



# **TAKING A COMPANY TO THE U.S.**

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# Introduction

- ▶ Many ways to “go to” the U.S.
  - Sell goods/services from abroad, direct to customer
  - Use local distributors or agents
  - U.S. joint venture partners
  - U.S. subsidiary
  - U.S. parent with foreign subsidiary
- ▶ My focus is on establishing a U.S. parent, but many issues apply in all contexts

# Why Go to the U.S.?

- ▶ Investor resources
  - In Q1 2021, record \$69 billion in U.S. venture investments (41% more than Q4 2018, previous record)
  - Remote fundraising process easier in post-COVID world
- ▶ Many U.S. investors do not invest in companies abroad
  - Similarly, accelerators may require incorporation in the U.S.
- ▶ Networks, know-how, startup infrastructure
- ▶ Limited to no notary use, free form signatures, limited public information, standard financing documentation

# Why Not Go to the U.S.

- ▶ Just because you have a Delaware corporation does not mean the investors will invest in it
  - If no connection to the U.S. (no customers, employees etc.), you will be unattractive to U.S. investors
- ▶ There are plenty of investors outside the U.S., and many U.S. investors invest abroad; startup infrastructure is no worse in many other countries
- ▶ Operating a company in the U.S. can be costly, especially from abroad
  - Can go to U.S. without establishing U.S. parent
- ▶ Decision even more difficult to reverse later

# Intro to Law for U.S. Business

- ▶ Overview of some key basic issues to be aware of
  - They are all manageable, but require time and resources to deal with
- ▶ Investors expect startups to comply with the various legal rules
  - Part of investor due diligence, financing documentation representations and warranties

# Intro to Law for U.S. Business

- ▶ First steps are easy
  - Vast majority of startups are formed in Delaware
  - Entity formation is easy, and so is adopting a basic “startup package” (bylaws, board/stockholder consents, equity incentive plan, founder stock issuance and agreements on vesting, employee confidentiality and IP assignment agreement, basic shareholders’ agreement)
- ▶ Next steps will be more difficult, particularly for foreigners
  - Bank account, tax ID
  - Operations in the U.S. need to comply with a variety of federal, state and local rules
  - Particularly if regulated industries, such as fintech, insurance, healthcare

# Taxes

- ▶ Delaware is no tax haven
  - Your company must file tax declarations and pay taxes on taxable income, if any
- ▶ If sell products in the U.S. broadly, sales tax related obligations
- ▶ Crucial to engage a tax accountant with appropriate experience

# Securities Laws

- ▶ Offering and selling securities (shares, notes, SAFEs) to investors requires an exemption from registration requirements on both federal and state level
- ▶ Typically, U.S. startups raise funds from “accredited investors”
- ▶ Exemption needed also for stock option grants and other equity incentives to employees



# Employment and Benefits

- ▶ “At will” employment, but anti-discrimination rules
  - Employment practices insurance
- ▶ Additional tax registration, filing, withholding obligations; workers’ compensation
- ▶ Each state has its own employment laws
  - For example, in California (and a couple of other states), you cannot have any form of post-employment non-competition agreements with employees
- ▶ When to establish employee benefit plans (health care, 401(k) retirement plan)?
- ▶ Deferred compensation traps (Section 409A)
- ▶ Employee/contractor classification

# Other Topics

- ▶ Litigation risk
  - At a minimum need basic insurance package (general liability, D&O, E&O, cyber, employment practices)
- ▶ Immigration
  - Need proper visa in order to work in the U.S.
    - Immigration policies change constantly
- ▶ IP Protection and Strategy
- ▶ Data protection
  - CCPA, GDPR, special issues in connection with data transfer across borders

# Other Topics

- ▶ International Trade (FCPA/Export Controls/Sanctions etc.)
- ▶ ADA compliance for consumer-oriented online businesses
- ▶ National security/CFIUS matters
  - Not only if you have sensitive technology, also if you serve government, government contractors or other companies that have such technologies
- ▶ ESG

# Relationships with Foreign Subsidiary

- ▶ How will operations of the Baltic subsidiary be financed (considering funds are raised in the U.S.)?
  - Frequently, intercompany services agreement (need to follow transfer pricing rules)
  - At some point, requires more careful tax planning with involvement from tax accountants

# When Go to the U.S.

- ▶ Establish the parent in the U.S. from the beginning, if U.S. focus is clear
- ▶ Upon clear investor/accelerator requirement
- ▶ When have resources to deal with U.S. issues
- ▶ “Flip” transaction may take some time, particularly if the Baltic company has already been in existence and/or has many owners



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