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# Coming to America and accessing the US markets

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You run an established business outside the United States (let's call it "InterCo") and you want to set up shop in the US. How should you structure your business in the US? What key legal issues should you consider? This article describes some of the ways non-US companies set up shop to access US markets.

## What are the choices?

To access the US market, you can (1) allow InterCo to go direct into the US market; (2) have InterCo set up a US branch office; (3) have InterCo set up a US subsidiary; or (4) "flip" your business by having InterCo create a US holding company with your non-US company as its subsidiary. The best structure for your business will depend upon your particular circumstances.

Going direct or setting up a US branch essentially means that InterCo, the non-US entity, is operating directly in the US. Both of these arrangements expose InterCo's global operations to US tax liability and US courts. Setting up a US subsidiary or flipping into a US holding company can address these concerns.

## US subsidiary

*Objective*: InterCo needs a US presence for contracting, hiring, managing employees, protecting IP and structuring taxes in the US. To accomplish this, you would establish a separate legal entity in the US, which shields from liability of your non-US business from the acts of the US entity.

*Process*: Set up a new corporation or limited liability company ("SubCo"), typically in Delaware, whose sole common stockholder is InterCo. For more information about entity choices, see our article, and for more information about why corporations are commonly incorporated in Delaware, see our article. SubCo has one or more directors and three officers: President, Secretary, and CFO (they can all be the same natural person, who can also be the sole director). For more information about the roles of directors and officers in US corporations, see our article.

*Other considerations*: Your Delaware corporation or LLC will need to make separate filings to "qualify" SubCo to do business in the individual US states in which it will operate. For more on qualifying to do business, see our article. You should also consider what operational structures to create and whether your Delaware and non-US entities should enter into intercompany and IP agreements. And you will want to consider tax optimization through the use of an intercompany services agreements and transfer pricing.

## "Flip" into a US holding company

*Objective*: If InterCo plans to seek US venture capital sources, going direct or setting up a branch or subsidiary likely will *not* be the best structure, because US venture capital investors typically prefer to invest in US-based companies. Instead, you will want to consider a "flip" of your non-US business into the US by inserting a new US parent or holding company above InterCo. This option might work best when your CEO and sales staff are based in the US; other staff, such as R&D, technical, and support staff, can remain abroad.

*Process*: You incorporate a new Delaware corporation ("NewCo"). Among other methods, flipping can be accomplished when a majority of the existing InterCo shareholders contribute their InterCo shares to NewCo in exchange for NewCo shares. NewCo can now seek US venture financing to fund operations. You conduct business in the US through NewCo, while certain foreign activities continue through InterCo (or other subsidiaries, as needed). Compared with setting up a US subsidiary, flipping into the US can be a longer and more cost-intensive process.

*Other considerations*: Because inserting a holding company above InterCo requires the InterCo shareholders to exchange their InterCo shares for NewCo shares, shareholder consents and approvals might be necessary. It may or may not be necessary (or possible) to compel the exchange of shares from any holdout InterCo shareholders. Other considerations are implicated when flipping through other methods.

You will also want to consider tax and IP issues at the time of the flip and going forward. Some issues include tax rollover and deferral, as well as the valuation of InterCo. It may be advisable to effect the flip sooner rather than later, prior to the creation of significant value in InterCo. Tax implications might also influence whether you keep your IP in InterCo or migrate it to the US; but note that US venture capital sources might require that your IP is held by the US company in which they are investing.

## What intercompany agreements are needed?

Once it has been decided that a subsidiary or holding company structure is optimal for your business, it will be important to consider the relationship between the related companies in the corporate family. Multiple compensation arrangements are possible between InterCo's home country office, its US office, and its customers. Some of the possibilities are summarized below; your legal and tax advisors can help steer you to the optimal method for your business.

## Option 1 – US is a service provider

The US office provides sales, marketing and/or R&D services. In return, the home office pays the US office for its costs plus a return. The home office bills customers and retains other activities.

## Option 2 – US is a distributor

The US office is compensated as a distributor, earning a targeted operating margin. The home office grants the US office distribution rights and goods. The US office distributes the goods and services to customers and passes back the earnings, less the retained operating margin, to the home office.

## Option 3 – US licenses IP from home country office

The US office acts as an entrepreneur, licensing the IP from the home office in exchange for a royalty payment to the home office. The US office engages in high-end activities and bills customers.

## Option 4 – US buys IP from home country office

In this option, your business migrates its IP to the US. The US office becomes your parent office and the residual profit claimant.

## Option 5 – Cost-sharing arrangement

The US and home offices share IP development costs, and each office retains the rights specific to its territory. The US office pays the home office for the right to use the IP in the US, and then co-develops the IP with the home country parent. Each office distributes goods and services to customers in its specific territory.

While there are many options for expanding your business into the US, careful consideration of the business and legal issues will help to minimize any bumps in the road on your journey to America.

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