



# Kansas

Prepared by Lex Mundi member firm,  
Foulston Siefkin LLP

This guide is part of the Lex Mundi Guides to Doing Business series which provides general information about legal and business infrastructures in jurisdictions around the world. View the complete series at: [www.lexmundi.com/GuidestoDoingBusiness](http://www.lexmundi.com/GuidestoDoingBusiness).

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries. Through close collaboration, our member firms are able to offer their clients preferred access to more than 21,000 lawyers worldwide – a global resource of unmatched breadth and depth.

**Lex Mundi – the law firms that know your markets.**

---

# GUIDE TO DOING BUSINESS IN KANSAS

---

Prepared May 2020 by

**FOULSTON**  
ATTORNEYS AT LAW

---

9225 Indian Creek Parkway, Suite 600, Overland Park, Kansas 66210-2000 · 913.498.2100

534 S. Kansas Avenue, Suite 1400, Topeka, Kansas 66603-3436 · 785.233.3600

1551 N. Waterfront Parkway, Suite 100, Wichita, Kansas 67206-4466 · 316.267.6371

## I. INTRODUCTION

### A. Geography, Location, Climate, and Demographics

Kansas is located almost exactly in the center of the contiguous United States (*i.e.*, not including Alaska and Hawaii), and is bordered by Nebraska to the north, Missouri to the east, Oklahoma to the south, and Colorado to the west. Kansas ranks 15th among the states in size with an area of approximately 82,282 square miles (213,109 square kilometers), characterized by hills and wooded river valleys in the east, and flatter treeless plains in the west. The elevation level in Kansas ranges from 679 feet (207 meters) to 4,039 feet (1,231 meters) above sea level.

The Kansas climate is generally hot during the summer and cool to cold during the winter. Average January temperatures are around 30 degrees Fahrenheit (-1 degree Celsius), while average July temperatures range from below 76 degrees to above 80 degrees Fahrenheit (24 - 27 degrees Celsius). Summer daytime temperatures in the 90s and 100s Fahrenheit (30s and 40s Celsius) are not uncommon. Annual precipitation ranges from between 34 and 40 inches (860 and 1,020 mm) in the east, to between 16 and 20 inches (410 and 510 mm) in the west. Most of the annual precipitation falls as rain between April and October, usually in the form of heavy thunderstorms or hailstorms. In the winter, precipitation is generally light in the form of rain and snow. Tornadoes do occur in Kansas, usually in the spring.

In the 2010 census, Kansas had a population of 2,853,118. Topeka, the capital, is located in the northeastern part of the state, and has a population of 127,473. The largest city in Kansas is Wichita, located in south central Kansas. Wichita, with a population of 382,368, is one of the two leading manufacturing cities in Kansas. The other large metropolitan area is Kansas City, Kansas, with a city population of 145,786, but which forms the greater Kansas City area along with Kansas City, Missouri, and their suburbs, with a population around 2,000,000, located in northeastern Kansas on the Missouri River.

Kansas was settled by Europeans largely through migration from the northeastern, Ohio Valley, and Missouri states between 1850 and 1870 and immigration from Northern, Central and Eastern Europe, particularly Germany, Scandinavia, the former Austro-Hungarian empire and what is now the Czech Republic, Russia and Ukraine, between 1875 and 1920. In the 1930s, the state's population declined from almost a decade of drought and dust storms, combined with the effects of the Depression. That was followed by a large migration, including African Americans, from nearby states to the south and southeast during and after the Second World War in connection with work in the aviation industry. In recent years, Kansas population trends have been comparatively stable, although the population is becoming more concentrated in the state's metro areas.

### B. Investment Climate

Kansas's main economic activity has traditionally been agriculture, with an emphasis on wheat production. Kansas is the leading producer of wheat and sorghum grain in the United States. Mineral resource extraction became a major activity in the early 20<sup>th</sup> century, with natural gas and

oil as the most valuable mining products in Kansas. In the 1940s, industrial plants greatly increased in Kansas. Transportation equipment manufacture, particularly aircraft and automobiles, is the leading industrial activity in Kansas. Wichita is home to manufacturing facilities for some of the world's leading manufacturers of light aircraft, including Bombardier (formerly Learjet) and Textron (formerly Cessna and Beechcraft), along with larger aviation and aviation parts manufactured by Spirit AeroSystems, while significant automobile assembly work is carried on in the Kansas City area.

With its low corporate tax rate of four percent, extraordinary workforce, central location, low costs of production, and highly developed distribution channels, Kansas is a very attractive location for any business. Kansas has numerous subsidiaries of multinational corporations, such as Phillips, Siemens, Cargill, Airbus, and Pfizer, and serves as the global headquarters for companies such as Cerner and Koch Industries.

Kansas welcomes new business and industry from around the world. The Kansas Department of Commerce and Housing, and the Kansas Department of Revenue offer programs and tax incentives to businesses desiring to locate or expand within the state. In addition, a new Kansas Tech Council called FlagshipKansas works to spotlight Kansas tech companies, recruit new companies and tech talent, and pursue state funding and policy support.

There are approximately 1,489,000 workers in Kansas, and the unemployment rate is around 3.1 percent. Median weekly wages for Kansas manufacturing employees is around \$1,100. In 2018, 7.0 percent of workers in Kansas belonged to trade unions.

Many of the railroad lines and highways across Kansas form sections of major transcontinental and regional routes. Kansas has the fourth highest mileage of public roadways in the United States with 142,054 miles (228,613 kilometers). Of these miles, 874 (1,406 kilometers) are interstate highways, including the Kansas Turnpike, which is a toll road. Greater Kansas City is one of the principal rail centers in the Middle West. There are 4,216 miles (6,785 kilometers) of railroad tracks in Kansas, much of it operated by BNSF (a combination of Burlington Northern and Santa Fe railroads), Union Pacific Railroad (a combination of UP, MoPac, Katy, and segments of the Rock Island), and Kansas City Southern Railway. There are eight commercial terminals on the Missouri River, which forms Kansas's eastern border, located near Atchison, Leavenworth, Lansing, White Cloud, and Kansas City. Kansas also has approximately 300 airports and airfields, many handling private aircraft and local commercial flights. The airports in Kansas's largest cities are stops for major airline routes to hubs and other destinations in the Midwest, Southwest and Southeast.

### C. Education

Kansas takes pride in its strong public educational system. All elementary and secondary public schools are supported by a system of state aid rather than local taxes. School attendance is compulsory for all children from the ages of 7 to 18. Of all Kansans age 25 and older in 2017, 90.5% percent had a high school diploma, compared to an average of 90 percent in the United States.

Kansas students score exceptionally well in the ACT national standardized test. Seventy-two percent of Kansas high school seniors took the 2019 ACT exam, well above the national average of 52% percent. Kansas' composite score of 21.2, puts the state slightly above the national average of 20.7

In addition to traditional public schools, Kansas also offers alternative charter schools. Charter schools are nonsectarian, outcomes-oriented educational programs that are operated within a school district, but independently from the other school programs of the district. Charter schools encourage school improvement and educational reform through innovative practices and higher academic expectation. Kansas encourages local flexibility and autonomy in other ways as well. Kansas was the second state to participate in the U.S. Department of Education's Ed Flex waiver program, in which local schools can apply for waivers of federal and state regulations, and the fourth state to have an educational improvement plan approved under the Educate America Act: Goals 2000 Program. In 2019, Kansas had 10 charter schools.

Kansas is served by 36 public institutions of higher education: six state universities, a municipal university, 19 community colleges, and six technical colleges. Kansas also has 30 private colleges and universities.

#### D. Government

Kansas state government is composed of the executive, legislative and judicial branches. The governor is the head of the executive branch, and is elected to a four-year term along with the lieutenant governor. The governor may not serve more than two terms in a row. The governor does have veto power, but the legislature can override a veto by a two-thirds majority vote in each house. Other elective executive officials include the secretary of state, attorney general, treasurer of state, and commissioner of insurance, all of whom are also elected to four-year terms.

The state legislature is made up of a Senate, with 40 members, and a House of Representatives, with 125. Senators are elected to four-year terms, while representatives are elected for two years. On the local level, Kansas's 105 counties are each governed by a board of three to five commissioners elected to four-year terms. Counties are further divided up into townships, each of which are governed by three-member boards. Kansas has 627 incorporated municipalities, most of which have the mayor and council form of municipal government. On the national level, Kansas is represented in the United States Congress by four members in the House of Representatives and two Senators.

The judiciary is composed of a State Supreme Court, Court of Appeals, and district courts of general jurisdiction which also address probate, criminal and juvenile matters. Many local cities have municipal courts. The Kansas Supreme Court is the highest court in the state with seven justices. These justices are appointed by the governor but must be confirmed by voters in a general election after the first year in office and thereafter stand for retention in nonpartisan elections every six years. The same procedure applies to the Court of Appeals, although the governor's appointments must be confirmed by a majority vote of the Senate. Since 2014, the chief justice

position is elected by the judges on the Court of Appeals. Judges serve four years and are retained for successive terms by public vote. District court judges are elected to four-year terms. The state's constitution was approved in 1859, and can be amended only by approval of two-thirds of each house of the state legislature or a constitutional convention with a majority vote of the electorate in either instance.

## II. BUSINESS ENTITIES

### A. Corporations

The corporation is the most complex form of business structure. It is a separate legal entity comprised of shareholders, directors, and officers. The shareholders elect a board of directors to manage the corporation. The corporation is responsible for the debts and obligations of the business, and shareholders are typically insulated from claims against the corporation.

Corporate formation in Kansas is governed by the Kansas General Corporation Code, Kan. Stat. § 17-6001 *et seq.* This Code is modeled on the Delaware Corporation Code. It provides for the formation of a corporation conducting or promoting any lawful business or purpose.

#### 1. Incorporation Process

##### a) Articles of Incorporation.

Any single individual, partnership, association, or corporation, singly or jointly, without regard to residency, domicile or state of incorporation, may form a corporation in Kansas by filing an Articles of Incorporation with the Secretary of State, along with a filing fee (currently \$90). The Articles must include the name, which must include a "word of incorporation" and not be identical or confusingly similar to the name of another Kansas corporation absent consent; address of the registered office and name of the resident agent; purpose of the business; number of authorized shares of each class of stock and the rights of each class, unless that power is given to the Board of Directors; and the name and address of each incorporator or director. In addition, the Articles may contain any other provision not inconsistent with the law or the corporate bylaws.

Any amendments to the Articles must be approved by a majority of the incorporators if no payment for stock has been made, or by the board of directors and shareholders if payment has been made and filed with the Secretary of State. Annual reports must include the name of the corporation, location of the principal office, names and addresses of the Officers and Board of Directors, number of shares issued and paid up, nature and purpose of the business, and names and address of shareholders owning at least 5 percent of the stock. The annual report filing fee is \$40.

##### b) Bylaws

The corporate bylaws are an agreement or contract between the corporation and its shareholders to conduct the corporate business in a certain way. The initial bylaws are adopted by the incorporators or initial board of directors if named in the Articles, and may contain any provision not inconsistent with the law or Articles relating to the business of

the corporation. Only the shareholders have the power to amend the bylaws, unless such power is jointly held with the board of directors under the Articles.

c) Foreign Corporations

A foreign corporation is one that is incorporated in another state or country other than Kansas. In order to conduct business in Kansas, a foreign corporation must file a Certificate of Authority with the Secretary of State, along with a filing fee (currently \$115). A business that is opening an office or distribution point in Kansas, or delivering wares to resident agents in Kansas for sale, must obtain such a Certificate.

The Certificate must set forth a certificate of good standing from the jurisdiction of incorporation; the address of the principal office; address of the principal office in Kansas; purpose of the business; name and address of each officer or director; expiration date in jurisdiction of incorporation; statement of assets and liabilities; address of registered office and name of registered agent; and the date of commencement of business in Kansas. A Certificate application must be accompanied by written consent to service of process.

If the application is properly executed, the Secretary of State will issue a Certificate to do business in Kansas unless the name is indistinguishable from the name of a domestic or foreign corporation already authorized to do business in Kansas and written consent has not been obtained, or the state of incorporation is not indicated. Following the issuance of a Certificate, each foreign corporation must annually file a certificate of good standing.

d) Professional Corporation

A professional corporation is comprised on a single professional, or group of professionals, who file both Articles of Incorporation and a certificate from their specific professional regulatory board with the Secretary of State, along with the filing fee. Shareholders of a professional corporation are limited to members of that specific profession.

## 2. Shares

a) Issuance and Acquisition of Shares

The number of shares a corporation is authorized to issue must be stated in the Articles of Incorporation. The Board of Directors has the power to issue the shares, and may be given the power to determine the preferences and rights of the shares in the Articles. Every shareholder in a corporation has a right to a certificate signed by or in the name of the corporation certifying the number of shares he or she owns.

Consideration for shares may be paid in cash, labor already completed, personal property, or real property. The amount of consideration per share is determined by the Board, unless reserved to the shareholders under the Articles. Shares of stock may have par value, indicating an amount of initial consideration to be attributed to capital under the Articles. The Board may not issue par value shares for less than the determined amount. All of the consideration paid for no-par value shares is attributed to capital, unless the Board decides otherwise. Shares may be issued for less than the full purchase price, but are subject to call

for the remainder. With partly paid shares, the stock certificate must indicate the total purchase price and the amount that has been paid.

A corporation can acquire its own shares as long as it does not cause an impairment of capital; in other words, as long as the net assets exceed capital. Such shares are commonly called “treasury shares,” and are not voted at shareholder meetings.

#### b) Dividends

The discretion to declare dividends rests with the Board of Directors. The amount declared may equal either the corporation’s surplus (the amount by which net assets exceed capital), or the net profits for the current or preceding fiscal year. The Directors are jointly and severally liable to the corporation for improper dividends or stock purchases if the violation is willful or negligent.

### 3. Shareholders

#### a) Meetings

A corporation’s shareholders must hold an annual meeting, at a date and time designated by the bylaws, for the purpose of electing directors and conducting other business, such as removal of directors, amendment of Articles or Bylaws, merger, sale of all assets, and voluntary dissolution. Upon application by a stockholder or director, the court may order a meeting if the annual meeting is not held within 30 days after the designated date, or within 13 months after the organization of the corporation or the last annual meeting. Special meetings may be called by the Board, or any person given such power in the Articles or Bylaws.

Shareholder meetings are held in the place designated by the bylaws, in or out of the state of Kansas, or the corporation’s registered office if the bylaws are silent. Written notice of the place, date and time (and purpose, if a special meeting) of all shareholder meetings must be given to persons entitled to vote at the meeting between ten and sixty days prior to the meeting, unless announced at the adjournment of the prior meeting or waived by written waiver. Shareholders may act without a meeting with written consent from all persons entitled to vote.

The corporation must prepare a list of the names and addresses of each person entitled to vote at any shareholder meeting upon written request of any shareholder at least 20 days prior to the meeting and must provide access to this list to all shareholders for at least ten days before the meeting at the place of the meeting, as well as at the meeting itself.

#### b) Voting

Persons whose ownership is shown on the corporation’s stock transfer book on the record date determined by the Board (between 10 and 60 days before a shareholder meeting), are entitled to notice of and to vote at the meeting. If no record date is set, it is the date before notice is given, or the day before the meeting if no notice is given. Each share is entitled to one vote, unless the Articles provide otherwise. Cumulative voting, whereby each



shareholder is entitled to votes equal to the number of shares he or she owns multiplied by the number of directors to be elected, may be permitted by the Articles.

A corporation is free to set its own quorum requirements in its Articles or Bylaws, as well as the number of votes needed for approval of a matter, unless otherwise provided by law. A shareholder may authorize another person to act for him or her by proxy, which expires after 3 years unless the proxy provides for a longer term. A proxy is revocable unless it includes a statement that it is irrevocable and is coupled with a sufficient interest in the corporation.

Voting trusts, whereby some or all of a corporation's shareholders transfer their share to a trustee who votes the shares, and voting agreements, whereby shareholders retain their share but agree to vote in a certain manner, are allowed under Kansas law. Voting trusts are limited to a 10-year term, though they may be extended for another 10 year period within two years prior to expiration by those who consent to do so.

#### c) Derivative Suits

In order to bring a derivative suit against the corporation, the plaintiff must have been a shareholder at the time of the transaction, and must remain a shareholder until the conclusion of the cause of action. The plaintiff must first make a demand upon the corporation's Board of Directors to bring the suit, unless it can be shown that a demand would be useless. Then the plaintiff must make a demand on the other shareholder, unless reason not to can be shown.

Court approval of any dismissal or settlement of a derivative suit is required. Unlike most jurisdictions, Kansas will not award attorney fees to a plaintiff when the corporation benefits from the suit.

#### d) Right of Inspection

Any shareholder has the right to inspect and copy certain corporate documents upon written demand under oath to the corporation stating a proper purpose for the inspection. These documents include the stock register, list of stockholders, bylaws, books of account, minutes of shareholder and director meetings, and the corporation's other books and records.

#### e) Limited Liability

Unless the Articles provide otherwise, shareholders are not liable for the corporation's debts, unless the shareholder has an intimate and dominating relationship with the corporation and recognition of the corporation would result in fraud or injustice. In addition, shareholders may be liable by reason of their own conduct.

### 4. Directors

#### a) Duties

The business of every corporation is managed by the Board of Directors, except as

otherwise provided in the Corporation Code or Articles of Incorporation. The Board consists of one or more members, and the number of and qualifications for Directors are fixed by the Bylaws or Articles. Directors do not need to be shareholders, unless required by the Articles or Bylaws. Each Director holds office until a successor is elected or the Director resigns or is removed by a majority of the shareholders. Any Director may resign at any time upon written notice to the corporation. The Board has the authority to fix compensation for the Directors, unless otherwise restricted by the Articles and Bylaws.

b) Meetings

The time and place of Board meetings are governed by the Articles or Bylaws. There is no requirement that Board meetings be held in Kansas, and members may participate by conference call unless prohibited by the Articles or Bylaws. In the case of special meetings, notice must be given within a reasonable time, and may be waived by written waiver.

c) Voting

Unless the Articles or Bylaws otherwise provide, a majority of Directors constitutes a quorum. A lower requirement may be imposed, but not less than one-third. The vote of a majority of persons at a meeting with a quorum constitutes an act by the Board, unless the Articles, Bylaws, or Corporation Code impose a higher requirement. Action may be taken without a meeting by unanimous written consent.

d) Action by Committee

Formation of a committee of one or more Board members may be created by a resolution passed by a majority of the Board. Any committee may be given, through a resolution or the Bylaws, all the power and authority of the Board, except the power to approve an amendment to the Articles or Bylaws, a merger, a sale or lease of substantially all corporate assets, dissolution, or declaration of dividends or issuance of shares (unless provided by the Articles and Bylaws).

e) Liability

A Director is fully protected from liability when he or she has in good faith relied upon accounts or reports prepared by a corporate officer, independent certified public accountant, attorneys, or other records of the corporation.

f) Conflict of Interest

No corporate contract or transaction is voidable solely because a Director or Officer is party thereto or participated or voted at the meeting approving the transaction if his or her interest was disclosed, the contract or transaction was approved by a majority of disinterested Directors or Shareholders, and the contract or transaction is fair.

g) Inspection

Directors have a right to examine the corporation's books and records for a purpose reasonably related to the Director's position as a Director. The court may in its discretion prescribe any limitations or conditions regarding the inspection, or award any relief deemed

just and proper.

#### 5. Officers

Officers are elected as provided in the Bylaws, which is usually election by the Board of Directors. Each corporation must have, at least, a president, treasurer, and secretary, who is required to record all proceedings at the Board and Shareholder meetings. All other officer responsibilities are fixed by the Bylaws. Officers serve until a successor is elected, the officer resigns, or is removed. There are no qualifications to be an Officer, and an Officer is not prohibited from holding more than one office. Vacancies are filled by the Board, unless the Bylaws require otherwise.

#### 6. Indemnification

Directors, officers, employees, and agents may be indemnified by the corporation for expenses, judgments, fines, settlements, and attorneys fees if that person is a party to a lawsuit, other than a derivative suit, due to his or her position in the corporation and acted in good faith in the best interests of the corporation. The lawsuit may be threatened, pending, completed, civil, criminal, administrative or investigative. Indemnification is mandatory for all reasonable expenses if the person is successful in defending against a lawsuit. In defending a derivative action, the person may be indemnified for expenses only if he or she acted in good faith in the best interests of the corporation. The corporation may change these provisions in the Bylaws, and may purchase liability insurance that would cover matters not properly indemnified under the Corporate Code.

#### 7. Merger or Consolidation

A merger occurs when two or more existing corporations combine into one of the corporations, whereas consolidation is where the surviving corporation is a newly formed entity. Approval by the Board of each corporation is required, except approval by the Board of the acquired corporation is not required if the surviving corporation already owns 90 percent or more of the shares of the acquired corporation; there are no special quorum or voting requirements. The shareholders of each corporation also must approve the transaction by a majority vote, except approval by the shareholder of the surviving corporation is not required if the merger does not amend its Articles, and the number of shares to be issues does not exceed twenty percent of outstanding shares of the non-surviving corporation immediately prior to the merger, and approval is not required by either corporation if the surviving corporation already owns 90 percent or more of the shares of the acquired corporation.

#### 8. Dissolution

A corporation can be dissolved with the written consent of all shareholders, or with the vote of a majority of the Board and the vote of a majority of the shareholders. Regardless, all corporations are continued for at least three years following dissolution for the purpose of prosecuting and defending civil, criminal or administrative lawsuits by or against the corporation, and to settle and close the business (dispose of property, pay liabilities, distribute remaining assets to shareholders), but not to continue business. The corporation shall be continued longer if there are pending lawsuits begun before or within the three years following dissolution, or if the court so directs.

#### 9. Close Corporations

A corporation organized in Kansas may elect to be a close corporation if: 1) the Articles indicate that the corporation is a close corporation and provide that all of the corporation's shares shall be held by no more than a certain number of persons not to exceed 35; 2) all shares are subject to one or more transfer restrictions, and 3) the corporation shall make no public offering of stock. A close corporation can be formed or terminated by amending the Articles by a two-thirds vote of each class of shares. A close corporation may be involuntarily terminated if any of the conditions are breached and no steps are taken to cure the breach.

Close corporations are governed by the general provisions of the Corporation Code, unless there is a special provision for close corporations. These special provisions include, if the Articles so provide, that a close corporation may be managed by the shareholders without a Board, and any shareholder may have the option to dissolve the corporation at will or upon the occurrence of a specified event.

#### 10. Not for profit Corporations

Not for profit corporations are governed by the general provisions of the Corporation Code, unless there is a special provision for non-profit corporations, such as to operate on a membership basis rather than issue stock, if the Articles so provide. In a membership nonprofit corporation, each member is entitled to one vote, cumulative voting is not permitted, it can amend its Articles with approval only by the Board, it is not required to have officers, less than one-third can constitute a quorum, and personal immunity is granted for negligent acts by volunteers of charitable organizations that are exempt from federal income taxes.

#### 11. Advantages and Disadvantages

The advantages of a corporation include the limited liability of the shareholders, officers and directors, easy transferability of interests in the business, may be taxed as a partnership if the corporation complies with Subchapter S of the Internal Revenue Code (IRC), shares may be sold to investors to obtain financing, greater availability of fringe benefits (such as pension and insurance plans) under the IRC, and perpetual existence of the entity.

Disadvantages are that the cost of organization may be expensive, a minority shareholder may have no effective voice in electing the board of directors and determining how the business is run, the possibility of double taxation exists (once as corporate income, and again as individual income when shareholders receive dividends), and loss may not be deducted by individual shareholders unless the corporation is taxed under Subchapter S.

#### B. Partnerships

A partnership is a form of business organization that exists whenever more than one person associates for the purpose of doing business for profit. Partnership law in Kansas is governed by the Revised Uniform Partnership Act, found at Kan. Stat. § 56a-101 *et seq.* While a partnership is primarily governed by the partnership agreement, the Act provides gap-filler or default rules, such as for the creation and dissolution of a partnership and the rights and liabilities of partners. The Act provides for two kinds of partnerships: general and limited liability.

## 1. General Partnerships

### a) Creation

A partnership can be formed without any kind of formality. No filings, written partnership agreement or even intent are necessary to form a partnership. The Act does provide, however, that a statement executed by at least two partners may be filed with the Secretary of State, along with a filing fee (currently \$35.00).

### b) Authority

Each partner is an agent of the partnership, and an act of a partner carrying on in the ordinary course of business binds the partnership, unless the partner had no authority to act and the person with whom the partner was dealing knew that the partner lacked authority. An act of a partner that is not apparently in the ordinary course of business does not bind the partnership unless authorized by the other partners.

A partnership may file a statement of partnership authority. Such a statement must include the name of the partnership, the address of its principal office and an office in Kansas if one exists, the names and addresses of all the partners or an agent, and the names of the partners authorized to execute an instrument transferring real property belonging to the partnership. The statement may also include the authority, or limitation on authority, of a partner to enter into transactions on behalf of the partnership. The main purpose of such a statement is to assure any third party that the partner has the authority to bind the partnership for a particular transaction. Any limitation on a partner's authority does not affect third parties who are unaware of the statement, except as to real estate transactions. Statements of authority are cancelled by operation of law after five years.

### c) Duties, Rights and Liabilities

Partners owe the partnership and the other partners a duty of loyalty, duty of care, and obligation of good faith and fair dealing. These duties may not be waived or eliminated in the partnership agreement, but the agreement may identify activities and determine standards for measuring performance of the duties, if not unreasonable. The duty of loyalty encompasses the duty to hold any property or profit derived by the partner in the conduct of business as a trustee for the partnership, not to deal with an interest adverse to the partnership, and not to compete with the partnership. The duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law. Merely acting to further a partner's own interest does not violate any of these duties.

Each partner is presumed entitled to an equal share of the partnership profits and is chargeable with a proportional share of the partnership losses unless otherwise prescribed by the agreement. A partner has a right to reimbursement by the partnership for payments made and liabilities incurred in the ordinary course of business. Each partner has equal rights in the management of the business but is not entitled to remuneration for services performed except for reasonable compensation included with winding up the business of a partnership. A person may become a partner only with the consent of all the partners. A

partnership must also provide partners access to its book and records, if any are kept, including the right to inspect and copy.

A partnership is liable for loss or injury caused to a person, or penalty incurred, as a result of a wrongful act or omission of a partner acting in the ordinary course of business of the partnership, or with the partnership's authority. In a general partnership, all partners are jointly and severally liable for all obligations of the partnership, meaning that the partnership's obligations can be satisfied from a partner's personal assets if the partnership's assets are insufficient. A person admitted as a partner to an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as partner.

#### d) Transferability

A partner is not a co-owner of partnership property and has no interest in it. The only transferrable interest that a partner has in the partnership is the partner's share of the profits and losses and the right to receive distributions. The right to participate in the management of the partnership may not be transferred, and the transferor remains personally liable for all partnership obligations. The partners may agree among themselves to restrict the right to transfer their partnership interests.

#### e) Dissociation, Dissolution and Winding Up

A partner has the power to dissociate at any time, even if not permitted by the partnership agreement. Dissociation may occur when the partnership is notified of a partner's express will to withdraw, an event agreed to in the partnership agreement takes place, a partner is expelled, goes bankrupt, dies, or is adjudicated incompetent. A partner's dissociation is wrongful only if it is a breach of an express provision of the partnership agreement; or, if the partnership is for a definite term or an express undertaking, a partner voluntarily withdraws by express will, is expelled, or goes bankrupt before the term or undertaking is completed. A partner who wrongfully dissociates is liable to the partnership and the other partners for damages cause thereby.

For two years after a partner dissociates, the partnership is bound by an act of the dissociated partner if, at the time of entering the transaction, the other party reasonably believed the dissociated partner was still a partner and did not have notice of the partner's dissociation, but the dissociated partner is liable to the partnership for damages arising from any such transaction. The dissociated partner or the partnership may file a statement of dissociation with the name of the partnership and the fact that the partner is dissociated. This statement is a limitation on the dissociated partner's authority, and third parties are deemed to have notice of the dissociation 90 days after the statement is filed. A partner's dissociation will always result in either a buyout of the partner's interest or a dissolution and winding up of the business.

A partnership is dissolved and its business wound up upon any of the following

occurrences: a partner's express will to withdraw from a partnership at will, the expiration of the term or undertaking in a partnership for a definite term or express undertaking, the express will of all of the partners, or the express will of at least half of the partners following a dissociation by another partner; the occurrence of an event agreed to in the partnership agreement or an event that makes it unlawful for the business to be continued; or by judicial determination. The partnership continues after dissolution only for the purpose of winding up, unless all of the partners (other than those wrongfully dissociated) waive their right to have the business wound up following dissolution. The partnership is bound by a partner's act after dissolution if it is appropriate for winding up the business, or if the other party to the transaction did not have notice of the dissolution. If a statement of dissolution is filed by any partner who has not wrongfully dissociated, third parties are deemed to have notice of the dissolution and limitation of the partner's authority 90 days after it is filed.

In settling the account of the partnership, the partnership assets are first applied to discharge the liabilities of the partnership. Profits and losses are credited or charged to each partner's account. After settling the partners' accounts, each partner must contribute the amount necessary to satisfy partnership obligations in the proportion in which the partner shares losses. Solvent partners proportionately share the shortfall caused by insolvent partners unable to contribute their share.

#### f) Mergers and Conversions

A partnership may be merged with another general or limited liability partnership pursuant to a plan of merger. The plan must set forth the name of each partnership that is party to the merger, name of the surviving entity, type of partnership of the surviving entity and status of each partner, terms and conditions of the merger, manner and basis of converting the interest of each party into the interest of the surviving entity, and address of the surviving entity's principal office. The plan of merger must be approved by all of the partners or by the number specified in the partnership agreement, in the case of a general partnership. In the case of a limited liability partnership, approval must be by the vote required to approve of a merger by the law of the state in which the limited partnership is organized or, if no such law exists, by all of the partners.

A merger takes effect upon approval by all parties, the filing of all requisite documents, or by any date specified in the merger plan, whichever is later. After a merger, the surviving partnership may file a statement that the partnerships have merged into the surviving entity. The statement must include the name of each partnership that is party to the merger, the name of the surviving entity, the address of the surviving entity's principal office and an office in the State if any, and whether the surviving entity is a general or limited liability partnership.

General partnerships may be converted to limited liability partnerships. The terms and conditions must be approved by all the partners, or by the number specified in the partnership agreement. The partnership must file a certificate of limited partnership

including a statement that the partnership was converted, its former name, and number of votes cast by the partners for and against conversion. The conversion takes effect when the certificate is filed or at a later date specified in the certificate.

Limited liability partnerships also may be converted to general partnerships. The terms and conditions must be approved by all partners, regardless of what the partnership agreement provides. After it is approved, the partnership must cancel its certificate of limited partnership. The conversion takes effect upon cancellation of the certificate.

#### g) Advantages and Disadvantages

The advantages to doing business as a general partnership include the fact that it is easy to organize, few initial costs, quasi-entity status (can own assets, contract, sue and be sued, register trademarks, and file bankruptcy), liability is shared by all partners, and partners can deduct business losses on their personal income tax forms. Disadvantages are that each partner is liable for all partnership obligations, the partnership can be bound by the act of any partner, there is no continuity of life, and all partners must pay tax on their share of the partnership profits even if the profits are retained by the business.

## 2. Limited Liability Partnerships

A limited liability partnership is a partnership, and the rules that govern such matters as partners' obligations to each other, distributions, dissociation from partnership, and dissolution of the partnership remain the same for limited liability partnerships as they do for traditional general partnerships. There are, however, significant changes in the liability of limited partners and in how a limited liability partnership is created.

#### a) Creation

The terms and conditions by which a partnership becomes a limited liability partnership must be approved by the vote necessary to amend the partnership agreement or, if none is specified, then by approval of every partner. After approval, the partnership must file a statement of qualification containing the name of the partnership, the address of the registered office and the name of the resident agent for service of process required, a statement of election to be a limited liability partnership, and a deferred effective date if any, along with the appropriate fee (currently \$165.00). The status of the partnership is effective upon filing of the statement, and remains so until either canceled or revoked. A limited liability partnership must file an annual report with the Secretary of State containing (1) the name of the limited liability partnership and (2) a list of partners owning at least 5% of the capital of the partnership with each partner's address and (3) the financial condition of the partnership.

#### b) Liabilities

The most significant advantage that a limited liability partnership has over a general partnership is the level of limited liability that it provides, which is nearly the same as that of a shareholder in a corporation. A partner in a limited liability partnership has immunity



from personal liability for any partnership obligation. However, a partner is fully liable for any obligation personally incurred in the conduct of partnership business.

### 3. Limited Partnerships

Kansas also recognizes the limited partnership as a business entity. Limited partnerships are governed by the Revised Uniform Limited Partnership Act (RULPA), found at Kan. Stat. § 56-1a101 *et seq.*

#### a) Creation

A limited partnership must be formed in writing between one or more general partners and one or more limited partners. The partnership must file a Limited Partnership Certificate with the Secretary of State, which includes the name of the limited partnership, the address of the registered office and name and address of the resident agent, the name and address of each general partner, and the latest date upon which the partnership is to dissolve, together with the appropriate fee (currently \$165.00, or \$160.00 if made online). The limited partnership is deemed created at the time of filing the Certificate, or at a later time specified in the Certificate. The Certificate may be amended or canceled by filing a certificate of amendment or cancellation with the Secretary of State. A limited partnership must file a written annual report to the Secretary of State containing (1) the name of the limited partnership, and (2) a list of partners owning at least 5% of the capital of the partnership with each partner's address., and (3) the financial condition of the partnership.

#### b) Rights and Liabilities

Each limited partner has the right to obtain from the general partners information regarding the state of the business and financial condition of the partnership, a copy of the partnership's income tax returns, a current list of the name and address of each partner, a copy of the Certificate of Limited Partnership and amendments if any, information regarding the capital contributed by each partner, the date on which each partner became a partner, and any other information regarding the partnership that is just and reasonable. Limited partners have no role in the management of the partnership.

A limited partner is not liable for any partnership debts, unless he or she is also a general partner or participates in the control of the business. If a limited partner participates in the control of the business, he or she is liable only to persons who transact business with the limited partnership reasonably believing that the limited partner is a general partner. A limited partner who allows his name to be used in the name of the limited partnership is liable to creditors who extend credit to the partnership without knowledge that the limited partner is not a general partner.

A general partner in a limited partnership has the same rights and liabilities as a partner in a general partnership. The partnership agreement may provide for different classes of general partners having different rights, powers and duties.

#### c) Transferability

A partnership interest is personal property, and is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to exercise any rights as a partner. An assignee is entitled to a share of profits and losses, receive distributions and allocations of income, gain, loss, deduction or credit to the extent of the assignment. A partner ceases to be a partner upon assignment of all partnership interest.

An assignee of any partner in a limited partnership may become a limited partner if the assignor gives the assignee that right according to the partnership agreement or all the other partners consent. An assignee who becomes a limited partner has, to the extent assigned, the same rights and liabilities of a limited partner under the partnership agreement and RULPA; however, the assignee is not obligated for liabilities unknown to the assignee at the time he or she became a limited partner.

#### d) Dissolution

A limited partnership must be dissolved and its affairs wound up upon an event specified in the partnership agreement, written consent of all partners, withdrawal of a general partner and within 90 days all remaining general partners and a majority in interest of the limited partners agree in writing to dissolve the limited partnership or there is no remaining general partner and the limited partners fails to appoint an additional general partner within 90 days, , or by a decree of judicial dissolution.

Upon winding up a limited partnership, the assets are distributed first to creditors, then to partners in satisfaction of liabilities for distributions, and finally to partners for return of their contributions and partnership interests.

#### e) Advantages and Disadvantages

Advantages to doing business as a limited partnership include the fact that investors' liability is limited to the amount of their investment, it is a separate entity (can sue and be sued, own property, raise capital by selling interests in the partnership, and borrow money), it does not have to be dissolved upon death of a partner, and it is managed by a general partner. The disadvantages are that a limited partnership requires advanced accounting procedures, it does not live in perpetuity but rather for a stipulated period, limited partners have little voice in management, it may need to register its securities, interests cannot be freely traded, and a Certificate of Limited Partnership and annual reports must be filed with the Secretary of State.

#### f) Foreign Limited Partnership

A foreign limited partnership is governed by the laws of the state or other jurisdiction under which it is organized, and may not be denied registration because of any difference between those laws and Kansas laws. In order to do business in Kansas, a foreign limited partnership must register with the Secretary of State by submitting an original and duplicate copy of an application for registration as a foreign limited partnership executed by a general

partner, along with payment of the fee. The application must include the name of the foreign limited partnership distinguishable from the names of corporations and partnerships already registered in Kansas absent consent, the state, country or other jurisdiction where it was organized, the date of organization, a statement of good standing in the jurisdiction, the nature and purposes of the business, the address of the registered office and name and address of the resident agent for service of process, irrevocable written consent of the partnership that actions may be commenced against it in the proper court by service of process on the Secretary of State, the name and address of each general partner, and the date on which the partnership first did or will do business in Kansas. Registration can be amended or cancelled by filing a certificate of amendment or cancellation with the Secretary of State, along with the appropriate fee. Every foreign limited partnership must file a written annual report to the Secretary of State showing the financial condition of the partnership.

### C. Limited Liability Company

A limited liability company (LLC) is a business entity that combines the limited liability of a corporation with the flexible management options of a general partnership. In 1990, Kansas became the fourth state to authorize the creation of LLCs by enacting the statutes found at Kan. Stat. § 17-7662 *et seq.*

#### 1. Creation

In order to form an LLC, Articles of Organization must be filed with the Secretary of State setting forth the name of the LLC, the address of the registered office and name of the resident agent for service of process, any matters the members determine to include, the profession if the entity is a professional LLC, and if the LLC company will have series. An LLC is formed at the time of filing the initial Articles of Organization with the Secretary of State, or at any later time specified in the Articles. The Articles may be amended or cancelled by filing a Certificate of Amendment or Cancellation with the Secretary of State. The name set forth in the Articles of Organization must contain the words “limited liability company,” “limited company,” or the abbreviation “LLC,” or “LC,” and must be distinguishable from the name of any other corporation, partnership, or LLC registered with the Secretary of State. An LLC must file annual reports like a limited partnership.

#### 2. Rights, Authority and Liabilities

An operating agreement may provide for classes of members having different rights, powers and duties. Each member of the LLC has the right to obtain, upon reasonable demand for any purpose reasonably related to the LLC, information regarding the status of the business and financial condition of the LLC, a copy of the LLC’s income tax returns, a copy of any written Operating Agreement and Articles of Organization, past and future amounts contributed to the LLC by each member and date on which they became members, and any other information that is just and reasonable, subject to reasonable standards set forth in the Operating Agreement. Each manager of an LLC has the right to inspect the above-listed information, and may keep confidential those records which he or she reasonably believes is a trade secret or not in the best interests of the company. Except as provided in the operating agreement, members and managers of an LLC may transact business with the LLC, may be indemnified by the LLC for any claims and demands, and

share in profits, losses and distributions based on amount of contribution to the LLC.

Unless otherwise provided in the Operating Agreement, the management of an LLC is vested in its members. If the Operating Agreement provides for management by a manager, the manager must be chosen by the members in the manner provided by the Agreement. Each member or manager, depending on who manages the company, has the authority to bind the company. A member or manager also has the power, without ceasing to be a member or manager, to delegate to one or more other persons the member's or manager's rights and powers to manage and control to business, unless otherwise provided by the Operating Agreement. A manager may make contributions and share in the profits and losses of the LLC as a member. A manager has the right to resign in accordance with the Operating Agreement, or by giving written notice to the members and other managers. A member may resign according to the Operating Agreement and, upon resignation, becomes an assignee but is not released from any liability to the LLC.

Any member or manager of an LLC is fully protected in relying in good faith upon the records of the LLC and such information or opinions from other members, managers or employees of the LLC. The debts and liabilities of the LLC belong solely to the LLC. No member or manager of an LLC is personally obligated for any debt or liability of the LLC, unless so provided under the Operating Agreement.

### 3. Transferability

An LLC interest is assignable in whole or in part except as provided in an Operating Agreement. The assignee shall have no right to participate in the management or become a member of the LLC except upon compliance with any procedure provided in the Operating Agreement or upon the approval of all other LLC members. An assignee who does become a member is not liable for any of the assignor's obligations other than to make contributions to the LLC. Unless otherwise provided in the Operating Agreement, the assignee is not entitled to exercise any rights as a member (unless assignor was the only member of the LLC at the time of assignment), but is entitled to share in the profits, losses and distributions of the LLC and has no liability as a member. A member ceases to be a member upon assignment of all interest in the LLC. The granting of a security interest in the member's LLC interest does not cause the cessation of membership unless otherwise provided in the Operating Agreement. An LLC may acquire any LLC interest of a member or manager, thereby cancelling the member's or manager's interest in the LLC, unless otherwise provided in the Operating Agreement.

### 4. Merger and Conversion

A domestic LLC may merge or consolidate with or into one or more LLCs formed in Kansas or any other state. Unless the Operating Agreement provides otherwise, a merger or consolidation must be approved by the members of each LLC that is party to the merger. The surviving LLC must file a Certificate of Merger or consolidation with the Secretary of State, which states the names of the merging LLCs and the jurisdiction of organization for each, that a merger agreement has been approved by each LLC, the name of the surviving LLC, any amendments to the articles of incorporation of the surviving LLC which allowed for a change of name or registered officer or agent, the effective date of the merger if not at the time of filing the Certificate, that the agreement

is on file at the surviving LLC's office and state the address, and that a copy is available on request to any member of any limited liability company which is to merge or consolidate, and an agreement to service of process if the surviving entity is not an LLC.

Any other entity may convert to an LLC by filing with the Secretary of State a Certificate of Conversion to an LLC, and the Articles of Organization. The Certificate must state the date and jurisdiction where the entity was created, the previous name of the entity, the name of the LLC as stated in the Articles of Organization, and the effective date of the conversion if not upon filing the Certificate. The conversion is not considered a dissolution, but rather a continuation of existence of the converting entity, therefore entity is not required to wind up its business, unless otherwise agreed or required by a non-Kansas law. An LLC may convert into another entity by the approval of a majority of members, or as authorized in the Operating Agreement for conversion or merger.

#### 5. Dissolution

An LLC is dissolved and wound up upon the occurrence of the time or event specified in the Operating Agreement, the written consent of a majority of members in the LLC, at any time there are no remaining members in the LLC, or by judicial decree. Unless otherwise provided in the Operating Agreement, the death, bankruptcy or other termination of a member's membership does not cause the dissolution of the LLC., unless the majority of remaining members agree in writing within 90 days of the occurrence to dissolve the LLC.

#### 6. Advantages and Disadvantages

The advantages of an LLC are that the liability of its members is limited to the amount invested, there are flexible management options, it may be taxed as a partnership, and it can be perpetual. The disadvantages are that an LLC's life is ordinarily limited (the Articles of Organization must state a date upon which the company will dissolve), it is not available in every state and thus may not be recognized by the courts of other states, it is complicated to form, and the transfer of interest in an LLC is limited since all members must vote to transfer a member's interest.

#### D. Sole Proprietorship

The sole proprietorship is the most common form of business structure, consisting of a business owned and controlled by one individual. It is limited to the life of its owner; upon death of the owner, the business ends. The owner receives the profits and takes the losses of the business, and is solely responsible for its debts and obligations. Income and expenses of the business are reported on the owner's individual income tax return, and profits are taxed at the individual rate. A sole proprietor who does not expect to have employees is not required to apply for a Federal Employer's Identification Number through the Internal Revenue Service.

Kansas does not require a sole proprietorship to register or file its business name. A sole proprietor may wish to register the business name as a trademark or servicemark, however, with the Secretary of State.

The advantages to a sole proprietorship include few formalities and start-up costs, all decision

making by one person, avoidance of corporate “double tax,” business losses can be taken as a personal income tax deduction, all profits are taxed at individual income tax rate, and registration of a trade name is available. The disadvantages would be that a sole proprietor is not eligible for certain tax benefits given to corporations and partnerships, business terminates upon death of owner, investment capital is limited to that of owner, loans are based on owner’s credit worthiness, and the owner’s assets are subject to business liabilities.

#### E. Joint Ventures

In Kansas, a joint venture is not a separate legal entity. A joint venture is merely a term to describe an association of persons with the intent, demonstrated in an express or implied contract, to carry out a single business venture for joint profit, but who do not create a partnership or corporation. When the business objective is attained or abandoned, the venture ceases to exist. Traditional joint ventures are made up of two competing parties who undertake a project that neither could handle by itself. Other joint ventures might be considered “strategic alliances,” which involve parties coming together for a project that necessitates the collaboration of certain skills or resources.

Joint ventures and partnerships are very similar in their nature and in the contractual relations they create. As such, it is important when creating a joint venture that the parties express their intent to enter into a joint venture and not a partnership. Parties who wish to enter into a joint venture should consider including an explicit statement of intent in the contract.

Kansas, however, also recognizes implied agreements to enter into joint ventures. The acts that Kansas recognizes as indicative of a joint venture include: the joint ownership and control of property; the sharing of expenses, profits and losses, and exercising some voice in determining the division of net earnings; a community of control over the management of the enterprise; and the fixing of salaries by joint agreement.

Unless otherwise agreed to by the parties, liability for losses is shared equally. This, however, does not mean that each party must bear the same type of loss or that the losses attributed to each party must be precise, numerical equivalents. For example, when one party contributes money and another party contributes time and effort, each will lose what he has contributed.

Joint ventures are treated like partnerships for tax purposes. Federal and state taxes “pass through” to the venturers. Each joint venturer must report the venture’s earnings and losses on their individual return.

### III. TRADE REGULATION

#### A. Federal Considerations

##### 1. Federal Antitrust Law

The antitrust laws of the United States are primarily reflected in five federal statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Act.

- a) The Sherman Antitrust Act of 1890. The Sherman Act is divided into two primary sections. Section 1 prohibits contracts, combinations, and conspiracies made in restraint of trade. Section 2 prohibits unilateral and combined conduct that monopolizes or attempts to monopolize trade. Under the Sherman Act, some restraints are "per se" unreasonable (such as price-fixing agreements between competitors) and others are subject to analysis under a "rule of reason" (such as some restrictions placed on a distributor by a manufacturer). Restraints subject to the "per se" rule are never permitted, while those governed by the "rule of reason" test will be evaluated on a case-by-case basis.
- b) The Clayton Act of 1914. The Clayton Act prohibits certain specific anticompetitive activities. For example, the Act prohibits some corporate mergers, exclusive dealing contracts, and agreements under which one product is sold subject to the requirement that the purchaser also buy another product from the seller (known as a "tying" arrangement).
- c) The Robinson-Patman Act of 1936. The Robinson-Patman Act prohibits a seller from discriminating (or inducing others to discriminate) among competing purchasers in the price charged for commodities "of like grade and quality." While the Act focuses on price discrimination, it also addresses other concerns such as discriminatory advertising allowances.
- d) The Federal Trade Commission Act. The FTC Act declares unlawful "unfair methods of competition" and "unfair or deceptive acts or practices."
- e) The Hart-Scott-Rodino Antitrust Improvements Act of 1976. The Hart-Scott-Rodino Act requires that , under certain circumstances, a company proposing to merge with or acquire another company must give prior notice of the proposed acquisition to the Federal Trade Commission and the Justice Department. Failure to report may result in very substantial fines.

Enforcement: Private individuals and corporations may bring lawsuits under the Sherman Act, the Clayton Act and the Robinson-Patman Act. Remedies may include injunctive relief, treble damages and attorney fees. The government may enforce the Sherman Act through criminal prosecutions and civil suits. In addition, the government may enforce the Clayton Act and the Robinson-Patman Act through the FTC or the Justice Department. Only the government can enforce the Federal Trade Commission Act and the Hart-Scott-Rodino Act.

## 2. Federal Import Controls

### a) Import Procedure

The procedures for the importation of goods are governed primarily by the Customs Procedural Reform and Simplification Act of 1978 and regulations, and the Harmonized Tariff Schedules. Generally, goods must be "entered" by the importer within 5 working days after the arrival of the importing vessel or aircraft, meaning that the importer must file

the necessary documentation to release the goods from the custody of the U.S. Customs and Border Protection. The documentation to be filed by the importer includes: Customs Form 3461 or 7533; evidence of the right to make entry; a commercial invoice, where appropriate, containing an adequate description, quantity and value of the merchandise and the item number from the Harmonized Tariff schedules; and an appropriate bond.

If the entry is accepted, the shipment is examined and the entry summary documentation, which is necessary to enable Customs to assess duties and collect statistics on imported merchandise, is filed on Customs Form 7501, with estimated duties attached, within 10 working days after the time of entry. The entry summary documentation usually may be filed at the time of entry, along with the estimated duties, serving as both the entry and entry summary, or may be submitted for preliminary review before the arrival of the merchandise, without the estimated duties attached. The Customs officers examine samples of the goods to determine the value of the goods and their dutiable status, whether the goods are properly marked, contain prohibited articles, are correctly invoiced, and meet any special requirements of the law. Following valuation, the Customs officer must “liquidate” the entry by making a final determination as to the classification and rate of duty applicable to the merchandise.

If an interested party (e.g. U.S. manufacturer, producer, wholesaler, union, trade association) believes that the appraised value, classification or rate of duty is not correct, he or she may file a petition with the Secretary of the Treasury setting for a description of the merchandise, the proposed proper value, classification or rate of duty, and reasons for this belief. If the petitioner is dissatisfied with the Commissioner of Custom’s decision, he or she may file a notice with the Commissioner within 30 days to contest the decision. The decisions of the appropriate customs officer are generally final and conclusive unless a protest is filed with the District Director within 90 days after liquidation. If a protest is denied, a civil action may be commenced in the U.S. Court of International Trade within 180 days after the denial.

#### b) Import Restrictions

There are five major types of import restrictions. First is absolute and tariff-rate quotas. Absolute quotas prescribe an absolute number of certain merchandise that may be imported over a certain period of time. Tariff-rate quotas, on the other hand, subject merchandise to different quotas depending on the time period. Importers should check the Harmonized Tariff Schedules to determine if a quota applies to the type of merchandise being imported, and should be aware that the merchandise may be subject to additional regulations by other federal agencies.

The second major import restriction is legal prohibitions on trade between the U.S. and certain countries. Trade with these countries is only permitted after securing a special license from the Department of Treasury, and imports may be subject to a higher rate of duty.



Third is the “Buy American Act,” which establishes a preference for materials and products which have been produced in the U.S. or from U.S. sources in purchases made by the U.S. federal government by imposing a price differential on foreign product offers. Contractors and suppliers who fail to disclose foreign content may be subject to exclusion from future contracts for 3 years. Exceptions to the Buy American Act may be made if the articles are in short supply in the U.S. or the cost is unreasonably high, or if the President waives the restrictions as applied to a foreign country that is a party to the GATT Agreement on Government Procurement.

The Tariff Act of 1930 is the fourth major import restriction, which places absolute prohibitions on the importation of certain items, such as articles made by forced labor or convicts, or obscene, immoral or seditious items. The Tariff Act also protects U.S. trademarks by empowering Customs to exclude items bearing marks already owned by a U.S. citizen and registered with the Secretary of the Treasury, as well as prohibiting unfair competition and importation, and protecting against U.S. patent and copyright infringement. The importer must also determine whether other prohibitions are applicable under U.S. agency regulations.

Finally, imports are restricted by requiring that all items entering the U.S. must bear a mark indicating their country of origin. Failure to provide such a mark subjects the importer to an additional duty, plus the items must be marked before they are allowed to enter the country. The Trademark Act of 1946 provides that articles entering the U.S. may not bear marks or names calculated to induce consumers into believing that the item was manufactured elsewhere than the country of origin, false designation of origin, or false description or representation.

#### c) Prohibitions on Unfair Competition and Importation Practices

The Tariff Act of 1930 and the Trade Act of 1974 protect U.S. businesses from unfair foreign competition and importation practices. The Tariff Act addresses anti-dumping, countervailing duty, and unfair methods of competition. Anti-dumping laws are intended to prevent injury to American industries from imported goods sold below cost. Title VII of the Tariff Act imposes an anti-dumping duty upon merchandise which is, or is likely to be, sold in the U.S. at less than its fair value if an industry in the U.S. is materially injured, threatened to be materially injured, or the establishment of an industry is materially retarded, at an amount equal to the amount by which the foreign market value exceeds the U.S. price. This includes dumping in a third country through assembly of products or incorporation of below-cost components in the final products sold in the U.S.

Title VII of the Tariff Act also imposes a countervailing duty upon subsidized merchandise imported into the U.S. from certain countries that materially injures a U.S. industry in an amount equal to the net subsidy. Additionally, if an upstream subsidy (such as the provision of capital, loans, preferential rates on goods and services, grants, or assumption of costs and expenses) is being paid for by a foreign government on merchandise which is the subject of a countervailing duty proceeding, the International Trade Commission will

investigate. If the upstream subsidy bestows a competitive benefit on the merchandise and has a significant effect on the cost of manufacturing or producing the merchandise, the amount of the subsidy will be included in any countervailing duty imposed on the merchandise.

Finally, the Tariff Act addresses unfair methods of competition and acts of importation. As amended by the Trade Act, it provides broad prohibition of trade practices that are unfair to U.S. patents, copyrights, trademarks, and relief from foreign misappropriation of trade secrets and false advertising. No showing of injury is required in the case of infringement of statutory rights. The remedies for an unlawful, unfair act include a general exclusion order directing U.S. Customs and Border Protection to exclude the product from entry into the U.S., and a cease and desist order requiring termination of the unfair act. The International Trade Commission is required to make a determination within 90 days of a petition, and may impose daily fines of \$100,000 or the value of the goods, whichever is greater, for violation of its orders.

The Trade Act includes an “Escape Clause,” which provides U.S. producer or labor groups with temporary protection from serious injury caused by increased foreign imports. These actions are heard by the International Trade Commission, which determines whether an article is being imported into the U.S. in such increased quantities as to cause or threaten to cause serious injury to the domestic industry producing an article like or in competition with the imported article. The Commission recommends a remedy to the President, such as duties, tariff-rate or absolute quotas, negotiation of orderly marketing agreements, or adjustment assistance for workers, firms or communities. The President may take such action only if it will facilitate efforts by the domestic industry to make a positive adjustment to import competition and the economic and social benefits outweigh the costs.

In addition to the Escape Clause, the Trade Act authorizes interested persons to petition the U.S. Trade Representative to take retaliatory action against foreign trade practices which deny the rights of the U.S. under trade agreements, or are unjustifiable and burden or restrict U.S. commerce. Retaliatory action may include suspension or withdrawal of trade agreement concessions, the imposition of duties or import restrictions, or the denial of service sector access. Generally, the investigation and taking of retaliatory action is mandated, but the form is within the discretion of the Trade Representative. Mandatory retaliation may be waived by the President where a GATT dispute settlement panel finds that U.S. rights under the trade agreement have been upheld, a foreign government eliminates the unfair practice or provides compensatory trade benefits, the Trade Representative determines that the action would cause serious harm to national security or to the economy disproportionate to its benefits. The Trade Representative is also required to identify unfair practices and countries, and negotiate over three years with those countries to correct the unfair practices and reduce trade barriers.

### 3. Regulation of International Trade and Investment

Foreign investment in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. statutes and related regulations. The following discussion outlines some of the more important aspects of these laws which might be relevant to someone investing in or trading with entities located in the U.S.

a) Restrictions on Foreign Investment

Under a statutory provision commonly referred to as the Exon-Florio Amendment (Section 721 of Title VII of the Defense Production Act of 1950, as added by Section 5021 of the Omnibus Trade and Competitiveness Act of 1988), the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the U.S. Congress has indicated that the term "national security" is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

The statute sets out a timetable for investigations of transactions which can take up to 90 days to complete. The President or his designee has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to decide whether to undertake a full-scale investigation of the transaction. The President has delegated the authority to make investigations pursuant to the Exon-Florio Amendment to the Committee on Foreign Investment in the U.S. ("CFIUS"), an interagency committee made up of representatives of various executive branch agencies. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency.

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete an investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair the national security. If the President makes such a determination, Exon-Florio empowers the President to take any action which the President deems appropriate to suspend or prohibit the transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses which require a facility security clearance in order to perform contracts involving classified information. Under Department of Defense regulations, foreign ownership may cause the Department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD5220.22-R). Assuming that a foreign owner will be in a position to "effectively control or have a dominant influence over the business management of the U.S. firm," the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a "special security agreement" approved by the Department of Defense

and designed to preclude the disclosure of classified information to the foreign owner or other foreign interests.

b) Reporting Requirements for Foreign Direct Investment

All foreign investments in a U.S. business enterprise which result in a foreign person owning a 10% or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis, a part of the U.S. Department of Commerce. Pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. 3101-3108) and the regulations promulgated thereunder (15 C.F.R. 806), such reports must be made within 45 days after the investment transaction. Depending on the size of the entity involved, quarterly, annual and quintennial reports may be required thereafter.

c) The International Investment and Trade in Services Survey Act

The International Investment and Trade in Services Act ("IISA" or the "Act"), passed in 1976, authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. The IISA's primary function is to provide the federal government with the information necessary to formulate an informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IISA, international investments are divided into two classifications – direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated the power to collect data on direct investments to the Bureau of Economic Analysis ("BEA"), a part of the Department of Commerce, and on portfolio investments to the Department of the Treasury.

A "foreign person" is any person who resides outside of the U.S. or is subject to the jurisdiction of a country other than the U.S. A "direct investment" is defined as the ownership or control, directly or indirectly, by one person of 10% or more of the voting interests in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because the IISA further defines "business enterprise" to include any ownership in real estate, any foreign investor's direct or indirect ownership of U.S. real estate constitutes a "direct investment" and falls within the requirement that reports be filed with the BEA.

Unless an exemption applies, a report on Form BE-13 must be filed with the BEA within 45 days of the date on which a direct investment is made. The form collects certain financial and operating data about the investment, the identity of the acquiring entity and certain information about the ultimate beneficial owner. In addition, a Form BE-14 must be filed by any U.S. person assisting in a transaction which is reportable under Form BE-13. The purpose is, obviously, to ensure that those required to file a Form BE-13 do so.

d) The Agricultural Foreign Investment Disclosure Act of 1978

The Agricultural Foreign Investment Disclosure Act ("AFIDA" or the "Act") of 1978 requires all foreign individuals, corporations and other entities to report holdings, acquisitions and dispositions of U.S. agricultural land occurring on or after February 1, 1979. The Act contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the Secretary of Agriculture to determine the nature and magnitude of this foreign investment. Unlike the reports filed under the International Investment Security Act of 1976, reports filed under AFIDA are not confidential but are available for public inspection.

For the purposes of the Act, a "foreign person" is (i) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (ii) a corporation or other legal entity organized under the laws of a foreign country; and (iii) a corporation or other legal entity organized in the U.S. in which a foreign entity, either directly or indirectly, holds 5% or more of an interest. The definition of "agricultural land" is any land in the U.S. which is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding more than a 5% interest in the ownership entity.

#### e) Export Controls

In general, U.S. export controls are more stringent and restrict a wider array of items than the export controls of most other countries. (See the Export Administration Act of 1979, as amended, 50 U.S.C. App. 2401-2420 and the regulations promulgated thereunder, 15 C.F.R. 730-799.) Except for exports to U.S. territories and possessions, and in most cases, Canada, all exports from the U.S. are subject to an export "license." An export license is an authorization which allows the export of particular goods or technical information. Two basic types of licenses exist: general licenses and individual validated licenses.

There are many types of general licenses. These are authorizations which are generally available and for which it is not necessary to submit a formal application. They cover all exports which are not subject to a validated license requirement. Most exports can be made under one of these general classifications.

In contrast, individual validated licenses are required for those items for which the U.S. specifically controls the export for reasons of national security, foreign policy or short supply. If the export of a specific product to a specific destination is subject to an individual validated license requirement, it is necessary to apply for and obtain such a license from the Office of Export Administration, an office within the U.S. Department of Commerce, prior to the export. Certain commodities cannot be exported to any country without an individual validated license, while certain other commodities may require a validated license only for shipment to specified

countries.

For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs in the U.S. Thus, if disclosure of information is subject to a validated license requirement, the disclosure may not be made to a foreign national without first obtaining the necessary validated license, whether or not the disclosure is to occur outside the U.S.

#### f) Foreign Trade Zones

Foreign trade zones are areas in or adjacent to ports of entry which are treated as outside the customs territory of the U.S. In order to expedite and encourage trade, goods admitted into a foreign trade zone are generally not subject to the customs laws of the U.S. until the goods are ready to be imported into the U.S. or exported. These foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, exhibiting and reshipment of merchandise. Foreign trade zones are created pursuant to the Foreign Trade Zones Act (19 U.S.C. 81a-u) and are operated as public utilities under the supervision of the Foreign Trade Zones Board. Under the Foreign Trade Zones Act, the Board is authorized to grant to public or private corporations the privilege of establishing a zone. Regulations covering the establishment and operation of foreign trade zones are issued by the Foreign Trade Zones Board, while U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.

#### g) Anti-dumping Law

The U.S. anti-dumping law (19 U.S.C. 1671-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry, or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the "dumping margin" is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price which is less than their "foreign market value" (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.

The Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. The International Trade Commission makes the determination of whether such sales cause or threaten material injury to a U.S. industry.

### B. State Considerations

#### 1. Kansas Franchise Laws

Although Kansas does not have a separate franchise registration or disclosure statute, it does have a number of franchise termination statutes.

a) Beer and Liquor

The Kansas Liquor Control Act, Kan. Stat. Ann. § 41-410, provides that no supplier or distributor shall terminate or modify a franchise for the distribution of alcoholic liquor or cereal malt beverage or change the franchise's geographic territory without giving thirty days written notice to the Director of Alcohol Beverage Control and satisfying other requirements.

b) Motor Vehicles

Under Kan. Stat. Ann. §§ 8-2401 through 8-2437, the Vehicle Dealers and Manufacturers Licensing Act, a manufacturer or distributor may not cancel, terminate or fail to renew a franchise agreement with a vehicle dealer unless ninety days' notice has been given to the dealer and the Kansas Director of Vehicles. Such notice must state all the reasons and causes for the cancellation, termination or nonrenewal, and is subject to challenge by the dealer. The burden is upon the manufacturer or distributor to show that it did not act arbitrarily or unreasonably and that good cause exists for the cancellation, termination or nonrenewal of the franchise agreement.

Upon termination, the manufacturer must repurchase or reasonably compensate for the dealer's inventory of all new, unused, undamaged vehicles, parts, accessories, trade dress and furnishings, tools, and equipment required to be purchased and transportation costs, subject to various adjustments and exceptions. The manufacturer must also pay the dealer the lesser of the fair market value of its place of business for one year or the termination of the lease, subject to certain exceptions regarding use of the property and reasons for cancellation, termination, or nonrenewal.

A vehicle dealer cannot transfer, assign, or sell a franchise agreement or interest in a dealership unless the dealer gives prior written notice to the manufacturer or distributor. The first or second stage manufacturer or distributor shall have a right of first refusal to acquire the new vehicle dealer's assets or ownership under a proposed change or all or substantially all of the dealer's ownership or assets if the manufacturer or distributor follows certain procedures enumerated under the Act. Manufacturers and distributors cannot either directly or indirectly own an interest in a new vehicle dealer or dealership, however a manufacturer or distributor may temporarily own an interest in a new vehicle dealer or dealership if the intention is to eventually turn it over to a new vehicle dealer who could not buy the dealership outright.

c) Farm Equipment

Kan. Stat. Ann. §§ 16-1001 through 16-1007 encompasses the Kansas Agricultural Equipment Dealership Act. It provides that a farm equipment manufacturer must provide the dealer with written notice (stating good cause) at least ninety days before termination, cancellation, or nonrenewal. Except for under certain statutorily defined reasons, the notice must state that the dealer has sixty days to cure any claimed deficiency.

A manufacturer or distributor of farm equipment canceling or discontinuing a franchise

agreement must repurchase the retailer's inventory or credit the retailer's account for one hundred percent of the net cost of all new machinery and ninety-five percent of the net prices of all new repair parts, subject to various adjustments and exceptions. Additionally, the manufacturer or distributor shall pay the retailer an additional five percent of the current net price of all returned parts for handling, packaging, and loading, unless the manufacturer or distributor elects to perform the handling, packaging and transportation itself.

d) Outdoor Power Equipment

The Kansas Outdoor Power Equipment Dealership Act, Kan. Stat. Ann. §§ 16-1301 to 16-1312, prohibits a supplier, either directly or indirectly, from terminating, canceling, failing to renew, or substantially discontinuing an outdoor power equipment dealership contract without good cause, as defined in the Act. The supplier must in all events, provide ninety days prior written notice stating the reasons constituting good cause and providing a sixty day period in which to cure any claimed deficiency. The supplier must repurchase the retailer's inventory at one hundred percent of the net cost of all new equipment and ninety-five percent of the net price for repair parts, subject to various adjustments and exceptions.

e) Lawn and Garden Equipment

The Kansas Lawn and Garden Equipment Dealership Act, Kan. Stat. Ann. §§ 16-1401 to 16-1412, prohibits a supplier from terminating, canceling, failing to renew, or substantially discontinuing a lawn and garden dealership without good cause as defined in the Act. The supplier must give ninety days written notice and provide sixty days for the retailer to cure any claimed deficiency. The supplier must repurchase inventory at one hundred percent of the net cost of all new equipment and ninety-five percent of the net price for repair parts, subject to various adjustments and exceptions.

## 2. Kansas Antitrust and Fair Trade Laws

At least thirteen states already had antitrust statutes when the U.S. Congress passed the Sherman Act in 1890. Kansas was the first state to adopt an antitrust law of general application when it approved the Restraint of Trade Act in 1889. The Kansas Legislature modified the Act through the turn of the century and again in 1968. Its basic provisions, however, remain substantially unchanged today.

The Restraint of Trade Act prohibits trusts, which it defines as a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons formed for the purpose of restricting trade, increasing or reducing the price of goods, preventing competition, fixing prices, or contracting to do any of the above.

A violation of the Restraint of Trade Act is a misdemeanor. Penalties, however, are cumulative; a violator may be subject to more than one penalty as provided under the Act. The Act provides that violators may be required to forfeit the corporate charter, dissolve the existence of the corporation, and enjoined from doing business in Kansas. Violators may also be criminally liable and subject to a fine and imprisonment. Any contract or agreement that violates the Act may be voided, and violators may also be forced to pay damages and reasonable attorney fees. The state may recover



a civil penalty of \$100 per day of the violation. A person who is injured by violations of the Act is entitled to the full consideration paid for any goods whose price was fixed. The application of any penalty as provided in the Act does not preclude the enforcement of any other penalty as provided by Kansas state law.

While the Kansas Restraint of Trade Act is similar to certain federal anticompetitive acts, there are important distinctions between them that may influence whether state or federal charges will be filed against the trust. First, although plaintiffs may recover triple damages under both the federal Clayton Act and the Kansas Restraint of Trade Act, the additional \$100 per day penalty outlined in the Kansas act may make the Kansas Restraint of Trade Act an attractive option when the state is the plaintiff. Second, the Sherman Act holds certain activities to be “per se” unlawful, therefore a plaintiff alleging a “per se” violation need not investigate the reasonableness of the alleged violation. Third, the federal statute of limitations is four years, while Kansas requires the suit to be filed within three years.

### 3. Kansas Consumer Protection Laws

The Kansas Legislature has enacted several provisions relating to consumer protection. The following are the most significant.

#### a) Kansas Consumer Protection Act

The Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-623 *et seq.*, is intended to simplify the law governing consumer transactions, protect consumers from deceptive and unconscionable practices, protect consumers from unbargained-for warranty disclaimers, and provide consumers with a three-day cancellation period for door-to-door sales. A consumer is defined as an individual or sole proprietor who seeks or acquires property or services for personal, family, household, business, or agricultural purposes. A consumer transaction includes a sale, lease, assignment, or other disposition for value of property or services within Kansas to a consumer, or a solicitation by a supplier with respect to any of these.

Prohibited deceptive acts include a seller misrepresenting the components of a product, representing that returned goods used by the original purchaser are unused, engaging in excessive “puffing” (describing the product or service as better than it is), making false price comparisons, and using “bait and switch” tactics (enticing consumers with one product or service, then selling them something different). Unconscionable acts, however, are determined by the court on a case-by-case basis. Such acts may include a seller taking advantage of a consumer’s illiteracy or infirmity, inducing a consumer to enter into a one-sided contract, limiting the implied warranty of merchantability and fitness for a particular purpose, and grossly overpricing a good readily available elsewhere at a lower price.

The KCPA may be enforced either by the Kansas Attorney General or the injured consumer. The action may seek to obtain a declaratory judgment that an act violates the KCPA, to enjoin or obtain a restraining order against the supplier who is violating the KCPA, or to acquire damages for the loss or injury. The KCPA also provides an additional

civil penalty of up to \$5,000 per violation or up to \$10,000 per willful violation. Class actions may also bring suit under the KCPA, but they are not entitled to the civil penalty award.

#### b) Motor Vehicles

Kansas's Lemon Law, Kan. Stat. Ann. 50-645, provides remedies to purchasers or lessees of motor vehicles. A motor vehicle is defined as a new motor vehicle which is sold in Kansas, and registered for a gross weight of 12,000 pounds or less, and does not include the customized parts of motor vehicles that have been added by second stage manufacturers. The Lemon Law mandates that the manufacturer or dealer repair all warranted nonconformities discovered within the warranty period or within one year of delivery, whichever is earlier. If the manufacturer or dealer cannot conform the motor vehicle within a reasonable amount of attempts, the manufacturer shall either replace the motor vehicle with a comparable one or accept return of the vehicle and refund the purchase price less allowance for use. A reasonable amount of attempts to conform the vehicle is presumed if the same nonconformity is subject to repair four times within the warranty period or one year after delivery, if the vehicle is out of service due to repair for a cumulative total of thirty or more days during such period, or if there have been ten or more attempts to repair any nonconformities that substantially impair the vehicle's use and value.

Another statute relating to purchasers of motor vehicles is the Odometer Fraud Act, Kan. Stat. Ann. 50-647 *et seq.* It provides that a consumer who proves that the supplier has tampered with the odometer is entitled to void the contract of sale.

#### c) Kansas Fair Reporting Act

The Kansas Fair Reporting Act, Kan. Stat. Ann. § 50-701 *et seq.*, is an enactment of the federal credit reporting statutes, 15 U.S.C. § 1681 *et seq.* It prohibits a consumer reporting agency from furnishing a consumer report to anyone except a court that orders it, the consumer who requests it, or another person who requests it and whom the agency also has reason to believe intends to use it for employment purposes, in connection with the underwriting of insurance involving the consumer, in connection with the consumer's eligibility for a license or other benefit, or otherwise has a legitimate business need for it in connection with a business transaction involving the consumer. The Act also prohibits reporting adverse information which antedates the report by more than seven years, such as bankruptcies, suits and judgments, tax liens, accounts placed for collection, and arrest records or other criminal indictments or convictions. The Act entitles a consumer to a copy of his report and the source of information contained in it.

An agency which willfully violates any provision of the Act is liable to the consumer for actual damages sustained by the consumer as a result of the violation plus such punitive damages as the court will allow, and reasonable attorney's fees. An agency which negligently violates any provision of the Act is liable to the consumer in the amounts listed above, but not for punitive damages.

#### d) Uniform Consumer Credit Code

The Uniform Consumer Credit Code, Kan. Stat. Ann. § 16a-1-101 *et seq.*, is intended to clarify the law regarding retail installment sales, consumer credit, and consumer loans; provide rate ceilings; foster competition among suppliers of consumer credit; and protect consumers from unfair practices. The Code contains highly specific provisions regulating consumer credit transactions, and it should be consulted thoroughly whenever a credit dispute arises.

## IV. TAXATION

### A. Federal Taxation

#### 1. Federal Income Taxation

Federal income taxes are not affected by where a business chooses to locate in the U.S. There are various methods of controlling the amount of the U.S. income tax-payable, and many of these apply to domestic corporations as well as foreign owned corporations or foreign individuals.

#### 2. Personal Income Tax

Individuals are subject to U.S. income tax on their worldwide income if they are U.S. citizens or resident aliens. Resident alien status is determined under a set of complex rules. Any individual who is not a U.S. citizen, and who does not wish to be taxed as such, and who plans to spend a substantial amount of time in the U.S., should pay careful attention to these rules. Currently, the highest marginal U.S. individual income tax rate is 39.6% for ordinary income and 28% for capital gains. A nonresident alien generally is subject to tax on dividends from U.S. corporations, as discussed below.

##### a) Personal Income Tax

#### 1. U.S. Citizens

The United States subjects U.S. citizens and residents to progressive rate taxation on their worldwide income, regardless of source. Current marginal federal income tax rates range from 10 to 35%.

#### 2. Resident Aliens

Non-resident aliens are subject to U.S. income tax upon income they derive from U.S. sources. In contrast, resident aliens are subject to the same U.S. income tax as all U.S. citizens, i.e. are taxed upon their entire worldwide income. Thus, the concept of U.S. residency has important tax consequences for non-U.S. citizens.

Generally, a foreign person is considered to be a U.S. resident for U.S. income tax purposes under either of two tests: the green card test or the substantial presence test.

Under the green card test, a foreign person is considered to be a U.S. resident if he or she has been admitted to the U.S. under a visa permitting permanent residence in the U.S., assuming the visa has not been revoked or abandoned. The green card test is a bright line test providing automatic residency for U.S. income tax purposes, regardless of the motive in seeking the green card or the amount of time spent in the U.S. by the green cardholder.

The substantial presence test determines U.S. residency for income tax purposes based upon the amount of time a foreign person is physically present in the United States. A foreign person is automatically considered a U.S. resident if he or she is physically present in the United States for 183 days or more during any calendar year. A foreign person who is physically present in the United States less than 183 days during the calendar year will not be considered a U.S. resident unless the number of days physically present in the United States during the year exceeds 30 and the sum of days present in the current calendar year plus one third of the number of days present during the first preceding calendar year plus one sixth of the number of days present during the second preceding calendar year equals or exceeds 183 days.

Under some circumstances a person who otherwise meets the requirements of the substantial presence test may not be treated as a U.S. resident if he or she is present in the U.S. during the current year for less than 183 days and has a tax home (usually a principal place of business) in a foreign country to which the foreign person has a closer connection than he or she does to the U.S. Residency exceptions also apply for certain occupations such as foreign government employees, teachers, trainees, and students.

### 3. Non-resident Aliens

Non-resident alien individuals are subject to U.S. taxation only on income determined to be derived from U.S. sources. The rate of U.S. income tax depends on whether U.S. source income is considered active business income (effectively connected income) or passive income.

Foreign corporations and nonresident aliens engaged in a U.S. business are taxed at regular U.S. income tax rates on income "effectively connected" with that business. Relevant factors to determine whether a foreign person is engaged in a U.S. business include the level, nature, continuity, and regularity of the foreign investor's activities in the U.S. All U.S. source income (excluding passive income) derived by a foreign person engaged in a U.S. business is treated as effectively connected.

U.S. source income which is not effectively connected with the conduct of a U.S. trade or business is not subject to United States taxation. Such income is

only taxed in the United States if it is deemed to be Fixed or Determinable, Annual or Periodic (FDAP) income. This includes interest, dividends, rents, annuities and other fixed forms of income. Gains from the sale of capital assets (e.g., corporate stock) are not FDAP income. The U.S. source capital gains of a foreign corporation are not subject to U.S. tax so long as they are not effectively connected with the conduct of a U.S. trade or business. Gains from the sale of an interest in U.S. real estate, however, are taxable as business income.

FDAP income is subject to a flat 30% withholding tax on the gross amount of the income. However, an applicable tax treaty between the United States and the foreign taxpayer's country could reduce the withholding tax rate to 5 15% for dividends and zero for interest or royalty income.

### 3. Corporate Income Tax

Corporations are considered U.S. residents if they are created or organized under the laws of the U.S. or its states. All other corporations are considered foreign corporations.

#### a) U.S. corporations

U.S. corporations are taxed on their worldwide income. Some deductions or credits for taxes paid to foreign governments may be allowed. Varying marginal tax rates apply to a corporation's net income. Current federal income tax rates range between 15 and 35%.

Generally speaking, a U.S. corporation is taxed on its gross profits minus its ordinary and necessary business expenses. Business expenses may include start-up costs, operating expenses, advertising expenses, payroll expenses, and employee benefits plans. Net profits are taxed whether they are retained (kept in the company to cover expenses and expansion) or distributed as dividends to shareholders.

#### b) Foreign corporations

The U.S. method of taxation of foreign corporations follows in many respects the rules applicable to the taxation of nonresident alien individuals. U.S. source investment income that is effectively connected with a U.S. trade or business will be taxed at the normal U.S. corporate tax rates of 15-35%. Income that is not effectively connected to a U.S. trade or business is taxed at a 30 percent flat rate. In addition, US shareholders may be taxed upon certain income of "controlled foreign corporations" whether or not that income is received.

The method by which income of a U.S. business can be repatriated to its foreign parent is a major concern of a foreign corporation doing business in the U.S. Whether a foreign parent decides to operate their U.S. business as a branch or a corporate subsidiary can have major tax implications.

#### 1.) Branch Operations

The U.S. imposes a branch tax (in addition to regular income tax) on the profits of foreign corporations operating a branch business in the U.S. All of the branch's

profits which are not reinvested in the branch are taxed at a flat rate of 30%.

The United States has income tax treaties with some countries which contain a nondiscrimination clause. If the foreign corporation is a "qualified resident" of one of these countries, the branch tax can be avoided. Certification as a qualified resident is difficult for a privately held company to obtain.

## 2.) Corporate Subsidiary Operations

There are three major tax advantages to creating a U.S. subsidiary instead of a branch. First, any tax on repatriated income will be deferred until a dividend is actually paid to foreign investors. In contrast, the branch tax is automatically imposed on the branch's earnings whether or not they are distributed to the parent corporation.

Second, parent corporations that are qualified residents of countries with which the U.S. has income tax treaties can have their FDAP withholding rates reduced from 30% to as low as 5%.

Finally, doing business in the U.S. through a corporate subsidiary gives the foreign investor the option of financing its investment through a combination of both debt and equity. Tax liability may be reduced through debt financing because interest payments made by the U.S. subsidiary are deductible from its U.S. taxes while dividend payments are not. The availability of income tax deductions for interest payments for subsidiaries are subject to U.S. "earnings stripping" limitations.

Foreign corporations must be aware of transfer pricing rules that regulate the conduct of their relationships with U.S. subsidiaries. Any intercompany transactions between a U.S. subsidiary and its foreign parent must be charged at "arm's length" prices and terms. Arm's length prices are the prices that unrelated parties operating in the open market would charge each other. The Internal Revenue Service has broad discretion to reallocate income and expenses between parties if it feels that U.S. taxable income has been artificially depressed by unfair pricing.

## 4. Income Tax on S Corporations, Partnerships and LLCs

### a) S Corporations

Qualifying corporations may make a Subchapter S election. A Subchapter S election permits shareholders to eliminate the corporate income tax. Unless a corporation elects otherwise, it will be classified as a C corporation.

In a C corporation, the company itself is taxed on business profits. In addition, the owners pay individual income tax on money that they receive from the corporation as dividends. In contrast, an S corporation itself does not usually pay corporate-level income tax. Business profits "pass through" to the shareholders, who report those profits on their

personal income tax returns. The S corporation files an information tax return to tell the IRS what each shareholder's portion of the corporate income is.

Total tax liability on dividends is lower in a S corporation than a C corporation. In a C corporation, dividends get taxed twice B once as corporate profits and then after distribution as personal income. In an S corporation, dividends are only taxed as personal income.

Not all businesses may elect S corporation status. In order to qualify, a corporation must have only one class of stock and less than 75 stockholders. All of the shareholders must be individuals (U.S. citizens or residents), estates, certain tax-exempt organizations or certain qualified trusts. The shareholders must consent in writing to the S corporation election. Besides avoiding double taxation (at the corporate and personal level, S corporations have other advantages.

An S corporation generally allows shareholders to pass business losses through to their personal income tax return, allowing it to potentially offset income that they have from other sources. When an S corporation is sold, the taxable gain on the sale of the business can be less than if it was operated as a C corporation.

There are some disadvantages to S corporation status. S corporation profits and losses may be allocated only in proportion to each shareholder's interest in the business. An S corporation shareholder may not deduct corporate losses that exceed the shareholder's stock "basis" which equals the amount of the shareholders' investment in the company (in the form of equity or debt) plus or minus a few adjustments. S corporations may not deduct the cost of fringe benefits provided to employee shareholders who own more than 2% of the corporation. Finally, shareholders should be aware that they are taxed on the taxable income of the corporation whether or not that income is distributed.

#### b) Partnerships

Each partner in a partnership is required to pay personal income taxes on his or her "distributive share" of the partnership's profits. This is the portion of profits to which the partner is entitled under the partnership agreement or state law. Regardless of how much money partners actually withdraw from the partnership, they are taxed as though they received their distributive share each year. The partnership itself doesn't pay federal income taxes.

#### c) Limited Liability Companies (LLC)

An LLC is a "pass through entity" treated much like a partnership or sole proprietorship. It is not a separate tax entity like a C corporation. All profits and losses of an LLC "pass through" the business to the LLC owners who report them on their personal income tax returns. The LLC itself does not pay federal income taxes.

Although a partnership or LLC pays no entity level federal income tax, it is still responsible

for withholding payroll taxes from its employees and payment of the employer portion of social security taxes as well as unemployment taxes.

## 5. Estate and Gift Taxes

The tests for determining residency status for federal estate tax purposes and for federal income tax purposes are different. Residency for estate taxation purposes is equivalent to domicile. A foreign individual acquires a U.S. domicile by living in the U.S. with no definite present intention of leaving.

### a) U.S. Residents

The federal estate tax is imposed on the transfer of an individual's property at death and on other transfers considered to be the equivalent of transfers at death. The tax is imposed on the "taxable estate," which is the value of the total property transferred at death reduced by allowed deductions.

Currently, the highest estate tax rate is 48%. The first \$1,500,000 of an estate is exempt from the tax. Under current legislation, the estate tax rate is scheduled to decrease and the estate tax exemption amount is scheduled to increase until 2011.

A federal gift tax is imposed on the transfer of money or other property by gift. All transactions in which property is gratuitously transferred to another are considered gifts. Gift taxes are paid by the donor and not the recipient of the gift. The gift and estate taxes are generally integrated under a "unified" rate schedule and credit into a single tax on transfers during life and at death, although lifetime gifts in excess of \$1,000,000 may be subject to tax after 2003 even if they would otherwise have been exempt from estate tax. An annual gift tax exclusion is provided that permits tax-free gifts to each donee of up to \$11,000 each year. A husband and wife who agree to treat gifts to third persons as joint gifts can exclude up to \$22,000 a year to each donee. An unlimited exclusion for medical expenses and school tuition both paid directly to the institution for the benefit of any donee is also available in addition to the annual gift tax exclusion.

### b) Nonresident Aliens

Nonresident aliens pay U.S. estate taxes only on the transfer of property situated within the U.S., including stock issued by U.S. corporations. The same estate tax rate schedule that applies to estates of U.S. citizens applies to the estates of nonresident aliens.

Nonresident aliens are subject to U.S. gift taxation only if the gift property is real estate or tangible personal property situated in the U.S. at the time of the gift. Generally speaking, a nonresident is not subject to U.S. tax on a gift of intangible property.

The U.S. currently has treaties with Australia, Austria, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Sweden, Switzerland, and the United Kingdom that may affect the estate and gift taxation liability of citizens of those countries.



## B. State Taxation

### 1. Personal Income Tax

Kansas uses a graduated tax rate schedule based on net taxable income. Personal exemptions, itemized deductions, or standard deductions are applied to gross income to obtain net taxable income. The tax rate for joint returns ranges from 3.5% on the first \$30,000 of taxable income to 6.45% of taxable income over \$60,000. The tax rate for all other taxpayers ranges from 4.4% on the first \$20,000 of taxable income to 7.75% of taxable income over \$30,000. Kansas taxable income is reduced by the amounts of various standard and itemized deductions.

Nonresidents pay Kansas income taxes, at the same rate as Kansas residents, only on their Kansas source income.

### 2. Corporate Income Tax

The Kansas Corporate Income Tax is levied on the corporation's federal taxable income, with modifications (additions and subtractions). The normal corporation income tax rate is four percent of all Kansas taxable income plus a surtax of 3.35 percent of taxable income in excess of \$50,000. A Kansas corporate return must be filed by all corporations doing business within, or deriving income from, sources within Kansas.

For corporations with facilities both inside and outside Kansas, the net income attributable to Kansas is a proportion, based on the percentage of the corporation's business that is located in Kansas. Computation is based on a three-factor, simple-average formula of the proportion of sales, property, and payroll attributed to the State. Corporations whose payroll factor for a taxable year exceeds 200 percent of the average of the property and sales factors may opt to use a two-factor apportionment formula in lieu of the three-factor formula. The two-factor formula multiplies the same modified federal taxable income by the average percentage of sales and property attributable to Kansas. Whether using the two-factor or three-factor formula, the normal and surtax rates apply.

#### a) Exemptions and Exclusions

Persons, or organizations exempt from federal income taxation are exempt from Kansas income tax, and electric cooperatives exclusively engaged in the manufacture or distribution of electric power for their members are not required to file a return

#### b) Modifications to Federal Taxable Income

To arrive at Kansas taxable income, certain additions and subtractions are made to federal taxable income.

Significant additions include: State and municipal interest, less any related expenses claimed as exempt on the federal return; Taxes on or measured by income, or fees on payments in lieu of income taxes deducted from the federal return; Federal net operating loss deducted from federal return.

Significant subtractions include, to the extent that they are included in federal taxable income: Interest income from U.S. obligations, less expenses; State income tax refunds; Exempt State, and municipal interest; Amount of federal targeted jobs tax, and WIN credit; Net operating losses carried forward and back in the same manner as under IRS Code. The amount of NOL is that portion of the total loss that is allocated to Kansas. Net operating losses incurred in tax years after December 31, 1987 must be carried forward for ten years.

c) Corporate Estimated Income Tax Kansas Department of Revenue

A corporation must declare and make estimated income tax payments if its yearly Kansas income tax liability can reasonably be expected to exceed \$500. Corporations beginning business during a tax year are not required to file a declaration for that tax year, and no underpayment penalty will be imposed.

d) Subchapter S Corporation

Corporations that elect, under Subchapter S of the Internal Revenue Code, not to be taxed as a corporation, are not subject to the Kansas income tax on corporations. The shareholders of such corporations shall include in their individual taxable income the proportionate part of such corporation's federal taxable income, subject to the modifications of Kansas law, in the same manner and to the same extent as required by the Internal Revenue Code.

e) Financial Institutions

Special rules apply to banks, savings and loan and trust companies, which are subject to a Kansas privilege tax in lieu of corporate income tax. For banks, the normal tax rate is 4.25 percent of net income, and the surtax is 2.125 percent of net income in excess of \$25,000 for a combined 6.375 percent of net income over \$25,000. For trusts, and savings and loan associations, the normal tax rate is 4.5 percent of net income and the surtax is 2.25 percent of net income over \$25,000, for a combined rate of 6.75 percent of net income over \$25,000.

3. Taxation of partnerships and limited liability companies

For Kansas income tax purposes, a partnership (whether general or limited) and a limited liability company functions as a conduit, and not as a separate taxable entity; therefore, no tax is imposed on the entity itself. Those carrying on business as partners or members of a limited liability company are liable for tax only in their separate or individual capacities. Each individual partner or LLC member is subject to the same reporting requirements and tax rates as a sole proprietor or individual. Nevertheless, the entity must file an information return each year to enable the State to determine liability.

4. Franchise Tax

Kansas corporations are assessed an annual franchise tax of \$2 per \$1,000 of the corporation's equity attributable to Kansas. The tax amount is a minimum of \$40 and a maximum of \$5,000. In general, the portion of the corporations' equity attributable to Kansas is computed in the same manner as the three-factor formula that is used to calculate the corporation's Kansas corporate

income tax liability.

## 5. Property Tax

### a) Real property

Real property is appraised at its current market value as of January 1st each year. In Kansas, real property is categorized into six major subclasses and assessed accordingly:

- Residential: 11.5 percent
- Vacant lots: 12 percent
- Nonprofit organizations: 12 percent
- Commercial, industrial, and agricultural improvements: 25 percent
- Other real property: 30 percent

The assessed value of real property is taxed at a rate determined by local taxing jurisdictions, within limits set by the legislature.

There is no direct tax on the transfer of real property in Kansas. A certificate of value stating the amount for which the property was sold must be filed with the Register of Deeds. A filing fee is charged. Forms may be obtained at the County Register of Deeds office. While there is no tax on the transfer of real property there is a mortgage registration tax amounting to \$0.0026 for each dollar of the mortgage.

### b) Personal Property

Any business owning property, whether as an individual, corporation, or merchant, must file a property tax statement with the county appraiser by March 15. The county appraiser's office is usually located in the courthouse of each county. Some counties mail the statements in January or statements may be obtained at the county appraiser's office.

Commercial and industrial machinery and equipment is valued using economic lives with a maximum of a seven-year economic life, straight-line depreciation from retail cost when new, with a 20 percent residual, and assessed at 25 percent thereof. All merchants' and manufacturers' inventories and livestock are exempt.

Kansas law permits the imposition of a 3% intangible personal property tax on the income derived from all money, securities, credits, notes or other evidences of indebtedness. Counties, cities, and townships have the option of reducing or eliminating the tax.

The State has authorized local governments to apply an initial tax based on the manufacturer's suggested retail price on autos, trucks, and motorcycles. Every year thereafter, the value is depreciated. Motor vehicles are assessed at 30% of fair market value

### c) Exemptions

Some of the significant property tax exemptions and exclusions are: Aircraft used in

business and industry-aircraft used exclusively in business and industry; property (land, building, and equipment) purchased, constructed, reconstructed, or otherwise improved with the proceeds of economic development revenue bonds, improvement district bonds, industrial district bonds, or certain other types of revenue bonds, including tax-exempt private activity bonds, are exempt for a period often years from the time the bonds are issued; machinery and equipment used regularly in farming and ranching operations, or feed lots, except for passenger vehicles, trucks, truck tractors, trailers, semi-trailers, or pole trailers; grain; all hand tools used by a mechanic in the construction, or repair of machinery and equipment, including motor vehicles, including hand tools, and toolboxes used exclusively by a mechanic, or tradesperson in the construction industry; hay and Silage, Farm Storage, and Drying Equipment; livestock; inventories held by merchants and manufacturers; motor vehicle dealers' inventory; all real and tangible personal property used for the above purposes, and operated by a nonprofit corporation; personal property that is moving in interstate commerce, or stored in warehouses, or storage areas prior to shipment out-of-state.

Any property owner requesting an exemption from the payment of ad valorem property taxes assessed, or to be assessed, against their property, shall be required to file an initial request for exemption on forms approved by the Board of Tax Appeals, and provided by the county appraiser. Thereafter, the owner, or owners of all property which is exempt from the payment of property taxes for a specified period of years shall claim such exemption on or before March 1 of each year.

## 6. Sales Tax

The Kansas sales and use tax rate is 5.3% of the sale price of tangible personal property and taxable services sold at retail to the consumer. Cities and counties may choose to assess additional sales tax above the state base sales tax rate. The total state and local sales tax rates vary throughout the state, ranging from 5.3 to 8.3%.

All retail sales of goods and taxable services are presumed to be taxable unless specifically exempted bylaw. Each retailer is obligated to determine the validity of a purchaser's claim for exemption, and obtain a duly executed exemption certificate on all exempt purchases.

Some of the significant exceptions and exclusions are: sales of aircraft, including replacement parts and service, to licensed interstate carriers in the United States or a foreign country; sales of animals, fowl, or fish for agricultural purposes; sales of equipment that is used directly, and primarily to generate broadcast signals for over-the-air free access radio and television stations, and the electricity used to power the equipment that generates its signal; sales of property used as ingredients, or component parts of products manufactured for ultimate sale at retail; sales of tangible personal property, and services purchased by nonprofit religious organizations are exempt from sales tax if the property, or services are used exclusively for religious purposes (this exemption does not apply to sales made to contractors who purchase materials to perform work on property owned by these organizations; however, any sale of materials will be exempt if made directly to the exempt church, or other religious organizations); charges for installation, or

application labor services when such services are performed in connection with “the original construction, re-construction, restoration, remodeling, renovation, repair, or replacement of a residence; all sales of drugs and insulin by a prescription order from a licensed practitioner; free meals furnished to employees of public eating places, (if the employees’ work is related to the furnishing or sale of such meals); sales of materials, tangible personal property, or services purchased in conjunction with constructing, reconstructing, enlarging, remodeling, or installing machinery or equipment for a qualified business, or retail business are exempt from sales tax upon proper claim (the entity must qualify under the Kansas Enterprise Zone Act); sales of farm machinery and equipment, repair and replacement parts, and maintenance services performed on them to persons engaged in farming or ranching (including operation of a feedlot, farm and ranch work for hire); all isolated or occasional sales of tangible personal property, services, substances, or things, except sales of motor vehicles (an isolated or occasional sale is a non-recurring sale, or a sale once a year by a person not in the business of selling that type of property, such as church bake sale, garage sale, estate auction, or a sale between individuals (except motor vehicles) that is not in the normal course of a trade or business); all sales of machinery and equipment used to directly manufacture, assemble, process, finish, store, warehouse, repair, replace parts and accessories, or distribute tangible personal property in Kansas; direct purchases by nonprofit nursing homes and nonprofit intermediate care homes of medical supplies and equipment not used for human habitation purposes; sales of used mobile or manufactured homes; sales of drill bits and explosives actually used in oil and gas exploration and production; sales of property consumed in the production, processing, mining, drilling or refining of other property; labor services performed to remodel, reconstruct, restore, renovate, repair, or replace a residence; sales of tangible personal property or services purchased by a contractor for the erection, repair, or enlargement of buildings, or other projects for any public or private nonprofit hospitals or educational institutions, or for any political subdivision of the State (a Kansas Department of Revenue approved project exemption certificate is required); sales of materials and services used to repair, service, maintain, or modify equipment used outside the state for transmission of natural gas or liquids by pipeline; sales of motor vehicles, semi-trailers, pole trailers, or aircraft to residents of another state, provided the item is not kept in Kansas and is taken out-of-state within ten days.

#### 7. Compensating Use Tax

Compensating use tax applies to property purchased in another state for use, storage or consumption in Kansas on which a sales or use tax of at least 5.3% has not been paid. The compensating use tax rate is the same as the state sales tax rate. Local compensating use tax, if levied by city and/or county, is imposed on all transactions which are currently subject to the state compensating use tax.

#### 8. Other Taxes

##### a) Insurance Premiums Tax

Insurance premium taxes are levied upon gross premiums and are administered by the Insurance Commissioner.

##### b) Motor Carrier Property Tax

Motor carrier property tax is based on the assessed value of over-the-road motor vehicles and rolling equipment owned, used, leased, or operated by persons engaged in non-local intrastate, and interstate business. For interstate operators, the tax is prorated based on the number of miles traveled in Kansas.

c) Motor Fuel Taxes

A tax is imposed on fuel (regular gasoline and gasohol), diesel, LP-gas and CNG) received by each distributor, manufacturer, or importer in the state. An inventory tax is payable for fuel owned on the date of increase in tax rate, and a refund is payable on the date of a decrease in the tax rate. Each distributor, manufacturer, or importer of motor vehicle fuels is not taxed on 2.5 percent of the gallons received during each calendar year, to account for ordinary losses in the handling of such motor fuels. In addition, Kansas is a member of the International Fuel Tax Agreement (IFTA), a base-rate method for the collection of Interstate Motor Fuel. Under this agreement, Kansas receives tax payments from interstate motor carriers located in the state and disburses taxes due to other states.

d) Severance (Minerals) Tax

A severance tax is levied based on the gross value of oil and gas and the volume of coal produced in Kansas.

e) Miscellaneous Taxes

Other taxes include cigarette and tobacco products tax imposed upon distributors, liquor sales enforcement taxes imposed upon liquor, and cereal malt beverages sold by a retail liquor store, microbrewery or winery or by distributors, bingo taxes, tire excise taxes, and the a dry cleaning environmental surcharge tax.

f) Local taxes

Local taxes that can be imposed include local sales and compensating use tax, grain bushel tax, gross earnings tax on intangibles, local license and occupation taxes, mortgage registration tax, and the transient guest tax.

## 9. Business Incentives

The state of Kansas offers significant comprehensive incentives designed to encourage investment in the construction and expansion of Kansas businesses.

a) Job Expansion and Investment Tax Credit

To qualify for a Job Expansion and Investment tax credit a business must be a revenue producing, taxpaying, qualified Kansas business facility.

The Job Expansion and Investment Tax Credit Act of 1976 provides a job expansion credit of \$100 per net new employee and an investment tax credit of \$100 per \$100,000 of qualified investment per year for ten years. Credits may be used to offset up to 50 percent of the business' Kansas income tax liability. Unused credits may not be carried forward, but companies can elect to delay the start of the credits by up to three years.

#### b) Enterprise Zone Incentives

Enterprise zone incentives are available to qualifying business throughout the state based on the location of the facility, the type of business operation, amount of capital investment, and the number of net new jobs created.

Basic enterprise zone incentives are available to businesses throughout the state. Business in metropolitan regions may qualify for a \$1,500 income tax credit per each qualified employee, and a \$1,000 income tax credit per \$100,000 of qualified investment. Businesses in designated non metropolitan regions may be eligible for enhanced incentives. All counties, with the exception of Douglas (Lawrence), Johnson (Olathe), Leavenworth (Leavenworth), Sedgwick (Wichita), Shawnee (Topeka), and Wyandotte (Kansas City), may be designated non metropolitan areas. Under the Enterprise Zone Program, income tax credits earned may be used to offset up to the full amount of a business' income tax liability. The credit is computed once and the remainder of the credit is carried forward until used as long as the taxpayer maintains the minimum number of qualified employees.

Sales tax exemptions as well as income tax credits are available under the Enterprise Zone Program. Firms may be eligible for a sales tax exemption on the purchase of materials, equipment, and services used when building, expanding, or renovating a business facility.

#### c) High Performance Incentive Program

Through the High Performance Incentive Program, tax credits and incentives are available to firms regardless of their location in the state. There are four requirements to be eligible for the High Performance Incentive Program. First, a firm must either pay above average wages for their industry or 1.5 times the statewide average wage. For firms in major metropolitan counties, whether a firm pays above average wages will be analyzed by comparison to similar businesses within the same county. For firms located in other counties, the businesses' wages will be compared to an average of similar businesses in the same region of the state. Second, the company must invest at least two percent of its payroll in training or participate in one of the state's workforce training programs. Third, the business must be certified by the Kansas Department of Commerce and Housing as falling under major standard industrial classification (SIC) categories 20 51 (manufacturing, transportation, utilities, wholesale trade) or 60 89 (finance, insurance, real estate, services). Finally, if the business is in SIC category 40 51 (transportation, utilities, wholesale trade) or 60 89, at least 51 percent of sales must be to Kansas manufacturers and/or out of state commercial or governmental customers.

Firms meeting these qualifications are eligible for incentives that include the following:

- A ten percent investment tax credit against corporate income tax on capital investment exceeding \$50,000.
- A sales tax exemption on purchases relating to new investment in facilities or

equipment.

- A workforce training tax credit of up to \$50,000 per year on training expenditures above two percent of total company payroll.
- Priority consideration for other state business assistance programs.

#### d) Trade Incentives

Foreign trade zones provide a duty free and quota free entry point for foreign goods. Kansas has three foreign trade zones, located in Kansas City, Topeka, and Wichita. Goods brought into a foreign trade zone may be stored, manipulated, or mixed with domestic or foreign materials used in manufacturing processes or exhibited for sale. Goods shipped out of a zone into the United States customs territory is then subject to normal duties. Goods may be reshipped to foreign nations without ever being subject to U.S. customs duties.

The Kansas Export Loan Guarantee Program was established to help companies that do not have sufficient working capital to export products overseas. Kansas is one of the few states having a program that encourages lending institutions to provide financing to small companies for exporting. The guarantee protects the lending institution 90 percent against the risk of default by the exporter. This program works especially well for companies that engage in large contracts with long production cycles, bridging the gap between when suppliers need to be paid and when payment is received from the foreign buyer.

The state also offers trade show assistance, international market research, and trade missions to help Kansas businesses promote themselves overseas.

## V. LABOR AND EMPLOYMENT

### A. Federal Considerations

#### 1. Immigration

With the globalization of world markets, employers located in the United States often seek to employ foreign personnel. A variety of permanent and temporary visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the United States employer and the foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the United States for a temporary time and often the employment authorization is limited to specific employers, jobs, and even specific work sites.

##### a) Permanent Residency (the "green card")

Permanent residency is most commonly based on family relationships, such as marriage to a United States citizen, or offer of employment. Permanent residence gained through employment often involves a time-consuming process that can take several years to obtain. Therefore, employers considering the permanent residence avenue for an alien employee



should ascertain the requirements for that immigration filing prior to bringing the employee to the United States.

#### b) Temporary Visas

The following are the most commonly used temporary visas:

##### 1. E-1 Treaty Trader and E-2 Treaty Investor Visas

These are temporary visas for persons in managerial, executive or essential skills capacities who individually qualify for or are employed by companies that engage in substantial trade with or investment in the United States. E visas are commonly used to transfer managers, executives or technicians with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its United States location. Generally, E visa holders receive a five-year visa stamp but only one-year entries at any time.

##### 2. H-1A and H-1B Specialty Occupation Visas

H-1B visas are for persons in specialty occupations that require at least a bachelor's degree. Examples of such professionals are engineers, architects, accountants, and, on occasion, business persons. Initially, H-1B temporary workers are given three-year temporary stays with possible extensions of up to an aggregate of six years. H-1B visas are employer-and job-specific. H-1A visas are for registered nurses only.

##### 3. L-1 Intracompany Transferee Visas

Most often utilized in the transfer of executives, managers or persons with specialized knowledge from international companies to United States-related companies, L-1 visas provide employer-specific work authorization for an initial three-year period with possible extensions of up to seven years in certain categories. As in the case of certain E visa capacities, some L managers or executives may qualify for a shortcut in any permanent residence filings.

##### 4. B-1 Business Visitors and B-2 Visitors for Pleasure

These visas are commonly utilized for brief visits to the United States of six months or less. Neither visa authorizes employment in the United States. B-1 business visitors are often sent by their overseas employers to negotiate contracts, to attend business conferences or board meetings, or to fill contractual obligations such as repairing equipment for brief periods in the United States. B-1 or B-2 visitors cannot be on the United States payroll or receive United States-source remuneration.

##### 5. TN Professionals

Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include some medical/allied health professionals,

engineers, computer systems analysts, and management consultants. TN holders are granted one-year stays for specific employers and other employment is not allowed without prior INS approval. Particularly with regard to Canadians, paperwork required for filing these requests is minimal.

#### 6. F-1 Academic Student Visas Including Practical Training

Often foreign students come to the United States in F-1 status for academic training or M-1 status for vocational training. Students in F-1 status can often engage, within certain constraints, in on-campus employment and/or off-campus curricular or optional practical training for limited periods of time. Vocational students cannot obtain curricular work authorization but may receive some post-completion practical training in limited instances.

#### 7. J Exchange Visitor Visas

These visas are for academic students, scholars, researchers, and teachers traveling to the United States to participate in an approved exchange program. Training, not employment, is authorized. Potential employers should note that some J exchange visitors and their dependents are subject to a two-year foreign residence requirement abroad before being allowed to change status and remain or return to the United States.

#### 8. O-1 and O-2 Visas for Extraordinary Ability Persons

O-1 and O-2 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim. Also included in this category are those persons who assist in such O-1 artistic or athletic performances.

#### 9. P-1 Athletes/Group Entertainers and P-2 Reciprocal Exchange Visitor Visas

These temporary visas allow certain athletes who compete at internationally recognized levels or entertainment groups who have been internationally recognized as outstanding for a substantial period of time, to come to the United States and work. Essential support personnel can also be included in this category.

10. There are a number of other non-immigrant visas categories that may apply to specific desired entries. When planning to bring foreign personnel to the United States, United States employers should allow several months for processing by the Immigration and Naturalization Service, as well as the Department of State and Department of Labor. Furthermore, employers should be aware that certain corporate changes, including stock or asset sales, job position restructuring, and changes in job duties, may dramatically affect (if not invalidate) the employment authorization of foreign employees.

## 2. Employment Discrimination

a) Age Discrimination in Employment Act ("ADEA")

The ADEA forbids discrimination based on age in employment decisions. The ADEA applies to employers engaged in interstate commerce who have twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

b) Americans with Disabilities Act ("ADA")

The ADA proscribes discrimination in employment based on the existence of a disability. Furthermore, the Act requires that employers take reasonable steps to accommodate disabled individuals in the workplace. This Act applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

c) Employee Polygraph Protection Act ("EPPA")

The EPPA greatly restricts polygraph testing of employees. The Act applies to all employers engaged in interstate commerce. Exempted are employers whose primary business purpose is running a security service or manufacturing, distributing or dispensing a controlled substance.

d) Equal Pay Act ("EPA")

The EPA was an amendment to the Fair Labor Standards Act and is designed to promote equal pay for men and women who do the same jobs. Therefore, if the minimum wage provision of the FLSA is applicable to one's business, then the EPA is applicable as well.

e) Fair Labor Standards Act ("FLSA")

The FLSA establishes the minimum wage, overtime and child labor laws for employers engaged in industries affecting interstate commerce, regardless of the number of employees.

f) Family and Medical Leave Act ("FMLA")

The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave per year for the birth or adoption of a child or the serious health condition of the employee or the spouse, parent or child of the employee. This Act applies to all employers engaged in commerce where the employer employs fifty or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.

g) Federal Contractors

Employers that are federal contractors or subcontractors, depending on the type and size of their contracts, may have affirmative action obligations under Executive Order 11246 and the Vocational Rehabilitation Act. Certain federal contractors are also covered by the Drug-Free Workplace Act.

h) Other Federal Regulations

Many employers operate in industries that are regulated by federal agencies. For example, the Department of Transportation requires employers to drug-test employees who drive motor vehicles of more than 26,000 pounds. Employers in regulated industries must be aware of any requirements imposed by federal or state regulations.

i) National Labor Relations Act and Labor Management Reporting and Disclosure Act  
These statutes set forth the guidelines governing labor-management relations. They apply to all employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts.

j) Occupational Safety and Health Act ("OSHA")  
OSHA is the act that established the mechanism for establishing 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.

k) Title VII  
Title VII is the broad civil rights statute that forbids discrimination in hiring based on race, religion, gender and national origin. It applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

l) Worker Adjustment Retraining and Notification Act ("WARN")  
WARN requires employers to give sixty days' notice to their employees of plant closings or mass layoffs. This Act applies to all businesses that employ 100 or more employees, excluding part-time employees, and to businesses that employ 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

m) Immigration Reform and Control Act ("IRCA")  
IRCA requires that employers verify employment authorization for all employees hired on or after November 6, 1991. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under IRCA, as well as for hiring unauthorized workers or discriminating against persons who appear or sound foreign.

### 3. Benefits

a) Employee Retirement Income Security Act of 1974 ("ERISA")  
ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, health care plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, 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.

b) Consolidated Omnibus Budget Reconciliation Act ("COBRA")

COBRA requires employers to make continuing coverage under medical reimbursement and health care plans available to certain terminated employees, at the cost of the employees. The usual period for which this coverage must be continued is eighteen months. COBRA contains very specific procedures for notifying terminated employees of their COBRA rights

4. Other

a) Worker Adjustment Retraining and Notification Act (WARN)

The Worker Adjustment Retraining and Notification Act (WARN), 29 U.S.C. § 2101 *et seq.*, requires employers of one hundred (100) or more employees, to give sixty (60) days notice to their employees in advance of a plant closing (if the shutdown results in an employment loss of fifty (50) or more employees) and/or a mass layoff (a reduction in force of six (6) months or longer resulting in the employment loss of 33% of the employees and at least fifty (50) employees, or at least five hundred (500) employees). There are several exceptions to the notice requirement. However, employers who fail to give notice and do not meet an exception are liable for a day's wages and benefits for each day during the sixty (60) days when the notice was not given.

b) Occupational Safety and Health Act of 1970

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, as amended, was enacted to reduce the number of injuries, illnesses and fatalities in the workplace by establishing and enforcing safety regulations in the workplace. It applies to all employers engaged in an industry affecting commerce, regardless of the number of employees. The general responsibilities of an employer under the Act are to maintain a workplace free of recognized hazards likely to cause death or serious physical harm ("general duty clause") and comply with the applicable safety and health standards. Employers must also maintain accurate records of all work-related accidents and diseases; inform employees of their protection and duties under the Act, permit inspections of the premises, and report any accident, within forty-eight (48) hours, resulting in an employee fatality or hospitalization of five (5) or more employees. Additionally, the Act prohibits employers from discharging or discriminating against employees for exercising rights under the Act.

Two government agencies are responsible for administering the Act. The Occupational Safety and Health Administration (OSHA), part of the U.S. Department of Labor, promulgates safety and health standards and regulations with which employers must comply, conducts inspections of workplaces for compliance, and cites employers for violations. Citations must describe the alleged violation with particularity, set a date by which the employer is to remedy the situation, and propose penalties. The National Institute of Occupational Safety and Health (NIOSH), part of the U.S. Department of Health and Human Services, supports OSHA by performing research on occupational safety and health issues and developing recommended criteria for standards.

The Act encourages states to develop and operate state job safety and health programs, subject to supervision by the U.S. Department of Labor. When the Department of Labor determines that a state plan is as effective as the federal program, the Secretary of Labor certifies the state plan and the state then takes over enforcement of safety and health matters covered by the plan. At least twenty-five (25) states have adopted OSHA-approved programs, but Kansas is not one of them. Kansas has, however, enacted a law providing for the safety and protection of employees and the inspections of workplaces for health and safety hazards. Kan. Stat. Ann. § 4-636.

c) Uniformed Services Employment and Reemployment Rights Act (USERRA)

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), employees who leave their jobs to enter military service or to take periodic military training in the reserves or national guard are entitled to re-employment so long as they return to work within a specified period of time after completing their military duty. Employees are required to be returned to work without any loss of status or seniority after military service. This legislation has taken on increased importance in recent years with the deployment of significant numbers of reserve component military personnel overseas.

e) Employee Polygraph Protection Act (EPPA)

The Employee Polygraph Protection Act (EPPA), 29 U.S.C. § 2001 *et seq.*, severely restricts employers' use of polygraphs or other similar devices used to render an opinion regarding the honesty or dishonesty of an individual and applies to all employers engaged in interstate commerce. Employers whose primary business is running a security service or manufacturing, distributing or dispensing a controlled substance are exempt. Employers subject to the Act that directly or indirectly require, request, suggest, or cause an employee or applicant to take a polygraph, uses the results, or discriminates against the individual for refusing to take such a test, is subject to civil penalties of not more than \$10,000 and private civil actions by the individual. The EPPA contains a broad anti-waiver of rights provision.

f) National Labor Relations Act of 1935 (NLRA)

The National Labor Relations Act of 1935 (NLRA or the Wagner Act), 29 U.S.C. §§ 151-169, as amended, sets forth the guidelines governing labor-management relations. The NLRA applies to all employers engaged in any industry affecting interstate commerce, regardless of the number of employees.

The NLRA protects the rights of employees either in forming, joining or assisting labor unions for the purpose of bargaining with their employer regarding terms and conditions of employment, or in refraining from such activities. Unions and employers cannot discriminate against employees for exercising these rights. If a union wins the right to represent a group of employees (which may be a company, plant, or department), it becomes the exclusive bargaining representative of all employees in that group, whether or not those employees join the union (the Kansas Constitution prohibits unions and employers from requiring employees to join or pay dues to a union as a condition of employment - see "Right to Work" below). The employer is then obligated to engage in

collective bargaining with the union regarding wages, hours, and other terms and conditions of employment. If a contract is reached, the employees' terms and conditions of employment are governed by the written collective bargaining agreement, including those employees who do not join the union. Disputes arising under this agreement are generally processed through a grievance procedure typically outlined in the agreement and, if unresolved, tried before an impartial third party, an arbitrator.

The NLRA is administered by the National Labor Relations Board (NLRB). When a group of employees seeks union representation, the NLRB conducts secret ballot elections. The NLRB also investigates and, where evidence of violations of the Act are found, prosecutes unfair labor practice charges against employers and unions both in the organizational phase, collective bargaining process, and ongoing relationship.

A statute similar to the NLRA, the Railway Labor Act (RLA), governs unionization in the railway and airline industries.

g) Government contractors

Employers that are federal contractors or subcontractors, depending on the type and size of their contracts, may have additional affirmative action obligations. Executive Order 11246 requires employers doing business with the federal government to comply with certain equal opportunity and affirmative action regulations. First, each government contract must contain an equal opportunity clause prohibiting the contractors from discrimination against employees or applicants on the basis of race, color, religion, sex, or national origin, unless the contract is for less than \$10,000. Second, employers with fifty (50) or more employees and contracts worth \$50,000 or more must develop and maintain an affirmative action plan. The employer is required to analyze its employment practices and affirmatively hire, retain and promote women and minorities.

Under the Vietnam Veteran's Readjustment Assistance Act of 1974, certain government contractors and subcontractors must take affirmative action to hire, retain, and promote qualified individuals who are disabled or who served in the military during the Vietnam War era. The Rehabilitation Act of 1973 requires employers with government contracts worth \$2,500 or more prohibits discrimination against individuals with physical or mental handicaps.

Employers who have contracts with the federal government for the procurement of certain property or services also have obligations under the Drug Free Workplace Act. Additionally, employers holding various types of contracts with the federal government may have obligations under one or more of the following federal statutes: Davis-Bacon Act, contract Work Hours and Safety Standards Act, Walsh-Healey Government Contracts Act, Anti-Kickback Act of 1986, and/or Service Contract Labor Standards Act.

## B. State Law Considerations

## 1. Discrimination

### a) The Kansas Human Rights Commission (KHRC)

The purpose of the Kansas Human Rights Commission (KHRC) in employment relations is to eliminate and prevent segregation and discrimination, or separation, because of race, religion, color, sex, disability, national origin or ancestry, or age, either by employers, labor organizations, employment agencies, or other persons. The KHRC is a seven member group appointed by the governor for a term of four years based in Topeka, with satellite offices in Wichita, Dodge City, and Independence.

### b) Kansas Act Against Discrimination (KAAD) and Kansas Age Discrimination in Employment Act (KADEA)

The Kansas Act Against Discrimination (KAAD), Kan. Stat. Ann. § 44-1001 to 44-1013, and the Kansas Age Discrimination in Employment Act (KADEA), Kan. Stat. Ann. § 44-1111-1121, proscribe discrimination in employment on the basis of race, religion, color, sex, disability, national origin, ancestry, or age. Prohibited conduct includes refusing to hire, discharging, discriminating in compensation or other terms and conditions of employment, segregating, or following any employment practice which results in discrimination based on the individual's membership in a protected class. The Acts also prohibit employers from seeking to obtain or use genetic screening or testing information or subject, directly or indirectly, any employee or applicant to any genetic screening or test. Employers may not publish or indicate any preference as to race, religion, color, sex, disability, national origin, ancestry, or age, unless based on a bona fide occupational qualification, nor may an employer retaliate against anyone who opposes practices forbidden under the Acts.

A complaint may be filed with the KHRC by an aggrieved employee, the KHRC or attorney general, or an employer against a labor organization, employment agency, employer, or person. Unlike the federal Title VII, the KAAD permits individual supervisors, managers, and other employees to be named in complaints to the KHRC. The KHRC then investigates the complaint and issues a "probable cause" determination. If the investigating commissioner finds that probable cause exists, the KHRC seeks to eliminate the unlawful practices by conference, conciliation and persuasion. If unsuccessful, a public hearing is held.

## 2. Benefits

### a) Workers Compensation

Workers compensation is a private insurance plan provided by the employer (by law) to pay employee benefits for job-related injuries, disability, or death. The law covers most employers in the state of Kansas no matter how many employees or the nature of work, except where the employer has a payroll of less than \$20,000 (excluding wages paid to the employer or immediate family) or is engaged in agricultural pursuits. Workers compensation is a no-fault system. Employers benefit by substituting a known expense (insurance premiums) for the risk of large, unbudgeted expenses in the event of serious employee disabilities. Employees benefit because negligence of the employer is not an



issue in determining liability. An employer cannot elect out of the Act if mandatorily covered, and the employee cannot waive rights as to coverage under the Act. There are some options for employers to elect into or certain employees to elect out of workers compensation coverage.

Employees who are disabled due to a job-related injury or disease are entitled to medical expenses to treat the injury or illness, and income benefits to replace part of the wages lost due to disability. If death results from a job-related injury or disease, benefits may be paid to the surviving spouse, dependents, or heirs. Coverage begins the first day on the job. Income benefits are paid at the rate of 2/3 of the employee's average weekly wage (which includes base wage, average weekly overtime, and the weekly value of fringe benefits that have been discontinued) while the worker is off work, up to a maximum amount of 75% of the state's average weekly wage. Injured workers are not entitled to compensation for the first week they are off work unless they lose three (3) consecutive weeks. In no case can such payments exceed a total of \$100,000 for permanent partial or temporary disability, or \$125,000 for permanent total disability. In some cases in which the worker retains an ability to continue working for comparable wages disability benefits may be limited to \$50,000. All medical benefits are paid to cure and/or relieve the worker of the effects of the injury. The employer has the right to choose the treating physician. If an employee dies as a result of a job-related injury, the surviving spouse or dependents can receive compensation based on a rate of 2/3 of the employee's average weekly wage up to the applicable maximum.

Benefits are paid at the employer's expense, regardless of insurance coverage. Employers may satisfy this requirement in one of three ways: workers compensation insurance obtained from a licensed insurance carrier; self-insurance upon demonstration to the State of financial ability to pay any claims; and a group-funded pool consisting of a group of employers meeting certain statutory requirements that for a self-insurance program. Intentional failure to provide for workers compensation payment is a misdemeanor and subjects the employer to a civil penalty of twice the annual premium the employer would have paid or \$25,000, whichever is greater.

Employers must post written notice advising employee what to do in case of injury. Free posting notices are available from the Division of Workers Compensation. Employees must tell an employer about an injury within ten (10) days of its occurrence. Immediately upon learning of an employee's injury or death, the employers must furnish written information to the employee or employee's beneficiaries on the available benefits, the claims process, and the employer or insurance company contact for claims. The employer or insurance carrier must then file an accident report with the Division of Workers Compensation within twenty-eight (28) days from the date of reportable injury, death, or employer notification of such. It is reportable if the employee is wholly or partially incapacitated for more than the remainder of the shift on which the injury was sustained. The employee must file a written claim with the employer within 200 days of the date of accident or last date benefits are paid requesting workers compensation benefits. An

employee can not be fired, demoted or otherwise discriminated against for filing a workers compensation claim in good faith. Traditionally the workers compensation litigation process in Kansas has been administered very heavily in favor of employees at the expense of employers, although benefit levels overall are not necessarily oppressive.

#### b) Unemployment Compensation

The intent of Kansas' Unemployment Compensation law, Kan. Stat. Ann. § 44-701 *et seq.*, is to provide income to those who become "involuntarily unemployed" and to prevent "economic insecurity, due to unemployment." All employers in Kansas, except governmental entities and nonprofit organizations, finance their unemployment tax liability by paying contributions determined by multiplying a specified contribution rate times a taxable payroll earned by each employee during a calendar year. An employer's contribution rate is determined by its experience rating account to which all tax payments are added and all benefit charges are subtracted. This allows employers to "earn" a tax rate based on their own individual experience and potential risk of unemployment. Each quarter, employers submit a Wage Report and Contribution Return (K-CNS 100) to report wages and pay the amount due.

An unemployed individual is qualified to receive unemployment benefits if the individual (1) has made a claim for benefits; (2) has registered for work; (3) is able to work, available for work, and actively seeking work; (4) has been unemployed and has claimed a waiting period of one week within the prior year; (5) has received wages from insured employment in two or more quarters of the base period (first four of the last five quarters prior to filing the claim), and has a total base period wages equaling at least thirty (30) times the weekly benefit amount; (6) the individual's employment was not specifically excluded by the act; and (7) the individual is not disqualified. A claimant may be disqualified if he or she has voluntarily left work without good cause attributable to the work or employer (with some exceptions), was discharged for misconduct connected with the work (with some exceptions), failed without good cause to apply for or accept suitable work when offered, or failed to request an additional assignment after a temporary one. Even when an employee is terminated for performance reasons, that employee is still qualified for unemployment, unless the grounds for termination amounted to willful misconduct.

Once a claimant is found to be "qualified," there is still a continuing question as to whether the individual is "eligible." This is determined on a weekly basis and includes questions regarding whether weekly claims are being filed properly, the individual has properly registered with a job service, is physically able to work, and is actively pursuing work. An individual must be both "qualified" and "eligible" in order to receive benefits for any given week. A claimant's weekly benefit amount is computed by multiplying 4.25 percent of the highest paid quarter in the base period. The total benefit amount a claimant is eligible to receive in one benefit year is the lesser of twenty-six (26) times the weekly benefit amount or one-third of the wages paid during the base period. During periods of high unemployment, an additional thirteen (13) weeks of benefits may be paid to the claimant.

The claimant's benefits are proportionately charged to the accounts of any employers who employed the claimant during the base period.

c) Kansas Continuation of Group Health Benefits

Kansas insurance law, Kan. Stat. Ann. § 40-2209(I) provides continuation of group health benefits for employees who do not fall under the federal continuation law, COBRA (see *supra*). When an employee leaves a fully insured group health plan of less than twenty (20) employees, Kansas law allows for six (6) months continuation of coverage if the employee has been covered under the group plan continuously for three (3) months, pays the full cost for the coverage, and applies for the continuation benefits within thirty-one (31) days of termination of coverage. At the end of the six-month period, an employee has thirty-one (31) days to apply for conversion to an individual health policy. In most cases, this "conversion" policy is a last resort option because of the limited benefits and high costs associated with this kind of policy.

3. Other

a) The Office of Employment Standards

The Employment Standards Office of the Kansas Department of Human Resources enforces State Labor Laws which regulate wage payments, overtime and minimum wage, child labor laws and private employment agencies. This division also distributes the required State Labor Law posters and information on how to obtain the Federal posters.

b) Kansas Wage Payment Act

Although the federal Fair Labor Standards Act (FLSA) governs wages and overtime, the Kansas Wage Payment Act, Kan. Stat. Ann. § 44-313 *et seq.*, controls many other important aspects of the payment of wages and benefits to Kansas employees. The Act defines wages, establishes when wages must be paid (including upon termination), and dictates the withholding of wages. Employees cannot waive their rights under the Wage Payment Law.

c) Kansas Minimum Wage and Overtime Law

The Kansas Minimum Wage and Overtime Law, Kan. Stat. Ann. § 44-1201 *et seq.*, covers those employers not covered by the federal Fair Labor Standards Act and guarantees a minimum wage of \$2.65 per hour for workers eighteen (18) years of age and older. Overtime pay is required after 46 hours of work in a work week.

d) Kansas Child Labor Law

The Kansas Child Labor Law, Kan. Stat. Ann. §§ 38-602 - 38-603, regulates the employment of workers under the age of eighteen (18). This law protects children by prohibiting work in hazardous occupations for individuals under the age of 18, and by limiting work hours for workers 14 or 15 years of age. Workers under age 14 may not be employed (with a few exceptions).

e) Right to Work

In some states, employees are required to join or pay dues to a union in order to retain their jobs if the union represents the employees at that particular facility and the employer agrees to this request. The National Labor Relations Act (NLRA), however, allow states to prohibit compulsory union membership. Kansas is one of fourteen states with a “Right to Work” law prohibiting unions and employers from requiring employees to join or pay dues to a union as a condition of employment, found in Article 15, Section 12 of the Kansas Constitution.

f) At Will Employment

Kansas has long followed the general rule that in the absence of a contract, express or implied, between an employee and an employer covering the duration of employment, the employment is terminable at will for any reason, as long as the reason is not unlawful. There are a few exceptions to this general rule, including termination in violation of a federal or state statute and termination in retaliation for actions that are consistent with important public policies (such as whistleblowing - reporting improper or illegal activity by an employer to authorities - and filing a workers compensation claim).

g) Noncompete Agreements

A noncompete agreement is any agreement in which the employee promises not to participate in certain competitive activities for a specified period of time in a specific geographical area. With certain limitations, noncompete agreements are valid in Kansas. In order to be enforceable in Kansas, covenants not to compete must meet six (6) factors: (1) supported by valid consideration (presumed in Kansas); (2) ancillary to an otherwise lawful contract (Kansas has enforced those ancillary to at-will employment relationships); (3) protects a legitimate business interest; (4) time and geographic restrictions are reasonable; (5) does not impose an undue burden on the employee; (6) does not injure the public. If a Kansas court finds that a restriction is unreasonable, it is empowered to modify the agreement appropriately, most commonly by adjusting the temporal or geographic restriction.

h) Negligent Hiring, Training, Supervision or Retention

Kansas law recognizes claims against employers for negligent hiring, supervision or retention of an employee who injures a non-employee third party. Liability for such a claim requires proof (1) of a causal relationship between the dangerous propensity or quality of the employee, of which the employer had or should have had knowledge, and the injuries suffered; (2) that the employer had reason to believe that an undue risk of harm existed to others as a result of continued employment of the employee; and (3) that the resulting harm was within the risk created by the propensity or quality of the employee.

## VI. ENVIRONMENTAL LAW

### A. Federal Considerations

1. Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. " 6901, et seq

RCRA's primary goal is to control the generation, transportation, storage, treatment and disposal of hazardous waste. The administration of RCRA has been delegated to a number of states by statute (including to South Carolina through the Hazardous Waste Management Act) and, therefore, the states regulate most aspects of hazardous waste management within their borders.

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

RCRA was amended in 1984 by the Hazardous and Solid Waste Amendments of 1984, which added new requirements pertaining to groundwater contamination. Currently, a permit for a treatment, storage or disposal facility must detail required corrective action for any release of hazardous waste from any solid waste management unit, regardless of when the waste was placed on the site.

## 2. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"): 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 damage to natural resources caused by hazardous substance releases. This statute has possibly generated more litigation and controversy in the past decade than any other federal legislation.

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

- Current "owners or operators" of the contaminated facility. A "facility" is virtually any place in which a hazardous substance is found. The current owner or operator is 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.
- Past "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; and
- 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. EPA is expected to issue standards for 150 to 200 industrial source categories of air pollutants by the year 2000. The sources that will be affected range in size from large petrochemical complexes to neighborhood dry cleaners.

The CAA, as amended, requires a new operating permit for all "major" air sources, with state administration and enforcement. A significant new feature is a permit fee based on tons of pollutants emitted on an annual basis; the permit fees are to fund and support the state operating permit programs.

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 U.S. unless a permit has been issued. Permits are issued by either the state under an approved state program or by the EPA if the state program has not been approved. South Carolina's program has been approved. The permit limits are based upon EPA's effluent limitation regulations and are incorporated into a National Pollutant Discharge Elimination System ("NPDES") permit.

The CWA effluent limitations for industrial dischargers will also specify standards for pretreatment for those who discharge to a publicly owned treatment work. In 1990, EPA promulgated new rules regarding permits for storm water discharges under the NPDES permit program.

## B. State Law Considerations

The State of Kansas through the Kansas Department of Health and Environment (KDHE) has worked hard over the years to achieve delegation of most of the major federal environmental programs from the Environmental Protection Agency. Kansas has been delegated primary responsibility for the administration of the Resource Conservation and Recovery Act, the Clean Air Act and the Clean Water Act. As such, the KDHE takes a lead role in environmental permitting

and enforcement issues in Kansas. Kansas has its own statutory and regulatory enactments that provide regulation in these important areas and others.

Kansas does not take an overly strict or a lax approach to environmental regulation. Instead, it has a moderate environmental policy which is both protective of environmental resources in the State and conducive to conducting business in an enlightened manner.

### 1. Clean Water Act

In 1907, Kansas began enacting statutes which regulated the discharge of pollutants into the waters of the State. Kansas law now provides all of the necessary authority to maintain a fully-delegated Clean Water Act program. KDHE issues NPDES permits and takes the lead in most of the enforcement activities within the State. KDHE also operates a pre-treatment program and a storm water permitting program.

Kansas has made major changes to its regulation of confined animal feeding operations. There are a number of types of livestock feeding operations conducted in the State, including very large beef feedlots, swine production facilities and dairies.

Kansas law also establishes regulations for public drinking water supplies and for the regulation of underground injection of various wastes. KDHE handles the underground injection control program except for Class 2 wells. The Kansas Corporation Commission, which regulates oil and gas activities in Kansas, has primary enforcement responsibility for produced saltwater disposal wells, otherwise known as Class 2 underground injection control wells.

### 2. Clean Air Act

Kansas has established a permitting program under the federal Clean Air Act. KDHE has full delegation of all Clean Air Act enforcement within the State and is primarily responsible for this activity. Kansas has relatively clean air and does not have a large concentration of industries that emit air pollutants listed under federal criteria. There are some concerns near major metropolitan areas, such as Wichita and Kansas City, Kansas, about ground level ozone, but at this time there are no non-attainment areas within the State.

### 3. Solid and Hazardous Waste

The KDHE manages the hazardous waste program within the State. Kansas has established requirements which are more stringent than those under federal law. Generators that produce 25 kilograms or more of hazardous waste each month are regulated by the KDHE, whereas federal requirements become effective only when a generator produces 100 kilograms or more of hazardous waste each month. In most other respects, the Kansas program mirrors the federal program.

The KDHE also conducts solid waste planning and enforcement. KDHE approval and a permit must be obtained for the construction and operation of landfills within the State.

KDHE also has specialized regulations for waste tires and for construction and demolition landfills.

#### 4. Underground Storage Tanks

Kansas has enacted statutes which mirror the federal RCRA requirements for underground storage tanks and impose responsibility on owners and operators of underground storage tanks. The Kansas program applies to above ground tanks as well. All storage tanks must be permitted by the Kansas Department of Health and Environment and must meet regulatory requirements which are designed to protect the environment from releases from these tanks.

Kansas has established a trust fund for the remediation of releases from storage tanks and an insurance fund to provide insurance for owners and operators so that they may meet their RCRA financial responsibility requirements for liability to third parties.

#### 5. CERCLA Issues

Kansas does not have a “mini CERCLA” statute. Under Kansas law, a person responsible for the release of contaminants into the environment is required to remediate the same. However, KDHE does have a very active Bureau of Environmental Remediation which has been successful at obtaining cooperative agreements with potentially responsible parties at Superfund sites. KDHE has the lead at most of the major sites in Kansas.

Kansas has also established a voluntary clean-up program and has separate trust funds, similar to the storage tank trust fund, for the remediation of contamination from dry cleaning facilities and from releases of agricultural chemicals into the environment. Both of these programs are operated by KDHE and provide opportunities for public funding of remedial efforts where appropriate.

#### 6. Oil and Gas Operations

The Kansas Corporation Commission (KCC) regulates the production of oil and gas in Kansas. It has enacted regulations which protect the environment from oil and gas production activities and which require remediation of contamination.

#### 7. Spill Reporting

Under Kansas law, a spill or release of contaminants into the environment, except pursuant to a permit issued under the Clean Air Act or the Clean Water Act, is required to be reported to the Kansas Department of Health and Environment within twenty-four hours.

#### 8. Water Resources

Kansas is a prior appropriation State. In order to use groundwater or surface water, one must obtain a permit from the Kansas Department of Agriculture, Division of Water Resources.

## VII. INTELLECTUAL PROPERTY



A. 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 U.S. patent. A U.S. patent provides the inventor with the exclusive right for a specified time to make, use, import, offer to sell, or sell in the U.S. 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 5 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 U.S. 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 U.S. Furthermore, an invention that is the subject of a foreign patent cannot be the subject of a U.S. patent, unless an application for a U.S. 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 U.S. 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 U.S.

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

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

- (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 U.S. Patent and Trademark Office. There one may examine all U.S. 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 U.S. patent application must be filed with the U.S. 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 U.S. 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.

## B. Copyrights

### 1. Federal Considerations

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 use, distribute, modify and display the work. Generally, works are entitled to copyright protection for the life of the author plus 50 years. However, as to works made for hire, copyright protection is for the shorter of 75 years after publication or 100 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright and may be liable for actual or statutory damages and may be subject to injunctive relief.

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

**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 U.S. Copyright Office provides advantages. A certificate of registration is prima facie evidence of the validity of the copyright, provided registration occurs not later than five years after first publication. With respect to works whose country of origin is the U.S., registration is a prerequisite to an action for infringement. With respect to all works, regardless of the country of origin, certain damages and attorneys' fees relating to the period prior to registration cannot be recovered in an infringement action. Registration also is 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 U.S. 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 a copyright 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 a "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.

**Copyright Protection for Foreign Authors.** Copyright protection is available under U.S. law for foreign authors until the copyrightable work is published. If the work has been published, the availability of continued U.S. copyright protection is dependent upon the location of the publication and the nationality or domicile of the author. Copyright protection continues in the U.S. subsequent to publication if publication by the foreign author occurs in the U.S., 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 U.S.,

continued copyright protection in the U.S. is only available if the foreign author is either a domiciliary of the U.S. or a national or domiciliary of a country that is party to a copyright treaty to which the U.S. is also a party. A person is generally a domiciliary of the country in which the person resides with the intention to remain permanently.

### C. 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 trade name. Although the same designation may function as both a trademark and a trade name, a trade name 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. "Descriptive" marks are the weakest and least defensible. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A "fanciful" mark, the strongest type of mark, is a coined name that has no dictionary definition.

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

Selection of a trademark should be accompanied by a trademark search to determine whether another manufacturer 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 manufacturer become involved in an expensive infringement lawsuit. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.

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

Federal registration of a trademark is presumptive evidence of the ownership of the trademark and of the registrant's exclusive right to use of the mark in interstate commerce, strengthening the registrant's ability to prevail in any infringement action. Federal registration is also a prerequisite for bringing a lawsuit under the federal trademark laws.

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 U.S. of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.

State registration provides some advantages, not as extensive as federal registration. State registration is usually advisable, particularly in situations in which a manufacturer's sales will occur only in South Carolina.

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

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

An applicant whose trademark is proposed for registration before actual use receives, upon approval of the application, a "notice of allowance." An application 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. 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.

#### 1. State Considerations

Kansas trademark law is governed by the Revised Kansas Trademark Act of 1999, which is in Kan. Stat. Ann. §§ 81-201 through 81-220. As used in the Act, the word “mark” embodies both trademarks and service marks.

##### a) Type of Mark

Only marks “used” in Kansas may be registered, meaning that the mark must be placed on the goods or their containers, or on advertising associated with the services, and the services are rendered in Kansas. Certain marks will not be registered, including marks that consist of deceptive, immoral or scandalous matter; a flag or coat of arms of the United States or other sovereign; material that may disparage or falsely infer a connection with living or dead persons, institutions, national symbols, beliefs or may cause them contempt or disgrace; matter that when used in association with the goods and services provided by the applicant is merely descriptive (geographically or otherwise) or deceptively misdescriptive of them; primarily of a surname only; matter that is likely to cause confusion, mistake, or deception, or connects a living person through their name, picture, or signature without their consent.

##### b) Registration Process

There are five categories in which a mark may be classified: generic, descriptive, suggestive, arbitrary, and fanciful. Generic marks are not registrable. Descriptive marks are registrable upon a showing of a secondary meaning. Arbitrary, fanciful, and suggestive marks are registrable without any further showing requirement.

Any person who uses a mark may file an application with the Secretary of State in accordance with the requisite procedures. The applicant must provide his name and business address, describe the goods or services upon or with which the mark will be used and the mode or manner in which the mark is going to be used, and the date when the mark was first used by the applicant (both anywhere and in Kansas). The applicant must provide a statement that confirms that he or she is the owner of the mark, that the mark is in use, and that to the applicant’s knowledge no other person has registered an identical or nearly identical mark anywhere. He must also disclose all information regarding any registration or denial of registration of the mark by the applicant or a predecessor either federally or in any other state. The Secretary may also require a drawing of the mark to be included in the application. The application must be signed and verified, and be accompanied by three specimens as well as the \$25 application fee. The goods and services will be classified according to the classification system adopted by the U.S. Patent and Trademark Office. If the goods and services in a single application fall within multiple classes, the Secretary may require a fee for each class. Upon compliance

with these application procedures, the Secretary of State will have the application examined for conformity with the Act. Once it is determined to conform, the Secretary will issue a certificate of registration to the applicant. This certificate is admissible in evidence as competent and sufficient proof of registration of the mark.

Registration is effective for a five-year term from the date of registration. The registrant may renew registration by filing an application with the Secretary of State six months before the term expires. Registration may be renewed for consecutive five-year terms. All renewal applications must include a verified statement that the mark is still in use and include a specimen showing the actual use of the mark on the applicant's goods or services. The current renewal fee is \$5 and is payable to the Secretary of State.

A registration will be canceled if the registrant or assignee voluntarily requests cancellation or registration is not renewed. Cancellation will also occur upon a court finding that the mark has been abandoned, the registrant does not own the mark, the registration was improperly granted or fraudulently obtained, the mark has become the generic name for the goods or services for which it was originally registered, or the mark is likely to cause confusion, mistake, or deception. A court of competent jurisdiction may also order cancellation of a registration on any ground.

#### c) Infringement and Remedies

A person will be liable for infringement if he either uses the mark without the consent of the registrant in a manner likely to cause confusion or mistake, or uses it to deceive. The person will be liable as well if he reproduces a mark and applies the reproduction to labels, signs, prints, packages, wrappers, receptacles or advertisements.

The owner of the mark may recover all profits derived and all damages suffered from wrongful use of the mark. The court may order defendants to turn over any imitations or counterfeits in their possession. The court may also choose to award damages in the amount of three times the profits and damages or reasonable attorney fees to the prevailing party, or both in cases of intentional wrongful acts or acts committed in bad faith.

The owner also may sue to enjoin the manufacture, use, display or sale of any counterfeits or imitations. An owner of a mark is entitled to an injunction against another person's commercial use of the mark if the mark is famous and the use causes dilution of the distinctive quality of the mark. When determining whether a mark is distinctive and famous, a court may consider several factors including, but not limited to, the degree of inherent or acquired distinctiveness of the mark in Kansas; the duration and extent of advertising and publicity of the mark in Kansas; the geographical range of the trading area of the mark; the channels of trade for the



goods and services which the mark represents; the level of recognition the mark receives in the trading areas and channels of trade in this state utilized by the owner and the person against whom the injunction is sought; the nature and extent of the use of the same or similar marks by third parties; and where the mark is registered.

d) Common Law

Kansas has recognized the common law tort of unfair competition. It permits a party to bring a similar cause of action to prevent confusion between two parties' products. To prevail under the common law theory, a party must prove that it owns a valid, protectable mark, and that the defendant's goods or services are so similar to the plaintiff's that the use of the mark is likely to cause confusion. The use of an unregistered mark is protected against another party's subsequent use of a similar mark that would cause confusion if that mark may otherwise be registered and protected under federal or state statutes. Registration does not adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law.

e) Assignments

A mark and its registration are assignable with the good will of the business in which the mark is used. The assignment must be made by a duly executed written instrument recorded with the Secretary of State. An assignment fee of \$5 must be paid to the Secretary of State. Upon compliance with the assignment procedures, the Secretary will issue a new certificate in the name of the assignee. An assignment is void as against a subsequent purchaser for valuable consideration without notice if it is not recorded within three months after the date of the assignment or before such subsequent purchase.

D. Trade Secrets

Kansas provides both statutory and common law protection for trade secrets.

1. Uniform Trade Secrets Act.

Kansas has adopted the Uniform Trade Secrets Act, Kan. Stat. Ann. §§ 60-3320 to 60-3330. It provides injunctive relief for the actual or threatened misappropriation of trade secrets. The Act defines a trade secret as information, including a pattern, formula, program, compilation, device, technique, method, or process, that gains independent economic value, either actual or potential, from the fact that it is not generally known and not freely ascertainable through proper methods by others who can economically gain from its disclosure or use. The information must also be the subject of reasonable efforts, under the circumstances, to keep it a secret.

A trade secret is misappropriated when a person has improperly acquired a trade secret of another and knew or should have known that the trade secret was acquired improperly. Misappropriation also occurs when there is disclosure or use of a trade secret by another person who does not have express or implied consent to do so. That person must have used

improper means to gain knowledge of the trade secret, or knew or should have known that the trade secret was derived from a person who used improper means to acquire it, acquired under circumstances leading to a duty to maintain its secrecy, or derived from a person who owed a duty to the party seeking relief to keep it a secret. In addition, misappropriation occurs if the person knew or should have known that it was a trade secret that was acquired by mistake before he made any material change in his position.

A complainant may recover damages from misappropriation of a trade secret for actual loss or unjust enrichment in certain circumstances. In lieu of other methods of measurement, damages may be measured by the imposition of liability for the reasonable royalty for unauthorized disclosure or use of a trade secret. If the misappropriation was willful or malicious, the court may award exemplary damages not exceeding twice any royalty award. If the claim of misappropriation is in bad faith, the motion to terminate the injunction is made or resisted in bad faith, or willful or malicious misappropriation exists, the court may award reasonable attorney fees to the prevailing party.

An action for misappropriation of a trade secret must be brought within three years after the misappropriation was discovered or should have been discovered through the exercise of reasonable diligence. The time limit begins to run when the plaintiff discovers or should have discovered sufficient facts to plead a cause of action. The Act displaces conflicting tort, restitutionary, and other laws of Kansas pertaining to civil liability for misappropriation of a trade secret. The Act does not affect, however, contractual remedies, other civil remedies, or criminal remedies. This is true even if the remedies are not based on the misappropriation of a trade secret. The Act is not retroactive.

## 2. Common Law.

In order to prove unfair competition arising out of the unauthorized use of a trade secret, the plaintiff has the burden of establishing: (a) the existence of a trade secret used by the plaintiff in its business or trade, (b) a confidential relationship between the parties, (c) disclosures made in confidence by the plaintiff to the defendant concerning the trade secret, and (d) unauthorized use of the disclosures by the defendant.

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives an opportunity to obtain an advantage over competitors who do not know it. Kansas considers six factors to determine whether a particular matter constitutes a trade secret: (a) the extent to which the information is known outside the business; (b) the extent to which the information is known to those inside the business, i.e., to the employees; (c) precautions taken by the holder of the trade secret to guard the secrecy of the information; (d) the savings effected and the value to the holder in having the information as against competitors; (e) the amount of effort or money expended in obtaining or developing the information; and (f) the amount of time and expense it would take for others to acquire and duplicate the information. Such common law claims must be brought within Kansas' two-year statute of limitations under Kan. Stat. Ann. § 60-513(a).

## VIII. DISPUTE RESOLUTION

### A. Federal Court System

The trial courts of the federal court system are the U.S. District Courts. Each district has four federal district court judges who are appointed by the President for life terms upon approval by the United States Senate. Appeals are to the Fourth Circuit Court of Appeals.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the U.S. Constitution and federal statute. They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, and federal crimes, federal torts, and customs. All other jurisdiction is concurrent with that of the state courts. There are generally two ways to gain access to the federal district courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding \$50,000. 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 involves a federal question, i.e., presenting an issue arising under the Constitution, statutes, or treaties of the United States. If a party's case does not fit within one of the statutorily mandated jurisdictions, there is no recourse to the federal courts.

The workings of the federal district courts are governed by the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court and approved by the U.S. Congress. These are a uniform body of procedural rules applicable to every federal district court in the U.S. Each federal district court also establishes its own rules applicable only to the procedure in that district court.

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 federal district court must be aware of that court's local rules as well as the Federal Rules of Civil Procedure.

### B. State Court System

#### 1. District Courts

At least one trial court, called a district court, is located in each of Kansas's 105 counties. District courts have general original jurisdiction over all civil and criminal cases, including juvenile matters, domestic relations, guardianships, small claims, and probate. Kansas also has municipal courts, or city courts, that oversee violations of city ordinances. Municipal courts do not have jury trials; rather, all final decisions are made by a judge. Any person may appeal a municipal court decision to the district court in the county in which the municipal court is located. Each judicial district determines whether the district court judges in that district are chosen by merit selection and retention vote, or by partisan ballot, so that the Kansas trial bench is made up of a mixture of elected and appointed judges depending on the district. Municipal Judges are appointed by the city council.

Kansas is divided into thirty-one judicial districts, each of which is supervised by an

administrative judge. The administrative judge is a district court judge appointed by the Kansas Supreme Court for a period of 2 years, but are frequently reappointed. The administrative judge assumes general authority over the assignment of cases in his or her district, as well as remaining responsible for his or her judicial responsibilities. The judicial districts belong to one of six judicial departments. One justice of the Kansas Supreme Court oversees each department, referred to as a “departmental justice.” The departmental justice is authorized to assign judges from one judicial district to another.

## 2. Court of Appeals

Any district court decision may be appealed to the Kansas Court of Appeals, although some decisions may be appealed directly to the Kansas Supreme Court. Twelve judges currently sit on the Court of Appeals, but the number will be expanded to fourteen in the foreseeable future depending upon budget appropriations. All twelve judges may theoretically hear an appeal, but this type of hearing, called a hearing en banc, has not taken place in nearly 30 years and does not seem to be a likely alternative. The Court may hear an appeal anywhere in the state. Hearings often take place in Hays, Garden City, Olathe, Chanute, Lindsborg, Wichita, Kansas City, and Topeka, most commonly in the last three. The home courthouse for the Court of Appeals is located along with the Supreme Court at the Judicial Center in Topeka, the state capitol. Selection to the court is essentially the same as that for the Supreme Court, as noted below.

## 3. Supreme Court

The Kansas Supreme Court, the highest court in the state, hears appeals from both the district courts as well as the Kansas Court of Appeals. It hears direct appeals from the district courts only for certain felony convictions or for cases in which a statute was found unconstitutional. All other appeals come from the Court of Appeals and are discretionary. Seven justices sit on the Kansas Supreme Court. Each justice is chosen by the governor from a list of three qualified individuals recommended by the Supreme Court Nominating Commission, which is comprised of one attorney and one lay person from each congressional district (Kansas currently has four congressional districts). Attorney members are elected by the members of the bar who live in the same congressional district as the nominee, while lay persons are appointed to the Commission by the governor. The term of office is the same as the number of congressional districts in the state at the time of the member’s election or appointment, currently four years, and a member may be re-elected or re-appointed only once. Following appointment by the governor, a justice is subject to a retention vote after his first year in office. If the justice is retained, he remains in office for a term of six years. Another retention vote is held at the conclusion of each six-year term. The appointment process for judges for the Kansas Court of Appeals is identical to that for the Kansas Supreme Court, but the judges serve only four-year terms.

### C. Arbitration

Arbitration is an alternative to litigation. Instead of filing suit in court, parties submit their dispute to an agreed-upon third party arbitrator or panel of arbitrators. The arbitrator, rather than a judge or jury, decides the dispute. Arbitration procedures are more flexible than trial procedures. The

parties, for example, decide the rules of evidence and the extent of discovery. The parties also determine whether the arbitration will be binding or non-binding. Unlike a judicial decision, however, review of a binding arbitration award is usually limited only to instances of fraud or bias.

Kansas adopted a version of the Uniform Arbitration Act in 1973. The Kansas Uniform Arbitration Act, Kan. Stat. Ann. § 5-401 *et seq.*, enforces most arbitration clauses in written contracts. The Act, however, does not mandate arbitration for certain types of disputes; rather, the parties must agree to arbitrate. Agreements to arbitrate can be made part of a contract before the dispute arises, or parties can submit to arbitration after the dispute. If a party contests the validity or existence of an agreement to arbitrate, the court may decide whether a valid agreement exists. If the agreement is valid, the court will compel arbitration.

The Act allows the parties to choose their arbitrator, and authorizes the court to appoint an arbitrator if the parties do not. The parties may either select a person with whom they are familiar, or they may ask an organization like the American Arbitration Association for a list of attorneys and non-attorneys trained in dispute resolution skills.

Unless otherwise specified in the arbitration agreement, the arbitrator has broad powers. He may hear and decide the dispute even when a party fails to appear at the arbitration. He may issue subpoenas for witnesses and the production of documents. He may also permit depositions to be taken. The parties are entitled to be heard, and have the right to present evidence and cross-examine witnesses appearing at the hearing. They also have the right to have an attorney present during all stages of the arbitration.

An arbitration award may be in any form and, once confirmed, is enforceable as any other judgment, but may be modified by the court. The court will modify an arbitration award when there is a miscalculation of the figures used in reaching the award or when the arbitrator awarded on an issue not submitted to arbitration. An arbitration award may also be vacated, although the Act limits the grounds to when the award was procured by fraud, the arbitrator abandoned his or her neutrality during the proceedings, the arbitrator exceeded his or her powers, the arbitrator conducted the proceedings in a manner that substantially prejudiced a party, or, in some circumstances, when it is later found that there was no agreement to arbitrate. That the award would not have been granted by a court, had the dispute been litigated rather than arbitrated, is not grounds for vacating an award.

Agreements to arbitrate disputes arising out of interstate commerce, admiralty, or international relations are subject to the United States Uniform Arbitration Act, 9 U.S.C. § 1-16, rather than the Kansas Uniform Arbitration Act. There are several differences between the two processes. The federal act, for example, allows tort claims to be arbitrated, whereas the Kansas Uniform Arbitration does not. A second, and more practical, difference is the length of time it takes to confirm an arbitration award. Whereas Kansas state courts can confirm an award within weeks, it is difficult for a federal court to do so that quickly.

## IX. FINANCING INVESTMENTS

### A. Tax Exempt Financing

Kansas offers tax exempt financing to qualifying institutions and government agencies in the form of economic development bonds, which can be issued by any city in the state of Kansas. The purpose of these tax exempt bonds is to promote, stimulate, and develop the welfare of the state of Kansas. This is accomplished through financing new business and industry, health care facilities, and agricultural facilities. Economic development bonds are also intended to retain existing business within the state. At no time can the amount of the bond be greater than the actual cost of the facility or property purchased with the bond.

Tax exempt bonds are also available to finance public works projects, including highways and public schools, as well as other state and county projects. Bonds issued for municipal energy agencies are tax exempt. Irrigation development projects are also eligible for tax exempt financing.

A tax exemption for financing of public transportation systems is provided for under Kan. Stat. Ann. §13-3114. This special exemption is only available to cities with a population of over 225,000 people. Wichita is the only city in Kansas that is eligible for this special tax exempt financing alternative.

### B. Commercial Banking

Kansas has a strong system of banking. In addition to solid intrastate banks, many national banks have branches in Kansas. Kansas has no foreign banks operating in state. A list of some representative banking institutions can be found in Appendix section C. Kansas banking institutions provide a wide variety of financing alternatives, including real estate loans, construction loans, agricultural loans, and Small Business Administration loans.

### C. Other Financing Alternatives

#### 1. Kansas Department of Commerce and Housing (KDOC&H)

The Kansas Department of Commerce and Housing (KDOC&H) is the lead agency for economic development in Kansas. They have seven divisions that are responsible for economic development through promotion of business, commerce, and industry. One of the seven divisions is the business development division. Their mission is to maximize positive impacts on the Kansas economy through the creation/retention of jobs and increased capital investment. The business development division also promotes the growth and retention of existing businesses in Kansas. The business development division has been very successful. As a result of their efforts in fiscal year 2000, forty companies decided to establish or expand facilities in Kansas. This resulted in over 400 million in capital investments and more than 5,000 new jobs. The results of job creation were noticed by Area Development Magazine, which placed Kansas fifth among all states in job creation and sixth among all states for overall quality of life.

Another notable division of KDOC&H is the trade and development division. The mission of the trade and development division is to provide leadership and expertise to small and medium sized companies developing or expanding exports, and to Kansas communities

recruiting or expanding investment. The trade and development division also works to promote Kansas products and services on an international scale.

#### D. Securities Issues

##### 1. Federal Regulation

Federal law governs the purchase and sale of securities. The Securities Act of 1933 ('33 Act) and the Exchange Act of 1934 ('34 Act) are the two basic statutory provisions. States also have limited power to regulate the purchase and sale of securities. State securities laws are commonly called 'Blue Sky' laws. The main purpose of these laws is to give the investing public confidence that the market will treat them fairly and that they will have the requisite information to make investing decisions.

The '33 Act regulates the purchase and sale of securities that have not been previously on the market. If no exemptions are available, the issuer must register with the Securities and Exchange Commission (SEC). The SEC has strict requirements that must be followed in order to register a security for sale. Companies wishing to register a security for sale must generate a prospectus informing the investing public of the sale and other key financial information. Companies that are considering a public offering, or are in the midst of registering, have to comply with the requirement of Section 5 of the '33 Act, which regulates communication with any investors regarding the purchase and sale of securities. Because the statute is broadly construed, an issuer must be wary of all communication with investors while registering a security for sale.

The '33 Act provides exemptions from registration, of which Regulation D and the intrastate offering exemption are the most widely used. Regulation D provides three exemptions: Rules 504, 505, and 506. In order to use Regulation D exemptions, the issuer must comply with its requirements, including various capital limits and purchaser requirements. The Regulation D exemptions are generally targeted at offerings of less than 5 million dollars and sophisticated investors. The intrastate offering exemption exempts securities from federal regulation if they are wholly offered within one state. The intrastate offering exemption has an extensive list of requirements, including resale limitations.

The '34 Act regulates securities transactions carried out on securities exchanges or over the counter markets. These markets include the New York Stock Exchange (NYSE) and the National Association of Securities Dealers Automated Quotation (NASDAQ). The Act requires quarterly and annual reporting.

##### 2. State Regulation

Kansas law regulates the sale and distribution of securities through the Kansas Securities Act, Kan. Stat. Ann. §§ 17-1252 *et seq.* Securities can be registered in Kansas through coordination with the Federal Securities Act of 1933 or through qualification. In order to register a security in Kansas through coordination, a registration statement must be filed under the '33 Act. Registration by coordination is accomplished by filing documents with the Securities Commissioner of Kansas, which include, but are not limited to, the

registration statement, a prospectus, the amount of securities to be offered, and the articles of incorporation.

Kansas also allows registration of securities by qualification, which is available for any security. To register by qualification, the issuer or any other person on whose behalf the securities will be offered, or a registered broker-dealer, must file the required information with the Securities Commissioner of Kansas. This information includes, but is not limited to: the name and address of the issuer, the kind and amount of securities to be offered, the proposed offering price, the state of the issuer, the name of the directors of the corporation, and the financial data of the issuer.

Kansas provides two general exemptions from registration: transaction exemptions and securities exemptions. Transaction exemptions exempt securities from registration for a particular transaction. However, that same security may require registration for a different transaction. Exempt transactions are regulated by Kan. Stat. Ann. § 17-1262. Exempt transactions include transactions by a broker or dealer pursuant to an unsolicited order or offer to buy, non-issuer distributions by a broker or dealer, and any isolated transaction, among others.

Securities exemptions, on the other hand, exempt a security for any transaction. The exempt security can be sold and resold to different parties without registration. In Kansas, exempt securities are regulated by Kan. Stat. Ann. § 17-1261. Exempt securities include, but are not limited to, securities issued by the United States or any state, securities issued by Canada, securities issued by or guaranteed by a bank, any security issued by a federal savings and loan association, and securities issued by a railroad or public utility.

Kansas requires brokers, dealers, agents, and investment advisors to be registered in order to transact securities business. Broker-dealers cannot employ or associate with another agent doing securities business unless that person is also registered in Kansas. Broker-dealers are exempt from registration if they deal only in transactions that are exempt under the Kansas Securities Act. Investment advisors must register under the Kansas Securities Act unless they have no place of business in Kansas, and their only business is with large investment companies. In order to register, broker-dealers, investment advisors, or agents must file the prescribed written form with the Kansas Commissioner of Securities.

Kansas has broad antifraud provisions and severe penalties. It is unlawful to employ any device or scheme to defraud in the connection with the purchase or sale of a security, either directly or indirectly. Fraud is committed if any person makes any untrue statement or omits a material fact in connection with the purchase or sale of a security. Violation of the fraud provisions is a felony. Violation of the antifraud provisions resulting in a loss of \$25,000 or more brings a presumptive sentence of imprisonment.

## X. REAL ESTATE



## A. Ownership

In Kansas, individuals, corporations, partnerships, limited liability companies and trustees of trusts all can own real estate. Under Kansas law, the age of majority is eighteen years, sixteen years of age if the individual has been married, and at that point will be considered of age in all matters which relate to contract, property rights, liabilities and the capacity to sue and be sued. If the individual intends to use the property for his own personal purposes, such as a residence, the individual will want to own the property in individual ownership because taxes and mortgage interest are deductible against the owner's income.

### 1. Domestic/Foreign Corporations

There are many advantages for domestic and foreign corporations to own real estate in Kansas. The primary advantage is insulating the individual stockholder from corporate obligations. If, for example, the corporation owned a piece of real estate and could not pay the mortgage, the foreclosure would be against the corporation itself, not the individual stockholders. Another advantage is the elimination of title problems that can accompany unincorporated forms of ownership. Because title can be held in the corporation's name for perpetuity, this makes it easy to transfer, lease, and mortgage the real estate.

The primary disadvantage of the corporate structure owning real estate is the income tax assessed. This disadvantage, however, has been somewhat mitigated by changes in the rules applicable to S corporations. The tax rate benefits of the individual ownership and corporate ownership are not as drastic as they used to be. Today, the tax benefits will vary depending upon the corporations net income. If the corporations nets \$75,000 or less in a year, typically it will pay less tax than an individual which nets \$75,000. Because corporations are treated like separate entities, the potential tax benefits of owning real estate are lost. Corporations are not able to pass gains and losses on to their individual stockholders. In addition, because the corporation is a separate entity, the corporate income is taxed twice.

Under Kansas corporation law, a "foreign corporation" is defined as "a corporation organized under the laws of any jurisdiction other than this state." Kan. Stat. Ann. § 17-7301(a). Pursuant to Kan. Stat. Ann. § 17-7301(b), the foreign corporation cannot engage in business in Kansas until it applies for authority to engage in business in Kansas as specified in Kan. Stat. Ann. § 17-6003. The Kansas Corporation Code, however, states that a foreign corporation is not considered to be "doing business" in Kansas if its only presence entails the transfer, purchase, mortgage or foreclosure of real estate. Kan. Stat. Ann. § 17-7304.

### 2. Domestic/Foreign Partnerships

#### a) General Partnership

The primary advantage of general partnership ownership of real estate is the way it is treated under income tax laws. The taxable income of the partnership goes directly to each partner and is taxed at the partner level, regardless of whether or

not the income actually is disbursed to the partner. The partnership entity is not taxed, so there is not double taxation as in the corporate context. Any money over the taxable net income can be allocated tax free to the individual partners. This enables the possibility of creating a “tax shelter”. A tax shelter can take one of two forms: sheltering income from the real estate itself and/or sheltering other taxpayer income. Another advantage is that the partner interest in the partnership is considered a personal property interest, even though the partnership owns real estate. This is extremely beneficial in the probate context because if a partner resides and dies in Kansas and the partnership owns real estate in another state, the deceased partner’s estate can still be probated in Kansas, instead of in the other state.

The most significant disadvantage for general partnership ownership of real estate is the fact that all the general partners are personally liable for all the other partner responsibilities, financial or otherwise. Another disadvantage is the “mutual agency” problem which basically empowers any partner in the partnership to bind the partnership, thus making the other partners personally liable to third parties. In this context, most real estate ownership by partnerships is characterized as a “joint venture” instead of as a partnership.

#### b) Limited Partnership

The primary advantage of limited partnership (“LP”) ownership of real estate is its tax treatment, which is nearly the same as the general partnership’s tax treatment, with a few exceptions. Up until LLCs were recognized in Kansas in 1990, LPs were the first choice for real estate ownership. Another advantage is that statutes and case law regarding LPs is prevalent, unlike in the LLC context. In addition, real estate can be owned in the partnership name, remaining undisturbed when the makeup of the partnership undergoes change.

One of the disadvantages of LP ownership is that both domestic and foreign LPs must be authorized to do business in Kansas and must provide the state with an annual accounting, similar to the requirements of corporations. Another disadvantage is the fact that a limited partner cannot participate in the management of the partnership without potentially losing his limited liability.

There is no explicit registration exemption, as there is for corporations in Kan. Stat. Ann. § 17-7303, for limited partnerships whose only presence in Kansas is for purposes of purchase, transfer, mortgage or foreclosure of real estate.

#### c) Limited Liability Partnership

Unlike many states, Kansas does recognize limited liability partnerships (“LLPs”). LLPs were created to safeguard partners from the vicarious liability for the malpractice of their fellow partners and employees. Even with this protection, partners are still liable for the commercial obligations of the LLP. Because of this,

typically LLP ownership of real estate is not used, where the LLC is a viable option, with no commercial debt liability.

There is no explicit registration exemption for foreign LLPs whose sole presence in Kansas involves the purchase, transfer, mortgage or foreclosure of real estate as in the case of corporations pursuant to Kan. Stat. Ann. § 17-7303.

### 3. Limited Liability Corporations

The limited liability corporation (“LLC”) ownership structure combines the most beneficial characteristics of corporations and partnerships for real estate ownership. The most important advantage is the LLCs ability to be treated like a partnership for tax purposes. This avoids the double taxation burden that corporate ownership is confronted with, and also permits the allocation of appreciated property without taxation at the LLC level. In addition, the real estate is the property of the LLC, whereas the members interest is a personal interest in the LLC itself, which enables the freer transfer of real estate.

The primary disadvantage for LLC ownership of property is the lack of case law interpreting the Kansas LLC Act, and governing what LLCs can and cannot do. This is quickly changing, and will not be a disadvantage in the near future.

There is no explicit registration exemption for a foreign LLC whose activities in Kansas are limited to the purchase, transfer, mortgage or foreclosure of real estate as in the case of corporations pursuant to Kan. Stat. Ann. § 17-7303.

Under Kansas law, corporations, LLCs, LPs and corporate partnerships, other than a family farm corporation, authorized farm corporation, limited liability agricultural company, limited agricultural partnership, are all prohibited from owning or leasing farm land, unless they meet one of the exceptions listed in Kan. Stat. Ann. § 17-5904.

## B. Concurrent Ownership

### 1. Tenancy in common

Tenancy in common is recognized in Kansas and is created by a devise or grant of an undivided real estate interest to two or more people, which is not expressed in the conveyance or the deed to constitute a joint tenancy. A tenant in common has an undivided right to possess the real estate, but holds this right in several with the other co-tenants. This right will pass upon his death to his devisees or heirs, unless the granting conveyance of the tenancy in common provides otherwise.

There are several advantages of holding real estate in tenancy in common and they are essentially the same advantages as holding the real estate in individual ownership. It is a less complicated form of ownership because there is no legal entity's rules and regulations, such as a corporation, to deal with. Typically, a co-tenant is not responsible for the debts contracted by another co-tenant without the former's permission. In addition, all income generated from the real estate is divided equally among the co-tenants in proportion to their respective interest in the real estate. If the instrument creating the tenancy in common is

silent, a co-tenant may transfer or encumber his undivided interest in the same manner as any other property the co-tenant may own in fee simple.

The primary disadvantage of holding real estate in tenancy in common arises in the context of title problems resulting from death, divorce, partition, lawsuits, incompetency, bankruptcy and any other occurrence that affects the co-tenant individually, thereby inhibiting the prompt passage of title and mortgage. In addition, each co-tenant is personally liable for the debts relating to his interest and in order to convey the tenancy in common all co-tenants must sign the conveying instrument, i.e. deeds, contracts, mortgages, or leases.

## 2. Joint Tenancy

A joint tenancy is formed by a devise or grant of two or more people containing language that clearly expresses the party's intent to create a joint tenancy. The following language is suggested to express this intention: "To A and B, as joint tenants with right of survivorship and not as tenants in common." *See* Kan. Stat. Ann. § 58-501. Unlike the tenancy in common, the joint tenancy contains a right of survivorship. Under the right of survivorship, after a joint tenant's death, his interest in the real estate passes to the survivor or survivors of the joint tenancy. Eventually, the last survivor receives the property in its entirety. A joint tenant may do what he wants with his interest, but if he conveys or encumbers the real estate, he will break up the joint tenancy, thereby causing the transferee to be a tenant in common with the other co-tenants.

The advantages and disadvantages of a joint tenancy are essentially the same as a tenancy in common. One additional advantage the joint tenancy possesses that the tenancy in common does not is the avoidance of probate to pass the real estate title at death. *See* Kan. Stat. Ann. § 59-2286. One additional disadvantage that the joint tenancy possesses is that joint tenant ownership restricts this type of ownership to situations where the owners want their interest to pass at death to their co-tenants rather than to their devisees or heirs. Based on this disadvantage, most parties that enter into a joint tenancy are family members.

## 3. Tenancy by the entirety

A tenancy by the entirety is similar to a joint tenancy and is based on the common law concept of husband and wife. Each spouse owns the entire parcel of real estate and not a fractional interest. A tenancy by the entirety vests whenever the husband and wife obtain real property and once created, neither spouse can partition the real estate. This form of real estate ownership is not recognized in Kansas.

## C. Spousal Rights

In Kansas, a spouse maintains an inchoate interest in the other spouse's real estate. Pursuant to Kan. Stat. Ann. § 59-505, the surviving spouse is entitled to one half of all real estate owned by the deceased spouse during the marriage or disposed of by the deceased spouse during the marriage without the surviving spouse's written consent. The surviving spouse will not be entitled to the one half interest if he or she was not a resident of the state during the conveyance of the real estate and never had been a resident of the state. Under Kansas law, even if the real estate is in only one

spouse's name, he or she must get the other spouse's written consent for the conveyance, or the grantee will be taking the real estate subject to the surviving spouse's inchoate interest. Both spouses' signatures are essential if the grantee wants to be able to assert specific performance in the future. The spouse may sign the deed as grantor or sign the deed separately to release all her rights in the real estate. If the spouse chooses the later option, she will not be liable for the covenants and warranties of her grantor spouse. When a conveyance of a homestead takes place, both the spouses' consent and signatures are required in order to make the conveyance valid.

If the marriage ends in separation, any personal or real property that either spouse held at the time of the marriage will remain that individual spouse's property and will not be subject to the debts of the other spouse or disposal to the other spouse upon separation. *See* Kan. Stat. Ann. § 23-201. All property acquired after the marriage, whether acquired individually or not, will constitute marital property upon commencement of divorce, separation or annulment proceedings. Upon the commencement of proceedings, each spouse has a common ownership in the marital property and the court will decide what each spouse will get pursuant to Kan. Stat. Ann. § 60-1610.

If the real estate is land other than a homestead, one spouse can sign a mortgage that will be enforceable against the other spouse. A homestead is a constitutional entitlement and therefore, in order to execute a valid mortgage on a homestead, requires the consent and signatures of both spouses. Just as real estate can be sold by one spouse without a spouse's signature, but the grantee takes the land subject to the unsigning spouse's inchoate interest, likewise, if the mortgagee forecloses on the land and becomes the owner of the property and then the original owner dies, the mortgagee would take subject to the surviving spouse's inchoate interest.

#### D. Purchase/Sale of Property

##### 1. Purchase

Contracts which affect an interest in real estate must contain several provisions to ensure that the contract is enforceable, comprehensive and clear. Pursuant to Kan. Stat. § 33-106, all real estate contracts for the purchase or sale of real estate must be in writing. In order to be enforceable, the writing must be signed by the party to be bound or by his authorized agent, and must state each party to the contract, the real estate description and the terms of the contract. An exception to the writing requirement provides that if there has been partial or full performance of an oral contract, no writing is required. General contract elements are applicable to the real estate contract situation. These include: the contract must be in writing, the parties to the contract must be competent, the parties must have mutual assent, and consideration must be exchanged.

Unlike some other states, Kansas does not mandate a stamp tax on real estate, with the exception of the Kansas Mortgage Registration Tax. Pursuant to Kan. Stat. Ann. § 79-3102, before a mortgage will be filed or recorded, the party must pay .26% of the principal debt which is secured by the mortgage to the register of deeds in the county where the real estate is located. For everything else, the register of deeds will charge a minimal filing fee to record the instrument, but no other charges will be assessed.

In Kansas, real estate taxes are assessed on a calendar year basis. Kansas does permit real estate taxes to be paid on a semi-annual basis, with the first installment being due by December 20 of the calendar year for which the taxes apply and the second payment to be made by June 20 of the following year. Kan. Stat. Ann. § 79-1805 provides that the seller/grantor is responsible for payment of the taxes if the conveyance of the real estate occurs between November 1 and January 1. The buyer/grantee is responsible for payment of the taxes if the conveyance occurs between November 1 and January 1. The parties may specify in the contract if they want to prorate the taxes as of the date of closing. It can be difficult to determine the seller's prorate share when the calendar year's taxes are not made available until November of the calendar year. Consequently, many contracts will provide for the proration of taxes at the time of closing, but provide that for proration purposes it will be based on the previous year's taxes.

## 2. Closing

### a) Deeds

In Kansas, in order for a deed to be valid, the deed must be in writing, and at least contain the names of the grantor and grantee, an adequate legal description of the real estate, language sufficient to grant, declaration of the interest conveyed, and the signature of the grantor. Other common included elements are: the date the deed is effective, recitals, consideration, reservations and exceptions, if any, and a release of spousal interests. A deed need not be acknowledged for its validity and effectiveness between the parties to the deed and any third parties with actual knowledge of the conveyance. To be recorded, however, Kan. Stat. Ann. §§ 58-2211 and 58-2221 require that the deed be acknowledged pursuant to the Uniform Laws on Notarial Acts in Kan. Stat. § 53-502 *et seq.* The filing of a written, certified and recorded deed with the register of deeds imparts notice to all subsequent purchasers and mortgagees pursuant to Kan. Stat. Ann. § 58-2222.

Kan. Stat. Ann. §§ 2203 and 2204 contain the statutory form of a warranty deed and of a quitclaim deed, respectively. A warranty deed is a deed by which the grantor guarantees that there are no title defects or adverse claims attached to the real estate. This creates potential liability for the grantor and the grantor's heirs and assigns for virtually any title defect or adverse claim even if the grantor was without knowledge of the defect at the time of the grant and the defect occurred prior to the grantor's ownership. A quit claim deed, on the other hand, is a deed by which the grantor provides the grantee with no guarantees as to the title at all. Kansas also provides for a special type of deed called a transfer on death deed in Kan. Stat. Ann. § 59-3501. The transfer on death deed provides for the transfer of real estate effective upon the death of the grantor. The transfer on death deed acts as a will substitute and therefore is primarily used for estate planning purposes.

### b) Mortgage

Unlike many states, Kansas uses mortgages instead of deeds of trust. Under a deed of trust, the real estate is conveyed to a trustee who either reconveys the real estate

to the owner if he pays the debt or holds a public nonjudicial sale for the lender if the owner defaults on the debt. Under a mortgage, the debtor holds title to the property subject to the mortgage encumbrance.

Kan. Stat. Ann. § 58-2303 provides a mortgage form to be followed. The mortgage must include the names of the mortgagor and mortgagee, the legal description of the real estate, the amount for which the mortgage is granted, the date, and the signature and acknowledgment of the grantor. Kansas also imposes a mortgage registration tax pursuant to Kan. Stat. Ann. § 79-3102. The mortgage tax is based on the amount of debt secured by the mortgage. Before a mortgage can be filed or recorded, the party must pay a fee equal to .26% of the principal debt for which the mortgage is secured.

To assign or discharge a mortgage, a writing acknowledging the assignment or satisfaction, must be signed by the mortgagee or his authorized agent and must also state the name of the assignee, if any. The writing must also be acknowledged and certified just like other documents affecting real estate. The instrument must contain the names of the mortgagor and mortgagee, the legal description of the premises, and the volume and page in which the mortgage is recorded.

#### c) Financing

Financing of real estate transactions can be done in many different ways through institutional lenders or private parties. As is true in other states, Kansas lenders typically require title insurance policies, surveys, assurances as to compliance with relevant laws, environmental assessments, evidence of authority of the borrower, customary opinions of counsel and other standard documentation. In most commercial real estate transactions, lenders require not just a note and mortgage, but collateral assignments of leases, construction and architectural contracts and plans (if relevant), and security interests in the personal property used in connection with the real estate.

#### d) Closing Statement

At closing, the parties each receive a closing statement containing the charges and credits due each party. Under Kansas law, licensed real estate brokers are required to provide closing statements to each party, displaying all receipts and disbursements. Even if a real estate broker is not involved in the conveyance, it is still common practice for closing statements to be prepared for both the buyer and the seller. The closing statement should comport with the contract, and generally a title company, broker, or lawyer will carry out the closing.

### E. Foreclosures

In Kansas, a statutory procedure is in place to carry out foreclosure proceedings. Kan. Stat. Ann. §§ 60-2401 *et seq.* Generally, most foreclosure actions are based on an easily proven default, such as an untimely mortgage payment. If the cause of action is based on a payment default and the

mortgage documents do not contain an acceleration provision, the lender can only get a judgment for the amount of the default payment, not for the entire debt. Consequently, without an acceleration provision, the lender is forced to bring suit each time the debtor defaults on a payment and can only recover for the amount of defaulted payments.

In Kansas, the lender usually gives the debtor notice prior to bringing a foreclosure action. In addition, if the loan was made under the Uniform Consumer Credit Code, which applies to loans for personal, family or household use, the debtor must be provided with notice of his "right to cure." Kan. Stat. Ann. § 16a-5-110. Pursuant to Kan. Stat. Ann. § 16a-5-111, specific language for such notices is suggested and mandates that the debtor has twenty days to cure before the debt can be accelerated and a foreclosure action filed.

#### F. Easements

Kansas has adopted the Restatement definition of easement. An easement is an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles him to protection as against third parties from interference with such use or enjoyment; (c) is not subject to the will of the possessor of the land; (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and (e) is capable of creation by conveyance. Kansas recognizes the following easements:

- Easement appurtenant. An easement appurtenant is an easement for the benefit of the land and passes automatically with the land and is not personal to any one individual.
- Easement in gross. An easement in gross is personal to the individual which possesses it. It does not benefit any particular tract of real estate and its right of use is independent of ownership of a tract of real estate.
- Easement acquired by prescription. An easement acquired by prescription is an easement acquired through the long and continued use of an easement. In Kansas, it takes fifteen years to acquire a prescriptive easement.
- Easement of necessity. An easement of necessity is implied when the transfer of a part of real estate results in either the part retained or the part transferred being landlocked.
- Easement by implied grant or reservation. If the owner of a tract of real estate has been using a portion of the tract to benefit another tract of real estate, and the use has been continuous, permanent and apparent, and the owner decides to sell part of the real estate, an easement for the continued use will be implied if necessary for the reasonable enjoyment of the real estate retained or transferred.
- Solar easements. As in most states, Kansas does not permit easements for light or air by prescription or implication, but Kansas does permit the creation of written solar easements under Kan. Stat. Ann. §§ 58-3801 and 58-3802.

#### G. Lease

##### 1. Residential

Residential leases in Kansas are governed by the Kansas Landlord and Tenant Act, Kan. Stat. Ann. § 58-2501 *et seq.* In Kansas, it is possible for either a landlord or tenant to become bound by a lease which he or she has not signed. Pursuant to Kan. Stat. Ann. § 58-2546(a), if the tenant signs the lease and gives the lease to the landlord accompanied



with a rent check, and the landlord knowingly accepts the check without any reservation, the landlord is bound under the lease, just as if he had signed the lease. Pursuant to Kan. Stat. Ann. § 58-2546(b), if a landlord signs a lease and gives it to his tenant and the tenant enters into possession of the premises and pays rent without any reservation, the tenant is bound to the lease, just as if he had signed the lease.

The landlord must deliver possession of the premises to the tenant on the commencement date specified in the lease. If he fails to do so, the tenant's rent is abated until he receives possession. The tenant may also choose to terminate the lease, contingent on the tenant providing the landlord with five days written notice or in the alternative, he may demand performance of the lease and maintain a cause of action against the landlord or a third party who is wrongfully in possession. If he brings a cause of action, he will be able to recover for any damages he sustained as a result.

In Kansas, residential leases limit the tenant's occupancy of the premises to use as a dwelling, unless the landlord and tenant agree otherwise. The landlord and tenant are required to inventory the leased premises within five days of moving in to document all damage or problems with the premises. Inventory of the leased premises is mandated for residential leases in order to prove the condition of the premises at the time of leasing. Another limitation of the lease is that the landlord is prohibited from enforcing substantially new rules on the tenant after the lease has begun, unless the tenant agrees to the new rule in writing. In addition, it is important that the rent amount is specified in the lease, otherwise, the rent will be the fair market value of the premises.

A tenancy at will is presumed unless proven otherwise. Landlords are permitted to acquire security deposits from their tenants, but are limited to one month's rent for unfurnished apartments and one and a half month's rent for furnished apartments. If the tenant's lease permits the tenant to own pets while living in the leased premises, the landlord may charge an additional half month's rent. A lien or security interest, however, in a tenant's personal property is unenforceable.

The tenant's duty to pay rent is contingent upon the landlord's performance of duties prescribed in Kan. Stat. Ann. § 58-2553. These duties include: compliance with the applicable building and housing codes, maintenance of common areas, and maintenance of all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and elevator units.

If the tenancy is a tenancy at will, the landlord or tenant must provide thirty days notice in writing to terminate the lease. The same notice is required for a tenancy for a period of three months or less. If the tenant is an employee of the landlord, the landlord may provide the tenant with written notice of only ten days to vacate. If the tenant is forced to terminate the lease because of military service, fifteen days notice in writing is sufficient to terminate the lease. In order to terminate tenancies from year to year, except for farm tenancies, thirty days notice in writing must be given prior to the expiration of the year.

The above periods are applicable where there has been no breach of the lease. If the tenant is delinquent on rent payments, unless the rent is paid during the notice period, notice in writing of ten days for tenancies of more than three months and notice of three days for tenancies of less than three months is adequate.

In Kansas, notice may be served on a tenant in several ways. The tenant may be served in person, and if he cannot be located, a copy can be left at his usual place of residence. In addition, a person of the age of 12 that resides on the leased premises may also receive the notice. If no one is found on the premises, notice will be valid if a copy of the notice is posted in a conspicuous place on the leased premises or notice may be given via registered or certified mail, with return receipt requested, addressed to the tenant at his usual place of residence.

In Kansas, a transfer of the tenant's entire interest in the leased premises is called an assignment. If a tenant enters into a lease of two years or less, he must get the landlord's permission, in writing, before he can assign his lease interest. If the lease is for two or more years, the tenant's interest is freely assignable.

## 2. Commercial

In Kansas, oral leases with terms of less than a year are enforceable. Typically, the first section of a written commercial lease describes the property to be leased. The current approach is to provide a street address or building number and then attach a complete metes and bounds description to the lease. Right of ways, easements and routes of ingress and egress should also be included in the description. If the lease is for premises within a shopping center or office building, a drawing portraying the leased space should also be attached. In addition, if the lease provides for use of common areas, the common areas should be stated specifically within the lease. The commencement and termination dates of the lease should also be included on the lease documents.

Parties to a lease should include a number of provisions to protect their interests. A lessor should include a provision in the lease that states that the tenant has inspected the property and accepts the condition of the property. In addition, both the lessor and lessee may benefit from a clause that specifies the consequences of the lessor failing to deliver possession of the premises to the lessee upon the commencement date of the lease term. Failure to include this clause may leave the lessee with inadequate remedies if the lessor fails to deliver possession on the date of commencement. The lease should state which party is responsible for all expenses on the property, such as taxes, assessments, water, sewer and utility costs. Generally, most commercial leases require the lessees to contract directly with the utility company for electricity, water and gas services.

Lessors commonly charge lessees one or two months rent in advance and may also require a security deposit to be used in the event the lessee damages the premises. Some jurisdictions require the lessor to pay interest on the security deposits, but Kansas does not have this requirement. Typically, shopping centers and office space lessors require the

lessee to pay its proportionate share of the costs of maintaining and operating the premises. Clear language in the lease on this provision is essential because in the event something occurs and needs repairing, there usually is not enough time to sort out which party is responsible for the cost of repairs.

Usually a lessor has no duty to maintain or repair the leased property, with the exception of concealed defects present at the commencement of the lease. If the lessor is to have this duty, it must be specifically stated in the lease. Kansas has addressed the issue of the lessor's duty to maintain and repair premises in a number of cases. Specifically, in *Trimble v. Spears*, 182 Kan. 406, 320 P.2d 1029 (1958), the Kansas Supreme Court held that when the lessor leases different portions of the premises to different lessees and expressly implies that the common areas have been reserved for the use of all the lessees, it is the lessor's duty to use reasonable care and keep those common areas maintained and repaired.

Unlike some states, Kansas does permit the lessor to place an exculpatory clause in the lease which exonerates himself from liability to third parties.

### 3. Agricultural

Under Kansas law, agricultural leases receive special treatment. Some of the provisions contained in agricultural leases are not typically found in ordinary landlord tenant rental agreements. For specific provisions regarding agricultural leases, see Kan. Stat. Ann. §§ 58-2531 and 58-2532.

### H. Zoning

Legislation facilitating city zoning and county zoning resolution is found in Kan. Stat. Ann. § 12-753(a). City and county governing bodies are authorized to adopt zoning regulations to divide up territories, within their respective jurisdictions, for the purpose of restricting land and building use as may be deemed necessary to carry out the purposes of the enabling act as set forth in Kan. Stat. Ann. § 12-741. Governing bodies are permitted to regulate: the minimum size of a lot, including such specifics as width, depth and minimum yard size; the density of the population; the portion of a lot that may be occupied; the dimension of any building; the location, use and aesthetics of any building and the land; and the preservation of mineral resources. In addition, governing bodies must identify the boundaries for each district.

Kan. Stat. Ann. §§ 12-753 to 12-758 describe the process for the adoption and implementation of zoning regulations. Cities are permitted to describe their zoning jurisdictions to encompass unincorporated portions of the county that are situated within three miles from the boundaries of the city, unless it would include land that is more than half the distance to another city. Zoning regulations must start off from a proposal made by the planning commission after holding at least one public hearing. Notice of the public hearing should be provided through the use of the official city or county newspaper. Notice must be published at least once, and publication must occur at least twenty days before the date of the public hearing. If the board is a joint zoning board, comprised of both city and county officials, notice must be published in both the official city and official county newspapers.

If the planning commission approves the proposed zoning regulation, the commission then offers the proposed regulation to the governing body accompanied with a written summary of the public hearing that took place. The governing body has three possible alternatives to choose from: (1) approve the proposed regulations; (2) override the planning commission's advice with a 2/3 majority vote of the governing body; or (3) give the proposal back to the planning commission, providing the planning commission with feedback as to what the governing body had pause with and requesting that the planning commission take it under further advisement. The planning commission could then either offer the original proposal and its reasons for resubmitting it, or the planning commission could offer new or amended suggestions after it reconsiders the proposal. The governing body may adopt, revise or amend the second proposal, or take no action at all, by a simple majority vote.

If one violates a zoning regulation, it is a misdemeanor offense. It is punishable by a fine of \$500 or less or by imprisonment not to exceed six months, or a combination of the two. Each day a violation persists qualifies as a separate offense. The city or county or any person harmed by the zoning regulation violation may seek injunctive relief.

#### I. Mineral Rights

Estates in mineral rights, such as oil and gas rights, may be created in the same manner as estates in land. They may be created by a separate conveyance, often called a royalty deed, or by reservation in a deed. The estate in land and the mineral interest are listed as separate entries with the register of deeds and each is taxed separately. The deed conveying or reserving title to the mineral rights must be recorded with the register of deeds within ninety days after the execution of the deed. Otherwise, the deed will become void, unless the mineral rights are listed for taxation purposes within the same ninety day period.

A lease in mineral rights is merely a document granting the lessee permission to enter the land and explore for minerals and, if minerals are found, to get the working interest dictated in the lease. The working interest is typically 7/8 of the oil or gas produced. It is not a conveyance of the mineral rights, and does not pass title to the mineral rights. Mineral leases should be executed and recorded in the same manner as deeds.

#### J. Eminent Domain

Eminent domain is an inherent power of the state to acquire the ownership and possession of private property for public use. The state must give the owner "just compensation" for the real estate.

The procedure for exercising eminent domain is set forth in Kan. Stat. Ann. §§ 26-501 to 26-516. A verified petition must be filed in the district court of the county where the real estate is located. If, however, the real estate is located in two or more counties, the proceeding may be brought in any county where the real estate is located. The petition must include: 1) the authority for the taking; and 2) insofar as their interests are to be taken, (a) the name of any owner or lien holder of record and (b) the name of any party in possession. The plaintiff must also give proper notice

pursuant to Kan. Stat. Ann. § 25-503 by publishing a notice of the proceeding in a newspaper of general circulation in the county where the real estate is located at least nine days prior to the date fixed by the court to hear the petition. In addition, within seven days of the proceeding, the plaintiff must send a copy of the notice and petition to the party insofar as it relates to his real estate interest.

#### K. Mechanic's Liens

Pursuant to Kan. Stat. Ann. §§ 60-1101, any person who furnishes “labor, equipment, material, or supplies used or consumed for the improvement of real property, under a contract with the owner or with the trustee, agent, or spouse of the owner. . .” may file a lien on real property. In order to be valid, the lien must be filed within four months of when the labor, equipment, material, or supplies were last provided. Pursuant to Kan. Stat. Ann. § 60-1102(a), the claimant must file a “verified statement,” containing the name of the owner of the real estate, the name and address of the claimant, a description of the real estate, and an itemized statement and amount of the claim. The lien priority date starts on the date the labor, equipment, material or supplies were first furnished, priority is granted to that claimant over all liens filed subsequent to that date.

#### L. Water Rights

The water appropriation program of the Kansas Department of Agriculture's Division of Water Resources administers the Kansas Water Appropriation Act and rules and regulations about the management of water resources. This program issues permits to appropriate water, regulates water use, and maintains records of all water rights in the state.

It is illegal for persons in Kansas to use water without holding a vested right or applying for, and receiving, a permit to appropriate from the Division of Water Resources. The exception is water used solely for domestic purposes. In other words, water primarily used for the household, watering livestock, or watering up to two acres of lawn and garden does not require a permit for water usage.

The right to use Kansas water is based on the principle of “first in time, first in right.” In times of shortage, those with the earliest water rights or permit holders have first rights to use the water. The maintenance of water rights and permit records allows Kansas water to be allocated fairly.

The Water Appropriation Act, Kan. Stat. Ann. §§ 82a-701 *et seq.*, outlines the Kansas law in the area. Violation of this act subjects a person to a maximum of six months in jail and a fine of up to \$500. For further information on Kansas water rights see Kan. Stat. Ann. § 82a-101 *et seq.*

### XI. APPENDIX

#### A. Federal Agencies

Internal Revenue Service  
120 S.E. Sixth St.  
Topeka, KS 66603  
(785) 235-3053

<http://www.irs.gov/>

National Labor Relations Board  
1099 14th St. N.W.  
Washington, D.C. 20570-0001  
1-866-667-NLRB  
<http://www.nlr.gov/nlr/home/default.asp>

U.S. Citizenship and Immigration Service  
Kansas City District  
9747 Northwest Conant Avenue  
Kansas City, MO 64153  
1 (800) 357-2099  
<http://uscis.gov/graphics/index.htm>

U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20229  
<http://www.customs.treas.gov/>

U.S. Department of Commerce  
<http://www.commerce.gov/>

U.S. Department of Labor  
<http://www.labor.gov/>

U.S. Equal Employment Opportunities Commission  
1801 L Street, N.W.  
Washington, D.C. 20507  
1-800-669-4000  
<http://www.eeoc.gov/>

#### B. State Agencies

Kansas Clerk of Courts  
Kansas Judicial Center  
301 W. 10th  
Topeka, Kansas 66612-1507  
(785) 296-3229  
<http://www.kscourts.org/>

Kansas Department of Agriculture  
109 SW 9th Street  
Topeka, KS 66612

(785) 296-3556

<http://www.accesskansas.org/kda>

Kansas Department of Commerce and Housing

1000 S.W. Jackson Street, Suite 100

Topeka, Kansas 66612-1354

(785) 296-3481

[http://kdoch.state.ks.us/ProgramApp/index\\_mm.jsp](http://kdoch.state.ks.us/ProgramApp/index_mm.jsp)

Kansas Corporation Commission

1500 SW Arrowhead Road

Topeka, KS 66604-4027

785-271-3100

<http://www.kcc.state.ks.us/>

Kansas Department of Health and Environment

1000 S.W. Jackson Street

Topeka, Kansas 66612-1354

(785) 296-1500

<http://www.kdhe.state.ks.us/>

Kansas Department of Human Resources

<http://www.hr.state.ks.us/>

Kansas Department of Revenue

<http://www.ksrevenue.org/>

Kansas Human Rights Commission

900 SW Jackson, Suite 568-S

Topeka, KS 66612-1258

(785) 296-3206

<http://www.khrc.net/resources.html>

Kansas Secretary of State

Memorial Hall, 1<sup>st</sup> Floor

120 SW 10<sup>th</sup> Ave.

Topeka, KS 66612-1594

<http://www.kssos.org/main.html>

Kansas Securities Commissioner

618 S. Kansas Ave.

Topeka, KS 66603-3804

(785) 296-3307

<http://www.securities.state.ks.us/>

## C. Financial Institutions

### 1. Kansas Banks

Bank of Kansas

(620) 663-5011

[www.bankofkansas.com](http://www.bankofkansas.com)

First National Bank of Kansas

(913) 266-9000

[www.fnbkansas.com](http://www.fnbkansas.com)

Emprise Bank

(316) 383-4400

[www.emprisebank.com](http://www.emprisebank.com)

Commerce Bank

(316) 261-4775

[www.commercebank.com](http://www.commercebank.com)

Intrust Bank

(800) 895-2265

[www.intrustbank.com](http://www.intrustbank.com)

Central National Bank

(888) 262-5456

[www.centralnational.com](http://www.centralnational.com)

### 2. Out-of-State Based Financial Institutions

Commerce Bank

(316) 261-4700

[www.commercebank.com](http://www.commercebank.com)

Fidelity Bank

(316) 268-7456

[www.fidelitybank.com](http://www.fidelitybank.com)

Bank of America

(888) 287-4637

[www.bankofamerica.com](http://www.bankofamerica.com)

## D. Commercial Institutions



FlagshipKansas.Tech – Kansas Tech Council, Inc.  
125 N. Market, Suite 1735  
Wichita, Kansas 67202  
(316) 469-6800

E. Publications

*Lex Mundi Intellectual Property World Desk Reference: A Guide to Practice by Country, State, and Province.* Kluwer Law and Taxation, Deventer, the Netherlands/Boston, MA 1992