



EXPAND YOUR BUSINESS INTO THE UNITED STATES



Anne Wolfson, PLLC

Attorney at Law

Anne Wolfson is a business lawyer and counselor in New York with experience in financial regulation and technology, including the use and ownership of technology, data and intellectual property, both domestically and internationally. As the current or former general counsel to several growing tech companies, she is familiar with the range of legal issues that SMEs encounter on a daily basis, and provides counsel on how to avoid or address those risks sensibly. Having advised growing European companies for many years, Anne understands the new risks and challenges facing them when they enter the US market.



Knowing What You Don't Know: Optimizing Your Legal Strategy for US Market Entry

Anne Wolfson

Anne Wolfson, PLLC

Luxembourg American Chamber of Commerce

Luxembourg City, 19 June 2019

1. US Legal System Overview – Civil law vs. Common Law
2. What Not to Do – Common Mistakes
3. Corporate Form – C-Corp/LLC and State of Incorporation
4. IP Protection – Protecting Your **Most Important** Assets
5. Contracts – Risk Management
6. Litigation – **More** Risk Management!
7. Employment – **The Other Most Important Assets**
8. Real Estate – Getting an Office (or a Warehouse or a Factory)
9. Things/Stuff - Exporting and Products Liability Protection
10. GDPR – Not Just for Europe Anymore



1. US Legal System

Why is US law so complicated?

Why are US lawyers so expensive
and so specialized?



Civil law vs. Common law

Sources of Civil Law – relatively few and predictable

- Statute books
- Administrative regulations
- Relevant EU law (statutes and regulations)
- Civil law is clearer and less subject to interpretation than common law

Civil Law Contracts

- Generally brief, don't spell out the relationship exactly

Common law

Many sources and less predictable:

- Statutes: fed (affects all); 50+ states/territories; municipal statutes
- Regulations from all levels of government
- Court cases – judges/juries interpret the law based on specific facts
- Case law is crucial - analysis of law depends on facts of each case
- Finding and understanding the right answer (or an approximation) requires a lot of searching and harmonizing of legal sources
- **Everything of importance to the two parties is in the contract**

Common Law – Features, not bugs

- Hiring lawyers is normal practice
 - Lawyers are **business partners**
- Can help avoid problems/disputes
 - **Always** more costly to fix after a dispute has begun
- Lawyers become hyper-specialized
 - Result of the complexity in finding the “answer”

Litigation is more likely, easier to initiate and more valuable to winner



2. What Not to Do!

- **Didn't engage US lawyer before entering market**
 - Nordic employment contract missing **crucial** NY phrase – **costly lawsuit!**
 - IT contract missing standard IP ownership – **costly, lengthy lawsuit!**
 - No tax advice after founding – **potentially large tax bill at sale**
 - Founded at home - **needed costly reorganization to get US VC funding**
 - Struggling restaurant took on partners who stole from the restaurant **Had legal fight to remove partners in order to renew visa**
 - Foreign co saved money in entry plans, looked unserious to USIS **Visa applications had to be redrafted and resubmitted**

3. The Corporate Form

Why Set Up a US entity?

- Asset protection, Tax and legal liability reduction

US Entity v. Local Corporate Partner/Distributor

US Entity options

- Which business structure?
 - LLC, C-Corporation, S-Corporation or Partnership
- Where to incorporate?
 - NY, Delaware or another state
 - Need either an entity or a “Right to Do Business”

4. IP Protection

IP protection regimes in the US and Europe are different

- US and EU systems are converging
- They are not yet the same
- **Wise to get legal review in each jurisdiction**
 - Litigation is expensive
 - Distracts management attention



5. Contracts

- Tech – hardware and software, licenses and user agreements
- Vendor/Services/Sale or Use of goods or equipment
- Real Estate Leases
- Independent Contractor/Consulting Agreements
- Employment contracts – used only for some senior executives
- Insurance – advisable to get US-based insurance policies

Changes should be in writing

Oral agreements difficult to enforce



6. Managing Litigation Risk

Litigation more frequent under common law

- US Litigation system is notoriously complex and expensive
- Draft agreements with an eye to managing litigation risk
- Settlement is often the better and more efficient answer
 - Cost of doing business in the US

Don't be afraid of the risk, but don't ignore it

7. Employment Law

- Employment law is **mostly** state-by-state
- NYS: “Employment at will” – most employees do not have contracts
 - Either party can end the relationship with minimal notice
 - Employer’s reason must not be an illegal one
 - Hiring, termination and resignation simpler than outside the US
- “Employee” vs. “Contractor” – how they work and are supervised
- NY has complex wage/hour laws – errors are expensive
- **Discrimination**
 - Not hiring/recruiting/interviewing enough of a protected group as reflected in the population, whether conscious, intentional or not

8. Real Estate

- Certain visas need **physical space** to show intent to do business
 - Some co-working space leases are acceptable
- Real estate laws are **hyperlocal**
 - Most are by city, some are by county, some by state
- NYC: commercial spaces have landlords' standard terms
 - Industrial space varies based on location and purpose



9. Things/Stuff

Exporting to the US

Need Commercial partners: local structure and presence

- Distributors, Retailers, Sales Agents

Products Liability

- Manufacturers, distributors, suppliers, retailers, others
- **Legally responsible** for those products' injuries
- **Defect and Failure to warn**
- Different standards across industries, based on insurance coverage

10. GDPR

- GDPR affects US firms with EU operations in complex ways
 - The inquiry and answer are **fact-dependent**
- It **may** apply to EU firms operating in the US

Do NOT assume that your US operations will be GDPR-free

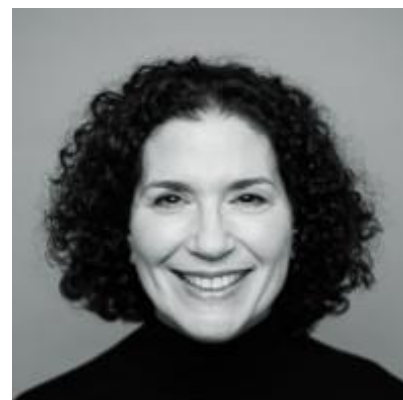
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Contact information

Anne Wolfson

anne@annewolfson.com

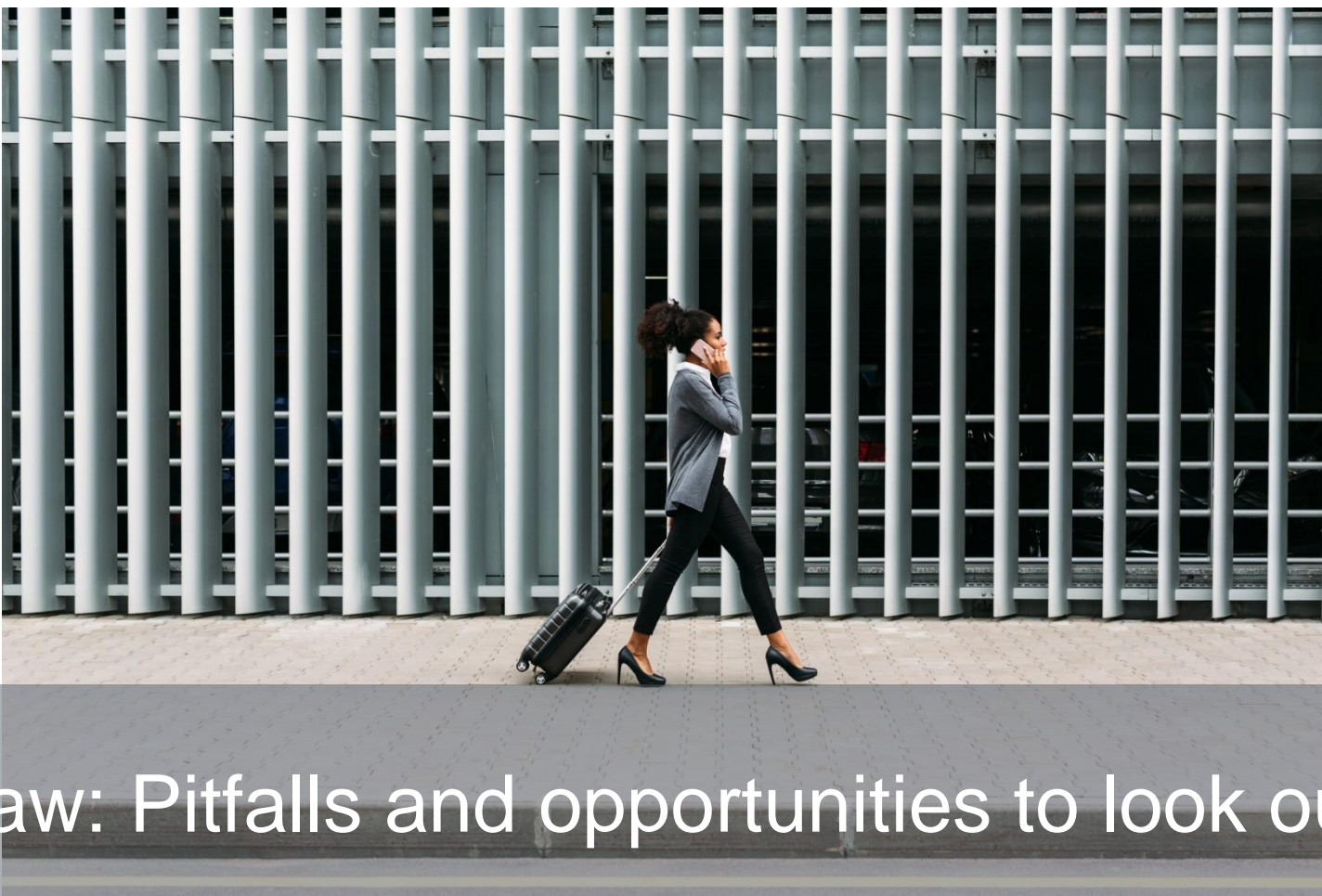
+1 917 584 6085





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Mark van der Linden is an all-round tax lawyer with 25 years of experience in the global tax arena, 18 of which were spent living and working in the USA. His main focus is assisting (US) multinationals in establishing and structuring their global operations within the framework and limitations of the US tax codes. Mark has extensive knowledge of the interaction between the US, the Dutch and a vast amount of foreign tax systems. Areas of expertise include product development, mergers and acquisitions, supply chain structuring, international group restructuring combined with the use of typical financial instruments or hybrid structures. Fluent in Dutch, German and English, he is registered with the Dutch Order of Tax Consultants and as a Foreign Legal Consultant with the NY State Bar.



Tax law: Pitfalls and opportunities to look out for

Mark van der Linden
Chief Operating Officer, North America

Luxembourg American Chamber of Commerce
Luxembourg City, 19, June 2019

Let's talk about taxes



Content

1 Relevant Differences in Tax System

2 Keeping inventory in the USA

3 Sales tax in the USA

4 Current tax benefits of the USA

5 Setting up in the USA

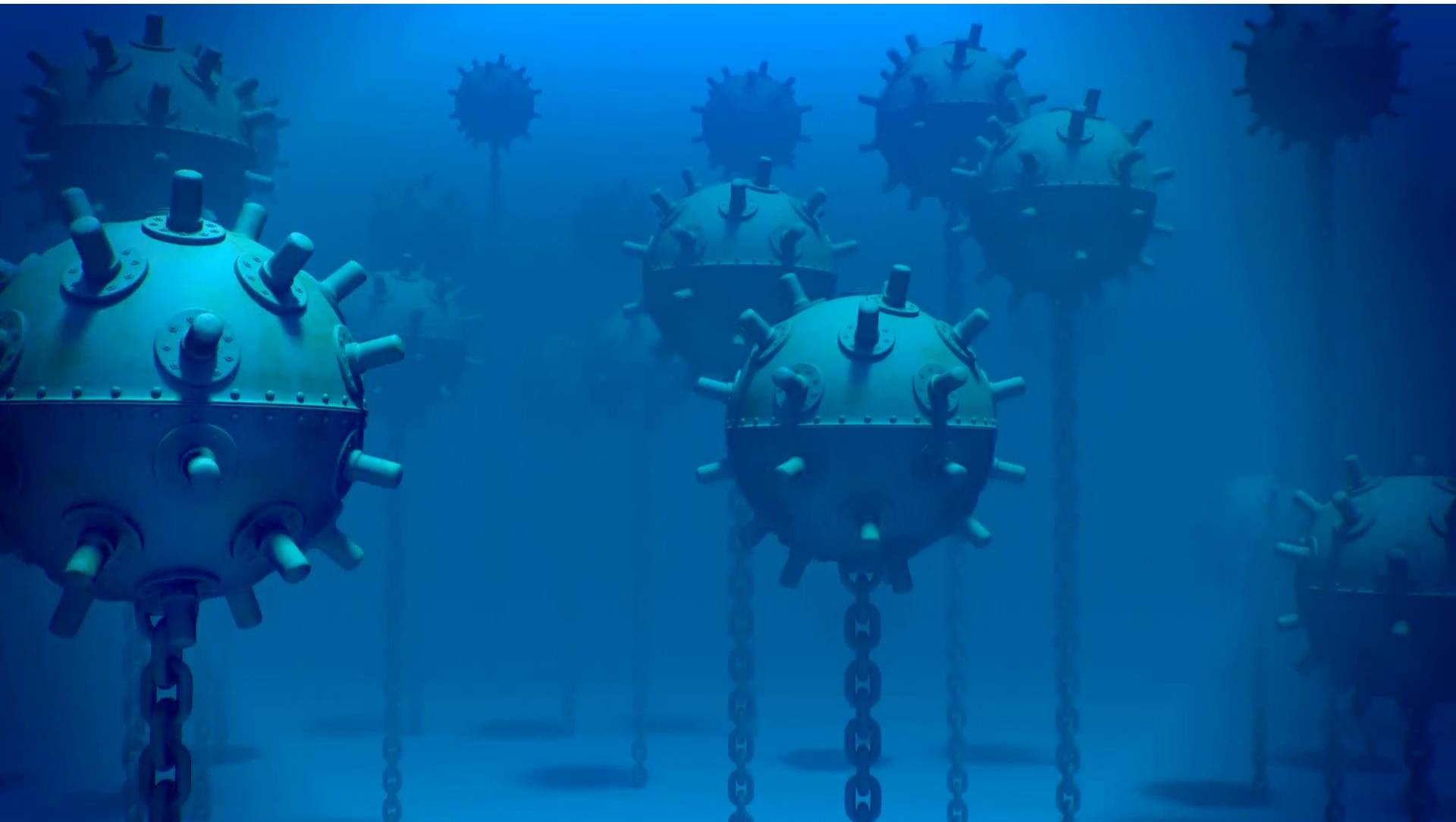


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You think it looks like



But it sometimes looks like



Content

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5	Setting up in the USA

US tax = a four layer chocolate cake



Sales tax

City/Municipal income tax

State income tax

Federal income tax

That's ok, we have a tax treaty



Treaty does not always help

Treaty

Sales tax

Does not apply

City/Municipal income tax

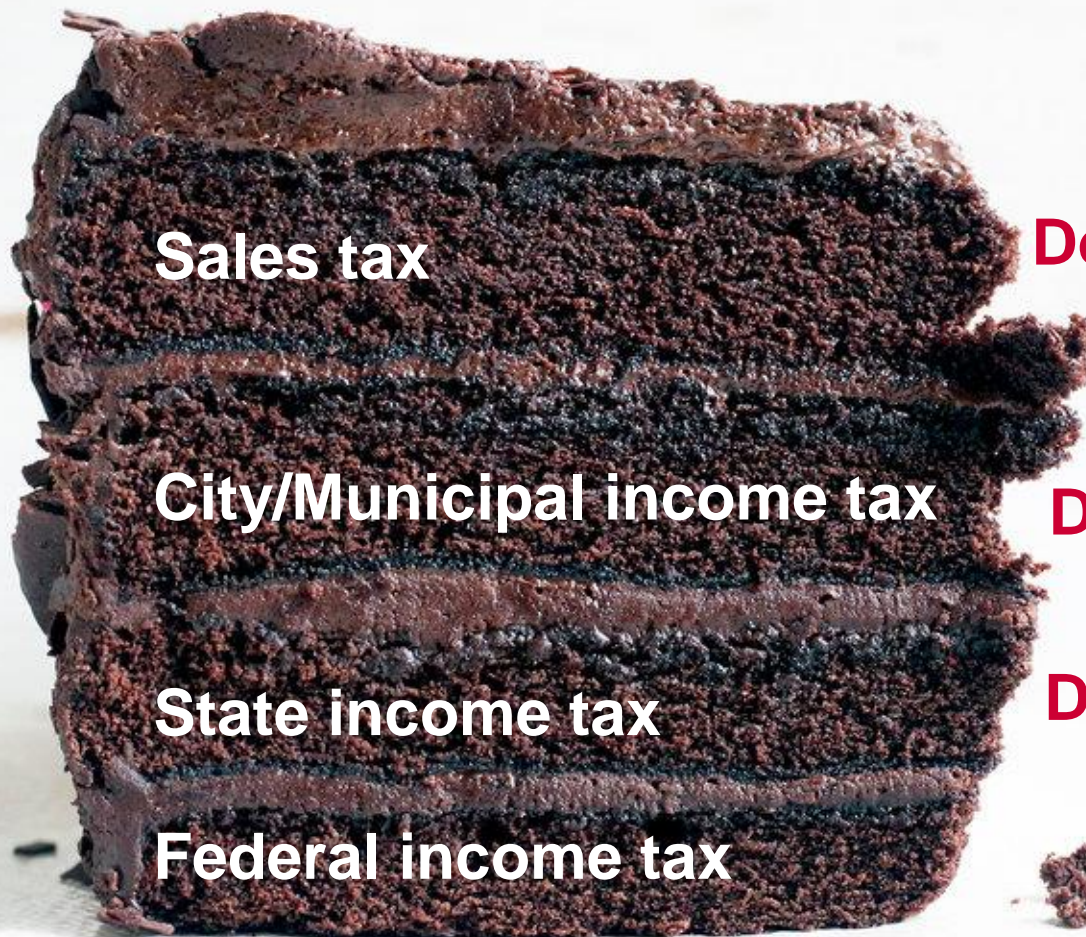
Does not apply

State income tax

Does not apply

Federal income tax

Does apply



US tax filings: compliance, compliance, compliance



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Keeping inventory in the USA

Important criterion: is this taxable or not?

ARTICLE 5

Permanent Establishment

1. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

4. Notwithstanding the preceding provisions of this Article, the term 'permanent establishment' shall be deemed not to include:

- a) the use of facilities solely for the purpose of storage, display, or delivery of goods or merchandise belonging to the enterprise;
- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display, or delivery;
- c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

- Perfect, we are done ! ?

USA Tax filing for inventory

Filing



Sales tax

Yes

City/Municipal income tax

Yes

State income tax

Yes

Federal income tax

Yes

No file; no statute of limitation



But on the other hand...

Planning idea

- » There is a planning idea to have the margin realized with the USA inventory sales taxed at a very low rate
- » Maybe even as low as 0%.



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Myth busting 1

Sales tax does not work like VAT

- » It is a State tax
- » There is no input Sales tax that can be offset
- » Requires Nexus in a State, but Wayfair case substantially expanded taxable presence (merely sales is sufficient).

This is a big compliance concern

- » Suggestion: outsource for first few years.

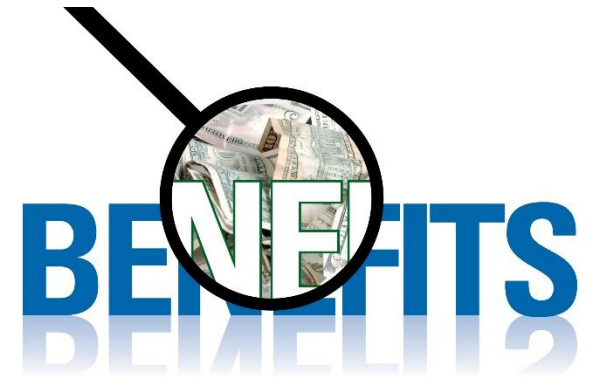


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Current tax benefits of the USA?

- » Lowest federal corporate income tax rate ever (21% coming from 35%)
- » Large entrepreneurial facilities
 - › direct full amortization
 - › Definition entrepreneurial expenses is wide
 - › R&D low taxed
 - › Subsidised manufacture in USA and then export (50% benefit or more)
- » States offer incentives to establish businesses
- » Strong support for businesses



States with low or no income tax

State tax benefits

- » Wyoming, Nevada, and South Dakota have no corporate or individual income tax (though Nevada imposes gross receipts taxes);
- » North Carolina's flat rate of 2.5 percent is the lowest in the country, followed by rates in North Dakota (4.31 percent) and Colorado (4.63 percent).
- » Four other states impose rates at or below 5 percent: Arizona (4.9 percent), Utah (4.95 percent), and Kentucky, Mississippi, and South Carolina (5 percent).
- » Alaska has no individual income or state-level sales tax;
- » Florida has no individual income tax;
- » New Hampshire, Montana, and Oregon have no sales tax



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Setting up: what and where?



Problems with the LLC

Foreign tax requirements for the owner

- » Participation exemption generally requires % of shares (Luxembourg (10%), Germany (10%), Netherlands (5%))
- » LLC does not have capital divided into shares.
- » LLC sometimes tax transparent.
- » Issue with EU ATAD rules (anti-hybrid).
- » Amend LLC contract to facilitate.



On the other hand

LLCs are great for planning

- » Very easy to make hybrid (filing form)
- » Foreign country qualifies on merits
- » Is an automatic hybrid
- » Be careful with anti-abuse rules
- » US did not sign off on OECD BEPS





Thank you for your attention

Mark van der Linden

646-248-0127

Mark.vanderlinden@wts.com

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Q&A



Anne Wolfson, PLLC

Attorney at Law

Anne Wolfson



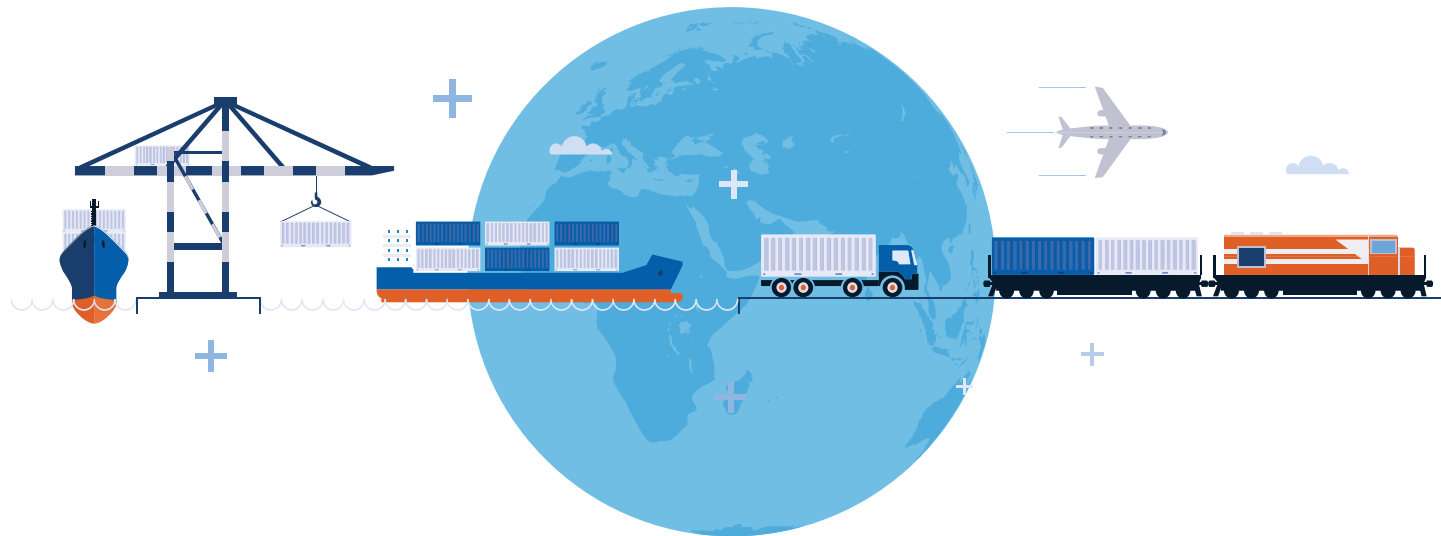
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Mark van der Linden



Nunzio De Filippis, a U.S. Licensed Customs Broker (LCB), is the CEO and part of the second generation of family leaders at CargoTrans, Inc. He started playing with boxes at age 2 and working with them at age 12! Over the course of his lifelong training and career, he has worked in almost every aspect of logistics – from picking orders to picking ERP systems. Today, Nunzio is a Supply Chain Strategist who partners with businesses and people to grow their brands by taking the hassle out of shipping. After spending over a decade working in Operations and Business Development with multimillion-dollar brands and startups, Nunzio understands that truly connecting with the hard-working people you're trying to help and communicate your understanding to them is what wins – *NOT* mastering the spot rate of the week.

EXPAND YOUR BUSINESS INTO THE U.S.

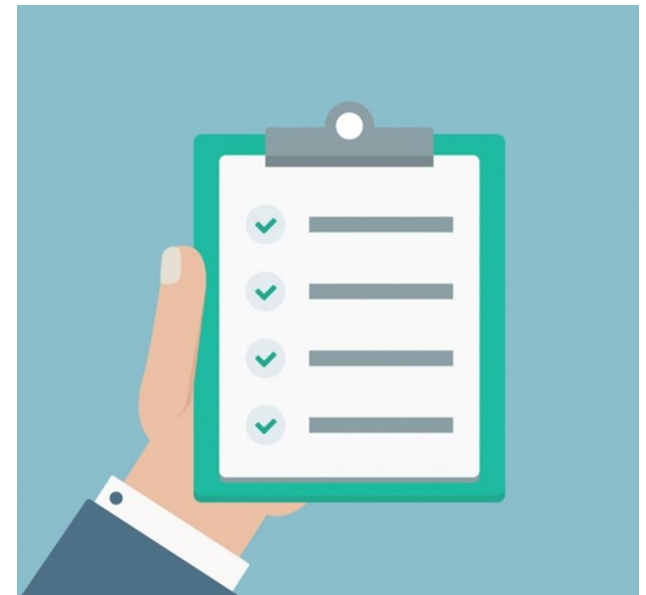


Nunzio De Filippis
Licensed Customs Broker
CEO
CargoTrans, Inc.

Luxembourg American Chamber of Commerce
Luxembourg City, 19, June 2019

WHAT WILL WE BE DISCUSSING?

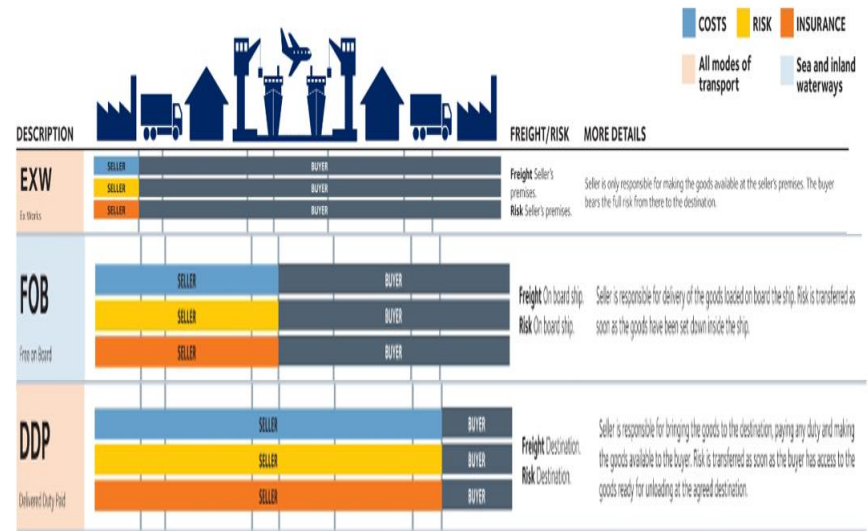
1. Terms of Sale
2. Foreign Importer of Record
3. Other Government Agencies
4. Selecting a Freight Forwarder, Customs Broker, Third-party logistics (3PL)
5. Customs Compliance Tips
6. Out-of-the-Box Strategies



TERMS OF SALE

What's the difference?

- Familiarize yourself with all Incoterms to decide which is best for you
- Who's responsible for the losses/damages? Don't forget about insurance.
- Consider the power of offering DDP to a U.S. buyer not familiar with importing. – **Convenience SELLS!!**



FOREGIN IMPORTER OF RECORD

How do I execute a DDP transaction?



- U.S. Customs allows shipper's to be declared as the Importer of Record.
 - Power of Attorney
 - Customs Bond: Single Entry Bond vs Continuous (annual) Bond.
- Fully Responsible to comply with all U.S. Customs regulations.
 - U.S. Consignee is only required to provide you with their U.S. tax I.D.
 - Not required to complete any docs.

OTHER GOVERNMENT AGENCIES

Do I need to comply with Other Government Agencies? (OGA's)

- United States Department of Agriculture, Fish and Wildlife, Food and Drug Administration, Etc.
- U.S. Customs is the enforcer, but you need to obtain releases from each OGA.
- Consult with your Customs Broker if you're not sure the commodity has to comply with OGA's



SELECTING A FREIGHT FORWARDER, CUSTOMS BROKER, 3PL

What should I consider when selecting a logistics partner?



- Buyer's Beware – Selecting based on price only may limit your growth
- Look for value – I.E. Technology, visibility, reporting, EDI/API connectivity
- Share as much as possible about your business as a start-up and where you envision it in the future
- Request for documentation and Harmonized Tariff Schedule (HTS) classification review.
- Third-party logistics (3PL)
 1. Advantages to having inventory in the U.S.
 2. Resource – Flexe

Customs Compliance Tips

What do I need to know?

- Responsible Supervision: Import SOPs, HTS Selection, Country of origin markings.
- Record Keeping
 - Five years from date of entry
 - Never tell customs my “broker” has it
- Take advantage of ACH periodic monthly statements
- Inward manifest confidential treatment
- Partnership programs with U.S. Customs.
 - i.e. BKIP, C-TPAT, etc.



OUT-OF-THE-BOX STRATEGIES

#WeMakeShipHappen

How can I compete in a crowded marketplace?



- Tariff Engineering – I.E. Sink for Starbucks vs. Furniture Counter
- Valuation Strategies
 - First Sale
 - Unbundling
- Country of Origin – Shift strategies
 - Extremely useful with Section 301 China Tariffs
 - Pillow and bed comforters
 - Cosmetic body sprays

Thank you

Contact information

Nunzio De Filippis | CEO

CargoTrans

e: nunzio@cargotransinc.com

d: 1 (516) 881-4184

cargotransinc.com





Steve Maggi was born in Argentina and raised in New York City, studied broadcast journalism and history at UNC-Chapel Hill and then law at Georgetown University. A U.S. immigration and consular law attorney with over fifteen years of experience, Steve founded SMA Law Firm with the mission of helping foreign nationals achieve their unique version of the American Dream. Under his direction, SMA provides comprehensive U.S. immigration and consular law services, including assisting U.S. businesses sponsoring foreign nationals for employment, entrepreneurs establishing U.S. start-ups, foreign companies expanding operations to the U.S., and family-based petitions and humanitarian cases. On the consular side, Steve has represented clients at over 70 U.S. embassies and consulates in their visa and waiver application processes and has processed hundreds of E-2 Treaty Investor visas.



U.S. IMMIGRATION AS PART OF U.S. BUSINESS STRATEGY EXPANDING YOUR BUSINESS INTO THE U.S.

Steve Maggi, Esq.
SMA Law Firm

Luxembourg American Chamber of Commerce
Luxembourg City, 19, June 2019

Overview

- Fundamental Parts of U.S. Immigration
- Preliminary Steps
- Visa Waiver Discussion
- E-2 visa Intro and case example
- L-1 visa Intro
- Comparison Chart
- Real Case Examples
- Common Mistakes and Final Comments



Fundamental parts of U.S. immigration: The Bridge

Foundation:

- Establishment of U.S. entity
- Funding
- Business model/plan
- Physical office space

Suspension Mechanism:

- Nationality of U.S. entity (Majority Luxembourg ownership)
- Continuing Existence of U.S. entity
- Revenue and Job Creation in the U.S.
- Continuing Activity of Luxembourg entity, if applicable

Path/Lane: Visa Category(ies) chosen to achieve immigration goals

How to Utilize Visa Waiver/ESTA in order to lay the foundation

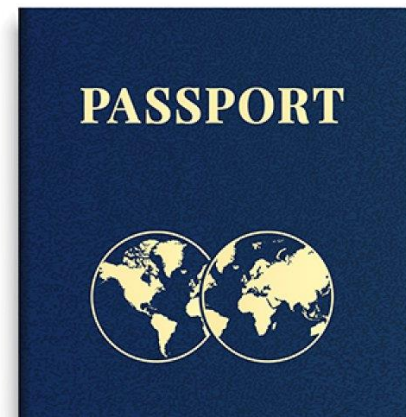
What is allowed?

- Consult with business associates
- Attend a scientific, educational, professional, or business convention or conference
- Attend short-term training
- *Negotiate a contract – This includes incorporating the company, securing a lease, opening a bank account, signing contracts for services to be provided by or for the company

How to Utilize Visa Waiver/ESTA in order to lay the foundation

What is **not** allowed?

- Study, for credit
- *Employment – This means doing ANY work on behalf of a U.S. entity that is compensated in any way (money, food, housing, travel)
- *Permanent residence in the U.S. – No extensions, no change of status – Time in the U.S. is now tracked – Can lead to “intent” issues



ESTA: Mistakes to avoid in laying groundwork

- Do not use U.S. company funds to cover individual costs – can be seen as form of payment. If foreign entity exists, cover costs from the foreign entity
- Do not send money invested back to foreign entity until after visas have been secured
- If you work for a foreign company, always come into the U.S. as a representative of that company and do **not** say that you will be working on behalf of the U.S. entity

Path 1: E-2 Treaty Investor Visa: Eligibility

- U.S. Entity must be created and then it “sponsors” visa petitions
- All Luxembourg nationals are eligible if U.S. company is at least 50% Luxembourg owned (nationality of U.S. company and visa beneficiaries must match)
- A “substantial investment” must be committed to the U.S. entity
- An office space must be secured that is sufficient in size for the first-year projected staff to work – Year is calculated based on when petition is submitted and operations are to begin
- A five-year business plan must be submitted
- *No foreign entity is required – Can be set up/owned by an individual

Benefits to the U.S.

In order to obtain the visa you have to show the U.S. government the following will happen:

- Job creation – Marginality – More than just the visa beneficiary and his/her family must benefit – the more jobs that are created the better for maximizing success of visa applications
- Ideally, projected/sustained ratio is 1 Foreign national for each 5+ American workers
- Revenue generated and Taxes paid
 - With regards to revenue, a business may be barely profitable but as long as jobs are created and maintained this is usually sufficient



“Show me the Money”/ “Put Your Money Where Your Mouth Is”

- Investment-Based Visa – Investment must be “Substantial” – covers 1st year operating costs
- Funds must be “committed” – Irrevocable – They must be in the U.S. entity’s account and stay there (for how long is situational)
- Funds must be “at risk” – Must spend the money to show real risk (office, services)
- Company must be “real and operating” (funds are in motion) – Subsequent visa petitions require company to be consistently active



Suspension: Maintaining Luxembourg nationality

- The U.S. entity must always continue to maintain Luxembourg nationality by never ceding more than 50% of ownership to nationals from other countries

This is especially tricky in three specific scenarios:

- 1) Joint Venture – 50% Luxembourg /50% [Other Country] ownership – Luxembourg ownership may not be reduced AT ALL
- 2) Companies seeking venture capital – Must be careful not to cede the minimum 50% threshold when bringing in investors
- 3) In case where there is a foreign parent owner – If the ultimate ownership changes and the foreign parent is no longer 50% Luxembourg, then U.S. company no longer qualifies to sponsor E2 visas

Path 2: L-1 Intra-Company Transfer Visa

- Foreign companies create subsidiaries in U.S.
- Most often used by companies whose ownership nationality does not qualify them for E-2 sponsorship or whose employee's nationality does not
- Foundation: Requires Existence of Foreign Company and Directly-Related U.S. Entity
 - Subsidiary
 - Joint Venture
 - Branch
- Foreign company must have existed for at least one year
- Any employees to be transferred must have worked for at least 1 continuous year in the past 3 years for ANY foreign related
- Suspension: Foreign entity must continue to function and relationship between foreign and U.S. entity must to continue exist

L-1

- Duties must be managerial or executive (L-1A) in nature in both foreign employment and U.S. position – No mixing and matching
- “Specialized Knowledge” (L-1B) is almost impossible to establish – Used for software engineers and trainers for unique and proprietary products only, so very rare and renewals very difficult
- Similar to E-2 in terms of Preliminary steps but ramp-up for renewals is much faster/higher expectations
- Ideal for larger companies with locations in several countries or with employees from different countries
- Blanket L is a great solution for big companies



- Duration of L-1 depends on how long the U.S. entity has existed:
 - If less than one year, initial visas can be granted for only one year (New office visa)
 - If more than one year, visas can be granted for an initial period of three years
 - In the case of L-1A visas, executives or managers are expected to be removed from day-to-day activities before renewing their first visas. Hard for New Office visas.
 - Renewals in 2-year increments for up to total of 7 years



Luxembourg-Owned Company: E-2 vs. L-1



E-2

L-1

Non-Luxembourg Nationals Eligible	NO	YES, with 1 year at LUX or related company
No Foreign Company	YES	NO
Small Company	YES	NO
Not Capable of Creating U.S. Hierarchy Quickly	YES	NO
Where Adjudicated	U.S. Embassy in LUX – Lower Denial %	USCIS – 70% RFE rate and much higher denial %
Filing Fees	\$205	\$2,370
Visa Period	Up to 5 years with unlimited renewals	1 or 3 years with 2 year renewals (7 yr. max)
Renewals	YES with jobs created	MAYBE: higher denial %

L-1/E-2: Real Case Examples

- Luxembourg hotel company plans expansion to U.S. and U.S. entity is incorporated as subsidiary of the Luxembourg company
- Executives and Managers travel to U.S. on visa waiver/ESTA to lay groundwork for U.S. entity
- Entity is properly funded to meet first-year operating costs for 1st year
- Once first project is set to begin, Project Manager (Luxembourg national) is sponsored for E-2 visa for 5 years
- After U.S. entity has been in existence for one year, application made to Immigration Services for L-1A visa for project manager for UK national working at the UK branch for more than one year
- Hierarchy was created where executives and managers are removed from day-to-day activities and are supervising another level of employees, so that other Luxembourg nationals can be hired and non-Luxembourg employees can be transferred

Common Mistakes – Reasons for Potential Denials

- Making tax minimization the controlling decision-making factor
- Not putting up full funds to cover first year of operating costs
- Sending funds back to the foreign parent company as soon as petitions are submitted
- Not securing sufficient office space
- Spending invested funds in the U.S. to bankroll visiting ESTA employees to pass them off as real costs
- Sending foreign employees without work visas under ESTA or B1 visas to train U.S. employees – can be seen as working
- Not hiring sufficient American employees once first visa is issued and hindering chance at renewals or additional visas

Final Comments

- E-2 is almost always the first choice if nationality test is met and the employee is eligible
- Job creation is the single-most important factor to keep in mind when deciding which path to take and when
- Do not put saving money on taxes as priority #1 – If it looks like you are creating a pass-through company which will not pay its fair share of U.S. taxes, the applications may be denied.

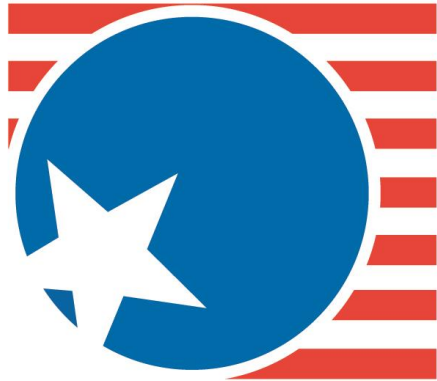


Final Comments (2)

- E-2 is the ideal category for start-ups without the resources to create large staff numbers, as the expectations for job creation are lower
- L-1 is a multinational business model and fits organizations that are already well-established overseas and have the resources to create more U.S. jobs in the short-term
- Take the time necessary to make sure all these steps are taken and a full commitment to the venture is made, **BEFORE** applying



Thank you



SMA

**IMMIGRATION &
CONSULAR LAW
ATTORNEYS**

Steve Maggi, Esq.
SMA Law Firm
U.S. Immigration & Consular Law
222 Broadway, 19th Floor
New York, NY 10038
Office: (212) 402-6885
Email: smaggi@smalawyers.com
Web: www.smalawyers.com

Q&A



Nunzio De Filippis



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IMMIGRATION &
CONSULAR LAW
ATTORNEYS

Steve Maggi



Thank you!

“Alone we can do so little; together we can do so much.”
- Helen Keller