Country Guide
USA - Louisiana

Prepared by

Jones Walker LLP

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I. GEOGRAPHY

A. Louisiana's Geography, Location and Climate:

Louisiana is located in the south central region of the United States and bounded by Texas to the west, Arkansas to the north, Mississippi to the east, and the Gulf of Mexico to the south. Louisiana's elevation is low along the Gulf coast and Mississippi River and rises only in highlands near Arkansas.

Louisiana is known for a humid subtropical climate, largely due to its proximity to the Gulf of Mexico. Louisiana's seasons are typically temperate, most notably marked by long, hot summers and brief, mild winters. Rain is frequent throughout the year but is most potent during the summer. Southern Louisiana receives significantly more precipitation than the rest of the state. Louisiana is affected by tropical cyclones and is vulnerable to hurricanes due to its distinctive geography. Some hurricane flooding occurs along the coast line as a result of the state's low elevation and proximity to the Gulf and the Mississippi River.

Louisiana is the 25th most populous state in the United States. Baton Rouge is the state capital, while New Orleans is Louisiana's largest city. Louisiana is the only state in the U.S. whose political subdivisions are designated as parishes rather than counties.

B. Louisiana's Cultural/Ethnic Background:

Louisiana is home to a variety of notable cultures rich in tradition and legend. In addition to the original French, Spanish, and Anglo-American settlers, three distinctive groups have contributed to the state's unique heritage: the **Louisiana Creoles**, typically people of color and descendants of free mixed-race Spanish and French families of the colonial and early statehood periods; the **Cajuns**, whose French ancestors were expelled from Acadia (Nova Scotia and New Brunswick) by the British in 1755; and the **Isleños**, descendants of Spanish Canary Islanders many of whom relocated to what is modern-day St. Bernard Parish.

According to the 2000 census, 90.8 percent of Louisiana residents speak only English and 4.7 percent speak French at home. Other minority languages are Spanish, which is spoken by 2.5 percent of the population, and Vietnamese by 0.6 percent.

Along the rivers and bayous, a number of old mansions remain overhung with Spanish moss, recalling the elegance and grandeur of antebellum days. Plantation tours from Baton Rouge and Natchitoches are popular, while the Cajun country west of New Orleans also attracts visitors.

Louisiana has a musically rich culture. It can be divided into three regional categories: rural south Louisiana, home to Creole Zydeco and Old French (known as cajun music), New Orleans, and north Louisiana. The Greater New Orleans area has a singular musical heritage well known for Dixieland jazz, blues, and Afro-Caribbean rhythms as well as for its pioneer role in the development of grand opera in America. The portion of the state north of Baton Rouge shares the musical heritage of other Southern states.

Louisiana is rarely discussed without mentioning the diversity and quality of its cuisine. Creole cuisine is influenced by traditional French cooking with Spanish, African, and Indian influences. Cajun cuisine has a reputation for being spicy. Seafood is especially popular in southern Louisiana. Most local dishes include some combination of shrimp, crawfish, crabs, oysters, or fish. Other foods distinctive to Louisiana include gumbo, étouffée, jambalaya, muffuletta, po'boy, Natchitoches' meat pies, and red beans and rice. Famous desserts and snacks include King Cake, beignets, pralines, sweet potato pie and pecan pie. People in Southern Louisiana are known to say that while others eat to live, they live to eat.

Tourists flock to Louisiana yearly for its many famous festivals such as the New Orleans Jazz & Heritage Festival, Bayou Country Superfest, French Quarter Festival, Southern Decadence, Essence Music Festival, Buku Music + Art Project, Voodoo Music + Arts Experience, and its most celebrated, Mardi Gras.

Six Louisiana cities were ranked in the top ten happiest cities in the U.S. in 2014. Additionally, The 2013 annual state-level ACCRA cost of living index ranked Louisiana as the state with the fourth-lowest cost of living in the country based on prices for housing, health care, groceries, transportation and other goods and services. Louisiana residents benefit from a total tax burden that ranks fifth lowest in the nation, according to a 2015 report by the Tax Foundation. Louisiana is one of the most affordable states in the country in which to own a home due to its having the third lowest property taxes in the country.

C. Louisiana's Investment Climate:

Louisiana provides an ever-growing pool of highly skilled workers. The state has invested in modernized training facilities at community universities and technical colleges including computer science and engineering departments.

Louisiana's workforce includes over 450,000 citizens employed in occupations relevant to manufacturing and over 23,000 information technology professionals. As of 2013, Gallup ranks Louisiana as the No. 1 state for workforce engagement. Chief Executive magazine named Louisiana No. 7 in the nation for best living environment in the 2014 ranking of Best & Worst States for Business.

The state's principal agricultural products include seafood (the state is the largest producer of crawfish in the world, supplying approximately 90 percent), cotton, soybeans, cattle, sugarcane, poultry and eggs, dairy products, and rice. Leading industries generate chemical products, petroleum and coal products, processed foods, transportation equipment, and paper products.

The Port of South Louisiana, located on the Mississippi River between New Orleans and Baton Rouge, is the largest volume shipping port in the Western Hemisphere and the fourth largest in the world, as well as the largest bulk cargo port in the world.

Louisiana is known for petroleum and natural gas. The state offers unique opportunities for companies manufacturing products or delivering services to the energy industry. More than 80 percent of waterborne U.S. oil rigs are located off Louisiana's coast. According to the Energy Information Administration the state is No. 2 in crude oil and No. 3 in natural gas production in the nation. The recent discovery of the Haynesville Shale formation in Caddo, Bossier, Bienville, Sabine, De Soto, Red River, Sabine, and Natchitoches parishes have made it the world's fourth largest gas field with some wells initially producing over 25 million cubic feet of gas daily.

Decades of manufacturing expertise, the lowest taxes in the country for new manufacturing operations, and highly competitive incentives are making Louisiana the epicenter of the U.S. manufacturing resurgence. Strategic investments in site identification, robust GIS-mapping technology, a strong, pro-business climate, and the nation's best state workforce development program are attracting industry leaders such as Nucor, Benteler Steel/Tube, Bell Helicopter, Boeing, Lockheed Martin, Northrop Grumman, and Gardner Denver to Louisiana.

These manufacturing advantages extend to the automotive industry as well. Located in the core of the U.S. Southern Automotive Corridor, Louisiana offers strategic advantages to both automakers and suppliers.

New Orleans, Shreveport, and Baton Rouge are also home to a thriving film industry. State financial incentives since 2002 and aggressive promotion have earned Louisiana the nickname "Hollywood South." Because of its distinctive culture within the United States, only Alaska rivals Louisiana's popularity as a setting for reality television programs. Louisiana is the only state that offers a package of incentives uniquely designed for motion pictures, digital interactive and software development projects, sound recording and live performance productions.

Tourism and culture are major factors in Louisiana's economy as well, earning an estimated $11.5 billion annually from 28.9 million visitors per year.

II. BUSINESS ENTITIES

Corporations, limited liability companies ("LLCs"), partnerships and limited liability partnerships ("LLPs") are formed by filing the requisite organizational documents (discussed below) with the Office of the Secretary of State. Most other business filings, such as foreign entity registrations, annual reports, and name reservations are also made with the Secretary of State. The Office of the Secretary of State maintains a website at www.sos.la.gov where forms of organizational documents under Louisiana law may be found along with a current fee schedule for filings. The website permits online filing of organizational documents, annual reports and other documents. Filings may also be made by facsimile ((225) 932–5314) or in person by visiting the Office of the Secretary of State[1] which is located at: 8585 Archives Avenue, Baton Rouge, Louisiana 70809. If filing by mail, the mailing address is: Commercial Division P.O. Box 94125 Baton Rouge, LA 70804-9125. Expedited service is available for an additional fee.

Generally, filings with the Secretary of State are effective upon the later of filing or an effective date and time no later than 90 days after filing. (La. Rev. Stat. § 12:1-203(A)). For formation documents only, the filing may be effective upon proper execution provided it is received for filing by the Secretary of State within five days, exclusive of holidays. (La. Rev. Stat. § 12:1-203(B)). The term "filed" with the Secretary of State does not mean the date the document was submitted for filing. If the document satisfies the filing requirements, the Secretary of State will record it as filed. (La. Rev. Stat. § 12:1-125(B)). However, if the document is defective, the Secretary of State will return it to the filing entity within five days after submission with a brief explanation of the defect. (La. Rev. Stat. § 12:1-125(C)).

A. Corporations:

1) Introduction

Effective January 1, 2015, Louisiana adopted a new corporate code, the Louisiana Business Corporation Act ("LBCA"), which is a customized version of the Model Business Corporation Act ("Model Act"). The LBCA replaced the Louisiana Business Corporation Law ("Old Law"), which had been enacted in 1968. While the LBCA replaced the Old Law in its entirety, vestiges of it remain in the LBCA.

The LBCA applies to business corporations and professional corporations. It does not apply to partnerships, limited liability companies or other types of business entities.

When reviewing a Louisiana corporate law matter the articles of incorporation and bylaws are best read together with the LBCA because many provisions that had been "opt-in" under the Old Law are now "opt-out" and vice versa.

2) Formation of a Corporation

A business corporation is formed by the filing of articles of incorporation with the Secretary of State as described above. One or more persons or entities may serve as the incorporators provided they have the capacity to contract. Unlike the Model Act, the written consent of the registered agent must accompany the articles of incorporation, signed by the incorporator(s), when they are submitted for filing. Signatures must be notarized. (La. Rev. Stat. § 12:1-201).

Subsequent to the formation of a Louisiana corporation, an organizational meeting must be held. If the directors are named in the articles, the board holds the organizational meeting to appoint officers and to do such other business as is necessary. If the board is not named in the articles, the incorporator or incorporators hold a meeting to elect the board of directors, which then is responsible for the remainder of the organizational matters. (La. Rev. Stat. § 12:1-205).

3) Articles of Incorporation

The articles of incorporation of a Louisiana corporation must include the following:

(a) A corporate name that satisfies all requirements of the LBCA with respect to names (discussed below);

(b) The number of shares the corporation is authorized to issue;

(c) The street address (not a post office box) of the corporation's registered office and, if different, the street address (not a post office box) of the corporation's initial principal office;

(d) The name and street address (not a post office box) of the registered agent;

(e) If the corporation rejects or limits the provisions of La. Rev. Stat. § 12:1-832 protecting directors and officers against liability for breach of duty to the corporation, there must be an affirmative statement to the effect; and

(f) The name and address of each incorporator. (La. Rev. Stat. § 12:1-202).

The articles of incorporation may include additional provisions such as naming the initial directors, indemnifying directors and officers in certain circumstances or establishing a par value for the company's shares. If the corporation desires to limit or "opt out" of La. Rev. Stat. § 12:1-832 protecting directors and officers from liability to the corporation and its shareholders for actions taken in their official capacity, it must affirmatively do so in its articles of incorporation. This is a significant change from the Old Law which required a corporation to "opt-in" to director and officer exculpation from liability. Any provision that may be included in a company's bylaws may instead be included in its articles of incorporation. (La. Rev. Stat. § 12:1-202(B)).

Certain ministerial amendments to the articles of incorporation may be made without shareholder approval unless the articles of incorporation provide otherwise. (La. Rev. Stat. § 12:1-1005). For substantive amendments after shares have been issued, the approval process depends on whether the corporation is public or closely-held. For closely-held corporations, amendments require only the approval of shareholders; prior approval by the board of directors is not necessary. For public corporations (companies with shares traded on a national securities exchange or regularly traded in a market by members of a national securities exchange), amendments must first be adopted by the board of directors and submitted to shareholders together with a recommendation from the board as to whether the proposed amendment should be approved, unless conflicts of interest prevent the board from making the recommendation. In either event, the vote of a majority of the shares outstanding is necessary to approve the amendment unless the corporation's articles of incorporation provide otherwise. (La. Rev. Stat. § 12:1-1003; La. Rev. Stat. § 12:1-140 (25B)).

4) Bylaws

The board of directors of a Louisiana corporation may, but is not required to, adopt bylaws which may contain provisions for managing the business of the corporation that are not inconsistent with law or the articles of incorporation (La. Rev. Stat. § 12:1-206), subject to the right of the shareholders to amend or repeal them. (La. Rev. Stat. § 12:1020).

5) Certain Provisions Governing Corporations

(a) Corporate Name

The name of a Louisiana corporation must contain the word "corporation," "incorporated," "company" or "limited" or the abbreviation of any of those with or without punctuation. While foreign words may be included in the name, they must be spelled using English letters or characters. The name may not include the terminology "doing business as" or an abbreviation thereof or imply that the corporation is organized for a purpose other than what it was. The LBCA also restricts the usage of certain terms such as "bank" or "insurance" to companies actually conducting that line of business. The name must be distinguishable from other entities of all types formed or authorized to do business in Louisiana. (La. Rev. Stat. § 12:1-401).

(b) Authorization of Shares; Par Value

The number and classes of shares authorized for issuance must be set forth in the articles of incorporation. A Louisiana corporation must authorize one or more classes of shares that have unlimited voting rights and that are entitled to receive the net assets of the corporation upon dissolution. (La. Rev. Stat. § 12:1-601). The articles may also authorize the board of directors to classify any unissued shares into one or more series. The board must determine the rights, preferences or limitations of any such series and deliver for filing with the Secretary of State articles of amendment to the corporation's articles setting forth the terms before any shares of the new series are issued. (La. Rev. Stat. § 12:602).

Among the notable changes from the Old Law to the LBCA was the elimination of the requirement that a par value per share be specified or that a dollar value for the consideration received be stated and allocated between the various capital accounts. The LBCA gives the board discretion to determine the adequacy and type of the consideration the corporation receives in exchange for shares. Shareholder approval is required before issuing shares only if both of the following conditions are satisfied: (1) the shares are issued for consideration other than cash or cash equivalents and (2) the voting power of the shares to be issued exceeds 20 percent of the voting power of the shares that were outstanding immediately prior to the transaction. (La. Rev. Stat. § 12:621).

6) Preemptive Rights

With the exception of corporations formed before January 1, 1969, shareholders do not have preemptive rights unless there is an affirmative statement to that effect in the articles of incorporation. For corporations formed before January 1, 1969, preemptive rights have been grandfathered unless there is a statement in the corporation's articles enlarging, limiting or denying preemptive rights. Even when preemptive rights are generally available, they are subject to a number of statutory exceptions. (La. Rev. Stat. § 12:1-630).

7) Dividends; Share Repurchases

Subject to any limitation in the corporation's articles of incorporation, the board of directors may authorize cash distributions if, after giving effect to the distribution, (a) the corporation would be able to pay its debts as they come due in the normal course and (b) its total assets would not be less than the sum of its total liabilities plus the amount necessary to satisfy any preferential amounts upon dissolution if the corporation were dissolved at the time of the distribution. The board of directors may base a determination of the amount of total assets on a fair valuation or other method. (La. Rev. Stat. § 12:1-640).

Share dividends may also be paid *pro rata* to existing shareholders. However, there are limits on paying a dividend of shares of one class or series on shares of another class or series. (La. Rev. Stat. § 12:1-623).

The LBCA also permits share repurchases provided that after the repurchase there remains one or more classes of securities possessing unlimited voting rights and the right to receive the net assets of the corporation upon dissolution. Repurchases are not permitted unless the financial tests described above for payment of cash dividends are satisfied. Repurchased shares revert to the status of authorized but unissued shares rather than treasury shares. (La. Rev. Stat. § 12:1-603).

8) Board of Directors

Except when shareholders have adopted a unanimous governance agreement that eliminates a board (discussed below), every Louisiana corporation must have a board of directors consisting of one or more individuals, the precise number to be specified in or in accordance with the corporation's key corporate documents. (La. Rev. Stat. § 12:1-803). If the articles of incorporation so provide, the terms of directors may be staggered by dividing the total number into two or three classes. If the board is classified, one class of directors is elected at each annual meeting for a two or three year term depending on the number of classes. If the board is not classified, directors are elected annually. (La. Rev. Stat. § 12:1-806).

The term of a director elected to fill a vacancy expires when the term of that director's predecessor in office would have expired. (La. Rev. Stat. § 12:1-805).

Cumulative voting in the election of directors is not permitted unless the corporation's articles of incorporation so provide. The default voting standard for the election of directors is a plurality of the votes cast at a meeting at which a quorum is present. (La. Rev. Stat. § 12:1-728).

9) Meetings of Shareholders

A Louisiana corporation must hold an annual meeting unless directors are elected by unanimous consent. If no annual meeting is held for a period of 18 months and directors are not elected by unanimous consent, a shareholder may demand that the secretary of the corporation call a meeting. The secretary is obligated to give notice of the meeting within 30 days after receipt of the demand. (La. Rev. Stat. § 12:1-701).

Special meetings may be called by the board of directors or upon demand of shareholders. Unless a greater or lesser percentage is specified in the articles of incorporation, written demand from the holders of at least 10 percent of the outstanding shares is sufficient. The maximum threshold a corporation may specify in its articles of incorporation is 25 percent of the outstanding shares. (La. Rev. Stat. § 12:1-702).

Action may be taken without a meeting if approved by the written consent of all shareholders entitled to vote on the matter. The corporation may also provide in its articles of incorporation that action may be taken without a meeting by less than all shareholders if consented to by at least the number required to approve the matter. In this case, however, the corporation must give its nonconsenting shareholders written notice not more than 10 days after written consent sufficient to approve the matter has been received or properly tabulated. The notice must describe the action taken. (La. Rev. Stat. § 12:1-704).

10) Record Date

The bylaws may set forth the manner for establishing a record date for voting. No record date may be more than 70 days before the meeting or action required. If a meeting is adjourned to a date more than 120 days after the date of the original meeting, a new record date must be established. (La. Rev. Stat. § 12:1-707).

11) Quorum; Vote Required to Approve Matters

The default quorum requirement for a Louisiana corporation is a majority of the outstanding shares. (La. Rev. Stat. § 12:1-725; 12:1-140(25B)). An important change between the Old Law and the LBCA is that any variant to the default quorum standard must now be included in the articles of incorporation and may not be less than 25 percent of the shares entitled to vote. Under the Old Law, corporations were permitted to include such a provision in their bylaws. (La. Rev. Stat. § 12:1-727).

12) Proxies

Voting may be by proxy. Any such proxy is revocable unless coupled with an interest. (La. Rev. Stat. § 12:1-722).

13) Indemnification

Indemnification of directors and officers is mandatory if the director or officer is wholly successful on the merits in defense of any action resulting from the individual serving in his or her official capacity. (La. Rev. Stat. § 12:1-852). Under the Old Law, indemnification was also mandatory for employees and agents. Corporations may also provide indemnification in certain other circumstances if a determination is made that the director or officer met the applicable standard of conduct. (La. Rev. Stat. § 12:1-851(A), (B) and (C)). Absent a court order, however, corporations are not permitted to indemnify a director or officer in connection with: (i) any proceeding by or in the right of the corporation, except for expenses and only if it is determined that the director has satisfied the appropriate standard of conduct or (ii) any proceeding with respect to conduct where the director was adjudged liable due to having received a financial benefit to which he or she was not entitled. (La. Rev. Stat. § 12:1-851(D).

A corporation may advance expenses to a director or officer before final disposition of a proceeding provided the individual delivers to the board a written affirmation of his or her good faith belief that the required standard of conduct has been met and undertakes in writing to repay any funds advanced if it is ultimately determined that he or she is not entitled to indemnification. (La. Rev. Stat. § 12:1-853).

14) Unanimous Governance Agreements

A unanimous governance agreement under the LBCA is a written agreement, other than the articles of incorporation and bylaws, that satisfies all of the following:

(a) is approved in one or more writings signed by all persons who are shareholders at the time of the agreement;

(b) governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them; and

(c) states that it is a unanimous governance agreement or that it is governed by La. Rev. Stat. § 12:1-732.

The provisions of an otherwise valid unanimous governance agreement will cease to be effective once a company meets the definition of a public corporation. It is designed for small, closely-held companies. Provided a unanimous governance agreement meets the above requirements, it can include provisions contrary to other parts of the LBCA including eliminating the board of directors, requiring dissolution in certain circumstances or changing the relative voting power of shareholders. Unless otherwise provided in a unanimous governance agreement, its initial term is 20 years subject to renewal an unlimited number of times for additional terms of up to 20 years by the unanimous written consent of the shareholders at the time of renewal. The existence of any unanimous governance agreement must be noted conspicuously on the share certificates. Failure to do so would give a purchaser without notice the right to rescind the purchase but would not affect the validity of the agreement. (La. Rev. Stat. § 12:1-732).

15) <u>Mergers, Share Exchanges and Similar Transactions</u>

The LBCA provides a variety of methods by which business combinations may be effected. They include (i) mergers with domestic or foreign corporations or other "eligible entities;" (ii) share exchanges; (iii) domestication transactions by which a corporation may change its state of incorporation without merging with a shell entity in the target jurisdiction; (iv) entity conversions through which (a) a domestic corporation may become a domestic or foreign limited liability company or partnership, (b) a domestic unincorporated entity may become a domestic business entity, or (c) a foreign unincorporated entity may become a domestic business corporation; and (v) asset sales. Each is described below.

(a) Mergers and Share Exchanges

The LBCA permits the merger of a Louisiana corporation with one or more domestic or foreign corporations. It also permits the merger of a Louisiana corporation with unincorporated entities or domestic or foreign nonprofit corporations (each, an "Eligible Entity"). (La. Rev. Stat. § 12:1-1102(A)). Similarly, share exchanges are permitted by the LBCA between domestic corporations and foreign corporations and Eligible Entities. (La. Rev. Stat. § 12:1-1103(A)). Mergers and share exchanges with foreign Eligible Entities are subject to the requirement that the laws of the state of the foreign entity must permit such a merger. (La. Rev. Stat. § 12:1-1102(B) and La. Rev. Stat. § 12:1-1103(B)). In a merger, one entity merges with and into another, while in a share exchange one corporation acquires all the shares of one or more classes of shares of another domestic or foreign corporation, or all of the interests of another Eligible Entity, in exchange for securities, eligible interests, cash or other property, or any combination thereof. (La. Rev. Stat. § 12:1-1103(A)).

A merger is effected in accordance with a plan of merger that must include the following provisions:

(i) The names of the corporations or Eligible Entities that are to be party to the merger and the name of the surviving entity;

(ii) The terms and conditions of the merger;

(iii) The manner and basis of converting the shares or interests of the parties to the merger;

(iv) The articles of incorporation of any domestic or foreign corporation or governing documents of any other entity that will result from the merger or any changes to these documents if one of the parties is the surviving entity; and

(v) Any other terms or provisions required by the law of the foreign jurisdiction if one of the parties is a foreign entity.

The plan of merger may contain other provisions as well. (La. Rev. Stat. § 12:1-1102(C)).

A share exchange must be effected in accordance with a plan of share exchange. The plan of share exchange must contain the same required provisions as a plan of merger with the exception that, since the target entity survives as a subsidiary of the acquiring entity, no articles of incorporation or proposed amendments need be included. (La. Rev. Stat. § 12:1-1103(C)).

Plans of merger or share exchange must be adopted by the board of directors and, if a vote is required, it must then be submitted to shareholders along with the board's recommendation to approve the plan unless the board is unable to make a recommendation due to a conflict of interest. If a vote is required, a plan of merger or share exchange must be approved by a majority of the shares outstanding unless the articles of incorporation or the board require a greater vote. Unless the articles otherwise require, no shareholder vote is required if the domestic corporation survives the merger or is the acquiring corporation in a share exchange except in the following circumstances:

(i) The articles of incorporation will be amended as part of the transaction;

(ii) Shareholders of the surviving corporation will not own the same number of shares with the same rights and privileges as before the effective date of the transaction; or

(iii) The voting power of the shares of the surviving corporation that are to be issued exceeds 20 percent of the voting power of the shares that were outstanding immediately prior to the transaction. (La. Rev. Stat. § 12:1-1104).

"Short-form" mergers between a parent and a subsidiary may be effected under the LBCA provided the parent owns at least 90 percent of the voting power of the subsidiary. If a foreign entity is involved, it must also comply with the requirements of that state's laws as well. If no shareholder vote is required, the parent must give notice to any minority shareholders within 10 days after the effective date of the merger. (La. Rev. Stat. § 12:1-1105).

After a plan of merger or share exchange has received all required board and shareholder approvals, articles of merger or share exchange must be filed with the Secretary of State. The effective date of the transaction will be the filing date unless a later date is specified in the articles. Within 30 days after the effective date of the merger, a duplicate copy must be filed in every parish in which any of the parties to the merger have immovable property. (La. Rev. Stat. § 12:1-1106).

(b) Domestication

A corporation seeking to reincorporate in another state or a foreign corporation seeking to reincorporate in Louisiana may do so without merging the existing corporation into a new corporation organized in the target jurisdiction. The corporation retains its existence, but becomes subject to a different state's laws. Because not every state provides for domestication, this procedure is available only if both the current and the target states provide for domestication. (La. Rev. Stat. § 12:1-920).

The LBCA requires a corporation seeking to domesticate to first adopt a plan of domestication setting forth certain required provisions including, but not limited to (i) the terms and conditions of the domestication, (ii) the manner and basis of reclassifying the shares and (iii) any desired amendments to the articles of incorporation. (La. Rev. Stat. § 12:1-920). After adoption of the plan by the board of directors, the plan must be submitted for shareholder approval, together with the recommendation of the board of directors that shareholders approve the plan unless a potential conflict of interest prevents the board from making a recommendation. Unless the articles of incorporation or the board of directors requires a greater approval standard, the plan must be approved by a majority of the shares outstanding. If a corporation formed before January 1, 2015 has a provision in its articles of incorporation setting forth a voting standard for a merger, that standard is deemed to apply to a domestication transaction as well. (La. Rev. Stat. § 12:1-921).

If, upon completion of the domestication transaction, the company will no longer be a Louisiana corporation, it is required to file articles of charter surrender with the Secretary of State setting forth specified provisions. (La. Rev. Stat. § 12:1-923).

(c) Entity Conversions

The LBCA also provides for certain entity conversions including:

(i) Conversion of a domestic business corporation into either a domestic or foreign nonprofit corporation;

(ii) Conversion of a foreign nonprofit corporation into a domestic business corporation; or

(iii) Conversion of a domestic corporation into a domestic or foreign unincorporated entity (*i.e.*, a partnership, limited liability company, partnership or business trust).

Conversions must be effected pursuant to a plan of conversion and, if a foreign corporation is involved, also in compliance with the laws of the jurisdiction of the foreign entity permitting the conversion. (La. Rev. Stat. § 12:1-950-956).

(d) Asset Sales

Asset sales, even if significant in amount, do not require shareholder approval under the LBCA as long as they are in the ordinary course of business and the entity's articles of incorporation do not otherwise require a shareholder vote. (La. Rev. Stat. § 12:1-1201). A disposition of assets *not* in the ordinary course of business requires shareholder approval only if the disposition leaves the corporation without any significant continuing business activity. If the asset sale leaves the corporation with a business activity that represented at least 25 percent of total assets at the end of the last fiscal year and at least 25 percent of income from continuing operations before taxes or revenues from continuing operations for that last fiscal year, the corporation will be conclusively deemed to have a significant business activity. If shareholder approval is required, the transaction must first be approved by the board of directors and then submitted to shareholders with a recommendation to approve the transaction unless the board is unable to make a recommendation due to a conflict of interest. Unless a greater vote is otherwise required, approval of a majority of the shares outstanding is necessary to approve the asset sale. (La. Rev. Stat. § 12:1-1202).

(e) Appraisal Rights

A shareholder may object to a transaction and seek payment of the fair value of shares owned in the following circumstances:

(i) A merger if a shareholder vote is required (unless the shareholder's shares remain outstanding);

(ii) A "short form" merger of a subsidiary into a parent;

(iii) A share exchange if the shareholder of the target company owns shares of the class that has been acquired;

(iv) A sale of assets that required shareholder approval (unless the corporation distributes its net assets in cash);

(v) An amendment to the articles of incorporation that reduces the number of shares of a class owned by the shareholder to a fraction of a share, if the corporation has the right to repurchase the fraction (*i.e.*, a reverse share split);

(vi) A domestication if the shareholder does not receive shares in the foreign corporation resulting from the domestication that have terms at least as favorable and represent at least the same percentage interest as before the domestication;

(vii) Conversion of a corporation from profit to non-profit status; and

(viii) Conversion of a corporation to an unincorporated entity.

However, appraisal rights are not available in connection with a transaction listed in 1-6 and 8 above for a security that is: (i) a "covered security" as defined in the Securities Act of 1933, as amended (the "Securities Act"); (ii) traded in an organized market and has at least 2,000 shareholders and a market value of at least $20 million exclusive of shares held by affiliates; or (iii) issued by an open end management investment company registered with the Securities and Exchange Commission ("SEC") under the Investment Company Act of 1940 and redeemable at the option of the holder at net asset value. (La. Rev. Stat. § 12: 1-1302).

(f) Statutory Anti-takeover Provisions

The LBCA eliminated all statutory antitakeover provisions. The Old Law had included a control share statute and a fair price law.

B. Limited Liability Companies (LLCs):

An LLC is defined as an unincorporated entity with one or more members. An LLC is similar to a German GmbH and provides limited liability protection comparable to a corporation but may elect to be taxed as a partnership rather than a corporation.

1) Formation

An LLC is formed by filing articles of organization with the Secretary of State's office together with an Initial Report. (La. Rev. Stat. § 12:1304). The Initial Report lists the addresses of the members and registered agent and includes the consent of the registered agent to serve as such. LLCs have the powers of a corporation and of a partnership under Louisiana law. The LLC may adopt an operating agreement but it is not required to be filed.

2) Operations

An LLC may be managed either by its members or by managers elected by its members provided a statement to that effect is included in the LLC's articles of organization. (La. Rev. Stat. § 12:1311; 1313). If the LLC is manager-managed, most day-to-day operations are conducted by the manager although members retain voting power on major transactions such as admission of an assignee as a member; mergers and acquisitions; incurrence of debt other than in the ordinary course of business; and amendments to the articles of organization. (La. Rev. Stat. § 12:1318). Some actions require the unanimous approval of members while others require only majority approval but in either case the required voting standard may be varied in the LLC's articles of organization or in an operating agreement. (La. Rev. Stat. § 12:1318).

Unless the operating agreement provides otherwise, profits and losses are shared equally among the members regardless of their relative capital contributions to the LLC. (La. Rev. Stat. § 12:1323). A distribution may be made only if (a) the LLC would, after giving effect to the distribution, still be able to pay its debts as they come due in the normal course and (b) its total assets would not be less than the sum of its total liabilities plus the amount necessary to satisfy any preferential amounts upon dissolution if the LLC were dissolved at the time of the distribution. A distribution must also not violate any restriction in the articles of organization or written operating agreement. (La. Rev. Stat. § 12:1327).

Louisiana LLCs have the authority to merge with one or more domestic LLCs, partnerships, partnerships *in commendam* or business or nonprofit corporations. (La. Rev. Stat. § 12:1357; 1362). The procedure is similar to that described above for business corporations except there is no requirement that the manager of a manager-managed LLC approve the plan of merger. Only member approval is required. (La. Rev. Stat. § 12:1359). There are no appraisal rights available in connection with an LLC merger.

3) Professional Corporations

Louisiana statutes permit individuals practicing specified professions to join together to form a professional corporation. Rather than one statute governing all such corporations and specifying which types of professions may form them, however, each type of professional corporation is addressed in a separate statute. Twelve different professional corporation acts covering professions such as law, medicine, dentists, accountants, chiropractors, veterinarians, occupational therapists and others. (La. Rev. Stat. § 12, Chapters 8-23). A professional corporation is limited to practicing the profession for which it was formed and may only employ professionals licensed to practice that profession in Louisiana. The name of the professional corporation must include the name of a present or former shareholder or member of a predecessor firm if it is formed for the purpose of practicing law, dentistry, chiropractic, nursing, accounting or optometry. With the exception of an architectural-engineering professional corporation, the names of all other professional corporations must end with the words "professional corporation." The corporate aspects of each type of professional corporation are covered by the LBCA.

C. Partnerships:

Louisiana law provides for general partnerships, limited partnerships (known as partnerships *in commendam* in Louisiana) and limited liability partnerships.

1) General Partnerships

A general partnership in Louisiana is defined as a juridical person that is distinct from its partners and is created by contract between two or more persons that join together for their mutual profit and benefit and share the risk of the venture. (Civil Code Article 2801). Unless the agreement provides otherwise, all partners in a general partnership share equally in the profits even though they may not have made equal capital contributions. (Civil Code Article 2803).

The partnership agreement need not be in writing although if the partnership is to acquire immovable property or wishes to vary any of the default provisions under the statute, it must be in writing. (Civil Code Article 2806). Because the statutory default standard to approve certain actions is the unanimous vote of the partners, it is advisable to have a written agreement. A general partnership must also file its partnership agreement with the Secretary of State in the event real estate is acquired. To register the partnership with the Secretary of State, a filing must be made consisting of the required form, which can be found on the website of the Secretary of State, and paying the requisite fee. (La. Rev. Stat. § 9:3401 *et seq.*). The filing must be accompanied by a certified copy of the contract of partnership. Amendments to a recorded contract of partnership must also be filed with the Secretary of State. A copy of the certificate of registry must also be filed in the real estate records of the parish in which the partnership maintains its principal place of business. (See Form #342 on website of Secretary of State).

Unless a written partnership agreement provides otherwise, day-to-day decisions regarding the operations or management of the partnership may be made by a majority of the partners, but a unanimous vote of the partners is required to admit new partners, amend the partnership agreement, terminate the partnership, or permit a partner to withdraw without just cause if the partnership has been formed for a specific term. (Civil Code Article 2807).

A partner is entitled to inform himself of the business activities of the partnership and may consult its books and records, even if he has been excluded from management. The partnership agreement may not provide otherwise. However, he may not exercise this right in a manner that unduly interferes with the operations of the partnership or prevents other partners from exercising their rights in this regard. (Civil Code Article 2813).

Louisiana law provides that the partnership will terminate upon the occurrence of certain events such as bankruptcy or upon the agreement of the partners. The partnership will also terminate if there remains only one partner. (Civil Code Article 2826). As long as there remains more than one partner, partners may withdraw from the partnership under certain circumstances. Consent of the remaining partners is required if the partnership has been formed for a term. (Civil Code Article 2821). If the partnership has not been formed for a specific period of time, a partner may withdraw provided he gives reasonable notice in good faith at a time that is not unfavorable to the partnership. (Civil Code Article 2822).

2) Partnerships *in Commendam*

A partnership *in commendam* consists of one or more general partners who have the powers, rights and obligations of general partners and one or more partners *in commendam* whose powers, rights and obligations are limited. (Civil Code Article 2837). Unlike general partnerships, partnerships *in commendam* are formed only by written agreement filed with the Secretary of State. (Civil Code Article 2841). Until it is filed, limited partners may be liable to third parties to the same extent as general partners. (Civil Code Article 2841). As with a general partnership, the filing must be accompanied by a fee and a certified copy of the partnership agreement. (See Form #342 on website of Secretary of State). All partnership agreements *in commendam* must also be filed in the real estate records of the parish in which the partnership maintains its principal place of business.

In order for the liability of partners *in commendam* to be limited as to third parties, the name of the partnership as set forth in the partnership agreement must contain words such as “limited partnership” or “partnership *in commendam*.” (Civil Code Article 2838). As long as a limited partner or partner *in commendam* does not allow his or her name to be used in business dealings of the partnership or otherwise participate in the control of the partnership’s business, a limited partner’s liability to third parties is limited to his agreed-upon capital contribution. (Civil Code Article 2844). However, a limited partner may deal with the partnership as an employee or contractor and may attend partnership meetings and take certain other actions without being deemed to have participated in the control of the partnership. (Civil Code Article 2844).

3) Limited Liability Partnerships

A limited liability partnership in Louisiana is a special form of partnership that shields its partners from certain types of liabilities. Specifically, partners in a registered limited liability partnership are not individually liable for the liabilities and obligations of the partnership arising from errors, omissions, negligence, incompetence, malfeasance, or willful or intentional misconduct committed in the course of the partnership business by another partner or a representative of the partnership. The limited liability partnership is, therefore, well suited for professions where such liabilities may arise. (La. Rev. Stat. § 9:3431). The statute does not, however, shield an individual partner from liability for his own actions. In addition, each partner is responsible for his share of the partnership's debts arising from any cause other than the shielded liabilities. (La. Rev. Stat. § 9:3431).

Limited liability partnerships must register with the Secretary of State. The form must set forth certain required information and be accompanied by the requisite fee. The registration must be renewed annually. (La. Rev. Stat. § 9:3432). If the registration of a limited liability partnership lapses, it reverts to the status of a general partnership. (La. Rev. Stat. § 9:3435). A registered limited liability partnership's name must contain the words "registered limited liability partnership" or the abbreviation "L.L.P." as the last words or letters of its name. (La. Rev. Stat. § 9:3433).

D. Sole Proprietorships:

Sole proprietorships are businesses owned by one individual. As no separate legal entity is formed, there is no filing requirement with the Secretary of State, although other filings may be necessary to legally operate the particular business of the sole proprietorship. For example, if the business has more than one employee, it may still be required to obtain a tax identification number. State licensing requirements may also apply. The individual owner will be responsible for the debts of the sole proprietorship and will be taxed on its income.

E. Joint Ventures:

Louisiana does not provide for a distinct entity known as a joint venture.

F. Nonprofit Corporations and Cooperatives:

1) Nonprofit Corporations

Nonprofit or "not for profit" corporations may be formed in Louisiana pursuant to the terms of the Louisiana Nonprofit Corporation Law ("LNCL"). A nonprofit corporation may not be operated for pecuniary profit or gain for its shareholders or pay dividends or similar pecuniary remuneration. (La. Rev. Stat. § 12:266). As with a "for profit" corporation, a nonprofit is formed by filing of articles of incorporation with the Secretary of State. (La. Rev. Stat. § 12:205). The articles of incorporation may provide that the entity is organized on a "non-stock" basis whereby, in lieu of shareholders, there are members or classes of members or both. (La. Rev. Stat. § 12:203). The nonprofit corporation must also file an annual report with the state. (La. Rev. Stat. § 12:205.1).

Subject to limitations on engaging in for-profit activities or paying dividends, a nonprofit corporation generally has the same powers as a business corporation including providing indemnification for directors, officers and agents. (La. Rev. Stat. § 12:207). However, unless the articles of incorporation or bylaws provide otherwise, a nonprofit corporation may not borrow money, purchase real estate or sell or encumber real estate without approval of its voting members (or shareholders if shares have been issued) at a meeting convened for this purposes. (La. Rev. Stat. § 12:207).

The LNCL contains limitations on the name that may be used by a nonprofit corporation depending upon its purpose. (*See* La. Rev. Stat. § 12:204, 12:204.1 and 12:204.2).

As with for profit corporations, the affairs of the nonprofit corporation are managed by its board of directors who may be known by any other title deemed appropriate. The board must consist of a minimum of three individuals unless the corporation has fewer than three members. The articles of incorporation or bylaws may specify any other eligibility requirements or term limits for directors provided that no director may serve a single term longer than five years. (La. Rev. Stat. § 12:224). At least one meeting of members must be held annually and, if such a meeting is not held within six months of the designated time, any ten members or members holding 5 percent or more of the voting power may call a meeting. (La. Rev. Stat. § 12:229).

Any two or more nonprofit entities may merge or consolidate or undertake other business combination transactions, such as significant asset sales or change in jurisdiction of incorporation, subject to board and member or shareholder approval. (La. Rev. Stat. § 12:242). Appraisal rights are available to dissenting shareholders (but not to members) unless the transaction is approved by not less than two-thirds of the total voting power. (La. Rev. Stat. § 12:248).

The LBCA authorizes business corporations to convert to nonprofit corporations through compliance with the entity conversion statutes. (La. Rev. Stat. § 12:1-930).

2) Cooperatives

Louisiana law provides for the formation of cooperative organizations for such special purposes as the provision of electricity (La. Rev. Stat. § 12:401 *et seq*.), seafood marketing associations (La. Rev. Stat. § 12:441 *et seq*.), housing corporations (La. Rev. Stat. § 12:499.1 *et seq*.) agricultural cooperatives (La. Rev. Stat. § 3:71 *et seq*.) and agricultural marketing cooperatives (La. Rev. Stat. § 3:121 *et seq*.). While each has some powers similar to corporations, such as the ability to sue and be sued, own property and borrow and make loans, in general their powers are limited to the particular industry for which the cooperative was formed. The formation and powers of such cooperatives vary. For example, while an electric cooperative is formed by filing of articles of incorporation, a cooperative housing corporation is formed by filing articles of organization, and a seafood marketing cooperative is formed by filing articles of association. Due to the variations associated with the formation and operation of these entities, the applicable statutes should be examined closely by any attorney advising a client.

G. Alternatives:

1) Branch Office

A U.S. branch is an extension in the United States of its foreign corporate owner. Setting up a branch operation does not require a prescribed formation procedure, other than registration to obtain the authority to do business in the jurisdiction (*e.g.*, state, local) in which the branch is located.

A branch is taxed as a division of its parent and is not a legal entity subject to entity-level tax in the United States. The interest holders of a branch are taxed on income that is effectively connected with a U.S. trade or business and are subject to a branch profits tax on certain unremitted earnings. When a foreign company establishes a U.S. branch, there is no bright-line test to determine whether and when the branch conducts a U.S. trade or business within the United States. This determination must be based upon all the facts and circumstances surrounding the business.

2) U.S. Effectively Connected Income, Business Profits; Permanent Establishment

Generally, when a foreign person engages in a trade or business in the United States, all income from sources within the United States connected with the conduct of that trade or business is considered to be effectively connected income. Under the "force of attraction" principle, this rule applies whether or not there is any connection between the income and the trade or business.

By contrast, a foreign corporation that is a resident of a country that has a double taxation treaty with the United States is generally subject to U.S. taxation only on the business profits attributable to a U.S. permanent establishment.

As discussed above, the United States taxes the income of foreign persons on income that is effectively connected with a U.S. trade or business. However, where the foreign person is a tax resident of a jurisdiction with which the United States has an income tax treaty, the permanent establishment rules of the applicable treaty, rather than the U.S. trade or business rules, may apply. The term "permanent establishment" is generally a fixed place of business through which the business of an enterprise is wholly or partially carried out.

3) Sales Representative

The activities of certain agents of a foreign corporation may be imputed to the corporation and taken into account in determining whether the corporation is engaged in a trade or business within the United States and therefore subject to U.S. income taxation. For example, if a foreign corporation has an agent with authority to conclude contracts in the United States that are closely and directly related to the derivation of profit, and such agent regularly exercise that authority in the United States, its activities will normally be sufficient to constitute a trade or business within the United States.

III. TRADE REGULATION

A. Federal Antitrust Law:

Statutory Framework. The antitrust laws of the United States are based on the principle that competition fosters the most efficient allocation of resources, the lowest prices, and the highest quality goods and services. To protect competition, the antitrust laws prohibit agreements that unreasonably restrain trade, the monopolization of markets, and the lessening of competition through discriminatory pricing or acquisitions and mergers. The federal antitrust laws consist of a patchwork of statutes interpreted over more than 120 years in court decisions, enforcement actions, and agency regulations and guidelines. The most significant antitrust laws are the Sherman Act of 1890, 15 U.S.C. § 1 *et seq.*, the Clayton Act of 1914, 15 U.S.C. § 12 *et seq.*, the Federal Trade Commission Act of 1914, 15 U.S.C. § 41 *et seq.*, the Robinson Patman Act of 1936, 15 U.S.C. § 13 *et seq.*, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

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.

1) <u>Section 1 of the Sherman Act</u>

Section 1 of the Sherman Act prohibits only joint or concerted activity that unreasonably restrains trade. Thus, Section 1 does not apply to unilateral or independent conduct by a single firm. Nor does it apply to joint conduct by certain affiliated companies, such as a parent and its wholly-owned subsidiary. However, a violation of Section 1 does not require a formal (oral or written) agreement. An agreement can be inferred from a course of dealing or other circumstantial evidence, *i.e.*, an agreement can be implied from the facts that exist surrounding a particular situation. Whether conduct unreasonably restrains trade is determined either under the "rule of reason" or the per se rule. Under the rule of reason, a plaintiff must show that the conduct under challenge had an anticompetitive and unreasonable effect in a relevant market. On the other hand, the per se rule is based upon the belief that the dangers associated with hard-core violations of the antitrust laws are so great that the public must be protected regardless of the purpose and effect of the challenged conduct in any particular case. Rather, the conduct, if proven, is automatically illegal. Thus, in the case of a per se violation, good intentions or reasonable objectives count for nothing.

2) <u>Section 2 of the Sherman Act</u>

Section 2 of the Sherman Act proscribes monopolization, attempts to monopolize, and conspiracies to monopolize. In contrast to Section 1 which proscribes concerted activity, Section 2 applies primarily to conduct by a single firm. Its focus is on anticompetitive conduct by a single firm having substantial market power. To be guilty of monopolization, a company must possess monopoly power (defined as the power to control price or exclude competition in a relevant market) and have either acquired or used that power in an anticompetitive manner. Obtaining or maintaining monopoly power as a result of a superior product, business acumen, or historic accident does not violate Section 2 and represent common defenses to such claims.

3) The Clayton Act

The Clayton Act supplements the Sherman Act by proscribing conduct that may not yet rise to a violation of the Sherman Act but nonetheless represents a potential threat to competition. Section 3 of the Act prohibits exclusive dealing arrangements, requirements contracts, and tying arrangements when they may substantially lessen competition or tend to create a monopoly. Section 7 of the Clayton Act prohibits corporate mergers and acquisitions, joint ventures, tender offers, and other transactions that increase industry concentration and market power to such a degree that firms would be better able to collude or the post-merger entity would be able to raise prices or suppress output without competitive consequence. Finally, Section 8 prohibits board and officer interlocks between companies with competitive overlap and between certain banks.

4) The Robinson-Patman Act

This Act prohibits seller discrimination in prices and promotional allowances for commodities of like grade and quality when the effect of such discrimination may be to lessen competition substantially or tend to create a monopoly. The Act applies only to discriminatory sales that are made reasonably contemporaneously in time as determined based on several factors. The Act also has a number of other built-in exceptions and defenses. Government enforcement is uncommon and private parties rarely succeed in efforts to bring damage claims under this Act. Nonetheless, non-compliance with the Robinson-Patman Act can create significant antitrust risk and is, therefore, a compliance priority for most companies.

5) The Federal Trade Commission Act

The Federal Trade Commission,[2] an independent regulatory agency, is charged with enforcement of Section 5 of the Federal Trade Commission Act. Section 5 is designed to protect consumers against unfair and deceptive acts or practices. It reaches the same conduct as the Sherman Act, Clayton Act, and Robinson Patman Act, but it can also reach other conduct such as invitations to collude through private and public communications even where there is no evidence of acceptance and manipulation of standard setting processes and licensing agreements. The FTC has authority under the Act to issue regulations and cease and desist orders and to commence civil litigation in federal court for civil penalties and injunctive relief.

6) The Hart-Scott-Rodino Antitrust Improvements Act

The Hart-Scott-Rodino Act established the federal premerger notification program, which provides the FTC and the Department of Justice with information about large mergers and acquisitions before they occur. The parties to certain proposed transactions must submit premerger notification to the FTC and DOJ. Premerger notification involves completing an

HSR Form, also called a "Notification and Report Form for Certain Mergers and Acquisitions," with information about each company's business. The parties may not consummate their transaction until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period. Based on its investigation, the government may seek to prevent the transaction from closing or seek other remedial measures such as asset divestitures to protect competition. Failure to comply with the reporting requirements of the Act will often lead to the imposition of significant civil penalties.

7) <u>Remedies and Enforcement:</u>

The United States Department of Justice (USDOJ)[3] has exclusive jurisdiction to charge criminal violations of the federal antitrust laws. USDOJ shares civil jurisdiction with the FTC, state attorneys general, and private parties, but has broader investigative and enforcement resources than any of the other groups. State attorneys general often seek relief collectively and in coordination with federal regulatory authorities. Private parties may recover treble damages, injunctive relief, and other civil remedies under federal antitrust laws, other than the Federal Trade Commission Act, if they can demonstrate that they have been injured in their business or property *and* the injury stems from a competition-reducing effect of the challenged conduct. This standing requirement imposes a significant barrier to many lawsuits, but the antitrust laws nevertheless remain a significant source of commercial and class action litigation in the United States.

8) <u>Criminal Prosecution</u>

Jail sentences and probation are now common for antitrust violations and can be a source of personal embarrassment and tragedy for employees involved. The criminal penalties for antitrust violations include fines up to $100 million for corporations and fines up to $1 million and/or ten years imprisonment for individuals for each offense. Criminal proceedings also includes arrest, fingerprinting, photographing, and sometimes imprisonment pending trial. Those convicted of a felony also lose such civil rights as voting and holding public office.

9) <u>Injunctions and Damages</u>

Civil lawsuits may also be brought by federal or state government agencies, injured consumers, and injured competitors. Civil lawsuits may result in injunctions (which could adversely affect the way a firm conducts business in the future) as well as damage awards totaling three times the actual damages suffered, plus attorney's fees and costs.

10) <u>Legal Costs</u>

Investigations and legal proceedings resulting from alleged violations can take years to resolve, leading to high costs and diversion of management time from the business.

B. 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 that might be relevant to someone investing in or trading with entities located in the U.S.

1) 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 that 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 that authority to the Committee on Foreign Investment in the U.S. ("CFIUS"),[4] 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 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 the foreign interest exercising control might take action to impair the national security. If the President makes such a determination, Exon-Florio empowers him or her to take any action 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 that 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 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.

2) Reporting Requirements for Foreign Direct Investment

All foreign investments in a U.S. business enterprise that result in a foreign person owning a 10 percent or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis,[5] a part of the U.S. Department of Commerce.[6] 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 site of the entity involved, quarterly, annual and quintennial reports may be required thereafter.

3) 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 rather 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, who 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 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 percent 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 that is reportable under Form BE-13. The purpose is to ensure that those required to file a Form BE-13 do so.

4) The Agricultural Foreign Investment Disclosure Act of 1978

The Agricultural Foreign Investment Disclosure Act ("AFlDA" 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 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 a 5 percent or more interest. The definition of "agricultural land" is any land in the U.S. that 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[7] any time it holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires 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.

5) 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 that allows the export of particular goods or technical information. The two basic types of licenses are general licenses and individual validated licenses.

There are many types of general licenses. These authorizations are generally available and for which it is not necessary to submit a formal application. They cover all exports 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 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,[8] an agency 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 the 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.

6) Foreign Trade Zones

Foreign trade zones are areas in or adjacent to ports of entry that 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 that 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.[9] Under the Foreign Trade Zones Act, the Board is authorized to grant 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[10] regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.

7) 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, 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 the goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price 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 whether such sales cause or threaten material injury to a U.S. industry.

C. State Considerations:

1) Describe your state's antitrust laws

(a) Substantive Louisiana Antitrust Laws

The substantive antitrust laws of Louisiana, La. Rev. Stat. §§ 51:21-126, track Sections 1 and 2 of the Sherman Act. Louisiana Courts, therefore, rely on federal jurisprudence for guidance. However, the Louisiana courts have commonly reached different outcomes than federal jurisprudence on several significant issues including, for example, intraenterprise conspiracy (*Copperweld* doctrine). Additionally, many areas of antitrust law are unsettled in Louisiana. For example, litigants frequently litigate whether Louisiana antitrust laws apply only to claims involving intrastate commerce or also extend to conduct affecting interstate commerce. State courts in Louisiana also are more likely to take into account "intent" evidence such as poorly worded documents as relevant to their legal analysis and to the factfinder. The remedies available for antitrust violations in private plaintiff suits include injunctive relief, treble damages, and attorneys' fees. Louisiana courts apply a one-year prescriptive period (statute of limitations) to state antitrust claims.

(b) Procedural Louisiana Antitrust Laws

Unlike other states, Louisiana has adopted a unique set of procedural rules, La. Rev. Stat. §§ 51:127-152, which govern all state antitrust claims filed in state court. These procedural rules create a "rocket docket" under which courts must prioritize antitrust cases over other cases. Meanwhile, defendants must file exceptions *in limine litis* and appeal interlocutory orders within 5 days. These procedural rules also establish permissive evidentiary rules (*e.g.,* the content of the books and records of defendant are "presumed to be true" without authentication) and grant expansive discovery rights and remedies to the Louisiana Attorney General.[11] Litigants must be careful to avoid pitfalls associated with these procedural rules.

(c) Merger Clearance

Louisiana does not have a reporting requirement for mergers. However, mergers may be challenged under Louisiana antitrust laws. Additionally, the Louisiana Attorney General is an active member of the National Association of Attorneys General and frequently joins their suits. Accordingly, very early in the transaction process parties to a potential transaction should undertake a critical assessment of the antitrust issues raised by the transaction in order to anticipate regulatory concerns that may be unique to Louisiana. In many cases, this means working with economists able to develop evidence necessary to define the relevant market(s) and document the ease and likelihood of new entry. Identifying potential problems that may be unique to Louisiana in the early stages of a transaction is critical to an overall effective deal strategy.

2) Explain how Louisiana regulates franchises

There are no franchise registration laws or filing laws that specifically address franchising as such. Businesses operating in Louisiana as franchisors should comply with the FTC regulations governing franchises and state commercial, antitrust, and intellectual property laws and recognize that the Louisiana Attorney General and Louisiana courts will exercise jurisdiction over franchisors operating in Louisiana. Additionally, Louisiana has adopted specific laws that govern the expiration, modification, cancelation, and termination of franchise agreements for beer wholesaling, automobile dealers, recreational product dealers, agricultural equipment, and service stations.

3) Explain any Louisiana consumer protection laws

The principal consumer protection law is the Louisiana Unfair Trade Practices and Consumer Protection Act ("LUTPA"). (La. Rev. Stat. §§ 51:1401-30). LUTPA prohibits businesses from engaging in fraud, misrepresentation, deception, and other oppressive and unscrupulous conduct but does not prohibit sound business practices or the exercise of permissible business judgment. Louisiana state courts give "great deference" to the decisions by the Federal Trade Commission in the area of unfair trade practices. However, when a plaintiff has failed to adequately allege an antitrust violation, it has also failed to state a claim under LUTPA. On the other hand, the converse is not necessarily true. A plaintiff who has not alleged an antitrust violation must still allege "specific acts of fraud, misrepresentation, or deception" on the part of the defendant to state a viable claim. LUTPA grants standing to bring suit to the Louisiana Attorney General, consumers, business competitors, and any other persons who assert a loss of money or property as a result of the use or employment of an unfair or deceptive method, act, or practice. Remedies available for a LUPTA violation include damages and attorneys' fees. Treble damages also may be recovered if the defendant continued to engage in the deceptive act or practice after the Louisiana Attorney General notifies the defendant of the alleged misconduct. Suits must be brought within one year of the alleged act or transaction giving rise to the claim.

IV. TAX

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 calculating the amount of the U.S. income tax payable, and many of these apply to foreign owned corporations or foreign individuals as well as to domestic corporations and 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 percent for ordinary income and 28 percent for capital gains. A nonresident alien generally is subject to tax on dividends from U.S. corporations.

B. State Taxation

1) Explain State Personal Income, Corporate Income, Franchise, Property, Sales and Uses Taxes

(a) Personal Income Tax

Louisiana imposes a personal income tax on the net income of residents and certain non-nonresidents. (La. Rev. Stat. § 47:31). The computation of Louisiana's taxable income begins with federal adjusted gross income , less deductions, to derive "net income " upon which tax is imposed. The tax is imposed annually at graduated rates between 2 percent and 6 percent of taxable net income.

(i) Gross Income Defined

Gross income includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from dealings in property. Gross income also includes income from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit. (La. Rev. Stat. § 47:42(A)).

(ii) Deductions

If a taxpayer claims a standard deduction for federal purposes, the taxpayer must also claim a standard deduction for Louisiana purposes. The standard deduction is combined with personal exemptions. (La. Rev. Stat. § 47:79).

(b) Corporation Income Tax

Louisiana imposes a net income tax on every corporation that has Louisiana taxable income (the "Corporation Income Tax"). (La. Rev. Stat. § 47:287.11(A) and (B)). The Corporation Income Tax applies to the income of both corporations and other entities taxed as corporations for federal income tax purposes. (La. Rev. Stat. § 47:287.11(A)). A corporation need not have a physical presence in the state in order to become subject to the Corporation Income Tax. The tax is imposed annually at graduated rates between 4 percent and 8 percent of Louisiana taxable income.

(i) Partnerships and LLCs

Louisiana conforms to the federal tax treatment of partnerships. Partnerships are not subject to the Corporation Income Tax. (La. Rev. Stat. § 47:201). Limited liability companies ("LLCs") electing to be treated as partnerships for federal tax purposes are treated as partnerships for Income Tax purposes and, therefore, are not subject to the Corporation Income Tax. LLCs electing to be treated as C corporations for federal tax purposes are also treated as corporations for Corporation Income Tax purposes and, therefore, are subject to the Corporation Income Tax. (La. Rev. Stat. § 12:1368; La. Rev. Stat. § 47:201; La. Rev. Stat. § 47:287.11(A)).

(ii) S Corporations

Louisiana has adopted a unique regime for S corporation status. An S corporation is required to file in the same manner as a C corporation. However, an S corporation may exclude a percentage of income attributable to its shareholders who report their allocable share as income on their individual returns. (La. Rev. Stat. § 47:287.732). *See* Section B(2), below.

(iii) Tax-Exempt Entities

Organizations exempt under Federal Tax Code §§ 401(a) or 501 are exempt from the Corporation Income Tax.

(c) Corporation Franchise Tax

Louisiana imposes a corporation franchise tax ("Franchise Tax") on all domestic and foreign corporations doing business in the state based on a corporation's issued and outstanding capital stock, surplus, and undivided profits. (La. Rev. Stat. § 47:601(A); La. Rev. Stat. § 47:602(A)). For Franchise Tax periods beginning on or after January 1, 2017, LLCs and other entities taxed as C corporations for federal purposes are also subject to the Franchise Tax. However, the Franchise Tax does not apply to an LLC that is qualified and eligible to make an S corporation election under federal law. (La. Rev. Stat. § 47:601(C)(1)(b), as added by 2016 La. Act No. 12 (2016 First Extraordinary Session)).

Generally, foreign corporations are subject to Franchise Tax in the same manner as a domestic corporation. (La. Rev. Stat. § 47:601(A)). For taxable periods beginning on or after January 1, 2017, the Franchise Tax will be levied on a foreign corporation that owns or uses property in the state whether owned directly or indirectly by or through a partnership, joint venture, or any other business organization of which the domestic or foreign corporation is a related party. (La. Rev. Stat. § 47:601(A), as added by 2016 La. Act No. 12 (2016 First Extraordinary Session)).

Foreign corporations that derive income from Louisiana sources must file a return whether or not there is any tax liability. A foreign corporation is subject to the Franchise Tax if it meets any one of the criteria listed below:

- Qualifying to do business in Louisiana or actually doing business within Louisiana;
- Exercising the corporate charter within this state; or
- Owning or using any part or all of the corporate capital, plant, or other property in Louisiana in a corporate capacity.

Certain corporations are exempt from the Franchise Tax, including insurance companies paying a gross premiums tax, banking and mutual companies paying a share tax, charitable or educational organizations, and various cooperatives. (La. Rev. Stat. § 47:608; Louisiana Administrative Code ("LAC") § 61:I.308.) A corporation is not exempt from the Franchise Tax merely because it is a nonprofit organization, but generally must apply for exemption with the Department of Revenue.[12] A corporation is either entirely exempt or wholly taxable. There is no statutory provision under which partial exemption may be granted. (LAC § 61:I.308(A)(7)).

Corporations organized under Louisiana law must file a return for the Franchise Tax unless exempt from both the Franchise Tax and the Corporation Income Tax, which are filed on the same form (CFT-620). The Franchise Tax for domestic corporations accrues, regardless of whether assets are owned or business operations are conducted, until a Certificate of Dissolution is issued by the Louisiana Secretary of State.

For the 2016 Franchise Tax period, the Franchise Tax is imposed on the tax base at the rate of $1.50 for each $1,000, or major fraction thereof, of the first $300,000 of taxable capital and $3 for each $1,000, or major fraction thereof, that exceeds $300,000 of taxable capital.

(d) Sales and Use Tax

Louisiana generally levies a sales tax on a "sale at retail." Louisiana also imposes a complementary use tax on the use, consumption, distribution, or storage for use or consumption of tangible personal property. In addition, Louisiana imposes a lease tax on the rental of tangible personal property in the State. Louisiana also levies a sales tax on certain specifically enumerated services. Numerous transactions, taxpayers, and property are specially excluded or exempt from Louisiana sales tax.

The Louisiana state-level sales/use/lease tax rate is 5 percent effective April 1, 2016 through June 30, 2018, and decreases to 4 percent effective July 1, 2018. Additionally, Louisiana local sales/use/lease tax rates range from 3 percent to 7 percent. As a result, the current combined Louisiana state and local sales/use/lease tax rate can range from 8 percent to 12 percent, depending on the locality in which the taxable transaction occurs.

For sales and use tax purposes, the classification of "tangible personal property" is determined under Louisiana civil law. Therefore, the term "tangible personal property" generally has the same meaning for purposes of tax law as "corporeal movable property" under the Louisiana Civil Code. Louisiana Private Letter Ruling 06-010 (July 24, 2006).

(i) Taxation Upon Sale, Use, Consumption, Distribution, or Storage

The Louisiana sales tax on tangible personal property is levied on the property's "sales price." (La. Rev. Stat. § 47:302(A)(1)). The sales price includes the total consideration paid in money or otherwise for tangible personal property. (La. Rev. Stat. § 47:301(13)(a)). The Louisiana use tax on tangible personal property is levied on the property's "cost price." The cost price is the lesser of the tangible personal property's actual cost or "reasonable market value" upon becoming subject to Louisiana use tax. The property's "reasonable market value" is what a willing seller would receive from a willing buyer in an arms-length sale of similar property at or near where the property is situated. (La. Rev. Stat. § 47:301(3)(a); LAC § 61.I:4301(C) ("Cost Price")(a)). Louisiana courts have consistently held that use is defined as use within Louisiana for the intended purpose of the tangible personal property.

Although not statutorily defined, consumption means the property is consumed or expended within Louisiana during the fulfillment of its intended purpose. Similarly, distribution contemplates that the property has been distributed within Louisiana in the process of its intended purpose. Lastly, storage is defined as the keeping or retention of property within Louisiana for use or consumption within Louisiana.

(ii) Taxation Upon Lease or Rental

If tangible personal property is leased or rented within Louisiana in connection with the business of the lessor, sales tax is levied on the "gross proceeds" of such lease or rental. In the case of the lease or rental of tangible personal property not in connection with the business of the lessor, sales tax is levied on the total monthly lease or rental price paid or contracted to be paid to the owner of the property. (La. Rev. Stat. § 47:302(B)(2); La. Rev. Stat. § 47:321(B); La. Rev. Stat. § 47:331(B)).

(iii) Taxation of Services

Louisiana imposes sales tax only on services specifically enumerated in the statute as taxable services. Some services subject to tax include:

- furnishing of repairs;
- furnishing of sleeping rooms by hotels;
- furnishing of telecommunication services for compensation;

- sale of admissions to amusement places, athletic entertainment (other than that of schools, colleges, and universities), and recreational events, and the furnishing, for dues, fees or other consideration, of the privilege of access to clubs;

- furnishing of cold storage space and preparing tangible personal property for cold storage;

- furnishing printing services; and

- furnishing of storage or parking privileges by auto hotels and parking lots. (La. Rev. Stat. § 47:301(14)),

(iv) Exclusions and Exemptions

Louisiana recognizes a number of exclusions and exemptions from sales and use tax for certain items and transactions. (La. Rev. Stat. § 47:305.14(C); La. Rev. Stat. § 47:305.18(C); La. Rev. Stat. § 47:305.43(E)). Exemptions from taxation are strictly construed against the taxpayer, while exclusions are construed liberally in favor of the taxpayer and against the taxing authority.

Some notable exclusions and exemptions available in Louisiana are:

- Sale for Resale Exclusion;

- Isolated or Occasional Sale Exclusion;

- Manufacturing Machinery and Equipment Exclusion;

- Further Processing Exclusion;

- Interstate Commerce Exclusion; and

- Vessel Exemptions.

(v) Local Sales and Use Tax

The political subdivisions of Louisiana, including the governing authority of any parish or school board, are also authorized to impose local sales, use, and lease taxes on the sale, use, or lease/rental of tangible personal property, as well as the sale of enumerated taxable services within their geographic jurisdictions.

Although local sales and use tax is levied by local taxing authorities (*e.g.*, parishes, cities, and school boards), it is designed to be administered uniformly throughout the state. However, there is a notable lack of uniformity amongst the various taxing authorities.

(e) Severance Tax

Louisiana imposes a severance tax on natural resources based on the quantity or value of the products or resources recovered. Severance tax is generally imposed on oil and gas, timber, freshwater mussels, oysters, and other natural resources. The tax is generally paid by the owner at the time of severance. (La. Rev. Stat. § 47:632(A)),

The taxable value for refinery gas is computed by multiplying 52 cents per thousand cubic feet by a fraction of which the numerator is the posted price for a barrel of West Texas Intermediate Crude Oil on December 1 of the preceding calendar year and the denominator is \$29. As of December 1, 2015, the posted price for a barrel of West Texas Intermediate Crude Oil was \$40.58.

$$\$0.52 \times \frac{(\$40.58)}{(\$29)} = \$0.728 \text{ per MCF}$$

Severance tax on timber and pulpwood is based on the current average stumpage market value determined annually in December by the Louisiana Forestry Commission ("LFC") (La. Rev. Stat. § 47:633). The LFC has issued the following rates for the 2016 tax year:

Product	**Valu Per Ton**	**Tax Rate**	**Tax per Ton**
Pine Sawtimber	\$31.58	2.25%	\$0.71
Hardwood Sawtimber	\$35.19	2.25%	\$0.79
Pine Chip-n-Saw	\$16.62	2.25%	\$0.37
Pulpwood Pine	\$9.46	5.00%	\$0.47
Pulpwood Hardwood	\$9.91	5.00%	\$0.50

(f) Property Tax

In Louisiana, all property is taxable unless it is specifically exempted. (La. Const. art. VII, § 21). Real property in Louisiana is divided into five different classes for *ad valorem* assessment, with subclasses for valuation, identification, and equalization purposes. (La. Const. art. VII, § 18(B)). In addition, Louisiana levies *ad valorem* property tax on non-exempt personal property.

Usually the parish assessor is responsible for listing, valuing, and assessing all taxable real property within the parish, but public service properties are assessed by the Louisiana Tax Commission.[13] (La. Const. art. VII, § 18; La. Rev. Stat. § 47:1957(a)). Assessments are generally based on the property's condition as of January 1 of each year (except for Orleans Parish, which has an assessment date of August 1). All real property in the State must be reassessed and revalued at least once every four years. (La. Rev. Stat. § 47:1952(a)). Personal property is typically self-reported by taxpayers and must be reappraised every year. (La. Const. art. VII, § 18(F)).

Most property is assessed based on its fair market value, which is the price at which the property would sell between a willing and knowledgeable buyer and a willing and knowledgeable seller. However, agricultural, horticultural, marsh, and timber lands are assessed at their use value, which is the highest value of the land at its current use. (LAC § 61:V.213(A)). Property generally may be assessed on the cost method, income method, or sales/market method. Other methods are applicable to a narrow group of other properties. (La. Rev. Stat. § 47:2323(C); LAC § 61:V.111).

The property's fair market value or use value is multiplied by a percentage based on the property's classification to determine its assessed value. These percentages vary between 10 percent and 25 percent. Assessors then multiply the property's assessed value by the property tax rate to determine the property's tax liability. (La. Const. art. VII, § 18(A)).

Tax bills are mailed annually to each property owner. Taxes are generally due by December 31, except in Orleans Parish where taxes are due by January 31. (La. Rev. Stat. § 47:2127).

2) <u>Explain "Sub-S" Status</u>

(a) Treatment of S Corporations

Louisiana has adopted a unique system for taxing corporations that have elected S corporation status for federal income tax purposes. Most other states either do not recognize a federal S election or treat an S corporation as a pass-through entity like a partnership and tax its income to its shareholders, rather than at the corporate level.

The Louisiana regime for taxing S corporations partakes of both systems used by other states. An S corporation is required to file a Louisiana income tax return in the same manner as a C corporation. An S corporation is entitled to claim an exclusion from its taxable income, however, for the percentage of its income that is reported by its shareholders on their individual Louisiana income tax returns. In effect, the Louisiana system places the burden on the S corporation of policing its nonresident shareholders' obligation to report their respective percentages of its income on their individual returns by requiring the corporation to pay income tax on the portion of its income that its shareholders do not report on their own returns.

(b) Subsidiaries of S Corporations

A qualified S subsidiary ("Q-Sub" or "QSub") corporation is not automatically treated as a "disregarded entity" for Louisiana income tax purposes, as it is for federal income tax purposes. Whether a Q-Sub is treated as a disregarded entity is determined by the taxpayer's election. This election is made by filing returns under the elected method. No election forms are necessary. (La. Rev. Stat. § 47:287.732.1(A); La. Rev. Info. Bul. No. 04-003 (01/07/2004)). Taxpayers can elect to treat a Q-Sub as a disregarded entity of the S corporation parent. It is to the Q-Sub's advantage to attribute all of the income to its parent, because the parent is eligible for the S corporation exclusion allowed by La. Rev. Stat. § 47:287.732(B). If such an election is made, a corporation income tax return must still be filed for the Q-Sub. However, Louisiana income is reported as zero. A statement that the Q-Sub income, expenses, and credits are being reported on the S corporation parent's return must be attached to the Q-Sub's return. The parent's income tax return must include all assets, liabilities, and items of income, deduction, credit, and any other items of the Q-Sub. Income tax credits earned by the Q-Sub are attributed to the parent. Credits that can be applied against income or franchise tax are attributed to the parent, to the extent they are not applied against the Q-Sub's corporate franchise tax. (La. Rev. Stat. § 47:287.732(C); La. Rev. Stat. § 47:287.732.1(C)).

Under an alternative election, taxpayers can elect to treat the Q-Sub as a separate corporation for income tax purposes, in which case the parent S corporation and the Q-Sub are each required to compute their Louisiana corporation income tax as if they had been required to file federal income tax returns as C corporations for the current and all prior tax years. Under this election, the S corporation can take the S corporation exclusion allowed by La. Rev. Stat. § 47:287.732(B), but the Q-Sub cannot take that exclusion. (La. Rev. Stat. § 47:287.732(C); La. Rev. Stat. § 47:287.732.1(C); La. Rev. Info. Bul. No. 04-003 (01/07/2004)).

If an election is made to disregard a Q-Sub for income tax purposes, separate computations of the property ratio (Schedule M) must be made in calculating the S corporation parent's income tax. The parent's income tax Schedule M is based on a combined balance sheet with the Q-Sub. (La. Rev. Info. Bul. No. 04-003 (01/07/2004)).

3) <u>Explain Any Tax Benefits Your State Offers to Attract New Business, Foreign Investors</u>

(a) Angel Investor Tax Credit

Louisiana's Angel Investor Tax Credit ("AITC") encourages accredited investors to invest in early stage, wealth-creating Louisiana businesses that seek startup and expansion capital. (La. Rev. Stat. § 47:6020). The AITC provides a 25.2 percent tax credit on investments by accredited investors in businesses certified by the Louisiana Department of Economic Development[14] as Louisiana Entrepreneurial Businesses. The AITC is subject to a $3.6 million annual program cap. Investors can invest $720,000 per business per year and $1.44 million per business over the life of the program. The AITC Program sunsets on July 1, 2017.

(b) Competitive Projects Payroll Incentive Program

The Competitive Projects Payroll Incentive Program ("CPPI") provides an incentive rebate of up to 15 percent of a participating company's new payroll for up to 10 years. (La. Rev. Stat. § 51:3121 *et seq.).* Additionally, a participating company will be eligible for either a rebate of state Sales and Use Tax on capital expenditures or a 1.2 percent project facility expense rebate. The Secretary of LED may invite a business to participate in the program upon determining the business meets certain criteria.

(c) Digital Interactive Media and Software Development Incentive

Louisiana's Digital Interactive Media and Software Development refundable tax credit provides a 25.2 percent tax credit on qualified payroll for in-state labor and 18 percent for qualified production expenses incurred through June 30, 2018, and a 35 percent tax credit on qualified payroll for in-state labor and 25 percent for qualified production expenses incurred on or after July 1, 2018. (La. Rev. Stat. § 47:6022). The credit does not have a cap or a minimum requirement. The tax credit is available either for a refund of 100 percent of its value claimed on Louisiana state tax return or certified applicants can receive 85 percent of the value earned as a rebate any time during the year. The incentive is open to all companies producing digital interactive media products or platforms in Louisiana. Certain exclusions apply, such as static internet websites or software primarily designed for internal use, which are non-qualifying. Only work physically performed in Louisiana and direct development equipment purchased through Louisiana businesses qualify for the incentive.

(d) Enterprise Zone Program

The Enterprise Zone Program (the "EZ Program") is a jobs incentive program that provides Louisiana Income Tax and Franchise Tax credits to a new or existing business located in Louisiana creating permanent net new full-time jobs, and hiring at least 50 percent of those net new jobs from one of four targeted groups. (La. Rev. Stat. § 51:1787). The EZ Program provides:

- Either a one-time $3,500 or $1,000 tax credit for each net new job created.
- A 4 percent rebate of Sales and Use Tax paid on qualifying materials, machinery, furniture, and/or equipment purchased or a 1.5 percent refundable investment tax credit on the total capital investment, excluding tax exempted items. The 4 percent or 1.5 percent rebate may not exceed $100,000 per net new job.

(e) Industrial Tax Exemption

The Louisiana Industrial *Ad Valorem* Tax Exemption Program ("ITEP") is a state incentive program offering an attractive tax incentive for manufacturers within the state. *See* Art. VII, Section 21(F) of the Louisiana Constitution of 1974, as amended. ITEP abates, up to ten years, local *ad valorem* property taxes on a manufacturer's new investment and annual capitalized additions related to the manufacturing site.

Businesses must be classified either as a manufacturer or as related to a manufacturing project in order to receive the benefits of the ITEP program. ITEP is available only for activities related to manufacturers.

(f) Motion Picture Investor Tax Credit

Louisiana's Motion Picture Investor Tax Credit provides motion picture productions up to a 30 percent transferable tax credit on total qualified in-state production expenditures, including resident and non-resident labor. (La. Rev. Stat. § 47:6007). For productions using in-state labor, Louisiana offers an additional 10 percent payroll tax credit.

(g) Musical and Theatrical Production Tax Incentive

Louisiana’s musical and theatrical production income tax credit program is open to concert, theatrical and other live productions that originate or debut in the State of Louisiana. (La. Rev. Stat. § 47:6034). The musical and theatrical production income tax credit for infrastructure projects is available to state certified higher education musical or theatrical infrastructure projects. There is a $100,000 minimum in-state expenditure requirement.

(h) Quality Jobs

The Quality Jobs Program (“QJ Program”) provides a cash rebate to companies that create well-paid jobs and promote economic development. (La. Rev. Stat. § 51:2451 *et seq.).* The QJ Program provides up to a 6 percent cash rebate on 80 percent of gross payroll for new direct jobs for up to 10 years. Effective July 1, 2018, the rebate is available on 100 percent of gross annual payroll.

The QJ Program provides a 4 percent state Sales and Use Tax rebate on capital expenditures or a 1.5 percent refundable investment tax credit on the total capital investment, excluding tax exempted items.

(i) Research and Development Tax Credit

The Research and Development Tax Credit (the “R&D Credit”) encourages existing businesses with operating facilities in Louisiana to establish or continue research and development activities within the state. (La. Rev. Stat. § 47:6015). The R&D Credit provides up to a

40 percent tax credit on qualified research expenditures incurred in Louisiana with no cap and no minimum requirement.

The R&D Credit is open to companies that have incurred research and development expenditures in Louisiana and that meet certain requirements. Only research and development conducted in Louisiana will qualify for the R&D Credit. In order for credits to be awarded, a taxpayer must claim the expenditures within one year after December 31 of the year in which the expenditure was incurred.

(j) Restoration Tax Abatement

The Restoration Tax Abatement ("RTA") program provides an up to ten-year abatement of *ad valorem* property taxes on the renovations and improvements of existing commercial structures and owner-occupied residences. (Art. VII, Section 21(H) of the Louisiana Constitution of 1974, as amended; La. Rev. Stat. § 47:4311 *et seq*,). The RTA is a five-year contract with an option for a five-year renewal with local governing authority approval.

The RTA incentive is open to all Louisiana businesses and homeowners with existing structures to be expanded, restored, improved or developed in qualifying locations, and as approved by the local governing authority. However, if property taxes have been paid on the improvements a business or homeowner is not eligible to apply for the exemption.

(k) Sound Recording Investor Tax Credit

The Sound Recording Investor Tax Credit provides an 18 percent tax credit for sound recording projects made in the State of Louisiana. (La. Rev. Stat. § 47:6023). Louisiana also offers some of the world's finest talent and sophisticated recording studios to complement the attractive financial benefits of recording in state. Sound recording investor tax credits are issued as rebates. The program is subject to a cap of $2.16 million between July 1, 2015 and June 30, 2018. Starting July 1, 2018, program is subject to a cap of $3 million in tax credits per calendar year.

(l) Technology Commercialization Credit and Jobs Program

The Technology Commercialization Tax Credit provides a 28.8 percent refundable tax credit for companies that invest in the commercialization of Louisiana technology and a 4.32 percent payroll rebate for the creation of new, direct jobs. (La. Rev. Stat. § 51:2351 *et seq.*). The technology must be created by a Louisiana business and researched by a Louisiana university or college. The credits shall be earned and granted for a period of not less than five tax years.

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 limited 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:

(i) 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.

(ii) 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.

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

(vii) 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.

(viii) 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.

(ix) 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.

(x) Other Non-Immigrant Visa Categories

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,[15] as well as the Department of State[16] and Department of Labor.[17] 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) Labor And Employment Statutes

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

The ADEA prohibits 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. The Act also 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 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 up to twelve weeks of unpaid leave per year for the birth or adoption of a child or a serious health condition of the employee or of the spouse, parent or child of the employee. This Act applies to all employers engaged in commerce that employ fifty or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.

(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 over 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 guidelines governing labor-management relations. They apply to all employers 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 creating and enforcing safety regulations in the workplace. It applies to all employers 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) <u>Employee Benefits</u>

(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 available continuing coverage under medical reimbursement and health care plans 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 specific procedures for notifying terminated employees of their COBRA rights.

B. State Considerations:

1) <u>Employment "At-Will"</u>

Louisiana is a strong "employment-at-will" state. This means that when an employee is hired for an indefinite period of time, as are most employees, the employer may discharge the employee at any time for any reason not otherwise prohibited by law. Likewise, the employee is free to leave his employment at any time without giving any reason. La. Civ. Code art. § 2747. Unlike in many states, there are no public policy exceptions to "employment-at-will" in Louisiana.

2) <u>Employment Contracts, Employee Handbooks, and Non-Competes</u>

(a) General

In Louisiana, when an employment contract is made for a fixed period of time, unless otherwise provided in the contract, an employee who is discharged without cause before the contract period expires may recover damages for breach of contract. Such a contract need not be in writing to be enforceable.

(b) Employee Handbooks/Personnel Policies

Employee handbooks, personnel policy manuals, written and unwritten employment policies, offer letters, and oral or written comments made in job interviews and performance appraisals can be relied upon by employees as evidence of an enforceable employment contract. Therefore, it is best to include in employee handbooks and any other written employment policies a statement that such materials are merely guidelines and not a contract.

(c) Agreements Restricting Competition by Former Employees.

So-called non-compete or non-competition agreements and agreements that prohibit the solicitation of an employer's customers by former employees are strictly limited in Louisiana. Such agreements are lawful only if limited to no more than two years following termination of employment and only if they specify the "parish or parishes, municipality or municipalities, or parts thereof," in which competition and/or solicitation are prohibited and only if "the employer carries on a like business therein." (La. Rev. Stat. § 23:921(C)).

(d) Choice of Law and Choice of Forum Clauses.

Any clause in an employment contract with a Louisiana employee that purports to adopt another state's law as the governing law or that purports to require the employee to litigate any dispute arising under the agreement in an out-of-state court is unenforceable unless expressly ratified by the employee after the occurrence of the event that is the subject of the dispute. (La. Rev. Stat. § 23:921 (A)(2)).

3) <u>Unions/Collective Bargaining</u>

(a) "Right to Work"

Louisiana is a "right to work" state, meaning that so-called "union shop" agreements that require union membership or payment of union dues or fees as a condition of employment are prohibited. (La. Rev. Stat. § 23:983).

(b) Strike Replacement Workers

Except with respect to common carriers, Louisiana law prohibits employers from bringing in workers from out of state to replace employees who are on strike. (La. Rev. Stat. § 23:898, 899).

4) <u>Protection from Employment Discrimination</u>

(a) General

The Louisiana Employment Discrimination Law ("LEDL"), La. Rev. Stat. § 23:301, *et seq.*, prohibits discrimination in employment for all the same reasons prohibited under federal law (race, gender, national origin, religion, age, and disability) and allows for the recovery of back pay, front pay, compensatory damages and attorney fees in the case of a violation. Punitive damages are not available under state law; however, unlike federal law, state law does not cap or limit the amount of compensatory damages that may be awarded in the event of a violation. Claims under the LEDL must be brought in court within one year after the alleged discriminatory conduct; however, the one-year prescriptive period can be stayed or suspended for up to six months if the employee files a charge of discrimination under federal law with the U.S. Equal Employment Opportunity Commission[18] ("EEOC"). The LEDL also established the Louisiana Commission on Human Rights[19] ("LCHR"), a state-level EEOC-type agency empowered to investigate charges of employment discrimination in violation of state law. The creation of the LCHR makes Louisiana a "deferral" state for purposes federal discrimination law, meaning the time period for filing an EEOC charge is extended from 180 to 300 days following the alleged discriminatory conduct. However, a Louisiana employee is not required to file a charge with either the LCHR or the EEOC before filing suit under the LEDL.

(b) Special Protections

Louisiana law also prohibits discrimination in employment on the basis of the following special categories:

(i) Pregnancy/Maternity Leave

Louisiana employers may not discriminate on the basis of pregnancy, child birth, or related medical conditions. Employers with 25 or more employees also must provide a minimum of 6 weeks of leave for pregnancy and childbirth and up to 4 months of leave if medically necessary. Unlike the federal Family and Medical Leave Act ("FMLA"), employees need not be employed for any minimum period of time to be eligible for pregnancy/maternity leave under Louisiana law. (La. Rev. Stat. § 23:342).

(ii) Military Service

Louisiana law makes it unlawful to discriminate against members of the Armed Forces, Reservists, or members of the Louisiana National Guard. (La. Rev. Stat. § 29:38.1 and 29:404). The Louisiana Military Service Relief Act, La. Rev. Stat. § 29:401, *et seq.*, provides employees who serve in the military with many of the same employment and re-employment rights and benefits available under federal law, including military leave and reemployment rights. Additionally, La. Rev. Stat. § 29:410(J) makes it unlawful to discharge an employee without cause within one year after being reinstated to his former employment following military service.

(iii) Genetic Information

With certain limited exceptions, it is unlawful in Louisiana to discriminate against an employee or applicant for employment based on genetic information. (La. Rev. Stat. § 23:368).

(iv) Sickle Cell Trait

Louisiana law prohibits discrimination in employment against persons with sickle cell trait, a medical condition that primarily affects African-Americans. (La. Rev. Stat. § 23:352).

(v) Political Activity

Louisiana employers may not discriminate against employees on the basis of political beliefs, opinions, or affiliations. (La. Rev. Stat. § 23:961, 962).

(vi) Jury Duty

Louisiana employers may not discharge employees because of service on a criminal or civil jury. (La. Rev. Stat. § 23:965).

(vii) Smoking/Tobacco Use

Although employers may prohibit smoking or the use of tobacco products at work, employers may not discharge or otherwise discriminate against employees because they smoke or use tobacco products away from work. (La. Rev. Stat. § 23:966).

(viii) LGBT Status

Although state law does not prohibit discrimination on the basis of LGBT status, at least two municipalities, ***New Orleans and Shreveport***, have enacted ordinances that prohibit discrimination based on sexual orientation and gender identity.

5) <u>Protection from Retaliation and Whistleblower Activities</u>

(a) General

It is unlawful to discharge, discriminate against, or engage in any other form of retaliatory action against an employee because the employee has made or threatened a claim or testified or furnished information in connection with a claim, investigation or proceeding under Louisiana labor and employment laws. (La. Rev. Stat. § 23:964).

(b) Workers' Compensation Claimants

It is unlawful to discharge or engage in any form of discriminatory or retaliatory action against an employee because the employee has asserted a claim under Louisiana's Workers' Compensation Law. (La. Rev. Stat. § 23:1361).

(c) Garnishments

Louisiana law makes it unlawful to discharge or deny employment to an individual because of a voluntary assignment or single garnishment of wages. However, it is permissible to discharge an employee whose earnings have been subjected to three or more garnishments for unrelated debts over a two-year period; provided, however, that a garnishment resulting from an accident or illness that causes an employee to miss ten or more consecutive work days cannot be considered one of the three. (La. Rev. Stat. § 23:731(C)).

(d) Whistleblowers

The Louisiana Whistleblower Protection Law, La. Rev. Stat. § 23:967, prohibits employers from discharging or engaging in any type of discriminatory or other retaliatory action against employees for disclosing or threatening to disclose violations of law, for refusing to engage in unlawful conduct, or providing testimony to law enforcement authorities in connection with an investigation of a violation of law by the employer.

6) Compensation and Benefits

(a) No State Minimum Wage

Louisiana law does not mandate a minimum wage higher than the federal minimum. In fact, Louisiana law prohibits parishes and municipalities from enacting so called "living wage" ordinances that require employers within the jurisdiction of a parish or city to pay a minimum wage higher than the federal minimum. (La. Rev. Stat. § 23:642). ***However,*** local governments are not prohibited from requiring parish and city contractors to pay above the federal minimum wage; and the city of ***New Orleans*** recently adopted an ordinance requiring certain companies doing business with the city to pay a minimum "living wage" above the federal minimum. The minimum "living wage" for New Orleans city contractors has an annual escalator to adjust for inflation and is currently set at $10.55 per hour.

(b) No State Mandatory Leave

Other than leave for pregnancy/child birth and military leave, noted above, there is no requirement under Louisiana law for employers to provide any form of leave, paid or unpaid. ***However,*** state law does not prohibit local governments from imposing such requirements on their contractors; and the same ***New Orleans*** ordinance requiring certain city contractors to pay above the federal minimum wage also requires such companies to provide at least seven days of paid leave per year.

(c) Frequency of Payment

Louisiana employers engaged in mining, drilling for oil, or manufacturing operations and all public service corporations are required to pay their employees at least twice monthly. Employers also must post a notice in the workplace informing workers of the frequency and method of payment and provide such information to employees at the time of hire. (La. Rev. Stat. § 23:633).

(d) Termination Pay

Louisiana employers must pay employees all amounts due upon discharge or resignation within 15 days or by the next regular payday, whichever comes first, following discharge or resignation. (La. Rev. Stat. § 23:631). Failure to make timely payment of all amounts due following discharge or resignation subjects an employer to strict liability for penalty wages of up to 90 days of pay calculated at the employee's regular daily rate of pay plus the employee's attorney fees. (La. Rev. Stat. § 23:632).

(e) Payment of Unused Vacation Pay

An employee's accrued, unused vacation pay is considered an amount due under La. Rev. Stat. § 23:631 and must be timely paid along with all other amounts due following discharge or resignation.

(f) Wage Forfeitures and Fines Unlawful

Any employment policy or contract requiring an employee to forfeit compensation earned by the employee for any reason is unlawful in Louisiana. (La. Rev. Stat. § 23:634). Likewise, Louisiana employers are prohibited by law from assessing fines against their employees; provided, however, that an employer may deduct from an employee's wages the cost of any damages caused to the employer's property by the employee's negligence or willful misconduct. (La. Rev. Stat. § 23:635).

(g) Continuation of Benefits

Louisiana has a so-called "Little COBRA" law that requires employers with fewer than 20 employees (those not covered by COBRA) to allow employees the option to continue their group health insurance, at their own expense, for up to twelve months following termination of employment. (La. Rev. Stat. § 22:1046).

7) <u>Workplace Safety and Health</u>

(a) General

Similar to the general duty clause under the federal Occupational Safety and Health Act ("OSHA"), Louisiana law requires employers to provide a "reasonably safe" workplace "in accordance with the accepted and approved practice in such or similar industry or places of employment considering the normal hazard of such employment. . . ." (La. Rev. Stat. § 23:13). However, Louisiana has no state-level regulatory scheme similar to that established under OSHA.

(b) Employment of Minors

Louisiana employers are prohibited from employing minors (persons under the age of 18) in certain occupations. Louisiana law also restricts the hours that certain minors may work. (La. Rev. Stat. § 23:151, *et seq.*).

(c) Smoke Free Workplace

The "Louisiana Smokefree Air Act," La. Rev. Stat. § 40:1291.1, *et seq.*, requires all enclosed workplaces to be smoke-free. (La. Rev. Stat. § 40:1291.11(5)).

(d) Mandatory Drug Testing

Louisiana employers may require employees and applicants for employment to submit to mandatory drug testing as a condition of employment. However, all such testing must comply with the Louisiana mandatory drug testing statute which, among other things, requires employers to follow the guidelines and procedures established by the College of American Pathologists[20] or the National Institute for Drug Abuse[21] and to keep the results of employee drug tests confidential. (La. Rev. Stat. § 49:1001, *et seq.*).

(e) Cost of Medical Testing

Louisiana law prohibits employers from requiring employees or job applicants to pay for the cost of any medical examination or test, including a drug test, that is required by the employer as a condition of employment. (La. Rev. Stat. § 23:897).

(f) Firearms

Louisiana law allows properly licensed employees to store firearms in a locked personal, but not company, vehicle parked in a designated lot or garage provided by their employer. However, employers may require such employees to keep their firearms hidden from view in a locked case or container within their personal vehicles. (La. Rev. Stat. § 32:292.1). Employers also have a property right to prohibit employees from carrying concealed handguns in the workplace or on any company premises. (La. Rev. Stat. § 40:1379.3 (O)).

(g) Workers' Compensation

Louisiana employers are required to pay workers' compensation benefits to employees in connection with work-related injuries and illnesses. Workers' compensation benefits are an administrative remedy administered by the Louisiana Workers' Compensation Commission[22] and, generally, are the exclusive remedy for work-related injuries and illnesses. Louisiana employers who meet established criteria for safe workplaces may qualify for a discount of up to 20 percent of their workers' compensation insurance premiums. (La. Rev. Stat. § 23:1031, *et seq.*).

8) Employment of Aliens

Louisiana law forbids the knowing employment, recruitment, hiring, or referral for employment of aliens who are not entitled to lawful residence in the United States, except with respect to employment in the production of raw agricultural crops, horticultural, livestock, dairy or poultry products, or the care, feeding and training of horses. (La. Rev. Stat. § 23:992, 992.1).

9) Industry and Occupation Specific Standards

In addition to the above, Louisiana law imposes specific standards on certain industries and occupations. Some examples are as follows:

(a) Criminal Records and Criminal Background Checks

Persons with certain criminal histories may not be employed in the insurance industry or as ambulance or private security personnel. Additionally, employers must conduct criminal background checks on applicants for employment in the insurance industry, as child daycare workers, in any occupation with authority over children, as ambulance personnel, in occupations involving nursing care and certain other health-related services, or as dentists or dental hygienists.

(b) Use of Cell Phones and Text Messaging While Driving

The use of cell phones, other than hands-free wireless devices, while operating motor vehicles, including in the course and scope of employment, is prohibited. (La. Rev. Stat. § 32:300.6, 300.7). Text messaging and accessing social media while operating motor vehicles also are prohibited. (La. Rev. Stat. § 32:300.5, 300.7).

10) Unemployment Compensation

Employees who are terminated for "misconduct connected with [their] employment" or who leave their employment voluntarily "without good cause attributable to a substantial change . . . by the employer" are disqualified from receiving unemployment benefits. (La. Rev. Stat. § 23:1601). Conversely, employees who are terminated for reasons other than "misconduct" or who leave their employment voluntarily for "good cause" generally qualify for unemployment benefits. Unemployment benefits are funded by employer contributions through payroll taxes. Each employer's unemployment tax rate is based on its experience rating, which means an employer's unemployment tax rate may be increased if the number of employees receiving benefits is more than allowed by its experience rating. Employers may challenge claims for and awards of benefits through a three-tiered administrative procedure administered by the Office of Employment Security.[23] (La. Rev. Stat. § 23: 1624, *et seq*.). Any agreement under which an employee agrees to waive his/her right to receive unemployment compensation is null and void. (La. Rev. Stat. § 23:1691).

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[24] (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:

- "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.

- "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.

- Arrangers who arranged for disposal of a hazardous substance at a site.

- 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 under 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 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. Environmental Law in Louisiana:

In addition to the myriad federal environmental related laws that must be complied with by businesses and individuals, Louisiana has enacted numerous laws and its agencies have promulgated a significant number of regulations related to the protection of the environment, some of which are discussed in this section.

1) Environmental Permitting in Louisiana

With limited exceptions, the Louisiana Department of Environmental Quality[25] (LDEQ) is responsible for most environmental regulations and the issuance and enforcement of most environmental permitting in Louisiana. *See* the Louisiana Environmental Quality Act (LEQA), La. Rev. Stat. § 30:2001, *et seq*., and the Louisiana Administrative Code, Title 33, Chapters I-XV. LDEQ administers most of the major federal environmental programs, including the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act and, for all intents and purposes, is Louisiana's closest equivalent of the U.S. Environmental Protection Agency (EPA).

LDEQ uniquely operates under a "public trust" doctrine pursuant to the Louisiana Constitution, which is similar to the federal National Environmental Policy Act (NEPA) in substance but not procedure. This doctrine requires that in certain permitting actions LDEQ consider project impacts, alternatives, mitigation, and other factors to determine whether the social and economic benefits of the proposed facility or action outweigh its adverse environmental impacts (a so called "IT" analysis). *See* La. Rev. Stat. § 30:2018 (regarding environmental assessment statements in applications for LDEQ permits); *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984). Courts have held that this requirement also applies to other permitting agencies such as the Louisiana Department of Natural Resources[26] (LDNR). This permitting scheme allows Louisiana to compete for new industries and balance development with protection of public health and the environment.

2) LDEQ Organization

The three main offices of the LDEQ are the Office of Environmental Compliance,[27] the Office of Environmental Services[28] and the Office of Environmental Assessment[29] (created effective August 1, 2016).

The Office of Environmental Services is divided into the following three main divisions: air, water and waste permits. This office coordinates permit applications and file reviews and provides administrative support for the permitting process.

The new Office of Environmental Assessment handles matters formerly addressed under the Office of Environmental Compliance. It has several divisions, including assessment, underground storage tanks, and remediation, including Brownfields. Louisiana has a number of Superfund sites as well as numerous sites that are cleaned up under LDEQ's Risk

Evaluation/Corrective Action Plan (RECAP) which establishes remediation standards for both non-industrial and industrial sites.

The Office of Environmental Compliance is also authorized to enforce the LEQA, as well as other statutes LDEQ is charged with administering, through civil actions and administrative orders, which may include civil penalties and/or specified corrective actions. The basic enforcement philosophy is one of graduated response, with the severity of the response being commensurate with the nature of the violation. Ultimately, LDEQ's enforcement philosophy is to achieve consistent compliance with the least amount of intrusive regulatory effort necessary. LDEQ uses a penalty matrix similar to EPA's but has a different formula to calculate penalties. LDEQ also has discretion to offset penalties with Beneficial Environmental Projects (similar to but not as strict as EPA's Supplemental Environmental Projects). Litigation against LDEQ is normally before the Division of Administrative Law's administrative law judges or the 19th Judicial District Court in Baton Rouge, Louisiana.

3) Release Reporting

Release, spill, and unauthorized discharge reporting authority is shared among several Federal and State agencies (see attached chart). At the State level, reporting is either to LDEQ Compliance for permit exceedances or to a Single Point of Contact Office for unauthorized discharges.

4) Air Regulation

Louisiana has adopted an EPA-approved State Implementation Plan, and the EPA has generally delegated to LDEQ the authority for implementing and enforcing the Federal Clean Air Act (CAA). Most Louisiana parishes are in attainment with the CAA, except for the Greater Baton Rouge Metropolitan Area parishes which are marginally non-attainment for ozone and St. Bernard Parish which is marginally non-attainment for sulphur dioxide.

LDEQ's air regulations are substantially similar to the federal air regulations. The LEQA prohibits the construction or modification or use of any source (*e.g.*, facility, production unit) that may cause air pollution, unless the facility has an exemption (< 5 tons per year of a regulated air pollutant emitted), regulatory general permit, minor source permit, or a major source permits, as appropriate. LDEQ also maintains a toxic air pollutant program in addition to EPA's hazardous air pollutant program. Consequently, any business or industry seeking to locate or expand in Louisiana must obtain the appropriate air permits from LDEQ if proposed activities would result in regulated air emissions.

LDEQ will issue a construction and/or an operating air permit following application and review. The operating permits issued by LDEQ are for a fixed term of five years, except that minor source permits typically have a ten-year term. Emission fees vary depending on the nature of the source and the amount of tonnage of the criteria pollutants to be emitted. Specific permit limits depend upon the type of emission source, size of emission source, and location of the facility. Permit limits are more stringent in a few areas that have not attained National Ambient Air Quality Standards (for ozone or sulphur dioxide).

5) Regulation of Solid and Hazardous Wastes and Materials

LDEQ's Waste Permits Division regulates most aspects of solid and hazardous waste in Louisiana under the LEQA. This statutory authority also mandates comprehensive planning by local governments in addressing solid waste needs and long-range planning. LDEQ has responsibility for regulating the treatment, processing and disposal of solid waste. The LEQA also provides for parishes and cities in Louisiana to discharge their duties by offering permitted solid waste collection and disposal services to the public or, alternatively, by entering into contracts with private corporations to perform those tasks.

LDEQ has adopted numerous rules governing the management of wastes in Louisiana. Storage and transportation activities are regulated according to the type of waste. For example, the storage and transportation of medical waste receives individual attention in the regulations due to its nature. In addition, LDEQ has adopted standards and procedures for the siting of industrial and municipal solid waste landfills. A business or industry locating in Louisiana, however, need concern itself only with subscribing to a solid waste collection service and not to the relatively complex solid waste regulations.

Louisiana has established a statewide program to provide for the safe management of hazardous wastes. The EPA has delegated authority to LDEQ to operate the RCRA program in Louisiana and LDEQ has adopted by reference most aspects of the EPA's RCRA regulations. Hazardous waste law and regulations govern the actions of persons who generate or transport hazardous wastes and persons who own or operate a hazardous waste treatment, storage or disposal (TSD) facility. Businesses or industries seeking to transport hazardous waste or operate a TSD facility in Louisiana should invest a substantial amount of time in gaining a complete understanding of the applicable hazardous waste regulatory and permitting scheme. In contrast, businesses in Louisiana that do not intend to operate a TSD facility may nevertheless discover that their routine activities classify them as "generators" of hazardous waste. LDEQ has promulgated regulations applicable to generators of hazardous waste that are consistent with EPA regulations.

Louisiana also regulates Naturally Occurring Radioactive Materials ("NORM"). See LAC 33: Chapter XV.

The Louisiana State Police,[30] with the United States Department of Transportation,[31] regulates the transportation of hazardous material.

6) Underground Storage Tanks

The Underground Storage Tank and Remediation Division[32] operates Louisiana's underground storage tank (UST) program. The regulation imposes duties on "owners and operators" of USTs and establishes standards for tank operation and maintenance. The regulation also imposes on owners and operators of USTs responsibility for clean-up of contaminants released into the environment from such USTs. The owner and/or operator of a UST is obligated to register every tank covered by the UST program with LDEQ and pay certain tank fees and Louisiana UST Trust Fund fees. Any tank that stores petroleum or a hazardous substance as defined by Superfund and has more than ten percent of its volume beneath the surface is covered under the UST program. Every subsequent owner of those tanks must re-register with LDEQ. Any suspected release, spill or overflow must be reported by an owner or operator.

7) Water Discharge Regulation

The federal Clean Water Act (CWA) established the Water Quality Standards (WQS) program and the National Pollutant Discharge Elimination System (NPDES). Subject to federal oversight by the EPA, LDEQ operates and implements both programs. Citizens have unsuccessfully challenged EPA's delegation to Louisiana in recent years.

8) Individual LPDES Permits

Under the WQS program, LDEQ establishes "designated uses" for all navigable surface waters in Louisiana, which vary depending on a given body of water's historic use, expected future use, and water quality. LDEQ also sets out specific technical water quality criteria that apply to the various use classifications. Essentially, LDEQ establishes the minimum level of water quality that must be maintained so that discharges into the receiving stream do not degrade the water quality called total maximum daily loads below the existing use classification.

Prior to directly discharging any pollutant into navigable waters, a prospective business or industry seeking to locate in Louisiana must obtain a Louisiana Pollutant Discharge Elimination System (LPDES) permit from LDEQ. Generally, LPDES permits require the use of certain level of pollution control technology to limit pollutants discharged from the facility into the receiving stream. The stringency of the pollution control requirements varies depending on the facility's process and the water quality standard associated with the receiving stream.

LDEQ has established a separate permitting system for dischargers that indirectly discharge pollutants to a publicly-owned treatment works. Any indirect discharger is required to obtain a POTW indirect discharge permit. This permit contains its own set of pre-treatment discharge limitations, as well as monitoring and reporting obligations.

The Louisiana Department of Health and Hospitals[33] (LDHH) regulates sanitary wastewater treatment systems.

9) Storm Water Permitting

LDEQ also maintains a general LPDES permit program for storm water discharges that requires industries conducting land disturbance activities to apply for coverage under the general storm water permit. These regulations also require the permittee to adopt measures to control erosion and sedimentation and pollution prevention plans.

10) UIC and Drinking Water in Louisiana

LDNR regulates Underground Injection Control (UIC) to protect drinking water. Any business or industry involved in the construction of facilities that will be used for subsurface injection purposes must apply for a permit.

LDHH also provides for safe drinking water and has primacy for Safe Drinking Water Act rules in Louisiana except for UIC.

11) Corps of Engineers Permitting in Louisiana

Louisiana has millions of acres of wetland resources that present permit and mitigation challenges to developers, industry, environmental groups, local governments, and agencies. The U.S. Army Corps of Engineers[34] (Corps), through several district offices in Louisiana, Mississippi, and Texas, under the authority of CWA § 404, regulates the discharge of dredged or fill material into waters of the United States (generally referred to as wetlands permitting) as well as work in traditionally navigable waters under the Rivers and Harbors Act. The Corps' regulations govern several permitting programs pertaining to wetlands (*e.g.*, individual permits, nationwide permits and regional permits). LDEQ is involved only in providing water quality certification pursuant to CWA § 401. LDEQ's role in water quality certification involves each individual permit and the issuance or re-issuance of nationwide or regional permits. Generally, the Corps cannot issue the permit in question if LDEQ denies certification to a particular activity. Therefore, CWA § 401 water quality certification by LDEQ is an important condition in the Corps' permitting process.

The LDNR Office of Coastal Management also issues coastal use permits (CUPs) for work affecting Louisiana's coastal zone. These are usually processed jointly with the Corps and LDEQ. The Corps cannot normally issue its permits until the CUP is satisfied.

12) Litigation

Louisiana is considered a hotbed of citizen activity, and controversial environmental permits are frequently challenged in court. Private NORM personal injury and contamination cases from oil field tubular storage or cleaning and "legacy" contamination litigation on oil and gas fields are also prevalent in Louisiana. Cleanups of these sites involve an entanglement of courts and agencies.

See Millan, et al., Louisiana Environmental Compliance (West 2015-2016) for a more complete treatment of Louisiana environmental law. Attached is a chart with an overview of various agency regulatory and enforcement jurisdictions in Louisiana.

LOUISIANA ENVIRONMENTAL AGENCY CHART

AGENCY	JURISDICTION
Louisiana Department of Environmental Quality	Air, water and waste permits Underground storage tanks Remediation of contaminated sites Water quality certificate Naturally Occurring Radioactive Materials Groundwater and water of the State spills Enforcement Spill reporting
Louisiana Department of Natural Resources	Coastal use permits – mitigation Coastal wetlands Underground injection control Enforcement
Department of Health and Hospitals	Drinking water standards Sanitary facilities Enforcement
State Police	Hazardous material & spills Enforcement Release reporting
United States Corps of Engineers	Wetland and navigable water permits and mitigation Enforcement
United States Environmental Protection Agency United States Coast Guard	Oil discharges on navigable waters or adjoining shorelines Hazardous substance releases Discharge and release reporting

VII. INTELLECTUAL PROPERTY

A. Copyright:

1) Federal Law

Copyrights are generally governed by federal law, which preempts conflicting state law. *See* 17 U.S.C. § 301. Unlike some other states, there are currently no reported Louisiana cases finding copyright protections under state law, including, for example, for pre-1972 sound recordings

(a) In General

Copyright law provides the author of a copyrightable work (or in the case of a "work made for hire," his or her employer) with certain exclusive rights to reproduce, distribute, adapt, and publicly perform and display the work. Subject to any applicable fair use or other defenses, anyone who violates these rights may be liable for actual or statutory damages and may be subject to injunctive relief. Generally, works created on or after January 1, 1978, are entitled to copyright protection for the life of the author plus 70 years. If the work was made for hire, however, the copyright term is the shorter of 95 years from publication or 120 years after creation.

(b) Copyrightable Subject Matter

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, architectural works, and some computer software. Copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery. To qualify for copyright protection, all works must meet two requirements. First, the work must be fixed in a tangible medium. In other words, there must be a physical embodiment of the work such that the work can be reproduced or otherwise displayed or performed. Second, the work must be the result of original, independent authorship. Originality requires some minimum level of creativity, not novelty or ingenuity.

(c) Copyright Registration

Registration of the work with the U.S. Copyright Office[35] provides several 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. Timely registration may also allow the copyright owner to seek statutory damages and attorneys' fees in infringement cases. Registration is generally a prerequisite to filing a lawsuit for infringement of a U.S. work, *e.g*., a work first published in the U.S. or authored by a U.S. citizen or national. This requirement does not apply to foreign works.

(d) Application Process

To register a copyright, an application must be filed with the U.S. Copyright Office accompanied by a filing fee and deposit copy. The application generally 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. If it was a work made for hire, the application must say so.

(e) 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 it is still advantageous. For example, the defense of "innocent infringement" is generally unavailable to an alleged infringer if a copyright notice is used. The notice should be located in such a manner and location as to sufficiently demonstrate the copyright claim. The notice should consist of three elements. First should be the symbol ©, the word "copyright," or the abbreviation "copr." Second should be the year of first publication. Third should be the name of the copyright owner.

(f) Works Made for Hire; Assignment

In the case of a work made for hire, the employer or other person for whom the work was prepared is generally considered the author and owner of the copyrights in the work. A work is made for hire if either (i) the work was prepared by an employee within the scope of his or her employment or (ii) the parties sign a written contract that the work will be a work made for hire *and* the work is commissioned as part of a motion picture or other audiovisual work, as a translation, as a compilation, or one of several other types of works set forth in the Copyright Act. For example, text or graphics created by an independent contractor, without more, may not qualify as a work for hire, but they may qualify if the parties signed a written agreement confirming that the text or graphics were commissioned as part of a motion picture or a compilation. Nevertheless, regardless of the type of work, copyrights must be assigned by an instrument in writing.

(g) Copyright Protection for Foreign Authors

U.S. copyright protection for unpublished works is generally available for foreign authors. If the work has been published, the availability of continued U.S. copyright protection depends on the nationality or domicile of the author, the type of work, and the location of first publication or first fixed. For all types of works, protection is available if, as of the date the work was first published, one or more of the authors was a national or domiciliary of the United States, a treaty party to the Universal Copyright Convention, or a stateless person. Similarly, protection is available if the work was first published in the United States or a treaty party. For foreign sound recordings, protection is available if it was first fixed in a treaty party. For foreign architectural works embodied in a building or pictorial, graphic, or sculptural works incorporated in a building or other structure, protection is available if the building or structure is located in the United States or a treaty party. Protection may also be available if covered by a Presidential proclamation.

2) <u>Louisiana Law: Protections for Authors and Artists</u>

(a) Louisiana's Artists' Authorship Rights Act (La. Rev. Stat. § 51:2151)

Subject to certain limitations, the Act protects works of fine art from being publicly displayed or published in an altered, defaced, mutilated, or modified form without the artist's consent. It also bars any person, other than the artist, from displaying the artist's works if to do so would damage the artist's reputation under certain circumstances. The Act gives artists rights of attribution and the right to disclaim authorship of his or her work. Artists have a private right of action under the Act.

(b) Child Performer Trust Act (La. Rev. Stat. § 51:2131)

Every contract executed by or on behalf of a minor rendering artistic or creative services for compensation in Louisiana must require that fifteen percent of the minor's gross earnings be placed in a trust fund created for the benefit of the minor. Except in necessitous circumstances, no money may be withdrawn from the trust until the minor reaches the age of majority. Both parents of the minor, or the minor's court-appointed tutor, generally serve as trustees of the trust.

(c) Unauthorized Opera Performances (La. Rev. Stat. § 14:208).

It is a crime in Louisiana to publicly perform or represent any unpublished or undedicated opera without the consent of the opera's owner or proprietor. It is also a crime to permit, aid, or take part in an opera without the consent of the owner or proprietor if the person knows the opera is unpublished or undedicated. The penalty is not less than $100 and not more than $500 or imprisonment for less than 30 days.

B. Patents:

1) Federal Law

The issuance of patents is exclusively governed by federal law. *See* Title 35 of the United States Code. Patent assignments and demand letters are governed by federal and state law, however.

(a) In General

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or improvement thereof, may obtain a patent. A U.S. patent grants the exclusive right to make, use, import, offer to sell, or sell in the U.S. the patented invention. Anyone who, without authority from the patent holder, violates these rights of a valid, unexpired patent is considered to "infringe" the patent and may be liable for damages.

(b) Term

A utility patent, which may protect the functional and/or structural aspects of an invention, 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 a non-provisional or international patent application. A design patent, which covers the ornamental design of an article of manufacture, is enforceable for 15 years from the date the patent is granted.

(c) Foreign Patents

A foreign patent is generally not enforceable in the U.S. Further, 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 the first publication or issuance of the foreign patent. Accordingly, an inventor who holds a foreign patent and who fails to apply for a U.S. patent within that time will usually have no recourse against others who use the invention in the U.S.

(d) Utility Patent Requirements

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

(i) "novel," *i.e.*, not patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the application filing date;

(ii) "non-obvious" to a person having ordinary skill in the relevant art; and

(iii) "useful," in that it has utility, actually works, and is not frivolous or immoral.

(e) Design Patents

A design patent may be obtained for the ornamental design of an article of manufacture. A design patent protects only the appearance of an article, not its construction or function.

(f) Plant Patents

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.

(g) Searches

To determine the likelihood of patentability of an invention, it is often useful to search the records of the U.S. Patent and Trademark Office.[36] A patent search is customarily performed before filing a patent application. A patent attorney or patent agent may be asked to render an opinion regarding the patentability of a particular invention. An inventor may then make an informed decision whether to proceed with the cost of the patent application.

(h) Patent Application

Under U.S. Patent and Trademark Office rules, a complete non-provisional patent application includes four elements. First, the application must include the "specification." The specification describes what the invention is, what it does, and how to make the invention. The specification must conclude with at least one claim. The specification can be filed in a foreign language, provided 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 the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included. 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.

(i) Application Process

After an application is filed, it is assigned to an examiner with knowledge of the relevant subject matter. The examiner reviews 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 or more, depending on the subject matter. Rejection of a patent application by the examiner may be appealed to the Patent Trial and Appeal Board and from there appealed to the federal courts.

(j) 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 recover certain damages in an infringement action.

(k) Employee Inventions; Assignments

Disputes sometimes arise between employers and employees over ownership of inventions made by employees during the course of employment. To avoid such conflict, 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. Patents must be assigned by an instrument in writing. The assignment must also satisfy all the requirements of a valid contract under Louisiana law.

2) <u>Louisiana Law</u>

Under Louisiana law, it is an unfair trade practice to send a demand letter in bad faith asserting patent infringement by an end-user of a product or service. Factors for determining whether the letter was sent in bad faith include whether it contains: the patent application number or patent number, the name of the patent owner, and allegations concerning the specific areas in which the products or services or their use are covered by the claims in the patent. Or, if the letter does not contain such information, whether it was provided within a reasonable time upon request. Other factors include: whether the letter contains a misrepresentation of fact or a demand for a licensing fee or response within an unreasonably short period of time; whether the person sending the letter first made a reasonable effort to compare the claims in the patent to the product or service; and whether the assertion is without merit and the person sending the letter knew or should have known it was without merit. The Louisiana Attorney General has sole authority to investigate or pursue any alleged bad faith assertions of patent infringement.

C. Trademarks and Unfair Competition:

1) <u>Federal Law</u>

(a) In General

A trademark is often used by a manufacturer to identify its merchandise and to distinguish its goods from those of other manufacturers. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination thereof. 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 renders services may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

(b) Trademark Selection

A business should carefully consider the mark selected for its goods and services. The level of protection against infringement of a mark varies with its "strength," "distinctiveness," and other factors. The strength of a mark is usually evaluated on a spectrum spanning, from weakest to strongest, descriptive, suggestive, arbitrary, and fanciful. "Descriptive" marks are the weakest and may receive relatively narrow protection. A descriptive trademark describes some characteristic, function, or quality of the goods. A trademark that is "merely descriptive" cannot be registered under federal law without a showing of acquired distinctiveness or a "secondary meaning." A mark is "suggestive" if it requires imagination, thought and perception to reach a conclusion as to the nature of goods. Marks are "arbitrary" if they bear no relation to the goods (*e.g*., Apple computers), and a "fanciful" mark is a coined word (*e.g*., Exxon or Kodak). Selection of a mark is often accompanied by a search to determine whether another has already adopted or used a mark that is the same or similar to the desired one. Actual and potential trademark conflicts may thereby be avoided.

(c) Registration

Federal registration of a mark is presumptive evidence of the ownership of the mark, the validity of the mark, and of the registrant's exclusive right to use of the mark in interstate commerce. After five years of continuous use of the mark following federal registration, the registration may be eligible to become incontestable. An incontestable registration may be challenged only on limited statutory grounds. A federal registration may be recorded with U.S. Customs and Border Protection to assist in preventing the importation into the U.S. of foreign goods that bear an infringing mark. (State registration provides some advantages, though not as extensive as federal registration, and provides protection only for the sale of goods and services in Louisiana. A state registration provides an additional cause of action for infringement under state law.)

(d) Federal Application Process

The U.S. Patent and Trademark Office examines all federal trademark applications. The application must identify the applicant, the mark, and the goods or services with which the mark is used or is proposed to be used. A use-based application must also include the date of first use, first use in commerce, and a specimen showing use of the mark on the identified goods or services. After the application is filed, it is reviewed by an examiner who evaluates, among other matters, the ability of the mark to serve as an indicator of source and the possibility of confusion with marks previously registered or applied for with the Patent and Trademark Office. If the examiner rejects the application, his 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 oppose the application.

(e) Maintenance

A registration issued by the Patent and Trademark Office remains in effect for ten years, but it may be canceled early unless the registrant furnishes evidence of continued use of the trademark between the fifth and sixth anniversary of registration. Thereafter, the registration must be renewed within one year prior to every tenth anniversary of its registration. With the payment of a surcharge, the Patent and Trademark Office will an additional six-month grace period to renew a registration after its sixth or every tenth anniversary. (Marks registered with the Louisiana Secretary of State must be renewed every ten years.)

2) Louisiana Law

The Louisiana Secretary of State generally registers trademarks, trade names, and service marks as a matter of course, unless there is a virtually identical registration or business name already on record. The application must identify the applicant, the mark, and the goods or services used in connection with the mark.

D. Trade Secrets Governed By Federal and State Law:

1) EEA

The U.S. Economic Espionage Act of 1996, as amended by the 2016 Defend Trade Secrets Act, includes criminal penalties for theft of trade secrets and gives an owner of the trade secret a private cause of action for trade secret misappropriation. The EEA permits expedited civil seizure of the trade secret and related property and authorizes courts to issue robust protective orders protecting the trade secret and securing any seized property. The EEA also permits courts to award exemplary damages and attorney's fees for willful and malicious misappropriation.

2) LUTSA

Louisiana has adopted the Uniform Trade Secrets Act (La. Rev. Stat. § 51:1431), which gives trade secret holders a private cause of action for misappropriation of trade secrets. Courts may award injunctive relief, actual damages for the misappropriation as well as any unjust enrichment, and attorney's fees to the prevailing party under certain circumstances. The statute of limitations is three years after the misappropriation is or should have been discovered.

3) Trade secrets defined

Both the LUTSA and EEA similarly define "trade secrets" as information that (1) is the subject of reasonable efforts to keep the information secret and (2) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

4) Misappropriation

Both the LUTSA and EEA similarly define "misappropriation." A trade secret is misappropriated when it is acquired by another person who knows or has reason to know the trade secret was acquired by "improper means," *i.e.*, theft bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. A trade secret is also misappropriated by unauthorized disclosure or use by a person who (1) used "improper means" to acquire the trade secret, (2) at the time of the disclosure or use, knew or had reason to know that the trade secret was either (i) derived from a person who used "improper means "to acquire it, (ii) acquired under circumstances giving rise to a duty to maintain its secrecy, or (iii) derived from a person who owed a duty to the person seeking to maintain its secrecy or limit its use, or (3) before a material change of the position of the person, knew or had reason to know it was a trade secret and that knowledge of it had been acquired by accident or mistake. Unlike the LUTSA, the EEA expressly provides that "improper means" does not include reverse engineering, independent derivation, or any other lawful means of acquisition.

5) Immunity; Notice

The EEA grants limited immunity under state and federal law to employees and contractors who disclose trade secret information to governmental agencies or to their attorneys. The EEA includes a prospective requirement in employee contracts and policies to give employees and contractors notice of such immunity. Failure to give notice may bar recovery of exemplary damages and attorney's fees in cases of willful and malicious misappropriation.

VIII. DISPUTE RESOLUTION

A. Federal Court System:

The trial courts of the federal court system are the U.S. District Courts. Federal district court judges are appointed by the President for life terms upon approval by the United States Senate. Appeals are to the Circuit Court of Appeals and then on a discretionary basis to the U.S. Supreme Court.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are fixed by the U.S. Constitution and federal statutes. They have exclusive jurisdiction over bankruptcy, patent, 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 $75,000. 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 of federal jurisdiction 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.

Procedure in the federal district courts is 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 rules applicable to every federal district court in the U.S. Each federal district court also establishes supplemental rules applicable only to the details of procedure in that district court.

Local rules set forth 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:

The judicial branch of the Louisiana state government is comprised of a supreme court, the courts of appeal, and the district courts. In addition, Louisiana has city, parish, and justice of the peace courts to handle small claims, as well as specialized courts such as juvenile and family courts. The procedural rules governing civil actions and proceedings in the state courts are contained in the Louisiana Code of Civil Procedure, the Civil Code, and Title 13 of the Louisiana Revised Statutes. Additionally, the majority of courts promulgate procedural rules that apply to all civil actions in that court.

1) Louisiana's trial court system

The district courts are the trial courts of original general jurisdiction for the majority of civil and criminal matters. With the exception of the Civil District Court for the Parish of Orleans,[37] each district court has both civil and criminal jurisdiction. Louisiana is divided into forty-two judicial districts, each of which encompasses at least one parish and is served by a district court presided over by at least one full time district judge.

2) Louisiana's appellate courts

Louisiana is divided into five appellate circuits, with one court of appeal in each. Except as otherwise provided by the state constitution, the courts of appeal have appellate jurisdiction over all civil matters and may review and decide questions of law and fact. Litigants are entitled to either a *devolutive* or *suspensive* appeal to the appropriate courts of appeal. A *devolutive* appeal does not suspend the execution of the judgment during the time the appeal is pending, while a *suspensive* appeal does suspend execution of the judgment.

The Supreme Court of Louisiana[38] is the state's highest court. A decision is appealable to the supreme court as a matter of right only if: (1) a law or ordinance has been declared unconstitutional; or (2) the defendant has been convicted of a capital offense and the death penalty has been imposed. Otherwise, the Supreme Court may exercise its discretion to not entertain an appeal.

3) Louisiana tax court system

Louisiana has two separate administrative panels to address taxpayer appeals. While Louisiana district courts have general original jurisdiction, the Louisiana Legislature has enacted laws that require tax matters to be heard by one of the two administrative panels.

First, the Board of Tax Appeals[39] ("BTA") has jurisdiction over all state taxes as well as local sales and use tax (effective as of July 1, 2015 under Act 640 of the 2015 Regular Session of the Louisiana Legislature). (La. Rev. Stat. § 47:1401, *et seq.*). The BTA functions as a trial court and, therefore, the record of the case is made at the BTA. Appeals are to a Louisiana court of appeal (as of July 1, 2015), which reviews the BTA's factual findings under a "manifestly erroneous" standard and legal findings on a *de novo* basis.

Second, the Louisiana Tax Commission[40] ("LTC") has administrative jurisdiction over local *ad valorem* property tax. (La. Rev. Stat. § 47:1831, *et seq.*). The LTC has oversight authority over tax assessors in order to ensure constitutional uniformity. In addition, the LTC also hears appeals by taxpayers and tax assessors with respect to correctness challenges (*i.e.,* valuation disputes). Like the BTA, the LTC functions as a trial court, and, therefore, the record of the case is made at the LTC. Appeals are to a Louisiana district court (and thereafter to a Louisiana court of appeal), which reviews the LTC's decision *de novo*.

IX. FINANCIAL INSTITUTIONS

A. Tax-Exempt Financing Opportunities in Louisiana:

1) In General

Tax-exempt financing opportunities in Louisiana are similar to those available in other states because the federal income tax exemption applicable to interest received by investors on tax-exempt debt is authorized by the federal Internal Revenue Code (the "*Code*") rather than state law.

Tax-exempt municipal bonds are the foundation of public finance for economic development. They are either governmental bonds (used primarily to finance government functions and services) or private activity bonds (the State or a local governmental issuer serves as a conduit to provide financing to private businesses). Private activity bonds are tax-exempt only if issued for permitted purposes and classified as "qualified private activity bonds" under the Code. Qualified private activity bonds include (a) exempt facility bonds, (b) small issue manufacturing bonds, and (c) qualified 501(c)(3) bonds.

2) Conduit Issuers in Louisiana

Private companies desiring to finance a project with the proceeds of tax-exempt qualified private activity bonds must first identify a governmental entity to issue the bonds on behalf of the company. Such issuers are referred to as conduit issuers. Companies constructing a project within the boundaries of a Louisiana port typically use the local port, harbor and terminal district as the conduit issuer. For projects unrelated to port facilities, two conduit issuers with statewide jurisdiction are widely used. These are the Louisiana Local Government Environmental Facilities and Community Development Authority[41] (LCDA)[*] and the Louisiana Public Facilities Authority[42] (LPFA)[†]. See the following website links for the LCDA (http://www.louisianacda.com/) and the LPFA (http://www.lpfa.com/) for more information.

3) Qualified Small Issue Bonds

The Code authorizes qualified small issue bonds, often referred to as small issue manufacturing bonds. These may be issued for selected manufacturing projects, subject to a limit of $10 million. They can support expansion and investment in existing manufacturing facilities, as well as the development of new facilities and the purchase of new machinery and equipment. Detailed restrictions in the Code apply to the classification of a project as a "manufacturing facility"; capital expenditure limits of the project owner; and availability of bond proceeds for acquisition of existing property.

4) Exempt Facility Bonds

Exempt facility bonds may be used to finance a wide variety of projects, including facilities for airports, docks and wharves, mass commuting, water, sewerage, solid waste disposal, qualified residential rental projects, local furnishing of electric energy or gas, local district heating or cooling, qualified hazardous waste, high-speed intercity rail, environmental enhancements of hydroelectric generating plants, qualified public education, qualified green building and sustainable design projects, or qualified highway or surface freight transfer. Each type of bond must comply with detailed restrictions in the Code relating to the specific class of exempt facility bonds.

5) Annual State Volume Limitations for Qualified Private Activity Bonds

Each state has a limit on the aggregate dollar amount of qualified private activity bonds it may issue in a calendar year. The limit is determined based on each state's population with the exception of: (i) bonds for certain governmentally-owned facilities such as airports, ports, high-speed intercity rail and solid waste disposal; (ii) qualified 501(c)(3) bonds; and (iii) bonds subject to separate local, State or national volume limits, such as qualified public educational facility bonds, enterprise zone facility bonds, qualified green building bonds and qualified highway or surface freight transfer facility bonds. The limit available to each state is referred to as its private activity volume cap. For calendar year 2016, Louisiana's private activity volume cap is $467,072,400. In recent years, the majority of Louisiana's annual private activity volume cap allocation has remained unused.

6) Tax Increment Financing

For companies desiring to develop a project that will generate increases in local sales taxes, sales tax increment financing may be an option. Louisiana allows local governmental subdivisions and other tax recipient entities to use incremental increases in sales tax receipts attributable to new commercial development within the boundaries of a designated economic development district (EDD) in excess of a base year's collections for financing an economic development project. Such a project generally includes improvements in infrastructure and projects determined by the local governmental subdivision to create economic development, including those to assist commercial industries. An EDD must designate the boundaries from which incremental increases in sales taxes will be used to secure bonds issued by the EDD to provide funds for the construction of improvements. An EDD may also levy up to two percent of new sales taxes, two percent of hotel occupancy taxes and five mills of *ad valorem* taxes to help defray the cost of financing a commercial development.

7) Community Development Districts

For companies interested in residential developments, a community development district (CDD) provides a mechanism to finance infrastructure improvements without requiring the developer to use its own or borrowed funds. A CDD may be created by a local governmental subdivision to finance certain types of infrastructure and community improvements relating to a residential development, including water management and control for the lands within the district; water supply, sewer, and wastewater management, reclamation, and reuse; bridges or culverts; and roads. A CDD may also be granted special authority by the local governmental subdivision to finance parks and facilities for indoor and outdoor recreational, cultural, and educational use; fire prevention and control, including fire stations, water mains and plugs, fire trucks, and other vehicles and equipment; school buildings and related structures; security; control and elimination of mosquitoes and other public health nuisances; waste collection and disposal; and revenue producing utilities that regularly supply a public commodity or service, including water, ice, ferries, warehouses, docks, wharves, terminals, airports, transportation, telephone, telegraph, radio, television, drainage, sewerage, garbage disposal, and emergency medical services.

A CDD is authorized to levy special assessments upon all property within the boundaries of the CDD. The assessments are collected at the same time and in the same manner as *ad valorem* taxes and are used to secure repayment of bonds issued by the CDD to finance the infrastructure improvements described above. State law requires a CDD to provide full disclosure of information relating to the public financing and maintenance of real estate improvements undertaken by the district. All purchasers of property within a CDD must be informed that their property may be assessed by the CDD.

<u>Contact information for agencies referenced above</u>:

*Louisiana Local Government Environmental
Facilities and Community Development Authority
5420 Corporate Blvd., Suite 205
Baton Rouge, Louisiana 70808
Attention: Ty E. Carlos, Executive Director

†Louisiana Public Facilities Authority
2237 South Acadian Thruway, Suite 650
Baton Rouge, Louisiana 70808
Attention: James W. Parks II, President and CEO

B. Commercial Banking Opportunities In Louisiana:

In order to establish a de novo state-chartered commercial bank in Louisiana, an organizing group must file an application for a Certificate of Authority for a new bank charter with the Louisiana Office of Financial Institutions[43] ("LOFI"). The relevant application form to be submitted is the Interagency Charter and Federal Deposit Insurance Application. The current application fee is $10,000. A majority of the organizers must be domiciled in Louisiana. (La. Rev. Stat. § 6:211(B)). The corporate name of the bank must include the word "bank" or a form of that word in any combination with other words. (La. Rev. Stat. § 6:212(A)). Within 30 days prior to receipt of the application by the LOFI, the applicant must publish notice of the filing of the application in a newspaper of general circulation in the community where the bank will be located. (La. Admin. Code tit. 10, § I-503). Upon accepting the application for filing, the LOFI will notify all financial institutions in the relevant community and will allow them to comment on the application during a 14-day period. *Id.*

The applicant must also submit articles of incorporation to the LOFI for approval. The articles of incorporation must contain: (i) the name and parish of domicile of the bank, (ii) the duration of existence or statement that it is perpetual, (iii) the classes of stock, (iv) the number of shares authorized and par value, (iv) the names and addresses of the proposed incorporators, and (v) the names, addresses, and occupations of the proposed directors. (La. Rev. Stat. § 6:213). The articles of incorporation may also contain other provisions as outlined in § 6:213, including a provision eliminating or limiting the personal liability of directors or officers to the bank or its shareholders for monetary damages for breach of fiduciary duty, provided that the provision may not eliminate or limit liability for (i) a breach of the duty of loyalty, (ii) acts or omissions not in good faith or involving intentional misconduct or a knowing violation of law, (iii) liability incurred pursuant to La. Rev. Stat. § 12:1-833, or (iv) any transaction from which the director or officer derived an improper personal benefit.

Once the application is submitted, the LOFI conducts an investigation to determine whether the public interest would be served by permitting the organization of the proposed state bank. In its investigation, the LOFI will take into consideration, among other factors, (i) whether the character, financial responsibility, and general fitness of the persons named in the application as proposed incorporators, directors, principal shareholders and executive officers are such as to command the confidence of the community, (ii) the need for additional banking facilities in the community where the bank is to be located and the ability of the community to support the new bank, (iii) the adequacy of the proposed initial capital, and (iv) future earnings prospects. (La. Rev. Stat. § 6:214 and La. Admin. Code tit. 10, § I-503). If the LOFI concludes that all of these requirements have been satisfied, and if deposit insurance coverage is granted by the Federal Deposit Insurance Corporation[44] ("FDIC"), it will issue a Certificate of Authority permitting the bank to begin business. Upon issuance of the Certificate of Authority, the LOFI will record the Articles of Incorporation and issue the bank a Certificate of Incorporation. (La. Rev. Stat. § 6:217). A copy of the Articles of Incorporation, the Certificate of Authority and the Certificate of Incorporation must be filed with the office of the recorder of mortgages for the parish where the bank's main office is located. *Id.*

The organizational expenses and compensation for the sale and underwriting of stock must be approved by the LOFI before being paid out of funds raised in the initial stock offering. (La. Rev. Stat. § 6:218).

In addition to obtaining the approval of the LOFI for a new bank charter, the applicant will also be required to file an Interagency Charter and Federal Deposit Insurance Application with the FDIC to obtain federal deposit insurance. This application must be filed concurrently with the LOFI application. The FDIC will conduct its own investigation and will take into consideration substantially similar factors as the LOFI. The FDIC is also charged with considering the risk presented by the proposed bank to the deposit insurance fund. Notice of filing of the application is required to be published in a newspaper of general circulation in the community in which the main office will be located as near as practicable to the date the application is filed and no sooner than five days prior to filing. (12 C.F.R. § 303.23). A 30-day comment period is allowed during which interested parties can submit comments to the FDIC. The procedures governing the filing and review of federal deposit insurance applications are found in 12 C.F.R. Part 303 Subpart B as well as in the FDIC Policy Statement on Applications For Deposit Insurance and the Supplemental Guidance to the Policy Statement issued in April 2016.

The Interagency Charter and Federal Deposit Insurance Application filed with both the LOFI and FDIC must contain: (i) a detailed business plan meeting the criteria set forth in the application's business plan guidelines, (ii) financial projections covering the first three years of operation, (iii) biographical and financial information on each of the bank's proposed organizers, directors, senior executive officers and principal shareholders (any individual or group acting in concert that will own or control 10 percent or more of the bank's stock) submitted on the Interagency Biographical and Financial Report Form, as well as a fingerprint card, (iv) copies of any stock option or incentive compensation plans (which are subject to the terms set forth in the FDIC's Policy Statement on Deposit Insurance Applications) and employment agreements, (v) discussion of proposed IT infrastructure and IT security, and (vi) copies of major bank policies (*e.g.*, loan policy, investment policy, interest rate risk policy, Community Reinvestment Act policy, *etc.*).

If the organizers wish to form a holding company to own the bank, an application to form a bank holding company must be filed with the Federal Reserve.

C. Describe Any Out-of-State Financial Institutions in Louisiana:

The FDIC's Summary of Deposits Report as of June 30, 2015, shows the following number of Louisiana offices and statewide deposit market share for banks headquartered outside of Louisiana (statewide deposit market share rank in parentheses):

Name	State HQ'd	Offices in Louisiana	Louisiana Deposit Market Share
JPMorgan Chase Bank	OH	160	18.11% (1st)
Capital One	VA	158	16.59% (2nd)
Whitney Bank	MS	109	10.48% (3rd)
Regions Bank	AL	109	7.36% (4th)
BancorpSouth Bank	MS	24	.95% (13th)
State Bank & Trust Co.	MS	4	.13% (97th)
The First	MS	2	.04% (139th)
Woodforest National Bank	TX	19	.01% (143rd)
United Mississippi Bank	MS	1	.01% (144th)
Fort Sill National Bank	OK	6	.01% (145th)
First American Trust	CA	1	.01% (146th)

D. Describe Prominent Foreign Banks in Louisiana:

The Federal Reserve Board's[45] database on U.S. Banking Offices of Foreign Entities does not list any offices of foreign banks in Louisiana.

E. State Securities Issues:

Louisiana state securities or "blue sky" laws are administered by the Securities Division of the Office of Financial Institutions. The address is as follows:

Louisiana Office of Financial Institutions
Securities Division
8660 United Plaza Blvd., 2nd Floor
Baton Rouge, Louisiana 70809

Securities offerings in Louisiana may be made only (i) pursuant to an effective state registration statement; (ii) in an offering exempt from the Louisiana registration requirements or of an exempt security; or (iii) of securities that are "federal covered securities." (La. Rev. Stat. § 51:705). Federal covered securities are defined in the rules and regulations of the SEC and generally comprise all securities registered for listing on a national securities exchange or securities senior to any such security. Securities dealers and salesmen must also register in Louisiana unless exempt from the requirements. (La. Rev. Stat. § 51:703).

La. Rev. Stat. § 51:708 sets forth a list of 12 exempt securities and La. Rev. Stat. § 51:709 lists 16 exempt transactions. The sale of securities that have been registered with the SEC under the Securities Act is an exempt transaction provided prior notification has been made to the Louisiana Securities Division, together with consent to service of process and the requisite fee. The fee is based on the value of the securities to be sold in Louisiana (currently a minimum of $100 and a maximum of $1,000) plus a $250 examination fee. Louisiana also provides for private offering exemptions that were designed to be safe harbors similar to offerings under Rules 505 and 506 of Regulation D under the Securities Act. Louisiana currently charges a $300 fee and requires notification of these offerings within 15 days after the first sale of securities in the state.

If registration with Louisiana is required, the statute provides for (i) registration by qualification in which the issuer must file a registration statement meeting the requirements of the statute that will be reviewed; (ii) registration by notification; and (iii) small issue registration. No securities may be sold in Louisiana until the registration statement has been approved. Companies that have been in existence for at least five years and satisfy certain financial tests may qualify for a short form registration by notification procedure. Provided the requisite documentation is filed, a registration statement filed under the notification procedures will automatically become effective on the fifth full business day after it was filed with the Division. (La. Rev. Stat. § 51:705).

X. REAL ESTATE

A. Ownership:

An owner or holder of fee simple title to immovable (real) property owns all property interest with respect to a portion of ground including all rights under, on and above the land. These rights are referred to in Louisiana by the Latin terms *usus*, *fructus* and *abusus*. They mean the owner of fee simple has the right to use the property, to collect the revenues therefrom during the term of his ownership, and to alienate the property. The only restrictions on the fee simple owner's use of the property are those appearing in the public records at the time of acquisition of the property and those placed thereon by zoning restrictions. The restrictions created by private acts can take the form of conditions, covenants and restrictions placed against a parcel of property to restrict its development or use. In this regard, it is important to note that Louisiana is a pure "public record doctrine" state. For any limitation to affect title to immovable (real) property, it must be recorded in the proper public records in the parish in which the property to be affected is located. An unrecorded agreement will have no effect against a purchaser of immovable (real) property even if that purchaser is aware of the existence of the unrecorded agreement.

1) <u>Who can hold title in Louisiana</u>?

Title to property in Louisiana may be held by a legally competent human, referred to as a natural person, or an entity, referred to as a juridical person.

2) <u>When can an individual own property in Louisiana</u>?

Individuals, including foreign individuals, can own property in Louisiana.

3) <u>When can a domestic/foreign business entity own property in Louisiana</u>*?*

In Louisiana juridical persons, corporations and other legal entities may acquire, hold, use and alienate or encumber property of any kind. As discussed elsewhere in this guide, foreign corporations are required to register with the Secretary of State if they wish to do business in the State of Louisiana. A foreign corporation, however, is not considered to transact business by acquiring and disposing of property on a non-regular basis. Other than tax considerations resulting from Federal law and limited liability under corporate law, domestic corporations and foreign corporations that qualify to do business essentially share the same rights and remedies with respect to real estate as individuals.

B. Concurrent Ownership:

1) <u>Tenancy in common</u>

Louisiana law does not recognize the common law concept of "tenancy in common." However, property may be owned under the civil law regime of co-ownership, or ownership of the same thing by two or more persons whose ownership is in indivision, each owner having an undivided share. In the absence of other provisions of law or juridical act, the shares of all co-owners are presumed to be equal. A co-owner has the freedom of disposition with respect to his share of the co-owned thing, but any disposition is effective only with respect to his interest. All co-owners must consent to a lease, alienation, encumbrance, substantial alteration or substantial improvement of the entire co-owned thing held in indivision. Louisiana law provides statutory procedures for partition.

2) Joint tenancy

As a civil law jurisdiction, Louisiana does not recognize the common law concept of property held in joint tenancy with right of survivorship.

3) Tenancies by the entirety

As a civil law jurisdiction, Louisiana does not recognize the common law concept of property held as tenancies by the entirety.

C. Spousal Rights:

1) What rights does a spouse, partner have to properties in the event of death or separation?

Louisiana is a community property state and, unless spouses otherwise elect, each spouse will own a present undivided one-half interest in and to any community property. Property acquired during a marriage by either spouse is rebuttably presumed to be community property.

The community or, in Louisiana parlance, the community of acquets and gains, terminates upon the death of a spouse, judgment of divorce or separation, or execution of a matrimonial agreement terminating the community. Subsequent to the termination of the community property regime, Louisiana law governing co-ownership is generally applicable.

2) What responsibilities does a spouse, partner have in the execution of mortgages?

During the existence of a community property regime, each spouse acting alone may generally manage, control, or dispose of community property. However, the alienation, encumbrance, or lease of certain types of property, including real estate, requires the concurrence of both spouses.

D. Purchase/Sale of Property:

1) Purchase

(a) What are the procedures in drafting purchase agreements?

To acquire a fee simple title to a parcel of immovable (real) property in Louisiana a prospective purchaser usually submits a written offer to purchase setting forth the terms and conditions on which the property is to be purchased. Examples of such conditions are the purchaser's ability to obtain financing, the ability of the seller to deliver good title, the nature and condition of the improvements located on the property, *etc*. If the offer is accepted in writing by the seller, the agreement becomes a purchase agreement binding on both parties. Once the conditions set forth in the purchase agreement to transfer title have been met, the title can be transferred through an act of sale. An act of sale in Louisiana is the same as a deed in other states.

(b) What should a purchase statement in Louisiana include?

The closing attorney generally prepares a closing statement that summarizes the seller's and purchaser's transaction. Closing statements contain a list of charges and credits by both buyer and seller. Charges to purchaser include the purchase price and any insurance, interest, taxes or rents prepaid by the seller. The first credit to the purchaser is usually the purchaser's deposit that is to be applied toward the purchase price. Next is credited any existing mortgage balances on the property the purchaser is assuming. The purchaser also receives credit for any portion of the purchase price financed by the seller.

(c) What state legislation protects buyers against fraud?

A purchaser of real estate may rely conclusively on the public records as a result of the Louisiana public records doctrine which provides, generally, that an interest in real estate must be recorded in order to affect third parties. Accordingly, an unrecorded title or interest in real estate will generally have no effect on third persons.

Under Louisiana law, a seller of real estate makes two simple implied warranties. First, the seller warrants purchaser's ownership and peaceable possession of the property sold. The seller also warrants that the real estate is free of hidden defects and that the thing sold is "reasonably fit for its ordinary use". These implied warranties may be waived or modified. Seller's implied warranty of title is often waived or modified in commercial and some residential transactions to warrant only against "acts by, through or under seller", similar to a special warranty deed in other states, with the purchaser relying instead on a title insurance policy. The implied warranty of condition is almost always waived in both commercial and residential transactions.

(d) What kind of taxes are levied on a seller, buyer?

Real estate is subject to *ad valorem* taxes assessed and collected by the local parish (county) government on an annual basis. The charges by clerks of court for recording in the various parishes vary depending upon local rules. The charge is usually based upon a nominal fee per page rather than a fee dependent upon the price or value of the property. Only Orleans Parish charges a separate documentary stamp tax on the conveyance or encumbrance of immovable (real) property. In general the tax is a flat fee of $325, but can be as much as $2,525, depending on the number of pages. In order to qualify as the same "transaction" for stamp tax purposes the documents transferring the property, such as a sale and subsequent bank mortgage, must be dated the same date.

(e) How are taxes prorated in Louisiana between buyer/seller?

In Orleans Parish *ad valorem* taxes are paid at the beginning of the year and the buyer reimburses the seller at closing for the buyer's proportionate share of the taxes. In all parishes other than Orleans Parish, taxes are assessed and paid in arrears, at the end of the year. In those parishes, the closing agent estimates taxes based on the prior tax bill and a proportionate share of the estimated taxes is deducted from the seller's proceeds. Often the parties agree that such an estimate is considered final except where unique circumstances exist, such as the sale of a new building that has not been previously assessed for the full value.

2) Closing

(a) Deed

As noted earlier, title to real estate is usually transferred in Louisiana by an act of sale, typically drafted by the purchaser's counsel or title company. Acts of sale must be in writing. However, in order for an instrument to be effective against third parties it must be recorded.

Acts of sale and other documents affecting real estate are recorded in the official records of the clerk of court for the parish in which the property is located. Louisiana is divided into 64 parishes, each of which has a clerk of court. If an act of sale is not recorded and the original seller resells the property, the new purchaser acquires the property free and clear of the claims of the original purchaser, even when the new purchaser is aware of the existence of the prior sale.

It is the standard practice for lenders to obtain title insurance when making real estate loans in Louisiana. Title insurance is available from many attorneys and from various title insurance companies with offices in Louisiana. Jones Walker maintains a captive title company, Baronne Title Company,[46] which acts as agent for all of the major national title insurance companies. Basic coverage premiums are established by state regulation, and most of the standard American Land Title Association[47] (ALTA) forms, as well as additional Louisiana endorsement forms, have been approved for use in Louisiana.

(b) Bill of sale

Transfers of movable (personal) property are usually made by a bill of sale.

(c) Mortgage

In Louisiana a loan may be secured by a mortgage granted by the owner of the property in favor of the lender.

Three different forms of contractual or "conventional" real estate mortgages are recognized in Louisiana: (1) ordinary conventional real estate mortgages, (2) collateral real estate mortgages, and (3) multiple indebtedness mortgages.

(i) Ordinary Conventional Mortgages

An ordinary conventional mortgage may effectively secure only a single onetime extension of credit evidenced by a promissory mortgage note. Such a mortgage will not secure multiple loans or other extensions of credit on a cross-collateralization basis, nor will it effectively secure multiple loan advances under a revolving line of credit. An ordinary conventional mortgage must contain a full description of the mortgage note, including the principal amount and maturity date.

(ii) Collateral Mortgages

A collateral mortgage is a special type of conventional real estate mortgage traditionally used to secure both multiple extensions of credit on a cross-collateralized basis and multiple loan advances on a revolving line of credit basis, as well as onetime extensions of credit. Four documents are typically used under a collateral real estate mortgage set: (1) the collateral mortgage which secures (2) a collateral mortgage note payable to bearer on demand, generally in an amount greater than the secured indebtedness. The collateral mortgage note is pledged to the lender/mortgagee under (3) a security agreement prepared in accordance with Louisiana UCC Article 9, under which the borrower/mortgagor grants a security interest in and pledges the collateral mortgage note to secure not only the primary extension of credit, but also other present and future indebtedness the borrower may owe the lender on a cross-collateralization basis. The indebtedness is evidenced by (4) one or more "hand notes" executed by the borrower on terms as to principal, interest, and maturity that reflect the parties' business transaction. The lien of a collateral mortgage secures subsequent loan advances, as well as unrelated extensions of credit on a cross-collateralized basis, with retroactive priority to the date the original mortgage was recorded in the public records.

(iii) Multiple Indebtedness Mortgages

Institutional lenders typically require a multiple indebtedness mortgage as part of their standard lending procedure. Multiple indebtedness mortgages serve the same purpose as collateral real estate mortgages. They may secure multiple extensions of credit on a cross-collateralization basis as well as multiple loan advances under a secured revolving line of credit. A multiple indebtedness mortgage differs from a collateral mortgage in not requiring a collateral mortgage note or a collateral pledge agreement. The mortgage directly secures multiple extensions of credit or multiple loan advances on a line of credit basis.

(iv) Every mortgage in Louisiana must satisfy the following requirements:

(A) be in writing;

(B) be signed by the mortgagor;

(C) adequately identify the mortgagor (including the mortgagor's marital status, if an individual) and the last four digits of the mortgagor's taxpayer identification number;

(D) contain a description of the secured indebtedness, including the amount and, if applicable, the maturity date of the mortgage note;

(E) in the case of a collateral mortgage, state that the collateral mortgage note is payable on demand;

(F) in the case of a multiple indebtedness mortgage, state the maximum amount of indebtedness the mortgage secures (which generally exceeds twice the principal amount of the mortgage debt);

(G) contain a full legal description of the mortgaged property; and

(H) if taken on the mortgagor's personal residence, contain a waiver of homestead exemption.

The mortgage should also be executed in the presence of two witnesses and a notary public. In this form, the mortgage becomes an "authentic" act which enhances the lender's rights in a foreclosure proceeding. The mortgage must also be recorded in the mortgage records of the parish in which the property is located. A recorded mortgage generally has priority over all liens and encumbrances recorded or arising after the mortgage other than privileged liens such as laborers' liens and federal tax liens.

Deeds of trust are not recognized under Louisiana law.

Once recorded, an ordinary conventional mortgage remains valid and effective as to third persons for a period of ten years from the date of the instrument. If the mortgage note has a payment term of nine years or longer, a recorded mortgage describing the mortgage note's maturity date will remain valid and effective for a period of six years following the note's nominal maturity date.

A recorded collateral or multiple indebtedness mortgage will remain valid and effective as to third persons for a period of ten years from the date of the instrument.

To continue the effectiveness of a Louisiana real estate mortgage beyond these dates, it is necessary to "reinscribe" the mortgage by filing a written notice of reinscription identifying the mortgagor and the recordation information of the original mortgage, and declaring that the mortgage is reinscribed. Once reinscribed, a Louisiana mortgage will continue to be valid and effective for ten years from the date the notice is recorded.

E. Explain Foreclosures in Louisiana:

The basic mechanism to enforce a loan secured by a mortgage on immovable (real) property is the foreclosure action. In Louisiana, unlike many other states, a foreclosure can be effected only judicially. There is no mechanism for a private foreclosure and sale in Louisiana. Two types of judicial foreclosure proceedings are recognized in Louisiana.

1) Foreclosure Via Ordinary Process

Under this procedure, an ordinary lawsuit is filed for failure to make loan payments as required. Once the judgment is rendered, the lender obtains a writ of *fieri facias* directing the sheriff for the parish where the property is located to seize and sell it. The mortgaged property can also be seized prior to judgment by use of prejudgment attachment or sequestration procedures. The sheriff proceeds to seize the property, obtain two appraisals, and advertise it for public sale. After due notice and advertisement, the sale is held. Unless the property is sold for at least two-thirds of the appraised value, the lender loses its right to pursue the borrower for any deficiency between the amount of the judgment and the sale price of the seized property. If no one bids two-thirds, the property is re-advertised for sale a second time. At the second sheriff's sale, the property can be sold for any amount, and the lender's rights to pursue any deficiency are preserved.

2) Foreclosure Via Executory Process

Executory process is available only if the mortgage is executed in the presence of a notary and two witnesses and contains a consent to foreclosure under Louisiana executory process. Under executory process, the lender petitions the court to order the sheriff to immediately seize the property and sell it at public sale. There is no need to obtain a judgment. Once the property is seized, the procedures are the same as in a foreclosure by ordinary process. The advantage of executory process is that it eliminates delays connected with ordinary process.

Under both foreclosure methods, the purchaser of the property at the sheriff's sale acquires full ownership of the property immediately upon the execution of the sheriff's deed of sale. The only party with a right to redeem the property is the federal government for federal tax liens, and then only if proper notification was not given to the federal government.

F. Land Contracts:

A land contract, referred to as bond for deed, is a contract to sell immovable (real) property whereby the buyer commits to pay the purchase price to the seller in installments, with the seller retaining ownership of the property until the purchase price is paid in full. Bonds for deeds are not widely used in Louisiana and are discouraged in Louisiana commercial transactions.

G. Easements:

In Louisiana, a person may acquire less than a fee simple ownership in the form of a usufruct, a servitude, or an interest in mineral rights. A usufruct is similar to a servitude (which is referred to as an easement in other states) in that it grants the right to use a parcel of property owned by another, known as the "naked owner," for a limited duration. The usufruct may be of consumable or non-consumable things. If the usufruct is of consumable things, the usufructuary (the person to whom the usufruct is granted) becomes owner of them. He may consume, alienate or encumber them as he sees fit. Upon termination of the usufruct, the usufructuary is bound to pay the naked owner either the value of the things as of the commencement of the usufruct, or deliver to the naked owner things of the same quantity and quality.

If a usufruct is of non-consumable thing – such as real estate – the usufructuary has the right to possess it and derive products and profits from it with the obligation of preserving the substance of the property. In such a situation the usufructuary is also bound to use the things as a prudent administrator and to deliver them to the naked owner at the termination of the usufruct. A usufruct is a type of servitude known in Louisiana as a personal servitude. The other type of servitude recognized in Louisiana is a predial servitude, which is a charge on one parcel of real estate for the benefit of another adjacent or nearby parcel of real estate.

H. Lease:

Real estate leases in Louisiana are subject to the lease articles of the Louisiana Civil Code, namely Louisiana Civil Code Articles 2668 *et seq*.

A lease grants a lessee the right to use the leased property and possibly retain revenues therefrom during the term of the lease. A leasehold interest is evidenced by a lease agreement setting forth the terms and conditions on which the tenant, or lessee, may occupy the leased property. A lessee's primary obligation in a lease agreement is the payment of rent to the lessor in consideration of the lessee's use of the property. The lease agreement may contain any other contractual provisions as long as they are not contrary to public policy. An example of a provision contrary to public policy is a lease agreement in perpetuity. A lease can exist only for a definite term in Louisiana. Also of importance in a lease agreement is the default and remedy clause. Should a lessee fail to fulfill an obligation under the lease and be in default, the lessor is usually granted the right either to terminate the lease or to accelerate the rent due under the remaining term of the lease. A lessor cannot do both, however. If the rent is accelerated for the remaining term of the lease, the lessee is entitled to occupy the property for the remaining term.

A commercial lease typically contains numerous clauses, such as a clause setting forth the uses to which the property can be put and a casualty provision dictating what happens in the event the leased property is damaged by fire or other casualty. Leases may be for undeveloped land or for space in a building. Ground Leases usually allow (or may require) the tenant to construct improvements on the ground.

I. Zoning:

Regulations governing the development of immovable (real) property in Louisiana may be created either by private act or by statute. A private act creating land use restrictions is recorded in the parish where the property is located. If property is acquired when such an act is of record, the purchaser can develop the property only in accordance with those restrictions. Examples are square footage requirements of housing developments, set-back requirements from public streets and height limitations.

Development restrictions may also occur in public laws. Local governments have the authority to adopt zoning regulations controlling the development of property located within their jurisdiction. Zoning ordinances are intended to protect the public health, safety and general welfare by regulating the uses to which land may be put. Essentially, a zoning designation is a classification of a parcel of land for a particular purpose such as agricultural, residential, commercial, retail, industrial, or other use. Zoning regulations usually apply to property located within a municipality. Property located outside a municipality is typically classified as rural property and is exempt from subdivision regulations as long as it is not divided into small lots. Within the broad categories of zoning classifications may exist subcategories that further define the uses to which particular parcels can be put. For example, an area may be designated "Residential One" which would allow only single family housing, while another area may be designated "Residential Two," which may allow multi-family housing. Similar sub-categories exist with respect to industrial classifications. Zoning regulations may further specify the manner in which improvements must be built and placed on the property, such as set-back requirements, height limitations, parking requirements, *etc*. A landowner may request a variance to a zoning ordinance to use the property in a way currently prohibited. This usually involves public notice, public hearings, and approval by the governing authority.

In Louisiana the laws governing the state's coastal areas also affect the use of immovable (real) property. State law has created a Coastal Management Zone. Certain activities are prohibited in this Zone without the approval of the appropriate state agency. Numerous exemptions from these laws limit their overall impact on the use of real estate.

J. Mineral Rights:

1) <u>Introduction</u>

Louisiana's rich supply of natural resources has long been a significant factor driving the economic growth and prosperity of the State. Industries involving the exploration, production, refining and transportation of oil and gas have historically offered the greatest business opportunities. Louisiana's salt, sulfur and lignite mining industries, as well as its timber and seafood industries, have also provided substantial investment opportunities. *(In this subsection, oil, gas, salt, sulfur, lignite and other similar natural substances are referred to as "minerals," and the rights to own and/or explore for minerals are referred to as "mineral rights.")*

Oil and gas are found throughout virtually all of Louisiana's 64 parishes (counties) as well as beneath the Gulf of Mexico adjacent to Louisiana's coastline. Efforts to discover and produce these natural resources have given rise to a variety of industries, including those providing transportation, food services, equipment, and other services and supplies to exploration and production companies engaged in discovering and producing oil and gas. Louisiana is also the home to liquefied natural gas and crude refining facilities, as well as an intricate web of gathering lines and pipelines that ultimately bring oil, gas and refined products to much of the United States. Louisiana's offshore waters are also home to the deep-water Louisiana Offshore Oil Port ("LOOP"), through which much of the crude oil imported into the United States has historically been transported. In addition, the State contains a network of salt domes that provide storage for much of the nation's Strategic Petroleum Reserve, as well as offering storage capacity to the natural gas industry.

2) <u>The Ownership of Minerals</u>

(a) In General

Under the Louisiana Mineral Code (the "Mineral Code"), ownership of land includes the ownership in place of solid minerals, but does not include the ownership in place of oil, gas and other fugacious minerals. Rather, the ownership of oil and gas in Louisiana is suspended until these substances are reduced to possession (*i.e.*, captured). Ownership of land does, however, include the right to explore for and produce oil and gas on or beneath such land even though such efforts might lead to the drainage and capture of oil and gas from adjoining lands. The rule of capture is, however, restricted by the Mineral Code's recognition of the doctrine of correlative rights in common reservoirs and by the concept of forced unitization (or pooling) to protect such rights under Louisiana's Conservation Act.

(b) State-Owned Lands

By law, the State of Louisiana owns the beds and bottoms of all naturally navigable waterways within its borders, including all waters within three miles of its southernmost coast. Louisiana also owns vast amounts of marshlands and other lands acquired for public works. Mineral rights in lands owned by the State are generally acquired by private persons by leasing from the State or by acquiring the leasehold rights of an existing lessee. The State is prohibited from selling its rights in minerals.

The millions of State-owned acres covered by public works, marshes, bayous, rivers, lakes and coastal waters in Louisiana are subject to the jurisdiction of the Louisiana State Mineral Board[48] (the "Mineral Board"). A potential lessee wishing to acquire a lease to explore for oil and gas on State-owned lands must first file an application with the

Louisiana Department of Natural Resources. This agency submits the application to the Mineral Board, which may obtain geophysical and geological surveys to determine the potential of the lands described in the lease proposal. Thereafter, the Mineral Board decides which lands it chooses to make available for lease and advertises them for bids. The Mineral Board may also, on its own motion or pursuant to a request by the Secretary of the Department of Natural Resources, nominate and advertise State-owned lands for bids. After bids are received, the Mineral Board generally awards a lease to the person or entity bidding the highest bonus, rental and royalty for a particular tract. The Mineral Board has discretion in determining which bid is most advantageous to the State. Similar leasing methods are required for lands owned by State agencies such as Levee Districts or School Boards.

Once the Mineral Board awards a lease, the lessee and the State enter into a lease in the form adopted by the Mineral Board. The Mineral Board is charged with the duty of supervising all mineral leases granted by the State and must approve any transfer or assignment affecting any lease from the State.

(c) Privately-Owned Lands

As previously noted, a landowner possesses the right to explore for and produce oil and gas on his lands. Mineral rights in privately-owned lands, like those in lands owned by the State, are established by contract. Because private landowners are not subject to the constraints imposed on the State's development of minerals under State-owned lands, however, private landowners have a greater degree of flexibility in deciding how to sell or develop the mineral potential of their lands. Accordingly, the variety of mineral rights in privately-owned lands that may be created in Louisiana is limited only by the imagination of the parties to the contract and by certain public policy considerations set forth in the Mineral Code or other Louisiana statutes. If the Mineral Code does not expressly or impliedly cover a particular situation, the Civil Code and other pertinent laws of Louisiana will apply.

(d) The Basic Types of Mineral Rights

The Mineral Code specifically recognizes four basic mineral rights that may be created by the landowner: the mineral servitude, the mineral lease, the mineral royalty, and the executive right. These rights are not, however, the only mineral rights that may be created under Louisiana law. The Mineral Code provides that this enumeration does not exclude a landowner from creating other mineral rights.

(i) Mineral Servitude

A mineral servitude provides its owner with the right to use the land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership. While the owner of a mineral servitude has the right to conduct operations in search of minerals that may be found under the servitude lands, mineral servitude owners generally grant mineral leases (see subsection *(iii)* below) pursuant to which the lessees are given the right to explore for minerals underlying the leased premises and reduce them to possession. A Louisiana mineral servitude differs from a "mineral estate" recognized in many other states. In Louisiana, rights in minerals cannot exist in perpetuity independent of title to the land. Thus, for example, as a general rule, a mineral servitude must be "used" within ten years of its creation or it will, by law, prescribe (lapse) and mineral ownership will revert to the then-current landowner.

(ii) Mineral Royalty

A mineral royalty is the right to share in minerals produced from the lands subject to the mineral royalty interest. Unless otherwise agreed in a lease of the mineral servitude, the mineral royalty owner's share of production is free of the costs of exploration and production. A mineral royalty interest may be created by a landowner or mineral servitude owner in favor of a third party. The owner of a mineral royalty interest, if he has no other interest in the minerals or lands to be developed, does not have executive rights (see subsection *(iv)* below) but merely participates in mineral production brought about by exploration and production activities conducted by others. Like a mineral servitude, a mineral royalty interest cannot exist in perpetuity independent of title to the land. It must be "used" within ten years of its creation or it will, by law, prescribe (lapse). {Note: A royalty interest created by a mineral lease wherein the lessor retains a percentage of production from the leased premises, commonly referred to as the "lessor's royalty," is not to be confused with a mineral royalty interest. In addition, an interest created out of a mineral lessee's interest in production, commonly referred to as an "overriding royalty interest," is not to be confused with a mineral royalty interest.}

(iii) Mineral Lease

The typical Louisiana mineral lease is a contract whereby the mineral owner (the landowner or mineral servitude owner), as lessor, grants in favor of another the right to explore for minerals underlying the leased premises and reduce them to possession. A mineral lease is generally for a stated primary term (usually 3-5 years) and for so long thereafter as minerals are produced in paying quantities. The lessee will also stipulate payment to the lessor of a fixed royalty, usually 25 percent or less, of the total production from the leased premises, as well as a “bonus” (an amount paid for the grant of a lease), “delay rentals” (an amount payable annually during the lease’s primary term for the privilege of delaying drilling operations on the leased property), and “shut-in royalties” (an amount payable once natural gas has been discovered but before it can be sold because of a lack of a market or pipeline facilities). The rights of the parties to a mineral lease are subject to its specific provisions, but the Louisiana Mineral Code recognizes certain implied obligations should they not be specifically addressed in the lease. These implied obligations include the lessee's duty to reasonably develop the leased premises, to protect the leased premises from drainage, to use diligence in marketing production from the leased premises, and to restore the leased premises to their original condition as nearly as is practicable.

(iv) Executive Right

The executive right is the exclusive right to grant a mineral lease affecting lands or mineral rights. The owner of an executive right may lease the lands or mineral rights over which the executive right is effective to the same extent and under the terms and conditions as he could grant a mineral lease if he were the owner of a mineral servitude. The owner of an executive right generally has the right to retain bonuses and delay rentals payable under a mineral lease. An executive right may exist independently of another form of mineral right, or it may exist as part of another mineral right. For instance, a mineral servitude generally includes the executive rights such that the mineral servitude owner has the right to grant a mineral lease covering the servitude premises; however, the executive rights may be alienated from the mineral ownership and established in favor or a third party. An executive right existing independently is subject to prescription for non-use similar to that by which a mineral servitude lapses.

(e) Correlative Rights and the Conservation Act

In Louisiana, mineral rights are subject to voluntary and compulsory unitization. "Unitization" refers to the process by which interests drained by a well producing from a common reservoir of oil or natural gas are pooled in order to avoid the unnecessary drilling of more than one well to the same reservoir. Voluntary unitization, such as by declared and voluntary unit agreements, is contractual and, therefore, varies according to the preferences of the parties involved. Compulsory unitization poses the most concern for an investor, because to some degree it is involuntary.

Under Louisiana's Conservation Act, any interested owner may apply to the Louisiana Commissioner of Conservation[49] (the "Commissioner") to force pool the tracts around an existing or proposed oil or gas well. The Commissioner, after a public hearing, is charged with creating and defining a unit consisting of the entire area that can be efficiently and economically drained by the proposed unit well. Compulsory unitization serves to limit the number of wells in a defined pool or reservoir, as a unitized lessee is precluded from drilling on that portion of his lease included in the unit created by the Commissioner. In exchange, the lessee receives a proportionate share of unit production, whether or not the unit well is located on his leased premises. Thus, to some extent, Louisiana's unitization laws alter the "rule of capture." Moreover, compulsory unitization alters the contractual relationship of the parties whose interests are included in a unit, creates certain quasi-contractual relationships and provides a powerful tool for, and at times a substantial obstacle to, the development of an oil or gas field.

3) Minerals in Federal Offshore Areas

The resources of the Outer Continental Shelf ("OCS") of the Gulf of Mexico are managed by the United States Department of the Interior[50] ("Interior"). Pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), the Secretary of Interior (the "Secretary") is responsible for administering all leasing and production activities on the OCS. The OCS includes submerged lands lying seaward and outside of the boundary of the State of Louisiana, being a distance of three miles offshore from the State's coastline. The United States is declared by the OCSLA to have the power to control the OCS. The above discussion involving Louisiana concepts of ownership of minerals and mineral rights, and the powers of the Commissioner, therefore, do not generally pertain to OCS minerals.

The Secretary is authorized to grant an OCS oil and gas lease to the highest responsible "qualified" bidder determined by competitive bidding. In this regard, the Secretary may issue mineral leases only to the following: (1) a natural person who is a citizen or national of the United States, (2) a natural person who is an alien lawfully admitted for permanent residence in the United States, (3) a private, public, or municipal corporation or limited liability company or limited liability corporation organized under the laws of any State of the United States, the District of Columbia, or any territory or insular possession subject to United States jurisdiction, (4) an association of such citizens, nationals, resident aliens, or corporations, (5) a State of the United States, the District of Columbia, or any territory or insular possession subject to United States jurisdiction, (6) a political subdivision of a State of the United States, the District of Columbia, or any territory or insular possession subject to United States jurisdiction, or (7) a trust organized under the laws of a State of the United States, the District of Columbia, or any territory or insular possession subject to United States jurisdiction. OCS leases are subject to bonding requirements, and a new lease will not be issued unless the proposed lessee satisfies those requirements. Likewise, applicable bonding requirements must be satisfied prior to approval of an assignment of an OCS lease or an interest in one.

The duties of the Secretary regarding the administration of leasing and production activities on the OCS have been delegated to the Bureau of Ocean Energy Management[51] ("BOEM"), the Bureau of Safety and Environmental Enforcement[52] ("BSEE"), and the Office of Natural Resource Revenue[53] ("ONRR"). The BOEM is responsible for resource management of OCS lands. Its duties include leasing, economic analysis, resource evaluation, environmental analysis, and lease management. BOEM evaluates lease bids for technical and legal sufficiency, and leases are issued to the highest qualified bidder following review by the Attorney General and the Federal Trade Commission to ensure that the award will not be inconsistent with antitrust laws. The BSEE is responsible for safety and environmental management associated with oil and gas activities on the OCS. Its duties include permitting, inspection, enforcement, and the implementation of safety and environmental management programs. The ONRR is responsible for management of revenues from Federal offshore leases. Its duties include collection and distribution of bonuses, rentals, royalties, and other revenues.

Under the OCSLA, federal law extends to the OCS. In addition, the OCSLA authorizes the application of the laws of the adjacent state as "surrogate federal law" in order to fill existing gaps in federal law, to the extent that state laws are applicable and not inconsistent with the OCSLA or with other federal laws and regulations. In the absence of controlling federal law, therefore, the laws of Louisiana, to the extent applicable and not inconsistent with the OCSLA or with other federal laws and regulations, apply as "surrogate federal law" to disputes, transactions and contractual relationships affecting the portion of the OCS that would be within the State of Louisiana if its boundaries were extended seaward.

4) Restrictions on Foreign Investors

The State of Louisiana does not restrict individuals who are non-US citizens from buying and owning lands or mineral rights located in the State. In addition, foreign corporations may buy and own lands and mineral rights located in the State. Foreign partnerships generally enjoy the same rights and privileges as domestic partnerships with regard to the purchase and ownership of lands and mineral rights located in the State. (The articles of partnership must be in writing and recorded with the Louisiana Secretary of State.)

Foreign limited liability companies may acquire and own lands and mineral rights located in the State, but they must apply for a certificate to do business in the State. Special rules may apply to a foreign individual or entity. For example, the transfer of a real property interest in the United States by a foreign person is subject to income tax withholding under the Foreign Investment in Real Property Tax Act of 1980 (commonly known as FIRPTA), and one who purchases a real property interest in the United States from a foreign person is generally responsible for withholding some portion of the purchase price for remittance to the Internal Revenue Service.[54]

As noted above, OCS leases may be granted only to "qualified" bidders. Consequently, unlike the regime governing onshore Louisiana interests, an individual who is not a citizen or national of the United States or who is not lawfully admitted for permanent residence in the United States may not hold a lease on the OCS. Likewise, corporations or other entities that are not organized under the laws of any State of the United States, the District of Columbia, or any territory or insular possession subject to United States jurisdiction may not hold a lease on the OCS. Thus, any such foreign investors may acquire an undivided interest in a mineral lease on the OCS only through ownership of a corporation or limited liability company organized under the laws of any State of the United States, the District of Columbia, or any territory or insular possession subject to United States jurisdiction.

5) Typical Transaction Structures

Although the United States and the State of Louisiana place certain restrictions on the transfer and ownership of interests in leases affecting lands under their jurisdiction, several types of transactions between private persons are typical in the oil and gas industry. Persons can acquire an interest in mineral leases or other mineral rights in Louisiana by purchasing or obtaining a transfer or assignment of such an interest. If the original lessee or transferor retains an interest in the lease, the transaction is deemed to be a sublease as opposed to an assignment. An interest in a lease can be obtained through a "farm-out" agreement, by which one person obtains the operating rights attributable to a lease. By accomplishing predetermined objectives, such as drilling and completing a productive well, the acquiring party may obtain more rights to the leased property, while the original owner or lessee generally retains some form of interest in the property. Parties may also enter into a partnership, joint venture or joint operating agreement under which two or more persons pool a variety of resources and expertise to explore or develop a mineral property. Under these arrangements, the parties agree in advance as to their respective rights and on the method of allocation of the costs of exploration, development or operation, as well as to the allocation of the benefits to be derived from their efforts.

As stated above, the form of transactions affecting minerals and mineral rights is limited only by specific restrictions placed on them by the original owner, the parties to a particular transaction, or the entities with jurisdiction over the lands or minerals under development. Historically, Louisiana's State policy has tended to promote and facilitate development of its mineral resources. Accordingly, Louisiana's oil and gas and natural resource industry offers investors many promising opportunities.

K. Eminent Domain:

The Louisiana Constitution allows for the taking of private property for a public and necessary purpose. In Louisiana the right to take or expropriate property is granted by statute to a number of "expropriation authorities." (La. Rev. Stat. § 19:1 *et seq*.). The expropriation authorities include the state and its political subdivisions and corporations; other legal entities created for or engaged in the construction or operations of railroads, toll roads, navigational canals, waterworks, railways; natural gas companies: telegraph/telephone companies; electric companies: and, petroleum and carbon dioxide pipeline companies. (*See* La. Rev. Stat. § 19:2).

In Louisiana, an expropriation authority is required to negotiate in good faith in an attempt to acquire the property amicably before instituting an expropriation proceeding. Additionally, there are other perquisites to filing a petition for expropriation, including providing the landowner with information regarding the value of the property and the right of the expropriation authority to take the property. The perquisite steps generally require between 60 and 90 days. This time includes a statutorily mandated waiting period of at least 30 days from the time the landowner receives a written offer to purchase the property, in an amount equal to or in excess of its appraised value before an expropriation authority can file suit to obtain the property. The only expropriation authority entitled to "quick taking" rights in Louisiana is the State through the Department of Transportation and Development pursuant to (La. Rev. Stat. § 48:441 *et seq*.).

A defendant in an expropriation proceeding has 30 days to answer the petition for expropriation. If a defendant fails to answer or file responsive pleadings within the 30 day period, it waives all defenses except the right to contest compensation. The court is required by statute to set the expropriation proceeding with dispatch but cannot set the trial date sooner than 60 days from the day the defendant is served with the petition for expropriation. If the defendant contests any issue other than compensation, a hearing is to be set within 30 days from the filing of the answer. All issues except compensation are tried to the bench. Either the expropriation authority or the defendant can request a jury trial on the issue of compensation. The trial takes place in a bifurcated manner, in which all non-compensation issues—the right to take, reasonableness of the taking, etc.—are heard first. Once a ruling on these non-compensation issues has been rendered, the court is required to set the compensation component for trial within 45 days.

An expropriation authority does not obtain the property until a judgment has been rendered in the expropriation suit. The expropriation authority takes possession of the property upon payment to the landowner or upon depositing the funds into the registry of the court. The judgment issued by the trial court is appealable, but the appeal does not suspend or interrupt the judgment.

The general rule guiding the courts in determining the value of the land expropriated is that the "landowner shall be compensated to the full extent of his loss," and fair market value has been consistently used by courts in determining that loss. (La. Rev. Stat. § 19:9). One nuance in Louisiana law in connection with damages is that a landowner may collect reasonable attorney's fees if he was awarded more in damages than the highest offer made by the expropriation authority. (La. Rev. Stat. § 19:8).

XI. MISCELLANEOUS

A. Requirements for Qualification to do Business in Louisiana

Foreign corporations or associations must first obtain a certificate of authority from the Secretary of State before doing business in Louisiana (La. Rev. Stat. § 12:301). In order to obtain the certificate of authority, the requisite form, together with a certificate of existence or good standing from the jurisdiction in which the company is incorporated must be filed with the Secretary of State. The form must name a registered agent in Louisiana which may be an individual resident in Louisiana, an individual attorney or partnership authorized to practice law in Louisiana, or a domestic or foreign corporation authorized to act as agent for other corporations. There is a filing fee of $150. If the name of the foreign corporation includes the words "engineer," "engineering," "surveyor," or "surveying," special requirements must be satisfied. (See Form #326 on website of Secretary of State). Once it has been determined that all requirements have been met, the Secretary of State will issue a certificate of authority to do business in Louisiana. (La. Rev. Stat. § 12:305).

Louisiana has special requirements for names of foreign corporations seeking to do business in Louisiana. Consistent with the rules governing names of domestic corporations, the name must contain the word "corporation," "incorporated," "company" or "limited" or the abbreviation of any of those with or without punctuation. While foreign words may be included in the name, they must be spelled using English letters or characters. The name may not include the term "doing business as" or an abbreviation thereof or imply that the corporation is organized for other than its true purpose. The name may not contain words implying that it is organized or empowered to conduct the business of banking or insurance or similar industries. The name must be distinguishable from other entities of all types formed or authorized to do business in Louisiana. (La. Rev. Stat. § 12:303).

Foreign corporations that have qualified to do business in Louisiana are required to file with the Secretary of State an annual report on or before the anniversary of the date they qualified to do business setting forth required information. (La. Rev. Stat. § 12:309). Certain other changes, such as change in registered agent, name changes and mergers, consolidations or dissolutions affecting the foreign corporation, must also be reported to the Secretary of State. Failure to make any of these filings can result in the revocation of authority to do business in Louisiana. (La. Rev. Stat. § 12:313).

Foreign limited liability companies, partnerships and limited liability partnerships must also obtain a certificate of authority before doing business in Louisiana. The procedure is the same as for foreign corporations. (La. Rev. Stat. § 12:1342).

Whether a foreign corporation or other foreign entity's activities within Louisiana constitute "doing business" depends on the facts and circumstances. La. Rev. Stat. § 12:302 sets forth a nonexclusive list of activities that do not constitute doing business necessitating a certificate of authority. The list of exempt activities includes maintaining bank accounts within the state, maintaining or defending a lawsuit, holding meetings of its directors or shareholders or acquiring or disposing of property not as part of a regular business activity. (La. Rev. Stat. § 12:302).

A foreign entity doing business in Louisiana without the proper certificate of authority is excluded from presenting any judicial demand before any court in Louisiana. In order to so qualify, the foreign corporation will be required to pay all fees and penalties as if it had registered at the time it commenced doing business in the state. (La. Rev. Stat. § 12:314).

B. Licensing and Regulatory Requirements:

1) <u>Lenders</u>

As a general rule, non-Louisiana based commercial lenders are not required to be licensed to engage in permissible commercial lending activities in Louisiana. The general rule is subject to the following exceptions:

- Non-Louisiana state chartered savings and loan associations may not engage in certain types of business activities in Louisiana without first obtaining a certificate of authority and public necessity from the Office of Financial Institutions. (*See* La. Rev. Stat. § 6:892 *et seq*.)

- Motor vehicle manufacturers and lessors are required to be licensed by the Louisiana Motor Vehicle Commission.[55] (*See* La. Rev. Stat. § 32:1251 *et seq*.)

- Consumer finance lenders making loans subject to the Louisiana Consumer Credit Law, La. Rev. Stat. § 9:3510 *et seq*., are required to be licensed by the Office of Financial Institutions whether or not they have offices in the state.

- Motor vehicle sales finance lenders making consumer loans and purchasing motor vehicle retail installment sales contracts subject to the Louisiana Motor Vehicle Sales Finance Act, La. Rev. Stat. § 6:969.1 *et seq*., are required to be licensed by the Louisiana Motor Vehicle Commission whether or not they have offices in the state.

Subject to exemptions and qualifications, the Louisiana S.A.F.E. Residential Mortgage Lending Act, La. Rev. Stat. § 6:1081 *et seq*., generally requires the licensing and certification of residential mortgage lenders. (*See* La. Rev. Stat. § 6:1082 and 6:1087).

The Office of Financial Institutions (OFI) is responsible for the chartering and supervision of all state chartered depository institutions and certain affiliated and related entities. The OFI also regulates Business and Industrial Development Corporations (BIDCOs) and Certified Louisiana Capital Companies (CAPCOs). The BIDCO program promotes the formation of business and industrial development corporations to help meet the financing assistance and management needs of business firms in the State. The CAPCO program provides tax credits to companies who invest in CAPCOs, which in turn make equity investments in qualifying Louisiana businesses.

The OFI is also responsible for the licensing and supervising of ten non-deposit-related programs including: (i) licensed lenders; (ii) loan brokers; (iii) residential mortgage lenders and brokers; (iv) notification filers (defined as persons who are engaged in selling goods and services on credit and who undertake direct collection of credit from these parties); (v) self-help repossession agents; (vi) pawnbrokers; (vii) check cashers; (viii) bond for deed escrow agents; and (ix) payday lenders. Licensing requirements and general information can be found on the OFI's website located at www.ofi.state.la.us.

2) Contractors

The Louisiana Contractor Licensing Law La. Rev. Stat. § 37:2150, *et seq*., makes it unlawful for any person to engage or to continue in the business of contracting, or to act as a contractor, in Louisiana unless such person holds an active license as a contractor. *See* La. Rev. Stat. § 37:2160. Subject to limited exceptions, the Louisiana Contractor Licensing Law requires any person who offers or undertakes to improve immovable property to have a contractor license if the cost of the work is more than $50,000. This requirement cannot be circumvented by dividing a project into phases or stages. (*See* LAC 46:XXIX, § 1109A).

3) Insurance

The Louisiana Insurance Code, Title 22 of the Louisiana Revised Statutes, and the rules and regulations promulgated thereunder, regulate the entry by and operation of insurance companies, producers, agents and adjusters in Louisiana under the direction of the elected commissioner of insurance.

C. Applicability of State Usury Laws:

1) Commercial

Generally, business, commercial and agricultural purpose loans and other extensions of credit to individuals, sole proprietorships, corporations, partnerships, limited partnerships, limited liability companies, and other business entities, are exempt from Louisiana conventional interest rate or usury limitations. (*See* La. Rev. Stat. § 9:3509(A)). As a special exception, La. Rev. Stat. § 9:3509(B) limits the ability of a lender to prospectively increase the contractual interest rate following the borrower's default under an otherwise fixed rate commercial purpose loan. The statute limits post-default interest rates to a maximum of twenty-one percent, or three percent over the fixed contractual interest rate prior to default, whichever is greater. For smaller commercial loans with an initial principal balance of $250,000 or less, post-default interest is limited to the greater of eighteen percent or three percent in excess of the fixed contractual interest rate. This post-default interest rate limitation applies only to fixed rate simple interest business or commercial purpose loans and does not extend to variable rate commercial loans or to consumer purpose loans. The general prohibition against the recovery of interest upon accrued interest provided in Louisiana Civil Code article 2001 does not apply to transactions entered into for commercial, business, or agricultural purposes. (*See* La. Rev. Stat. § 9:3509.2).

2) <u>Consumer</u>

The Louisiana Consumer Credit Law, La. Rev. Stat. § 9:3510 *et seq.*, generally regulates extensions of credit to Louisiana consumers for personal, family or household purposes. It regulates the making of "consumer loans" and "consumer credit sales."

The maximum loan finance charge for any consumer loan (other than one made with a lender credit card) that may be charged, contracted for or received by a licensed lender or supervised financial organization may equal but not exceed:

- 36 percent per year for that portion of the unpaid principal amount of the loan not exceeding $1,400;
- 27 percent per year for that portion of the unpaid principal amount of the loan exceeding $1,400 and not exceeding $4,000;
- 24 percent per year for that portion of the unpaid principal amount on the loan exceeding $4,000 and not exceeding $7,000; and
- 21 percent per year for that portion of the unpaid principal amount of the loan exceeding $7,000. (*See* La. Rev. Stat. § 9:3519(A)).

Except for charges after negotiations provided by La. Rev. Stat. § 9:3521, the maximum credit service charge for any consumer credit sale other than pursuant to a revolving charge account may not exceed the greater of any of the following:

(a) 24 percent per year on that part of the unpaid balances of the amount deferred that is not in excess of $1,750; and

(b) 18 percent per year on that part of the unpaid balances of the amount deferred that is more than $1,750 and not exceeding $5,000;

(c) 12 percent per year on that part of the unpaid balance of the amount deferred that is more than $5,000; or

(d) 18 percent per year on the unpaid balances of the amount deferred; or

(e) any other method of computation that would not yield a greater credit service charge than (1) or (2) of this section. (*See* La. Rev. Stat. § 9:3520(A)).

The Louisiana S.A.F.E. Residential Mortgage Lending Act, La. Rev. Stat. § 6:1081 *et seq.*, regulates certain residential mortgage lending activities. The maximum interest rate on a residential mortgage loan, other than a federally related mortgage loan, may not exceed the greater of 21 percent or 15 percent above the Federal Reserve Board of Governors approved "Discount Rate." (*See* La. Rev. Stat. § 6:1096(B)).

D. Restrictions on Specific Professions:

Depending on the nature of the business or profession, licenses and or registrations with one or more public or quasi-public entities in Louisiana may be required.

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XIII. APPENDIX

[1] **Office of the Secretary of State**
8585 Archives Avenue
Baton Rouge, LA 70809
www.sos.la.gov
(225) 922-2880

[2] **Federal Trade Commission**
600 Pennsylvania Avenue, NW
Washington, DC 20580
www.ftc.gov
(202) 326-2222

[3] **United States Department of Justice**
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
www.justice.gov
(202) 353-1555

[4] **Committee of Foreign Investment in the U.S. ("CFIUS")**
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220
www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx
CFIUS@treasury.gov
(202) 622-1860

[5] **Bureau of Economic Analysis**
4600 Silver Hill Rd.
Washington, DC 20233
www.bea.gov/
CustomerService@bea.gov
(301) 278-9004

[6] **United States Department of Commerce**
1401 Constitution Ave., NW
Washington, D.C. 20230
www.commerce.gov/
TheSec@DOC.gov
(202) 482-2000

[7] **United States Department of Agriculture**
1400 Independence Ave., S.W.
Washington, DC 20250
www.usda.gov/
(202) 720-2791

[8] **Office of Export Administration**
www.bis.doc.gov/
ECDOEXS@bis.doc.gov
(202) 482-4811

[9] **Foreign Trade Zones Board**
1401 Constitution Ave., NW, Room 21013
Washington, DC 20230
www.trade.gov/ftz

[10] **U.S. Customs and Border Protection (New Orleans Office)**
423 Canal Street
Room 260
New Orleans, LA 70130
www.cbp.gov/
(504) 670-2391

[11] **Louisiana Attorney General**
1885 N. Third Street
Baton Rouge, LA 70802
www.ag.state.la.us
ConstituentServices@ag.louisiana.gov
(225) 326-6079

[12] **Louisiana Department of Revenue**
Post Office Box 201
Baton Rouge, LA 70821-0201
617 North Third Street
Baton Rouge, LA 70802
revenue.louisiana.gov/
(855) 307-3893

[13] **Louisiana Tax Commission**
5420 Corporate Blvd., Suite 107
P.O. Box 66788
Baton Rouge, LA 70896
www.latax.state.la.us/
(225) 925-7830

[14] **Louisiana Department of Economic Development**
1051 North Third Street
Baton Rouge, LA 70802-5239
www.opportunitylouisiana.com/
(225) 342-3000

[15] **United States Immigration and Naturalization Service**
New Orleans Field Office
1250 Poydras Street, Suite 1800
New Orleans, LA 70113.
www.uscis.gov
(800) 375-5283

[16] **United States Department of State**
2201 C Street, NW
Room 2236
Washington, D.C. 20520
www.state.gov/
OFMInfo@state.gov
(202) 895-3500

[17] **United States Department of Labor**
200 Constitution Ave., NW
Washington, DC 20210
www.dol.gov
(866) 487-2365

[18] **United States Equal Employment Opportunity Commission**
Hale Boggs Federal Building
500 Poydras Street, Suite 809
New Orleans, LA 70130
www.eeoc.gov
(800) 669-4000

[19] **Louisiana Commission on Human Rights**
1001 N. 23rd Street Suite 268
Baton Rouge, LA 70802
gov.louisiana.gov/page/louisiana-commission-on-human-rights
(225) 342-6969

[20] **College of American Pathologists**
325 Waukegan Road
Northfield, IL 60093-2750
www.cap.org/
(800) 323-4040

[21] **National Institute for Drug Abuse**
6001 Executive Boulevard
Room 5213, MSC 9561
Bethesda, Maryland 20892-9561
www.drugabuse.gov
(301) 443-1124

[22] **Louisiana Workers' Compensation Corporation**
2237 South Acadian Thruway
Baton Rouge, LA 70808
www.lwcc.com/
information@lwcc.com
(225) 924-7788

[23] **Louisiana Workforce Commission (Office of Employment Security)**
1001 N. 23rd Street
Baton Rouge, LA 70802
www.laworks.net/
(225) 342-3111

[24] **Federal Environmental Protection Agency ("EPA")**
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
www.epa.gov
(202) 272-0167

[25] **Louisiana Department of Environmental Quality ("LDEQ")**
Galvez Building
602 North Fifth Street
Baton Rouge, LA 70802
www.deq.louisiana.gov
(225) 219- 5337

[26] **Louisiana Department of Natural Resources ("LDNR")**
617 North Third Street
LaSalle Building
Baton Rouge, LA 70802
dnr.louisiana.gov/
dnrinfo@la.gov
(225) 342-8955

[27] **Louisiana Office of Environmental Compliance**
P.O. Box 4312
Baton Rouge, LA 70821-4312
www.deq.louisiana.gov/portal/ABOUT/OfficeofEnvironmentalCompliance.aspx
deqoec@la.gov
(225) 219-3710

[28] **Louisiana Office of Environmental Services**
P O Box 4313
Baton Rouge, LA 70821-4313
www.deq.louisiana.gov/portal/ABOUT/OfficeofEnvironmentalServices.aspx
(225) 219-3181

[29] **Louisiana Office of Environmental Assessment**
P. O. Box 4312
Baton Rouge, LA 70821-4312
www.deq.louisiana.gov/portal/DIVISIONS/Assessment.aspx
DEQ-div-assessmentdivision@la.gov
(225) 219-3550

[30] **Louisiana State Police**
7919 Independence Blvd.
Baton Rouge, LA 70806
www.lsp.org
(225) 925-6006

[31] **United States Department of Transportation**
1200 New Jersey Ave, SE
Washington, DC 20590
www.transportation.gov
(202) 366-4000

[32] **Underground Storage Tank and Remediation Division**
02 N. Fifth Street
Baton Rouge, LA 70802
www.deq.louisiana.gov/portal/DIVISIONS/UndergroundStorageTankandRemediationDivision.aspx

[33] **Louisiana Department of Health and Hospitals ("DHH")**
628 N. 4th Street
Baton Rouge, LA 70802
www.dhh.louisiana.gov/
ldhwebinfo@la.gov
(225) 342-9500

[34] **United States Army Corps of Engineers**
441 G Street NW
Washington, DC 20314-1000
www.usace.army.mil/
(202) 761-0011

[35] **United States Copyright Office**
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
www.copyright.gov/
(202) 707–3000

[36] **United States Patent and Trademark Office**
USPTO Madison Building
600 Dulany Street
Alexandria , VA 22314
www.uspto.gov/
(800) 786-9199

[37] **Civil District Court for the Parish of Orleans**
421 Loyola Avenue, Room 402
New Orleans, Louisiana 70112
www.orleanscdc.com
chiefdeputyclk@orleanscdc.com
(504) 407-0000

[38] **Supreme Court of Louisiana**
400 Royal St.
New Orleans, LA 70130
www.lasc.org/
(504) 310-2300

[39] **Louisiana Board of Tax Appeals ("BTA")**
Board of Tax Appeals
627 N. Fourth St.
Baton Rouge, LA 70802
www.labta.louisiana.gov/
(225) 219-3145

[40] **Louisiana Tax Commission ("LTC")**
5420 Corporate Blvd., Suite 107
P.O. Box 66788
Baton Rouge, LA 70896
www.latax.state.la.us/
(225) 925-7830

[41] **Louisiana Local Government Environmental Facilities and Community Development Authority ("LCDA")**
5420 Corporate Blvd., Suite 205
Baton Rouge, LA 70808
www.louisianacda.com/
(225) 924-6150

[42] **Louisiana Public Facilities Authority ("LPFA")**
2237 South Acadian Thruway
Suite 650
Baton Rouge, LA 70808
www.lpfa.com/
(225) 923-0020

[43] **Louisiana Office of Financial Institutions ("LOFI")**
8660 United Plaza Boulevard, Suite 200
Baton Rouge, LA 70809-7024
www.ofi.state.la.us/
(225) 925-4660

[44] **Federal Deposit Insurance Corporation ("FDIC")**
1310 Courthouse Road
Arlington, VA 22201
www.fdic.gov
(877) 275-3342

[45] **Federal Reserve Board**
20th Street and Constitution Avenue N.W.
Washington, D.C. 20551
www.federalreserve.gov
(202) 974-7008

[46] **Baronne Title Company**
201 St. Charles Ave
New Orleans, LA 70170-5100
www.joneswalker.com/
(504) 582-8000

[47] **American Land Title Association ("ALTA")**
1800 M Street, NW, Suite 300S
Washington, D.C. 20036-5828
www.alta.org/
service@alta.org
(202) 296-3671

[48] **Louisiana State Mineral Board**
617 North Third Street
LaSalle Building
Baton Rouge, LA 70802
dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=43
(225) 342-4615

[49] **Louisiana Commissioner for Conservation**
617 North Third Street
LaSalle Building
Baton Rouge, LA 70802
dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=46
(225) 342-5540

[50] **United States Department of the Interior**
1849 C Street NW
Washington, DC 20240
www.doi.gov
(202) 208-3100

[51] **Bureau of Ocean Energy Management ("BOEM")**
1849 C Street, NW
Washington, D.C. 20240
www.boem.gov/
(202) 208-6474

[52] **Bureau of Safety and Environmental Enforcement ("BSEE")**
1849 C Street, NW
Washington, D.C. 20240
www.bsee.gov
(202) 208-6184

[53] **Office of Natural Resource Revenue ("ONRR")**
1849 C Street NW, Mail Stop 4211
Washington DC 20240
www.onrr.gov/
(202) 513-0600

[54] **Internal Revenue Service**
1111 Constitution Avenue Northwest
Washington, DC
www.irs.gov
(800) 829-1040

[55] **Louisiana Motor Vehicle Commission**
3519 12th Street
Metairie, LA 70002
www.lmvc.la.gov/
(504) 838-5207