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Guide to Doing Business

Indiana

Prepared by Lex Mundi member firm,
Faegre Baker Daniels LLP

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GUIDE TO
DOING BUSINESS IN INDIANA

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DOMESTIC GUIDE TO DOING BUSINESS IN INDIANA

I. GEOGRAPHY

A. Describe your state's geography, location and climate:

Long known as both the "Hoosier State" and "Crossroads of America," Indiana (population: 6.6 million) is one of eight states in the Great Lakes Region and lies within a day's drive of nearly two-thirds of the U.S. population. Indiana is bordered on the north by Michigan, on the east by Ohio and on the west by Illinois. Lake Michigan borders Indiana on the northwest, and the Ohio River separates Indiana from Kentucky on the south. Among the 50 states in the U.S., Indiana is the 38th largest by area (36,418 square feet of land and water) and 16th most populous (a resident being known as a "Hoosier").

Indiana has a humid continental climate, with cold winters and warm summers. The extreme southern portion of the state is within the humid subtropical climate area and receives more precipitation than other parts of Indiana. Temperatures generally diverge from the north and south sections of the state. In the middle of the winter, average high/low temperatures range from around 30 degrees F./15 degrees F. in the far north to 39 degrees F./22 degrees F. in the far south. In the middle of summer, there is generally a little less variation across the state, as average high/low temperatures range from around 84 degrees F./64 degrees F in the far north to 90 degrees F./69 degrees F. in the far south.

B. Describe your state's cultural/ethnic background:

Indiana, whose capital and largest city is Indianapolis (pop. 834,852), was admitted to the U.S. as the 19th state on December 11, 1816. Today, the "Hoosier State" has four metropolitan areas (Indianapolis, Fort Wayne, Evansville and South Bend) with populations greater than 100,000 and a number of smaller industrial cities and towns.

The racial and ethnic diversity of Indiana is 86.8 percent White American, 9.4 percent African American, 1.7 percent Asian, 1.7 percent biracial or multi-racial, 0.4 percent Native American and 0.1 percent Native Hawaiian and other Pacific Islanders. Hispanic or Latino of any race makes up 6.2 percent of the population. The Hispanic population is Indiana's fastest-growing ethnic minority, and 28.2 percent of the state's children under the age of 1 belong to minority groups.

The median age of Hoosiers is 37.0 years. Based on population estimates, 6.6% of the state's population is under the age of five, 24.5 percent is under the age of 18 and 13.2 percent is 65 years of age or older. Although the largest single religious denomination in the state is Catholic (747,706 members), most of the population are members of various Protestant denominations. The largest Protestant denomination by number of adherents is the United Methodist Church with

355,043. German is the largest ancestry in Indiana with 22.7 percent of the population. Persons citing American (12.0 percent) and English ancestry (8.9 percent) are also numerous, as are Irish (10.8 percent) and Polish (3.0 percent).

C. Describe your state's investment climate.

Indiana has a diverse economy with a gross state product of over $294 billion in 2013 – the 16th largest among U.S. states. Nearly 30% of Indiana's GDP came from manufacturing in 2013. The Calumet region of northwest Indiana is the largest steel producing area in the U.S. Indiana's other manufacturers include pharmaceuticals and medical devices, automobiles, electrical equipment, transportation equipment, chemical products, rubber, petroleum and coal products, and factory machinery. In 2015, Indiana was ranked fifth in the country for best places to do business according to Chief Executive Magazine (May 2015).

Despite its reliance on manufacturing, Indiana has been much less affected by declines in traditional Rust Belt manufacturing than many of its neighbors. Much of the heavy manufacturing, such as industrial machinery and steel, requires highly skilled labor, and companies are often willing to locate where hard-to-train skills already exist. Also, Indiana's labor force is located primarily in medium-sized and smaller cities rather than in very large and expensive metropolises. This makes it possible for companies to offer somewhat lower wages for these skills than would normally be paid. Companies often see in Indiana a chance to obtain higher than average skills at lower than average wages.

Indiana is home to the international headquarters and research facilities of pharmaceutical company Eli Lilly in Indianapolis, the state's largest corporation, as well as the world headquarters of Mead Johnson Nutritionals in Evansville. Overall, Indiana ranks fifth among all U.S. states in total sales and shipments of pharmaceutical products and second highest in the number of biopharmaceutical related jobs. In addition, northern Indiana is known as the “RV Capital of the World” because of the area's decades-long mass production of recreational vehicles.

Indiana also is home to professionals sports teams and athletic events, including the NFL's Indianapolis Colts, NBA’s Indiana Pacers, WNBA’s Indiana Fever, NASL's Indy Eleven and motorsports racing’s Indianapolis 500 and Brickyard 400.

D. List three events that have made state or national headlines within the last year:

Consistently Ranked as a Great Place for Business. Indiana continues to be nationally recognized for its strong business climate. After weathering the Great Recession as one of the only a few states to maintain its AAA bond rating, Indiana continues to attract top talent. The state was ranked sixth nationally in 2015 as the best place for business by Chief Executive Magazine (May 2015). In August of 2015, Indiana surpassed its all-time record for Hoosier employment.

(**www.astatethatworks.com**) Additionally, Indiana was rated a Top 10 state by the State Business Tax Climate Index in its 2016 Tax Foundation Rankings. (taxfoundation.org)

A Destination for Millennials. Furthermore, Indiana continues to gain national attention as an attractive destination for young professionals. Huffington Post and Conde Nast Traveler recognized Indianapolis as a top destination for millennials because of its affordability and cultural amenities (CondeNastTraveler.com, "America's Most Underrated Cities for Millenials, 2015), while Business Insider ranked Indianapolis at the second best city in the U.S. for culture, offering one cultural attraction for every 705 residents. (Receiving particular attention in the ranking are the globally recognized Children's Museum of Indianapolis and the renowned Indianapolis Motor Speedway and Hall of Fame Museum.)

Anthem, Inc. Acquisition of Cigna. At the Center of the U.S. Health Care Evolution, Indiana is home to Anthem, Inc., a major health insurer, which in 2015 announced its intent to acquire competitor Cigna in a $54 billion cash and stock transaction. The deal is expected to close in the second half of 2016, following state regulatory approvals. Experts indicate the Anthem/Cigna tie up is one of many health care consolidations in the U.S. that are being driven by the Patient Protection and Affordable Care Act, signed into law in 2010.

II. BUSINESS ENTITIES

A. Corporations

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Room E018
Indianapolis, Indiana 46204

Telephone: 317-232-6576
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Website: **www.in.gov/sos/business**

Indiana Economic Development Corporation
One North Capitol, Suite 700
Indianapolis, Indiana 46204

Telephone: 317-232-8800
Fax: 317-232-4146
Website: **www.ined.in.gov**

1. Incorporation of a Corporation in Indiana.

Corporations in Indiana are governed by the Indiana Business Corporation Law (the "IBCL") which can be found at Article 1 of Title 23 of the

Indiana Code ("I.C."). The IBCL provides that a corporation may be incorporated in Indiana through the filing of Articles of Incorporation with the Indiana Secretary of State. Two copies of the Articles of Incorporation must be presented to the Secretary of State's office along with a fee in the amount of $90 ($100 beginning July 1, 2016). Please note that the Indiana Secretary of State's forms still state that one original and one copy are required to be submitted for filing. However, the Secretary of State will accept original, facsimile or PDF copies for filing. Articles of Incorporation may also be completed online for a fee of $85 payable by Visa, MasterCard or Discover credit card or through an AccessIN account. The Indiana Secretary of State offers form articles (state form 4159) that are acceptable, but not required.

The Articles of Incorporation must be signed by one or more persons acting as incorporators (conformed signatures are accepted for electronic filings), be printed on 8 ½" by 11" white paper and contain the following information:

(i) a corporate name distinguishable in the records of the Secretary of State and containing the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd." or words or abbreviations of like import in another language;

(ii) the number of shares the corporation is authorized to issue (neither the number of authorized shares nor the par value of such shares affect entity reporting fees);

(iii) the street address of the corporation's initial registered office in Indiana and the name of its initial registered agent at that office; and

(iv) the name and address of each incorporator (the incorporator(s) may be, but is not required to be, a shareholder, director or officer of the corporation; the incorporator(s) does not need to be a resident of Indiana).

The Articles may also set forth:

(i) the names and addresses of the initial directors;

(ii) the purpose or purposes for which the corporation is organized;

(iii) provisions regarding the management of the business and affairs of the corporation;

(iv) provisions defining, limiting and regulating the powers of the corporation, its board of directors and its shareholders;

(v) a provision regarding the par value for authorized shares or classes of shares;

(vi) the imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions; and

(vii) any other provision not inconsistent with law.

A corporation's existence commences on the date the Articles are filed unless a later date is specified in the Articles. Unless otherwise provided in the Articles, the corporation's existence is perpetual. Following incorporation, if initial directors are named in the Articles, the initial director must call a meeting for the purpose of completing the organization of the corporation. In that meeting, officers are appointed, bylaws are adopted and any other appropriate business is conducted. If initial directors are not named in the Articles, the incorporator(s) must hold an organizational meeting to elect a board of directors who shall complete the organization of the corporation. If a corporation will not have a board of directors (as allowed under I.C. 23-1-33-1(c)), the subscribers shall hold an organizational meeting to complete the organization of the corporation.

The incorporators or the board of directors must adopt initial bylaws for the corporation. 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 Articles and generally contain provisions governing director and officer qualifications, powers and duties; voting; meetings of shareholders, directors and officers; filling of vacancies; committees; property holding and transfer; indemnification of directors and officers; bank accounts; fiscal year audits and financial reports; conflicts of interest; and amendment, merger and dissolution procedures.

Unless the Articles of Incorporation provide otherwise, the Articles may be amended by the board of directors without shareholder action to:

(i) extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(ii) delete the names and addresses of the initial directors;

(iii) delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State;

(iv) change each issued and unissued authorized share of an outstanding class into a greater number of whole shares or a lesser number of whole shares and fractional shares if the corporation has only shares of that class outstanding;

(v) change the corporate name by substituting the word "corporation," "incorporated," "company," "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution for the name;

(vi) reduce the number of authorized shares solely as the result of a cancellation of treasury shares; or

(vii) make any other change expressly permitted by this article to be made without shareholder action.

Other amendments to the Articles must be recommended to the shareholders by the board of directors and approved by the shareholders.

2. Recordkeeping and State Reports.

Under I.C. 23-1-52 *et seq.*, a corporation is required to maintain: (1) permanent records of all meetings or written consents of its shareholders, board of directors and committees of the board of directors; (2) appropriate accounting records; (3) a list of its shareholders; (4) articles or restated articles of incorporation and all amendments to them currently in effect; bylaws or restated bylaws and all amendments to them currently in effect; (5) all written communications to shareholders generally within the past three (3) years, including the financial statements furnished for the past three years; (6) a list of the names and business addresses of its current directors and officers; and (7) a copy of its most recent entity report filed with the Indiana Secretary of State.

Under I.C. 23-1-53-3, a corporation must file a business entity report with the Indiana Secretary of State every two years. The entity report is due no later than the last day of the anniversary month of the corporation's incorporation. For example, a corporation incorporated in August 2015 will have its first entity report due no later than August 31, 2017 and every two years thereafter by August 31. Reports may be filed in hard copy or online using the Secretary of State's electronic filing system. Fees are $30.00 if filed in hard copy or $20.00 if filed online. If a corporation fails to file its entity reports in a timely manner, it is subject to administrative dissolution at the discretion of the Secretary of State's office.

3. Shares.

The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation. Shares may be issued with or without certificates. In the case of fractional shares, corporations have the option of issuing the fractions or paying in money the value of fractions of a share. The Articles, Bylaws or a separate agreement between shareholders and the corporation may impose restrictions on the transfer of shares. The shareholders do not have a preemptive right to acquire the corporation's shares unless such a right is provided in the Articles.

4. Meetings and Voting of Shareholders.

A corporation must hold an annual meeting of the shareholders and may hold special meetings, provided notice describing the business to be conducted is delivered to all shareholders. If the Articles or Bylaws so provide, shareholders may participate in meetings through conference calls, videoconferences or any other means of communication so long as all shareholders participating may simultaneously hear each other during the meeting. Action which shareholders may take at a meeting of shareholders may also be taken via written consent signed by shareholders with sufficient voting power to approve the action. Each shareholder approving the action by written consent must date his, her or its signature and the last required signature must be made within 60 days of the first signature. If action is taken by less than unanimous written consent and at least 10 days prior notice was not provided to all shareholders, the corporation must notify all non-consenting shareholders of the action taken within 10 days of the effective date of the action. The signed written consent must describe the action taken and be delivered to the corporation for inclusion in the minutes or the corporate records.

Shareholders may vote by proxy. An appointment by proxy is valid for 11 months, unless a shorter or longer period is expressly provided. Unless otherwise provided in the Articles, voting for directors is by a plurality of the votes cast. Cumulative voting rights may, however, be provided for in the Articles. If cumulative voting is provided for in the Articles, directors may not be elected by less than unanimous consent. Shareholders may create voting trusts so long as such trust is not irrevocable for more than 10 years after its effective date. Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose.

Shareholder approval is required for important corporate issues such as election of directors, mergers, sale of substantially all assets and dissolutions.

5. Directors and Officers.

All corporate powers of a corporation are exercised under the authority of the board of directors. A director need not be a resident of Indiana or a shareholder of the corporation. Directors serve for a 1-year term unless the corporation elects to use staggered terms or the director is earlier removed or resigns. The Articles or Bylaws may provide for staggered terms by dividing the directors into either 2 groups each serving 2-year terms or 3 groups each serving 3-year terms. Directors may hold both regular and special meetings and may act through unanimous written consent describing the action taken and filed with the corporate records. Directors may participate in meetings through any means of communication by which all directors participating may simultaneously hear each other during the meeting.

A corporation must have at least one officer and have the officers described in its Bylaws elected or appointed by the board of directors. The same individual may simultaneously hold more than one office in a corporation.

6. Liability of Shareholders, Directors and Officers.

Shareholders are subject to personal liability if a court finds that the shareholders have not been operating the company as a corporation (by failing to observe corporate formalities, for instance). Shareholders must operate the corporation as a separate entity and avoid commingling the business of the corporation with personal business.

A corporation **may** indemnify an individual director against liability if the individual's conduct was in good faith and the individual reasonably believed the conduct was in the best interests of the corporation or not opposed to the best interests of the corporation. Unless otherwise limited by the Articles, the corporation **must** indemnify a director who was wholly successful on the merits or otherwise in defense of action resulting in the individual's conduct as a director. Unless provided otherwise in the Articles, an individual may also apply to the court for indemnification from the corporation.

Unless provided otherwise in the Articles, an officer of the corporation, whether also a director or not, is entitled to mandatory indemnification if wholly successful on the merits or otherwise in defense of action resulting in the individual's conduct as an officer. An officer is also entitled to apply for court-ordered indemnification. The corporation may indemnify an officer, employee or agent of the corporation to the same extent as a director.

A corporation may purchase and maintain insurance to provide for indemnification of its directors, officers, agents and employees.

7. <u>Domestication and Conversion.</u>

The IBCL permits the conversion of an Indiana corporation into any other type of entity (other than a non-profit corporation). In addition, a corporation organized in another state may become a domestic corporation (as long as also allowed under the foreign jurisdiction's laws). There are specific restrictions in the statute regarding financial institutions and insurance companies. The procedures for conversion and domestication are found in Article 38.5 of the IBCL.

8. <u>Merger and Share Exchange.</u>

Under the IBCL, one or more corporations may merge into another corporation if the board of directors of each corporation adopts, and its shareholders approve, a plan of merger. The plan of merger must set forth the name of each corporation planning to merge and the name of the surviving corporation, the terms and conditions of the merger and the manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property. The plan of merger may also set forth amendments to the Articles of the surviving corporation and other provisions relating to the merger.

A corporation may also acquire all of the outstanding shares of one or more classes or series of another corporation if the board of directors of each corporation adopts and its shareholders approve the exchange. The plan of exchange must set forth the name of the corporation whose shares will be acquired and the name of the acquiring corporation, the terms and conditions of the exchange and the manner and basis of exchanging the shares to be acquired. The plan may also set forth other provisions relating to the exchange.

A merger or share exchange is first approved by the board of directors, who recommend approval to the shareholders (unless there is a conflict of interest at the board level, in which case the plan would go straight to the shareholders).

The surviving corporation must file articles of merger or share exchange with the Indiana Secretary of State. Forms are available at the Indiana Secretary of State's website, or corporations may draft their own forms as long as they comply with statutory requirements.

Indiana permits a variety of cross-species mergers explicitly via statute. While different statutes govern depending on the type of entities merging, the basic requirements for all cross-species mergers similarly require that

(i) each entity is formed, organized, or incorporated under the laws of Indiana or any other applicable foreign jurisdiction if such entity is a foreign entity and otherwise abides by the corporate laws applicable to it, (ii) the merger does not violate either Indiana law or the law of any applicable foreign jurisdiction, (iii) the parties submit a plan of merger to the Secretary of State, accompanied with a $30 fee, and (iv) the entity obtains all shareholder, member, or partner consents (as applicable) that may be necessary.

9. <u>Special Transactions.</u>

A corporation may sell, lease, exchange or otherwise dispose of all or substantially all of its assets other than in the ordinary course of business only upon the recommendation of the board of directors and the approval of the shareholders if the disposition would leave the corporation without a significant continuing business activity. If the corporation retains a business activity that represented at least twenty-five percent of total assets at the end of the most recently completed fiscal year, and twenty-five percent of either income from continuing operations before taxes or revenues from continuing operations for the fiscal year, the corporation is conclusively considered to have retained a significant continuing business activity. I.C. 23-1-41-2(a).

The IBCL also regulates any acquisition of shares that provides the acquirer with established percentages of the voting power. Specifically, the voting rights associated with shares acquired in an acquisition of a controlling interest are limited if the issuer of the acquired shares has more than 100 shareholders, has its principal place of business, its principal office or assets having a fair market value of more than $1,000,000 within Indiana and more than 10% of its shares are owned by Indiana residents, 10% of its shareholders reside in Indiana or has 1,000 shareholders resident in Indiana. The provisions of the regulations can be found in Chapter 42 of the IBCL. Chapter 43 of the IBCL, in turn, regulates the combination of corporations with shareholders holding established percentages of voting power in the corporation.

Article 2 of Section 23 of the Indiana Code governs various securities matters. Chapter 3.1 of Article 2 sets forth the requirements for takeover offers. Various restrictions and requirements apply, depending on the size and registration of the company involved. All takeover offers are subject to a twenty business day waiting period after the first offer.

10. <u>Dissenters' Rights.</u>

Article 44 of the IBCL grants shareholders who dissent from significant corporate actions the right to obtain payment of the fair value of the shareholder's shares. The significant corporate actions triggering the right include certain mergers and share exchanges, most sales of all or substantially all of the corporation's assets, the approval of a control share acquisition and any other corporate action to the extent that the Articles, Bylaws or any resolution of the board of directors grants such a right.

11. Benefit Corporations.

Beginning on January 1, 2016, newly formed and existing Indiana corporations may elect to be treated as a "benefit corporation." A benefit corporation must have the purpose of creating a general public benefit, and may identify in its articles of incorporation specific public benefits as well. The benefit corporation generally follows the laws of a corporation, but the directors and officer must consider not only the short and long term interests of the corporation, but also consider the effects of any action or inaction on the interest of customers as beneficiaries of the public benefit, the community and societal factors, the local and global environment, and the ability of the benefit corporation to accomplish its general and specific public benefit purpose.

A newly formed or existing corporation may become a benefit corporation by ensuring that its articles of incorporation contain a statement that the corporation is a benefit corporation and contain the following statement: "By enacting this article, the State of Indiana does not endorse any particular benefit corporation, or approve or disapprove any of the purposes of a benefit corporation or any claimed general public benefit or specific public benefit, and no inference should be drawn from the acceptance of any filings with respect to a benefit corporation under I.C. 23-1.3, that the benefit corporation has or will in fact provide any general public benefit or specific public benefit."

The board of directors must designate an independent "benefit director" who has the power and duty to prepare an annual benefits report on whether the benefit corporation acted in accordance with its general (and specific) public benefit purpose, whether the directors and officers have complied with their expanded fiduciary duties, and an explanation for any instances of noncompliance. A benefit corporation may appoint a benefit officer who can prepare the annual benefit report for the benefit director. The report must include an assessment of the overall social and environmental performance of the benefit corporation against a selected third party standard, the name of the benefit director and benefit officer (if any) and an address for correspondence, the compensation paid by the benefit corporation to each director during the year, and a statement explaining any connection between the organization that established the third party standard selected, and the directors, officers, and any 5% or greater shareholder that may affect the credibility of using such third party standard. A benefit corporation must send its annual benefit report to each shareholder within 120 days following the end of the fiscal year of the benefit corporation, post the annual benefit report on the company's internet website (if any), and deliver a copy of the report to the Indiana Secretary of State.

A director or officer of a benefit corporation will not be personally liable for failure to provide a general public benefit or stated specific benefit nor subject to lawsuits for such failures and will have no duty to beneficiaries of the corporation's public benefits. The corporation, however, may bring suit via a benefit enforcement proceeding, and shareholders may initiate a benefit enforcement proceeding in a derivative lawsuit.

B. Partnerships

1. <u>General Partnerships.</u>

General partnerships are governed by the Indiana Uniform Partnership Act (the "UPA") which can be found at Article 4 of Title 23 of the Indiana Code. The UPA defines a partnership as an association of two or more persons to carry on as co-owners of a business for profit, including a limited liability partnership. (The term "person" includes individuals, partnerships, limited liability companies, corporations and other associations.) None of common property, part ownership or the sharing of gross returns establishes a partnership. However, the receipt of a share of profits is *prima facie* evidence that a person is a partner in the business. All property brought into the partnership or subsequently acquired on behalf of the partnership is partnership property. Property may be acquired in the partnership’s name. Every partner is an agent of the partnership for the purpose of its business, and the action of every partner usually binds the partnership. A partner’s right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. General partnerships are not required to register with the Indiana Secretary of State but may file for a "doing business as" name if desirable. All partners are jointly and severally liable for the debts and obligations of the partnership. On dissolution, the partnership is not terminated, but continues until the winding up of partnership affairs are complete. The dissolution of the partnership does not of itself discharge the existing liability of any partner.

2. <u>Limited Partnerships.</u>

Limited partnerships in Indiana are governed by I.C. 23-16 *et. seq*. A limited partnership is defined as a partnership formed by two or more persons under the laws of Indiana that has one or more general partners and one or more limited partners. A limited partnership is formed through the filing of a certificate of limited partnership with the Indiana Secretary of State. The certificate must include the name of the limited partnership (which must include the words "Limited Partnership" or the abbreviation

"L.P."), the address of the office and the name and address of the agent for service of process, the name and business address of each general partner, and the latest date upon which the limited partnership is to dissolve. The certificate may contain any other matters the general partners agree to include. A limited partnership must also have a partnership agreement; however, limited partnerships in Indiana do not have any reporting requirements (*e.g.*, business entity reports) with the Secretary of State.

In a limited partnership, a general partner has the rights and powers of, and is subject to the restrictions of, a partner in a partnership without limited partners. A limited partner is not responsible for the obligations and liabilities of the partnership (unless also a general partner) but must not participate in the control of the partnership's business. A limited partner who participates in the control of the business is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner. A limited partnership may indemnify a person made a party to an action because the person is or was a partner, employee, officer, or agent of the partnership against liability incurred in the action. Limited partnerships may merge with other limited partnerships, corporations, limited liability companies, or limited liability partnerships or may convert to another entity.

General partnerships are easy to establish and maintain but provide unlimited liability to partners for the debts and obligations of the partnership. Limited partnerships involve more complexity and expense with regard to the organization and maintenance of the entity but permit limited partners to avoid liability for the debts and obligations of the partnership.

3. Limited Liability Partnership.

To qualify as a limited liability partnership ("LLP"), a partnership must file a registration with the Indiana Secretary of State that is signed by one or more partners authorized to sign the authorization, states the name of the limited liability partnership (which must contain the words "Limited Liability Partnership" or the abbreviation "L.L.P." or "LLP" as the last words or letters of the name), state the address of the LLP's principal office, state the name of the LLP's registered agent and the address of the LLP's registered office, contain a brief statement of the business in which the LLP engages, states any other information that the LLP determines to include, and states that the filing of the registration is evidence of the LLP's intention to act as a limited liability partnership. The certificate must be accompanied by a $90 filing fee (increasing to $100 beginning July 1, 2016) ($85 if filed electronically).

A partner of a LLP is not personally liable for the debts, obligations or liabilities of the LLP. However, a partner of a LLP may be personally liable for the partner's own acts or omissions. A limited liability partnership is liable out of partnership assets for partnership debts, obligations, and liabilities. LLPs may merge into corporations, limited liability companies, limited liability partnerships and limited partnerships, or may participate in entity conversions.

LLPs function like general partnerships but provide extra protections for the general partners. Such protections include personal immunity for liability arising from the negligence and wrongful acts of other partners, unless the other partners were under their direct supervision. Thus, a partner's loss with respect to the LLP is usually limited to his/her investment in the partnership.

4. Limited Liability Companies.

Limited liability companies ("LLCs") in Indiana are governed by the Indiana Business Flexibility Act ("IBFA") which can be found in Article 18 of Title 23 of the Indiana Code. A LLC is formed in Indiana by filing Articles of Organization with the Indiana Secretary of State, setting forth the following information:

(i) the name of the LLC, distinguishable in the records of the Secretary of State and containing the words "limited liability company," "LLC" or "L.L.C.";

(ii) the name and street address of the LLC's registered agent and office in Indiana;

(iii) the period of duration of the LLC (*i.e.* whether perpetual or defined term);

(iv) a statement as to the management of the LLC (*i.e.* whether member or manager managed); and

(v) any other matters the members agree to include, including any matters that are required to be or may be included in an operating agreement.

The Articles of Organization must be signed by at least one person and such person does not need to be a member of the LLC or a resident of Indiana. The person executing the Articles of Organization may, but is not required to, sign in the capacity of "authorized person" or "attorney." Articles of Organization may be filed by hand-filing, mail-in, fax, or by using the Secretary of State's online registration system. Original signatures are not required and fax or PDF documents are acceptable provided the document is clear and able to be scanned legibly. Filing fee is $90.00 (increasing to $100.00 on July 1, 2016) for hard copy filings (hand, mail or fax) and $85.00 for online registrations. The Indiana Secretary of State offers form articles (State Form 49459) that are acceptable but not required.

Under I.C. 23-18-4-8, a LLC must keep at its principal office: (1) a list with the full name and last known mailing address of each member and manager, if any, of the LLC from the date of organization; (2) a copy of the articles of organization and all amendments; (3) copies of the LLC's federal, state, and local income tax returns and financial statements, if any, for the three (3) most recent years, or if the returns and statements were not prepared, copies of the information and statements provided to or that should have been provided to the members to enable them to prepare their federal, state, and local tax returns for the same period; (4) copies of any written operating agreements and all amendments and copies of any written operating agreements no longer in effect; and (5) unless otherwise set forth in a written operating agreement, a writing setting out the following: (a) the amount of cash, if any, and a statement of the agreed value of other property or services contributed by each member and the times at which or events upon the happening of which any additional contributions agreed to be made by each member are to be made; (b) the events, if any, upon the happening of which the limited liability company is to be dissolved and its affairs wound up; and (c) other writings, if any, required by the operating agreement.

A LLC must file a business entity report with the Indiana Secretary of State every two years. The entity report is due no later than the last day of the anniversary month of the LLC's organization. Reports may be filed in hard copy or online using the Secretary of State's electronic filing system. Fees are $30.00 if filed in hard copy (increasing to $50.00 beginning July 1, 2016) or $20.00 if filed online. If a LLC fails to file its entity reports in a timely manner, it is subject to administrative dissolution at the discretion of the Secretary of State's office. Owners of a LLC are referred to as members. The members may, but need not, enter into a written Operating Agreement to regulate or establish any aspect of the affairs of the LLC. The Operating Agreement typically includes provisions dealing with management of the LLC, allocation and distribution of the profits and losses of the LLC, transferability of interests in the LLC, and the method by which new members may be admitted. It may contain provisions to eliminate or limit personal liability of a member or manager for monetary damages for breach of duty as well as provide for indemnification of members or managers.

Unless otherwise provided for in the Operating Agreement, a member is not liable for damages to the LLC or to the other members for any action taken on behalf of the LLC unless the action constitutes willful misconduct or recklessness. A member, manager, agent or employee of a

LLC is not personally liable for the debts, obligations or liabilities of the LLC or for the acts or omissions of any other member, manager, agent or employee of the LLC, but may be personally liable for the person's own actions or omissions.

Unless otherwise limited by the Operating Agreement, a LLC may merge with or into another LLC in accordance with a plan of merger. Such merger is effected by filing Articles of Merger with the Indiana Secretary of State. Indiana also allows for foreign and domestic LLC mergers as well as cross-species merger and entity conversion.

For a voluntary dissolution, a LLC is dissolved and the LLC's affairs must be wound up when the first of the following occurs: (1) at the time or on the occurrence of events specified in the articles of organization or operating agreement; (2) when agreed in writing by a majority of members; or (3) by court decree of judicial dissolution. Articles of Dissolution must be filed with the Secretary of State.

A LLC may be administratively dissolved by the Secretary of State for: (1) failure to file business entity reports as required; (2) failure to maintain a registered agent and registered address for a period of more than 60 days; (3) failure to notify the Secretary of State of a change in registered agent or registered address within 60 days; or (4) the period of duration specified in the articles of organization has expired.

C. Sole Proprietorship

A sole proprietorship is not a business entity under Indiana law but rather is the description given to an individual engaged in business on his or her own without the benefit of a separate entity. Sole proprietorships do not need to be formed so there is no expense or formal organization that must be accomplished. All that is required is the commencement of doing business. Unfortunately, a sole proprietor is also responsible for all debts and obligations of the business. All of the personal assets and assets devoted to the sole proprietorship can be seized to make payments. A sole proprietorship itself cannot be sold since there is complete unity between the enterprise and its owner, but the assets used in the enterprise can be sold. A sole proprietorship terminates upon the death of its owner. . Because the sole proprietorship is not considered an entity, all income, losses, deductions and credits of the sole proprietorship are reported on the individual owner's income tax return.

D. Joint Ventures

A joint venture is not a statutory form of business entity in Indiana but is a term generally used to refer to a partnership organized for a specific limited purpose. Joint ventures can be accomplished as general partnerships through a written joint venture agreement or can be organized as one or more entities separate and apart from their owners. The tax consequences of the joint venture will depend on the form of the transaction. If the parties operate the joint venture through a contractual agreement with no new entity formed, each party will report items of gain, loss, deduction or credit on their tax return according to the rules of a general partnership, subject to any terms and conditions of the contract. Using this form of venture means the parties have unlimited liability as to the operations of the joint venture. If the joint venture parties form a new entity, the scope of potential liability and the income tax treatment of the parties will depend on the form of the new entity. For example, if the parties form a limited liability company, each party will have limited liability as to the operations of the new entity and, for tax purposes, all items of gain, loss, deduction, or credit of the new entity are reported on each partner's income tax return per the terms of the new entity's operating agreement.

E. Nonprofit Corporations

1. Not-For-Profit Statutes of 1935 and 1971.

As of August 1, 1993, Indiana nonprofit corporations organized under either of the general not-for-profit statutes passed by the Indiana General Assembly in 1935 or 1971 automatically became subject to the Indiana Nonprofit Corporation Act of 1991 (the "1991 Act"). I.C. 23-17-1-1(a) and Public Law No. 179-1991, Section 35. Virtually all nonprofit corporations in the state that were organized after August 1, 1991, also are covered by the new statute.

2. Key Provisions of the 1991 Act.

a. Articles of Incorporation and Bylaws. An Indiana nonprofit corporation becomes a legal entity when the incorporator(s) deliver articles of incorporation to the Indiana Secretary of State for filing. Pursuant to the 1991 Act, a nonprofit corporation must have articles of incorporation that include (i) a proper corporate name; (ii) a statement declaring the corporation to be a public benefit corporation, a mutual benefit corporation, or a religious corporation; (iii) the street address and name of the corporation's initial registered agent; (iv) the name and address of each incorporator; (v) a declaration of whether or not the corporation will have members; and (vi) proper provisions regarding the distribution of the corporation's assets upon dissolution. Details for regulating and managing the affairs of the corporation may be included in the articles of incorporation or in bylaws adopted by the board of directors.

b. Members. The 1991 Act defines the term "member" as a person who, on more than one occasion, has the right to vote for the election of a director under a nonprofit corporation's articles of incorporation or bylaws. An individual is not a member solely because he or she is a delegate or director or has the authority to designate a director. A nonprofit corporation is not required to have members.

c. Board of Directors. An Indiana nonprofit corporation must have a board of directors. A director must be an individual. The board must consist of at least three individuals, with the precise number specified or fixed in accordance with the corporation's articles of incorporation or bylaws. For a membership model nonprofit corporation, all directors except the initial directors shall be elected at the first annual meeting of members and each annual meeting thereafter, unless the articles of corporation or bylaws provide another time or method of election or that some of the directors are designated or appointed by another person. For non-membership model nonprofit corporations, directors are elected, designated, or appointed as provided in the articles of incorporation or bylaws.

d. Officers. Unless otherwise provided in articles of incorporation or bylaws, an Indiana nonprofit corporation governed by the 1991 Act must have a president, a secretary, and a treasurer. Bylaws or a board resolution must delegate to an officer the duty to prepare minutes of meetings and to authenticate the records of the corporation.

e. Corporate Standard of Conduct. As a general matter, a director of a nonprofit corporation under the 1991 Act is not liable for any action or inaction taken in that capacity unless both (i) the director has breached or failed to perform the duties of the director's office in compliance with the statute, and (ii) such breach or failure to perform constitutes willful misconduct or recklessness. Compliance with such duties under the 1991 Act, including a director's actions as a member of a committee of a nonprofit corporation, requires that the director act:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the director reasonably believes to be in the best interests of the corporation.

f. Tax Exemption. Indiana nonprofit corporations are not automatically exempt from federal, state, or local income, property, and other taxes. Exemption from tax is generally governed by statutes, rules, and regulations implemented and enforced by the Internal Revenue Service and the Indiana Department of Revenue.

F. Alternatives

1. Branch Office.

Most business entities in Indiana are required to have a principal place of business or registered office on file with the Indiana Secretary of State. Indiana business entities may also have one or more locations other than the principal or registered office where the company engages in business.

2. Independent Distributors.

Indiana has no statutory or regulatory scheme specifically aimed at defining or governing "independent distributors." However, an independent distributor may face unique regulatory requirements depending upon the type of business in which the distributor is engaged. Independent distributors must often attain a particular license or permit before commencing operations. For example, a business involved in the wholesale distribution of non-dairy food must comply with the regulations and requirements set forth by the Indiana Department of Health. Given such requirements, before initiating business, a distributor should contact Indiana's State Information Center for a comprehensive listing of regulated commercial activities.

State Information Center
Indiana Government Center South
402 W. Washington Street
Room W160A
Indianapolis, IN 46204-2725

Phone: 317-233-0800
Email: stinfo@sic.IN.gov

3. Licensing and Franchising.

Indiana regulates franchises under the Indiana Franchise Disclosure Act (I.C. 23-2-2.5-1 *et seq.*) and the Indiana Deceptive Franchise Practices Act (I.C. 23-2-2.7-1 *et seq.*). In order for these Acts to apply, a business relationship must qualify as a "franchise" under the applicable statutory definition. Specifically, a business relationship must meet the following elements in order to be regulated as a franchise under Indiana law: "(i) a franchisee is granted the right to engage in the business of dispensing goods or services, under a marketing plan or system prescribed in substantial part by a franchisor; (ii) the operation of the franchisee's business pursuant to such a plan is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and (iii) the person granted the right to engage in this business is required to pay a franchise fee" (I.C. 23-2-2.5-1(a)). Furthermore, certain franchises may be exempt from the Indiana Franchise Disclosure Act under I.C. 23-2-2.5-3.

The Indiana Franchise Disclosure Act requires that any person wishing to offer or sell a franchise (provided the franchise is not exempt under the Act) (i) register with the Indiana Securities Commissioner on the notification form prescribed by the Commission (I.C. 23-2-2.5-10.5) and (ii) provide to any prospective franchisee a disclosure statement together with a copy of all proposed contracts relating to the sale of the franchise at least ten days prior to the execution by the franchisee of a binding franchise or ten days prior to the receipt by the franchisor of any consideration, whichever first occurs (I.C. 23-2-2.5-9). In addition, the Indiana Securities Commissioner may also request additional forms and documents to be submitted with the notification form, including, but not limited to, (i) a disclosure form (I.C. 23-2-2.5-13), (ii) consent to service of process (I.C. 23-2-2.5-24) and (iii) filing fee (I.C. 23-2-2.5-43).

If a business relationship falls within the definition of a franchise and the foregoing initial requirements are met, the Indiana Deceptive Franchise Practices Act will continue to regulate the conduct between franchisor and the franchisee both during and upon termination of their business relationship. For example, the Indiana Deceptive Franchise Practices Act expressly sets forth certain (i) contractual provisions which may not be included in any franchise agreement (I.C. 23-2-2.7-1) and (ii) actions with respect to franchises which constitute unfair practices or acts and are prohibited by Indiana law (I.C. 23-2-2.7-2). In addition, the Indiana Deceptive Franchise Practices Act provides that a franchisee may be terminated only for good cause and without bad faith and must be afforded 90 days' notice of termination (I.C. §§ 23-2-2.7-1 and 23-2-2.7-3).

Failure to comply with and violations of the Indiana Franchise Disclosure Act and the Indiana Deceptive Franchise Practices Act can subject the violator to various types of liability, penalties, damages and consequences, including, but not limited to: (i) an administrative cease and desist order from the Indiana Securities Commissioner, (ii) criminal liability, (iii) civil liability, or (iv) reformation of the franchise agreement. It is also important to remember that franchises may also be subject to federal law requirements, in addition to the applicable Indiana Acts.

4. <u>Sales Representatives.</u>

Indiana law addresses sales representatives in I.C. 24-4-7-4. A corporation, limited liability company, partnership, unincorporated association, estate or trust may operate as a sales representative. When a principal contracts with a sales representative to solicit orders in Indiana, the principal is itself deemed to be doing business in Indiana.

When a contract between a sales representative and a principal is terminated, Indiana law requires that the principal pay the sales representative any commissions due within fourteen (14) days of the time when payment would have been due under the contract. If commissions due are not paid, the principal may face treble damages. Moreover, if a principal makes a revocable offer of a commission to a sales representative and then revokes the offer, the sales representative must be paid the commission if: (1) the sales representative establishes that the revocation was for the purpose of avoiding payment of the commission; (2) the revocation happens after the sales representative attained a written order for the principal's product because of the efforts of the sales representative; and (3) the order is shipped to and paid for by the customer. (I.C. 24-4-7-7).

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 (FTC) 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. The Sherman Act contains very broad, open-ended language, and, as a result, court rulings have brought to life much of the Act’s practical application.

2. The Clayton Act of 1914.

Congress passed the Clayton Act to strengthen the Sherman Act. It provides more detailed provisions prohibiting specific anticompetitive activities. For example, the Act prohibits some corporate mergers, and certain 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, which amends certain sections of the Clayton 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. It also prohibits commissions or brokerage fees except for actual services rendered related to the sale of the relevant goods, wares or merchandise.

4. The Federal Trade Commission Act.

The FTC Act declares unlawful "unfair methods of competition" and "unfair or deceptive acts or practices" that may affect business commerce.

5. The Hart -Scott-Rodino Antitrust Improvements Act of 1976.

The Hart-Scott-Rodino Act is a set of amendments to the federal antitrust laws, and principally the Clayton Act, requiring, under certain circumstances, that a company proposing to merge with or acquire another company give prior notice of the proposed acquisition to the FTC and the Department of Justice (DOJ). Failure to report may result in very substantial fines, as well as divestitures or the company having to reverse the transaction in its entirety should the FTC or DOJ conclude that the combination was anticompetitive.

6. 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 attorneys’ fees and costs. 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 DOJ. Only the government can enforce the Federal Trade Commission Act antitrust provisions and the Hart-Scott-Rodino Act.

B. Regulation of International Trade and Investment

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

1. Restrictions on Foreign Investment.

Under a statutory provision commonly referred to as the Exon-Florio Amendment (Section 721 of Title VII of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800), 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 the proposed transaction constitutes a threat to the national security of the U.S. Congress has indicated that the term "national security" is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

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

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete an investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair national security. If the President makes such a determination, the Exon-Florio Amendment 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 foreign investment in U.S. businesses having facility security clearance to classified information. The purpose of this policy is to ensure that foreign owners cannot obtain access to critical technology or classified information that might undermine U.S. security or export controls. Executive Order 12829, as amended by Executive Order 13691, establishes the National Industrial Security Program, which is intended to safeguard such classified information. The Under Secretary of Defense for Intelligence ("USDI"), within the Department of Defense, implements this program through DOD Instruction 5220.22 and two publications: (1) the Industrial Security Regulation, DOD 5220.22-R, and (2) the National Industrial Security Program Operating Manual, DOD 5220.22-M ("NISPOM"). 48 C.F.R. § 4.402.

Chapter 2, Section 3, of NISPOM indicates that foreign investment in a U.S. business may cause USDI to revoke that U.S. business's security clearance unless certain steps are taken to reduce the risk that the foreign owner will obtain access to classified information. Assuming that the foreign owner will be in a position to gain "unauthorized access to classified information or adversely impact classified contract performance," the USDI may require, as a condition to continuation of the security clearance, that the foreign owner enter into an agreement approved by the Department of Defense, such as a voting trust agreement, a proxy agreement, Special Security Agreement, or Security Control Agreement.

2. 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 (the "BEA"), a part of the U.S. Department of Commerce. These reports are required pursuant to the International Investment and Trade in Services Survey Act, 22 U.S.C. §§ 3101-3108, as amended ("IITSSA"), and the regulations promulgated thereunder, 15 C.F.R. Part 801.

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

Under IITSSA, 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 BEA and on portfolio investments to the Department of the Treasury.

Under IITSSA, a "foreign person" is any person who resides outside of the U.S. or is subject to the jurisdiction of a country other than the U.S. A "direct investment" is defined as the ownership or control, directly or indirectly, by one person of 10% or more of the voting interests in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because IITSSA 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. Residential real estate held exclusively for personal use (not for profit-making purposes) is exempt from the reporting requirements.

The foreign investment in the U.S. must be reported on one or more BEA forms depending on the size and nature of the investment:

New investment in the U.S. by a foreign person must be reported on form BE-13 if the investment exceeds $3 million. The reporting obligation is on the U.S. entity at the top of the ownership chain (i.e., the U.S. entity that is owned by the foreign person), and that U.S. entity must report on a consolidated basis for all U.S. entities in which it directly or indirectly owns more than 50% of the outstanding voting interests. The purpose of the BE-13 is to capture new investment transactions when a foreign direct investment relationship is created or when an existing U.S. affiliate of a foreign parent establishes a new U.S. legal entity, expands its U.S. operations, or acquires a U.S. business enterprise. The initial report must be filed no later than 45 days after the date of the investment transaction. A response is required from entities subject to the reporting requirements of the BE–13, whether or not they are contacted by BEA.

Form BE-605 is a quarterly reporting form used to report the positions and the transactions between a U.S. affiliate and its foreign parents and between the U.S. affiliate and the foreign affiliates of the foreign parents. A BE–605 report is required for any U.S. affiliate that was established, acquired, liquidated, sold, or became inactive during the reporting period. Quarterly reports must be filed within 30 days after the close of each of the U.S. affiliate's calendar or fiscal quarter, or within 45 days if the report is for the final quarter of the U.S. affiliate's financial reporting year. Entities not contacted by BEA have no reporting responsibilities for the BE-605.

Form BE-15 is used to file an annual report with the BEA, which is due no later than May 31st of each year. Entities not contacted by BEA have no reporting responsibilities for the BE–15.

The BEA requires the filing of a comprehensive Benchmark Survey on Form BE-12 once every five years. A response is required from entities subject to the reporting requirements of the BE–12, whether or not they are contacted by BEA.

Failure to timely file the relevant reports with the BEA may result in the imposition of penalties. The BEA has the authority to impose civil penalties ranging from $2,500 to $32,500 and to seek an injunction compelling the violating party to comply. In addition, whoever willfully fails to file a report may be fined up to $10,000 and, if an individual, may be imprisoned for up to one year. Any officer, director, employee or agent of any corporation who knowingly participates in such violations may be fined up to $10,000 and imprisoned for up to one year.

3. <u>The Agricultural Foreign Investment Disclosure Act of 1978.</u>

The Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. § 3501 *et seq.* ("AFIDA"), was enacted to provide the U.S. government reliable data on the nature and magnitude of foreign investment in U.S. agricultural land. The information collected through AFIDA's reporting requirements is utilized to prepare periodic reports to Congress and the President regarding the effect of foreign investment in U.S. agricultural land on family farms and rural communities. 7 C.F.R. § 781.1.

AFIDA requires all "foreign persons" within 90 days of acquiring or transferring U.S. agricultural land, to file a report, on a Form FSA-153, with the county office of the Farm Service Agency of the Department of Agriculture. 7 C.F.R. §§ 781.3(a), (b). The Form FSA-153 requires detailed information about the foreign person and the investment, including information concerning the identity of the foreign person, the nature of the interest held, the details of the purchase or transfer, and the agricultural purposes for which the foreign person intends to use the land. 7 C.F.R. §§ 781.3(e)-(k). These reports are available for public inspection. Notably, AFIDA imposes no actual restrictions on foreign investment in U.S. agricultural land, only these reporting requirements.

Under AFIDA, a "foreign person" is defined to include, among other categories: (i) any individual who is not a citizen or national of the U.S. or who is not lawfully admitted to the U.S.; (ii) a corporation or other legal entity organized under the laws of a foreign country or which has its principal place of business located outside of the U.S.; or (iii) a corporation or other legal entity organized in the U.S. in which a foreign person, either directly or indirectly, holds 10% or more of an interest. 7 C.F.R. §§ 781.2(g), (k). "Agricultural land" means any land in the U.S. used for forestry production, farming, ranching, or timber production. This definition also includes any idle land if such land was last used, within the past five years, for farming, ranching, or timber production. 7 C.F.R. § 781.2(b). The definition does not, however, cover tracts of less than ten acres with annual gross receipts from produce not exceeding $1,000. Therefore, if, for example, a foreign person acquires a very small tract of agricultural land that produces minimal receipts, the reporting requirements of AFIDA will not apply to that acquisition.

4. Export Controls.

In general, U.S. export controls are more stringent and restrict a wider array of goods, services, software and technology than the export controls of most other countries. "U.S. Export Controls" include the following statutes: The Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (the "EAA"), the Arms Export Control Act, 22 U.S.C. §§ 2751 *et seq*. (the "AECA"), the Trading with the Enemy Act ("TWEA"), 50 App. U.S.C. § 1 *et seq*., the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 ("IEEPA"), the Atomic Energy Act, (42 U.S.C. Part 2011 *et seq*.), and regulations and executive orders promulgated thereunder. Except for exports to U.S. territories and possessions, exports from the U.S. of commercial products, technology, software or services may be subject to an export license, unless the exporter determines that no license is required for the export to that particular destination and end-user or an exception applies. A license is always required for the export of "defense articles" from the U.S. to any foreign country, and no license exceptions are available.

A number of U.S. agencies are involved in administering U.S. Export Controls, including the Bureau of Industry and Commerce ("BIS") of the Department of Commerce, the Directorate of Defense Trade Controls ("DDTC") of the Department of State, the Office of Foreign Assets Control ("OFAC") of the Department of the Treasury, the U.S. Nuclear Regulatory Commission ("NRC") and the Department of Energy ("DOE"). Generally, commercial exports of goods, related services, software and technology are regulated by BIS under the EAA, IEEPA and Export Administration Regulations ("EAR"). The DDTC is responsible for controlling the export of defense articles, related services and technical data with military capability. Military exports are regulated under the AECA and the International Traffic in Arms Regulations ("ITAR"). OFAC is charged with enforcing economic and trade sanctions against targeted foreign countries, regimes, and individuals. OFAC exercises its authority by virtue of the President's delegation of authority under IEEPA or TWEA and of specific legislation to impose controls on transactions and to freeze assets under U.S. jurisdiction. The NRC administers regulations on the control of the export and re-export of commodities relating to nuclear reactor vessels under 10 C.F.R. Part 110. The DOE administers regulations relating to the production of special nuclear materials under 10 C.F.R. Part 810.

Different statutes or regulations may define controlled goods, technology or services differently, depending upon the purpose and scope of the regulatory regime involved. For example, goods are defined as "items" listed on the Commerce Control List ("CCL") under the EAR for commercial exports, but as "defense articles" listed on the U.S. Munitions List ("USML") under the ITAR for military exports. Generally, both the export and "re-export" of a product may be covered by U.S. Export Controls, meaning when goods that originated in the U.S. are transferred from one foreign country to another foreign country. Finally, U.S. Export Controls apply not just to commercial products originating in the U.S., but also may apply to products manufactured overseas if they (i) are produced using controlled U.S. software or technology; (ii) are bundled or co-mingled with controlled U.S. software; or (iii) contain more than a *de minimis* content of a controlled U.S. commodity. There are no *de minimis* rules for defense articles, so foreign-made defense articles containing any U.S. controlled content are subject to ITAR.

An export license is an authorization which allows the export (or re-export) of particular goods, related services, software or technology. Whether an export license is required for a particular commercial product or related services, software or technology governed by the EAR depends on four determinations: (1) Classification – What is the item being exported? (2) Destination – Where is the item being exported? (3) End-User – Who will receive and use the exported item? (4) End-Use – What will the exported item be used for? For example, an exporter must determine whether the product is listed on the CCL under the EAR, whether the destination country is shown as controlled on the EAR's Commerce Country Chart, and whether any exceptions apply if there is a licensing requirement. Violations of the EAR can have significant criminal and administrative penalties, including denial of export privileges and fines. Therefore, U.S. persons, their foreign branches and in some cases, foreign subsidiaries should determine whether a license is required before an export takes place.

For some commercial products that would otherwise require a license to be exported, a license exception might be available under the EAR allowing export of the product without obtaining a license. For example, License Exception "GBS" authorizes export of certain commodities that would otherwise require a license to countries listed under the "Country Group B" list in the EAR's Country Groups Chart. If an export is eligible for a license exception, the designation of that license exception must be written on the export documentation.

Unlike exports of commercial goods and related services, software and technology under the EAR, an export license is always required for the export of "defense articles" regulated by ITAR. This is true regardless of the destination, end-use or end-user of the defense article. Defense articles are those products, technology, software or services listed on the USML under ITAR. No license exceptions are available for the export of defense articles. Similar to violations of the EAR, exporting defense articles in violation of ITAR can result in civil and criminal penalties, including incarceration.

The physical export of products is the primary focus of U.S. Export Controls, but these controls also apply to activities that constitute a release of technology or software to a foreign national, even if the transfer takes place *within* the U.S. The "release" can occur orally as well as through other means of communication and through visual inspection of equipment or facilities. This release is "deemed" an export to the home country of that foreign national or "deemed" a re-export if the release occurs in a third country. Consequently, before technology or software is "released" to a foreign national, the provider of such technology or software must determine whether an export license is required, and if it is required, obtain the license before releasing technology or software to that person.

The U.S. government agencies responsible for U.S. Export Controls are currently coordinating reforms to the U.S. Export Control system. The purpose of the reforms is to decontrol products currently classified as "defense articles" which no longer give the U.S. a military advantage. Those items and related services, software and technology are moving from ITAR to the EAR, which has resulted in a new classification on the CCL known as the “600 Series”. Generally speaking, the controls on products and related services, software and technology classified under the 600 Series are more stringent than on most other items on the CCL, but their removal from ITAR jurisdiction means that they will be less stringently controlled than “defense articles” on the USML. The U.S. Export Control reforms are occurring one category of items at a time, so the process is expected to take several more years to complete.

5. Foreign Trade Zones.

Foreign trade zones are secure areas in or adjacent to ports of entry which are treated as outside the customs territory of the U.S. In order to expedite and encourage trade, goods admitted into foreign trade zones are generally not subject to the customs laws of the U.S. until those goods are ready to be imported into the U.S. or exported. Foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, repacking, labeling, exhibiting and reshipping of merchandise.

Foreign merchandise may be admitted into a zone with "non-privileged status" or "privileged status." Merchandise with "non-privileged status" is classified for duty assessment at the time it is transferred out of the zone. It may make sense to admit merchandise as non-privileged when that merchandise can be manufactured within the zone into a new product with a lower duty rate. Merchandise with "privileged status" is classified at the time the privilege is properly applied for with the port director. It may make sense to admit merchandise as privileged when that merchandise has a lower duty rate upon admittance into the zone than it would as a finished product.

For foreign merchandise, foreign trade zones can also serve to defer the payment of duties. Duties are paid only once the goods are transferred out of the zone.

Foreign trade zones are created pursuant to the Foreign Trade Zones Act of 1934, as amended (19 U.S.C. §§ 81a – 81u) and are operated as public utilities under the supervision of the Foreign Trade Zones Board. The Foreign Trade Zones Board issues regulations covering the establishment and operation of foreign trade zones. 15 C.F.R. Part 400. U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.

6. Anti-dumping Law.

U.S. antidumping law includes parts of the Tariff Act of 1930, 19 U.S.C. § 1673 *et seq.*, as amended by the Uruguay Round Agreements Act, and as implemented by Section 351 of the Department of Commerce's antidumping regulations, 19 C.F.R. Part 351. U.S. antidumping law regulates international price discrimination, or "dumping," to ensure that domestic industries are not injured by unfair foreign competition. Dumping occurs when a foreign firm sells merchandise into the U.S. market at a lower price than the price it charges for a comparable product in its domestic market. Dumping may also occur in certain instances when a foreign firm sells merchandise in the U.S. at a price that is below the price it charges in other export markets or below the cost of producing the merchandise, after taking into account a profit margin. In addition, if the foreign seller is located in a non-market economy country, dumping may occur even if the price the foreign seller charges for a comparable product in its domestic market is the same as what it charges for the product in the U.S. To determine whether dumping has occurred, a comparison will be made between U.S. prices and a "surrogate" country. The difference between a company's U.S. sales price and the comparison market price or cost is called the "dumping margin." 19 U.S.C. § 1677(35)(A).

The Antidumping and Countervailing Duty Operations Unit of the Enforcement and Compliance Division of the U.S. Department of Commerce's International Trade Administration ("E&C") administers U.S. antidumping laws. Although the E&C may self-initiate a case, antidumping investigations are usually initiated when a party in an affected U.S. industry files a petition requesting an investigation. *See* 19 C.F.R. § 351.201. The E&C determines whether dumping is occurring, and the U.S. International Trade Commission ("ITC") determines whether the U.S. industry competing with the allegedly dumped product has been materially injured. If the E&C and ITC determine that dumping is occurring and that the U.S. industry is suffering material injury, an antidumping order is issued, instructing U.S. Customs and Border Protection to collect duties on the specific merchandise when it enters the U.S.

C. Indiana Law

1. <u>Indiana Antitrust Act.</u>

Indiana's Antitrust Act is codified at I.C. 24-1-2-1 *et seq*. Sections 1 and 2 of the Act are comparable to the federal Sherman Act., with Section 1 addressing combinations in restraint of trade and Section 2 dealing with monopolization. I.C. §§ 24-1-2-1 and 24-1-2-2. Because these provisions were modeled off of the Sherman Act, Indiana's Act "has been interpreted consistent with federal law interpreting 15 U.S.C. 1." *Rumple v. Bloomington Hospital*, 422 N.E.2d 1309, 1315 (Ind. Ct. App. 1981). As a result, Indiana courts often rely upon federal antitrust case law as persuasive authority in interpreting Indiana's Antitrust Act. *See, e.g.*, *City of Auburn Through Bd. of Public Works and Safety v. Mavis*, 468 N.E.2d 584, 585 (Ind. Ct. App. 1984); *Berghausen v. Microsoft Corp.*, 765 N.E2d 592, 594 (Ind. Ct. App. 2002), *trans. denied*.

With regard to Section 1 causes of action, a plaintiff "must prove a scheme, design understanding, contract, conspiracy or agreement . . . which had as either its purpose or effect an unreasonable restraint of trade." *Rumple,* 422 N.E.2d at 1315. To prevail on a monopolization claim, a plaintiff must prove a violation of the statute, an injury to the plaintiff's business or property proximately caused by the violation, and actual damages. *City of Auburn Through Bd. Of Public Works and Safety*, 468 N.E.2d at 585. In addition, a plaintiff may pursue a claim of attempted monopolization by proving that the defendant had a specific intent to monopolize, conduct manifesting that intent, and a dangerous probability of success in the relevant market. *Photovest Corp. v. Fotomat Corp*., 606 F.2d 704, 711 (7th Cir. 1979).

Indiana's Antitrust Act has two additional provisions for which there is no specific counterpart in the Sherman Act. *Brownsburg Community School Corp. v. Nature Corp*., 824 N.E.2d 336, 339 (Ind. 2005). One of these provisions, Section 3, makes it a Class A misdemeanor to restrain or restrict bidding for public or private works projects. I.C. 24-1-2-3. The other provision, Section 4, prohibits "collusion or fraud" among contract bidders. I.C. 24-1-2-4.

The Indiana Attorney General is vested with authority to bring an action on behalf of the state or a political subdivision for "injuries or damages sustained directly or indirectly" as a result of a violation of Indiana's antitrust laws. I.C. §§ 24-1-1-5.1, 24-1-2-5.1, 24-1-3-3.1, 24-1-4-5. In addition, injured parties can bring civil suits for the loss he or she has sustained by the defendant's acts constituting a restraint of trade or other violation of Indiana's Antitrust Act. I.C. §§ 24-1-1-5, 24-1-2-7, 24-1-3-4, 24-1-4-4. An individual who was a party to a contract or combination to restrain trade cannot recover damages. *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129 (Ind. Ct. App. 1980). As with the federal antitrust laws, in nearly all instances a plaintiff (including the Indiana Attorney General) can recover treble damages, attorneys' fees and costs. Ind. Code § 24-1-2-7. However, the Indiana Supreme Court has ruled that a plaintiff cannot recover treble damages against a governmental body under the Act. *See Brownsburg Community School Corp.*, 824 N.E.2d at 348. In addition to damages, plaintiffs may seek a permanent injunction to restrain a conspiracy to restrict and prevent competition and to fix prices to the detriment of the public. *See Fort Wayne Cleaners and Dyers Ass'n v. Price*, 137 N.E.2d 738, 739 (Ind. Ct. App. 1956).

In *Berghausen v. Microsoft Corp.*, 765 N.E.2d at 594-96, the Indiana Court of Appeals adopted the U.S. Supreme Court's holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which denied indirect purchasers the right to sue under the federal antitrust laws for lack of standing. This has been the only appellate opinion in Indiana addressing an indirect purchaser's standing. In 2008 the Indiana General Assembly amended the Antitrust Act and ancillary statutes to allow the Attorney General to sue for damages sustained *directly or indirectly* by the State of Indiana or its political subdivisions. However, these amendments do not confer standing on private indirect purchasers, and, consequently *Berghausen* is still binding precedent where private indirect purchasers are concerned.

2. <u>Consumer Protection Laws.</u>

a. <u>Indiana Uniform Consumer Credit Code.</u>

Indiana adopted the Uniform Consumer Credit Code, but Indiana's version (the "UCCC") now contains numerous non-uniform provisions. The UCCC establishes license and registration requirements applicable to entities that engage in consumer finance in Indiana, gives the Indiana Department of Financial Institutions (the "DFI") supervisory and enforcement powers over such entities, and regulates the substantive terms of "consumer loans," "consumer credit sales" and "consumer leases." The definitions of these terms are such that the scope of the UCCC is substantially the same as the scope of the federal Consumer Credit Protection Act. However, transactions secured by a first lien or security interest against a dwelling or residential real estate are exempt from many of the substantive provisions of the UCCC, and are regulated under other statutes (see "Mortgage Lending" below).

Most entities that engage in consumer lending (including taking assignments of consumer loans and direct enforcement of consumer loans) must be licensed by the DFI. Licensing also is required for entities engaged in consumer credit sales that are secured by subordinate liens or security interests against dwellings or residential real estate. The Nationwide Mortgage Licensing System and Registry ("NMLSR") has been designated as the sole entity responsible for certain licensing functions. In addition, persons engaged in consumer credit sales, consumer loans, and consumer leases, and persons who take assignments of and enforce such consumer credit sales, consumer loans, and consumer leases, are required to file a "notification" – a type of registration – with the DFI. Creditors who are required to file "notification" with the DFI (including all licensees) are also required to pay annual fees based on the volume of consumer loans, consumer leases, or consumer credit sales made in Indiana during the preceding calendar year.

The UCCC limits the rates of interest, fees, and other charges that may be imposed in consumer loans and credit sales. The UCCC also imposes certain substantive limitations on the terms of consumer loans, consumer credit sales, and consumer leases, such as restrictions on fees, prepayment premiums, and default charges, prohibition of wage assignments and confessions of judgment, limitations on end-of-lease obligations, and limitations on deficiency judgments in secured consumer transactions.

Although the UCCC once contained extensive disclosure requirements applicable to consumer loans, consumer leases, and consumer credit sales, they were replaced with a requirement that a creditor make the disclosures it is required to make under the federal Consumer Credit Protection Act, as amended, and regulations promulgated thereunder. The UCCC provides separate state law remedies (which are similar to the federal law remedies) for failure to give the required disclosures.

b. Small ("Payday") Loans.

The UCCC also contains a special set of rules applicable to "small loans." A "small loan" is a loan with a principal amount of at least \$50 and not more than \$605 (the maximum amount being subject to adjustment by regulation) in which the lender holds the borrower's check for a specified period, or receives authorization to debit the borrower's account after a specified period, i.e., a "payday" loan. Lenders making "small loans" must post a $50,000 bond for each location where small loans are made, up to a maximum that may be determined by the DFI. The bond is available to pay damages and penalties to consumers, and must remain in effect for two years after the lender ceases Indiana operations. Although "small loans" technically are "consumer loans," they are subject to special finance charge and fee restrictions, as well as limits on their payment terms, the amounts of such loans as a percentage of the borrower's income, and the total number and amount of small loans that a borrower may have outstanding. The UCCC also limits renewals of small loans, gives borrowers rescission rights, and contains a list of prohibited activities, including prohibited collection activities, prohibited contract terms, and prohibited lender remedies. A creditor in a small loan must make the disclosures it is required to make under the federal Consumer Credit Protection Act, as amended, and regulations promulgated thereunder. Lenders must post a specifically-worded notice in each business location advising customers of the perils of payday loans and that the customer has the right to rescind the loan, and must include that notice in loan documents.

c. Mortgage Lending.

Pursuant to the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008, Indiana requires creditors and mortgage loan originators to be licensed by the DFI and to be registered with the NMLSR. Although certain creditors are exempt from licensing, exempt creditors who employ licensed mortgage loan originators also must be registered with the NMLSR. Licensed mortgage loan originators must be employed by and associated with licensed creditors or exempt creditors who are registered with the NMLSR. Licensed creditors and exempt creditors who employ mortgage loan originators must be covered by surety bonds in amounts determined by the DFI reflecting the dollar amount of transactions they originate. Licenses may be revoked for cause, including failure to comply with any state or federal law, regulation, or rule applicable to first lien mortgage transactions. Licensees have certain reporting requirements and are subject to examination by the DFI. These requirements are created by Indiana's First Lien Mortgage Lending Act and implementing regulations.

The First Lien Mortgage Lending Act applies to "first lien mortgage transactions" that are secured by an interest in a dwelling in Indiana, or residential real estate in Indiana on which a dwelling is constructed or intended to be constructed, unless the debtor is not a resident of Indiana at the time the transaction is entered into and the laws of the debtor's state of residence require that the transaction be made under the laws of the state of the debtor's residence. A "first lien mortgage transaction" is a consumer loan or a consumer credit sale that is or will be used by the debtor primarily for personal, family, or household purposes and that is secured by a mortgage or a land contract, or another equivalent consensual security interest which constitutes a first lien on a dwelling or residential real estate upon which a dwelling is constructed or intended to be constructed. A "consumer credit sale" is a sale of goods, services, or an interest in land in which: (a) credit is granted by a person who engages as a seller in credit transactions of the same kind; (b) the buyer is a person other than an organization; (c) the goods, services, or interest in land are purchased primarily for a personal, family, or household purpose; (d) either the debt is payable in installments or a credit service charge is made; and (e) with respect to a sale of goods or services, either the amount financed does not exceed $53,000 (which amount is adjusted in accordance with the exempt threshold amount in federal Regulation Z) or the debt is secured by personal property used or expected to be used as the principal dwelling of the buyer. "Dwelling" means a residential structure that contains one (1) to four (4) units, regardless of whether the structure is attached to real property, including an individual condominium unit, cooperative unit, mobile home, or trailer, in each case, if it is used as a residence. "Residential real estate" means any real property located in Indiana on which a dwelling is located or intended to be constructed.

Although the primary focus of the First Lien Mortgage Lending Act is licensing and supervision of mortgage creditors and mortgage loan originators, it also establishes rules for timely delivery of pay-off statements and lender responses to short-sale offers, and prohibits prepayment fees in variable-rate loans. It requires lenders making reverse mortgages to obtain certification that prospective borrowers have received HUD-approved reverse mortgage counseling services. It proscribes various fraudulent or deceptive mortgage lending practices. Any violation of a state or federal law, regulation, or rule applicable to first lien mortgage transactions is a violation of the First Lien Mortgage Lending Act.

Indiana's "Home Loan Practices" law further regulates residential mortgage loans, other than home equity lines of credit and reverse mortgage transactions. Loans made by various federally-chartered and state-chartered financial institutions are exempt from all provisions other than those prohibiting deceptive acts, as are certain other specified loan types. The Home Loan Practices law prohibits and regulates various home loan lending practices that may be predatory or abusive, such as financing certain types of credit insurance, delaying crediting of payments, acceleration without material cause, and discrimination. It contains provisions like those in the First Lien Mortgage Lending Act regarding prepayment fees, pay off statements, and short sales. Loans in which the interest rates and fees payable by the borrower exceed certain thresholds are subject to additional restrictions, including prohibitions on negative amortization, limitations on prepayment penalties, and limitations on balloon payments. Such "high cost" home loans also are subject to additional disclosure requirements. The statute also establishes that the state is the sole regulator of the business of originating, granting, servicing, and collecting loans in Indiana and the manner in which such business is conducted, and preempts all regulation of such matters by political subdivisions.

It is unlawful to corrupt or improperly influence a real estate appraiser or an appraisal report, or to attempt to do so. Creditors are required to give mortgage loan applicants a notice advising them to report suspected violations of this prohibition to the Attorney General, and of the right to inspect the HUD-1 or HUD-1A settlement statement before settlement. Loan brokers and their principal managers, and mortgage loan originators, as well as members of their families may not own or control a majority of an appraisal company (see "Loan Brokers" below).

At least 30 days before filing a foreclosure action, the creditor (or servicer) is required to give the borrower a notice, in a prescribed form, to inform the borrower of the availability of foreclosure counseling. A borrower has the right to participate in a settlement conference with the lender, and a complaint for foreclosure must include a notice, also in a prescribed form, advising the borrower of that right. No notices are required if the borrower is not occupying the property as a primary residence, has defaulted under an earlier "foreclosure prevention agreement" (e.g., a forbearance, modification, or agreement for deed-in-lieu or short sale) or is prohibited by bankruptcy law in participating in a settlement conference.

d. Loan Brokers.

Indiana requires "loan brokers" and their "principal managers" and "mortgage loan originators" to be licensed, and also requires "mortgage loan originators" and principal managers of loan brokers to be registered with the NMLSR. A "loan broker" is "[a]ny person who, in return for any consideration from any source procures, attempts to procure, or assists in procuring a residential mortgage loan from a third party or any other person, whether or not the person seeking the loan actually obtains a loan." A "residential mortgage loan" for these purposes is a loan that is or will be used for personal, family or household purposes, and is secured by a mortgage, or other consensual security interest on a dwelling or other residential real estate on which a dwelling is constructed or intended to be constructed. A "mortgage loan originator" is an individual engaged in "origination activities" including taking mortgage loan applications and negotiating loan terms. "Principal managers" are individuals with at least three years of mortgage loan origination or financial services experience who have principal responsibility for supervision and management of the employees and business of a loan broker licensee. Mortgage loan originators and principal managers must provide proof of academic instruction on specific topics related to mortgage lending, pass written exams, and provide proof of continuing education each calendar year.

Notwithstanding the definition above, the following are not "loan brokers":

(1) banks, savings banks, trust companies, savings associations, credit unions, or other financial institutions regulated by the federal government or any state and regularly actively engaged in the business of making consumer loans that are not secured by real estate or taking assignments of consumer sales contracts that are not secured by real estate,

(2) insurance companies,

(3) persons arranging financing for the sale of the person's own product; or

(4) creditors licensed under the First Lien Mortgage Lending Act.

All contracts for the services of a loan broker, except for those that provide only for payment of referral fees by a lender or third party, must be in writing and be signed by the contracting parties and must contain a specific warning about oral representations by loan brokers. Loan brokers also are required to assign account numbers to all loan broker agreements and to maintain detailed records regarding their activities. Loan brokers are prohibited from collecting or soliciting any fee or other consideration until a loan is closed, except certain appraisal fees, credit report fees, title exam and/or title insurance fees, and other "bona fide third party fees." In all cases, they must be "customary and reasonable." The loan broker statute has a detailed list of "prohibited acts," including releasing personal information and violating federal consumer credit protection laws.

Any person who violates the loan broker statute in connection with a contract for the services of a loan broker is liable to any person damaged by the violation for actual damages, interest at the legal rate, and attorney's fees. If a loan broker violates any provision of the statute in connection with a contract for loan brokering services the contract is void, and the prospective borrower is entitled to receive from the loan broker all sums paid to the loan broker. Civil penalties up to $10,000 per violation may be imposed. Knowing violations of the statute carry criminal penalties. Each loan broker licensee must post a bond with the State to secure payment of damages to any person who is aggrieved by the licensee's violation of the loan broker statute.

e. Debt Collection.

Indiana does not have a statute in the nature of a little "Fair Debt Collection Practices Act" regulating the collection practices of persons involved in debt collection. However, Indiana does require collection agencies to be licensed. The term "collection agency" includes any individual, firm, partnership, limited liability company, or corporation engaged in soliciting claims for collection or collecting claims owed to another. Also, any such person or entity who uses a fictitious name, or any name other than his or its name, in the collection of accounts receivable with the intention of conveying to the debtor that a third person has been employed, is a "collection agency." Exempt persons include attorneys, persons regularly employed on a regular wage or salary in the capacity of credit men or in a similar capacity except as independent contractors, banks, (including trust departments), fiduciaries, financial institutions including licensees under the UCCC, licensed real estate brokers, and employees of licensed collection agencies. Collection agencies must post surety bonds for each location where they operate.

f. Credit and Foreclosure Counseling.

Providers of budget counseling, credit counseling, debt management, debt pooling services, or other debt and financial management services who enter into written agreements with consumers to disburse money or anything of value are required to be licensed and bonded as "debt management companies," regardless of whether the consumer pays for the services. (The NMLSR has been designated as the entity responsible for processing debt management company licenses.) Debt management services may be provided only pursuant to written agreements containing specific details about the terms of the debt management plan and the consumer's statutory termination and cancellation rights. Before entering into a debt management agreement, and periodically during the term of the agreement, a budget analysis must be performed to ensure the suitability of the plan for the consumer. The budget analysis must include documentation and verification of income, expenses, and debt. In addition, before entering into the agreement, the licensee must provide specific disclosures regarding other ways of handling debts, whether the licensee will be compensated by creditors, the effect of failing to perform the agreement, and potential tax consequences of debt forgiveness. Consumers have certain rights to reinstate debt management agreements after failing to make required debt payments. Debt management companies must create and maintain trust accounts to hold payments made by consumers, and are obligated to remit funds to creditors within specified time periods. Fees that may be imposed on consumers, as well as other practices, are restricted. Violators of the statutes may be subject to civil penalties of up to $20,000 per violation, as well as criminal penalties.

Persons who, for money or valuable consideration, sell, provide, perform, or represent that they can perform other types of credit services such as "credit repair," obtaining loans, forbearances, or lower interest rates on credit, or renegotiation, settlement, or modification of existing debt, are regulated as "credit services organizations." There are certain exemptions for depository institutions, non-profits, licensed real estate brokers acting in that capacity, attorneys licensed in Indiana acting in the scope of a law practice, loan servicers acting on behalf of a lender, and "debt management companies." Contracts made by credit services organizations must be in writing, and must contain a complete description of the services that will be performed and the results to be achieved, required payments, and a disclosure regarding cancellation rights given by statute. A credit services organizations must maintain a $25,000 bond and file it with the Attorney General. Certain specified deceptive acts and practices are prohibited and any violation of the relevant statutes is a "deceptive act" (see "<u>Deceptive Practices</u>" below).

A homeowner who enters into a contract with a "foreclosure consultant" who offers to perform services involving the prevention or postponement of foreclosure, allowing the homeowner to rent the residence during or after foreclosure, or giving the homeowner an option to repurchase the residence after foreclosure, may rescind the contract within 7 business days. Foreclosure consultants are forbidden to engage in certain practices, including receiving compensation prior to completion of the services as represented or agreed (unless the foreclosure consultant is a bonded credit services organization), receiving compensation that exceeds 8% of the amount of any loan the foreclosure consultant makes to the homeowner, or acquiring any interest in the residential property. Foreclosure reconveyance transactions, in which a "foreclosure purchaser" acquires an interest or lien on the residence during the foreclosure proceeding that would allow the purchaser to acquire title, and agrees to grant an interest back to the homeowner that allows the homeowner to possess the residence after the foreclosure, also are rescindable within 7 business days after the initial transfer to the foreclosure purchaser, and no conveyance document may be recorded until the rescission period expires. A foreclosure purchaser may not enter into a foreclosure reconveyance agreement if the purchaser has not "verified and demonstrated" that the homeowner has "reasonable ability" to perform the homeowner's purchase or rental obligations under the agreement. A foreclosure purchaser may not engage in any unfair conduct, or represent that the purchaser is acting in an advisory capacity to the homeowner, or helping the homeowner "save the residence" or avoid foreclosure. If property that is the subject of the foreclosure reconveyance agreement is sold within 18 months, the former homeowner is entitle to receive an amount not less than 66% of the net proceeds, and the purchaser is required to provide a detailed accounting of the basis for the amount of the payment. Foreclosure purchasers also must be bonded as credit services organizations. Violations of these provisions carry criminal penalties and are "deceptive acts" (see "Deceptive Practices" below). In civil actions, homeowners may recover attorney's fees, as well as treble damages for knowing or willful violations. Exemptions from these provisions exist for certain financial institutions; FNMA, FHLMC and any Federal Home Loan Bank, federal and Indiana government agencies; servicers for any of the foregoing; persons servicing or enforcing loans they own; and attorneys licensed in Indiana who represent a mortgagor.

g. Security Interests in Consumer Transactions under Revised Article 9.

Indiana adopted the model version of Revised Article 9 of the Uniform Commercial Code, effective July 1, 2001, as well as the 2010 Amendments, effective July 1, 2013 (with minor variations), including those provisions which relate specifically to consumers, consumer transactions, and consumer-goods transactions.

In addition, the Uniform Consumer Credit Code limits the types of collateral that may secure certain consumer loans, consumer leases, and consumer credit sales, and restricts the ability to cross-collateralize such obligations. It also limits the creditor's right to a deficiency judgment after realizing on collateral.

h. Rental Purchase Agreements.

Indiana regulates the terms of so-called "rental purchase agreements" and requires certain disclosures to be made in connection with such agreements. A "rental purchase agreement" is an agreement between a lessor and a lessee that (1) provides for the use of personal property (other than a dwelling) by an individual primarily for a personal, family, or household purpose, (2) has an initial period of four months or less, (3) is automatically renewable with each rental payment, and (4) permits the lessee to become the owner of the property. In addition, the director of the DFI may determine an agreement or transaction is a "rental purchase agreement" if the director determines it has been structured to avoid application of the statutes governing rental purchase agreements.

All rental purchase agreements are subject to contract format and disclosure requirements. The statute places a number of substantive limitations on the terms of rental purchase agreements and fees that may be imposed on lessees. For example, wage assignments, waivers of service of process, prejudgment garnishments, and confessions of judgment are prohibited. Motor vehicles or other titled property may not be the subject of a rental purchase agreement. The rights and remedies of the parties to rental purchase agreements are regulated in detail. A rental purchase agreement may not contain a provision that conflicts with the rights and duties imposed under the statute.

Lessors engaged in rental purchase agreements must file a "notification" with the DFI within 30 days after soliciting or entering into a rental purchase agreement and before February 1 of any subsequent year that the lessor solicits or enters into rental purchase agreements. A lessor who files notification must pay fees to the DFI with its initial notification, and for each place of business operated by the lessor on December 31 of the preceding year, with each annual notification subsequently filed. A lessor also is required to pay to the DFI all reasonable costs incurred by the DFI in connection with any examination of its books or records. The amounts of these fees are set by the DFI annually.

i. Deceptive Practices.

The Indiana "deceptive practices" statute prohibits certain acts or representations that constitute "deceptive acts" in "consumer transactions" and prescribes remedies for curing and compensating consumers harmed by such deceptive acts. For purposes of the deceptive practices statute, a "consumer transaction" is a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible (except securities and insurance issued by Indiana-licensed insurers), with or without an extension of credit, to an individual for purposes that are primarily personal, familial, charitable, agricultural, or household, or a solicitation to supply any of these things. The statute further includes in the definition structured settlement payments, unsolicited telephone advertisements, and collections (and attempted collections) of a debt by a debt collector. Additionally, some actions are expressly deemed “deceptive acts” by other Indiana consumer protection laws.

The "deceptive practices" statute divides acts into two categories: incurable and curable acts. A deceptive act is an "incurable deceptive act" if it is part of a scheme, artifice, or device with intent to defraud or mislead. The term includes failures by a transferee of a structured settlement to timely provide a true and complete disclosure statement to the payee. Unless a deceptive act is "incurable," a consumer may not bring an action against the supplier unless the consumer has given a written notice to the supplier within the sooner of: (1) six months after the initial discovery of the deceptive act; (2) one year following the consumer transaction; or (3) any time limitation, not less than 30 days, of any period of warranty applicable to the transaction. Further, the consumer may not bring an action unless the deceptive act becomes an "uncured deceptive act."

An "uncured deceptive act" is a deceptive act: (a) with respect to which a consumer has given the required notice; and (b) either no offer to cure has been made within 30 days after such notice, or the act has not been cured within a reasonable time after the consumer accepts an offer to cure. A "cure" is either: (a) an offer in writing to adjust or modify the consumer transaction to conform to the reasonable expectations of the consumer generated by such deceptive act and to perform such offer if accepted by the consumer; or (b) an offer in writing to rescind such consumer transaction and to perform such offer if accepted by the consumer.

A person alleging an uncured or incurable deceptive act may bring an action, subject to a two-year statute of limitations, for actual damages or $500, whichever is greater. The action may be brought either individually or as a class action, governed by the normal procedural rules for class actions. In either case, the court may award a reasonable attorney's fee to the party who prevails in the action, determined by the amount of time reasonably expended by the attorney and not by the amount of the judgment, although a contingency fee may be considered. For willful deceptive practices, a court may grant treble damages or $1000. In addition, the Attorney General may enforce the deceptive practices statute by injunction and actions for civil penalties, similar but not identical to statutory damages available in civil actions brought by individuals.

j. Data Security and Identity Theft Prevention.

A consumer may place a "security freeze" on the release of the consumer's credit report or credit score by a consumer reporting agency. Consumer reporting agencies must have electronic means for consumers to request security freezes and releases thereof. They are required to respond within specific time frames to a consumer's request for the placement or release of a security freeze, and must not charge a fee to place, temporarily lift, or permanently remove a freeze. When disclosing information in a credit report to a consumer pursuant to Section 609 of the federal Fair Credit Reporting Act, the consumer reporting agency also must provide a specific disclosure of the consumer's rights under Indiana law in regard to security freezes. If a consumer who has placed a security freeze applies for credit, the creditor must treat the application as incomplete if the consumer does not authorize release of the consumer report. Limited exceptions allow creditors and other persons with existing relationships with the consumer to obtain a consumer report even though a security freeze is in effect. Violations of these provisions may be subject to civil actions by both the consumer and Indiana’s Attorney General. Indiana law also permits a parent, or other representative, to request the placement of a security freeze on behalf of their minor child.

Extensions of credit to consumers may be made only after the creditor exercises reasonable procedures to verify the identity of the consumer, including compliance with federal Treasury regulations under the USA PATRIOT Act. Soliciting credit extensions from consumers who are not already credit customers by way of an unsolicited check that includes certain personal identifying information, or by way of an unsolicited credit card, is prohibited. Credit may not be denied to known victims of certain types of identity theft, unless the consumer has placed, and not temporarily lifted, a security freeze on the consumer's credit report.

A violation of any of these provisions is a "deceptive act" (see "Deceptive Practices" above).

The owner of a data base that includes certain personal information on consumers must maintain reasonable procedures to safeguard personal information. A data base owner must also notify consumers and the Indiana Attorney General when there is a breach of the security of data, specifically if unencrypted (or encrypted along with access to the encryption key) personal information was or may have been acquired by unauthorized persons. Depending upon the number of consumers involved and cost factors, the notice may be given by posting a notice on the data base owner's website and by notice to major news media in the geographic area where Indiana residents affected by the breach reside. If more than 1,000 consumers are affected, information also must be given to consumer reporting agencies. Data base owners who are in compliance with certain federal laws, including the USA PATRIOT Act, the Fair Credit Reporting Act, and HIPAA, in regard to their security plans and procedures and security breach disclosure procedures, are exempt from these requirements. A person who maintains a data base, but is not the owner, also must notify the owner if the person discovers that personal information was or may have been acquired by an unauthorized person.

k. Home Improvement Contracts.

Indiana law regulates home improvement contracts in which the contract price exceeds $150. "Home improvement" is broadly defined as any alteration, repair, or other modification of residential property, including those involving the exterior and roof. A home improvement supplier must provide a completed home improvement contract to a consumer before it is signed by the consumer. The contract must meet certain minimum requirements, such as including a reasonably detailed description of the proposed home improvements or a statement that the specifications will be provided to the consumer before commencing any work, the approximate starting and completion dates of the home improvements, a statement of any contingencies that would materially change the approximate completion date, and the home improvement contract price. The home improvement supplier may not require the consumer to sign the home improvement contract, or make any down payment, before the supplier has agreed unequivocally by written signature to all of the terms of the home improvement contract. The home improvement supplier must give a fully executed copy of the home improvement contract to the consumer immediately after the consumer signs it, and it must show the dates that the supplier and the consumer executed it. Other special rules apply if the contract is entered into as a result of damages, loss, or expense that are covered by insurance. A violation of this statute is a "deceptive act" that is actionable by the Attorney General or by a consumer (see "Deceptive Practices" above).

l. Cooling Off Periods for "Home" Sales.

Indiana has two statutory provisions that afford consumers the right to cancel transactions that occur in their homes or at a location that is not the seller's principal place of business. One applies only to transactions that are "consumer credit sales" under the UCCC, but the other has broader application.

The UCCC grants a consumer the right to cancel a "home solicitation sale" by requiring compliance with the Federal Trade Commission's "Door-to-Door Sales" Rule in such transactions. A "home solicitation sale" is a consumer credit sale of goods (other than farm equipment) or services in which (1) the seller or a person acting for him engages in a personal solicitation of the sale, including a telephone solicitation or solicitation at a residence of the buyer, resulting in the buyer's agreement or offer to purchase; or (2) the seller or his agent solicits a sale in a city or town in which the seller does not have a permanent business establishment, through mailings, advertisements, or telephone calls, which require the buyer to meet the seller or his agent at a place other than the seller's permanent business establishment. Sales made pursuant to a preexisting revolving charge account, or pursuant to prior negotiations at a fixed business location where goods or services are offered or exhibited for sale, are excluded.

The other statute provides the consumer with the right to rescind "home consumer transactions" with a cash price of at least $25. For purposes of this statute, a "consumer transaction" is a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible (excluding securities or insurance issued by Indiana-licensed insurers) to an individual for purposes that are primarily personal, family, or household, or a solicitation to supply any of these things, with or without an extension of credit. A "home consumer transaction" is a consumer transaction that the consumer did not solicit that results from direct contact by a supplier at a place other than the supplier's permanent place of business. For this purpose, "direct contact" does not include "contact conducted and consummated entirely by mail or telephone" or advertising to the general public. The supplier in a home consumer transaction is required to deliver to the borrower two copies of a written notice advising the consumer that he has the right to cancel the transaction, the contents of which are similar (but not identical) to the notice required by the FTC Door-to-Door Sales Rule. The consumer's cancellation right runs until midnight of the third "business day" after the later of the day the supplier furnishes the required notice or the date the consumer and supplier "finally agree" to the contract. Final agreement to a contract does not occur until the consumer and supplier "unequivocally agree to the contract and the supplier obtains any required approvals by another supplier or person." The rights and obligations of the seller and the buyer who cancels a home consumer transaction are similar to those under the FTC Door-to-Door Sales Rule. Violation of the statute is both a Class C Infraction and a "deceptive act" that is actionable by the Attorney General or a consumer (see "<u>Deceptive Practices</u>" above).

m. <u>Telemarketing.</u>

The Indiana Attorney General updates on a quarterly basis a statewide "do not call list" for residential telephone customers. "Telephone sales calls" may not be made to consumers who are on the do not call list. A "telephone sales call" is a call made to a consumer in Indiana (whether the call originates from inside or outside the state) for the purpose of soliciting the sale of consumer goods or services, or soliciting a charitable contribution. "Consumer goods and services" include: (1) tangible or intangible personal property and real property normally used for a personal, family, or household purpose; (2) property intended to be attached to real property; (3) services related to the foregoing; and (4) credit cards or the extension of credit. Calls made by automatic dialers are included. There are few exemptions, and in particular, there is no broad exemption for calls made to consumers with which the telemarketing entity has a prior relationship.

The Indiana statute does not prohibit calls to persons who are *not* on the do not call list, but calls to such persons, and calls made pursuant to "express requests" of persons who are on the list, as well as contracts that may result from those calls, are regulated. Telephone solicitors must keep records of their activities for two years and make them available to the Attorney General within 10 days of the receipt of an oral or written request. Certain types of telemarketers must register with the Consumer Protection Division of the Office of the Indiana Attorney General and the registration needs to be updated annually. Any person who makes a telephone solicitation to a prospective customer that is "outside the course of dealing" (as that term is defined in Section 1-205 of the Uniform Commercial Code) may not knowingly or intentionally block or attempt to block the display of the person's telephone number or identity by a caller ID service when attempting to initiate a telephone conversation for the purpose of making a solicitation. For both the "do not call list" and the "robocalls" discussed below, separate prohibitions and penalties apply to callers who provide false or misleading identification information regarding the caller's identity.

Indiana law also regulates "robocalls," known as "automatic dialing-announcing devices." These are devices that select and dial telephone numbers and disseminate a prerecorded or synthesized voice message to the telephone number called. The statute prohibits the use of an automatic dialing-announcing device to contact an Indiana telephone customer or persons living or residing with the telephone customer (both fall under the definition of a "subscriber"), unless the subscriber knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. The device must have the capability to disconnect within ten seconds after the subscriber terminates the call. Three types of automated messages are exempt from these regulations: (1) messages from school districts to students, parents, or employees; 2) messages to subscribers with whom the caller has a current business or personal relationship; and 3) messages advising employees of work schedules.

If an automatic dialing-announcing device is used and is preceded by a live operator, the live operator must disclose at the outset of the message the name of the calling organization or entity on whose behalf the message is made, the purpose of the message, the identity of the goods or services promoted, and, if applicable, whether the message intends to solicit payment or commitment of funds. Automatic dialing-announcing devices cannot be used to place calls to certain types of medical and residential facilities, state institutions, as well as law enforcement agencies and fire departments. The statute also prohibits automated commercial telephone solicitations at nighttime, defined as calls that would be received before 9:00 a.m. or after 8:00 p.m.

The Seventh Circuit Court of Appeals upheld this law against a challenge that it was pre-empted by the federal Telephone Consumer Protection Act (TCPA). Violations of this law may constitute a class C misdemeanor under Indiana criminal statutes and a "deceptive act" (see "Deceptive Practices" above, section

III.C.2.i, for applicable definitions and penalties) and courts may issue injunctions against violators to prevent future calls.

A separate statute regulates commercial solicitations conducted through e-mail, though it includes similar regulations, such as requiring consumer consent and mandating an easy removal option from subscription lists at no cost to consumers who do not wish to be solicited.

IV. TAXATION

A. Federal Taxation

1. Federal Income Taxation.

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

2. Personal Income Tax.

Individuals are subject to U.S. income tax on their worldwide income if they are U.S. citizens or resident aliens. Resident alien status is determined under a set of complex rules based on either the individual's lawful permanent residency in the U.S. or the amount of time such individual spent in the U.S. during the most recent three years. Any individual who is not a U.S. citizen, and who does not wish to be taxed as such, and who plans to spend a substantial amount of time in the U.S., should pay careful attention to these rules. Currently, the highest marginal U.S. individual income tax rate is 39.6% for ordinary income and 20% for capital gains. A nonresident alien generally is subject to tax on dividends from U.S. corporations, as discussed below.

B. State Taxation

1. Indiana Adjusted Gross Income Tax.

Indiana's income tax is imposed on the "adjusted gross income" of resident persons and on the "adjusted gross income derived from sources within Indiana" of corporations and of nonresident persons. Persons are defined to include individuals, trusts, and estates. The income tax is administered by the Department of Revenue.

In many respects, Indiana's income tax is keyed to the Internal Revenue Code ("IRC") effective as of a certain statutorily prescribed date, most recently January 1, 2015. For example, an individual taxpayer's "adjusted gross income" is its adjusted gross income as defined in IRC § 62, subject to certain Indiana statutory modifications. A corporation's "adjusted gross income" is the same as its "taxable income" as defined in IRC § 63, subject to certain Indiana statutory modifications. The tax rate for individuals, trusts, and estates is 3.4% (for taxable years beginning before January 1, 2015), 3.3% (for the 2015-2016 tax years), or 3.23% (starting with the 2017 tax year). The tax rate for corporations is 7.0% for tax periods after June 30, 2014, and before July 1, 2015, and decreases incrementally to 4.9% for tax periods after June 30, 2021.

- Specific rules apply for determining when adjusted gross income is derived from sources within Indiana for corporations and nonresident persons doing business in the state. A corporation that does business both within and outside Indiana must apportion its "business income" using a single sales factor apportionment formula. Effective January 1, 2016, business income is defined as all income apportionable to Indiana under the U.S. Constitution. Under this new definition, the traditional transactional and functional tests will no longer be applicable. This expanded definition could result in the classification of many types of income as apportionable business income that would not have been considered business income under the transactional and functional tests previously applied.

A corporation's "non-business income" is subject to specific "allocation" rules. Certain businesses, including insurance companies, may be subject to special apportionment formulae.

Consolidated income tax returns may be filed by those corporate members of an "affiliated group," as defined in the IRC, that have adjusted gross income derived from sources within Indiana. Unitary (combined) returns may be required or permitted to be filed by the Indiana Department of Revenue under certain circumstances.

Partnerships (including limited liability companies treated as partnerships for federal income tax purposes) and subchapter S corporations are not subject to Indiana's income tax, but are required to file returns. The partners, members, and shareholders of such "pass-through" entities are subject to tax in their separate or individual capacities. These pass-through entities are subject to tax withholding requirements and liabilities when they pay or credit amounts to nonresident partners, members, or shareholders.

2. Local Option Income Taxes.

Most counties in Indiana have adopted at least one of the various local income taxes that they are authorized to impose upon individuals. These "local option" income taxes are imposed (at various rates determined by the counties) upon an individual's taxable income as specifically defined.

Local bodies are not authorized to impose tax on the income of corporations.

3. Indiana Sales/Use Taxes.

The Indiana sales tax (the gross retail tax) is imposed at the rate of 7% on transactions of a "retail merchant" constituting "selling at retail." In general, sales of tangible personal property are the object of this tax, but sales of certain services (*e.g.*, renting accommodations for less than 30 days, furnishing certain public utility services, renting tangible personal property, furnishing or selling intrastate telecommunications service, providing cable or satellite television or radio service terminating in Indiana, etc.) are also subject to sales tax. The tax is added to the selling price paid by a purchaser and is collected by the retail merchant as agent for the state. Individuals or employees, officers, or members of corporate or partnership retail merchants with a duty to collect and remit sales tax to the State may personally be held liable for failing to do so.

A companion use tax is imposed at the rate of 7% on the storage, use, or consumption in Indiana of tangible personal property acquired in a retail transaction. Use tax imposed may be reduced by a credit equal to the amount of tax paid to any state for the acquisition of the property.

There are a number of statutory exemptions from sales/use tax. For example, sales for resale and certain sales made to manufacturers, public utilities, and public transportation companies are exempt from tax. In order to make retail sales or issue exemption certificates, retailers, manufacturers, wholesalers, and others must register with the Indiana Department of Revenue and obtain a retail merchant's certificate.

The Department of Revenue administers the sales and use tax.

4. Local Sales Taxes.

Certain counties and cities in Indiana have adopted local innkeeper, admissions, and food and beverage taxes that are imposed and collected in addition to the state sales tax.

5. Indiana Property Tax.

Indiana property tax is imposed on all real and personal property that is not expressly exempt. Through 2015, the assessment date was March 1 of each year. Starting in 2016, the assessment date is January 1 of each year. Such real and personal property is assessed pursuant to regulations issued by the Department of Local Government Finance.

The property tax rate (established for each local taxing unit based on the aggregate assessed valuation of real and personal property within the taxing unit and the taxing unit's budget for the ensuing tax year) is multiplied against the assessed valuation of the property, and the resulting tax is payable in May and November of the year following the assessment date. For example, tax based on an assessment as of January 1, 2016 will be due in two equal installments in May and November 2017.

Certain properties and owners are eligible for deductions from their assessed values, and some properties qualify for exemptions on the basis of their ownership, occupancy, and use. Owners of property to which deductions or exemptions may apply generally must satisfy certain application, compliance, or other filing requirements, often repeating such filings annually.

a. Personal Property.

- By May 15 of each year, a taxpayer must report its tangible depreciable personal property to the appropriate local assessor. Extensions of up to 30 days may be obtained pursuant to prescribed procedures. The taxpayer distinguishes personal property from real property and assigns values to depreciable personal property according to standards established by the Indiana Department of Local Government Finance. Inventories are not subject to personal property tax, nor are motor vehicles, boats, and trailers that are subject to annual license or excise taxes. Effective July 1, 2015, personal property with a total acquisition cost of less than $20,000 as of the assessment date is exempt, subject to an annual certification.

b. Real Property.

Approximately one-fourth of the real property in each county is assessed annually by local assessing officials in accordance with valuation guidelines established by the Indiana Department of Local Government Finance. In addition, assessing officials make annual adjustments to the assessed value of real property on each assessment date to ensure that values are reflective of the current market value-in-use conditions. The annual adjustments generally are based on sales of properties generally occurring during the two calendar years preceding the relevant assessment date.

6. Public Utility Property.

Special statutes, regulations, and procedures apply to the assessment and taxation of the property owned or used by public utilities.

7. Indiana Utility Receipts Tax.

The Indiana "utility receipts" tax is imposed on the gross receipts of taxpayers making retail sales of utility services for consumption. "Utility services" is defined as the furnishing of: (i) electrical energy; (ii) natural gas, either mixed with another substance or pure, used for heat, light, cooling, or power; (iii) water; (iv) steam; (v) sewage; and (vi) telecommunication services.

The tax is imposed at a rate of 1.4% upon (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana and (2) the taxable gross receipts derived from activities or businesses or any other source within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana. Various exemptions and deductions are available.

A complementary tax, the Indiana utility services use tax, is imposed on the retail consumption of utility services in the state. The tax is measured by the gross consideration received by the seller upon selling commodities and services in furnishing utility services. The tax rate is 1.4%.

8. Indiana Financial Institutions Tax.

Indiana imposes a franchise tax at the rate of 7.5% on the "apportioned income" (less certain deductions, if applicable) of corporations transacting the business of a financial institution in Indiana. The rate drops to 7% in 2016 and will decrease to 4.9% by 2023. Those subject to tax include various specifically enumerated, registered, or regulated financial institutions and their affiliates, as well as any other corporation carrying on the business of a financial institution, *i.e*., when 80% or more of that corporation's gross income (excluding extraordinary income) is derived from certain specifically listed activities, including, *inter alia*, the making, acquiring, selling, or servicing of loans or extensions of credit or operating a credit card, debit card, or charge card business, etc. Corporations that are partners in partnerships or beneficiaries of trusts engaged in the business of a financial institution may be subject to the tax. "Transacting business in Indiana" is broadly defined to include instances where the corporation does not even have a physical presence in the state. A receipts factor is used to apportion income, and a combined (unitary) return is required of a unitary group. A taxpayer subject to the financial institutions tax is not subject to the adjusted gross income tax; however, this exemption does not apply to the extent the taxpayer is acting in a fiduciary capacity.

9. Other Taxes.

Indiana or its counties also impose many other types of taxes, including, but not limited to, various gasoline, motor carrier fuel, and special fuel taxes; cigarette and tobacco products taxes; various alcoholic beverage excise taxes; insurance premiums tax; controlled substance tax; motor vehicle, commercial vehicle, boat, and aircraft license and excise taxes; wheel taxes; income withholding tax; vehicle excise surtaxes; unemployment tax; auto rental taxes; hazardous waste disposal tax; and commercial vessel (watercraft) tonnage tax. The inheritance tax, the estate tax, and the generation skipping tax were repealed effective Jan. 1, 2013.

10. State Tax Incentives for New Business and Foreign Investment.

Local governmental units and the State of Indiana provide businesses locating or expanding in Indiana with numerous tax incentives and other financial assistance. The following is a brief summary of significant incentives and financial assistance offered to businesses.

a. Local Incentives.

Real and personal property tax abatement provide property tax deductions for redevelopment of real estate and installation of new manufacturing, new research and development equipment, new logistical distribution equipment, or new information technology equipment.

Tax Increment Financing ("TIF") districts capture incremental property tax revenues to be used to finance public improvements, typically infrastructure improvements, such as roads and utilities. More limited Certified Technology Parks operate similarly to TIF districts by capturing incremental state sales and income tax revenues for public improvements.

Enterprise Zones and Economic Revitalization Areas provide various property tax credits and deductions and income tax credits.

b. State Incentives.

(1) Tax Credits

Income tax credits are available through a number of economic development programs, including:

- Economic Development for a Growing Economy ("EDGE") credits awarded to companies creating new full-time jobs, or retaining existing ones, according to agreements with the Indiana Economic Development Corporation ("IEDC");

- Hoosier Business Investment Tax Credits based on "qualified investment" in Indiana;

- Headquarters Relocation Tax Credit, measured by the costs of relocating a company's headquarters to Indiana;
- Tax credits for certain research and development expenses;
- Industrial Recovery Tax Credit, for companies investing in facilities requiring significant rehabilitation or remodeling; and
- Venture Capital Investment Tax Credits for investment in qualified and certified Indiana businesses.

(2) Financial Assistance

The Indiana Economic Development Corporation (IEDC) is the primary entity within State government that supports business growth and attraction in Indiana. The IEDC utilizes a number of tax credit programs in furtherance of its mission. However, the primary program used is the Economic Development for a Growing Economy (EDGE) Tax Credit. It is a fully-refundable corporate income tax credit that is calculated as percentage of the new employee withholdings created as part of an economic development project. Grants are also available to reimburse businesses for eligible employee training costs under the Skills Enhancement Fund and to support construction of infrastructure needs for new or expanding businesses in cooperation with a local unit of government through the Industrial Development Grant Fund. Taxable and tax-exempt business finance and credit support is available through the Indiana Finance Authority, successor to the Indiana Development Finance Authority. Technical and other support, especially for small business, is also available through the IEDC.

V. LABOR AND EMPLOYMENT

A. Federal Considerations

1. <u>Immigration.</u>

With the globalization of world markets, employers located in the United States often seek to employ foreign personnel. A variety of permanent and temporary visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the United States employer and the foreign employer.

Permanent residents are authorized to work for any employer. Temporary visa holders have authorization to remain in the United States for a temporary time and the employment authorization is generally limited to a specific employer, job, and work site.

a. Permanent Residency (the "green card"). Permanent residency is most commonly based on family relationships, such as marriage to a United States citizen, or an offer of employment.

Permanent residence gained through employment often involves a time-consuming process that can take several years. The employer may have to advertise and conduct a recruitment effort to prove that there are no minimally-qualified U.S. workers available. Therefore, employers considering the permanent residence avenue for an alien employee should ascertain the requirements for that process early in the employment.

b. Temporary Visas. The following are the most commonly used temporary visas:

(1) E-1 Treaty Trader and & E-2 Treaty Investor Visas:

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

(2) 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.

(3) L-1 Intracompany Transferee Visas:

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

(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. B-1 or B-2 visitors cannot be on the United States payroll or receive United States-source remuneration.

(5) TN Professionals:

Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include some medical/allied health professionals, engineers, computer systems analysts, and management consultants. TN holders are granted three-year stays for specific employers and other employment is not allowed without prior USCIS approval.

(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, trainees and teachers traveling to the United States to participate in an approved exchange program. 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 Visas for Extraordinary Ability Persons:

O-1 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim.

(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.

2. Labor and Employment Statutes.

a. Age Discrimination in Employment Act ("ADEA"). The ADEA forbids discrimination based on age (40 or older) in employment decisions. The ADEA applies to employers engaged in interstate commerce who have twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

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

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

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

e. Fair Labor Standards Act ("FLSA"). The FLSA establishes the minimum wage, overtime and child labor laws for employers engaged in industries affecting interstate commerce, regardless of the number of employees.

f. Family and Medical Leave Act ("FMLA"). The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave per year for the birth or adoption of a child or the serious health condition of the employee or the spouse, parent or child of the employee. It also permits the employee to take certain types of military family leaves (including up to 26 weeks of leave to care for an injured service member). This Act applies to all employers engaged in commerce where the employer employs fifty or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.

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

h. Genetic Information Nondiscrimination Act ("GINA"). Title II of GINA prohibits employers from using genetic information in making employment decisions and from requesting, requiring, or purchasing genetic information of employees or employees' family members.

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

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

k. Occupational Safety and Health Act ("OSHA"). OSHA established the mechanism for enforcing safety regulations in the workplace. It applies to all employers who are engaged in an industry affecting commerce, regardless of the number of employees.

l. 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.

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

n. Worker Adjustment Retraining and Notification Act ("WARN"). WARN requires employers to give sixty days' advance written notice to their employees of "plant closings" or "mass layoffs" as defined under WARN. 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). Certain exceptions may apply to excuse less than sixty days' advance notice, depending upon the facts/circumstances.

3. Employee Benefits.

a. Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, group health plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, setting forth fiduciary obligations and, for most types of retirement plans, coverage, vesting and funding requirements. ERISA generally preempts state laws that relate to these employee plans and arrangements.

b. Consolidated Omnibus Budget Reconciliation Act ("COBRA"). COBRA requires employers to make continuing coverage under medical reimbursement and health plans available to certain terminated employees and their covered dependents, with the employee paying the full premiums for coverage. The usual period for which this coverage must be continued in the event of an employment termination is eighteen months. COBRA contains very specific procedures for notifying terminated employees of their COBRA rights.

B. Indiana Law

1. Employment at Will.

Indiana is an employment at will state. An employment relationship that is not for a fixed duration is presumed to be at will and either the employee or the employer may terminate it at any time and for any or no reason with or without notice. If an employee is not at will, the employer must have cause to terminate the relationship. Indiana courts have recognized a few narrow public policy exceptions, including terminating someone for exercising a legal right, or terminating someone for refusing to violate a legal duty. If an individual gives consideration for the employment offer, such as a release of a claim, he is also taken out of the at-will rule. Another exception recognized by Indiana courts is when an individual leaves a job in which he had just cause type protections and, knowing that, the prospective employer made an offer of employment with some representation of similar protection.

2. State Statutes Prohibiting Adverse Employment Action.

a. Indiana Civil Rights Act. Prohibits employers with six or more employees from discriminating against individuals because of race, religion, color, sex, disability, national origin, veteran status, or ancestry, or because an employee assisted in an investigation. I.C. 22-9-1-1, *et seq*. The statute is enforced by the Indiana Civil Rights Commission, which has authority to issue complaints and hold administrative hearings. If a probable cause finding is made after investigation, the claims can be adjudicated in court if both parties agree.

b. Indiana Age Discrimination Law. Prohibits discrimination against individuals ages 40 through 74 because of their age. However, the state law exempts from its coverage employers who are covered by the federal Age Discrimination in Employment Act and there is no private cause of action. I.C. 22-9-2-1, *et seq*.

c. Indiana Veterans' Affairs Law. Prohibits employers from taking adverse action against reservists who take statutorily protected training leaves. I.C. 10-17-4-1, *et seq*.

d. Indiana Occupational, Safety and Health Act. Makes it unlawful for employers to take adverse action against an employee for making a complaint under the Indiana Occupational, Safety and Health Act. I.C. 22-8-1.1-38.1.

e. Uniform Consumer Credit Code. Prohibits employers from terminating an employee because of wage garnishments. I.C. 24-4.5-5-106.

f. Serving as a Juror/Witness. Indiana statutes prohibit employers from terminating an employee for performing jury duty or responding to a witness subpoena in a criminal case. I.C. 35-44-3-10; I.C. 35-44-3-11.1; and I.C. 34-28-4-1.

g. Indiana Health Code. Makes it unlawful for an employer to terminate an employee, withhold salary increase or other benefits, transfer, reassign or demote an employee, or deny a promotion to an employee for complaining to the State Board of Health about the employer's failure to comply with the requirements for providing training on infection control measures used to prevent the transmission of dangerous communicable diseases, including AIDS. I.C. 16-41-11-8(f).

h. Tobacco Users. Prohibits employers from discriminating against employees because of the employee's off-duty use of tobacco products. I.C. 22-5-4-1, *et. seq*. Thus, employers may not require as a condition of employment that an individual refrain from using tobacco products outside of work. This statute, however, does not limit an employer's right to regulate at-work conduct. Further, an employer may implement financial incentives intended to reduce tobacco use or related to health benefits provided by the employer.

i. Blacklisting Statute. An employer who discharges an employee and then prevents the individual from obtaining other employment commits a Class C infraction and is liable for damages to be recovered in a civil action. Importantly, this statute does not prohibit an employer from informing a prospective employer, in writing, of the truthful reasons for the discharge. Furthermore, an employer that discloses information about a current or former employee is immune from civil liability for the disclosure unless it is established that the information disclosed was known to be false at the time of the disclosure. I.C. 22-5-3-1.

j. Unemployment Compensation Statute. Employers in Indiana contribute to an Unemployment Insurance Compensation Fund made up primarily of a payroll tax paid by the employers on a quarterly basis. The Indiana Department of Workforce Development administers the unemployment compensation insurance system. The amount of contributions an employer pays is based upon the size of its workforce, the number of its former workers receiving unemployment benefits and its experience rating.

In order to be eligible for unemployment benefits, individuals must be (a) out of work through no fault of their own, (b) ready and able to work, and (c) making an effort to obtain other full-time employment. The weekly benefit is reduced by one-third if the individual is unable to or unavailable for work.

Employees who are discharged for just cause as defined by the statute (I.C. 22-4-15-1(d)) or who voluntarily left employment without good cause in connection with the work, can have their benefits reduced by twenty-five percent (25%). Employees discharged for "gross misconduct" are not entitled to benefits. Employees unemployed due to a labor dispute are also ineligible for benefits.

3. Worker's Compensation Statute.

Indiana's worker's compensation statute is found at I.C. 22-3-1-1, *et seq*. Occupational disease provisions are found at I.C. 22-3-7-1, *et seq.* Employers are required to insure their worker's compensation liability, either through worker's compensation insurance or through authorized and approved self-insurance. Employers who do the latter must furnish the Worker's Compensation Board with an application and satisfactory proof of financial ability to pay.

Compensation benefits are payable to employees injured by accident arising out of and in the course of employment. Benefits are available for occupational diseases arising out of and in the course of employment. In general, worker's compensation benefits are an injured employee's exclusive remedy against the employer. I.C. §§ 22-3-2-6; 22-3-7-6. Among the limited affirmative defenses available to employers are an employee's self-inflicted injury, intoxication, commission of an offense, knowing failure to use a safety device, knowing failure to obey a reasonable written rule prominently posted, and/or knowing failure to perform a statutory duty. I.C. 22-3-2-8. Under Indiana statute and case law, an employee may not be terminated for exercising rights under the worker's compensation laws.

4. Wage Statutes.

a. Minimum Wage. For employees not covered by the federal Fair Labor Standards Act, Indiana statutes provide a minimum wage of $7.25 per hour and that overtime be paid to non-exempt employees at a rate of one and one-half times the employees' regular rate of pay for each hour worked in excess of 40 hours. I.C. 22-2-2-4.

b. Wage Payment. This statute requires an employer to pay an employee at least semimonthly or biweekly. Further, if an employee voluntarily leaves employment, an employer is required to pay the employee the amount owed on the next regular pay day. I.C. 22-2-5-1. A prevailing plaintiff is entitled to reasonable attorneys' fees and court costs. If the court determines that the employer was not acting in good faith, the court must award liquidated damages in the amount of two times the amount owed. I.C. 22-2-5-2.

c. Wage Claim. When an employer discharges an employee, the employee's unpaid wages and compensation become due and payable on the next regular payday for the period in which the separation occurred. If there is a dispute about the amount owing, the employer must pay the amount it concedes is due without condition. The Commissioner of Labor for Indiana enforces compliance with these provisions. I.C. 22-2-9-1, *et seq*.

d. Vacation Pay as Deferred Compensation. By Indiana case law, absent a provision or understanding to the contrary, vacation pay is deemed to be earned incrementally in the form of deferred compensation and employees are entitled to the full amount of that deferred compensation (accrued vacation pay) at the time of separation from employment. Thus, if an employer does not wish that to occur, it is important that it include specific provisions in a vacation policy about when and under what circumstances employees who separate from employment will be entitled to vacation pay.

e. Deductions From an Employee's Paycheck. A statute governs the purposes for which an employer may deduct monies from an employee's paycheck. It prevents employers from making deductions except for specified reasons, such as payment of insurance premiums, payment of pledges or contributions, payment of union dues, purchase of employer merchandise, reimbursement of education or employee skills training costs, purchasing uniforms and equipment necessary for the job, and repayment of a loan from the employer evidenced by a written instrument. Other permissible deductions are listed in the statute. In addition, the employer must have a written agreement with the employee that is signed by the employee, identifies the deduction agreed upon and the parameters surrounding it, states that it is revocable at any time by written notice and is returned to the employer within 10 days after the agreement is signed. I.C. 22-2-6-1, *et seq*.

f. Recovery for Overpayment to Employees. By statute, an employer who has overpaid an employee is allowed a wage deduction for reimbursement of the overpayment if it gives the employee two weeks' notice before deducting the amount. The amount deducted can be no greater than the lesser of 25% of the employee's disposable earnings or the amount by which the employee's disposable earnings exceed 30 times minimum wage. If the overpayment is equal to ten times the employee's gross wages because of a misplaced decimal point, the entire overpayment may be deducted immediately. I.C. 22-2-6-4.

5. Restrictive Covenants and Trade Secrets.

a. Restrictive Covenants. There is no statute that governs covenants not to compete. Enforceability of restrictive covenants is controlled by common law. Courts strictly construe covenants and will enforce them if they are reasonable. Determination of reasonableness depends on whether the restriction is reasonable as to the scope of the activity, geographic area and time period. Protectable interests that can support a restrictive covenant include customer goodwill and confidential information. Indiana 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 a restrictive covenant, but case law suggests restrictions of up to eighteen months will be upheld. Courts are less strict in their review of covenants not to compete given by business owners in connection with a sale of the business; consequently, the parameters of reasonableness are enlarged in the sale of business context.

Indiana follows the "blue pencil" doctrine, which provides that a court will not rewrite an unreasonable covenant to make it reasonable under the guise of interpretation. If, however, a covenant is clearly severable into parts, a court may strike unreasonable parts and enforce the remaining ones.

b. Trade Secrets. Indiana has adopted the Uniform Trade Secrets Act, which is substantially similar to the Uniform Act. I.C. 24-2-3-1, *et seq*. Remedies for unauthorized disclosure or use of a trade secret include injunctive relief and recovery of monetary damages and double damages and attorneys' fees for willful violations. "Trade secrets" are considered information not generally known to or readily available by proper means to other people who would gain economic value from the information.

6. Safety and Health Statute.

The Occupational Safety and Health Act ("OSHA") permits states to assume jurisdiction over employment safety and health by submitting a state plan to OSHA for approval. Indiana has such an approved plan ("IOSHA") which is administered by the Indiana Occupational Safety and Health Administration. I.C. 22-8-1.1-1, *et seq.*

OSHA standards become enforceable as IOSHA standards 60 days after they become effective as OSHA standards. Furthermore, IOSHA provides that the Indiana Commissioner of Labor "may not adopt or enforce any provision . . . that is more stringent than the corresponding federal provision." As a result, Indiana adopts the OSHA standards verbatim. Indiana's version of OSHA's "general duty clause" is codified at I.C. 22-8-1.1-2.

7. Labor-Injunction Statute.

Indiana has a statute parallel to the federal Norris-LaGuardia Act that restricts state courts from issuing temporary restraining orders or injunctions in labor disputes. I.C. 22-6-1-1 *et seq*.

8. Miscellaneous.

a. Access to Personnel Files. There is currently no Indiana law that requires private sector employers to provide employees or former employees access to their personnel files.

b. Drug and Alcohol Testing. Indiana does not currently have any statutes regulating employment drug or alcohol testing.

c. Military Family Leave. Indiana law provides for a limited amount of military family leave. Employers of 50 or more employees must offer eligible employees the right to take up to ten days off per year for qualifying circumstances in conjunction with a family member's active duty in the military. To be eligible, an employee must have been employed by the employer for at least 12 months and have worked 1,500 hours in the 12 months prior to the leave. I.C. 22-2-13-1.

d. Layoff and Plant Closing Notice. Indiana currently does not have a state counterpart to the federal Worker Adjustment and Retraining Notification Act (WARN) or any other law imposing notice requirements on employers who will be laying off employees or closing all or a portion of their business.

e. Obtaining Criminal History. Employers are entitled to request and obtain a limited criminal history from the Central Records Division of the Indiana State Police Department. The limited history will contain information with respect to arrests, indictments, formal criminal charges and their disposition. I.C. 10-13-3-27. A small processing fee is involved.

f. Service Letter Requirements. By statute, employers, upon written request of a former employee, are required to issue a letter:
(a) stating the nature and character of service that had been

provided by the employee; (b) identifying the length of the employment; and (c) truthfully stating why the employee left the employment. Employers who do not require written recommendations or written applications are excluded from this statute's requirement. I.C. 22-6-3-1, *et seq*.

g. Employment of Minors. Restrictions are imposed by statute on the number of hours a day and a week and the starting and quitting times for minors ages 14 and 15, minors age 16, and minors age 17. I.C. 20-33-3-1, *et seq*.

h. Firearms. Employees have the right to bring legally-possessed firearms and ammunition onto an employer's property provided that they are locked in the trunk of the employee's vehicle, kept in the glove compartment of the employee's locked vehicle, or stored out of plain sight in the employee's locked vehicle. The law exempts certain employers, including schools, child care institutions, emergency shelters, private secure facilities, group homes, child care centers, penal facilities, postsecondary educational institutions, domestic violence shelters, and certain public utilities. Also, employers cannot require employees or applicants to divulge any information about their use, possession, or transportation of firearms and ammunition and cannot condition employment on an employee's relinquishment of rights related to gun ownership.

i. Expunged and Sealed Criminal Records. Employers cannot consider expunged or sealed criminal records. If an employment application asks a question about criminal records, the question must expressly exclude expunged and sealed criminal records.

j. Lactation Support in the Workplace. Indiana’s lactation support in the workplace law applies to employers with 25 or more employees. Employers must provide a private location (other than a toilet stall) where an employee can express milk in privacy. Employers must allow time for expression of milk during regularly scheduled breaks. Employers must provide a refrigerator for storing expressed milk or allow employees to bring coolers or other devices to store expressed milk.

k. Domestic Violence Victims. Indiana law prohibits employers from discharging employees who have sought protective orders in connection with alleged domestic violence. Specifically, employers cannot terminate employment (1) because an employee has filed a petition for a protective order (whether or not the protective order itself actually has been issued) or (2) based on the actions of the person against whom the protective order is sought (i.e., the alleged abuser or wrongdoer). The law also prohibits any changes to the employee's job (including temporary relocations, scheduling changes, or compensation changes) unless the employee agrees to the changes.

VI. ENVIRONMENTAL LAW

A. Federal Considerations

Four federal statutes have major impact on environmental matters in Indiana:

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

   RCRA's primary goal is to control and minimize the generation, transportation, storage, treatment and disposal of hazardous waste. The United States Environmental Protection Agency ("U.S. EPA") has delegated the administration of RCRA to Indiana and, therefore, the Indiana Department of Environmental Management ("IDEM") regulates most aspects of hazardous waste management within its borders, including the issuance of permits, under a State analog to RCRA.

   Under RCRA, some wastes are hazardous because of the source from which they come (such as degreasing solvents and most petroleum refining wastes), while others are hazardous because they fail a test for determining whether they are hazardous. All generators of solid waste must determine whether their wastes are hazardous, and generators of hazardous wastes must comply with stringent regulations applicable to the storage and handling of such wastes. Generators of more than 100 kg./month of hazardous wastes must transfer such wastes to a permitted hazardous waste treatment, storage, or disposal facility. A RCRA treatment, storage or disposal permit contains very detailed and stringent requirements designed to ensure that a release of hazardous waste does not occur. A treatment, storage or disposal facility permit also contains requirements for funding the closure and clean-up of the facility at the end of its useful life, and for corrective action for any release of hazardous or solid waste constituents at the facility.

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 to provide for the clean-up of abandoned disposal sites, although it is often invoked as well at disposal sites that have not been abandoned. U.S. EPA does not delegate the implementation of CERCLA to the states, but many states, including Indiana, have state statutory analogs giving them essentially the same powers U.S. EPA has under CERCLA. In Indiana, IDEM exercises the powers created by the State's CERCLA analog.

CERCLA allows U.S. EPA to order "potentially responsible parties," or "PRPs," to clean up releases, actual or threatened, of hazardous substances at their expense. It also allows the government and private parties to sue PRPs for reimbursement of clean-up costs caused by such releases, whether actual or threatened. There are four categories of persons potentially liable for clean-up orders or costs:

"Owners or operators" of the contaminated facility.

"Owners or operators" of the facility at the time of disposal of the hazardous substances.

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

"Transporters" of hazardous substances.

A PRP can escape liability if it can establish that the hazardous substance release was caused solely by an act of war, an act of God, or an act of a third party. This "third party" defense is not available if the damage from hazardous substances was caused by an employee or agent of the PRP or by a third-party in a "contractual relationship" with the PRP.

In 2002, Congress significantly expanded the defenses available to owners or operators by altering the definition of a "contractual relationship" to create a "no reason to know" exclusion. Under the 2002 changes, an owner or operator may establish that he or she had "no reason to know" the facility was contaminated by, among other things, conducting "all appropriate inquiries" into prior uses of the facility before the purchase or operation of the facility (also known as the "Innocent Landowner Defense"). When the "no reason to know" exclusion is shown, a contractual relationship does not disqualify the owner or operator from relying on the third-party defense. The 2002 changes also exclude a qualified contiguous property owner from being a "covered person" if that owner did not cause the contamination, is not affiliated with a PRP, and cooperates during a clean-up action. Finally, the amendments protect "bona fide" prospective purchasers of contaminated property if the owner can demonstrate that it made "all appropriate inquiries" and cooperates fully during a clean-up action.

3. The Clean Air Act ("CAA"): 42 U.S.C. §§ 7401, *et seq.*

The CAA requires each state to implement a regulatory program for meeting nationwide air quality goals known as National Ambient Air Quality Standards ("NAAQS"). U.S. EPA has promulgated NAAQS for six criteria pollutants: sulfur dioxide, particulate matter, nitrogen oxide, carbon monoxide, ozone and lead. The NAAQS are implemented through enforceable source-specific emission limitations and other air quality rules established by the states in state implementation plans ("SIPs"), which are designed to "attain" or "maintain" NAAQS. 1977 amendments to the CAA enhanced the role of NAAQS in state rules by distinguishing between "clean" air areas (attainment) and "dirty" air areas (non-attainment) throughout the U.S. Accordingly, New Source Review ("NSR") analysis is required before a new major stationary source is constructed or before an existing major stationary source undertakes a major modification in an attainment or nonattainment area.

Section 111 of the CAA established New Source Performance Standards ("NSPS") which are technology-based emission standards for specific industry source categories. These standards are not dependent on the ambient air quality of an area and required new or modified stationary sources subject to a NSPS to employ best available control technology.

National Emission Standards for Hazardous Air Pollutants ("NESHAPS") were established in 1970, but 1990 CAA amendments significantly changed the air toxics program set forth in Section 112. For all major and industrial sources that emit Hazardous Air Pollutants ("HAPs"), these amendments mandated the development of technology-based standards known as "maximum achievable control technology" ("MACT"). The definition of "major source" for § 112 purposes is different from the definition of "major source" used elsewhere in the CAA. For HAPs, a major source is one that emits or has the potential to emit, considering controls, 10 tons per year ("tpy") or more of an HAP or 25 tpy or more of any combination of HAPs. While many MACT standards for specific industries have been promulgated, some are still not final and/or subject to litigation. Pollutants may be regulated under one or more of these standards.

4. The Clean Water Act ("CWA"): 33 U.S.C. § 1251, *et seq.*

The CWA regulates the discharge of pollutants into all navigable waters of the United States and their tributaries. The CWA prohibits the discharge of any pollutant into the waters of the U.S. except in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit issued by IDEM under a State analog program approved by the U.S. EPA. Permit discharge limits are based upon technological and environmental factors, the most important of which is likely to be the water quality of the receiving stream. Limitations for discharges to the Great Lakes watershed are usually more stringent than those for discharges to the Mississippi River watershed.

The CWA specifies standards for pretreatment of industrial discharges to a publicly owned treatment works, which are generally enforced through NPDES permit limitations on the treatment works. The CWA also requires permits for certain storm water discharges to navigable waters or their tributaries.

The most controversial CWA provisions are those applicable to wetlands areas adjacent to navigable waters and their tributaries. The filling of as little as 1/10 acre of wetlands may require either a permit from or notification to the U.S. Army Corps of Engineers under Section 404 of the CWA. When a permit is required, the CWA also requires a certification under Section 401 of the CWA from the State of Indiana that the filling meets State requirements. As a condition of granting certification, IDEM often requires the set-aside or construction of wetlands to compensate for those lost by filling.

B. State Considerations

1. <u>State Environmental Organizations:</u>

a. <u>Indiana Department of Environmental Management ("IDEM").</u>

IDEM was created in the 1980s for the purpose of consolidating environmental programs within the state. The executive in charge is the Commissioner, who is appointed by the Governor. IDEM has four program offices: (1) the Office of Water Quality, responsible primarily for implementation of the federal Clean Water Act and analogous state statutes; (2) the Office of Land Quality with primary responsibility for implementation of RCRA and other state and federal laws related to management of solid and hazardous wastes as well as "brownfields" development, CERCLA type clean-ups, voluntary clean-ups of underground storage tanks ("UST") and non-UST petroleum clean-ups; (3) the Office of Air Quality with primary responsibility for implementation of the Clean Air Act and related state statutes; and finally, (4) the Office of Pollution Prevention and Technical Assistance with primary responsibility for developing pollution prevention projects and providing assistance to members of the public and regulated community in Indiana. IDEM also has civil and criminal enforcement responsibilities for state and federal laws.

b. <u>Rulemaking Board – Generally.</u>

Indiana’s environmental rulemaking board previously consisted of three separate boards: the Air Pollution Control Board, the Water Pollution Control Board, and the Solid Waste Management Board. The Indiana legislature consolidated the three boards into the Environmental Rules Board (“ERB”) in 2012, which consists of members appointed by the Governor. The ERB is responsible for adopting rules for the implementation of the respective federal environmental laws, *i.e.*, CAA, CWA, and RCRA, as well as other state environmental rules, such as those concerning actions on permits and permit modifications. The ERB is also responsible for developing operating policies governing the implementation of environmental management laws by the Commissioner. IDEM staff provides support to the ERB as it does not have an independent staff.

- Indiana Moratorium on New Regulations

On February 6, 2013, Indiana's then newly-elected governor, Michael Pence, issued Executive Order 13-03 for "Promoting Job Creation, Economic Development, and Freedom by Ordering a Moratorium on Regulations" (the "Moratorium"), which will remain effective until expressly modified or terminated by a new Executive Order. The Moratorium suspended rulemaking action for all proposed rules that did not have an accompanying notice to adopt submitted on or before January 14, 2013. The Moratorium also required the Office of Management and Budget ("OMB") to perform a comprehensive evaluation and rigorous cost benefit analysis of existing administrative rules. In its review process, OMB prioritized regulations with the most negative effect on job creation and economic development in the private sector.

Agencies wishing to propose new rules can do so only to the extent allowed by the Order's exceptions. The following types of rules are outside the Moratorium's scope: (1) rules concerning job creation and investment in Indiana or to improve Indiana's workforce; (2) rules repealing existing rules or reducing the regulatory impact of existing rules: (3) rules implementing a federal mandate that does not permit wavier; (4) rules necessary to avoid violation of a court order or federal law that would result in sanctions against the State; (5) rules to address matters concerning waste-handling, fraud or abuse within or against a state agency; and (6) rules affecting matters of emergency, health, or safety. Any agency wishing to commence rulemaking action is required to notify OMB of the proposed rule and explain why the proposed rule satisfies one of the exemptions above.

c. Indiana Department of Natural Resources ("IDNR").

The IDNR is responsible for protecting and enhancing the state's natural resources, including fish and wildlife, forests, nature preserves, wetlands, oil and gas, state parks and recreational areas, and historic sites. It operates the Indiana State Park System (including the State Museum) and issues permits regulating mining, flood plain management and construction in a floodway such as filling or levees. The Natural Resources Commission was created by state statute (I.C. 14-10) to address issues regarding the IDNR, including rulemaking. It has a Division of Hearings which conducts administrative review of decisions issued by the IDNR.

The IDNR is also responsible for historical sites, such as Indian burial grounds, which may be relevant when constructing a new facility. In addition, IDNR and IDEM are co-trustees of the State's natural resources and have begun to bring claims under CERCLA for natural resource damages.

d. IDEM – General Overview – Policy and Permits.

Non-Rule Policy Documents

IDEM has authority pursuant to I.C. 13-14-1-11.5 to issue non-rule policy documents ("NRD") which are used as guidance in interpreting state statutes. These documents do not have the force of law. The NRD are made available to the public forty-five (45) days prior to presentation to the applicable rulemaking board and are effective thirty (30) days thereafter. The most commonly referred to policy document is the Remediation Closure Guide which provides default residential and industrial clean-up standards for many substances.

"Greenfields" Notice of Permit Applications

I.C. 13-15-8 requires, for any application for an air, water or waste-related permit for a project set to proceed on undeveloped property or for which a valid existing permit has not been issued, that notice to owners or occupants of adjoining land be given not more than ten (10) working days after submitting an application for a permit to IDEM. The notice of the permit application must be in writing and include the date on which the application for the permit was submitted to IDEM and include a brief description of the subject of the application. This law applies to all permits issued by IDEM with the exception of a permit for the construction, installation or modification of a combined sewer, a sanitary sewer, a storm sewer, a public water supply or a water main extension.

Appeal of IDEM Determinations to Issue or Deny a Permit

Pursuant to I.C. 13-15-6-1, permits issued by the IDEM must be appealed no later than fifteen (15) days after service (plus three (3) days for mailing). Appeal of CAA Title V air operating permits must be filed no later than thirty (30) days after the date the person received the notice of the determination. Permits may be appealed by the permit applicant, any other person aggrieved or adversely affected by the Commissioner's action, or by a person entitled to review under any law. The appeal must be filed in writing with the

Office of Environmental Adjudication ("OEA"), an independent state agency, with a request that an Environmental Law Judge hold an adjudicatory hearing concerning the permit. The appeal process is governed by Indiana's Administrative Orders and Procedures Act ("AOPA") I.C. §§ 4.21-5-1 *et seq.* Judicial review of an OEA final order is also governed by AOPA.

Time Limitations for Approval or Denial of Permit Applications

I.C. 13-15-4 requires that the Commissioner of IDEM shall approve or deny an application for various air, water and waste management permits within a specific number of days. For example, significant air permit revisions within 120 days; Title V (CAA) minor source modifications within 45 days; Title V (CAA) significant source PSD modifications within 270 days; a new hazardous waste or solid waste landfill within 365 days; an NPDES (CWA) permit within 180 days; and a wastewater or water facility construction permit within 90 days.

If the Commissioner does not issue or deny a permit within the time specified under the law, the applicant has three options: (1) it may request and receive a refund of a permit application fee, and the Commissioner shall continue to review the application and approve or deny the application as soon as practicable; (2) the applicant may request and receive a refund of a permit application fee and submit to the department a draft permit and any required supporting technical justification, which the Commissioner must review and approve (with or without revision) or deny; or (3) an applicant may require IDEM to use the fee to hire an outside consultant to prepare a draft permit and any required supporting technical justification, which the Commissioner must review and approve (with or without revision) or deny. If additional money is required to hire the consultant, the applicant is responsible for those costs.

Citizen Suits

In addition to provisions under federal statutes which may permit citizens to bring suit to enforce various environmental laws, Indiana provides in I.C. 13-30-1 that the attorney general, a state or local agency, a citizen or a corporation may bring an action for declaratory and equitable relief in the name of the State of Indiana for "the protection of the environment of Indiana from significant pollution, impairment, or destruction." I.C. 13-30-1-1. Notice to the agency and the department is required; no action may be maintained if the agency commences an administrative proceeding or a civil action within 90 days of receiving notice or if the agency is diligently pursuing the administrative proceeding or civil action.

2. State Environmental Laws.

a. Air.

General Permit Requirements

IDEM implements Indiana's CAA program (326 IAC 1 *et seq.*) primarily through a permitting system tied to the kinds and amounts of emissions from a source. The kinds of pollutants regulated include particulates, sulfur dioxide, carbon monoxide, volatile organic chemicals, nitrogen dioxide, lead, and numerous hazardous air pollutants. The appropriate level of permitting required by any emission source is based primarily on its *potential to emit*. The *potential to emit* (See 326 IAC 2-1.1-1(16)) is the total potential emissions of any regulated pollutant which could result from operating under a "worst case operating scenario," running twenty four hours a day (with no pollution control equipment), 365 days a year at full capacity. The requirement to obtain a permit usually applies when a source has potential emissions of 25 tons per year ("tpy") or more of any one pollutant (5 tpy for lead). For smaller sources of air pollution, Indiana uses a system of exemption or registration.

Additional requirements apply to major sources of air pollution. Except for sources of hazardous air pollutants, a major source will have potential emissions of at least 100 tpy of any one pollutant. Major sources of hazardous air pollutants will have at least the potential to emit 10 tpy of any one hazardous air pollutant, or at least 25 tpy of a combination of hazardous air pollutants. When a "major" source of air pollution is constructed or modified, various CAA programs are likely to require the source to utilize some iteration of Best Available Control Technology ("BACT") to reduce emissions. Several areas in Indiana do not meet the NAAQS for particulate matter, ozone, and sulfur dioxide (nonattainment). In those areas, the construction or modification of major sources includes more stringent requirements.

Construction Permits, New Source Review and PSD

The Prevention of Significant Deterioration ("PSD") program is a pre-construction review requirement to prevent the significant deterioration of air quality in areas that have already satisfied NAAQS mandates (attainment). Since 1980, Indiana has been delegated authority for implementation of the federal PSD program.

In March, 2003, USEPA approved Indiana's PSD rules (326 IAC 2-2). Consequently, Indiana's program is now enforceable at the state and federal level. Additionally, all appeals of PSD permits are now subject to Indiana's administrative procedures and appeals process.

Interim Construction Permits allow the applicant, under limited circumstances, to commence at their own risk the construction or modification of a new emissions unit or control device at an existing source while the permit revision application is being reviewed. *See* 326 IAC 2-13-1. An interim petition to construct is applicable to the proposed modification/revision of an existing source operating under a valid operating permit and located in an attainment area. It is not a permit to operate. IDEM must review and act on these interim construction permit requests within nineteen (19) days after a public comment period. Projects which are not eligible for an interim construction permit are: construction of a new major PSD facility or a major PSD modification to an existing source; construction in non-attainment areas of a unit that would emit those pollutants for which the non-attainment designation is based; construction of a totally new plant or to any modification that is subject to the new source toxic control rules.

State BACT

Indiana has adopted its own state Best Available Control Technology ("BACT") requirement (326 IAC 8-1-6) that differs from the federal BACT in that (1) state BACT requirements apply only to VOC emissions; (2) state BACT applies only to new facilities that have potential emissions of 25 tons or more per year of VOCs that are not otherwise regulated by Indiana's specific VOC rules found at 326 IAC 8; and (3) state BACT applies to new facilities located anywhere in the state (including both attainment and non-attainment areas). If a project is determined to be subject to state BACT, the requirements for meeting BACT are the same as for the federal BACT.

"Facility/Source" Definitions

The definitions of the terms "facility" and "source" for Indiana permitting purposes have different meanings than the federal definitions, *i.e.*, the meanings of the terms have been reversed in Indiana. In Indiana, a "facility" is defined in 326 IAC 1-2-28 as any one structure, piece of equipment, installation or operation which emits or has the potential to emit any air contaminant. Single pieces of equipment or installations with multiple emission points are considered a "facility." A "source" for Indiana air permitting purposes (326 IAC 1-2-73), is an aggregation of one or more emission units, pollution control devices and associated origins of emissions of regulated pollutants which are all related to the production of a specific product and are located on one piece of property or contiguous or adjacent properties that are owned by the same person or are under common control.

<u>Public Notice</u>

Indiana requires a thirty (30) day public comment period for Title V significant source/permit modifications, significant permit revisions to a federally enforceable state operating permit ("FESOP") and for a significant permit revision to a minor source operating permit. All other types of air permits or modifications do not require a public comment period.

b. <u>Water.</u>

Indiana's water programs primarily focus on implementing requirements of the federal Clean Water Act. *See* Section VI.A.4. *supra*.

<u>NPDES Permits</u>

U.S. EPA delegated authority to IDEM to issue industrial and municipal NPDES permits (including pretreatment requirements) to regulate the discharge of pollutants into the waters of the state. IDEM also has general permits "by rule" for activities such as sand and gravel pits, coal mines, or stone quarries, cooling water, pipelines, and petroleum-related activities. However, as a result of deficiencies in Indiana's general permit program identified by the U.S. EPA, IDEM is in the process of transitioning out of its permit-by-rule system for stormwater and wastewater permits. IDEM's revision of the current rules and issuance of new general permits is ongoing.

<u>Storm Water Permits</u>

Indiana's stormwater general permits are by rule. There are three main stormwater general permits, which consist of storm water runoff associated with construction activity that disturb one (1) acre or more of land (Rule 5); "no exposure certification" exclusion for designated industries (Rule 6); and storm water runoff from municipal separate storm sewer systems which serve urban populations greater than 7,000 people within the scope of the rules (Rule 13). As noted above, IDEM is transitioning out if its permit-by-rule system and will eventually eliminate the above rules and issue general permits.

Construction Permits

IDEM issues permits for the construction of wastewater and water supply facilities. Along with the state budget agency (the Indiana Finance Authority), IDEM administers both a wastewater revolving program that provides financial assistance to plan, design, construct or improve wastewater collection and treatment systems and a Drinking Water Revolving Loan Program that provides similar financial assistance to plan, design and construct public water systems.

Wetlands

IDEM has developed rules to establish wetland water quality standards and revise its procedures and criteria for review of projects requiring water quality certification under § 401 of the CWA. The rules include requirements to obtain a permit for certain activities affecting "State Regulated Wetlands," a broader category of wetlands than those regulated under the CWA.

Spill Reporting

In addition to the release reporting requirements under RCRA, CERCLA, UST laws, and the CWA, Indiana imposes further release reporting requirements under its "spill rule" (327 IAC 2-6.1). Spill reporting requirements under the rule depend on the type and amount of substance spilled, where the spill occurs, and the impact or potential impact on water quality. For instance, in a wellhead protection area, any spill of over 55 gallons of petroleum is reportable. Also reportable is any petroleum or hazardous substance spill that damages waters of the state and that is close to certain types of water resources. Spills of over 100 pounds (or their CERCLA reportable quantity, if less) of hazardous substances to surface water or soils is reportable. For petroleum, spills to surface water are reportable if there is a sheen, while spills to soils are reportable if over 55 gallons (off-site) or over 1,000 gallons (on-site). The rule requires the owner or operator not only to report the spill, but to contain the spill, if possible, and to undertake a "spill response" (essentially, cleaning up any free product). If requested by IDEM, the owner or operator must submit a written spill report. The rule also provides that IDEM, upon request, will issue a "no further action" letter if it determines that the owner or operator has fully complied with the spill rule requirements.

Aboveground Storage Tank Reporting

Under I.C. 13-18-5.5, effective July 1, 2015, owners and operators of Aboveground Storage Tanks (“ASTs”) are now required to report various information to IDEM before January 1, 2016. For purposes of this new law, ASTs include any device comprised of a surface that is at least 10% exposed above the ground *and* that is designed to contain *more than* 660 gallons of liquid above ground. The report must include the following information: (1) the AST’s location; (2) the materials stored in the AST; (3) the AST’s storage capacity; and (4) the name and contact information of the person who may be contacted for information about the AST. The owner or operator must also submit a supplemental report if any of the above information changes.

Importantly, owners and operators of certain ASTs are exempt from the reporting requirement. For example, ASTs used to contain only uncontaminated drinking water, demineralizing water, circulating cooling water, or water stored for emergency purposes are exempt. Also, ASTs located on a farm or “agribusiness” and that are used by the owner operator for farming or produced as an agricultural commodity are likewise exempt. Several other exemptions may apply as well. Additionally, a report is not required if the owner or operator previously reported the AST to IDEM.

Water Threat Minimization

Under recent amendments to the Indiana Code (*see* I.C. 13-18-16), the person responsible for the operation of a public water system must implement a surface water quality threat minimization and response plan (“Response Plan”) upon discovering contamination, or the threat of contamination, of the surface water utilized by the public water system as a source of drinking water. A Response Plan must do the following: (1) identify critical drinking water intake facilities and critical drinking water infrastructure; (2) identify potential threats to raw water quality; (3) assess risks posed by any identified potential threats; (4) provide a communication, education, and risk minimization plan; and (5) provide an incident response plan.

Once developed, all plans must be submitted to IDEM and resubmitted every 5 years following the initial submission. Additionally, Response Plans are confidential and generally protected from Indiana’s public disclosure requirements.

Data Gathering for Indiana Water Resources

Pursuant to Indiana Senate Enrolled Act 132, codified in I.C. 8-1-30.5 *et seq.*, all water utilities must gather information regarding Indiana's water resources. Specifically, water utilities must provide the following information to the Indiana Utility Regulatory Commission ("IURC"): (1) types of water usage; and (2) the water utility's operations and maintenance costs in providing water service.

Additionally, the IURC must compile and aggregate the following data: (1) the number of Indiana customers served by each water utility; (2) a description of each water utility's service territory in Indiana; (3) the total utility plant in service for the water utility's Indiana customers; (4) the amount and location of the water resources used by the water utility to provide service to its Indiana customers; (5) the availability and location of additional water resources that could be used if necessary; and (6) the amount of, and purpose of, funding received from specified sources. Upon aggregating and analyzing the data points above, the IURC must prepare and circulate an annual report to the Indiana Legislative Council.

Indiana's Water Shortage Plan

On March 20, 2015, the IDNR issued an updated water shortage plan (the "Plan") that addresses following: (1) the definition of a water shortage; (2) conservation measures, and the benefits of implementing such measures, for individuals, utilities, and government; (3) water shortage identification plan phases and restrictions; (4) use of ground and surface water to help alleviate threats to environmental health and safety during a water shortage; (5) water use priorities; (6) water shortage plan development; and (7) data needs and water shortage plan review. The Plan also provides supporting information, including a model ordinance and various data, in six appendices.

c. Waste.

Hazardous Waste

Indiana's hazardous waste program (I.C. 13-22 and 329 IAC 3.1) incorporates the RCRA hazardous waste program by reference, with few changes, and IDEM is authorized to implement the RCRA program in Indiana. Indiana also has a "good character" law (I.C. 13-19-4) which requires anyone wishing to obtain (or renew, transfer, or modify) any permit for a commercial solid or hazardous waste facility to disclose to IDEM certain past civil or administrative environmental complaints and fines and certain criminal complaints and convictions. IDEM may deny the permit request based on the nature of that historical information. The disclosure requirement applies to officers, directors and senior management of the permit applicant, as well as any individual or entity that owns a twenty percent (20%) or higher interest in the applicant.

Solid Waste

Indiana has a unique set of laws and rules regulating solid wastes (at I.C. 13-20 and 329 IAC 10 through 15). Together, these laws and rules do all of the following:

- Require solid waste generators to determine the appropriate regulatory status of their waste, and to document this determination;
- Require solid waste disposal facilities to have permits, unless they meet certain exemptions;
- Create the following categories of solid waste land disposal facilities:
    - municipal solid waste landfills
    - construction/demolition sites
    - restricted waste sites (Type I through IV)
    - non-municipal solid waste landfills;
- Impose varying levels of design, operating, and closure and post-closure standards depending on facility type;
- Require solid waste management facility permit applicants to demonstrate that there is a local or regional need in Indiana for the proposed facility;
- Impose financial responsibility requirements on all solid waste disposal facilities that are required to have a permit;
- Impose permitting, operational and closure/post-closure requirements on "solid waste processing facilities" (defined as solid waste incinerators, transfer stations, balers, shredders, resource recovery systems, composting facilities, and garbage grinding facilities);

- Require shipments of municipal waste to be accompanied by a manifest;

- Impose specific permitting and operational requirements on municipal waste transfer stations;

- Impose annual disclosure requirements on persons collecting or transporting municipal waste (very similar to the "good character" disclosure requirements imposed on hazardous and solid waste permitting). Based on the information disclosed, IDEM may suspend an operator's municipal waste activities.

- Require certification for operators of solid waste facilities;

- Impose standards for used oil, consistent with the federal requirements at 40 CFR 279;

- Impose requirements for the processing, storage and transportation of waste tires;

- Impose certain notification and operational requirements on collection container systems;

- Impose restrictions on the sale or manufacture of PCBs;

- Impose certain requirements for the sale and disposal of lead acid batteries; and

- Restrict the sale and use of certain items containing mercury.

Revisions to the state's solid waste rules finalized in 2004 removed references to special wastes (also known as "industrial wastes") — a category eliminated by statute – and added management standards for the handling and disposal of certain wastes.

Underground Storage Tanks and Petroleum Clean-ups

Indiana's Underground Storage Tank ("UST") program (I.C. 13-23 and 329 IAC 9) contains all of the requirements of the federal UST program under the Solid Waste Disposal Act relating to technical standards for USTs, corrosion protection, release detection, spill and overfill prevention, financial responsibility, and reporting, investigating and clean-up of releases. Indiana's program also includes several unique features. It requires anyone installing, testing, retrofitting, removing or closing a UST to be certified for such activity by the Indiana State Fire Marshall. Indiana also imposes annual tank fees which are used to fund the State's

Underground Petroleum Storage Tank Excess Liability Fund ("ELF").

The ELF serves as a source of money to reimburse UST owners and operators for the costs of clean-up of petroleum UST releases, or for payment of liability to third- parties caused by petroleum UST releases. The UST Financial Assurance Board ("FAB") was created to oversee the administration of the ELF. The FAB has adopted rules (328 IAC 1) specifying the type and amount of expenses eligible for reimbursement from the ELF. Due to financial pressures on the ELF, the FAB in 2004 tightened the type and amount of expenses eligible for reimbursement. The changes included rules prioritizing ELF payouts wherever the ELF falls below specified levels.

Another unique feature of Indiana's UST laws is its UST cost recovery statute. Under I.C. 13-23-13-8(b), any person who performs or pays for clean-up of a release from a UST "is entitled to receive a contribution" from a person who owned or operated the UST at the time the release occurred. A successful plaintiff is also "entitled to receive reasonable attorney's fees and court costs."

In order to deal with petroleum contamination that is not related to USTs, Indiana has a "Petroleum Releases" statute at I.C. 13-24. It authorizes IDEM to order or undertake, if necessary, an action to clean up non-UST petroleum contamination, and imposes liability for the costs on the owner or operator of the facility. It also authorizes such an owner or operator to recover from another responsible person costs incurred or paid to the state by the owner or operator.

<u>Indiana's CERCLA-Like Laws</u>

I.C. 13-25-4-8 provides that a person liable under Section 107(a) of CERCLA (at a site in Indiana) is also liable to the state in the same manner and to the same extent. The statute also sets up a state hazardous substance response trust fund and gives IDEM the authority to order clean-ups of hazardous substances. An "Indiana scoring model" (at 329 IAC 7) provides criteria for the priority ranking by IDEM of hazardous substance sites in Indiana (excluding those on EPA's National Priorities List). IDEM's program is known as the "state clean-up" program.

There is no CERCLA-like cost recovery or contribution provisions in Indiana's hazardous substance clean-up statute. However, since 1998, Indiana has had a separate cost recovery statute (I.C. 13-30-9, "Environmental Legal Actions" ("ELA")), intended to provide a more fault/equity-based cost recovery alternative to CERCLA "without regard to any theory of joint and several liability." Under the ELA, a person may bring an action to recover costs of clean-up of a release of hazardous substances or petroleum against a person who caused or contributed to the release. The statute sets forth equitable factors for the court to consider, including "whether an award of reasonable costs, including attorneys' fees . . . is appropriate."

House Enrolled Act ("HEA") 1162 changed the remediation goals of several statutes with particular emphasis on I.C. 13-25-5. IDEM is now required by statute to consider exposure pathways and institutional controls as the ultimate remediation.

<u>Brownfields and the Indiana Voluntary Remediation Program</u>

Several Indiana programs provide incentives for brownfields redevelopment in Indiana. I.C. 6-1.1-42 provides for property tax abatement for brownfield redevelopment in designated brownfield revitalization zones. I.C. 13-19-5 establishes a revolving loan fund for granting loans, forgivable loans, and grants to political subdivisions for activities relating to brownfield redevelopment. In addition, IDEM has an informal program for reviewing brownfield investigations and clean-ups and providing "comfort letters" to the participants.

Indiana's Voluntary Remediation Program ("VRP") provides another incentive to brownfields clean-up, although it is a program available to anyone cleaning up a contaminated site in Indiana -- brownfield or otherwise. Under I.C. 13-25, anyone wishing to perform a clean-up under IDEM's supervision (even a UST clean-up) may apply to the VRP. In exchange for paying for IDEM oversight of the clean-up, the successful VRP participant will receive a covenant-not-to-sue from the state which bars all public or private claims under Title 13 of the Indiana Code with respect to the release that was remediated; however, it does not protect against claims by the federal government under federal law. In addition, once a participant signs an agreement with IDEM at the beginning of a VRP project, the participant receives protection during the clean-up from any liability under Title 13 relating to the release. These liability protection provisions have made the VRP a popular clean-up program in Indiana.

<u>Responsible Property Transfer Law</u>

The Indiana state legislature repealed Indiana's Responsible Property Transfer Law ("RPTL" at I.C. 13-25-3) in 2015. This statute previously imposed environmental disclosure requirements triggered by the transfer (as defined in I.C. 13-11-2-234) of certain types of property.

VII. INTELLECTUAL PROPERTY

A. General Note

Historically, copyright law has been governed exclusively by federal law. However, the United States Supreme Court in *Holmes v. Vornado,* 535 U.S. 826 (2002) ruled that a copyright or patent claim can only "arise under" federal law if the claim is raised in a complaint. As a result of this decision, if a purely state claim results in a counterclaim for copyright or patent infringement, the state court can now decide all the issues before it. In *Green v. Hendrickson Publishers, Inc.,* 770 N.E. 2d 784, 63 U.S.P.Q.2d 1852 (Ind. 2002) an Indiana state court claimed jurisdiction over a copyright claim brought as a counterclaim to a breach of contract complaint. The court in *Green* remarked, "we think *Holmes* requires us to reject the federal authorities stating or implying that a state court may not entertain a counterclaim under patent or copyright law." *Id.* at 793.

However, responding to the ability of state courts to potentially adjudicate patent and copyright claims, Congress included the “Holmes Group fix” in the 2011 Leahy-Smith American Invests Act ("AIA"). This statute added a new removal statute that allows ***any party*** asserting claims for relief under the federal laws protecting patents, copyrights or plant varieties to remove that case to federal court. *See Andrews v. Daugherty*, 994 F. Supp.2d 728, 731-32 (M.D. N.C. 2014); *see also Vermont v. MPHJ Technology Investments, LLC*, 803 F.3d 635 (Fed. Cir. 2015).

B. Copyright Law 17 U.S.C. *et seq*.

1. <u>Generally.</u>

Copyright law provides the author of a work with the exclusive right to reproduce, distribute, modify, perform, and display that work. Anyone who takes these action(s) without proper authority infringes the copyright in the work.

All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in a tangible medium of expression, that is, the work must be embodied in some format so that it can be reproduced or its intent communicated to the world. Second, the work must be an original work of authorship.

Although copyright protection automatically attaches to a work the moment that work is created, registration of that work with the United States Copyright Office provides certain advantages. A certificate of registration is *prima facia* evidence of the validity of the copyright provided that registration occurs no later than five years after the work is first published. 17 U.S.C. 410. For U.S. authors, copyright registration is a requirement to file an action for copyright infringement. For anyone to claim certain statutory damages and attorney fees, registration is also required. Time limits for registration are imposed when seeking certain types of damages. 17 U.S.C. 412.

To register a copyright, one files an application with the U.S. Copyright Office. The necessary forms and template can be found online at **http://www.copyright.gov/eco/**. An application must be accompanied by the proper fee ($35.00 for an online application for a work with a single author, same claimant, one work and not for hire; and for other online filings, $85; for all paper filings, $85; see **http://copyright.gov/docs/fees.html** for-up-to-date fee information), and a copy of the work must be submitted either electronically or by U.S. mail.

Federal copyright law also specifically addresses digital content. In short, the Digital Millennium Copyright Act makes it a crime to circumvent anti-piracy measures built into commercial software. It also outlaws the manufacture, sale, or distribution of code-cracking devices used to illegally copy software. Other highlights include: (i) limiting Internet service providers from copyright infringement liability for simply transmitting information over the Internet, and (ii) requiring webcasters to pay licensing fees to record companies.

2. Indiana Copyright Law (I.C. 32-37-1, *et seq.*).

This statute provides adequate information to the proprietors of offices, retail establishments, restaurants or similar such establishments, in their dealings with performance rights societies, such as ASCAP or BMI. Under this statute, a performing rights society must, at least 72 hours before the signing of a contract between the performing rights society and a proprietor, provide the proprietor with written information that includes: (1) a schedule of rates and terms of royalties; (2) a toll free telephone number for information the proprietor may need concerning those artists represented by the performing arts society; (3) notice that the performing rights society is in compliance with any previous orders issued by courts with jurisdiction over rates, royalty terms and licensing for public performance of copyrighted non-dramatic musical works.

The statute also requires the performing rights society to, upon request, provide the proprietor a list of members or affiliates represented by the performing rights society and the most recent list of musical works subject to copyright found in the performing rights society repertoire.

Contracts signed, issued or renewed in Indiana between a performing rights society and a proprietor must be in writing and must include the name and address of the proprietor, the name and address of the performing rights society, the name and location of each place of business to which the contract applies, the duration of the contract and the schedule of rates and terms of the royalties to be collected under the contract.

Under this statute, a performing rights society is prohibited from signing a contract with a proprietor unless the contract conforms to Indiana law. The performing rights society is also prohibited from entering the business premises to discuss any such contract without disclosing that its representative is an agent of the performing rights society. Any coercive conduct that substantially disrupts the proprietor's business is also prohibited.

A person who is harmed by violation of this law may sue for damages and attorneys' fees. They may also seek an injunction and any other remedy available at law or equity.

The above provisions do not apply to television networks, cable television operators or programmers, or to an investigation by a law enforcement agency of a suspected violation.

a. Unlawful Use of Sound and Video Recordings (I.C. 24-4-10, *et seq.*).

This statute prevents the sale, rental, transportation or possession of illegal audio, sound and video recordings. No such sale, rental, transport or possession for commercial gain or personal financial gain is allowed if the recording does not conspicuously display the true name and address of the manufacturer of the recording. A person found guilty of violating this statute has committed fraud, a Class D Felony.

b. Prohibition on Direct Molding Process (I.C. 24-4-8, *et seq.*).

This statute prevents a person from manufacturing, by use of a direct molding process, a watercraft or a component part of a watercraft without the permission of the person who owns the hull design. A person injured by a violation of this law may move for injunctive relief, damages caused by the violation, treble damages, costs and reasonable attorneys' fees. Injunctive relief is available without a showing of irreparable injury.

C. Patent Law

1. In General.

Patents are governed exclusively by federal law as set forth in Title 35 of the United States Code, which was amended in 2011 by the AIA.

One who invents or discovers a new machine or device, a new process, or a new composition of matter may be able to obtain a U.S. patent. A U.S. patent provides the inventor with an exclusive right for a specified time to make, use, import, offer to sell, or sell the patented invention in the U.S. In other words, 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. Anyone without authority from the patent holder who makes, uses, imports, or sells in the U.S. the patented invention during the life of the patent is considered to "infringe" the patent and may be liable for damages.

A utility patent, which generally governs the functional aspects of a machine, process, or composition of matter is enforceable beginning at the grant date of the patent and ending 20 years (may be extended for certain delays) after the filing date of the earliest U.S. application to which priority is claimed, excluding provisional applications. A design patent, which covers the design or ornamental appearance of an article of manufacture, is enforceable for 14 years from the grant date of the patent. A provisional patent application, which may be filed before a regular utility patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a utility patent application.

2. <u>Effect of Foreign Patents.</u>

A foreign patent is not enforceable in the U.S. Accordingly, an inventor who holds a foreign patent, but no U.S. patent, will usually have no recourse against others who practice the invention in the U.S.

3. <u>Patentability Under Federal Patent Statutes.</u>

To be eligible for a 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:

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

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

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

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

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

In order to determine patentability of an invention, it is often useful to search the records of the U.S. Patent and Trademark Office (USPTO). 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 a patent application.

4. Patent Application Process.

A complete patent application includes four elements. First, the application must include a "specification." The specification is a description of what the invention is and what it does. The specification must also include at least one claim which establishes the boundaries of patent protection for the invention. The specification can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period. Second, the application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English, the oath or declaration must be in a language that the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included.

After a proper application is filed, the application is assigned to an examiner with knowledge of the particular subject matter. The examiner makes a thorough review of the application and the status of existing "prior art" in the relevant area to determine whether the invention meets the requirements of patentability. The patent review process generally 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 (PTAB). Decisions of the PTAB may be appealed to the federal courts.

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

It is important to secure an early filing date with the USPTO. With the adoption of the AIA, U.S. patents are now awarded to the first inventor to file, not necessarily the first inventor to invent. Also, an inventor is prohibited from filing a patent application more than one year after a public disclosure (e.g., printed publication, public use, or sale).

5. Patent Marking.

After a patent application has been filed, products made in accordance with the invention described and claimed in the application may be marked with the legend "patent pending" or "patent applied for." After a patent is issued, products covered by the patent may be marked "patented" or "pat.," together with either: (a) the U.S. patent number (which constitutes a traditional physical marking) or (b) an address of a posting on the Internet that associates the products with the U.S. patent number (which constitutes a "virtual marking" under the AIA). Marking is not required, but it may be necessary to prove marking in order to recover damages in an infringement action.

6. Rights to Patented Inventions.

Disputes sometimes arise between employers and employees over the rights to inventions made by employees during the course of employment. To avoid such disputes, employers should 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 belong to the employer.

D. Trademark Law

Trademark law is governed by federal law and state law. A trademark is used by an individual or entity to identify its goods or services and to distinguish them from the goods or services offered by others. A trademark might be a word, design, symbol, sound, product design or product packaging that identifies the source of a product or services.

Under the trademark laws of the United States and Indiana, the principal method of establishing rights in a trademark is the actual use of that trademark in commerce. Registration of a trademark is not a required to establish legal rights in a trademark. Registration does, however, provide advantages.

1. Federal Law.

Federal registration of a trademark establishes a presumption that the registrant owns the trademark. It also is *prima facie* evidence of the registrant's exclusive right to use that mark, in connection with the relevant goods or services, in interstate commerce. This presumption can be useful in infringement actions.

Federal registration may help prevent the importation into the U.S. of foreign goods that display an infringing trademark. Registration also provides notice to others of the owner's trademark claim, and may dissuade others from adopting a confusingly similar term.

To federally register a trademark, the owner must file an application with the U.S. Patent and Trademark Office and pay the required fee (see **www.uspto.gov** for a current list of fees). After the application is filed, it is reviewed by an examining attorney. If the application is approved, the mark is published in an official publication of the United States Patent and Trademark Office allowing third parties thirty (30) days to oppose registration of the mark in the application. If no such challenge is raised, or if the challenges are unsuccessful, the mark is federally registered and a certificate of registration is issued.

A federally registered trademark has a term of ten years. It can be renewed indefinitely for similar periods if the trademark remains in use and certain documents and fees are submitted to the U.S. Patent and Trademark Office.

2. Indiana Law.

a. Indiana Trademark Act (I.C. 24-2-1, *et seq*.).

Indiana's definitions of a trademark and service mark are very similar to the federal definitions. A state trademark application is filed with the Indiana Secretary of State. A link to this form can be found online at **www.in.gov/sos/business/trademarks.html**. A state trademark application is examined for compliance with statutory formalities, and the Secretary of State has the option of asking for additional information from an applicant. Upon successful review, the Secretary of State issues a certificate of registration to the applicant providing a 5-year registration term. The registration term may be renewed for subsequent 5-year periods.

All common law remedies, including injunctive relief, are available to the owner of a mark in Indiana. The statute contemplates an action against counterfeiters for those who have registered their marks. Indiana common law also recognizes an unfair competition right of action for unregistered marks. Registered trademarks may be assigned with the goodwill of the business. The misleading use of certain federal names such as Army, Navy, PX, GI, etc. is prohibited. Also, under various Indiana statutes, special requirements apply to use of names such as bank, trust, savings and loan association, rural, lottery, architect, land surveyor and engineer.

Trademark dilution is also covered by Indiana statute and allows for injunctive relief for a mark famous in Indiana. Damages and other remedies potentially are available if the owner can prove a willful intent to trade upon or dilute the famous mark.

b. <u>Other Indiana Trademark Statutes.</u>

(1) Trademarks for Use on Indiana Products (I.C. 4-4-19-1, *et seq*.)

The Indiana Economic Development Corporation by statute is charged with devising a distinctive trademark and registering it with the U.S. Patent and Trademark Office. The trademark must indicate in some way that the product to which it is affixed is substantially produced or assembled in Indiana. An individual or entity may apply for permission to use the mark on eligible products.

(2) Corporate Names (I.C. 23-1-23-1, *et seq*.)

Under Indiana law, a corporate name must contain the word corporation, incorporated or similar terms and be distinguishable from the names of other corporations incorporated or authorized to transact business in Indiana.

A person may reserve the right to use a name, including a fictitious name, by filing an application with the Secretary of State. A link to this form may be found at **www.in.gov/sos/business/forms.html**. If the Secretary of State determines that the name is available, the Secretary shall reserve the name for the applicant's exclusive use for renewable 120-day periods.

A foreign corporation may register its name if the name is otherwise distinguishable by filing with the Secretary of State an application setting forth its name with any additions required by statute and the state or country and date of its incorporation. The name is then registered for the applicant's exclusive use upon the effective date of the application.

(3) Assumed Names (I.C. 23-15-1-1, *et seq.*)

"A person or general partnership conducting or transacting business in Indiana under a name, designation, or title other than the real name of the person or general partnership conducting or transacting the business shall file for record, in the office of the recorder of each county in which a place of business or an office of the person or general partnership is situated, a certificate stating the assumed name or names to be used and the full name and address of the person or general partnership engaged in or transacting business." See more at: http://codes.lp.findlaw.com/incode/23/15/1/23-15-1-1#sthash.SkjK8C5e.dpuf. Exceptions are listed in section 2.

Violation of this statute is a Class B Infraction. I.C. 23-15-1-3.

(4) Cloth Product Trademarks (I.C. 24-4-5, *et seq.*)

Under this statute the owner or supplier of "circulating products" defined as towels, sheets, linens, shirts and other such garments may adopt a name or device and weave or otherwise fix that name or device to the circulated product to show ownership and registration. Similarly, the owner of a delivery container may stamp or otherwise affix a name or symbol on its container to indicate ownership and registration. It is unlawful for anyone except the owner or registrant to buy, sell or otherwise traffic in such circulated products or delivery containers. It is also unlawful to erase, obliterate or conceal the name on any such circulated product or delivery container unless the article was purchased from the supplier or owner.

Violation of this statute is a Class B Infraction. One who suffers loss under this statute may bring an action to recover actual damages, costs and reasonable attorneys' fee.

(5) Right of Publicity (I.C. 32-36-1-1, *et seq.*)

Indiana recognizes the right of a living or dead natural person to control the commercial use of that person's name (actual or assumed), voice, signature, photograph, likeness, distinctive appearance, gestures or mannerisms if they have commercial value during the person's lifetime or for 100 years after the person's death unless written consent has been obtained from: the person, a person to whom the right of publicity has been transferred, or after the death of the person, by someone who possesses one-half (1/2) or more of a person's recognized rights.

One who violates the right of publicity is liable for actual damages, profits realized from any such unauthorized use, treble damages, punitive damages, costs and attorneys' fees.

This statute includes various exclusions for uses made as part of political commentary or works of art, news reporting or entertainment mediums, the use of a person's name to truthfully identify that person as an author, and use in connection with a truthful broadcast.

E. Trade Secrets

1. Overview.

A company's confidential information and trade secrets are valuable assets. In many cases, a company's livelihood may depend on maintaining and protecting its trade secrets.

Unlike patents, trademarks and copyrights, which are made available to the public, trade secrets, by their very nature, must be kept secret. In the case of patents, for example, a patentee agrees to teach the public to make or use the invention in exchange for a limited 20-year monopoly. Trade secrets, on the other hand, are only protected while the information remains secret. For this reason, a binding employee agreement not to disclose trade secrets is critical in most cases.

Although trade secrets are not registered, as in the case of patents, trademarks and copyrights, the law does protect trade secrets from theft or misappropriation. In most states, trade secrets are protected under a combination of both common law and state statute.[1] Such is the case in Indiana, where the Indiana legislature has adopted the Uniform Trade Secrets Act (I.C. 24-2-3-1, *et seq*.). However, the law does not prevent a competitor from copying or reverse-engineering an end product resulting from a trade secret, so long as it is done without misappropriating the underlying trade secret.

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[1] In certain cases, trade secrets are also protected under federal law. For example, the Economic Espionage Act of 1996 (18 U.S.C. § 1831, *et seq*.) makes the misappropriation of a trade secret to benefit a foreign power a federal crime.

2. Indiana Code.

a. Trade Secret.

Indiana defines a "trade secret" (I.C. 24-2-3-2) as having the following characteristics:

(1) information (*e.g.* formula, pattern, compilation, program, device, method, technique, or process)

(2) deriving independent economic value

(3) not generally known

(4) not readily ascertainable by proper means

(5) subject to reasonable efforts to maintain its secrecy

b. Misappropriation.

Indiana defines "misappropriation" of a trade secret (I.C. 24-2-3-2) as:

(1) "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) disclosure or use of a trade secret of another without express or implied consent by a person who:

(a) used improper means to acquire knowledge of the trade secret;

(b) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(i) derived from or through a person who had utilized improper means to acquire it;

(ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(c) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake."

c. Damages.

A successful plaintiff may be entitled to injunctive relief, damages for the actual loss caused by misappropriation, and damages for the unjust enrichment caused by misappropriation (I.C. 24-2-3-4(a)). If willful and malicious misappropriation exists, the court may also award punitive damages (I.C. 24-2-3-4(c)).

3. Indiana Case Law.

a. Burden of Proof.

The burden of proof is on the party asserting the trade secret to show that the information satisfies the statutory definition. *Zemco Mfg., Inc. v. Navistar Intern. Transp. Corp.,* 759 N.E.2d 239, 245 (Ind. Ct. App. 2001) *transfer denied*, 774 N.E.2d 519 (Ind. 2002).

b. Case Law Interpretation of "Readily Ascertainable".

To qualify as a trade secret, the information cannot be "readily ascertainable by proper means" (I.C. 24-2-3-2). Indiana courts do not require the trade secret holder to show an absolute impossibility of ascertaining the trade secret. Rather, the courts consider the ease or difficulty with which the information could be acquired or duplicated by others.

The Indiana Supreme Court has awarded trade secret protection to information that would require "a substantial investment of time, expense, or effort" to acquire or duplicate. *Amoco Prod. Co. v. Laird,* 622 N.E.2d 912, 919 (Ind. 1993). In *Amoco*, that information was a map indicating possible oil reserve sites that the trade secret holder developed based on geological surveys and microwave radar tests. *Id.* at 913.

Indiana courts have also recognized that, while certain elements by themselves may be "readily ascertainable" and in the public domain, the combination of those elements may qualify for trade secret protection. *U.S. Land Services, Inc. v. U.S. Surveyor, Inc.*, 826 N.E.2d 49, 63 (Ind. Ct. App. 2005). In *U.S. Land Services*, the plaintiff sought to protect its database of surveyors, customers, and prospective customers. *Id.* at 52. The defendant argued that the contact information in the database was "readily ascertainable by proper means," such as through the yellow pages and the internet. *Id.* at 63. According to the Court, the plaintiff's database may qualify as a trade secret because the act of compiling the underlying public information "required a substantial investment of time, expense, and effort." *Id.* at 64.

While Indiana courts are hesitant to grant trade secret status to customer lists alone, they are willing to grant such status when the misappropriated material includes detailed information about the customers. In *Steve Silveus Insurance, Inc. v. Goshert,* 873 N.E.2d 165 (Ind. Ct. App. 2007) the court concluded that the information misappropriated included crop insurance information, including such details as farm descriptions, past insurance coverage and loss histories, which were not readily ascertainable through public records.

c. Case Law Interpretation of "Reasonable" Efforts to Maintain Secrecy.

To qualify as a trade secret, the information must be subject to "reasonable" efforts to maintain its secrecy (I.C. 24-2-3-2). Indiana courts have recognized examples of actions which may be undertaken to maintain secrecy: (1) requiring employees to sign confidentiality agreements or otherwise advising them of the confidential nature of the information; (2) posting warning or cautionary signs, or placing warnings on documents; (3) requiring visitors to sign confidentiality agreements, sign in, and shielding the information from their view; (4) segregating information; (5) using unnamed or code-named ingredients or parts; and (6) keeping secret documents under lock. *Zemco Mfg., Inc. v. Navistar Intern. Transp. Corp.,* 759 N.E.2d 239, 246 (Ind. Ct. App. 2001) *transfer denied*, 774 N.E.2d 519 (Ind. 2002).

The most commonly addressed factor in this analysis is whether the trade secret holder requires its employees to sign confidentiality agreements. In *Zemco*, for example, the Indiana Court of Appeals refused to recognize a company's machine as a trade secret when the company failed to utilize confidentiality agreements with its employees and visitors who saw the machine, even though signs posted near the machine instructed viewers to keep information about the machine confidential. *Zemco Mfg., Inc. v. Navistar Intern. Transp. Corp.,* 759 N.E.2d 239, 249-250 (Ind. Ct. App. 2001) *transfer denied*, 774 N.E.2d 519 (Ind. 2002).[2]

[2] Confidentiality requirements are not always necessary. *See, e.g., N. Elec. Co. v. Torma*, 819 N.E.2d 417, 427-429 (Ind. Ct. App. 2004), *rehearing denied* (finding that a company that depended on longstanding trusting relationships with its employees rather than explicit confidentiality agreements had made "reasonable" efforts to

Confidentiality agreements, though important, may not be enough to protect a trade secret. Even though a company required some of its employees to sign confidentiality agreements, the Indiana Court of Appeals refused to recognize the company's customer database as a trade secret when that information was: (1) available to all of the company's employees, (2) kept in unlocked files and sometimes posted in open view, and (3) stored on computers that were not password-protected. *Coleman v. Vukovich*, 825 N.E.2d 397, 405 (Ind. Ct. App. 2005). *Cf. Landeen v. PhoneBILLit, Inc.*, 519 F.Supp.2d 844 (S.D. Ind. 2007) (applying Indiana law and finding that alleged trade secret holder's decision to maintain confidentiality of information with regard to its employees was insufficient, as no effort was made to inform other companies of the confidential nature of the information); *see also Paramanandam v. Herrmann*, 827 N.E.2d 1173 (Ind. Ct. App. 2005) (finding website owner failed to show it took any efforts to prevent data on its website from being copied and therefore could not prove prima facie case for trade secret misappropriation).

d. <u>Employer Liability for Newly Hired Employees.</u>

According to the Indiana Supreme Court, a company that hires an employee who took a trade secret from his or her former employer may also be liable for trade secret misappropriation if the company knew or should have known of the misappropriation, but not under the doctrine of respondeat superior. *Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028 (Ind. 2004). *Cf. Patriot Homes, Inc. v. Forest River Housing, Inc.*, 489 F.Supp.2d 865 (N.D. Ind. 2007) (rejecting defendant employer's and employee's argument that Indiana Uniform Trade Secret Act preempted all tort claims that may be related to trade secrets, including claims for tortuous business practices and unfair competition, and citing *Quandt* for proposition that respondeat superior claims are preempted due to scienter requirement of Trade Secret Act).

VIII. DISPUTE RESOLUTION

A. Federal Court System in Indiana

1. <u>United States District Courts.</u>

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

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maintain secrecy of information where the company limited access to its facility through a security system, kept the information under lock and key, and distributed the information on a limited basis to individuals who needed it).

federal statutes. They have exclusive jurisdiction over bankruptcy, patents, copyrights, antitrust, postal matters, internal revenue, admiralty, federal crimes, federal torts, and customs. All other jurisdiction is concurrent with the state courts. There are generally two ways to gain access to the federal district courts when there is concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states, citizens of a foreign country, or actions brought by foreign countries. Diversity jurisdiction requires an amount in controversy exceeding $75,000, exclusive of interest and costs, as well as complete diversity of citizenship, *i.e.*, none of the plaintiffs may be a citizen of the same state as any of the defendants. The second is federal question jurisdiction, *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.

There are two federal districts in Indiana, the Northern District of Indiana and the Southern District of Indiana. There are eight United States District Court Judges in the Northern District, six active status Judges, and two senior status Judges. The Southern District of Indiana currently has six Judges, five active status Judges, and one senior status Judge. Each district also has United States Magistrate Judges who handle discovery and other pretrial matters. There are five Magistrate Judges in the Northern District and seven Magistrate Judges (two of whom are on part-time status) in the Southern District. The Northern District of Indiana has four divisions: Fort Wayne Division; South Bend Division; Hammond Division; and Lafayette Division. Judges are resident in all but Lafayette which is staffed by judges who travel there as needed. The Southern District is composed of the following divisions: Indianapolis Division; Terre Haute Division; Evansville Division; and New Albany Division. Judges resident in the Indianapolis Division also sit in Terre Haute, Evansville, and New Albany. The geographic boundaries of each of the Indiana divisions is set forth in 28 U.S.C. § 94.

a. <u>District Court Rules and On-Line Resources.</u>

Matters pending in the federal district courts are governed by the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence 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, including the Northern and Southern Districts of Indiana, also establishes its own "local rules" applicable to cases pending in that district. The Northern and Southern Districts of Indiana Local Rules generally follow the same numbering system as the Federal Rules. Those Local Rules set forth specific local requirements that affect many important aspects of civil and criminal litigation. Close attention should be paid to the Local Rules in any case pending in a United States District Court in Indiana. Local Rules for both the Northern and Southern Districts are available on each District's website. Additionally, some, but not all, of the Judges and Magistrate Judges require specific courtroom procedures and encourage counsel to observe practice preferences in their courts.

Both the Northern and Southern Districts have websites collecting and linking to a wide range of information to assist practitioners. The website address for the Southern District of Indiana is **http://www.insd.uscourts.gov** and for the Northern District of Indiana is **http://www.innd.uscourts.gov**. Available information includes, but is not limited to, judge biographies, court personnel, local rules, attorney handbooks, courtroom procedures, forms, case/docket search capability, opinions database, and trial results.

The Northern and Southern Districts have implemented an Electronic Case Filing ("ECF") system, requiring attorneys to electronically file and serve pleadings and certain other court papers. Information about registering for and using the ECF program is available on the District websites. Out-of-state attorneys can register and participate in the Court's ECF program if they are admitted to practice in a case pending in the District.

b. Alternative Dispute Resolution.

The District Courts strongly encourage informal dispute resolution procedures. Case Management Orders typically establish a time table for the parties to exchange settlement demands and offers prior to trial. Magistrate Judges also require the parties to participate in settlement conferences similar to mediation. It is common for the District Courts to order a representative of each party to attend the settlement conference in person along with counsel.

2. United States Court of Appeals for the Seventh Circuit.

Appeals from the District Courts in the Northern and Southern Districts of Indiana are to the Seventh Circuit Court of Appeals in Chicago, Illinois. The Seventh Circuit is composed of the federal district courts located in Indiana, Illinois, and Wisconsin. Matters pending in the Seventh Circuit are governed by the Federal Rules of Appellate Procedure and the Seventh Circuit Local Appellate Rules and Procedures. Detailed information about the court and its procedures is available at **http:/www.ca7.uscourts.gov**.

The Seventh Circuit schedules a settlement conference in many civil appeals prior to the briefing stage.

B. Indiana's Court System

1. Trial Courts.

The trial courts in Indiana are organized by county. There are 92 counties in Indiana, each of which has a circuit court. In addition, most counties in Indiana have superior courts and some have special small claims courts as well as special municipal and traffic courts of various kinds. Populous counties have many courts and many judicial officers. Marion County, the location of the State's capital, Indianapolis, has 14 Superior Courts in its Civil Division, 25 Superior Courts in its Criminal Division, and 9 Small Claims Courts, one in each township. There are also Juvenile, Probate, and Environmental Division, each with a Superior Court Judge. With minor exceptions, trial court judges in Indiana are elected to six-year terms. In some counties trial courts have appointed commissioners, magistrates, and special masters to handle certain proceedings.

Matters pending in Indiana trial courts are governed by the Indiana Rules of Court including the Indiana Rules of Trial Procedure, the Indiana Rules of Criminal Procedure, the Indiana Small Claims Rules, the Indiana Rules of Evidence, and the Indiana Jury Rules. In addition, many counties have local rules that govern matters pending in their courts.

Indiana has very strict requirements for *pro hac* (or temporary) admission of attorneys not licensed to practice law in Indiana. All *pro hac* admissions are governed by Rule 3, Section 2 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys. The Rule sets forth the procedures for *pro hac* admission, including an annual fee, notice, and reporting requirements.

2. Appellate Courts.

Appeals from the State's trial courts go to the Indiana Court of Appeals. In rare cases involving a substantial question of law of great public importance requiring a speedy determination, however, the Supreme Court may take the appeal directly before consideration by the Court of Appeals. The Court of Appeals is composed of 15 Judges appointed by the Governor. Judges on the Court of Appeals serve for life, unless recalled. The Court of Appeals is divided into five districts. Judges from any district may serve in any given appeal. Appeals are decided by a panel of three Appellate Court Judges. Oral argument is not granted in every case. When oral argument is granted, it occasionally will be scheduled outside Indianapolis, typically at an Indiana college or high school. With the exception of matters of which the Supreme Court has exclusive jurisdiction, the Court of Appeals has jurisdiction of all appeals from final judgments, appeals from interlocutory orders, and appeals from agency decisions.

The Indiana Supreme Court is Indiana's highest court. The Governor appoints five justices to the Supreme Court who serve for life, unless recalled. In civil cases, there is no appeal of right from the Indiana Court of Appeals to the Indiana Supreme Court. A party seeking review of an Indiana Court of Appeals decision must file a petition to transfer, similar to a petition for a *writ certiorari* in the federal system. The number of civil cases in which transfer is granted by the Supreme Court is small, although relatively recent changes in the number of mandatory criminal appeals which the Indiana Supreme Court must hear has made it possible to hear more civil appeals. The Indiana Supreme Court has mandatory and exclusive jurisdiction over criminal appeals in which a sentence of death or life imprisonment without parole is imposed and criminal appeals in post conviction relief cases in which the sentence was death; appeals of final judgments declaring a state or federal statute unconstitutional in whole or in part; appeals involving waiver of parental consent to abortion under Rule 62; and appeals involving mandate of funds. The Indiana Supreme Court also has exclusive jurisdiction over matters involving the practice of law, supervision of judges, supervision of courts and issuance of writs.

3. <u>Tax Court.</u>

An initial judicial appeal from a final determination by the Indiana Department of Revenue, the Indiana Board of Tax Review or the Department of Local Government Finance is heard in the Indiana Tax Court. The Indiana Tax Court has one Judge, appointed by the Governor. Evidentiary hearings are heard by the Court without a jury. Proceedings in the Tax Court are governed by the Indiana Tax Court Rules. Appeal from the Tax Court is taken by petition to the Indiana Supreme Court. Acceptance of review by the Indiana Supreme Court is discretionary.

4. <u>Alternative Dispute Resolution.</u>

Indiana court proceedings are governed by the Rules for Alternative Dispute Resolution. The courts encourage the use of mediation, arbitration, mini-trials, summary jury trials, and private judges to resolve pending disputes. Mediation before a certified private mediator is commonly required in civil cases. Any party may request or the Court on its own motion may refer a civil case to mediation at any time 15 days or more after the time allowed for peremptory change of judge has expired.

IX. FINANCING INVESTMENTS

A. Tax Exempt Financing

Tax-exempt financing is available, for a wide range of purposes, to the various local governmental units in Indiana. Bonds may be issued in Indiana by counties, cities and towns, townships, school corporations, separate municipal corporations or special taxing districts.

Types of bonds which may be issued by governmental entities include (i) general obligation bonds payable out of ad valorem taxes, levied and collected on taxable property in the political subdivision issuing the bonds, (ii) special taxing district bonds issued by separate municipal corporations or special taxing districts payable from a tax levy which may be imposed by the separate municipal corporation or special taxing district, or (iii) revenue bonds which may be issued by any political subdivision or municipal corporation so authorized, which bonds would be payable from certain revenue streams pledged specifically for such purposes.

General obligation bonds issued by a political subdivision payable out of ad valorem property taxes are subject to a 2% debt limit set forth in the Indiana Constitution. Likewise, debt payable from property taxes issued by a separate municipal corporation or a special taxing district, while not subject to the constitutional debt limitation, typically will be subject to a separate debt limitation set forth in the authorizing statute. Sources of repayment of debt include, among others, property taxes, utility revenues, county taxes (which may include income taxes, food and beverage taxes, and/or hotel taxes), and tax increment financing. A petition/remonstrance contest is required for certain property tax-based financings that have project costs which will exceed $2,000,000. Most recently, Indiana law was amended to provide that projects of a certain size may be subject to a referendum process. Lease financing is generally available for capital projects to enable issuers to avoid the debt limitation otherwise applicable to such financings.

A local governmental unit may also issue bonds to provide economic incentives to private companies to locate in the unit. Bonds may be payable from a variety of revenue streams, including tax increment finance (“TIF”) revenues. The governmental unit, through its redevelopment commission, may capture increased tax revenues generated by new investment located in the unit (the TIF Revenues). Off-site improvements such as public infrastructure may be paid for with TIF revenues. Additionally, using its economic development commission, the unit may provide the proceeds of bonds payable from the TIF revenues to a company for use to pay for improvements needed by the company to operate its business in the unit.

In addition to the financing options for public improvements identified above, local units of government may also establish economic development commissions to provide for the issuance of economic development revenue bonds, the proceeds of which may be loaned to private companies seeking to develop facilities in Indiana. These bonds may be issued on a tax-exempt basis if certain requirements are satisfied with respect to the Internal Revenue Code. Municipalities may also issue taxable bonds for similar projects.

In addition to the local issuers identified above, bonds may be issued by the Indiana Bond Bank and the Indiana Finance Authority for public improvements located in Indiana. The state agencies have the ability to pool financings of local issuers into larger, combined issues in order to provide better access to the credit markets at reduced interest rates.

Private activity bond financing (for private manufacturing projects and certain other categories of projects eligible for tax-exempt financing under Federal law) is available primarily through either counties and municipalities (in cooperation with their local economic development commissions) or the Indiana Finance Authority. Additionally, the Indiana General Assembly has granted broad financing powers to the Indiana Port Commission for economic development projects throughout the state, whether or not actually situated at a port.

B. Commercial Banking and Financing Opportunities

According to the Indiana Department of Financial Institutions, as of December 31, 2013, there were 128 depository institutions, excluding credit unions, chartered in Indiana, representing more than $41.2 billion in total assets, consisting of 81 FDIC-insured state-chartered commercial banks, six FDIC-insured state-chartered savings banks, one FDIC-insured state-chartered savings association, and one FDIC-insured industrial loan and investment company, among others. In addition, as of December 31, 2013, there were 44 state-chartered credit unions, representing more than $10.8 billion in total assets, and an additional 131 federally-chartered credit unions operating in Indiana. State-chartered financial institutions are regulated by the Indiana Department of Financial Institutions. Among the largest financial institutions headquartered in Indiana are Old National Bank, a national banking association (approximately $11.9 billion in assets as of June 30, 2015), First Merchants Bank, National Association, a national banking association ($6.1 billion), 1st Source Bank, an Indiana banking corporation ($5 billion), Lake City Bank, an Indiana banking corporation ($3.6 billion) and MainSource Bank, an Indiana banking corporation ($3.2 billion).

I.C. 28-1-22-1 requires foreign financial institutions, including federally-chartered banks, to register as a foreign corporation with the Indiana Secretary of State before transacting business in Indiana, unless otherwise exempted pursuant to I.C, 23-1-49, *et seq*. As of September 2015, approximately 220 foreign financial institutions have registered and are authorized to transact business in Indiana as foreign corporations. Of those financial institutions, approximately 40 maintain branch offices in Indiana, according to the Indiana Department of Financial Institutions. Several prominent national banks have operations in Indiana, including JPMorgan Chase Bank, N.A., Wells Fargo Bank, National Association, U.S. Bank National Association, and PNC Bank, National Association.

Finance Authority offers or administers a wide variety of financing tools and credit enhancement products, including a brownfields redevelopment program, an industrial revenue bond program, a tax-exempt bond program, and a small bond program to provide access to tax-exempt market for projects under $3 million. Program details are available at **www.in.gov/ifa**. Also, many local economic development organizations have small business loan programs. In addition, the Indiana Economic Development Commission sponsors a variety of business grant and loan programs and tax credit programs, including the Indiana Capital Access Program which increases credit access for small businesses, capital access and financing programs for high-tech companies and infrastructure projects, and Indiana's 21st Century Research and Technology Fund designed to foster advanced technology in Indiana. A comprehensive guide to state business assistance programs can be found at the Indiana Economic Development Commission website, **www.iedc.in.gov**.

C. State Securities Issues

1. Registration of Securities.

Securities can be registered with the Indiana Securities Division, under the Indiana Secretary of State, by qualification or coordination. The Indiana Securities Division can be reached at:

Indiana Securities Division
302 West Washington Street
Room E-111
Indianapolis, Indiana 46204

Telephone: 317-232-6681
Fax: 317-233-3675
Website: **www.in.gov/sos/securities**

To register by coordination, the applicant must file the following with the Securities Division Commissioner: a Uniform Application to Register Securities on Form U-1; a consent to service of process on Forms U-2 and U-2A; a copy of the latest prospectus filed with the U.S. Securities and Exchange Commission (the "SEC"); a copy of the applicant's articles of incorporation and bylaws as currently in effect; a copy of any underwriting agreement; a copy of any indenture governing the issuance of the security being registered; copies of any other information filed under the Securities Act of 1933 requested by the Securities Division Commissioner; an undertaking to forward each amendment to the federal prospectus promptly after it is filed with the SEC; the appropriate filing fee under I.C. 23-19-3-5(b); and a statement specifying the amount of securities to be offered in Indiana, the states in which a registration statement has been or is to be filed, and any adverse order, judgment or decree issued in connection with the offering by a state securities regulator, a court or the SEC.

The registration statement for a registration by coordination becomes effective simultaneously with or subsequent to the federal registration statement, assuming all conditions are satisfied.

To register by qualification, the applicant must file the following with the Securities Division Commissioner: a Uniform Application to Register Securities on Form U-1; a consent to service of process on Forms U-2 and U-2A; a copy of the prospectus to be issued, which must be readable and understandable, and include all material information necessary to make the statements not misleading and material to an evaluation of the offered security, including the information required by 701 IAC 4-4-2; copies of any sales literature to be distributed; the appropriate filing fee under IC 23-19-3-5(b); and a statement specifying the amount of securities to be offered in Indiana, the states in which a registration statement has been or is to be filed, and any adverse order, judgment or decree issued in connection with the offering by a state securities regulator, a court, or the SEC.

A registration statement for registration by qualification generally becomes effective the thirtieth (30^{th}) day after it is filed with the Commissioner.

2. Registration Exemptions.

The following types of securities are generally exempt from the registration requirements described in the previous section, *supra*:

(i) a security issued or guaranteed by a government entity;

(ii) security issued or guaranteed by a foreign government with which the United States maintains diplomatic relations;

(iii) a security issued or guaranteed by an international banking institution, a banking institution organized under the laws of the United States or any other depository institution;

(iv) a security issued by and representing an interest in or debt of, or guaranteed by, an insurance company authorized to do business in Indiana;

(v) a security issued or guaranteed by a regulated common carrier, public utility, or public utility holding company;

(vi) a federal covered security specified under Section 18(b)(1) of the Securities Act of 1933;

(vii) a member's or owner's interest in a cooperative organized and operated as a nonprofit membership cooperative under the cooperative laws of a state;

(viii) an equipment trust certificate with respect to leased equipment, subject to certain conditions; and

(ix) some guaranteed student loan securities.

In addition, the following transactions are exempt from the registration requirements described above:

(x) an isolated nonissuer transaction;

(xi) a nonissuer transaction by or through a registered broker-dealer and a resale transaction by a sponsor of a unit investment trust in a security of a class that has been outstanding for at least ninety days, if (A) the issuer is engaged in business, is not in the organizational stage, bankruptcy or receivership, and is not a blank check, blind pool, or shell company; (B) the price is reasonable; (C) the security does not constitute a participation in the distribution of the securities by the issuer or through an underwriter; (D) certain information is publicly available through a nationally recognized securities manual or the SEC; and (E) the issuer (i) has a class of equity securities listed on a national securities exchange or designated for trading on the National Association of Securities Dealers Automated Quotation System, (ii) is a registered unit investment trust, (iii) has been engaged in continuous business for at least three years, or (iv) has total assets of at least $2,000,000;

(xii) a nonissuer transaction by or through a registered broker-dealer in a margin security of a foreign issuer;

(xiii) a nonissuer transaction by or through a registered broker-dealer in an outstanding security if the guarantor of the security files reports with the SEC;

(xiv) a nonissuer transaction by or through a registered broker-dealer in a security that is rated by a nationally recognized statistical rating organization in one of its four highest rating categories or has a fixed maturity or a fixed interest or dividend;

(xv) a nonissuer transaction by or through a registered broker-dealer effecting an unsolicited order or offer to purchase;

(xvi) a nonissuer transaction executed by a bona fide pledgee without the purpose of evading I.C. 23-19;

(xvii) a nonissuer transaction by a federal covered investment adviser with investments under management in excess of $100,000,000 acting in the exercise of discretionary authority in a signed record for the account of others;

(xviii) a transaction in a security in exchange for one or more bona fide outstanding securities, claims, or property interests, if the terms and conditions have been approved by the Securities Division Commissioner;

(xix) a transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(xx) a transaction in an evidence of indebtedness secured by a mortgage or other security agreement if the evidence of indebtedness is offered and sold with the mortgage or other security agreement as a unit, a general solicitation or general advertisement of the transaction is not made, and a commission or other remuneration is not paid to a person not registered in Indiana as a broker-dealer or as an agent;

(xxi) a transaction by an executor, administrator of an estate, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(xxii) a sale or offer to sell to an institutional investor or a federal covered investment adviser;

(xxiii) a sale or an offer to sell securities of an issuer, if the transaction is part of a single issue in which not more than 25 purchasers are present in Indiana during any 12 consecutive months, a general solicitation or general advertising is not made, a commission is not paid to a person other than a broker-dealer or an agent registered for soliciting a prospective purchaser in Indiana, and the issuer reasonably believes that all the purchasers in Indiana are purchasing for investment;

(xxiv) a transaction under an offer to existing security holders of the issuer, if a commission is not paid for soliciting a security-holder in Indiana;

(xxv) an offer to sell, but not a sale, of a security not exempt from registration under the Securities Act of 1933 if a registration statement has been filed, but is not effective, or the offer is made in compliance with Rule 165 adopted under the Securities Act of 1933, and no stop order has been issued;

(xxvi) an offer to sell a security exempt from registration under the Securities Act of 1933 if a registration statement has been filed under I.C. 23-19, but is not effective, a solicitation of interest is provided to offerees in compliance with Indiana rules, and no stop order has been issued;

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

(xxviii) a rescission offer, sale, or purchase under I.C. 23-19-5-10;

(xxix) an offer or sale of a security to a person not a resident of Indiana and not present in Indiana if the offer or sale does not constitute a violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade I.C. 23-19;

(xxx) employees' stock purchase, savings, option, profit-sharing, pension, or similar employees' benefit plan, including any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, established by the issuer for the participation of its employees including offers or sales of such securities to (A) directors, general partners, trustees, if the issuer is a business trust, officers, consultants, and advisers, (B) family members who acquire such securities from those persons through gifts or domestic relations orders, (C) former employees, directors, general partners, trustees, officers, consultants, and advisers if those individuals were employed by or providing services to the issuer when the securities were offered, and (D) insurance agents who are exclusive insurance agents of the issuer, or who derive more than 50% of their annual income from the issuer;

(xxxi) a transaction involving (A) a stock dividend or equivalent equity distribution, if nothing of value is given by stockholders or other equity holders for the dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property, or stock, (B) an act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or (C) the solicitation of tenders of securities by an offeror in a tender offer in compliance with Rule 162 adopted under the Securities Act of 1933; and

(xxxii) a nonissuer transaction in an outstanding security by or through a registered broker-dealer, if the issuer is a reporting issuer in Canada, has been subject to continuous reporting requirements in Canada for not less than 180 days before the transaction, and the security is listed on The Toronto Stock Exchange, Inc.

(xxxiii) an offer or sale of securities by an issuer only to persons who are or the issuer reasonably believes are accredited investors made in compliance with I.C. 23-19-2-2(24);

(xxxiv) an offer or sale of a security of an issuer in which: (A) the transaction is part of a single issue; (B) the offer or sale is made in compliance with Rule 504, 505 and 506 adopted under the Securities Act of 1933, including any offer or sale made exempt by the application of Rule 508(a) adopted under the Securities Act of 1933; (C) the issuer submits a Form D notice filing to the Securities Division Commissioner within 15 days after the first sale of securities in Indiana; (D) the issuer, upon written request, furnishes to the Securities Division Commissioner any information furnished to offerees; and (E) the issuer satisfies certain additional requirements set forth in I.C. 23-19-2-2(25) for offerings made in compliance with Rule 504 adopted under the Securities Act of 1933;

(xxxv) an offer or sale of securities by an issuer, not made by any form of general solicitation, that meets the requirements of the intrastate offering exemption set forth in Section 3(a)(11) of the Securities Act of 1933 and Rule 147 adopted thereunder and satisfies all of the requirements set forth in I.C. 23-19-2-2(26) and the rules adopted, and any orders issued, thereunder by the Securities Division Commissioner; and

(xxxvi) an offer or sale of a security by an issuer which is conducted in accordance with all of the requirements contained in the "Invest Indiana Crowdfunding Exemption" set forth in I.C. 23-19-2-2(27) and the rules adopted, and any orders issued, thereunder by the Securities Division Commissioner, including: (A) the issuer is a business entity organized under the laws of Indiana and authorized to do business in Indiana; (B) the transaction meets the requirements of the intrastate offering exemption set forth in Section 3(a)(11) of the Securities Act of 1933 and Rule 147 adopted thereunder; (C) subject to certain exceptions and limitations, the sum of all cash and other consideration to be received for all sales made in reliance on this exemption, excluding sales to any accredited investor or institutional investor, does not exceed $1,000,000 (if the issuer has not made available audited financial statements) or $2,000,000 (if the issuer has made available audited financial statements); (D) offers or sales to directors, officers and other specified "insiders" does not count toward the dollar limitations set forth in subsection (C); the issuer does not accept more than $5,000 from any single purchaser unless the purchaser is an accredited investor; (E) the issuer provides the Securities Division Commissioner with the requisite notice, fee and documents; (F) the issuer complies with all applicable disclosure and documentation requirements; (G) the issuer engages a third-party financial institution to provide escrow services for investor funds; (H) the exemption may not be used in conjunction with any other exemption under I.C. 23-19, except for offers and sales to individuals identified in the applicable disclosure document, during the immediately preceding 12 months; (I) subject to certain exceptions, the issuer and persons affiliated with the issuer are not subject to disqualification under a rule established by the Securities Division Commissioner or contained in the Securities Act of 1933 and Rule 262 adopted thereunder; (J) the offering is made exclusively through one or more Internet websites and each Internet web site satisfies certain requirements, including registration by the Internet web site operator as a broker-dealer with the Securities Division under certain circumstances; and (K) the issuer provides or makes available quarterly reports to investors and files the same with the Securities Division Commissioner.

In addition to the statutory exemptions described above, the Securities Division Commissioner has the authority pursuant to I.C. 23-19-2-3 to adopt rules or issue orders exempting a security, transaction or offer from registration, including the authority to issue an order waiving, in whole or in part, any or all conditions for an exemption or offer under the statutory security and transaction exemptions described above.

In addition, issuers of certain "federal covered securities" under Section 18(b) of the Securities Act of 1933 are required to make notice filings with the Securities Division Commissioner pursuant to I.C. 23-19-3-2 and the rules adopted thereunder depending on the type of federal covered security involved. For example, investment companies registered under the Investment Company Act of 1940 which offer securities for sale in Indiana must comply with the initial and ongoing notice filing and fee payment requirements set forth in I.C. 23-19-3-2(a)-(b). Further, as described above, issuers offering or selling securities in Indiana in accordance with Rule 504, 505 and 506 adopted under the Securities Act of 1933, which securities constitute "federal covered securities" under Section 18(b)(4)(D) of the Securities Act of 1933, must make a Form D notice filing with the Securities Division Commissioner within 15 days after the first sale of securities in Indiana and, upon written request, furnish the Securities Division Commissioner with any information furnished to offerees.

3. Broker-Dealer, Investment Advisor Registration.

The Indiana Code prohibits an unregistered person from transacting business as a broker-dealer by routinely engaging in the business of selling or purchasing securities, unless the broker-dealer: (1) does not have a place of business in Indiana; (2) has 3 or fewer clients in Indiana within the previous 12 months; (3) is registered in the state where it has its principal place of business; (4) sells or purchases securities exclusively in connection with the issuers of the securities, other broker-dealers, or financial institutions; and (5) other narrow exceptions set forth in I.C. 23-19-4-1.

The investment adviser registration exemption provides that if an investment adviser (1) has fewer than 5 clients in Indiana and (2) no physical location in Indiana, it is not required to register with the Securities Division. However, if an investment adviser has a physical location in Indiana, it must be registered with the Securities Division.

To register as a broker-dealer, the person must file a Form BD and Form U4 (for agents) on the Central Registration Depository (CRD) and an application (described in I.C. 23-19-4-6), audited financials and FOCUS I or II with the Securities Division, including the appropriate fees under I.C. 23-19-4-10(a). To register as an investment adviser, the person must file (1) the Form ADV Parts I and II on the Investment Adviser Registration Depository (IARD) website and (2) copies of any client agreements or contracts such investment adviser intends to use, a current balance sheet for the investment adviser and fingerprints of any applicant with the Securities Division, including the appropriate fees under I.C. 23-19-4-10(c). SEC registered investment advisers with a place of business in Indiana must make a notice filing and pay the requisite fees.

Registration normally becomes effective on the forty-fifth (45^{th}) day after the application is filed (unless it has been denied or is pending at that time), and it expires at the end of each calendar year, unless it is renewed in advance. An application for renewal requires a filing fee and a statement of any material changes in the information provided in the last filing.

4. Antifraud Provisions.

The Indiana code prohibits any person involved with the offer, sale or purchase of a security to employ a device scheme or artifice to defraud, make misleading factual statements or omissions, or engage in any act that would operate as a fraud or deceit.

In addition, it is unlawful for a person that is paid to advise others as to the value of securities or the advisability of investing in, purchasing, or selling securities, issue or promulgate analyses or reports relating to securities, or solicit, offer, or negotiate the sale of or sell investment advice to: employ a device, scheme, or artifice to defraud; or engage in any act, practice, or course of business that operates or would operate as a fraud or deceit.

Also, an investment adviser may enter into, extend, or renew an investment advisory contract that provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds of the client if certain conditions are met.

A person who sells a security in violation of the Indiana Uniform Securities Act has the burden to prove that he or she did not know, and in the exercise of reasonable care could not have known, of the violation. If the person cannot meet this burden, he or she is subject to suit for rescission of the contract with the client, and in addition, recovery of monies paid (with interest), costs of the action, and reasonable attorney's fees.

X. REAL ESTATE

A. Ownership

1. Individuals.

Any individual may own real property in Indiana. However, individuals adjudged mentally incompetent and minors under the age of eighteen (18) years old may not convey real property or an interest in real property. (I.C. 32-22-1-1)

2. Aliens.

Whether residing in the United States or in a foreign country, a natural person that is an alien may acquire, own or convey real property in the same manner and with the same effect as citizens of Indiana or the United States. The title of any real property inherited, mortgaged, conveyed, or devised is not affected by the alienage of any person from or through whom the title is claimed or derived. (I.C. 32-22-2-5)

3. Corporations.

Unless its articles of incorporation provide otherwise, a corporation may purchase, receive, lease, or otherwise acquire and own, hold, improve, use, and deal with real property or any legal or equitable interest in real property, wherever located, including the power to sell, convey, mortgage, pledge, lease, exchange or dispose of all or any part of its real property. (I.C. 23-1-22-2) A foreign corporation may own, "without more," real or personal property in Indiana without obtaining a certificate of authority from the Indiana Secretary of State. (I.C. 23-1-49-1)

4. Limited Liability Companies.

Unless its articles of organization provide otherwise, a limited liability company may purchase, receive, lease or otherwise acquire and own, hold, improve, use, and deal with real property or any legal or equitable interest in real property, including the power to sell, convey, mortgage, pledge, lease, exchange, or dispose of all or any part of its real property. (I.C. 23-18-2-2) A foreign limited liability company may own real property in Indiana without obtaining a certificate of authority from the Indiana Secretary of State. (I.C. 23-18-11-2)

5. Partnerships and Limited Liability Partnerships.

Partnerships, including a limited liability partnership, may acquire, own and convey real property in the name of the partnership. (I.C. 23-4-1-8) Real property conveyed by a partnership may be conveyed by only one partner, so long as such partner is acting within his/her authority with respect to the conveyance. (I.C. 23-4-1-10) Before transacting business in Indiana, a foreign limited liability partnership shall comply with any statutory or administrative registration or filing requirements governing the specific type of business in which the partnership is engaged and file a registration with the Indiana Secretary of State. (I.C. 23-4-1-49)

6. Limited Partnerships.

A foreign limited partnership may own, "without more," real or personal property in Indiana without obtaining a certificate of authority from the Indiana Secretary of State. (I.C. 23-16-10-2)

B. Concurrent Ownership

1. Tenancy in Common.

While having unity of possession in real estate, tenants in common each own an undivided fractional interest. A co-tenant may sell, convey, mortgage or transfer his or her fractional interest without the consent of his or her co-tenants. Tenants in common do not enjoy right of survivorship and, therefore, each interest will devise to the co-tenant's heirs or assigns rather than the surviving co-tenants.

2. Joint Tenancy.

Joint tenancy is disfavored under Indiana common law and an express declaration of joint tenancy is required in order to be enforceable. (Hornung v. Briggs, 23 N.E.2d 359, 360 (Ind. Ct. App. 1967); I.C. 32-17-

2-1) Joint tenancy is an estate held by two or more persons all with an equal right in the real estate. Joint tenants have right of survivorship whereby a joint tenant's interest will devise on a pro rata basis to the other joint tenants rather than to that joint tenant's heirs or assigns. A unique exception to the above-mentioned prejudice against joint tenancy is where an estate is vested in executors or trustees as executors. In these cases, Indiana statute deems these estates to be held in joint tenancy. (I.C. 32-17-2-1)

3. <u>Tenancies by the Entireties.</u>

Estates by the entirety are recognized in Indiana. [I.C. 32-17-3-1) An estate by the entirety is basically a joint tenancy but one that only occurs between a husband and wife. An estate by the entirety is created when a husband and wife jointly purchase or lease real property with an option to purchase and do not explicitly state in the conveyance instrument that they are creating a tenancy in common. (*Id.)*

C. Spousal Rights

1. <u>Divorce.</u>

A divorce has the effect of changing the former spouses' presumptive tenancy by the entireties into a tenancy in common in equal shares. (I.C. 32-17-3-2)

2. <u>Death.</u>

Under Indiana law, the surviving spouse is considered to have owned all rights under the contract conveying the real property to both spouses as tenants in the entireties from the inception of the contract. (I.C. 32-17-3-1)

3. <u>Mortgages.</u>

Under Indiana law, both the husband and wife should join in the execution of a mortgage that secures property owned by the husband and wife as tenants by the entireties. (I.C. 32-17-3-4)

D. Purchase/Sale of Property

1. <u>Purchase.</u>

Indiana law requires that contracts for the sale or transfer of an interest in real property must be in writing to be enforceable. (I.C. 32-21-1-1])

In Indiana, real property taxes assessed for a tax parcel in any calendar year are payable in arrears. The payment of property taxes between a purchaser and seller is typically an item of negotiation, incorporated into the purchase agreement and allocated to the respective party at closing.

Indiana law does not impose a transfer tax on the seller or buyer of real property.

For residential home sales in Indiana, a seller must provide a prospective buyer with a disclosure form. (I.C. 32-21-5-10) An accepted offer is not enforceable before closing against buyer until the owner and prospective buyer have signed the disclosure form. After closing, failure to provide a disclosure form by itself does not invalidate a transaction.

I.C. 24-5-0.5, *et seq*. protects persons against predatory lending and awards restitution to fraud victims under the Deceptive Consumer Sales Act.

2. Closing.

a. Deed.

A general warranty deed in Indiana must be substantially worded as follows:

"A.B. conveys and warrants to C.D. (insert description of premises) for the sum of (insert consideration)."

The deed must also be dated, signed, sealed and acknowledged by the grantor. (I.C. 32-17-1-2]) By conveying with a general warranty deed, the grantor covenants that he or she is lawfully seized of the premises, has good right to convey the premises, guarantees quiet possession, guarantees that the premises are free from all encumbrances and that the grantor will warrant and defend title against all lawful claims.

While there is no Indiana statute prescribing a form of limited or special warranty deed, such deeds are recognized in Indiana. By executing a limited or special warranty deed, a grantor may limit the general warranty deed warranties to the period during which the grantor owned the property. In addition, the grantor may specify limitations or exceptions to the warranties contained in a general warranty deed.

A quitclaim deed in Indiana must be substantially worded as follows:

"A.B. quitclaims to C.D. (describe premises) for the sum of (insert consideration)."

Again, the deed must also be dated, signed, sealed, and acknowledged by the grantor. (I.C. 32-21-1-15)

b. <u>Sales Disclosure Form.</u>

A county recorder shall not record a deed or other conveyance document serving as source of title without evidence that the parties have filed a sales disclosure form with the county auditor. (I.C. 6-1.1-5.5-6(b))

c. <u>Mortgage.</u>

A mortgage in Indiana must be substantially worded as follows:

"A.B. mortgages and warrants to C.D. (describe premises) to secure the repayment of (recite sum for which the mortgage is granted, or notes or other evidences of debt, or a description of debt sought to be secured and the date of repayment)."

The mortgage agreement must be dated, signed, sealed, and acknowledged by the grantor. (I.C. 32-29-1-5)

E. Mortgage Foreclosures.

In order to foreclose on a mortgage in Indiana, a mortgagee must initiate a judicial proceeding by filing a complaint. However, there is a statutory three (3) month waiting period between the date of filing the complaint and the earliest point at which court judgment or decree for sale can be executed. (I.C. 32-29-7-3]) Once a judgment and decree are issued, they must be filed with the county clerk who certifies a copy to the sheriff who, in turn, initiates the sale process.

An owner can redeem the foreclosed real property by paying the judgment amount, interest and costs to the county clerk before the issuance of the judgment and decree to the sheriff or to the sheriff after the issuance of the judgment and decree, but before the sale. Once the payment is received by the clerk or sheriff, either official may vacate the order of sale. (I.C. 32-29-7-7)

F. Easements.

Prescriptive easements, or an easement created by adverse use by a non-owner, are recognized in Indiana where there is twenty (20) years of uninterrupted adverse use by such non-owner. (I.C. 32-23-1-1) A prescriptive easement may grant a right of way, air, light or other easement from, in, upon or over the owner's land.

If a landowner owns a piece of land that lacks access to a public highway (due to the straightening of a stream, construction of a ditch, or erection of a dam) and such landowner is unable to acquire an easement or right of way on and over an adjacent parcel conveniently located between the affected land and the public highway, the landowner may be granted an easement as a way of necessity. (I.C. 32-23-3-1)

Solar easements for the benefit of using solar energy devices are recognized in Indiana. (I.C. 32-23-4-2) Also the Indiana Uniform Conservation Easement Act recognizes conservation easements in favor of governmental entities and charitable organizations. (I.C. 32-23-5, *et seq.)*

G. Leases.

1. Requirement for Recording.

Any lease longer than three years that is not recorded within forty five (45) days after execution is void against subsequent purchasers, lessees, or mortgagees who acquire the property in good faith and for valuable consideration. (I.C. 32-31-2-2)

2. Residential Landlord Tenant Statute.

Security deposits are generally governed by I.C. 32-31-3, *et seq.* Security deposits can only be used to reimburse a landlord for actual damage (excluding ordinary wear and tear), unpaid rent, including rent due for premature termination of the rental agreement by a tenant, the last rental payment if stipulated in the lease agreement, and reimburse a landlord for unpaid sewer and utility charges which were tenant's responsibility. (I.C. 32-31-3-13) Upon termination of the lease, a landlord must return the security deposit within forty five (45) days net of the following items: (i) any outstanding rent, (ii) damages suffered or that will reasonably be suffered by landlord as a result of tenant's noncompliance with law or rental agreement, or (iii) unpaid sewer and utility charges. All of the foregoing debited amounts must be itemized by landlord and provided to tenant. (I.C. 32-32-3-12)

Unless otherwise specified in the rental agreement between a landlord and tenant, a landlord must give a tenant at least thirty (30) days written notice before modifying a rental agreement for dwelling units (such as homes, residences or sleeping units) entered into or renewed after June 30, 1999. (I.C. 32-31-5-1; I.C. 32-31-5-4) Absent a voluntary agreement between landlord and tenant to the contrary, a landlord may not hold a tenant's personal property to enforce an obligation of the tenant to the landlord under a rental agreement. (I.C. 32-31-5-5) In addition, barring a tenant's abandonment of a dwelling unit, a landlord may not deny or interfere with a tenant's access to or possession of the tenant's dwelling unit by way of lock changes; removal of fixtures, appliances or other such items; or interference with utility services that benefit the tenant's dwelling unit. (I.C. 32-31-5-6)

H. Mineral, Gas and Oil Rights.

Indiana recognizes separate ownership of surface estate and mineral, oil, or gas estates. The discrete mineral interests grant rights in coal, oil, gas, and other minerals in, on, under, or that may be produced from beneath the surface of land. These discrete interests are created in the same manner and to the same extent as are other interests in real property. (I.C. 32-23-7-7) A possessor of an interest in oil or gas is deemed to have an "oil and gas estate in land" and the rights and privileges that accompany such an oil and gas estate including the right to enter the land for the purpose of exploring, prospecting, testing or otherwise investigating the potential for oil and gas production. (I.C. 32-23-7-6) Under Indiana's Dormant Mineral Interest Act, interests in coal, oil, gas or other minerals, if unused for a period of twenty (20) years or more, are extinguished and ownership reverts back to owner of interest out of which the coal, oil, gas or other mineral interest was carved. (I.C. 32-23-10-2)

I. Eminent Domain.

Any person or entity authorized under Indiana law to exercise the power of eminent domain must abide by the state eminent domain statute. (I.C. 32-24-1, *et seq.)* The statute sets out required procedures for any person attempting to condemn property. In particular, the authorized person or governmental body may enter upon any land to examine and survey the property sought to be acquired. (I.C. 32-24-1-3) The party seeking to exercise eminent domain must make an effort to purchase for the use intended the land, right-of- way, easement, or other interest, in the property. If property is taken by proceedings under the eminent domain statute, the entire fee simple title may be taken and acquired if the property is taken for any purpose other than a right-of-way. If the land or interest in the land, or property or right is owned by a person who is an "incapacitated person" (as defined in I.C. 29-3-1-7.5) or less than eighteen (18) years of age, the person seeking to acquire the property may purchase the property from the guardian of the incapacitated person or person less than eighteen (18) years of age and with court approval.

J. Recording.

Documents presented for recording must be not larger than 8½" by 14", and may not be "permanently bound" or in a "continuous form." They must be printed in black ink, in at least ten (10) point type, on white paper of at least twenty (20) pound weight. In addition, the documents must have clean margins on the first and last pages and at least two (2) inches on the top and bottom and one half (½) inch on the sides, and the margin on all other pages must be at least one half (½) inch all around. Recorders are permitted to "attach additional pages, as needed" to documents presented for recording that do not conform to these requirements, and to collect a fee of $1 for each non-conforming page. (I.C. 36-2-11-16.5)

For a conveyance, mortgage or instrument in writing to be recorded it must be acknowledged before a person authorized to take acknowledgments, such as a notary public, and the certificate of acknowledgment by the person authorized to take the acknowledgment shall be written on or attached to the deed. (I.C. 32-21-2-3; 32-21-2-9) In addition, a conveyance may not be recorded unless it includes the mailing address to which property tax statements for the real property being conveyed should be mailed. If such mailing address is not a street address or rural route address of the grantee, the conveyance must include the grantee's street address or rural route address after the mailing address for property tax statements. A conveyance complies with this requirement if it contains the required address or addresses at the end of the conveyance and immediately preceding or following the statements required by I.C. 36-2-11-15. (I.C. 32-21-2-3)

If a conveyance is notarized outside of Indiana, the notary must affix his/her seal to the document in order for it to be entitled to be recorded. (I.C. 32-21-2-5)

A recorder may receive for record an instrument executed or acknowledged in Indiana only if (i) the name of each person executing, witnessing, or acknowledging the instrument is legibly printed, typewritten or stamped immediately beneath his/her signature or the signature itself is printed, typewritten or stamped; and (ii) the name of each person executing the document appears identically in the body of the instrument, the acknowledgment, in his/her signature and beneath his/her signature. (I.C. 36-2-11-16(c))

A recorder may receive for record or filing an instrument executed or acknowledged in Indiana that conveys, creates, encumbers, assigns or otherwise disposes of an interest in or lien on property only if the name of the person or governmental agency, if any, that prepared the instrument is printed, typewritten, stamped or signed in a legible manner at the conclusion of the instrument, and all Social Security numbers in the document are redacted, unless required by law. (I.C. 36-2-11-15(b)) An instrument complies with these requirements if it contains statements in the following form at the conclusion of the instrument:

> "This instrument was prepared by (name)."
>
> "I affirm under penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law. (name)."

(I.C. 36-2-11-15(c) and (d))

XI. MISCELLANEOUS

A. Requirements for Qualification to do Business

A foreign entity may not transact business in Indiana until it obtains a certificate of authority from the Indiana Secretary of State. Although the Indiana Code also addresses foreign partnerships and foreign LLCs, this outline focuses on corporations as the provisions dealing with corporations are illustrative of the regulations applicable to other types of business entities. "Transacting business" generally refers to regular, systematic or continuing business and does not include isolated business transactions. Transacting business in Indiana specifically does not include:

(i) maintaining, defending or settling any proceeding;

(ii) holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;

(iii) maintaining bank accounts;

(iv) maintaining offices or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities;

(v) selling through independent contractors;

(vi) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside Indiana before they become contracts;

(vii) making loans or otherwise creating or acquiring indebtedness, mortgages, and security interests in real or personal property;

(viii) securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

(ix) owning, without more, real or personal property;

(x) conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature; and

(xi) transacting business in interstate commerce.

A corporation that transacts business in Indiana without first obtaining a certificate of authority may not maintain a proceeding in any court in Indiana until it obtains a certificate of authority. In addition, a foreign corporation is liable for a civil penalty of not more than $10,000 if it transacts business in Indiana without a certificate of authority.

(i) a foreign corporation may apply for a certificate of authority to transact business in Indiana by delivering an application to the Indiana Secretary of State along with a certificate of existence duly authenticated by the secretary of state or other official having custody of corporate records in the state or country under whose law it is incorporated. The applications must include:

(ii) the name of the foreign corporation or, if its name is unavailable for use in Indiana, a corporate name that satisfies the requirements of the Indiana Business Corporation Law;

(iii) the name of the state or country under whose law it is incorporated;

(iv) its date of incorporation and period of duration;

(v) the street address of its principal office;

(vi) the address of its registered office in Indiana and the name of its registered agent at that office; and

(vii) the names and usual business addresses of its current directors and officers.

B. Licensing and Regulatory Requirements

Doing business in Indiana does not require a single, all-inclusive business license. However, business entities face regulation and licensing issues at both the state and local level and the State of Indiana and many local governments require that businesses engaged in certain activities attain specific licenses, permits, and certifications.

At the state level, most licensing and regulatory requirements come through specific state agencies. The following non-exhaustive list includes examples of regulated activities (and the accompanying regulating agency): (1) the manufacture, distribution, serving or selling of alcohol (Alcohol Tobacco Commission); (2) the production, distribution or sale of food (Indiana Department of Health); (3) the operation of an In-Home Day Care or Child Day Care Center (Indiana Family and Social Services Administration); (4) any consumer-related financial services (Indiana Department of Financial Institutions, Non-Depository Division); (5) any securities, investments, collections or brokering (Indiana Secretary of State, Securities Division), (6) the intrastate transport of passengers, household goods, motor fuel or any other regulated property (Indiana Department of Revenue); and (7) work in a regulated profession (Professional Licensing Agency).

Before engaging in commercial activity, new businesses should contact the State Information Center for a more complete listing of regulated business activities at:

State Information Center
Indiana Government Center South
402 W. Washington Street
Room W160A

Indianapolis, IN 46204-2725

Phone: 317-233-0800
Email: stinfo@sic.IN.gov

Indiana's local governments differ when it comes to regulations and licensing requirements, including regulations and requirements for professional registration and zoning issues. For example, construction contractors face licensing requirements that vary from county to county and city to city. As a result, before initiating business a new business should contact the local government in the community in which it intends to do business.

C. Usury

While there is no Indiana statute that establishes a maximum legal interest rate applicable to mortgage loans, two (2) Indiana statutes might be deemed to establish such a maximum legal rate. One statute establishes a maximum rate of 72% per annum, but is applicable to non-consumer loans only if unlawful force or the threat of force is used to collect or to attempt to collect the loan or any of the consideration for the loan. I.C. 35-45-7-2. Violation of the statute may result in criminal penalties, and loans made in violation of the statute are void. The other statute provides that a loan with an interest rate in excess of 45% per annum calculated according to the actuarial method, is prima facie unenforceable, but only if made by a creditor with a reputation for using violence or criminal means to collect or to punish nonrepayment. I.C. 24-4.5-5-107.

D. Notice of Business Activities

Indiana requires all corporations, limited liability companies, limited liability partnerships and limited partnerships to file organizational documents with the Corporations Division of the Indiana Secretary of State's Office. Sole proprietorships and general partnerships are not required to file such organizational documents. In addition, if a corporation, limited liability company, limited liability partnership or limited partnership is already incorporated in another state or country and seeks to do business in Indiana, the entity must first obtain a Certificate of Authority from the Secretary of State. If a business entity seeks to do business in Indiana under a name different from that which it filed with the Secretary of State, the entity must file a Certificate of Assumed Business Name with the Secretary of State. Corporations, limited liability companies and limited liability partnerships must file biennial reports updating their business information with the Secretary of State.

E. Restrictions on Specific Professions

The Indiana Professional Licensing Agency ("IPLA") serves as a clearinghouse for a large number of licensing agencies in Indiana. The IPLA allows various professionals to renew and update their licenses. It also allows members of the public to check the professional qualifications of these various license holders, including the status of their licenses and whether complaints have been filed against them. Certain licenses can also be tracked by a "LicenseWatch" program that will send users automatic updates regarding activity of certain licenses.

The professional licensing boards, commissions, and committees within the IPLA are charged with the responsibility of disciplining licensees who have violated practice standards, acted dishonestly, or acted unethically. The standards of practice are located in I.C. 25-1-9 (health professions) and I.C. 25-1-11 (non-health professions). Additional standards of conduct may be contained in the individual board, commission, or committee statutes and rules.

The IPLA also runs the Indiana Scheduled Prescription Electronic Collection and Tracking ("INSPECT") program, which is designed to serve as a tool to address the problem of prescription drug abuse and diversion in Indiana. By compiling controlled substance information into an online database, INSPECT: (a) maintains a warehouse of patient information for health care professionals; and (b) provides an important investigative tool for law enforcement. All data collection and maintenance activities for INSPECT are handled in-house. The data repository is accessible only to registered users and available only through a secure website maintained by program staff.

The IPLA website can be accessed at **http://www.in.gov/pla**.

F. Business Name Registration Requirements

Registration of Foreign Corporation Name

The IBCL permits a foreign corporation to register its name if the name is distinguishable upon the records of the Indiana Secretary of State from the corporate name of a corporation or other business entity incorporated or authorized to transact business in Indiana, a corporate name reserved or registered with the Secretary of State, a fictitious name adopted by a foreign corporation authorized to transact business in Indiana because the foreign corporation's true name was unavailable, and the corporate name of a not-for-profit corporation incorporated or authorized to transact business in Indiana.

The name is reserved by filing with the Secretary of State an application setting forth its name and the state or country and date of its incorporation. The name is registered for the applicant's exclusive use upon the effective date of the application.

A foreign corporation whose registration is effective may thereafter qualify as a foreign corporation under that name or consent in writing to the use of that name by a corporation thereafter incorporated under this article or by another foreign corporation thereafter authorized to transact business in Indiana. The registration terminates when the domestic corporation is incorporated or the foreign corporation qualifies or consents to the qualification of another foreign corporation under the registered name.

Reservation of Exclusive Use of Corporate Name

Any person may reserve the exclusive right to the use of a name, including a fictitious name for a foreign corporation whose name is not available, by delivering an application to the Secretary of State for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. If the name applied for is available, the registration is effective for renewable 120 day periods. The owner of a reserved name may transfer the name to another person by delivering to the Secretary of State a notice of the transfer that states the name and address of the transferee.

Assumed Business Name

Any domestic or foreign corporation, domestic or foreign limited partnership, domestic or foreign LLC or domestic or foreign LLP conducting or transacting business in Indiana under a name other than its actual name must file for record in the office of the Secretary of State a certificate stating the assumed name or names to be used and the full name and address of the entity's principal office in Indiana (see state form 30353).

XII. APPENDIX

Business Services Division
302 W. Washington Street
Room E018
Indianapolis, Indiana 46204

Telephone: 317-232-6576
Fax: 317-233-3387
Website: **www.in.gov/sos/business**

Indiana Economic Development Corporation
One North Capitol, Suite 700
Indianapolis, Indiana 46204

Telephone: 317-232-8800
Fax: 317-232-4146
Website: **www.ined.in.gov**