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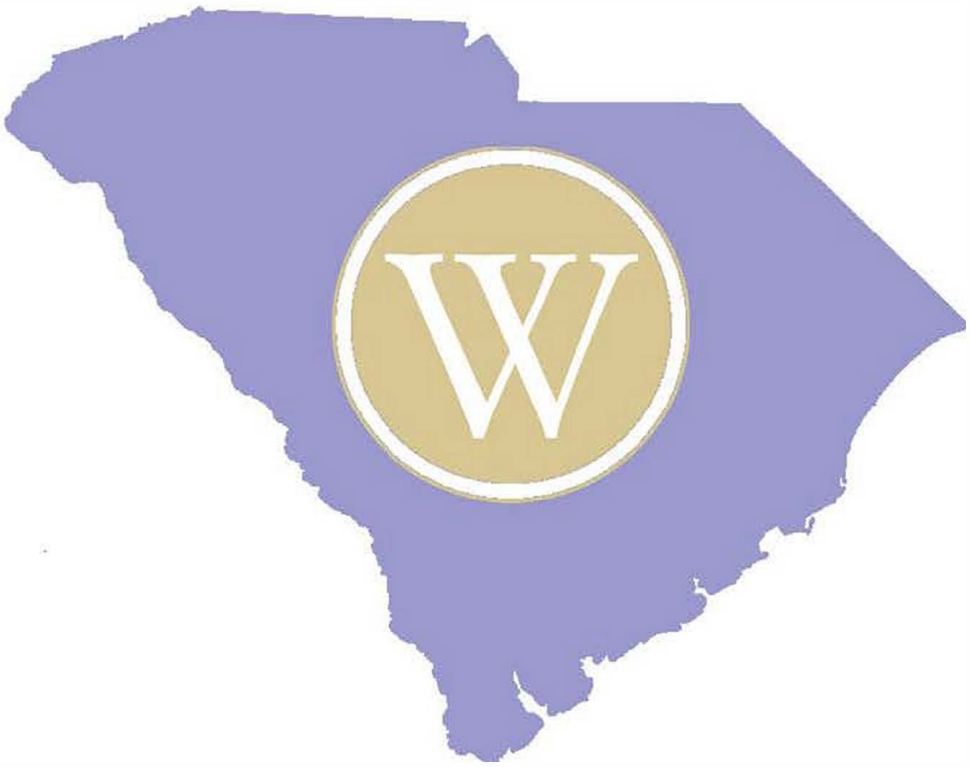
DOING BUSINESS

IN SOUTH CAROLINA

A Legal Guide Prepared by:

Wyche, P.A.



DOING BUSINESS IN SOUTH CAROLINA

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This is a general guide to certain laws applicable to doing business in South Carolina as of May 2020. The information contained in this publication is given by way of general reference only, is not intended to provide legal advice, and is not to be relied upon in any factual situation as it does not cover all laws or regulations that may be applicable in all circumstances. No responsibility will be accepted by the authors or publishers for any inaccuracy or omission or statement which might prove to be misleading. You are advised to seek your own professional advice before proceeding to invest or do business in the United States. Readers having questions or specific issues to be resolved should contact a lawyer authorized to practice in South Carolina.

About Wyche

At Wyche, P.A., we combine legal skills developed at the nation's leading law schools with a thorough knowledge of the community and the state. From our offices overlooking the historic and scenic Reedy River Falls in Greenville, we advise our clients on the gamut of legal issues.

Our general counsel representation includes a significant number of publicly traded corporations headquartered in South Carolina as well as many privately held domestic and foreign businesses. Wyche has a rich history of serving as legal counsel to start-ups, many of which are now successful, established businesses. We continue to serve the expanded needs of today's entrepreneurs, who are building some of the most dynamic and successful companies in the Southeast. Over the years, we have become trusted advisors and counselors to many of our clients.

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

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

In addition to our reputation as an innovative litigation firm, Wyche has developed substantial experience helping our clients and other firms, companies, and individuals resolve their disputes and lawsuits outside of the formal civil justice system. While nearly all of our litigators have experience representing clients in mediation, arbitration, and other forms of alternative dispute resolution, several Wyche lawyers have been certified as mediators or arbitrators in South Carolina federal, state, and family courts. This group brings creative resolution to complex disputes outside the confines of the courtroom. In addition to the areas just mentioned, the firm advises and litigates on behalf of clients in numerous areas, including bankruptcy, communications, construction, employment, employee benefits, environmental, estate planning, financial institutions, health care, probate, commercial real estate, taxation, intellectual property, and trade regulation.

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

USA for the Wyche Corporate/M&A, Litigation, Environmental, Real Estate, and Employment practices.

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

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I. INTRODUCTION

A. GEOGRAPHIC DESCRIPTION

South Carolina's varied geography is one of its chief attractions. This southeastern state extends more than 200 miles inland from the Atlantic Ocean to the foothills of the Blue Ridge Mountains. The state has three geographic regions -- the coastal plains or Low Country, the Midlands, and the foothills or Upstate. The three largest urban areas are Charleston on the Coast, Columbia in the Midlands, and Greenville-Spartanburg in the Upstate. The state is about 31,000 square miles and has a population of approximately 5.1 million.

B. INVESTMENT CLIMATE

South Carolina is one of the fastest-growing states in the nation and is proud of its dynamic, pro-business atmosphere. This friendliness to business, coupled with the pleasant Southern lifestyle, strategic location, low cost of living, and healthy growth, make South Carolina a magnet for business. South Carolina's corporate income tax rate is an attractively low 5%, one of the lowest in the Southeastern United States. The State recognizes the important role of small businesses in driving its economy and offers the same pro-growth incentives to both small and large manufacturers and companies.

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

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

During the past several years, diversified corporations, representing billions of dollars and thousands of new jobs, have invested in South Carolina.

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

South Carolina tourism is an approximately $20.2 billion industry that employs an estimated 200,000 people. National surveys of families who vacation at golf destinations routinely rank South Carolina first or second in consumer preference. The State also has a high number of Top 50 tennis resorts in the country. The Department of Tourism actively attracts visitors from all over the United States, Canada and the world to enjoy South Carolina's outstanding vacation opportunities, from the beauty of wilderness mountains and lakes in the Piedmont to the expansive beaches on the Coast.

Market access is another asset. Located halfway between New York and Miami and midway between Charlotte and Atlanta, South Carolina is within 750 miles of two-thirds of all United States markets. The State is served by a strong rail and highway transportation system, as well as major commercial airlines. The port of Charleston is the most preferred port on the south Atlantic coast.

C. EDUCATIONAL FACILITIES

South Carolina has 47 four-year universities and colleges, 16 technical colleges, four two-year campuses of the University of South Carolina, eight seminaries, and several junior colleges.

The University of South Carolina, founded in 1801 as South Carolina College, was the first state-supported college in the State and the third in the nation. The university has a system of eight campuses that includes four-year schools in Aiken, Beaufort, and Spartanburg. The curriculum offers, more than 350 undergraduate and graduate degree programs. USC's Moore School of Business Masters of International Business Program has been ranked in the top echelon of business schools by *U.S. News and World Report, The Wall Street Journal, Forbes,* and *Bloomberg Business Week.* The Columbia campus has a law school and a medical school. There is also a medical/dental school in Charleston.

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

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

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

D. STATE GOVERNMENT

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

The Executive branch is headed by the Governor. South Carolina also has a part-time Lieutenant Governor who serves as ex-officio President of the Senate. The Executive Department includes the Governor, Lieutenant Governor, Secretary of State, State Treasurer, Attorney General, Solicitors, Adjutant General, Comptroller General, State Superintendent of Education, Commissioner of Agriculture, and the Director of the Department of Insurance. The Judiciary includes the Supreme Court, the Court of Appeals, the Circuit Courts, Family Courts, and Probate Courts. Except for Probate Courts, judges are elected for specified terms by the General Assembly and are eligible for re-election. Probate Court judges are popularly elected in each county.

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

The House of Representatives annually prepares the South Carolina Legislative Manual that details all the Executive, Legislative, and Judicial members of government then in office, as well as a wealth of information related to South Carolina government and the State of South Carolina. You may acquire a copy of this manual from the Clerk of the House of Representatives for the State of South Carolina, Post Office Box 11867, Columbia, South Carolina 29211, Attn: Legislative Services, phone 803-212-4420. The cost is $12.

E. LEGAL SYSTEM

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

II. BUSINESS ENTITIES

Eric B. Amstutz, Jeffery D. Larson, Stephen R. Layne

A. CORPORATIONS

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

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

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

4. Name. The corporate name must contain the word "corporation," "incorporated," "company," or "limited," or an abbreviation of one of these words, and the name must be distinguishable from names of other corporations or limited partnerships doing business in South Carolina. Prior to incorporation, one can reserve a corporate name with certain limitations. A foreign corporation may register its name for exclusive use in South Carolina so long as the name is distinguishable from other corporate names and the corporation satisfies initial and annual filing requirements.

5. Bylaws. The Bylaws are not a matter of public record. The Bylaws usually contain detailed provisions for governance of the corporation, dealing with such matters as meetings of shareholders, meetings of directors, election and authority of officers, and indemnification of directors and officers. The Bylaws may be amended by

the directors except for certain amendments that require shareholder approval, including amendments relating to certain specialized voting requirements or limits on powers of the Board of Directors. Also, the Articles of Incorporation may restrict or deny the directors' power to amend the Bylaws.

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

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

8. Authority of Shareholders, Directors and Officers. A vote of the shareholders is required on certain fundamental matters, such as mergers, substantive amendments to the Articles of Incorporation, certain amendments to the Bylaws, election of directors, the sale of substantially all assets, and dissolution. Other matters may be voted on by the Board, including most types of amendments to the Bylaws, payments of dividends, issuance of authorized capital shares, corporate loans, and other significant transactions outside the ordinary scope of the day-to-day business. The Board also elects officers. The officers usually include a President, one or more Vice Presidents, a Secretary, and a Treasurer. There also may be a Chairperson of the Board, a Chief Executive Officer, a Chief Operating Officer, a Chief Financial Officer, and one or more Assistant Secretaries and Assistant Treasurers. Two or more offices may be held by the same person. Officers need not be citizens or residents of the State of South Carolina or of the United States.

9. Limited Liability. Corporate shareholders, as such, are generally not liable for corporate obligations, unless they agree to guarantee such obligations or unless

a court finds that the corporate form should be ignored because the shareholders acted in a manner that disregarded corporate formalities and responsibilities.

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

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

12. Books and Records. A corporation is required to have on file at its principal office certain tax returns and other corporate documents or at least copies of the same.

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

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

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

a. Maintaining, defending, or settling any proceeding;

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

c. Maintaining bank accounts;

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

e. Selling through independent contractors;

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

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

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

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

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

k. Transacting business in interstate commerce;

l. Owning and controlling a subsidiary corporation incorporated in or transacting business within this State; or

m. Owning, without more, an interest in a limited liability company organized or transacting business in this State.

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

15. Statutory Close Corporations. South Carolina has adopted a South Carolina Close Corporation Supplement which closely follows the Model Statutory Close Corporation Supplement. Corporations can elect close corporation status either in their initial Articles of Incorporation or by amending their Articles, in which case a two-thirds affirmative vote of all shareholder classes is required. Dissenting shareholders are given dissenters' rights in connection with that vote. Statutory close corporation provisions are designed to ease governance requirements for closely held entities; for instance, statutory close corporations can eliminate the board of directors and set voting rights by shareholder agreement or in the Articles of Incorporation, and there is no requirement of bylaws (if required provisions are already contained in either the articles of incorporation

or an authorized shareholder agreement) or of holding an annual meeting absent shareholder request. The close corporation supplement provides default share transfer restrictions that apply unless the Articles specify otherwise, as well as default provisions for corporate repurchase of shares on the death of a shareholder if the Articles so provide. The primary benefit of statutory close corporations is to permit a partnership style of governance within a corporate limited liability framework. This benefit has paled with the advent of the limited liability company.

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

17. Benefit Corporations. In 2012, South Carolina adopted the South Carolina Benefit Corporation Act. This act permits a corporation to adopt as one of its purposes the creation of general public benefit or specific enumerated public benefits and requires the directors of the corporation to consider its employees, the environment, the community, and other societal interests, in addition to the interests of the shareholders, when considering corporate actions. The corporation must appoint an independent director as the benefit director, who is responsible for certain reporting requirements regarding the corporation's adherence to its benefit purpose. A benefit corporation will not be liable for monetary damages for failure to pursue or achieve its benefit purpose. An existing corporation can elect to become a benefit corporation by amending its Articles of Incorporation after approval by a two-thirds shareholder vote for each class of stock. A two-thirds shareholder vote is also required for the termination of a corporation's status as a benefit corporation.

B. PARTNERSHIPS

1. General Partnership. A general partnership is an association of two or more individuals or entities operating a business for profit. General partnerships in South Carolina are governed by the provisions of the Uniform Partnership Act. ***See Title 33, Chapter 41, S.C. Code***. Any lawful business may be conducted in the general partnership form. Generally, there is no requirement of formality or registration in the formation of a general partnership. (Special provisions for registered limited liability partnerships are detailed below.) No partnership agreement is required, and the terms of the partnership agreement may be written or oral. Good practice suggests a written

agreement if the partnership business is substantial. The partnership may need to register in each county in which it conducts business by a filing with the Register of Deeds of the county or the Clerk of Court. There is no limit on the number of partners that may exist in a general partnership. Natural persons, corporations, and other entities may be partners.

In a general partnership, all partners are jointly and severally liable for the debts and obligations of the partnership, including those stemming from the acts of other partners and agents of the partnership. Each partner is generally authorized to act on behalf of the partnership. While each partner has an interest as a tenant in partnership in specific partnership property, the partners may deal with partnership property only in accordance with the Uniform Partnership Act and the terms of the partnership agreement. The partnership itself is not a taxable entity, and partnership income, gains, and losses pass through to the partners, for federal and South Carolina income tax purposes.

Except as noted above, there are no South Carolina non-tax annual report or other statutory reporting requirements for general partnerships, as such.

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

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

Limited partners have a passive investment and do not participate actively in management and control of the business of the limited partnership. Management of the partnership's activities is performed by the general partners. If a limited partner participates in the management of the partnership business in substantially the same manner as a general partner, the limited partner will have unlimited liability in the same

manner as the general partner. If a limited partner takes part in the control of the business, he or she is liable to persons who transact business with the partnership with actual knowledge of such participation in control. Certain discrete activities for the partnership may be carried out by limited partners without affecting limited partner status, such as acting as an agent, consultant or surety, or exercising voting rights on certain matters.

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

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

The name of a limited partnership is subject to name availability requirements similar to corporations. A name may not be the same as, or deceptively similar to, the name of any corporation or limited partnership organized under the laws of South Carolina or licensed or registered as a foreign corporation or limited partnership in South Carolina. The limited partnership name may not contain the name of a limited partner unless (i) it is also the name of a general partner or the corporate name of a corporate general partner or (ii) the business of the limited partnership has been carried on under that name before the admission of that limited partner.

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

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

C. SOLE PROPRIETORSHIP

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

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

D. LIMITED LIABILITY COMPANY

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

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

3. Reporting Obligations. There are generally no non-tax ongoing reporting obligations for LLCs, as such.

4. Name. The name of a limited liability company must contain "limited liability company" or "limited company" or the abbreviations "L.L.C.", "LLC", "L.C." or "LC". "Limited" may be abbreviated as "Ltd." and "company" as "Co." Name

restrictions and provisions for reservation and registration are otherwise similar to those for corporations.

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

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

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

E. JOINT VENTURE

There is no statutory form of organization in South Carolina for joint ventures. A joint venture is essentially a partnership, but the focus is normally on one project or effort. General principles of partnership law (or, if the joint venture is formed as a limited liability company, the laws applicable to limited liability companies) govern rights and responsibilities of parties involved in a joint venture.

F. BUSINESS TRUSTS

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

G. ADDITIONAL FORMALITIES

No matter what form of organization is selected, the business entity (other than a sole proprietorship or LLC taxed as a sole proprietorship) must obtain a federal taxpayer identification number, and local business permits or licenses may be required. Other decisions which must be made include, among others: means of providing for workers' compensation, types and extent of property and liability insurance coverage, and types of employee benefit plans and means of funding.

III. FEDERAL TRADE REGULATION

Henry L. Parr, Jr., Rachael Lewis Anna

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

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

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

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

- Agreements to allocate territories or customers.

- Agreements to boycott third parties.

- Agreements to restrict output.

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

- Attempts to tie the sale of two distinct products. A tying arrangement exists when a seller agrees to sell a product or service (the "tying" product) on the condition that the buyer also purchases a different product or service (the "tied" product) or agrees not to purchase that product or service from any other supplier. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the

buyer either did not want at all or might have preferred to purchase elsewhere on different terms.

- Attempts by a seller to require exclusive dealing or requirements contracts.

- Attempts by a manufacturer to limit dealer territories or customers.

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

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

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

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

C. THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENT ACT *15 U.S.C. §18A.*

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

D. THE FEDERAL TRADE COMMISSION ACT. *TITLE 15, U.S.C. § 45*

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

E. PENALTIES

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

IV. STATE TRADE REGULATION

Henry L. Parr, Jr., Rachael Lewis Anna

A. STATE ANTITRUST LAW IN SOUTH CAROLINA. *S.C. CODE ANN. §§ 39-3-10 ET SEQ.*

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

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

B. UNFAIR AND DECEPTIVE TRADE PRACTICES. *S.C. CODE ANN. §§ 39-5-10 ET SEQ.*

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

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

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

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

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

D. REGULATION OF FRANCHISES; BUSINESS OPPORTUNITY SALES ACT. *S.C. CODE ANN. §§ 39-57-10 ET SEQ.*

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

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

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

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

E. COVENANTS NOT TO COMPETE

In South Carolina, covenants not to compete are generally disfavored, are critically examined, and are strictly construed against an employer. However, South Carolina courts will enforce certain covenants not to compete in employment and other contracts. In order to be enforceable, such covenants must be (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by valuable consideration. In order for a new covenant with an existing employee to be enforceable, there must be additional consideration to the employee, beyond continued employment, in the form of increased salary, promotion, etc. In general, the South Carolina appellate courts have been hostile to the enforcement of such covenants, particularly if they are viewed as unduly broad with respect to time or territory. The trial courts may be more likely to enforce such covenants as written if there are no obvious violations of law. The courts have been more willing to enforce broad agreements not to compete in connection with the sale of a business. In cases where undue breadth of time or territory is found, the courts will typically refuse to enforce the covenant rather than rewrite the covenant in a more reasonable manner.

F. SALES COMMISSIONS

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

G. MISCELLANEOUS

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

V. TAXATION

Matthew W. Couvillion, Cary H. Hall

A. FEDERAL INCOME TAXATION

The federal government of the United States imposes a tax on the income of individuals and businesses. Federal income taxes are not affected by where a business chooses to locate in the United States. Most of the states of the United States also impose a tax on income earned by residents of the state and businesses within the state.

1. Personal Income Tax. Individuals are subject to United States income tax on their worldwide income if they are United States citizens or resident aliens. Resident alien status is determined under a set of complex rules. Any individual who is not a United States citizen, and who does not wish to be taxed as such, and who plans to spend a substantial amount of time in the United States, should pay careful attention to these rules. Currently, in 2020, the highest marginal United States individual income tax rate is 37% for ordinary income. A number of different tax rates can apply for long term capital gains but most capital gains are subject to federal income tax at rates of 0% or 28%. An additional tax of 3.8% is imposed on an individual's net investment income above certain threshold amounts. A nonresident alien generally is subject to tax on dividends from United States corporations, as discussed below.

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

B. STATE TAXATION

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

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

Individuals are subject to a maximum marginal income tax rate of 7%; however, an individual may claim a reduced rate of 5% on income from an active trade or business, subject to certain limitations. Corporations are subject to an income tax rate of 5%.

If a taxpayer is transacting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the

proportion of the business carried on within South Carolina. For most businesses this base is determined by "apportioning" the taxpayer's income from business carried on partly within South Carolina, with the amount apportionable to South Carolina being determined on the basis of the percentage of the taxpayer's sales or gross receipts in South Carolina. Certain items of income are directly allocated to South Carolina (*e.g.*, gains or losses from real estate located in South Carolina) without regard to apportionment.

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

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

2. Sales and Use Tax. South Carolina imposes a sales tax, which is an excise tax on the sale of goods and certain services in South Carolina. A use tax is imposed on goods and certain services purchased out of state and brought into South Carolina on which no sales tax has been paid. The statewide sales and use tax rate is 6%. The sale tax applies to the sale or use of tangible personal property and also applies to certain communications services, laundry and dry cleaning services, electricity, the value of tangible property manufactured in South Carolina or brought into South Carolina by its manufacturer for use in South Carolina by the manufacturer and the furnishing of accommodations.

3. Local governments in South Carolina have limited authority to impose additional sales taxes applicable in their own locality. There are a great number of exemptions from the tax in South Carolina that are available for certain types of property and transactions. For instance, sales of machines used in manufacturing personal property for sale are exempt. Also, upon the sale of a business when the purchaser will continue the business, the depreciable assets used in the operation of the business are exempt from sales tax. A maximum sales tax of $500 is imposed on the sale or lease of motor vehicles, motorcycles, boats, aircraft, trailers, and certain other types of equipment.

4. Tax Credits. South Carolina allows tax credits for numerous activities and expenditures. These credits usually may be used to offset South Carolina income tax liability, but some credits may be used to offset property taxes. Some of the credits may be sold by the taxpayer generating the credit. Credits are allowed for renewable energy production, creation of jobs in certain designated counties, establishment of corporate

headquarters, research and development, recycling facilities, land conservation, rehabilitation of abandoned textile sites, historic structures and abandoned buildings, motion pictures, and many other specific activities and expenses.

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

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

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

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

The millage rate is determined by the tax district and municipality, if any, in which the property is located. The millage rate is equivalent to the tax per $1,000 of assessed value; for instance, if the millage rate is 200 mills and the assessed value (after application of the assessment ratio) is $1,000, the tax is $200.

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

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

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

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

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

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

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

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

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

Permanent businesses engaged in manufacturing, processing, warehousing, wholesaling, research and development, and certain other industries locating in this state

are eligible for a jobs creation tax credit. (See Article X "Economic Incentives Available Under South Carolina Law.")

Certain credits against South Carolina income taxes are allowed for qualified manufacturing and equipment properties placed in service in South Carolina.

Credits against South Carolina income taxes are allowed for qualified costs of establishing a corporate headquarters in South Carolina.

A number of other South Carolina income tax credits are allowed for various types of business investments.

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

VI. EMPLOYMENT AND LABOR LAWS

Camden Navarro Massingill, J. Theodore Gentry, Wade S. Kolb, McKinley H. Hyman

A. FEDERAL LAWS

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

1. Federal Labor and Employment Statutes.

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

b. Americans with Disabilities Act ("ADA"). Title I of the ADA proscribes discrimination in employment based on the existence of a disability. Furthermore, the ADA requires that employers take reasonable steps to accommodate disabled individuals in the workplace. The ADA applies to employers engaged in an industry affecting interstate commerce who employ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Other

titles of the ADA address accessibility of facilities for handicapped persons. The Americans with Disabilities Act Amendments Act of 2008 broadens the definition of "disability," making it easier for an individual to establish that he/she has a disability within the meaning of the ADA. ***42 U.S.C. §§ 12101 et seq.***

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

d. **Equal Pay Act ("EPA").** The EPA applies to all employees subject to the minimum wage standard of the Fair Labor Standards Act. The EPA prohibits wage discrimination on the basis of sex, requiring equal pay for men and women who do equal work in the same establishment. The Equal Pay Act covers virtually all employers. ***29 U.S.C. § 206(d).***

e. **Fair Labor Standards Act ("FLSA").** The FLSA establishes the minimum wage, overtime, child labor, and recordkeeping laws for covered enterprises or employees engaged in interstate commerce. The Affordable Care Act amended the FLSA to require certain employers to provide break time for non-exempt nursing mothers to express breast milk for one year following childbirth. ***29 U.S.C. §§ 201 et seq.***

f. **Family and Medical Leave Act, as amended ("FMLA").** The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave in a twelve-month period for the birth or adoption of a child, for the serious health condition of the employee or the spouse, parent, or child of the employee, or because of any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is a covered service member with the regular Armed Forces. The FMLA also allows up to 26 weeks of leave during a 12-month period for eligible employees to care for a covered service member (including, in certain circumstances, veterans) with a serious injury or illness if the employee taking leave is the spouse, son, daughter, parent, or next of kin of the covered service member. The FMLA applies to all employers engaged in commerce that employ fifty or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year. ***29 U.S.C. §§ 2601 et seq.***

g. **Federal Contractors.** Employers that are federal contractors or subcontractors, depending on the type and size of their contracts, may have affirmative action obligations under Executive Order 11246, as amended by Executive Order 13672, and the Vocational Rehabilitation Act. ***29 U.S.C. §§ 701 et seq.*** Certain federal contractors are also covered by the Drug-free Workplace Act, ***41 U.S.C. §§ 701 et seq.***; the Rehabilitation Act of 1973, ***29 U.S.C. § 793***; the Vietnam Era Veterans Readjustment Assistance Act, ***38 U.S.C. § 4212***; Service Contract Act, ***41 U.S.C. §§ 351 et seq***.; the Walsh-Healey Public Contracts Act, ***41 U.S.C. §§ 35 et seq***.; and Davis-Bacon Act, ***40 U.S.C. § 276a.*** Executive Order 12989, as amended, requires most federal contractors to use the E-Verify system to verify employment eligibility of new hires and existing employees assigned to a federal contract. Executive Order 13658, signed February 1, 2014, set the minimum wage paid by contractors to workers on covered contracts at $10.10 per hour, subject to annual increases. As of January 1, 2020, the minimum wage will be $10.80 per hour. Executive Order 13556, signed on April 8, 2014, prohibits federal contractors from discriminating against employees and applicants who inquire about or disclose their own compensation or the compensation of any other employee or applicant. Executive Order 13706 signed on September 7, 2015, requires certain contractors to provide employees with up to seven days of paid sick leave. The requirement applies to contracts issued on or after January 1, 2017. Certain federal contractors and subcontractors may also be prohibited from using or enforcing pre-dispute mandatory arbitration provisions with employees and independent contractors.

h. **National Labor Relations Act and Labor-Management Reporting and Disclosure Act.** These statutes set forth the guidelines governing labor-management relations. They apply to most private sector employers, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts. The National Labor Relations Board has been increasingly active in regulating policies of non-unionized employers. ***29 U.S.C. § 151-169; 29 U.S.C. §§ 401 et seq.***

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

j. **Title VII.** Title VII is the broad civil rights statute that forbids discrimination in hiring, advancement, working conditions, or other aspects of employment based on race, color, religion, gender, or national origin.[1] It applies to employers engaged in industry affecting interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. Other statutes that speak to non-discrimination in the workplace include the Civil Rights Acts of 1866 and 1870. ***See 42 U.S.C. §§ 2000(e) et seq.; 42 U.S.C. §§ 1981, 1983.***

k. **Worker Adjustment Retraining and Notification Act ("WARN").** WARN requires employers to give sixty days' written notice to their employees of plant closings or mass layoffs. A plant closing is defined as any permanent or temporary shutdown of a single site of employment, or one or more facilities within a single site of employment, if the shutdown results in a loss of employment by 50 or more full-time employees during a 30-day period. WARN applies to all businesses that employ 100 or more employees, excluding part-time employees, or to businesses that employ 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime hours). ***29 U.S.C. §§ 2101 et seq***.

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

m. **Immigration Reform and Control Act ("IRCA").** IRCA requires that employers verify that all employees hired on or after November 6, 1986 are authorized to work in the United States. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under IRCA (Form I-9), as well as for hiring unauthorized workers. IRCA also prohibits smaller employers (with between 4 and 14 employees) from discriminating on the basis of national origin in hiring or discharge. ***8 U.S.C. § 1101 et seq***.

[1] In a recent decision, the United States Supreme Court ruled that Title VII's ban on "sex"-based discrimination prohibits discrimination based on sexual orientation and transgender status. ***See Bostock v. Clayton Cty., Georgia,* 140 S. Ct. 1731 (2020).**

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

o. **The Fair Credit Reporting Act ("FCRA").** The Fair Credit Reporting Act prescribes the scope, and manner by which employers may use consumer reports and credit information in making employment decisions, including hiring and termination. FRCA imposes strict guidelines requiring employers to use such credit reports only for a permissible purpose, after disclosure to employment applicants or employees of the intent to seek and use credit information, and only after obtaining the written consent of the employee/applicant. The disclosure/consent may not be made a part of the employer's application form. Additionally, employees/applicants must be notified of any adverse decision based in whole or in part upon credit information. Additional requirements apply to investigative consumer reports. ***15 U.S.C. § 1681***.

p. **Genetic Information Nondiscrimination Act ("GINA").** Title II of GINA prohibits the use of genetic information in making employment decisions, restricts the acquisition of genetic information by employers, and limits the disclosure of genetic information. Genetic information includes information about genetic tests of an individual and his/her family members, including information about any disease, disorder or condition of a family member. GINA generally adopts the definition of covered employers under Title VII. ***42 U.S.C. § 2000ff et seq***.

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

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

2. Employee Benefits

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

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

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

d. The Patient Protection and Affordable Care Act ("ACA"). The ACA made extensive changes to the laws governing employer-sponsored health plans, including expanded coverage, disclosure and reporting rules. Some plans in existence on March 23, 2010, the date the ACA was enacted, may be "grandfathered" and therefore exempt from some of the ACA's requirements. ***42 U.S.C. §§ 18001 et seq.***

B. SOUTH CAROLINA STATE LAWS

1. Common Law Background.

South Carolina is an employment-at-will state, which means that an employee without a contract providing otherwise may be discharged at any time for any reason that does not violate the law. Federal and state statutes, including those mentioned herein, place limitations on reasons for which employees may be terminated. Additionally, since 1985, South Carolina has recognized a cause of action for "wrongful termination in violation of public policy." While it is not exactly clear what constitutes egregious activity to justify such a cause of action, it is fair to say that the activity must involve a violation of law or clear, unambiguous mandate of public policy. ***See, e.g., Ludwick v. This Minute of Carolina, Inc*., 337 S.E.2d 213 (S.C. 1985); *Garner v. Morrison Knudsen Corp*., 456 S.E.2d 907 (S.C. 1995).**

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

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

2. State Statutes

a. Drug Testing and Prevention in the Workplace. Sections 38-73-500 and 41-1-15 of the South Carolina Code allow for the establishment of a drug prevention program in private sector workplaces, random drug testing, and confidentiality of test results and related information. The law contains provisions regarding evidentiary admissibility of such information and reduced premiums for workers' compensation insurance for employers who establish a conforming drug testing policy. South Carolina has also implemented the SC Drug-Free Workplace Act, requiring that

employers who meet certain conditions implement and maintain a drug-free workplace program. ***S.C. Code Ann. §§ 44-107-10 et seq***.

b. **Employment References.** Employers who give written responses to written requests concerning an employee or former employee are immune from civil liability for disclosure of the following information to which the employee or former employee may have access:

i. Written employee evaluations;

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

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

iv. Information about job performance.

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

c. **Employment Security Act.** This statute sets forth the rules governing the unemployment system in South Carolina. Taxes are levied against employers to provide unemployment compensation to individuals losing their jobs. ***S.C. Code Ann. §§ 41-27-10 to 41-43-290***.

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

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

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

g. **Occupational Safety and Health Act.** South Carolina is one of 28 states and territories that administers its own occupational safety and health program through an agreement with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"). (See reference to federal OSHA requirements above.) South Carolina has adopted the federal OSHA standards in their entirety, with select modifications to the construction and general industry standards. The South Carolina Department of Labor, Licensing and Regulation ("SC LLR") is given broad authority to investigate and address work safety. ***S.C. Code Ann. §§ 41-15-80 et seq.***

h. **Payment of Wages.** This law sets forth requirements for payment of wages, including initial written notice to employees, notices regarding deductions, and record keeping, and provides for penalties for non-compliance. ***S.C. Code Ann. §§ 41-10-10 et seq.*** The Act provides for treble damages and attorneys' fees for failure to pay wages due. ***S.C. Code Ann. §§ 41-10-80(c).*** Employers must pay wages due to separated employees within 48 hours of the time of separation or by the next regular payday, which may not exceed 30 days. ***S.C. Code Ann. § 41-10-50***. Both "employers" and "wages" are broadly defined in the South Carolina Wage Payment Act. ***S.C. Code Ann. § 41-10-10.***

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

j. **New Hire Reporting Program.** The Office of Child Support Enforcement of the Department of Social Services for the State of South Carolina, in compliance with state and federal law, has developed the Employer New Hire Reporting Program. Through this program employers must report all newly hired and rehired

employees. This information will be used to ensure that noncustodial parents live up to their financial responsibilities to their children. ***S.C. Code Ann. § 43-5-598***.

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

l. **Garnishment.** Although the property of a debtor (against whom a judgment has been obtained) can often be attached and ordered by a judge to be applied to the satisfaction of the debt, South Carolina law provides generally that "the earnings of the debtor for his personal services cannot be so applied." ***S.C. Code Ann. § 15-39-410; see also S.C. Code Ann. § 37-5-104***. The withholding of wages pursuant to garnishment proceedings in other states is also prohibited unless certain conditions are satisfied, and an employer should consult with counsel before complying with any garnishment order from another state. ***S.C. Code Ann. § 15-39-420***. Employees cannot be discharged from employment as a result of an attempt of garnishment of unpaid earnings. ***S.C. Code Ann. § 15-39-420.***

An important exception is in the area of child support and alimony. An employer is required to withhold the wages of an employee who voluntarily requests and authorizes such action to meet child support and spousal maintenance obligations. ***S.C. Code Ann. § 63-17-1420.***

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

n. **Political Opinions.** It is unlawful for an employer to discharge or intimidate an employee due to political opinions or the employee's exercise of constitutionally guaranteed political rights and privileges. ***S.C. Code Ann. §§ 16-17-560 et seq.***

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

p. **Immigration.** The South Carolina Illegal Immigration and Reform Act of 2008, as amended ("SCIIRA"), requires all employers to verify the legal status of new employees through the Department of Homeland Security's E-Verify system and prohibits employment of any employee not legally in the U.S. and authorized to work. In addition to completing Form I-9 as required by federal law, South Carolina employers must, within three business days of employment:

i. Verify the employee's work authorization through the E-Verify work authorization program.

ii. Employers may no longer confirm a new employee's employment authorization with a driver's license or state identification card.

S.C. Code Ann. §§ 41-8-10 et seq.

If a private employer fails to timely verify a new hire through E-Verify, SC LLR will place the employer on a one-year probation for the first violation. If the employer has subsequent violations within three years, SC LLR will suspend its licenses for 10-30 days, notify federal, state and local law enforcement, and publish the violation. ***S.C. Code Ann. §§ 41-8-50(D)(1)(b).***

SC LLR will suspend the employment license of any private employer who knowingly or intentionally employs an unauthorized alien for 10-20 days, so that the employer may not engage in business, open to the public, employ an employee or otherwise operate. ***S.C. Code Ann. §§ 41-8-50(D)(2).***

Note that there are a number of political subdivisions throughout the state that have local ordinances pertaining to the employment, licensing, permitting, or otherwise doing business with a person based upon that person's authorization to work in the United States. The SCIIRA expressly voids any such ordinances that exceed or conflict with federal or state law.

q. **Employment of Minors.** SC LLR regulations are similar to the FLSA regulations on the employment of minors. ***S.C. Code Ann. § 41-13-20.*** South Carolina provides various restrictions on employment of minors 14 and 15 years of age, in S.C. Code of Regs. 71-3106 and on employment of minors 16 and 17 years of age, in S.C. Code of Regs. 71-3107.

r. **Guns in the Workplace.** South Carolina's Law Abiding Citizens Self-Defense Act of 1996 allows South Carolinians who qualify for a permit to carry concealed handguns under certain conditions. The Act also expressly upholds the right of employers to prohibit persons licensed under the Act from carrying concealed weapons on the employer's premises, so long as the employer provides requisite notice by posting a legally complaint sign. ***S.C. Code Ann. §§ 23-31-205 et seq.***

s. **Work on Sundays.** There may be limitations on which commercial enterprises can be open before 1:30 p.m. on Sundays, and there are statutes that protect employees' rights to attend church or synagogue and also to not work on Sundays. South Carolina law gives protection (broader than federal laws prohibiting religious discrimination) to employees who object to working on Sunday. Even in counties where "Sunday Blue Laws" do not apply, eligible employees can refuse to work on Sundays, and the remedies for unlawful termination can be significant (treble damages, attorneys' fees, and reinstatement). A lessor or franchisor may not be able to require a proprietor to be open on Sunday. ***S.C. Code Ann. §§ 53-1-5 et seq.***

t. **Pregnancy Accommodations.** The South Carolina Pregnancy Accommodations Act amends the South Carolina Human Affairs Law to require employers with at least 15 employees to make facilities readily accessible for and provide reasonable accommodations to employees for medical needs arising from pregnancy, childbirth, or other related medical conditions (including lactation), unless the employer can demonstrate the accommodation would impose an undue hardship on the operation of the business. ***S.C. Code Ann. §§ 1-13-30 et seq.***

u. **Lactation Support.** The South Carolina Lactation Support Act requires employers to provide employees reasonable unpaid break time, or permit employees to use their paid break time or mealtime, each day to express breast milk, unless doing so would impose an undue hardship on the operation of the business. Under the Act, employers are also required to make reasonable efforts to provide a room or other location (other than a toilet stall) in close proximity to the work area for an employee to express milk in privacy. ***S.C. Code Ann. §§ 41-1-130.***

v. **Other State Statutes.** There are other isolated statutes that speak to employment. Civil and sometimes criminal penalties may result from violations. Generally, such laws are administered by the

Director of SC LLR. Examples of other statutes that may affect employment include:

- Breastfeeding – A woman may breastfeed her child in any location where the mother and her child are authorized to be; breastfeeding in a location where the mother is authorized to be is not considered indecent exposure. ***S.C. Code Ann. § 63-5-40***.

- Time Off to Attend Worship – Employees in retail settings may request time off to attend and travel to worship services. ***S.C. Code Ann. § 53-1-80***.

- Electronic Surveillance – Employers may generally monitor and/or review the contents of an employee's e-mail, telephone conversation, and/or voice mail with (1) prior consent or (2) disclosure by a party to the communication, under certain conditions. ***See S.C. Code Ann. §§ 17-30-10 et seq***.

- Arbitration – The South Carolina Arbitration Act requires conspicuous notice, in underlined CAPITAL letters, of arbitrability on the first page of the contract in question. ***S.C. Code Ann. § 15-48-10(a).*** However, the Act does not apply to employment contracts, unless the contract in question expressly provides that the Act does apply. ***See S.C. Code Ann. § 15-48-10(b)(2).***

- Training Program Disclaimer - South Carolina employers that require applicants to complete a training program before being considered for employment must give notice that completion of the training program does not guarantee a job. ***See S.C. Code Ann. § 41-1-90.***

3. Retaliation. Employees are generally protected from retaliation for disclosing any violations of the above laws. ***S.C. Code Ann. §§ 8-27-10 et seq.***

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

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

- **Misrepresentation, Defamation, Slander or Libel.** An employer may be liable for defaming, slandering, or libeling any third party, including employees. ***See, e.g., McBride v. School Dist. Of Greenville County, 698 S.E.2d 845 (Ct. App. 2010).***

- **Negligent Hiring and Supervision.** An employer may be liable for negligent hiring/retention if it owed a duty of care to the victim, it breached that duty by failing to exercise the care of a reasonable person in hiring or retaining the employee who committed the violent act, and the victim suffered damage proximately resulting from the employer's breach. ***See, e.g., Degenhart v. Knights of Columbus, 420 S.E.2d 495 (S.C. 1992).*** An employer can be liable for negligent supervision of an employee when an employee intentionally harms another on the employer's premises and the employer (1) knows or has reason to know that he has the ability to control his employee, and (2) knows or should know of the necessity and opportunity for exercising such control. ***Id.; Hamilton v. Charleston County Sheriff's Dep't,*** **731 S.E.2d 727 (S.C. Ct. App. 2012).**

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

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

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

- **Premises Liability.** Tort liability can attach against employers if a perpetrator of violence used the employer's actual or apparent authority to commit an attack. Similar to negligent supervision or retention claims,

companies may be liable for their failure to take prompt and remedial action once they knew or should have known of the risk of an attack. ***See, e.g., McBeth v. TNS Mills*, 458 S.E.2d 52 (S.C. Ct. App. 1995).**

VII. ENVIRONMENTAL LAW

Rita Bolt Barker, Gregory J. English

A. FEDERAL CONSIDERATIONS

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

By statute, the disposal of hazardous waste is prohibited except in accordance with a permit. A permit for a treatment, storage, or disposal facility must detail required corrective action for any release of hazardous waste from any solid waste management unit, regardless of when the waste was placed on the site. Section 7003 of RCRA authorizes the United States Environmental Protection Agency (the "EPA") to bring suit against any person or entity contributing to the handling, storage, treatment, or disposal of hazardous waste in a manner presenting an imminent and substantial endangerment to health or the environment, and DHEC asserts this same authority.

2. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). ***42 U.S.C. §§ 9601 et seq***. CERCLA, or Superfund as it is commonly called, was enacted in 1980 to provide for the clean-up of abandoned disposal sites. It also provides a vehicle for the EPA to recover for response costs and damage to natural resources caused by hazardous substance releases. DHEC has the same authority under the South Carolina Hazardous Waste Management Act, which incorporates this statute.

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

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

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

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

Transporters of hazardous substances.

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

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

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

The CAA, as amended, requires an operating permit for all major air sources, with state administration and enforcement. DHEC also enforces the CAA in South Carolina.

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

B. STATE CONSIDERATIONS

1. South Carolina Pollution Control Act. ***S.C. Code Ann. §§ 48-1-10 et seq.*** DHEC has jurisdiction over the quality of air and waters with authority to abate, control, and prevent pollution under the South Carolina Pollution Control Act. The Act

gives the Department authority to set standards for air and water quality and makes it unlawful to discharge organic or inorganic matter into the environment without a permit from the Department.

The Department is empowered to issue orders and assess penalties. It may institute legal proceedings to compel compliance with the Pollution Control Act or determinations and orders of the Department.

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

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

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

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

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

3. Brownfields/Voluntary Cleanup Program. ***S.C. Code Ann. §§ 44-56-710 through 760*****.** The State's Brownfields Voluntary Cleanup Program allows a non-responsible party to purchase a contaminated property with State Superfund liability protection for existing contamination by agreeing, in a Voluntary Cleanup Contract ("VCC") with DHEC, to perform an environmental assessment and remediation. Under a VCC, the purchaser must send the Department a written progress report including actions taken, planned actions, sampling and test results, and a description of any environmental problems encountered. The amount of environmental work the VCC requires is site-specific and dependent on the intended future use of the site.

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

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

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

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

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

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

10. Tidelands and Wetlands. ***S.C. Code Ann. §§ 48-39-10 et seq*****.** This statute and corresponding regulations must be carefully scrutinized before there is any development of beachfront or wetlands property. Permits are required for most development in "critical" areas, defined as coastal waters, tidelands, beaches, beach dune systems, and wetlands. Civil and criminal penalties are available for enforcement.

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

DHEC often works in concert with federal agencies on environmental protection. Laws have proliferated to protect the environment and often limit commercial or business operations. Permitting and inspection are extensive, and government regulation does not preempt private lawsuits. Injunctive relief is also available to the government and individuals. Before acquiring any significant property or business, a prospective purchaser should explore any possible environmental problems.

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

12. Challenging DHEC Decisions. For fifteen (15) calendar days after notice of a DHEC staff decision has been mailed to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified, those notified may submit a written request for final review accompanied by a filing fee in the amount of $100 to the South Carolina Board of Health and Environmental Control ("the Board"). Otherwise, the DHEC staff decision becomes a final agency decision. S.C. Code Ann. § 44-1-60(E). Within sixty (60) calendar days of receiving a written request for a final review and the filing fee, the Board must accept or decline to conduct a final review of the DHEC staff decision. S.C. Code Ann. § 44-1-60(F). To challenge a Board decision, any applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court ("the ALC"). S.C. Code Ann. § 44-1-60(G). The request must be filed with the ALC within thirty (30) calendar days of receiving notice of the Board decision. *Id.*; *see also* S.C. Code Ann. § 1-23-600. Pursuant to SCALC Rule 34, unless otherwise established by statute and notwithstanding S.C. Code Ann. 1-23-380(2), the filing of a request for a contested case hearing automatically stays the final decision of DHEC. Typically, the ALC creates the record concerning the challenged decision and, after a trial-type hearing to receive evidence, issues its own findings of fact and conclusions of law. Appeals from the decisions of the ALC are heard by the Court of Appeals if an aggrieved party files and serves a notice of appeal within thirty (30) days after the party receives notice of the final decision of the ALC. S.C. Code Ann. § 1-23-610(A). The Court of Appeals may reverse the findings of the ALC if its findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B).

VIII. INTELLECTUAL PROPERTY

Wallace K. Lightsey, Meliah Bowers Jefferson

A. FEDERAL LAW

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

In General. Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to copy, use, distribute, modify, and display the work. Generally, works are entitled to copyright protection for the life of the author plus 70 years. However, as to works made for hire, copyright protection is for the shorter of 95 years after publication or 120 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright, may be liable for actual or statutory damages, and may be subject to injunctive relief. Further, despite previous debate, a copyright owner may not file a suit for infringement until the Register of Copyrights has acted to register the copyright.

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

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

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

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

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

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

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

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

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

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

In General. One who invents or discovers a new machine or device or a new manufacturing process may be able to obtain a United States patent. A United States

patent provides the inventor with the exclusive right for a specified time to make, use, import, offer to sell, or sell in the United States the patented invention. A patent provides the holder with a limited monopoly on the use of the patented invention. A valid patent forecloses use of the patented invention by any other party, even if another party independently conceives the identical invention.

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

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

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

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

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

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

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

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

A plant patent may be obtained by anyone developing a new variety of asexually reproduced plant, such as a tree or flower. Some plants may also be protectable with a utility patent or under the Plant Variety Protection Act, administered by the United States Department of Agriculture.

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

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

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

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

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

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

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

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

In General. A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination.

A trademark should not be confused with a tradename. Although the same designation may function as both a trademark and a tradename, a tradename refers to a business title or the name of a business; a trademark is used to identify the goods manufactured by the business. A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

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

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

Selection of a trademark should be accompanied by a trademark search to determine whether another person or business has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and there are businesses that specialize in trademark searches. Actual and potential trademark conflicts should be avoided, lest the company become involved in an expensive infringement lawsuit. Of possibly greater concern is the potential loss of the right to use a mark because another has already established rights in that mark or one similar to it, but the prior use is not discovered until after considerable expenditure in advertising merchandise bearing the mark. A trademark licensor who goes into bankruptcy cannot assert the bankruptcy as a ground for voiding the licensing rights granted to the licensee(s).

Infringement. In recent years, there has been a split among the federal courts over whether a plaintiff must prove willful infringement to seek an award of the infringer's profits under the Lanham Act. The Supreme Court held in 2020 that a plaintiff no longer must prove willful infringement to recover. The Court's holding essentially advises that while a defendant's state of mind is an important consideration in determining whether profits should be awarded to the plaintiff, willfulness is not a prerequisite for the availability of such an award.

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

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

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

Federal Registration Application Process. ***15 U.S.C. §§ 1051 et seq***. Federal trademark registration requires that a trademark application be filed with the United States Patent and Trademark Office. The application must identify the mark and the goods with which the mark is used or is proposed to be used, the date of first use, and the

manner in which it is used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and three specimens of the mark as it is actually used. After the application is filed, it is reviewed by an examiner who evaluates, among other matters, the substantive ability of the mark to serve as a valid mark and the possibility of confusion with existing marks that are registered or for which a registration application is already pending. If the examiner rejects the application, the examiner's decision can be appealed to the Trademark Trial and Appeals Board. An adverse decision by that body can be appealed to federal court.

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

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

Post-Certificate Federal Procedures. A certificate of trademark registration issued by the Patent and Trademark Office remains in effect for ten years. However, registration expires at the end of six years, unless the registrant furnishes evidence of continued use of the trademark between the fifth and sixth year after registration. The initial ten-year term of a certificate of registration can be renewed within the term's last six months for an additional ten-year term by furnishing evidence of continued use of the mark and paying a fee.

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

4. Trade Secrets. This area is governed by both state and federal law.

In General. The federal trade secrets legislation is known as the Defend Trade Secrets Act ("DTSA"), ***Title 18 U.S.C. §§ 1831 et seq.*** **("DTSA")**. Unlike the copyright and patent legislation, the DTSA does not preempt state law protection for trade secrets. Most states (48 out of 50) have adopted the Uniform Trade Secrets Act, or "UTSA."

South Carolina has its version of the UTSA, the South Carolina Trade Secrets Act, or "SCTSA."

Definition of Trade Secret. The term "trade secret" is defined as "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if" a) the owner has taken reasonable measures to keep the information a secret; and b) the information derives independent economic value.

Significance of DTSA. Although many aspects of the DTSA are the same or very similar to state law, there are several significant advantages that the DTSA provides:

• A uniform body of federal law for trade secret protection throughout the U.S. While most state trade secret laws are very similar, there are a few states whose legislatures or courts have made substantial departures from the UTSA.

• Ex parte seizure orders. The DTSA provides a procedure and standards for a trade secret owner to obtain an ex parte order (that is, an order issued by the court without the other side being present to argue against it) seizing a trade secret that has been wrongfully taken and prohibiting any further transmission or transfer of it.

• A federal forum applying federal rules of procedure. In disputes where the parties and witnesses are located in different states, it is much easier to litigate in federal court.

B. STATE CONSIDERATIONS

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

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

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

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

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

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

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

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

> A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The

collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

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

The Act provides the trial court with the ability to enjoin actual or threatened misappropriation of a trade secret. The statute also offers a variety of circumstances under which the court may issue injunctive relief, including conditioning future use of a trade secret upon payment of a reasonable royalty for a period of time within limits set by the statute. The Act also provides for compensatory damages for misappropriation of trade secrets in certain circumstances and exemplary damages up to twice the amount of the compensatory damage award for willful and malicious misappropriation. Finally, attorneys' fees are recoverable to a prevailing party, including for a willful and malicious appropriation of a trade secret and, conversely, for a claim of misappropriation made in bad faith.

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

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

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

c. Receives, buys, or possesses trade secrets, knowing the trade secrets have been obtained by any means described in items a or b;

d. Attempts to commit any offense described in items a through c;

e. Wrongfully solicits another to commit any offense described in items a through c; or

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

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

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

IX. DISPUTE RESOLUTION

John C. Moylan III, James E. Cox, Jr.

A. FEDERAL COURT SYSTEM

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

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

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

Additionally, all matters of bankruptcy are governed by federal statute and under the exclusive jurisdiction of the United States Bankruptcy Court. Title 11 of the United States Code (the "Bankruptcy Code") is the uniform federal law that governs all bankruptcy cases. The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure and local rules of each bankruptcy court. The United States Bankruptcy Court for the District of South Carolina has three United States bankruptcy judges and sits in Charleston, Columbia, and Spartanburg. A bankruptcy judge may decide any matter connected with a bankruptcy case, such as eligibility to file. However, much of the process is administrative and conducted away from the courthouse. For cases under chapters 7, 12, or 13, and sometimes 11, of the Bankruptcy Code the administrative process is carried out by a trustee appointed to oversee the case.

B. STATE COURT SYSTEM

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

2. Court of Appeals. The Court of Appeals was created in 1983 to hear most types of appeals from the Circuit Court and the Family Court. The exceptions are for appeals that fall within any of the seven classes of cases where appellate jurisdiction is exclusively reserved to the Supreme Court. The Court of Appeals consists of a Chief Judge and eight associate judges who are elected by the South Carolina General Assembly to staggered terms of six years each. The court sits either as three-judge panels or as a whole, and it may hear oral arguments and motions from any county of the state.

3. The Circuit Court. The Circuit Court is the State's court of general jurisdiction. It consists of the Court of Common Pleas (civil court), and the Court of General Sessions (criminal court). In addition to general trial jurisdiction, the Circuit Court has limited appellate jurisdiction over appeals from the Probate Court, Magistrate's

Court, and Municipal Court. The State is divided into sixteen judicial circuits. In each circuit, one circuit judge is designated as the circuit's Chief Administrative Judge and has the authority to fulfill the various administrative actions required to facilitate court processes. Also, each circuit has at least one resident circuit judge who maintains an office in the judge's home county within the circuit. There are currently 49 circuit judges who serve the different circuits on a rotating basis. Court terms and assignments are determined by the Chief Justice based upon recommendations of Court Administration. Circuit Court Judges are elected by the South Carolina General Assembly to staggered terms of six years.

In the Court of Common Pleas, either by the Chief Administrative Judge's own motion or a motion by counsel, following the filing of the of the original complaint, the Chief Administrative Judge may designate a case as complex, establish a date proper to which the case will not be called for trial, and assign exclusive jurisdiction to handle the case until its completion to a judge of the circuit or adjoining circuit. When the Chief Administrative Judge finds a case is not so complex as to require a specific judge for the entirety of the case, he or she may still partially grant the motion by providing a date in the order before which the case may not be called for trial. If the motion for designation as a complex case is denied in full, then the case will be placed on the trial roster and handled in the same manner as all other cases.

4. Business Court. In 2007, the Supreme Court of South Carolina established a Business Court Pilot Program, which has since been extended to cover all counties in the state. The Business Court may be assigned cases where the principal claims involve certain South Carolina statutes relating to areas of business and trade, such the Business Corporation Act, the Uniform Securities Act, certain chapters of the Uniform Commercial Code, and the Trade Secrets Act. This is a non-exclusive list. In order to facilitate administrative processes of the Business Court, the State Supreme Court, through administrative order, has assigned a Chief Business Court Judge for Administrative Purposes ("Chief Business Court Judge"). The Chief Business Court judge is authorized, on a statewide basis, to perform administrative actions, such as signing for the Chief Justice in the denial or acceptance of cases to the Business Court. Cases may be referred to the Business Court either by the Chief Business Court Judge, sua sponte, or at the request of counsel for a party to the case no later than 180 days after the commencement of the action, unless waived by the Business Court for good cause. For Business Court cases, the state is divided into three regions, and two to three Business Court judges (Circuit Court judges assigned to business court cases in addition to their other duties as Circuit Court judges) preside over each region. An additional four business court judges serve the three regions at large. The Chief Business Judge may assign jurisdiction over a case to any Business Court Judge. Once assigned to a case, the Business Court Judge retains jurisdiction over the case regardless of where he or she is assigned to hold court. The Business Court Judge may schedule hearings at any time without regard to whether there is a term of court scheduled. The goal of the Business Court program is to allow for the assignment of certain business-related cases to a single judge, who retains jurisdiction over the matter from start to finish. Business Court

decisions are maintained in a database on the South Carolina Judicial Department website.

5. Master-In-Equity. Masters are appointed by the Governor with the advice and consent of the General Assembly for six-year terms. Masters-In-Equity have jurisdiction over matters referred to them by the Circuit Courts. They have the power and authority of the Circuit Court sitting without a jury and may take all measures necessary or proper for the efficient performance of their duties under the order of reference. This includes ruling on motions, requiring the production of evidence, ruling upon the admissibility of evidence, and calling and examining witnesses under oath. Masters may also conduct judicial sales. There are currently 21 Masters-In-Equity. Final orders based on masters' reports are executed by circuit judges unless the master enters final judgment under limited circumstances. Appeals from final judgments entered by a master are to the Supreme Court or Court of Appeals as provided by the Appellate Court rules.

6. Family Court. The South Carolina Family Court system was established in 1976 with exclusive jurisdiction over matters involving domestic or family relationships. The Family Court is the sole forum for hearing all cases concerning marriage, divorce, legal separation, custody, visitation rights, termination of parental rights, adoption, support, alimony, division of marital property, and change of name. The courts also generally have exclusive jurisdiction over minors under the age of seventeen alleged to have violated any state law or municipal ordinance, although most traffic, fish, and game law violations are triable in magistrate or municipal courts and serious criminal charges may be transferred to the Circuit Court. Family Court Judges are elected by the South Carolina General Assembly to staggered terms of six years.

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

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

9. Municipal Court. Any municipality may create a court for the hearing of those State offenses and municipal ordinances subject to a fine not exceeding $500 or imprisonment not exceeding 30 days, or both, and which occur within the municipality. Municipal courts may also hear certain criminal cases transferred from the Circuit Court (General Sessions), where the penalty does not exceed one year of imprisonment or a $5,000 fine. Approximately 200 municipalities in South Carolina have created municipal courts. Municipal Courts have no civil jurisdiction. The term of a municipal judge is set by the council of the municipality but cannot exceed four years. Municipal judges must be certified by examination at least once every eight years. To serve as a municipal judge, members of the South Carolina Bar are exempt from the examination; however, they are required to attend the orientation program.

10. Administrative Law Court. The Administrative Law Court is an agency within the executive branch of state government charged with conducting hearings on contested cases arising under the Administrative Procedures Act, appeals from the professional and occupational licensing boards, and regulations promulgated by certain State agencies. Appeals from the decisions of administrative law judges are heard by the Court of Appeals.

C. ARBITRATION AND MEDIATION IN SOUTH CAROLINA

South Carolina has moved to a mandatory mediation system throughout the state. Mediation is mandatory throughout the state in nearly all cases brought in the Circuit Courts in civil suits or Family Courts in domestic relations actions, unless the parties agree to conduct arbitration in the case. Mediation must be conducted on or before three hundred (300) days from the date of filing of an action in Circuit Court, and the case will not be placed on the trial roster until proof of alternate dispute resolution is filed. Medical malpractice actions in South Carolina are subject to pre-suit mediation. The parties may use a mediator appointed by the Clerk of Court or may select their own mediator by agreement.

South Carolina has adopted the Uniform Arbitration Act. ***S.C. Code Ann. §§ 15-48-10 et seq.*** Written agreements submitting matters, including future matters, to arbitration are valid and enforceable, but such agreements must, on the first page of the agreement, clearly notice that the contract is subject to arbitration. Such notice must be in UNDERLINED CAPITAL LETTERS or rubber-stamped prominently. Courts have authority to confirm, award, and enter appropriate judgment. Certain matters are statutorily excluded from arbitration, including workers' compensation claims, unemployment compensation claims, insurance claims, and personal injury claims.

D. STATE AGENCIES

South Carolina has literally hundreds of State agencies, each with limited jurisdiction and each with the possibility of affecting your business in South Carolina. Each agency is set up to handle disputes that arise as a result of its licensing, inspection,

or enforcement. An adverse ruling at an agency level is appealable to the Administrative Law Division, as provided by the Administrative Procedures Act, but it is difficult to reverse rulings. Securing counsel at the outset of a dispute is strongly recommended.

X. ECONOMIC INCENTIVES AVAILABLE UNDER SOUTH CAROLINA LAW

Joshua Lonon

South Carolina offers quite a number of economic incentives to companies doing business in the state. Not only are South Carolina's economic incentives available in connection with major new projects and expansions, but also many of these incentives are available to companies in the ordinary course of business. Each incentive is subject to a number of technical and procedural requirements. Moreover, the deadlines with respect to each incentive can be traps for the unwary, and whether a particular incentive is available to an individual company often turns on fact-specific information related to the company's employment, operations, and investment activities. While there are numerous economic incentives available under South Carolina, some of the major or more common available economic incentives are summarized below. Note that this guide is not intended to be all-encompassing and that relevant law and revenue rulings should be reviewed carefully.

I. JOB OR EMPLOYEE TAX CREDITS

A. Traditional and Small Business Tax Credit

There are several types of job tax credits options in South Carolina for businesses which are for manufacturing, tourism, processing, agricultural packaging, warehousing, distribution, research and development, corporate office, qualifying service-related facilities, agribusiness operations, extraordinary retail establishment, professional sports teams, and qualifying technology intensive facilities and banks. Subject to conditions, the credits are limited to 50% of the taxpayer's tax liability for income, bank, or insurance premium taxes for a single tax year. Unused credits may be carried forward for fifteen years.

The "traditional" job tax credit is available per new full-time job each year for five years beginning the year following the creation of the job, so long as certain statutory conditions continue to be met, including without limitation, maintenance of the required minimum level of new jobs (generally ten). Depending in part on the tier designation of the county in which the company's operations are located, employers are entitled to credits ranging from $1,500 (jobs located in Tier I counties) to $25,000 (jobs located in Tier IV counties) per job created. In Tier IV counties, taxpayers that operate retail facilities and service-related industries also qualify for this credit. The tier level of a county is determined based on its unemployment rate and per capital income.

Generally, and subject to certain dollar limitations, businesses located in a business or multi-county or industrial business park pursuant to Section 13 of Article VIII of the State Constitution are allowed an additional $1,000 tax credit for each new full-time job. Similarly, for qualifying jobs located where a response action has been completed pursuant to the Brownfields Voluntary Clean Program, an additional $1,000 credit is allowed for each new fulltime job created (unless the taxpayer is a "responsible party," as defined). These credits cannot be sold and are nonrefundable.

Prior to initially staffing a new facility or expanding an existing facility, a business should lock in current county tier designations by filing a Notification to Lock In County Designation form (SC616) with the South Carolina Department of Revenue, though this is not required. In order to claim job tax credits, one should complete and file a Tax Credit 4 Form (TC-4) with the State of South Carolina Department of Revenue. This form includes calculations for tax credits, along with detailed information regarding qualifications.

Small businesses creating and maintaining new jobs in South Carolina, with a monthly average increase of at least two new, full time jobs, in South Carolina may also qualify for the "annual" or "accelerated" small business jobs tax credit (a small business being one with 99 or few employees worldwide).

B. Job Development Credits

At the discretion of the South Carolina Coordinating Council for Economic Development, the State of South Carolina offers economic development incentives known as job development credits to promote growth of manufacturing, processing, warehousing, distribution, research and development, technology intensive, and other targeted businesses. Under this program, South Carolina law allows qualifying businesses to retain a portion of their employees' withheld state income tax (job development credits) for approved business expenditures, including training costs and facilities, purchasing or improving upon real property, improvements to private or public utility systems, costs associated with fixed transportation facilities, changes to real property for the purpose of meeting environmental regulations, qualifying employee relocation expenses, qualifying employee training programs, apprenticeship programs, and certain quality improvement programs. The maximum amount of job credits that a qualifying business may claim is determined by a percentage of the gross wages paid to new employees; this allowable percentage is based on the employee's hourly earnings.

To qualify for job development credits, South Carolina businesses must meet the following criteria:

- Qualify for the aforementioned jobs tax credit;
- Generally, create at least ten net, new full-time jobs; and

- Provide a benefit package to full-time employees, including a comprehensive healthcare plan, of which the employer must pay at least 50% of the premium for eligible employees.

Eligible businesses must submit an application to the South Carolina Coordinating Council for Economic Development, along with a nonrefundable application fee and financial statements prior to an official announcement by the business of its South Carolina location or expansion. If approved, the business must then enter into a Revitalization Agreement with the Council in order to become eligible to receive the credits. The business must then certify to the Council that the business has met the minimum requirements for capital investment and job numbers under the program. Once approved, there are various annual recordkeeping, reporting, and renewal requirements that approved businesses must follow.

C. Job Retraining Credits

South Carolina also provides job retraining credits for qualifying businesses engaged in manufacturing or processing operations or technology intensive activities at a manufacturing, processing, or technology intensive facility. Under this program, which is administered by the South Carolina Technical Colleges and State Board for Technical and Comprehensive Education (SBTCE). Employers may able to retain tax withholdings as annual credits of $1,000 per qualifying employee for retraining purposes.

In order to be eligible for job retraining credits, businesses must:

- Be engaged in certain areas of manufacturing, processing, or technology as defined in South Carolina Code Section 12-6-3360(M) and Regulation 117-750.1;
- The retraining must be considered necessary for the business in order to either remain competitive or to introduce new workplace technologies;
- Provide a benefits package, including health care, to employees being retrained;
- Spend at least $1.50 on eligible employees for each dollar claimed as a job retraining credit; and
- Develop a retraining plan approved by a technical college within the appropriate service area.

Eligible training programs include, but are not limited to, the retraining of current employees on newly installed equipment, or on newly implemented technology. Career development, executive training, management development training, personal enrichment training, and cross-training of employees on equipment or technology are not eligible.

II. INCENTIVES RELATED TO PROPERTY DEVELOPMENT

A. Textile Revitalization Credit

The South Carolina Textile Communities Revitalization Act provides a tax credit for the renovation, rehabilitation and redevelopment of abandoned textile mills. The Act was passed in response to the significant amount of vacant textile mills left in South Carolina after the sharp decline in the state's textile industry. The credit can be used against property or income taxes.

If the taxpayer chooses a credit against income taxes, it must file a Notice of Intent to Rehabilitated with the South Carolina Department of Revenue. The Notice should be filed before the taxpayer receives building permits as only those rehabilitation expenses incurred after receipt of building permits qualify. The Notice must indicate the taxpayer's intent to rehabilitate the textile mill site, its location and acreage, the estimated expenses to be incurred in connection with the rehabilitation, information as to which buildings the taxpayer plans to renovate or demolish, and whether new construction is involved. The credit amounts to 25% of the taxpayer's actual qualified rehabilitation expenses except for those expenses which exceed one hundred and 25% of the estimate provided in the Notice. The entire credit is earned in the year in which all or a phase of the site is placed in service and is claimed in equal installments over five years.

The approval process and credit provisions differ for taxpayers seeking the property tax credit. In that case, the Notice is filed with the municipality or county where the textile mill site is located prior to incurring any rehabilitation expenses at the site, as only those expenses incurred after filing of the Notice qualify. If the actual rehabilitation expenses are between 80% and 125% of the estimated expenses in the Notice, only those expenses up to 125% qualify. If the actual expenses are below 80% of the estimate, then no credit is allowed. The property tax credit may be claimed beginning with the tax property year in which the applicable phase or portion of the textile mill site is placed in service and may be taken against up to 25% of the real property taxes due on the textile mill site each year for up to eight years.

Whether the site qualifies as a "textile mills site" which is "abandoned" depends on the requirements of the Act. However, the taxpayer may seek certification from the municipality or county where the textile mill is located and, upon receipt, the taxpayer may conclusively rely on the same.

B. Abandoned Building Revitalization Credits

To create an incentive for the rehabilitation, renovation, and redevelopment of abandoned buildings, located in South Carolina, the state passed the Abandoned Building Revitalization Act of 2013. The Act provides that a taxpayer who incurs qualifying expenses exceeding $75,000, $125,000, or $250,000 in rehabilitating an abandoned building, as defined, and meets other Act requirements are eligible for a credit in the amount of 25% of the rehabilitation expenses against income taxes or real property taxes. As with tax credits for rehabilitation of textile mill sites as provided above, the taxpayer must file a Notice of Intent to Rehabilitate with the South Carolina Department of

Revenue for a credit against income tax, or the municipality or county where the abandoned building is located.

For a credit against income taxes or property taxes, if actual rehabilitation expenses exceed 125% of the estimated expenses as provided in the Notice of Intent, then the credit for each building site is capped at 25% of the one hundred and 25% of the estimated amount. If actual rehabilitation expenses are below 80% of estimate, no credit is allowed. The total income tax credit earned for any taxpayer for each abandoned building site, unit, or parcel may not exceed $500,000. No such limit exists for a credit against property taxes.

Note that as of the date of this writing, the Act will be repealed on December 31, 2021, unless a bill is enacted to extend this deadline.

C. Fee in Lieu of Taxes Agreements

To promote the growth of manufacturing within South Carolina, the legislature has enacted several fee-in-lieu of property tax statutes: one is commonly referred to as the "Big Fee," another is commonly referred to as "Little Fee," and yet another commonly referred to as the "Simplified Fee." Under these statutes, companies making capital investments of at least $2.5 million are permitted to negotiate with individual counties in the state of South Carolina to pay a fee rather than property taxes and to lock in millage rates, and possibly taxable values, for up to 30 years. Property subject to the fee usually consists of land, improvements to land, and machinery and equipment located at the project.

Under the South Carolina Constitution, manufacturing real or personal property and commercial real property are assessed at 10.5% of their fair market values. Commercial real property, such as an office building or hotel, is assessed at 6.0%. Within fee-in-lieu of tax agreements, the 10.5% assessment ratio for manufacturing real or personal property is often negotiated as low as 6%, with the largest investments often negotiated down to 4%. Additionally, the company and the county can agree to freeze the millage rate applicable to the property at the current millage rate, or adjust the millage rate every five years, for the period the fee-in-lieu is in effect. Therefore, typically, only manufacturers take advantage of the fee-in-lieu incentive; however, even though the commercial real property will likely still be assessed at a 6% rate, the fact that the millage rate can be fixed for a period of time may make this an incentive worth evaluating for certain non-manufacturing commercial real property owners.

To qualify for a fee-in-lieu arrangement, a company must invest at least $2.5 million within a five-year period (subject to a possible five-year extension). The only requirement related to the intended use of the project is that the project must be anticipated to benefit the general public welfare of the locality by providing services, employment, recreation, or other public benefits. A company is not required to create

any new jobs to become eligible for a fee transaction, though some counties may still require the same on a case-by-case basis.

Each type of fee-in-lieu agreement requires many steps to put into place and is often a process that takes months. Careful attention should be paid to the particular requirements.

In general, both "Big Fee" and "Little Fee" arrangements usually require at least the following six steps: project identification by the county in which the project is located, the county and company must enter into an inducement agreement (in which the company is designated as the "sponsor"), the county and company may either enter into a separate millage rate agreement or agree to the millage rate elsewhere, the title of the property must be transferred to the county, the company and the county enter into a lease agreement.

Simplified Fee arrangements do not require transfer of title the county nor a lease agreement.

XI. SECURITIES and BLUE SKY REGULATION

Eric B. Amstutz, Jeffery D. Larson, Stephen R. Layne

The South Carolina Uniform Securities Act of 2005 (the "Act"), as amended, *S.C. Code Ann. §§ 35-1-101 et seq.*, regulates offers and sales of securities in South Carolina. Commonly referred to as South Carolina's "blue sky" law, the Act is based on the Uniform Securities Act, with certain modifications. The Act is designed to protect investors by, among other things, regulating the offer and sale of securities through registration, disclosure and other substantive requirements, and prohibiting fraudulent, manipulative, and deceptive practices in connection with the offer or sale of securities.

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

Offers and sales of securities are also subject to Federal and, where applicable, other States' securities laws. These should be consulted, along with the Act, whenever a securities transaction is contemplated.

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

1. Domestic government securities. Any security, including a revenue obligation, issued, insured or guaranteed by the United States, any state, any political

subdivision of a state, any public authority, agency, or instrumentality of one or more states, any political subdivision of one or more states, or any person controlled or supervised by and acting as an instrumentality of the United States under authority granted by the Congress, or any certificate of deposit for any of the foregoing;

2. Foreign government securities. Any security issued, insured or guaranteed by a foreign government with which the United States currently maintains diplomatic relations, or any of its political subdivisions, if the security is recognized as a valid obligation by the issuer, insurer or guarantor;

3. Securities of banking institutions. Any security issued by and representing or that will represent an interest in or a direct obligation of, or be guaranteed by, an international banking institution, any banking institution organized under the laws of the United States, a member bank of the Federal Reserve System, or any depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law;

4. Securities of insurance companies. Any security issued by and representing an interest in or a debt of, or insured or guaranteed by, an insurance company authorized to do business in South Carolina;

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

6. Securities listed on stock exchanges. Any security listed or approved for listing upon notice of issuance on a national securities exchange, or any other security of the same issuer which is equal in seniority or a senior security to such security;

7. Securities of religious, charitable, and trade organizations. Any security issued by any person organized and operated exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce, and not for pecuniary profit, no part of the net earnings of which inures to the benefit of a private stockholder or other person, or any security of a company that is excluded from the definition of an investment company under the Investment Company Act of 1940 (except that debt securities are subject to significant disclosure requirements);

8. Securities of state cooperatives. Any member's interest in a security issued by a cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of a U.S. state; and

9. Securities concerning certain interests in equipment. Any equipment trust certificate with respect to equipment leased or conditionally sold to a person, if any security issued by the person would be exempt under the Act's section exempting certain securities or would be listed on a stock exchange.

The Act also includes twenty-three exemptions from registration which are based on the nature of the transaction in which the offer or sale takes place. These include:

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

2. Transactions with broker-dealers in specified outstanding securities. Any nonissuer transaction effected by or through a broker-dealer registered or exempt from registration under the Act , in a security of a class that has been outstanding in the hands of the public for at least ninety days, if, at the date of the transaction, certain requirements set forth in the Act are met;

3. Specified foreign transactions. Any nonissuer transaction by or through a broker-dealer registered or exempt from registration under the Act in a security of a foreign issuer that is a margin security defined in regulations or rules adopted by the Board of Governors of the Federal Reserve System;

4. Transactions in securities reported under the Securities Exchange Act of 1934. Any nonissuer transaction by or through a broker-dealer registered or exempt from registration under the Act in an outstanding security if the guarantor of the security files reports with the Securities and Exchange Commission under the reporting requirements of the Securities Exchange Act of 1934;

5. Transactions in specified fixed income securities. Any nonissuer transaction by or through a broker-dealer registered or exempt from registration under the Act in a security that (a) is rated at the time of the transaction by a nationally recognized statistical rating organization in one of its four highest rating categories or (b) has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security and the issuer is engaged in business as a going concern;

6. Unsolicited brokerage transactions. Any nonissuer transaction by or through a broker-dealer registered or exempt from registration under the Act effecting an unsolicited order or offer to purchase;

7. Transactions by pledgees. Any nonissuer transaction executed by a bona fide pledgee without any purpose of evading the Act;

8. Transactions with federal covered investment advisors. Any nonissuer transaction by a federal covered investment adviser with investments under management in excess of one hundred million dollars acting in the exercise of discretionary authority in a signed record for the account of others;

9. Specified exchange transactions. Any transaction in a security, whether or not the security or transaction is otherwise exempt, in exchange for one or more bona fide outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, if the terms and conditions of the issuance and exchange or the delivery and exchange and the fairness of the terms and conditions have been approved by the Securities Commissioner after a hearing;

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

11. Unit secured transactions. Any transaction in a note, bond, debenture, or other evidence of indebtedness secured by a mortgage or other security agreement if (a) the note, bond, debenture, or other evidence of indebtedness is offered and sold with the mortgage or other security agreement as a unit; (b) a general solicitation or general advertisement of the transaction is not made; and (c) a commission or other remuneration is not paid or given, directly or indirectly, to a person not registered under the Act as a broker-dealer or as an agent;

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

13. Transactions with specified investors. Any sale or offer to sell to an institutional investor, a federal covered investment adviser, or any other person exempted by rule adopted or order issued under the Act;

14. Limited offerings. Any sale or an offer to sell securities by or on behalf of an issuer, if the transaction is part of a single issue in which (a) not more than twenty-five purchasers, other than those designated in item (13) above, are present in South Carolina during any period of twelve consecutive months; (b) a general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities; (c) a commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer registered under the Act or an agent registered under the Act for soliciting a prospective purchaser in South Carolina; and (d) the issuer reasonably believes that all the purchasers in South Carolina, other than those designated in paragraph (13), are purchasing for investment;

15. Conversions and exercise of warrants. Any transaction under an offer to existing security holders of the issuer, including persons that at the date of the transaction are holders of convertible securities, options, or warrants, if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in South Carolina;

16. Offers of nonexempt securities after registration statements filed. Any offer to sell, but not a sale, of a security not exempt from registration under the Securities Act of 1933 for which a registration statement has been filed, but is not effective, under the Securities Act of 1933 if no stop order is in effect and no public audit, inspection or proceeding looking toward such an order is pending;

17. Offers of exempt securities after registration statements filed. Any offer to sell, but not a sale, of a security exempt from registration under the Securities Act of 1933 for which a registration statement has been filed, but is not effective, under the Act where a solicitation of interest is provided in a record to offerees in compliance with a rule adopted by the South Carolina Securities Commissioner under the Act if no stop order is in effect and no public audit, inspection or proceeding looking toward such an order is pending;

18. Control transactions. Any transaction involving the distribution of the securities of an issuer to the security holders of another person in connection with a merger, consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer, or its parent or subsidiary and the other person, or its parent or subsidiary, are parties;

19. Rescission offers. Any rescission offer, sale, or purchase under Section 35-1-510 of the Act;

20. Out-of-state offers. Any offer or sale of a security to a person not a resident of South Carolina and not present in South Carolina if the offer or sale does not constitute a violation of the laws of South Carolina or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade the Act;

21. Employee benefit plans. Any employees' stock purchase, savings, option, profit-sharing, pension, or similar employees' benefit plan, including any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the issuer's parent for the participation of their employees including offers or sales of such securities to (a) directors, general partners, certain trustees, officers, consultants, and advisors; (b) family members who acquire such securities from those persons through gifts or domestic relations orders; (c) former employees, directors, general partners, trustees, officers, consultants, and advisors if those individuals were employed by or providing services to

the issuer when the securities were offered; and (d) insurance agents who are exclusive insurance agents of the issuer, or the issuer's subsidiaries or parents, or who derive more than 50 percent of their annual income from those organizations;

22. Dividends, tender offers, and reorganizations. Any transaction involving: (a) a stock dividend or equivalent equity distribution, whether the corporation or other business organization distributing the dividend or equivalent equity distribution is the issuer or not, if nothing of value is given by stockholders or other equity holders for the dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property, or stock; (b) an act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash; or (c) the solicitation of tenders of securities by an offeror in a tender offer in compliance the Securities Act of 1933; and

23. Transactions of specified foreign issuer securities traded on designated securities exchanges. Any nonissuer transaction in an outstanding security by or through a broker-dealer registered or exempt from registration under the Act, if the issuer is a reporting issuer in a foreign jurisdiction designated pursuant to the Act, has been subject to continuous reporting requirements in the foreign jurisdiction for not less than 180 days before the transaction, and the security is listed on the foreign jurisdiction's securities exchange designated pursuant to the Act, or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing.

By regulation, South Carolina provides exemptions from registration for Regulation D offerings under the federal securities laws which comply with Rules 501 through 505, and 507 through 508 of Regulation D under the Securities Act of 1933. There is also an exemption from registration for offers and sales to accredited investors as defined in Regulation D. In addition, South Carolina provides an intrastate offering exemption from registration. There is also an exemption for offers and sales of securities effected by exempt Canadian broker-dealers. These exemptions have a number of detailed requirements found in rules issued by the South Carolina Securities Commissioner. Any issuer that desires to rely on any of these exemptions should contact the South Carolina Securities Commissioner to determine whether any requirements, in addition to those found in the rules, are currently in effect.

The Act also contains provisions regulating certain broker-dealers, agents, investment advisers, investment adviser representatives and federal covered investment advisers.

Any person who offers or sells a security in violation of the Act's registration provisions, who makes material misstatements in connection with the offer, sale or purchase of a security, or who otherwise engages in fraudulent conduct may be subject to

civil and criminal liability. Dealers, salesmen, investment advisers, and investment adviser representatives are also prohibited from engaging in fraudulent practices and are subject to revocation of their registration and other penalties for violations of the Act.

The Attorney General is deemed by the Act to be the securities commissioner but delegates that authority to the South Carolina Securities Division. The South Carolina Securities Division's mailing address is: Office of the S.C. Attorney General, Securities Division, Rembert Dennis Building, 1000 Assembly Street, P.O. Box 11549, Columbia, S.C. 29211-1549 and can be reached by phone at: (803) 734-9916.

XII. REAL ESTATE

Joshua Lonon, Megan P. O'Neill, Kara Bailey Hamilton

South Carolina permits the acquisition of real estate by persons or entities other than United States citizens or residents (foreign persons). There are certain aspects of South Carolina law and custom, however, which must be taken into account by anyone considering the purchase of real estate. Typical issues that arise in real estate transactions include the state of title to the property, whether a purchaser will have adequate access to the property, whether there are any easements or other restrictions encumbering the property that will hinder or prohibit the purchaser's intended use of the property, whether the property is located in a flood hazard area, whether there are any environmental problems with the property (or in the vicinity of the property that may negatively impact the property), and whether and to what extent zoning and other land use restrictions will affect the development and use of the property. In South Carolina the governmental approvals necessary in connection with the acquisition and development of real estate vary from county to county. The zoning, planning, building, environmental protection, and subdivision laws are enforced by numerous city and county bodies pursuant to local ordinances enacted in accordance with state statutes. It is customary for the purchaser's attorney to be responsible for determining that title to the property is marketable and for certifying title for the purpose of obtaining title insurance.

The state and local associations for real estate brokers have developed standardized forms of purchase and sale agreements that are widely used, especially in residential transactions. Forms developed by these associations attempt to strike a fair balance between the purchaser and seller and are available from realtors and law firms. Mediation is normally required now if disputes arise under these agreements. While these standardized forms are often used in residential transactions, it is not recommended that they be used in the commercial arena since commercial transactions often involve subtle and complex issues that typically cannot be captured by standardized forms.

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

A. AFIDA 7 U.S.C. §§ 3501 ET SEQ.

The Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA") requires all foreign persons and organizations to report the acquisition or transfer of an interest in agricultural land within ninety days of the conclusion of the transaction. Agricultural land includes any area of land last used within the past five years for farming, ranching or timber production, except land not exceeding ten acres in the aggregate, if the annual gross receipts from the sale of the farm, ranch, or timber products produced from the land do not exceed $1,000. Reports must also be filed within ninety days after the date an owner of agricultural land becomes a foreign person or land held by a foreign person becomes agricultural. The foreign person must disclose in these reports extensive personal information in addition to information about the land itself. Penalties for noncompliance with AFIDA may be up to 25% of the fair market value of the foreign entity's interest in the land.

B. IITSSA 22 U.S.C. §§ 3101 ET SEQ.

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

Any business enterprise which is 10% owned, directly or indirectly, by a person of another country is considered to be a United States affiliate. IITSSA requires that United States affiliates make several filings with the BEA. A report must be filed within thirty days of the close of each quarter in certain circumstances. United States affiliates must file an extensive survey every five years, and additional reports may be required depending on the amount of the investment.

There are several exemptions from the BEA's filing requirements. For example, no filing is required for investment in real estate when the investment is for personal use. There are also exemptions based on the size or value of the real estate acquisition. The penalty for failure to comply with reporting requirements includes an injunction requiring a report and a civil penalty of up to $45,268, but not less than $4,527. Willful failure to submit any of the information required can also result in a maximum fine of $10,000 and up to one year in prison.

C. FIRPTA 26 U.S.C. § 871-897

The Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") authorizes the Secretary of Treasury to require foreign investors to file information returns and also imposes withholding requirements on transferees in the disposition of a United States real

property interest when the transferor is a foreign person. The transferee generally must withhold 15% of the amount realized by the transferor on the transaction (10% for dispositions before February 17, 2016), although there are several situations in which withholding is not required or the amount of tax withheld is decreased. Any transferee failing to withhold the tax may be liable for the amount of tax, including a penalty equal to the amount of the tax not collected. Additional penalties include a civil penalty of up to $10,000. A transferee also may be found criminally liable for fraud.

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

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

Any sale of South Carolina real property by a non-resident is subject to a withholding requirement. The purchaser is required to withhold a percentage of the gain recognized or the amount realized and forward it to the Department of Revenue unless an exemption from withholding is established by the seller. ***S.C. Code Ann. § 12-8-580.***

E. SOUTH CAROLINA STATUTES AND LAW

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

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

Recording. Recording fees for deeds will be assessed by the local recording office. The current recording fee is $3.70 for each $1,000, or fractional part thereof, of the realty's value, plus a nominal charge for recording a document (normally $15). Certain exemptions to the fees apply. All recording fees are normally the liability of the seller, though the purchaser will be secondarily liable. In an arm's length transaction, the term "value" means the consideration paid or to be paid in money or money's worth for the realty including other realty, personal property, stocks, bonds, partnership interests,

and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of a right. ***S.C. Code Ann. § 12-24-10 et seq.***

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

Mortgages. ***See generally, Title 29, S.C. Code*.** Mortgages of real estate are usually given to secure promissory notes. The lien theory applies. Mortgages must be properly executed, witnessed, and acknowledged to allow for recording and to otherwise protect the mortgagee's rights. The cost for recording a mortgage is $25, and there are now no other taxes or recording fees. On default of a mortgage, a mortgagee cannot maintain a possessory action. For real estate mortgaged, a mortgagor is still deemed owner of land, and the mortgagee must proceed by judicial foreclosure and sale. Foreclosure of mortgages is by ordinary suit of Summons and Complaint in the county where the property is located. The court may render judgment and order a public sale. Public sales are normally the first Monday of each month.

The mortgagor has certain rights in a foreclosure action. Anyone who is subject to a deficiency judgment in an action has the statutory right to an appraisal of the property if a deficiency judgment against the mortgagor or other obligor is sought. Appraisal rights can be waived in commercial transactions if the mortgagee gives written notice to the mortgagor or obligor of such expectation prior to closing of the transaction and the mortgagor or obligor signs a statement waiving appraisal rights. A statutory form of statement of waiver is required. Any application for appraisal rights is to the Court of Common Pleas.

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

No mortgage or deed having the effect of a mortgage or other lien shall constitute a lien upon any real estate after the lapse of twenty years from the date for the maturity of such lien. But if the holder of any such lien shall, at any time during the continuance of such lien, cause to be recorded upon the record of such mortgage or deed having the effect of a mortgage or other lien a note of some payment on account or some written acknowledgment of the debt secured thereby, with the date of such payment or acknowledgment, such mortgage or deed having the effect of a mortgage or other lien shall be, and continue to be, a lien for twenty years from the date of the recording of any such payment on account or acknowledgment. When there is no maturity stated or fixed in the mortgage or the record of the mortgage then the provisions hereof shall be

applicable from the date of such mortgage, and such mortgage shall not constitute a lien after the lapse of twenty years from the date thereof. ***S.C. Code Ann. § 29-1-10.***

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

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

Landlord/Tenant. South Carolina has fairly extensive statutes governing landlord/tenant relationships in the residential context. ***S.C. Code Ann. §§ 27-40-10 et seq.*** Though there is a statute covering commercial leases, they are largely a matter of contract law, and the practices in South Carolina do not differ significantly from those in other states. There is not a standard form for commercial leases. Commercial leases range from the relatively simple agreements for smaller matters to long and complex leases for larger tenants or unusual projects. Recording of leases or a memorandum of the lease is often necessary to protect a tenant's rights in the leased property.

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

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

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

Marshall Winn, William M. Wilson

A. DEBTOR AND CREDITOR

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

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

Property exempt from execution, levy, and sale includes Social Security, veterans, and illness or disability benefits; unemployment compensation; alimony; child support; crime reparation; personal injury awards; wrongful death awards; and life insurance payments. Other exemptions include a debtor's aggregate interest of up to $50,000 in real estate; $5,000 in a motor car; $4,000 in personal property; $1,000 in jewelry; $500 in professional tools; and unmatured life insurance. Adjustments in the exemption amount based on the Consumer Price Index are made very two years. Also exempt are any wages of debtor and income for personal services. There is no garnishment for civil judgments in South Carolina. ***S.C. Code Ann. §§ 15-41-10 et seq.*** *See* section on garnishment below.

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

Proceedings in aid of execution include:

1. Supplementary Proceedings. When the execution is returned unsatisfied by the sheriff, on the affidavit of the judgment creditor that he believes that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment,

the judgment creditor may obtain an order from the Circuit Court requiring the judgment debtor to appear and answer under oath, questions concerning his assets and property, at the time and at a place specified in the order within the county where the execution was issued. The judgment debtor also may be ordered to produce financial records. If property not otherwise exempt is thereby discovered, it may be taken and applied toward satisfaction of the judgment.

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

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

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

3. Receivership. ***S.C. Code Ann. §§ 15-65-10 et seq.*** A receiver may be appointed: (1) before judgment, on application of either party, to obtain possession of property which is the subject of an action which is in the possession of an adverse party, when such property or its rents and profits are in danger of being lost or materially injured; (2) after judgment, to carry judgment into effect; (3) after judgment, to dispose of property according to the judgment or to preserve it during appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property to satisfaction of judgment; (4) when a corporation has been dissolved or is insolvent or is in danger of insolvency or has forfeited its corporate rights; or (5) in such other cases as may be provided by law or may be in accordance with existing practice. A receiver may be appointed by petition to the court, either before or after judgment. Unlike a trustee in bankruptcy, the receiver has no "super-powers," but merely succeeds to the debtor's rights and liabilities. The South Carolina statute contains few provisions that guide receivers, and the receiver's duties and authority are normally set out in the court's order.

4. Claim and Delivery. (*i.e.* "Replevin") ***S. C. Code §§ 15-69-10 et seq.*** A party may recover possession of personal property to which it is entitled through statutory claim and delivery proceedings initiated in the Court of Common Pleas or Magistrate's Court if the amount in controversy does not exceed $7,500. Possession of personal property may not be recovered unless five days' notice and an opportunity to be heard have been afforded the party in possession, but this right of a preseizure hearing may be waived. When immediate delivery of personal property is demanded, plaintiff or someone in his behalf must make an affidavit showing: (1) that plaintiff is owner of the

property claimed (particularly describing it), or is lawfully entitled to possession thereof by virtue of special property rights therein, facts in respect to which must be set forth; (2) that the property is wrongfully detained by defendant; (3) the alleged cause of detention according to his best information, knowledge, and belief; (4) that the property has not been detained for tax, assessment, or fine pursuant to statute, or seized under execution or attachment against property of plaintiff, or if so seized, that it is by statute exempt from such seizure; and (5) the actual value of the property.

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

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

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

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

B. FRAUDULENT CONVEYANCES

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

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

consideration or for nominal consideration; and (3) that the transferor failed to retain sufficient property to pay the creditor in full.

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

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

C. LIENS

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

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

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

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

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

owner of the ship, if known, and the name of the ship or a description thereof. The lien is enforced by a petition in the Court of Common Pleas.

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

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

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

Miscellaneous. ***S.C. Code Ann. §§ 29-15-10 et seq.*** Keepers of inns, hotels, or boarding houses have a lien on the baggage of guests. The baggage may be sold ten days after the date of departure of the persons incurring the debt, with the sale to be advertised by written or printed notice at three public places in the vicinity for ten days before the sale. A proprietor or owner or operator of a repair shop or storage garage, who makes repairs on any article left at his shop or furnishes any material for such repairs, may sell the article at a public auction after thirty days from written notice to the owner of the property and to any lien holder with a perfected security interest in the property.

XIV. LICENSES

Eric K. Graben

A. PROFESSIONAL LICENSES IN GENERAL

A license is required for practically every profession and business. *See generally* Title 40, S.C. Code. The following businesses and professions are among those licensed pursuant to statute: accountants; architects; attorneys at law; chiropractors; contractors; dentists; engineers; nurses; pharmacists; physicians; psychologists; residential home builders; social workers; insurance; real estate; and banks. The list of professions and businesses requiring a license includes some unobvious ones such as junk dealers and

fortune tellers. Licensing for most professions and businesses is handled by the South Carolina Department of Labor, Licensing and Regulation, which can be contacted at 110 Centerview Drive, Columbia, South Carolina 29210, telephone (803) 896-4300. The Department maintains a Professional and Occupational Licensing Board web site at www.llr.sc.gov.

B. General Contractor and Mechanical Contractor Licenses

A general or mechanical contractor desiring to perform or offer to perform contracting work for which the total costs of construction is greater than $5,000 must have a contractors' license issued by the South Carolina Contractors' Licensing Board of the Department of Labor, Licensing and Regulation.[2] There is an initial license fee of $350, and biennial renewal fees are $135. A fee schedule is available at www.llr.sc.gov/clb/Forms/CLB_fee_info.pdf.

The licensing procedure is complicated. Among other things, an applicant for licensure must (i) have a certified qualifying party who has passed specified exams in full-time employment in a responsible management position, (ii) file financial statements demonstrating a specified net worth that varies depending on the dollar size of jobs that the applicant wishes to bid for or perform and (iii) include a reference from a bank in a specified form.[3] The table below sets forth the minimum net worth requirements for general contractors:[4]

Job Size	Required Net Worth	Financial Statements
Up to $50,000	$10,000	Owner-prepared
Up to $200,000	$40,000	Owner-prepared
Up to $500,000	$100,000	Compiled by CPA in accordance with GAAP for initial application; may be owner-prepared for renewals
Up to $1,500,000	$175,000	Compiled by CPA in accordance with GAAP for initial application; may be owner-prepared for renewals
Unlimited	$250,000	Prepared in accordance with GAAP. Audited by CPA for initial application; reviewed by CPA for renewals

[2] §44-11-30.
[3] S40-11-20(20); §40-11-240.
[4] §40-11-260(A)

The table below sets forth the minimum net worth requirements for mechanical contractors:[5]

Job Size	Required Net Worth	Financial Statements
Up to $17,500	$3,500	Owner-prepared
Up to $50,000	$10,000	Owner-prepared
Up to $100,000	$20,000	Compiled by CPA in accordance with GAAP for initial application; may be owner-prepared for renewals
Up to $200,000	$40,000	Compiled by CPA in accordance with GAAP for initial application; may be owner-prepared for renewals
Unlimited	$200,000	Prepared in accordance with GAAP. Audited by CPA for initial application; reviewed by CPA for renewals

In lieu of providing a financial statement showing the required minimum net worth for a license group, an applicant may provide a surety bond from a surety authorized to transact business in South Carolina in an amount of twice the required net worth for the applicant's license group with its initial or renewal application.[6]

Inquiries regarding licensure should be addressed to the South Carolina Contractors' Licensing Board at 110 Centerview Drive, Columbia, South Carolina 29210, telephone (803) 896-4686, e-mail Contact.CLB@llr.sc.gov.

A construction manager must be licensed as a general or mechanical contractor or as a registered engineer or architect who meets the financial requirements of a prime contractor working on the project.[7] A building official may not issue a building permit for an undertaking that would classify the applicant as a contractor unless the applicant has furnished evidence that he, she or it is licensed as a contractor or exempt from licensure.[8]

Provisions of the contractors' licensure chapter do not apply to work performed on property owned by the federal government, to contractors performing construction work for the South Carolina Department of Transportation pursuant to that department's prequalification requirements, or in other specified circumstances.[9]

[5] §40-11-260(B).
[6] §40-11-262
[7] §40-11-320(A).
[8] §40-11-350.
[9] §40-11-360(A).

C. CONSUMER LENDING LICENSES

Persons or entities other than banks, savings and loan associations, savings banks, trust companies, insurance companies, credit unions or licensed pawnbrokers that engage in the business of making consumer loans must be licensed by the State Board of Financial Institutions.[10] If the lender desires to make consumer loans of $7,500 or less it can be licensed as a "restricted lender" under Chapter 29 of Title 34 of the South Carolina Code of Laws.[11] If lender desires to make consumer loans of up to $25,000 or loans secured by land, it must seek to be licensed as a "supervised lender" under Part 5 of Chapter 3 of Title 37 of the South Carolina Code of Laws.[12] If a lender desires to engage in deferred presentment lending (sometimes colloquially referred to as "payday lending"), the lender must be licensed under Chapter 39 of Title 34 of the South Carolina Code of Laws.[13]

Applicants to be either a restricted lender or a supervised lender must pay a $300 license fee with an initial application.[14] The annual renewal fee for each license is based on gross loans receivable at year end and can change from year to year.[15] The Consumer Finance Division posts renewal fees on its website at www.consumerfinance.sc.gov. The Board will make an evaluation regarding the applicant's financial responsibility, character, and general fitness (and experience in the case of a restricted lender) and whether the convenience and advantage of the community will be promoted by granting the license.[16] The applicant must have available funds of at least $25,000 per branch to obtain a license.[17] Restricted and supervised lenders must obtain a separate license for each branch conducting lending operations and generally must obtain approval to move a branch.[18]

Applicants to be licensed as a deferred presentment lender must pay a $1,500 license fee with an initial application.[19] Applicants must obtain a separate license for each business location, and annual renewal fees are $1,000 for the first location of business and $250 for each additional location.[20] The Board will make an evaluation regarding the applicant's financial responsibility, character, experience and general fitness, and the applicant must have available funds of at least $25,000 per branch to obtain a license.[21] A deferred presentment office must be completely separate from any space where goods

[10] §34-29-20; §37-3-502 and -503.
[11] §34-29-10(a)(definition of consumer finance company); §37-3-501 (definition of restricted loan and restricted lender).
[12] §37-3-104 (definition of consumer loan); §37-3-501 (definition of supervised lender).
[13] §34-39-130.
[14] Go to www.consumerfinance.sc.gov and click on "Regulated Institutions – Consumer Lending" and then click on "Consumerlendingapplication.pdf"
[15] §34-29-30; §37-3-503(8).
[16] §34-29-40(b); §37-3-503(1).
[17] §34-29-40(b); §37-3-503(2).
[18] §34-29-60; §37-3-503(4).
[19] §34-39-150(C).
[20] §34-39-130(A); §34-39-150(D).
[21] §34-39-160

or services are sold or leased and must be separately staffed and not have a common entrance with any other business.[22]

Inquiries regarding licensure should be made to the Consumer Finance Division of the State Board of Financial Institutions at 1205 Pendleton Street, Suite 306, Columbia, South Carolina 29201, telephone (803) 734-2020. The Consumer Finance Division maintains its own website at www.consumerfinance.sc.gov.

D. SECURITIES BROKER-DEALER AND INVESTMENT ADVISOR LICENSES

Generally, any person engaged in the business in South Carolina of effecting transactions in securities for the account of others or for his or her own account is classified as a broker-dealer under South Carolina law and must register with the Securities Division of the South Carolina Attorney General's Office.[23] Agents, who are defined as individuals representing broker-dealers *or representing issuers* in effecting securities transactions, must also register.[24] There are certain exemptions from the registration obligation.[25] Investment advisors and their representatives must also register with the Securities Division unless they satisfy the criteria for an exemption from registration.[26] Applicants must pass one or more exams and pay an application fee ($310 for broker-dealers, $110 for agents, $210 for investment advisors and $55 for investment advisor representatives).[27] Broker-dealers who are not registered under Section 15 of the Securities Exchange Act of 1934, do not use a national securities exchange facility and do business exclusively in South Carolina must post a bond of at least $50,000.[28] Investment advisors who have custody of client funds or securities must maintain a minimum net worth of $50,000 or post a surety bond in that amount.[29] Investment advisors who do not have custody of client funds or securities but do have discretionary authority over client funds or securities must maintain a minimum net worth of $35,000 or post a surety bond in that amount.[30]

The Securities Division of the South Carolina Attorney General's Office can be reached at 1000 Assembly Street (zip code 29201) or Post Office Box 11549 (zip code 29211), Columbia, South Carolina, telephone (803) 734-9916, www.scag.gov/scsecurities.

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[22] §34-39-120(6).
[23] §35-1-102(4) (definition of broker-dealer); §35-1-401(a) (obligation to register).
[24] §35-1-102(2) (definition of agent); §35-1-402(a) (obligation to register)
[25] §35-1-401(b); §35-1-402(b).
[26] §35-1-403; §35-1-404.
[27] See the Securities Division's website at www.scag.gov/scsecurities/registration and click on the checklists under "Registration of Stockbrokers" and "Registration of Investment Advisors" and then the "Q&As" for investment advisors and their representatives.
[28] §35-1-411(e); South Carolina Code of Regulations 13-405(C).
[29] §35-1-411(e); South Carolina Code of Regulations 13-406. FAQs on the Securities Division's web site indicate that no bond is required for Investment Advisor Firms registered with the US Securities and Exchange Commission.
[30] Id.

XV. ETHICS, LOBBYING, CAMPAIGN FINANCING

John C. Moylan III, Matthew T. Richardson

Doing business in South Carolina may require interaction with public officials, members or employees of state and local governments and may also involve participation in lobbying or election campaigns. This is an abbreviated overview of the sometimes confusing and often uncertain areas of compliance, disclosure, and ethics in government, lobbying, and campaign financing. It is best to seek legal counsel before wading into this area because many issues do not have clear or easy-to-find answers.

The State Ethics Commission maintains a website with links to relevant laws, lobbying and campaign disclosure reports, and the statements of economic interests required of all public officials (including candidates), members, and employees. See http://ethics.sc.gov.

The public reporting for members of the South Carolina House of Representatives and Senate may also be found on the State Ethics Commission's website, but the members are governed by the respective Ethics Committees. See: https://www.scstatehouse.gov/CommitteeInfo/houseethics.php and https://www.scstatehouse.gov/CommitteeInfo/senateethics.php.

A. OVERVIEW

In 1991, South Carolina adopted the State Ethics, Government Accountability, and Campaign Reform Act with a view of restoring public trust in governmental institutions and the political processes. S.C. Code §§ 8-13-10 *et seq*. ("Ethic Reform Act"). The Ethics Reform Act, as revised, and related laws affect the lobbying of and interaction with public officials and employees and participation in election activities.

While some of the laws can be found in the Ethics Reform Act and in other parts of the South Carolina Code, other sources of rules and guidelines include agency regulations, Attorney General Opinions, and Ethics Advisory Opinions by the State Ethics Commission and the House and Senate Ethics Committees. This overview does not include election law offenses, which can be found in Chapter 25 of Title 7, or the State Procurement Code or other more generally applicable laws and regulations of South Carolina. The rules on lobbying are in both the Ethics Reform Act and in other parts of the Code. In addition, the Federal Election Commission and federal statutes, such as the Hobbs Act and the Hatch Act of 1939, may apply even to state officials and employees. For convenience and efficiency, we will refer to this collective body of law as the "State Ethics Law".

The Ethics Reform Act applies to all public officials, public employees, and public members of the State and political subdivisions, with the exception of members of the judiciary. The Campaign Practices Article 13 in Chapter 13 of Title 8 of the Code (S.C. Code §§ 8-13-1300 *et seq.*) covers campaign and election activities by and on

behalf of candidates, including probate judges, candidates for public office, committees, and ballot initiatives. The Lobbyists and Lobbying Chapter 17 of Title 2 of the Code applies to all public officials and to both lobbyists and lobbyists' principals. The definition sections in each part of the State Ethics Law are particularly important.

One significant effect on campaign finance is that in 2010, a federal judge in South Carolina overturned as unconstitutionally overbroad the definition of "committee" in the Ethics Reform Act. *See South Carolina Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708 (D.S.C. 2010); *see also S. Carolinians for Responsible Gov't v. Krawcheck*, 854 F. Supp. 2d 336 (D.S.C. 2012) (noting that decision "from a peer judge within this district" was not controlling, but coming to the same conclusion the definition being unconstitutionally overbroad). The General Assembly has introduced but not passed another definition of committee. The full impact is unclear of the court's striking down the definition of committee, but the Ethics Commission has issued a formal advisory opinion that it would not enforce the contribution limits for committees that are exclusively engaged in independent expenditures. Thus, since late 2010 groups operating independently of and not coordinating with candidates, agents of candidates, political parties or campaigns may not be subject to registration, the contribution or other expenditure limits, or disclosures. However, the absence of a statutory definition of committee does not invalidate other parts of the State Ethics Law, particularly regulation of candidates, political parties, and their campaigns.

In 2013, the South Carolina Supreme Court held that under the State Ethics Law a state legislative body's ethics committee has exclusive jurisdiction to hear a **civil** ethics complaint against one of its members. *Rainey v. Haley*, 404 S.C. 320, 322, 745 S.E.2d 81, 82 (2013) (emphasis added). In 2014, the South Carolina Supreme Court held that while House and Senate ethics committees are charged with the exclusive responsibility for handling ethics complaints as to their respective members, the authority granted to the ethics committees by State Ethics Law does not limit criminal prosecutions. *Ex Parte Harrell*, 409 S.C. 60, 64-70, 760 S.E.2d 808, 810-12 (2014).

Following the decision in *Ex Parte Harrell*, the state Attorney General designated a solicitor to make prosecutive decisions into alleged public corruption committed by then-Speaker of the South Carolina House of Representatives and later two members of the South Carolina General Assembly that were identified but redacted from the original investigation report into the Speaker's illegal activities. As a result of disagreement between the Attorney General and the designated solicitor about the state grand jury as an investigative tool, the South Carolina Supreme Court decided the designated solicitor was vested with authority to use the state grand jury to investigate "the redacted legislators." *See Pascoe v. Wilson*, 416 S.C. 628, 788 S.E.2d 686 (2016). Following the state grand jury investigation into the redacted legislators, the designated solicitor indicted six individuals and one entity, obtaining guilty pleas from three legislators and the entity, one guilty verdict after trial while one individual had all charges dismissed with prejudice, and the other individual's charges are still pending.

The designated solicitor also entered "Corporate Integrity Agreements" with some but not all companies and government entities that were clients of the one entity charged with failing to register as a lobbyist. The Agreements provided immunity from criminal, civil, and administrative liabilities in exchange for testimony in the one trial from the investigation and payment of significant fines in excess of the penalties provided for in the Ethics Act. The propriety of these Agreements were raised in the pending appeal of the one guilty verdict. *See State v. Harrison*, Appellate Case No. 2018-002128 (argued in the S.C. Sup. Ct. June 11, 2020).

In addition to developments in the case law, the public corruption probe led the South Carolina General Assembly to pass 2016 Act Number 282. Section 17 of the Act made amendments and additions to State Ethics Law to reconstitute the process of appointments to as well as administrative proceedings within the State Ethics Commission. S.C. Code §§ 8-13-310, -320. The Act also includes requirements for the legislative ethics committees to, in certain instances, refer complaints to the Ethics Commission for investigations and hearing. S.C. Code §§ 8-13-530, -540.

B. RULES OF CONDUCT

Generally, the Ethics Reform Act prohibits:

1. The private use of public materials, personnel, or equipment; unless it is incidental use that does not result in additional public expense. S.C. Code § 8-13-700(A).

2. The use of public office for personal benefit or for taking any action to influence personal economic benefits for the public official or employee, a family member, or an individual or business with which the official is associated. S.C. Code §§ 8-13-700(A) & (B), and 8-13-100(4), (11), (15) & (21).

3. The giving or acceptance of anything of value to influence an official action. S.C. Code § 8-13-705.

4. The use of government property, personnel, equipment, or materials in election campaigns. S.C. Code § 8-13-765 & 8-13-1346.

5. Any lobbyist or lobbyist principal employing on retainer a public officeholder, member of the household, or organization in which there is an economic interest. S.C. Code § 2-17-110(G).

6. The acceptance of anything of value from a lobbyist or a lobbyist's principal, except under limited conditions. S.C. Code § 2-17-80 & 90.

7. The acceptance of anything of value for a speech in an official capacity; however, public officials or members may be reimbursed for actual expenses of an out-of-state speeches with prior approval. S.C. Code § 8-13-715.

8. The acceptance of additional money for public duties. S.C. Code § 8-13-720.

9. Use or disclosure of confidential information for personal gain. S.C. Code § 8-13-725.

10. Any service on a regulatory board which regulates a business with which the official is associated or as an employee if there is a frequent conflict. S.C. Code § 8-13-730 & 735.

11. Making agency decisions affecting a personal economic benefit if on agency board and also agency employee. S.C. Code § 8-13-730.

12. Representing clients before same level of government, except before a court or in a contested case before State agencies other than the Public Service Commission. S.C. Code § 8-13-740.

13. Legislators representing clients before a State agency if they have either voted on the members of that agency's governing body or the agency appropriation during the prior 12 months, unless the representation is before a court in the unified judicial system. Nothing in the Ethics Act prevents an elected official from communicating with a board or commission member or employee, on behalf of a constituent relating to delays in obtaining a hearing, discourteous treatment, scheduling, or other matters not affecting the outcome of pending matters, provided the elected official, or a business or individual with whom the elected official is associated, is not representing the constituent for compensation. S.C. Code § 8-13-745.

14. Any nepotism (hiring, promotion, or advancement of a "family member"). S.C. Code § 8-13-750.

15. Accepting employment for one year from a business if the business was regulated by former agency and if the employee participated directly and substantially in matters affecting the prospective employer. S.C. Code § 8-13-755.

16. The acceptance of employment with contractor if procurement duties involved that contractor. S.C. Code § 8-13-760.

17. Any interest in a contract if authorized to perform an official function relating to the contract. S.C. Code § 8-13-775.

C. COMPLAINTS OR VIOLATIONS

Any person aggrieved by a violation of the State Ethics Law may file a complaint with the Commission, or the appropriate ethics committee. S.C. Code §§ 8-13-320(9), -530(2). When the majority of either ethics committee identifies a violation, that committee must file a complaint with the Commission. S.C. Code § 8-13-530. The Commission itself may also file a complaint if it suspects a violation has occurred. S.C. Code § 8-13-320(10)(d). The State Ethics Commission has jurisdiction for all open complaints and pending investigations in the Ethics Commission. S.C. Act No. 282, § 17 (2016).

Complaints, investigations, inquiries, hearings, and accompanying documents must remain confidential until a finding of probable cause or dismissal, unless the respondent waives the right to confidentiality. S.C. Code § 8-13-320(10)(g); S.C. Regs. 52-718; *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 685 S.E.2d 600 (2009).

If the Commission determines that a violation has occurred, it may:

1. Recommend administrative or disciplinary action by the Agency or political subdivision.
2. Impose oral or written warnings or reprimands.
3. Require the violator to pay a civil penalty of not more than $2,000 for each violation.
4. Require the forfeiture of anything received or the value of anything received in violation of the law.
5. Refer the matter to the Attorney General for criminal prosecution.

Technical violations are those that are inadvertent or unintentional and must remain confidential unless confidentiality is waived.

D. STATEMENTS OF ECONOMIC INTERESTS

All public officials and all public members serving on a state board, commission, or council must electronically file annual Statements of Economic Interests. S.C. Code § 8-13-1110. Statements of economic interest must include a list of the private source and type of income, meaning anything which must be reported on a form used by the Internal Revenue Service for the reporting or disclosure of income received by an individual or a business, received in the previous year by the filers or a member of their immediate family. S.C. Code § 8-13-1120(A)(10), -1120(C). Additionally, a public official, public member, or public employee required to file a statement of economic interests, and any of these who receives anything of value worth twenty-five dollars or more in a day and anything of value worth two hundred dollars or more in the aggregate in a calendar year must report receiving it from certain people or entities. S.C. Code § 8-13-710(B). Further, all persons required to file a statement of economic interests are required to report if the filer knows that a lobbyist or a lobbyist's principal has purchased goods or services for an excess of two hundred dollars in a calendar year from the filer, an immediate family

member of the filer, or an individual or business with whom the filer is associated. S.C. Code § 8-13-1130. Following the ballot controversy in 2012, all Statements of Economic Interest must be updated by March 30 for the previous calendar year or timely filed by candidates for public office, including those elected or appointed and then confirmed by the General Assembly. S.C. Code § 8-13-1140, 8-13-1356 & 8-13-910.

E. LOBBYING

The Commission also regulates lobbying in the state. See S.C. Code §§ 2-17-10 *et seq.* Registration and filing fees are required by law. Filing must take place within 15 days after being employed, appointed, or retained as a lobbyist; and thereafter a lobbyist must register annually. If lobbying activity is terminated, the Commission must be advised. The registered lobbyist must also disclose all lobbying income and expenditures.

Lobbying prohibitions include:

1. Neither a lobbyist nor anyone acting on behalf of a lobbyist shall offer, solicit, facilitate, or provide to or on behalf of any public official or public employee: (a) lodging, (b) transportation, (c) entertainment, (d) food, meals, beverages, money or any other thing of value, or (e) campaign contributions. This does not prohibit the reimbursement of or expenditures for actual expenses for public officials for speaking engagements.

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

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

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

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

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

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

F. CAMPAIGN FINANCING

The Ethics Commission and the relevant legislative body's ethics committee also regulate campaign financing.

There are limits on the amount and type of campaign contributions. Contributions to a statewide candidate, or jointly elected statewide candidates, are limited to $3,500 per election cycle and $1,000 for any other candidates per election cycle, but contributions can be made by any person, entity, business, or "any other organization or group of persons acting in concert."

Election cycles includes a primary election if held, a primary run-off if held, and the general election for that office. Statewide candidates are eight of the nine State Constitutional officers: Governor, Lieutenant Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Education, Comptroller General, and Commissioner of Agriculture. Adjutant General is now appointed by the Governor with advice and consent of the South Carolina Senate. *See* S.C. Code § 25-1-320. Other candidates include candidates for the General Assembly and for all other elections of public officials of counties, municipalities, school districts, or other political subdivisions. Some public officials are elected/appointed by the General Assembly or appointed by the Governor, legislative delegations for each county, other public officials, or political subdivisions.

Contributions are generally anything of value and include loans, guarantees upon which collection is made, forgiveness of a loan, payment or compensation for personal services rendered to a candidate or committee without charge, and in-kind payments or expenditures whether any of the above are made or offered directly or indirectly. Excluded are volunteer personal services on behalf of a candidate or committee for which the volunteer or any person acting on behalf of or instead of the volunteer receives no compensation either in cash or in-kind, directly or indirectly, from any source.

A significant exception for contributions exists for what is commonly called "31(c) Communications" to influence the outcome of an election. *See* S.C. Code § 8-13-1300(31)(c). The expenditures for 31(c) Communications must be independent from any candidate or the candidate's campaign, so they are not in-kind contributions to the candidate. These funds must be deposited in an account separate from a campaign account used for direct and in-kind contributions for a candidate or candidate committee. More specifically, 31(c) Communications may be made from deposits of money or anything of value to a non-candidate committee or group and are not considered

"contributions"—and thus not subject to disclosure or the contribution limits—if it is used for "any communication made, not more than forty-five days before an election, which promotes or supports a candidate or attacks or opposes a candidate, regardless of whether the communication expressly advocates a vote for or against a candidate [and is] any paid advertisement or purchased program time broadcast over television or radio; (ii) any paid message conveyed through telephone banks, direct mail, or electronic mail; or (iii) any paid advertisement that costs more than five thousand dollars that is conveyed through a communication medium other than those set forth in subsections (i) or (ii) of this paragraph. *See also* S.C. Code 8-13-1300(7) (defining contributions not to include any of "value made to a committee, other than a candidate committee, and is used to pay for communications made not more than forty-five days before the election to influence the outcome of an elective office as defined in Section 8-13-1300(31)(c)."). But a 31(c) Communication "does not include news, commentary, or editorial programming or article, or communication to an organization's own members."

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

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

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

An employer may not provide an advantage to or impose a disadvantage on an employee concerning the employee's employment or conditions for employment based on the employee's contribution, promise to contribute, or failure to contribute to a candidate or committee. An elected official or candidate may not solicit contributions from employees in their area of official responsibility.

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

Loans are permitted but must be by written agreement. A loan is considered a contribution from the maker or the guarantors of the loan and is subject to contribution limits, unless the proceeds of a loan are:

1. Made by a commercial lending institution;
2. In the regular course of business;

3. Granted on the same terms ordinarily available to members of the general public, and
4. Secured or guaranteed upon which collection is not made.

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

Contributions may not be accepted from a registered lobbyist if that lobbyist engages in lobbying the public office or public body to which the candidate is seeking election. S.C. Code § 8-13-1314(A)(3).

Any person may contribute up to the maximum amount of $3,500 in a calendar year to a party committee, legislative caucus committee, or non-candidate committee for campaign accounts. Such committees may not accept more than $3,500 from any one person in a calendar year, unless it is segregated and used for operation expenses (see S.C. Code § 8-13-1300(34)), as opposed to campaign contributions or expenses.

Independent expenditures may be made without registration or reporting (see S.C. Code § 8-13-1300(17)) based on the current statutory definition of non-candidate committee having been ruled unconstitutional and not having yet been amended or replaced. However, any expenditure coordinated with a candidate or agent of a candidate would be an in-kind contribution, subject to limits, disclosure, and use. The Ethics Reform Act defines "Coordinated with" as "discussion or negotiation [with] a candidate or a candidate's agent … concerning, but not limited to, a political communication's:

> (1) contents, including the specific wording of print, broadcast, or telephone communications; appearance of print or broadcast communications; the message or theme of print or broadcast communications;
> (2) timing, including the proximity to general or primary elections, proximity to other political communications, and proximity to other campaign events;
> (3) location, including the proximity to other political communications, or geographical targeting, or both;
> (4) mode, including the medium (phone, broadcast, print, etc.) of the communication;
> (5) intended audience, including the demographic or political targeting, or geographical targeting; and
> (6) volume, including the amount, frequency, or size of the political communication.

S.C. Code § 8-13-1300(33).

G. PUBLIC REPORTING

Public reporting has become an increased focus of regulation and enforcement. All reports required by the State Ethics Law must be filed electronically. The Ethics Commission maintains public reporting with online access to electronic copies of Statements of Economic Interests, certified campaign reports for candidates and committees, lists and disclosures of lobbyists and lobbyist principals, and people or entities that owe fines or penalties to the Commission. Failure to disclose activities and other information has been the subject of recent investigations and prosecutions of lobbyists, lobbyist principals, and people or entities acting in such capacities. Likewise, candidates and public officials have also been targets for disclosure and reporting violations by enforcement actions by the Commission, legislative committees, and prosecutors.

An initial campaign report must be certified and filed after receipt or expenditure of $500. After the initial report, quarterly campaign reports must be filed within ten days following the end of each calendar quarter until the campaign account is closed and the final distributions are made for only specified purposes. S.C. Code §§ 8-13-1308(A), -1370.

Although recent revisions to the Ethics Reform Act increased the penalties for not filing a required report and made full payment of penalties and fines a precondition to continued registration or the re-registration of lobbyists and lobbying principals, the Commission is permitted to waive penalties or dismiss complaints for merely technical violations of the Act. The Commission may also charge late filing fees that can accrue up to $5,000. S.C. Code § 8-13-1510.

Public officials and members must disclose their recusal from official responsibility on matters which affect an economic interest of themselves, their family members, and individuals and businesses with which they are associated. S.C. Code § 8-13-700(B).

H. CONCLUSION

This is only an overview of compliance, disclosure, and ethics in government, lobbying, and campaign financing in South Carolina. It is best to seek legal counsel before wading into this area because it is far better to plan and conform activities to the law and interpretations of the Commission, ethics committees, and prosecutors rather than trying to justify past actions with arguments about technical violations or good faith errors. In addition, prior planning can avoid or protect against many issues in this area that do not have clear or easy-to-find answers, and advisory opinions may exist or be sought in some circumstances.

XVI. COMMERCIAL LAW; MISCELLANEOUS

Marshall Winn, William M. Wilson

A. INTEREST RATES; USURY

The legal rate of interest (*i.e.*, prejudgment interest on liquidated sums) in South Carolina is 8¾%. ***S.C. Code Ann. § 34-31-20.*** Different calculations are applied for judgments entered prior to January 1, 2005. The interest rate on judgments is the prime rate as listed in the Wall Street Journal first edition for the year, plus 4%. The South Carolina Supreme Court is to issue an order January 15th of each year confirming the annual prime rate. ***S.C. Code Ann. § 34-31-20.*** Outside the consumer context, no usury laws exists, and parties may contract for any rate of interest. With consumer transactions, public notice of interest to be charged is required, and there are maximum amounts. Extensive statutory authority about interest rates is found in the South Carolina Consumer Protection Code. ***Title 37, S.C. Code.***

B. UNIFORM COMMERCIAL CODE. TITLE 36, S.C. CODE ANN. §§ 36-1-101 ET SEQ.

In 1966, South Carolina adopted the Uniform Commercial Code based on the 1962 Official Text. In 2001, South Carolina adopted *Article 2A – Leases* and the revised *Article 9 – Secured Transactions*. In addition, South Carolina has adopted the 1972 Text for *Article 4A – Funds Transfers* and amendments to *Article 8 – Investment Securities*. Apart from the usual assortment of nonstandard provisions and these revisions, South Carolina's adoption generally follows the 1962 Official Text; the South Carolina Reporter's Comments at the end of each section detail variations.

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

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

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

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

a. Transacting any business in this State;

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

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

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

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

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

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

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

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

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

C. SUNDAYS. S.C. CODE ANN. §§ 53-1-5 ET SEQ.

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

D. HOLIDAYS. S.C. CODE ANN. §§ 53-5-10 ET SEQ.

Holidays for banks and savings and loan institutions are those observed by the Federal Reserve Bank. State holidays include:

1. January 1

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

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

4. May 10th (Confederate Memorial Day)

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

6. July 4 (Independence Day)

7. The first Monday in September (Labor Day)

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

9. National Thanksgiving Day and the day after

10. December 24-26

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

E. LEGAL AGE

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

F. MOTOR VEHICLES. SEE GENERALLY, TITLE 56, S.C. CODE.

The Uniform Motor Vehicle Registration Act is closely followed. The State Department of Motor Vehicles, P.O. Drawer 1498, Blythewood, South Carolina 29016 (10311 Wilson Blvd., Building C, Blythewood, SC 29016), has general supervision of motor vehicles. Most counties have at least one office of the Department where business can be conducted.

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

trailer must be registered and license fee paid. Dealers may issue temporary license plates and registration for vehicles sold to nonresidents for licensing and registration in another state.

All persons operating a motor vehicle are required to have a driver's license from the Department of Motor Vehicles. A nonresident with a valid home state license is exempt. Members of the military must have a license. The license must be in the immediate possession of the operator.

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

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

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

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

The owner of any motor vehicle for which registration is required must maintain security in the form of a valid policy of insurance or such other form of security as may be approved by the Department of Motor Vehicles. Such policy must provide liability coverage with minimum limits of $25,000 for injury or death of one person, $50,000 for injury or death of two or more persons, $25,000 for injury to or destruction of property. Penalties for noncompliance include fine or imprisonment and revocation of driving license and all registrations in the offender's name.

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

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

G. STATUTE OF LIMITATIONS

Like many jurisdictions, South Carolina has a myriad of statutes that speak of Limitations of Actions. Many, but not all, of the statutes are found in ***S.C. Code Ann. §§ 15-3-20 et seq.*** The applicability of each, however, will need to be very carefully determined on a case-by-case basis, after an examination of any other relevant statutes and after close consultation with South Carolina counsel.

H. PRODUCTS LIABILITY. S.C. CODE ANN. §§ 15-73-10 ET SEQ.

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

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

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

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

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

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

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

XVII. STATE AGENCIES

A. SOUTH CAROLINA SECRETARY OF STATE

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

Current Administrators
Secretary of State: Mark Hammond
Director of Business Filings: Jody Steigerwalt

Deputy Secretary of State & Chief Legal Counsel: Melissa W. Dunlap
General Counsel: Shannon A. Wiley

B. SOUTH CAROLINA DEPARTMENT OF REVENUE

Post Office Box 125
Columbia, South Carolina 29214

300A Outlet Pointe Boulevard
Columbia, South Carolina 29210
Phone: (803) 898-5000
Website: www.sctax.org

Current Administrators
Director: W. Hartley Powell
Counsel: Joe Dusenbury, Jr and Jason Luther

C. SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION

Post Office Box 11329
Columbia, South Carolina 29211

Synergy Business Park, Kingstree Building
110 Centerview Drive
Columbia, South Carolina 29210
Phone: (803) 896-4300
Website: www.llr.state.sc.us

Current Administrators
Director: Emily Farr
Chief Advice Counsel: Darra James Coleman

D. SOUTH CAROLINA DEPARTMENT OF COMMERCE

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

Current Administrators
Secretary of Commerce: Robert M. Hitt III
Chief Legal Counsel: Karen B. Manning

E. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Aycock and Sims Building
2600 Bull Street
Columbia, South Carolina 29201

Phone: (803) 898-3432
Website: www.scdhec.gov

Current Administrators
Director: Rick Toomey
General Counsel: W. Marshall Taylor Jr.