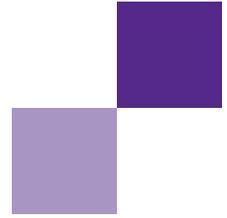


# Doing business in the United States

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## LEGAL SYSTEM

### 1. What is the legal system (civil law, common law or a mixture of both)?

The US has a common law legal system. The Constitution takes precedence over all other laws and the courts can declare statutes, regulations and actions that violate the Constitution invalid. The US is organised as a federal system of government. Therefore, the 50 states and the District of Columbia have their own local laws and state constitutions that apply within their respective territorial jurisdictions provided that they do not violate the federal Constitution or federal laws.

## FOREIGN INVESTMENT

### 2. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

There are various restrictions on investments in certain sectors, mainly involving:

- Defence.
- Commercial aviation.
- Maritime industries.
- Commercial fishing.
- Power generation.
- Banking.

- Communications.
- Broadcasting.
- Mining rights.

Investments in these sectors are generally reserved for US citizens or for US-owned or US-controlled entities. Certain qualifying foreign investors are also required to file reports with federal government agencies under the International Investment and Trade in Services Survey Act 1976 and the Agricultural Foreign Investment Disclosure Act 1978. Individual US states may also have sector-specific reporting requirements.

In addition, there are certain review processes that can be triggered based on the nature of the investment. For example, under the US National Industrial Security Program and Regulation, the Department of Defense can review foreign investments in companies or facilities that do work involving classified material. Also, under the Exon-Florio Amendment to the Defense Production Act 1950, the Committee on Foreign Investment in the United States can review transactions that result in foreign persons acquiring control of an existing US business that may present a threat to US national security.

### 3. Are there any exchange control or currency regulations?

There are no exchange control or currency regulations. However, there are reporting and other requirements for certain transactions under anti-money laundering laws.

#### 4. What grants or incentives are available to investors? Are any of these aimed specifically at foreign investors?

The federal government does not generally give any grants or incentives to foreign investors. However, certain state and local governments provide some incentives to foreign investors to encourage investment.

### BUSINESS VEHICLES

#### 5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction?

In relation to this vehicle, please state:

- **Registration formalities (including timing).**
- **Minimum (and maximum) share capital.**
- **Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities).**
- **Any restrictions on the rights that can attach to shares.**
- **Any restrictions on foreign shareholders.**
- **Management structure and any restrictions on foreign managers.**
- **Directors' liability.**
- **Parent company liability.**
- **Reporting requirements (including filing of accounts) and cost of compliance.**

The most common form of business vehicle established by a foreign company in the US is a corporation incorporated in Delaware.

- **Registration formalities.** A certificate of incorporation must be filed with the Secretary of State of Delaware. The certificate is effective on the date of filing. A corporation also requires bye-laws and organisational minutes of the board of directors (board); however, these are not filed with the state. A corporation is not active until it has issued shares.
- **Share capital.** Delaware imposes no minimum or maximum share capital.
- **Non-cash consideration.** Shares can be issued

for property, goods and services provided to the corporation. There may be tax implications where shares are issued for non-cash consideration.

- **Rights attaching to shares.** Restrictions on rights can be imposed by:
  - the certificate of incorporation;
  - bye-laws;
  - a separate shareholders' agreement.

A shareholder cannot be prohibited from transferring shares.

- **Foreign shareholders.** There are no restrictions on foreign shareholders except in certain industries (see *Question 2*).
- **Management structure.** A board elected by the shareholders manages a corporation. Officers appointed by the board are responsible for the corporation's day-to-day management.
- **Directors' liability.** A director owes fiduciary duties to the corporation and its shareholders, and can be personally liable for any breach of these duties. The certificate of incorporation can eliminate or limit a director's personal liability for certain acts and breaches. Corporations usually indemnify their directors against certain liabilities and purchase insurance to cover claims against its directors or officers.
- **Parent company liability.** A parent company generally is not liable for its subsidiaries' obligations. A court can, as an equitable remedy, revoke the limited liability status of the shareholders.
- **Reporting requirements.** Corporations must file with the Secretary of State:
  - certificates identifying any change of names, registered agent or registered office;
  - annual franchise tax reports, which includes an annual report.

If the corporation is qualified to do business in another state, it must comply with that state's reporting requirements. In addition, a public corporation must comply with the reporting requirements of the US Securities Exchange Act 1934.

## EMPLOYEES

### 6. What are the main laws regulating employment relationships?

Federal, state and local laws regulate employment matters. At the state level, employment issues are treated as a matter of private contract. At the federal, state and local level, employment statutes generally fall into one of the following categories:

- **Labour relations laws.** These include the National Labor Relations Act, the Taft-Hartley Act and state “right to work” laws. They protect the right to organise and join unions for the purpose of collective bargaining and regulating the collective bargaining process.
- **Labour standards laws.** The main federal labour standards statutes are the Fair Labor Standards Act and the Occupational Safety and Health Act. State laws also regulate employers in these areas. These cover:
  - minimum wages;
  - maximum hours;
  - child labour;
  - occupational safety and health.
- **Non-discrimination laws.** The main non-discrimination laws are:
  - Title VII of the Civil Rights Act of 1964;
  - The Americans with Disabilities Act of 1990;
  - The Age Discrimination in Employment Act of 1967.

These prohibit discrimination on the basis of stated criteria, such as:

- race;
- religion;
- sex;
- disability.

They also prohibit retaliation against an individual who:

- opposes an unlawful practice; or
- has filed a case for employment discrimination.

States have comparable laws, some with greater protections than federal law and some that prohibit discrimination on other bases, such as sexual orientation.

- **Employee benefit laws.** The federal laws that regulate employee benefits are:

- the Employee Retirement Income Security Act. This is the main statute governing employee benefits;
- the Consolidated Omnibus Budget Reform Act. This regulates the availability of health benefits;
- the Family and Medical Act. This regulates the availability of unpaid leave and medical benefits for certain medical conditions.

Many of these statutes have statutory counterparts in state laws, some of which provide greater protection than federal law.

Federal laws generally do not apply extraterritorially. Generally, US employers need not comply with US law abroad where the compliance violates the law of the foreign nation. However, several key non-discrimination laws apply to US citizens working for US employers abroad. US employment laws generally also apply to non-US citizens working in the US.

### 7. Is a written contract of employment required? What, if any, other terms are likely to govern the employment relationship?

A written employment agreement is not required unless the employee is represented by a union. For unionised employers, collective bargaining agreements are written. Other terms may be imposed by statute (see *Question 6*).

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**8. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?**

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Employees are not entitled to management representation. Where there is a union, the union is entitled to represent employees in redundancy situations.

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**9. What statutory rules govern the termination of individual employment contracts?**

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Labour relations and non-discrimination laws (see Question 6) prohibit, for example, the dismissal of:

- An employee for engaging in statutorily-protected conduct such as union-organising or complaining about discrimination.
- A disabled employee who can perform the essential elements of his position.
- An employee for the purpose of interfering with his benefits entitlement.

Similarly, both statute and common law, mainly at the state level, identify other illegal grounds for termination. In many jurisdictions it is unlawful to dismiss an employee for engaging in conduct that furthers the state's public policy (most typically reporting suspected wrongdoing to appropriate governmental officials).

The remedies for dismissals that violate a state's laws include:

- Reinstatement.
- Backpay.
- Future payments.
- Lawyers' fees.

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**10. Are redundancies/mass layoffs regulated? If so, please give details.**

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Federal and some state laws require employees to be given notice in the event of the closure of a company or mass redundancies. Collective bargaining agree-

ments usually specify the procedures to be followed in redundancy situations. Severance benefits may be provided in collective bargaining agreements or in the voluntary policies of larger employers.

However, most US employees are employed by small employers and by employers without collective bargaining agreement, and are therefore not entitled to many benefits on termination.

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- *Avoiding penalties under the Internal Revenue Code.*
- *Promoting, marketing or recommending to another party any plan or arrangement addressed herein.*

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**11. In relation to employees, what constitutes tax residency in your jurisdiction?**

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An employee is generally treated as a US tax resident if he:

- Is a US citizen.
- Is lawfully admitted for permanent residence in the US.
- Has maintained a "substantial presence" in the US.

A presence of 183 days or more in the US during a tax year is generally sufficient to constitute tax residency, although residency may be established with a lesser presence in a year if the employee is present in the US during either, or both, of the two previous years.

An employee's tax liability is subject to any applicable double tax treaties.

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## 12. What income tax or social security contributions must the following pay:

- Tax resident employees?
  - Non-tax resident employees?
  - Employers, in relation to their employees?
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### Tax resident employees

Income paid to an employee for services performed in the US is generally subject to federal income tax and certain employment taxes. Statutory income tax rates range from 10% to 35%. Generally, employers and employees must pay social security, Medicare and unemployment tax on payments made to employees for services performed in the US.

Tax is imposed at the following rates:

- **Social security tax.** This is payable at the rate of 12.4% (half by the employer and half by the employee) on the wage base, (which is US\$94,200 (about EUR73,421) for 2006).
- **Medicare tax.** This is payable at the rate of 2.9% (half by the employer and half by the employee) on all wages, irrespective of the wage base.
- **Unemployment tax.** This is payable by the employer at the rate of 6.2% on the first US\$7,000 (about EUR5,456) of wages paid to each employee.

### Non-tax resident employees

Payments by a non-US employer to an employee for services performed in the US can generally be exempt from US federal income tax under a double tax treaty if:

- The employee is present in the US for fewer than 183 days during the year.
- The payments are made by, or on behalf of, a non-resident employer.
- The payments are not borne by any US permanent establishment which the non-resident employer has in the US.

Social security and Medicare tax obligations can be reduced if a social security treaty exists between the

US and the employee's or employer's jurisdiction. In the absence of a treaty exemption, a non-tax resident employee is generally taxed at the rate of 30% on its US-source wages.

### Employers

See above, *Tax resident employees*.

Employers are generally required to withhold tax on wages paid to employees in the US.

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## 13. Do foreign employees require work permits and/or residency permits? If so, how long does it take to obtain them and how much do they cost?

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All foreign employees must obtain authorisation from the Citizenship and Immigration Services to work in the US. The two most common non-immigrant visas issued to foreign persons who have a job offer in the US are the L-1 and H-1B visas. Both can take from 15 days to four months to obtain. Legal fees for H-1B and L-1 visa petitions are about US\$3,000 (about US\$2,338) and US\$2,000 (about EUR1,559), respectively, excluding filing fees.

A person with an immigrant visa petition who is in the US can usually apply for work authorisation. The legal fees are about US\$750 (about EUR585) and the application procedure takes about 90 days.

### TAX

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## 14. In relation to business entities, what constitutes tax residency in your jurisdiction?

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A corporation incorporated in the US is a tax resident of the US.

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## 15. What proportion of a tax resident business entity's income is taxed and what are the main taxes that potentially apply (including rates)?

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A corporation incorporated in the US is subject to federal income tax on its worldwide income. The main tax is the federal corporate income tax. The statutory rate is 35% for net taxable income above US\$10 million (about EUR7.8 million). Rates are between 15% and

34% for taxable income that is US\$10 million or less. Corporate capital gains are generally subject to tax at the same rates as ordinary income.

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### 16. How are the activities of non-tax resident business entities taxed?

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A company not incorporated in the US is generally subject to federal income tax on its net income that is effectively connected with its US trade or business.

A non-resident company that is resident in a country with which the US has a double tax treaty is generally subject to US tax on its business profits attributable to its permanent establishment in the US.

A non-resident company's US-source income from certain passive activities (for example, dividends, interest, rents and royalties) can be subject to US withholding tax, regardless of whether that income is attributable to a permanent establishment or effectively connected with a US trade or business.

Capital gains of a non-resident corporation that are not effectively connected with a US trade or business are not generally subject to tax.

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### 17. Please explain how each of the following is taxed:

- **Dividends paid to foreign corporate shareholders.**
- **Dividends received from foreign companies.**
- **Interest paid to foreign corporate shareholders.**
- **Intellectual property (IP) royalties paid to foreign corporate shareholders.**

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- **Dividends paid.** A 30% withholding tax is payable on dividends paid to foreign shareholders, subject to the provisions of any applicable double tax treaty.
  - **Dividends received.** Dividends received by a US taxpayer from foreign companies are generally subject to tax at normal US federal income tax rates. A credit against US tax can be allowed for taxes withheld from the dividend distribution in the other country. In certain circumstances, a US-resident corporate shareholder can also be entitled to a foreign tax credit for taxes paid by

the distributing company on the earnings and profits constituting the dividend.

- **Interest paid.** A 30% withholding tax is payable on interest paid to foreign shareholders, subject to the provisions of any applicable double tax treaty.
- **IP royalties paid.** If IP is used in the US, a 30% withholding tax is payable on the royalties for that IP paid to foreign shareholders, subject to the provisions of any applicable double tax treaty.

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### 18. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)? If so, please give details.

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Interest expense deductions may be disallowed for certain types of interest paid by companies. A company is subject to these rules if it has both:

- "Excess interest expense" (that is, the company's net interest expense exceeds 50% of the company's "adjusted taxable income").
- A debt-to-equity ratio that exceeds 1.5:1 at the end of the taxable year.

If these two tests are met, deductions for amounts of "disqualified interest" (that is, interest paid to a related person, or guaranteed by a tax-exempt organisation or a foreign person, if the interest is not subject to US federal income tax) during the taxable year are disallowed up to the company's excess interest expense.

Interest payments made by thinly-capitalised entities can be also treated as dividend distributions or the return of capital if the entity's debt is re-characterised as equity under common law debt-to-equity principles.

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### 19. Are there any controlled foreign company rules? If so, please give details.

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A US shareholder of a controlled foreign corporation (CFC) must generally include as income its pro rata share of the CFC's "subpart F" income. A non-US company is generally a CFC if, on any day during the foreign company's taxable year, US shareholders own more than 50% of either:

- The total combined voting power of all classes of shares.
- The total value of the company's shares.

Also, US persons who own any amount of the shares of a foreign company (other than a CFC) with passive assets (that is, assets that generate passive income such as dividends, rents, or royalties), or passive income exceeding certain thresholds, can be subject to similar (or more onerous) rules.

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### 20. Are there any transfer pricing rules? If so, please give details.

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Transactions between two taxpayers owned or controlled by the same interests, including transactions between US companies and their non-US affiliates, must be priced on an arm's length basis and properly documented. Otherwise, the Internal Revenue Service can allocate income, credits and deductions between the parties to prevent the avoidance or evasion of tax or to reflect income clearly.

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### 21. How are imports and exports taxed?

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Imports and exports may be subject to certain non-income taxes, such as tariffs, depending on the type of goods and country of import or export.

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### 22. Is there a wide network of double tax treaties? If so, please give details.

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The US has tax treaties with about 50 countries, including its most significant trading partners.

## COMPETITION

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### 23. Are restrictive agreements and practices regulated by competition law in your jurisdiction? If so, please give brief details.

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Any agreement, contract or conspiracy (or combination of these) that unreasonably restrains trade among the states or with foreign nations is unlawful under federal and most state anti-trust laws.

Violators can be subjected to criminal and civil penalties (including imprisonment) as well as liability in private actions for treble damages and lawyers' fees.

Almost every state has anti-trust statutes that are comparable to federal anti-trust laws. Many states also have anti-trust statutes that cover specific industries and particular practices, such as:

- Bid-rigging.
- Franchise terminations.
- Below-cost sales.

Some restrictive agreements are presumed to restrain competition unreasonably, including those between competitors that:

- Fix prices or output.
- Allocate customers or markets.
- Constitute group boycotts or concerted refusals to deal.

Agreements to merge and to form joint ventures are unlawful under US anti-trust statutes if their effect can be to substantially lessen competition in any relevant market.

## INTELLECTUAL PROPERTY

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### 24. Please outline the main intellectual property rights that are capable of protection in your jurisdiction. In each case, please state:

- **Nature of right.**
  - **How protected.**
  - **How enforced.**
  - **Length of protection.**
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#### Patents

- **Nature of right.** A patent owner can exclude others from making, using, offering to sell, selling and importing in the US an invention that is new, useful and not obvious. The invention can be a process, machine, manufacture, composition of matter, or any new and useful improvement of any of these. Genetically engineered life forms, computer software and methods of doing busi-

ness can be patented. Importation of an unpatented article of manufacture into the US can also be prohibited if the article was made outside the US by a process covered by a US patent.

- **How protected.** A utility patent application must be filed with the US Patent and Trademark Office (USPTO), for the patent to be protected.
- **How enforced.** A patent owner can:
  - bring a civil action to prevent infringement;
  - seek damages for the infringement (which may be trebled in cases of wilful infringement) and an injunction against future use of the patented invention;
  - ask the US International Trade Commission to block the importation of infringing articles into the US.
- **Length of protection.** Protection lasts for 20 years from the date of filing the application.

### Trade marks

- **Nature of right.** Any name, word, device, logo, slogan or combination of these which, when used in commerce, indicates the source or origin of goods or services, qualifies as a trade mark unless the mark falls within a statutorily excluded category. The mark must be distinctive and not merely descriptive. The right holder can exclude others from using the mark in a way that is likely to cause confusion as to the source of the goods or services.
- **How protected.** To be protected, a trade mark must be either registered with the USPTO or, if not registered, used continuously in commerce.
- **How enforced.** The enforcement procedure and remedies available for the infringement of a trade mark are the same as for patents (*see above, Patents*).
- **Length of protection.** If registered, protection lasts for ten years from the date of filing. Protection is renewable continuously if used in commerce for successive ten-year periods. If unregistered, protection is indefinite provided that there is continuous use in commerce.

### Registered designs

- **Nature of right.** A person who invents any new, original and ornamental design for an article of manufacture can exclude others from making, using, offering to sell, selling and importing it in or into the US.
- **How protected.** To be protected, a design can be registered with the USPTO.
- **How enforced.** The enforcement procedure and remedies available for the infringement of a design right are the same as for patents (*see above, Patents*).
- **Length of protection.** Protection lasts for 14 years from the date of grant.

### Unregistered designs

- **Nature of right.** The nature of unregistered design rights is the same as for registered designs (*see above, Registered designs*).
- **How protected.** No formal or statutory system of protection exists for unregistered designs except by way of the common law principles of unfair competition and trade dress.
- **How enforced.** The enforcement procedure and remedies available for the infringement of a design right are the same as for patents (*see above, Patents*).
- **Length of protection.** Protection lasts indefinitely provided that the design is distinctive and used in commerce.

### Copyright

- **Nature of right.** Original works of authorship are protected as expressions fixed in a tangible medium. This includes literary, musical, dramatic, pictorial, graphic, movies and other audiovisual works, sound recordings, and architectural works. The copyright owner has exclusive rights to reproduce, prepare derivative works from, distribute copies of, publicly perform, and publicly display the copyrighted work.
- **How protected.** Protection subsists automatically without formalities. Registration with the US Copyright Office is required for judicial enforcement.

- **How enforced.** The enforcement procedure and remedies available for the infringement of copyright rights are the same as for patents (see above, *Patents*).

In addition, the government can seek criminal penalties for economic espionage or theft of trade secrets.

- **Length of protection.** Protection lasts for the life of the author plus 70 years. In the case of an anonymous work, a pseudonymous work or a work made for hire, protection lasts for 95 years from the year of its first publication or 120 years from the year of its creation, whichever expires first.

### Confidential information

- **Nature of right.** A trade secret is any formula, pattern, device or compilation of information that has value, which is used in a person's business and gives a person an opportunity to obtain an advantage over competitors who do not know or use it. A person who originates or lawfully gains access to a trade secret can use it in confidence, subject to any contract by which access was obtained.
- **How protected.** Trade secret rights are available to the originator under common law. The originator can share a trade secret with others under a licence or contract.
- **How enforced.** The owner can bring a civil action to prevent misappropriation or breach of contract (if misuse is by a licensed user). The owner can be awarded damages for the infringement.

In addition, the government can seek criminal penalties for economic espionage or theft of trade secrets.

- **Length of protection.** Protection lasts for as long as the information is maintained in confidence.

### Mask works

- **Nature of right.** A mask work is a series of related images representing the three-dimensional layout of a semiconductor chip product. The owner of a mask work has an exclusive right to reproduce the mask work and to import or distribute a semiconductor chip product embodying the mask work.

- **How protected.** A mask work must be registered with the Register of Copyrights to be protected.
- **How enforced.** The enforcement procedure and remedies available for the infringement of a mask work right are the same as for patents (see above, *Patents*).
- **Length of protection.** Protection lasts for ten years from the date on which the mask work is registered, or the date on which the mask work is first commercially exploited anywhere in the world provided that registration is made within two years of exploitation.

## MARKETING AGREEMENTS

### 25. Are marketing agreements regulated in your jurisdiction? If so, please give brief details in respect of the following arrangements:

- **Agency.**
- **Distribution.**
- **Franchising.**

- **Agency.** There are no specific federal laws regarding agency agreements. However, federal and state anti-trust laws must be complied with.
- **Distribution.** Certain kinds of distribution agreements (for example, automobile and petroleum products) are regulated by federal and state laws. Distribution agreements are also subject to federal and state anti-trust laws.
- **Franchising.** Federal and state laws can regulate certain kinds of franchising agreements and all franchise agreements are subject to federal and state anti-trust laws. In addition, persons who offer franchises and business opportunities to consumers can be subject to regulation by the Federal Trade Commission.

## E-COMMERCE

### 26. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)? If so, please give brief details.

The Uniform Electronic Transactions Act (UETA), which has been passed into law in most states and

other US jurisdictions, gives legal effect to electronic signatures, contracts and other transactional records, and does not require any particular technology to be used for an electronic signature. The federal Electronic Signatures in Global and National Commerce Act 2000 has a similar effect in the few US jurisdictions where the UETA has not been enacted.

The Uniform Computer Information Transactions Act applies to licences and other contracts that involve the creation, use or distribution of electronic information.

The Controlling the Assault of Non-Solicited Pornography and Marketing Act 2003 (CAN-SPAM Act):

- Prohibits various conduct relating to the transmission of unsolicited commercial e-mails.
- Imposes requirements on the content of such e-mails.
- Requires that recipients be provided an address to opt out from receiving further e-mails from a particular sender.

Some states have also enacted legislation relating to e-commerce. For example, the California Online Privacy Protection Act 2003 requires website operators who collect personal information from Californian customers to post privacy policies and imposes requirements regarding the content of those policies.

## DATA PROTECTION

### 27. Are there any data protection laws? If so, please give brief details.

The US has federal data protection and privacy legislation:

- **The Health Insurance Portability and Accountability Act 1996.** This protects the confidentiality and privacy of personally identifiable health information.

- **The Children's Online Privacy Protection Act 1998.** This imposes requirements of parental notice and consent on the collection, use and disclosure of personally identifiable information regarding children under 13 that is gathered on the internet.
- **The Financial Services Modernization Act 1999 (Gramm-Leach-Bliley Act).** This imposes requirements on the handling of consumers' personal information by financial institutions.
- **The CAN-SPAM Act.** This imposes certain data protection obligations for e-mails (*see Question 26*).

There is no cross-sectoral data protection legislation in the US. However, the US Federal Trade Commission has brought complaints against companies alleging inadequate data protection measures, using its general authority under the FTC Act of 1914 to address unfair or deceptive trade practices.

In addition, many states have enacted data protection legislation. A significant number of states (currently more than 30), including California, New York, Washington and Florida, have enacted data security breach notification laws. A smaller but also increasing number of states, including California, Arkansas and North Carolina, require entities to implement reasonable security measures for data. A small number of states also have passed laws containing data and record destruction requirements.

## PRODUCT LIABILITY

### 28. Are there any laws regulating product liability and product safety? If so, please give brief details.

In general, consumers who have been injured by a defective product can sue manufacturers or distributors of that product under product liability laws and recover compensation and damages. Each state has developed its own jurisprudence. In a few limited circumstances, federal law governs product liability actions.



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