

# Cross Borders Practice at Maynard Nexsen: Doing Business with Japan

Practical Tips for Setting Up or Expanding Your Business in North/South Carolina

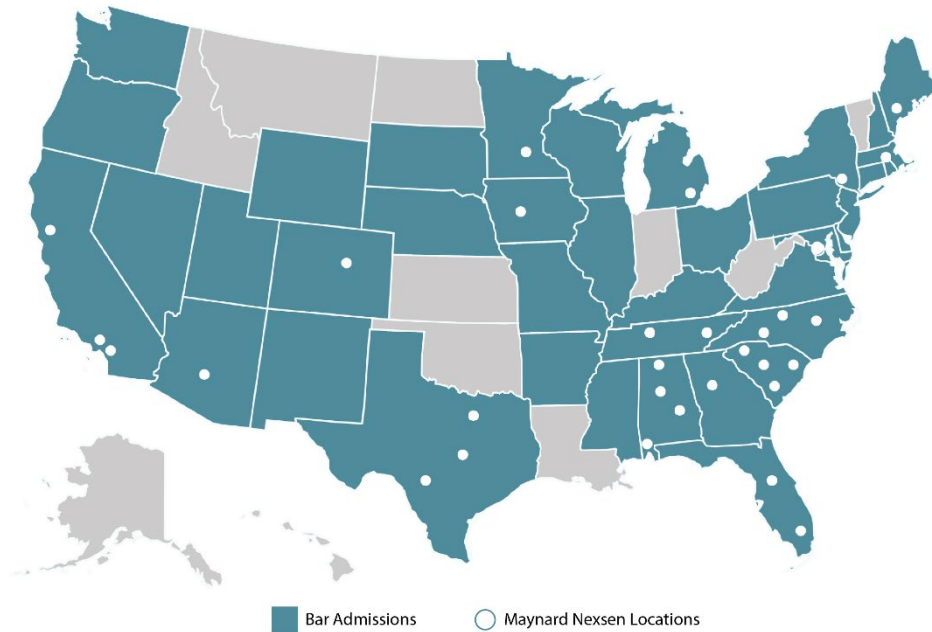
## Maynard Nexsen PC | Introduction

We are pleased to provide you with this overview of certain legal and business issues facing companies seeking to establish operations in the United States. Our lawyers have many years of experience assisting internationally owned companies - large and small - with capital projects in the US, and we hope to be part of your team. As of this printing, Maynard Nexsen is the only law firm recognized by *Southern Business and Development* magazine as a top economic development law firm in both North and South Carolina.

Maynard Nexsen's base of operations is centrally located along the Eastern coast of the United States. Our region is home to one of the most dynamic and diverse economies of the world with world class Universities, 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, Maynard Nexsen provides a wide array of legal and consulting services to its business clients wherever they do business. Our firm's lawyers cover a comprehensive range of legal services, including:

- Establishing and guiding companies through every stage of business formation and growth
- Negotiating and securing investor and bank financing for new and growing companies
- Transferring your key personnel to the U.S. and around the world
- Navigating environmental, regulatory and tax "minefields"
- Negotiating incentives packages, and developing business construction and employment forms and contracts
- Developing and protecting your intellectual property portfolio in the U.S. and
- In general, protecting and defending your business interests.



## BUSINESS STRUCTURES

Some companies initially enter the U.S. market through branch office or agency arrangements. Such arrangements generally entail an agency or contractor agreement, a lease of distribution facilities and/or arrangements protecting the intellectual property rights of the foreign company. A company should evaluate whether to establish a separate U.S. subsidiary when it has more than merely isolated sales here. In most instances, companies will need to carefully consider the tax implications of whether their US activities rise to the level of a permanent establishment in the US.

One of your first decisions will be to decide in which state to organize. For practical reasons, many 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 rules and regulations.

Most states offer options to organize as a standard subchapter “C” corporation, subchapter “S” corporation, limited liability company (“LLC”), general 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 to limit liability of the shareholders. Where properly formed and operated, the corporate or LLC form shields the shareholders from liability for corporate debt and limits their personal exposure to the amount of their investment.



Determining the proper structure for your US business involves careful study, and a balancing of tax treaty benefits, business objectives, and available structure options.

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. This initial filing generally 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. An LLC is formed by filing Articles of Organization, a form analogous to a corporation's Articles of Incorporation with the same office of the Secretary of State. An LLC's Operating Agreement serves as the equivalent of a corporation's by-laws.

Many foreign companies will find that US company disclosure requirements are minimal and simple. However as there can be significant consequences for filing lapses, we routinely assist companies with their annual and routine compliance obligations.

As a part of the company establishment process, businesses will also need to evaluate whether other business licenses must be obtained and maintained. We can help.

## FINANCE

Financing options range from traditional bank loans to tax-advantaged or other 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, its track record in the U.S. and abroad, and other factors impacting overall business.

### **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. We are happy to make introductions when necessary. During the first several years of operation in the States, U.S. financing institutions will typically require some form of guarantee from a the 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 U.S. \$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 improvement 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's 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 allows the borrower to purchase the Series B loan at a nominal price, *i.e.* 1% of principal owed.

## **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.

## **AGENCY, JOINT VENTURE AND LICENSING AGREEMENTS**

To minimize costs, foreign owned companies often start with agency relationships to establish and grow their initial foray into the 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 other intellectual property.

# IMMIGRATION

Immigration is obviously an important 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 comprehensive documentation in transferring the personnel needed to complete an expansion to the United 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). Significant personal investments in certain types of ventures can result in an immigrant visa (“green card”) under the US EB-5 program. However, 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 typically include B-1, L-1, E, H-1B and O-1 visas. By treaty, some foreign nationals on short trips to the U.S. may be exempt from non-immigrant visa requirements. The following are the most commonly used non-immigrant visa categories:

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 to 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 five or 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 indefinite extensions in two-year increments. Such treaties typically require that the company making the request for visas have either substantial trade with U.S. companies, or have significant investments within the United States.

The H-1B (Specialty Occupation) visa is for those entering the United States who have a special, professional job skill, such as scientists, computer experts, and engineers. In order to obtain this visa, the employer must obtain “professional” approval from the U.S. Department of Labor and certify that it will pay the foreign national the prevailing wage in that area for the needed services.

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

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

The application and approval process for all visas is extremely complex and requires significant paperwork. Advanced planning is extremely important. We can help.

# 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 markets 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 40 years due in large part to the region's overall business climate, strong incentives 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 involve 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 income 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. Tax credits for certain research activities, and transportation uses, might also be available.



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.

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 a 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 the U.S. plant is under construction.

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 before making its final decision. Otherwise, it loses negotiating leverage with governmental entities.

Sufficient lead time should be allowed for this negotiation process. Consultants, accountants and attorneys each assist with aspects of this process. 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.

# SITE SELECTION

## **SEARCH PROCESS**

Most companies making an initial investment in the U.S. engage the services of a consulting firm specializing 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. Maynard Nexsen is affiliated with Sanford Holshouser Economic Development Consulting, LLC.



## **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. We can help structure a deal that fits your business needs.

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 includes 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 at the start of the site selection process. We can also arrange introductions to other service providers as necessary.

## **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. A multinational company must understand when and if UCC terms are favorable to the UN Convention on the International Sale of Goods (“CISG”) provisos. 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 determines 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) 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) filings.
- 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 many state laws governing the employment arena as well.

In addition to complying with state and federal laws governing the workplace, there are many employment decisions to be made by management often on a daily basis, including:

- Employment Discrimination & Hiring Issues
- 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
- Employee Handbooks, Contracts and Benefit Plans

## DISPUTE RESOLUTION

There are ways to proactively 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.

## DISCLAIMER

While the scope and detail of the information contained in this guide is limited and cannot be considered legal advice, it illustrates a number of legal and business issues that may require consideration for your company to enter into or expand its business in the states in which we operate. Maynard Nexsen PC looks forward to working with you on your journey to achieving your business goals. If you would like more information, please feel free to contact us. We wish you the best of luck in your development and projects, as well as your business in the Carolinas.

For more than 75 years, Maynard Nexsen PC has earned a reputation as a professional and principled service company. These enduring values have allowed us to build and maintain long-term relationships based on trust and confidence.

Maynard Nexsen PC's mission is to serve our clients and communities with an exceptional level of legal skills and a commitment to high standards of ethics and professional awareness. We approach our business with a problem-solving attitude and are committed to achieving our goals by partnering with our clients. Our high standards are reflected not only in the legal field, but also in the people we serve, as well as in our employees and their families. By committing to a policy of acting as a responsible corporate citizen, we are adding value to our client services while also helping to improve the quality of life for our communities.

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