Transaction Prohibitions
 - Certain foreign nationals are prohibited from undertaking financial transactions within the U.S.
- Certain Sanctioned Countries
 - Balkans; Belarus; Burma; Cote d'Ivoire; Cuba; Dem. Rep. Congo; Iran; Iraq; Liberia; North Korea; Sudan; Syria; Zimbabwe
- Certain Sanctioned Individuals and Entities
 - OFAC Specially Designated Nationals and Blocked Persons (SDNs)
 - BIS Denied Persons List and Entities List
 - FBI Most Wanted List
 - Dept. of State Debarred Persons List
 - FinCEN Bank Secrecy Act and PATRIOT Act

Merger / Acquisition Legal Framework

- **Principal State Law**
 - Corporation law (statute) and Common law (court decisions)
 - Antitrust law
 - Real Estate law
- **Principal Federal Law**
 - Federal Securities law (public company acquisition only)
 - Antitrust law
- **Other Laws**
 - Tax law: Federal and State
 - Contract law
 - Labor law; Environmental law; Pension law

Legal Structure of M&A Transaction

- Merger
 - Combination of two entities pursuant to State corporate law
- Stock Purchase
 - Purchase of all or a substantial portion of an entity's outstanding equity
 - Smooth transition of business; exposure to undisclosed liabilities
 - Better price/terms due to lower taxes for seller
- Asset Purchase
 - Purchase of all or a substantial portion of an entity's assets
 - Can pick best assets; select liabilities
 - Possibly a messier transaction (customers, suppliers, employees, etc.)



M&A Transaction Process

- Approach Seller; Obtain Detailed Information
 - Execution of Confidentiality Agreement
- Decision to Move Forward
 - Forward Letter of Intent
 - Negotiate Term Sheet
- In Depth Analysis
 - Due Diligence: Legal, Financial, Appraisal, etc.
- Contract Stage
 - Negotiation/drafting of Merger or Purchase/Sale Agreement
 - Ancillary documents, including Financing, Consents, Approvals
- Closing of Transaction; Form BE-13 Filing



Protecting Funds: Hedging Currency Risk

- Locking in Favorable Currency Exchange Conditions
 - Currency Swaps
 - Forward Purchase Contract
 - Problem: exchange rates may move against you during the time between the fixing of a price and closing of the transaction
 - Solution: enter into an agreement to purchase a fixed amount of US dollars for a fixed price at some future date
 - Forward Sales Contract
 - Problem: the funds that will secure the investment will be received at some future date and exchange rates may move against you
 - Solution: enter into an agreement to sell the future funds for US dollars at the current exchange rate
- Interest Rate Risk May also be Hedged



Financing the Acquisition

- Debt Finance
 - Bank loan; Mortgage loan
 - Commercial Finance; Asset Based Loan
 - Download Small Business Finance from www.shajlaw.com
- Equity Finance
 - Private Placements: Common or Preferred Stock
 - Public Issuance of Stock
 - Download Capitalizing A Small Business from www.shajlaw.com
- Cross-border Finance or U.S. Finance
 - Cost: Interest Rates, Currency Exchange, Hedges
 - Tax: Impact of Foreign, Federal, State and Local taxes



Touching On Federal Taxation

- Nonresident Alien vs. Resident Alien
 - Nonresident Alien: taxed only on U.S.-source income
 - Resident Alien individual: taxed on worldwide income
- U.S. Trade or Business
 - Foreign corporations and nonresident alien individuals taxed on the net amount of income effectively connected with the conduct of a trade or business
- Impact of Foreign Investment in Real Property Tax Act
 - Download [Investing in U.S. Real Estate](http://www.shajlaw.com) from www.shajlaw.com
- Impact of Income Tax Treaty
 - See next slide for tax treaty countries



Income Tax Treaty Countries

Australia	Finland	Japan	Philippines	Thailand
Austria	France	Kazakhstan	Poland	Trinidad
Bangladesh	Germany	Korea	Portugal	Tunisia
Barbados	Greece	Latvia	Romania	Turkey
Belgium	Hungary	Lithuania	Russia	Ukraine
Canada	Iceland	Luxembourg	Slovak Rep.	USSR
China	India	Mexico	Slovenia	UK
Cyprus	Indonesia	Morocco	South Africa	Venezuela
Czech Rep.	Ireland	Netherlands	Spain	
Denmark	Israel	New Zealand	Sri Lanka	
Egypt	Italy	Norway	Sweden	
Estonia	Jamaica	Pakistan	Switzerland	



Conclusion

- Acquiring a U.S. business can make sense for many reasons, including currency exchange rates
- Immigration issues and FDI restrictions may have an impact
- Legal and business considerations affect the M&A process
- Risk mitigation, transaction finance and taxation are key issues
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