

10 KEY LEGAL ISSUES TO CONSIDER WHEN MOVING STATESIDE

Even before the uncertainties following the Brexit referendum result, a move to the U.S. was an attractive proposition for high growth UK businesses. Common language, similar culture, access to capital and a familiar business approach are appealing to those seeking growth. However, the regulatory and legal complexities in the U.S. market can pose significant challenges for new entrants.

1

Corporate structure

The best corporate structure for your U.S. operations will depend on your business strategy and tax considerations. If you plan to raise venture capital in the U.S. you might consider reorganising as a Delaware corporation. A 'flip transaction' (*i.e.* making your existing UK company a subsidiary of a new U.S. company) is one way of achieving this. Or, if you plan to launch operations in the U.S., you may choose to form a U.S. subsidiary. Reorganising in the U.S. or establishing operations can be complicated and, at the very least, you will need to appoint directors, develop a tax strategy and meet all U.S. corporate duties.

2

Tax

Although there are a number of tax rules to consider, IP rich companies should review IP ownership and distribution tax implications. To reduce U.S. taxable income, an earnings repatriation strategy from the U.S. should be implemented, especially if in the form of royalties and interest. Also consider matters relating to the remuneration of executives, particularly when deferred or equity-based compensation is involved. Remunerated individuals may need to consider whether so-called "Section 83(b) elections" are appropriate. Finally, a review of the activities undertaken in each jurisdiction ensures that executives and employees are not unwittingly subjecting the company to tax in jurisdictions where it doesn't file tax returns.

3

Initial investment

If you plan to raise money in the U.S., you will probably need to reorganise as a Delaware corporation (see point 1). Seed financings in the U.S. take the form of convertible notes, SAFEs or equity investments. Early stage companies generally favour convertible notes and SAFEs when raising seed financing to avoid establishing an enterprise valuation and to utilise a simple document. Variables that will affect the structure of your seed round include the amount of money that you're raising, the investors you are working with and the willingness to negotiate valuation. More start-ups are leaning towards SAFEs because they do not accrue interest or contain maturity dates, which separates them from convertible notes.

4

Protecting your assets - IP

The U.S. has comprehensive intellectual property laws governing trade secret, copyright, trademark, and patent rights.

Trademark - although you can enforce a trademark in the U.S. even if it has not been registered, best practice is to apply for registered trademarks with the U.S. Patent and Trademark Office.

Copyright - unlike trademarks, you must register a U.S. copyright work before enforcing it in the U.S. courts.

Patent - consider seeking patent protection and, depending on the technology, consider patent landscape searching/IP due diligence.

Trade secret/employment – put in place appropriate confidentiality and IP agreements for your employees and contractors. Ensure that all IP developed by any third-party contractors is transferred to your company.

A STATESIDE VIEW – WATCH OUT FOR LITIGATION!

A significant difference between Europe and the U.S. is the litigious nature of the U.S.

In the U.S., parties usually bear their own costs of litigation regardless of the result of the dispute. Compare this to the UK's general adverse costs rule (where the losing party pays the successful party's costs) which acts as a significant disincentive against frivolous claims. Further, claimants in the U.S. can demand that their civil disputes are decided by juries rather than a single judge – often seen as an advantage for small or consumer claimants against corporate defendants. Those juries are also able to award punitive damages in a large number of actions.

Also, the U.S. system encourages court action for claims that in the UK would be addressed through other routes. For example, employees in the U.S. aren't required to take their employment claims to employment tribunals; instead, they can file a lawsuit in civil court and seek all types of damages. Plus, there are many class action lawsuits against employers for seemingly technical violations of wage and hour laws and similar issues. In sum, it's easy for U.S. employees to sue employers.

It's also fairly easy for consumers in the U.S. to sue companies: many privacy laws give a private right of action to consumers, so they can go to civil court and sue directly, rather than having to go through a regulator.

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5 E-commerce - operating online

You will need to put in place terms of use for your online platforms. Any existing terms of use that you have in place for the UK will need to be adapted to meet applicable U.S. federal and state laws. Also, bear in mind, U.S. laws such as the CAN-SPAM Act, will affect your digital marketing and social media activities.

6 Regulation

You will need to identify all applicable industry laws and regulations (federal and state) relevant to your business. Certain sectors are more heavily regulated than others, and multiple regulators may oversee your business.

For example, FinTech players in the payments vertical often overlook laws addressing prepaid payments or stored value products. These laws apply to any pre-funding of an account or money that will be stored for a period of time, no matter how short. A patchwork of federal and state laws that address disclosure requirements need to be considered.

As U.S. regulations are sector-specific, you will need to draw on advice from legal experts that have particular knowledge about your area of business.

7 Data privacy

Unlike Europe, the U.S. doesn't have an umbrella data privacy law. Instead, it has a patchwork of federal and state data privacy laws, some of which are sector-specific (*e.g.* the Health Insurance Portability and Accountability Act for the health care sector and the Gramm-Leach-Bliley Act for the financial sector). Others have a more general application (*e.g.* the Children's Online Privacy Protection Act and the Telephone Consumer Protection Act). You will need to ensure that you meet all applicable requirements including putting in place an appropriate privacy policy for your website and mobile app. Violations may result in enforcement actions and class action lawsuits.

8 Product liability

If your business involves selling consumer products, be mindful of U.S. federal and state laws on product safety, warnings, marketing, and advertising. Given the risk of class actions, excessive jury verdicts, and governmental oversight of safety, this isn't an area where you want to fail or take shortcuts in getting the right advice for your business and product.

9 Employment - hire, motivate, retain

Federal, state and local laws regulate employment matters, and non-compliance can result in stiff penalties and litigation. You will need to put in place proper procedures for hiring, compensating and terminating your U.S.-based employees, as well as related compliance policies and employee agreements. You will also need to ensure that all employees working in the U.S. are authorised to work in the U.S., and obtain any necessary work visas.

It's important to note that U.S. law strictly limits the use of independent contractors and you should ensure that your labour practices take this into account.

10 Securities law filings

U.S. securities laws require all securities offerings to be registered with the SEC or exempt from registration. Generally a start-up will not register its securities until its public offering, so you need to ensure that you are relying on a proper exemption from the federal registration requirements. In addition to federal regulation, each state has its own securities laws that you'll need to consider before offering securities to residents of a particular state. Failure to comply with securities laws could give rise to investors being granted rescission rights, meaning the ability to cancel an investment transaction.