

## Starting and buying a business in the US



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**A**ttracted by the size and diversity of the US economy, many Indian and other companies start a business in the US or acquire or invest in existing companies.

The US has no exchange controls, so long as currency transactions greater than US\$10,000 are disclosed, and does not require financial audits of privately owned companies. There are no restrictive laws on closing plants or terminating employees, and only about 10% of the labour force is unionized. Various localities provide tax and financial incentives for creating jobs, building a plant or investing in renewable energy.

### Business entities

State laws set the rules for establishing and governing business structures. Foreign businesses usually use a corporation as it is easy to set up, transfer ownership of its shares, and create employee equity incentives. The foreign parent is not liable for debts and obligations of its subsidiary corporation. A corporation is governed by a certificate of incorporation, filed in its state of incorporation, and by its bylaws, which are not publicly filed.

A business can choose to incorporate in any state, regardless of the location of its operations. Delaware and New York are the most popular states among non-U.S. investors. Corporations are controlled by a board of directors elected by the shareholders, and managed by officers appointed by the board. While required by law to have only a small amount of capital, a corporation should have enough capital to meet its obligations, should present itself to the public as a separate entity, maintain detailed books and records and hold regular meetings of its directors and shareholders. A corporation

pays federal and state tax on its net income, and shareholders pay taxes on dividends.

Limited liability companies (LLCs), unlike corporations, are not subject to tax. All income, deductions and losses “pass through” to the LLC’s owners. LLCs are governed by a confidential agreement among the owners (called “members”), which provides flexibility in specifying the economic and management rights of the members.

Limited partnerships are similar to LLCs in that all taxable income passes through to the partners. Only the general partner is liable for the obligations of the partnership. Limited partnerships are governed by a confidential limited partnership agreement among the general and limited partners.

The term joint venture describes a corporation, LLC or partnership jointly owned, for example, by an Indian and a US company, to carry out a particular business venture. The arrangement is governed by a joint venture agreement.

If an Indian company wants to operate directly in the US, it can set up a branch office that is not a separate legal entity. The branch will subject the Indian company to US tax. The Indian company has liability for all obligations of the branch, can be sued in US courts, and its assets are at risk if needed to satisfy a court judgment.

### Acquiring and investing

Acquisitions of US companies by non-US companies take many forms and usually do not require approval by any governmental authority. An Indian buyer may acquire the shares or the assets of the target company. The buyer may use a new US subsidiary to effect the acquisition or merge its US subsidiary into the target. Alternatively, an investor may buy a minority equity

position. The choice is often influenced by tax concerns.

Various government restrictions and filing requirements may apply to certain acquisitions and investments. For example, the Committee on Foreign Investment in the United States (CFIUS) can block transactions in which a foreign company seeks to acquire control of a US company if such control could impair US national security. Seeking prior approval of CFIUS may be advisable in aerospace, defence and telecom transactions, as well as those involving critical power, computer and transportation networks. Other restrictions apply to investments in aviation, energy, land and banking.

The Department of Commerce requires reporting of all foreign direct investments that equal or exceed a 10% voting interest in a US business. This information is confidential and used only for statistical reporting purposes.

Pre-merger filings with the Federal Trade Commission are required if the assets or sales of the buyer and target companies exceed certain dollar thresholds. In rare circumstances, a transaction that will unduly restrain competition may be blocked.

An investor who acquires 5% or more of the voting shares of a publicly traded company must file a Schedule 13D with the Securities and Exchange Commission (SEC). Tender offers, mergers and other actions that affect control of a public company typically require shareholder votes and extensive SEC disclosure.

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