Legal Considerations for the Foreign Investor

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1.1 Introduction: Doing Business in the United States

Smith Gambrell & Russell LLP is pleased to provide this brochure as an introductory guide for foreign investors, who are interested in establishing or acquiring operations in the United States.

The United States is one of the world's most advanced nations in adopting and developing new technology, with a highly-developed information technology sector. The United States have a sophisticated financial services sector operating in an efficient and transparent market place. The market infrastructure is state-of-the-art and the regulatory system supports free markets and ensures predictability. It has long been the position of the U.S. government to encourage foreign investment and to maintain open capital markets.

The United States is a stable democracy, organized as a federal republic. The federal parliament, The Congress, consists of the Senate (Upper House) and the House of Representatives (Lower House). The members of the Congress are elected by popular vote in their respective home states. There are 50 state governments and a few U.S. possessions, as well as the District of Columbia. The several U.S. states enjoy a great level of sovereignty, providing services such as education, local regulatory authority, and policing.

The United States operate under a common law system, which originated in British law. Each state has its own judicial system and its own courts. Federal courts deal with matters of federal law, such as constitutional issues, patent and trademark law, and suits between citizens of different states. Both, the state and federal judiciaries, have two levels of appeal courts. The highest court in the country is the United States Supreme Court, located in Washington, D.C. In this guide, we frequently rely on the laws and regulations of the state of Georgia as an example. The laws of other states may differ in important details.

The decentralized U.S. legal system, with its interplay between state and federal courts and agencies, requires legal advise tailored to the specific situation. The information in this guide should not be relied upon as legal advise. We encourage you to consult with your legal counsel and other professionals before taking actions on specific matters.

Sincerely,

Smith, Gambrell & Russell, LLP

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In General

A number of business forms are available to carry on business in the United States. The following briefly outlines the basic choices among the forms of business organizations available for use in the United States in general. Although each state in the U.S. has adopted its own laws and regulations governing the formation and operation of the various forms of business entities, the fundamental laws do not vary significantly from state to state. The effect of choosing one form over another, however, may be significant. Tax and liability considerations are usually the most important factors in determining the most appropriate form of business entity, as tax and liability consequences vary according to the type of entity. No matter what form is chosen, establishing a business in the U.S. is comparatively quick and inexpensive. The decision whether to utilize a particular form should be made in consultation with an attorney. The following business forms are the most commonly used:

2.1 Sole Proprietorship

The sole proprietorship is the most basic business form. In a sole proprietorship, the business and its owner are the same legal person, i.e. one person owns all the assets of the business and is solely liable for all the debts of the business. In other words, there is no limited liability insulating the owner from his business. The regulation of sole proprietorships is minimal. In certain circumstances additional licenses may be required, for example, a restaurant selling alcohol to its consumers will be required to obtain a liquor license.

Advantages. Simplicity is the greatest advantage of a sole proprietorship. They require no legal action and are consequently easy to start. There are generally no formal requirements for operating in this form, other than registering the true name of the business owner if the business is conducted under a trade name. Management of the business is left solely to the owner. Especially very small businesses with no initial capital benefit from the initial savings.

Disadvantages. The owner is personally liable for the debts and obligations of the business to the full extent of his personal property and assets. The capital of the business is limited to the cash and credit of the owner.

Tax Considerations. The proprietorship itself is not a taxable entity. The sole proprietor reports items of income and expense of the business on his personal tax return. The sole proprietor's business and personal income tax returns can be combined and business losses are easily deducted from personal income.

2.2 Partnerships

2.2.1 In General

A partnership, as the name implies, is a business entity in which two or more co-owners join efforts. In many aspects, the general partnership is a counterpart to the sole proprietorship.

2.2.2 General Partnership

In General. A general partnership is a contractual association of two or more persons or entities to operate a common enterprise and to share in the management, as well as in the profits and losses of the enterprise. Basically, a general partnership is a proprietorship with more than one owner. A written agreement among partners is not mandatory but is often desirable. The partnership agreement generally includes provisions governing the sharing of profits and losses, duties of the partners, and prescribes ways for joining and leaving the partnership.

Advantages. As with a proprietorship, flexibility and simplicity of formation and operation are the significant advantages of a general partnership. In addition, the combined capital and credit of each partner is available for the partnership. Tax consequences are "passed through" to the partners. A partnership may specially allocate items of income, loss, deduction or credit to different partners, subject to certain restrictions. One partner may be authorized to act on behalf of the partnership.

***Disadvantages*.** Each partner is jointly and severally liable for all debts and obligations of the partnership. Thus, the partners have unlimited liability and should the partnership's funds not suffice to cover the liabilities of the partnership, creditors can reach the personal assets of the partners. Further, each partner may be bound by the acts of each of his partners. The ability of a partner to sell or transfer his interest in the partnership is often restricted.

***Tax Considerations*.** A partnership is not treated as a separate legal entity for U.S. income tax purposes and is, therefore, not itself subject to tax, although it must file an information return reflecting the receipts and expenditures of the business. Instead, the partners are taxed directly on their proportionate share of the income earned by the partnership (and are entitled to use their proportionate share of partnership losses to offset other income) whether or not that income is actually distributed to the partners. Special allocations of items of income and expense to partners may not be given effect for tax purposes unless those allocations comply with complex regulations which generally require that tax consequences relate to actual economic consequences. Partnerships are generally required to withhold U.S. tax from distributions to foreign partners.

General partnerships in Georgia. Georgia partnerships are governed by the Uniform Partnership Act of 1914. According to the Act, all partners have an equal right to participate in the business. In other words, each partner has an equal vote in the management of business. Generally, a simple majority is all that is required, but certain decisions, such as changes to the partnership agreement, admission of new partners, the sale of the business, etc., require unanimity. All partners are considered to be agents of the partnership and consequently each partner is fully liable for his fellow partner's actions. These default provisions of the Act may be changed by entering into a partnership agreement.

2.2.3 Limited Partnership

General. A limited partnership has two different kinds of partners, general and limited partners. The general partners exercise and have unlimited joint and several liability for the entity's debts and obligations. The limited partners, on the other hand, have no personal liability for the debts and obligations of the business (except to the extent of funds contributed by them to the business) and have virtually no powers of management. Although, the limited liability of a limited partner can be lost if he participates in the management of the partnership.

The creation and operation of limited partnerships are governed by the various state limited partnership acts. Creation of a limited partnership requires the filing of a certificate with the appropriate state or county official, naming the general partners and disclosing certain other information, and the payment of a nominal fee. Unless otherwise agreed to in the partnership agreement, a loss of general partners dissolves the partnership. Loss of limited partners has no effect on the partnership.

Georgia limited partnerships are governed by the Uniform Limited Partnership Act of 1916. It is required, that limited partnerships be registered with the Secretary of State.

***Advantages*.** A limited partnership enjoys most of the advantages of a general partnership, with the additional benefit that individuals who invest as limited partners are, to a large extent, insulated from personal liability for the obligations of the partnership.

***Disadvantages*.** A limited partnership is subject to formal statutory requirements not placed on general partnerships. In addition, the general partners retain unlimited liability for the debts and obligations of the partnership. The ability of a general partner to transfer his interest is usually restricted, while a limited partner's interest is usually made transferable by provisions of the limited partnership agreement. Furthermore, limited partnership interests are generally deemed to be "securities," rendering the offer and sale of such interests subject to federal and state securities laws.

***Tax Considerations*.** Like a general partnership, a limited partnership is not treated as a separate taxable entity. For income tax purposes, the general partners of a limited partnership are treated identically to the partners of a general partnership. However, unlike general partners, the limited partners are subject to certain limitations on their ability to utilize partnership losses to offset other income.

2.3 Joint Venture

In General. A joint venture is a one-time association of two or more persons in a particular business undertaking, which is typically used for a specific project and for a limited period of time. A joint venture essentially is the same as a general partnership limited to a single venture. It is usually formed pursuant to a written agreement among venturers, although a written agreement is not required. Due to its similarity to a partnership, state courts tend to apply the state's partnership laws to joint ventures.

***Advantages*.** By its nature as an ad hoc-arrangement, joint ventures are extremely flexible. Like partners in a partnership, joint venturers receive "pass-through" tax treatment; the venture itself is not taxed as an entity. The joint venture form facilitates a cooperation for joint development of specific projects by companies, each of which has a specialty to offer. A foreign company might be attracted to a joint venture if it did not want to acquire or set up a U.S. corporation on its own, but is willing to share the risks and benefits with an established U.S. business. The U.S. venturer might offer capital as well as personnel and technical marketing assistance in connection with initially developing the U.S. market.

***Disadvantages*.** As with a partnership, each venturer is liable for the debts and obligations of the venture as well as for the actions of other venturers within the scope of the enterprise.

***Tax Considerations*.** Joint ventures are treated as partnerships for tax purposes.

2.4 Corporations

In General. The corporation is the most prevalent form of organization for businesses of any size in the U.S. A corporation is a business, owned by shareholders and registered with the Secretary of State. The formation and operation of a corporation are governed by state statute. The process of incorporation is a more complicated process than starting a partnership. Corporate existence commences with the filing of the Articles of Incorporation, which contain the name of the corporation, a description of the authorized capital stock and certain other identifying information. The business and affairs of a corporation are controlled by its board of directors, who are elected by the holders of the corporation's stock. The board of directors selects the officers of the corporation, who oversee the day-to-day operations of the business. Shares of common stock represent the basic equity in the corporation, although there may be classes of stock with widely varying preferences, limitations and relative rights.

***Advantages*.** The primary advantage of operating in corporate form is the insulation of the corporation's shareholders from personal liability for the debts and obligations of the corporation. The corporation has its own legal identity, separate from its shareholders and it may acquire, own, and sell property, maintain legal actions, and do everything a person can do. Generally, interests of shareholders can be transferred with relative ease. Corporations typically have perpetual duration and their existence is unaffected by the death or withdrawal of a shareholder. Use of the corporate form may facilitate the raising of outside capital, subject to compliance with securities laws. Furthermore, the use of the corporate form may insulate non-U.S. business persons from taxation in their home country of income earned in the U.S. (although that income would probably be taxed when distributed to the businessperson in the form of a dividend) and may facilitate meeting requirements for U.S. immigrant or nonimmigrant visas.

***Disadvantages*.** Utilizing the corporate form involves a considerable amount of formality and paperwork, even in the smallest corporations. Minutes should be kept and annual reports and separate franchise tax returns filed. A registered office and registered agent must be maintained. The corporation may be required to qualify to transact business if it desires to conduct business in a state other than its state of incorporation. Shares of stock are "securities" and as such are subject to federal and state regulation of their offer and sale. Public corporations must comply with burdensome periodic reporting requirements and bear the corresponding increase in record keeping, legal and accounting expenses. Additionally, public corporations may be subject to attempts by third parties to acquire control of the corporation against the will of management.

***Tax Considerations*.** A corporation is a separate taxpaying entity with its own tax rates. Taxes are to be paid on federal and state levels. Federal corporate income tax rates presently range from 15% to 35%. There is an element of double taxation in the corporate form if the corporation pays dividends on its stock. Income to the corporation is taxed at the corporate level and, if dividends are paid to shareholders, such dividends are taxed again as income to the individual shareholders. Dividends paid to foreign shareholders are generally subject to

U.S. tax withholding, although the rate of withholding may be reduced from the usual 30 percent level pursuant to the terms of an applicable tax treaty. In many small corporations, double taxation can be avoided by electing "S-corporation" (see below) status, which essentially eliminates the entity-level tax and taxes corporate income at individual rates at the shareholder level, similar to the taxation of a partnership.

"S corporations": "S corporations" combine traits of general partnerships and corporations. The advantage of "S corporations" is that the profits are only taxed once when dividends are distributed to the shareholders. To receive treatment as a "S corporation" several conditions need to be met:

- the corporation has no more than 35 shareholders on record;
- only one class of shares exists;
- the business cannot be a subsidiary of a larger business;
- the shareholders cannot be other businesses;
- all shareholders have to be U.S. citizens or permanent residents.

Shareholders in "S corporations" declare dividends directly as income in the private income tax return. As long as a shareholder is actively engaged in the management of the business, he or she is permitted to deduct business losses from his or her personal income.

2.5 Limited Liability Company

In General. Another structure for the conduct of business operations in the U.S. is the limited liability company. The limited liability company (LLC) is a form of unincorporated business organization that essentially is a hybrid between a corporation and a partnership. LLCs are very flexible and can be set up to allow entrepreneurs to emulate the governance characteristics of a corporation.

The relationships between the members of a LLC are governed by the operating agreement. The creation and operation of LLCs are governed by each state's statute which specifically provides for LLCs. While Georgia state law provides some default provisions, custom provisions in the operating agreement can replace them. The LLC is confined to businesses whose interests are not publicly traded. The uses of a LLC range from small start-up businesses to public corporations that otherwise would form a subsidiary to enter into a joint venture to carry out a particularly risky project. Further, the members of the LLC can be other businesses. If not otherwise agreed to, loss of a member dissolves the LLC.

Advantages. The benefits of an LLC stem from its hybrid status. All of its members have limited liability, as in a corporation. Thus, its members enjoy limited liability and the debtors of the LLC cannot reach the member's personal assets to satisfy the company's debts. The LLC is treated as a pass-through entity for tax purposes, like a partnership. Unlike a limited partnership, members can and frequently do participate in the management. Also, LLCs are not bound by requirements for management by a board of directors. Another benefit of the LLC structure is that the numerous restrictions on "S-corporations" are not applicable to

LLCs. As a result, corporations and non-resident aliens may be members of LLCs without jeopardizing the availability of favorable tax treatment.

***Disadvantages*.** Although numerous states have adopted legislation providing for LLCs, not all 50 states have done so. Absent a statute protecting foreign LLCs in an LLC's state of operation, the limited liability of an LLC operating outside its state of organization may not be respected in its state of operation. Thus, the taxation of LLCs and their members in those jurisdictions is unclear. As LLCs become more and more prevalent as business structures, rules and issues regarding LLCs have become more certain and thus, the above concern has increasingly diminished.

***Tax Considerations*.** For tax purposes, members of the LLC are treated like partners; profits and losses are carried on to their individual income tax returns. Therefore, members of an LLC avoid the double taxation of income necessary in corporations.

2.6 Limited Liability Partnerships

In General. A form of a general partnership, the limited liability partnership (LLP) differs slightly from the standard general partnership and the limited partnership. The LLP has become a popular business structure for professional firms. The LLP is defined by general partnership law and LLP statutes. Unlike a limited partnership, all members of the LLP enjoy limited liability. Typically, LLP members retain liability for contract-debts but enjoy limited liability with respect to tort-debts of the business. A minority of states give LLP members limited liability for both contract and tort debts. The formalities and prerequisites for forming a limited liability partnership are far greater than the formalities in forming a limited or general partnership.

***Advantages*.** Unlike partners of a general partnership, LLP partners are not individually liable for the debts of the business. Unlike a partner in limited partnership, each LLP partner participates directly in management and control, unless they otherwise agree. Also, LLP statutes generally do not restrict distributions and the effect of compromising member contribution obligations while most limited partnership statutes do not. Furthermore, the LLP is not taxed as an entity and its partners enjoy "flow through" tax treatment.

***Disadvantages*.** The formalities and organizational prerequisites of LLPs are more extensive than the requirements applied to limited partnerships. A LLP that does not comply with formalities loses its status as an LLP and is considered as a general partnership. The relative novelty of the LLP may also present problems such as uncertainty as to how the LLP will be classified under tax and regulatory statutes. One member and nonprofit firms are excluded from the LLP form but may be able to organize under certain LLC statutes.

***Tax Considerations*.** Like a general partnership, a LLP is not treated as a separate taxable entity. Partners are taxed only once on income, enjoying the ability to deduct business losses against personal income under some circumstances.

2.7 Branch of a Foreign Corporation

Many foreign corporations choose to do business in the United States simply through a branch office.

Advantages. By operating as a branch office of a non-U.S. corporation, many of the organizational burdens associated with the other forms are avoided.

Disadvantages. Operation as a branch subjects the foreign parent company to liability for the debts of its branch.

Tax Considerations. A foreign corporation with a U.S. branch generally is taxed in the same manner as a U.S. corporation on income derived from the branch's U.S. operations. However, under the normal rules of taxation applicable to U.S. corporations, a U.S. branch of a foreign corporation would have a tax advantage over a foreign owned U.S. corporation conducting the same business operations. That advantage results because the earnings of the U.S. corporation would be subject to taxation in the U.S. at the standard corporate rate and would be further subject to taxation again when distributed to the foreign shareholder as a dividend. Although the U.S. earnings of the U.S. branch of a foreign corporation would also be subject to U.S. taxation at the applicable corporate rate, internal distributions of the after tax profits would not constitute dividends subject to the second layer of tax. To eliminate that disadvantage for foreign-owned U.S. corporations, the U.S. has imposed a branch profits tax under which amounts deemed to be the equivalent of dividend distributions by the branch to its home office are subject to U.S. tax at the 30 percent rate generally applicable to dividends. Like the withholding tax imposed on dividends, the branch profits tax is subject to reduction or elimination pursuant to the terms of applicable tax treaties.

3 Forming a Business: The Georgia Corporation as an Example

3.1 In General

General corporate and tax considerations are mainly governed by the laws of each particular state. This chapter illustrates some basic principles regarding the operation of a business, which depends heavily on applicable state law. As an example, we will focus on Georgia state laws.

3.2 Formation and Operation of a Business Entity

The procedures for the formation of a business entity are set forth in the statutes of the state in which the entity is going to exist. Although these laws may vary somewhat from state to state, the basic procedures are generally the same. Persons seeking to form a business entity may choose any state in which to incorporate, regardless of the residence of the business' officers, directors, or its operations. Often, business entities are organized in the state in which the primary business will be carried out, although occasionally businesses will seek to incorporate in states with favorable laws, such as Delaware, even though they carry out little or no business in such states.

The governing statute for Georgia corporations is the Georgia Business Corporation Code. The state of Georgia, through substantial amendments to its corporation law in 1989, greatly liberalized and made its laws more flexible with the goal of encouraging new businesses to incorporate in Georgia. In Georgia, a corporation is initially formed through the filing of Articles of Incorporation with the Secretary of State of Georgia. The Articles of Incorporation must contain a corporate name, a statement of the number of shares of stock authorized to be issued by the corporation, the address of the registered agent of the corporation and the name of the corporation's registered agent at such address, the name and address of each incorporator and the mailing address of the corporation's initial principal office. The Articles of Incorporation may contain other provisions relating to the internal governance of the corporation. Prior to filing the Articles of Incorporation, the corporation's name should be chosen and reserved through application with the Secretary of State. The Secretary of State will conduct a search to ensure that the desired corporate name is not confusingly similar to the name of any other corporation, association or limited partnership organized or authorized to conduct business in Georgia. If the desired name is available, the Secretary of State will reserve it for the applicant.

Once the Articles of Incorporation are filed, the existence of the corporation commences and the corporation will be deemed to have perpetual duration for the purpose of engaging in any lawful business, unless such duration or purpose is restricted in the Articles of Incorporation. The Secretary of State will issue to the corporation a Certificate of Incorporation, verifying that the corporation was duly formed on a particular date. Following the filing of the Articles of Incorporation, the incorporators of the corporation (i.e., the persons filing the Articles of Incorporation) will meet to elect the initial directors of the corporation, unless the initial directors are already named in the Articles of Incorporation. The initial directors will then hold an organizational meeting (often times by unanimous written consent) to complete the organization of the corporation by electing officers, adopting bylaws, approving the establishment of a bank account, accepting initial stock subscriptions from shareholders and carrying out any other matters necessary to complete the organization of the corporation.

Georgia law also requires that each Georgia corporation hold an annual meeting of shareholders, at which the shareholders will elect or reelect a board of directors for the next year. The shareholders may also act upon various proposals, such as the adoption of incentive plans for management, that may come before the meeting for shareholder approval. Often the newly elected board of directors will meet immediately following the annual shareholders' meeting to select the corporate officers for the next year.

Every Georgia corporation, as well as all foreign corporations authorized to transact business in Georgia, are required to file with the Secretary of State an annual registration, setting forth certain identifying information and to remit a nominal annual fee.

3.3 Foreign Corporations

A foreign corporation is any corporation organized for profit in a jurisdiction other than that in which it is incorporated. Foreign corporations desiring to transact business in Georgia must first obtain a certificate of authority to do so from the Georgia Secretary of State. The certificate may be obtained by filing an application along with a certificate of existence from the state of its incorporation and the payment of a fee. A foreign corporation authorized to transact business in Georgia generally has the same rights, privileges and responsibilities as a corporation organized in Georgia. A corporation which is transacting business in Georgia without having obtained a certificate of authority is subject to the imposition of a monetary penalty and is prevented from initiating a proceeding in any Georgia court until it obtains such a certificate.

3.4 City and County Licensing

Typically, cities and counties require all businesses located within their boundaries to obtain a business license prior to commencing business and to renew such licenses annually. Cities and counties also require payment of an annual license fee, based in part on the number of employees of the business and the gross revenues attributable to the business’ activities within the city or county boundaries. A business located within city limits is required to obtain only the city business licenses, whereas a business located in an unincorporated part of a particular county is required to obtain a county business license. Penalties are imposed for failure to register in a timely fashion.

In addition, cities and counties separately require the annual filing of an ad valorem or property tax return and payment of property taxes by any entity owning real or tangible personal property, including inventory. Tax rates vary from county to county and city to city.

3.5 State and Local Business Incentives

To provide an incentive to attract new businesses to Georgia, and to keep existing businesses from moving elsewhere, the state and local governments may provide certain tax and financing benefits to businesses operating in the state or in a particular county. For example, government entities may provide a source of funds for the construction or expansion of certain industrial facilities by issuing tax-exempt bonds, thereby allowing the business to borrow the necessary funds at a lower rate of interest than would otherwise be available to it. In addition, various counties in Georgia have enacted “freeport” exemptions under which certain inventories of finished goods or goods in the process of manufacture are exempted from the imposition of ad valorem taxation.

4 Corporate Governance

4.1 In General

There are important corporate governance issues to consider for directors and officers of U.S. corporations. The most important ones are the business judgment rule and the requirements of the Sarbanes-Oxley Act.

4.2 Business Judgment Rule

Generally, directors, officers, and controlling shareholders have to act in the best interest of the corporation. They owe the shareholders especially a duty of care and a duty of loyalty. The business judgment rule presumes that directors and officers of a corporation make their decisions on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company.

Thus, the business judgment rule creates a strong presumption in favor of the board of directors. The business judgment rule has two effects: One is that if its requirements are met the courts will not second-guess the business decision. In other words, the court will not review the decision and it will not substitute its own notions of what is a good or bad business decision. The second effect of the business judgment rule is that it shields the board of directors from liability for a decision which resulted in harm to the corporation if it was a bad decision.

However, the presumption of the business judgment rule is rebuttable. This is the case if there is proof of fraud, illegality, or a conflict of interest, if the decision lacked any rational business purpose or if it can be shown that the decision was made with gross negligence, which means that the directors were not adequately informed. If there is proof for any of this, the court will review the contents of the decision and the directors and officers may become liable for their decisions.

4.3 Sarbanes-Oxley Act

The Sarbanes-Oxley Act was passed in response to a number of corporate and accounting scandals like Enron, Tyco International and WorldCom. The purpose of the Act is to prevent and punish fraud. The Act requires enhanced financial disclosures for public companies and strengthens auditor independence. There are also a number of potential civil and criminal penalties concerning management conduct and reporting.

The rules on management conduct and reporting are, for example, the prohibition of personal loans, extension or maintenance of credits to corporate executives and officers, the forfeiture of certain bonuses and profits of chief executive officers and chief financial officers like the profits derived from sale of securities within the first 12 months of the first issuance of the security. Corporate executives are, among other things, obliged to verify financial statements filed with the SEC and to file internal control reports. Additionally, corporate executives are subject to criminal penalty for knowing or willful violations of securities laws.

5 Securities Law

5.1 In General

U.S. securities laws are designed to ensure that investors have accurate information about the type and value of interest they are purchasing. Federal and state laws regulate securities. Generally, federal securities laws are administered by the Security and Exchange Commission (SEC). The first of the federal securities laws enacted was the Federal Securities Act of 1933, which regulates the public offering and sale of securities in interstate commerce. The 1933 Act prohibits the offer or sale of a security not registered with the Security and Exchange Commission and requires the disclosure of certain information to the prospective security's purchaser. The objective of the 1933 Act's registration requirement is to enable a purchaser to make a reasoned decision based on reliable information. The Securities Exchange Act of 1934 requires that issuers, subject to certain exemptions, register with the SEC if they want to have their securities traded on a national exchange.

The definition of "securities" is broad and covers notes, stocks, treasury stocks, bonds, certificates of interest or participation in profit sharing agreements, collateral trust certificates, preorganization certificates or subscriptions, transferable shares, investment contracts, voting trust certificates, certificates of deposit for a security, and fractional undivided interests in gas, oil, or other mineral rights. Certain types of notes, such as notes secured by a home mortgage or a note secured by accounts receivable or other business assets are not securities.

Issuers of securities registered under the 1934 Act must file various reports with the SEC in order to provide investors with adequate information about companies with publicly traded stock. Although periodic filings are generally not required for non-publicly traded stock, registration may still be required unless the issuers fits one of a number of available exemptions.

The 1934 Act also regulates proxy solicitation and requires that certain information be given to a corporation's shareholders as a prerequisite to soliciting votes. The 1934 Act permits the SEC to promulgate rules and regulations to protect the public and investors by prohibiting manipulative or deceptive devices or contrivances via mails or other means of interstate commerce.

The SEC has promulgated strict rules against insider trading, which refers to trades of securities made by corporate insiders based on an informational advantage over the general public. Illegal insider trading occurs when corporate insiders buy or sell shares or other securities of his or her corporation using material, nonpublic information obtained through the insider's corporate position in breach of his fiduciary duties. The insider unlawfully exploits the informational advantage at the expense of the corporation or others who trade in the corporation's stock. Insider trading also includs "tipping" such information, securities trading by the person "tipped," and securities trading by those who misappropriate such information.

The states also regulate securities through laws commonly known as Blue Sky laws. Typical provisions include prohibitions against fraud in the sale of securities, registration requirements for brokers and dealers, registration requirements for securities to be sold within the state, as well as sanctions and civil liability. A majority of states, with the exception of New York and California, have, at least in part, adopted the Uniform Securities Act.

6 Antitrust Law

6.1 In General

The U.S. antitrust laws proscribe certain activities and transactions which are viewed as unreasonably hindering or reducing competition. Activities and transactions which will, or may, run afoul of those antitrust laws include, but are not limited to, the following:

- agreements which have the effect of unreasonably restraining trade;
- the acquisition of an equity interest in, or the assets of, an entity if that acquisition may tend to substantially lessen competition or create a monopoly;
- monopolization, attempts to monopolize and conspiracies to monopolize;
- exclusive dealing contracts;
- tying arrangements;
- price fixing;
- price discrimination with respect to similar goods sold to competing buyers;
- group boycotts; and
- certain unfair methods of competition.

Certain of those activities, such as group boycotts, price-fixing and certain tying arrangements have been found by U.S. courts to be inherently anticompetitive and have therefore been held to be violations of the antitrust laws whenever they occur. In other words, the very existence of those activities or conduct is considered to be a "per se" violation of law without consideration of the specific effects of the activity or conduct. Other forms of activity or conduct may be considered violations of law based on their overall circumstances and effects rather than their mere existence. That "rule of reason"-approach to determining whether violations have occurred generally takes into account such factors as whether or not competition has been adversely affected to a significant extent; whether there is justification for the activity, conduct or acquisition being examined; whether less anti-competitive means are available to achieve the same end; and whether the suspect activity, conduct or acquisition is reasonable on the whole.

In attempting to keep U.S. markets free and competitive, antitrust laws are also concerned with mergers that lead to monopolization of the market. Mergers of firms competing in the same market are likely to be scrutinized. However, there should be little risk of violation of the merger provisions of the antitrust laws, since legal counsel assists most mergers.

The prohibitions contained in the various antitrust laws (see below) can be summarized as prohibitions against horizontal and vertical restraints on trade.

6.1.1 Horizontal restraints

Price Fixing. The most important horizontal restraint on trade is price fixing. Agreements among competitors with respect to prices for products or services are illegal per se. Competitors may not agree on the actual prices they will charge or pay for a product or service. Whenever competitors follow a similar course of conduct that would not ordinarily been taken in the absence of a prior agreement, it is possible that an interference of conspiracy will be drawn.

Allocation of markets or customers. Another horizontal constraint is the allocation of markets or customers. Any agreement among competitors dividing markets by territory or customers is illegal per se. Competing firms may not divide among themselves the geographical areas in which they sell, nor may they distribute customers or allocate the available market. All such understandings, whether direct or indirect, are unlawful.

Concerted refusal to deal. Refusals to deal are agreements to deny supplier or customer relationships that competitors need in the competitive struggle. Refusals to deal are illegal per se. Generally, sellers should not agree to deal with a known boycotter, nor should buyers join in boycotting sellers whose prices are too high or whose goods are defective.

6.1.2 Vertical restraints

The prohibitions on vertical restraints of trade are generally treated less strictly than those on horizontal restraints.

Vertical price fixing. In a vertical price fixing agreement, the seller and the buyer agree with respect to the price at which the buyer will resell. Unlike horizontal agreements, the per se rule does not apply to vertical agreements which merely affect prices.

Non-Price vertical restraint. To ensure the orderly marketing of their goods, sellers often resort to sale restrictions. These restraints limit competition between dealers in the seller's goods to enhance the goods' position in the market relative to the goods of other sellers. As long as they do not involve vertical price fixing, orderly marketing arrangements are permissible and prohibited only when unreasonable in the totality of the economic circumstances of the market.

Exclusive selling agreements granted to a particular dealer are limitations on the seller's freedom and are generally valid. Even if the seller is induced to grant such an "exclusive" right by the dealer, the courts have not found an illegal concert of action.

Territorial and customer restrictions are agreements by dealers to resell the product only within specified territories or to specified classes of customers. These agreements are permissible as long as they are purely vertical and do not involve horizontal conspiracy among the dealers. The issue is whether the anticompetitive effect of the restraint on interbrand competition (among dealers selling the same brand) is outweighed by the pro-competitive effect on interbrand competition (among different brands) generated by strengthening the seller's ability to compete.

Exclusive dealing agreements are contracts under which a buyer promises to purchase all its requirements for the product from the seller. The Clayton Act (see below) prohibits such contracts if they are likely to lessen competition substantially. In recent years, courts have become more tolerant of these agreements.

Tying arrangements are efforts by sellers to tie the sale of one product to that of another. These arrangements are prohibited if the likely result is a substantial loss of competition. Tie-ins are per se unlawful if the seller possesses sufficient market power in the tying product, and coerces the buyer to take the tied product as a condition to obtaining the desired product.

Refusals to deal. Vertical boycott agreements have historically been treated harshly. A seller should not agree with a customer that it will not sell to another. Such agreements are generally illegal. The prohibition of refusal to deal is in tension with the seller's right to select those with whom he will do business. What distinguishes a legal selection of business partners from illegal refusals to deal is concerted vertical effort between buyers and sellers.

6.2 Antitrust Statutes

6.2.1 In General

Various provisions of the antitrust statutes provide for enforcement of the applicable restrictions and limitations by means of private civil lawsuits and/or enforcement actions brought by the U.S. Department of Justice or the Federal Trade Commission. The U.S. antitrust regime is comprised of several acts, which are briefly described below.

6.2.2 Sherman Act

Originally enacted in 1890, the Sherman Act is one of the cornerstones of U.S. antitrust law. As interpreted by the courts, the provisions of the Sherman Act apply to both interstate and foreign commerce and prohibit, among other things, (i) business combinations, arrangements and conspiracies which unreasonably restrain trade and (ii) monopolization and attempts or conspiracies to monopolize.

Penalties for each violation of the Act include fines of as much as $ 10,000,000 for corporations or $ 350,000 for individuals, as well as imprisonment for up to three years. The U.S. Department of Justice is responsible for enforcing the Act, although private lawsuits are also allowed. Remedies available for a successful private plaintiff include treble damages, attorneys' fees and/or injunctive relief.

6.2.3 Clayton Act

Besides the Sherman Act, the Clayton Act is one of the fundamental elements of U.S. antitrust law, having been enacted in 1914. The Clayton Act deals with specific types of restraints, including exclusive dealing arrangements, tie-in sales, price discrimination, mergers and acquisitions, and interlocking directorates. Since the Act applies to sales and leases of goods intended for use, consumption or resale in the United States, its scope includes business practices and arrangements pertaining to goods either manufactured in or imported into the U.S. The Act prohibits, among other things, the use of exclusive dealing or tying arrangements under which a seller with great market power requires as a condition of sale to its customer that the customer either (i) refrain from using or dealing in the goods of a competitor, or (ii) purchase another item from the seller in addition to the item desired by the customer. In addition, the Act prohibits the merger of businesses or the establishment of joint ventures if the effect of the merger or joint venture may be to substantially lessen competition or to tend to create a monopoly.

As in the case of the Sherman Act, the Clayton Act is subject to enforcement by both private civil lawsuits and government actions brought by either the Department of Justice or the Federal Trade Commission. Remedies for violations of the Act include both monetary damages and injunctive relief.

6.2.4 Robinson-Patman Act

Enacted in 1936, in part as an amendment to the Clayton Act, the Robinson-Patman Act, among other things, makes it unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality if such discrimination may lessen competition or create a monopoly. In addition, the act prohibits any person engaged in commerce from paying any commission or compensation to any other party to a transaction (or to such other party's agent) other than for services rendered in connection with the sale of goods. The provisions of the Robinson-Patman Act apply to goods imported into the U.S. and some provisions also apply to goods exported from the U.S.

The Act is subject to enforcement through both private civil lawsuits and legal actions brought by the Department of Justice or the Federal Trade Commission.

6.2.5 Federal Trade Commission Act

The Federal Trade Commission Act, originally adopted in 1914, established the Federal Trade Commission to enforce the substantive provisions of the act and other antitrust statutes. Basically, the Federal Trade Commission Act is a catchall enactment which has been construed to include all prohibitions of the other antitrust laws and, in addition, may be used to fill what may appear to be loopholes in the more explicit regulatory statutes.

The Act makes unfair methods of competition and unfair or deceptive acts or practices affecting commerce unlawful. However, the act does not apply to unfair methods of competition involving commerce with foreign nations (other than the importation of goods into the U.S.) unless those unfair methods have a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce or on U.S. export commerce. The Federal Trade Commission is empowered by the Act to issue “cease and desist orders” prohibiting the continuation of activities found to be violative of the Act.

Violations are subject to civil penalties in an amount not to exceed $ 10,000 for each violation, each day in which the prohibited activity continues constituting a separate violation. To assist businesses in structuring their activities in compliance with statutory requirements, the Federal Trade Commission will, in some circumstances, issue advisory opinions as to whether contemplated activities would be considered violations of the Act.

6.2.6 Hart-Scott-Rodino Antitrust Improvements Act of 1976

This Act requires that certain proposed acquisitions of corporate stock or assets be reported to the Federal Trade Commission and the Antitrust Division of the Department of Justice prior to their consummation so that those agencies may raise objections to the acquisition. The Act's reporting requirements are applicable to a proposed acquisition only if certain threshold tests are met with respect to such factors as asset or sales values of the parties involved and the percentage or value of the equity interest in the acquired entity held by the parties who would be required to do the reporting.

Civil penalties of up to $ 10,000 per day may be imposed for failure to make the required reports with respect to a covered acquisition.

6.2.7 State Laws

In addition to the federal statutes, various states have adopted laws covering many of the same subjects and other issues, most notably the pricing of goods. Other state laws are written in order to advance the interests of local dealers and distributors against manufacturers.

7 Intellectual Property Rights and Their Protection

7.1 In General

The protection of assets in the form of ideas, information and technology has become a great concern for business people in all industries and professions. In the United States, a combination of federal and state laws provide protection for inventions, trademarks and service marks, original works of authorship, trade secrets, know-how, and other confidential information. These interests are protected through the laws of patents, trademarks, copyrights and trade secrets. These terms are broadly categorized as "intellectual property."

7.2 Patents

A patent is a time limited grant to an inventor from the U.S. government of the right to exclude others from making, using offering for sale or selling a particular invention. An inventor files a patent application with the U.S. Patent and Trademark Office in Washington, D.C., describing the invention in detail, setting forth the best mode for carrying out the invention, and distinctly claiming what the inventor believes is his invention. The patent office reviews the application and will grant a patent if the invention is new, useful and unobvious to a person of ordinary skill in the art.

Three primary types of patents may be granted. A "*utility patent*" may be obtained for a machine, an article of manufacture, a composition of matter, a process, and improvements thereof. A "*design patent*" may be obtained for the ornamental appearance of an article and protects only the physical appearance. A design patent will not exclude others from using the functional properties of the article. A "*plant patent*" may be obtained by anyone who develops or discovers and asexually reproduces a new variety of plant (*i.e.*, a tree, flower, etc.).

Design patents expire after 14 years from the date of grant and patents other than design patents expire 20 years from the date on which the patent application was first filed or, if the application contains a specific reference to an earlier filed application or applications, from the date on which the earliest such application was filed.

It is advisable to conduct a preliminary patentability search of the files of the U.S. Patent and Trademark Office to determine whether or not the proposed invention appears sufficiently different from those disclosed in prior patents or publications to qualify for a patent. Such a search is not required, but if the results are unfavorable, the inventor may save the expenses associated with preparing and filing an application.

In the U.S., an inventor loses the right to patent his invention unless he files an application within one year of either the first public use of the invention, the first printed publication of the invention, or the first sale or offer for sale of the invention. It is generally advisable, however, to file a patent application prior to any public disclosure of the invention.

The U.S. Patent and Trademark Office will grant a patent to the first to invent, rather than the first to file an application for a patent. Therefore, in the U.S., it is important to document the date of the invention by keeping dated, written records of its development or by filing a written description of the invention with the U.S. Patent and Trademark Office.

7.3 Trademarks

A trademark or a service mark is a distinctive word, picture, device or symbol used by an individual or business to identify its goods or services and to distinguish them from the goods or services of others. Trademark status is also granted to distinctive packaging, color combinations, building designs, product styles, and overall product presentation. It is also possible to receive trademark status for identification that is not on its face distinct or unique but which has developed a secondary meaning over time that identifies it with the product or seller. The owner of a trademark has the exclusive right to use it on the product it was indented to identify.

In the United States, trademarks may be protected by federal statute under the Lanham Act and states’ statutory and common law. A trademark registered under the Lanham Act has nationwide protection. Under the Lanham Act, a seller registers a trademark with the Patent and Trademark Office. If the trademark is approved by an examiner, it is published in the Official Gazette of the Trademark Office to notify other parties of the pending approval so that it may be opposed. The benefits of such registration include constructive notice of the registrant's claim of ownership of the mark, and a presumption of validity of the registration of the registrant's ownership of the mark, and of the registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the registration. A search may be conducted prior to using a mark to see if the proposed mark is likely to cause confusion with someone else's mark. A company name may be considered a trademark or service mark if the name is used to market products and/or services. This treatment allows the name to be registered as a trademark with the Patent and Trademark Office. An incontestable presumption of validity and ownership arises after the trademark has been registered for five years and the registrant has filed an affidavit of continuing use. A trademark registration must be renewed every ten years.

Trademarks may also be registered in a particular state. State registration of a mark usually reserves the exclusive right to use the mark within the state to the registrant. State law protects a mark as soon as the mark is used, but such protection is generally limited to the geographic area of actual use.

7.4 Copyrights

The U.S. Copyright Act is federal legislation enacted by Congress under its constitutional grant of authority to protect creative works of authorships. The Copyright Act reaches architectural design, software, the graphic arts, motion pictures, and sound recordings. Given the scope of the federal legislation and its provision precluding inconsistent state law, copyright law is almost exclusively federal. The Copyright Office of the Library of Congress administrates the Copyright Act.

Copyright arises automatically when an original work of authorship is created. A certificate of copyright registration is a federally granted right which protects the copyright owner from unauthorized copying or performance of his original work of authorship. Copyright protection extends to various works, such as books, computer programs, written articles, catalogs, advertising copy, compilations of information, audio/visual works such as phonograph records and tapes, graphic art, paintings, photographs, prints, maps, charts and technical drawings and performing arts works such as plays, songs, dances and motion pictures.

A copyright gives the owner the exclusive right to reproduce, distribute, perform, display, or license his work. The owner also receives the exclusive right to produce or license derivatives of the work. Limited exceptions to this exclusivity exist for types of “fair use,” such as certain academic uses or book reviews. To be covered by copyright, a work must be original and in a concrete “medium of expression”.

Under current law, works are covered whether or not a copyright notice is attached and whether or not the work is registered. Although the copyright arises automatically when the work is created, a notice of copyright should be placed on the work when published. A certificate of copyright registration can be obtained, either before or after the work is published, by applying to the copyright office at the Library of Congress. A certificate of copyright registration must be obtained before a suit for copyright infringement can be brought and, for maximum protection, should be obtained within three months of first publication. Once registered, the copyright protects the author for the author's lifetime plus 50 years.

In the case of a work made for hire, an anonymous work or a work by multiple authors, copyright protection extends for a period of either 75 years from date of its first publication or of 100 years from the date of its creation, whichever period is shorter.

7.5 Trade Secrets

A “trade secret” is information that derives independent economic value from not being generally known or readily ascertainable by proper means and is subject to reasonable efforts under the circumstances to protect its secrecy. Trade secrets can be reverse engineered but it is prohibited to obtain trade secrets by fraud, industrial espionage, or breach of contract, amongst others “improper means”. A trade secret can provide protection for non-patentable inventions.

The law relating to trade secrets is designed to protect a business' property interest in commercially sensitive and important information. Trade secrets are governed by state law.

The Georgia Trade Secrets Act of 1990 defines a trade secret as information without regard to form that includes: technical or non-technical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information: (a) derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The owner of a trade secret can prevent the unauthorized use or disclosure of such information. A trade secret exists only so long as it is kept secret and any unauthorized public disclosure can destroy its protection. Thus, key to maintaining a trade secret is the imposition and maintenance of reasonable security measures, which can include physical security measures, a general security policy, limited disclosure of the secret to essential personnel, confidentiality agreements, etc. No written agreement is needed to protect the trade secret and the information be protected as long as it remains a trade secret. The owner of a trade secret must take affirmative steps to safeguard the information claimed to be a trade secret. Such steps should include, at the very least, limiting access to such information, labeling all confidential documents as such, requiring all outside parties to execute nondisclosure or confidentiality agreements and ensuring that all employment agreements contain similar provisions.

The Georgia Trade Secrets Act prohibits the actual or threatened misappropriation of trade secrets and provides for both injunctive relief and damages resulting from any misappropriation.

8 Labor and Employment Relations

8.1 In General

Employment laws are a pedigree of local, state and federal law. In contrast to European labor laws and regulations, the U.S. employment laws tend to offer less protection to employees and generally place lighter burdens on employers.

8.2 Federal Employment Laws

8.2.1 In General

Although most federal laws cover employers engaged in commerce that crosses state boundaries, each law establishes its own particular qualifications for coverage. Therefore, employers must look carefully at the individual federal laws in order to determine if the laws apply to them. Many federal statutes, for example, apply to employers with 15 or more employees in the U.S., but state and local laws often lower that threshold. A number of federal laws are enforced by the Department of Labor; however, some acts authorize the creation of special boards or committees which have the power to ensure compliance with a particular act. Most federal laws also allow individuals to enforce provisions through lawsuits in state or federal court.

8.2.2 National Labor Relations Act

Under the National Labor Relations Act (NLRA), employees have the right to self-organization, to form, join or assist labor organizations and to bargain collectively for the purpose of negotiating the conditions of their employment. Although employees generally have an equal right to refrain from these activities, an employer may require membership in a labor organization as a condition of employment.

The employer may not interfere with these rights or discriminate in the hiring or firing of employees based on membership in any labor organization. The NLRA also requires labor organizations to bargain collectively with employers with respect to wages, hours and other conditions of employment. This Act is enforced by the National Labor Relations Board which has the authority to investigate, call hearings, and prevent any person from engaging in any unfair labor practice affecting commerce.

8.2.3 Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) sets out minimum wage and overtime requirements that apply to any employer who engages in interstate commerce. The FLSA covers all employers who are engaged in commerce or the production of goods for commerce and is enforced by the U.S. Department of Labor. The Act, however, does not cover certain employees employed in a bona fide executive, administrative or professional capacity. Under the FLSA, non-exempt hourly employees must be paid a minimum wage of $ 7.25 per hour. When the employee works more than 40 hours per week, the employer must pay the employee one and one-half times their regular rate for every hour worked over forty hours per week. Some states, such as California, require overtime for all hours worked over 8 in a day. The act also requires employers to keep records of all employees, the wages, and hours maintained by them. The FLSA further provides that no employer engaged in commerce may employ any "oppressive child labor." "Oppressive child labor" is defined, generally, as the employment of persons under the age of 16 years or employment of persons between the ages of 16 and 18 in an occupation particularly hazardous to children. Moreover, manufacturers and dealers are prohibited from shipping goods which have been produced in an establishment where oppressive child labor is employed. The act can impose individual liability on the decision makers for willful violations.

8.2.4 Equal Pay Act

The Equal Pay Act prohibits compensation based discrimination against employees on the basis of sex. The Act prohibits paying wages to employees at a rate less than the rate at which the employer pays employees of the opposite sex for equal work, requiring equal skill, and performed under similar working conditions. This Act does not apply where payment is made pursuant to a seniority system, a merit system, or a system which measures earnings by quality or quantity.

8.2.5 Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination against any individual with respect to his compensation or the terms, conditions, or privileges of his employment because of his race, color, religion, sex or national origin by employers. Title VII covers employers engaged in an industry affecting commerce which have fifteen or more employees. Employers may not discharge employees or otherwise retaliate against their employees for asserting their rights to be free of discrimination. Sex discrimination includes discrimination based on pregnancy, childbirth, or related medical conditions. Some states have broader definitions and more protected classifications.

In regard to discrimination prevention, employers should maintain an anti-discrimination policy. This policy should include express language declaring that the employer will not discriminate against any qualified individuals on the basis of race, religion, national origin, color, gender, age, disability, or veteran status. This Title is enforced by the Equal Employment Opportunity Commission (EEOC) or by individual lawsuits in state or federal courts.

8.2.6 Age Discrimination in Employment Act

The purpose of this Act is to promote employment of older persons based on their ability rather than their age. The Act makes it unlawful for an employer to discharge or to refuse to hire an individual because of his or her age. It also prohibits limiting or segregating employees on the basis of age where the limitation or segregation would deprive the individual of employment opportunities. An employee must be at least 40 years of age in order to receive protection from this Act.

This Act covers employers with 20 or more employees, including foreign corporations controlled by American employers. This act is also enforced by the EEOC which has the power to make investigations and require the keeping of records necessary for the administration of this Act. Individuals may bring lawsuits in state or federal courts.

8.2.7 Americans With Disabilities Act

The American with Disabilities Act (ADA) prohibits employer discrimination in the hiring, advancement, or discharge of a qualified individual with a disability because of the individual's disability. An individual is considered to be disabled under the statute if he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Discrimination also includes a failure to make reasonable accommodations to the known physical or mental limitations of a disabled individual, unless the employer can demonstrate that the accommodation would impose an undue hardship on the business. The ADA covers employers engaged in an industry affecting commerce which have fifteen or more employees. This Act is enforced by the EEOC or by individual lawsuits in state or federal courts.

8.2.8 Immigration Reform and Control Act

This Act requires all employers to verify that their employees have a legal right to work in the United States and are legal aliens. Employers are required to complete an I-9 form to verify each employee’s authorization to work in the U.S. Employees must provide documents establishing both authorization and identity. For employers with four or more employees, the Act also prohibits discrimination in the hiring and firing of an individual because of the individual's national origin or citizenship. This Act is enforced by the Department of Labor and the Immigration & Customs Enforcement (ICE). Employers who do not comply with the Act are subject to both civil and criminal penalties.

8.2.9 Occupational Safety and Health Act

The Occupational Safety and Health Act (OHSA) requires employers to maintain a work place free from hazards likely to cause death or serious harm to their employees. OSHA also requires that employers comply with all safety and health standards provided for under the Act. The Act covers all employers who are engaged in a business affecting commerce and is enforced by the Department of Labor. The Act also authorizes the entry, inspection and investigation of places of employment in order to verify compliance with the Act.

8.2.10 Employee Retirement Income Security Act

The purpose of the Employee Retirement Income Security Act (ERISA) is to protect the interests of participants in employee benefit plans by requiring disclosure of financial and other information to the participants. Each employer must disclose a description of the benefit plan to each participant and must report any modifications in the plan to the Secretary of Labor. The Act regulates minimum participation standards, minimum vesting standards, and the form and payment of benefits. It establishes standards of conduct and obligations for fiduciaries of employee benefit plans. The Act further covers all employers and provides protection for any employee benefit plan maintained by an employer engaged in commerce. The Department of Labor and the Internal Revenue Service administer ERISA. The Department of Labor may initiate enforcement proceedings in federal courts. Participants, beneficiaries and fiduciaries may also bring individual actions in federal or state courts. All violations of this Act are subject to both criminal and civil penalties.

8.2.11 Consolidated Omnibus Budget Reconciliation Act

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employer group health plans to provide beneficiaries with the opportunity to elect to continue coverage under the plan when coverage is lost for certain reasons set forth in the Act. The continuing coverage must be identical to the coverage under the plan for similarly situated beneficiaries. The coverage must also extend for at least 18 months after the event which initially terminated coverage, although under certain circumstances, the coverage may extend for 36 months. An employee who has been terminated for gross misconduct is not eligible for continued insurance coverage under COBRA. COBRA covers employers with 20 or more employees. Failure to provide continued coverage may result in tax disadvantages, civil liability and monetary penalties.

8.2.12 Social Security Act

This Act imposes a tax on the wages of employees to finance old age, survivors' disability and medical insurance. The tax is collected by the employer of the taxpayer by deducting the amount from the taxpayer's wages. The employer then becomes liable for payment of the tax. This Act also imposes on employers an excise tax equal to the percentages of the wages paid by the employees.

8.2.13 Government Contractors Laws

Additional laws exist which apply to contractors who do business with or receive grants from the United States Government. These laws often require the government contractor to provide minimum wages, overtime pay, and safe working conditions for employees. Some of these laws also prohibit child labor as well as require contractors to incorporate anti-discrimination clauses and affirmative action plans in their contracts. Other laws require contractors to prepare and disseminate to their employees policies prohibiting the use of illegal drugs at the work place. These laws are enforced by the Department of Labor. Failure to meet these requirements could result in the loss of government contracts for a period of time.

8.2.14 Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) requires that employers provide eligible employees with twelve work weeks of unpaid, job-protected leave during a twelve month period for the birth of a child, the care of a newborn child, the care of a child newly placed with the employee from adoption, the care of a spouse or child, the care of a parent who has a serious health condition, or for the employee’s own health, if the employee has a serious health condition that makes her unable to perform the functions of her position. Under certain circumstances employers may require employees to take unpaid FMLA leave rather than accrued paid leave. The FMLA applies to all governmental and educational entities and to private employers with fifty or more employees who are employed within a 75 mile radius

8.2.15 Health Insurance Portability and Accountability Act

Under this Act, employers must give employees who lose insurance coverage through job termination a certificate stating for how long employee had coverage. Future employers will not be allowed to bar coverage for a new employee's medical condition if the employee was covered for that condition for more than twelve months at an old job.

8.3 State Employment Laws – Example of Georgia

8.3.1 In General

Generally, Georgia is regarded as a "pro-employer" state because of its strong policy against government interference with the relationship between employer and employee. Georgia largely remains an *employment-at-will* state. The employment-at-will doctrine provides that, absent an employment contract for a definite period of time, both, an employer and an employee may terminate their employment relationship at any time and for almost any reason. Thus, the employer may terminate an employee for good cause, bad cause, or no cause at all, as long as it is not an illegal cause. There is no notice period required before discharging an employee.

8.3.2 Georgia Minimum Wage Law

The Georgia Minimum Wage Law sets the minimum wage at $ 5.15 per hour. This law supplements the FLSA (see above) and does not apply to any employer already covered by the FLSA, so employers must pay the minimum wage established by federal law ($ 7.25 per hour).

8.3.3 Georgia Equal Employment for the Handicapped Code

The Code provides that no employer shall refuse to hire, discharge or discriminate against any handicapped individual with respect to wages, rates of pay, hours or other conditions of employment because of that person's handicap, unless the handicap restricts his ability to engage in the particular job for which he is eligible. The Code applies to employers with fifteen or more employees. Any handicapped person discriminated against may institute civil action against the employer. A court may order reinstatement or hiring of the individual, award court costs, and award reasonable attorney fees to the prevailing party.

8.3.4 Health and Safety Standards

Georgia law provides that employers have a duty to furnish employment which is reasonably safe for their employees. Thus, employers must furnish safety devices and safeguards and must do every other thing reasonably necessary to protect the health and safety of their employees.

8.3.5 Georgia Workers' Compensation Law

This Georgia law requires employers with three or more employees to provide workers' compensation coverage for their employees. This law assures that the employee receives compensation for the injury and assures the limited liability of the employer. Every employer must insure the payment of compensation to his employees, either through a third party insurer or through a self-insurance program. This law was enacted to enable an injured employee to recover compensation from an employer for the injury. The monetary compensation is a preset amount for the injury regardless of whether the employer or employee was negligent in causing the injury. Employers are liable for personal injury caused by an on-the-job accident only to the extent specified by this statute. In most cases, workers' compensation benefits are the only source of recovery for an employee and they are not able to file a separate law suit against their employer.

This law covers any employer in Georgia who is not specifically exempted, and is administered by the State Board of Workers' Compensation. Up to five corporate officers may be exempt from coverage as long as written certification is given to the insurer or, if there is no insurer, to the State Board of Workers' Compensation.

8.3.6 Georgia Right to Work Law

No individual will be required as a condition of employment to be a member of or to resign from membership in, a labor organization. Any contract which requires membership in a labor organization or payment of a fee to a labor organization is void as contrary to the public policy of the state of Georgia.

8.3.7 Georgia Unemployment Contributions

The legislature of the state of Georgia has created an Employment Security Fund to be used to assist individuals during periods of unemployment. The fund is maintained by mandatory quarterly contributions by all "employing units" which, in either the current or preceding calendar year, (1) paid wages in any calendar quarter of $ 1,500 or more for service in employment, or (2) had in employment at least one individual for some portion of a day in each of 20 different calendar weeks (whether consecutive or not). Generally, employers are required to contribute at the rate of 2.7% of the first $ 8,500 of wages paid to each employee during the calendar year, although that rate may be adjusted in response to a particular employer's past payment history.

8.3.8 Employer New Hire Reporting Program

Under this program, all employers doing business in the state of Georgia are required to report the hiring of any person who resides or works in the state. The purpose of the program is to assist Child Support Enforcement to locate, establish, and enforce child support obligations. The law supplies penalties for employers who fail to supply the required reports.

8.3.9 Employee Handbook

It is advisable for private employers in Georgia to provide their employees with an employee handbook. Under current Georgia law, a handbook will generally not affect the employee's employment-at-will status. Any handbook should contain a conspicuous disclaimer setting forth an express provision that the at-will-relationship is not affected by the handbook and that the policies set forth in the handbook are subject to change at any time.

9 Immigration Law

9.1 In General

A person traveling to the United States for business purposes will, in general, be required to obtain a visa from a Consulate or Embassy of the United States prior to entering the U.S., unless that person is a U.S. citizen. Those persons intending to visit or work in the United States only temporarily must obtain a nonimmigrant visa, a relatively easy process. Persons intending to reside permanently in the United States must obtain an immigrant visa (commonly called a green card), a much more difficult and frequently lengthy process.

The U.S. Citizenship and Immigration Services (USCIS) is responsible for admitting individuals to the United States. Generally, USCIS presumes all individuals applying for entry into the U.S. intend to reside permanently. The individual must demonstrate an intent or approval to stay temporarily (nonimmigrant status), and approval to reside permanently (immigrant status) or proof of U.S. citizenship.

9.2 Nonimmigrant Visas

Those who enter the U.S. in nonimmigrant status come to the U.S. temporarily for a particular purpose and generally must intent to leave at the conclusion of their visit. Nonimmigrant status may last a matter of days or several years. Nonimmigrants include tourists, students, temporary professional workers, investors, intracompany transferees, diplomats, and others. Some nonimmigrants may later decide to pursue permanent residency or to change to other nonimmigrant visa categories. The immigration laws provide ways to do this. The principal categories of nonimmigrant visas applicable to business visitors to the United States are briefly described below.

9.2.1 B-1 Visitor for Business

This visa is appropriate for persons who are employed and paid abroad by a non-U.S. company and who will be visiting the U.S. temporarily for “business” incident to international trade. What constitutes “business” for purposes of this visa is not precisely defined but it would include negotiating contracts, consulting with business associates, conducting research, attending business conventions and conducting litigation. The applicant must demonstrate that he has a residence in a foreign country which he does not intend to abandon. The holder of a B-1 visa may initially be authorized to stay in the U.S. up to six months, although the period will vary with the purpose of the visit, and most initial stays are authorized for periods of three months or less. The stay may be extended for an additional six months or for the period necessary for the applicant to complete his business, whichever is shorter. Nationals of many countries may obtain combined B-1/B-2 (business/tourist) visas that are usually valid for ten years and that authorize an unlimited number of entries into the U.S. The spouse and minor children of a B-1 visa holder are not authorized to enter the U.S. by virtue of the holder’s visa; instead, they must separately qualify for and obtain their own visas (normally B-2 tourist visas) in order to accompany the B-1 visa holder to the U.S.

9.2.2 Visa Waiver Program – Business Visitor

Nationals of certain countries are eligible for this program which allows entry into the U.S. for a temporary visit without complying with the usual visa requirements. The program is especially convenient for short notice business travel since eligible persons may obtain entry into the U.S. simply by presenting their valid passports at the U.S. point of entry without first obtaining a visa from a Consulate or Embassy. However, the convenience of participation in the program has a price, as participants must waive their rights to procedural protections ordinarily available to visa holders under U.S. immigration laws and they may not change to another status during their stay in the U.S. The period authorized for that stay will be no more than 90 days and may not be extended. International travelers who are seeking to travel to the United States under the Visa Waiver Program are subject to enhanced security requirements and will be required to pay an administrative fee. All eligible travelers who wish to travel to the U.S. under the Visa Waiver Program must apply for authorization and then pay the fee using the Electronic System for Travel Authorization at https://esta.cbp.dhs.gov/esta/.

9.2.3 E-1 Treaty Trader

This visa is available to nationals of countries having a treaty of friendship, commerce and navigation with the United States who will be visiting the U.S. solely in order to carry on "substantial" trade (including trade in services) primarily between the U.S. and the treaty country of which the visa applicant is a national. This category of visa is not available to persons who intend to initiate trading activity; the trading activity must be in existence at the time the E-1 visa application is filed. The trade must be "substantial," a standard which is not well defined, but which should include a continuous flow of trade involving numerous transactions over an extended period of time, even if the individual transactions involve only small dollar amounts. More than one-half of the total value of the trade conducted by the enterprise in the U.S. must be between the U.S. and the treaty country of which the enterprise and the visa applicant are nationals. The nationality of a corporation is considered to be the nationality of the shareholders controlling the corporation. The nationality of an individual shareholder is determined by that person's citizenship.

An applicant for an E-1 visa is not required to have a foreign residence that he does not intend to abandon. However, the applicant must express an unequivocal intent to leave the U.S. when the E-1 trade activities cease. An E-1 visa will authorize an initial stay in the U.S. of one to three years, and an unlimited number of one-year extensions may be obtained while the trading activity continues. A spouse and minor children may accompany the visa holder to the U.S., but they are usually not authorized to work during their stay. A spouse can apply for employment authorization through USCIS.

9.2.4 E-2 Treaty Investor

This visa is similar to the E-1 visa in that it is available to nationals of countries having a treaty of friendship, commerce and navigation with the United States. However, instead of trading activities, the applicant's visit to the U.S. must be for the purpose of developing and directing the operations of an enterprise in which the applicant has invested, or is in the process of investing, a "substantial" amount of capital. Whether a capital investment is "substantial" is generally not evaluated in terms of a fixed dollar amount. Rather, the substantiality of the investment is evaluated under either of two proportionality tests: (i) the amount of the investment weighed against the value of the business enterprises, or (ii) the amount of the investment weighed against the amount normally considered sufficient to establish such an enterprise.

As in the case of an E-1 visa, an applicant for an E-2 visa is not required to have a foreign residence which he does not intend to abandon, but the applicant must express an unequivocal intent to leave the U.S. when the E-2 investment activities cease. An E-2 visa will authorize an initial stay in the U.S. of one to three years, and an unlimited number of one-year extensions may be obtained while the investment activity continues. A spouse and minor children may accompany the visa holder to the U.S., but they are usually not authorized to work during their stay. A spouse can apply for employment authorization through USCIS.

The E-1 visa and the E-2 visa are obtained at the U.S. Consulate or Embassy abroad. The primary advantage of E-1/E-2 visas over L-1 intracompany transferee visas discussed below is that the E-1/E-2 visa may be revalidated indefinitely as long as the underlying venture qualifies. Thus, although the stay is considered temporary, key personnel may remain in the U.S. without any limitation on the number of years they may stay

9.2.5 H-1B Specialty Occupations

This category of visa is applicable to individuals who will be rendering services in a professional position for a limited time period. The types of positions or fields to which this visa applies are those for which a baccalaureate degree or higher is generally a prerequisite.

Prospective U.S. employers of H-1B candidates must file a Labor Condition Application (LCA) with the U.S. Department of Labor (DOL), documenting wages, working conditions and the absence of a strike or lockout. The U.S. employer must attest that the H-1B applicant will be paid the higher of the (i) actual wage for the job at the place of employment, or (ii) the prevailing wage for the area, and also that the employment of H-1B workers will not adversely affect U.S. workers similarly employed. Further, the prospective employer must attest in his filing that he has notified its other U.S. workers of the filing of the LCA. After the LCA has been certified by the DOL, the employer must then file a petition with USCIS. Only after that petition has been approved by USCIS may the prospective employee actually apply for the visa. Only 65,000 H-1B visas may be issued each year. In recent years, this category has been oversubscribed.

The U.S. employers must maintain files that document the attestation. U.S. employers must also agree to pay the reasonable cost of return transportation should the employer terminate the H-1B nonimmigrant's employment prior to the conclusion of the authorized period of stay.

The visa will generally authorize an initial stay of two to three years with an extension of one to three years available. The H-1B visa will usually not allow a total stay in the U.S. in excess of six years. A spouse and minor children may accompany the visa holder to the U.S., but they are not authorized to work during their stay.

9.2.6 L-1 Intracompany Transfers

The L-1 visa is applicable to managers, executives and employees with specialized knowledge who are being assigned to positions in the U.S. after at least one year's employment abroad in similar positions with the same employer or one of its affiliates. The employer may be any U.S. or foreign firm, corporation, or other legal entity doing business in the U.S. and at least one other country during the period the L-1 visa holder is in the U.S.

Before the individual may apply for an L-1 visa, the U.S. employer must file a petition with the USCIS. A company that is transferring a number of employees to the U.S. may file a blanket petition (which, if approved, would eliminate the need for an individual petition for each employee) if the company: (i) is engaged in a commercial trade or business; (ii) has maintained an office in the U.S. for one year or more; (iii) has three or more domestic or foreign branches, subsidiaries or affiliates; and (iv) has obtained approval of at least ten L-1 petitions in the previous 12 months or has a work force of 1,000 employees or has U.S. affiliates with combined annual sales of $ 25,000,000.

Once an applicable petition (whether individual or blanket) has been approved, the employee may apply for the visa at a U.S. Consulate or Embassy. The employee is not required to show a foreign residence that he does not intend to abandon.

The L-1 visa will generally authorize an initial stay in the U.S. of one to three years with one to two-year extensions available. The longest stay authorized for an L-1 visa is five years for employees qualifying by reason of specialized knowledge and seven years for managers and executives. A spouse and minor children may accompany the visa holder to the U.S., but they are usually not authorized to work during their stay. A spouse can apply for employment authorization through USCIS.

9.2.7 O-Workers with extraordinary ability

Those with extraordinary ability in science, arts, education, business or athletics may qualify for the O visa if they can document (i) sustained national or international acclaim and (ii) their entry will substantially benefit the U.S. Business people and certain others may be admitted in O status for up to three years: athletes and entertainers are admitted only for the duration of the event for which they seek entry. Applications are made directly to the USCIS.

9.2.8 TN Canadian and Mexican Professionals

Canadian citizens coming to the U.S. to work in certain professional capacities (listed in a schedule annexed to the North American Free Trade Agreement) generally requiring a baccalaureate degree as a prerequisite may obtain permission to enter the U.S. by demonstrating at the point of entry proof of Canadian citizenship and qualification for one of the eligible positions. No advance USCIS approval or LCA is required.

Mexican citizens must also obtain prior approval from the DOL and USCIS and must obtain a TN Visa before coming to the U.S. The initial period of stay authorized is three years, and three-year extensions are permitted. A spouse and minor children may accompany the TN professional to the U.S. in TD status, but they are not authorized to work during their stay.

9.2.9 J-1 Exchange Visitor

Although not directly aimed at individuals conducting business in the U.S., J-1 visas can be used by companies to employ foreign workers. This category of visas was created to allow students, scholars, teachers, physicians as well as trainees and specialists to enter the U.S. temporarily and be “compensated” for their work. This category enables employers with structured training programs to train overseas employees in the U.S. Permissible purpose for

J-1 exchange visitors for business and industrial organizations are to receive training in particular skills, methods, or techniques.

This visa is sponsored by either a governmental agency, an international organization, or a “citizen” of the U.S. designated by the Department of State. The “au pairs” hired by U.S. families fit in this visa category. The admission, duration, and extension conditions within this visa category vary from one type of applicant to the other.

9.2.10 Overstay Penalties

Once in the U.S., holders of nonimmigrant visas must be careful not to stay longer than their I-94 Departure Record allows. If an individual remains in the U.S. for one day or more after his I-94 expires, he must return to his home country to obtain a new visa before he will be permitted to re-enter the U.S. In addition, an individual who stays in the U.S. six months or more after his I-94 expires may be ineligible to re-enter the U.S. for three to ten years. To avoid these harsh penalties, foreign visitors will need to pay close attention to the expiration date of their I-94 cards and to apply in advance for a status extension, if one is available.

9.3 Immigrant Visas

9.3.1 In General

Permanent residents receive a “green card” and may reside permanently in the U.S. After a waiting period, permanent residents may become citizens. Permanent residents remain citizens of and retain the passport issued by their country of nationality. It is assumed that lawful permanent residents have an intent to live in the U.S. on a permanent basis. Permanent residents must pay taxes on their worldwide income as long as they are U.S. permanent residents.

Permanent residents are subject to deportation based on certain types of conduct, generally criminal convictions, and they can loose their permanent residency if they abandon their residence in the U.S. if a permanent resident remains outside of the U.S. for an extended period of time, he or she may be deemed to have abandoned his or her permanent residence unless the absence is temporary.

There are three general preference systems through which a person may become a lawful permanent resident and obtain a green card: The alternatives are (i) family based immigration for certain relatives of U.S. citizens and permanent residents; (ii) employment based immigration for those with offers of employment, investors, and limited groups of special immigrants; and (iii) the visa lottery. This section focuses principally on employment-based immigration.

9.3.2 Employment-based immigration in general

Employment-based immigration into the U.S. generally is prohibited unless the U.S. Secretary of Labor certifies to the Secretary of State and the Attorney General that (i) there are not sufficient workers able, willing, qualified and available at the time of application for an immigrant visa and at the place of the immigrant’s intended employment; and (ii) the immigrant’s intended employment will not adversely affect the wages or working conditions of similarly employed domestic workers. Once the required labor certification has been obtained, the prospective employment-based immigrant must file a petition with the USCIS seeking classification in one of the categories described below. If the number of approved petitions for a particular category exceeds the number of available visas, the applicant is placed on a waiting list generally based on the date the filing process was initiated. In some categories, no waiting period for a visa is usually required. However, in other categories, the waiting period may be quite lengthy.

Employment-based immigrant visas are currently limited to 140,000 per year (including visas for spouses and minor children accompanying the employment-based immigrants) of which generally no more than seven percent (9,800) may be issued to nationals of any one country. Those visas are allocated among various categories of immigrants as described below. The spouse and children under age 21 of those who receive permanent residency through employment become permanent residents as well and may work in the U.S.

9.3.3 EB-1 Priority Workers

This category is comprised of (i) persons possessing extraordinary ability in the arts, sciences, education, business, or athletics who have demonstrated sustained national or international acclaim in their field and who propose to continue working in that field after entering the U.S.; (ii) outstanding professors and researchers having at least three years experience who seek to enter the U.S. pursuant to offers of employment for certain teaching or research positions at institutions of higher learning or within certain private employers engaging in research; and (iii) executives and managers employed for at least one of the preceding three years in a similar capacity with a foreign affiliate of the U.S. company for which the immigrant will work in the U.S.

No DOL certification or recruiting of U.S. workers is required with respect to immigrants in this category. The EB-1 category has an annual allocation of 40,000 visas plus any visas allocated to, but unused under, categories EB-4 and EB-5 described below.

9.3.4 EB-2 Advanced Degree Professionals and Those with Exceptional Ability

This category includes (i) members of the professions (such as doctors, lawyers, architects, engineers and teachers) who have at least a master’s degree or baccalaureate degree with at least five years of progressive experience in the applicable area of expertise, and (ii) persons of exceptional ability (i.e., having a degree of expertise above that normally encountered, but less than that required for the EB-1 visa described above) in the arts, sciences or business.

Obtaining an EB-2 visa generally requires a labor certification although a waiver for that requirement for a specific job offer is available if the USCIS determines that the applicant’s services in the U.S. would be in the national interest. This category also has an annual allocation of 40,000 visas plus any visas allocated to, but unused under, category EB-1.

9.3.5 EB-3 Skilled Workers, Basic Degree Professionals and Unskilled Workers

This category encompasses all other workers, including managers and professionals having a baccalaureate degree but insufficient qualifications for an EB-1 or EB-2 visa, skilled workers in fields requiring two years of training or experience, and unskilled workers. A DOL labor certification concerning the unavailability of qualified U.S. workers is required before an EB-3 visa can be issued. A maximum of 40,000 EB-3 visas (plus any visas allocated to, but unused under, categories EB-1 and EB-2) will be issued each year, with no more than 10,000 available for unskilled workers.

9.3.6 EB-4 Religious Workers

This classification is generally inapplicable to most businesses. A total of 10,000 visas are available annually for this category.

9.3.7 EB-5 Employment Creation Immigrants

Known as the "investment green cards," the visas in this category are available to individuals who are making an investment of at least $ 1,000,000 in a new commercial enterprise that will provide employment to ten or more U.S. workers. The required investment is reduced to $ 500,000 in targeted rural area and areas of high unemployment. To be considered "new," a commercial enterprise may, but need not be, newly established. A purchase of an existing enterprise will also qualify as "new" if sufficient changes are made to the business, as will an expansion of an existing enterprise if there is a 40 percent increase in the net worth or level of employment of the business (although the minimum of ten new workers would still apply).

An EB-5 visa initially provides only conditional permanent residency, the condition being removable after two years if the enterprise continues to meet the applicable requirements. A total of 10,000 EB-5 visas are available each year, of which 3,000 are set aside for areas of high unemployment.

9.3.8 Immigrant visa lotteries

An annual lottery program has been created to increase immigration from under represented countries. The under represented countries are designated each year. The procedure for lotteries is that only one application per person is allowed; there is a month-long application period and selection is on a purely random basis. Since visa allocations become available at the start of the government's fiscal year each October, the lottery is usually held several months before the beginning of the fiscal year.

9.3.9 Employers' Record-Keeping Responsibilities

The Immigration Reform and Control Act of 1986 imposes penalties on employers who fail to keep the required records on employees. Employers are required to fill out I-9 forms, on which the employer records that an employee produced documentation that indicates the employee is authorized to work in the U.S. If an employer makes a good faith effort to comply with the I-9 requirements, that employer may not be sanctioned for technical or procedural mistakes.

In addition, employers who assist their foreign employees in preparing immigration documents can be held civilly or criminally liable if those documents contain a false statement that the employer knew or should have known to be false. An increasing number of states are requiring certain employers to use E-Verify in addition to the I-9 process. E-Verify is an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility. For more information, please go to http://www.dhs.gov/e-verify.

10 Torts & Product Liability

10.1 In General

Myths abound about the litigiousness of Americans. While it is true that more court cases are filed in the United States than in many foreign jurisdictions, few of the filed cases end in success for the plaintiff. Courts dispose over 95% of the cases before trial. Awareness of the duties and requirements placed on businesses by the law and compliance with the imposed norms allows businesses to minimize potential exposure and to keep legal costs manageable. In addition, the average jury awards are much smaller than the news media portray; million dollar verdicts are the great exception.

10.2 Tort Law in General

Most civil suits originate in tort. Torts are civil wrongs recognized by law as grounds for a lawsuit. These wrongs result in an injury or harm constituting the basis for a claim by the injured party. The primary aim of tort law is to provide relief for the damages incurred and deter others from committing the same harms. The injured person may request an injunction to prevent the continuation of the tortuous conduct or for monetary damages. Tort law is state law created through judges and by statute.

In general, torts can be distinguished into several categories, such as (1) intentional torts, (2) negligent torts, and (3) strict liability torts. Intentional torts are those wrongs that the defendant knew or should have known would occur through their actions or inactions; for example trespass, assault and battery. In contrast, negligent torts occur when the defendant's actions were unreasonable. Lastly, strict liability wrongs do not depend on the degree of carefulness by the defendant, but are established when a particular action causes damage. An example for such a liability is the making and selling of defective products.

10.3 Class Actions

Class actions permit a representative plaintiff to sue on behalf of a group of similarly situated individuals. Through pooling of plaintiffs, class actions make it economical to sue in cases where the damages of the individual are small. Before certifying a class, courts carefully examine whether or not the named plaintiff is a good representative of the class.

10.4 Product Liability

Product liability refers to the liability of manufacturers and retailers for a defective product. This includes the manufacturers of component parts, assembling manufacturers, wholesalers, and the retail storeowners. The focus of product liability suits are products containing inherent defects that cause harm to a consumer of the product.

Product liability claims can be based on negligence, strict liability, or breach of warranty of fitness, depending on the jurisdiction within which the claim is based. Many states have enacted comprehensive product liability statutes. Although there is no federal product liability law, the United States Department of Commerce has promulgated a Model Uniform Product Liability Act (MULPA) for voluntary use by the states.

No matter where the action is brought, one must prove that the product is defective. There are three types of product defects that incur liability in manufacturers and suppliers: design defects, manufacturing defects, and defects in marketing. Design defects are inherent; they exist before the product is manufactured. While the item might serve its purpose well, it can be unreasonably dangerous to use due to a design flaw. On the other hand, manufacturing defects occur during the construction or production of the item. Only a few out of many products of the same type are flawed in this way. Defects in marketing deal with improper instructions and failures to warn consumers of latent dangers in the product.

Product liability is considered a strict liability tort. Strict liability torts do not depend on the degree of carefulness by the defendant. In product liability cases, a defendant is liable when it is shown that the product is defective. Thus, it is irrelevant whether the manufacturer or supplier exercised great care. If there is a defect in the product that causes harm, he or she will be liable for it.

11 Overview of the U.S. Litigation Process

11.1 In General

The American litigation process is significantly different from systems in other industrialized nations. A general understanding of these differences may impact whether one wishes to expose himself to this process by investing in the U.S. Generally, nearly any breach of a right or duty will be actionable if it results in damage to the party maintaining the action. What rights or duties exist, and may be possibly breached, is a question of substantive law and is addressed elsewhere in this pamphlet.

11.2 U.S. Court Systems

There are separate court systems in the United States: the courts of the individual states and the federal courts. There are also federal administrative forums and municipal courts within each state, the latter of which handle violations of city ordinances, such as traffic violations. Most actions are maintained in the state court system, which have jurisdiction over suits not involving interpretation of the U.S. Constitution or the application of federal statutes. The state court system in Georgia is comprised of two courts of general jurisdiction, handling most tort and contract claims and certain specialty courts, such as probate court (handling the administration of trusts and wills) and magistrate court (a less formal court having the power to decide smaller monetary claims). The federal courts are given the power to decide (i) cases or controversies arising under the U.S. Constitution or national laws and treaties (cases involving federal questions) and (i) cases or controversies between or involving two different states or citizens of two different states (diversity of citizenship) and in which the amount in controversy exceeds $ 75,000. In cases over which the federal courts have jurisdiction based on diversity of citizenship, the substantive law of one of the states concerned will be applied but the federal court's procedural rules will govern the litigation process itself.

Often, a suit will be filed in state court in a matter over which the federal courts also have jurisdiction. In such a case, the non-filing party may move the case to the federal court by filing papers in federal court. This procedure is called “removal” and is often attempted because federal dockets are less crowded and the quality of federal judges.

11.3 The Litigation Process

11.3.1 Pleading

Practically all litigation starts with the filing of a complaint with the clerk of the state or federal court and service of this complaint upon the party being sued. The federal and Georgia state courts follow the system of "notice pleading" in which the complaint need not set forth all the facts giving rise to the cause of action sued upon, but instead need only state facts sufficient to put the party sued on notice of the general nature of the claims against it. The party sued is required to file an answer responding to each of the facts or allegations in the complaint by admitting or denying, where possible, each of the facts or allegations and stating certain general defenses. One of the most important potential defenses to a lawsuit is that the time allowed under the law of that jurisdiction for bringing the claim, known as the Statute of Limitations (SoL), expired before suit was filed. Sometimes, although very rarely, the complaint may not state facts supporting a cause of action. In such rare cases, the party sued may file a motion for judgment on the pleadings and have the lawsuit dismissed. However, there are numerous mechanisms the complaining party can use to correct most lawsuits that suffer only from defective pleading.

11.3.2 Discovery

Unquestionably, one of the most important elements of the American judicial system is the discovery process. The purpose of discovery is to allow each side to explore the facts of the case in order to gain a fuller understanding of the other party's contentions and defenses. Unlike in many countries, state and federal courts in the U.S. provide for an extensive pretrial discovery process. Although local court rules govern the length of the mandatory discovery period, in courts of general jurisdiction the discovery period usually lasts a minimum of four to six months and, in complex commercial cases is routinely extended, by court order or agreement, to allow for several years of discovery.

During discovery, a party may require the adverse party to answer written questions under oath, produce all documents in the adverse party's possession relevant to the lawsuit, or admit or deny certain facts. Depositions are also a routine part of discovery. At a deposition, lawyers direct oral questions to the individual being deposed, who has sworn to provide immediate truthful responses. The deponent's responses are recorded verbatim and may be read to the judge or jury at trial if the deponent makes a inconsistent statement at trial, or, under certain circumstances, if he is deceased or otherwise unavailable for the trial of the case. A party may take depositions of any person with knowledge of facts relevant to the lawsuit, including persons who are not parties to the lawsuit, as well as persons who are expected to testify as expert witnesses for the adverse party at trial by giving opinions regarding professional, technical or scientific matters. A party may compel a non-party to give deposition testimony upon penalty of law by obtaining a “subpoena”, which is routinely issued by the court for such purposes. Any party suing a corporation (including another corporation) may inform the corporation that it wishes to take the deposition of the corporate representative having the most knowledge of one or more general subject areas. When such a deposition is requested it then becomes the responsibility of the corporation to "designate" the individual most knowledgeable as to the requested area(s) to be covered.

The scope of permissible discovery is very broad and, accordingly, there are few legitimate reasons for failing to respond to requests for information relevant in any way to the litigation. Accordingly, discovery in complex cases is often very expensive and can seem quite intrusive. Adequate discovery is necessary, however, to avoid surprises at the trial of the case and to inform both sides as to the facts that will be considered by the judge or jury at trial. The vast majority of all lawsuits are settled prior to trial because of revelations made during discovery. If the totality of facts that become known during discovery establishes a party's claim or refutes the claim of the adverse party, the party may request by motion prior to any trial that the judge enter a judgment in its favor or dismiss the adverse party's claim. Such a "summary judgment" will only be granted where the undisputed facts viewed in the light most favorable to the party not requesting “summary judgment” do not support the non-movant's claim or fully establish the claim of the moving party.

11.3.3 Trial

The culmination of the litigation process is the trial itself. In the U.S., the right to a jury trial is considered paramount and, thus, in virtually every case, either party has the right to demand that the case be tried before a jury. If a jury trial is not requested, the case is tried before a judge who listens to the evidence, makes findings of fact and law, and issues an order deciding the case.

A jury trial is slightly more complex. The first step in a jury trial is selection of the jury. A pool of persons is selected at random from the community where the court sits and then prospective jurors are questioned by the court or the attorneys for the two parties and removed or "struck" to produce the jury that will hear the case. Depending on the locale and court, the final jury may be composed of either six or twelve persons.

During any trial, jury or non-jury, each side is given the opportunity to present both an opening and a closing statement in which the party's attorney makes an uninterrupted argument to the judge or jury in support of his client's position. Each party is entitled to call witnesses to testify and to question witnesses called by the adverse party. Likewise, each side may introduce evidence as exhibits. Witnesses to be called and evidence to be tendered as exhibits must ordinarily be revealed to the other side prior to trial. Each party will attempt to discredit or "impeach" the opposing party's witnesses through cross examination or by presenting conflicting testimony from a more reliable source. Often, it is not the facts, but a party's presentation that wins or loses a case.

The role of the jury is to decide the facts and then determine liability in response to instructions given to them by the judge explaining the legal issues to be decided. Although the judge may overrule the jury's findings and enter a verdict contrary to that of the jury, the jury is given wide latitude in deciding the facts. Accordingly, such a "judgment notwithstanding the verdict" is rare, properly occurring only when the jury's decision is clearly erroneous. In a jury trial, all of the jurors must reach an unanimous verdict. If the verdict is not unanimous, the case ends in a mistrial and must be retried before a new jury.

The jury does not decide the law to be applied. This determination falls to the judge. If one party has presented all its evidence at the trial and the totality of the facts support the claim or defense of the opposing party, the judge may direct the jury to enter a verdict against the party who has finished presenting his evidence. The judge may dismiss the case at any time if he finds the case has no merit.

11.3.4 Appeals

In all U.S. courts the parties are entitled to appeal verdicts or judgments of the trial court, including orders by the court granting motions for summary judgment or directing verdicts. The state and federal courts encompass three levels: (1) the trial court; (2) an appellate court; and (3) a "Supreme" court, which is the highest court in the jurisdiction, although the names and structures of these courts differ from state to state. Importantly, the primary purpose of appellate review is to correct errors of *law* made at the trial court level. Findings of fact made by the judge or jury will only be overturned on appeal if they are clearly erroneous, a very difficult standard to meet. Errors in construction or application of legal precedent, however, will be reviewed as if no decision had been previously rendered as to such matters.

Review by the highest court in a jurisdiction is discretionary and is limited to questions that are of great importance or necessary to a clarification of the law in that jurisdiction.

11.4 Alternative Dispute Resolution

Potential investors should be aware of the increasing use of various forms of alternative dispute resolution in the U.S., such as arbitration and mediation. Indeed, contracts often provide that any disputes arising with respect to the contract will be decided by binding arbitration, rather than by the courts. Courts usually force parties who have agreed to such arbitration clauses to submit to arbitration rather than having their case decided by the courts. Arbitration is often quicker and less expensive than litigation, the parties have a great deal of control over the process, and the outcome remains confidential. The level of discovery is determined by agreement among the parties. However, under binding arbitration the parties lose the right to have their case tried before a jury or to appeal the verdict.