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GOING GLOBAL: USA
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The USA is rated as one of the easier countries in the world in which to do business, ranking 6th out of 189 countries globally according to the World Bank.

However, the US legal landscape initially can seem complex and unfamiliar, particularly for small companies that are coming to market for the first time. Successfully navigating early business and legal interactions is often the difference between success and failure. The US actively enforces its regulations, and the costs of getting it wrong can be very high, whether you are talking about ensuring the correct visas for entry or setting up a US subsidiary. You will need appropriate legal advice, but it does not have to be costly if your lawyers are experienced and accustomed to dealing with emerging companies.

Note that the US is a federal jurisdiction, with legislative, regulatory and tax authority divided between the federal government (laws applicable nationwide) and the 50 States and the District of Columbia. Municipalities may also have relevant laws, regulations and taxes. In this document you will find some basic information relating to the areas of: establishing a US entity, taxation, visas/immigration and customs regulations. The aim is to provide an overview of some of the key considerations that Irish companies should be aware of when conducting business in the US.

It should be noted that this guide is by no means comprehensive and is not designed as a substitute for professional legal advice. For recommendations or a list of service providers that specialise in advising small Irish companies in doing business in the U.S., please contact one of Enterprise Ireland's US offices.

SECTIONS

Establishing a US Business Entity

Taxation

Visas/Immigration

Trade & Customs

ESTABLISHING A US BUSINESS ENTITY

Benefits of setting up a US business

1. **Personal asset protection**
2. **Tax flexibility and incorporation tax benefits**
3. **Enhanced credibility**
4. **Brand protection**
5. **Perpetual existence**
6. **Deductible expenses**

Why not just set up a US Branch?

A branch office is an extension of a foreign company that merely registers ("qualifies") to do business in the United States. A branch office is likely sufficient in instances where no physical presence in the U.S. is planned (e.g. an online only business).

For the majority of foreign companies, a "branch" in the US is not the way to go. A branch of a foreign company is just an extension of that company within the USA. It subjects the parent company to (1) being a more visible target for lawsuits and claims in the States; and (2) being liable for U.S. federal, state and local income taxes, and possibly other taxes. If you plan to have a physical presence or significant operations in the U.S. it is best to form a U.S. legal entity offering limited liability to its owners[1]

Type of Entity

1. **Business Corporation** - The business corporation is a share corporation that is equivalent to an Irish limited company. It is familiar to customers and other parties, and is tax opaque (i.e., it is treated as a separate person for tax purposes). However, it does require that you observe certain corporate formalities and the profits of a C-Corp will may be taxed twice, both at the corporate level and as shareholder dividends. A C-Corp is assessed both at federal and state (if any) level in terms of corporate income tax on any profit. Should the company then wish to distribute its earnings, shareholders will then pay capital gains tax on any dividend income. This is known as *"double taxation"*.

   Despite this, C corporations tend to be more attractive because they are scalable and can be made public and if you want your business funded, institutional investors prefer a C corporation. It should also be noted that for most early stage companies, any revenue or profits tend to be reinvested as opposed to distributed via dividends, therefore double taxation is not so much of an issue.

2. **Limited Liability Company -** An LLC has two advantages: (a) flexibility in terms of structuring the internal management arrangements (and not being subject to the same formal requirements as a corporation); and (b) flow-through taxation i.e. taxes are not paid at the business level, only on the individual level. This means that all profit/loss of the company is attributed directly to the shareholders, and is reported (generally on a pro-rata basis) on a shareholder's own tax return. The cost of forming an LLC is generally similar to that of a C-Corp.[2]

[1] Irish companies that hire a consultant in the US to conduct business for them should also be wary as this could be viewed as constituting a branch in the US depending on the type of activities performed by the consultant e.g. if just performing lead generation then that is fine but if also signing business deals then may legally be considered an extension of the Irish company and subject to same liabilities and taxes as a branch. A lot of attention should therefore be given to the arrangement of consultancy services in the US.

[2] With the exception of New York state, which includes the cost of publishing notice of the entity's formation in newspapers.

However, the LLC is generally not chosen by foreign companies to structure US operations because:

(1) An LLC that is the wholly owned subsidiary of a foreign entity cannot enjoy the "flow through" tax advantages of the LLC structure, as the income would "flow through" to the parent entity overseas which would then be obligated to file a U.S. tax return – which is undesirable for most foreign entities. The only way to avoid this is for the LLC to elect to be taxed in the same way as a C-Corporation (and be subject to the same double taxation issues).

(2) There is a perception that the members (shareholders) of an LLC are less separate/independent than the shareholders of a C-Corp, which provides less certainty in terms of offering legal protection/limited liability.

Why is Delaware seen as the most desirable state to establish a US company?

- **Delaware is seen as No.1 state for corporate law** - Delaware's business statutes generally provide a number of advantages to domestic & international businesses. Its laws tend to be copied/adopted by other states as well but Delaware is always striving to stay ahead of the curve in providing the best business-friendly laws. Any changes or updates to state laws will usually be of benefit to companies.
- **Favourable court system** - The Court of Chancery focuses solely on business law and uses judges instead of juries. Decisions tend to favour business interests and courts are less likely to interfere with signed corporate agreements. Having such a high degree of legal certainty can be very appealing to foreign companies.
- **Location isn't a factor** - Delaware's corporate law applies to all Delaware corporations no matter where they are located, whether their headquarters are in a different state or in a different country. This means an Irish company can set up a physical presence in a different US state but still have its corporate affairs come under Delaware law.
- **Residency isn't a factor** - Shareholders, directors and officers of a corporation or members or managers of an LLC don't need to be residents of Delaware.
- **Favourable taxation laws** -
- For corporations, there is no state corporate income tax for companies that are formed in Delaware but do not transact business there (but there is a fixed franchise tax).
- There is no personal income tax for non-residents.
- Shares owned by persons outside Delaware are not subject to Delaware taxes.
- **Easy and straightforward application process.**

Whilst there is a drive in other US states to attract foreign companies to set up, whether through lower fees or a simplified process, some of these states (when compared to Delaware) don't have the legal tradition and systems in place to protect companies with a high degree of certainty. Companies would usually be advised to establish their US entity in a jurisdiction that provides a high degree of legal certainty in the long run as opposed to one that offers short-term savings.

However, in situations where the US business will be physically based in a single-state, there is little reason to form a Delaware entity instead of setting one up in their main state of operation. For example, a company that intends to establish an office in New York and conduct its entire business within the state would be better suited to establish its entity with the Division of Corporations in New York's Department of State, as the fees and initial online application process would be similar to Delaware's.

On the other hand, if for example a company's business will be conducted primarily online and selling to multiple states, incorporating in Delaware would be seen as the desirable option. A lawyer will be best placed to advise on which state makes the most sense for a particular company to form a US subsidiary.

Entity Creation Process[3]

FORM A CORPORATION (C-Corp) IN 4 STEPS:

1. **CHOOSE A BUSINESS NAME** - Check online to see if the company name you want is available. If you are not quite ready to incorporate, you can reserve the name online for a $75 fee and you can reserve your name before you finish the incorporation process through the Delaware Division of Corporations website.
2. **APPOINT A REGISTERED AGENT** - Delaware requires that you appoint a registered agent to receive service of process and other state correspondence on behalf of your company. You can act as your own agent if you have a Delaware address (as opposed to a post office box). You can appoint someone else, such as your attorney or your accountant, or use a registered agent service company. The cost for a registered agent service company can range from $45 to more than $300.
3. **FILE A CERTIFICATE OF CORPORTATION** - Delaware's Certificate of Incorporation requires the name of the corporation, the name and address of its registered agent, the purpose of the corporation, and the total number of shares the corporation is authorized to issue. The standard fee for filing the Certificate of Incorporation in Delaware is $89. Processing time for a standard filing generally takes a few days. Expedited filing is available for overnight or even same-day service, for an additional fee.
4. **REMAIN IN GOOD STANDING** - All Delaware corporations are required to file an annual report and to pay a franchise tax. The annual report filing fee for all Delaware corporations is $50. The franchise tax is assessed according to the number of authorized shares. For corporations with 5,000 or less authorized shares the minimum tax is $175. Payment is due by March 1 every year and Corporations have the option to pay online.

Breakdown of Delaware Incorporation Fees

Initial Incorporation Fees
Name Reservation (optional): $75
Appointment of Registered Agent: $50-$300
Certificate Filing: $89
Certified Copy of Incorporation: $50

Annual Fees
Registered Agent Fee: $50-300 per annum
Annual Report Filing: $50 per annum
Franchise Tax: (min) $175 per annum

Application Fees Total:
$189 (min) $514 (max)

Annual Fees Total:
$275 (min)

Note on Franchise Tax: There are two methods for assessing franchise tax in Delaware – the authorized share capital method, and the assumed par value capital method. Unwary companies that authorize a large number of shares, of which only a small number are issued, or that have no par value, can end up with franchise tax bills in the tens of thousands of dollars – accordingly it's important for a company that plans to authorize over 5000 shares, or to authorize shares without par value, to seek professional legal advice.

[3] This is the process for incorporating in Delaware. Incorporation in other states will follow a similar process.

Business operations in other states

If a company is conducting business in any states other than the state where it is incorporated (or formed an LLC), then it needs to register its business in those new states. This is often called "foreign qualification." What counts as 'conducting business' can vary from state to state. No states provide a clear definition, though many provide a clear list of what does **not** entail "doing business".

For rules that are specific to each state, it is best to consult with a lawyer or check each jurisdiction's department of state website (see 'Useful Links' at the the end of this section).

Some questions to ask to see if one needs to file a foreign qualification for a state:

- Does the LLC or corporation have a physical presence in the state (e.g. office)?
- Does the company often conduct in-person meetings with clients in the state?
- Does a significant portion of the company's revenue come from the state?
- Do any of the employees work in the state? Does the company pay state payroll taxes?
- Did the company apply for a business license in the state?

If the answer to any of these is 'yes', the business will likely need to file a foreign qualification in that state.

To do this, it generally must obtain a certificate of authority to do business from that state's Secretary of State, which can cost as high as $800 to as low as $90 depending on the state. In applying for this, a company will need to submit a Certificate of Good Standing and needs to appoint a registered agent for each state in which it wants to do business. The process is broadly similar across the US:

A company deemed to be *doing business* in a state will be subject to state income taxes whether they register or not. After a company registers in a state, it must pay state income taxes on the profits earned in that state. Some states, such as Texas, have a generous tax-free allowance that results in small businesses paying little or no state income tax.[4]

Opening a US Bank Account

If you form your company in Delaware (or other state), one of the many advantages is that there is no requirement to maintain a company bank account in the state of Delaware. Many clients open bank accounts in locations (the state or country) where it is most convenient to conduct their banking transactions.

Obtaining an Employer Identification Number (EIN)

An Employer Identification Number (EIN) is necessary to open a bank account, secure a business license, obtain loans, hire employees, and pay taxes.

If you have a U.S. Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN), you may apply for an EIN using IRS's website (see 'Useful Links at the end of this section).

If you do not have a Social Security Number (SSN), you can apply directly by fax, or you can have a lawyer act as a Third-Party Designee for you. The business lawyer will prepare and process your Application for an EIN with the IRS and receive your EIN on your behalf.

Example: Applying to do business in New York as a Delaware Corporation

Obtain Certificate of Good Standing from Delaware:	$50
Application for Certificate of Authority to NY:	$225
Appointment of Registered Agent in NY:	$50-300
Biennial Report Filing (to remain in good standing):	$9

[4] Please refer to the 'Taxation' section of this guide for further information on tax issues.

An **EIN Confirmation Letter (Form SS4)** is required by ALL banks to open a business account. Many banks will accept a fax from the IRS assigning the entity with an EIN, as opposed to the formal "welcome" letter that can take a few weeks to arrive. Most banks will also want a copy of the company's "formation" documents; US business address and annual statement of officers and directors.

Banks need to verify the identity of any person opening an account with them, and that these persons pass all mandatory anti-money laundering and Know Your Customer checks.

There are several ways this requirement can be satisfied:

- Get a visitor visa, travel to the U.S., go to your bank of choice, and personally open an account.
- Use third-party services to help you set up an account.
- There are also a number of banks that will set up an account without the relevant corporate officer being in the United States – if acting on a referral from a legal representative, everything can be done via email.

Employment Considerations

Irish companies should carefully plan their approach to hiring someone in the US as there can be many pitfalls associated with this. For instance, a company may hire someone as a consultant or independent contractor but under US law it could be determined that they are actually an employee. Improper classification can open a company up to penalties and liabilities, such as withholding of taxes, benefits and being sued by the employee. The law around US employment & benefits is extremely complicated, which means it is vital that companies consult with legal professionals for advice on this area.

Legal Service Costs

For small companies using a lawyer or legal service provider to take care of all of the above, the fixed fee package should generally not exceed $3000 - 5000. This will tend to include general counselling, the various application fees, the creation of incorporation, confidentiality agreements and stock issuance. Operating/shareholders agreements can be very complex and would generally cost additional fees. IP transfers are similarly complex and costly, although a lot of Irish companies tend to keep their IP rights within the Irish parent and establish the US entity as a servicing company.

Useful Links

Delaware Division of Corporations:
https://corp.delaware.gov/

List of all state department & division of corporations websites can be found here:

https://www.thebalance.com/secretary-of-state-websites-1201005

To apply for an EIN on the IRS website visit:

https://www.irs.gov/businesses/small-businesses-self-employed/how-to-apply-for-an-ein

TAXATION

The US tax system can be complex and confusing, even to US residents. Therefore, if you are considering doing business in the US, ***you'll need tailored advice from a certified public accountant or tax lawyer.***

The federal government, state governments and local governments within each state have their own tax administration, tax laws, and tax forms. At the federal level, there is income tax, including corporate and personal income tax, capital gains tax, income tax on dividends, interest and royalties, and on partnership profits; and employee payroll taxes. At the state level, there are, in most states, similar taxes as the above federal ones; as well as sales and use taxes. Some counties and cities have their own tax regimes, such as income and business taxes and property taxes e.g. New York City.

US taxes for an Irish person/individual

As a general rule, a non-U.S. individual may become a U.S. resident alien if they fall into either of the following two categories:

- "Green card" holder (requires application to the U.S. Government); or
- "Substantial presence" in the United States.

Substantial Presence Test

You will be considered a United States resident for tax purposes if you meet the substantial presence test for the calendar year. To meet this test, you must be physically present in the United States (U.S.) on at least:

- 31 days during the current year; and
- 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting:
  - All the days you were present in the current year, and
  - 1/3 of the days you were present in the first year before the current year, and
  - 1/6 of the days you were present in the second year before the current year.

Example

You were physically present in the U.S. on **130 days** in each of the years **2014, 2015,** and **2016**. To determine if you meet the substantial presence test for **2016**, count the full **130 days of presence in 2016, 44 days in 2015 (1/3 of 130), and 22 days in 2014 (1/6 of 130)**. Since the **total for the 3-year period is 196 days (>183)**, you are therefore considered a resident under the substantial presence test for 2016.

US taxes for Branches

The requirement to pay corporate taxes in the US and file tax returns depends to a large extent on whether or not a business has a permanent establishment there (effectively a branch).

In this regard, it is worth noting that permanent establishment is a higher threshold of activity as compared to a U.S. trade or business.

Permanent Establishment

In accordance with the Double Taxation Treaty between Ireland and the USA (1997) (the "Treaty") an Irish company may be deemed to have a U.S. Permanent Establishment (PE) when the Irish enterprise's presence is sufficiently significant such that the U.S. is allowed to impose tax on the profits attributable to such PE.

In this regard, Article 5 of the Treaty broadly provides that a permanent establishment will exist in two circumstances:

1. *Existence of a fixed place of business through which the enterprise is carrying on business activities. However, it is important to note that certain activities can be deemed insignificant and do not cause permanent establishment e.g., facilities used for purposes of storage, display or delivery of goods or other activities.*
2. *Conducting business activities through a dependent agent (that may be an employee or a third-party), where the dependent agent has the authority to conclude contracts for the enterprise and habitually exercises such authority.*

If an Irish entity is deemed to have a permanent establishment in the US, it will be deemed to be subject to U.S. federal income tax on its income attributable to that permanent establishment. The company will be required to file a U.S. federal income tax return. These forms can downloaded from the IRS website (https://www.irs.gov/forms-instructions) and completed/returned to the IRS directly but companies should consult with qualified accountants on this.

If taking the position that no permanent establishment, a U.S. federal income tax return is still typically required.

Dividend, Interest and Royalties payments

The Treaty may allow Irish residents/entities to be taxed at a reduced rate, or to be exempt from U.S. income taxes on certain items of income they receive from sources within the United States.

Under US domestic tax laws, a foreign person generally is subject to 30% US tax on its US-source income. US persons making payments ('withholding agents') to foreign persons generally must withhold 30% of payments, such as dividends and royalties, made to foreign persons.

In other situations, withholding agents may apply reduced rates or be exempted from withholding tax at source when there is a Treaty in place between the foreign person's country of residence and the United States. The United States has entered into various income tax treaties with countries in order to avoid double taxation of the same income and to prevent tax evasion. The table below shows the various rates of withholding tax applicable to payments made by a US entity.

Withholding taxes	Dividends paid by US corporations in general	Qualifying Dividends (i.e. more than 10% beneficial ownership)	Interest paid by US obligors in general	Royalties
Normal Federal Rate of Tax for Foreign Corps	**30%**	**30%**	**30%**	**30%**
Rate for Irish companies when Treaty applies	**15%**	**5%**	**0%**	**0%**

The Treaty applies to U.S. federal income tax (and the income taxes of the other treaty country). Irish companies should consult with professional tax advisors to determine if they are entitled to a reduced rate under the Treaty. Also, before entering into a venture in the USA, you should determine which taxes may be due to states and municipalities. These are not covered by the Treaty.

Form W-8BEN

If an Irish company is eligible for benefits under the Treaty, in order to claim a complete or partial exemption from US federal withholding tax under the Treaty, the Irish company would have to provide to its US customer a US tax form, called Form W-8BEN, that indicates the Irish company's US taxpayer identification number (for a company, generally its US employer identification number).[1] Obtaining a US taxpayer identification number, in and of itself, should not result in the Irish company being subject to US federal income tax or withholding of such tax.

This Form W-8BEN generally is valid for three calendar years following the year in which it is signed by the Irish company, unless information provided on the form materially changes during that time. The Form W-8BEN is not filed with the US Internal Revenue Service, but rather must be retained by the US customer.

Taxes for US Entity or Subsidiary

If a non-US company's US activity rises to the level of conducting business in the US for federal income tax purposes, and PE is established, consideration should be given as to whether the non-US company should conduct its business through a subsidiary (US corporation or LLC) that is taxed as a corporation for US federal income tax purposes. In this case the US Subsidiary undertakes all tax filing and payment requirements, as indicated below.

(a) State & Local Taxes

U.S. state and local taxes (e.g., income tax, sales and use tax, etc.) should be carefully analysed:

- State and local tax laws differ from the federal tax law.
  - o Income tax treaties of the United States are generally not applicable to state and local tax jurisdictions;
  - o State and local tax jurisdictions may subject a non-U.S. person to tax even if there is no federal tax liability as a result of a Treaty.
- State and local taxing jurisdiction needs a connection, or "nexus," to the business transaction producing the income and the jurisdiction to impose an income tax.
- Apportionment – To help mitigate income being taxed in multiple states, the concept of "apportionment" was developed. Typical apportionment factor methodology may consist of property, payroll and sales in the jurisdiction.
- States may use less factors, or weight the factors differently.

(b) Tax Filing and Administration

US corporate taxpayers are taxed on an annual basis. Corporate taxpayers may choose a tax year that is different from the calendar year. New corporations may use a short tax year for their first tax period, and corporations changing tax years also may use a short tax year.

The US tax system is based on the principle of self-assessment. A corporate taxpayer must file an annual tax return (generally Form 1120) by the 15th day of the third month following the close of its tax year. A taxpayer can obtain a six-month extension to file its tax return, provided it timely and properly files Form 7004 and deposits the full amount of any tax due.

[1] Please refer to the 'Establishing a US Business Entity' section of this guide

(c) Important tax return due dates for businesses

All federal tax returns (whether personal or business) are filed with the IRS and can be done by paper mail, online using IRS tax preparation software, or through a professional service (recommended method for Irish companies).

FORM NO.	TITLE	PURPOSE	DUE DATE
W-2	Wage and Tax Statement	Employers must provide employees with statements regarding total compensation and amounts withheld during year.	Must be sent to employees on or before January 31, with copies to the Social Security Administration.
1099 series	Various	Information returns to be provided to recipients of dividends and distributions, interest income, non-employee compensation, miscellaneous income, etc.	Must be sent on or before January 31.
1120 series, including 1120S (for S corporations)	US Corporation Income Tax Return	Income tax returns for domestic corporations or foreign corporations with US offices.	March 15 (Form 7004 may be filed to obtain an automatic six-month filing extension)
Schedule K-1	Partner's Share of Income, Deductions, Credits, etc.	Information returns to be provided to partners by partnerships.	March 15
1065	US Return of Partnership Income	Information returns to be filed by partnerships	April 15 (Form 7004 may be filed to obtain an automatic five-month filing extension)
State income tax returns	Various	Income tax returns for states where corporation carries on trade/business	Varies, often April 15

(d) Tax credits and/or incentives available to foreign companies

There are a variety of tax credits and incentives available to foreign companies operating in the US at both the federal and state level. For Irish companies, the ones offered at state level are more relevant.

From a US state and local tax perspective, there are two main methods for incentivizing business:

1. Statutory credits – typically offered to all qualifying companies within a jurisdiction and can, in certain circumstances, be claimed retroactively.

State and local governments have become more competitive in offering tax credits to attract and retain growing companies for the purpose of promoting economic development. Today there are hundreds of statutory tax credits available as a result of this competition. These credits usually apply to activities performed only in a given state or local jurisdiction and may include things like hiring and jobs tax credits; investment tax credits; alternative and renewable energy tax credits; R&D credits; port tax credits.

2. Discretionary incentives – typically must be negotiated between the taxpayer and the state and local governing bodies or economic development groups prior to commencement of a project.

State and local governments continue to add to their array of economic incentives to encourage private-sector investment. The types of incentives offered vary significantly depending on jurisdiction and industry. The majority of incentives are based, at least partially, on increases in workforce and capital investment in property. Each state differs in its offering to companies and it's best to consult with the relevant state economic development agency to find out what might be available.

Other considerations

Transfer Pricing

It is important that the Irish parent and its US operating subsidiary deal with each other on an arm's length basis in order to minimize the risk of disputes with tax authorities as to whether income has been earned in the US or the home country jurisdiction.

Transfer pricing applies to a wide range of intercompany transactions, including transactions involving:

- tangible goods (e.g., manufacturing, distribution)
- services (e.g., management services, sales support, IT services)
- financing (e.g., intercompany loans, accounts receivable, guarantees)
- intangibles (e.g., royalties, cost sharing, buy-in payments, sales of intangibles).

The American tax authorities are concerned that profits between a foreign parent company and its U.S. subsidiary or affiliate may be shifted from the U.S. to the foreign country. This would be the case whenever the parent company invoices the subsidiary at a higher price than would be charged a third party.

As an exporter this normally means that you must be able to prove to the tax authorities that the price you charge to your branch, subsidiary or affiliate in the United States is the same as you charge an unrelated third party (i.e. at arm's length or market value). Transfer pricing analysis is highly subjective and dependent on the facts and circumstances of each particular transaction.

A foreign company can also encounter U.S. customs problems when it invoices a related party at too low a price.

Funding requirements

In relation to the funding of the US operations, it is also important to understand who will fund the business and in particular if borrowings are required to fund the US operations.

In Ireland, where interest is incurred wholly and exclusively for trading purposes it may be allowed as a trading expense at 12.5%. Alternatively, if borrowings are acquired by an Irish company and lent to the US, consideration should be given in relation to potential transfer pricing obligations and the treatment of any interest income received from the US and the tax deductibility of interest paid in Ireland. In the US, interest expenses are generally deductible (at a higher rate than Ireland) but there may be limitations due to thin capitalisation rules.

Useful Links:

For further information on tax issues and implications of doing business in the United States, you can download a guide by PWC:

https://www.pwc.com/us/en/tax-services-multinationals/assets/pwc-doing-business-in-the-us-2017-2018.pdf

The IRS has an information page for foreign entrepreneurs and businesses:
https://www.irs.gov/businesses/international-businesses

IMMIGRATION & VISAS

The skills and experience of employees are often critical to the success of a new operation in the US meaning that foreign businesses that wish to enter the US market should carefully consider US immigration law as early as possible in the planning stages.

Please note that US immigration laws are complex, highly regulated and constantly changing and therefore specialised legal advice is absolutely necessary *

Short-term Business Trips

The Visa Waiver ('VW') Program allows for travel to the US without a visa for "limited business purposes" but not employment in the US.

Visa waiver travellers must apply for electronic system travel authorization (ESTA) online in advance of travel (see: https://esta.cbp.dhs.gov/)

VW is an extremely useful and flexible means of travel to the US for short, infrequent trips with a definite purpose; working is prohibited except in some well-defined instances.

Duration of stay: Qualified participants may stay in the US for up to 90 days. However, there is no opportunity for extension. Those that apply for consecutive Visa Waivers within short periods of times will come under increased scrutiny by Customs & Border Protection (CBP). If 50% of your time, cumulatively, has been spent in the US over the last one year, you will almost certainly be denied entry on Visa Waiver. Remember, one strike and you're out, meaning one refusal of entry to the US on VW, and you cannot use VW again (see B visas).

Key requirements

- Participants must be a national of a qualifying country
- If traveling by air or sea, participant must have a return or onward ticket.
- Only certain limited business activities are permitted (e.g., attending meetings and conferences, negotiating contracts, pre-investment activities).
- Participants must obtain an Electronic System for Travel Authorization (ESTA) registration and authorization before traveling.

Visitor Visa: B-1

Visitor visas are also available to individuals who wish to enter the US for short periods of time and/or cannot use VW for any reason. The B-1 visa is intended for temporary visits specifically for business purposes while B-2 allows visits for tourism. An embassy interview is required.

Although the B-1 visa is attractive in some cases, because it permits longer stays than VW, it is important to note that the B-1 visa does not permit employment and exactly mirrors allowable business activities of the VW program, it does not expand them. An embassy official will require evidence of purpose of travel and ties outside the US at a B visa interview.

B-1 is necessary where VW is not an option and can also be useful for business people who need to travel frequently as CBP officers will know the individual has been interviewed by an embassy official. B visas are granted to Irish nationals, in the normal course, for 10 years, though each entry to the US is for a maximum of 6 months. Admission period is determined by the US CBP officer on the day, and an extension may be sought when in the US, though frivolous B extension applications or change of status (for example, at the end of a J-1 visa) are not advisable and may come back to haunt you.

Key requirements

- Purpose of Travel: only the same limited business activities as permitted on VW are allowed for B-1 visa holders. and that does not include working in the US, regardless of source of payment. B-1 visa applicants must demonstrate that they possess economic, family and social "ties" external to the US that are significant enough to ensure they will leave the US at the end of their stay.

Longer term stays and working in the US

Foreign business owners and employees may need to enter the US for a substantial amount of time to open a new office or operation. Such a visit, although not permanent, may require a lengthier visa program.

"L" Visa Category

The "L" visa is best used to facilitate the transfer of non-US employees from related entities abroad to established operations in the US or for purposes of establishing a new office. "L" visas are divided into two categories:

The L-1A visa for managers and executives can be used to transfer a foreign executive or manager who has previously worked with the foreign company in one of those capacities for at least one year preceding the transfer to a US parent, subsidiary or affiliate in order to perform a similar function.

The L-1B visa is for employees with specialized knowledge (SK) of the foreign company's business, systems and processes. It can be used to transfer a foreign employee who has "specialized knowledge" to the US to work at an established business or to open a new operation that is related to the overseas entity. The same qualifying relationship must exist between the foreign transferring company and the US entity and although the minimum is one year of work experience with the foreign company, in most cases an L1-B will require the employee to have a lot more.

Duration of stay - "L" category visa recipients entering the US to establish a 'new office' will be allowed a maximum initial stay of one year, while all other recipients will be allowed a maximum initial stay of three years. Requests for extensions of stay may be granted until the employee has reached the maximum limit of seven years (in the case of an L-1A visa) or five years (in the case of an L-1B visa).

Key requirements

- The employee must have been continuously employed by the foreign company abroad for at least one year within the previous three years and is being transferred to a parent, subsidiary, affiliate, branch or joint venture operation in the US.
- Petition approval must first be obtained from US Citizenship and Immigration Services before the visa is applied for at a US embassy abroad

This visa is suitable for well-established U.S. companies and less so, generally, for start-ups. The requirement for 'specialized knowledge' for L-1B workers is still interpreted inconsistently by USCIS. This means that L-1B can be a tough and risky category in many cases.

"E" Visa Category

"E" visas can be procured for employees of foreign businesses when the employee is a national of a country with which the US has a significant trade treaty and the foreign employee is entering the US to (1) engage in substantial international trade or (2) develop and direct the operations of an enterprise which has or is investing in the US. One benefit of this program is the local application process. Unlike "L" visas, the application process for "E" visas is conducted at the US Consulate in the country in which the employee resides.

Duration of stay: "E" visas are issued for a maximum of five years. Typically, the initial "E" visa will be issued for two years for smaller organizations or organizations with smaller investments, with renewals being issued for up to five years at the discretion of the US Consulate.

E-1 Visa: Treaty Traders

E-1 visas can be granted to employees of a foreign entity that (1) is established in a country that has made a trade treaty with the US and (2) is entering the US to engage in substantial international trade.

Key requirements

- The foreign parent company must have a US subsidiary, affiliate or US branch operation. However, a US entity does not need to have a foreign entity in order to qualify for E-1 status.
- The foreign national's country's trade must be "substantial" and at least 50% of it must be with the US.
- The company must be owned 50% or more by foreign nationals from a qualifying country.
- The employee must show that he/she will hold a supervisory position in the USA operation and has the requisite skill for the post (unlike the L-1, new hires may qualify for E Treaty visas).

E-2 Visa: Treaty Investors

E-2 visas may allow for the authorization of employees of a foreign entity that (1) is established in a country that has made a trade treaty with the US and (2) is investing significant capital into a US business. Again, there is no requirement that a foreign entity exist in order to obtain E-2 status.

Key requirements

- Applicant must have the same nationality as the foreign entity or the ultimate owners of the entities.
- Applicant must be engaged in an executive or supervisory capacity or have special qualifications essential to the enterprise.
- Applicant must be entering the US for the sole purpose of developing the investment enterprise.
- Min threshold of investment into the US: most US consulates insist on at least $100k
- Both E-1 and E-2 applicants must demonstrate that they intend to depart the US upon the expiration or termination of their visa status.

E-2 is also currently the closest thing to a U.S. start-up visa for entrepreneurs and remains one of the foreign entrepreneur's best options.[1]

"H" Visa Category

"H" visas are reserved for persons that belong to specialty occupations. For the purposes of transferring current employees to the US, there are three bases for an employee to receive permission to enter the US using an "H" visa.

Duration of stay: Recipients of "H" category visas can remain in the US for up to a total of six years, with "H" visa status being granted for up to three years at a time.

H-1B Visa: Highly Skilled Workers - This visa is often used for highly skilled workers that have a university degree or an equivalent combination of education and experience.

Key requirement

- Approval of application to US Department of Labor — petitioning companies must prove the employee will be paid a fair wage and will not displace US workers.

H-2B Visa: Technical Workers - intended for technical workers needed for particular tasks. For instance, an employee could receive authorization to remain in the US to install and teach US workers how to operate new machinery under this program.

Key requirement

- Approval of application to US Department of Labor.

H-3 Visa: Employee Training - appropriate for aliens coming to the US to be trained.

Key requirement

- The training received by the employee must not be available in the employee's home country.

Unlike "L" visas, no qualifying relationship needs to be established between the US employee and the foreign entity. In addition, unlike the "E" visa, there is no common nationality requirement.

Only 65,000 regular "H" visas and an additional 20,000 "H" visas for US master's degree (or higher) holders are available each fiscal year and due to over-subscription, USCIS runs a computer-generated lottery to decide which applications will be accepted for processing; chances of 'winning' are about 3:1.

"O" Visa Category

O-1 visa is for individuals with extraordinary ability or achievement in sciences, education, business, athletics or the arts. Extraordinary ability in the fields of science, education, business or athletics means a level of expertise indicating that the person is one of the small percentage who has risen to the very top of the field of endeavor.

[1] USCIS proposed a new rule in 2016, which would allow certain international entrepreneurs to be considered for parole (temporary permission to be in the United States) so that they may start or scale their businesses in the US. The proposed rule would allow the Department of Homeland Security (DHS) to parole eligible entrepreneurs on a case-by-case basis. However, the measure has been officially delayed until March 2018 by DHS.

Duration of stay: An O-1 visa is initially granted for up to three years. Subsequently, it can be extended for one year at a time. There is no limit to the number of extensions that may be granted.

Key Requirements

- Need to provide at least three forms of documentation that proves extraordinary ability as demonstrated by sustained national or international acclaim;
- Examples of proof of extraordinary ability include nationally or internationally recognized prizes or awards for excellence, membership in associations requiring outstanding achievements, and articles written by or about the applicant.
- Evidence that the individual has either commanded a high salary or will command a high salary or other remuneration for services is also acceptable.

Permanent Relocation

To facilitate long-term operations in the US, it may become necessary or desirable for employees to permanently relocate to the US. Usually, this is done through an application for a Green Card, although there may be an exception for investors.

Green Card (Permanent Residence)

Applicants generally apply for Green Cards based on employment by showing that they have a job offer. Employers can "sponsor" employees for permanent residency by presenting evidence of such a job offer.

Key requirements

- In some cases, the applicant must already have a temporary, unexpired visa.
- Applicants who are granted Green Cards will become subject to US income taxation.
- Applicants must comply with certain maintenance requirements, such as maintaining the intent to remain resident in the US, even if currently residing elsewhere.

EB-5 Visa

This special class of visa is reserved for individuals who make substantial investments in the US economy. Individuals must meet several requirements to receive permanent residency through this means.

Key requirements

- Applicant must make a major investment in a "new USA enterprise." A "new USA Enterprise" can be a newly created business, the expansion of an existing business, or a new enterprise resulting from the purchase and restructuring of a US business.
- A "major investment" is usually defined as one that is in excess of US$1 million.
- Applicant must show that his investment benefits the US economy, for example, through job creation (specifically the creation or preservation of at least 10 jobs for US workers).

Fees & Processing

For information on the fees associated with each visa type please visit: https://travel.state.gov/content/visas/en/fees/fees-visa-services.html

For information on the application process for each visa, including how to apply, timelines, documentation required etc. please visit: https://ie.usembassy.gov/visas/

Further Info

To keep up to date with news and regulations by US Immigration authorities, visit: https://www.uscis.gov/

A presentation that highlights further details on US Visa Options for Irish businesses can be found at: http://obrienandassociates.com/us-immigration-resources/

From here, you can also download a useful e-guide, which covers options available to executives and professionals desiring to work and live in the US and explores common pitfalls and widespread myths about US immigration rules and practice.

TRADE & CUSTOMS REGULATIONS

Before you start to engage in trading with customers in the US, there are many factors that need to be considered including:

- Can the goods be legally exported? Are there restrictions on, or special forms required, for delivery to the US?
- Are the item(s) being brought to the US for commercial or non-commercial purposes? Are you importing the goods yourself to then sell in market or do the goods already have a buyer? This will determine the obligations between the exporter and importer.
- Who is responsible for shipping costs? How is the product being shipped (e.g. freight, express carrier or international postal service)? If you're not careful, transportation and handling costs could far outweigh the purchase price. Sometimes, the seemingly cheaper methods can be more expensive in the long run because they are more susceptible to theft, mis-deliveries and logistical problems.
- What information about the item being shipped and relevant documentation needs to be provided?

Consequently, Irish companies are advised to consult with professional service providers that have expertise in the area of trade and US customs law.

Governing bodies

U.S. Customs and Border Protection (CBP) is the federal law enforcement agency of the United States Department of Homeland Security. It is charged with regulating and facilitating international trade, collecting import duties, and enforcing U.S. regulations, including trade, customs, and immigration. CBP is the largest law enforcement agency in the United States and enforces all US laws at point of entry to the US.

Depending on the goods being traded, there may be other relevant authorities that have oversight of laws and regulations that must be observed. For a list of these agencies and their rules on trade, see 'Useful Links' at the end of this section.

Before you import

The responsibilities of an Irish company that is trading with the US will depend on the selling process. For instance, if the company is shipping a product in the fulfilment of a sale that has already been agreed with a US customer, they only need to satisfy their requirements as an exporter. On the other hand, if the company is bringing their product to the US itself with the intention to sell, it will have to fulfil a lot more obligations as an importer.

CBP does not require an importer to have a license or permit, but other agencies may require a permit, license, or other certification, depending on the commodity that is being imported. CBP acts in an administrative capacity for these other agencies, and you may wish to contact them directly for more information.

You may also need a license from local or state authorities to do business. CBP entry forms do ask for your importer number: this is either your IRS business registration number or your Employer Identification Number (EIN). You are also required to have your ultimate consignees details, address, contact and EIN as part of the entry process.

If you are a Foreign Importer of Record, work with your Customs Broker on the requirements and Power of Attorney.

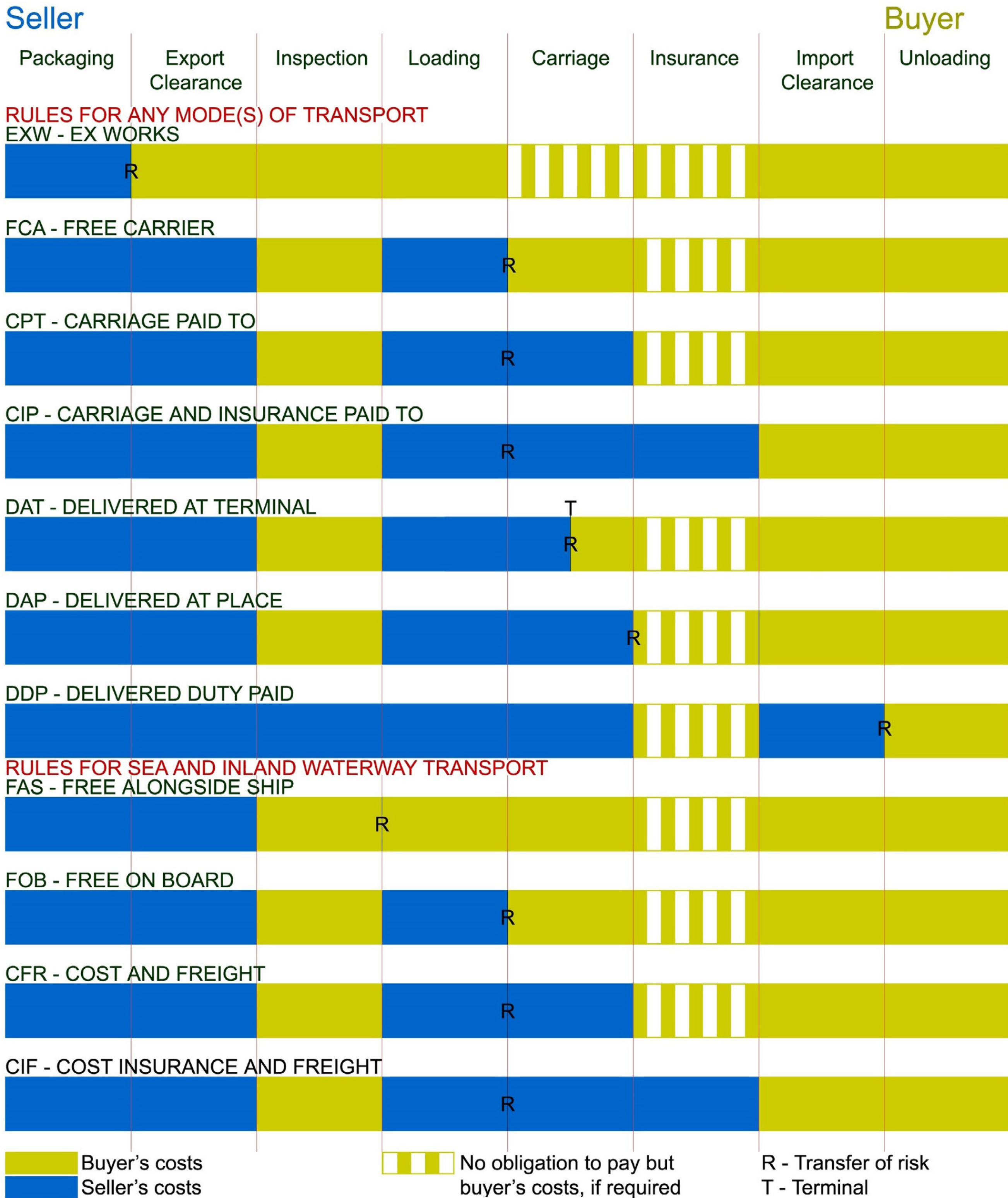
For basic tips on exporting/importing to the US and to keep up to date with relevant customs regulations, visit: https://www.cbp.gov/trade/basic-import-export/importer-exporter-tips

Customs bond - Insurance policy that guarantees payment to U.S. Customs & Border Protection if a regulated requirement is not performed. This is required for commercial imports.

Costs and Risks

The International Chamber of Commerce in tandem with the United Nations have created a set of trade terms which are internationally recognised as INCO Terms.

These terms are used globally to determine the agreed selling/purchase terms between a vendor and a purchaser of goods and services:



Insurance

Understand what your insurance covers. For example, you may only be covered until goods are dropped at airport or ocean terminal. Maybe they are not covered if they are wet and damaged. Be sure you know the terms and conditions and consider additional insurance in the event the value of goods or commodities could be destroyed if wet etc.

Use of Brokers and Freight Forwarders

Customs Broker?

There is no legal requirement for you to hire a Customs Broker to clear your goods. However, many importers opt to do so for the convenience. Customs Brokers are licensed by U.S. Customs and Border Protection to conduct CBP business on behalf of importers. They take the burden of filling out of paperwork and obtaining a CBP bond off of the importer's hands.

The importer is always ultimately responsible for knowing CBP requirements and for ensuring their importation complies with all federal rules and regulations, but using a Customs Broker can save you from making costly mistakes.

Freight Forwarder

A freight forwarder organizes shipments to get goods from the manufacturer or producer to a market, customer or final point of distribution. Forwarders contract with a carrier or often multiple carriers to move the goods. A forwarder does not move the goods but acts as an expert in the logistics network. They will also handle the preparation and processing of customs and other documentation.

Customs Brokers and Freight Forwarder fees will vary depending on the type of good and quantity. A company wishing to use their services will need to consult directly with them to get a direct quote and most of these service providers will offer an initial consultation free of charge.

Express Carriers

If goods are being imported via an express carrier (DHL, FedEx etc.), they are an integrated carrier that have full visibility and in most cases ownership of the goods until delivery. Express Consignment Operators (ECO) not only move the goods but also fall under different regulations in the US. They have in-house Custom Brokers and clearance operations that run 24/7 to clear the goods prior to arrival in most cases. When an individual or company purchases goods from an overseas supplier, CBP considers that individual/company the ultimate importer. The ultimate importer can clear the goods or have a broker clear them on their behalf. They can break the contract with the ECO and pay to have paper transferred to another broker or individual for clearance if they desire.

If the Irish company as the supplier hires a carrier that provides door to door service, the carrier will usually clear the goods as part of their service, acting as a nominal consignee and importer of record and thereby assuming the risk (for goods valued under $2500).

Postal

Goods sent through the international postal service that are under $800 in value generally do not require an importer number or additional paperwork to be cleared through CBP other than the commercial invoice required by postmasters prior to exports bound for the US.

Calculation of Tariffs & Duties

Generally, customs duties are a percentage that is applied to the dutiable value of the imported goods. Some articles are dutiable at a specific rate of duty (i.e. per piece, per pound, per kilogram), while others at a compound rate (a combination of a percentage and specific rates).

You must determine the 10-digit Harmonized tariff code (HTS) for the goods. The Harmonized Tariff System (HTS) provides duty rates for virtually every item that exists https://www.usitc.gov/tata/hts/by-chapter/index.htm

The U.S. International Trade Commission-Tariff Database is an interactive data base that will enable you to get an approximate idea of the duty rate for a particular product: https://dataweb.usitc.gov/

Please be aware that the duty rate you request is only as good as the information you provide. The actual duty rate of the item you import may not be what you think it should be as a result of your research.

Whilst the importer or broker assigns the tariff, the CBP makes a final determination and can increase the rate if they feel it was misclassified. Companies are therefore advised to seek professional consultation before deciding on how to classify their goods.

Other Taxes or Fees

Yes, there are other taxes and fees that U.S. CBP collects on goods being imported into the US:

- CBP collects federal taxes and fees on behalf of other federal agencies depending on the commodity being imported e.g. alcoholic beverages or tobacco and more. Please refer to the relevant agencies' import guides (see 'Useful Links' at the end of this section)
- Goods imported into the US are subject to user fees. The user fee depends on the type of entry and mode of transportation used. For instance, formal and informal entries are subject to a Merchandise Processing Fee (MPF). If the mode of transportation is via ship a Harbor Maintenance Fee (HMF) applies.

Valuation considerations e.g. duties to be added, related party prices & fees, currency conversion, will need to be observed as a way of calculating what the 'landed price' of your products will be once it gets to market (this can be done by freight forwarders).

CBP ***does not*** collect General Sales Tax (GST). You will have to look into your tax requirements State by State and should seek professional consulting. The USA does not have VAT.

During Importation

Documentation

To obtain clearance from the CBP, importers and their merchandise must take necessary steps of entry, examination, appraisal, classification, and liquidation. All of these steps can be supported through the services of a broker and it is advised that companies seek professional advice on the exact documentation required for their particular goods as this will depend on the supply chain and the type of product being brought in, the product's end user etc.

When a shipment reaches the United States, the owner, purchaser, or designated licensed customs broker (i.e. the importer of record) must file entry documents for the goods with the port director at the goods' port of entry. Within 15 calendar days of the date that a shipment arrives at a U.S. port of entry, entry documents must be filed at a location specified by the port director.

Informed Compliance and Reasonable Care

Informed compliance is a standard implemented by US Customs to increase the compliance by exporters and involves the education of importers on the methods for classifying and assigning a value to their merchandise and to ensure familiarity with laws and regulations of the Customs agency.

CBP has a number of Informed Compliance Publications (ICPs) in the "What Every Member of the Trade Community Should Know About: …" series that cover a variety of topics on informed compliance: https://www.cbp.gov/trade/rulings/informed-compliance-publications

The term Reasonable Care means that a good faith effort has been made to ensure that all information provided to the US CBP and other Government Agencies is accurate. "Reasonable care" must be exercised when providing U.S. Customs & Border Protection ("CBP") with entry information.

The importer has ultimate responsibility for code and compliance, even if using a customs broker (Importer is liable to U.S. government; broker may be liable to importer). Giving misleading or inaccurate information about the nature of the item and its value is illegal and one could face legal action and fines for this violation. In summary it is important to:

- Understand the importing process
- Act reasonably concerning customs issues
- Provide proper value, classification, rate of duty, duty programs, origin, trade remedies, quantity, etc.

Common Types of Entry

(This is not an extensive list of types of entry but highlights some of the most commonly used methods)

Consumption Entry: when goods are imported for use in the United States and going directly into the commerce of the U.S. without any time or use restrictions placed on them, which covers about 95% of all entries. For use in the U.S. means for commercial, business or personal purposes.

Transportation & Exportation: allows goods to be transported through the CBP territory of the U.S. under bond and then exported intact.

Temporary Importation: a bond can be posted that allows goods to be imported duty-free up to one year with a guarantee the goods will be exported or destroyed at the end of the bond period. This is used for trade show material, like table stands, lighting etc. that will be returned or for items on display for a show. See Trade show below for more details

Warehouse Entry: If one wishes to postpone release of the goods, they may be placed in a CBP bonded warehouse under a warehouse entry. The goods may remain in the bonded warehouse up to five years from the date of importation. At any time during that period, warehoused goods may be re-exported without paying duty, or they may be withdrawn for consumption upon paying duty at the duty rate in effect on the date of withdrawal.

Foreign Trade Zone: An importer wishing to further manufacture merchandise before entering it into the United States and paying duty may do so in a Foreign Trade Zone (FTZ). FTZs are usually located close to a transport or logistics hub (port, airport etc.). FTZs are typically used when an imported product has a higher duty-rate than a manufactured product made from it. So if the imported component has a duty rate of 5%, and the finished product has a free duty-rate, the importer can bring the product into the FTZ, pay no duty, manufacture the product, and then make a consumption entry into the United States at the rate of duty for the finished product.

Heads-Up!

U.S. Customs and Border Protection does not inform importers of the arrival of cargo or freight. When cargo or freight arrives at a U.S. port of entry, it is the responsibility of the shipper or a designated agent to inform the importer of its arrival. However, proper notification does not always happen, particularly, if the shipper has incomplete contact information for the importer. Therefore, it is important to find out the scheduled arrival date of the import and follow-up.

If you are not notified that your goods have arrived and you or your broker have not presented the proper paperwork to CBP within 15 days of your goods' arrival, your goods will be transferred to a warehouse, and you will be liable for storage charges. Be sure to have your full US contact information provided on all documentation.

After Importation

Record Keeping: All importers are required to maintain all records for a period of at least five years after importation and exportation.

It is the responsibility of the importer to maintain these records, even if the customs broker already does so. In addition, these records must be maintained for each entry and customs transaction, and must be produced to Customs upon request. However, travelers who physically clear CBP by making an oral declaration are not required to maintain supporting documents, as long as they are not declaring commercial merchandise.

E-Commerce

The regulatory issues affecting regular trade with the US also apply to ecommerce transactions. Irish companies that utilise e-commerce to sell their product to customers in the US should therefore be aware of their exporter obligations around packaging and delivery, as well as giving careful attention to how their product is described and advertised online. Local and State taxes apply so be sure you understand your landed cost and your INCO Terms.

For more info on how the US oversees eCommerce and protects consumers, see: https://www.cbp.gov/trade/basic-import-export/e-commerce

Other Issues

Transporting products in-person

If you are travelling to the U.S. and are bringing commercial products with you, you will then need to make a declaration to CBP on entry to the U.S. and pay the relevant duties (if there is intention to sell) or declare the products as samples (meaning they won't be sold).

Trade Shows - exhibiting a product

If you are traveling into the U.S. to exhibit a product at a Trade Show/Fair, there are a number of considerations that need to be made as everything that is being transported for a trade show must be documented and categorised appropriately. Generally, anything that will be returned to Ireland should be documented and shipped separately from anything that will remain in the US afterwards. This means that items such as samples, giveaways and marketing collateral should be classified differently as they may carry their own duties/tariffs and shipments can become null and void if this isn't done correctly. As such, companies intending to travel for a trade show should seek professional advice on customs requirements as part of their preparations.

Useful Links

List of other U.S. agencies and their rules on trade & import guides:
https://www.cbp.gov/trade/basic-import-export/e-commerce/partner-government-agencies-import-guides

The **Irish Exporters Association (IEA)** is an independent representative body for all Irish Exporters. It offers a range of practical help and support to its members, which includes providing guidance and advice on customs issues and challenges
http://www.irishexporters.ie/

The US CBP maintains a data base of common questions and answers that can be searched by topic:
https://help.cbp.gov/

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