

# GETTING STARTED

## PRACTICAL TIPS FOR ESTABLISHING OR EXPANDING BUSINESS IN THE USA

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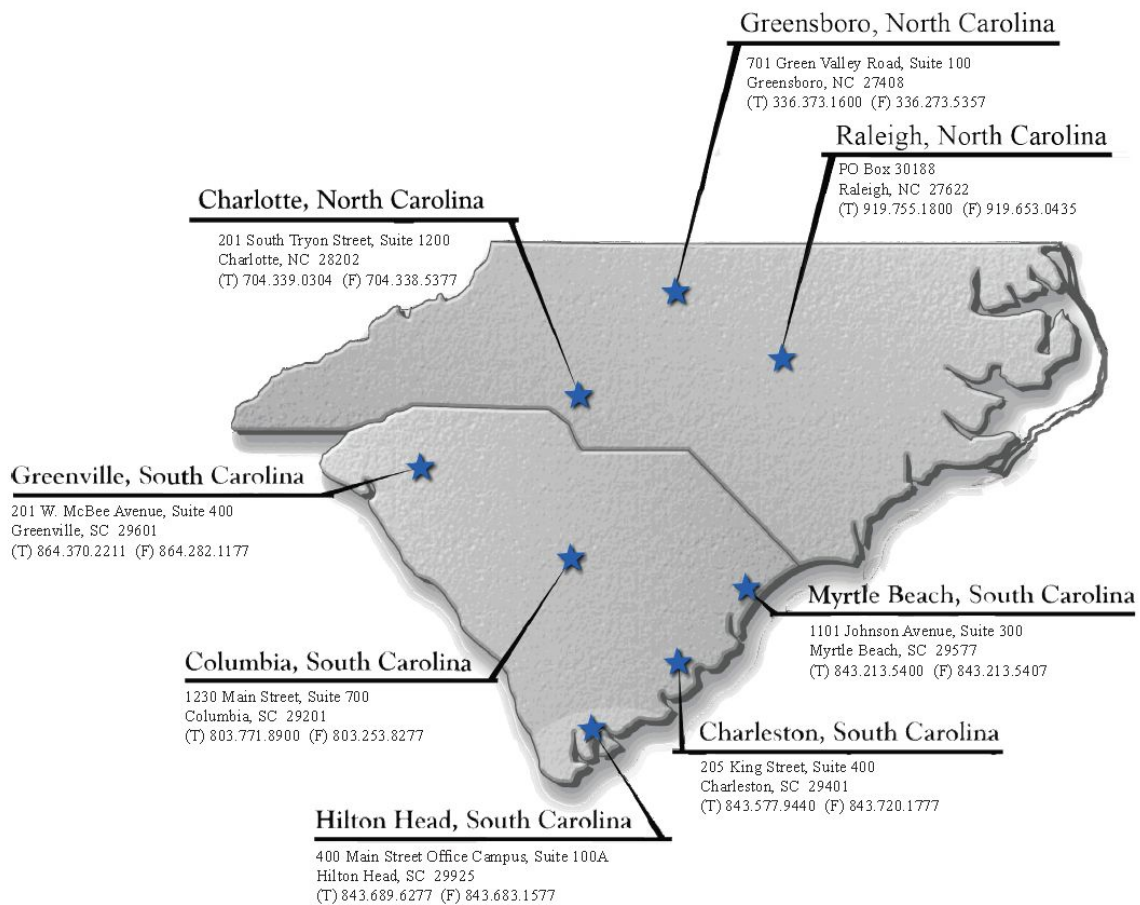
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*For more than 50 years, NEXSEN PRUET, LLC, has earned a reputation for professional, principled service. These enduring values have enabled the firm to build and sustain long-term relationships founded on trust and confidence.*

*The Mission of Nexsen Pruet, LLC, is to serve our clients and our communities with an exceptional level of legal skill and a commitment to high standards of ethics and professionalism. We bring a problem-solving attitude to our practice, seeking to partner with our clients to further their goals. The firm's high standards will be demonstrated not only by our respect for the law, but also by our respect for the people we serve and for our employees and their families. By committing to a policy of responsible corporate citizenship we will add value to our client services while at the same time improving the quality of life in our community.*



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## INTRODUCTION TO NEXSEN PRUET, LLC

We are pleased to provide you with this overview of certain legal and business issues facing businesses seeking to establish operations in the United States. Nexsen Pruet, LLC has offices across the States of North and South Carolina, which are centrally located along the Eastern coast of the United States. Our region is home to one of the most dynamic economies of the world with access to strong markets, energy at reasonable costs and a transportation system conducive to business. We are proud of our community and hope that you will choose to do business here.

As one of the largest law firms in the Carolinas, Nexsen Pruet, provides a wide array of legal and consulting services to its business clients. Our firm's experience covers a comprehensive range of legal specialties:

- Corporate & Securities
- Real Estate Planning & Development
- Environmental Planning & Permitting
- Business & Personal Tax
- Construction
- Technology & Communications
- Regulatory & Administrative
- Health Care
- Mediation & Arbitration
- Appellate
- Banking & Finance
- Intellectual Property
- Economic Development
- Immigration
- Labor & Employment
- Contracts & Joint Ventures
- Legislative & Governmental Affairs
- Business Litigation
- White Collar Crime
- Public Finance

In addition, Nexsen Pruet is an active member of LaWorld and Mackrell International, premier networks of international law firms throughout Europe, Asia, the Middle East, Australia and the United States. This affiliation provides us instant access to legal expertise throughout the United States and the world.

This guide is not intended to be an exhaustive survey of all topics nor legal advice. Readers should consult legal counsel experienced in these matters to support their business decisions. However, we hope it will provide you with useful insights in conducting business in our region. We have drawn our conclusions primarily from our North and South Carolina experience, but similar legal concepts would apply in other states. For more information about Nexsen Pruet, including profiles of our attorneys, we invite you to visit our website at [www.nexsenpruet.com](http://www.nexsenpruet.com). We also encourage you to call us with any questions you may have. Please contact April Lucas in our Columbia, South Carolina office at (803) 540-2035 for additional information.

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## **BUSINESS STRUCTURES**

Many companies break into the U.S. market through agency arrangements. Such arrangements generally entail an agency agreement, a lease of distribution facilities and/or arrangements protecting the intellectual property rights of the foreign owned company. The company should evaluate whether to establish a separate U.S. subsidiary when it has more than isolated sales here.

At that time, one of your first decisions will be to decide in which state to organize. For practical reasons, most companies incorporate in the state where their operations are centered. Larger entities and those which transact business in many states often choose to incorporate in another state, frequently Delaware, which has a well developed and widely respected system of corporate regulation.

Most states offer options to organize as a standard subchapter "C" corporation, subchapter "S" corporation, limited liability company, general partnership or limited partnership, registered limited liability partnership and various joint venture structures. Companies typically choose either the corporate or limited liability form.

As in most countries, the primary benefit of incorporation is the limited liability of the shareholders. Where properly formed and operated, the corporate form shields the shareholders from liability for corporate debt and limits their exposure to the amount of their investment. In order to provide this insulation, U.S. laws generally require adequate capitalization. There is no set formula for determining adequate capitalization. Rather, the capitalization must be reasonable under the circumstances.

The primary disadvantage of subchapter C corporations is that a corporation's income is taxed twice; once at the corporate level and again at the shareholder level. A corporation's income will be taxed by both the federal and state governments in this fashion. For this reason, limited liability companies, or LLCs, have become increasingly popular in the last 15-20 years. An LLC is typically ignored for income tax purposes, but the owners or members of the LLC still enjoy the shield from liability against the debts of the company.

Please note that the federal tax rate may be reduced if the United States has a tax treaty with the foreign entity's government. Reference to the terms of any such treaty will be required to verify its precise implications. Most states apportion income tax according to the extent of business conducted by the company within the state.

A corporation is formed upon the filing of its Articles of Incorporation with the office of the Secretary of State in the jurisdiction of choice. The initial filing only requires the name of the corporation, the authorized number of shares, the name and address of the registered agent located in the state, and the name and address of at least one of the incorporators. Most companies govern themselves according to bylaws and/or shareholder agreements, which are not typically publicly filed for privately held companies.

An LLC is formed by filing Articles of Organization, a form analogous to a corporation's Articles of Incorporation. An LLC's Operating Agreement serves as the equivalent of a corporation's by-laws.

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## **FINANCE**

Financing options range from traditional bank loans to below market financing, such as industrial development bonds and new market tax credit financing, to joint ventures, venture capital funding and private and public stock offerings. The availability of a particular form of financing will depend upon the stage of development of the company, the track record in the U.S. and other factors impacting the strength of the credit.

### **BANK FINANCING**

Charlotte, North Carolina is the second largest banking center in the United States, followed closely by Atlanta, Georgia. As a result, there are many banks throughout the Southeast U.S. which can accommodate lending needs large and small. During the first several years of operation in the States, U.S. financing institutions will typically require some type of guarantee from a strong parent company or from the company's bank in its home country.

### **INDUSTRIAL DEVELOPMENT BONDS**

State or local governmental entities may issue governmental bonds at low interest rates with relatively long durations and loan the proceeds to manufacturers and certain other businesses establishing a capital project within the issuer's jurisdiction. The governmental entity passes through the low interest rate to the private borrower. The private borrower will agree to repay the governmental entity in amounts sufficient to repay the bonds. There is no government guarantee on the bonds. The private borrower nearly always arranges for a letter of credit to enhance the marketability of the bonds. Up to \$10,000,000 in bonds can be issued for a particular manufacturing project. Other limits apply for other eligible facilities. Bond funds may not be used for working capital.

### **GRANTS**

State and local governments often provide grants for infrastructure improvements and sometimes for relocation expenses and job training to facilitate a company's move into the community. Some programs reimburse companies for portions of the project costs. The Company may be required to reimburse the governmental entity if it fails to achieve and/or maintain its investment and job creation goals.

### **NEW MARKET TAX CREDIT FINANCING**

This federal program targets low income areas, and allows lenders to provide favorable financing terms. Typically structured as Series A/Series B loans, the borrower usually pays interest only for seven years at which time the lender gives the Series B loan.

### **LEASING ARRANGEMENTS**

Many companies seek to minimize the impact on their financial statements from the significant capital costs associated with a project by using lease arrangements. Lease arrangements range from simple equipment leases to complex synthetic leases. The typical lease, however, entails relying upon a developer as owner of the real estate in a build to suit arrangement.

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**FINANCE- continued**

**AGENCY, JOINT VENTURE AND LICENSING AGREEMENTS**

To minimize costs, foreign owned companies often start with agency relationships to establish the initial U.S. market. They rarely seek to raise equity through stock offerings in the early days of U.S. operation, but will sometimes raise equity through joint venture arrangements with U.S. partners. The parties will typically create a new company and control the respective obligations and revenue division through shareholder agreements, non-compete agreements and licensing arrangements covering the use of patents, trademarks and processes.

## IMMIGRATION

Immigration is obviously a primary issue for any foreign company planning to expand into the United States. Although the United States, and North and South Carolina in particular, encourage foreign investment, our immigration laws require careful documentation in transferring the personnel needed to complete an expansion to the States.

There are many types of visas available under the immigration laws of the United States. The laws distinguish between immigrants (persons intending to live permanently in the United States), and non-immigrants (people intending to stay in the United States for a limited period of time). The non-immigrant business visas are typically obtained by company officials coming to the U.S. to establish a new business enterprise on behalf of a foreign company or to work for a foreign or U.S. company on a temporary basis in the U.S. These include the B-1, L-1, E, H-1B and O-1 visas.

The B-1 visa (business visitor) enables a business person to visit the U.S. for a short period of time to conduct business without receiving a salary from a U.S. source. B-1 visitors may be admitted to the U.S. for not more than one year and may be granted extensions of temporary stay in increments of not more than six months each. The L-1 visa (intracompany transferee) is available for managers, executives and other key individuals and allows the individual to stay in the United States from one to three years, with possible extensions up to a total of seven years.

The E visa (Treaty Trader and Investor) is provided pursuant to a treaty between the United States and many foreign countries for an initial period of two years with possible extensions in two-year increments. Such treaties typically require that the company making the request for visas either has substantial trade with U.S. companies, or have significant investments within the United States. The H-1B visa is for those entering the United States who have a special job skill, such as scientists, computer experts, engineers, etc. In order to obtain such a visa, the employer must obtain special approval from the U.S. Department of Labor and certify that it will pay the foreign national the prevailing wage within the U.S. for the needed services.

The O-1 visa is available for those individuals who are recognized internationally as having an exceptional ability in a particular field.

Family members of the individuals who obtain either a L-1, H-1B, E and O-1 visas and who accompany the visa holder to the United States may also obtain visas for the same length of a stay as the primary visa holder.

The application and approval process for all visas is extremely complex and requires the completion of significant paperwork. Planning ahead is extremely important for a successful application. Applicants should work closely with a qualified attorney throughout the process in order to obtain the necessary visas.

## **ECONOMIC DEVELOPMENT INCENTIVES**

### **ROLE OF INCENTIVES**

Most states offer incentives to entice companies to locate within their jurisdiction and thus promote the economic development of their respective communities. Typical incentive programs center on capital investment, job creation and increases to per capita income.

While incentives may prove useful or even critical to some projects, they should not override basic business considerations such as proximity to market or vital resources, transportation and infrastructure requirements, and overall cost of doing business. If the general cost of doing business is roughly the same in two jurisdictions, incentives might tip the scale in favor of one location versus another. Incentives also sometimes level the playing field. For instance, if property taxes are higher in one jurisdiction, an incentive to lower the tax might make that locality competitive.

Incentives also serve as an indication of the business climate in a particular community. States and communities with strong incentive programs often work harder to make sure the overall business climate is conducive to business. The Southeastern states have outpaced the rest of the nation over the last 30 years due in large part to the region's overall business climate, strong incentive programs and eagerness to improve their economies. Much of the development is thanks to foreign-owned investment, and the region has become increasingly cosmopolitan as a result.

### **PRIMARY INCENTIVE TOOLS**

Incentive programs typically entail tax incentives or exemptions, below-market financing, grants, in-kind services and job training. Tax oriented incentives relate to the primary forms of tax at the state and local level: income tax, sales tax and property tax. Frequently a state's income tax code will provide exemptions and credits for job creation, capital investment, pollution control facilities, energy efficient facilities, corporate headquarters, distribution facilities, research & development facilities, investment in targeted sectors, investment in targeted communities and other activities which boost the economy or otherwise serve the public interest. Few county and city governments impose taxes outright, although many impose business license fees which have a similar effect. Most income tax incentives, therefore, relate to state income taxes. In contrast, both state and local governments often impose sales taxes, and companies should investigate whether exemptions or credits are available for construction and equipping of facilities, for purchase of raw materials, communication services or energy consumption or for the company's particular product. Local governments rely heavily on property taxes to fund municipal, county and school services. Exemptions and credits abound for targeted businesses, and local governments also frequently reduce the rate of taxation through fee in lieu of tax or other programs.

Grants might come from either State or local governments or even a bank or utility which then claims an income tax credit. Most grant funds are used for required infrastructure improvements and are often unavailable in connection with the acquisition of existing facilities.

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## ECONOMIC DEVELOPMENT INCENTIVES-continued

Some grant programs will pay, or reimburse companies for payment of, project costs, relocation costs and job training costs. In lieu of grant funds, some communities offer in-kind services, such as site work, to offset the company's capital requirements.

Job training may take the form of cooperative agreements with the local technical college or a state may pay to send supervising workers to the home factory to be custom trained using the company's equipment and resources while a plant is under construction. These programs often save the company millions and enable it to start operations with a specially trained workforce in place.

Note also that many incentives are tiered according to the development level of a particular community. Companies which are willing to locate to a nearby, but less developed community may reap considerable additional benefits from doing so. Companies should also note that they may be required to repay grants and other incentives if they fail to honor their investment and job commitments.

### INCENTIVE APPROVAL PROCESS

Many incentives are statutory—they are built into the state or local code of laws. If a company earns a tax credit, for example, it simply completes the appropriate tax form and claims the credit. In other cases, the incentive is discretionary with the state or local government. In such instances, the company must negotiate an incentive agreement or agreements before making its final decision. Otherwise, it loses negotiating leverage with the governmental entities.

Sufficient lead time should be allowed for this negotiation process. Consultants, accountants and attorneys can assist in this process. The company would be well advised to seek assistance from an advisor familiar with the particular jurisdiction. Although governmental representatives will often assist with information, they represent the community and not the company and do not always disclose all of the possible programs which might have applicability.

## SITE SELECTION

### SEARCH PROCESS

Most companies making an initial investment in the U.S. engage the services of a consulting firm which specializes in site selection. These firms offer services ranging from market analysis, to transportation and infrastructure reports, to civil engineering and real estate evaluation, to business models which compare the cost of doing business in selected jurisdictions. Often these roles are split among consultants, accountants and attorneys. Some companies have staff and experience to shoulder all or part of this due diligence.

In each case, the project coordinator will work with the company to narrow the search geographically and will then ask for data and proposals from the communities under consideration. If confidentiality is important, the project coordinator may withhold the company name and will ultimately ask for a confidentiality agreement. Most states have freedom of information statutes which mean that the final terms of incentive packages will become public. Disclosure can often be delayed, however, until the project is nearly complete. Care should be taken to avoid identifying the company to many individuals since disappointed communities often leak information to the press, and the company has few remedies if that happens.

### DUE DILIGENCE

Once a location has been determined, the company must decide whether to lease or purchase facilities and whether to utilize existing facilities or construct new facilities. It is common for landlords to provide standard form leases that contain terms very favorable to the landlord. In order to protect your interests, we recommend that you obtain legal counsel to advise you.

Whether you choose to purchase or lease a facility, you will need to undertake certain due diligence with respect to the specific property and your proposed operations. Your due diligence list with respect to the property might include: environmental reports, civil engineering, availability of gas, power, rail, and roads, endangered species and cultural artifact reports, wetlands delineation and title matters. Due diligence with respect to ongoing operations would include environmental and regulatory permitting, minimization of taxes and governmental fees, such as business license fees, and other costs of doing business. Environmental and regulatory permitting, for example, can take many months for certain projects. Governmental representatives can assist in this process, but companies are well advised to seek the advice of counsel before the site selection process is too far advanced. Counsel can also arrange introductions to other service providers.

## ON-GOING OPERATIONS

### CONSTRUCTION

Builders often suggest standardized architectural and construction contracts, which are sometimes skewed in their favor. An experienced construction attorney can recommend a more favorable form or changes which substantially improve the rights of the company.

### TRANSACTING BUSINESS

Most states have adopted versions of the Uniform Commercial Code, a detailed set of regulations that govern the sale of goods within the United States. The “UCC” provides working definitions for common commercial terms, sets general rules for the sale and purchase of goods, and generally attempts to facilitate commercial transactions. Though parties generally are free to negotiate the terms of their agreements, an understanding of the UCC and standard commercial practices is essential for any company transacting business in the Carolinas. When an agreement is silent on certain issues, the UCC “fills in” the gaps and determine how a contract will be enforced. It also imposes minimum warranties on manufactures for the products they sell. On occasion this can significantly affect the rights and obligations of the parties to a contract. Businesses should consult legal counsel when drafting standard form contracts and other significant agreements.

### INTELLECTUAL PROPERTY

Even if the foreign-owned company only engages an agent to market its services or products in the U.S., it should confirm that (1) it is not violating the property rights of any company already doing business here and (2) that it has adequately protected its own intellectual property rights. Protective action may include:

- Preparing and prosecuting patent, trademark and copyright applications.
- Licensing, negotiating and drafting agreements regarding patents, trademarks, copyrights and trade secrets.
- Obtaining international patent and trademark protection, including Patent Cooperation Treaty (PCT) practice.
- Maintaining domestic and international patent and trademark portfolios.
- Identifying and protecting trade secrets.
- Identifying trade dress infringement and related unfair competition claims

### LABOR AND EMPLOYMENT

Companies doing business in the United States face many complex laws governing the employment and the quality of working conditions. At the national level, the Fair Labor Standards Act, the Americans with Disabilities Act, the Occupational Safety and Health Act, the Employee Income Retire Security Act and the Equal Pay Act constitute a sample of the many federal laws which may apply to any business within the United States. There are also

### **ON-GOING OPERATIONS-continued**

many state laws governing the employment arena as well as some of which overlap the federal laws.

In addition to complying with state and federal laws governing the workplace, there are many employment issues to be addressed by management, such as employment contracts, employee benefit plans, stock option plans and retirement plans. Other issues include:

- Employment Discrimination
- Employee Discipline
- Substance Abuse Testing and Policies
- Family Medical Leave Act and Other Leave Policies
- Employee Privacy Rights
- Wage and Hour Issues
- Sexual Harassment
- Protection of Confidential Information and Trade Secrets
- Proper Hiring and Firing Techniques
- Employee Handbooks

### **DISPUTE RESOLUTION**

Although it is hoped that business will run smoothly, there are ways to minimize the costs and lost management time associated with litigation. Many companies include arbitration or mediation clauses in their contracts and view these processes as a preferable alternative to litigation in court. To ensure that such options will be available, companies must specifically follow state law provisions governing how these clauses must be written. Some states, for example will not enforce binding arbitration unless a specific legend is included on the front of the contract.

## SUMMARY

Starting a business enterprise in the United States is an exciting and rewarding experience. Although the information provided in this guide is limited in its scope and detail, it is a sampling of the many legal and business issues which require attention as you begin doing business in our states. Nexsen Pruet, LLC looks forward to assisting you with all your legal needs. Please feel free to contact us at any time for more information. We wish you good fortune with your project and hope that you prosper in our community.

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