

**LEGAL GUIDE
TO DOING BUSINESS
IN TEXAS**

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DISCLAIMER

The information in this Legal Guide represents a general guide to certain Texas state laws applicable to doing business in Texas and is based on information available as of November 1, 2002. This guide does not address United States federal law issues and should not be relied upon in any specific factual situation. It is not intended to cover all laws or regulations that may be applicable to a specific factual situation. If you have questions or specific issues to be resolved, you should contact a lawyer authorized to practice in Texas.

INTRODUCTION

Geographic Description

Texas is located in the southern United States and extends from the Gulf of Mexico to the Guadalupe Mountains of far West Texas and from the semitropical Lower Rio Grande Valley to the High Plains of the Panhandle. Texas occupies about 7 percent of the total water and land area of the United States, consisting of 261,914 square miles of land and 5,363 square miles of water. The State's 2001 population was in excess of 21.3 million.

Investment Climate

Texas offers a favorable business climate, with relatively low wage rates and taxes. Other factors contributing to the favorable business climate are an excellent transportation system, strong motor freight and railroad services, deep-water port facilities and a number of major airports.

Texas now accounts for 7.2 percent of total U.S. employment and leads all states in net job creation since 1990.

Texas has large energy, manufacturing and service sectors. It also has a significant technology base, with the second-highest technology wage base and the third-highest number of high tech establishments among U.S. states.

Educational Institutions

Texas strongly supports higher educational institutions with significant state assets permanently allocated to its colleges and universities. Several Texas universities and research institutions are leaders in electronics, medical, biotechnology, aerospace, advanced materials, and energy-related research. The University of Texas System and the Texas A&M University System have their main campuses in Austin and College Station, respectively, with additional facilities in a number of other Texas cities. The Texas Medical Center in Houston is one of the world's largest medical centers with several leading teaching and research hospitals and institutions. A number of other fine colleges and universities are located in various Texas cities and towns.

BUSINESS ENTITIES

Corporations

State of Incorporation. The Texas Business Corporation Act was adopted in 1955 and has been amended regularly since then to keep up with changes in corporate practices.

Corporate Formation. A Texas corporation may be formed by filing Articles of Incorporation with the Secretary of State. The Articles of Incorporation must be signed by an incorporator who is any natural person of the age of 18 or more. The signed Articles may be mailed physically or sent by facsimile to the Secretary of State. A filing fee of \$300 is required to be paid to the State (for expedited service, an additional \$10 fee is charged). After the Articles are filed, the incorporator has no function, and the Board of Directors adopts bylaws and conducts other organizational formalities.

Articles of Incorporation. The Articles of Incorporation are a matter of public record. They must specify the name of the corporation, the period of duration (which may be perpetual), the purpose for which the corporation is organized, the initial registered agent and registered office, name and address of the incorporator, the names and addresses of the initial board of directors, the number of authorized shares and the designation of any classes of shares and their relative rights, and a statement that the corporation will not commence business until it has received for the issuance of shares consideration of the value of a stated sum which must be at least \$1,000. Other provisions may be included which are not inconsistent with law such as limitations on the liability of directors, reservation of preemptive rights, granting of cumulative voting and voting requirements for written shareholder consents. After shares are issued, amendments to the Articles may be made only with shareholder approval.

Name. The corporate name must contain the word "corporation," "incorporated" or "company", or an abbreviation of one of those words, and the name must not be deceptively similar to the names of other corporations doing business in Texas or contain language that would imply it is organized for any purpose other than the one(s) contained in its Articles of Incorporation.

Bylaws. The Bylaws are not a matter of public record. The Bylaws contain provisions for regulation and management of the affairs 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 or the shareholders unless that power is reserved only to the shareholders in the Articles of Incorporation or Bylaw provisions.

Authorized Shares. Shares of capital stock may be issued for any consideration deemed sufficient by the Board, including cash, services performed or contracts for services to be performed, promissory notes, securities of the corporation or other securities. The number of authorized shares specified in the Articles of Incorporation is the maximum number of shares which may be issued, with no obligation for a corporation to issue all authorized shares. A corporation may issue one or more classes of shares having different rights and preferences, and any such class may be divided into one or more series. Shares having a par value may not be issued for less than the par value thereof.

Meetings of Shareholders and Directors. Texas law provides for annual meetings and special meetings of shareholders. Failure to hold the annual meeting at the time designated does not work a dissolution of the corporation. Shareholders may also act by written consent in lieu of a meeting. Shareholders elect the Board of Directors at the annual shareholders meeting. The

Board of Directors, which may consist of one or more directors, elects officers and manages the business and affairs of the corporation. Directors need not be citizens or residents of the State of Texas or of the United States unless the Articles of Incorporation so require. Directors may act by unanimous written consent in lieu of a meeting. Notice requirements for shareholders and directors meetings are set forth; however attendance by a director at a meeting constitutes a waiver of notice in most circumstances.

Authority of Shareholders, Directors and Officers. The shareholders must vote or consent to approve certain corporate actions such as mergers, amendments to the Articles of Incorporation, the sale of all, or substantially all, the property and assets of the corporation, if not made in the usual course of its business, and dissolution. Other matters are voted on by the Board, including most types of amendments to the Bylaws, payments of dividends, issuance of shares, corporate loans and other significant transactions outside the ordinary scope of the day-to-day business. The Board also elects officers, which must include a President and a Secretary and usually also includes one or more Vice Presidents and a Treasurer. There may also be a Chairman 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 Texas, or of the United States.

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 pierced because the corporation did not maintain formal corporate practices.

Foreign Corporations. No foreign corporation is entitled to transact business in Texas until it has obtained a Certificate of Authority to do so from the Secretary of State of Texas. Each foreign corporation authorized to transact business in Texas must maintain a registered office and a registered agent in the state. The president and all vice-presidents of a foreign corporation authorized to transact business in Texas and its registered agent are agents of such corporation upon whom process, notice or demand required or permitted by law to be served on the corporation may be served. A foreign corporation which transacts business in Texas without a Certificate of Authority shall be liable for all fees and franchise taxes which would have been payable if a Certificate of Authority had been obtained, plus all applicable penalties plus an amount not less than \$100 nor more than \$5,000 for each month during which the corporation transacted business in Texas without a Certificate of Authority.

Annual Reports/Franchise Tax. Corporations organized in Texas or otherwise authorized to do business in Texas must file an Annual Franchise Tax Report with the Comptroller of Public Accounts each year setting forth certain financial information relating to calculation of the Texas franchise tax and other information including the names and addresses of its officers and directors.

Partnerships

Partnership. A partnership is an association of two or more persons to carry on a business for profit as owners. The persons may be individuals, corporations and other entities. Texas partnerships are governed generally by the Texas Revised Partnership Act and, if applicable, its predecessor, the Texas Uniform Partnership Act. A partnership is an entity distinct from its partners.

Except as prohibited by law, a partnership agreement governs the relations of the partners and between partners and the partnership. If not addressed by the partnership agreement, the Texas Revised Partnership Act governs those relations.

Each partner is an agent of the partnership for the purpose of its business. Unless a third party knows that a partner does not have authority to act for the partnership in a particular matter, an act of a partner binds the partnership if the act is for apparently carrying on the partnership business in the ordinary course. Generally, all partners are liable jointly and severally for all debts and obligations of the partnership.

A partnership may become a registered limited liability partnership by filing an appropriate application with the Texas Secretary of State. An annual renewal application must be filed in order to maintain the effectiveness of the registration. A registered limited liability partnership's name must contain the words "registered limited liability partnership" or the abbreviation "L.L.P." as the last words or letters of its name. A partner in a registered limited liability partnership is not individually liable for obligations of such partnership, except where the partner was involved in acts or omissions of another partner giving rise to the obligation or where the partner knew of such acts or omissions and failed to take reasonable steps to prevent or cure such acts or omissions.

Limited Partnership. A limited partnership is a partnership formed by two or more persons under the laws of Texas and having one or more general partners and one or more limited partners. A person may be an individual, corporation, partnership or other entity.

The name of a limited partnership must contain the words "Limited Partnership", "Limited", or the abbreviation "L.P." or "Ltd." as the last words or letters of its name and may not contain,

except in certain circumstances, the name of a limited partner. The exclusive right to use of a name may be reserved for 120 days by filing an appropriate application with the Secretary of State of Texas.

A limited partnership or a foreign limited partnership subject to the Texas Revised Limited Partnership Act must maintain a registered office and a registered agent for service of process in Texas.

To form a limited partnership, the partners must enter into a partnership agreement and one or more partners, including all general partners, must execute a Certificate of Limited Partnership. The certificate must be filed with the Secretary of State of Texas.

A limited partnership may become a registered limited liability partnership as well as a limited partnership if it complies with the requirements of the Texas Revised Partnership Act applicable to such registration.

Except as provided by the Texas Revised Limited Partnership Act, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided by such Act, a limited partner is not liable for the obligations of a limited partnership, unless the limited partner is also a general partner or, in addition to exercising the limited partner's rights as a limited partner, the limited partner participates in the conduct of the business.

Before transacting business in Texas, a foreign limited partnership must file an appropriate application with the Secretary of State of Texas. A foreign limited partnership must maintain a registered office and a registered agent for service of process in Texas.

Limited Liability Companies

The Texas Limited Liability Company Act permits any person, which includes an individual, corporation, or other entity, to act as an organizer of a limited liability company by signing and filing Articles of Organization for such company with the Secretary of State of Texas. If the Articles of Organization are found to conform to law, the Secretary of State will issue a Certificate of Organization and the existence of the limited liability company will begin.

The name of a limited liability company must contain the words "Limited Liability Company" or "Limited Company" or the abbreviations "L.L.C.", "LLC", "LC", or "L.C.". The word "Limited" may be abbreviated as "Ltd." or "LTD" and the word "Company" may be abbreviated as "Co". The exclusive right to the use of a limited liability company name may be reserved for 120 days by filing an appropriate application with the Secretary of State.

Each limited liability company or foreign limited liability company subject to the Limited Liability Company Act must maintain a registered office and a registered agent in Texas. The managers, if any, and the registered agent are the agents of the limited liability company for service of process.

A limited liability company may have one or more members. The members normally adopt the Regulations of the limited liability company containing provisions for the regulation and management of the affairs of the limited liability company. Except to the extent reserved to the members by the Articles of Organization or Regulations, the business of the limited liability company may be managed by a manager or managers elected by the members. Generally, the Regulations contain provisions regarding the number and election of managers, the manner of filling a manager vacancy, committees of managers and meetings of managers. One or more

persons, who may or may not be members or managers, may be designated as officers of the limited liability company.

Except as otherwise may be provided in the Regulations, a member or manager is not liable for the debts, obligations or liabilities of a limited liability company. A membership interest is personal property and a member has no interest in specific limited liability company property.

A promise by a member to make a contribution to a limited liability company is not enforceable unless set out in writing and signed by the member. The Regulations govern allocations of profits and losses among and distribution to members.

No foreign limited liability company may transact business in Texas unless it files an appropriate application with the Secretary of State of Texas. A foreign limited liability company which transacts business in Texas without a Certificate of Authority shall be liable for all fees and franchise taxes which would have been payable if a Certificate of Authority had been obtained, plus all applicable penalties plus an amount not less than \$100 nor more than \$5,000 for each month during which the limited liability company transacted business in Texas without a Certificate of Authority.

Assumed Business Names

Any individual, partnership or other entity, other than a corporation, limited partnership, registered limited liability partnership or limited liability company, which regularly conducts business in Texas under an assumed name must file an appropriate assumed name certificate with the county clerk in each county in which such person maintains business premises (or if there are no premises, in which business is conducted). Any corporation, limited partnership,

registered limited liability partnership or limited liability company which regularly conducts business in Texas under an assumed name must file an appropriate assumed name certificate with the Secretary of State of Texas and with the county clerk in each county designated by statute. If information in a previously filed certificate becomes materially misleading, a new certificate must be filed. A certificate remains effective for a term not exceeding ten years from the filing date and may be renewed for successive ten year terms.

STATE TRADE REGULATION

Texas Antitrust Law

The Texas Free Enterprise and Antitrust Act is part of the Texas Business and Commerce Code. This antitrust statute is similar to the federal Sherman Act, and Section 15.05 has provisions much like Sherman Act §§ 1 and 2 and Clayton Act § 7. There is no requirement for premerger notification akin to the federal Hart-Scott-Rodino Act.

The Texas statute covers trade and commerce occurring wholly or partly within Texas. It explicitly requires that it be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes, to the extent that this can be done consistent with its purpose to provide the benefits of competition to consumers in Texas. The statute also specifically maintains most explicit federal antitrust exemptions, does not prohibit actions approved or required by a governmental agency, and protects actions by providers of professional services that are designed to improve quality or cut costs.

For one antitrust cause of action, predatory pricing, the Texas Supreme Court has developed a unique, specific standard. To prove that a seller's prices are predatory, a plaintiff must show that (1) the seller has an objectively reasonable expectation of recouping the losses it incurs while charging predatory prices, by charging higher prices later, and (2)(a) the seller's prices were below its average variable cost or (b)(i) there are substantial barriers to entry, (ii) the seller's prices were below its short-run profit-maximizing price and its average total cost, and (iii) the benefits of this pricing comes from its tendency to discipline or eliminate competition and thereby enhancing the seller's long-term ability to reap the benefits of monopoly power. In contrast, the federal standard is not so specific. Generally speaking, the federal courts have

required that the seller's prices be below some appropriate measure of cost, usually marginal or average variable cost, and that the seller had a reasonable prospect of recouping its losses.

The Texas antitrust laws may be enforced by persons who have been injured by a violation of the statute or by the Attorney General of Texas. As under *Illinois Brick*, indirect purchasers lack standing to pursue antitrust claims. The statute of limitations is four years. A copy of the petition that initiates a private action must be sent to the attorney general. The attorney general also has the authority to investigate possible antitrust violations using civil investigative demands for documents and testimony. In an action brought by the attorney general to challenge a merger or acquisition that may lessen competition, a court may order divestiture.

Covenants Not to Compete

Texas courts will enforce a covenant not to compete if it does not impose on the promisee a greater restraint than is reasonably necessary to protect the business and good will of the promisor. Texas courts generally will refuse to enforce a noncompete covenant rather than rewrite it. Aside from its enforceability under that standard, a covenant not to compete may violate the Texas antitrust law. However, a savings provision in the antitrust statute states that a noncompete covenant remains enforceable if it is part of an otherwise enforceable agreement and to the extent that its restrictions as to time, geographical area, and scope of activity are reasonable and do not impose a restraint greater than is necessary to protect the business interests of the promisee. No noncompete covenant has been found to violate the Texas antitrust law.

Deceptive Trade Practices

Texas has a Deceptive Trade Practices Act that is designed to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty. The DTPA provides a cause of action for deceptive trade practices and reduces the burdens of proof and the defenses that are part of common law fraud and breach of warranty claims. The “laundry list” of conduct that may violate the DTPA includes making misleading statements about the origin or quality of goods or services, passing off, false advertising, disparaging the goods or services of others, and misrepresenting warranties. Under the DTPA, conduct may be “unconscionable” if, to a consumer’s detriment, it takes advantage of the consumer’s lack of knowledge, ability, experience, or capacity to a grossly unfair degree.

The DPTA provides remedies that go beyond the common law remedies for similar wrongful conduct. A consumer who prevails in a DTPA action may obtain his actual damages, damages for mental anguish, additional damages where the violation was knowing, attorney fees, and injunctive relief.

Theft of Trade Secrets

Texas common law allows a cause of action for theft of a trade secret. The claim requires that the information actually have been a trade secret, that the trade secret was improperly acquired through a confidential or contractual relationship, and that the trade secret was used without authorization from the owner. The Texas Theft Liability Act also provides a statutory cause of action for misappropriation of trade secrets.

Business Opportunities

Texas has a Business Opportunity Sales Act designed to protect against false, misleading, or deceptive practices in the marketing and sale of business opportunities. 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 represents that the purchaser will profit from the business opportunity or for which the seller will provide a marketing program or assist in finding a location for the business. The Act requires registration with the Texas Secretary of State prior to offering the business opportunity and disclosure of certain information to the potential purchaser before the sale. Some business opportunities are exempt from these requirements.

Texas does not regulate the sale of franchises as such. Although the Business Opportunity Sales Act covers some sales of franchises, such sales are exempt from the Act if covered by Federal Trade Commission franchise regulations.

TAXATION

State and Local Taxation

Businesses operating in Texas may be subject to a variety of taxes and fees imposed by the state of Texas, as well as by various localities. The most important generally applicable Texas state and local taxes are as follows:

Sales and Use Tax. Texas imposes a sales tax of 6.25% on retail sales of tangible personal property, as well as on a number of services. Local sales taxes may also be imposed, up to a maximum combined state and local rate of 8.25%. The sales tax is collected by the seller at the point of the sale or service. Taxpayers who purchase tangible property or taxable services outside of Texas for use in Texas are liable for a corresponding use tax.

Taxable services include amusement services, cable television services, personal services, motor vehicle parking and storage services, the repair, remodeling, maintenance, and restoration of tangible personal property, telecommunications services, credit reporting services, debt collection services, insurance services, information services, real property services, data processing services, real property repair and remodeling, security services, and telephone answering services.

Important exemptions from the sales tax are available for occasional sales and sales of a business, purchases of manufacturing equipment, sales for resale, purchases by exempt entities,

certain medical and food items, and certain uses of gas and electricity. Other exemptions are also available.

Motor vehicles are not subject to the general sales and use tax. Rather, these sales are subject to a separate motor vehicle sales and use tax at a rate of 6.25%.

Property Tax. Cities, counties, school districts, and other Texas local governments are funded primarily through the property tax, which is imposed on real property and business personal property. On January 1 of each year, taxable property is valued by the central appraisal district for the county in which the property is located. Taxpayers may protest property valuations before the central appraisal district's appraisal review board.

Each taxing unit (*e.g.*, city, county, school district) adopts a rate each year and applies that rate to the value of each taxpayer's property as determined by the central appraisal district. Property taxes are generally payable by January 31 of the year following the tax year.

Franchise Tax. Corporations and limited liability companies are subject to a franchise tax based on the greater of (a) 0.25% of the corporation's net taxable capital (generally, its assets minus its liabilities) or (b) 4.5% of its net taxable earned surplus (federal taxable income with certain modifications). Partnerships and trusts are currently not subject to the franchise tax.

Texas taxes only that portion of a corporation's net taxable capital or net taxable earned surplus which is apportioned to Texas. The apportionment process involves determining the fraction of

a corporation's overall receipts which are Texas receipts, and multiplying a corporation's net taxable capital or net taxable earned surplus by that fraction. Receipts are characterized as Texas or non-Texas receipts using rules prescribed by the Texas Comptroller of Public Accounts.

Other Taxes. Other state and local taxes which may impact a business operating in Texas may be motor fuel taxes, severance taxes, and utility gross receipts taxes.

No Personal Income Tax. Texas currently has no personal income tax.

LABOR

State Labor Laws

Texas remains an employment-at-will state, which means that an employee without a contract for a definite term may quit or be discharged without liability at any time for any reason that does not violate a statute. A very narrow, judicially-created exception to the employment-at-will doctrine prohibits an employer from discharging an employee solely because the employee refused to perform an illegal act that carries criminal penalties. The Texas Legislature has enacted the following statutes which govern labor and employment relationships within the State:

Texas Commission on Human Rights Act (TCHRA). This statute prohibits employers with fifteen or more employees from discriminating on the basis of race, color, disability, sex, religion, national origin or age. The TCHRA—which also applies to employment agencies and labor organizations – contains a retaliation provision similar to that in the federal Title VII statute, and it imposes a duty similar to that of the federal ADA to reasonably accommodate an employee's disability. The TCHRA gives employees a private cause of action, but also requires the employee to exhaust administrative remedies by filing an administrative complaint with the Texas Commission on Human Rights and receiving a right-to-sue notice. Texas courts frequently rely on federal case law interpreting Title VII, the ADA and the ADEA in adjudicating TCHRA claims.

Discrimination Based on Genetic Information. An employer, labor organization or employment agency commits an unlawful employment practice if it discriminates against an employee or applicant on the basis of genetic information or requires employees or applicants to

submit to genetic testing. Texas law also regulates the procedures and confidentiality of genetic testing.

Religious Accommodation. Texas law requires an employer to accommodate the religious beliefs and practices of an employee unless doing so would constitute an undue hardship on the employer's business. In addition, an employee may not be required to work during a period that the employee requests to be off to attend one regular weekly religious worship service.

Unemployment Compensation Act. This statute sets forth the rules governing the unemployment system in Texas. A totally or partially unemployed individual is eligible to receive benefits for a specified period if he or she is available for work, is able to work, and has registered at a Texas Workforce Commission office and met the TWC's reporting and other requirements. An employee who was discharged for misconduct connected with the work or who voluntarily resigned from employment is not eligible for benefits. Unemployment benefits are paid out of an Unemployment Compensation Fund administered by the State's comptroller, into which state employers pay taxes based on rates set by the Texas Workforce Commission. The TWC also provides training programs, employment services and child care benefits to eligible individuals. The right to apply for unemployment benefits may not be waived.

Employment of Children. The Texas Labor Code contains detailed guidelines for the employment of children under 14, limiting the occupations and hours in which children may be employed.

Wage and Hour Provisions. The Texas Labor Code sets the minimum wage and maximum hour regulations for those Texas employers not covered by the FLSA. The Act also contains requirements for all Texas employers regarding the manner and time for payment of wages and

the setting of paydays, post-termination wage payments, penalties for failure to pay wages, nonexclusive administrative procedures for filing of wage claims, and rules governing deductions from wages. The Texas Family Code sets out the obligations of employers with regard to deducting child support obligations from employees' wages.

"Right-to-Work" Law. Texas is a "right-to-work" state that guarantees the right to work without regard to membership or nonmembership in a union. Employers may not require employees or applicants to join or remain members of a labor union, nor can they prohibit employees from seeking or maintaining union membership. The Texas Labor Code also contains regulations governing labor unions, organizing activities and the arbitration of labor disputes and grievances. Picketers are prohibited from physically obstructing the free entrance or exit from any premises, and picketers may not use insulting, threatening or obscene language.

Workers' Compensation Act. Workers' compensation benefits include the payment of medical bills and partial replacement of lost wages for employees who are injured at work or who have work-related diseases or illnesses. Texas is unusual in that it allows private employers to choose whether to maintain workers' compensation insurance. Employers who choose not to maintain coverage must notify the Texas Workers' Compensation Commission and their employees, and such employers are then subject to personal injury lawsuits from injured workers with modified defenses. If the employer does choose to maintain workers' compensation coverage, such coverage is the exclusive remedy for employees injured on the job without regard to the fault of the employer. However, at the time of employment, an individual employee may elect to retain his or her common law right of action for future on-the-job injuries rather than accepting workers' compensation coverage. The Act specifies requirements for reporting accidents,

provisions for maintaining workplace safety, procedures for compensating employees, and an administrative process for resolving disputes regarding eligibility or compensation.

Disclosure of Information about Employees. An employer whose authorized employee discloses certain work-related information about a current or former employee to a prospective employer is not civilly liable for damages proximately caused by that disclosure unless it is proven by clear and convincing evidence that the disclosure was knowingly false or made with malice or in reckless disregard of the truth or falsity of the information disclosed.

Arbitration Agreements. The Texas Civil Practice & Remedies Code provides for the validity of agreements to arbitrate claims rather than litigating them in court, and sets out procedures for arbitration.

ENVIRONMENTAL

Delegated Federal Programs

The United States Environmental Protection Agency (“EPA”) has delegated to the State of Texas authority to administer and to enforce a number of federal environmental regulatory programs. Pursuant to Title V of the federal Clean Air Act, 42 U.S.C. § 7661-7661f, Texas administers the state’s federal operating permit program. Similarly, EPA has approved State Implementation Plans delegating to the state Clean Air Act enforcement authority over a variety of federal air programs including the Federal Standards of Performance For New Stationary Sources, Prevention of Significant Deterioration program, and the National Emission Standards for Hazardous Air Pollutants.

EPA has delegated to Texas authority over various hazardous waste management programs under the Resource Conservation and Recovery Act ("RCRA") and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901-6992k, including the development of state and regional solid waste management plans and the permitting of hazardous waste treatment, storage, and disposal facilities.

Along with its delegated air and waste programs, Texas administers and enforces federally delegated programs for the regulation of water pollution including the implementation of federal technology-based standards for the regulation of discharges and the permitting of point source discharges under the federal Clean Water Act, 33 U.S.C. §§ 1251-1387. In addition, Texas has delegated authority to administer and to enforce the state’s public drinking water systems program and underground injection control program pursuant to the federal Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26.

State Programs

Pursuant to the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE §§ 361.001-.540, Texas has developed programs regulating the management of industrial solid waste that impose restrictions on the disposal of solid waste not otherwise regulated as hazardous waste under RCRA. Similarly, Texas has implemented a program for the regulation of aboveground storage tanks that mirrors the state's underground storage tank program. TEX. WATER CODE §§ 26.341-.359.

With regard to air permitting, the state requires persons planning to construct new facilities or to modify existing facilities to acquire preconstruction permits or to satisfy the conditions for a permitting exemption prior to beginning such work on the facility. 30 TEX. ADMIN. CODE § 116.110.

The state has developed an independent state Superfund program designed to address contaminated sites that do not qualify for federal cleanup under the federal Superfund program. TEX. HEALTH & SAFETY CODE §§ 361.131-.137, .181-.202.

Texas has developed hazard communication and community right-to-know programs modeled on similar federal laws. Under the Texas Hazard Communication Act, TEX. HEALTH & SAFETY CODE §§ 502.001-.019, owners and operators of regulated facilities in the state must provide information to their employees regarding the hazards of chemical exposure in the workplace. Similarly, under the Manufacturing Facility Community Right-To-Know Act, TEX. HEALTH & SAFETY CODE §§ 505.001-.016, the Public Employer Community Right-To-Know Act, TEX. HEALTH & SAFETY CODE §§ 506.001-.017, and the Non-Manufacturing Facilities Community Right-To-Know-Act, TEX. HEALTH & SAFETY CODE §§ 507.001-.013, owners and operators of

regulated facilities must provide information regarding chemical hazards to the public and emergency responders.

INTELLECTUAL PROPERTY

Trademarks and Service Marks

Statute. Any person who has used a mark in connection with goods or services in Texas may apply for registration upon application with the Secretary of State and payment of a fee of \$50. The items excluded from registration parallel those found in the Federal Trademark Act. Registration is for a term of ten years, with successive ten-year renewal periods available. Registration of the mark is constructive notice of the registrant's claimed rights in the mark and is prima facie proof of ownership, validity, and the exclusive right to use the mark in Texas. Registration entitles the registrant to damages and an injunction for any infringement of the mark. There is no provision in the statute allowing the recovery of attorneys' fees or costs.

Common Law. In Texas, palming off, which falls within the realm of unfair competition, is similar to, but broader than, trademark infringement. It is the use or simulation by someone of the name, symbol, or device of a business rival in such a manner as is calculated to deceive and cause the public to trade with the second when they intended to have traded with the first. The scope of this protection is broader than that provided by statutory trademark law because it considers the total physical image of the product and the name together. Statutory trademark law only provides the holder of the trademark an exclusive right to use the mark to identify and distinguish his product or service. The remedies for unfair competition include injunctions and monetary damages including lost profits and punitive damages.

Anti-dilution Statute. Although Texas' anti-dilution statute follows the Model State Trademark Act, it offers broader protection than federal law because it allows injunctive relief regardless of

whether there is competition between the parties or a likelihood of confusion as to the source of goods or services. The owner of a distinctive mark may seek to enjoin any act likely to dilute the distinctive quality of a mark, regardless of whether the mark is registered or whether there is competition between the parties or confusion between the marks.

Trade Names

Any person, including individuals, corporations, partnerships, and other legal entities, doing business under an assumed name must file a certificate with the county clerk, and entities created by filing with the Secretary of State (*e.g.*, corporations, limited liability companies or limited partnerships) must file an additional certificate with the Secretary of State. The certificate provides information such as the true name and address of the person and the business to be conducted. A new certificate must be filed within 60 days of any material change of the information contained in the existing certificate.

Trade Secrets

Texas provides common law trade secret protection in civil matters and statutory protection in the criminal context, but it has not adopted the Uniform Trade Secrets Act.

Criminal Statute. A trade secret is defined as any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes. A person commits a third-degree felony in Texas if the person knowingly steals a trade secret, makes a copy of an article representing a trade secret, or communicates or transmits the trade secret without the owner's consent.

Common Law. Texas provides for common law protection of trade secrets. The owner of a trade secret may make the trade secret known to others subject to the contractual duty not to use or disclose the secret.

Ownership of Employee-Developed Inventions

Statute. There is no Texas statute governing ownership of inventions made by employees.

Common Law. If an employee is employed to devise or perfect a particular invention, then the rights in the results of the work for which the employee was employed are the property of the employer. Even where the employee was hired merely to “invent,” without specifying a particular result, the employer is likely to be treated as owner of the rights in inventions made in the scope of employment. With respect to patents, even where the employer is found not to own the patent in the invention, as when the invention is made outside the scope of employment and not subject to an implied agreement to assign, the employer will receive a “shop right,” a royalty free license to use any inventions of employees made on the employer’s time, or with the employer’s facilities and materials. It is unclear whether the “shop right” applies to trade secrets.

Right of Publicity

Statute. Texas provides statutory protection for the use of a deceased individual’s name, voice, signature, photograph, or likeness. Under the statute, an individual has a freely transferable, survivable property right in the use of the individual’s name, voice, signature, photograph, or likeness after the death of the individual. The statute excepts noncommercial uses and certain

media enterprises. Individuals may register the property right, and registration is deemed prima facie evidence of a valid claim to a property right. Only the registered owners of the right, executors, administrators, or court-appointed guardians may exercise the property right during the first year following the death of the individual. The right expires on the fiftieth anniversary of the death of the individual, but if the individual has not transferred the right and there is no surviving spouse, child, grandchild, or parent, the right expires on the first anniversary of death. Liability includes actual damages, or \$2,500, whichever is greater; profits from the unauthorized use; exemplary damages; and attorney's fees, expenses, and costs.

Common Law. Texas courts have recognized a common law right of privacy, including the commercial appropriation of a person's name or likeness without consent. Actual damages are recoverable for mental suffering and anguish resulting from intentional invasion of the right of privacy, regardless of the absence of physical injury. Exemplary damages may be awarded if the tort was committed with malice.

DISPUTE RESOLUTION

State Court System. In the Texas court system, there are two basic types of courts, trial courts and appellate courts. A trial court has one judge. However, appellate courts sit in panels and hear appeals in cases that have been previously tried in the trial courts. Texas is divided into nine administrative judicial regions. Each region has a presiding judge appointed by the Governor for a four-year term. The duties of the presiding judge include promulgating and implementing regional rules of administration, advising local judges on judicial management, recommending changes to the Supreme Court for the improvement of judicial administration, and acting for local administrative judges in their absence. The presiding judges also have the authority to assign visiting judges to hold court when necessary to dispose of accumulated business in the region.

State Trial Courts. There are five different types of trial courts in Texas: municipal courts, justice of the peace courts, constitutional county courts, statutory county courts, and district courts. The subject matter of the case, the amount in controversy, and the relief sought controls which trial court has jurisdiction. In some instances there is concurrent jurisdiction.

Texas Municipal Courts. The Texas Legislature has created municipal courts in each of the incorporated cities of the State. These courts have original and exclusive jurisdiction over violations of city ordinances and, within the city limits, concurrent jurisdiction with justice of the peace courts over Class C misdemeanor criminal cases where the punishment upon conviction is by small fine only. When city ordinances relating to fire safety, zoning, public health, or

sanitation are violated, fines of up to \$2,000 may be charged, when authorized by the governing body of the city. Municipal judges may issue search or arrest warrants. These courts do not have jurisdiction in most civil cases but do have limited civil jurisdiction in cases that involve owners of dangerous dogs.

Texas Justice of the Peace Courts. The Texas Constitution requires that each county in the State establish between one and eight justice of the peace precincts, based on the population of the county. Also, depending on the population of the precinct, either one or two justice of the peace courts are established in each precinct. There are approximately 900 justice of the peace courts in Texas. Justices of the peace are elected in partisan elections and serve four-year terms.

Justice of the peace courts have original jurisdiction in Class C misdemeanor criminal cases, which are less serious minor offenses. These courts also have jurisdiction of minor civil matters. Unless another court has been granted jurisdiction over the subject matter of an action, a justice court has original exclusive jurisdiction over cases in which there is an amount in controversy of \$200 or less. Justice courts also have exclusive subject matter jurisdiction over forcible entry and detainer cases, so long as the matter does not require a trial of title to land.

These courts also share concurrent jurisdiction with the county and district courts in cases where the amount in controversy is between \$200 and \$5000, exclusive of interest. However, a justice court has no authority to issue injunctive relief. A justice of the peace may issue search or arrest warrants, and may serve as the coroner in counties where there is no provision for a medical examiner. These courts also function as small claims courts.

Constitutional County Courts. The Texas Constitution provides that each of the 254 counties of the State has a single county court presided over by a county judge. These judges are elected in partisan elections and serve four-year terms. Unless a case is specifically assigned to another court because of its subject matter, a constitutional county court shares concurrent jurisdiction with justice of the peace courts, county courts at law, and district courts in civil cases where the amount in controversy is between \$200 and \$5,000 exclusive of interest. Also, the constitutional county courts generally hear the probate cases filed in the county, unless the county has a statutory probate court. Constitutional county courts have original jurisdiction over all Class A and Class B misdemeanor criminal cases, which are the more serious misdemeanors.

Texas statutes deny constitutional county courts jurisdiction in suits: (1) to recover damages for slander or defamation of character; (2) to enforce liens on land; (3) on behalf of the state of Texas for escheat; (4) for divorce; (5) for forfeiture of corporate charters; (6) for the trial of rights to property valued at \$500 or more and levied on under a writ of execution, sequestration, or attachment; (7) regarding eminent domain; or (8) for recovery of land.

Constitutional county courts have appellate jurisdiction in cases appealed from justice of the peace and municipal courts where the judgment rendered exceeds \$20, except in counties where county courts at law have been established. Unless the appeal is one from a designated municipal court of record (trial proceedings are recorded by a court reporter), the appeal takes the form of a trial de novo (a completely new trial). Because the courts of appeals require a

minimum judgment or amount in controversy of \$100 the county courts are often the courts of last resort for small claims.

County Courts at Law. Because the Constitution limits each county to a single county court, the Legislature has created statutory county courts at law in the larger counties to aid the single constitutional county court in its judicial functions. Judges sitting in the county courts at law are elected in partisan elections and serve four-year terms.

The legal jurisdiction of these special county-level trial courts varies considerably and is established by the statute that creates the particular court. In order to determine the exact contours of a particular statutory court's jurisdiction, counsel must first consult the specific statute to determine what it provides about a statutory county court's jurisdictional role in the county in which it operates. If a specific provision creating a county court at law conflicts with a general provision in Government Code concerning county courts at law, the specific provision controls.

Generally, statutory county courts have (1) concurrent jurisdiction with district courts in civil cases where the amount in controversy exceeds \$500 but does not exceed \$100,000 (excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs); (2) concurrent jurisdiction with district courts over appeals of final rulings and decisions of the Texas Workers' Compensation Commission, regardless of the amount in controversy; and (3) concurrent jurisdiction with district courts in eminent domain cases. Also, unless a county has a statutory probate court, a statutory county court has concurrent jurisdiction with the

constitutional county court over probate matters. County courts at law have appellate jurisdiction in cases appealed from justice of the peace and municipal courts where the judgment rendered exceeds \$20. Unless the appeal is one from a designated municipal court of record the appeal takes the form of a trial de novo. Because the courts of appeals require a minimum judgment or amount in controversy of \$100 the county courts are often the courts of last resort for small claims.

But, unless otherwise provided by statute, statutory county courts have no jurisdiction in the following cases: (1) a suit to recover damages for slander or defamation of character; (2) a suit for enforcement of a lien on land; (3) a suit on behalf of the state of Texas for escheat; (4) a suit for divorce; (5) a suit for the forfeiture of a corporate charter; (6) a suit for the trial of a right to property valued at \$500 or more and levied on under a writ of execution, sequestration, or attachment; (7) an eminent domain suit; or (8) a suit for recovery of land.

Texas District Courts. The district courts are Texas' trial courts of general jurisdiction. The geographical area served by each court is established by the Legislature, but each county must be served by at least one district court. These judges are elected in partisan elections and serve four-year terms. In sparsely populated areas of the State, several counties may be served by a single district court, while an urban county may be served by many district courts.

The district court is the preeminent Texas trial court. District courts have original jurisdiction in: (1) all felony criminal cases; (2) divorce cases; (3) cases involving title to land; (4) election contest cases; (5) civil matters in which the amount in controversy (the amount of money or

damages involved) is \$200 or more; and (6) any matters where jurisdiction is not placed in another trial court. While most district courts try both criminal and civil cases, in the more densely populated counties the courts may specialize in civil, criminal, juvenile, or family law matters.

Jury trials are available in civil cases upon demand. Defendants in criminal cases or the parties in civil lawsuits have the right to a trial by either six or twelve local citizen. Except in capital murder cases, the right to a trial by jury may be waived.

Proceedings. All civil proceedings in the justice, county, and district courts are governed by the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure are promulgated by the Texas Supreme Court and have the same effect as statutes. Also, judicial regions and individual courts have adopted local rules that vary extensively.

In Texas, filing a petition with the court commences a suit. After the plaintiff files the petition the clerk of the court issues a citation. The plaintiff is responsible for delivering both the citation and a copy of the petition to the defendant, thereby ensuring that the defendant receives his constitutionally required right of notice. There are strict rules governing this procedure. In Texas, one can serve process on individuals by: (1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached; or (2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto. Also, upon motion supported by an affidavit stating the location of defendant's business, usual place of abode, or

other place where defendant can be found, and stating specific facts showing that the above mentioned methods have not been successful at the address mentioned in the affidavit, the court may authorize service: (1) by leaving a true copy of the citation and a copy of the petition with anyone over sixteen years of age at the location specified in such affidavit; or (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit. Service upon partnerships, domestic and foreign corporations, state agencies, and county and city political bodies have similarly detailed rules for service of process to follow to ensure valid service of process.

Once the defendant receives proper service, he must make an appearance by 10:00 am on the Monday following the expiration of 20 days after service (10 days in justice court.) To preserve objections to personal jurisdiction a defendant must file a special appearance before any other pleading. Also, challenges to venue must be filed before any other pleading except a special appearance. Generally though, the first pleading filed by a defendant is an answer. Unlike federal court, in Texas the answer can take the form of a general denial. A general denial denies all of the plaintiff's allegations and places the burden of proof on the plaintiff. In some instances though a defendant must make a special denial, such as when plaintiff has claimed that all condition precedents have been met or when a verified denial is required by Texas Rule of Civil Procedure 93.

The defendant at this time should also assert any defenses to plaintiff's allegations and allege any counter-claims that may exist against the plaintiff. The plaintiff need not file a general denial in response to defendant's counter-claims, but plaintiff must file a reply if he seeks to assert the

verified denials contained in TRCP 93, challenge whether a condition precedent to defendant's counter-claims has been met, or assert affirmative defenses.

Once this process, called "pleading," is completed, the parties engage in discovery. The purpose of modern discovery is to eliminate any surprise in the adversarial process. Thus, anything relevant to the subject matter of the suit that is not privileged is within the scope of discovery. Information obtained through discovery need not be admissible at trial as long as it is reasonably calculated to lead to admissible evidence.

State Appellate Courts. In Texas, there are three levels of appellate courts, the Courts of Appeals, the Court of Criminal Appeals, and the Texas Supreme Court. The 14 courts of appeals have intermediate jurisdiction in both civil and criminal cases appealed from district and county courts. There are presently eighty judges authorized for these courts, each elected for a six-year term by voters in their court of appeals district. The Court of Criminal Appeals is composed of 9 judges each elected to a six-year term in a statewide election. The Court of Criminal Appeals is the highest state court for criminal matters. The Court of Criminal Appeals sits in Austin and has the power to take discretionary review of all criminal cases decided by the courts of appeals. The Texas Supreme Court is the highest state court for civil matters. The Supreme Court is composed of nine judges elected in statewide election for six-year terms. The jurisdiction of the Texas Supreme Court is limited by the Texas Constitution and by statute. There are specific instances when the Texas Supreme Court can exercise its appellate jurisdiction.

Texas Courts of Appeals. Each court of appeals has jurisdiction in a specific geographical region of the State. Each court is presided over by a chief justice and has at least two other justices. The specific number of justices on each court is set by statute and ranges from three to thirteen. A panel of three justices usually hears appeals in the courts of appeals, unless an en banc hearing is ordered. In an en banc hearing all the justices of that court hear and consider the case.

The courts of appeals have appellate jurisdiction in criminal cases, except in criminal cases in which the death penalty has been assessed. But, the appellate jurisdiction does not embrace any case appealed from an inferior court (municipal court or justice of the peace court) to a county court where the fine imposed by the county court in question does not exceed \$100, unless the sole issue is the constitutionality of the statute or ordinance on which the conviction was based.

A court of appeals has appellate jurisdiction within its territorial limits over final judgments in civil cases where the county or district courts have or assume original jurisdiction and the judgment or the amount in controversy exceeds \$100. In the following instances the decisions of the courts of appeals are final and not appealable to the Texas Supreme Court: (1) All cases of contested elections other than those for statewide offices, except when the validity of a statute is questioned by the decision; (2) All appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals allowed by law, except an interlocutory order denying a media defendant's motion for summary judgment concerning a prior restraint; (3) All civil cases appealed from the county court or from a district court when under the Constitution a county court would have had original or appellate jurisdiction to try it, except in probate matters,

in cases involving the revenue laws of the state, or in cases involving the validity or construction of a statute; (4) All appeals from orders or judgments in suits in which a temporary injunction has been granted or refused or when a motion to dissolve has been granted or overruled; (5) All other cases except when appellate jurisdiction is specifically given to the Texas Supreme Court by statute and is not made final in the court of appeals.

But, if the justices of a court of appeals disagree on a question of law material to the decision or if one court of appeals holds differently from a prior decision of another court of appeals or from the Texas Supreme Court, the Texas Supreme Court has jurisdiction in cases that the courts of appeals otherwise have final judgment.

A court of appeals may issue writs for the general supervision and control over proceedings of lower courts in its own jurisdiction.

Court of Criminal Appeals. The Court of Criminal Appeals is Texas' highest court for criminal cases. The Court has statewide final appellate jurisdiction of criminal cases and makes rules of post-trial and appellate procedure for criminal cases. Most of the cases heard by this Court are appeals from one of the fourteen intermediate courts of appeals. An important exception is that appeals in cases where the death penalty is imposed are made directly from the trial court to the Court of Criminal Appeals. This Court has the authority to issue such orders as may be necessary to enforce its jurisdiction and judgments.

Texas Supreme Court. The Texas Supreme Court is the highest court for civil and juvenile cases in Texas. The Court has original jurisdiction to determine certain legal questions involving

a violation of a legal duty by any officer of the state government, except the governor or certain judicial officers. The Court's appellate jurisdiction extends to questions of law, but does not encompass questions of fact. Accordingly, the Court is precluded from reviewing questions of "insufficient evidence." The Court is limited to reviewing "no evidence" or "as a matter of law" points of error, but may consider questions of fact that are necessary for it to determine whether it has jurisdiction.

The Court may act only if a court of appeals has exercised its appellate jurisdiction, and then only in the following cases: (1) where the judges on a court of appeals disagree on any question of law material to the decision; (2) where one of the courts of appeals holds differently from a prior decision of the Supreme Court or another court of appeals on any question of law material to a decision of the case; (3) involving the validity or construction of a statute necessary to a determination of the case; (4) involving the revenue of the state; (5) where the Railroad Commission is a party; and (6) where it appears that an error of law was committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction, but excluding cases in which the jurisdiction of the court of appeals is made final by statute.

By statute, the Texas Supreme Court is proscribed from hearing cases where the amount in controversy is \$5,000 or less. But, this restriction does not apply to cases involving probate, revenue laws, or the construction or validity of a statute. In such situations the Court may exercise its jurisdiction under the error of law standard even though the amount in controversy requirement has not been met.

The Court may hear a direct appeal from any order of any trial court granting or denying an interlocutory appeal or permanent injunction on the ground of constitutionality or unconstitutionality of any Texas statute. The Court also has the power to issue all writs necessary to enforce its jurisdiction as well as writs of mandamus against any district judge, statutory or constitutional county judge, statutory probate judge, a court of appeals or justice thereof, and any state officer, except the governor. The Court's mandamus jurisdiction extends to cases over which it would not have appellate jurisdiction.

In addition to its adjudicative functions, the Supreme Court of Texas has many administrative duties. It is responsible for the efficient operation of the Texas judicial system. The court makes the rules of practice and procedure governing trials and appeals in civil and juvenile cases in the State, the rules of administration for the Texas judicial system, and the rules for the operation of judicial agencies.

Alternative Dispute Resolution in Texas. Parties seeking alternative dispute resolution have a wide variety of options in Texas. In the state's effort to support alternative dispute resolution Texas passed the Alternative Dispute Resolution Procedures Act which allows a court on its own motion or a motion of a party to refer a pending dispute to alternative dispute resolution. Texas has also passed statutes providing for the judicial enforcement of arbitration agreements and awards.

There is not currently mandatory alternative dispute resolution or arbitration in Texas. However, the Alternative Dispute Resolution Act makes it the responsibility of all trial and appellate court judges and administrators to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. When the court or the

parties do choose to engage in alternative dispute resolution the options include: mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration. Parties engaging in court ordered arbitration must decide before arbitration begins whether the arbitrator's ruling will be binding. If the parties so choose, the arbitrator's award is enforceable in the same manner as any other contractual obligation. Also, if the parties engaging in alternative dispute resolution reach a settlement, the settlement is enforceable as a contractual obligation and can be incorporated into the court's final decree.

FINANCING

Tax-Exempt Financing

Tax-exempt financing may be available through various governmental and quasi-governmental entities for manufacturing and other projects that promote economic development or other goals targeted by the legislature. The most commonly encountered source of such financing is the issuance of industrial revenue bonds ("IRBs"), exempt facility bonds ("EFBs") and sales tax bonds ("STBs") pursuant to the Development Corporation Act of 1979 (as amended, the "Act"). As identified below, certain types of bonds must receive a reservation under the volume limitation (the "Volume Cap") imposed by the federal Tax Reform Act of 1986 on the aggregate principal amount of "private activity bonds" that may be issued within the State of Texas during any calendar year. Currently, the State of Texas' Bond Review Board holds its annual lottery for Volume Cap allocation in October of every year.

IRBs. IRBs may be utilized to finance land and depreciable property for facilities that manufacture, produce or process one form of tangible personal property into another form of personal property. IRB issuances are limited to a maximum amount of \$10,000,000 (subject to reduction for other capital expenditures in the jurisdiction of the issuer), subject to a total company limit of \$40,000,000 nationwide and are limited by restrictions on eligible project costs and use of proceeds. IRB issuances also must reserve a portion of the Volume Cap.

Exempt-Facility Bonds. EFBs may be issued to finance certain types of specified facilities. The restrictions on such issuances depend on the type of facility being financed. EFBs may be issued

for airports, dock and wharf facilities, mass commuting facilities, high-speed inter-city rail facilities and qualified hazardous waste facilities (including certain training and storage facilities) without any limit on the amount of the issue or a reservation under the Volume Cap. While such facilities must be governmentally owned, they may be leased by or subject to management contracts with the business. EFBs for water, sewage and solid waste facilities, qualified residential rental projects, facilities for the local furnishing of electricity or gas and local district heating or cooling facilities must reserve a portion of the Volume Cap.

Sales Tax Bonds. STBs may only be issued by cities that have passed a local sales and use tax for economic development in accordance with the Act. In addition to manufacturing and industrial projects, STBs may also be issued for commercial, recreational, infrastructure, and other types of projects that fit within the guidelines set forth in Section 4A and/or 4B of the Act. STBs may be issued without limitation as to amount (other than inherent limitations imposed by the availability of sales and use tax proceeds) and may not require a reservation of a portion of the Volume Cap. Ineligible projects include for-profit hospitals, multi-family projects and projects that provide municipal services.

Commercial Banking

In Texas, state regulation of financial institutions falls within the jurisdiction of the Finance Commission, and within the Commission, state banks, trust companies and money service businesses are regulated by the Banking Commissioner, savings and loan associations and savings banks are supervised by the Savings and Loan Commissioner, and consumer lending falls within the jurisdiction of the Consumer Credit Commissioner. In the case of banks and

savings and loans, state regulation is cumulative of federal deposit insurance regulation and holding company regulation. Most state regulatory statutes are contained in the Texas Finance Code.

Generally banks may receive and pay deposits, discount and negotiate promissory notes, borrow or lend money with or without security and interest, invest and deal in securities, buy and sell exchange, coin, and bullion, and exercise incidental powers as necessary to carry on the business of banking; act as agent, registrar or transfer agent and in that capacity receive and disburse money and transfer securities; act in fiduciary capacity as guardian, receiver, executor, administrator or trustee; and/or engage in any other activity determined by the Texas Banking Commissioner to be closely related to banking. The appointment of managers (directors and officers) is subject to regulatory approval, as are transactions with affiliates. Acquisition of control of financial institutions or financial institution holding corporation is regulated. Generally, total loans and extensions of credit by a state bank to a person outstanding at one time may not exceed 25% of the bank's capital and certified surplus. For a bank, real estate may not be acquired except to be used as a banking facility or in satisfaction of indebtedness. A state bank may establish and maintain branch offices at any location on prior written approval of the Banking Commissioner.

In keeping with national trends, banks are permitted to affiliate with certain securities companies, subject to strict limitations.

The Texas Constitution, Art. XVI, §16(c) grants to state banks the same rights and privileges that are or may be granted to national banks domiciled in Texas, subject to regulatory notice and approval.

State Blue Sky and Other Securities Issues

The Texas Securities Act of 1957 (the "Texas Act") regulates offers and sales of securities in Texas. Like the federal securities laws, the Texas 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 Texas are prohibited, regardless of the size of the offering, unless the security is registered with the Texas State Securities Board or the security or the particular transaction is exempt under the Texas Act. (Note that state registration requirements have been preempted by federal legislation for certain types of securities and transactions.) 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.

Securities exemptions are divided into two different categories. Exempt securities relate to the nature of the securities offered, such as a security issued by a regulated public utility. The Texas Act sets forth six types of exempt securities: railroad and public utility securities; non-profit corporation securities; securities listed on one of several stock exchanges or the NASDAQ National Market System; commercial paper; debt securities secured by deposit with a trustee of certain entities including a state or the U.S. Government; and debt securities of religious, charitable or benevolent corporations.

The other type of exemption is for the particular nature of the transaction by which the securities will be offered and sold. The Texas Act identifies twenty types of securities transactions that are

exempt from registration. These transactional exemptions include certain transactions made in reliance on SEC Regulation D; transactions made pursuant to private offerings to no more than thirty-five persons everywhere in a twelve-month period (or to 15 persons in Texas as long as the seller reasonably believes that all buyers in Texas are purchasing for investment); offers and sales to certain institutions; offers to an issuer's existing security holders (if no commission or other remuneration is paid for soliciting the security holders); sales of securities under employee benefit plans and several non-issuer exemptions, among others.

Any person who offers or sells a security in violation of the Texas Act's registration provisions, who makes material misstatements or omissions in connection with the offer, sale or purchase of a security, or who otherwise engages in fraudulent conduct is subject to civil and criminal (felony) sanctions as well as administrative orders and fines.

Dealers, agents, investment advisers and their representatives must register with the State Securities Board prior to selling securities or rendering investment advice in Texas, unless exemptions or federal preemption provisions apply. They are also prohibited from engaging in fraudulent practices and may have their registrations revoked or other penalties imposed upon them for violations of the Texas Act.

REAL ESTATE

State Real Estate Law

The State of Texas provides by statute that an alien has the same real and personal property rights as a United States citizen. There are, however, numerous federal and state laws that affect real estate conveyances involving foreign citizens and entities.

Typically, purchasers of real property conduct a due diligence review of the property pursuant to the terms of a purchase and sale agreement (also sometimes called an earnest money contract). The scope of the due diligence review can vary widely according to the transaction, but usually includes the examination of the state of title of the property, a survey of the property, an environmental report and any laws and local ordinances affecting the property, including zoning ordinances. Purchasers of real property obtain a title commitment from a title company. The title commitment sets forth the state of title to the property, including the record owner, any recorded encumbrances such as easements and restrictive covenants, and any liens affecting the property. With the payment of the premium to the title company, purchasers obtain a title policy that insures the purchaser against losses that occur if the state of title is not as set forth in the policy, up to the policy limit. The State Bar of Texas has developed many standardized forms which may be used in real estate purchase transactions, including deeds, assignments and bills of sale.

City and county ordinances enacted in accordance with state statutes, including subdivision, zoning, building and environmental ordinances, affect the development of real property and must be reviewed prior to undertaking development activities.

In Texas, a mortgage of real property is typically in the form of a deed of trust pursuant to which a borrower conveys the property in trust to a trustee (usually a nominee of the lender) as security for a debt owing to the lender. The borrower retains title to the property and the lender obtains a lien. A Deed of Trust includes a power of sale clause, which permits a non-judicial foreclosure in the event of a default by the borrower.

Both real and personal property are subject to ad valorem taxes.

In Texas, the subsurface mineral estate may be separated from the surface estate and conveyed independently. The owner of the mineral estate owns the dominant estate, meaning that, absent any agreement to the contrary between the estate owners, he has the right to use the surface in a reasonable manner to extract subsurface minerals.

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