DOING BUSINESS

IN SOUTH CAROLINA

A Legal Guide Prepared by:
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Wyche Burgess Freeman & Parham, P.A.

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Our general counsel representation includes a significant number of the publicly traded corporations headquartered in South Carolina as well as many privately held businesses. Over the years, we have become trusted advisors and counselors to many of our clients.

Our corporate practice includes leveraged buy-outs, recapitalizations, public and private offerings, securities compliance, debt refinancings, economic incentives, revenue bond financings, and mergers and acquisitions. These transactions range from relatively small amounts to billion-dollar deals.

We also engage in complex civil litigation in state and federal courts, including substantial class action work. We regularly handle matters in areas such as antitrust, First Amendment, securities, corporate governance, insurance practices, copyrights, patents, and trade secrets.

In addition to the areas just mentioned, the firm advises and litigates on behalf of clients in numerous areas, including bankruptcy, communications, construction, employment, employee benefits, environmental, financial institutions, health care, probate, commercial real estate, taxation, intellectual property, and trade regulation.

At the same time, we have an extensive practice relating to the needs of individuals, ranging from estate planning to immigration matters.

Wyche attorneys have law degrees from Harvard, Yale, the University of Virginia, Columbia, and other leading law schools. Many of our attorneys were law review editors; collectively, our attorneys have earned a bounty of academic honors. Several of the firm's attorneys have held clerkships in the United States District Court, the Court of Appeals or the United States Supreme Court. More than two-thirds of the members of the firm were selected for the 2007 edition of *The Best Lawyers In America.*

Members of our firm have been actively involved in many major projects that have enhanced the quality of life in South Carolina. Wyche Burgess Freeman & Parham, P.A. is one of the oldest law firms in South Carolina and has been recognized by *The American Lawyer* as one of the 13 great small law firms in the United States.

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I. INTRODUCTION

A. GEOGRAPHIC DESCRIPTION

South Carolina's varied geography is one of its chief attractions. This southeastern state extends more than 200 miles inland from the Atlantic Ocean to the foothills of the Blue Ridge Mountains. The State has three geographic regions -- the coastal plains or Low Country, the Midlands, and the foothills or Upstate. The three largest urban areas are Charleston on the coast, Columbia in the Midlands, and Greenville-Spartanburg in the Upstate. The state is about 31,000 square miles and has a population of 4.1 million.

B. INVESTMENT CLIMATE

South Carolina is one of the fastest-growing states in the nation and is proud of its dynamic, pro-business atmosphere. This friendliness to business, coupled with the pleasant Southern lifestyle, strategic location, low cost of living, and healthy growth, make South Carolina a magnet for business. South Carolina's corporate income tax rate is an attractively low 5%, one of the lowest in the Southeastern United States.

Investments by companies with 50 or fewer employees make up approximately 15% of the State's total capital investment. South Carolina recognizes the important role of small businesses in driving its economy and offers the same pro-growth incentives to both small and large manufacturers and companies.

South Carolina also enjoys an ever-broadening mix of cultures, traditions, languages, foods and customs. Enterprises from Germany, Japan, France, Switzerland, Taiwan, the United Kingdom, Sweden, the Netherlands, Italy, China, Brazil, Canada, Chile, Denmark, Finland, Ireland, Luxembourg, Mexico, Norway, South Africa, Spain, and Korea have all invested in South Carolina, bringing a multi-national dimension to the economy and social values of the State.

Once driven by agriculture and textiles, South Carolina's economy has expanded to include substantial tourism, automotive, financial services, health care, foreign and domestic business investments, as well as a $3 billion up-and-coming "sunrise industry" generated by newly arrived families and retirees. Economic diversification is one of the key principles of South Carolina's economic development strategies.

During the past several years, thousands of diversified corporations, representing billions of dollars and thousands of new jobs, have invested in South Carolina. Some of the largest include Fuji Photo Film, Michelin, BMW, Kimberly-Clark, Eastman Chemical, Martek Biosciences, SKF USA, Westinghouse Electric, Nucor Corporation,

Sterilite Corporation, Trane Company, Suminoe Textile Co. LTD., Velanite Inc., APAC Teleservices, Interactive Performance, Bigger Brothers, Georgia-Pacific, Wells Fargo, and National Car Rentals, to name just a few.

The pro-business environment in South Carolina is encouraged through right-to-work legislation. Non-agricultural union membership is among the lowest in the country. South Carolina workers are some of the country's most productive – time lost to work stoppage is well below the national average.

South Carolina tourism is an approximately $15 billion industry that employs an estimated 200,000 people. National surveys of families who vacation at golf destinations routinely rank South Carolina first or second in consumer preference. The State also has one of the highest numbers of Top 50 tennis resorts in the country. The Department of Tourism actively attracts visitors from all over the United States to enjoy South Carolina's outstanding vacation opportunities, from the beauty of wilderness mountains and lakes in the Piedmont to the expansive beaches on the Coast.

Market access is another asset. Located halfway between New York and Miami and midway between Charlotte and Atlanta, South Carolina is within 750 miles of two-thirds of all United States markets. The State is served by 42,000 miles of highways, 11 commercial airlines, 2,500 miles of rail, the Southeastern UPS hub in Columbia, a large Federal Express facility at the Greenville-Spartanburg International Airport, and the port of Charleston – the most preferred Port on the south Atlantic coast.

C. EDUCATIONAL FACILITIES

South Carolina has 34 four-year universities and colleges, 16 technical colleges, four two-year campuses of the University of South Carolina, and several private junior colleges.

The University of South Carolina, founded in 1801 as South Carolina College, was the first state-supported college in the State and the third in the nation. The university has a system of eight campuses that includes four-year schools in Aiken, Beaufort, and Spartanburg. The main campus in Columbia has approximately 25,000 students, with more than 350 degree programs. *U.S. News and World Report* ranked USC's Moore School of Business Masters of International Business Program number one or two in the nation for 15 consecutive years. The Columbia campus has a law school and a medical school. There is also a medical/dental school in Charleston.

Clemson University, a land-grant college established in 1889, is known for its programs in engineering, tourism, agricultural science, and architecture. It offers 80 undergraduate and 100 graduate degree programs through its five academic colleges.

The College of Charleston was the first municipal college in the nation and is the 13th oldest college in the United States. Founded in 1770, it is now a state-supported institution of about 9,000 students.

Winthrop in Rock Hill, Lander in Greenwood, Coastal Carolina in Myrtle Beach-Conway, Francis Marion in Florence, The Citadel in Charleston, and South Carolina State in Orangeburg are other state-supported institutions of higher learning.

The State is home to a number of respected private colleges and universities, including Furman University, Presbyterian College, Wofford College, Erskine College, Converse College, Columbia College, Southern Wesleyan University, and Coker College.

D. STATE GOVERNMENT

The South Carolina Constitution provides for three branches of government: the Executive, Legislative, and Judiciary. The Legislative branch of government has historically dominated government in the state. The Legislature, called the General Assembly, has two houses, the Senate (46 Senators) and the House of Representatives (124 Members). Legislators are elected locally and serve either four-year terms (Senators) or two-year terms (House Members).

The Executive branch is headed by the Governor. South Carolina also has a part-time Lieutenant Governor who serves as ex-officio President of the Senate. The Executive Department includes the Governor, Lieutenant Governor, Secretary of State, State Treasurer, Attorney General, Solicitors, Adjutant General, Comptroller General, State Superintendent of Education, Commissioner of Agriculture, and the Chief Insurance Commissioner.

The Judiciary includes the Supreme Court, the Court of Appeals, the Circuit Courts, Family Courts, and Probate Courts. Except for Probate Courts, judges are elected for specified terms by the General Assembly and are eligible for re-election. Probate Court judges are popularly elected in each county.

The government of South Carolina also includes a legion of departments, divisions, boards, commissions, and committees that have inspection, regulatory, police, and enforcement powers, many of which directly influence business and commercial operations in the State.

The House of Representatives annually prepares the South Carolina Legislative Manual that details all the Executive, Legislative, and Judicial members of government then in office, as well as a wealth of information related to South Carolina government and the State of South Carolina. You may acquire a copy of this manual from Sandra McKinney, Clerk of the House of Representatives for the State of South Carolina, Post Office Box 11867, Columbia, South Carolina 29211, phone 803-734-2010. The cost is $5.00.

E. Legal System

Like most states of the United States, South Carolina has a common law legal system, with deep roots in English common law.

II. BUSINESS ENTITIES

Eric B. Amstutz, Lawson M. Vicario, Melinda Davis Lux

A. Corporations

1. State of Incorporation. The South Carolina Business Corporation Act was substantially revised and modernized in 1988. As a result, a corporation having its principal facilities in South Carolina will find it convenient and efficient to incorporate in this State. The act is derived from the 1984 Model Business Corporation Act. ***See Title 33 S.C. Code.***

2. Corporate Formation. A South Carolina corporation may be formed with a minimum of formality. Articles of Incorporation must be signed by one or more incorporators and filed with the Secretary of State of South Carolina in Columbia. There is a filing fee of $135, which includes initial tax and license fees. An Initial Annual Report for the Department of Revenue must accompany the filing of the Articles. An attorney licensed to practice law in South Carolina must sign a certificate certifying that the requirements of incorporation have been complied with. If the members of the initial Board of Directors are not named in the Articles, the incorporators elect the initial Board. The incorporators or initial Board complete the organization process by appointing officers and adopting Bylaws for the corporation.

3. Articles of Incorporation. The Articles of Incorporation are a matter of public record. They must specify the name of the corporation, the number and classes of authorized shares, the initial registered agent and the street address of the initial registered office, and the name, address, and signature of each incorporator. Other provisions may be included, such as names and addresses of the initial directors, corporate purpose, and provisions defining, limiting, and regulating the affairs of the corporation. Unless the Articles provide otherwise, certain statutory provisions will apply to the corporation, including preemptive rights for shareholders and cumulative voting for elections of directors. Once shares are issued, substantive amendments to the Articles may be made only with shareholder approval.

4. Name. The corporate name must contain the word "corporation," "incorporated," "company," or "limited," or an abbreviation of one of these words, and the name must be distinguishable from names of other corporations doing business in South Carolina. Prior to incorporation, one can reserve a corporate name with certain

limitations. A foreign corporation may register its name for exclusive use in South Carolina so long as the name is distinguishable from other corporate names and the corporation satisfies initial and annual filing requirements.

5. Bylaws. The Bylaws are not a matter of public record. The Bylaws usually contain detailed provisions for governance of the corporation, dealing with such matters as meetings of shareholders, meetings of directors, election and authority of officers, and indemnification of directors and officers. The Bylaws may be amended by the directors except for certain amendments that require shareholder approval, including amendments relating to certain specialized voting requirements or limits on powers of the Board of Directors. Also, the Articles of Incorporation may restrict or deny the directors' power to amend the Bylaws.

6. Share Capital. Shares of capital stock may be issued for any consideration deemed reasonably sufficient by the Board, including services performed. For services to be performed and promissory notes, shares may be issued but, except in certain circumstances for corporations with publicly registered stock, must be held in escrow until completion of services and payment. The number of authorized shares specified in the Articles of Incorporation limits the number of shares that may be issued. There is no obligation for a corporation to issue all authorized shares. A corporation may issue two or more classes of shares having different rights and preferences, although at least one class of stock must have unlimited voting rights and at least one class must be entitled to receive the corporation’s net assets on dissolution.

7. Meetings of Shareholders and Directors. South Carolina law provides for annual meetings and special meetings of shareholders. Shareholders may also act by unanimous written consent in lieu of meeting. The Board of Directors, which may consist of one or more directors, elects officers and determines the general business direction and policies of the corporation. Directors need not be citizens or residents of the State of South Carolina or of the United States. Directors may act by unanimous written consent in lieu of meeting. Board meetings may also be conducted by any means by which each participant can hear each other, including telephone conference calls. South Carolina has rules requiring notice, and permitting waiver of notice, of shareholder and director meetings, and governing the conduct of such meetings, which are similar to those of most states.

8. Authority of Shareholders, Directors and Officers. A vote of the shareholders is required on certain fundamental matters, such as mergers, substantive amendments to the Articles of Incorporation, certain Bylaw amendments, election of directors, the sale of substantially all assets, and dissolution. Other matters may be voted on by the Board, including most types of amendments to the Bylaws, payments of dividends, issuance of authorized capital shares, corporate loans, and other significant transactions outside the ordinary scope of the day-to-day business. The Board also elects officers. These are usually a President, one or more Vice Presidents, a Secretary, and a

Treasurer. There also may be a Chairperson of the Board, a Chief Executive Officer, a Chief Operating Officer, a Chief Financial Officer, and one or more Assistant Secretaries and Assistant Treasurers. Two or more offices may be held by the same person. Officers need not be citizens or residents of the State of South Carolina or of the United States.

9. Limited Liability. Corporate shareholders, as such, are generally not liable for corporate obligations, unless they agree to guarantee such obligations or unless a court finds that the corporate form should be ignored because the shareholders acted in a manner that disregarded corporate formalities and responsibilities.

10. Indemnification. South Carolina law follows the Model Act and allows for indemnification of officers and directors who act in good faith and on reasonable belief by the officer or director that he/she is acting in the best interests of the corporation. A corporation may provide and maintain insurance on its directors, officers, and employees. Directors are required by law to be indemnified for all reasonable expenses associated with a successful defense of any proceeding in which they were a party.

11. Annual Reports. Corporations organized in South Carolina or otherwise authorized to do business in South Carolina must file an annual report each year with the Department of Revenue setting forth certain nonfinancial information, including the names and addresses of its key officers and directors. An initial annual report is to be filed with the filing of the Articles of Incorporation. Also, corporations are required to furnish shareholders an annual financial statement, and shareholders have the right to inspect shareholder lists.

12. Books and Records. Corporations are required to have on file with its registered office certain tax returns and other corporate documents or at least copies of same.

13. Taxation. Corporations are generally taxable entities subject to both federal and South Carolina tax. Income and license taxes apply.

14. Foreign Corporations. A corporation not incorporated under South Carolina law may not transact business in South Carolina until it obtains a Certificate of Authority from the Secretary of State. The application for a Certificate of Authority must include the name of the corporation, its state or country of incorporation, the date of incorporation and period of duration, the street address of its principal office, a proposed registered agent and office for South Carolina, names and addresses of its directors/officers, and information on authorized shares. The foreign corporation shall file with the application a Certificate of Existence duly authenticated by the Secretary of State or other official having custody of the records in the state or country under whose law it is incorporated. An initial annual report must also be filed, with annual reports each year thereafter.

The following activities in South Carolina, among others, do not require a Certificate of Authority from the Secretary of State:

1. Maintaining, defending, or settling any proceeding;

2. Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;

3. Maintaining bank accounts;

4. Maintaining offices or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositories with respect to those securities;

5. Selling through independent contractors;

6. Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;

7. Creating or acquiring any indebtedness, mortgages, and security interests in real or personal property;

8. Securing or collecting any debts or enforcing mortgages, security interests, or any other rights in property securing debts;

9. Owning, without more, real or personal property;

10. Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature;

11. Transacting business in interstate commerce; or

12. Owning and controlling a subsidiary corporation incorporated in or transacting business within this state.

A foreign corporation that fails to register will be liable in an amount equal to all fees and taxes that would have been imposed upon the corporation if it had registered, plus interest and penalties, and it cannot maintain any action, suit, or proceeding in any court of this State until it has registered.

15. Statutory Close Corporations. South Carolina has adopted a South Carolina Close Corporation Supplement which closely follows the Model Statutory Close Corporation Supplement. Corporations can elect close corporation status either in their initial Articles of Incorporation or by amending their Articles, in which case a two-thirds

affirmative vote of all shareholder classes is required. Dissenting shareholders are given dissenters' rights in connection with that vote. Statutory close corporation provisions are designed to ease governance requirements for closely held entities: for instance, statutory close corporations can eliminate the board of directors and set voting rights by shareholder agreement or in the Articles of Incorporation, and there is no requirement of bylaws or of holding an annual meeting absent shareholder request. The close corporation supplement provides default share transfer restrictions that apply unless the Articles specify otherwise, as well as default provisions for corporate repurchase of shares on the death of a shareholder if the Articles so provide. The primary benefit of statutory close corporations is to permit a partnership style of governance within a corporate limited liability framework. This benefit has paled with the advent of the limited liability company.

16. Non-Profit Corporations. South Carolina has adopted the Revised Model Non-Profit Corporation Law with some variances. The Articles of Incorporation must include certain language, including a statement that the corporation is either a public benefit corporation, mutual benefit corporation or a religious corporation, designation of an initial registered agent and address, the name and full address of each incorporator, whether or not the corporation will have members, provisions for the distribution of assets on dissolution, and the address of the principal office. The principal office does not have to be in South Carolina. The Articles of Incorporation may include other provisions. The Articles must be signed by each incorporator and director, and the filing fee is $25. The Attorney General is authorized to investigate the non-profit status of any such corporation, and there are limitations on the solicitation of charitable funds.

B. PARTNERSHIPS

1. General Partnership. A general partnership is an association of two or more individuals or entities operating a business for profit. General partnerships in South Carolina are governed by the provisions of the Uniform Partnership Act. ***See Title 33, Chapter 41*, *S.C. Code***. Any lawful business may be conducted in the general partnership form. Generally, there is no requirement of formality or registration in the formation of a general partnership. (Special provisions for registered limited liability partnerships are detailed below.) No partnership agreement is required, and the terms of the partnership agreement may be written or oral. Good practice suggests a written agreement if the partnership business is substantial. The partnership may need to register in each county in which it conducts business by a filing with the Register of Deeds of the county or the Clerk of Court. There is no limit on the number of partners that may exist in a general partnership. Natural persons, corporations, and other entities may be partners.

In a general partnership, all partners are jointly and severally liable for the debts and obligations of the partnership, including those stemming from the acts of other partners and agents of the partnership. Each partner is generally authorized to act on behalf of the partnership. While each partner has a right in specific partnership property,

the partners may deal with partnership property only in accordance with the Uniform Partnership Act and the terms of the partnership agreement. The partnership itself is not a taxable entity, and partnership income, gains, and losses pass through to the partners for federal and South Carolina income tax purposes.

There are no publication, annual report, or other statutory reporting requirements for general partnerships.

In 1994, South Carolina created the form of registered limited liability partnerships (or "LLPs"). These are general partnerships that have registered for LLP status. Registration requires filing, both initially and each year (within a 60-day window prior to expiration of the prior year's application), an application containing the partnership's name, principal office address (and, if this is outside South Carolina, a registered office address and name and address of a registered agent for service of process), the number of partners, a brief statement of the partnership's business, and that the partnership is applying for or renewing its status as a registered LLP. Each application requires a $100 fee. A registered LLP must add "Registered Limited Liability Partnership" or "L.L.P." to the end of its name. In South Carolina, partners of registered LLPs have limited protection from liability, avoiding liability that arises from negligence or misconduct by another partner or the partnership's employees or agents that were not supervised or controlled by the partner. Each partner of a registered LLP retains liability for his or her own torts (and torts of people supervised or controlled by him or her) and for entity contract liabilities. There are special liability rules for registered LLPs providing professional services.

2. Limited Partnership. A limited partnership is an association composed of one or more general partners with unlimited liability and one or more limited partners who are generally not liable for obligations of the partnership. Limited partnerships in South Carolina are governed by the provisions of the Revised Uniform Limited Partnership Act. ***See Title 33, Chapter 42, S.C. Code.***

Limited partners have a passive investment and do not participate actively in management and control of the business of the limited partnership. Management of the partnership's activities is performed by the general partners. If a limited partner participates in the management of the partnership business in substantially the same manner as a general partner, the limited partner will have unlimited liability in the same manner as the general partner. If a limited partner takes part in the control of the business, he or she is liable to persons who transact business with the partnership with actual knowledge of such participation in control. Certain discrete activities for the partnership may be carried out by limited partners without affecting limited partner status, such as acting as an agent, consultant or surety, or exercising voting rights on certain matters.

Unlike general partnerships, limited partnerships are subject to various registration and other formal requirements. In order to form a limited partnership, a

certificate must be filed with the Secretary of State of South Carolina in Columbia, setting forth the name of the limited partnership, the address of its office, the name and street address of the registered agent, the names and addresses of each general partner, the latest date of dissolution, and other matters the partners deem appropriate. The filing fee is $10.00. If a limited partnership intends to conduct business in South Carolina under a name other than the name shown on its certificate of limited partnership, it shall file with the Secretary of State an assumed name certificate. LP, L.P. or "limited partnership" must be included in the name of the limited partnership. Generally, the partnership itself is not a taxable entity, and partnership income, gains, and losses pass through to the partners for federal and South Carolina income tax purposes.

A limited partnership organized outside of South Carolina must be registered with the Secretary of State before doing business in South Carolina. The registration application must set forth the name and address of a registered agent for service of process in South Carolina, as well as certain other required information.

The name of a limited partnership is subject to name clearance procedures similar to corporations. A name may not be registered unless it is sufficiently unique to permit separate indexing in the limited partnership records. The limited partnership name may not contain the name of a limited partner unless (i) it is also the name of a general partner or the corporate name of a corporate general partner or (ii) the business of the limited partnership has been carried on under that name before the admission of that limited partner.

Subject to the terms of the certificate of limited partnership or partnership agreement, a limited partnership may be dissolved upon the written consent of all partners, upon an event of withdrawal of a general partner, or pursuant to entry of a decree of judicial dissolution. Assignment of limited partnership interests is permissible unless restricted by the partnership agreement.

To date, South Carolina has not created any statutory form of limited liability limited partnership.

C. SOLE PROPRIETORSHIP

A sole proprietorship – an individual doing business for his or her own account – is the most informal form of business organization. A sole proprietorship may be formed without any expense or formality of organization whatsoever.

A sole proprietorship is not an entity distinct from the owner, and accordingly, the owner will be subject to unlimited liability with regard to the debts of the business. Given the option of creating a single-member limited liability company with a liability shield and taxation as a sole proprietorship (unless the member specifies otherwise), the attraction of the sole proprietorship form is minimal.

D. LIMITED LIABILITY COMPANY

1. General. A limited liability company (or "LLC") consists of one or more persons and has features of both a corporation and a partnership. Like a corporate shareholder, a member or manager of an LLC is generally not personally liable for obligations of the business. An LLC is taxed for federal and South Carolina income tax purposes as a partnership (for multiple member LLCs) or sole proprietorship (for single-member LLCs) unless the LLC affirmatively elects to be taxed as a corporation. This means that profits of the business are typically taxed only once at the owner level. In addition, a hallmark of LLCs is flexibility, with the option to follow elements of corporate-style or partnership-style governance. LLCs in South Carolina are governed by the provisions of the Uniform Limited Liability Company Act of 1996, which follows closely the Uniform Limited Liability Company Act. ***See Title 33, Chapter 44, S.C. Code*.**

2. Articles of Organization. Organizing an LLC requires the filing of Articles of Organization by one or more persons with the South Carolina Secretary of State with a $110 filing fee. The Articles must contain a satisfactory name, the address of the initial designated office, name and street address of the initial agent for service of process, the name and address of each organizer, whether the company is to be a term company and, if so, the specified term, whether the company is to be manager-managed (and, if so, the name and address of each initial manager), and whether one or more members will be liable for the LLC's debts and obligations. Unless the Articles provide for manager-management, the LLC will be managed by its members. Members will be authorized to sell the LLC's real estate assets unless the Articles provide otherwise.

3. Reporting Obligations. There are no ongoing reporting obligations for LLCs.

4. Name. The name of a limited liability company must contain "limited liability company" or "limited company" or the abbreviations. "L.L.C.", "LLC", "L.C." or "LC". "Limited" may be abbreviated as "Ltd." and "company" as "Co." Name restrictions and provisions for reservation and registration are otherwise similar to those for corporations.

5. Operating Agreement. The powers, duties, and obligations of the members or managers and other matters respecting the LLC may be set out in an operating agreement. The operating agreement is not a matter of public record. Generally, members have flexibility with respect to operating agreement provisions, though there are a few statutory restrictions on operating agreement provisions: the agreement may not eliminate the statutory duties of good faith and fair dealing or of loyalty, unreasonably reduce the statutory duty of care, unreasonably restrict statutory rights to information or access to records, vary the right to the judicial expulsion of a member for wrongful acts, vary the requirement to wind up the LLC's business under some circumstances, or restrict rights of third parties. South Carolina has "gap-filler" statutory provisions relating to LLC management, distributions, powers of members and management, rights to

information, and standards of conduct, among other things, but the operating agreement can provide different provisions, subject to the relatively limited statutory restrictions noted above.

6. Management. Management will vary depending on the nature and choices of the LLC. An LLC can choose to adopt a corporate-style governance with passive equity owners, a "board" and "officers", a general partnership-style governance with independent equal agents of the LLC, a limited partnership-style governance with general-partner-like managers, and passive "limited" members, or to combine elements of any of these, as well as different or novel elements.

7. Foreign LLCs. An LLC organized outside of South Carolina must be registered with the Secretary of State before transacting business in South Carolina. The registration application must set forth the name and address of a registered agent for service of process in South Carolina, as well as certain other required information.

E. JOINT VENTURE

There is not a statutory form of organization in South Carolina for joint ventures. A joint venture is essentially a partnership, but the focus is normally on one project or effort. General principles of partnership law govern rights and responsibilities of parties involved in a joint venture.

F. BUSINESS TRUSTS

These are little used in South Carolina and then primarily in connection with real estate holdings. There is a limited statutory scheme governing the creation and operation of business trusts, and filings are required with the Secretary of State and in the county of its principal place of business in South Carolina. ***S.C. Code Ann. §§ 33-53-10, et seq.***

G. ADDITIONAL FORMALITIES

No matter what form of organization is selected, the business entity (other than a sole proprietorship or LLC taxed as a sole proprietorship) must obtain a federal taxpayer identification number, and local business permits or licenses may be required. Other decisions which must be made include, among others, means of providing for workers' compensation, types and extent of property and liability insurance coverage, and types of employee benefit plans and means of funding. If the business is to be conducted under an assumed name, the assumed name may need to be registered with the Register of Deeds or Clerk in each county in South Carolina in which the business is to be conducted.

III. FEDERAL TRADE REGULATION

Henry L. Parr, Jr.

A. THE SHERMAN AND CLAYTON ACTS. *TITLE 15, U.S.C.*

These Acts prohibit contracts, combinations, or conspiracies in restraint of trade, as well as certain monopolies and monopolistic practices.

1. Sherman Act Section 1. This Act prohibits, among other things, the following agreements between competitors as illegal horizontal restraints of trade:

- Agreements to fix prices. The prohibition against price fixing is the most serious and most strictly enforced rule under the statute. It prohibits agreements among competitors which affect the price at which a product or service is sold. The agreement can be informal and indirect; mere acquiescence to a price fixing scheme may make one liable for price fixing.
- Agreements to allocate territories or customers.
- Agreements to boycott third parties.
- Agreements to restrict output.

The following practices which typically occur between a manufacturer and its distributors or customers are held, under certain circumstances, to be illegal vertical restraints of trade:

- Attempts by manufacturers or distributors to impact minimum resale prices, *i.e.*, an agreement between a seller and its customers (*e.g.*, dealers, distributors, wholesalers) to maintain the resale price of the seller's goods at a certain minimum level.
- Attempts to tie the sale of two distinct products. A tying arrangement exists when a seller agrees to sell a product or service (the "tying" product) on the condition that the buyer also purchases a different product or service (the "tied" product) or agrees not to purchase that product or service from any other supplier. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms.
- Attempts by a seller to require exclusive dealing or requirements contracts.
- Attempts by a manufacturer to limit dealer territories or customers.

- Attempts to sell only on the condition that the purchaser not use or deal in the goods of a competitor of the seller.

2. Sherman Act Section 2/Clayton Act Section 7. These provisions prohibit monopolization and attempts or conspiracies to monopolize. Among other things, courts have found predatory pricing to be evidence of intent to monopolize. Predatory pricing is pricing below some appropriate measure of cost with the purpose of profiting later by destroying competitors. The Acts also forbid mergers and acquisitions which might tend to create monopolies or to lessen competition.

B. THE ROBINSON-PATMAN ACT. *TITLE 15, U.S.C.*

This Act prohibits price discrimination between competing customers of the seller's products where such discrimination might lessen competition among (i) the seller and its competitors or (ii) the favored customer and its competitors.

C. THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENT ACT *15 U.S.C. §§ 1311, ET AL.*

The Hart-Scott-Rodino Antitrust Improvement Act requires parties to certain acquisitions (including tender offers), mergers, or joint ventures to give notice to the Justice Department and Federal Trade Commission on prescribed forms prior to consummation of the transaction. Whether a notice is required is determined by a formula contained in the Act and the regulations promulgated under it. The key factors are the size of the parties and the value and percentage of the assets of the acquired party that are being acquired. The Act requires a minimum of a 30 day waiting period after the filing before the transaction may be consummated, but for certain transactions an early termination of the waiting period is possible. Failure to file may result in fines up to $10,000 per day. Currently a non-refundable filing fee of $45,000 to $280,000 (depending on the size of the transaction) is required from the acquiring party for each proposed transaction.

D. THE FEDERAL TRADE COMMISSION ACT. *TITLE 15, U.S.C.*

This Act bars unfair methods of competition and unfair and deceptive acts or practices. Among other things, courts have found such acts to include false and misleading advertising, false disparagement of competitors or their products, and commercial bribery.

E. PENALTIES

Criminal violations of the antitrust laws can bring felony prison sentences of up to ten years and fines of up to $100 million for corporations and $1,000,000 for individuals. Even larger fines may be imposed pursuant to the Comprehensive Crime Control Act and the Criminal Fine Improvements Act, ***18 U.S.C. §§ 3571-3572***, which provide that the fine may be increased to twice the gain from the illegal conduct or twice the loss to the victims. Civil actions under the antitrust laws can allow injured firms and individuals to recover treble damages and attorneys' fees.

IV. STATE TRADE REGULATION

Amos A. Workman

A. STATE ANTITRUST LAW IN SOUTH CAROLINA. *S.C. Code Ann. §§ 39-3-10, et seq.*

South Carolina has specific antitrust statutes similar to federal statutes. A business operating in South Carolina, or whose operations affect South Carolina, is subject to those statutes and must recognize that certain conduct detrimental to free-market competition may violate those statutes. The South Carolina Attorney General is authorized to investigate and prosecute violations of any of the State's antitrust and unfair competition laws. The Attorney General can also pursue civil actions and seek injunctive relief. Violators could also forfeit their corporate charter. Private civil actions against an offender are also allowed.

There are also statutes affecting the marketing of specific products and they should be consulted. ***See, generally, Title 39 of the S.C. Code***.

B. UNFAIR AND DECEPTIVE TRADE PRACTICES. *S.C. Code Ann. §§ 39-5-10, et seq.*

South Carolina also has an Unfair Trade Practices Act which has generated much litigation. §39-5-20(a) states: "Unfair methods of competition and unfair or deceptive practices in the conduct of any trade or commerce are hereby declared unlawful." The Attorney General and private citizens (in public interest is involved) may enforce this statute, and the successful party could recover treble damages, legal fees, and costs. Civil penalties and injunctive relief are also available, and corporations found to be liable could lose their charter.

There are other statutes that also speak to fair trade practices, and they should be consulted.

C. SOUTH CAROLINA CONSUMER PROTECTION CODE/DEBT COLLECTION. *Title 37, S.C. Code.*

South Carolina has enacted a version of the Uniform Consumer Credit Code to protect consumers making credit sales and loans. The Attorney General, The South Carolina Department of Consumer Affairs, and The South Carolina Board of Financial Institutions have authority to investigate and penalize violations and to file suit in certain cases. Private causes of action are also available.

South Carolina also has extensive debt collection laws that restrict debt collection practice. South Carolina is generally a debtor-oriented state, and collection of debts and judgments is limited because of this statute and other applicable law, especially with respect to debts of individuals. Reference is also made to federal statutes limiting debt collection. ***15 U.S.C. §§ 1692, et seq.***

D. REGULATION OF FRANCHISES; BUSINESS OPPORTUNITY SALES ACT. *S.C. Code Ann. §§ 39-57-10, et seq.*

South Carolina does not regulate the sale of franchises as such. However, the Business Opportunity Sales Act is broadly written to cover the sale of many franchises. A "business opportunity" is the sale or lease of products, equipment, supplies, or services for the purpose of enabling the purchaser to start a business and in which the seller makes certain representations, including that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity, or that the seller will provide a sales program or marketing plan to the purchaser.

Most, if not all, franchises involve a sales or marketing plan, which may include such topics as design and layout of store, uniforms for employees, signs and advertising that mention the franchised name, store hours, products sold, and sales techniques. Frequently, franchisors discuss potential sales or profits the franchisee may make. Accordingly, most franchises fall within the definition of "business opportunity" under South Carolina law.

South Carolina's Business Opportunity Sales Act is a "registration and disclosure law." There is also a surety requirement. The Act requires registration of business opportunities with the Secretary of State prior to their offer, as well as disclosure of certain prescribed information which must be delivered to prospective franchisees within prescribed periods of time before sale. Many franchises and business opportunities are exempt from South Carolina's registration requirement, including incidents where the seller has a net worth of ten million dollars.

Failure to comply with the Act may result in civil and criminal liability.

E. Covenants Not to Compete

In South Carolina, covenants not to compete are generally disfavored, are critically examined, and are strictly construed against an employer. However, South Carolina courts will enforce certain covenants not to compete in employment contracts. In order to be enforceable, such covenants must be (1) in writing, (2) entered into at the time and as part of the contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. In order for a new covenant with an existing employee to be enforceable, there must be additional consideration to the employee in the form of increased salary, promotion, etc. In general, the South Carolina courts have been hostile to the enforcement of such covenants, particularly if they are viewed as unduly broad with respect to time or territory. The employer must show that the protection sought is limited to the protection of its legitimate interests. The courts have been more willing to enforce broad agreements not to compete in connection with the sale of a business. In cases where undue breadth of time or territory is found, the courts will typically refuse to enforce the covenant rather than rewrite the covenant in a more reasonable manner.

F. Sales Commissions

South Carolina has statutory authority governing payment of sales commissions due terminated salespersons. Actual and punitive damages (not to exceed three times actual damages) are recoverable, with attorneys' fees. ***See S.C. Code Ann. §§ 39-65-10, et seq.***

G. Miscellaneous

There is a legion of statutes in South Carolina that affect the establishment and operation of specific commercial enterprises. For example, there are laws regulating art prints, personnel agencies, and car dealerships. Many such statutes are archaic, but some are designed to meet current needs. These statutes should be consulted.

V. TAXATION

Cary H. Hall

A. Federal Income Taxation

Federal income taxes are not affected by where a business chooses to locate in the United States. There are various methods of controlling the amount of the United States

income tax payable, and many of these apply to domestic corporations as well as foreign owned corporations or foreign individuals.

1. Personal Income Tax. Individuals are subject to United States income tax on their worldwide income if they are United States citizens or resident aliens. Resident alien status is determined under a set of complex rules. Any individual who is not a United States citizen, and who does not wish to be taxed as such, and who plans to spend a substantial amount of time in the United States, should pay careful attention to these rules. Currently, the highest marginal United States individual income tax rate is 35% for ordinary income and 15 to 28% for long term capital gains. A nonresident alien generally is subject to tax on dividends from United States corporations, as discussed below.

2. Corporate Income Tax. If a foreign business chooses to operate in the United States through a corporation formed here, that corporation will be subject to United States income taxation on its worldwide income. Dividends from that corporation to foreign shareholders will be subject to United States income tax that will be withheld by the United States payor. The amount of that tax may be significantly reduced by treaty. United States branches of foreign businesses are taxed similarly to United States corporations owned by foreign shareholders. United States partnerships and limited liability companies withhold and pay the income tax applicable to foreign partners and members at United States rates.

B. State Taxation

The South Carolina Department of Revenue administers most taxes levied under the laws of the State of South Carolina. The Department of Revenue maintains a web site at which the Department's revenue rulings, information releases, forms, and publications are available. (http://www.dor.state.sc.us)

1. Income Taxation. South Carolina imposes an income tax on individuals and corporations who are residents of, doing business in or owning property in South Carolina under a system which closely conforms to the federal income tax system. In general the South Carolina income tax is imposed upon federal taxable income, with adjustments to take into account income which is not subject to South Carolina tax (*e.g.*, out-of-state income and interest paid by the federal government) and to take into account those areas where South Carolina income tax law differs from federal law (*e.g.*, South Carolina allows an income tax deduction of 44% of net capital gains realized from the sale of capital assets held for two or more years; no such deduction is allowed for federal income tax purposes).

Individuals are subject to a maximum marginal income tax rate of 7%. Corporations are subject to an income tax rate of 5%.

If a taxpayer is transacting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the business carried on within South Carolina. For most businesses this base is determined by "apportioning" the taxpayer's income from business carried on partly within South Carolina, with the amount apportionable to South Carolina being determined on the basis of an average of the percentage of the taxpayer's property, payroll, and sales in South Carolina. (In determining the average, the sales factor is "double weighted.") Certain items of income are directly allocated to South Carolina (*e.g.*, gains or losses from real estate located in South Carolina) without regard to apportionment.

Almost all entities which are treated as "pass through" entities for federal income tax purposes are also recognized as such for South Carolina income tax purposes. For instance, a partnership is generally not considered to be a taxable entity; its taxable income is passed through and taxable directly to its partners. Limited liability companies that are taxed as partnerships (*i.e.*, on a pass-through basis) for federal income tax purposes are also taxed as partnerships for South Carolina income tax purposes.

South Carolina imposes income tax withholding requirements in a manner similar to federal withholding requirements. Also, South Carolina imposes withholding requirements on sellers of South Carolina real property, on distributions by partnerships and "S" corporations to nonresident partners and shareholders, and on various other payments by residents to nonresidents.

2. Sales and Use Tax. South Carolina imposes a sales tax, which is an excise tax on the sale of goods and certain services in South Carolina. A use tax is imposed on goods and certain services purchased out of state and brought into South Carolina on which no sales tax has been paid. The statewide sales and use tax rate is 5%. Counties may impose an additional 1% local sales tax if voters in the county approve the tax. (As of 2003, twenty-seven counties imposed the additional 1% local option sales tax.) Generally, all retail sales are subject to the sales tax. However, a number of exemptions from the tax are available for certain types of property and transactions. For instance, sales of machines used in manufacturing personal property for sale are exempt. Also, upon the sale of a business when the purchaser will continue the business, the depreciable assets used in the operation of the business are exempt from sales tax. A maximum sales tax of $300 is imposed on the sale or lease of motor vehicles, motorcycles, boats, aircraft, trailers, and certain other types of equipment.

3. Accommodations Tax. The rental of hotel/motel rooms and other accommodations is subject to a 2% accommodations tax (in addition to the sales tax).

4. Corporate License Fee. Corporations must pay an annual license fee of .001% of the corporation's capital stock, paid in capital and capital surplus, plus $15 (but not less than $25).

5. Property Tax. South Carolina imposes *ad valorem* property taxes on all real and tangible personal property. This tax is generally administered and collected by local governments with the assistance of the Department of Revenue. The Department of Revenue directly assesses manufacturing, utility, railroads, carlines, airlines, and business personal property, with local governments billing and collecting the tax.

The actual rate of taxation is based upon two factors, the "assessment ratio" and the "millage rate." The assessed value of a property is determined by applying the assessment ratio to the value of the property. The applicable millage rate is then applied to the assessed value to determine the amount of the tax. Different classes of property have different assessment ratios, as follows:

Class of Property	Assessment Ratio
Manufacturing Property and Utility Property	10.5% of fair market value
Railroad, Private Carlines, Airlines and Pipelines	9.5% of fair market value
Legal Residence (and up to 5 acres of surrounding land)	4.0% of fair market value
Agricultural Property (privately owned)	4.0% of use value
Agricultural Property (corporate owned)	6.0% of use value
Other Real Estate	6.0% of fair market value
Personal Property	10.5% of depreciated cost

The millage rate is determined by the tax district and municipality, if any, in which the property is located. The millage rate is equivalent to the tax per $1,000 of assessed value; for instance, if the millage rate is 200 mills and the assessed value (after application of the assessment ratio) is $1,000, the tax is $200. By way of example, millage rates in taxing districts in Greenville County, South Carolina, in 2003 varied from 208 mills to 314 mills.

All businesses are required to file a business personal property tax return annually.

Certain classes of property are exempt wholly or partially from the property tax, including 1) inventories of manufacturers and merchants; 2) new manufacturing establishments, new corporate headquarters, new distribution facilities and new research facilities (but these exemptions are for five years and extend only to a portion of the property tax); 3) certain pollution control facilities; and 4) all intangible property.

6. Business License Fees. Some counties and municipalities also impose a business license fee upon businesses located or doing business within their jurisdictions. These fees are generally calculated as a percentage of the business' gross receipts.

7. Other Taxes. Special taxes are levied on certain specific enterprises and products such as banks, coin machines, alcoholic liquors, solid waste, and others. Insurance companies are subject to a tax administered by the South Carolina Department of Insurance.

Incentives: South Carolina offers a number of tax advantages to businesses, including:

1. South Carolina has no inventory taxes. All inventories not offered for sale or available for sale at retail, including raw materials, goods in process, and finished goods, are exempt from taxation. In addition, a manufacturer's inventory, whether produced in South Carolina or not, can be stored or warehoused in South Carolina and not be subject to inventory taxes under the same provisions.

2. All new or newly expanded manufacturing facilities and research and development facilities with a capital investment equal to or in excess of $50,000 and all new corporate headquarters, corporate office facilities, and distribution facilities with a cost equal to or greater than $50,000, or which create 75 or more new full time jobs, or 150 or more substantially equivalent jobs, are exempt for five years from all county property taxes, except those levied for public schools and certain special taxes.

3. South Carolina provides a sales tax exemption for machines used in the manufacturing or processing of tangible personal property for sale, repair parts to such machines, electricity and fuel used in manufacturing tangible personal property for sale, and materials which become an integral part of the finished product.

4. South Carolina exempts from both sales tax and property tax machines used in manufacturing which prevent or abate air or water pollution caused by other machines used in manufacturing tangible personal property.

5. South Carolina allows a 15-year carryover of net operating losses.

6. South Carolina follows the Internal Revenue Service's regulations on deductions for depletion and depreciation for state income tax purposes.

7. South Carolina does not have a unitary tax which taxes worldwide profits. Only United States profits attributable to operations in South Carolina are subject to the State corporate income tax rate of 5 percent.

8. Permanent businesses engaged in manufacturing, processing, warehousing, wholesaling, research and development, and service-related industries locating in this state are eligible for a jobs creation tax credit. (See Article X "Economic Incentives Available Under South Carolina Law.")

9. Real property owned by or leased to a manufacturer and used for research and development or as an office building will be assessed as "other property" at 6 percent of the fair market value, rather than being assessed as manufacturing property at 10.5 percent of fair market value. An office building may not be located on the premises or contiguous to the plant site of the manufacturer.

10. The maximum sales and use tax applied to each sale of a motor vehicle, motorcycle, boat, aircraft, trailer, or item of self-propelled light construction equipment is $300.

11. The maximum sales tax levied on the sale of certain machinery used for research and development is $300.

12. A taxpayer whose income tax liability increases due to an increase in foreign trade receipts may defer that portion for a period of up to five years. Although the tax may be deferred, the taxpayer must pay interest on the deferred amount at the Treasury-bill rate.

VI. EMPLOYMENT AND LABOR LAWS

J. Theodore Gentry, Mark W. Bakker, Patricia S. Ravenhorst

A. FEDERAL LAWS

A detailed exposition of the many federal laws affecting the employment relationship is beyond the scope of this guide. After a brief description of these laws that apply throughout the United States, we will turn to the particular laws of South Carolina.

1. Business Immigration. In the area of business immigration, there are two primary methods by which a foreign national may legally enter the United States for business and/or employment reasons: 1) a nonimmigrant visa and 2) an immigrant visa, more commonly known as legal permanent residency or the "greencard." Nonimmigrant visas are issued to those foreign nationals intending to enter the United States for only a limited period of time or temporarily. Immigrant visas, or greencards, are issued to those foreign nationals intending to live and work permanently in the United States. With only a few exceptions, foreign nationals can obtain a nonimmigrant or immigrant employment-based visa only through sponsorship by a specific United States employer.

In addition to employment-based visas, foreign nationals can also obtain legal permanent residency through a qualifying family relationship.

When planning to bring foreign personnel to the United States, United States employers should allow at least three to six months for processing of nonimmigrant visas and at least one to two years for the processing of immigrant visas by the United States Citizenship and Immigration Service (USCIS), as well as the United States Department of State (DOS) and the United States Department of Labor (DOL). Furthermore, employers should be aware that certain corporate changes, including stock or asset sales, job position restructuring, and changes in job duties, may dramatically affect (if not invalidate) the employment authorization of foreign employees.

The remainder of this section will briefly outline the basic requirements and benefits for the most common employment-based nonimmigrant and immigrant visa options available to foreign national employees and their employers.

a. Nonimmigrant Visas. In order to assist United States employers in obtaining the skills and talents of foreign national workers on a temporary basis, the United States immigration laws have created over 20 nonimmigrant employment-based visas, each specifically designed to meet a particular business need. These visa categories include the following:

A: Diplomatic employees and their households;

B-1 (and the Visa Waiver Program): Business visitor;

E-1/E-2: Treaty Traders and Treaty Investors (from countries with which the United States has a treaty of commerce and investment);

F: Students (with approved Curricular Practical Training or Optional Practical Training and work authorization);

G: Employees of International Organizations (IMF, OPIC, OAS, International Red Cross, etc.);

H-1B: Professionals in a specialty occupation;

H-1C: Nurses;

H-2A: Agricultural workers;

H-2B: Temporary or seasonal workers;

H-3: Trainees;

I: Representatives of international media;

J: Exchange visitors (educational exchange students, *au pairs*, graduate medical trainees, practical training students, professors and researchers, short-term scholars, camp counselors);

L: Intracompany transferees: executives, managers, and specialized knowledge employees;

N: NATO employees;

O: Extraordinary ability aliens;

P: Athletes, entertainment groups, and support personnel;

Q: Cultural exchange visitors;

R: Religious workers;

TN: Designated professionals from Mexico and Canada under NAFTA.

While the above list of nonimmigrant work visas provides insight into the number of available options, the five most commonly used visas by professionals, supervisory personnel, and other skilled workers are the 1) B-1 visa for business visitors who will not work in the United States, 2) H-1B visa for professionals in specialty occupations, 3) E visa for treaty traders and treaty investors and their employees, 4) the L visa for intracompany transferees, and 5) the TN visa for Canadian and Mexican professionals as defined by NAFTA. The only nonimmigrant visa options available for semi-skilled and unskilled positions are the 1) H-2A program for temporary or seasonal agricultural workers and 2) H-2B program for temporary or seasonal nonagricultural workers.

i. The Business Visitor Visa – B Visa and the Visa Waiver Program

The B-1 nonimmigrant visa is for use by persons who wish to enter the United States temporarily for legitimate business reasons, *i.e.*, engage in commercial transactions which do not involve gainful employment in the United States; negotiate contracts; consult with business associates; litigate; participate in scientific, educational, professional or business conventions, conferences, or seminars; or undertake independent

research. This visa category is **not** to be used for persons wishing to enter for the purpose of study or of performing skilled or unskilled labor.

The primary advantage of the B-1 visa is that no United States sponsor is needed for entry, and, if necessary, the B-1 visa holder may be entitled to apply for an extension of stay or for a change of status to another visa category while in the United States. The disadvantage to the B-1 visa is that it can be granted for only an initial one-year period and extensions will be granted in only six-month increments.

For nationals of certain countries, the United States has established what is commonly known as the **Visa Waiver Program** (VWP), which exempts certain business visitors from the requirement that they obtain a B-1 visa. Business visitors from the countries listed below, who otherwise meet the eligibility requirements of the B-1 visa program and seek entry into the United States for only 90 days or less, may enter the country without a visa. While the obvious advantage to this program is avoidance of the visa application procedures, it is important to note that business visitors under the VWP are not entitled to an extension of stay, nor are they entitled to change to another visa status. In all cases, the VWP business visitor must leave the United States prior to the expiration of the period of entry authorized by the USCIS officer at the port of entry.

As of November 2004, nationals from the following countries are entitled to participate in the Visa Waiver Program:

> Andorra, Austria, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom, including persons with the unrestricted right of permanent abode in England, Scotland, Wales, Northern Ireland, the Channel Islands, and the Isle of Man.

ii. The H-1B Visa for Professionals in Specialty Occupations

The H-1B nonimmigrant visa category is available to United States employers that wish to employ foreign nationals temporarily engaged in "specialty occupations." A "specialty occupation" is defined as an occupation that requires: (A) theoretical and practical application of a body of highly specialized knowledge and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. In order to obtain visa approval, the employer must demonstrate that the position is a specialty occupation and that the foreign national beneficiary meets the education and/or experience equivalence requirements for the position.

Currently, the USCIS may issue only 65,000 H-1B visas per year (October 1 to September 30). The H-1B petition may be granted for a period of up to three years and is

renewable for a total maximum stay of six years. After six years, the foreign national must either have petitioned for immigrant status or returned home for at least one year to re-petition for a new H-1B visa.

A prerequisite to filing an H-1B visa petition with the USCIS is to obtain the DOL's certification that the employer has filed a labor condition application (LCA) identifying the occupational specialty in which the foreign national will be employed and certifying that the wages paid meet the required wage level for the occupation in the area of employment. The LCA for H-1B visas requires the employer to disclose the period of anticipated employment, the work location, the actual wage, and the prevailing wage in the area.

iii. E Visa for Treaty Traders and Treaty Investors

The E visa program is for use by both companies and individual investors who are engaged in international trade (E-1) or investment (E-2) with the United States and are nationals of countries with which the United States has an applicable trade treaty. In order to qualify as a treaty trader (E-1), the applicant must seek admission to the United States solely to carry on trade of a substantial nature, which is international in scope, either on the foreign national's behalf or as an agent of a foreign person or organization engaged in trade, principally between the United States and the foreign state. In order to qualify as a treaty investor, the applicant must have invested or be actively in the process of investing a substantial amount of capital in a bona fide enterprise in the United States and be seeking entry solely to develop and direct the enterprise.

An employee of a treaty trader or a treaty investor may enter if he/she is a national of the treaty country and is coming to the United States to engage in duties of an executive or supervisory character or, if employed in a lesser capacity, the employee has special qualifications that make the services to be rendered essential to the efficient operation of the enterprise.

E visas are generally issued for a period of four to five years depending on reciprocity with the treaty country. At the port of entry, the foreign national may receive a maximum period of admission of two years. Each time the employee travels abroad and reenters at a United States port of entry, the E nonimmigrant will be granted an extension for another two years. There is no limit to the number of times a person can be admitted to the United States in E status. The underlying E visa will simply need to be renewed prior to the expiration of the four to five year period of validity.

iv. L-1 Visa for Intracompany Transferees

The L-1 visa for intracompany transferees is designed to assist multinational companies in temporarily assigning to the United States foreign national employees serving in managerial or executive positions (L-1A) or positions involving "specialized knowledge" (L-1B). The L-1 visa is also available for employees who are coming to the

United States to set up a new office in the United States or traveling back and forth to set up a new office. To be eligible for the L-1 visa, the employee must have been employed abroad for one continuous year within the preceding three years by an affiliated company.

The L-1A visa for managers and executives can be granted for an initial period of three years with a maximum period of stay of seven years. The L-1B visa for specialized knowledge employees can be granted for an initial period of three years with a maximum period of stay of only five years.

v. The TN Visa: Canadian and Mexican NAFTA Professionals

The TN visa, which was created by the North American Free Trade Agreement (NAFTA), is available only to Canadian and Mexican nationals seeking temporary entry into the United States to render prearranged professional services to an individual or enterprise in the United States in one of 63 approved professions. The NAFTA approved professions are listed in Appendix 1603.D.1 of the NAFTA. The applicant for the TN must also demonstrate that he/she possesses the education, usually a baccalaureate degree, and/or work experience required for the occupation.

The treatment of Mexican and Canadian TN applicants under NAFTA is dramatically different. United States employers seeking to classify a Mexican citizen as a TN are required to follow the same procedures as required for the H-1B visa in so far as they both require the filing of a labor condition application, a nonimmigrant visa application with the USCIS, and visa processing at the United States Embassy or consulate. In stark contrast to the application procedures for Mexican citizens, Canadian TN applicants are not required to submit a labor condition application, a prior petition with the USCIS, or even a nonimmigrant visa application with the United States Embassy or consulate. Canadians may file their application for TN status with a USCIS officer at any class "A" port of entry (United States airport handling international traffic or a pre-clearance/pre-flight inspection station). In addition, the number of Mexican TN visas is capped at 5,500 per year, while there is no cap on the number of Canadian TN visas.

The advantages of the TN visa over the H-1B and L-1 visas are that there is no specified upper limit on the number of years a Mexican or Canadian citizen may use this visa category; it can be used when the quota for H-1B visas has been met for the year; and, unlike the L-1 visa, the immigrant beneficiary does not have to work for the company abroad for one year. The disadvantage to the TN visa is that it will be approved for an initial period of only one year and can be extended in only one-year increments.

vi. The H-2A Visa for Temporary or Seasonal Agricultural Workers and the H-2B Visa for Temporary or Seasonal Nonagricultural Workers

The only two nonimmigrant visa programs available to United States employers for the sponsorship of unskilled and skilled workers are 1) the H-2A program for agricultural workers and 2) the H-2B program for nonagricultural workers. In order to

qualify for these two programs, the employer's need for these workers must be temporary or seasonal and must generally be for one year or less, intermittent, one-time occurrence, or a peak load need. The employer cannot have year-round or permanent need for employees to fill the position offered. Therefore, there is often what is called a "double temporary" component to both programs – the employee must intend only to enter the United States temporarily, and the employer must have only a temporary need to fill the position. The double temporary nature of this program restricts the types of employers that can effectively use these programs.

Typically an initial H-2A or H-2B visa is issued for a period of less than one year or as per the approved period of employment. In addition, the H-2A and H-2B visas may be granted two one-year extensions for a total maximum stay of three years.

b. Immigrant Visas – The Employment-Based Greencard

The issuance of employment-based immigrant visas (or greencards) is subject to a worldwide annual limit of 140,000. Because the demand for such visas often exceeds the 140,000 cap, employment-based immigrant visas have been divided into five basic categories and ranked according to priority of need as determined by Congress, with highly skilled professionals taking top priority and service sector employees the lowest. The following discussion outlines each of these categories:

i. First Preference for "Priority Workers"

"Priority workers" include the following three categories:

- Aliens with extraordinary ability in the sciences, arts, education, business, or athletics, which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field.
- Outstanding professors and researchers who are recognized internationally as outstanding in a specific academic area, have at least three years of experience in teaching or research in the academic area, and seek to enter the United States for a tenured position (or tenured track position) within an institution of higher education or for a comparable position to conduct research in the area with a private employer that employs at least three persons full-time in research activities and have achieved documented accomplishments in an academic field.
- Certain multinational executives and managers who in the preceding three years have been employed for at least one year by an affiliated company and seek to enter the United States in order to continue to render services to the same employer in a capacity that is managerial or executive. (Note that these requirements parallel the requirements for the L-1A nonimmigrant visa for intracompany transferee executives and managers discussed above.)

The primary advantage to classifying a prospective employee in the First Preference category is that it does not require the prior approval of the United States Department of Labor. Aliens of extraordinary ability have an additional advantage in that they are not required to have a job offer or an employer sponsor and can choose to self-petition without a prospective employer.

ii. Second Preference for Professionals Holding Advanced Degrees or of Exceptional Ability

The Second Preference category is available for 1) members of the professions holding advanced degrees or their equivalent, and 2) persons of "exceptional ability" in the sciences, arts (including athletics), or business who will substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Under the Second Preference categories, labor certification by the DOL is generally required. However, if the position is in a recognized shortage occupation or it is deemed to be in the national interest, the applicant is exempt from the labor certification requirement.

iii. Third Preference for Skilled Workers, Professionals, and Other Workers

The Third Preference category is available for skilled workers, professionals, and other workers. <u>Skilled workers</u> are those capable of performing skilled labor requiring at least two years training or experience. <u>Professionals</u> are those who hold baccalaureate degrees and who are members of the professions. The broad category of <u>other workers</u> includes those who are capable of performing unskilled labor. A prerequisite to filing under the Third Preference category is certification by the United States Department of Labor that there are no United States workers available for the position.

iv. Fourth Preference for Special Immigrant Religious Workers

The Fourth Preference category includes several categories of "special immigrants"; however, the one employment-based category is for special immigrant religious workers. In order to qualify as a religious worker, the foreign national must be a member of a religious denomination that has a non-profit religious organization in the United States and has been a member of this religious denomination for at least two years. The work to be performed in the United States must be 1) as a minister or priest of the religious denomination; 2) in a professional capacity in a religious vocation or occupation for the religious organization (a professional capacity means that a United States baccalaureate degree or foreign equivalent is required to do this job); or 3) in a religious vocation or occupation for the religious organization or its nonprofit affiliate. In addition, the applicant must have been performing this same work for the past two years.

v. Fifth Preference for Entrepreneurs or Investors

The Fifth Preference category is for foreign nationals who have invested or are actively in the process of investing the required amount of capital into a "new commercial enterprise." A "new commercial enterprise" includes an original business, restructuring or reorganizing an existing business, expanding an existing business by 140 percent of the pre-investment number of jobs or net worth, or retaining all existing jobs in a troubled business that has lost 20 percent of its net worth over the past 12 to 24 months. The required amount of investment is at least $1,000,000 or at least $500,000 where the investment is being made in an area that has experienced unemployment of at least 150 per cent of the national average rate or a designated rural area. The foreign national must also demonstrate that the investment will benefit the United States economy by either creating at least ten full-time jobs or maintaining the number of existing employees for at least two years, where investing in a troubled business.

2. Federal Labor and Employment Statutes.

a. Age Discrimination in Employment Act ("ADEA"). The ADEA forbids discrimination against those over 40 years of age in employment decisions. The ADEA applies to employers engaged in interstate commerce who have twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. ***29 U.S.C. §§ 621-634.***

b. Americans with Disabilities Act ("ADA"). Title I of the ADA proscribes discrimination in employment based on the existence of a disability. Furthermore, the ADA requires that employers take reasonable steps to accommodate disabled individuals in the workplace. The ADA applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Other titles of the ADA address accessibility of facilities for handicapped persons. ***42 U.S.C. §§ 12101 et seq.; 42 U.S.C. §§ 12134 et seq.***

c. Employee Polygraph Protection Act ("EPPA"). The EPPA greatly restricts polygraph testing of employees. EPPA applies to all employers engaged in interstate commerce. Employers whose primary business purpose is running a security service or manufacturing, distributing, or dispensing a controlled substance are exempted. ***29 U.S.C. §§ 2001 et seq.***

d. Equal Pay Act ("EPA"). The EPA applies to all employees subject to the minimum wage standard of the Fair Labor Standards Act. The EPA requires equal pay for men and women who do equal work in the same establishment. ***29 U.S.C. § 206(d).***

e. Fair Labor Standards Act ("FLSA"). The FLSA establishes the minimum wage, overtime, child labor, and recordkeeping laws for covered enterprises or employees engaged in industries affecting interstate commerce. ***29 U.S.C. §§ 201 et seq.***

f. Family and Medical Leave Act ("FMLA"). The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave in a twelve-month period for the birth or adoption of a child or the serious health condition of the employee or the spouse, parent, or child of the employee. The FMLA applies to all employers engaged in commerce that employ fifty or more employees for each working day during each of twenty or more calendar weeks in the current or preceding year. ***29 U.S.C. §§ 2601 et seq.***

g. Federal Contractors. Employers that are federal contractors or subcontractors, depending on the type and size of their contracts, may have affirmative action obligations under Executive Order 11246 and the Vocational Rehabilitation Act. ***29 U.S.C. §§ 701 et seq.*** Certain federal contractors are also covered by the Drug-free Workplace Act, ***41 U.S.C. §§ 701 et seq.***; the Rehabilitation Act of 1973, ***29 U.S.C. § 793***; the Vietnam Era Veterans Readjustment Assistance Act, ***38 U.S.C. § 4212***; Service Contract Act, ***41 U.S.C. §§ 351 et seq***.; the Walsh-Healey Public Contracts Act, ***41 U.S.C. §§ 35 et seq***.; and Davis-Bacon Act, ***40 U.S.C. § 276a.***

h. National Labor Relations Act and Labor-Management Reporting and Disclosure Act. These statutes set forth the guidelines governing labor-management relations. They apply to all employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts. ***29 U.S.C. § 151-169; 29 U.S.C. §§ 401 et seq.***

i. Occupational Safety and Health Act ("OSHA"). OSHA establishes the mechanism for setting and enforcing safety regulations in the workplace. It applies to all employers who are engaged in an industry affecting commerce, regardless of the number of employees. ***29 U.S.C. §§ 651 et seq.***

j. Title VII. Title VII is the broad civil rights statute that forbids discrimination in hiring, advancement, working conditions, or other aspects of employment based on race, color, religion, gender, or national origin. It applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Other statutes that speak to non-discrimination in the workplace include the Civil Rights Acts of 1866 and 1870***. See 42 U.S.C. §§ 2000(e) et seq.; 42 U.S.C. §§ 1981, 1983.***

k. Worker Adjustment Retraining and Notification Act ("WARN"). WARN requires employers to give sixty days' notice to their employees of plant closings or mass layoffs. A plant closing is defined as any permanent or temporary shutdown of a single site of employment, or one or more facilities within a single site of employment, if the shutdown results in a loss of employment by 50 or more full-time employees during a 30-day period. WARN applies to all businesses that employ 100 or more employees, excluding part-time employees, or to businesses that employ 100 or more employees

who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime). ***29 U.S.C. §§ 2101 et seq***.

l. Pregnancy Discrimination Act ("PDA"). The PDA prohibits discrimination in the workplace on account of pregnancy and provides protection to pregnant employees. It applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year as well as to labor organizations and employment agencies. ***42 U.S.C. § 2000(e).***

m. Immigration Reform and Control Act ("IRCA"). IRCA requires that employers verify that all employees hired on or after November 6, 1991 are authorized to work in the United States. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under IRCA (Form I-9), as well as for hiring unauthorized workers. IRCA also prohibits employers with between 4 and 14 employees from discriminating based on national origin in hiring or discharge. ***8 U.S.C. § 1101 et seq***.

n. Uniformed Services Employment and Reemployment Rights Act ("USERRA"). USERRA protects members of the uniformed services and veterans by prohibiting employers from discriminating on the basis of past, current, or prospective military service. Further, employers cannot refuse an employee's military leave of absence or discriminate in employment or re-employment based on military service, including non-career service. USERRA also protects other terms and conditions of employment, including protection of vacation pay, health plans, pensions, stock options, bonuses, seniority rights, and severance pay. ***38 U.S.C. § 4301***.

o. The Consumer Credit Reporting Reform Act ("CCRRA"). The CCRRA places restrictions on employers who seek "consumer reports" (including credit checks and criminal checks). In short, the CCRRA requires that employers who seek consumer reports must (1) provide the individual with a "clear and conspicuous disclosure" (in a document that consists only of the disclosure) that such a report may be obtained and (2) get written authorization to obtain this report. Before taking adverse action based on the information in the consumer report, the employer must, among other things, provide the affected individual with a copy of the report and a summary of his or her rights under the Fair Credit Reporting Act. After taking adverse action, the employer must provide notice of the adverse action, information concerning the reporting agency, notice of the right to obtain a free copy of the report, and other information to the affected individual. ***15 U.S.C. § 1681***.

p. Other Federal Regulations. Many employers operate in industries that are regulated by federal agencies. For example, the Department of Transportation requires employers to drug test employees who drive motor vehicles of over 26,000 pounds.

Employers should consult counsel to determine if there are special regulations affecting their industry.

3. Employee Benefits

a. Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, health care plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, and setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting, and funding requirements. ERISA generally preempts state laws governing employee plans and arrangements. ***29 U.S.C. §§ 1001 et seq.; 26 U.S.C. §§ 401-424, 4971-5000.***

b. Consolidated Omnibus Budget Reconciliation Act ("COBRA"). COBRA requires employers to make available continuing coverage under medical reimbursement and health care plans to certain terminated employees at the cost of the employees. The period for which this coverage is required to be continued under COBRA, depending on which qualifying event has occurred, runs for a maximum of eighteen to thirty-six months. COBRA contains specific procedures for notifying terminated employees of their COBRA rights. ***29 U.S.C. § 1162; 26 U.S.C. § 4980***.

c. Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA imposes portability requirements on group health care plans, creates a test program for tax-favored medical savings accounts, treats costs of long-term care services and some long-term care insurance premiums as medical expenses for itemized deduction purposes, and extends the income tax exclusion for life insurance death benefits to benefits paid during life to the terminally ill. HIPAA's Privacy Rule standards address the use and disclosure of protected health information by covered entities, as well as standards for individuals' privacy rights to understand and control how their health information is used. ***29 U.S.C. §§ 1181 et seq***.

B. SOUTH CAROLINA STATE LAWS

1. Common Law Background. South Carolina is an employment-at-will state, which means that an employee without a contract for a definite term may be discharged at any time for any reason that does not violate a statute. Since 1985, South Carolina has recognized a cause of action for "wrongful termination in violation of public policy."

While it is not exactly clear what constitutes egregious activity to justify such a retaliatory discharge cause of action, it is fair to say that the activity must involve a violation of law or clear, unambiguous mandate of public policy. ***See, e.g., Ludwick v. This Minute of Carolina, Inc*., 337 S.E.2d 213 (S.C. 1985); *Garner v. Morrison Knudsen Corp*., 456 S.E.2d 907 (S.C. 1995).** Recently, the South Carolina Supreme Court also determined that a termination due to racial discrimination by an employer that was not otherwise covered by federal or state law could be a wrongful discharge in violation of public policy. ***See Hessenthaler v. Tri-County Sister Help, Inc.*, 2004 WL 2377863 (S.C. October 18, 2004).**

For many years, South Carolina courts have struggled with whether promises or ambiguities in an employee handbook or other written policies could be deemed to give rise to contractual obligations and further erode the concept of at-will employment. ***See, e.g., Conner v. City of Forest Acres*, 560 S.E.2d 606 (S.C. 2002).** The South Carolina Legislature addressed this problem in part by promulgating ***S.C. Code Ann. § 41-1-110***. This statute affirms the at-will nature of employment relationships in South Carolina and provides a specific safe harbor for ensuring that a handbook is not an employment contract:

> It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

2. State Statutes

a. Drug Testing and Prevention in the Workplace. Sections 38-73-500 and 41-1-15 of the South Carolina Code allow for the establishment of a drug prevention program in private sector workplaces, random drug testing, and confidentiality of test results and related information. The law contains provisions regarding evidentiary admissibility of such information and reduced premiums for workers' compensation insurance for employers who establish a conforming drug testing policy. The Drug-Free Workplace Act requires all employers who do substantial business with the State of South Carolina to implement a drug-free workplace environment. ***S.C. Code Ann. §§ 44-107-10 et seq***.

b. Employment References. Employers who give written responses to written requests concerning an employee or former employee are immune from civil liability for

disclosure of the following information to which the employee or former employee may have access:

1. Written employee evaluations;

2. Official personnel notices that formally record the reasons for separation;

3. Whether the employee was voluntarily or involuntarily released from service and the reason for the separation; and

4. Information about job performance.

This immunity is waived if the employer knowingly or recklessly releases or discloses false information*. S.C. Code Ann. § 41-1-65.*

c. Employment Security Act. This statute sets forth the rules governing the unemployment system in South Carolina. Taxes are levied against employers to provide unemployment compensation to individuals losing their jobs. Foreign nationals are covered by the Act if lawfully in the United States. The employment security law is administered by the three-member Employment Security Commission whose members are elected by the State Legislature. ***See, generally*, *S.C. Code Ann. §§ 41-27-10-41-43-290*.**

d. South Carolina Human Affairs Law. This statute prohibits employment discrimination on the basis of race, sex, religion, disability, color, age, or national origin by employers with more than fifteen employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. South Carolina's Human Affairs Statute mirrors many of the federal protections but is explicitly provided not to augment the federal protections. It is administered by the State Human Affairs Commission. ***S.C. Code Ann. §§ 1-13-10 et seq.***

e. "Right to Work" Act. South Carolina is a "right-to-work" state that guarantees the right to work without regard to membership or nonmembership in a union. Statutory authority prohibits closed shop, union shop, and maintenance of membership contracts. ***S.C. Code Ann. §§ 41-7-10 et seq.***

f. Workers' Compensation Law. The Workers' Compensation Act provides the exclusive remedy for employees who suffer a work-related injury or illness without regard to the fault of the employer. Employers who have three or more regular employees are subject to the Act with certain exceptions. The Act specifies methods for reporting accidents and procedures for compensating employees. If agreement on compensation is not reached, either party may apply to the South Carolina Workers' Compensation Commission for a ruling. Foreign nationals are covered by the Act, regardless of whether they are lawfully or unlawfully employed in the United States. ***See generally, Title 42, S.C. Code***.

g. Employers' Notice of Shutdown. This prohibits shutdown of an employer's place of business without two weeks' advance notice to employees. It applies to all employers who require notice from an employee prior to the employee's quitting work. ***S.C. Code Ann. § 41-1-40.***

h. Occupational Safety and Health Act. South Carolina is one of 23 states and territories that administers its own occupational safety and health program through an agreement with the United States Department of Labor, Occupational Safety and Health Administration (OSHA). (See reference to federal OSHA requirements above.) South Carolina has adopted the federal OSHA standards in their entirety, with select modifications to the construction and general industry standards. The South Carolina Department of Labor, Licensing and Regulation is given broad authority to investigate and address work safety. ***S.C. Code Ann. §§ 41-15-10 et seq.***

i. Payment of Wages. This law sets forth requirements for payment of wages, including initial written notice to employees, notices regarding deductions, and record keeping, and provides for penalties for non-compliance. The Act includes a right to treble damages and attorneys' fees for failure to pay wages due. ***S.C. Code Ann. §§ 41-10-10 et seq***.

j. Payment of Commissions. Terminated salespersons due commissions can recover actual and punitive damages (not to exceed three times actual damages) with attorneys' fees for failure to pay. ***S.C. Code Ann. §§ 39-65-10 et seq***.

k. New Hire Reporting Program. The Office of Child Support Enforcement of the Department of Social Services for the State of South Carolina, in compliance with State and Federal Law, has developed the Employer New Hire Reporting Program. Through this program employers must report all newly hired and rehired employees. This information will be used to ensure that noncustodial parents live up to their financial responsibilities to their children. ***S.C. Code Ann. § 43-5-598***.

l. Payment From Relief Funds. An employer who operates a relief fund in which its employees are required or permitted to participate must pay the accrued benefits to the employee or his/her heirs upon the injury or death of the employee. However the acceptance of the benefit by the employee or his/her heirs does not affect the right of the employee, his/her personal representative, or his/her heirs to sue the employer for damages arising from any injury or death caused by the negligence of the employer or its agents. Any waiver or release that is given by the employer or his/her heirs in return for payment of benefits from the relief fund is null and void. ***S.C. Code Ann. § 41-1-50.***

m. Military Duty. South Carolina protects employees who are called up to active duty and/or who serve in the South Carolina State Guard or South Carolina National Guard. Employers must provide reemployment for them when they return from duty. ***S.C. Code Ann. §§ 25-1-2310 et seq.***

n. Voluntary Apprenticeship Agreements. Subject to the approval of the Director of the South Carolina Department of Labor, Licensing and Regulation, an employer can enter into an apprenticeship agreement to provide training and instruction in a particular craft or industry. An apprenticeship council establishes standards for apprenticeship agreements, approves the agreements, and otherwise regulates apprentice training. ***S.C. Code Ann. §§ 41-21-10 et seq.***

o. Agricultural Labor Contracts. Contracts between the owners of land and laborers must be witnessed by a disinterested party. Additionally, the contract must set out clearly the length of the employment and the amount of money to be paid and when. At the request of either party, the contract shall first be explained by a magistrate and signed in his presence. Sharecropping agreements must indicate the portion of the crop to be shared and the division, which must be made by a disinterested person and, if this is requested by either party, must be made before the crop is removed from where it was planted or harvested. A person who breaches a sharecropping agreement fraudulently and with malicious intent is guilty of a misdemeanor. ***S.C. Code Ann. §§ 41-23-10 et seq***.

p. Migrant Farm Workers. The South Carolina Division of Labor and the Migrant Farm Workers Commission have promulgated rules concerning the facilities an employer must provide to migrant farm laborers. An employer hiring such employees should contact the South Carolina Department of Labor, Licensing and Regulation for further information. ***S.C. Code Ann. §§ 41-3-510 et seq***.

q. Garnishment. Although the property of a debtor (against whom a judgment has been obtained) can often be attached and ordered by a judge to be applied to the satisfaction of the debt, South Carolina law provides generally that "the earnings of the debtor for his personal services cannot be so applied." ***S.C. Code Ann. § 15-39-410***. The withholding of wages pursuant to garnishment proceedings in other states is also prohibited unless certain conditions are satisfied, and an employer should consult with counsel before complying with any garnishment order from another state. ***S.C. Code Ann. § 15-39-420***.

An important exception is in the area of child support and alimony. An employer is required to withhold the wages of an employee who voluntarily requests and authorizes such action to meet child support and spousal maintenance obligations. An employer is also required, after receiving notice from the Clerk of Court, to withhold support payments, pay them to the Clerk of Court, and inform the court if the employee changes jobs. ***S.C. Code Ann. § 20-7-1315.***

r. Retaliatory Discharge or Demotion on Account of Jury Service. It is unlawful to discharge or demote employees for complying with a valid subpoena or serving on a jury. Employees alleging such discrimination may file a civil action for damages. ***S.C. Code Ann. §§ 41-1-70 et seq.***

s. Political Opinions. It is unlawful for an employer to discharge or intimidate an employee due to political opinions or the employee's exercise of constitutionally guaranteed political rights and privileges. An employer violating this law can be fined up to $1,000 or imprisoned for no more than two years, or both. ***S.C. Code Ann. §§ 16-17-560 et seq.***

t. Use of Tobacco Products. An employee's use of tobacco products outside the workplace cannot be the basis of a personnel action regarding hiring, termination, demotion, or promotion. There is no stated procedure or remedy for addressing violations of this statute. ***S.C. Code Ann. §§ 41-1-85 et seq.***

u. Other State Statutes. There are other isolated statutes that speak to employment. Employees are generally protected from retaliation for disclosing any

violations of the above laws. Civil and sometimes criminal penalties may result from violations. Generally, such laws are administered by the Director of the Department of Labor, Licensing and Regulation in Columbia.

C. OTHER COMMON LAW TORTS THAT MAY AFFECT EMPLOYMENT IN SOUTH CAROLINA

Although the exclusivity provision of the South Carolina Workers' Compensation Act, ***S.C. Code Ann. § 42-1-540***, immunizes most employers from accidental on-the-job injuries suffered by employees, and while South Carolina courts have been loathe at times to recognize new torts, employers in South Carolina may still be subject to tort liability. Some of the workplace torts that are available in South Carolina include:

- **Misrepresentation, Defamation, Slander or Libel.** An employer may be liable for defaming, slandering, or libeling any third party, including employees.

- **Negligent Hiring and Supervision.** An employer may be liable for negligent hiring/retention if it owed a duty of care to the victim, it breached that duty by failing to exercise the care of a reasonable person in hiring or retaining the employee who committed the violent act, and the victim suffered damage proximately resulting from the employer's breach. ***See, e.g., Degenhart v. Knights of Columbus, 420 S.E.2d 495 (S.C. 1992).***

- **Breach of Contract Accompanied by a Fraudulent Act.** To establish a breach of contract accompanied by a fraudulent act and recover punitive damages, a plaintiff must prove three elements: (1) breach of contract, (2) fraudulent intent relating to the breach, and (3) a fraudulent act accompanying the breach. ***See Edens v. Goodyear Tire & Rubber*****, 858 F.2d 198 (4th Cir. 1988).** This cause of action can be applied to employment contracts and/or severance agreements.

- **Intentional Infliction of Emotional Distress.** The exclusivity provision of the workers' compensation laws does not bar a common law action against an employer for intentional infliction of emotional distress (or other intentional torts). ***See Edens v. Bellini,*** **597 S.E.2d 863 (S.C. Ct. App. 2004);** ***McSwain v. Shei*****, 402 S.E.2d 890 (S.C. 1991),** ***overruled in part on other grounds, Sabb v. S.C. State Univ*****., 567 S.E.2d 231 (S.C. 2002).**

- **Tortious Interference with Contractual Relations.** South Carolina courts recognize the common law cause of action for tortious interference with contractual relations, ***see, e.g., Barnes Group, Inc. v. C & C Products, Inc*****., 716 F.2d 1023 (4th Cir. 1983**), and intentional interference with prospective contractual relations. ***See, e.g., Crandall Corp. v. Navistar Int'l Transp. Corp*****., 395 S.E.2d 179 (S.C. 1990).**

- **Premises Liability.** Tort liability can attach against employers if a perpetrator of violence used the employer's actual or apparent authority to commit an attack. Similar to negligent supervision or retention claims, companies may be liable for their failure to take prompt and remedial action once they knew or should have known of the risk of an attack. ***See, e.g., McBeth v. TNS Mills*****, 458 S.E.2d 52 (S.C. Ct. App. 1995).**

VII. ENVIRONMENTAL LAW

Gregory J. English

A. FEDERAL CONSIDERATIONS

1. Resource Conservation and Recovery Act ("RCRA"). ***42 U.S.C. §§ 6901, et seq*.** RCRA's primary goal is to control the generation, transportation, storage, treatment, and disposal of hazardous waste. The administration of RCRA has been delegated to a number of states by statute (including to South Carolina through the Hazardous Waste Management Act) and, therefore, the states regulate most aspects of hazardous waste management within their borders.

By statute, the disposal of hazardous waste is prohibited except in accordance with a permit. Section 7003 of RCRA authorizes the United States Environmental Protection Agency (the "EPA") to bring suit against any person or entity contributing to the handling, storage, treatment, or disposal of hazardous waste in a manner presenting an imminent and substantial endangerment to health or the environment.

RCRA was amended in 1984 by the Hazardous and Solid Waste Amendments of 1984, which added new requirements pertaining to groundwater contamination.

Currently, a permit for a treatment, storage, or disposal facility must detail required corrective action for any release of hazardous waste from any solid waste management unit, regardless of when the waste was placed on the site.

2. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). ***U.S.C. §§ 9601, et seq*.** CERCLA, or Superfund as it is commonly called, was enacted in 1980 to provide for the clean-up of abandoned disposal sites. It also provides a vehicle for the EPA to recover for damage to natural resources caused by hazardous substance releases. This statute has possibly generated more litigation and controversy in the past twenty-five years than any other federal legislation.

CERCLA allows the government and private parties to sue "potentially responsible parties," or "PRPs," for reimbursement of clean-up costs caused by releases, actual or threatened, of hazardous substances. Liability is strict, joint and several, with little or no regard for causation. By statute, there are four categories of persons liable for clean-up costs:

1. "Owners or operators" of the contaminated facility. A "facility" is virtually any place in which a hazardous substance is found. The current owner and operator are liable, regardless of when the hazardous substance was disposed of at the facility and whether the present owner or operator did anything to contribute to the release.

2. "Owners or operators" of the facility at the time of release of the hazardous substances.

3. Any person who contracted or arranged to have hazardous substances taken to, disposed of, or treated at a facility. This category generally applies to generators and manufacturers.

4. Transporters of hazardous substances.

There are limited defenses under Superfund that are narrowly construed. A PRP can escape liability if it can establish that the hazardous substance release was caused solely by an act of war, an act of God, or an act of unrelated third parties. This latter "third party" defense does not apply if the damage from hazardous substances was caused by an employee or agent of the PRP, or a third party acting in connection with a contract with the PRP.

3. The Clean Air Act ("CAA"). ***42 U.S.C. §§ 7401, et seq*.** The CAA regulates air pollutants under federal standards implemented and enforced by the states. The Act was amended in 1990 to add several new programs, including acid rain control and stratospheric ozone protection programs, coupled with modification of existing programs for attaining the national ambient air quality standards ("NAAQS") and reducing emissions of hazardous air pollutants. Because of the nature of air pollution and its

sources, this program is generally considered to be the most complex of the federal environmental programs.

Under the Act, air emissions are regulated through various controls.

The CAA, as amended, requires a new operating permit for all "major" air sources, with state administration and enforcement.

4. The Clean Water Act ("CWA"). ***33 U.S.C. §§ 1251, et seq.*** The CWA regulates the discharge of pollutants into all navigable waters. The CWA prohibits the discharge of any pollutant into the water of the United States unless a permit has been issued. Permits are issued either by the state under an approved state program or by the EPA if the state program has not been approved. South Carolina's program has been approved. The permit limits are based upon EPA's effluent limitation regulations and are incorporated into a National Pollutant Discharge Elimination System ("NPDES") permit. The CWA effluent limitations for industrial dischargers will also specify standards for pretreatment for those who discharge to a publicly owned treatment work.

In 1990, EPA promulgated new rules regarding permits for storm water discharges under the NPDES permit program.

B. STATE CONSIDERATIONS

1. South Carolina Pollution Control Act. ***Titles 44, 48, S.C. Code***. The South Carolina Department of Health and Environmental Control (the "Department" or "DHEC") has jurisdiction over the quality of air and waters with authority to abate, control, and prevent pollution under the South Carolina Pollution Control Act. The Act gives the Department authority to set standards for air and water quality and makes it unlawful to discharge organic or inorganic matter into air or water without a permit from the Department. Evidence of a violation of air or water pollution regulations is sufficient to submit a question of punitive damages to a jury.

The Department is empowered to hold hearings, compel attendance of witnesses, make findings of fact, issue orders, and assess penalties. It may institute legal proceedings to compel compliance with the Pollution Control Act or determinations and orders of the Department.

The state in its own name or in the name of the Department, or any appropriate state agency or subdivision, may bring an action for damage to animal life, plant life, or property.

The State Attorney General is designated the legal advisor to the Department and, upon request of the Department, shall institute court action.

Civil and criminal penalties, with injunctive relief, are available to the state as remedies.

Permits are usually needed for any new point source or change in existing source.

2. South Carolina Hazardous Waste Management Act. ***S.C. Code Ann. §§ 44-56-10, et seq.*** This statute governs the treatment, storage, and disposal of hazardous waste. Broad powers are given the Department to enforce this Act, including assessment of fees and civil and criminal liability. DHEC also implements and enforces CERCLA.

3. State Underground Petroleum Environmental Response Bank Act ("SUPERB"). ***S.C. Code Ann. §§ 44-2-10, et seq.*** This statute makes funds available to owners and operators of underground storage tanks to help in cleaning up contamination resulting from underground storage tank releases. The law provides for fees, registration, and inspection of all underground storage tanks. Financial responsibility requirements are included. Civil and criminal penalties can be invoked for violations.

4. South Carolina Infectious Waste Management Act. ***S.C. Code Ann. §§ 44-93-10, et seq.*** This law governs and regulates the disposal of human blood, tissue, and other medical waste. DHEC monitors and may assess penalties for violations.

5. Clean Indoor Air Act. ***S.C. Code Ann. §§ 44-95-10, et seq.*** This law prohibits smoking in many public facilities and requires smoking/non-smoking designated areas when smoking is permitted.

6. Solid Waste Policy and Management Act. ***S.C. Code Ann. §§ 44-96-10, et seq.*** This law provides extensive regulation of the transport and disposal of solid waste, including used oil, tires, trash, and batteries. DHEC administers this statute. The Act places significant emphasis on recycling. Solid waste incinerators and landfills are extensively regulated. Civil and criminal penalties are available to assist inspection and enforcement.

7. South Carolina Mining Act. ***S.C. Code Ann. §§ 48-20-10, et seq.*** This law governs mining operations in the state and provides for reclamation of lands mined. Permits are needed for exploration and mining. Civil and criminal penalties may be assessed for violations.

8. Stormwater Management and Sediment Reduction Act. ***S.C. Code Ann. §§ 48-14-10, et seq.*** This law requires a stormwater management plan to be submitted before certain land-disturbing activities can be conducted. Civil penalties can be invoked for failure to comply.

9. Tidelands and Wetlands. ***S.C. Code Ann. §§ 48-39-10, et seq.*** This statute and corresponding regulations must be carefully scrutinized before there is any development of beachfront or wetlands property. Permits are required for most

development in "critical" areas, defined as coastal waters, tidelands, beaches, beach dune systems, and wetlands. Civil and criminal penalties are available for enforcement.

10. Radioactive Waste Transportation and Disposal Act. ***S.C. Code Ann. §§ 13-7-110, et seq.*** This Act governs transportation and disposal of radioactive waste within South Carolina. Permits are required, and DHEC administers the program.

State agencies often work in concert with federal agencies on environmental protection. Laws have proliferated to protect the environment and often limit commercial or business options. Permitting and inspection are extensive, and government regulation

does not preempt private lawsuits. Injunctive relief is also available to the government and individuals. Before acquiring any significant property or business, a prospective purchaser should explore any possible environment problems.

South Carolina has additional statutes that are designed to protect the environment and general welfare. These should be carefully consulted.

VIII. INTELLECTUAL PROPERTY

Wallace K. Lightsey

A. FEDERAL LAW

1. Copyright Law. This area is governed exclusively by federal law. ***Title 17, U.S.C.***

In General. Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to copy, use, distribute, modify, and display the work. Generally, works are entitled to copyright protection for the life of the author plus 50 years. However, as to works made for hire, copyright protection is for the shorter of 75 years after publication or 100 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright, may be liable for actual or statutory damages, and may be subject to injunctive relief.

Copyrightable Works. Works of authorship that qualify for copyright protection include literary works, musical works (including lyrics), dramatic works, choreographic works, audiovisual works, pictorial, graphic and sculptural works, sound recordings, and architectural works. The Computer Software Copyright Act of 1980 expressly made computer software eligible for copyright protection, a point previously in doubt. The precise scope of copyright protection for computer software has not yet been fully defined. Constantly developing technology is likely to present many new issues presently unforeseen.

All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in some tangible medium; there must be a physical embodiment of the work so that the work can be reproduced or otherwise communicated. Second, the work must be the result of original and independent authorship. The concept of originality does not require that the work entail novelty or ingenuity, concepts of importance to patentability, but merely that it not have been copied from another person's work.

Advantages of Copyright Registration. Copyright protection automatically attaches to a work the moment that the work is created. However, "registration" of the

work with the United States Copyright Office provides advantages. A certificate of registration is *prima facie* evidence of the validity and ownership of the copyright, provided registration occurs not later than five years after first publication. With respect to works whose country of origin is the United States, registration is a prerequisite to an action for infringement. With respect to all works, regardless of the country of origin, certain damages and attorneys' fees relating to the period prior to registration cannot be recovered in an infringement action. Registration is also a useful means of providing actual notice of copyright to those who search the copyright records.

Copyright Registration Application Process. In order to obtain registration of copyright, an application for registration must be filed with the United States Copyright Office. The application must be made on the specific form prescribed by the Register of Copyrights and must include the name and address of the copyright claimant, the name and nationality of the author, the title of the work, the year in which creation of the work was completed, and the date and location of the first publication. In the case of a work made for hire, a statement to that effect must be included. If the copyright claimant is not the author, a brief statement regarding how the claimant obtained ownership of the copyright must be included. An application must be accompanied by the requisite fee, and a copy of the work must be submitted.

Copyright Notice. Until 1989, all publicly distributed copies of works protected by copyright and published by the authority of the copyright owner were required to bear a notice of copyright. A copyright notice is no longer mandatory, but a copyright notice is still advantageous. For example, the defense of "innocent infringement" is generally unavailable to an alleged infringer if a copyright notice is used.

If a copyright notice is used, the notice should be located in such a manner and location to sufficiently demonstrate the copyright claim. The notice should consist of three elements. First should be the symbol of an encircled "C," or the word "copyright," or the abbreviation "copr." Second should be the year of first publication. Third should be the name of the copyright owner.

Works Made for Hire. In a "work made for hire," the employer is presumed to be the author. Authorship is significant because copyright ownership initially vests in the author. The parties can rebut the presumption of employer authorship by an express written agreement to the contrary.

The term "work made for hire" applies to any work created by an employee in the course and scope of employment. On occasion there is dispute as to whether a work created by an employee arose from the employment. Employers often require execution of a formal employment agreement under which the employee expressly agrees that all copyright rights will belong to the employer. A similar agreement is also advisable in connection with the engagement of an independent contractor to perform copyrightable services for a business, but the employer should be aware that only certain types of works may be considered "work made for hire" when created by an independent contractor. If the particular matter cannot be a "work made for hire," the employer should negotiate an agreement for the assignment of the copyright by the independent contractor. Thus, it is advisable to provide in any agreement with an independent contractor that all works created by the latter will be deemed "work made for hire" and that, if it is determined not to be a "work made for hire," then the contractor assigns all copyright to the employer. Any copyright assignment must be in writing to be effective.

Copyright Protection for Foreign Authors. Copyright protection is available under United States law for foreign authors until the copyrightable work is published. If the work has been published, the availability of continued United States copyright protection is dependent upon the location of the publication and the nationality or domicile of the author. Copyright protection continues in the United States subsequent to publication if publication by the foreign author occurs in the United States, or occurs in a country that is a party to the Universal Copyright Convention or to the Berne Convention, or occurs in a country named in a Presidential copyright proclamation. If the work is first published by a foreign author outside the United States, continued copyright protection in the United States is available only if the foreign author is either a domiciliary of the United States or a national or domiciliary of a country that is party to a copyright treaty to which the United States is also a party. A person is generally a domiciliary of the country in which the person resides with the intention to remain permanently.

2. Patents. This area is governed exclusively by federal law. ***Title 35 U.S.C.***

In General. One who invents or discovers a new machine or device or a new manufacturing process may be able to obtain a United States patent. A United States patent provides the inventor with the exclusive right for a specified time to make, use, import, offer to sell, or sell in the United States the patented invention. A patent provides the holder with a limited monopoly on the use of the patented invention. A valid patent forecloses use of the patented invention by any other party, even if another party independently conceives the identical invention.

A utility patent, which generally governs the functional aspects of a machine, manufacturing process, or composition of matter, is enforceable beginning at the grant of the patent and ending 20 years (plus up to five more years for certain delays) after the filing date of the regular patent application. A design patent, which covers the design or appearance of an article of manufacture, is enforceable for 14 years from the granting date of the patent. A provisional patent, which is filed before a regular patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a regular patent application. Anyone without authority from the patent holder who makes, uses, imports, or sells in the United States the patented invention during the life of the patent is considered to "infringe" the patent and may be liable for damages.

Effect of Foreign Patents. A foreign patent is generally not enforceable in the United States. Furthermore, an invention that is the subject of a foreign patent cannot be the subject of a United States patent, unless an application for a United States patent is filed within one year following issuance of the foreign patent. Accordingly, an inventor who holds a foreign patent and who fails to apply for a United States patent within one year from the date of issuance of a foreign patent will usually have no recourse against others who use the invention in the United States.

Patentability Under Federal Patent Statutes. To be eligible for a federal utility patent, an invention must fall into one of the classes of patentable subject matter set forth in the United States patent statutes. These classes are machines (*e.g.*, a mechanism with moving parts), articles of manufacture (*e.g.*, a hand tool), compositions of matter (*e.g.*, a plastic), and processes (*e.g.*, a method of refining). An improvement falling within any of these classes may also be patentable. Discoveries falling outside these categories are not patentable, unless some other statutory provision applies.

In addition to being within one of the four classes and being fully disclosed, a utility invention must also be:

1. "Novel," in that it was not previously known to or used by others in the United States or printed or described in a printed publication anywhere;

2. "Non-obvious" to a person having ordinary skill in the relevant art; and

3. "Useful," in that it has utility, actually works, and is not frivolous or immoral.

A design patent may be obtained for the ornamental design of an article of manufacture. A design patent offers less protection than a utility patent, because the patent protects only the appearance of an article and not its construction or function.

A plant patent may be obtained by anyone developing a new variety of asexually reproduced plant, such as a tree or flower. Some plants may also be protectable with a

utility patent or under the Plant Variety Protection Act, administered by the United States Department of Agriculture.

In order to determine novelty and, hence, patentability of an invention, it is often useful to search the records of the United States Patent and Trademark Office. There one may examine all United States patents, many foreign patents, and a large number of technical publications. A patent search is customarily performed by a patent attorney or by an individual with similar technical training, sometimes referred to as a patent agent. A patent attorney or patent agent may be asked to render an opinion regarding the patentability of a particular invention. An inventor can then make an informed decision as to whether to proceed with the cost of an actual patent application.

Patent Application Process. A United States patent application must be filed with the United States Patent and Trademark Office. A complete patent application includes four elements. First, the application must include the "specification." The specification is a description of what the invention is and what it does. The specification can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period. Second, the application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English, the oath or declaration must be in a language that the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included.

After a proper application is filed, the application is assigned to an examiner with knowledge of the particular subject matter. The examiner makes a thorough review of the application and the status of existing concepts in the relevant area to determine whether the invention meets the requirements of patentability. The patent review process takes from 18 months to three years.

Rejection of a patent application by the examiner may be appealed to the Board of Patent Appeals. Decisions of the Board of Patent Appeals may be appealed to the federal courts.

Provisional patent application requirements are less stringent than a regular patent application. The oath or declaration of the inventor and claims are not required, and the application is held for the 12-month period without examination.

Markings. After a patent application has been filed, the product made in accordance with the invention may be marked with the legend "patent pending" or "patent applied for." After a patent is issued, products may be marked "patented" or "pat.," together with the United States patent number. Marking is not required, but it may be necessary to prove marking in order to recover damages in an infringement action.

Rights to Patented Inventions. Disputes sometimes arise between employers and employees over the rights to inventions made by employees during the course of employment. Because of this, employers often require employees to execute formal agreements under which each signing employee agrees that all rights to any invention made by the employee during the term of employment will belong to the employer.

3. Trademarks. This area is governed by both state and federal law.

In General. A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination. A trademark should not be confused with a tradename. Although the same designation may function as both a trademark and a tradename, a tradename refers to a business title or the name of a business; a trademark is used to identify the goods manufactured by the business. A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

Selection of Trademark. A manufacturer should carefully consider the trademark selected for its merchandise. The level of protection against infringement of a trademark varies with the "strength" or "uniqueness" of the trademark. "Generic" makes are not entitled to any legal protection. "Descriptive" marks are the next weakest and least defensible. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A "fanciful" mark, the strongest type of mark, is a coined name that has no dictionary definition.

Evaluation should also include consideration of the likelihood of success in obtaining federal and state registrations of the trademark. For example, a trademark that is "merely descriptive" cannot be registered under either federal or South Carolina law.

Selection of a trademark should be accompanied by a trademark search to determine whether another person or business has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and there are businesses that specialize in trademark searches. Actual and potential trademark conflicts should be avoided, lest the company become involved in an expensive infringement lawsuit. Of possibly greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.

Advantages of Trademark Registration. Under the trademark laws of the United States and South Carolina, the principal method of establishing rights in a trademark is actual use of the trademark. "Registration" of a trademark is not legally required but can provide certain advantages.

Federal registration of a trademark is presumptive evidence of the ownership of the trademark and of the registrant's exclusive right to use of the mark in interstate commerce, strengthening the registrant's ability to prevail in any infringement action. After five years of continued use of the mark following federal registration, the registrant's exclusive right to use of the trademark becomes virtually conclusive. Federal registration may assist in preventing the importation into the United States of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.

State registration provides some advantages not as extensive as federal registration. State registration is usually advisable, particularly in situations in which a company's sales will occur only in South Carolina. State registration also provides presumptive notice which may be very beneficial if the owner elects not to register the mark with the United States Patent and Trademark Office.

Federal Registration Application Process. ***15 U.S.C. §§ 1051, et seq*****.** Federal trademark registration requires that a trademark application be filed with the United States Patent and Trademark Office. The application must identify the mark and the goods with which the mark is used or is proposed to be used, the date of first use, and the manner in which it is used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and three specimens of the mark as it is actually used. After the application is filed, it is reviewed by an examiner who evaluates, among other matters, the substantive ability of the mark to serve as a valid mark and the possibility of confusion with existing marks. If the examiner rejects the application, the examiner's decision can be appealed to the Trademark Trial and Appeals Board. An adverse decision by that body can be appealed to federal court.

If the application is approved, the mark is published in an official publication of the Patent and Trademark Office. Opponents of the registration have thirty days after publication, or such additional time as may be granted, to challenge the registration. If no opposition is raised, or if the opponent's claims are rejected, an applicant whose mark is already in use receives a "certificate of registration."

An applicant whose trademark is proposed for registration before actual use receives, upon approval of the application, a "notice of allowance." An applicant who receives a notice of allowance must within six months of the receipt of the notice furnish evidence of the actual use of the trademark. The applicant then is entitled to a certificate of registration. Failure to furnish evidence of the actual use of the mark within the time allowed results in rejection of the application.

Post-Certificate Federal Procedures. A certificate of trademark registration issued by the Patent and Trademark Office remains in effect for ten years. However, registration expires at the end of six years, unless the registrant furnishes evidence of

continued use of the trademark between the fifth and sixth year after registration. The initial ten-year term of a certificate of registration can be renewed within the term's last six months for an additional ten-year term by furnishing evidence of continued use of the mark and paying a fee.

After at least five years of continuous use of a trademark following the receipt of a certificate of registration, a registrant can seek to have the status of the trademark elevated from "presumptive" evidence of the registrant's exclusive right to use of the trademark to virtually conclusive evidence of an exclusive right. To do so, the registrant must furnish the Patent and Trademark Office with evidence of continuous use of the trademark for at least five years. Additionally, there must not be any outstanding lawsuit or claim that challenges the registrant's rights to use the mark.

B. State Considerations

1. Trademarks and Service Marks. *S.C. Code Ann. §§ 39-15-1105, et seq.*

Registration. Any person or business who adopts and uses a trademark in this State may file an application for registration with (on a form furnished by) the Secretary of State. Unlike a federal application, which may be based on an intent to use a mark, a state application must be based on actual use. The application must be signed and verified by the applicant, a member of the firm, or an officer of the corporation or association applying, and must be accompanied by a specimens or facsimile of the trademark in triplicate and an application fee, payable to Secretary of State. The registration must also include information on the goods with which the mark is used, the statutory class of such goods, the date the mark was first used, and a statement that applicant is owner, the mark is in use, and that, on information and belief, there are no other registrants. Registration is effective for five years and may be indefinitely renewed for successive periods of five years. A renewal fee must be paid, and a renewal application must be filed within six months prior to expiration on a form furnished by Secretary of State. The Secretary of State may require additional information for any filings or amendments.

Assignment. A trademark with its registration is assignable with the good will of a business in which it is used. The assignment must be by written instrument, which should be recorded with the Secretary of State, with recording fee, upon which occasion, he records the assignment and issues to the assignee a new certificate for the remainder of term of registration or renewal. Such assignment is void as against a subsequent purchaser for valuable consideration without notice, unless so recorded within three months after date thereof, or prior to such subsequent purchase.

Protection Afforded. A certificate of registration (or copy certified by Secretary of State) is competent evidence in courts of the state and is proof of registration in any judicial proceeding.

Infringement. An injunction may lie where another uses, without the registrant's consent, any reproduction, copy, colorable imitation, or counterfeit of a trademark legally registered, whether such wrongful use be in sale, distribution, offer of sale, or advertising, if such use is likely to deceive or to cause confusion or mistake as to the source or origin of such goods or services. Recovery of profits and damages is limited, however, to cases where acts are committed with willful intent to cause confusion or mistake or to deceive.

2. Resale Price Agreements. S.C. Code Ann. §§. 39-7-10, et seq. Under the Fair Trade Act, the seller of a trademarked commodity may, by contract, require the purchaser thereof not to resell at less than a stipulated minimum price, and a willful and knowing violation of such contract is unfair competition. Such price restriction does not apply to: (a) closing out sale if stock is offered to producer or distributor at original invoice price at least ten days before being offered to the public; (b) sale of damaged or deteriorated goods after public notice for one week; (c) sale by officer acting under court order. The act does not apply to contract as to sale or resale prices between producers, between wholesalers, or between retailers.

3. Trade Names. There is no state filing requirement for businesses working under a fictitious name, except for limited partnerships that plan to conduct business in a name other than the one in which their certificate is issued. Mercantile and industrial establishments operating under fictitious names must file a form with the clerks of court of the counties where they do business, identifying the owner or proprietor.

4. Trade Secrets. In 1992, South Carolina adopted the Uniform Trade Secrets Act, but the Act was substantially revised in 1997. ***See S.C. Code Ann. §§ 39-8-10, et seq.*** Under the Act, a "trade secret" is defined as follows:

> A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

The Act's statute of limitations provides that an action for misappropriation shall be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. The statute rejects a continuing wrong theory and provides that a continuing appropriation for purposes of the limitation section constitutes a single claim.

The Act provides the trial court with the ability to enjoin actual or threatened misappropriation of a trade secret. The statute also offers a variety of circumstances under which the court may issue injunctive relief, including conditioning future use of a

trade secret upon payment of a reasonable royalty for a period of time within limits set by the statute. The Act also provides for compensatory damages for misappropriation of trade secrets in certain circumstances and exemplary damages up to twice the amount of the compensatory damage award for willful and malicious misappropriation. Finally, attorneys' fees are recoverable to a prevailing party, including for a willful and malicious appropriation of a trade secret and, conversely, for a claim of misappropriation made in bad faith.

The Act also provides for criminal penalties. Fines of up to $100,000 and/or imprisonment for up to 10 years, or both, may be imposed if one:

1. Steals, wrongfully appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains trade secrets;

2. Wrongfully copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys trade secrets;

3. Receives, buys, or possesses trade secrets, knowing the trade secrets have been obtained by any means described in items 1 or 2;

4. Attempts to commit any offense described in items 1 through 3;

5. Wrongfully solicits another to commit any offense described in items 1 through 3; or

6. Conspires with one or more other persons to commit any offense described in items 1 through 3, and where one of the conspirators performs an act to further the conspiracy.

The Act provides for protection of any trade secret during any civil or criminal court proceedings.

As to the relationship between the Act and other South Carolina common law theories, the Act "displaced conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." However, the Act does not preempt certain contractual remedies, and claims under the South Carolina Tort Claims Act.

IX. DISPUTE RESOLUTION

Troy A. Tessier

A. FEDERAL COURT SYSTEM

The trial courts of the federal court system are the United States District Courts. Although South Carolina constitutes a single federal district, it is organized into eleven "divisions" – Aiken, Anderson, Beaufort, Charleston, Columbia, Florence, Greenville, Greenwood, Orangeburg, Rock Hill, and Spartanburg. Federal trial courts sit in Aiken, Anderson, Beaufort, Charleston, Columbia, Florence, Greenville, and Spartanburg. There are currently thirteen federal district court judges and another eight federal magistrate judges in South Carolina. Federal district court judges are appointed by the President of the United States for life terms upon approval by the United States Senate. Appeals are to the Fourth Circuit Court of Appeals in Richmond, Virginia.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the United States Constitution and federal statute.

They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, ERISA, postal matters, internal revenue, admiralty, and customs, as well as federal crimes and federal torts. All other jurisdiction is concurrent with that of the State courts. There are generally two ways to gain access to the federal district courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding $75,000. For such a suit to be brought in federal court, there must be complete diversity, *i.e.*, none of the plaintiffs may be a citizen of the same state as any of the defendants. The second primary basis for federal jurisdiction is that the case involves a federal question, *i.e.*, presenting an issue arising under the Constitution, statutes, or treaties of the United States. If a case does not fall within one of the statutorily mandated jurisdictions, there is no recourse to the federal courts.

The federal courts are governed by the Federal Rules of Civil Procedure, promulgated by the United States Supreme Court and approved by the United States Congress. There is a uniform body of procedural rules applicable to every federal district court in the United States. Each federal district court also establishes its own local rules applicable only to the procedure in that district. These rules often set forth very specific guidelines for the handling of an action, and close attention must be paid to them. Thus, one participating in a suit in a federal district court must be aware of the local rules as well as the Federal Rules of Civil Procedure. The United States District Court for the District of South Carolina has promulgated an extensive set of local rules.

Additionally, all matters of bankruptcy are governed by federal statute and under the exclusive jurisdiction of the United States Bankruptcy Court. The United States Bankruptcy Court for the District of South Carolina sits in Charleston, Columbia and Spartanburg.

B. STATE COURT SYSTEM

1. Supreme Court. The State's highest tribunal is the Supreme Court. The court has both original and appellate jurisdiction. When the Court of Appeals was activated on September 1, 1983, the Supreme Court reserved exclusive jurisdiction over cases on *certiorari* from the Court of Appeals and certain classes of appeals directly from the circuit and family courts. Exclusive appellate jurisdiction of the Supreme Court includes cases involving (1) a death sentence; (2) public utility rates; (3) significant state constitutional issues; (4) public bond issues; (5) election laws; (6) orders limiting a State grand jury investigation; and (7) orders of the Family Court relating to abortion by a minor. Other appeals from the Circuit and Family Courts are apportioned between the Supreme Court and Court of Appeals. The Supreme Court renders decisions based on lower court transcripts, briefs, and oral arguments. In addition to hearing and deciding cases, the court also has rule-making authority for the unified judicial system, including ethics regulations for judges and control of admissions to and discipline of the members of the South Carolina Bar. The Supreme Court is composed of a Chief Justice and fourAssociate Justices who are elected by the South Carolina General Assembly for terms of ten years. The terms are staggered, and a justice may be reelected to any number of terms.

2. Court of Appeals. The Court of Appeals was created in 1983 to hear most types of appeals from the Circuit Court and the Family Court. The exceptions are for appeals that fall within any of the seven classes of cases where appellate jurisdiction is exclusively reserved to the Supreme Court.

The Court of Appeals consists of a Chief Judge and eight associate judges who are elected to staggered terms of six years each. The court sits either as three-judge panels or as a whole, and it may hear oral arguments and motions from any county of the state.

3. The Circuit Court. The Circuit Court is the State's court of general jurisdiction. It consists of the Court of Common Pleas (civil court), and the Court of General Sessions (criminal court). In addition to general trial jurisdiction, the Circuit Court has limited appellate jurisdiction over appeals from the Probate Court, Magistrate's Court, and Municipal Court, as well as appeals from the Administrative Law Judge Division over matters relating to state administrative and regulatory agencies. The State is divided into sixteen judicial circuits. Each circuit has at least one resident circuit judge who maintains an office in the judge's home county within the circuit. There are currently 46 circuit judges who serve the different circuits on a rotating basis. Court terms and assignments are determined by the Chief Justice based upon recommendations of Court Administration. Circuit Court Judges are elected to staggered terms of six years.

4. Master-In-Equity. Masters are appointed by the Governor with the advice and consent of the General Assembly for six-year terms. Masters-In-Equity have jurisdiction over matters referred to them by the Circuit Courts. They have the power and authority of the Circuit Court sitting without a jury and may take all measures necessary

or proper for the efficient performance of their duties under the order of reference. This includes ruling on motions, requiring the production of evidence, ruling upon the admissibility of evidence, and calling and examining witnesses under oath. Masters may also conduct judicial sales. There are currently 22 Masters-In-Equity. Final orders based on masters' reports are executed by circuit judges unless the master enters final judgment under limited circumstances. Appeals from final judgments entered by a master are to the Supreme Court or Court of Appeals as provided by the Appellate Court rules.

5. Family Court. The South Carolina Family Court system was established in 1976 with exclusive jurisdiction over matters involving domestic or family relationships. The Family Courts are the sole forum hearing all cases concerning marriage, divorce, legal separation, custody, visitation rights, termination of parental rights, adoption, support, alimony, division of marital property, and change of name. The courts also generally have exclusive jurisdiction over minors under the age of seventeen alleged tohave violated any state law or municipal ordinance, although most traffic, fish, and game law violations are triable in magistrate or municipal courts.

6. Probate Court. South Carolina has one Probate Judge in each county. The Probate Judge is popularly elected to a four-year term and has jurisdiction over marriage licenses, estates of deceased persons, guardianships of incompetents, conservatorships of estates of minors and incompetents, minor settlements of up to $25,000, and involuntary commitments to institutions for mentally ill and/or chemically dependent persons. They also have exclusive jurisdiction over trusts and concurrent jurisdiction with Circuit Courts over powers of attorney.

7. Magistrate Court. There are approximately 300 magistrates in South Carolina who serve in the county for which he or she is appointed to four-year terms by the Governor upon the advice and consent of the Senate. Magistrates in South Carolina need not be attorneys but must pass a certification examination within one year of their appointment. Magistrates generally have criminal trial jurisdiction over all offenses subject to the penalty of a statutory fine but generally not exceeding $500 or imprisonment not exceeding 30 days, or both. Magistrates are also responsible for setting bail, conducting preliminary hearings, and issuing arrest and search warrants. Magistrates have civil jurisdiction when the amount in controversy is $7,500 or less, except in cases involving landlord/tenant disputes, when the amount in controversy may be unlimited.

8. Municipal Court. Any municipality may create a court for the hearing of those State offenses and municipal ordinances subject to a fine not exceeding $200 or imprisonment not exceeding 30 days, or both, and which occur within the municipality. More than 200 municipalities in South Carolina have chosen to create municipal courts. Municipal Courts have no civil jurisdiction. The term of a municipal judge is set by the council of the municipality but cannot exceed four years. Municipal judges must be certified by examination at least once every eight years.

9. Administrative Law Judge Division. The Administrative Law Judge Division is an agency within the executive branch of state government charged with conducting hearings on contested cases arising under the Administrative Procedures Act, appeals from the professional and occupational licensing boards, and regulations promulgated by certain State agencies.

C. ARBITRATION AND MEDIATION IN SOUTH CAROLINA

In most of South Carolina's circuits, arbitration and mediation are voluntary. Clients and attorneys select a neutral arbitrator or mediator for each case. However, pilot projects in a few counties require mediation in most civil cases before trial, and it appearsthe State system is moving toward a mandatory mediation system throughout the State. South Carolina has adopted the Uniform Arbitration Act. ***S.C. Code Ann. §§ 15-48-10,et seq.*** Written agreements submitting matters, including future matters, to arbitration are valid and enforceable, but such agreements must, on the first page of the agreement, clearly notice that the contract is subject to arbitration. Such notice must be in underlined capital letters or rubber-stamped prominently. Courts have authority to confirm, award, and enter appropriate judgment. Certain matters are statutorily excluded from arbitration, including workers' compensation claims, unemployment compensation claims, insurance claims, and personal injury claims.

D. STATE AGENCIES

South Carolina has literally hundreds of State agencies, each with limited jurisdiction and each with the possibility of affecting your business in South Carolina. Each agency is set up to handle disputes that arise as a result of its licensing, inspection, or enforcement. An adverse ruling at an agency level is appealable to the Administrative Law Division, as provided by the Administrative Procedures Act, but it is difficult to reverse rulings. Securing counsel at the outset of a dispute is strongly recommended.

X. ECONOMIC INCENTIVES AVAILABLE UNDER SOUTH CAROLINA LAW

James I. Warren, III

South Carolina offers a number of economic incentives to companies doing business in the state. Not only are South Carolina's economic incentives available in connection with major new projects and expansions, but many of these incentives are available to companies in the ordinary course of their business. Each incentive is subject to a number of technical requirements. Moreover, the deadlines with respect to each incentive can be traps for the unwary, and whether a particular incentive is available to an individual company often turns on fact-specific information related to the company's

employment, operations, and investment activities. Three major economic incentives available under South Carolina law, as well as a favorable financing incentive known as an Industrial Revenue Bond, are summarized below.

1. Jobs Tax Credit. One of the key components of South Carolina's income tax economic development incentives is the Jobs Tax Credit. This statute is designed to give an employer a credit against income tax for the creation of new jobs. Depending on the location of a company's operations, employers are entitled to Jobs Tax Credits as follows:

- Least-Developed Counties - $4,500 tax credit per job created.
- Under-Developed Counties - $3,500 tax credit per job created.
- Moderately-Developed Counties - $2,500 tax credit per job created.
- Developed Counties - $1,500 tax credit per job created.

These credits are available each year for five years beginning the year after the job is filled or created. The carry-forward on the Jobs Tax Credit (the length of time which the business may carry-forward unused credit) is 15 years. In general, a business must create a minimum of ten jobs to be eligible for the credit and be engaged in manufacturing, processing, warehouse, distribution, or tourism, or the facility must be a corporate office facility. Additionally, certain new types of businesses now qualify for the Jobs Tax Credit, including service-related facilities which are those engaged in providing health services or service businesses which create 250 jobs minimum at a single location. Also, businesses engaged in retail sales and those which are engaged in providing services which are located in least developed counties now also qualify for the Jobs Tax Credit if they create at least 10 jobs. For example, if a fast food restaurant were to open an establishment in a least developed county, the restaurant would be entitled to take advantage of this incentive if the restaurant employed at least 10 people. There is not an investment requirement related to this incentive. Therefore, a business which creates more than 10 jobs but only invests $100,000 in the project could still qualify for this incentive.

2. Job Development Fees. Another major part of South Carolina's economic development incentives is a program known as Job Development Fees. South Carolina law allows businesses to retain a portion of their employees' withheld state income tax for certain uses, including training costs, acquiring and improving real estate, and meeting environmental standards.

The retained withholdings are referred to as Job Development Fees ("JDFs"). The amount of JDFs that a company may retain depends on the wages paid to its new employees. Specifically, a business may retain the following:

- 2% of wages for employees earning $6 - $8 per hour.
- 3% of wages for employees earning $8 - $10 per hour.

- 4% of wages for employees earning $10 - $15 per hour.
- 5% of wages for employees earning $15 or more per hour.

Eligibility. To be eligible to apply for these benefits, a business must meet four requirements:

1. Must qualify for the Jobs Tax Credit;
2. Create at least 10 new jobs;
3. Provide a benefit package to full-time employees which includes health care; and
4. Enter into a Revitalization Agreement with the Advisory Council for Economic Development.

The county in which a business locates in the State affects the amount of JDFs that a business may retain for its own use. A business can retain 100% of the maximum allowable JDFs it collects if it is located in a least-developed county, 85% if located in an under-developed county, 70% if located in a moderately-developed county, and 55% if located in a developed county. The difference between the maximum allowable JDFs and the amount retained by the business must be remitted to the State Rural Infrastructure Fund. Most of the money in the State Rural Infrastructure Fund will be used to provide financial assistance to local governments located in least-developed and under-developed counties for certain specified uses, including improvements to water and sewer systems, public and private electric, natural gas, and telecommunications systems.

Because the retained JDFs can be escrowed by a company and spent to offset certain project-related costs for a period of up to 15 years, the incentive can be very significant. For example, assume a company which manufactures widgets makes a $500,000 plant expansion over a period of 5 years, creates 20 new jobs as result of the expansion, is located in Barnwell County, South Carolina (a least-developed county), and pays its employees $8 an hour, and assume that the employees work 2,000 hours each year. If the South Carolina Coordinating Council approved the maximum benefits for which the company would be eligible, this widget manufacturer could take $144,000 that would otherwise have been paid to the Department of Revenue in the form of employee withholding taxes and apply it against the cost of its $500,000 expansion.

In addition to the JDFs described above, an employer may also retain up to $500 of withholding per year per employee (up to a maximum of $2,000 over 5 years) for the retraining of production employees. The employer must match the withholding on a dollar-for-dollar basis, and the retraining must be provided by a technical college or another training entity approved by the technical college.

The deadlines for application for the JDF program can be exacting.

3. Fee-in-Lieu of Property Taxes.

Introduction. Under the South Carolina Constitution, manufacturing real or personal property is assessed at 10.5% and commercial personal property is also assessed at 10.5%. Commercial real property, such as an office building or hotel property, is assessed at 6.0%. To promote the growth of manufacturing within South Carolina, the legislature has enacted two fee-in-lieu of property tax statutes (typically called "Fee-in-Lieu" or "Fee"). Property subject to the Fee usually consists of land, improvements to land, and machinery and equipment located at the project. The Fee statutes permit a company to negotiate with the county where the property is located to pay a Fee instead of paying property taxes. The 10.5% assessment ratio for manufacturing real or personal property can be, and often is, negotiated as low as 6%. Additionally, the company and the county can agree to freeze the millage rate applicable to the property at the current millage rate, or adjust the millage rate every five years, for the period the Fee is in effect. Therefore, normally, only manufacturers take advantage of the Fee-in-Lieu incentive; however, even though the commercial real property will still be assessed at a 6% rate, the fact that the millage rate can be fixed for a period of time may make this an incentive worth evaluating for certain non-manufacturing businesses. During the period of the Fee, the value of the personal property is deemed to decrease each year by a statutory depreciation rate (subject to a 10% floor) while the value of the real property remains constant and therefore is not subject to inflation. The period of the Fee is 20 years for each item of property with an overall limit of 30 years. The additional 10 years allows for a 10-year period to complete the project and have property at the project subject to the Fee and still obtain the maximum 20 years for each item of property.

Calculations of the Fee must be made incorporating any property tax exemptions for which the property may be eligible, except for the five-year exemptions from county taxes allowed for manufacturing property.

To qualify for a Fee transaction, a company must invest at least $5 million within a five year period (subject to a possible five-year extension). The only requirement related to the intended use of the project is that the project must be anticipated to benefit the general public welfare of the locality by providing services, employment, recreation, or other public benefits. A company is not required to create any new jobs to become eligible for a Fee transaction.

Process. It typically takes two to three months to complete a Fee-In-Lieu transaction and there are many steps which must be completed.

Industrial Revenue Bonds. In connection with expansion projects, companies often seek financing via the issuance by a governmental entity of Industrial Revenue Bonds ("IRBs"). Under an IRB transaction, a governmental entity issues bonds in a maximum amount not in excess of $10 million. A limited dollar amount of IRB's is allowed to each state, and in South Carolina these are allocated by the State Budget and Control Board. Obtaining an allocation of available IRB dollars can be difficult. The earnings of the company borrowing the money under an IRB are pledged to support the bonds, but the real credit enhancement usually involves the issuance of a letter of credit

by the company's lender. The chief advantage of financing a transaction via an IRB is that the interest rate is much lower than any traditional financing available to a company.

XI. SECURITIES and BLUE SKY REGULATION

James M. Shoemaker, Jr., Melinda Davis Lux

A. FEDERAL SECURITIES LAW ISSUES

The focus of the United States securities laws is to protect the interests of investors and the public by requiring the disclosure of material information in connection with the offer and sale of securities and prohibiting fraud and manipulative practices. The Securities Act of 1933 (the "1933 Act") provides that the offer or sale of a security is prohibited unless either the transaction is registered with the Securities and Exchange Commission (the "SEC"), the federal agency responsible for administering and enforcing United States securities laws, or the transaction or the particular type of security is exempt from registration. In addition, the Securities Exchange Act of 1934 (the "1934 Act") (i) subjects certain issuers (generally those whose equity securities are held by the public) to ongoing disclosure requirements in their quarterly, annual and other reports filed with the SEC and to certain rules regarding the solicitation of proxies and the making of tender offers, (ii) imposes reporting and trading restrictions on directors, officers, principal shareholders, and other insiders in connection with their personal transactions in securities of the issuer, and (iii) regulates the activities of securities brokers and dealers. The 1933 Act and 1934 Act also prohibit the making of material misstatements or omissions and other fraudulent practices in connection with the purchase or sale of any security, whether or not the transaction is registered with the SEC.

There are several exemptions from registration under the 1933 Act and certain preemption of the applicability of certain state securities laws. Certain exemptions are available based on the type of security issued. For example, exempt securities include securities issued by federal or state governments or related agencies or by a bank, savings and loan association or similar institution subject to governmental regulation and securities issued for nonprofit purposes. Other exemptions are available based on the type of transaction in which the security is issued. One of the most commonly used transaction exemptions applies to transactions that do not involve a "public offering." The test to determine whether a public offering is involved has not been clearly defined, although the following factors are relevant: the number of offerees and their relationship to each other and the issuer; the size and manner of the offering; the sophistication of the offerees; and the nature and kind of information concerning the offering provided to offerees. The SEC has adopted certain "safe harbor" rules that, if followed, ensure that an offering will be exempt as a non-public offering or will otherwise be exempt.

Certain of these rules are contained in Regulation D promulgated by the SEC pursuant to the 1934 Act. These rules impose objective requirements on the dollar amount of the offering, the number of purchasers, informational requirements, advertising, solicitation restrictions, and limitations on resale. Other often usedexemptions from registration under the 1933 Act apply to offerings conducted exclusively in the state where the issuer is organized and does a substantial amount of its business, and to offers and sales of securities of non-public issuers made pursuant to employee benefit plans and compensatory employment contracts if the amount of securities offered and sold does not exceed certain dollar limitations and the purpose of the sale is to compensate employees, rather than to raise capital for the issuer. Certain of the exemptions referred to above require notice filings to be made with the SEC.

In addition to the foregoing, issuers may be able to rely on Regulation S for offers and sales of securities that are made in "offshore transactions" so long as no "directed selling efforts" are made in the United States. The Regulations S "safe harbor" from registration applies to both the primary distribution by an issuer (and related parties) and to offshore resales by persons other than an issuer (or related persons).

If no exemption is available and registration is required, a registration statement must be filed with, and declared effective by, the SEC in connection with the offering, and a prospectus containing specified information must be provided to investors. The SEC's registration forms call for varying levels of financial and other disclosures depending on the size and type of the issuer.

B. STATE BLUE SKY AND OTHER SECURITIES ISSUES

The Uniform Securities Act (Act), ***S.C. Code Ann. §§ 35-1-10, et seq.***, as most recently amended in 1997, regulates offers and sales of securities in South Carolina. Commonly referred to as South Carolina's "blue sky" law, the Act is based on the Uniform Securities Act, with certain modifications. Like the federal securities laws, the Act is designed to protect investors by, among other things, regulating the offer and sale of securities through registration, setting forth disclosure and other substantive requirements, and prohibiting fraudulent, manipulative, and deceptive practices in connection with the offer or sale of securities.

In general, offers and sales of securities in South Carolina are prohibited, regardless of the size of the offering, unless the security is registered with the South Carolina Secretary of State or the security or the particular transaction is exempt under the Act. If an exemption is not available, an offer or sale of a security may not be made unless it is registered. Even if an exemption is available, notice or other filings (and possibly filing fees) may be required, depending on the type of exemption.

The Act identifies eleven types of securities that are exempt from registration. These include:

1. Domestic government securities. Any security, including a revenue obligation, issued or guaranteed by the United States, any state, any political subdivision of a state or any agency or corporate or other instrumentality of one or more of the foregoing, or any certificate of deposit for any of the foregoing;

2. Foreign government securities. Any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

3. Securities of banks, trusts and savings institutions. Any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States or any bank, savings institution, or trust company organized and supervised under the laws of any state;

4. Securities of federal savings and loan and similar associations. Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association, organized under the laws of any state and authorized to do business in South Carolina;

5. Securities of federal or state credit unions. Any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under the laws of South Carolina;

6. Securities of public service companies. Any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company which is (a) subject to the jurisdiction of the Interstate Commerce Commission, (b) a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act, (c) regulated in respect of its rates and charges by a governmental authority of the United States or any state, or (d) regulated with respect to the issuance or guarantee of the security by a governmental authority of the United States, any state, Canada or any Canadian province;

7. Securities listed on stock exchanges. Any security listed or approved for listing upon notice of issuance on the New York Stock Exchange, the American Stock Exchange, the Midwest Stock Exchange, the NASDAQ/National Market System, or such other securities exchange as the securities commissioner by regulation may designate, any other security of the same issuer which is of senior or substantially equal rank, any security called for by subscription rights or warrants so listed or approved, or any warrant or right to purchase or subscribe to any of the foregoing;

8. Securities of religious, charitable, and trade organizations. Any security issued by any person organized and operated not for private profit but exclusively for

religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association;

9. Short-term commercial paper. Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal;

10. Employees' investment plans. Any investment contract issued in connection with an employees' stock purchase, savings, pension, profit-sharing, or similar benefit plan if the securities commissioner is notified in writing thirty days before the inception of the plan, and

11. Securities of State cooperatives. Any security issued by a cooperative association organized under the laws of South Carolina.

The Act also includes twelve exemptions which are based on the nature of the transaction in which the offer or sale takes place. These include:

1. Isolated nonissuer transactions. Any isolated nonissuer transaction, whether effected through a broker-dealer or not;

2. Distributions of outstanding securities. Any nonissuer distribution of an outstanding security if (a) a recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or (b) the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security;

3. Nonissuer transactions with broker-dealers. Any nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy; but the securities commissioner may, by rule or otherwise, require that the customer acknowledge upon a specified form that the sale was unsolicited and that a signed copy of each such form be preserved by the broker-dealer for a specified period;

4. Underwriting transactions. Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter or among underwriters;

5. Mortgage bonds sold as unit. Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement,

together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

6. Transactions by fiduciaries. Any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

7. Transactions by pledgees. Any transaction executed by a bona fide pledgee without any purpose of evading South Carolina's Uniform Securities Act;

8. Transactions with banks, and other financial institutions or institutional buyers. Any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

9. Limited offerings. Any transaction pursuant to an offer directed by the offeror to not more than twenty-five persons, other than those designated in item (8) above, in South Carolina during any period of twelve consecutive months, whether or not the offeror or any of the offerees is then present in South Carolina, if (a) the seller reasonably believes that all the buyers in South Carolina, other than those designated in item (8) above, are purchasing for investment and (b) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in South Carolina, other than those designated in item (8) above; but the securities commissioner may by rule or order, as to any security or transaction or any type of security or transaction, withdraw or further condition this exemption, increase or decrease the number of offerees permitted or waive the conditions in clauses (a) and (b) with or without the substitution of a limitation on remuneration, and the securities commissioner, further, may require persons claiming this exemption to notify him in writing of the claim of exemption, the number of offers extended and to whom made at any point during the offering process;

10. Limited preorganization subscriptions. Any offer or sale of a preorganized certificate or subscription if (a) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, (b) the number of subscribers does not exceed twenty-five, and (c) no payment is made by any subscriber prior to filing of the articles of incorporation or limited partnership, limited liability partnership, or limited liability company agreement with the Secretary of State.

11. Conversions and exercise of warrants. Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, if (a) no commission or other remuneration, other than a standby commission, is paid or given directly or indirectly for soliciting any security holder in South Carolina or (b) the issuer first files a notice specifying the terms of the offer, and the securities commissioner does not by order disallow the exemption within the next five full business days;

12. Offers after registration statements filed. Any offer, but not a sale, of a security for which registration statements have been filed under both South Carolina's

Uniform Securities Act and the 1933 Act if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under this chapter.

By regulation, South Carolina provides exemptions for Regulation D offerings under the Federal Securities Laws which comply with Rules 501-505, and 507-508 of Regulation D under the 1933 Act. There is also an exemption for accredited investors as defined in Regulation D. Reg. D, Rule 506. Finally, there is a limited offering exemption for ten or fewer purchasers. These exemptions have a number of detailed requirements found in rules issued by the South Carolina Securities Commissioner. Any issuer that desires to rely on any of these exemptions should contact the South Carolina Securities Commissioner to determine whether any requirements, in addition to those found in the rules, are currently in effect.

Any person who offers or sells a security in violation of the Act's registration provisions, who makes material misstatements in connection with the offer, sale or purchase of a security, or who otherwise engages in fraudulent conduct may be subject to civil and criminal liability. Dealers, salesmen, investment advisers, and investment adviser representatives are also prohibited from engaging in fraudulent practices and are subject to revocation of their registration and other penalties for violations of the Act. The Attorney General is deemed by the Act to be the securities commissioner but delegates his authority to the South Carolina Securities Division, Office of Attorney General, Rembert C. Dennis Building, 1000 Assembly Street, P.O. Box 11549, Columbia, S.C. 29211-1549 (Attention: Tracy A. Myers), phone number: (803) 734-4731.

XII. REAL ESTATE

James I. Warren, III, Megan P. O'Neill, Amos A. Workman

South Carolina permits the acquisition of real estate by persons or entities other than United States citizens or residents (foreign persons). There are certain aspects of South Carolina law and custom, however, which must be considered by anyone considering the purchase of real estate. Typical issues that arise in real estate transactions include the state of title to the property, whether a purchaser will have adequate access to the property, whether there are any easements or other restrictions encumbering the property that will hinder or prohibit the purchaser's intended use of the property, whether the property is located in a flood hazard area, whether there are any environmental problems with the property (or in the vicinity of the property that may negatively impact the property), and whether and to what extent zoning and other land use restrictions will

affect the development and use of the property. In South Carolina the governmental approvals necessary in connection with the acquisition and development of real estate vary from county to county. The zoning, planning, building, environmental protection, and subdivision laws are enforced by numerous city and county bodies pursuant to local ordinances enacted in accordance with state statutes. It is customary for the purchaser's attorney to be responsible for determining that title to the property is marketable and for certifying title for the purpose of obtaining title insurance.

The state and local associations for real estate brokers have developed standardized forms of purchase and sale agreements that are widely used, especially in residential transactions. Forms developed by these associations attempt to strike a fair balance between the purchaser and seller and are available from realtors and law firms. Mediation is normally required now if disputes arise under these agreements.

There are various tax and reporting requirements that should be considered in connection with the purchase of real estate by foreign persons in the United States. These requirements are summarized below.

A. AFIDA *7 U.S.C. §§ 3501 et seq.*

The Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA") requires all foreign persons and organizations to report the acquisition or transfer of an interest in agricultural land within ninety days of the conclusion of the transaction. Agricultural land includes any area of land exceeding ten acres and producing more than $1,000 annually from farming, ranching, forestry, or timber production. Reports must also be filed within ninety days after the date an owner of agricultural land becomes a foreign person or land held by a foreign person becomes agricultural. The foreign person must disclose in these reports extensive personal information in addition to information about the land itself.

B. IITSSA *22 U.S.C. §§ 3101 et seq.*

The International Investment and Trade in Services Survey Act ("IITSSA") requires that all foreign direct investment in the United States be reported to the Bureau of Economic Analysis ("BEA"). Foreign direct investment in the United States includes foreign ownership of real estate and the direct or indirect ownership or control by a foreign person of a 10% or more voting interest in a United States business enterprise. For purposes of this Act, a foreign person is any individual or organization residing outside of the United States or who is subject to the jurisdiction of a country other than the United States.

Any business enterprise which is 10% owned, directly or indirectly, by a person of another country is considered to be a United States affiliate. IITSSA requires that United States affiliates make several filings with the BEA. An initial report must be filed

within forty-five days of the transaction establishing the United States affiliate. In addition, an annual report must be filed within thirty days of the close of each quarter in certain circumstances. Finally, United States affiliates must file an extensive survey every five years, and additional reports may be required depending on the amount of the investment.

There are several exemptions from the BEA's filing requirements. For example, no filing is required for investment in real estate when the investment is for personal use. There are also exemptions based on the size or value of the real estate acquisition. However, if an acquisition is exempt from reporting requirements due to its size or value, a claim of exemption must be filed within forty-five days of the acquisition. The penalty for failure to comply with reporting requirements includes an injunction requiring a report and a civil penalty of up to $10,000. Willful failure to submit any of the information required can also result in a maximum fine of $10,000 and up to one year in prison.

C. FIRPTA *26 U.S.C. § 871-897*

The Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") authorizes the Secretary of Treasury to require foreign investors to file information returns and also imposes withholding requirements on transferees in the disposition of a United States real property interest when the transferor is a foreign person. The transferee generally must withhold 10% of the amount realized by the transferor on the transaction, although there are several situations in which withholding is not required or the amount of tax withheld is decreased. Any transferee failing to withhold the tax may be liable for the amount of tax, including penalties and interest. Penalties include a civil penalty of up to 25% of the tax due. A transferee also may be found criminally liable for fraud.

In some situations, a foreign investor may benefit from making an election under Section 897(I) of the Internal Revenue Code. An 897(I) election permits a foreign corporation to be treated as a domestic corporation for the purposes of FIRPTA. With this election, income from United States real property held by a foreign investor is taxed at graduated ordinary income rates, all expenses in connection with the income are deductible, the foreign investor avoids withholding on transfers, and special non-recognition rules promulgated under FIRPTA which treat foreign investors unfavorably will not apply. Before a foreign investor makes an 897(I) election, however, the foreign investor must employ careful planning because an 897(I) election affects all of the United States real property held by the foreign investor, and such an election is irrevocable without the consent of the IRS.

D. SOUTH CAROLINA INCOME TAX WITHHOLDING ON SALES BY NON-RESIDENTS

Any sale of South Carolina real property by a non-resident is subject to a withholding requirement. The purchaser is required to withhold a percentage of the gain

recognized or the amount realized and forward it to the Department of Revenue unless an exemption from withholding is established by the seller. ***S.C. Code Ann. § 12-8-580.***

E. SOUTH CAROLINA STATUTES AND LAW

Estates. The following estates are recognized in South Carolina: fee simple, tenancy in common, joint tenancy (without right of survivorship unless the instrument creating the joint tenancy expressly provides for survivorship), and life estate with remainder. The method of conveyance is by deed, and a statutory form of deed is prescribed.

South Carolina has adopted the Uniform Statutory Rule Against Perpetuities. ***S.C. Code Ann. §§ 27-6-10, et seq.***

Recording. Recording fees for deeds will be assessed by the local recording office. The recording fee is $3.70 for each $1,000, or fractional part thereof, of the realty's value, plus a nominal charge for recording a document (normally $10). Certain exemptions to the fees apply. All recording fees are normally the liability of the seller, though the purchaser will be secondarily liable. In an arm's length transaction, the term "value" means the consideration paid or to be paid in money or money's worth for the realty including other realty, personal property, stocks, bonds, partnership interests, and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of a right. ***S.C. Code Ann. § 12-24-30.***

Partition. Joint tenants and tenants in common are absolutely entitled to partition of land held jointly by them. Partition in kind is favored when it can fairly be made without injury to parties, and the party that is seeking partition by sale carries the burden of proving partition in kind is not practical or fair. The Court of Common Pleas has jurisdiction in all partition actions. ***S.C. Code Ann. §§ 15-61-10, et seq.***

Mortgages. ***See generally, Title 29, S.C. Code.*** Mortgages of real estate are usually given to secure promissory notes. The lien theory applies. Mortgages must be properly executed, witnessed, and acknowledged to allow for recording and to otherwise protect the mortgagee's rights. The cost for recording a mortgage begins at $10, and there are now no other taxes or recording fees. On default of a mortgage, a mortgagee cannot maintain a possessory action. For real estate mortgaged, a mortgagor is still deemed owner of land, and the mortgagee must proceed by judicial foreclosure and sale. Foreclosure of mortgages is by ordinary suit of Summons and Complaint in the county where the property is located. The court may render judgment and order a public sale. Public sales are normally the first Monday of each month.

The mortgagor has certain rights in a foreclosure action. Anyone who is subject to a deficiency judgment in an action has the statutory right to an appraisal of the property if a deficiency judgment against the mortgagor or other obligor is sought. Appraisal rights can be waived if the mortgagee gives notice to the mortgagor or obligor of such expectation prior to closing of the transaction and the mortgagor or obligor signs

a statement waiving appraisal rights. A statutory form of statement of waiver is required. Any application for appraisal rights is to the Court of Common Pleas.

The South Carolina Consumer Protection Act may also have an impact on mortgages involving consumers. South Carolina law also compels a prompt and timely satisfaction of paid mortgages. If a mortgagee fails to cancel or record a paid mortgage within 90 days, it may be subject to serious financial penalties. ***S.C. Code Ann. § 29-3-320.***

No mortgage or deed having the effect of a mortgage or other lien shall constitute a lien upon any real estate after the lapse of twenty years from the date for the maturity of such lien. But if the holder of any such lien shall, at any time during the continuance of such lien, cause to be recorded upon the record of such mortgage or deed having the effect of a mortgage or other lien a note of some payment on account or some written acknowledgment of the debt secured thereby, with the date of such payment or acknowledgment, such mortgage or deed having the effect of a mortgage or other lien shall be, and continue to be, a lien for twenty years from the date of the recording of any such payment on account or acknowledgment. When there is no maturity stated or fixed in the mortgage or the record of the mortgage then the provisions hereof shall be applicable from the date of such mortgage, and such mortgage shall not constitute a lien after the lapse of twenty years from the date thereof. ***S.C. Code Ann. § 29-1-10.***

Vacation Time Sharing and Condominiums. ***S.C. Code Ann. §§ 27-32-10, et seq.*** Vacation time sharing plans are recognized but are comprehensively regulated. Condominium ownership is allowed and regulated by the South Carolina Horizontal Property Act. ***S.C. Code Ann. §§ 27-31-10, et seq.***

Development. Land developers should be alert to state and local laws which regulate the development, subdividing, and sale of land. South Carolina has adopted the Uniform Land Sales Practices Act, which is administered by the South Carolina Real Estate Commission. ***S.C. Code Ann. §§ 27-29-10, et seq.*** On July 1, 1988, the South Carolina Legislature enacted legislation, ***S.C. Code Ann. §§ 48-39-10, et seq.,*** which is intended to provide for beach protection and management through a program to restore the beach/dune system along the coast to its natural state. It requires the creation of a comprehensive, long-range beach management plan to provide for the protection, preservation, restoration, and enhancement of the beach/dune system and for a gradual retreat from the beach/dune system over a forty-year period. The responsibility for implementing the legislation has been placed with the South Carolina Coastal Council. This legislation affects the use of beachfront property by restricting the construction of new structures and erosion control devices and by restricting the repair and reconstruction of existing structures and erosion control devices. A number of court decisions has also impacted beachfront development.

Landlord/Tenant. South Carolina has fairly extensive statutes governing landlord/tenant relationships in the residential context. ***S.C. Code Ann. §§ 27-40-10, et***

seq. Though there is a statute covering commercial leases, they are largely a matter of contract law, and the practices in South Carolina do not differ significantly from those in other states. There is not a standard form for commercial leases. Commercial leases

range from the relatively simple agreements for smaller matters to long and complex leases for larger tenants or unusual projects. Recording of leases or a memorandum of the lease is often necessary to protect a tenant's rights in the leased property.

Miscellaneous. South Carolina provides by statute that it is lawful for aliens to hold, convey, and inherit any interest in real (and personal) property, but the maximum ownership of real property is 500,000 acres. ***S.C. Code Ann. §§ 27-13-10, et seq.***

Recording of real estate documents in the county where the real estate is located is highly critical to the preservation of rights. Again, South Carolina counsel needs to be consulted.

XIII. DEBTOR and CREDITOR; INSOLVENCY; FRAUDULENT CONVEYANCES; LIENS

Marshall Winn, Amos A. Workman

A. DEBTOR AND CREDITOR

Actions to recover a debt due or to pursue a claim are normally initiated by the filing and service of a Summons and Complaint in the Court of Common Pleas. Certain claims not in excess of $7,500 may be pursued in Magistrate's Court. Once the court awards judgment, the judgment is entered in the judgment rolls. Because a judgment constitutes a lien on defendant's real estate, judgment should be enrolled in all counties where the judgment defendant owns real estate. A judgment does not constitute a lien on any of defendant's personal property until the sheriff levies on such personal property. Judgment liens are good for ten years and cannot be renewed.

Judgments are enforced by execution and proceedings in aid of execution. ***S.C. Code Ann. §§ 15-39-10, et seq.*** Executions may issue on final judgments at any time within ten years of the entry of judgment. The sheriff is responsible for levying on any property of the judgment debtor available to satisfy the judgment. In many cases, an individual defendant's personal property is exempt from execution and levy; in addition, historically in South Carolina, sheriffs are reluctant to levy on an individual defendant's property. The sheriff seizes any property levied on and then holds a public sale of the property. Proceeds from the sale are applied to satisfy the judgment debt, after payment of sheriff's fees and court costs.

Property exempt from execution, levy, and sale includes Social Security, veterans, and illness or disability benefits; unemployment compensation; alimony; child support; crime reparation; personal injury awards; wrongful death awards; and life insurance payments. Other exemptions include a debtor's aggregate interest of up to $5,000 in real estate; $1,200 in a motor car; $2,500 in personal property; $500 in jewelry; $750 in professional tools; and unmatured life insurance. Also exempt are any wages of debtor and income for personal services. ***S.C. Code Ann. §§ 15-41-10, et seq.***

South Carolina has opted out of the federal bankruptcy exemptions, and, therefore, a debtor in a bankruptcy proceeding is not entitled to **Bankruptcy Code §522(d)** exemptions. The South Carolina exemptions, contained in ***S.C. Code Ann. § 15-41-30***, are patterned on those in ***Bankruptcy Code §522(d)*** but generally contain substantially lower dollar amounts.

Proceedings in aid of execution include:

1. Supplementary Proceedings. When the execution is returned unsatisfied by the sheriff, on the affidavit of the judgment creditor that he believes that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment, the judgment creditor may obtain an order from the Circuit Court requiring the judgment debtor to appear and answer, under oath questions concerning his assets and property, at the time and at a place specified in the order within the county where the execution was issued. The judgment debtor also may be ordered to produce financial records. If property not otherwise exempt is thereby discovered, it may be taken and applied toward satisfaction of the judgment.

Those owing money to the judgment debtor may be required to appear and answer questions regarding their indebtedness. Witnesses may also be required to appear and testify. The Court may order any property of the judgment debtor, not exempt from execution, in the hands of himself or any other person, or due the judgment debtor, to be applied toward satisfaction of the judgment. In supplementary proceedings the judge may appoint a receiver and prohibit the transfer of any property of a judgment debtor.

2. Garnishment. The judge may order any property of the judgment debtor, not exempt from execution, to be applied to satisfaction of judgment, except wages and earnings for personal services. Under certain conditions, earnings may be attached for medical care, exclusive of doctor's fees, when the care was paid for by the government.

Employers are generally prohibited from withholding wages of employees to satisfy any debt or judgment except certain Family Court obligations.

3. Receivership. ***S.C. Code Ann. §§ 15-65-10, et seq.*** A receiver may be appointed: (1) before judgment, on application of either party, to obtain possession of property which is the subject of an action which is in the possession of adverse party, when such property or its rents and profits are in danger of being lost or materially

injured; (2) after judgment, to carry judgment into effect; (3) after judgment, to dispose of property according to the judgment or to preserve it during appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property to satisfaction of judgment; (4) when a corporation has been dissolved or is insolvent or is in danger of insolvency or has forfeited its corporate rights; or (5) in such other cases as may be provided by law or may be in accordance with existing practice. A receiver may be appointed by petition to the court, either before or after judgment. The receiver has no "super-powers," unlike a bankruptcy trustee, and merely succeeds to the debtor's rights and liabilities. The South Carolina statute contains few provisions that guide receivers, and the receiver's duties and authority are normally set out in the court's order.

4. Claim and Delivery. (*i.e.,* "Replevin") ***S. C. Code §§ 15-69-10, et seq.*** A party may recover possession of personal property to which it is entitled through statutory claim and delivery proceedings initiated in the Court of Common Pleas. Possession of personal property may not be recovered unless five days notice and an opportunity to be heard have been afforded the party in possession, but this right of a preseizure hearing may be waived. When immediate delivery of personal property is demanded, plaintiff or someone in his behalf must make an affidavit showing: (1) that plaintiff is owner of the property claimed (particularly describing it), or is lawfully entitled to possession thereof by virtue of special property rights therein, facts in respect to which must be set forth; (2) that the property is wrongfully detained by defendant; (3) the alleged cause of detention according to his best information, knowledge, and belief; (4) that the property has not been detained for tax, assessment, or fine pursuant to statute, or seized under execution or attachment against property of plaintiff, or if so seized, that it is by statute exempt from such seizure; and (5) the actual value of the property.

Notice must be attached to the affidavit notifying the defendant that within five days from service thereof he may demand in writing to the Clerk of Court a preseizure hearing. Upon receipt of the affidavit and notice, with written undertaking by one or more sufficient sureties for bond in double value of the property claimed, the sheriff shall serve the documents upon defendant. If the defendant fails to make a timely demand for a preseizure hearing, or after such hearing the judge finds that plaintiff should have immediate possession, or the preseizure hearing has been waived in writing, or there is a probability that the property is in immediate danger of destruction or concealment by the possessor, the judge shall direct the sheriff to take the property.

5. Attachment. ***S.C. Code Ann. §§ 15-19-10, et seq.*** Proceedings in attachment are also available. The grounds for attachment are (1) the defendant is a foreign corporation or non-resident of the state; (2) defendant has departed the state with intent to defraud creditors; (3) defendant has removed or is about to remove property from this state with intent to defraud his creditors; or (4) defendant has assigned, disposed of or secreted, or is about to assign, dispose or secrete, its property.

Under certain conditions, attachment may also be had when the debt is not due, *e.g.* real and personal property may be attached in any action for unpaid purchase money. Writs of attachment are obtained through the Court of Common Pleas, and there are bond

requirements. When prejudgment attachment is obtained, any ensuing judgment will relate back to the date of attachment.

6. Bankruptcy. ***Title 11, U.S.C.*** South Carolina consists of one federal district, and bankruptcy filings are made centrally in Columbia. However, the Bankruptcy Court sits in Spartanburg, Columbia, and Charleston.

B. FRAUDULENT CONVEYANCES

Fraudulent sales and conveyances are also prohibited by long-standing statutory authority. ***S.C. Code Ann. §§ 27-23-10, et seq.***

Any transfer of an interest in property, or any proceeding or written instrument made to delay, hinder, or defraud creditors and others, or to deceive purchasers, is void as to such persons and those claiming under them. Fraudulent intent need not be proven if the transfer is not made for "valuable consideration." A creditor may set aside a transfer on showing (1) the debt owed at time of transfer; (2) that the transfer was made without consideration or for nominal consideration; and (3) that the transferor failed to retain sufficient property to pay the creditor in full.

Parol gifts of personal property are invalid against subsequent creditors, purchasers, or mortgagees except where the donee lives apart from the donor and actual possession is delivered and is continuous in the donee.

A debtor may make a general assignment for the benefit of his creditors. However, an assignment for the benefit of creditors by an insolvent debtor in which a preference or priority is given any one creditor is void. ***S.C. Code Ann. §§ 27-25-10, et seq.***

C. LIENS

South Carolina law provides for a number of liens to protect providers of services, labor, and materials.

Mechanic's Liens and Materialman's Liens. ***S.C. Code Ann. §§ 29-5-10, et seq.*** Any person to whom a debt is due for labor performed or furnished, or for materials purchased and actually used in the erection, alteration, or repair of a building, has a lien on the building and upon the land on which it is situated. The statute defines "labor performed" rather broadly. Where work is done or material furnished at the direction of a contractor or someone other than the owner, written notice must be given to the owner in order to maximize lien rights. Certain filings and notices within statutory times are required to preserve lien rights that can be enforced in the Court of Common Pleas.

Contractors can protect themselves from lower tier subcontractors and materialmen by giving certain notices. ***S.C. Code Ann. § 29-5-23.*** Failure to pay subcontractors or for material provided can also subject the owner and/or contractor to criminal penalties under some circumstances.

Agreements to waive the right to file or claim a lien for labor and materials are against public policy and are unenforceable, unless payments substantially equal to the amount waived are actually made.

Ships. ***S.C. Code Ann. §§ 29-9-10, et seq.*** Any person to whom money is due for labor performed, or materials used or furnished in the construction, launching, or repair of a ship or vessel, or in the construction of launching-ways, or for provisions, stores, or other articles furnished for or on account of any ship or vessel, has a lien upon such ship to secure the payment of said debt. This lien is preferred to all others except mariners' wages. A statement of lien must be recorded within ninety days after labor or materials are furnished in the Office of Register of Deeds or the Clerk of Court of the county within which the ship or vessel was at the time the debt was contracted. The statement must contain the name of the person with whom the contract was made, the name of the owner of the ship, if known, and the name of the ship or a description thereof. The lien is enforced by a petition in the Court of Common Pleas.

Agricultural Liens. ***S.C. Code Ann. §§ 29-13-10, et seq.*** Landlords have a paramount lien for rent to the extent of all crops raised on the leased premises, whether the crop is raised by the tenant or another. Laborers who assist in raising the crop have a lien, next in priority to the lien for rent, to the extent of the amount due for labor; there is no preference among the claims of laborers. Landlords also have a lien for advances (subject to liens for rent and labor), which must be indexed in the office of the Clerk of Court or of the Register of Deeds of the county in which the land is located in order to affect rights of subsequent purchasers or creditors. Suppliers have a lien upon supplies furnished prior to all other liens until the supplies are consumed by use. Holders of liens may prevent improper disposal of crops subject to a lien.

Liens are enforced by a magistrate if the amount involved is not more than $100, otherwise in the Court of Common Pleas.

Aircraft. ***S.C. Code Ann. §§ 29-15-100, et seq.*** Persons engaged in servicing, furnishing supplies or accessories for or providing contracts of indemnity for aircraft have a lien on the aircraft. Within ninety days after service, furnishing supplies or contract of indemnity, the lienor must file with the Office of Register of Deeds in the county where the aircraft was located at the time of service a verified statement of account which also identifies the aircraft. The lien may be enforced in the manner provided for liens on ships.

Miscellaneous. ***S.C. Code Ann. §§ 29-15-10, et seq.*** Keepers of inns, hotels, or boarding houses have a lien on the baggage of guests. The baggage may be sold ten days

after the date of departure of the persons incurring the debt, with the sale to be advertised by written or printed notice at three public places in the vicinity for ten days before the sale. A proprietor or owner or operator of a repair shop or storage garage, who makes repairs on any article left at his shop or furnishes any material for such repairs, may sell the article at a public auction after thirty days from written notice to the owner of the property and to any lienholder with a perfected security interest in the property.

XIV. WILLS, PROBATE, ESTATE AND GIFT TAXES

Lesley R. Moore

South Carolina has adopted the Uniform Probate Code, but with substantial modifications. ***See generally, Title 62, S.C. Code.***

A. WILLS, POWERS OF ATTORNEY AND MISCELLANEOUS

1. Who May Make A Will. Any person married or age 18 or older who is of sound mind may make a will.

2. Execution. Every will shall be in writing signed by testator or in testator's name by some other person in testator's presence and by his direction, and shall be signed by at least two persons, each of whom witnessed either the signing or testator's acknowledgment of the signature or of the will.

3. Self-Proved Wills. South Carolina has provisions for simultaneous execution, attestation, and self-proof. Statutory form available.

4. Holographic Wills. South Carolina code does not recognize holographic wills.

5. Foreign Executed Wills. Written will is valid if executed in compliance with South Carolina law either at time of execution or at time of death of testator, or if its execution complies with law at time of execution of (a) place where will is executed or (b) place where testator is domiciled at time of execution or death.

6. Foreign Probated Wills. Final order of court of another state determining testacy or validity of will made in proceeding involving notice to and opportunity for contest by all interested persons must be accepted as determinative by courts of this State, if final order includes finding that decedent was domiciled at his death in state where order was made.

7. Elective Share. If married person domiciled in this state dies, surviving spouse has a right of election to take one-third of decedent's net probate estate. In

determining share, spouse is charged with property of probate estate passing to spouse outright or in a form that qualifies for the federal estate tax marital deduction. Spouse must elect by filing petition in Probate Court with a copy to the Personal Representative (within later of eight months after decedent's death or six months after probate of will).

8. Probate. Probate jurisdiction is in Probate Court of each county. Appeal lies to Circuit Court. Informal and formal probate and appointment processes are available.

9. Living Wills – Known as Death With Dignity Act. ***S.C. Code Ann. §§ 44-77-10, et seq***. Adult may make written directive instructing his physician to withhold or withdraw life sustaining procedures (including tube feeding) in event of terminal condition or permanent unconsciousness. It must be in a form prescribed by the statute.

10. Powers of Attorney. No special form for a power of attorney is mandated, but it must be executed and attested with the same formality as a will. Unless the power deals solely with health or medical issues, the power must be recorded in the county in which the principal resides. For a power of attorney to survive the physical disability or mental incompetence of a principal, statutorily prescribed language is required. The power may define "physical disability" or "mental incompetence" and may set forth the procedures for determining whether the principal is physically disabled or mentally incompetent. An out-of-state power of attorney is valid if its execution complies with the law of the jurisdiction where the instrument was executed and it is recorded as described above.

11. Health Care Powers of Attorney. A health care power of attorney is an instrument in which an individual or principal authorizes another person, an attorney-in-fact or agent, to make health care decisions on his behalf if the principal cannot make those decisions for himself. South Carolina has adopted a statutory form health care power of attorney that includes living will provisions but use of this form is not mandatory. There are certain requirements for the proper execution of a health care power of attorney. ***S.C. Code Ann. § 62-5-504.***

12. Gifts to Minors. South Carolina has adopted the Uniform Gifts to Minors Act. ***S.C. Code Ann. §§ 20-7-140, et seq.*** Thus, an adult person may make a gift of a registered or unregistered security, a life insurance policy, an annuity contract, money, real estate, or tangible personal property to a person who has not attained the age of eighteen years on the date of the gift (by amendment, twenty-one years for instruments executed after August 2, 2002). The gift must be made to one designated custodian. Any transfer of interest made in accordance with the provisions of the Act is a valid and irrevocable gift.

B. Estate Taxes

With repeal of the state death tax credit after 2004, South Carolina currently has enacted no separate estate tax for decedents dying on or after January 1, 2005. For decedents dying after June 30, 1991, and before January 1, 2005, South Carolina estate

tax is equal to a maximum amount of federal credit allowed under **I.R.C. § 2011**. Property of a resident includes real property in State, tangible personal property having situs in State, and intangible personal property regardless of where it is located. For a nonresident, real property and tangible personal property located in State are subject to State estate tax. Credit is given for estate taxes paid to other states. The estate tax is administered by the Department of Revenue. A ten-year lien arises automatically on decedent's property upon failure to pay taxes.

C. Gift and Inheritance Taxes

There is no gift tax in South Carolina for any gift after 1991, and no inheritance tax.

XV. LICENSES

Eric K. Graben

A. Professional Licenses in General

A license is required for practically every profession and business. ***See generally, Title 40, S.C. Code.*** The following businesses and professions are among those licensed pursuant to statute: accountants; architects; attorneys at law; chiropractors; contractors; dentists; engineers; nurses; pharmacists; physicians, surgeons, and osteopaths; psychologists; residential home builders; social workers; insurance; real estate; and banks. The list of professions and businesses requiring a license includes some unobvious ones such as junk dealers and fortune tellers. Licensing for most professions and businesses is handled by the South Carolina Department of Labor, Licensing and Regulation, which can be contacted at 110 Centerview Drive, Columbia, South Carolina, 29210, or Post Office Box 11329, Columbia, South Carolina, 29211-1329, phone (803) 896-4300. The Department maintains a Professional and Occupational Licensing Board web site at www.llr.state.sc.us/pol.asp.

B. GENERAL CONTRACTOR AND MECHANICAL CONTRACTOR LICENSES

A general or mechanical contractor desiring to perform or offer to perform contracting work for which the total cost of construction is greater than $5,000 must have a contractors' license issued by the South Carolina Contractors' Licensing Board of the Department of Labor, Licensing and Regulation (biennial license fee $350).[1]

The licensing procedure is complicated. Among other things, an applicant for licensure must have a certified qualifying party (biennial certificate fee $10) who has passed specified exams in full-time employment in a responsible management position and file financial statements demonstrating a specified net worth that varies depending on the dollar size of jobs that the applicant wishes to bid for or perform.[2] General contractors wishing to bid on or perform jobs of $350,000 or more and mechanical contractors wishing to bid on or perform jobs of $50,000 or more must submit with the initial application financial statements prepared in accordance with Generally Accepted Accounting Principals (GAAP) by a licensed certified public accountant or licensed public accountant and indicating a net worth of at least $70,000 for a general contractor or $10,000 for a mechanical contractor.[3] Inquiry regarding licensure should be addressed to Contractors' Licensing Board at 110 Centerview Drive, Columbia, South Carolina 29210, or Post Office Box 11329, Columbia, South Carolina 29211-1329, phone (803) 896-4686.

A construction manager must be licensed as a general or mechanical contractor, registered engineer, or an architect.[4] A building official may not issue a building permit for an undertaking that would classify the applicant as a contractor unless the applicant has furnished evidence that he, she, or it is licensed as a contractor or is exempt from licensure.[5]

Provisions of the contractors' licensure chapter do not apply to work performed on property owned by the federal government, to contractors performing construction work for the South Carolina Department of Transportation pursuant to that department's prequalification requirements, or in other specified circumstances.[6]

C. CONSUMER LENDING LICENSES

Persons or entities other than banks, savings and loan associations, and other entities regulated under banking or insurance laws that engage in the business of making

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[1] License requirement in §44-11-30. Fees set forth in §40-11-50.
[2] §40-11-20(20); §40-11-240; fee set forth in §40-11-50.
[3] §40-11-260(A)(3)(a), (b) and (B)(3)(a), (b).
[4] §40-11-320(A).
[5] §40-11-350.
[6] §40-11-360(A)(3), (4).

consumer loans must be licensed by the State Board of Financial Institutions.[7] If the lender desires to make consumer loans of $7,500 or less it can be licensed as a "restricted lender" under Chapter 29 of Title 34 of the South Carolina Code of Laws.[8] If lender desires to make consumer loans of up to $25,000 or loans secured by land, they must seek to be licensed as a "supervised lender" under Part 5 of Chapter 3 of Title 37 of the South Carolina Code of Laws.[9]

Applicants to be either a restricted lender or a supervised lender must pay a $300 license fee with an initial application. The annual renewal fee for each license is based on gross loans receivable at year end and can change from year to year. For renewals in early 2005, the renewal fee was $300 regardless of the amount of gross loans receivable. The Board will make an evaluation regarding the applicant's financial responsibility, character, and general fitness (and experience in the case of a restricted lender), and whether the convenience and advantage of the community will be promoted by granting the license.[10] The applicant must have available funds of at least $25,000 per branch to obtain a license.[11] Restricted and supervised lenders must obtain a separate license for each branch conducting lending operations and generally must obtain approval to move a branch.[12]

Inquiries regarding licensure should be made to the Consumer Finance Division of the State Board of Financial Institutions at Post Office Box 11905, Columbia, South Carolina 29211, phone (803) 734-2020.

D. SECURITIES BROKER-DEALER AND INVESTMENT ADVISOR LICENSES

Generally, any person in South Carolina engaged in the business of effecting transactions in securities for the account of others or for his own account is classified as a broker-dealer under South Carolina law and must register with the Securities Division of the South Carolina Attorney General's Office.[13] Agents, who are defined as individuals representing broker-dealers *or issuers* in effecting securities transactions, must also register.[14] There are certain exemptions from the registration obligation.[15] Investment advisors and their representatives must also register with the Securities Division unless they satisfy the criteria for an exemption from registration.[16] Applicants must pass one or more exams and pay an application fee ($310 for broker-dealers, $110 for agents, $210

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[7] §34-29-20; §§37-3-502 and -503.
[8] §34-29-10(a)(definition of consumer loan); §37-3-501 (definition of restricted lender).
[9] §37-3-104 (definition of consumer loan); §37-3-501 (definition of supervised lender).
[10] §34-29-40(b); §37-3-503.
[11] *Id.*
[12] §34-29-60; §37-3-503.
[13] §35-1-20 (definition of broker-dealer); §35-1-140 (obligation to register).
[14] *Id.*
[15] §35-1-415.
[16] §35-1-420.

for investment advisors, and $55 for investment advisor representatives).[17] Broker-dealers who are not registered under Section 15 of the Securities Exchange Act of 1934, do not use a national securities exchange facility, and do business exclusively in South Carolina must post a bond of at least $50,000.[18] Investment advisors who have custody over client funds or securities must maintain a minimum net worth of $50,000 or post a surety bond in that amount.[19] Investment advisors who do not have custody of client funds or securities but do have discretionary authority over client funds or securities must maintain a minimum net worth of $35,000 or post a surety bond in that amount.[20]

The Securities Division of the South Carolina Attorney General's Office can be reached at 1000 Assembly Street (29201), Post Office Box 11549, Columbia, South Carolina 29211, phone (803) 734-9916, www.scsecurities.org.

XVI. ETHICS, LOBBYING, CAMPAIGN FINANCING

Wallace K. Lightsey, Frank S. Holleman, III

In 1991, South Carolina adopted the State Ethics, Government Accountability and Campaign Reform Act with a view of restoring public trust in governmental institutions and the political processes. ***S.C. Code Ann. §§ 8-13-10, et seq.***

The State Ethics Act applies to all public officials, public employees, and public members of the State and political subdivisions, with the exception of members of the judiciary. Probate judges, candidates for public office, and committees or groups working on behalf of candidates are also covered by the law.

The Act prohibits:

1. The use of public materials, personnel, or equipment for private use.

2. The use of public office for personal benefit; taking action to influence personal economic benefit of $50 or more.

3. The acceptance of anything of value to influence an official action.

4. Any lobbyist or lobbyist principal employing on retainer a public officeholder, member of household, or organization in which there is an economic interest.

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[17] §35-1-480.
[18] Order 97004, Part III.
[19] CCH Blue Sky Reporter ¶51,528A.
[20] *Id.*

5. The acceptance of anything of value from a lobbyist principal, except under certain conditions.

6. The acceptance of an honorarium from a lobbyist.

7. The acceptance of anything of value for a speech in an official capacity; public officials or members may be reimbursed for out-of-state speeches with prior approval of chief executive officer.

8. The acceptance of additional money for public duties.

9. Any disclosure of confidential information.

10. Any service on a regulatory board which regulates a business with which associated; nor employee if there is a frequent conflict.

11. Making agency decisions affecting a personal economic benefit of $50 or more if on agency board and also agency employee.

12. Representing clients before same level of government, except before a court or a contested case before State agencies.

13. Legislators representing clients before a State agency if they have either voted on the members of that agency's governing body or the agency appropriation during the prior 12 months. Legislators are prohibited from serving on most State boards and commissions.

14. Any nepotism (hiring, promotion, or advancement of a family member).

15. Accepting employment for one year from a business if the business was regulated by former agency and if the employee participated directly and substantially in matters affecting the prospective employer.

16. The acceptance of employment with contractor if procurement duties involved that contractor.

17. The use of government property, personnel, equipment, or materials in election campaigns.

18. Any interest in a contract if authorized to perform an official function relating to the contract.

A State Ethics Commission oversees compliance and enforcement of the ethics laws. Any person aggrieved by a violation may file a complaint with the Commission. If the Commission determines that a violation has occurred, it may:

1. Recommend administrative or disciplinary action.

2. Impose oral or written warnings or reprimands.

3. Require the violator to pay a civil penalty of not more than $2,000 for each violation.

4. Require the forfeiture of anything received or the value of anything received in violation of the law.

5. Refer the matter to the Attorney General for criminal prosecution.

The Commission, on request, can also render advisory opinions.

The Commission also regulates lobbying in the state. Registration and filing fees are required by law. Filing must take place within 15 days after being employed, appointed, or retained as a lobbyist, and thereafter a lobbyist must register annually. If lobbying activity is terminated, the Commission must be so advised. The registered lobbyist must also disclose all income and expenditures. Lobby prohibitions include:

1. Neither a lobbyist nor anyone acting on behalf of a lobbyist shall offer, solicit, facilitate, or provide to or on behalf of any public official or public employee: (a) lodging, (b) transportation, (c) entertainment, (d) food, meals, beverages, money or any other thing of value, or (e) campaign contributions.

2. Public officials and public employees are prohibited from accepting those items mentioned above. These items are not prohibited if given to a family member for love and affection. Emergency assistance given gratuitously and in good faith is not prohibited.

3. Lodging, transportation, entertainment, food, meals, beverages, or any other thing of value which is furnished on the same terms or at the same expense to a member of the general public without regard to their official status may be accepted without violating the statute.

4. Lobbyists are prohibited from accepting or soliciting compensation contingent in any manner upon the passage or defeat of any pending or proposed legislation, covered agency actions, or covered gubernatorial actions.

5. A lobbyist may not cause the introduction of legislation or covered agency or gubernatorial actions for the purpose of obtaining employment as a lobbyist to support or oppose the action.

6. A lobbyist may not serve as a member of a State board or commission.

7. A lobbyist, including a lobbyist who is a former member of the General Assembly, may not enter the floor of either the House of Representatives or Senate unless invited by the membership of the respective chamber.

8. A lobbyist or anyone acting on behalf of a lobbyist may not employ on retainer a public official or public employee, a member of their immediate family, or a firm or organization in which the public officeholder has an economic interest. A retainer is payment for availability to perform services, rather than for actual services rendered.

9. A lobbyist or anyone acting on behalf of a lobbyist may not pay an honorarium to a public official or public employee. This does not prohibit the reimbursement of or expenditures for actual expenses for public officials for speaking engagements.

10. A lobbyist or anyone acting on behalf of a lobbyist may not offer, facilitate, or provide a loan to or on behalf of a statewide constitutional officer or member of the General Assembly unless the lobbyist principal is a financial institution authorized to transact business in this State and makes the loan in the ordinary course of business.

There are also limits on the amount and type of campaign contributions. Contribution to a statewide candidate is limited to $3,500 per election cycle, $1,000 for local candidates per election cycle. Statewide candidates are the State Constitutional officers. Local candidates include candidates for the General Assembly and for all other races of counties, municipalities, school districts, or other political subdivisions.

A person may not contribute more than $3,500 in a calendar year to a party committee, legislative caucus committee, or noncandidate committee. Such committees may not accept more than $3,500 from any one person in a calendar year.

Cash contributions are prohibited if they exceed $25 for each election. All cash contributions must be accompanied by the name and address of the contributor.

Anonymous contributions are prohibited except at a ticketed event where food and beverage are served or where political merchandise is distributed and where the price of the ticket is $25 or less and goes to defray the cost of food, beverages, or the political merchandise, either in part or in whole. Anonymous contributions which do not comply with this provision are to be sent within seven days to the Children's Trust Fund, P.O. Box 11593, Columbia, SC 29211.

Nothing of value, including money, may be solicited from any person as a consideration for an endorsement, article, or other communication in the news media promoting or endorsing a candidate, committee, or political party.

An employer may not provide an advantage or disadvantage to an employee concerning the employee's employment or conditions for employment based on the employee's contribution, promise to contribute, or failure to contribute.

A person may not reimburse another person, either directly or indirectly, for making a contribution, except for a member of the person's immediate family.

Loans are permitted. A loan is considered a contribution from the maker or the guarantors of the loan and is subject to such contribution limits. Any loan to a candidate must be by written agreement. The proceeds of a loan are not subject to contribution limits if it is:

1. Made by a commercial lending institution;

2. In the regular course of business;

3. Granted on the same terms ordinarily available to members of the general public, and

4. Secured or guaranteed upon which collection is not made.

Candidates for statewide office or members of their family may not be repaid after the election for a loan to the candidate of more than $25,000 in the aggregate. Candidates for other elective offices or members of their family may not be repaid after the election for a loan to the candidate more than $10,000 in the aggregate.

Contributions may not be accepted from a registered lobbyist if that lobbyist engages in lobbying the public office or public body to which the candidate is seeking election.

XVII. COMMERCIAL LAW; MISCELLANEOUS

Lawson M. Vicario, Amos A. Workman

A. INTEREST RATES; USURY

The legal rate of interest (*i.e.*, prejudgment interest on liquidated sums) in South Carolina is 8¾%. ***S.C. Code Ann. § 34-31-20.*** The interest rate on judgments is 12%. ***S.C. Code Ann. § 34-31-20.*** Outside the consumer context, no usury laws exist, and parties may contract for any rate of interest. With consumer transactions, public notice of interest to be charged is required, and there are maximum amounts. Extensive statutory authority about interest rates is found in the South Carolina Consumer Protection Code. ***Title 37, S.C. Code.***

B. UNIFORM COMMERCIAL CODE. *Title 36, S.C. Code Ann. §§ 36-1-101, et seq.*

In 1966, South Carolina adopted the Uniform Commercial Code based on the 1962 Official Text. In 2001, South Carolina adopted *Article 2A – Leases* and the revised *Article 9 – Secured Transactions*. In addition, South Carolina has adopted the 1972 Text for *Article 4A – Funds Transfers* and amendments to *Article 7 – Investment Securities*. Apart from the usual assortment of nonstandard provisions and these revisions, South Carolina's adoption generally follows the 1962 Official Text; the South Carolina Reporter's Comments at the end of each section detail variations.

South Carolina's adoption contains *Article 1 – General Provisions* ***S.C. Code Ann. §§ 36-1-101, et seq.***, *Article 2 – Sales* ***S.C. Code Ann. §§ 36-2-101, et seq.***, *Article 2A – Leases* ***S.C. Code Ann. §§ 36-2A-101, et seq.,*** *Article 3 – Commercial Paper* ***S.C. Code Ann. §§ 36-3-101, et seq.***, *Article 4A – Funds Transfers* ***S.C. Code Ann. §§ 36-4A-101, et seq.***, *Article 5 – Letters of Credit* ***S.C. Code Ann. §§ 36-5-101, et seq.***, *Article 7 – Warehouse Receipts, Bills of Lading and other Documents of Title* ***S.C. Code Ann. §§ 36-7-101, et seq.***, *Article 8 – Investment Securities* ***S.C. Code Ann. §§ 36-8-101, et seq.*** and *Article 9 – Secured Transactions* ***S.C. Code Ann. §§ 36-9-101, et seq.***

South Carolina has some departures from the Uniform Code. The Code discusses various warranties that accompany sales of goods. The statutory imposition of implied warranties of merchantability, fitness for a particular purpose and the like, and the extent to which and manner in which such warranties may be excluded or modified, are dealt with in Title 2 of the Uniform Commercial Code, and South Carolina liberalizes the warranty provisions.

One peculiar feature of the South Carolina version of the Uniform Commercial Code is the long-arm statute, designed to subject to court jurisdiction parties who even remotely do business in South Carolina. The statute reads:

1. A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:

    a. Transacting any business in this State;

    b. Contracting to supply services or things in the State;

    c. Commission of a tortious act in whole or in part in this State;

    d. Causing tortious injury or death in this state by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State; or

e. Having an interest in, using or possessing real property in this State; or

f. Contracting to insure any person, property, or risk located within this State at the time of contracting; or

g. Entry into a contract to be performed in whole or in part by either party in this State; or

h. Production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

2. When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him. ***S.C. Code Ann. § 36-2-803***.

The statute is designed to extend jurisdiction to the maximum limits allowed by the Due Process Clause of the Constitution.

C. SUNDAYS. *S.C. Code Ann. §§ 53-1-5, et seq.*

There are limitations on which commercial enterprises can be open before 1:30 p.m. on Sundays, and there are statutes that protect employees' rights to attend church or synagogue and also to not work on Sundays. Employees can recover treble damages costs and attorneys' fees for a violation of these rights. No lessor or franchisor can require a proprietor to be open on Sunday.

D. HOLIDAYS. *S.C. Code Ann. §§ 53-5-10, et seq.*

Holidays for banks and savings and loan institutions are those observed by the Federal Reserve Bank. In addition to holidays provided for in this section, State employees may select one non-national holiday: Robert E. Lee's birthday, January 19; Confederate Memorial Day, May 10; Jefferson Davis' birthday, June 3; or another a day of choice. Also, all general election days are legal holidays. Additional state holidays include:

1. January 1

2. The third Monday in January (Martin Luther King, Jr. Day)

3. The third Monday in February (President's Day)

4. The last Monday in May (United States Memorial Day)

5. July 4 (Independence Day)

6. The first Monday in September (Labor Day)

7. November 11 (Armistice or Veteran's Day)

8. National Thanksgiving Day and the day after

9. December 25-26

State and local governments and banks may be closed on these holidays.

E. Legal Age

Eighteen (18) years of age is the legal age in South Carolina.

F. Motor Vehicles. *See generally, Title 56, S.C. Code*.

The Uniform Motor Vehicle Registration Act is closely followed. The State Department of Motor Vehicles, P. O. Drawer 1458, Columbia, South Carolina 29250, has general supervision of motor vehicles. Most counties have at least one office of the Department where business can be conducted.

A vehicle license is required biennially. A reflectorized state number plate must be displayed on the rear of the car. There are no exemptions for members of the Armed Forces. A vehicle cannot be licensed unless all county and municipal taxes are paid on the vehicle and unless the applicant is not delinquent in the payment of any motor vehicle taxes, and, for a vehicle purchased outside this state, unless there is satisfactory evidence of payment of a state use tax. Boat trailers under 2,500 pounds and farm and utility trailers privately owned and not for hire need not be licensed or registered. A camper trailer must be registered and license fee paid. Dealers may issue temporary license plates and registration for vehicles sold to nonresidents for licensing and registration in another state.

All persons operating a motor vehicle are required to have a driver's license from the Department of Motor Vehicles. A nonresident with a valid home state license is exempt. No exemptions apply for members of the military. The license must be in the immediate possession of the operator.

A point system for traffic violations is established, and the Department of Motor Vehicles is authorized to suspend a driver's license based on the point system. Out-of-state driving convictions are considered.

Title to, lien on, or interest in a vehicle must be registered with the Department of Motor Vehicles, and a certificate of title obtained, except for vehicles owned by the United States, owned by manufacturers or dealers and held for sale, owned by a nonresident and not required by law to be registered, those regularly engaged in interstate transportation and certain husbandry implements. An odometer disclosure statement must be submitted with the application for new title, and the odometer reading will be noted on any new title.

A security interest in a vehicle is not valid against creditors of an owner or subsequent transferees unless such is registered with the Department. Upon an involuntary transfer or repossession by lienholder, transferee must mail to the Department the last certificate of title (or court order), an application for a new certificate, and an affidavit that the vehicle was repossessed, the security interest terminated pursuant to terms of security agreement, or that the statutory lien was foreclosed.

The owner of any motor vehicle for which registration is required must maintain security in the form of a valid policy of insurance or such other form of security as may be approved by the Department of Motor Vehicles. Such policy must provide liability coverage with minimum limits of $15,000 for injury or death of one person, $30,000 for injury or death of two or more persons, $10,000 for injury to or destruction of property. Penalties for noncompliance include fine or imprisonment and revocation of driving license and all registrations in the offender's name.

All policies of insurance issued must contain limits necessary to comply with Act, and term "damages" must include both actual and punitive damages. All policies must provide uninsured motorist provision within above-noted limits.

South Carolina is not a no-fault state. However, limited no-fault benefits may be offered.

A foreign vehicle registered in the home state or country and displaying license plates required by the laws of the home state may operate in South Carolina for up to 150 days without new license.

A nonresident operator at least 16 years of age, licensed in his home state or country, is exempt from securing a license. A nonresident operator whose home state or country does not require a license, if at least 18 years of age, may operate not more than 90 days a year without a license.

G. STATUTE OF LIMITATIONS

Like many jurisdictions, South Carolina has a myriad of statutes that speak of Limitations of Actions. Many, but not all, of the statutes are found in ***S.C. Code Ann. §§ 15-3-10, et seq.*** The applicability of each, however, will need to be very carefully

determined on a case-by-case basis, after an examination of any other relevant statutes and after close consultation with South Carolina counsel.

H. PRODUCTS LIABILITY. *S.C. Code Ann. §§ 15-73-10, et seq.*

South Carolina has adopted **§ 402A of the Restatement of Torts, 2d**, and all comments therein. The statute provides:

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if:

   a. The seller is engaged in the business of selling such a product, and

   b. It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

2. The rule stated in subsection (1) shall apply although:

   a. The seller has exercised all possible care in the preparation and sale of his product, and

   b. The user or consumer has not bought the product from or entered into any contractual relation with the seller.

XVIII. STATE AGENCIES

A. SOUTH CAROLINA SECRETARY OF STATE

Post Office Box 11350
Columbia, South Carolina 29211

Edgar Brown Building
1205 Pendleton Street, Suite 525
Columbia, South Carolina 29201
Phone: (803) 734-2170

Secretary of State: Mark Hammond
Director of Business Filings: Jody Steigerwalt
Counsel: Melissa Dunlap

B. SOUTH CAROLINA DEPARTMENT OF REVENUE

Post Office Box 125
Columbia, South Carolina 29214

Columbia Mills Building
301 Gervais Street
Columbia, South Carolina 29201
Phone: (803) 898-5000

Director: Ray N. Stevens
Counsel: Rick Handel

C. SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION

Post Office Box 11329
Columbia, South Carolina 29211

Synergy Business Park, Kingstree Building
110 Centerview Drive
Columbia, South Carolina 29210
Phone: (803) 896-4300

Director: Adrienne Riggins Youmans
Counsel: Lynne W. Rogers

D. SOUTH CAROLINA DEPARTMENT OF COMMERCE

1201 Main Street. Suite 1600
Columbia, South Carolina 29201-3200
Phone: (803) 737-0400

Secretary: Joe E. Taylor
Chief Operating Officer: David L. Logsdon
Legal Services and Communications Director: Karen Manning

E. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Aycock and Sims Building
2600 Bull Street
Columbia, South Carolina 29201
Phone: (803) 898-3432

Commissioner: C. Earl Hunter
Direct Phone: (803) 898-3300
Deputy Commissioner for Environmental Quality Control: Robert King
Direct Phone: (803) 896-8940