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BUSINESS ENTERPRISES WITH FOREIGN PARTNERS

June24, 2009

This memorandum was prepared for a client who owns a US company and who was considering a joint venture[1] in the State of Florida with a non-US individual. The venture entailedacquisition of US real property for the purpose of lease or resell. Because the legal and business conceptsdiscussed are of general application, and because foreign investment in US real estate is of the moment, the key points of the memorandum are set forth herein for public benefit.

Note that the best course of action with respect to many of these issues—probably most, in fact—must be determined by carefully considering the specific circumstances of each party involved and/or each acquisition. Therefore, please do not consider the following information as legal advice for your particular transaction(s). Rather, this memorandum is meant to provide guidance in terms of the steps involved and the important issues to address.

I. Entities & Liability

You have several options with respect to formation of the entity or entities that will actually make the acquisitions, and each option has its particular advantages/disadvantages.

a. Ongoing Concern. The parties can form an American company to make the acquisitions, and provide for the terms of their arrangement in the company's operating agreement. This approach is fairly common, straight-forward, and cost-effective. One disadvantage might be that a newly formed company may have difficulty obtaining financing from a lending institution. Over time, of course, the company will build up credit-worthiness. Also, liability to creditors and parties suing the company would potentially attach to all of the company's assets. By way of illustration, imagine the company owns ten (10) properties. In the event a dispute arises with a third-party over one of the properties, there is the chance that damages will not be limited strictly to the one property in question. Rather, the third-party might potentially attach the company's other assets, such as the other nine properties.

b. Separate Ventures. In order to limit liability, you may prefer to create a separate entity for each acquisition. By that means creditors and suing parties will be limited to the assets available in each separate acquisition. Such an approach would traditionally be accomplished through the use of separate trusts. Nowadays, limited liability companies, which are inexpensive and simple to form, can be used for the same purpose.

c. Subsidiary or Division. Where brand recognition or creditworthiness is important, considering creating a wholly-owned subsidiary or new division of your existing company. In this scenario, the parties would

[1] In fact, the use of the term "joint venture" may not be entirely correct since this memo discusses several different ways to structure the enterprise, including formation of a company. The term as used herein, therefore, is interchangeable with "joint enterprise."

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be partners in the new company or division, which would operate under the umbrella of the established company. This method can also be useful in satisfying laws against foreign ownership, etc. The downside is liability exposure.

II. Partner Contributions;Funds for Acquisitions

Depending upon what structure you use, you have the following possibilities.

a. The funds could be held in the company's bank account.

b. The funds could be held by the investor until needed for individual purchases.

c. The funds could be escrowed with a third party, who would be given instructions regarding the release of funds.

III. Taxation

Under the US tax code, foreign investors are liable for US taxes on any profits made by ventures within the US even if the investor (i) does not reside in the US, and (ii) is not a US citizen. In the case of a US citizen living abroad, the tax liability is even more onerous in some respects. There may be means of limiting the tax liability through the use of holding companies, off-shore accounts, etc. However, such matters are quite complex and must be discussed on a one-to-one basis. This firm has a certain level of expertise in these matters, and we also collaborate with international tax accountants.

As a final note, please be aware that there are a myriad of important provisions that must be included in whatever agreement the parties establish between them (*i.e.* joint venture agreement, operating agreement, corporate charter, escrow instructions, etc.). There is no shortage of disputes arising between foreign parties, and the party with the legitimate complaint is almost always the one to suffer the consequences of not having a written agreement prepared by a competent international lawyer. The reason for this involves the cost and delay involved in international litigation, as well as other factors such as political/judicial corruption, etc. I cannot over-emphasis the importance of a well-written agreement in such ventures, one which considers such things as choice of law, choice of forum, arbitration, asset protection, etc.

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