



Tennessee

Prepared by Lex Mundi member firm,
Bass, Berry & Sims PLC

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GUIDE TO DOING BUSINESS IN TENNESSEE

A Legal Guide for Out-of-State and Foreign Businesses

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I. GEOGRAPHY

A. TENNESSEE GEOGRAPHY, LOCATION AND CLIMATE

Tennessee is located in the southeastern region of the United States and is bordered by eight states: Kentucky and Virginia to the north; North Carolina to the east; Georgia, Alabama and Mississippi to the south; and Arkansas and Missouri to the west. The state is 120 miles wide (north to south) and 440 miles long (west to east). The state is divided geographically into three regions, or Grand Divisions: East Tennessee, Middle Tennessee and West Tennessee. The three white stars on the state flag symbolize these three regions. According to the state constitution, no more than two of the Tennessee Supreme Court's five justices can be residents of one Grand Division.

The geography of East Tennessee is dominated by various mountain ranges, including the Blue Ridge Mountains, the Appalachian Mountains and the Great Smoky Mountains. Spanning west from the mountains, are valleys and tributaries forming the Tennessee River. The state's third (Knoxville) and fourth (Chattanooga) largest cities are located in East Tennessee.

Middle Tennessee's main topographical feature is the Highland Rim, an elevated plain surrounding the Nashville Basin. Nashville, the state's capital, is located in Middle Tennessee.

The area of West Tennessee is bordered by the Tennessee River on the east and the Mississippi River on the west. This region is part of the Gulf Coastal Plain, stretching from the Gulf of Mexico to southern Illinois. Memphis, is located in West Tennessee.

The state's variety of topography provides a range of climate conditions. Generally, Tennessee has hot and humid summers (average temperatures in the summer months of around 90 degrees Fahrenheit) and mild winters.

The central location of Tennessee within the country provides an ideal position for a business operation. The state's borders are within one day's delivery of 75% of the major markets in the United States. Both Memphis and Nashville are major air travel hubs and there are eight major interstates running through Tennessee that link the state with the rest of the country.

B. TENNESSEE CULTURAL/ETHNIC BACKGROUND

According to latest census records, the total population of the state is 6,600,299 (based on data from July 1, 2015). This is a 4% increase since the 2010 census. In recent years, Tennessee has received an influx of residents relocating from other states to take advantage of the lower cost of living and the business-friendly advantages the state has to offer.

2015 census data shows the following population breakdown based on race/ethnicity:

White = 79%
Black/African American = 17%
Hispanic/Latino = 5%
Asian = 2%

The median age in Tennessee is 38 years old. The proportion of those 65 and older is growing while individuals under the age of 18 is declining.

Below is a breakdown of the four major cities in Tennessee.

Nashville

- Located in Middle Tennessee in Davidson County
- 2015 census estimate shows population of Nashville is 654,610; represents 4.5% increase over 2010

- 2015 census estimate shows Nashville MSA population is 1,830,345
- Largest city in Tennessee, state capital
- Largest Kurdish community in the United States
- Renowned music hub, famous for various music genres, including country, gospel, jazz
- Largest industry is healthcare, home to more than 300 healthcare companies
- Popular attractions include: Ryman Auditorium, Country Music Hall of Fame and Museum, Musicians Hall of Fame and Museum, Grand Ole Opry, Schermerhorn Symphony Center, the Parthenon
- Home of NFL team, Tennessee Titans, and NHL team, Nashville Predators

Memphis

- Located in West Tennessee on Mississippi River in Shelby County
- 2015 census estimate shows population of Memphis is 653,480; represents 1.0% increase over 2010
- 2015 census estimate shows Memphis MSA population is 1,354,354 (the MSA includes Tennessee, Mississippi and Arkansas)
- Second largest city in Tennessee
- Major transportation hub - air, land (both rail and road), water
- Home to world's second busiest cargo airport
- Renowned music hub, famous for various music genres, including blues, jazz, rock and roll, soul, gospel
- Popular attractions include: Beale Street, Graceland (home of Elvis Presley), Museum of Rock 'n' Soul, Sun Studio
- Home of NBA team, Memphis Grizzlies

Knoxville

- Located in northern East Tennessee in Knox County
- 2015 census estimate shows population of Knoxville is 185,291; represents 3.6% increase over 2010
- 2015 census estimate shows Knoxville MSA population is 861,424
- Third largest city in Tennessee
- Home to University of Tennessee
- Tennessee Valley Authority, nation's largest public power provider, federally owned and headquartered in Knoxville
- Popular attractions include: Market Square, Civil War Driving Tour, Women's Basketball Hall of Fame, Bijou Theatre

Chattanooga

- Located in southeastern East Tennessee in Hamilton County
- 2015 census estimate shows population of Chattanooga is 176,501; represents 5.3% increase over 2010
- 2015 census estimate shows Chattanooga MSA population is 547,776 (includes Tennessee and Georgia)
- Fourth largest city in Tennessee
- The city has its own typeface, Chatype, which was launched in August 2012
- Diversified manufacturing and service industries located in Chattanooga
- Popular attractions include: Tennessee Aquarium, Lookout Mountain, Rock City, Ruby Falls, Creative Discovery Museum, Chattanooga Choo Choo, Hunter Museum of American Art

C. TENNESSEE INVESTMENT CLIMATE

Businesses are attracted to Tennessee because of its central location within the country and the business-friendly environment. According to the Tennessee Department of Economic & Community Development, the following incentives continue to lure companies to the state:

- No personal income tax on wages and salaries
- A right-to-work state
- A long history of fiscal responsibility that crosses party lines
- Lowest state debt per capita in the country – The Tax Foundation
- Second lowest in the United States for state and local tax taxes paid per capita – The Tax Foundation
- Triple A-rated state, with the most recent bond sale at the lowest interest rates in recorded history
- Successful overhaul of tort and workers compensation laws

The state has received numerous awards recognizing our business-friendly environment, including:

- Tennessee was ranked No. 1 for foreign direct investment (FDI) job commitments in 2015 according to the 2016 Global Location Trends report. The annual report from the IBM Institute for Business Value measured the number of jobs created by foreign-owned companies in each state during the 2015 calendar year (August 2016)
- The Brookings Institution found that Tennessee ranks No. 1 among U.S. states for advanced industry job growth (August 2016)
- *Southern Business and Development Magazine* named Tennessee the 2016 State of the Year for Economic Development based on its project totals and the variety of the industry sectors that invested in the state and created jobs (August 2016)
- Tennessee was named the “Fourth Best State in the Country for Business” by *Chief Executive* magazine on its 2016 Best & Worst States for Business list (May 2016)

The main industries in Tennessee include:

Agriculture

- Tennessee’s agricultural economy accounts for 10% of the state’s economy while generating \$50.4 billion in output
- Tennessee’s more than \$745 million in beverage exports ranked third in the nation in 2014
- Tennessee’s government actively supports growth in the food and beverage sector, with 60 announced projects in the current administration, creating nearly 5,000 new jobs and \$1.6 billion in capital investment

Education

- The state has more than 70 institutions of higher education
- Tennessee collaborates with private and public colleges and universities to create top tier programs designed to support the business community
- Tennessee launched the Labor Education Alignment Program (LEAP), focused on increasing opportunities for post-secondary education compatible with workplace needs
- More than 16,000 students are currently enrolled in the Tennessee Promise, which commits to providing two years of community or technical college absolutely free of tuition and fees to graduating high school seniors on a continual basis

Entertainment

- The diverse music industry dominates the entertainment sector
- Prevalent music genres include: bluegrass, country, gospel, rock and roll, blues
- Growth in film and television production in recent years

Energy

- The energy sector is defined by nuclear power, clean air, renewable energy sources, energy efficiency and the green industry
- A \$6.5 billion investment from Y-12 National Security Complex is underway in the eastern portion of the state at the Uranium Processing Facility (UPF)
- Oak Ridge National Laboratory in East Tennessee is the largest U.S. Department of Energy Science and Engineering Lab
- Currently, 24,100 Tennesseans are employed at 309 establishments across the state involved in the energy technology sector

Healthcare

- Nashville has been defined as the “Healthcare Capital of the Country”
- In Middle Tennessee alone, the healthcare industry contributes an overall economic benefit of nearly \$38.8 billion and more than 250,000 jobs to the local economy every year
- Tennessee ranks second in the nation in exports of medical equipment and supplies, with a total of \$3.4 billion in 2014

Manufacturing

- Dominated by transportation, computer/electronic products, chemicals, household goods
- More than 930 auto suppliers located in Tennessee
- Tennessee has been *Business Facilities* magazine’s top state in automotive manufacturing strength for five of the last six years
- During the last three years, Tennessee has posted the second largest percentage increase in the Southeast in manufacturing GDP, which reached \$48.1 billion in 2014
- Transportation equipment is Tennessee’s top export - accounting for 23.3% of Tennessee’s total exports

Tourism

- Tennessee is ranked among the Top 10 destinations in the United States
- In 2014, a record 100 million people visited the state
- Top tourist destinations include: Great Smoky Mountains National Park, Graceland, Ryman Auditorium, Lookout Mountain, Tennessee Aquarium

Most of the content in this section was generated from the [Tennessee Department of Economic and Community Development website](#).

D. ABOUT BASS, BERRY & SIMS PLC

BASS BERRY & SIMS

Founded on client service in 1922; centered to deliver today.

OUR NUMBERS

100

More than 100 public company clients

60

More than 60 practice groups

54

54% of our clients have been with the firm for 10 or more years

86

86% advocacy rating (in comparison to the 54% industry benchmark)

270

More than 270 attorneys

4

4 offices

OUR CLIENTS

“The firm’s performance was outstanding. I’d put them up there with the big firms globally - some of the finest attorneys I’ve seen.”

- from *Chambers USA 2015*

“They provide outstanding professional service; all their lawyers are just fine quality people, very professional with a high level of confidence. I’ve recommended them many times over the years to many different individuals and companies.”

- CEO of a national restaurant chain

“I consider Bass, Berry & Sims a partner: Very knowledgeable and attentive. They deliver excellence.”

- Associate General Counsel at a global technology company

OUR AWARDS



- ✦ Won “M&A Deal of the Year” award as part of the 13th Annual M&A Advisor Awards
- ✦ Recommended Firm for M&A - Middle-Market(sub-\$500M) by The Legal 500 United States 2016
- ✦ 100 attorneys listed in *The Best Lawyers in America*® 2017
- ✦ Ranked as the sixth largest healthcare firm in the nation by American Health Lawyers Association, 2016
- ✦ 48 attorneys listed as leaders in *Chambers USA 2016*
- ✦ 6 practices ranked #1 in state in *Chambers USA 2016*
- ✦ Healthcare practice ranked in *Chambers USA 2016* Nationwide category
- ✦ “Tennessee Firm of the Year” for Litigation by Benchmark 2015 U.S.
- ✦ Ranked in the top 200 of *The National Law Journal’s* NLJ 350, 2014

II. BUSINESS ENTITIES

A. CORPORATIONS

1. *What is the current address and contact information for Tennessee's Corporation Commission and Department of Commerce?*
2. *Explain the application process for a corporation in Tennessee*
3. *What are the procedures concerning charter papers?*
4. *Explain in detail the laws governing corporations in Tennessee*
5. *Explain laws/provisions concerning incorporation*
6. *Explain Tennessee laws that affect corporate mergers, or change exchanges*

Creating a Tennessee Corporation

Persons desiring to create a corporation in Tennessee must, among other things, choose an appropriate name for the corporation, check to see that the name is available for use in Tennessee, draft its charter and bylaws, designate (an) incorporator(s), designate a registered office in Tennessee, designate a principal executive office of the corporation, and file a charter conforming to certain statutory requirements with the Tennessee Secretary of State.

A corporation's chosen name must include either one of the words "incorporated," "corporation" or "company" or one of the abbreviations "inc.," "corp." or "co." and must be distinguishable from: (1) the names used by all other corporations, not-for-profit corporations, limited partnerships, limited liability companies or other entities incorporated or organized under Tennessee law or authorized to do business in Tennessee; and (2) any other entity or assumed names that have been reserved or registered with the Tennessee Secretary of State. A name may be reserved in advance of incorporation for a small fee.

Under Tennessee law, the charter is the corporation's basic organizational document. A Tennessee corporation's charter may authorize the corporation to conduct any legitimate business and may designate perpetual existence for the corporation. Amendments to the charter after its filing with the Secretary of State generally require the recommendation of the board of directors and shareholder approval.

A corporation is organized by filing its charter with the Business Services Division of the Tennessee Secretary of State. The fee for filing a charter is \$100 as of 2016. The address, telephone number and website address for each of the Business Services Division of the Tennessee Secretary of State and the Tennessee Department of Commerce and Insurance are as follows:

Business Services Division
Tennessee Secretary of State
312 Rosa L. Parks Avenue
6th Floor, Snodgrass Tower
Nashville, TN 37243-1102
(615) 741-2286
<http://www.sos.tn.gov/>

Department of Commerce & Insurance
500 James Robertson Parkway
Davy Crockett Tower
Nashville, TN 37243-0565
(615) 741-2241
<http://tn.gov/commerce/>

Form documents may be obtained at the Secretary of State's website or by request from Secretary of State personnel. Additional basic organizational steps after the filing of a charter include the selection of the initial board of directors by the incorporator(s), the election of required officers, the adoption of bylaws, and the issuance of shares. The registered agent and registered office designated in the charter of the corporation will be the person and place upon whom and at which legal process may be served for the corporation.

A corporation must also file its charter with the Register of Deeds office in the county where its principal place of business is located (if such place of business is in Tennessee). The addresses and other information of the Register of Deeds for the four major counties in Tennessee are as follows:

Memphis
Register of Deeds, Shelby County
1075 Mullins Station
Bldg. W3, Suite W165
Memphis, TN 38134
(901) 222-8100
<http://register.shelby.tn.us/>

Knoxville
Register of Deeds, Knox County
City County Building, Suite 225
400 Main Street
Knoxville, TN 37902-1805
(865) 215-2330
<http://www.knoxcounty.org/register/>

Nashville
Register of Deeds, Davidson County
501 Broadway
Nashville, TN 37203
(615) 862-6790
<http://www.nashville.gov/Register-of-Deeds.aspx>

Chattanooga
Register of Deeds, Hamilton County
400 Courthouse
625 Georgia Avenue
Chattanooga, TN 37402
(423) 209-6560
<http://www.hamiltontn.gov/register/>

Doing Business as a Foreign Corporation in Tennessee

In Tennessee, a “foreign” corporation is either an out-of-state corporation or a corporation organized under the laws of a country other than the United States. Both types of foreign corporations are subject to the same rules under Tennessee law.

A foreign corporation must obtain a certificate of authority from the Tennessee Secretary of State before it transacts business in Tennessee. Failure to do so will subject the foreign corporation to liability for triple the amount of taxes, fees and penalties, plus interest, that the foreign corporation would have paid had it properly registered. Additionally, any foreign corporation without a certificate of authority to do business in Tennessee may not bring a proceeding in any court in the state until it obtains a certificate of authority.

To obtain a certificate of authority, a foreign corporation must deliver an application to the Secretary of State stating its name, its jurisdiction of incorporation, and other required information, including the name and address of its registered agent and office in Tennessee. Along with its completed application, a foreign corporation must also deliver a certificate of existence from its state of incorporation (obtained within two months prior to the filing of the application) and a \$600 fee. Once a certificate of authority is obtained, the foreign corporation is permitted to do business in Tennessee and is treated for most purposes the same as a Tennessee corporation.

Requirements of All Corporations Doing Business in Tennessee

All corporations must maintain certain corporate records in accordance with statutory requirements. Shareholders are generally entitled to inspect the corporation’s records. Additionally, all corporations must file an annual report with the Secretary of State that restates certain administrative information contained in the charter or application for certificate of authority as well as directors’ and officers’ names and addresses, the federal employer identification number of the corporation, and other details. The annual report may be filed online at the Secretary of State’s website.

Tennessee corporations are required to hold an annual meeting of their shareholders as well as special meetings of shareholders under certain circumstances. Corporations must also prepare and make available to shareholders annual financial statements that include a balance sheet, an income statement, and a statement of changes in shareholders’ equity for that year. Both federal and state tax returns must be filed and any taxes due must be paid as required.

Types of Financial Instruments and Distributions Allowed

Virtually all financial instruments (common stock, preferred stock, bonds, convertible debentures, etc.) are permissible in Tennessee. A corporation must specify in its charter the number and classes of shares, and the relative rights of each class, that the corporation will be authorized to issue. Amendment of the charter to change information regarding shares authorized usually requires (1) a recommendation by the board of directors to the shareholders that such change be adopted and (2) a majority approval by the shareholders.

Tennessee law prohibits distributions to shareholders that would (1) render a corporation unable to pay its debts as they become due or (2) cause the total assets of the corporation to be less than the sum of (a) its liabilities, plus (b) the amount needed to satisfy the rights of any shareholders whose rights are preferential to those receiving the distribution.

Shareholder Rights

Under Tennessee law, shareholders have the right to approve or disapprove most major corporate transactions such as mergers, the sale of substantially all the corporation's assets, charter amendments, or dissolution proposals. The extent of this voting power can depend upon the nature of the voting rights afforded shareholders by the corporation's charter. Many shareholder voting rights are granted by statute.

Shareholders have the right, upon prior written notice to the corporation, to go to the principal office of the corporation during regular business hours to inspect and make copies of certain corporate records and reports. Upon a good faith statement of a "proper purpose" and with prior written notice to the corporation, a shareholder may access certain additional records of the corporation, including minutes of board of directors meetings, accounting records, and other documents. Additionally, a corporation must mail its annual financial statements to each requesting shareholder.

Tennessee law provides dissenters' rights to disgruntled shareholders in certain circumstances. The law provides that a dissenting shareholder is entitled to obtain payment of the fair value of the shareholder's shares in the event that the corporation undertakes certain significant actions with which the shareholder disagrees, including: in most cases, a merger; a plan of share exchange; a sale or exchange of substantially all of the assets of the corporation; certain amendments to the charter that materially and adversely affect the shareholder's rights; and certain other transactions as stipulated by the charter or bylaws of the corporation or by resolution of the board of directors. If the shareholder and the corporation do not agree on the fair market value of the shares, a court may be petitioned to determine the fair value. Dissenters' rights are not available to shareholders of publicly traded companies.

Under Tennessee law, shareholders may bring derivative lawsuits on behalf of a domestic or foreign corporation against the directors of the corporation. In many cases, but not all, shareholders will be required to make a demand for action by the directors before bringing a derivative suit.

Mergers, Share Exchanges and Sales of Assets

Generally, a corporation may merge with another domestic or foreign nonprofit or for-profit corporation, limited liability company, or limited partnership as long as the board of directors of any corporation involved approves the transaction and the requisite approvals are obtained for any non-corporate entity taking part in the merger. The merger generally must also be approved by a majority vote of the shareholders of each corporation. The merging entities must file required documentation regarding the transaction with the Tennessee Secretary of State.

Other major changes affecting a corporation (e.g., share exchanges and sales of substantially all of the assets of the corporation) require the recommendation of the board of directors of a corporation and the approval of the shareholders.

Anti-Takeover Provisions Available Under Tennessee Law

The Tennessee Control Share Acquisition Act by its terms strips a purchaser's shares of voting rights any time an acquisition of shares in a Tennessee corporation brings the purchaser's voting power to one-fifth, one-third or a majority of all voting power. The purchaser's voting rights can be reinstated only by a majority vote of the other shareholders. The purchaser may demand a special meeting of shareholders to conduct such a vote. The corporation, in certain circumstances, has the option to redeem the purchaser's shares if the purchaser's shares are not granted voting rights.

The Tennessee Control Share Acquisition Act applies only to a Tennessee corporation that has adopted a provision in its charter or bylaws expressly declaring that the Tennessee Control Share Acquisition Act applies to it.

The Tennessee Greenmail Act applies to any Tennessee corporation which has a class of voting stock registered or traded on a national securities exchange or registered with the U.S. Securities and Exchange Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934. Under the Tennessee Greenmail Act, it is unlawful for any corporation to purchase, either directly or indirectly, any of its shares at a price above their market value, from any person who holds more than 3% of the class of the securities purchased if such person has held the shares for less than two years, unless either the purchase is first approved by the affirmative vote of a majority of the outstanding shares of each class of voting stock issued by the corporation or the corporation makes an offer of at least equal value per share to all shareholders of the same class.

The Tennessee Investor Protection Act applies to tender offers directed at corporations with substantial assets in Tennessee that are either incorporated in or have a principal office in Tennessee. The Act requires an offeror making a tender offer for such a corporation to file a registration statement with the Commissioner of the Tennessee Department of Commerce and Insurance. If the offeror intends to gain control of the corporation, the registration statement must disclose any plans to take specified actions the offeror has for the corporation. The Commissioner may require additional information deemed material to the takeover offer and may call for hearings. The Act does not apply, however, if the takeover offer is made on substantially equal terms to all shareholders and the target corporation's board of directors recommends the offer to the shareholders and discloses certain inducements, if any.

The Tennessee Investor Protection Act also requires the offeror and the corporation to deliver to the Commissioner all solicitation materials used in connection with the tender offer. This Act also prohibits fraudulent, deceptive or manipulative acts or practices by the offeror or the target corporation.

The Tennessee Business Combination Act requires a five-year moratorium on transactions between certain Tennessee corporations and an "interested shareholder" (generally, a 10% or greater shareholder) unless the transaction or the shareholder's becoming an "interested shareholder" is approved by the board of directors before the shareholder attains the status of "interested shareholder." A corporation that would otherwise be covered by the Tennessee Business Combination Act may exempt itself from the Act by adopting a charter provision specifically stating the corporation's election to be exempt.

Professional Corporations

Tennessee allows the use of the corporate form by groups seeking to offer certain professional services. The requirements to create a professional corporation are essentially the same as any other corporation, with the primary additional requirement that all directors, officers and shareholders of the corporation must be licensed members of the particular profession for which the corporation is organized, with some exceptions. In most cases a professional corporation renders only one specific type of professional service, but some combinations of professional purposes or professional and business purposes are authorized by the statute. A professional corporation must also file its charter with the applicable state licensing authority having jurisdiction over the profession within which it provides services.

B. PARTNERSHIPS

1. *Explain Tennessee's definition, requirements for*
 - *General partnerships*
 - *Limited partnerships*
2. *What advantages would a client have in forming a limited partnership over a general partnership in Tennessee?*

Partnerships

A partnership can be formed by any group of two or more people who associate to do business. A partnership's primary benefit is its ease of formation and relative informality. Its primary drawback is increased liability for the negligence of co-partners.

A "general partnership" is formed when two or more people associate to carry on as co-owners of a business for profit. General partnerships are governed by the Tennessee Revised Uniform Partnership Act, which contains default provisions for the formation, ownership, management, and termination of general partnerships. The formation of a general partnership does not require any official filing with the state of Tennessee. In fact, a general partnership can be formed even when the persons carrying on as co-owners do not expressly intend to form a partnership. In such instances, the existence of a general partnership may be implied under applicable law as a result of facts and circumstances of the association. For example, the receipt by a person of a share of the profits of an enterprise creates a rebuttable presumption that such person is a partner in an enterprise.

The finding that a person is a partner in a general partnership gives rise to certain duties and powers on the part of each partner. Each partner in a general partnership is an agent of the partnership for the purposes of carrying on the business and any act of a partner taken in the ordinary course of business that appears to be taken on behalf of the general partnership, such as the signing of an instrument in the partnership's name, will bind the partnership even if the other partners had not authorized the act. With limited exceptions, all partners in a general partnership will be jointly and severally liable for all obligations of the partnership. For example, any partner may be held personally liable for any debt incurred by or judgment awarded against the partnership, even if such partner is not responsible for creating the liability. Tennessee law recognizes "partnership by estoppel," which creates partnership liability for any person who represents, or allows the representation of, him or herself as a partner with one or more persons who are not actual partners.

Partners in a general partnership may enter into a written partnership agreement to define the business and the relationships among the partners. A written partnership agreement can modify any default statutory rule, other than certain non-waivable provisions specified by statute.

Among the non-waivable provisions include a partner's duty of loyalty, duty of care and obligation of good faith and fair dealing. The duty of loyalty requires that, among other things, a partner refrain from acting on behalf of a party having an interest adverse to the partnership and refrain from competing with the partnership before the dissolution of the partnership. Likewise, the duty of care requires that the partner refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law. The obligation of good faith and fair dealing generally restricts a partner from taking actions in bad faith to harm the partnership or the other partners.

A partnership will be dissolved only upon the occurrence of a specific event. If the partnership is at will, the partnership will generally be dissolved when the partnership receives notice that one of the partners desires to withdraw. If the partnership is for a definite term or particular undertaking, the partnership will be dissolved upon the completion of the undertaking, or upon the earlier express will of all of the partners. Upon dissolution, a partnership will continue solely for the purpose of winding up its business, which includes discharging obligations to creditors, and distributing any remaining assets to partners in accordance with their rights to distributions.

In contrast to the unlimited partner liability of a general partnership, Tennessee law allows partnerships to register as "limited liability partnerships," which limits a partner's liability for the obligations of the partnership, but otherwise retain all other properties of a "general partnership." A registered limited liability partnership name must contain

the words “registered limited liability partnership,” or the abbreviation “L.L.P.” or “LLP.”

Limited Partnerships

A “limited partnership” is another type of business entity recognized under Tennessee law. A limited partnership consists of two classes of partners: “general partners,” that are responsible for the management and control of the business and are jointly and severally liable for the limited partnership’s debts and obligations; and “limited partners,” that do not participate in the control and are provided the protection of limited liability and are not personally liable for the obligations of the limited partnership. The rights and obligations of general partners and limited partners of a limited partnership are generally specified and governed by a written limited partnership agreement.

In a process similar to that required of corporations, limited partnerships must register with the Tennessee Secretary of State by filing a certificate of limited partnership, which must include the name and principal address of the limited partnership, the name and address of the limited partnership’s registered agent for service of process and the name and address of each general partner. A limited partnership name must contain the words “limited partnership”, or the abbreviation “LP.” The certificate of limited partnership must be amended if any of the information contained in the certificate changes. The limited partnership agreement among the partners need not be filed.

As a result of its structure and liability protection for passive investors, a limited partnership would be appropriate for business associations in which one or more managers are intended to operate the business as general partners, while other partners are willing to forgo control of the business in return for limited liability. In contrast, a general partnership generally allows all business associates full control over the partnership’s business, but all partners will be jointly and severally liable for the obligations of the partnership.

Limited Liability Companies

A limited liability company (LLC) is an alternative business form to partnerships and corporations, intended to combine the flexibility and beneficial federal tax attributes of a partnership with the limited liability features of a corporation or a limited partnership. A Tennessee LLC will receive pass-through tax treatment for federal income tax purposes; however, the state tax benefits previously enjoyed by LLCs in Tennessee have been eliminated. Prior to June 1999, entities forming as LLCs in Tennessee enjoyed significant state tax benefits over corporations, but now LLCs are generally subject to Tennessee income and net worth taxes at the same rates as corporations unless a special exemption applies. In some cases, formation as an “S” corporation may be more beneficial for state tax purposes than formation as an LLC.

The Tennessee Revised Limited Liability Company Act (the Revised LLC Act) became effective on January 1, 2006 and applies to Tennessee LLCs formed on or after that date and Tennessee LLCs formed prior to January 1, 2006 that elect to be governed by the Revised LLC Act. All other Tennessee LLCs are governed by the Tennessee Limited Liability Company Act (the Old LLC Act). This summary will focus on the Revised LLC Act, which is generally considered streamlined and more user-friendly than the Old LLC Act.

Formation

An LLC is formed in Tennessee by one or more organizers who file articles of organization (a document comparable to a corporate charter) for the LLC with the Secretary of State. An LLC may be formed for any lawful business purpose. The LLC’s name must contain the words “limited liability company” or the abbreviations “L.L.C.” or “LLC”. The number of members at the date of filing and throughout the LLC’s existence must not be less than one. Under the Revised LLC Act, any other entity may convert into an LLC by observing certain statutory requirements and submitting the required official filings.

Members of an LLC may enter into an operating agreement to regulate the affairs of the LLC, the conduct of its business and the relationships among the members, officers, managers or directors, as applicable. An operating agreement can modify any default statutory rule, other than certain non-waivable provisions specified by statute.

An LLC operating agreement is not required to be in writing, but in practice generally is prepared in writing to ensure that all members are on notice of terms and conditions governing the LLC.

LLC Membership

An LLC is owned by its members, with the Old LLC Act or Revised LLC Act, as applicable, regulating the manner in which a person may become a member. Under the Revised LLC Act, member contributions to an LLC may consist of tangible or intangible property or other benefit to the LLC, including money, a promissory note, services performed, or an agreement to contribute money or property or to perform services. Unless otherwise provided in the articles of organization or operating agreement, the profits, losses and distributions of an LLC are allocated equally among its members.

A membership interest in an LLC is generally comprised of a financial right, representing a right to share in the profits and losses of the LLC and to receive distributions of cash or other property from the LLC, and a governance right, representing a right to vote with respect to matters concerning the LLC in accordance with applicable law or the operating agreement. Either of these rights may be transferred by a member, although the LLC may restrict such transfer in the articles or operating agreement. As a general rule, a member may transfer financial rights to any person and may transfer governance rights to another member without the consent of any other member. However, transfers of governance rights to any person that is not a member requires the consent of all of the other LLC members.

Generally, each member, manager or director, as applicable, has equal voting power per capita with each other member, manager or director, unless the articles of organization or operating agreement provide otherwise. In addition, the articles of organization or operating agreement may establish one or more series of members, holders, managers, directors, membership interests or financial rights having separate rights, powers or duties with respect to specified property or obligations of the LLC or profits and losses associated therewith and such series may have a separate business purpose or investment objective.

If an LLC is member-managed, meetings of members are not required to be held, unless required by the articles of organization or operating agreement. Likewise, unless the articles of organization or operating agreement provide otherwise, Tennessee law permits the members, managers or directors, as applicable, to take action on a matter without a meeting, prior notice, or a vote by action on written consent. Unless the articles or operating agreement provide otherwise, distributions of cash or other assets are allocated equally among members. Except as provided in the articles or operating agreement, members have no right to demand any distribution in kind and may not be compelled to accept any distribution of any asset in kind to the extent the percentage of the asset distributed to the member exceeds the member's pro rata share of the assets.

A member or holder of financial rights has a right to bring a derivative action in the right of an LLC in certain circumstances. For instance, where the LLC is director or manager-managed, a member or holder of financial rights may bring a proceeding against the LLC's directors or managers if the member or holder was a member or holder when the transaction complained of occurred. A member or holder of financial rights in a member-managed LLC may bring a proceeding to recover a judgment if the other members have refused to bring the proceeding, or if an effort to cause another member to bring the proceeding is not likely to succeed. LLC members and holders of financial rights may be granted contractual appraisal rights by the articles, operating agreement or merger agreement, if applicable, as to any specified action or event affecting the LLC.

LLC Management

Members are given discretion in structuring the LLC's management. An LLC may be managed by its members, in which case the members are analogous to partners in a general partnership. This type of structure is referred to as a "member-managed LLC." Alternatively, the LLC may vest management in a board of directors with duties, powers and rights similar to a board of directors in a corporation. This type of management structure is referred to as a "director-managed LLC." Finally, the LLC may be managed by one or more managers, who will have the exclusive right to decide any matter relating to the business of the LLC. In a "manager-managed LLC," a manager is elected, appointed, and removed by a majority vote of the members, unless otherwise provided in the articles or operating agreement. Unless required by the articles or operating agreement, which may prescribe qualifications

for such persons, directors and managers need not be members of the LLC.

Director-managed LLCs are required to have a president, who shall be appointed or elected by a majority of the directors. Unless prohibited by the articles of organization or operating agreement, members, managers and directors may, by resolution, delegate rights and powers to manage and control the business and affairs of the LLC to one or more officers, agents or employees, none of whom need to be members of the LLC. In a member-managed LLC, each member is an agent of the LLC and has the authority to, among other things, sign an instrument in the LLC's name in the ordinary course of business, unless the member is expressly prohibited from doing so. Likewise, in a manager-managed LLC, the manager is an agent and any act that is done in the ordinary course of business binds the LLC, unless otherwise prohibited. Finally, while the Revised LLC Act does not prescribe the duties of the president of the LLC, the president is also considered an agent of the LLC and any act of the president that appears to be taken on behalf of the LLC's business in the ordinary course generally binds the LLC.

Members of member-managed LLCs and managers of manager-managed LLCs owe a duty of loyalty and a duty of care (i.e., to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law) to the LLC and must discharge their duties in a manner consistent with the obligation of good faith and fair dealing. Likewise, directors and officers must perform their duties in good faith, with the care an ordinarily prudent person would exercise under similar circumstances, and in a manner he or she reasonably believes is in the LLC's best interests. The articles or operating agreement may not eliminate these duties, but may determine standards by which these obligations may be measured.

The articles may eliminate or limit a director's liability for monetary damages for breach of fiduciary duty, except for the following: (1) breach of the director's duty of loyalty to the LLC or its members; (2) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law; and (3) unlawful distributions.

Certain Requirements of LLCs

Among other requirements stipulated by statute, all foreign and domestic LLCs must continuously maintain a registered office and agent in Tennessee. Foreign LLCs must obtain a certificate of authority from the Tennessee Secretary of State before transacting business in Tennessee. All LLCs are required to file a franchise/excise tax return annually or such information as the Commissioner of Revenue may require. LLCs are required to maintain certain records stipulated by statute and members have a certain specified rights to inspect the records of the LLC. Professional limited liability companies may be formed for the purpose of rendering professional services.

Mergers and Transfers of Assets

Tennessee LLCs may merge with or into other domestic or foreign entities with or without a business purpose. A plan of merger must be approved by a majority of the managers, if the LLC is manager-managed, or a majority of the directors, if the LLC is director-managed, and a majority of the members in all cases, unless the articles or operating agreement provide otherwise. The sale, lease, transfer, or other disposition by an LLC of all, or substantially all, of its property not in the usual and regular course of business must be approved by a majority vote of the managers, if the LLC is manager-managed, or the directors, if the LLC is director-managed, and a majority vote of the members in all cases, regardless of the form the LLC takes.

Dissolution

Under the Revised LLC Act, events of dissolution for a Tennessee LLC include: (1) expiration of the period fixed in the articles; (2) action of the organizers or members; (3) court order; (4) administrative dissolution by the Secretary of State; (5) the occurrence of events specified in the articles or operating agreement; or (6) if so provided in the articles or operating agreement and certain other conditions are met, there are no members of the LLC. The termination, dissociation, death, incapacity, expulsion, retirement, resignation, or dissolution of any member does not generally cause the LLC to dissolve or its affairs to be wound up. Members may dissolve the LLC by a majority vote, or such other vote as may be provided for in the articles or operating agreement, of the members entitled to vote after written notice to all members, both voting and nonvoting, stating the purpose of the meeting.

If the LLC is to be terminated and wound up, other than by a merger, then the LLC must follow certain procedures. First, the members, managers or directors of the LLC must collect or make provisions of all known debts due or owing to the LLC and pay or make provision for all known debts, obligations and other liabilities owed by the LLC. The members, managers or directors may also choose to sell, lease, transfer or otherwise dispose of all, or substantially all, of the dissolved LLC's property without a vote of the members. Any tangible or intangible property remaining after the discharge of all of the LLCs debts and obligations must be distributed to the members and holders of financial rights according to certain statutory requirements.

C. SOLE PROPRIETORSHIP

1. *Explain sole proprietorship (includes taxes, advantages, disadvantages, liabilities)*

Persons may conduct business as sole proprietors in Tennessee. The chief advantage of the sole proprietorship is its informality: there are no filing requirements or operation fees other than those applicable to all Tennessee residents. Another benefit of establishing a sole proprietorship is there is no requirement to pay a franchise tax or excise tax when a sole proprietorship is formed.

The chief disadvantage of the sole proprietorship is the risk of personal liability. A sole proprietor will be personally liable for any of his or her own acts as well as those of his or her employees. Personal assets may be seized to satisfy judgments against a sole proprietor.

D. JOINT VENTURES

1. *Explain joint ventures (includes taxes, advantages, disadvantages, liabilities)*

A joint venture is not a statutory entity or form of doing business in Tennessee. Rather, a joint venture is created when two or more individuals, corporations, LLCs, or other entities combine their property, money, labor and skill in a joint undertaking for profit.

These typically take the form of corporations with each joint venturer being a shareholder, limited liability companies with each joint venture being a member or partnerships with each joint venturer being a partner. The formalities associated with the creation of a joint venture, and the regulation of the rights and activities of the parties, are the same as discussed above for corporations, limited liability companies or partnerships. Absent the creation of a new corporation, LLC or a contract specifying otherwise, a joint venture is governed by the same rules of law as those governing general partnerships. As such, a joint venture may be implied from the actions of the parties despite the lack of a formal instrument establishing a joint venture.

The primary advantage to a joint venture is the ability for venturers to combine their expertise and resources in a single legal entity, enabling the venturers to achieve operational synergies and economies of scale. Another advantage to a joint venture is the ability for the venturers to share the risk of an investment or enterprise with the other venturers. A joint venture does pose a few disadvantages. One disadvantage is that the determination of control of the joint venture and the avoidance of governance gridlocks can be difficult, especially when only two venturers are involved. Another potential disadvantage is that venturers may be personally liable for the debts of a joint venture if the joint venture is formed as a general partnership or is implied from the actions of the venturers.

A joint venture's structure dictates its tax treatment. If the joint venture is structured as a partnership or LLC, the joint venture will be a flow-through tax entity, with only the venturers being taxed on their profits from the joint venture. If, however, the venturers select to structure the venture as a corporation, the venture would be subject to applicable corporate taxes.

E. NONPROFIT CORPORATIONS AND COOPERATIVES

1. *Explain the procedure in forming a nonprofit corporation/cooperative in Tennessee*
2. *Explain laws that apply to nonprofit corporations/cooperatives*

The Tennessee Non Profit Corporation Act governs the formation, operation and dissolution of nonprofit corporations in Tennessee. Generally, a nonprofit corporation is an organization where none of the organization's income is distributable to its members, directors or officers. There are several advantages to choosing a nonprofit corporation, such as limited liability for its members, centralized management and perpetual duration.

Formation

There are a number of steps necessary to create a nonprofit corporation in Tennessee. One of the first is selecting a name. The Tennessee Nonprofit Corporation Act places a number of restrictions on names of nonprofit corporations, including a restriction on a nonprofit corporation using a name that implies the corporation has the power to transact business for which it is not authorized. A nonprofit corporation's name must also generally comply with the name requirements of a for-profit corporation in Tennessee.

Next, an incorporator or incorporators, who may be any individual(s) acting on behalf of a nonprofit, form(s) the nonprofit by signing and sending the charter and the \$100 filing fee to the Tennessee Secretary of State. Similar to a for-profit corporation's charter, a nonprofit charter is the entity's organizational document. While the charter of a nonprofit must contain many of the same provisions as the charter of a for-profit corporation, Tennessee law does require specific additional provisions be included in the charter of a nonprofit. These additional provisions are: a statement as to whether the nonprofit corporation is a public benefit or mutual benefit corporation; if the corporation is a religious corporation, a statement to that effect; a statement that the corporation is not for-profit; a statement that the corporation will or will not have members; and provisions not inconsistent with law regarding the distribution of assets upon dissolution. Tennessee law also allows, but does not require, certain other information to be included, such as: name and addresses of the initial directors; provisions limiting the personal liability of a director to the corporation or its members for monetary damages for breach of fiduciary duty; and other provisions not inconsistent with law.

Additional basic organizational steps after the filing of a charter include the selection of the initial board of directors by the incorporator(s) if not named in the charter, the election of required officers and the adoption of bylaws. The registered agent and registered office designated in the charter of the nonprofit corporation will be the person and place upon whom and at which legal process may be served for the corporation.

A nonprofit corporation has broad authority in drafting its bylaws. The bylaws may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the corporation's charter.

Management and Membership

In forming the management structure of a Tennessee nonprofit corporation, Tennessee law requires a board of at least three people, all of which must be natural persons. Additionally, Tennessee law requires that a nonprofit have a President and Secretary, with no one person acting as both President and Secretary. Beyond these requirements, nonprofit corporations have broad authority to shape their management structure through the nonprofit corporation's charter and bylaws. If the nonprofit corporation chooses not to address these issues in its charter or bylaws, the nonprofit corporation's management structure will be governed by the default rules in the Tennessee Nonprofit Corporation Act.

A Tennessee nonprofit corporation may also choose whether to have members. If the nonprofit corporation chooses to have members, the criteria and procedures for admitting members must be set forth in the nonprofit corporation's charter or bylaws. Additionally, a nonprofit that chooses to admit members may do so for no consideration or for an amount of consideration determined by the board.

Tax

A Tennessee nonprofit may qualify for IRS 501(c)(3) status as a tax-exempt charitable organization, subject to its satisfactory completion of certain forms required by the IRS, by designating and operating itself as a public benefit corporation. In addition to qualifying as a charitable organization, a Tennessee nonprofit designated and operated as a public benefit corporation is also exempt from Tennessee's franchise and excise taxes. However, if the nonprofit generates income from activity inconsistent with the reason it was granted nonprofit status, that income would be taxable.

F. ALTERNATIVES

1. *Explain the following in detail:*
 - *Branch office*
 - *Independent distributors*
 - *Licensing and franchising*
 - *Sales representatives*

Branch Offices

Tennessee permits entities to establish branch offices in places where the entity is otherwise authorized to transact business. In addition to requiring that out-of-state entities obtain a certificate of authority from the Secretary of State, Tennessee law imposes certain industry-specific guidelines on branch offices. For example, branch offices of home care organizations must be geographically close to the parent office, and there may be industry-specific regulation of branch offices that provide certain goods or services. Generally speaking, however, each branch office is subject to the same legal requirements to which the parent office would be subject if it were located in Tennessee.

Licensing and Franchising

A franchise is a business relationship where the franchisor is a firm with a successful product or service that enters into a contractual relationship with one or more franchisees to operate under the franchisor's trade name and under the franchisor's control. A franchise typically has three elements: a franchise fee, a trademark license, and the franchisor's substantial control over the franchisee's method of doing business. Tennessee does not require the franchisor to register, file or give notice to the state prior to selling or offering a franchise in the state. Tennessee law does, however, offer uniform rights and procedures in the termination or modification of franchise relationships codified at Tennessee Code Annotated § 47-25-1501 et seq.

Although Tennessee does not regulate the sale or offer of a franchise, federal law requires that all franchisors provide a prospective franchisee with a copy of a Federal Trade Commission-mandated disclosure document at least 14 calendar days before the prospective franchisee signs the franchise agreement or pays any money to the franchisor.

Sales Representatives and Independent Distributors

Tennessee generally allows foreign entities to utilize independent distributors and sales representatives to distribute and sell goods and products in Tennessee without requiring the foreign entity to obtain a certificate of authority from the Secretary of State. However, contracts with sales representatives will likely subject the foreign contracting entity to the jurisdiction of Tennessee courts and certain state taxes.

III. TRADE REGULATIONS

A. FEDERAL ANTITRUST LAW

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

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

Enforcement

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

B. REGULATION OF INTERNATIONAL TRADE AND INVESTMENT

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

Restrictions on Foreign Investment

Under a statutory provision commonly referred to as the Exon-Florio Amendment (Section 721 of Title VII of the Defense Production Act of 1950, as added by Section 5021 of the Omnibus Trade and Competitiveness Act of 1988),

the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the United States Congress has indicated that the term “national security” is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

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

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

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

Reporting Requirements for Foreign Direct Investment

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

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 United States. 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 United States. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IISA, international investments are divided into two classifications - direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated the power to collect data on direct investments to the Bureau of

Economic Analysis (BEA), a part of the Department of Commerce, and on portfolio investments to the Department of the Treasury.

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

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

The Agricultural Foreign Investment Disclosure Act of 1978

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

For the purposes of the Act, a “foreign person” is (1) any individual who is not a citizen or national of the United States and who is not lawfully admitted to the United States; (2) a corporation or other legal entity organized under the laws of a foreign country; and (3) a corporation or other legal entity organized in the United States in which a foreign entity, either directly or indirectly, holds 5% or more of an interest. The definition of “agricultural land” is any land in the United States which is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he/she holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding more than a 5% interest in the ownership entity.

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 United States are subject to an export “license.” An export license is an authorization which allows the export of particular goods or technical information. Two basic types of licenses exist, general licenses and individual validated licenses.

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

In contrast, individual validated licenses are required for those items for which the United States specifically controls the export for reasons of national security, foreign policy or short supply. If the export of a specific product to a specific destination is subject to an individual validated license requirement, it is necessary to apply for and obtain such

a license from the Office of Export Administration, an office within the U.S. Department of Commerce, prior to the export. Certain commodities cannot be exported to any country without an individual validated license, while certain other commodities may require a validated license only for shipment to specified countries.

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

Foreign Trade Zones

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

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

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

C. TENNESSEE CONSIDERATIONS

1. *Describe Tennessee's antitrust laws*
2. *Explain how Tennessee regulates franchises*
3. *Explain any Tennessee consumer protection laws*

State Antitrust Law

Tennessee has enacted a Trade Practices Act that in some measure parallels the federal antitrust laws. The law is not limited to anticompetitive conduct that occurs within the state, but applies to any conduct that has substantial effects on commerce in Tennessee. However, the Act only applies to anticompetitive conduct with respect to tangible goods or products, not services.

All arrangements, contracts, agreements, trusts or combinations between persons or corporations that tend to lessen full and free competition or tend to control the price or the cost of a product are unlawful and void. Also, arrangements, contracts or agreements to sell products at prices below the costs of production or importation into the state (allowing for a reasonable and just marginal profit) are generally prohibited. While there are few judicial decisions concerning the Act, Tennessee courts and the Tennessee Attorney General have acknowledged that federal caselaw interpreting the federal antitrust laws is persuasive in interpreting Tennessee's antitrust laws. Thus, many of the activities found to violate federal antitrust law may also be found to violate analogous provisions in Tennessee's antitrust law.

Violations of the Act are Class E felonies. A Tennessee corporation found in violation may forfeit its charter and thereby its corporate existence, and is subject to a fine of up to \$1 million. A foreign corporation found in violation will be denied the right to do business in Tennessee. Individuals who knowingly participate as principals, managers, directors, or agents may also be criminally culpable.

Any person who is injured or damaged by any such arrangement, contract, agreement, trust, or combination may sue and recover the full consideration or sum paid for goods the sale of which is controlled by the proscribed activity or arrangement. Indirect purchasers have standing to sue under the Act. The measure of damages for indirect purchasers is limited to the consideration or sum that was controlled or influenced by the antitrust violator, in other words the amount of overcharge a direct purchaser passed on to the indirect purchaser.

The Act provides that all persons or corporations, and the officers and stockholders of corporations, that are in any way connected with a trust or combination declared to be illegal under the Act are jointly and severally liable for all the debts, obligations and liabilities of each and every member of such trust or combination.

It is also unlawful under the Act to give away or sell any article for a price less than the cost of manufacture with the intent and purpose of destroying honest competition. However, manufacturers or producers may distribute samples to consumers if such distribution is done in good faith. A violation is a Class C misdemeanor.

Regulation of Franchises

Generally, a franchise is a license from the owner of a trademark or trade name (the franchisor) permitting another (the franchisee) to sell a product or service under that name or mark where the following additional elements are present: the franchisee undertakes to conduct a business or sell a product or services in accordance with methods and procedures prescribed by the franchisor; the franchisor agrees to assist the franchisee through advertising, promotion, and/or other advisory services; and the franchisee is required to pay a franchise fee.

Tennessee does not have any statute under which franchises are comprehensively regulated. However, there are statutes governing terminations, nonrenewals and modifications of franchises, as well as transfers or assignments of a franchisee's business. Certain business practices that may arise in the franchise context are also prohibited under the Tennessee Consumer Protection Act (the TCPA), including, in particular, pyramid schemes and certain aspects of chain referral sales plans. Treble damages are available for willful or knowing violations of the TCPA.

In addition to coverage under the TCPA, franchises and other business relationships in certain specific industries are regulated in Tennessee, including the following:

- Termination of the franchise of a retailer engaged in the business of selling farm implements, machinery, motorcycles, and utility and industrial equipment results in certain obligations of the franchisor to repurchase the franchisee's inventory.
- The Tennessee Petroleum Trade Practices Act subjects a vertically integrated petroleum producer to certain penalties (including treble damages) for wrongful termination or nonrenewal of a franchise agreement with a petroleum products dealer. A particular focus of the Act is to prevent oil companies from replacing franchised outlets with company owned outlets for anti-competitive purposes.
- Motor vehicle manufacturers may not require dealers to finance the purchase of inventory through a designated

finance company.

- A manufacturer or importer of alcoholic beverages may not terminate or fail to renew a contract with a wholesaler except for good cause, asserted in good faith. Prior to termination of a contract for good cause, the manufacturer or importer must be given a reasonable opportunity, no less than 30 days, to cure any deficiency. Failure to abide by these restrictions may result in the revocation of the manufacturer's or importer's permit or winery license.

Consumer Protection

Tennessee has enacted a Consumer Protection Act to protect consumers and businesses from unfair or deceptive business practices in the conduct of trade or commerce. The Act lists 50 different practices that are specifically prohibited (e.g., advertising goods or services with the intent not to sell them as advertised; making false or misleading statements of fact concerning the existence of or reasons for price reductions; pyramid distributorships; falsely advertising that a person is going out of business). The Act also mandates that very specific requirements be met in the offering of a prize as an inducement to purchase a product or service or listen to a sales presentation.

The Act defines the term "trade or commerce" to mean the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated. Under this definition, the actions of a bank and its agent in the repossession and disposition of a motor vehicle are not governed by the Act. Similarly, the Act does not apply to disputes arising in the employer-employee context. When applicable, however, the Act applies to even negligent conduct, and an actual intent to deceive or take unfair advantage is not required.

The provisions of the Act may not be limited or waived by agreement, and so the Tennessee Supreme Court has held that an "as is" disclaimer of warranties is insufficient to bar an action under the Act.

Whenever the Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance has reason to believe that a person has engaged in, or is about to engage in, an unfair or deceptive act, the Division may, with the approval of the Tennessee Attorney General, require the alleged violator to file a sworn statement responding to the allegations, examine any person connected with the transaction, and examine any merchandise deemed relevant to the investigation. The Attorney General is authorized to bring an action to obtain injunctive relief against anyone engaged in an unfair or deceptive act or practice. A court granting injunctive relief may also enter a judgment to restore any person who has suffered an ascertainable loss of money or property as a result of the unfair or deceptive practice.

The Act also provides a private right of action regardless of whether the state authorities have investigated or pursued an enforcement action. To have standing to sue, a person or business must have suffered an ascertainable loss of money or property as a result of the unfair or deceptive act or practice. A court has discretion to award attorney's fees and costs to a successful plaintiff. If a court finds that the unfair or deceptive activity was a willful or knowing violation of the Act, the court may award three times the actual damages sustained by the plaintiff, but may not award general punitive damages. If, however, a court finds that a lawsuit brought under the Act is "frivolous, without legal or factual merit, or brought for the purpose of harassment," it can require the plaintiff to indemnify the defendant "for any damages incurred, including reasonable attorney's fees and costs." A private action under the Act must be brought within one year of the discovery of the unlawful act or practice, but in no event may be brought more than five years after the consumer transaction giving rise to the claim for relief.

There are four specific exemptions. First, the Act does not apply to transactions required or specifically authorized by the laws or regulations of Tennessee or the United States. Second, the Act does not apply to persons principally engaged in the preparation or dissemination of information or the reproduction of printed or pictorial matter who do so on behalf of others without notification from state authorities that the information or matter violates the Act. Third, the Act does not apply to the credit terms of a transaction unless those terms are regulated by the Tennessee Equal Consumer Credit Act of 1974. Fourth, the Act does not apply to a retailer who has in good faith disseminated the claims of a manufacturer or wholesaler without actual knowledge that such claims violate the Act.

IV. TAXATION

A. FEDERAL TAXATION

Federal Income Taxation

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

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 United States, should pay careful attention to these rules. Currently, the highest marginal U.S. individual income tax rate is 39.6% for ordinary income and 28% for capital gains. A nonresident alien generally is subject to tax on dividends from U.S. corporations, as discussed below.

B. TENNESSEE TAXATION

1. *Explain Tennessee personal income, corporate income, franchise, property, sales and uses taxes*
2. *Explain "Sub-S" status*
3. *Explain any tax benefits Tennessee offers to attract new business, foreign investors*

Persons or entities considering forming organizations in Tennessee should be generally familiar with the various types of Tennessee taxes to which such persons or entities might be subject, including the sales and use taxes, the franchise and excise tax, the business tax, real and personal property taxes, the unemployment tax and the Hall income tax.

The Sales and Use Taxes

The sales and use taxes provide Tennessee with its largest source of tax revenue. The sales and use taxes apply at both the state and local (municipal and county) levels. Currently all counties and some municipalities in Tennessee levy the local option sales tax. The state sales and use tax rate is currently 7%, with the exception of food, which is taxed at a current rate of 5%. The local rate (combined county and city rates) cannot exceed 2.75%. The local option sales tax is applicable only to the first \$1,600 attributable to the sale or use of a single article of personal property. The state also collects an additional tax applicable to the next \$1,600 attributable to the sale or use of a simple article of personal property (that is; such portion of any single article as exceeds \$1,600 up to a maximum \$3,200) at a rate of 2.75%. The state and local option sales and use taxes are both collected by the Tennessee Department of Revenue which then distributes the local option sales tax to the appropriate county and municipal governments.

The liability for the collection and payment of sales and use taxes falls upon the "dealer," even though the dealer must, to the extent feasible, pass the expense of these taxes on to the ultimate consumer. A "dealer" generally is the person or entity making the final retail sale of a taxable item to the consumer. The definition of "dealer" includes, but is not limited to, those persons who manufacture, distribute, or lease property within Tennessee.

The sales and use tax is imposed generally as:

1. a sales tax on items or certain specifically identified services sold in Tennessee;
2. a use tax on items used in Tennessee where sales taxes have not previously been collected;

3. a contractor's use tax on materials installed by a contractor and not previously subjected to the sales or use tax; and
4. a tax on the application of self-produced property.

The sales tax applies to any person or entity who sells, manufactures, distributes, or leases tangible personal property within Tennessee for any purpose other than for resale. Many services are subject to the sales tax, including parking services, telecommunications services, repair services, certain installation services, laundering or dry cleaning services, telecommunications services, and certain charges for lodging or accommodations. The Department broadly interprets the scope of these taxable services.

The use tax complements the sales tax and applies to the use or consumption of any item of tangible personal property, irrespective of the ownership thereof, that has not been previously subject to the sales tax of Tennessee or another state. Its most common application is to persons who import tangible personal property into Tennessee without paying sales tax (or having paid a lower sales tax rate than imposed by Tennessee). Dealers are liable for the use tax on items they withdraw from their inventory for personal or business use. The use tax applies only to the cost price of an item, not its fair market value. Thus, the merchant withdrawing goods from its inventory for personal use pays tax on the cost price of the goods, not the price at which the merchant sells the goods at retail. To the extent that a sales tax has been paid to another state, Tennessee grants a credit against the use tax otherwise payable for the use or consumption of the property in Tennessee.

The contractor's use tax is imposed on a contractor who uses tangible personal property in the performance of a contract or to fulfill contractual obligations. This special tax applies to the contractor even where the title to the property is held by a tax exempt entity and where the tax exempt entity was not itself liable for any sales or use tax on the acquisition of property.

Lastly, the Tennessee sales tax also applies to a manufacturer or contractor who erects or applies tangible personal property that it has manufactured, produced, compounded or severed from the earth. The tax base is the fair market value of the materials used to fabricate the property, plus labor and overhead.

A "sale for resale" is exempt from sales taxes. A dealer engages in a "sale for resale" if the dealer is selling the property to a person or entity that will, in turn, resell the property, at which time the sales tax will apply. In order to qualify for the exemption, the dealer must obtain a resale certificate for all property sold or services rendered for resale.

A dealer is also not required to pay or collect sales taxes with respect to sales made to out-of-state customers if the goods are to be delivered by common carrier or by the U.S. mail to locations outside of Tennessee and possession of the goods is not transferred within Tennessee.

Numerous other specific exemptions from the sales and use tax scheme are available to certain businesses, transactions and items. These exemptions are often complicated and require strict compliance with their statutory terms. One such exemption, the exemption for manufacturing equipment and supplies, broadly exempts from sales and use taxes all equipment and supplies that are used in the manufacturing process.

Persons or entities subject to the Tennessee sales or use tax are required to apply to the Commissioner of Revenue for a "certificate of registration" for each "place of business" located in Tennessee. The sales tax is to be remitted to the Department of Revenue on a monthly basis, with the return for each calendar month due on or before the 20th day of the following calendar month. Inquiries may be addressed to:

Tennessee Department of Revenue
Sales and Use Tax Division
Andrew Jackson Building
500 Deaderick Street
Nashville, TN 37242

Excise and Franchise Taxes

Any corporation, limited liability company, limited partnership, regulated investment company, real estate investment trust, cooperative, joint stock association or business trust (e.g., almost any entity except general partnerships, sole proprietorships and certain trusts) that operates for profit under the laws of Tennessee or any other state or country and which conducts business in Tennessee is required to pay franchise and excise taxes to the Department of Revenue. Unlike some other states, a corporation that has made an election to be taxed as a small business corporation under Subchapter S of the Internal Revenue Code of 1986, as amended, is subject to Tennessee franchise and excise taxes.

The franchise tax is calculated at the rate of 25 cents per \$100 of the taxpayer's "net worth." "Net worth" is calculated as the greater of

1. the taxpayer's total assets less its total liabilities computed in accordance with generally accepted accounting principles or
2. the net book value of the property used or owned in Tennessee.

If a taxpayer conducts business in states other than Tennessee, then the taxpayer will apportion the applicable "measure of tax" between the states. Tennessee's formula for determining how much of the franchise tax is apportioned to Tennessee consists of three factors: the property factor, the payroll factor and the sales factor. These factors compare the extent to which the taxpayer's property is located in Tennessee, sales are conducted in Tennessee and employees work in Tennessee with the total of the taxpayer's property, sales and employee base. For tax years beginning prior to July 1, 2016, the sales factor is double-weighted, and for tax years beginning on or after July 1, 2016, the sales factor is triple-weighted.

Any taxpayer conducting business in Tennessee is also subject to the excise tax. The excise tax is levied at the rate of 6.5% upon the taxpayer's "net earnings." A taxpayer's "net earnings" is defined as its federal taxable income, computed with certain adjustments and modifications.

If a taxpayer conducts business in states other than Tennessee, the net earnings are modified to include only the "business earnings" apportioned to Tennessee and the "non-business earnings" allocated to Tennessee. The definition of "business earnings" includes all earnings arising from activities in the regular course of business, and earnings derived from the purchase, use, management or sale of property constituting an integral part of the taxpayer's regular trade or business. The burden rests with the taxpayer to show by "clear and convincing evidence" that the earnings derived from a particular activity are not "business earnings," and, for purposes of making this determination, a taxpayer may be considered to be engaged in more than one regular trade or business. A taxpayer's business earnings are apportioned to Tennessee based upon the three factors described earlier, the "property factor," the "payroll factor" and the "sales factor." Again, for tax years beginning prior to July 1, 2016, the sales factor is double-weighted, and for tax years beginning on or after July 1, 2016, the sales factor is triple-weighted. A company's non-business earnings, on the other hand, are allocated to Tennessee in their entirety if the company's "commercial domicile" is located in Tennessee but out-of-state if it is not.

The franchise/excise tax return is due each year on or before the first day of the fourth month after the close of the corporation's fiscal year. Taxpayers who have a combined franchise and excise tax liability of \$5,000 or more for two consecutive tax years are required to file four quarterly tax returns and pay one fourth (1/4) of its estimated franchise and excise tax liability for the year with each return. When the annual return is due, the taxpayer will then either remit any additional taxes owed or seek a refund. Inquiries may be addressed to:

Tennessee Department of Revenue
Franchise and Excise Tax Division
500 Deaderick Street
Andrew Jackson Building
Nashville, TN 37242
<http://www.tn.gov/revenue>

The Business Tax

The business tax is a gross receipts tax levied by municipalities and counties on the privilege of conducting a business within Tennessee. The business tax to the sale of goods, whether at retail or at wholesale, within the state of Tennessee and to the rendering of services in Tennessee, with limited exceptions. The business tax applies in the same manner as the sales tax except that there is no sale for resale exemption to the business tax and thus, as already mentioned, the business tax applies to both the wholesale and retail sale of goods. The business tax rate depends both upon the types of products sold or services rendered and upon whether the taxpayer is engaged in the retail or wholesale business. For instance, grocers, food brokers, gasoline wholesalers are in one class of business activity, and the business tax rate upon such activity is generally either 3/80 of 1% of the business' gross receipts at wholesale or 3/20% of 1% of the business' gross receipts at retail.

No business taxes are due with respect to sales made to out-of-state customers where delivery is made by common carrier or by the U.S. mail service to location outside of the state of Tennessee.

The Property Tax

The property tax is a tax levied upon all real and tangible personal property owned or used in Tennessee. The property tax is a tax collected by the Tennessee county and municipal governments.

The amount of property taxes paid is dependent upon three factors: the appraised fair market value of the property as determined by the county assessor; the level of assessment for the particular kind of property; and the rate of the tax as determined by the county or municipal government.

The fair market value of real property for property tax purposes is established by the county assessor's office, and re-established yearly by the Board of Equalization. Businesses, subject to review and audit, are responsible for assessing their own personal property. Under this system, a taxpayer lists on a schedule furnished by the county assessor all tangible personal property that the company owns or leases and the fair market value of the property. The property is listed at its acquisition price less a statutorily prescribed rate of depreciation.

Once the property is appraised, then the assessed value of the property is established based upon the use of the property in question. For example, commercial real property is assessed at 40% of its fair market value.

The amount of tax owed by a particular taxpayer is determined by multiplying the assessed value of the property by the rate of taxation. The rate of taxation is set by the county or municipal government.

Property taxes are due on the first Monday in October. However, the taxes are not delinquent until March 1 of the following year when interest and penalties begin to accrue on the outstanding property tax liability. Inquiries should be directed to the Assessor of Property in each county.

Unemployment Taxes

Unemployment taxes are collected by the Tennessee Department of Employment Security from all Tennessee employers. Employers are responsible for paying unemployment taxes if they have a total payroll of \$1,500 or more in any quarter or if they have at least one employee located in Tennessee on any day during 20 different weeks of a year.

The tax is generally imposed upon the employer to the extent of the first \$9,000 of "taxable wages" paid to each employee. "Taxable wages" are defined as "all remuneration paid for personal services from whatever source, including commissions, bonuses, tips . . . employee salary reduction contributions to cash or deferred plans . . . , employee salary reduction contributions to cafeteria plans . . . , and the cash value of all remuneration in any medium other than cash."

The rate of tax upon a new employer is 2.7% of wages. After an employer has been liable for the unemployment tax for three full calendar years, then the State Department of Employment Security will determine the liability owed by an employer based upon his or her experience rating as determined by a comparison of the contributions made to and benefits charged against the employer's account.

Unemployment tax returns are paid quarterly and are due within one month after the end of each "calendar quarter." "Calendar quarter" is defined as each three month period ending on March 31, June 30, September 30 and December 31.

Hall Income Tax

The Hall income tax is a tax levied on dividends and interest received by individuals, partnerships and trusts that have resided or have been domiciled in Tennessee for more than six months during any calendar year. The rate of tax is 5%, subject to certain limited exemptions (\$2,500 for married couples, \$1,250 for single persons). The Tennessee General Assembly has expressed an intent to reduce this rate by 1% annually for tax years beginning on or after January 1, 2017, but this will require further action. The Hall income tax has, however, been repealed for tax years that begin on or after January 1, 2022. Tennessee currently has no general individual income tax.

V. LABOR AND EMPLOYMENT

A. FEDERAL CONSIDERATIONS

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 U.S. employer and the foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the United States for a temporary time and often the employment authorization is limited to specific employers, jobs and even specific worksites.

Permanent Residency (the green card)

Permanent residency is most commonly based on family relationships, such as marriage to a U.S. 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.

Temporary Visas

The following are the most commonly used temporary visas:

1. **E-1 Treaty Trader and E-2 Treaty Investor Visas:** These are temporary visas for persons in managerial, executive or essential skills capacities who individually qualify for or are employed by companies that engage in substantial trade with or investment in the United States. E visas are commonly used to transfer managers, executives or technicians with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its U.S. location. Generally, E visa holders receive a five-year visa stamp but only one-year entries at any time.
2. **H-1A and H-1B Specialty Occupation Visas:** H-1B visas are for persons in specialty occupations that require at least a bachelor's degree. Examples of such professionals are engineers, architects, accountants, and, on occasion, business persons. Initially, H-1B temporary workers are given three-year temporary stays with possible extensions of up to an aggregate of six years. H-1B visas are employer-and job-specific. H-1A visas are for registered nurses only.
3. **L-1 Intracompany Transferee Visas:** Most often utilized in the transfer of executives, managers or persons with specialized knowledge from international companies to U.S.-related companies, L-1 visas provide employer-specific work authorization for an initial three-year period with possible extensions of up to seven years in certain categories. As in the case of certain E visa capacities, some L managers or executives may qualify for a shortcut in any permanent residence filings.
4. **B-1 Business Visitors and B-2 Visitors for Pleasure:** These visas are commonly utilized for brief visits to the United States of six months or less. Neither visa authorizes employment in the United States. B-1 business visitors are often sent by their overseas employers to negotiate contracts, to attend business conferences or board meetings, or to fill contractual obligations such as repairing equipment for brief periods in the United States. B-1 or B-2 visitors cannot be on the U.S. payroll or receive U.S.-source remuneration.
5. **TN Professionals:** Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include some medical/allied health professionals, engineers, computer systems analysts, and management consultants. TN holders are granted one-year stays for specific employers and other employment is not allowed without prior INS approval. Particularly with regard to Canadians, paperwork required for filing these requests is minimal.

6. **F-1 Academic Student Visas Including Practical Training:** Often foreign students come to the United States in F-1 status for academic training or M-1 status for vocational training. Students in F-1 status can often engage, within certain constraints, in on-campus employment and/or off-campus curricular or optional practical training for limited periods of time. Vocational students cannot obtain curricular work authorization but may receive some post-completion practical training in limited instances.
7. **J Exchange Visitor Visas:** These visas are for academic students, scholars, researchers, and teachers traveling to the United States to participate in an approved exchange program. Training, not employment, is authorized. Potential employers should note that some J exchange visitors and their dependents are subject to a two-year foreign residence requirement abroad before being allowed to change status and remain or return to the United States.
8. **O-1 and O-2 Visas for Extraordinary Ability Persons:** O-1 and O-2 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim. Also included in this category are those persons who assist in such O-1 artistic or athletic performances.
9. **P-1 Athletes/Group Entertainers and P-2 Reciprocal Exchange Visitor Visas:** These temporary visas allow certain athletes who compete at internationally recognized levels or entertainment groups who have been internationally recognized as outstanding for a substantial period of time, to come to the United States and work. Essential support personnel can also be included in this category.
10. There are a number of other non-immigrant visas categories that may apply to specific desired entries. When planning to bring foreign personnel to the United States, U.S. employers should allow several months for processing by the Immigration and Naturalization Service, as well as the Department of State and Department of Labor. Furthermore, employers should be aware that certain corporate changes, including stock or asset sales, job position restructuring, and changes in job duties, may dramatically affect (if not invalidate) the employment authorization of foreign employees.

Labor and Employment Statutes

1. **Age Discrimination in Employment Act (ADEA):** The ADEA forbids discrimination based on age in employment decisions. The ADEA applies to employers engaged in interstate commerce who have 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.
2. **Americans with Disabilities Act (ADA):** The ADA proscribes discrimination in employment based on the existence of a disability. Furthermore, the Act requires that employers take reasonable steps to accommodate disabled individuals in the workplace. This Act applies to employers engaged in interstate commerce who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.
3. **Employee Polygraph Protection Act (EPPA):** The EPPA greatly restricts polygraph testing of employees. The Act applies to all employers engaged in interstate commerce. Exempted are employers whose primary business purpose is running a security service or manufacturing, distributing or dispensing a controlled substance.
4. **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.
5. **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.
6. **Family and Medical Leave Act (FMLA):** The FMLA requires that eligible employees be allowed to take up to 12 weeks of unpaid leave per year for the birth or adoption of a child or the serious health condition of the employee or the spouse, parent or child of the employee. This Act applies to all employers engaged in commerce where the employer employs 50 or more employees for each working day during each of 20 or more calendar weeks in the current or preceding calendar year.

7. **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.
8. **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.
9. **National Labor Relations Act and Labor Management Reporting and Disclosure Act:** These statutes set forth the guidelines governing labor-management relations. They apply to all private employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts.
10. **Occupational Safety and Health Act (OSHA):** OSHA is the act that established the mechanism for establishing and enforcing safety regulations in the workplace. It applies to all private employers who are engaged in an industry affecting commerce, regardless of the number of employees.
11. **Title VII:** Title VII is the broad civil rights statute that forbids employment discrimination based on race, color, religion, gender and national origin. It applies to employers engaged in interstate commerce who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.
12. **Worker Adjustment Retraining and Notification Act (WARN):** WARN requires employers to give 60 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).
13. **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 as if they are from a foreign country.

Employee Benefits

1. **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, healthcare 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.
2. **Consolidated Omnibus Budget Reconciliation Act (COBRA):** COBRA requires employers to make continuing coverage under medical reimbursement and healthcare plans available to certain terminated employees, at the cost of the employees. The usual period for which this coverage must be continued is 18 months. COBRA contains very specific procedures for notifying terminated employees of their COBRA rights.

B. TENNESSEE CONSIDERATIONS

1. Explain Tennessee employment laws

TENNESSEE LAWS

Anti-Discrimination

The Tennessee Human Rights Act (THRA) (T.C.A. §§ 4-21-101 et seq.), prohibits discrimination against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin. The THRA applies to employers with eight or more employees within the state. The interpretation and enforcement of the THRA follows closely that of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, both of which are federal laws. The Tennessee Human Rights Commission (THRC) investigates charges of discrimination brought under the THRA, although most charges of this nature are filed jointly with the EEOC and THRC. State law claims of discrimination must be filed within 180 days with the THRC, and federal claims of discrimination must be filed within 300 days with the EEOC. Unlike the federal law, a legal action under the THRA can be brought directly in chancery or circuit court without first filing a charge of discrimination with the THRC. A one year statute of limitations applies to such THRA claims. A prevailing plaintiff can recover attorneys' fees and costs; compensatory damages, including lost pay; as well as damages for humiliation, embarrassment and emotional distress. Generally, punitive damages are not recoverable under the THRA.

The Tennessee Disability Act (T.C.A. §8-50-103) prohibits discrimination in hiring, firing and other terms and conditions of employment based upon an individual's disability. The interpretation and enforcement of this statute follows closely that of the federal Americans with Disabilities Act (ADA), although there is no "reasonable accommodation" requirement.

Maternity/Parental Leave

Employees who have been employed by the same employer (with 100 or more employees at one jobsite) for at least 12 consecutive months as a full-time employee may take a leave of absence not to exceed four months for adoption, pregnancy, child birth or nursing an infant. (T.C.A. § 4-21-408). The leave of absence may be with or without pay, at the discretion of the employer. With regard to adoption, the four-month leave period begins on the date that the employee receives custody of the child. An employee who gives at least three months' advance notice of his or her leave an intention to return to full-time employment after maternity leave must be restored to his or her previous or similar position. Employees who are unable to give three months' notice because of a medical emergency do not lose their right to reinstatement. Leave will not affect the employee's right to seniority, promotion, vacation time, sick leave or other benefits and bonuses for which he or she was eligible on the date of leave.

Tennessee law further requires that employers with one or more employee(s) provide reasonable unpaid break time to female employees who need to express breast milk for the employee's infant child, and to make reasonable efforts to provide a room close to the work area, other than a toilet stall, where the employee can express the milk in privacy. (T.C.A. § 50-1-305). Such break time may run concurrently with any other break time already provided by the employer to the employee.

Pay

Tennessee has its own Equal Pay Act which prohibits discrimination between employees in the same establishment on the basis of sex in their compensation for comparable work on jobs the performance of which requires comparable skill, effort and responsibility and which is performed under similar working conditions. (T.C.A. § 50-2-201 et seq.).

For employers with five or more employees, all compensation earned by an employee and unpaid prior to the first day of any month is due and payable not later than the 20th day of the month following the one in which such wages were earned and all compensation earned and unpaid prior to the 16th day of any month is due and payable not later than the 5th day of the succeeding month. (T.C.A. § 50-2-103). Any employee who leaves or is discharged from em-

ployment must be paid in full all wages or salary earned no later than the next regular payday following the date of dismissal or voluntary leaving, or 21 days following the date of discharge or voluntary leaving, whichever occurs last. Final wages of an employee must include any accrued wages, such as vacation pay or other such compensatory time that is owed to the employee by virtue of company policy or labor agreement. Any employer who misrepresents the amount of wages to be paid to any employee upon entering into a new contract of employment is subject to either a civil or a criminal penalty at the sole discretion of the Commissioner of the Tennessee Department of Labor. (T.C.A. § 50-2-104).

Plant Closings

Tennessee has a law regulating plant closings and reduction of operations. The law requires any employer who employs at least 50 but not more than 99 full-time employees at a workplace located within Tennessee to give at least 60 days' notice of any plant closing or any reduction in operations (including the relocation of a worksite to another site more than 50 miles away from the prior worksite) if the number of employees is permanently or indefinitely reduced by 50 or more employees during any three-month period. (T.C.A. § 50-1-601 et seq.).

Workers' Compensation

Tennessee employers must provide employees weekly workers' compensation benefits and pay all medical expenses related to any injuries or occupational diseases that arise out of and in the course of the employee's employment. The benefits that the injured employees receive are set by law and are the employee's sole remedy against the employer for the work-related injuries or illnesses. The employer may purchase insurance to provide these benefits or the employer may qualify as self-insured, but if the employer elects to be self-insured, it must be careful to comply with all of the legal requirements. (T.C.A. § 50-6-101 et seq.).

Unemployment Compensation

A terminated employee may be eligible for unemployment compensation benefits paid by the state, pursuant to certain exceptions, such as termination of employment for misconduct or voluntary resignation without good cause. These benefits are funded with premium payments made by the employer to the state in the form of a quarterly tax imposed on the employer's payroll. (T.C.A. § 50-7-101 et seq.).

Public Protection Act

Although Tennessee is an at-will employment state, under the Tennessee Public Protection Act (TPPA), an employer may not discharge or otherwise retaliate against any employee solely for the employee's refusing to participate in, or refusing to remain silent about, activities which are in violation of the criminal or civil code of Tennessee or the United States or any regulation intended to protect the public health, safety or welfare. (T.C.A. § 50-1-304). An employer also may not discharge, or take an adverse action against, an employee for attempting to exercise some other statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory or regulatory provision. Like many other states, Tennessee has recognized the common law claim for wrongful discharge in violation of public policy. While the TPPA preempts claims for wrongful discharge that may be brought under the TPPA, it does not preempt all common law claims. For example, an employee may bring a wrongful discharge claim if the employee is discharged for exercising his or her rights under the Tennessee Workers Compensation Laws.

Regulation of Wages and Hours

Tennessee has no laws regulating minimum wages, overtime or hours of work except that each employee must have a 30 minute unpaid rest break or meal period if the employee is scheduled to work six hours consecutively (unless the employee's job and work environment provide ample opportunity to rest or take an appropriate break). Tennessee does have a Child Labor Act which provides certain restrictions on employing minors, i.e. under 18, in the workplace. (T.C.A. §50-5-101 et seq.). Employers in Tennessee must provide their employees a reasonable period of time, not to exceed three hours, in order to vote in any election held in the state provided the employee does not have the opportunity to vote before or after his or her normal work schedule. (T.C.A. §2-1-106). An employer may not discriminate against any employee for serving on jury duty, and an employee who serves on jury duty is entitled to receive his or her usual compensation from the employer less any amounts received by the employee for serving as a juror. (Employers with fewer than five employees are not required to compensate the juror during the period of jury service.) However, the employer is not required to compensate the employee for more than those hours actually spent in jury service or in traveling to and from such service. (T.C.A. § 22-4-106).

Gun Laws

Tennessee's "Guns in Trunks" law (T.C.A. § 39-17-1313) permits handgun carry permit holders to lawfully store firearms and ammunition in their personal vehicles parked on public or private property, including while parked at work, so long as the firearms are "kept from ordinary observation and locked within the trunk, glove box, or interior of the person's vehicle or a container securely affixed to the vehicle if the person is not in the vehicle." The law applies to carry permit holders and to all "firearms" owned by the carry permit holder, whether or not the permit covers them. The law does not apply to guns carried or stored anywhere except in the employee's private vehicle; for instance, the law does not impact an employer's ability to ban weapons from company-owned vehicles or from any other part of the property other than the employee's personal vehicle. In addition, the law does not allow a carry permit holder to carry firearms on his or her person while at work. The law contains no exemptions for specific kinds of businesses but does state that the law will not control areas where firearms possession is expressly prohibited by federal law.

Effective from July 1, 2015, the law also prohibits employers from discharging or taking any adverse employment action against a Tennessee employee solely for complying with the "Guns in Trunks" law. An employee whose rights are violated is entitled to seek damages, attorneys' fees and court costs, as well as a court order prohibiting the employer from violating the law.

Password Protections

Tennessee's Employee Online Privacy Act of 2014 entered into effect on January 1, 2015 and prohibits an employer from requesting or requiring that applicants or employees disclose their passwords for personal internet accounts. This law also prohibits employers from requiring that applicants or employees add the employer to their list of contacts associated with personal internet accounts or permit the employer to observe their restricted online content after they have accessed an online account.

However, this law provides exceptions pertaining to the use of any electronic communication device, account or service provided or paid for by the employer, or a personal account used for the employer's business purposes. In addition, employers may discipline or discharge an employee for transferring the employer's proprietary or confidential information or financial data to the employee's personal internet account.

Further, the law does not limit the viewing, access or use of information that is available in the public domain, though use of this information may be limited by other laws, such as the National Labor Relations Act, anti-discrimination laws and laws prohibiting adverse employment actions based on lawful off-duty conduct.

Employers may also require an employee to cooperate in an investigation into prohibited work-related employee misconduct.

Tobacco Use

Tennessee's Non-Smoker Protection Act (T.C.A. § 39-17-1801, et seq.) applies to "employers in Tennessee," which is broadly defined as any entity that employs four or more individuals. It specifically bans smoking in any "enclosed area under the control of a public or private employer that employees normally frequent during the course of employment, including, but not limited to, work areas, private offices, employee lounges, restrooms, conference rooms, meeting rooms, classrooms, employee cafeterias, hallways, and vehicles."

This list of designations is not specifically limited to areas where the public is actually invited but is broader in scope and applies to any general enclosed area at the worksite. Employers and businesses must communicate the law's protections to all employees and prospective employees. Moreover, at every entrance of every public place and place of employment where smoking is prohibited, employers must place a "No Smoking" sign.

Tennessee also has a law that prohibits employers from discharging or terminating an employee solely for participating or engaging in the use of tobacco products during times when the employee is not working. The law also prohibits termination if the employee participates or engages in the use of tobacco products in a manner that complies with all applicable employer policies regarding use during times at which the employee is working (T.C.A. § 50-1-304(3)). The law does not prohibit an employer from refusing to hire a new employee for tobacco use.

Other Requirements

Tennessee has an Occupational Safety and Health Act (OSHA) designed to regulate safety and health in the work place. (T.C.A. § 50-3-101 et seq.). This statute is virtually identical to the federal OSHA law and, in fact, incorporates the regulations adopted by the federal government. There are no state laws in Tennessee regulating vacations or vacation pay, holidays or sick leave, aside from T.C.A. §50-2-103 discussed above, which provides that any vacation pay or other compensatory time that is owed to the employee by virtue of company policy or labor agreement must be paid with final wages when an employee is discharged or resigns. Most employers provide employees with either vacation time off or vacation pay, typically determined by the employee's length of service and/or position. Time off for holidays is not required in Tennessee but most employers provide employees time off for certain holidays selected by the employer. Most employers also provide employees with occasional days off due to sickness or injury with or without loss of pay and many employers provide health insurance benefits for employees in which the employer either pays a portion of or all of the cost of the insurance. Many employers provide some type of program to enable employees to accrue retirement benefits as well as life insurance, accidental death and dismemberment insurance and/or long-term disability insurance. Employees often are required to contribute to the cost of these benefits.

Employment at Will

Under Tennessee common law, an employee hired for an indefinite term is an employee at will who can terminate his or her employment, or be terminated, at any time, with or without cause. However, as noted above, by both statute and case law, some restrictions have been imposed upon the right of an employer to terminate an at-will employee. Specifically, under the TPPA, an employee cannot be terminated for refusing to participate in, or remaining silent about, illegal activities. In addition, an employee cannot be discharged for attempting to exercise a statutory or constitutional right or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory or regulatory provision. For example, an employee may not be discharged for exercising his or her rights under the Workers' Compensation Act.

Unions

Tennessee is a right to work state in which no employee may be required to join a union in order to continue his or her employment. Employer union relations in Tennessee are regulated by federal laws. According to the U.S. Department of Labor Statistics, only 5.4% of Tennessee's private employees were unionized in 2015, giving Tennessee one

of the lowest rates of private sector unionization in the nation. In the past few years, however, Tennessee has seen an increase in union membership. Under the LMRA, employers and unions have certain rights and restrictions in communicating with employees in an effort to persuade them to support or refrain from supporting a union. An employer faced with a union organizing effort should consult with an attorney who is experienced in this highly specialized area of the law.

Tennessee does have a law (T.C.A. § 50-1-102) which requires that an employer who advertises for new employees during a strike or work stoppage by its existing employees advise prospective applicants that a labor dispute is in progress.

Restrictive Covenants

There is no statute of general applicability that governs covenants not to compete in Tennessee. The Tennessee legislature has imposed restrictions on restrictive covenants that apply to physicians. These restrictions are codified at T.C.A. § 63-6-204, § 68-11-205, and § 63-1-148. Otherwise, enforceability of restrictive covenants is controlled by common law.

The Tennessee Supreme Court has adopted a “rule of reasonableness,” under which Tennessee courts, absent bad faith by the employer, will enforce covenants not to compete to the extent necessary to protect the employer’s interest without imposing undue hardship on the employee as long as the public interest is not adversely affected. Protectable interests that can support a restrictive covenant include customer goodwill and confidential information.

In applying the “rule of reasonableness,” the courts consider:

1. whether the employer provided the employee with specialized training;
2. whether the employee is given access to trade or business secrets or other confidential information; and
3. whether the employer’s customers tend to associate the employer’s business with the employee due to the employee’s repeated contacts with the customers on behalf of the employer.

Determination of reasonableness also depends on whether the restriction is reasonable as to the scope of the activity, geographic area and time period. Tennessee courts will generally enforce an otherwise valid restrictive covenant if it is limited to the geographic area of the employee’s duties. There is no bright line rule regarding the length of restrictive covenants, but case law suggests restrictions of no more than two years (contained in employment agreements) will be upheld. The courts are less strict in their review of covenants not to compete given by business owners in connection with a sale of the business.

Courts are not required to invalidate a noncompetition agreement if they find that it is too broad. If the employer has a protectable interest and has not been acting in bad faith, the courts will enforce an agreement after modifying it to the extent necessary to protect the employer’s interest without imposing undue hardship on the employee.

In Tennessee, the signing of a covenant not to compete at the inception of the employment relationship will provide sufficient consideration to support the covenant. If a covenant not to compete is signed after the employment relationship has begun, changes in the terms and conditions of an existing employee’s employment, such as a pay raise or promotion, along with continued at-will employment, will also provide sufficient consideration to support a covenant not to compete. Continued employment of an at-will employee alone may also constitute sufficient consideration, provided that the employer actually continues to employ the individual for a substantial period of time, usually at least one year.

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 (including Tennessee) and, therefore, the states regulate most aspects of hazardous waste management within their borders. Federal and state regulation of hazardous wastes in Tennessee is discussed in further detail below.
- 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 allows the United States Environmental Protection Agency (EPA) to recover money for damages to natural resources caused by hazardous substance releases. CERCLA allows government and private parties to sue "potentially responsible parties" for reimbursement of clean-up costs caused by releases, actual or threatened, of hazardous substances. Federal and state superfund regulation in Tennessee, including available defenses to liability, is discussed in further detail below.
- 3. The Clean Air Act (CAA):** 42 U.S.C. § 7401 *et seq.* The CAA regulates air pollutants. Federal standards are generally implemented and enforced by the states. The Act was amended in 1990 to add several new programs, including acid rain control and stratospheric ozone protection programs, coupled with modification of existing programs for attaining the national ambient air quality standards ("NAAQS") and reducing emissions of hazardous air pollutants. Because of the nature of air pollution and its sources, this program is generally considered to be the most complex of the federal environmental programs. Under the CAA, air emissions are regulated through various controls and permitting requirements. Federal and state regulation of air emissions in Tennessee is discussed in further detail below.
- 4. The Clean Water Act (CWA):** 33 U.S.C. § 1251 *et seq.* The CWA regulates the discharge of pollutants into navigable waters and prohibits the discharge of any pollutant into the waters of the United States unless a permit has been issued. Permits are issued by either the state under an approved state program (as is the case in Tennessee) or by the EPA if the state. Permit limits are based upon effluent limitation regulations and water quality parameters and are incorporated into a National Pollutant Discharge Elimination System (NPDES) permit.

The CWA also provides for specific regulation of industry categories for industries that discharge either to surface waters or to a publicly owned treatment works (POTW). Regulation of stormwater discharges also falls under the NPDES permit program. Federal and state regulation of water pollution in Tennessee is discussed in further detail below.

B. TENNESSEE CONSIDERATIONS

- 1. Explain any Tennessee environmental organizations*
- 2. Explain Tennessee environmental laws*

Tennessee Environmental Organizations

The Tennessee Department of Environment and Conservation (TDEC) is the chief environmental regulatory agency in Tennessee. It has delegated responsibility from the EPA to regulate sources of air pollution (except in certain Tennessee counties that have local city and/or county air pollution control agencies as noted below), solid and hazardous waste, radiological health issues, underground storage tanks, water supply and groundwater. TDEC has a history of negotiating proposed regulations with industry representatives, such as the Tennessee Chamber of Commerce & Industry. Industry representatives sit on all four of the major environmental oversight boards: the Air Pollution Control Board; the Water Quality Control Board; the Solid Waste Disposal Control Board; and the Petroleum Underground

Storage Tank Board. Furthermore, while federal environmental statutes specify that a state may adopt standards that are more, but not less, stringent than federal requirements, Tennessee generally does not adopt more stringent requirements. There are exceptions, some of which are noted in the following sections. Tennessee has also sought and received delegated authority to conduct many federal environmental programs.

Tennessee Environmental Laws

Attempting to summarize the entire spectrum of federal and state environmental laws would result in a handbook too voluminous to be of practical use. This section is designed to provide a general overview of the major environmental statutes and their applications in Tennessee. Exceptions and challenges to requirements abound, as do additional requirements and potential liabilities. To effectively avoid liability and receive the benefits that environmental statutes can provide, companies are strongly encouraged to conduct advance planning and engage a technical consultant and an environmental attorney if expertise in these areas with respect to Tennessee law is not available within the company. State and federal environmental regulation in Tennessee is briefly summarized with respect to as follows:

The Superfund Law

CERCLA is intended to provide a mechanism for cleaning up inactive hazardous substance sites – property that contains hazardous substance contamination from past releases, but at which releases no longer are taking place. CERCLA has initiated an onslaught of expensive and protracted litigation and imposes strict liability, regardless of fault, on four categories of persons: the current owner or operator of the property; the owner or operator of the property at the time of disposal; any generator of hazardous substances or person who arranged for treatment or disposal of hazardous substances at the site; and transporters of hazardous substances who selected the disposal site. Thus, companies seeking to purchase property in the United States must carefully evaluate the purchase of land where the disposal of hazardous substances has potentially taken place, because a new purchaser can become jointly and severally liable to clean up the property despite having no knowledge of the contamination and no participation in any disposals on the property.

Joint and several liability means that each person determined to be liable at a site is liable for the entire amount expended to clean it up, although CERCLA grants liable parties contribution rights against other liable parties. Thus, one liable party may be made to pay the bill (which may be several million dollars) and sue other remaining parties at a later date for their contribution to the contamination at the site. This can result in expensive litigation and the possibility that those sued will not be able to pay their allocated share.

One defense to liability under CERCLA is the third-party defense. If the release of a hazardous substance was caused by the act or omission of a third party not an employee or agent of the defendant, and not in a direct or indirect “contractual relationship” with the defendant, then the defendant is not liable under CERCLA. The defense is of limited availability, however, because the contractual relationship element has been liberally construed. For example, a company is in a contractual relationship with any prior party in that chain of title. If the seller caused the contamination, the purchasing company cannot assert the third-party defense.

To ameliorate the harshness of the contractual relationship application, CERCLA has been amended to include defenses for innocent landowner’s, bona fide prospective purchasers and contiguous property owners that meet specific statutory requirements. Each of these defenses requires a new owner or operator to conduct “all appropriate inquiry” prior to acquiring and to exercise due care regarding hazardous substances at the property. A purchaser who meets the burden of proof for these defenses is not liable for the clean up. Accordingly, companies now make it a regular practice to conduct an environmental site assessment (typically, and ASTM Standard Phase I) of property they wish to purchase in order to demonstrate that they exercised due diligence with respect property contamination prior to the purchase.

Tennessee’s Hazardous Waste Management Act of 1983 (THWMA), Tenn. Code Ann. §§68-212-201 et seq., is the State’s Superfund equivalent. Tennessee also has established a fund to assist in cleaning up inactive hazardous waste sites (the State Fund). The State Fund is supported by fees assessed on those who generate and manage hazardous waste in Tennessee.

Several advantages of the Tennessee statute over federal law are available to companies who might be found liable at a site in Tennessee. The major advantage is that joint and several liability is not imposed under THWMA for recovery of costs incurred by the state. A company only may be determined liable for its apportioned share of the amount expended at the site. In apportioning shares, equitable factors, such as the following, must be considered:

1. The amount of any benefit accruing to the company by virtue of the disposal of hazardous substances on the property or resulting from the cleanup.
2. The monetary benefit from the cleanup accruing to an owner who knew or should have known of a previous disposal of hazardous substances at the site
3. The monetary benefit from the clean up to an owner who knew or should have known that hazardous substances were disposed of at the site during that owner's period of ownership.
4. The company's culpability.
5. The company's efforts to restore the site to its natural condition.
6. The amount the company already expended at the site under the Superfund law.
7. The company's portion of the total volume of hazardous substances at the site.

Additionally, THWMA does not provide for interest charges on amounts expended from the state fund. Finally, procedures for cleaning up a site are not subject to the rigidity required by U.S. EPA guidance documents used at CERCLA sites.

Hazardous Waste Management

EPA has developed a system for regulating the generation, management, storage, transportation, treatment and disposal of hazardous waste. RCRA establishes mandates for handling hazardous waste from "the cradle to the grave." A waste is considered hazardous if it is specifically listed as such under EPA regulations, or if it exhibits one of four characteristics of a hazardous waste: corrosivity, ignitability, reactivity and toxicity. Those who generate or transport hazardous waste are subject to detailed statutory and regulatory requirements, as are the owners and operators of facilities that treat, store and dispose of hazardous waste (TSD facilities). Failure to comply with these regulations may result in the imposition of high civil and/or criminal penalties, and even imprisonment.

Generators, transporters and owners/operators of TSD facilities all must maintain written records (manifests) keeping track of hazardous waste from the time it leaves the facility until its disposal. TSD facilities must either have a permit or fall within the statutory criteria for interim status.

Tennessee received authorization on January 5, 1985 to administer the "base program" of the federal statutory scheme. The base program includes regulations issued pursuant to any RCRA provision included in RCRA as it originally was enacted in May 1980. In order to be authorized to implement regulations issued pursuant to any provision added since that date, which includes extensive provisions in the Hazardous and Solid Waste Amendments of 1984 (HSWA), the state must apply for and receive authorization from EPA. Tennessee has received such authorization for certain other RCRA requirements. The significance of state authorization is that the state is the primary overseer of the provisions, and the effective date of provisions for which the state has authorization is the date on which such authorization was received. For unauthorized provisions, the effective date is the date of the federal adoption of the provision.

Tennessee has adopted a few requirements that are more stringent than the federal mandates. For instance, transporters are required to have a permit prior to transporting hazardous waste to or from any Tennessee location. Rather than submitting the biennial report that is required under the federal statute, generators and owners/operators of TSD facilities must submit an annual report to TDEC. However, one way in which Tennessee may be beneficial to owners/operators of TSD facilities is that the Commissioner has the authority to waive standards otherwise applicable to such facilities on a facility-specific basis.

Underground Storage Tanks

The U.S. Congress added a program in 1984 specifically addressing underground storage tanks (USTs). Tennessee has been delegated authority to enforce the UST program for USTs containing petroleum. USTs storing hazardous substances are regulated in Tennessee under the federal statute.

Under both Tennessee's Petroleum Underground Storage Tank Act (TPUSTA) and the federal statute, a variety of tanks are exempted from the regulations. Companies should investigate whether their tanks fall within an exemption. Owners and operators that are not exempted from TPUSTA's requirements must obtain and post a certificate obtained from the state. Additionally, and most significantly, either the owner or the operator must meet financial responsibility requirements in order to assure that releases will be remediated and injured third parties will be compensated. While the federal and state statutes delineate several methods by which an owner/operator can meet financial responsibility requirements, in practice it is difficult to meet the requirements unless the state has established a fund for such a purpose. Tennessee has a Petroleum Underground Storage Tank Fund (Tank Fund) which allows eligible owner/operators to meet the financial responsibility requirements. Companies are strongly encouraged to ensure that their USTs are eligible for the Tank Fund, since in Tennessee this fund will cover the cleanup of releases (above a deductible) without seeking reimbursement from tanks owners/operators. In order to be eligible, the owner/operator must follow statutory guidelines, which include registering with the Tennessee Division of Underground Storage Tanks (TDUST), paying annual fees, and remaining in substantial compliance with the regulations.

TPUSTA imposes other requirements on owners/operators. For instance, both new and existing tanks must meet certain standards regarding leak detection, corrosion protection, and spill/overflow prevention. If a leak or spill of more than 25 gallons occurs, the owner/operator must notify TDUST within 72 hours and proceed by undertaking certain corrective action. Also, if a tank is temporarily or permanently closed or if there is a change in service, the owner/operator must follow notification and other requirements set forth in the statute and regulations.

Air Pollution Controls

Through the CAA and its implementing regulations, EPA has developed comprehensive statutory and regulatory requirements for controlling air emissions in order to accomplish two purposes: reduce the amount of air pollutants released in areas where the quality of air is considered below standards (nonattainment areas), and prevent the deterioration of air quality in areas where standards presently are being met (attainment areas). The standards referred to are the NAAQS, which are set for the following "criteria" pollutants: carbon monoxide, hydrocarbons, lead, nitrogen dioxide, ozone, particulates (TSP) and sulfur dioxide. If an area is designated as nonattainment for a certain pollutant, there are stringent requirements on emissions from new major sources in the area and major modifications to existing sources. Even major existing sources must implement reasonably available control technology. If an area is designated as an attainment area for a given pollutant, companies must still consider the Prevention of Significant Deterioration (PSD) regulations, which require major sources to implement the "best available control technologies" and to demonstrate that air emissions from a new source or a modification will not deteriorate significantly the air quality for a criteria pollutant.

Thus, whether an area is designated as attainment or nonattainment for a criteria pollutant will impact the costs to a company that wishes to construct a new source or modify an existing source in the area, if that source emits the criteria pollutant. Presently, several areas of Tennessee are designated as nonattainment for particulate matter and one area is designated as nonattainment for sulfur dioxide.

The CAA requires that each state receive EPA's approval of a State Implementation Plan (SIP) in order to ensure that the NAAQS are met. Tennessee has an approved SIP, pursuant to which TDEC issues air permits to facilities, except those in Shelby, Davidson, Knox and Hamilton counties. Local air pollution control divisions in those counties issue permits and implement the air regulations. While the federal CAA only requires certain facilities or certain types of emissions to be permitted, Tennessee requires every source (with a few listed exceptions) of any air contaminant emissions to receive a permit. Companies intending to build a source of air emissions in Tennessee or modify an existing source must obtain a permit prior to commencing construction. Air quality permit applications can be obtained through TDEC offices or from delegated county air pollution control divisions. The applicant must demonstrate compliance with the NAAQS, and the permitting authority conducts an independent

analysis of the source's impact on the air.

Nonattainment and PSD regulations, however, are not the only air requirements a company must consider. Two types of emissions standards are applicable to industries: (1) New Source Performance Standards (NSPS); and (2) National Emission Standards for Hazardous Air Pollutants (NESHAPs). NSPS define categories of sources that EPA determined significantly contribute to air pollution. New sources for facilities in each source category must meet standards based on demonstrated technology for criteria pollutants, hazardous pollutants, and other "designated" pollutants. The NESHAPs program set standards for hazardous air pollutants, applicable to new and modified sources of those pollutants. If a facility falls within the statutory criteria for a "major source" of HAPs or an "area source" of HAPs, it is required to obtain a permit and achieve the maximum available control technology.

Water Pollution Control

A company located in the United States may need one or more water permits. Tennessee has been delegated the authority to issue most permits contemplated by federal law, including those under the federal National Pollution Discharge Elimination System (NPDES). NPDES permits are required for the discharge of any "pollutant" into the "waters of the United States" from any "point source." These terms are defined broadly, so that practically any time a material is added to any surface water an NPDES permit is required. In Tennessee, "waters" is defined even more broadly, so that a separate state permit may be required when a material is added to groundwater.

Since it takes approximately six months to process a permit application, companies must plan ahead for new discharges or changes in the nature, frequency or volume of an existing permitted discharge. Also, "anti-backsliding" regulations prohibit the permitting authority from issuing a permit with less stringent effluent limits than were contained in a previous permit for that discharge. Thus, companies should try to obtain effluent limitations that allow for flexibility later. Permittees are required to monitor discharges, to maintain records for at least three years, and to report regularly to TDEC the results of monitoring.

Sources discharging into publicly owned sewage treatment works (POTWs) are exempted from NPDES requirements, but are required to comply with pretreatment standards and are usually required to obtain a pretreatment permit. Pretreatment standards are designed to prevent a facility from introducing into the POTW materials that may interfere with, pass through or otherwise be incompatible with the POTW. Those discharging to a POTW are prohibited from discharging certain pollutants into the system. Also, categorical pretreatment standards specify quantities or concentrations of pollutants which may not be discharged into a POTW by industrial users in specific industrial categories.

Before beginning the construction of a facility, it should be clear that the site does not have areas classifiable as a wetlands. Wetlands are areas that are sufficiently saturated by surface water or groundwater to support certain vegetation and life forms. The name "wetlands" may be misleading, since land that is wet is not always considered a wetlands, and land that appears dry may actually be a wetlands. If a site is a wetlands, a series of regulatory requirements, such as obtaining a permit from the Army Corps of Engineers (the Corps), must be followed prior to and during construction on the site. If it is unclear whether wetlands is present at a site, the company may submit a permit application to the Corps, which may then determine that a permit is not required. Undertaking construction in a wetlands without receiving a permit and without following the regulatory requirements may result in significant costs to a company, since the Corps may require the building to be taken down and the company may be required to mitigate the damage to the wetlands by developing a new wetlands area nearby.

Finally, a company must consider whether it needs a storm water permit. Most construction activities disturbing over one acre of land require a construction storm water permit. In addition, if a discharge of storm water falls within the statutory definition of a "discharge associated with industrial activity," then a storm water permit for such operations is required. The rationale behind requiring a permit for storm water discharges is that pollutants may become mixed in with the storm water, which at some point reaches a body of water. One way to obtain a storm water permit is to file a notice of intent, which gives rise to coverage under a general permit. The terms of a Tennessee general permit are set out within the general permits themselves and in state regulations addressing storm water permits. Alternatively, an individual facility may receive an individual permit, the terms of which are specific to the facility. This may be the case when a facility's NPDES permit covering wastewater discharges also

addresses storm water discharges. Where an NPDES permit addresses some, but not all, storm water discharge points, a facility may have to rely upon a combination of an NPDES permit and a general storm water permit to cover all storm water discharges from the facility.

VII. INTELLECTUAL PROPERTY

A. FEDERAL COPYRIGHT LAW

This area is governed exclusively by federal law. Title 17, U.S.C.

In General

Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to use, distribute, modify and display the work. Generally, works are entitled to copyright protection for the life of the author plus 70 years (17 U.S.C. § 302). However, as to works made for hire, copyright protection is for the shorter of 95 years after publication or 120 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright and may be liable for actual or statutory damages and may be subject to injunctive relief.

Copyrightable Works

Works of authorship that qualify for copyright protection include literary works, musical works (including lyrics), dramatic works, choreographic works, audiovisual works, pictorial, graphic and sculptural works, sound recordings and architectural works. The Computer Software Copyright Act of 1980 expressly made computer software eligible for copyright protection, a point previously in doubt. The precise scope of copyright protection for computer software has not yet been fully defined. Constantly developing technology is likely to present many new issues, presently unforeseen. All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in some tangible form; there must be a physical embodiment of the work so that the work can be reproduced or otherwise communicated. Second, the work must be the result of original and independent authorship. The concept of originality does not require that the work entail novelty or ingenuity, concepts of importance to patentability.

Advantages of Copyright Registration

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

Copyright Registration Application Process

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

Copyright Notice

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

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

Works Made for Hire

In a “work made for hire” the employer is presumed to be the author. Authorship is significant because a copyright initially vests in the author. The parties can rebut the presumption of employer authorship by an express written agreement to the contrary. The term “work made for hire” applies to any work created by an employee in the course and scope of employment. On occasion there is dispute as to whether a work created by an employee arose from the employment. Employers often require execution of a formal employment agreement under which the employee expressly agrees that all copyright rights will belong to the employer. A similar agreement is also advisable in connection with the engagement of an independent contractor to perform copyrightable services for a business, but the employer should be aware that only certain types of works may be considered a work made for hire when created by an independent contractor. If the particular matter cannot be a work made for hire, the employer should negotiate an agreement for the assignment of the copyright by the independent contractor.

Copyright Protection for Foreign Authors

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

B. FEDERAL PATENT LAW

This area is governed exclusively by federal law. Title 35, U.S.C.

In General

One who invents or discovers a new machine or device or a new manufacturing process may be able to obtain a U.S. patent. A U.S. patent provides the inventor with the exclusive right for a specified time to make, use, import, offer to sell, or sell in the United States the patented invention. A patent provides the holder with a limited monopoly on the use of the patented invention. A valid patent forecloses use of the patented invention by any other party, even if another party independently conceives the identical invention.

A utility patent, which generally governs the functional aspects of a machine, manufacturing process, or composition of matter is enforceable beginning at the grant of the patent and ending 20 years (plus up to five more years for cer-

tain delays) after the filing date of the regular patent application. A design patent, which covers the design or appearance of an article of manufacture, filed on or after May 13, 2015, is enforceable for 15 years from the date the patent is granted. A design patent filed before May 13, 2015, is enforceable for 14 years from the granting date of the patent (35 U.S.C. 173 & MPEP 1505). A provisional patent, which is filed before a regular patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a regular patent application. Anyone without authority from the patent holder who makes, uses, imports, or sells in the United States the patented invention during the life of the patent is considered to “infringe” the patent and may be liable for damages.

Effect of Foreign Patents

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

Patentability Under Federal Patent Statutes

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

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

1. “novel,” in that it was not previously known to or used by others in the United States or printed or described in a printed publication anywhere;
2. “non-obvious” to a person having ordinary skill in the relevant art; and
3. “useful,” in that it has utility, actually works, and is not frivolous or immoral.

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

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

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

Patent Application Process

A U.S. patent application must be filed with the U.S. Patent and Trademark Office. A complete patent application includes four elements.

1. The application must include the “specification.” The specification is a description of what the invention is and what it does. The specification can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period.
2. The application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English, the oath or declaration must be in a language that the inventor understands.
3. The application must include drawings, if essential to an understanding of the invention.
4. The appropriate fee must be included.

After a proper application is filed, the application is assigned to an examiner with knowledge of the particular subject matter. The examiner makes a thorough review of the application and the status of existing concepts in the relevant area to determine whether the invention meets the requirements of patentability. The patent review process takes from 18 months to three years. Rejection of a patent application by the examiner may be appealed to the Patent Trial and Appeal Board (35 USC § 134). Decisions of the Patent Trial and Appeal Board may be appealed to either the U.S. Court of Appeals for the Federal Circuit (35 USC § 141) or to the U.S. District Court for the Eastern District of Virginia (35 USC § 145). Provisional patent application requirements are less stringent than a regular patent application. The oath or declaration of the inventor and claims are not required and the application is held for the 12-month period without examination.

Markings

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

Rights to Patented Inventions

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

C. TRADEMARKS

This area is governed by both state and federal law.

In General

A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination. A trademark should not be confused with a trade name. Although the same designation may function as both a trademark and a trade name, a trade name refers to a business title or the name of a business; a trademark is used to identify the goods manufactured by the business. A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

Selection of Trademark

A manufacturer should carefully consider the trademark selected for its merchandise. The level of protection against infringement of a trademark varies with the “strength” or “uniqueness” of the trademark. “Descriptive” marks are the weakest and least defensible. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A “fanciful” mark, the strongest type of mark, is a coined name that has no dictionary definition.

Evaluation should also include consideration of the likelihood of success in obtaining federal and state registrations of the trademark. For example, a trademark that is “merely descriptive” cannot be registered under either federal or Tennessee (TCA § 47-25-502(5)) law.

Selection of a trademark should be accompanied by a trademark search to determine whether another manufacturer has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and there are businesses that specialize in trademark searches. Actual and potential trademark conflicts should be avoided, lest the manufacturer become involved in an expensive infringement lawsuit. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.

Advantages of Trademark Registration

Under the trademark laws of the United States and Tennessee, the principal method of establishing rights in a trademark is actual use of the trademark. “Registration” of a trademark is not legally required but can provide certain advantages.

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

After five years of continued use of the mark following federal registration, the registrant’s exclusive right to use of the trademark becomes virtually conclusive. Federal registration may assist in preventing the importation into the United States of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.

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

Federal Registration Application Process 15 U.S.C. “ 1051, et seq.

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

If the application is approved, the mark is published in an official publication of the Patent and Trademark Office. Opponents of the registration have 30 days after publication, or such additional time as may be granted, to challenge the registration. If no opposition is raised, or if the opponent’s claims are rejected, an applicant whose mark is already in use receives a “certificate of registration.”

An applicant whose trademark is proposed for registration before actual use receives, upon approval of the application, a “notice of allowance.” An application who receives a notice of allowance must within six months of the receipt

of the notice furnish evidence of the actual use of the trademark. The applicant then is entitled to a certificate of registration. Failure to furnish evidence of the actual use of the mark within the time allowed results in rejection of the application.

Post-Certificate Federal Procedures

A certificate of trademark registration issued by the Patent and Trademark Office remains in effect for 10 years. However, registration expires at the end of six years, unless the registrant furnishes evidence of continued use of the trademark. The initial 10-year term of a certificate of registration can be renewed within the term's last year, or during a grace period of six months after the end of the 10-year period (15 USC § 1059(a)) for an additional 10-year term by furnishing evidence of continued use of the mark and paying a fee.

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

D. TENNESSEE CONSIDERATIONS

1. Explain Tennessee laws regarding patents, copyrights, trademarks or trade secrets

Trade Secrets

Protection of trade secrets is based on common law principles of unfair competition, and in the United States is generally exclusively the subject of state common law. Most states, including Tennessee, have enacted some form of the model Uniform Trade Secrets Act, which generally codifies common law principles of trade secret protection. Tennessee also has enacted a criminal statute (T.C.A. § 39-14-138) applicable to the stealing, embezzling or unauthorized copying of another's trade secrets.

Effective July 1, 2000, Tennessee adopted an amalgamated version of the Model Uniform Trade Secrets Act. T.C.A. § 47-25-1701, et. seq. (the Trade Secrets Act). The Trade Secrets Act provides a civil cause of action against anyone who misappropriates a trade secret. Under the Trade Secrets Act, misappropriation includes acquisition of a trade secret by improper means or disclosure or use of a trade secret by one who used improper means to acquire it or knew or had reason to know the trade secret was acquired improperly or by accident or mistake.

The Trade Secrets Act defines "trade secret" as information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process or plan that (1) derives independent economic value from not being generally known and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The Trade Secrets Act includes damages, injunctive relief and attorney's fees in instances of bad faith or willful misappropriation. Unlike common law, absolute secrecy is no longer a requirement; only reasonable efforts to maintain secrecy are required.

Unfair Competition

The common law doctrine of unfair competition, certain aspects of which have been codified in federal and some state statutes, is a branch of tort law which allows one who is damaged in his or her business by the unfair actions of his or her competitor to recover in a civil action. At common law, unfair competition action includes trademark infringement, trade name infringement, false advertising, copying of trade dress (packaging, labeling or product appearance), misappropriation of trade secrets and disparagement (false statements about another's business or products).

Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) is the federal statutory codification of certain aspects of the

unfair competition law. This statutory provision creates civil liability for any person who uses any false designation of origin, false or misleading representation of fact, on or in connection any goods or services, or any container for goods, which is likely to cause confusion or to cause mistake or to deceive as to the affiliation, connection or association of the person with another person, or as to the origin, sponsorship or approval of his or her goods, services or commercial activities by another person, or who misrepresents the nature, characteristics, qualities or geographic origin or his or her or another person's goods, services or commercial activities in commercial advertising or promotion activities.

In Tennessee, unfair competition can be remedied via a suit under the Tennessee Consumer Protection Act (Tenn. Code Ann. § 47-18-122) for unfair competition or deceptive trade practices, assuming the consumer has suffered an ascertainable loss of money or property. Tenn. Cod Ann § 47-18-104 lists the unfair and deceptive acts or practices that are prohibited by the statute, which include passing off, causing a likelihood of confusion of the source or sponsorship of goods or services, false advertising, and a host of other deceptive sales and marketing practices. A successful plaintiff can recover actual damages, injunctive relief, and/or a declaratory judgment. If the court finds that the use of the unfair or deceptive trade practice was willful or knowing, the court can award treble damages and attorney fees and costs. Tenn. Code Ann. § 47-18-109.

Right of Publicity

In recent decades, a new intellectual property right has emerged, known as the right of publicity. This is the property right, created either by common law or by statute, of an individual in and to the exclusive commercial use or exploitation of his or her name, photograph, likeness and even, in some cases, voice for commercial purposes. The Tennessee statute, known as the Personal Rights Protection Act of 1984, prohibits the unauthorized use of another individual's name, photograph or likeness in any medium, in any manner, directed to any person either as an item of commerce or for the purposes of advertising products, merchandise, goods or services, or for purposes of fund raising, solicitation of donations, purchases of products, merchandise, goods or services. This prohibition does not apply to the use of a name, photograph or likeness in connection with any news, public affairs or sports broadcast or account.

The rights granted by this statute are specifically designated as property rights, and as such are freely assignable and licensable and do not expire upon the death of the individual protected, whether or not the rights were commercially exploited by the individual during his or her lifetime. Upon the death of the individual, this property right is descendible to the executors, assigns, heirs or devisees of the individual. In Tennessee, the right of publicity is exclusive to the individual during the individual's lifetime, subject to the right of assignment or licensing of the rights, and is exclusive to the executors, heirs, assigns or devisees for a period of 10 years after the death of the individual. If this property right is commercially exploited by any executor, assignee, heir or devisee within 10 years after the death of the individual, then the right shall continue after the expiration of the 10 year period as the exclusive property of the executor, assignee, heir or devisee until the right is terminated as a result of the non-use of the name, likeness or image of the individual for commercial purposes for a period of two years after the initial 10 year period following the individual's death. If the post-mortem right is not exercised within the 10 year period, it will terminate if there is no commercial exploitation for two subsequent years.

In the event of a violation of this statute, injunctive relief is appropriate, as well as actual damages suffered as a result of the knowing use or infringement of the rights of the individual in question, and any profits that are attributable to the use or infringement which are not taken into account in computing the actual damages. Profits or lack of them by the unauthorized use or infringement of an individual's rights is not, however, a criteria for determining liability. If a plaintiff is able to prove that the alleged infringer knowingly infringed the image and likeness rights of a member of the armed forces, that plaintiff is entitled to an award of treble damages and attorney fees. The remedies provided for in the statute, including confiscation of all unauthorized items and seizure of all instrumentalities used in the violation, are cumulative and are in addition to any others provided for by law. Violation of this statute is also a Class A misdemeanor.

VIII. DISPUTE RESOLUTION

A. FEDERAL COURT SYSTEM

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

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the U.S. Constitution and federal statute. They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, and federal crimes, federal torts and customs. All other jurisdiction is concurrent with that of the state courts. There are generally two ways to gain access to the federal district courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding \$50,000. To be brought in federal court, there must be complete diversity, i.e., none of the plaintiffs may be a citizen of the same state as any of the defendants. The second primary basis involves a federal question, i.e., presenting an issue arising under the Constitution, statutes or treaties of the United States. If a party's case does not fit within one of the statutorily mandated jurisdictions, there is no recourse to the federal courts.

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

These rules often set forth very specific guidelines for the handling of an action, and close attention must be paid to them. Thus, one participating in a suit in federal district court must be aware of that court's local rules as well as the Federal Rules of Civil Procedure.

B. TENNESSEE COURT SYSTEM

1. *Describe the Tennessee trial court system*
2. *Describe the Tennessee appellate courts*
3. *Describe the Tennessee tax court system*

Tennessee Trial Court System

The first level of the Tennessee court system consists of the state trial courts. In Tennessee, a lawsuit may be brought in Chancery Court, Circuit Court, General Sessions Court, Municipal Court or County Court. The circumstances in each case determine in which court a case may be brought. Most lawsuits are filed in either the Circuit Court or Chancery Court, which are the first level courts of record. Suits of an equitable nature, e.g. a suit requesting injunctive relief or rescission of a contract, and suits for a predetermined or specified sum are usually filed in Chancery Court. On the other hand, suits involving eminent domain, the Uniform Residential Landlord and Tenant Act, or those in which a plaintiff is asking the court to determine the amount of damages suffered, must be brought in Circuit Court. Both courts allow juries and neither has a monetary limit to its jurisdiction.

The Tennessee General Assembly also has provided for the creation of General Sessions Courts in most counties in Tennessee. General Sessions Court is much less formal from a procedural standpoint than either Chancery Court or Circuit Court. This informality allows an individual or company to have a case determined sooner and in a less expensive manner. General Sessions Courts cannot hear a case in which more than \$25,000 is at issue, except when it is a case of forcible entry and detainer, or when it is a case to recover personal property. In these latter cases, the court has unlimited original jurisdiction. The jurisdiction of a General Sessions Court does not extend beyond the county in which it sits. Appeal from a decision of the General Sessions Court is de novo to the Circuit Court of that county.

In incorporated municipalities in Tennessee there may be a municipal court. The jurisdiction of a municipal court may be confined to violations of the municipal charter and ordinances.

In 2015, the Tennessee Supreme Court implemented a pilot program for a Business Court in Nashville with the goal of increasing efficiencies in complex business litigation in Tennessee. The Business Court focuses on complex business litigation with the goal of expediting cases and developing a body of rulings from which lawyers and litigants can better predict and assess outcomes in business cases. A single Chancellor presides over the new Court. The Court may hear cases alleging at least \$50,000 in damages or seeking injunctive or declaratory relief and involving the internal affairs of businesses, or breach of contract, shareholder derivative or class action, intellectual property, commercial property or construction claims, among others. Business cases outside of Nashville may be transferred to the Business Court at the discretion of the Chief Justice of the Tennessee Supreme Court but only if all parties consent.

Tennessee Appellate Courts

An appeal from a judgment rendered by Circuit Court or Chancery Court is taken to the Tennessee Court of Appeals where there is an automatic right of appeal. The Court of Appeals has appellate jurisdiction over all civil appeals except workers' compensation cases.

The Supreme Court is the court of highest jurisdiction in Tennessee. It consists of five judges, and the concurrence of three judges is necessary for a decision. The Supreme Court has general power to take any action necessary to the orderly administration of justice within the state. Review of a lower court judgment by the Supreme Court is discretionary.

Tennessee Tax Court System

Tennessee has established an administrative procedure for handling state tax disputes. For all state taxes administered by the Department of Revenue (sales, franchise and excise, Hall income, inheritance and gift), the following procedures apply. A taxpayer faced with a new or unusual tax question, for a fee of \$500, may petition the department for a ruling. If a taxpayer disagrees with this ruling or another decision or audit from the department, the taxpayer's first recourse is to request informal adjustment by a supervisor. If informal procedures do not suffice, the taxpayer may take the question to the Chancery Court. There are two procedures available for appealing to Chancery Court. First, the taxpayer may pay the tax and sue for a refund within three years. Second, within 90 days of the final assessment, the taxpayer can file suit with or without paying the tax. Appeals are taken to the Court of Appeals. Further review can be sought from the Supreme Court, which has discretion in determining whether to hear tax appeals.

If a landowner desires to appeal the amount of property tax levied by the county or municipal government, it usually begins with the county or municipal Board of Equalization. An appeal then lies with the State Board of Equalization, and, if necessary, in the state court system.

IX. FINANCING INVESTMENTS

A. TAX-EXEMPT FINANCING IN TENNESSEE

Industrial Revenue Bonds

Industrial revenue bonds (IRBs) are securities issued by or on behalf of a county or a municipality for the purpose of purchasing land and constructing and equipping manufacturing and industrial facilities for loan or lease to responsible companies. Principal and interest on the bonds are payable solely from the lease rental or loan payment of the borrowing company. There is no profit to the issuing agency, but such agency may charge a fee, and the entity for whose benefit the bonds are issued is normally expected to pay the fees of the issuing agency's attorney. The payments are equal to amounts necessary to pay debt service on the bonds. If a lease structure is used, the company typically has the right to purchase the project for a nominal amount once the bonds are retired. The company requesting the bonds must have sufficient financial standing to assure prompt payment of rentals or loan payments over the life of the bond issue.

In Tennessee, such bonds are usually issued through an industrial development corporation established by a municipality or county pursuant to T.C.A. Section 7-53-101, et seq.

Interest on IRBs issued to finance manufacturing facilities and certain other specialized facilities, if structured in accordance with the requirements of the Internal Revenue Code of the United States, is exempt from federal income taxation and thus is normally lower than the interest rate on conventional financing.

Prior to a company's final selection of the site location and the general design of the industrial project, its representatives should meet with representatives from the industrial development corporation. The issuance of industrial revenue bonds requires the involvement of a specialized lawyer known as a "bond counsel" and usually an investment or commercial banking firm to act as underwriter for or purchaser of the bonds and a bank to act as trustee for the bondholders. The bond counsel, the underwriter or bank and the trustee bank are normally selected by the company. If the bond counsel and the underwriter or bank have been selected, they should be included in the initial meeting with the issuer.

The issuer is then requested to take action to evidence its intent to issue the bonds. This action is sometimes referred to as an inducement resolution, official action or a reimbursement resolution.

Although the industrial development corporation will be the nominal issuer of the bonds, the substantive economic terms are typically agreed upon by the company and the underwriter. Some of the more important terms are:

- security for the bonds;
- the term of the loan or lease;
- the redemption feature of the bond issue;
- the amount of the underwriting compensation;
- whether any credit enhancement, such as a letter of credit, will support the bond issue; and
- the interest rate (which may be a fixed rate or a floating rate).

The bond counsel prepares the bond documentation for review and agreement by the issuing authority, the company, the trustee bank and the underwriter. The bond underwriter then submits a firm agreement to purchase the bonds and generally the closing of the bond issue occurs several weeks thereafter. At the closing, the purchase price of the bonds is deposited with the trustee bank and the company may then direct the trustee bank to apply such money to the costs of its project or to reimburse the company for costs of the project that may have already been incurred.

Some of the requirements of the Internal Revenue Code which must be met in order for the interest on the bonds to be tax-exempt are:

1. 95% of net proceeds of issue must be spent on depreciable property or land - proceeds cannot be used to finance inventory or provide working capital.

2. \$10,000,000 limitation on bonds and \$20,000,000 limitation on certain capital expenditures in the relevant city or county.
3. \$40,000,000 limitation on IRBs issued anywhere in United States by company and related parties.
4. Must have an allocation of state volume cap.
5. Bond not tax-exempt if purchased by a substantial user of the facilities being financed.
6. Maturity may not exceed 120% of the weighted average life of the facilities financed with the issue.
7. No more than 25% of net proceeds can be used to acquire land.
8. None of the proceeds may be used to acquire existing property unless rehabilitation requirements met.
9. Must be approved by mayor or county executive after public hearing.
10. Issuance costs financed by issue may not exceed 2% of issue. Excess issuance costs can be paid from other sources. Cost of credit enhancement not counted against 2% limit but does not count toward 95% requirement as stated in requirement number one.

Property Tax Abatement

It is possible to obtain complete or partial abatement from property taxation in Tennessee if the industrial development corporation is willing to grant such concessions. Certain municipalities and counties in Tennessee have traditionally made such concessions available while others have not, but any tax abatement of more than 20 years requires the approval of certain state agencies. The only legal basis in Tennessee for such concessions is to have title to the project vested in an exempt entity such as a local industrial development corporation. The industrial development corporation can then lease the project to the company pursuant to a lease which would require the company to pay debt service on the bonds (if bonds are being issued to finance the project) and would give the company the right to purchase the project for a nominal amount upon retirement of the bonds. Such an arrangement should not result in the industrial development board being treated as the owner of the project for financial reporting purposes or federal income tax purposes, but companies should confirm that treatment with their accounting and tax advisors.

Notwithstanding that the effect of such an arrangement would be to cause the ownership of the project to be exempt from property taxation, most local communities in Tennessee will probably require some sort of in-lieu-of-tax payments. The amount of such in-lieu-of-tax payments will vary from community to community in Tennessee and would be negotiated between the company and the local industrial development corporation or municipality or county. Such a lease arrangement can also be used even if no bonds are being issued. Notwithstanding the fact that the industrial development corporation is treated as the owner of the project for property taxation purposes, care should be taken in structuring such arrangements so that the company's leasehold interest in the project is not separately subject to taxation.

Tax Increment Financing

Pursuant to T.C.A. Section 7-53-312, industrial development boards in Tennessee can issue bonds to assist in the development of industrial and commercial projects and such bonds can be repaid out of incremental property tax revenues from an area designated by the board which must include the project site. Before issuing such bonds, the board must obtain approval of each taxing entity (i.e., county, city and/or special school district) whose incremental tax revenues will be pledged to repayment of the bonds. Proceeds of such bonds can be used for infrastructure improvements, site acquisition and site preparation.

Other Incentives Programs for Economic Development

In addition to the assistance provided in the development of industrial facilities by industrial revenue bonds and property tax abatements, there are a number of other forms of financial assistance available through federal, state

or local sources for new companies and existing industry in Tennessee. Among these are the Tennessee Industrial Infrastructure Program, which allocates money to assist local governments in providing infrastructure to support new or expanding facilities. These include actual site improvements for such facilities, a Small Cities Community Development Block Grant and a revolving loan fund program available through nine development corporations in Tennessee, all of which are administered by the Tennessee Department of Economic and Community Development. In addition, the federal government, through the Tennessee Valley Authority, the Rural Electrification Administration and the Small Business Administration, can under certain circumstances make financial assistance available for new and expanding industries. For more details on these programs, contact the [Tennessee Department of Economic and Community Development](#).

B. COMMERCIAL BANKING IN TENNESSEE

Tennessee allows for, and regulates, a number of state chartered financial institutions, such as commercial banks, trust companies, and credit unions. In addition to chartered institutions, Tennessee licenses or registers other non-depository financial institutions, such as insurance premium finance companies, mortgage originators, title pledge lenders, and industrial loan companies. The compliance requirements placed on financial institutions under Tennessee law vary dependent on the type of institution.

C. OUT-OF-STATE FINANCIAL INSTITUTIONS IN TENNESSEE

Tennessee also has a number of out-of-state financial institutions operating in Tennessee. Recent Tennessee case law suggests that the National Banking Act preempts the requirement in Tennessee law that out-of-state U.S. chartered banks must obtain a certificate of authority from the Tennessee Secretary of State in order to conduct business in the state. However, foreign banks that lack a U.S. charter are still subject to the requirement under Tennessee law that foreign banks must obtain a certificate of authority from the Tennessee Secretary of State. Some of the larger U.S. chartered banks operating in Tennessee include:

- JPMorgan Chase Bank N.A.
- Wells Fargo Bank N.A.
- Bank of America N.A.
- U.S. Bank N.A.
- Branch Banking and Trust Company

D. FOREIGN BANKS IN TENNESSEE

No foreign bank maintains a prominent banking presence in Tennessee.

E. TENNESSEE SECURITIES ISSUES

1. *Registration of securities*
2. *Registration exemptions*
3. *Broker-dealer, investment advisor registration*
4. *Antifraud provisions*

Registration and Exemption

Under Tennessee's securities laws, sales of securities are unlawful unless the securities have been registered or an exemption from registration is available. "Security" is defined very broadly under Tennessee law, and may in some instances include an interest in a contract. Registration entails filing a registration statement with the Securities Division of the Tennessee State Department of Commerce and Insurance describing the business and the securities offered. Exemptions from registration exist for certain transactions and types of securities offered, including, among

others:

- For securities sold by certain nonprofit organizations;
- For offerings to Tennessee residents for no more than \$1,000,000 less the aggregate amount received for all sales by the issuer over the prior 12 months;
- For securities offered or sold only to “accredited investors,” as defined in Rule 501 of Regulation D under the Securities Act of 1933;
- For securities listed upon AMEX, NYSE, NASDAQ/NMS, or any other exchanges designated by the Commissioner of Commerce and Insurance, with some restrictions; and
- For “covered securities,” which are broadly defined to include securities
 1. listed on the NYSE, AMEX, or NASDAQ/NMS;
 2. listed on a national securities exchange that has listing standards determined by rule of the Securities and Exchange Commission to be substantially similar to those of the exchanges listed in (1) above;
 3. offered by the same issuer and at least equal in seniority to those listed securities noted in (1) and (2) above;
 4. issued by an investment company registered under the Investment Company Act of 1940
 5. sold to qualified purchasers (as defined by the SEC); or
 6. issued in connection with certain transactions exempt from registration under the Securities Act of 1933.

Entities with exemptions from registration must still, in some instances, file a notice of the offering with the Department of Commerce and Insurance. Securities for which (1) a registration statement under the Securities Act of 1933 or (2) a notification under Regulation A of the Securities Act of 1933 has been filed may, in some instances, be registered by coordination in Tennessee, and any security may be registered by qualification. Both securities registered by coordination and securities registered by qualification must have a registration statement containing specified information, which must be filed with the Securities Division of Tennessee’s Department of Commerce and Insurance and accompanied by any additional documents required by regulation. Securities registered by coordination will be effectively registered when the federal registration statement becomes effective. A registration statement for securities registered by qualification becomes effective 20 days following the filing or earlier or later, at the discretion of the Commissioner.

Broker-dealer, Investment Advisor Registration

Tennessee law also regulates the professionals who are active in the securities industry – brokers, dealers, investment advisors and their employees. Generally, these persons are required to register with the Securities Division of Tennessee’s Department of Commerce and Insurance, to meet certain educational and financial responsibility requirements and to follow certain business standards and practices designed to ensure protection of investors.

Antifraud Provisions

Similar to the antifraud provisions in the Federal securities laws, Tennessee law has various provisions in place to protect investors. Tennessee law forbids any person, in connection with the offer, sale or purchase of any security in Tennessee from:

- Employing any device, scheme, or artifice to defraud;
- Making an untrue statement of a material fact or omitting to state a material fact necessary to make the statements made not misleading; or
- Engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Tennessee law also forbids anyone who receives consideration from another person for the purpose of advising that person as to the value of securities from:

- Employing any device, scheme or artifice to defraud the other person;
- Engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon the other person; or
- Taking or having custody of any securities or funds of any client except as the commissioner may by rule permit or unless the person is licensed as a broker-dealer under Tennessee law.

In addition to these provisions, Tennessee law forbids any person from making, or causing to be made, an untrue statement of material fact or omission of a material fact necessary to make the statements made not misleading in any document filed with the Commissioner. Violation of these antifraud provisions may result in both criminal and civil penalties.

X. REAL ESTATE

Purchasing real estate in Tennessee is, in most respects, like purchasing real estate in any other state. Tennessee has its own peculiarities, but these generally are not significant. There is some regulation of real estate transactions on the federal level, but, except for environmental laws, laws regulating certain aspects of interstate land sales, requirements to report certain transactions, and laws designed to protect consumers in residential transactions, real estate is essentially a local affair.

A. OWNERSHIP

1. *Who can hold title in Tennessee?*
2. *When can an individual own property in Tennessee?*
3. *When can a domestic/foreign business entity own property in Tennessee?*
4. *What advantages does a corporation have when purchasing property?*
5. *What are the disadvantages?*
6. *When can domestic/foreign partnerships own property in Tennessee? Explain the advantages, the disadvantages.*
7. *When can limited liability corporations own property in Tennessee?*

Individuals and most business entities, including corporations, general and limited partnerships, and limited liability companies, may hold title in Tennessee. An individual may hold property in Tennessee, regardless of state residency or citizenship. A foreigner, resident or non-resident, may take and hold property in Tennessee and dispose of or transmit property the same as a native citizen; however, the foreigner may be subject to regulations under federal law (see details below).

To own property in Tennessee, domestic corporations and limited liability companies must first file certain documents with the [Tennessee Secretary of State](#). A domestic corporation must be duly organized and file its charter with the [Tennessee Secretary of State](#). A limited liability company must file its articles of formation and certificate of formation prior to acquiring property. After filing, domestic corporations and limited liability companies have the power to do all things necessary to carry out its business and affairs, including owning real property.

There are no restrictions or registration requirements in Tennessee on the ability of domestic partnerships to acquire and hold real estate. Property that is transferred to or acquired by the partnership, and not to the partners individually, belongs to the partnership. While limited partnerships and limited liability partnerships may also own property in Tennessee, those entities must first file an application with the [Tennessee Secretary of State](#) to establish their limited liability status.

There are no restrictions in Tennessee on the ability of foreign business entities to acquire and hold real estate. A foreign corporation, limited liability company or limited partnership must file a certificate of authority with the [Tennessee Secretary of State](#) if the entity's activity in Tennessee consists of anything more than the mere ownership of property. However, in the event that the entity acquires real property in connection with enforcing a deed of trust, the entity may manage or rent the property without filing for a certificate, so long as it is attempting to liquidate the investment and no office or other agency is maintained in Tennessee. While a foreign corporation or other entity must comply with the forms of conveyance required in Tennessee, its authority to make a conveyance is governed by the rules imposed upon it by the jurisdiction where such entity is organized.

Depending on the entity, there are certain advantages and disadvantages in connection with purchasing property. If, for example, a corporation obtains a loan secured by property, the loan is "non-recourse" as to the corporation's shareholders, and thus the owners are not personally liable for the debt in the event of a default. Conversely, if a partnership obtains a loan secured by partnership property, both the partnership assets and the partners own assets are subject to the claims of creditors in the event of a loan default.

Also, consider the sale and distribution of real property. For a corporation, gain from the sale or distribution of corporate real property is taxed at the corporate-level. If the corporation distributes the net cash from the sale to

shareholders, the individual shareholders are taxed by Tennessee's individual interest and dividend income tax. In contrast, when a general partnership distributes income from the sale of property to its partners, the distribution is only taxed at the individual level.

Regardless of the entity purchasing the real estate, the purchasing process involves three main steps: negotiation, financing and acquisition.

B. CONCURRENT OWNERSHIP

1. *Explain the advantages/disadvantages of the following:*

- *Tenancy in common*
- *Joint tenancy*
- *Tenancies by the entirety*

The main advantage of tenancy in common ownership is that an owner of a tenancy in common is free to alienate or encumber his or her interest without the consent of the other owners. Additionally, in Tennessee, a tenancy in common owner has the right to seek a judicial partition of the property to force the division or sale of the property, if desired. However, the freedom to transfer or encumber the property and the right to partition the property can also be seen as potential disadvantages, as an owner has no say in who else may become co-owners of the property or any way to prevent the partition of the property. Other than the risks that a co-owner may transfer his or her interest to an undesirable third-party or force an unwanted partition the property, the main disadvantage of a tenancy in common is that there is no restriction on a creditor's right to execute on a debtor's ownership interest in the property. Although not necessarily an advantage or disadvantage, it is important to note that this type of ownership does not include a right of survivorship, and therefore, upon the death of an owner, his or her interest would pass to his or her heirs or estate.

Although not necessarily an advantage or disadvantage, unlike a tenancy in common, a joint tenancy does provide for a right of survivorship, and therefore, to the extent one joint tenant dies, his or her interest in the property would be reapportioned between the surviving tenants, regardless of what the deceased joint tenant's will or other estate planning documents say. Like a tenancy in common, one advantage of the joint tenancy is that a joint tenant may freely transfer or encumber his or her ownership interest in the property or move to partition the property; provided, however, that such action would convert the joint tenancy with respect to the transferred interests into a tenancy in common with the other joint tenants. In addition to the disadvantages related to free alienation and partition rights discussed in relation to tenancies in common above, the major disadvantage of a joint tenancy is that a single joint tenant can sever the survivorship rights related to that joint tenant's interest by taking unilateral action to convert to a tenancy in common with respect to his or her ownership interest, such as selling or otherwise transferring his or her ownership interest, which defeats the main purpose for creating this type of joint ownership.

The major disadvantage to this type of ownership is that it is only available to spouses. Although not necessarily a disadvantage, a tenancy by the entirety cannot be severed unilaterally by one spouse. In a tenancy by the entirety, the property may only be transferred by both spouses acting together or by a single spouse following the death of the other spouse or following divorce (after which ownership automatically converts to a tenancy in common). The major advantage of holding property in a tenancy by the entirety is that, where the property is owned jointly by a debtor spouse and a non-debtor spouse, the creditors of a debtor spouse cannot attach to and sell the interest of the debtor spouse for so long as the non-debtor spouse remains living and may only attach to and sell the debtor spouse's survivorship rights. To the extent the debtor spouse were to die prior to the non-debtor spouse, the non-debtor spouse would not be subject directly to the claims of the deceased spouse's creditors.

C. SPOUSAL RIGHTS

1. *What rights does a spouse, partner have to properties in the event of death or separation?*
2. *What responsibilities does a spouse, partner have in the execution of mortgages?*

In the event of a divorce and provided that the spouses are unable to enter into a Marital Dissolution Agreement by

which the parties agree on the distribution of the assets, a judge will seek to institute an equitable distribution of the property acquired by either or both spouses during the course of the marriage. To the extent that one spouse owned real or personal property prior to the marriage or if such property otherwise qualifies as non-marital property, such property would be excluded from the equitable distribution determination.

In the event of one spouse's death, in Tennessee, real property (unlike personal property) transfers outside of the probate process (unless the decedent's estate is insolvent). To the extent that the real property was held as tenants by the entirety, it will transfer to the surviving spouse automatically upon the other spouse's death. In the event that the real property was held only by the deceased spouse and the decedent had a will, the real property will transfer in accordance with the decedent's will, unless the surviving spouse elects instead to take its elective share of the estate (which is based on the length of the marriage and stipulated by statute). To the extent that the real property was held only by the deceased spouse and the decedent died intestate, the surviving spouse will receive all of the real property to the extent there are no living children of the deceased spouse or in the event there are living children, the greater of a one-third ownership interest or a child's share of the estate. To the extent that the death of one spouse results in joint ownership of any real property, the form of joint ownership would be tenants in common, unless the will specifically calls for a joint tenancy.

In Tennessee, to the extent a deed of trust is required collateral for a transaction, a lender will typically require both the husband and wife to sign any deed of trust intending to secure a loan to either or both spouses, as lenders understand that, due to the nature of tenancies by the entireties and the related restrictions on creditor's rights, such lender may be barred from seeking the remedies provided in such deed of trust unless both spouses execute.

D. PURCHASE/SALE OF PROPERTY

1. Purchase

- *What are the procedures in drafting purchase agreements?*
- *What should a purchase statement in Tennessee include?*
- *What Tennessee legislation protects buyers against fraud?*
- *What kind of taxes are levied on a seller, buyer?*
- *How are taxes prorated in Tennessee between buyer/seller?*

2. Closing: Explain Tennessee procedures that affect the following:

- *Deed*
- *Bill of sale*
- *Mortgage*
- *Financing*
- *Closing statement*

Typically, a company establishing a facility or investing in real estate in Tennessee will either purchase or lease real estate. In either case, the first contact a company has will often be with a real estate broker. In some instances, a purchaser will hire its own broker. In other instances, the purchaser may elect to contact the real estate broker that has been hired by the seller to market the property to prospective purchasers. The broker's fee is computed on a percentage (usually around 6%) of the purchase price and is usually paid by the seller. If the purchaser and the seller each have a broker, such brokers typically split the agreed upon broker's fee.

In determining whether to buy real estate, the purchaser must consider the condition of the real estate and the uses to which it may be put. These questions form the basis for the conditions in the contract. A careful purchaser will want to evaluate the conditions of the land and any buildings and improvements that are located on the land. Most purchasers will have an engineering inspector assess the physical condition of the buildings and improvements. In addition, they will have an environmental consultant test the soil and the structures for the presence of hazardous wastes and identify potential governmentally protected wetlands. Because of the complexity of environmental laws and the stiff penalties that are imposed if there are violations, it is extremely important that the purchaser be satisfied with the environmental condition of the premises before the purchase is completed. Under many environmental laws, liability depends not just on fault, but may arise simply as a result of owning the land without regard to who caused the problem.

The purchaser will also want an attorney to review a survey and title insurance commitment with respect to the property. The title commitment will show what easements, covenants, restrictions, agreements, or liens have been recorded against the property. Often, certain items listed in a title commitment will be objectionable to the purchaser (e.g., outstanding liens, options to purchase the property, restrictions on use, etc.). The survey will be a drawing of the property, showing all improvements located on the property as well as the location of all title matters affecting the property (e.g., easements). Depending upon what provisions are in the contract, in most cases, the purchaser will inform the seller of all objectionable matters appearing in the title commitment and survey, and the seller will then inform the purchaser of which objectionable matters that the seller can have removed from the property.

Outside of the residential real estate context, the Tennessee legislature has not enacted specific antifraud protections or required seller disclosures for commercial purchasers. Accordingly, the burden to investigate any potential issues relating to the property to be acquired is very much on the purchaser. Residential purchasers are generally protected by the Tennessee Residential Property Disclosure Act (TRPDA). If applicable, the TRPDA requires sellers to make certain disclosures on a disclosure form, which the seller then provides to the purchaser before closing. Additionally, real estate agents and brokers are subject to the Tennessee Consumer Protection Act which prohibits real estate agents and brokers from engaging in unfair or deceptive acts or practices.

Transfer and Indebtedness Taxes

Tennessee imposes a tax upon the privilege of recording deeds to real property. As of January 1, 2006, the amount of the tax for warranty deeds (the most commonly used form of deed) is \$0.37 per \$100 of the greater of (1) the consideration for the transfer, or (2) the fair market value of the property. Tennessee also imposes a tax on the privilege of recording an instrument evidencing indebtedness, such as a deed of trust. The amount of this tax, as of January 1, 2006, is \$0.115 per \$100 of the indebtedness secured, except for the first \$2,000 of such indebtedness, which is exempt. Additional nominal recording fees are also charged on a per page basis by the Register's office in which documents are recorded. The purchaser or creditor typically pays the recordation tax for the deed or instrument evidencing indebtedness, respectively, but the parties may agree otherwise.

Apportionment of current property taxes and assessments may be made in any manner agreed to by the parties. Real property taxes and related taxes and assessments for the year of sale are imposed on the seller up to the date of sale. The purchaser's tax liability begins on the date of sale.

The actual transfer of title occurs at the "closing." Usually the purchaser, the seller, the lender and their lawyers all meet to close the loan, transfer title and pay the purchase price. These all occur simultaneously because the purchaser will not pay the purchase price without obtaining title to the property, the seller will not transfer title without the purchaser's paying the purchase price, and the lender will not lend the purchaser the money to pay the seller unless the purchaser can give the lender a lien upon the real estate. Because title is actually transferred at the closing, the seller wants to be assured of payment in good funds. Therefore, the purchaser must make arrangements in advance to have the funds available in the form of a "certified check," a "bank cashier's check," or in a bank account from which the money may be sent by wire transfer directly to the seller's or the closing agent's bank account.

At the closing, the seller delivers the "deed," which is the document that actually transfers title, to the purchaser. A "bill of sale," while allowed, is not a requirement for closing. The purchaser then signs the deed of trust and both documents are taken to the Register's office for the county in which the land is located.

Before the Register's office accepts the deed for recordation, a Notary Public must "acknowledge" that the deed was signed. Additionally, the parties must ensure that the following three essential items appear on the deed:

1. name and address of the individual who prepared the deed,
2. a legally sufficient description of the property, and
3. the source of the seller's title.

Finally, the deed must also contain a certificate by the purchaser as to the greater of the purchase price or value of the property. Similarly, a deed of trust or other instrument evidencing indebtedness must also include an attached

“acknowledgement” before it will be accepted for recordation.

At the same time a purchaser is investigating the property before the closing, the purchaser may also seek to borrow part of the acquisition costs (and perhaps the development and construction costs), unless it plans to pay for all of them out of its own funds. Traditionally the most common sources for financing have been commercial banks, insurance companies, pension funds and real estate investment trusts (REITs). For certain kinds of property, such as low-income housing, there may be some state or federal assistance available. A prospective lender will require a substantial amount of information in advance, both about the purchaser and the property. The lender will investigate the title to the property and the compliance of the property with local zoning ordinances. The lender will require a survey and information about the property’s compliance with environmental laws and regulations. If the purchaser is a corporation or partnership, the lender will also require evidence that the purchase is properly formed and has the authority to borrow and repay the money, together with a number of other documents and certificates.

Real estate lenders usually require their borrowers to purchase “title insurance” in connection with a loan. Upon the payment of a one-time insurance premium, the title insurance company will issue a “loan policy” that insures the priority of the lender’s lien against the real estate. If the purchaser pays a small additional premium, the title company will issue an “owner’s policy,” which insures the interest of the purchaser in real estate. Should the title be other than as stated in the title insurance policy, the title insurance company will reimburse the owner and the lender to the extent of their loss, but not in excess of the face amount of the policy. (If there is no loan involved, the purchaser may obtain an owner’s title insurance policy for a premium that is the same or slightly higher than the premium for the loan policy of the same amount.)

Federal Law Considerations

There are two federal laws of particular interest to foreigners who deal in real estate in Tennessee or any other state.

The Agricultural Foreign Investment Disclosure Act requires that any foreign person who acquires, disposes of, or holds an interest in U.S. agricultural land submit a report to the Secretary of Agriculture within 90 days after the date on which the acquisition or transfer of such interest occurs.

The Foreign Investment in Real Property Tax Act of 1980 imposes a tax on “foreign persons” who receive a gain on the disposition of U.S. real estate interests. In 2016, the Act was amended to add requirements for withholding 15% of the purchase price at the time of the sale of a real estate interest. The amount collected is then to be applied to the foreign taxpayer’s actual tax liability. There are several exemptions from the withholding requirement available. Most significantly, the purchaser may rely on a certificate of the seller, made under the penalty of perjury and containing the seller’s taxpayer identification number, that the seller is not a foreign person subject to withholding on the sale.

E. FORECLOSURES IN TENNESSEE

The loan and the promise to repay the borrowed money is set forth in a “promissory note” signed by the purchaser. The principal security for the repayment of the loan is a “deed of trust” on the real estate. While some other states use an instrument called a “mortgage,” Tennessee does not. By granting a deed of trust to a “trustee” designated by the lender, the purchaser is, in effect, conveying the property to the lender as security for the repayment of the loan. Once the debt has been repaid, the lender discharges the deed of trust and releases its interest in the land. If the purchaser defaults in the repayment of the promissory note, the lender may “foreclose” its deed of trust, subject to the debtor’s right to cure if a high-cost home loan is involved. The lender is required to publish certain statutory notices in a local newspaper, if any, or in various public places in the county. In addition, the notices must be sent to the debtor, and they must contain certain information, including the time and place of sale. After the required notices have been published, the property is sold by the trustee at a public auction, with or without division. The money received at the auction is applied to the repayment of the debt. When the high bid is not sufficient to repay the outstanding balance of the loan, there may be a “deficiency,” which the lender may collect by suing the owner. The deficiency shall be for the total amount of indebtedness prior to the sale plus certain costs, less the fair market value of the property at the time of the sale. If, however, the loan is “non-recourse,” the lender will look only to the

property for repayment. The debtor may redeem the property sold at any time within two years of the sale, unless such right of redemption was waived in the deed of trust. The debtor need only pay the purchaser of the property the amount bid or paid, along with interest.

F. LAND CONTRACTS

Once the purchaser identifies a site that fits its requirements, the purchaser tenders a written “contract of purchase and sale” to the seller. Oral agreements to buy and sell real estate are not enforceable. The respective attorneys for the purchaser and the seller usually negotiate the terms of the contract. In addition to including the basic business terms (e.g., location of property and purchase price), the contract often contains a number of conditions precedent to the purchaser’s obligation to purchase, such as the delivery of a commitment for an owner’s policy of title insurance, an updated survey of the property, an assignment and assumption of leases agreement, and/or an owner/seller affidavit and indemnity agreement. For example, the purchaser may not want to buy if there is a hazardous waste problem, if the local zoning regulations do not permit the intended use of the property, or if the purchaser cannot obtain satisfactory financing. Therefore, the purchaser often makes its obligations subject to the stipulation that these conditions will be satisfied prior to closing. The seller will expect the purchaser to request conditions, but because the seller may not want to keep the property off the market too long, the seller may insist that the purchaser either waive the conditions or terminate the agreement within a relatively short time period. A purchaser, upon payment of a negotiated sum of money to the seller as consideration and security, often has a specified time (often between 30 and 90 days for purchases of existing buildings and often considerably longer if the purchaser is contemplating construction) to investigate the land (including the right to conduct any nonintrusive tests and reports) and decide whether to proceed with the purchase. Should the purchaser decide during this time period not to proceed with the purchase, the purchaser may terminate the contract and receive a refund of the money paid to the seller, minus a small amount that is paid to the seller as consideration for entering into the contract. If the contract is not terminated by the buyer, the money paid to the seller is applied toward the purchase price.

G. EASEMENTS

An easement is a nonpossessory right or privilege that entitles the owner of some use of the property of another landowner for a specified purpose. Separate and distinct from the ownership of the land itself, which allows someone to possess and enjoy a parcel of land, the owner of an easement is entitled only to some use out of or over the land subject to the easement. The right to use another’s property created by an easement most commonly takes the form of a right-of-way.

Easements are categorized as either affirmative or negative easements. Affirmative easements entitle the holder to enter upon a parcel of land and make an affirmative use of it. Negative easements do not grant the holder the right to enter upon a parcel of land, but, however, entitle the holder to compel the landowner to refrain from engaging in activity on the land that otherwise, absent the easement, the landowner would be privileged to do. Easements are further categorized as either “appurtenant” or “in gross.” An easement is appurtenant if it involves two parcels of land and benefits a particular parcel of land at the burden of the other. Appurtenant easements are not separate from the rights in the land and, therefore, absent a transfer of the easement by the holder to the burdened landowner, pass along with title to the land. An easement in gross is a personal right to use the land of another and, unlike an appurtenant easement, is independent of any ownership or possession of any other land. While Tennessee recognizes both types of easements, easements in gross are not preferred by the state courts.

Easements in Tennessee are typically expressly created by agreement, grant or reservation, but may also by implication, prescription, estoppel, eminent domain or necessity. Express easements, whether by agreement, grant or reservation, must be evidenced by a signed writing and, thus, are typically created by deed, will or contract. Implied easements, prescriptive easements, easements by eminent domain and easements by estoppel are judicially created easements that fall outside the written requirement.

Practically, a grant of an express easement must contain all the formalities as a deed. The document creating the easement should give an accurate description of the right conveyed and must be in writing. Furthermore, the docu-

ment that conveys or creates an easement should be recorded in the Register of Deed's office for the county in which the parcel of land subject to the easement lies.

Before the Register's office accepts an easement-creating document for recordation, a Notary Public must "acknowledge" that the document is signed by the entity or individual acquiring the easement. Additionally, the parties must ensure that the following three essential items appear on the document:

1. the name and address of the individual who prepared the document,
2. a legally sufficient description of the easement, and
3. the source of the easement grantor's title.

Finally, the individual acquiring the right to the easement must certificate the purchase price or value of the easement, whichever is greater.

H. LEASES

1. *Residential*
2. *Commercial*

Commercial

A business enterprise that intends to locate in Tennessee might prefer not to tie up its funds by purchasing real estate, or the property in which it is interested may not be available for sale. The solution would be to lease property. Prior to leasing certain commercial property, prospective tenants may request a disclosure statement from the owner that describes the extent to which the owner believes the property is in compliance with local and state codes. Afterwards, the parties sign a lengthy and fairly complicated document - a lease - which gives the tenant the right to use the leased property and which provides that the landlord is entitled, in return, to receive a fixed amount of periodic rental payments. The lease also sets out the other conditions under which the property may be used. Leases usually describe who is responsible for maintaining the property, obtaining insurance and rebuilding the property if there is a casualty loss. Lease arrangements pursuant to which the tenant pays rent in return for space, but the landlord manages the building, are called "space leases." A "net lease," on the other hand, is a lease pursuant to which the tenant leases either all or a substantial part of a building and is responsible for all costs - repairs, replacements, insurance, and real estate taxes - connected with the building.

The tenant often negotiates an option that requires the landlord, upon the tenant's request, to extend the term if the tenant agrees to pay a new rent (sometimes equal to the then fair market rent for the premises). Many leases also provide that, as part of the rent, the tenant pays a proportionate share of the building's operating costs and real estate taxes. Leases may also require that the tenant pay an escalation in rent each year based upon increases in the Consumer Price Index or some other economic indicator. In many retail shopping center leases, the tenant also pays "percentage rent," which is computed as a percentage of sales.

Residential

Residential leases operate similarly to commercial leases; however, residential landlords and tenants are subject to Tennessee's Uniform Residential Landlord and Tenant Act. The Act is intended to simplify the law governing landlords and tenants, improve the quality of housing, and promote equal protection to all parties. Under the Act, landlords and tenants have certain obligations. Tenants must pay rent at the time and place agreed upon by the parties, subject to a five-day grace period beginning the day the rent was due. In addition, tenants must keep the premises as clean and safe as when they took possession, not deliberately or negligently damage the premises, and not engage in illegal conduct on the premises. Among landlords' obligations are holding tenants' security deposits in an account used only for that purpose, providing tenants the right to inspect the premises, and performing maintenance as necessary to keep the premises in a fit and habitable condition. If a breach occurs, there are certain steps the injured party may take to enforce or terminate the lease.

I. TENNESSEE ZONING

The purchaser will want to evaluate the property's "zoning." Each municipality and county in Tennessee typically has a zoning ordinance that divides it into districts and establishes the uses and dimensional requirements permitted in each district. For example, a municipality might require that manufacturing facilities only be located in a certain area. In addition, it may require that the facility conform to height, lot coverage, setback, and other dimensional requirements. The zoning ordinance will usually also regulate the minimum number of parking spaces that must be provided; the locations, size, and design of signs; and sometimes the landscaping and other decorative amenities. When the proposed project will not conform to the requirements of the zoning ordinance, the purchaser may, if the zoning ordinance permits, apply for a "variance" or "conditional use permit," each of which allows the purchaser to do something that otherwise would not be permitted under the zoning ordinance. In extreme cases, the purchaser may apply to have the property "rezoned," which requires amending the zoning ordinance by act of the local legislative body.

J. TENNESSEE MINERAL RIGHTS

Mineral rights are conveyed in the same manner as other interests in real property. (See, e.g., *Tennessee Valley Kaolin Corp. v. Perry*, 526 S.W.2d 488 (Tenn. Ct. App. 1974) (evaluating the parties' rights under a 30-year clay and mineral lease); *Layne v. Baggenstoss*, 640 S.W.2d 1, 4 (Tenn. Ct. App. 1982) (evaluating ownership of mineral rights reserved in deeds and stating that "Tennessee clearly permits a separation of strata and there may be a fee simple estate for a particular deposit or stratum")) Contracts entered on or after July 1, 2011, must identify the specific mineral interests in the conveyance, and only the minerals identified are conveyed. (TENN. CODE ANN. § 66-5-111.) For contracts transferring mineral interests prior to July 1, 2011, Tennessee courts apply common law principles to determine the intent of the parties. (Id.) Tennessee courts have found that the term "all mines, minerals, and metals in and under the land" includes oil and natural gas. (*Murray v. Allard*, 100 Tenn. 100, 43 S.W. 355, 359-60 (Tenn. 1897); see also TENN. CODE ANN. § 66-5-108(b)(1) defining "mineral interest" as "the interest which is created by an instrument, transferring either by grant, assignment, or reservation, or otherwise, an interest, of any kind, in coal, oil and gas, and other minerals.") A grant of mineral rights implies a right-of-way to mine and remove the minerals, including use of the surface for ancillary purposes. (*Sherrill v. Erwin*, 220 S.W.2d 878, 881 (Tenn. 1948)) However, the proposed extraction method must not unduly interfere with the surface owner's rights. (*State v. Lahiere-Hill, L.L.C.*, 278 S.W.3d 745, 755 (Tenn. Ct. App. 2008))

Tennessee statutes require mineral owners to identify their mineral interests with the property assessor in the county in which the interest is located. (TENN. CODE ANN. § 67-5-804(b)) Interests in "coal, oil and gas, and other minerals" are "extinguished" if unused for 20 years unless a statement of claim has been filed by the owner of the mineral interest. (TENN. CODE ANN. § 66-5-108(c)) If the mineral interest is extinguished, ownership reverts to the owner of the surface. (Id.)

In addition to automatic extinguishment of mineral interests, a surface owner "who will succeed to the ownership of any mineral interest upon the lapse thereof may commence such lapse." (TENN. CODE ANN. § 66-5-108(e)(1)) This can be initiated by filing a complaint of abandonment with the Chancery Court clerk and master in the county in which the mineral interest is located. (Id.) The form, procedures and notice requirements for such an action are prescribed by statute. (TENN. CODE ANN. § 66-5-108(e)) If the owner of the mineral interest does not answer the complaint after the required notice period, the court is required to enter an order vesting title to the mineral interest in the surface owner of the estate. (TENN. CODE ANN. § 66-5-108(e)(4))

K. EMINENT DOMAINS

Eminent domain is the governmental power or authority to take private property without the consent of the owner. The Tennessee Constitution expressly permits the exercise of eminent domain, but limits the power by prohibiting the taking of private property for private purposes and by requiring just compensation when private property is taken for public use.

In addition to state and local governmental agencies, certain private entities are authorized to exercise eminent domain in Tennessee. Pipeline corporations, gas and electric utilities, other entities engaged in the production or provi-

sion of gas and electric power, and corporations authorized by law to construct works of internal improvement (e.g., roads, canals, bridges, railroads, etc.) are authorized to acquire either ownership of private property or easements in private property as may be necessary in the construction, maintenance and operation of their facilities.

A governmental agency or corporation authorized by statute to exercise the power of eminent domain may take property by filing a petition (a condemnation action) in the circuit court of the county in which the land that the entity seeks to acquire lies. The petition must set out:

1. a description of the land and the extent of the rights to be acquired,
2. the name or names of the owners,
3. the purpose for which the land is sought, and
4. a request that a suitable portion of land or rights in the land be given to the entity filing the condemnation action.

All parties owning an interest in the land must be made defendants.

Prior to commencing any condemnation action, an appraisal of the property must be obtained. The appraisal should value the property considering its highest and best use, its use at the time of the taking, and any other uses to which the property is legally adaptable at the time of the taking. After the appraisal is conducted, the entity exercising the power of eminent domain must deposit with the clerk of the circuit court overseeing the action the amount determined by the required appraisal.

As an alternative to filing a condemnation action, an entity that possesses the power of eminent domain may consider negotiating with landowners for the appropriate easements or portions of land that it seeks to acquire. Negotiation has the potential to save much time and resources. As an additional consideration, the taking entity has greater leverage in negotiations with landowners because, should a landowner refuse to negotiate, the entity could simply file a condemnation action and bypass negotiation altogether.

XI. MISCELLANEOUS

A. REQUIREMENTS FOR QUALIFICATION TO DO BUSINESS IN TENNESSEE

Business entities not registered in the state of Tennessee must follow specific rules and procedures before they may qualify to do business in Tennessee. These requirements will apply to foreign corporations, limited liability companies, limited partnerships, and limited liability partnerships. Generally, a foreign business entity seeking to transact business in Tennessee must file for a Certificate of Authority with the Tennessee Secretary of State before doing business in the state.

Whether a foreign business entity is transacting business in Tennessee depends on the exact nature of the business transaction and the circumstances at hand. However, Tennessee law describes certain activities that do not constitute transacting business for this purpose. These activities include:

1. maintaining, defending or settling any claim or dispute,
2. holding meetings of the board of directors or shareholders, or carrying on any other activities involving internal corporate governance;
3. maintaining bank accounts;
4. maintaining offices or agencies for the transfer, exchange and registration of the corporation's own securities or appointing and maintaining trustees or depositories with respect to those securities;
5. selling through independent contractors;
6. soliciting or obtaining orders, whether by mail or through an employee, if the orders require acceptance outside Tennessee before they become contracts;
7. creating or acquiring indebtedness, deeds of trusts, mortgages, and security interests in real or personal property;
8. securing or collecting debts or enforcing mortgages, deeds of trust, and security interests in real or personal property;
9. owning, without more, real or personal property; provided, that for a reasonable time the management and rental of real property acquired in connection with enforcing a mortgage or deed of trust shall also not be considered transacting business if the owner is attempting to liquidate the owner's investment and if no office or other agency therefor, other than an independent agency, is maintained in this state;
10. conducting an isolated transaction that is completed within one month and that is not one in the course of repeated transactions of a like nature; or
11. transacting business in interstate commerce. One should note this list is not an exhaustive list of all the activities that do not qualify as "transacting business."

A foreign corporation's application for a Certificate of Authority must set forth several things before the Secretary of State grants a Certificate of Authority. The application must specify the name of the entity; the state or country of incorporation/registration; the date of incorporation/registration; the period of duration; the address of the entity's principal office; the address of the entity's registered office in Tennessee, including the county where the office is located, and the name of the registered agent at that office; the names and addresses of current business officers and current members of the board of directors; and an indication that the entity is for-profit. Furthermore, the application must be accompanied by an original certificate of existence duly authenticated by the Secretary of State or other official having custody of the corporate records in the state or country of incorporation. The certificate of existence must also not be more than two months old when the foreign business entity submits its application for a Certificate of Authority.

Provided a foreign business entity complies with the above requirements, and pays all necessary fees and taxes, the Secretary of State shall issue a Certificate of Authority qualifying the foreign business entity to do business in Tennessee. Even if a foreign business entity receives a Certificate of Authority, it must continuously maintain at all times in Tennessee a registered office and a registered agent, who may be either an individual residing in Tennessee,

a domestic corporation whose business office is identical with the registered office, or another foreign corporation authorized to transact business in Tennessee whose business office is identical with the registered office.

A foreign limited liability company (LLC) must comply with many of the same requirements at other foreign business entities described above, but must include additional information, such as the number of members of the LLC at the date of filing the certificate application.

Generally, a foreign business entity that transacts business in Tennessee without a Certificate of Authority will be barred from maintaining any proceeding or claim in a Tennessee court. Furthermore, the foreign business entity will be subject to fees in an amount equal to treble the amount of all fees, penalties and taxes, plus interest which would have been imposed on the business had it properly sought out a Certificate of Authority.

B. LICENSING AND REGULATORY REQUIREMENTS

A business entity with sales of more than \$3,000 looking to do business in Tennessee will most likely have to apply for either a minimal activity license or a standard business license from the county and/or municipal clerk where the business is registered. A business will not be allowed to operate until the license is obtained and posted in the business location.

If a business's taxable sales at any given location in Tennessee are more than \$3,000 but less than \$10,000, the business must apply for a minimal activity license in the county, and if applicable, the city where the business is located. The annual fee for the license is \$15 and it must be renewed each year.

If a business operating in Tennessee has taxable sales of \$10,000 or more, then the business must apply for a standard business license and must pay an additional business tax. The standard business license must be obtained through the county clerk before the business may operate within Tennessee. If a business is located in a city that imposes a business tax, then a business will also have to obtain a standard business license from the city official. A business with multiple locations must have a standard business license for each location in the state. Each license has an initial fee of \$15 and must be renewed annually. Businesses subject to the business tax can submit the tax electronically through the Tennessee Department of Revenue's website. The amount owed on the business tax will vary since it is based upon the gross receipts of the business.

C. APPLICABILITY OF TENNESSEE USURY LAWS

Tennessee Code 47-14-101 et seq. is the relevant statute covering usury laws. Section 47-14-103 provides the maximum interest rate. For all written contracts not subject to another statute that sets the maximum effect interest rate, the effective maximum interest rate is the "applicable formula rate." The Code, under Section 47-14-102(7) defines the formula rate as the lesser of 24% per annum or an annual rate of four percentage points above the most recent average prime loan rate that has been published by the Federal Reserve. The Tennessee Commissioner of Financial Institutions is required by the statute to provide notice, typically online, of the new applicable formula rate shortly after the Federal Reserve releases a new average prime loan rate. For all other transactions, including single payment loans for a term of one year or less, the maximum effective interest rate is 10% per year.

The willful collection of interest in excess of the applicable effective maximum interest rate is a Class A misdemeanor. A contract that includes excessive interest is on its face unenforceable. However, the lender may still bring an action against the borrower for the principal amount of the loan, plus any lawful interest. The statute of limitations on a claim for usury is three years from the date of the last payment of the same or foreclosure or court action, whichever occurs first.

D. NOTICE OF BUSINESS ACTIVITIES

As previously noted, most business entities such as corporations, limited liability companies and limited partnerships must file official documents with the Tennessee Secretary of State related to their incorporation or formation, or for a foreign entity, their authority to do business in Tennessee. One of the purposes of this filing requirement is to

provide notice to both the Tennessee government and general public of the existence of the entity and its business type. General partnerships are not required to file with the Secretary of State in order to form; however, general partnerships may voluntarily file for the purpose of providing public notice of basic information about the partnerships including the identity of each partner and must make a filing in order to elect into any limited liability status.

In addition to providing notice through public filings, corporations (both domestic and foreign), limited liability companies, limited partnerships, and limited liability partnerships must file an annual report with the Tennessee Secretary of State in order to maintain the privilege of transacting business within the state. Failure to timely file an annual report may result in the business being administratively dissolved and placed in inactive status. A business's annual report must generally set forth:

- the name of the entity and state or country of registration;
- the address of its registered office, the county in which the office is located, and the name of the registered agent at that office;
- the street address of the business's principal place of business,
- the names and business addresses of the directors and principal officers, or equivalent governing persons, and
- the federal employer identification number (FEIN) of the entity, or its corporation control number as assigned by the Secretary of State.

Annual reports may either be filed online with the Secretary of State's office or printed and mailed. For corporations the annual report fee is \$20. The initial filing fee and annual report fee for limited liability companies starts at \$300 and increases by \$50 per member over six members of the LLC, up to a maximum of \$3,000. Annual reports for business entities are due on or before the first day of the fourth month following the entities fiscal year closing.

Finally, most entities operating within the state of Tennessee must also give notice to the Secretary of State if there is a change in the business' mailing address, registered agent or principle address. A business may change its mailing address over email, regular mail or in person with the proper office. However, if a business wishes to change its registered agent or principle address it must file Articles of Amendment to its official filings with the Secretary of State. Article of Amendment forms for corporations, LLCs, LLPs and LPs can be found online at the Tennessee Secretary of State's website. A business filing Articles of Amendment must also pay a separate statutory filing fee.

E. RESTRICTIONS ON SPECIFIC PROFESSIONS

In addition to obtaining a business activity license, businesses practicing certain professions must also apply for an additional license to transact business from the Tennessee Department of Commerce and Insurance, which oversees the licensing and regulations of certain types of professions. The list of professions licensed by the Department of Commerce and Insurance include:

- accountancy
- alarm systems contractors
- architects and engineers
- auctioneers
- beauty pageants
- collections
- contractors and home improvement
- cosmetology and barber
- court reporters
- credit service businesses
- debt management
- fire permits and licensing
- funeral directors, embalmers and burial services
- geologists
- home inspectors
- insurance

- land surveyors
- locksmiths
- motor vehicle
- private investigation and polygraph
- private probation services
- real estate appraisers
- real estate commission
- scrap metals
- securities
- soil scientists

More information regarding the specific restrictions and licensing requirements for each profession can be found at www.tn.gov/commerce/section/licensing-regulations.

F. BUSINESS NAME REGISTRATION REQUIREMENTS

Tennessee law imposes certain requirements on the naming of any business entity, with specific requirements for each business entity type. For example, a corporation's name must contain the word "corporation," "incorporated," "company," or an abbreviation of one of those words. A limited liability company name must contain the words "limited liability company," or the abbreviation "L.L.C." or "LLC" and may not include the word "corporation," "incorporated" or any abbreviation of such word. Similarly, a registered limited liability partnership's name must include the words "registered limited liability partnership," or the abbreviations "L.L.P." or "LLP." Finally, a limited partnership is required to include in its name the words "limited partnership" or the abbreviation "L.P." and may also include other words such "association," "club," "company," "foundation," or "trust;" provided the name of the limited partnership does not include the word "corporation," "incorporated" or any abbreviation of such word. Provided a business complies with all of the statutory naming requirements, the business entity may transact business using an "assumed name," which is any name used by a business entity other than the entity's true, registered name. However, a business operating under an assumed name must still comply with the general name requirements and also notify the state of the assumed name.

Generally, any business entity registered in Tennessee or any foreign business entity authorized to transact business in Tennessee must select a business name that is distinguishable from any other name registered with the Tennessee Secretary of State.