



Alabama

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DOING BUSINESS IN ALABAMA



**MAYNARD COOPER
& GALE PC**
ATTORNEYS AT LAW

An introduction to the legal aspects of establishing and conducting business in Alabama

DOING BUSINESS IN
ALABAMA
*An Introduction to Laws
Affecting Businesses in Alabama*

PREPARED BY:

MAYNARD COOPER
 & GALE PC
ATTORNEYS AT LAW

The Alabama State Bar requires the following: “No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”

The information in this publication represents a general guide to certain Alabama state laws applicable to doing business in Alabama and is based on information available as of January 1, 2014. This publication should not be relied upon in any specific factual situation, does not cover all laws and regulations that might apply, and does not address United States (“U.S.”) federal law issues. It is not intended to cover all laws or regulations that may be applicable to a specific factual situation. If you have questions or specific issues to be resolved, you should contact a lawyer authorized to practice in Alabama.

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INTRODUCTION

This guide to doing business in the State of Alabama has been written primarily for the foreign (that is, non-Alabama) investor or business contemplating investing in an Alabama business or locating in Alabama. We have chosen topics and have provided information in an attempt to strike a balance between basic information for those with no experience in Alabama and more in-depth information. We have focused on topics that our experience has shown are among the most important to non-Alabama investors and businesses. Topics that we have chosen include a discussion on types of available business entities, environmental issues, bonds and other financing, trade regulation and real estate, among others.

FIRM PROFILE

Since its inception in 1984, Maynard Cooper & Gale has grown to be a nationally recognized firm with more than 205 attorneys and offices in Birmingham, Huntsville, Mobile and Montgomery. We maintain our philosophy to continually focus on each individual client and be responsive to their evolving needs. Additionally, we combine the understanding of the client's business climate with the knowledge of a dynamic legal environment to provide the highest quality service.

Maynard Cooper is the exclusive member firm in Alabama for Lex Mundi - the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide. As part of the Lex Mundi global network, we can provide our clients with global access and connectivity to more than 160 firms and 21,000 attorneys in 600 offices around the world. Working with other Lex Mundi firms, we are able to seamlessly handle our clients' most challenging cross-border transactions and disputes. Our diverse areas of practice, the depth of our expertise and the extent of our legal network enables Maynard Cooper to offer any client the timely business advice and professional legal counsel it needs.

Clients

Maynard Cooper represents a broad and diverse client base, including Fortune 500 companies, international, national, state and local business entities, charities, and individuals. The firm's client base also includes new business ventures and mid-sized companies in emerging and established industries. In response to today's global economy, the firm represents numerous clients who are based outside of the U.S. and clients who are actively engaged in business in various capacities in jurisdictions all over the world.

We recognize that our clients want us not only to know the law, but the industry in which they operate and conduct business. Our attorneys serve a wide range of industries, including banking and financial services, health care, insurance, natural resources, manufacturing, education, government, real estate and construction, consumer products and retail, biotechnology and pharmaceuticals, maritime, and transportation.

Services

Maynard Cooper is a full-service business law firm. The depth and breadth of the firm's legal services includes litigation, corporate law, banking and commercial law, real estate law, securities law, labor and employment, antitrust, public finance, trusts and estates, government contracts and bid protests, governmental affairs and relations, international trade regulation, admiralty and maritime, state and federal tax, intellectual property, health care, environmental law, and bankruptcy law.

Value

Maynard Cooper is dedicated to providing the highest quality professional service; remembering that service to our clients is the main reason for the existence of our firm. We tailor the firm's resources to meet each client's needs and provide solutions that produce efficient and economical results.

Reputation

Maynard Cooper is recognized as a leader in government, the community, and the legal profession. Many Maynard Cooper shareholders and associates can be found in key leadership positions in many professional organizations.

The firm's attorneys serve in leadership positions at the national, state, and local government levels. One member of the firm is a former Chief Justice of the Alabama Supreme Court. Two members of Maynard Cooper are past presidents of the American Bar Association. The firm has also had two shareholders serve as president of the Alabama State Bar. At the local level, two of Maynard Cooper's attorneys have served as president of the Birmingham Bar Association.

In addition, *Fortune Magazine* named Maynard Cooper one of the "Top Ranked Law Firms" in the country, and we were named a "Go To" law firm for Fortune 500 companies by *Corporate Counsel Magazine*. Maynard Cooper attorneys have been recognized by *Chambers USA*, *The Best Lawyers in America*, *Super Lawyers*, and other business and legal industry organizations.

OVERVIEW OF ALABAMA

Alabama is located in the Southeast region of the U.S. and bounded on the North by Tennessee, on the West by Mississippi, on the East by Georgia, and on the South by Florida and the Gulf of Mexico. The Southeastern portion of the U.S. is the fastest growing region in the U.S. and the fourth largest economy in the world. In recent years, the Southeast has counted for forty five percent of all job growth in the country. Alabama is the 23rd most populated state in the U.S. and the 30th largest state with an area of 52,419 square miles. Alabama's topography varies from the mountains in the North to the coastal plains in the South.

Alabama is an attractive and affordable place to live with one of the lowest overall cost of living rates in the U.S., including relatively low housing, tax, and utility costs. In total, Alabama has one of the lowest per capita tax burdens in the country and the average sale prices for homes are substantially below the national average. Four Alabama metro areas (Birmingham, Huntsville, Mobile and Montgomery) have received numerous favorable rankings for their business environment and quality of life in various national publications.

INVESTMENT CLIMATE

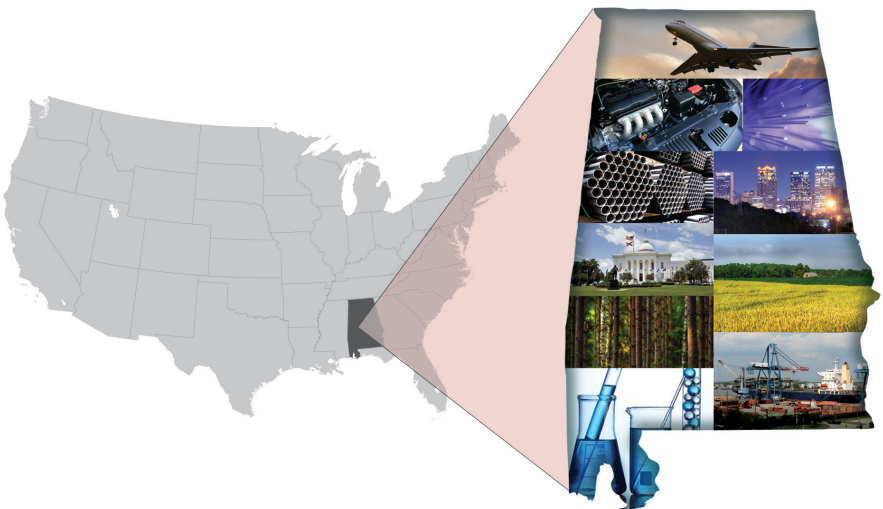
Over the last decade, Alabama has focused its efforts on recruiting national and international businesses. These companies include Mercedes-Benz, Airbus, Northrop Grumman, Honda, Boeing, ThyssenKrupp and Toyota. Public officials and economic development organizations have pooled together vast resources and attracted numerous new and expanding businesses with tremendous success.

Maynard Cooper has participated in the economic development of Alabama in a variety of roles including:

- Representation of the State of Alabama, the Alabama Department of Commerce and/or the Economic Development Partnership of Alabama in the successful efforts to attract Mercedes, Honda, Boeing, Hyundai, Ipsco Steel and Trico Steel.

- Serving as bond counsel for both taxable and non-taxable bond issues to finance industrial and commercial projects and to finance state-funded industrial and economic development programs.
- Preparation of a variety of legislation to attract industry and projects to the State of Alabama.
- Representation of numerous manufacturing and other industrial clients (as well as cities and counties) in negotiating millions of dollars of tax and other incentives for new investment in the State of Alabama.

Alabama, like any state, contains a myriad of laws that must be taken into account when any company is considering locating in the state, many of which are discussed in this guide. It is vital for all new companies to assess the prevailing business and tax climate, to determine whether utility, roads, or other public infrastructure are in place, to assess the quality of the public education system and the abilities and availability of the local workforce, and to determine the location of potential suppliers and customers. This guide will summarize many areas of the law that any entity doing business in Alabama may have to address.



BUSINESS ENTITIES

One of the most important decisions for any company locating in Alabama is the selection of a business entity. The types of entities from which to choose has expanded in recent years, which makes the decision process more complicated but provides businesses with more flexibility in structuring their affairs. In addition to determining the desired form of business entity, companies need to take special care to comply with the rules related to qualifying to do business in Alabama.

BUSINESS ENTITY OPTIONS IN ALABAMA

The Alabama Business and Nonprofit Entity Code

On January 1, 2011, Alabama's New Business and Nonprofit Entity Code ("Entities Code") became effective. The Entities Code brings together certain aspects that affect most forms of entities into a centralized location. This central portion is commonly referred to as the "Hub" and is set forth in Chapter 1 of the Entities Code (Ala. Code §§ 10A-1-1.01 et seq.). The specific provisions and concepts that apply to a specific entity type are divided into separate chapters, which are commonly referred to as "Spokes." The drafters of the Entities Code intended for the changes to be primarily non-substantive. Their goal was to simply bring together the common provisions of the various types of entities into a central "Hub" while leaving the specific laws related to the various entities unchanged within the specific "Spoke." The following types of business entities are now covered by and included within the Entities Code:

1. Alabama Business Corporation Law – Chapter 2;
2. Alabama Nonprofit Corporation Law – Chapter 3;
3. Alabama Professional Corporation Law – Chapter 4;
4. Alabama Limited Liability Company Law – Chapter 5;
5. Alabama Uniform Partnership Law – Chapter 8;
6. Alabama Uniform Limited Partnership Law of 2010 – Chapter 9;

7. Alabama Real Estate Investment Trust Law – Chapter 10; and
8. Other existing provisions of Alabama statutes governing domestic and foreign business and nonprofit entities and associations.

Corporation

Corporations are governed by the Alabama Business Corporation Law set forth at Ala. Code §§ 10A-2-1.01 et seq., which is based on the Revised Model Business Corporation Act. Corporations are generally taxable entities separate and distinct from their shareholders. Therefore, they are subject to double taxation, meaning the corporation pays taxes on its income and its shareholders pay taxes on the dividends they receive from the corporation. An advantage of the corporate form is that unless a court finds that the corporate form should be ignored, shareholders' liability is limited to their investment in the corporation. Therefore, shareholders are not personally liable for corporate obligations.

(1) Formation. Corporate existence begins when articles of incorporation are filed with the probate judge in the county of the corporation's initial registered office. Alabama requires that the corporation reserve its name with the Secretary of State before the probate judge can accept the filing of the articles of incorporation. Typically, the board of directors adopts the initial bylaws. However, the articles of incorporation can reserve that right to the shareholders.

(2) Share Capital. Shares may be issued for money, labor done or property actually received. The articles of incorporation must prescribe the classes of shares and number of shares in each class that the corporation is authorized to issue. If more than one class is authorized, the articles of incorporation must prescribe a distinguishing designation for each class and the preferences, limitations and relative rights of each class. The articles of incorporation may also provide that all or a specified number of directors may be elected by holders of one or more authorized classes of shares.

(3) Meetings of Shareholders and Directors. A corporation must hold a shareholder meeting annually. The meeting may be held in or out of state at a time or place stated in or fixed in accordance with the bylaws. Alabama also provides for special meetings of the shareholders. Once the holders of at least ten percent of the votes entitled to be cast at the special meeting properly request the meeting, the corporation must cause notice to be given of a special meeting. If notice is not delivered, or if the special meeting is not held, then the same shareholders may call the special meeting themselves. Regular meetings of the board of directors may be held with or without notice as prescribed by the bylaws. However, unless the articles of incorporation or bylaws provide otherwise, shareholders and directors may act without a meeting if the action is taken by all shareholders or directors, as applicable. The action taken must be evidenced by one or more written consents and signed by each shareholder or director, as applicable.

(4) Authority of Shareholders, Directors and Officers. A vote of the shareholders is required on several fundamental matters, including certain mergers and acquisitions, the sale of substantially all of the assets of the corporation, most amendments to the articles of incorporation and the election of directors. Generally, the directors have authority to decide matters outside the ordinary course of business, including adoption of bylaws, payment of dividends and issuance of shares. The officers have authority as provided in the bylaws or as determined by board resolution. Typically, the officers are granted authority to manage the day-to-day operations of the corporation.

(5) Indemnification. Alabama allows for indemnification of directors and officers who act in good faith and, when in their official capacity, reasonably believe that they acted in the best interests of the corporation. Mandatory indemnification is required for directors and officers who are successful, on the merits or otherwise, in the defense of any proceeding, or of any claim, issue or matter

in such proceeding, where they are or were a party because of their position in the corporation. A corporation may provide and maintain indemnification insurance on behalf of its directors, officers, employees and agents.

(6) Annual Corporate Reports. All domestic and foreign corporations doing business in Alabama must file an annual report with the Secretary of State setting forth certain non-financial information. A corporation must also provide its shareholders with annual financial statements.

Professional Corporation

A professional corporation (“PC”) is governed by the Alabama Professional Corporation Law set forth at Ala. Code §§ 10A-4-1.01 *et seq.* A PC may be formed only for the purpose of rendering a single professional service that may be lawfully performed and only pursuant to an issued license. In order to incorporate as a PC, the articles of incorporation must include as a stated purpose the rendering of professional services and must state that it is incorporating as a PC. Shares may be issued or transferred only to persons who are qualified to practice the profession for which the PC will render services. In addition, at least one director and the president must be a qualified person. Individual professionals remain liable for their own negligent or wrongful acts or omissions to the same extent as if they were rendering services as a sole practitioner. However, the personal liability of shareholders, employees, officers or directors for the negligent or wrongful acts or omissions of their fellow shareholders, employees, officers or directors is no greater than it would be under the Alabama Business Corporation Law.

Limited Liability Company

A limited liability company (“LLC”) is governed by the Alabama Limited Liability Company Law set forth at Ala. Code §§ 10A-5-1 *et seq.* An LLC may be formed by one or more persons by filing a certificate of formation with the probate judge in the county in which the initial registered office

of the LLC is located. Owners of an LLC are referred to as members. An LLC combines the flexibility and pass-through tax advantages of a partnership with the limited liability of a corporation. Unless the members elect otherwise, an LLC is not considered to be a separate taxable entity. Instead, the profits and losses of the LLC are passed through to the members in accordance with their interests in the LLC. As a result of these characteristics, the use of LLCs has increased, and it is now frequently the entity of choice for businesses.

(1) Operating Agreement. In addition to the certificate of formation, owners of an LLC usually enter into an operating agreement to provide for internal governance rules and to provide for rules related to the relationship among the members. In the absence of a written operating agreement, the LLC will be governed by statutory default rules. In many instances, the statutory default rules are not the rules desired by the members of the LLC. Therefore, the desired rights and obligations of the members should be set forth in an operating agreement. At the very least, the operating agreement should address dissolution, distributions, allocation of profits and losses, management authority and the transferability of the interests in the LLC.

(2) Governance Rights. An LLC may be governed by either its members or its managers. In a member-managed LLC, the management authority and duties of each member are similar to those of a general partner in a partnership. Alternatively, the certificate of formation may provide for one or more managers to control the LLC in a centralized management structure much like a limited partnership. Managers are not required to be natural persons or members of the LLC. The certificate of formation may also create classes of members or managers who have different financial rights and different governance rights.

(3) Professional Limited Liability Company. An LLC may be formed to render specific types of professional services pursuant to Ala.

Code § 10A-5-8.01. However, it will be limited to rendering only one specific type of professional service. A member is liable for his or her own negligent or wrongful acts to the same extent as if he or she were a sole practitioner. However, the personal liability of a member, manager or employee is not greater than that of a shareholder, employee, officer or director of a corporation organized under the Alabama Business Corporation Law. An LLC offering professional services is treated similarly to professional corporations.

(4) Foreign Limited Liability Company. Foreign limited liability companies are governed by the laws of the jurisdiction in which they were organized. They may not be denied registration in Alabama due to differences between the laws of Alabama and the foreign limited liability company's home state, as long as the foreign limited liability company does not undertake a business practice that is not allowed to be performed by domestic LLCs.

Partnership

Like an LLC, partnerships provide certain tax advantages because they are not considered a separate taxable entity. For each partnership, the income or losses of the partnership are passed through to the individual partners according to their interests in the partnership and are included on their personal income tax returns. In Alabama, a partnership may take various forms including the following:

(1) General Partnership. A general partnership is an association of two or more persons to carry on as co-owners a business for profit, regardless of whether the individuals intend to form a partnership. The general partnership is automatically formed without the need for any formalities of organization. However, a general partnership will be governed by the statutory default rules of the Alabama Uniform Partnership Law set forth at Ala. Code §§ 10A-8-1.01 *et seq.* Therefore, to avoid the statutory default rules, partners should enter into a partnership agreement that contains provisions concerning the

relationship among the partners, the affairs of the partnership and the conduct of its business. For example, many partnerships wish to avoid the statutory default rule that mandates that a partnership-at-will must be dissolved if one partner elects to withdraw from the partnership. Therefore, at the very least, the partnership agreement should address such issues as dissociation, dissolution, management authority, the transferability of partnership interests and the allocation of profits and losses among partners. A disadvantage of a general partnership is that all general partners are personally liable for the debts and obligations of the partnership. Liability is joint and several. However, judgment creditors must generally exhaust the partnership assets before enforcing a judgment against the separate assets of a partner.

(2) Limited Partnership. A limited partnership (“LP”) is governed by the Alabama Uniform Limited Partnership Law of 2010 set forth at Ala. Code §§ 10A-9-1.01 *et seq.* A certificate of limited partnership must be filed with the probate judge in the county in which the registered office is maintained. The information that must be included in the certificate is described in the Alabama Uniform Limited Partnership Law of 2010. LPs are prohibited from participating in the insurance or banking business. An LP has both general partners and limited partners. General partners have the same powers and liabilities as they would in a general partnership. Limited partners may not participate in the control of the business. Unlike general partners, limited partners are not personally liable for the debts and obligations of the partnership. The major advantage of an LP is the protection of the limited partners from personal liability beyond their contributions to the LP. However, the major shortcoming of an LP is that, unlike a corporation, the general partners are subject to personal liability. Like a general partnership, partners in an LP should enter into a partnership agreement to avoid the statutory default rules.

(3) Limited Liability Partnership. A limited liability partnership

(“LLP”) is governed by the registered limited liability provisions contained in the Alabama Uniform Partnership Law as set forth at Ala. Code §§ 10A-8-10.01 *et seq.* An LLP must file a registration with the probate judge in the county of the partnership’s principal office and with the Secretary of State stating the name and address of the partnership and a brief statement of the business of the partnership. An LLP functions much like a general partnership but provides liability protection for the partners. Unless otherwise agreed, no partner is personally liable for the debts or obligations of the LLP whether arising in tort, contract or otherwise. Like the general partnership and the limited partnership, partners of an LLP should enter into a partnership agreement to avoid the statutory default rules.

(4) Professional Limited Liability Partnership. A professional LLP is also governed by the registered limited liability provisions contained in the Alabama Uniform Partnership Law set forth at Ala. Code § 10A-8-10.10. Professional LLPs are limited to rendering only one specific type of professional service. A partner in a professional LLP is liable for his or her own negligent or wrongful acts to the same extent as if he or she were a sole practitioner. Unless otherwise agreed, no partner is personally liable for the debts, obligations or liabilities of the professional LLP or the other partners solely because of their position as a partner. A professional LLP is treated similarly to PCs and professional LLCs.

Sole Proprietorship

The sole proprietorship is not a true business entity. It requires no expense or formality of organization. Rather, it is automatically created whenever a business is owned and controlled by only one person. Because it is not a true business entity, the sole proprietorship is not a separate taxable entity distinct from the owner. Instead, the owner reports business income by attaching a schedule to the individual’s personal income tax return.

In addition, the owner is subject to unlimited liability for the debts and obligations of the business. As a result, all the personal and business assets of the owner can be seized to satisfy the liabilities of the business.

REGISTERING TO DO BUSINESS IN ALABAMA

Any foreign (non-Alabama) entity transacting business in Alabama must register to do business in Alabama with the Secretary of State pursuant to Ala. Code § 10A-1-7.01. Prior to January 1, 2014, the failure to register prevented a foreign corporation from maintaining any legal proceeding in the courts of Alabama as required by the Alabama Constitution.

Therefore, all contracts or agreements entered into in Alabama by a foreign corporation prior to registering were void when sued upon by the foreign corporation or anyone claiming through it. Furthermore, unlike other states, Alabama did not permit a foreign corporation to cure the failure to register. However, the provisions of the Alabama Constitution governing foreign corporations have been repealed effective January 1, 2014. Registration with the Secretary of State is still required, but the failure of a foreign entity to register in Alabama will not impair the validity of any contract or act of the foreign entity. Rather, the foreign entity is only prevented from maintaining an action in Alabama to enforce its rights until registration is properly filed.

INCENTIVES FOR NEW AND EXPANDING BUSINESSES

State and local governments in Alabama have aggressively pursued international and domestic businesses to locate or expand their operations within the state. Because of its business-friendly environment and the myriad of incentive packages available to new and expanding businesses, Alabama has been very successful in attracting new industries and companies. Some of the more significant incentives available to new and expanding businesses are discussed in this section.

DISCRETIONARY CASH INCENTIVES

Companies that agree to make significant investments and hire large numbers of workers, especially in certain industries deemed attractive by state and local officials, may receive discretionary cash incentives. The terms and conditions related to such incentives vary for each project. These include minimum capital investment and employment numbers established on a case-by-case basis. For larger projects in this state, the Alabama Department of Commerce typically takes a lead role, working with other state agencies and local elected officials.

CAPITAL CREDIT LAW

In June of 1995, the Alabama Legislature passed an industrial incentive package titled Tax Credits for Projects of New Businesses and Business Expansions set forth at Ala. Code §§ 40-18-190 *et seq.* (“Capital Credit Act”). The following is a summary of the provisions of the Capital Credit Act.

General Rule

A company that invests in a new capital project that qualifies for the Capital Credit Act can claim an annual credit against its Alabama income tax allocable to that project. The annual credit can be claimed each year for a period of twenty years, beginning with the year that the project is placed in service. The credit is an amount equal to one-twentieth (or five

percent) of the capital investment in the project each year for up to twenty years. The aggregate amount of credits claimed cannot exceed the total capital cost.

Qualifying Projects

Qualification depends on (1) the nature of the company's business at the project site, (2) the aggregate amount of capital investment in the project, (3) the number of new employees at the project, and (4) the compensation level of new employees at the project.

Nature of Business

The company's predominant trade or business at the project previously was limited to industrial, warehousing or research activity. New industries such as data centers, warehousing/storage facilities, coal mining operations and renewable energy facilities have been subsequently added as favored industries for which the capital credit is available. These activities are defined by reference to the 2007 North America Industry Classification System ("NAICS") as listed within the Capital Credit Act. The qualifying project can also be the headquarters facility of the investing company in any industry so long as fifty new jobs are created.

Capital Investment

In general, the investing company must invest not less than two million dollars at the new project. However, if the project is for a "small business addition," the required investment is only one million dollars. A "small business addition" is defined as an addition to the existing facilities of a company that employed one hundred or less full-time employees prior to the date that the addition is placed in service. If the project is in a "favored geographic area," the required investment is five hundred thousand dollars. In general, any project-related costs that must be capitalized for federal income tax purposes will qualify as part of the capital investment. Property previously owned by the investing company that is installed at the new project will qualify as part of the capital investment only if the property was located outside of Alabama

for a period of at least one year prior to the date the qualifying project is placed in service. The Capital Credit Act has special provisions relating to costs associated with a headquarters facility that is the subject of an operating lease or property subject to a capital lease with a term of not less than five years.

New Employees

In general, the investing company must have at least twenty new employees at the project. Certain categories require fifty new jobs. This employment level must be reached within one year after the project is placed in service and must be maintained for eleven out of twelve months for any year that the credits are claimed. For a small business addition, only fifteen new employees are required. Only full-time employees that meet a minimum base wage requirement count for purposes of this requirement. Persons who were previously employed by the investing company in Alabama are not treated as new employees. An investing company may qualify with a minimum of five jobs for new employees for a project locating in a “favored geographic area.” If the investing company closes an existing facility in Alabama within two years prior to the date that the new project is placed in service, only the new employees in excess of the number previously employed at the existing facility count toward the required number of new employees. After three years in which an investing company fails to comply with the employment requirements (whether or not consecutive), the investing company cannot claim the credit as to that project in any following year.

Carry Forward for Large Projects

For qualifying projects with at least one hundred million dollars in capital investment and at least one hundred new jobs, first use of the capital credit may be delayed for up to three years after the project is placed in service. For qualifying projects with at least one hundred new jobs and capital investment of at least one hundred million dollars, the capital credit may be carried forward for up to as much as four additional years depending on the exact level of capital investment.

Procedure for Claiming the Credit

At any time prior to the date the project is placed in service, the investing company must file a written statement of intent to claim the credit. This statement is filed with the Alabama Department of Revenue. The only requirements for claiming the credit are that the investing company must file the statement of intent with the Alabama Department of Revenue on a timely basis and that the investing company and its project meet the requirements outlined above. An annual certification of continued qualification must be filed by the investing company with its tax return for each year that the credit is claimed.

Allocation of Income

The investing company must enter into an agreement with the Alabama Department of Revenue for the allocation of income to the qualifying project, typically using a three-factor apportionment formula. This is significant when the investing company has existing operations in Alabama to which a portion of its income will be allocated. Income tax liability allocable to income from existing operations may not be offset by the credits available under this program.

Recapture of Capital Credit

If an investing company meets the criteria for the capital credit including minimum new jobs and wages in the first year, but then fails to remain in compliance (e.g., due to reduction in the workforce), the capital credit may be recaptured for up to the prior five years (one hundred percent of the prior year's credit plus twenty percent of the credit for each of the preceding four years). The capital credit is permanently forfeited if the investing company fails to qualify for more than three years in the twenty-year period.

Pass-Through of Credits

The Capital Credit Act is intended to make the incentives available to the shareholders, partners, members or other beneficiaries of an investing company that are not themselves a taxpaying entity (such as partnerships, S corporations and limited liability companies).

TAX INCENTIVE REFORM ACT OF 1992

The Alabama Legislature has enacted the Tax Incentive Reform Act of 1992 (Ala. Code §§ 40-9B-1 *et seq.*) (“1992 Reform Act”), which permits the abatement of state, county and city non-educational ad valorem, sales, and use taxes for certain companies locating or expanding facilities in Alabama. The following is a summary of the general provisions of the 1992 Reform Act. For all facilities owned by or leased to private companies, the requirements of the 1992 Reform Act must be followed to obtain these tax abatements.

Elements of the Abatement

Subject to limited exceptions, only industrial and research enterprises that fall within certain industrial classifications within the 2007 NAICS system qualify for an abatement under the 1992 Reform Act. Except for certain large projects, the maximum period for the abatement is typically ten years, measured from (1) the date bonds are issued to finance the project, or (2) if no bonds are issued, the later of the date that title is acquired by or vested in the county, city, or public authority, or the date the property becomes owned for federal income tax purposes by a private party. In the case of the cities of Alexander City, Athens, Auburn, Cullman, Enterprise, Fairfield, Homewood, Mountain Brook, Opelika, Ozark, Prattville, Sheffield, Sylacauga, and Talladega (which are all Class 6 municipalities in the state), city ad valorem taxes may be abated for up to fifteen years. Certain large data center projects qualify for a maximum thirty-year abatement period.

Abatement Beyond the Ten-Year Exemption

Further abatement with respect to the same property will only be granted if there is a major addition to the property. A major addition exists if the company spends at least the lesser of (1) an investment of thirty percent of the original cost of the property, or (2) two million dollars. This does not include repairs or renovations. The abatement only applies to non-educational ad valorem, sales, and use taxes attributable to the major addition.

Granting of the Abatement

The abatement may be granted by a public authority, county, or city with jurisdiction over the project. It is not necessary for the public authority, county, or city to own the property or for a lease to be executed. A company seeking an abatement must first file an application with the appropriate public authority, county, or city. The application must contain information needed to conduct a cost-benefit analysis of the proposed project and to determine the qualification of the property and maximum abatement period. If the abatement is approved, the company and the granting authority must then enter into a tax abatement agreement, which must include (1) an estimate of the amount of tax abated, (2) the maximum period for the abatement, (3) good-faith projections by the company of the amount to be invested in the project, and (4) good-faith projections by the company of the number of people who will be employed at the project site initially and in the succeeding three years and the payroll for such employees.

Mechanics of the Abatement

The tax abatement agreement must be filed with the Alabama Department of Revenue and with the Tax Assessor in the county in which the project is located within ninety days of grant of the abatement. Upon receipt of the Abatement Agreement and an application for exemption certificate, the Alabama Department of Revenue will issue an exemption certificate to the company evidencing the sales and use tax exemption. The certificate number must be included on all purchase orders for the

project. The Alabama Department of Revenue now permits contractors and subcontractors to also obtain exemption certificates by applying as the contractor for the taxpayer. Members of the local county commission must be notified by an affidavit of service in the case of physical delivery or by certified mail when a city or public authority grants an abatement. Beginning in 2014, licensed general contractors working on governmental contracts can obtain their own tax abatement and exemption certificates directly, provided that the project is other than a new public highway, bridge, or road.

Methods of Purchase

Purchases of property to be incorporated into the project are exempt from the non-educational portion of construction-related sales and use taxes. This is true whether the property is purchased by the contractor, subcontractor, or property owner, so long as the purchaser properly uses its exemption certificate.

Full Employment Act and Heroes for Hire

Employers with no more than fifty employees as of January 1, 2011, are eligible for a one thousand dollar non-refundable tax credit for each new qualifying job created, provided that the employee is paid more than ten dollars per hour and remains employed for at least twelve months. An additional one thousand dollar non-refundable tax credit is available for the hiring of a recently deployed, unemployed veteran. A two thousand dollar tax credit is available for expenses associated with a start-up business in which a veteran owns at least fifty percent.

ALABAMA ENTERPRISE ZONE ACT

Nature of Program

The Alabama Enterprise Zone Act (“Enterprise Zone Act”) is a federal program administered by the Alabama Department of Economic and Community Affairs. Funds are furnished by federal grants.

Enterprise Zones

Enterprise zones are defined as geographic areas that are economically depressed, and in need of expansion of business and industry and the creation of jobs. The Alabama Department of Industrial Relations is required to specify enterprise zones after giving consideration to unemployment, poverty rate, per capita income, migration, and number of residents receiving public assistance. There may be no more than twenty-seven enterprise zones established in Alabama.

Benefits

Benefits under Section 11 of the Enterprise Zone Act include (1) exemption from state and local sales tax, (2) exemption from corporate income tax for a period of five years, (3) exemption from corporate franchise tax for a period of five years, and (4) exemption from utility gross receipts taxes and utility gross receipts service taxes for a period of up to twenty years.

Requirements for Receipt of Benefits Under Section 11

(1) The company must certify that at least thirty five percent of its employees are residents of the enterprise zone, and were receiving some form of public assistance prior to employment or were considered unemployable by traditional standards or lacking in basic skills.

(2) The company must give preference and priority to Alabama manufacturers and, in the absence of Alabama manufacturers, to Alabama suppliers, contractors and labor, except where not reasonably possible to do so without added expense, substantial inconvenience or sacrifice in operational efficiency.

(3) The request for exemptions must be accompanied by an endorsement resolution approved by the appropriate local governing body in whose jurisdiction the company will be located.

(4) The company must be located within the boundaries of an enterprise zone.

(5) Additional incentives will be available if the business employs at least twelve hundred people and makes capital investments and capital improvements of at least seventy five million dollars.

POLLUTION CONTROL EXEMPTIONS

Ad Valorem Taxes

All devices, facilities, and structures, and all identifiable components thereof and materials used therein, which are required or constructed primarily for the control, reduction, or elimination of air or water pollution, are completely exempt from state and local ad valorem taxation.

Sales and Use Taxes

The gross proceeds from the sale of devices or facilities and all identifiable components thereof, or materials used therein, acquired primarily for the control, reduction, or elimination of air or water pollution and from the sale of all identifiable components of or materials used or intended for use in structures built for such purposes, are completely exempt from sales and use taxes.

Corporate Income Tax

In computing taxable income of corporations, all amounts invested during the taxable year in devices, facilities, or structures, and all identifiable components thereof or materials used therein, used or placed in operation in Alabama which are acquired or constructed primarily for the control, reduction, or elimination of air or water pollution shall be deductible; provided, however, that the corporation

may elect to amortize such amounts over a period not exceeding the useful life of such devices, facilities, or structures.

Alabama New Market Tax Credits

Qualifying companies in Alabama may obtain new market tax credits under the Alabama New Markets Development Act (Act No. 2012-483), which parallels the federal new market tax credit system under Internal Revenue Code § 45D. Investors in community development entities with allocations of credits, through financing structures involving the qualifying company, can obtain an aggregate of fifty percent state income, financial institution excise, and insurance premium tax credits against a qualifying investment over seven years (zero in the first year and pro rata in years two through seven). The Alabama Department of Commerce administers the program with a maximum allocation (on which the state tax credit is based) of ten million dollars per project.

Major Manufacturing Zones

Beginning in 2013, new tax increment financing districts may be created by cities and counties to provide new incentives for investing companies, so long as the site in Alabama has at least two hundred fifty continuous acres, the project consists of certain industries (with an emphasis on aerospace, automotive, medical, and technology), and the capital investment is at least one hundred million dollars.

ADDITIONAL GRANTS

State and Local Government Assistance

Amendment 772 to the Alabama Constitution, enacted in November 2004, significantly expands the powers of cities and counties to provide direct financial incentives to businesses. Cities and counties may make grants and lend credit, including becoming indebted up to fifty percent of the assessed value of taxable property in such jurisdiction. Businesses are cautioned that ambiguities remain for cities and counties with other existing amendments for economic development.

Alabama 21st Century Authority

Bonds issued by the Alabama 21st Century Authority, which are payable out of tobacco litigation settlement revenues received by Alabama, may be used to pay for job training for companies choosing to locate or expand in Alabama.

State General Obligation Bonds

Amendment 666 authorizes the issuance of general obligation bonds for economic development purposes, including job-training grants.

Job Training Facilities

Alabama Industrial Development Training, now a part of the Alabama Department of Commerce, presently operates training centers in Tuscaloosa, Mobile, Madison, Montgomery, and Talladega counties. Other facilities are operated by and located on campuses throughout the state, including Calhoun Community College and Troy University. These facilities have been used to train workers for specific skills needed for new and expanding businesses. Honda, Airbus, Mercedes, Boeing, Hyundai, Lockheed-Martin, and International Engine Group (formerly Navistar) have all benefited from these training facilities.

INTERNATIONAL BUSINESS

International businesses that are interested in establishing or acquiring operations in the U.S. must address numerous issues, many of which are discussed in this guide. One of the issues that investors outside of the U.S. must address is whether to utilize a foreign business entity or an entity organized in the U.S. to conduct its U.S. operations. Assuming the investor elects to organize an entity in the U.S., it must determine the form of business organization through which it will conduct its operations. The preferred form of business organization will vary depending on the unique characteristics and objectives of the company, involving both tax and non-tax considerations.

DOMESTIC ENTITY VERSUS FOREIGN ENTITY

Domestic Entity

A domestic entity is any entity that is formed under the laws of any state or territory of the U.S. The U.S. asserts broad authority to tax the worldwide income of its domestic entities. Therefore, the U.S. may not only tax the income earned by domestic entities within the borders of the U.S. but may also tax the income earned by its domestic entities anywhere in the world. This can result in double taxation, but relief is provided through tax treaties and credits for foreign taxes. The potential for double taxation is not a particularly important issue for international investors forming domestic entities because it is likely the income of such entities will be generated solely in the U.S.

Foreign Entity

A foreign entity is one that is formed under the laws of a jurisdiction other than the U.S. All foreign entities are classified as either individuals, corporations, trusts, estates, or partnerships. The distinction between whether the entity will be classified as a corporation or a partnership is important because a partnership's income will pass through to the entity's owners and be reported on the tax returns of each owner (the partnership does not have direct tax liability), whereas a corporation's income will not

pass through to the owners and will be reported on the tax return of the corporation (the corporation has direct tax liability). With certain forms of business organizations, the taxpayer has the option to be treated as a taxable entity or pass-through entity. In addition to the tax laws, a U.S. entity will be subject to other local and federal laws of the U.S. generally applicable to businesses.

As a general rule, the U.S. taxes a foreign entity on two sources of income earned within the U.S. First, a foreign entity is taxed on “effectively connected income” (“ECI”) that arises from the conduct of a U.S. trade or business. ECI is taxed at the same tax rates applicable to a U.S. citizen or corporation. For a foreign entity to have taxable ECI, it must be engaged in a U.S. trade or business. Second, a foreign entity is taxed on U.S. source “fixed or determinable, annual or periodic” income (“FDAP”). FDAP is normally taxed at a flat rate and includes such items as dividends and interest.

FORMS OF BUSINESS ORGANIZATIONS

There are numerous types of business entities available in the U.S. that may be utilized depending on the circumstances of the particular party. For further discussion, see the Business Entities Section of this guide. Corporations and limited liability companies are two of the most common forms of business organizations. Another option frequently considered by foreign businesses is to simply conduct its U.S. operations as a branch of its existing foreign-based entity. A brief discussion of each of these options is set forth below.

Corporation

The most common method by which foreign companies engage in a U.S. trade or business is by forming a corporation as a separate subsidiary. The trade or business of the subsidiary corporation is not attributed to the foreign parent company merely because of the parent’s ownership of the subsidiary’s stock. None of the parent corporation’s income is subject to tax in the U.S., unless it can be properly allocated to the subsidiary.

Any distribution received by the parent from the subsidiary is FDAP. Requirements for incorporation depend on state law, but generally include the filing of a certificate or articles of incorporation, drafting of corporate bylaws, issuance of stock, and payment of incorporation fees to the state. A corporation can be formed in the U.S. quickly and without a great deal of expense compared to many other countries.

Although complete insulation from personal liability is not available in the U.S. legal system, the corporate form provides a high level of protection. A shareholder is generally not personally responsible for the debts and obligations of the corporation. Accordingly, a shareholder's loss is limited to the amount invested in the corporation.

Limited Liability Company

A limited liability company ("LLC") may take many unique forms and be specifically tailored to the specific needs of its owners. An LLC is most commonly taxed as a partnership, but at the election of the owner, may be taxed as a corporation. This election is rarely made because of numerous complications that can arise. For an LLC taxed as a partnership, the choice of using a foreign LLC or a domestic LLC is not important for tax purposes because the trade or business of the LLC will be attributed to the foreign parent. Therefore, the foreign parent will be directly taxed according to the special foreign tax rules. For an LLC taxed as a corporation, the trade or business of the LLC is not attributed to the foreign parent company merely because of the parent's ownership of the LLC. None of the parent corporation's income is subject to tax in the U.S., unless it can be properly allocated to the subsidiary. The subsidiary is subject to the tax laws of the U.S. and is taxed on its worldwide income. Absent a special election by the owner, an LLC with one owner is not treated as a separate entity for U.S. tax purposes and is deemed to be merely a division or branch of the parent company. As a result of the LLC's operations, the parent company will be deemed to be directly engaged in the active conduct of a trade or business of the U.S., and any income earned will be taxed according to the special foreign tax rules.

Branch of Foreign Corporation

A foreign company may wish to establish branch operations in the U.S. rather than forming a separate U.S. subsidiary. If the foreign company employs an agent in connection with its branch, then the foreign company is deemed to be engaged in the active conduct of a trade or business in the U.S. and any income generated will be taxed according to the special foreign tax rules. Foreign corporations often elect not to conduct operations in the U.S. through a branch because of extensive disclosure requirements and tax allocation problems.

TAXATION

This section briefly summarizes the major business taxes applicable to domestic entities and foreign entities doing business in Alabama.

CORPORATE INCOME TAX

Alabama's corporate income tax, set forth at Ala. Code §§ 40-18-31 *et seq.*, is imposed on each domestic corporation and each foreign corporation that is (1) licensed or qualified to do business in Alabama, (2) doing business in Alabama, or (3) deriving income from sources within Alabama. The tax is imposed annually on the net taxable income of a corporation at a flat rate of six and one-half percent. Alabama's corporate income tax has been substantially conformed to federal corporate tax law.

Alabama does not, in general, impose an entity-level tax on S corporations or on limited liability companies or partnerships treated as pass-through entities under federal tax law. Partners, members, or shareholders, however, may be subject to Alabama's personal income tax on their distributive or prorated shares of income. The top marginal personal income tax rate is five percent. Alabama requires composite returns and composite payments on behalf of certain non-resident shareholders of an S corporation unless the non-resident shareholder files an election with the Alabama Department of Revenue and agrees to file a non-resident income tax return and pay any income tax due. For entities governed by Subchapter K of the Internal Revenue Code, such as limited liability companies, composite reporting is required on behalf of non-resident owners and no election out is available. Certain exceptions apply to the composite return requirement including exceptions for business trusts and qualified investment partnerships.

Alabama net taxable income is determined by allocating and apportioning income to Alabama. Alabama apportioned income is determined using a four-factor apportionment formula which includes property, payroll, and double-weighted sales factors. Alabama has adopted the Multistate Tax

Compact (“MTC”), the Uniform Division of Income for Tax Purposes Act, and most of the MTC’s regulations. Alabama allows consolidated income tax reporting for C corporations. Only corporations having a nexus with Alabama may be included in an Alabama consolidated return.

BUSINESS PRIVILEGE (FRANCHISE) TAX

The business privilege tax, as set forth at Ala. Code §§ 40-14A-21 *et seq.*, is a tax on the apportioned net worth of all corporations and limited liability entities (including disregarded entities) that do business in Alabama or are organized under the laws of Alabama. The tax accrues on January 1st of each year and is due on March 15th for corporations and April 15th for all limited liability entities. In the first year of a taxpayer incorporating, organizing, qualifying, or otherwise doing business in Alabama, the taxpayer must calculate the tax on the day it is organized or first does business in Alabama and must pay the tax within two and one-half months later. Consolidated reporting is not allowed.

Tax Rates

Tax rates on corporations are graduated and based on federal taxable income apportioned to Alabama:

Prior Year’s Taxable Income	Tax Rate
Less than \$1	\$0.25 per \$1,000
\$1 to \$200,000	\$1.00 per \$1,000
\$200,000 to \$500,000	\$1.25 per \$1,000
\$500,000 to \$2,500,000	\$1.50 per \$1,000
\$2,500,000 and over	\$1.75 per \$1,000

Tax Caps

The minimum amount of tax is one hundred dollars. The maximum amount for most taxpayers is fifteen thousand dollars. For insurance companies subject to premium taxes, the maximum amount of tax is three million dollars. For financial institutions subject to the financial institution excise tax, the minimum amount of tax varies based on the total amount

of Alabama deposits, and the maximum amount of tax is three million dollars.

SALES AND USE TAX

The state portion of the general sales tax rate on retail sales of tangible personal property is four percent. Machinery and equipment used in a manufacturing process or farming is subject to a reduced state rate of one and one half percent. In addition, local counties and municipalities may also levy sales and use taxes. The average combined state and local general sales tax rate is approximately eight percent. The average combined state and local sales tax rate for manufacturing and farm equipment is approximately two and three-quarters percent.

The use tax is a complementary tax to the sales tax. Alabama's use tax is imposed on the first storage, use, or other consumption of tangible personal property in Alabama. Local counties and municipalities may also impose a use tax. The use tax is not imposed if the property is subject to the Alabama sales tax. In contrast to the sales tax that requires the seller to collect and remit the tax, the purchaser is subject to the use tax and must remit the tax to the proper state, municipal, or county authorities.

Alabama generally allows a credit for sales and use taxes paid to another state or political subdivision. The total credit allowed, however, cannot exceed the total amount of state or local sales and use tax liability.

Generally, builders, contractors, and landowners are liable for sales or use tax at the time of purchase of all building materials used in adding to, repairing, or altering real property.

There are numerous sales and use tax exemptions. Some of the major exemptions include the following:

- Wholesale sales – purchases for resale are exempt;
- Pollution control equipment – equipment and materials

purchased primarily for the control, reduction, or elimination of air or water pollution are exempt;

- Raw materials – raw materials used by manufacturers or compounders that become an ingredient or component part of the manufactured or compounded product are exempt; and
- Casual or isolated sales – sales by persons not engaged in the business of selling are exempt with the exception of certain motor vehicles.

Alabama's sales and use tax statutes can be found at Ala. Code § 40-23-1 *et seq.*

RENTAL OR LEASING TAX

Alabama imposes a privilege tax on persons engaging in the business of leasing or renting tangible personal property pursuant to Ala. Code §§ 40-12-122 *et seq.* The general state tax rate is four percent of the gross proceeds of the leasing or rental of tangible personal property. There is a reduced rate of one and one half percent for the leasing of automotive vehicles, truck trailers, semi-trailers, or house trailers, and two percent for the rental of linens or garments. Counties and municipalities may also impose a local rental or leasing tax.

UTILITY GROSS RECEIPTS TAX

Alabama imposes a utility gross receipts tax on every utility furnishing electricity, domestic water, or natural gas in Alabama pursuant to Ala. Code §§ 40-21-80 *et seq.* Unlike sales and use taxes, which are imposed on the consumer, this tax is imposed on the seller and collected from the consumer.¹ The tax at the state level is imposed on the gross receipts from sales of utility services at the rate of two percent of gross receipts. Counties and municipalities may also impose a local gross receipts tax.

¹ The tax is to be added to the price charged to the users of the utility and is administered and collected pursuant to the provisions of the state's sales tax. Much litigation has arisen in Alabama regarding who is responsible for paying these taxes as between the seller and the buyer. The law in Alabama is now clear that the seller must pay these taxes unless the buyer is clearly bound to pay them under the terms of a contract.

There are several exemptions and exclusions from the utility gross receipts tax, including the following:

- Wholesale sales;
- The furnishing of electricity to a manufacturer or compounder for use in an electrolytic or electrothermal manufacturing or compounding process, if separately metered;
- The purchase of natural gas which becomes an ingredient or component part of tangible personal property manufactured or compounded for sale;
- The furnishing of natural gas to be used by a manufacturer or compounder to chemically convert raw materials prior to the use of the converted raw materials in an electrolytic or electrothermal process; and
- The furnishing of electricity, natural gas, or domestic water for use or consumption by, in, or for the direct production, generation, processing, storage, delivery, or transmission of electricity, natural gas, or domestic water.

PROPERTY TAX

All real and personal property located in Alabama is subject to property taxes, unless specifically exempted pursuant to Ala. Code §§ 40-8-1 *et seq.* The state millage rate on both real and personal property is limited by the Alabama Constitution to six and one-half mills or six dollars and fifty cents per one thousand dollars of assessed value. Counties, cities, and school districts may also impose property taxes, and these local rates vary. The average combined state and local millage rate is forty-three mills or forty three dollars per one thousand dollars of assessed value. The owner of real property and tangible personal property located in Alabama on October 1 of each year is assessed property taxes. Between October 1 and December 31, all taxable property must be assessed by the tax assessor of the county in which the property is located. “Utility property,” however, is assessed by the Alabama Department of Revenue. “Utility property” is generally considered to be property of a taxpayer that has the essential

characteristics of a utility, including the power of eminent domain and federal and state regulation of rates or tariffs. Alabama arrives at an assessed value for property based upon four different classifications: (1) utility property is assessed at thirty percent of its appraised value; (2) business property is assessed at twenty percent of its appraised value; (3) agricultural, forest, and residential property and historic buildings are assessed at ten percent of appraised value; and (4) private passenger autos and trucks are assessed at fifteen percent of appraised value.

Major property tax exemptions include the following:

- Inventory – inventories of goods, wares, and merchandise for sale are not subject to property tax. Inventories of raw materials for use as an ingredient or component part of a manufactured or compounded product are also exempt;
- Pollution control equipment – all equipment and materials purchased primarily for the control, reduction, or elimination of air or water pollution are exempt; and
- Property used for purposes purely charitable.

STATE ANTITRUST AND COMPETITION LAW AND TRADE REGULATION

Alabama does not have extensive statutory regulation of trade and commercial activities. Unlike many states in the U.S., Alabama does not have a “mini-Sherman Act” or a “mini-Federal Trade Commission Act.” Accordingly, statutory law in Alabama governing antitrust and competitive activities is relatively limited and has been narrowed by judicial construction. While there is not a significant body of statutory regulation in this field, Alabama’s judiciary has continued to recognize various business torts which might exist by virtue of legislation in other states. This section summarizes Alabama’s treatment of antitrust, competition, and trade regulation.

ANTITRUST STATUTES

Alabama has two antitrust statutes. Ala. Code § 6-5-60 provides a civil cause of action for activities that restrain trade. Although the remaining code sections, §§ 8-10-1, 8-10-2, and 8-10-3, provide for criminal penalties, both statutes should be construed as a uniform system of regulation designed to punish or provide redress for activities in restraint of trade. Both statutes were enacted at the beginning of the twentieth century and have never been amended. Allegations of violations of these statutes are often included in federal antitrust actions, but as the parties typically concentrate on the claims under federal law, these state statutes have rarely been construed by Alabama courts.

Ala. Code § 8-10-1 provides as follows:

Any person or corporation who engages or agrees with other persons or corporations or enters, directly or indirectly, into any combination, pool, trust, or confederation to regulate or fix the price of any article or commodity to be sold or produced within this state . . . or any [entity] who enters into, becomes a member of or party to any pool, agreement, combination, or confederation to fix or limit the quantity

of any article or commodity to be produced, manufactured, mined or sold in this state . . . [is guilty of a violation.]

The penalty for a violation is a fine of not less than five hundred dollars and no more than two thousand dollars, but the statute does not specify whether these fines represent the total amount of punishment or whether the fine may be imposed for each sale of a product made in violation of this statute. Additionally, a restraint of trade (and even an attempt to restrain trade) constitutes a misdemeanor pursuant to Ala. Code § 8-10-3.

According to Ala. Code § 6-5-60, any person, firm, or corporation who is injured or damaged by an “unlawful trust, combine or monopoly” may bring an action in the state courts of Alabama to recover, in each instance of such injury or damage, all actual damages plus the penal sum of five hundred. The action may be commenced in any Alabama county where the trust, combine, or monopoly was formed or where its purposes were carried out. Likewise, an action under this provision may be brought in any county where any defendant is domiciled or where an officer or agent of the defendant corporation may be found.

The Alabama Supreme Court has interpreted these two state antitrust statutes as permitting actions by “indirect purchasers,” thus distinguishing their reach from that of federal antitrust law. In subsequent decisions, however, the Alabama Supreme Court has greatly limited the application of these state laws by declaring that they cover only purely intrastate activity and do not provide a cause of action for damages resulting from an agreement to control the prices of goods shipped in interstate commerce.

CONTRACTS WITH INDIVIDUALS IN RESTRAINT OF TRADE

In addition to the state antitrust laws mentioned above, Alabama recognizes the general principle that any agreement which restrains an individual from exercising a lawful profession, trade, or business of any kind is void. Ala. Code § 8-1-1(a) makes this general proclamation but

creates a highly significant exception permitting enforcement of covenants not to compete in two specific instances, so long as the non-compete agreements are reasonable as to time and territory. Specifically, the statute provides that if one sells the goodwill of his or her business, he or she may agree with the buyer that he or she may not compete in a specified territory for a defined period of time. Likewise, an employer can enforce a written covenant not to compete (which is reasonable as to time and territory) against an employee who may leave his or her employment. For a more thorough explanation of covenants not to compete in the employment context in Alabama, see the Labor and Employment Law Section of this guide (see page 40).

DECEPTIVE TRADE PRACTICES

In 1981, the Alabama Legislature enacted an extensive law to protect the consumer from unfair or misleading practices in the sale of goods. The Deceptive Trade Practices Act (“DTPA”), set forth at Ala. Code §§ 8-19-1 *et seq.*, makes illegal a wide range of activities in the sale of a product, including the mislabeling of goods and services, creating confusion and misunderstanding as to the source or certification of goods or services, using deceptive representations as to the geographic origin of the goods or services, misrepresenting the quality of the goods or services being offered, making false or misleading statements relating to the pricing of goods and services, falsely representing that goods are of a particular standard, quality, or grade, failing to identify damage to the goods, and disparaging the goods, services, or business of another by false or misleading representations of fact.

The DTPA prohibits specific violations relating to the sale of motor vehicles and tobacco products. The DTPA also provides for enforcement by the Attorney General of the State of Alabama, as well as by the District Attorneys of Alabama’s counties. These officials may seek fines, injunctive relief, and even criminal sanctions if the violation in question is proven to be continuous and willful.

MISCELLANEOUS

Alabama does not have a state-specific franchise statute. However, as is the case in most states, Alabama has a host of specific legislation relating to particular areas of trade and commerce, including but not limited to, sales of motor vehicles, sales of agricultural and industrial equipment, marketing of motor fuel, telemarketing, auctions, public warehousing, sale or disposal of hazardous materials, and sales of explosives.

LABOR AND EMPLOYMENT LAW

Alabama is an increasingly pro-business state. Employment claims are frequently litigated in both state and federal courts, and despite Alabama's former reputation as a challenging forum to defend against a lawsuit, favorable outcomes are regularly obtained. In addition, the implementation of tort reform has made the state friendlier to business.

EMPLOYMENT AT-WILL/EMPLOYEE HANDBOOKS

Alabama is an at-will state. This means that, without a clear and unequivocal offer or contract for a specified, definite term, employment is at-will. As such, both the employer and the employee have the right to terminate the employment relationship at any time, for any reason, or for no reason and with or without notice.

An employer, however, may inadvertently create an employment contract with its employee if it has a poorly drafted employee handbook that does not include an appropriate disclaimer or if the employer makes an offer of lifetime employment. Alabama courts have recognized exceptions to the at-will rule where the employee handbook or personnel policies do not clearly indicate that they do not constitute employment contracts. To create contractual rights, the terms of the handbook or policy must be specific enough to constitute an offer, the offer must be communicated to the employee, and the employee must accept it. Continued employment can constitute acceptance and supply the necessary consideration for the "contract."

Employment policies requiring arbitration of employment disputes are enforceable in Alabama even when the employment is at-will. Alabama has no law in addition to the federal laws that regulate areas of inquiry for employment applicants, imposes no specific statutory requirements or restrictions on advertising or job recruitment, and imposes no specific statutory requirements or restrictions on references or background investigations.

EMPLOYMENT CONTRACTS/NON-COMPETE AGREEMENTS

Use of employment contracts is not common in Alabama, except with highly paid executives and professionals. Employment contracts will often be construed according to generally accepted principles of contract law. Courts will look to whether the provisions of the contract were bargained for, the relative bargaining position of the employer and employee, and whether there was adequate consideration for certain provisions, such as a non-competition covenant.

Although Alabama statutorily disfavors restrictions of trade (Ala. Code § 8-1-1), Alabama courts generally will enforce non-competition, non-solicitation, and non-disclosure agreements between the employer and a non-professional employee, provided the employer has protectable interests and the restrictions in the agreement are not unduly burdensome on an individual's ability to earn a living. Courts will “blue pencil” non-competition agreements in Alabama, which means that, even if the court determines that the restrictions are overly broad and/or oppressive, it can modify the restrictions to make them reasonable and enforce the modified restrictions. The Alabama Trade Secrets Act, set forth at Ala. Code §§ 8-27-1 *et seq.*, also provides an employer protection against the misappropriation and use of its confidential and proprietary trade secret information.

DISCRIMINATION AND WAGE AND HOUR LAWS/EMPLOYMENT TORTS/STATE AND FEDERAL BENCHES

Alabama has no state human rights agency or comprehensive discrimination law. Accordingly, employees who feel that their employer has discriminated against them on a protected basis typically file suit in federal court under federal discrimination statutes after satisfying their administrative prerequisites (*i.e.* Equal Employment Opportunity Commission (“EEOC”) complaint and dismissal). The only notable Alabama discrimination statute, the Alabama Age Discrimination

Employment Act, set forth at Ala. Code §§ 25-1-20 *et seq.*, is modeled after the federal Age Discrimination Employment Act of 1967, except that an employee does not have to file with the EEOC before filing his or her lawsuit in state court. Alabama courts recognize the torts of invasion of privacy, assault, battery, outrage, and negligent hiring, retention, and supervision, which often arise in the context of sexual harassment or workplace violence.

Alabama's child labor laws, which regulate the employment of minors, are set forth at Ala. Code §§ 25-8-1 *et seq.* Aside from those child labor laws, Alabama does not have any statute or laws governing workday, workweek, or work hour issues. Alabama does not require employers to provide paid vacation, sick leave, or paid time off to employees. Alabama law does not contain a provision similar to the federal Family and Medical Leave Act. There is also no state equivalent of the federal Worker Adjustment and Retraining Notification Act. As with other types of leave listed above, there is no specific statutory requirement for employers to provide disability leave to employees or to give pregnancy leave, maternity leave, or paternity leave.

State court judges in Alabama at all levels are elected and vary widely in their inclinations, so business interests are often better served defending in federal court if that jurisdiction is available.

WORKERS' COMPENSATION ACT/RETALIATION

Alabama does not have a workers' compensation agency. Claims are tried before judges without juries in Alabama circuit courts. Employers must provide workers' compensation insurance and may satisfy their obligation (1) by purchasing insurance, (2) by establishing sufficient security under the Department of Labor regulations to qualify as "self-insured," or (3) by joining a self-insured workers' compensation fund. The Alabama Workers' Compensation Act, set forth at Ala. Code §§ 25-5-1 *et seq.*, provides a schedule for injuries to most parts of the body and for vocational benefits to employees who have suffered a disability that affects

their ability to find comparable future employment. Medical benefits are payable for the employee's life. The Alabama Workers' Compensation Act also provides a cause of action for employees who have been terminated in retaliation for making a workers' compensation claim. The retaliation provision provides for a jury trial and unlimited compensatory and punitive damages. Fortunately, however, the Alabama Supreme Court, in *Alabama Power Co. v. Aldridge*, 854 So. 2d 554 (Ala. 2002), reaffirmed that employees can only succeed on a retaliatory discharge claim under the Alabama Workers' Compensation Act if they demonstrate that retaliation for bringing a workers' compensation claim was the sole reason for the termination decision.

UNEMPLOYMENT COMPENSATION

Unemployment benefits are not available to employees on strike, to employees who were terminated for dishonest or criminal conduct, to employees who were terminated for misconduct after a prior warning, or to employees who voluntarily terminated their employment. If an employee obtains a favorable unemployment compensation award, an employer has administrative appellate review available within the Department of Labor and ultimately may appeal an unfavorable decision to an Alabama circuit court for a de novo trial. The significance of unemployment decisions made by the Department of Labor has increased in recent years after the Alabama Supreme Court held in *Wal-Mart v. Smitherman*, 743 So. 2d 442 (Ala. 1999) that a party, in certain circumstances, may be collaterally estopped from re-litigating an issue that was determined at the administrative agency level.

MISCELLANEOUS

Alabama has no specific laws governing what information may or may not be included in employee personnel files. Federal law, especially as it relates to medical information, would apply. Personnel records of public employees are open under the state's Open Records Act, and access is denied only if disclosure of the information would result in undue harm or embarrassment to the individual or if public interest

would clearly be affected adversely. For private employees, there are no requirements under Alabama law that employees be permitted to inspect their personnel records. The Workers' Compensation Act authorizes an employer or insurer to obtain, without a release, medical records directly relating to injuries or disabilities for which an employee is receiving benefits under such Act.

Alabama has a specific statute dealing with payments to commissioned sales persons set forth at Ala. Code §§ 8-24-1 *et seq.*, although it only applies to employers who sell products at wholesale. The sales person must be paid within thirty days after the date of termination and commissions that become due after the termination must be paid within thirty days after the date on which they became due. If these amounts are not paid when due the employer faces treble damages. There are no statutes or laws mandating payment within a specific time for any other employees.

Alabama does not have a statute pertaining to employee drug testing although Alabama does have a Drugfree Workplace Program which provides participating employers with discounts on their workers' compensation taxes. Alabama also has no equivalent to the federal Employee Polygraph Protection Act.

There is no statute governing whether and to what extent private employers may conduct searches of employee work areas, desks, etc. Because of the possibility for claims of invasion of privacy, employers should have a clear policy that allows searches of such areas in order to diminish the employees' expectation of privacy.

Surveillance and monitoring of employee activities is subject to the same consideration as other potential actions that might constitute an invasion of privacy. The less intrusive, and the more closely related to the employer's legitimate business interests, the more likely the practice will be upheld by a court. Alabama is a one-party state, which means that taping

a conversation is legal as long as one party to the conversation is aware that the conversation is being taped.

Parts of Alabama have a fairly strong union presence and numerous labor unions operate throughout the state (the Rubberworkers, UMWA, Steelworkers and IAM most notably). However, Alabama is a right-to-work state, meaning that an employee may not be required as a condition of employment to become or remain a member of a union.

Alabama passed a new gun law in 2013, which prohibits businesses from restricting the possession and carrying of firearms onto the business's property in certain instances. Essentially, the restrictions can be broken down into three categories: (1) in order to completely prohibit firearms, the facility must have both continuous posting of guards and some form of barrier that limits public access to the facility; (2) a business that allows members of the public access to its building may prohibit a person from openly carrying a holstered pistol into the building, but it may not prohibit a person with a concealed weapons permit from carrying his or her concealed pistol into the building; and (3) an employer can always prohibit employees from bringing weapons inside its facility and can prohibit employees from carrying weapons when the employee is engaged in the employer's work, whether on- or off-site. However, an employer that maintains a parking lot for its employees is prohibited from restricting an employee from having a firearm that is out of sight and in his or her locked vehicle under certain circumstances.

IMMIGRATION

Employers in Alabama are regularly faced with employment decisions that are impacted by federal and state immigration laws. Employers seeking to employ non-U.S. citizens are sometimes required to file a petition in order that the non-U.S. citizen can lawfully work. There are a number of permanent and temporary visas available, and the visa choice depends on a number of factors, including the proposed job, the candidate's qualifications, and the relationship between the U.S. employer and the foreign employer. Permanent residents, *i.e.* green card holders, can work in any occupation for an indefinite period of time. Temporary residents, *i.e.* non-immigrant visa holders, are usually restricted in their length of stay and in the employment options available to them.

LAWFUL PERMANENT RESIDENCY

Permanent resident status can be obtained through a relative or an offer of employment. For an employment-based green card, employers must sponsor the beneficiary employee for permanent residency. This process is demanding and the waiting periods may be long depending on the position and the nationality of the beneficiary employee. The employer must also work with a number of federal agencies, including the U.S. Department of State, the U.S. Department of Labor, and the U.S. Citizenship and Immigration Service ("USCIS"). There are also quotas on the number of permanent residents allowed annually.

TEMPORARY NON-IMMIGRANT VISAS

There are a number of temporary visas available to foreign nationals coming to the U.S. (or already present in the U.S.) to conduct business and/or to seek employment with a U.S. employer. Most temporary visas require the U.S. employer to file a petition with USCIS. In some limited circumstances, however, a foreign national may apply for a temporary visa on their own behalf.

FORM I-9 EMPLOYMENT AUTHORIZATION

Pursuant to federal law, all employers are required to verify that every new hire is either a U.S. citizen or authorized to work in the U.S. To comply with this requirement, employers must complete the federal Form I-9. Employers should regularly review the USCIS website to ensure they are using the most recent form. Failure to comply with the Form I-9 requirements can lead to sanctions and penalties. Those penalties include monetary fines and, in some cases, criminal penalties.

In addition, employers cannot discriminate against employees based on their immigration status. Thus, once an employee has satisfied the employer that he or she is eligible to work in the U.S., the employee's immigration status should not be used in any other employment decisions.

ALABAMA'S IMMIGRATION ACT

In 2011, Alabama passed its Immigration Act - the Beason-Hammon Alabama Taxpayer and Citizenship Protection Act (Act No. 2011-535). The Act prohibits the hiring of an unauthorized alien and contains severe penalties for non-compliance, including the suspension or permanent revocation of business licenses and permits. Additionally, the Act requires employers to enroll and participate in the federal E-Verify program.

ENVIRONMENTAL LAW

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

ENVIRONMENTAL PERMITTING

With limited exceptions, the Alabama Department of Environmental Management (“ADEM”) is responsible for environmental regulation and the issuance and enforcement of all environmental permitting in Alabama. ADEM administers all of the major federal environmental programs, including the Federal Clean Air Act, Clean Water Act, Resource Conservation & Recovery Act, and the Safe Drinking Water Act, and for all intents and purposes, is Alabama’s equivalent of the Environmental Protection Agency (“EPA”). ADEM’s consistent philosophy has been to obtain necessary legislative authorization and funding to administer and execute all programs of environmental regulation required under federal law and to do so in a manner that is consistent with, and no more stringent than, the standards of those federal programs and, to the extent possible, those of other states. This permitting scheme allows Alabama to effectively compete for new industries, particularly with neighboring states.

DEPARTMENTAL ORGANIZATION

The seven members of the Alabama Environmental Management Commission (“Environmental Management Commission”) are appointed by the Governor of Alabama with advice and consent of Alabama’s Senate and serve for staggered six-year terms. Each member must possess specific statutory qualifications for his or her appointment. The Environmental Management Commission is responsible for promulgating rules, regulations, and standards to implement the various environmental programs it administers. Furthermore, the Environmental Management Commission is responsible for developing environmental

policy and hearing administrative appeals of ADEM actions.

ADEM is divided into the following five divisions: (1) Permits and Services, (2) Air, (3) Water, (4) Land, and (5) Field Operations. Each of these divisions operates under the authority of a “Chief” and is further subdivided into branches and sections. The Field Operations Division has field offices in the cities of Mobile, Montgomery, Birmingham, and Decatur, from which ADEM field staff can promptly investigate complaints and respond to spills. The Permits and Services Division coordinates permit applications, files reviews, and provides administrative support for the permitting process. The functions of the Air, Water, and Land Divisions are discussed below.

In addition to its permitting functions, ADEM is also authorized to enforce the Environmental Management Act along with any and all statutes that ADEM is charged with administering through civil actions and administrative orders, which may include civil penalties and/or specified corrective actions. The basic enforcement philosophy is one of graduated response with the severity of the response being commensurate with the nature of the violation. Ultimately, ADEM’s goal with respect to enforcement is to achieve compliance with the least amount of intrusive regulatory effort necessary.

AIR REGULATION IN ALABAMA

Alabama has an EPA-approved State Implementation Plan, and the EPA has generally delegated to ADEM the authority for implementing and enforcing the Federal Clean Air Act. Similarly, each county board of health in Alabama has the authority to establish a local air pollution control program that is consistent with or stricter than the air pollution regulations adopted by ADEM. Only Jefferson County, however, where the City of Birmingham is located, and the City of Huntsville Department of Natural Resources and Environmental Management have elected to establish such local programs. Both Jefferson County and the City of Huntsville have promulgated regulations, which are virtually identical to those issued by ADEM.

The purpose of the Alabama Air Pollution Control Act of 1971 (“Air Pollution Control Act”), set forth at Ala. Code §§ 22-28-1 *et seq.*, was to provide a coordinated statewide program of air pollution prevention, abatement and control and to develop cooperation among the various jurisdictions of Alabama in dealing with air pollution issues. ADEM’s air regulations are substantially similar to the federal air regulations. More specifically, the Air Pollution Control Act prohibits the modification or use of any equipment which may cause air pollution or which is intended to prevent or control air pollution unless ADEM has issued a permit for that equipment. Consequently, any business or industry seeking to locate or expand in Alabama must obtain the appropriate air permits from the ADEM Air Division (or one of the two local programs) if proposed activities would result in regulated air emissions.

Prior to initiating any construction or modifications to equipment which may cause the emission of air pollutants, the owner must apply to ADEM for a construction permit which, when issued, is valid for two years. Following construction, ADEM will issue an operating permit upon inspection of the equipment by ADEM or based on a certification by a professional engineer. The operating permits issued by ADEM are for a fixed term of five years and are non-transferable. However, an authorization to construct must be obtained prior to construction of a major new emission source or a major modification to an existing emission source. ADEM imposes phased-in permit fees on certain sources, per ton of regulated criteria pollutant. Emission fees vary, depending on the nature of the source and the amount of tonnage of the criteria pollutants to be emitted. Specific permit limits will depend upon the type of emission source, size of emission source, and location of the facility. Permit limits are more stringent in areas that have not attained National Ambient Air Quality Standards.

REGULATION OF SOLID AND HAZARDOUS WASTES

ADEM's Land Division, through its Solid Waste Branch and Resource Compliance and Recovery Act ("RCRA") Branch, regulates most aspects of solid and hazardous waste in Alabama. The management of solid waste in Alabama is primarily governed by the Alabama Solid Wastes Disposal Act ("Disposal Act") set forth at Ala. Code §§ 22-27-1 *et seq.* The Disposal Act allocates the responsibility for solid waste management in Alabama between ADEM and the Alabama Department of Public Health ("Health Department"). Importantly, this statutory authority also mandates comprehensive planning by local governments in addressing solid waste needs and long-range planning. ADEM has responsibility for regulating the treatment, processing, and disposal of solid waste, while the Health Department controls the collection, storage, and transportation issues associated with solid waste. The Disposal Act provides for counties and cities in Alabama to discharge their duties by offering solid waste collection and disposal services to the public or, alternatively, by entering into contracts with private corporations to perform those tasks.

ADEM has adopted numerous rules governing the management of wastes in Alabama. Storage and transportation activities are regulated according to the type of waste at issue. For example, the storage and transportation of medical waste receives individual attention in the regulations due to the nature of the waste. In addition, ADEM has adopted standards and procedures for the siting of industrial, inert, and municipal solid waste landfills. A business or industry locating in Alabama, however, need only concern itself with subscribing to a solid waste collection service and not to the relatively complex solid waste regulations. It is worth noting that solid waste disposal fees in Alabama are normally lower than such fees in other parts of the country.

Pursuant to the Hazardous Waste Management and Minimization Act, set forth at Ala. Code §§ 22-30-1 *et seq.*, Alabama has established a statewide program to provide for the safe management of hazardous

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

The Groundwater Branch of ADEM's Water Division also operates Alabama's underground storage tank ("UST") program. Alabama adopted the Alabama Underground Storage Tank and Wellhead Protection Act ("Protection Act"), set forth at Ala. Code §§ 22-36-1 *et seq.*, and created the Alabama Storage Tank Trust Fund ("Trust Fund"). The Protection Act imposes certain duties on "owners and operators" of USTs and establishes standards for tank operation and maintenance. The Protection Act also imposes on the owners and operators of USTs responsibility for cleanup of contaminants released into the environment from such USTs. Significantly, the Protection Act operates in conjunction with the Trust Fund to provide the necessary financial assurances required by the federal UST program. The owner and/or operator of a UST is obligated to register every tank covered by the UST program with ADEM and pay certain tank fees and Trust Fund fees. Any tank that stores petroleum or a hazardous substance as defined by Superfund and more than ten percent of its volume is beneath the surface is covered under the UST program. Every subsequent owner of those tanks must re-register with ADEM. Any suspected release, spill, or overflow must be reported by an owner or operator.

WATER REGULATION IN ALABAMA

The federal Clean Water Act (“CWA”) established the Water Quality Standards (“WQS”) program and the National Pollutant Discharge Elimination System (“NPDES”). Subject to federal oversight by the EPA, ADEM operates and implements both programs.

Individual NPDES Permits

Under the WQS program, ADEM establishes “designated uses” for all navigable surface waters in Alabama, which vary depending on a given body of water’s historic use, expected future use, and water quality. ADEM also sets out specific technical water quality criteria that apply to the various use classifications. Essentially, ADEM establishes the minimum level of water quality that must be maintained so that discharges into the receiving stream do not degrade the water quality below the existing use classification. Prior to directly discharging any pollutant into navigable waters, a prospective business or industry seeking to locate in Alabama must obtain a NPDES permit from ADEM. Generally, NPDES permits require the use of a certain level of pollution control technology to limit those pollutants discharged from the facility into the receiving stream. The stringency of the pollution control requirements will vary depending on the facility’s process and the water quality standard associated with the receiving stream.

ADEM has established a second permitting system for those dischargers who indirectly discharge pollutants to a publicly owned wastewater treatment plant. Any indirect discharger is required to obtain a State Indirect Discharge (“SID”) permit. The SID permit will contain its own set of pre-treatment discharge limitations, as well as monitoring and reporting obligations. Additionally, ADEM has promulgated regulations covering the injection of treated wastewater into wells to protect Alabama’s drinking water. These regulations require any industry or business which is seeking to inject wastewater into any subsurface to obtain an Underground Injection Control permit. Any business or industry involved in the construction of facilities that will be used for subsurface injection purposes must similarly apply for a permit.

Stormwater Permitting

ADEM also has a general NPDES permit program for storm water discharges, which requires industries that conduct land disturbance activities involving five or more acres to apply for coverage under the general storm water permit. These regulations also require the permittee to adopt measures to control erosion and sedimentation. The EPA has promulgated a final rule that will require NPDES storm-water permits for all land disturbances and construction site activities involving one or more acres. ADEM has recently adopted a similar rule.

Corps of Engineers Permitting

The U.S. Army Corps of Engineers (the “Corps of Engineers”), under the authority of CWA § 404, regulates the discharge of dredged or fill material into waters of the U.S. (generally referred to as wetlands permitting). Although the Corps of Engineers’ regulations govern several different permitting programs pertaining to wetlands (*e.g.*, individual permits, nationwide permits and regional permits), ADEM is only involved in providing water quality certification pursuant to CWA § 401. ADEM’s role in water quality certification involves each individual permit and the issuance or reissuance of nationwide or regional permits. Generally, the Corp of Engineers cannot issue the permit in question if ADEM denies the certification to a particular activity. Therefore, CWA § 401 water quality certification by ADEM is an important condition in the Corps of Engineers’ permitting process.

Water Resource Use

In an effort to refine Alabama’s water policy and increase resource management at the state level without severing existing water rights currently held by landowners, Alabama enacted its own form of water resource management entitled the Alabama Water Resources Act set forth at Ala. Code §§ 9-10B-1 *et seq.* Essentially, all persons who divert or withdraw waters of the state are required to file a Declaration of Beneficial Use (“Declaration”) with the Office of Water Resources (“OWR”). The Declaration must contain such information as the primary

use of the water and estimated quantity of water diverted. After reviewing the Declaration, the OWR issues a Certificate of Use lasting from five to ten years. Persons holding a Certificate of Use must file water use reports on a periodic basis with the OWR. The rationale behind the Declaration filing requirement and periodic reporting is to allow the OWR to undertake necessary steps to develop long-term strategic management for the efficient use of Alabama's waters. Businesses seeking to locate or expand in Alabama should note that the OWR has yet to undertake any actions to alter or modify an existing riparian landowner's capacity to divert or withdraw water.

DISPUTE RESOLUTION IN ALABAMA

Alabama, like all other states, has two separate court systems—state and federal—each with separate and distinct jurisdictional requirements. Additionally, Alabama is similar to most other states in offering methods of dispute resolution apart from judicial litigation, namely the quasi-formal hearings involved in arbitration and the informal assisted settlement conferences involved in mediation.

ALTERNATIVE DISPUTE RESOLUTION

Like most states, options for dispute resolution in Alabama range from mediation and arbitration to litigation in either state or federal court. Although long viewed as inhospitable to mediation and (especially) arbitration, Alabama state courts, as well as the federal courts within Alabama, now routinely enforce contracts calling for either arbitration or mediation. Even where the remnants of anti-arbitration sentiment remain in Alabama's state court system, recent decisions from the Alabama Supreme Court (as well as the United States Supreme Court) provide little room for a court to deny arbitration if the contract in question expressly provides for arbitration in the event of a dispute under the contract and relates to interstate commerce or is otherwise covered by the Federal Arbitration Act (9 U.S.C. §§ 1-16).

LITIGATION IN ALABAMA COURT

Background

If other means of dispute resolution fail and litigation becomes necessary, the general preference in representing business clients is to seek resolution of the case in federal court. This practice, in part, dates back to the 1980s and early 1990s when Alabama state courts were known as one of the least hospitable forums for business defendants. Over the last twenty years, however, the Alabama Supreme Court and Alabama Legislature have both moderated the law of punitive damages, thereby reducing both the likelihood that excessive verdicts will occur and, if such a verdict does

occur, the likelihood that such a verdict will be upheld. Accordingly, many of Alabama's state courts are now acceptable venues.

Alabama's State Court System

As to civil litigation, Alabama's state courts are divided into four levels: (1) District Court, (2) Circuit Court (the courts of general jurisdiction), (3) Court of Civil Appeals, and (4) Supreme Court. Alabama's District, Circuit, and Court of Appeals judges as well as its Supreme Court Justices are elected officials.

(1) District Court. Each of Alabama's sixty-seven counties has a District Court that has exclusive jurisdiction over all claims with a value less than or equal to three thousand dollars. In addition, claims with a value greater than three thousand dollars but less than or equal to ten thousand dollars may also be brought in District Court. Equitable claims are not allowed in District Court. Befitting the relatively small amounts at stake in District Court cases, the timeline for discovery and trial are much shorter than in Circuit Court, and the court has much discretion as to the amount and type of discovery to be allowed. District Courts do not use juries and all cases are tried before a judge. Appeals from District Court decisions are taken to the appropriate Circuit Court for a *de novo* proceeding.

(2) Circuit Court. Within Alabama's state court system, business litigation is most likely to take place in Circuit Court. Alabama has forty judicial circuits, with each Circuit Court having jurisdiction over one to five counties, depending upon population. Circuit Courts have exclusive jurisdiction over all actions worth more than ten thousand dollars and concurrent jurisdiction with the District Courts for claims for more than three thousand dollars but less than or equal to ten thousand dollars. Additionally, Alabama's Circuit Courts also have exclusive jurisdiction over most equitable actions. In most civil actions, any party may demand a trial by jury. Circuit Courts also exercise appellate jurisdiction over District Courts.

Alabama's Circuit Courts are governed by the Alabama Rules of Civil Procedure and the Alabama Rules of Evidence, both of which are generally patterned on their Federal counterparts but contain some significant differences.

(3) Court Ordered Mediation. Due to general governmental budgetary concerns (which at times have been severe), many Circuit Courts are assessing ways to save money, including asking parties to agree to smaller petit juries for civil cases. In certain extreme situations, some Circuit Courts have temporarily postponed all civil jury trials until funding issues are resolved. As a result, many judges are very active in facilitating settlement discussions between parties and are apt to order parties to mediate their dispute. More often, however, civil cases simply sit on a court's docket for months and even years. It is likely that such attempts to try cases with a small jury or to persuade parties to seek alternative dispute resolution methods will become more common.

(4) Court of Appeals and Supreme Court. Alabama's state court system has two levels of appellate jurisdiction. Alabama's Court of Civil Appeals is an intermediate court of appeals which hears appeals from trials if the amount in controversy is less than or equal to fifty thousand dollars, the claims in dispute involve worker's compensation, or the claims involve domestic relations. The Alabama Supreme Court hears appeals from all cases where the amount in controversy exceeds fifty thousand dollars. Supreme Court rules, however, permit it to refer appeals to the Court of Civil Appeals for final resolution.

The Alabama Supreme Court has become much more business-friendly in recent history. The Supreme Court's pro-business bent is manifest in its indication that it will enforce long-ignored statutory limits on punitive damages as well as its general enforcement of arbitration clauses despite Alabama's long-stated public policy against arbitration. While the court's composition can change with each general election, at present it does not

appear that the Alabama Supreme Court's make-up, and thus its pro-business tendencies, will materially change in the near future.

(5) Appellate Mediation. Like their trial court counterparts, both the Alabama Court of Civil Appeals and the Alabama Supreme Court encourage parties to engage in mediation. Pursuant to Rule 55 of the Alabama Rules of Appellate Procedure, an appellate court may direct attorneys to appear before an approved mediator in an attempt to resolve the appeal. Such mediation sessions are confidential and are not to be disclosed to the appellate court. Accordingly, alternative dispute resolution methods will likely take on an increasingly prominent role in Alabama.

Federal Courts in Alabama

Where claims present questions under federal law or the requirements of diversity jurisdiction are met, a party may seek resolution of a dispute in the federal courts in Alabama.

(1) United States District Courts. Three United States District Courts are located in Alabama: the United States District Court for the Northern District of Alabama, the United States District Court for the Middle District of Alabama, and the United States District Court for the Southern District of Alabama. In general, due to their greater resources and experience, the federal courts are better equipped to handle complex civil litigation than are Alabama's state courts. Like their state court counterparts, federal judges in Alabama will promote settlement whenever possible. Unlike Alabama's state courts, however, cases rarely—if ever—languish on a federal docket. In fact, although slightly slower than the national average, the median time interval from the time a case is filed in one of the federal courts in Alabama until the case is disposed of has been less than ten months.

(2) U.S. Court of Appeals for the Eleventh Circuit. If an appeal from a federal district court in Alabama is necessary, litigants may appeal to the United States Court of Appeals for the Eleventh Circuit (which also

accepts appeals from the federal district courts in Georgia and Florida.) According to federal statistics, the Eleventh Circuit is slightly more likely than other Courts of Appeals to reverse a district court's ruling in a private civil action, although the Eleventh Circuit is only likely to do so approximately fifteen percent of the time. Finally, the Eleventh Circuit—like the Alabama appellate courts—also strongly encourages mediation of the cases before it.

INTELLECTUAL PROPERTY

Both federal and state laws have been enacted which have as their primary purpose the protection of intellectual property rights. In the section that follows, the more significant laws related to intellectual property are discussed.

COPYRIGHTS

U.S. copyright law, which is based on powers conveyed to Congress under Article I, Section 8 of the U.S. Constitution, is principally embodied in the Copyright Act of 1976 (“Copyright Act”) (works created prior to January 1, 1978, continue to be governed by the Copyright Act of 1909). Unlike patent and trade secret laws, which protect ideas, copyrights protect the rights of the author in the *expression* of the idea.

Copyright protection exists in original works of authorship fixed in a tangible medium of expression. To be original, a copyrightable work must be independently created by the author and possess some minimal degree of originality.

Once an author fixes a work of sufficient originality in a tangible medium, the Copyright Act conveys to the author the exclusive right to reproduce copies of the work, distribute the work, perform the work publicly, display the work publicly, and prepare derivative works. Works protected under U.S. copyright law include, among others, literary (including computer software), musical, dramatic, pictorial, graphic, sculptural, and architectural works and motion pictures. While formal registration of copyrights is not required, registration conveys additional benefits on the copyright owner and is a prerequisite to enforcing rights under the Copyright Act.

There are limitations on the exclusive rights granted to copyright owners. The fair use by another of a copyrighted work is not an infringement. Fair use includes use by reproduction for purposes of

criticism, comment, news reporting, teaching, scholarship, or research. To determine whether the use of a work is a fair use, one must consider the purpose and character of the use, the nature of the copyrighted work, the amount of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon or value of the copyrighted work. As a general rule, copyright ownership vests initially in the author or authors of the work. Work-made-for-hire is an exception to the general rule. In a work-made-for-hire situation, the copyright ownership vests in the author's employer. Generally, work-made-for-hire is applicable in only two situations: (1) works created by an employee acting within the scope of his or her employment, and (2) works of an independent contractor if it was specially ordered and the type of work created was a contribution to a collective work, a supplemental work, a compilation, or an instructional text.

The remedies available to a copyright owner for the infringement of a registered copyright-protected work include injunctions, seizure, impoundment, and disposition of infringing articles, statutory or actual damages, including the infringer's profits based on its gross revenue, and attorneys' fees. If the copyright owner elects to recover statutory damages, there is no requirement to prove lost profits or actual damage. Rather, the court may award between seven hundred fifty dollars and thirty thousand dollars for each work infringed. If the court finds that the infringement was willful, the statutory award may be increased up to one hundred fifty thousand dollars. A prevailing party in a copyright suit involving a registered work may also seek to recover reasonable attorneys' fees incurred in the action with such award made at the court's discretion.

PATENTS

Governed exclusively by federal law, U.S. patents are granted to inventors of new and useful inventions. During the life of the patent, the patent owner has the right to exclude others from making, using, selling, offering for sale, or importing the patented invention into the U.S.

The two principal types of patents are (1) utility patents, which govern the functional aspects of a device, process, or composition, and (2) design patents, which cover the design or appearance of an article. The term of a utility patent begins at the date the patent is granted and ends twenty years after the patent application is filed. A design patent is enforceable for fourteen years from the date the design patent issues. Plant patents are also available to protect a statutorily defined category of plant life. Patent protection is not available if the invention was in use or on sale in the U.S. more than one year prior to the date of the application for patent. The United States Patent and Trademark Office (“USPTO”) offers inventors the option of filing a provisional application for patent. The provisional application is intended to provide a less expensive vehicle for entry into the U.S. patent system and to give patent applicants equivalent treatment under U.S. law as is given to foreign applicants under the laws of other countries. Specifically, a provisional application allows the filing of an application at a lower filing fee, without a formal patent claim, without formal patent illustrations, without an oath or declaration, and without an Information Disclosure Statement. Further, a provisional application provides the applicant with the ability to use the term “patent pending” while still preserving the application in secrecy. A provisional application cannot result in a U.S. patent unless one of the following two events occur within twelve months of the provisional application filing date: (1) a corresponding non-provisional application for patent entitled to a filing date is filed that claims the benefit of the earlier filed provisional application, or (2) a grantable petition under 37 CFR § 1.53(c)(3) to convert the provisional application into a non-provisional application is filed.

Under the provisions of 35 U.S.C. § 119(e), a non-provisional application claiming the benefit of an earlier provisional application benefits applicants in three ways: (1) patentability is evaluated as though filed on the earlier provisional application filing date, (2) the resulting publication or patent is treated as a reference under 35 U.S.C. § 102(e) as of the earlier provisional application filing date, and (3) the twenty-year patent

term is measured from the later non-provisional application filing date. The later-filed non-provisional application claiming the benefit of the provisional application must include at least one claim particularly pointing out and distinctly claiming the subject matter that the applicant regards as the invention. Although a claim is not required in a provisional application, the written description and any drawings of the provisional application must adequately support the subject matter claimed in the later-filed non-provisional application for the later-filed non-provisional application to benefit from the provisional application filing date.

Once a patent application is filed with the USPTO, the applicant may mark products embodying the invention with the designation “patent pending” or “patent applied for.” These designations indicate that a patent application has been filed and has been neither abandoned nor issued as a patent. Because the application is kept secret during at least the first eighteen months of its prosecution, a “patent pending” notice may deter competitors, who cannot determine either the extent of possible patent protection available or when a patent might issue.

When a patent has issued, patented articles should be marked with the word “patent” or “pat.” and the patent number. The purpose of marking is to inform the public that the product is protected by a patent. This is referred to as “constructive notice.” If a patented article is sold without constructive notice and the patent is infringed, the patent owner may not recover damages for acts occurring before the alleged infringer received actual notice of the patent and the patent owner’s rights. Additional information may be obtained by visiting www.uspto.gov.

TRADEMARKS

Trademarks identify the source and origin of goods, and when valid and enforceable, confer the right to exclude others from using marks that create a likelihood of confusion as to the origin or sponsorship of goods or services. The USPTO recognizes several different types of trademarks, the most common in use being trademarks and

service marks. A trademark is defined as “any word, name, symbol or device or any combination thereof” which is used by a person or company to identify their goods from others. A service mark is a “mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others.”

Trademarks and service marks are governed by both federal and Alabama law. Used to identify the provider of goods or services, trademarks may take the form of words, names, or symbols. Although these marks are owned by the user of the mark they are legally intended to benefit the consumer by permitting the consumer to distinguish among various sources of similar goods and services.

Under both federal and Alabama law, trademarks and service marks are acquired by providing goods or services bearing the mark in a commercial transaction. Also, under both federal and Alabama law, the distinctiveness of a mark is an essential aspect of its value and, therefore, the ability of the trademark owner to protect the mark from use by others. Generic terms, for example, may not be protected as trademarks under any circumstances, while terms that describe a characteristic or feature of the goods or services may only be protected after a showing of acquired distinctiveness, which means the mark has become associated with the trademark owner in the minds of consumers. At the opposite end of the spectrum, marks that are suggestive or arbitrary are considered inherently distinctive and are therefore afforded the greatest scope of protection under trademark law.

Registration of a mark is not required to secure or enforce rights in the mark. Federal registration of a mark, however, affords significant benefits to its owner, including the right to use the mark throughout the U.S. in those areas where it is not already in use.

Both trademarks and service marks may be registered in Alabama. As noted above, however, rights in a mark are acquired through adoption and usage, and a mark must have been used in the state before it may be registered. In Alabama, marks are registered with the Secretary of State. Under Alabama law, registration is effective for a term of ten years from the date of registration and may be renewed every ten years thereafter by filing the necessary form with the Alabama Secretary of State.

TRADE SECRETS

Alabama provides protection for trade secrets under the Alabama Trade Secrets Act (“ATSA”), set forth at Ala. Code §§ 8-27-1 *et seq.*, which supersedes prior common law protection of trade secrets to the extent such prior protections are inconsistent with the ATSA. The ATSA provides injunctive relief for actual or threatened misappropriation of a trade secret. The ATSA also provides for monetary damages for unauthorized disclosure or use of a trade secret and, in certain circumstances, reasonable attorneys’ fees. If the misappropriation is “willful and malicious,” the court may award exemplary damages in an amount not to exceed the actual award but not less than five thousand dollars.

An action for misappropriation must be brought within two years after the misappropriation is, or by the exercise of reasonable diligence should have been, discovered pursuant to Ala. Code § 827-5. Alabama also provides criminal sanctions for the misappropriation of a trade secret at Ala. Code § 13A-8-10-4.

BONDS AND OTHER FINANCING

There are many debt-financing mechanisms available for businesses seeking opportunities in Alabama. This section highlights key features of a selection of these mechanisms and points out certain issues arising with public assistance.

For certain categories of businesses, tax-exempt financing may be available. Even for those businesses that do not qualify for tax-exempt financing, creative structures adapted from the public finance arena could lower a borrower's debt service costs and make investment in Alabama projects more attractive.

TAX-EXEMPT FINANCING

Under current law, tax-exempt financing may be available for certain manufacturing enterprises through the issuance of "qualified small issue bonds." Such financing requires the issuance of private activity bonds by a governmental unit or a conduit entity. This type of financing is only available for manufacturing projects involving capital expenditures of twenty million dollars or less. There are a number of other tax-driven limitations on this financing mechanism that require careful scrutiny.

Qualified small issue bonds are typically issued solely on the credit of the borrower and, more importantly, any credit enhancer, such as a bank providing a letter of credit. Unlike general obligation bonds, these bonds obligate neither the State of Alabama nor any of its governmental units, including the issuing authority, for repayment of any amount beyond what is received from the borrower.

In Alabama, financing for a company's tax-exempt manufacturing project is typically done through a local industrial development board or industrial development authority, rather than a state-level agency. While there are various financing structures that could be considered, the bonds are frequently enhanced by a direct-pay letter of credit issued by a

bank with a marketable credit rating, with the borrower responsible for reimbursing the bank for draws on the letter of credit. The bonds typically bear interest at a variable rate. Bonds are sold either through public sale, usually to money market funds, in large minimum denominations or through private placements directly to investors or through banks.

The Internal Revenue Code established a state ceiling on private activity bonds (including “qualified small issue bonds”) that may be issued in each state within any calendar year. For specific details concerning the method by which Alabama allocates its available state ceiling, see Ala. Code §§ 41-10-35 *et seq.* In recent years, Alabama has rarely exhausted the available volume cap allocation for qualified small issue bonds.

The structure described above results in variable interest rate exposure. If the borrower would prefer fixed-rate debt, the borrower could request that the bank issuing the letter of credit or another financial firm provide an interest rate swap under which the borrower could fix its payment obligations. The ability of the borrower to obtain such a swap is dependent upon its credit standing.

There are certain other types of private activity bonds that can be issued on a tax-exempt basis in limited circumstances. For example, bonds may be issued for the capital needs of a charitable organization that is tax exempt under the federal tax laws. Section 501(c)(3) of the Internal Revenue Code provides that entities that satisfy certain requirements are exempt from most federal income taxes. Such entities are commonly referred to as 501(c)(3) organizations. Tax-exempt financings for 501(c)(3) organizations are usually conducted through local, independent public boards or authorities established solely for that purpose.

TAXABLE FINANCINGS THROUGH VARIABLE RATE DEMAND NOTES

One common source of capital for expanding business has been the traditional bank loan, whether at a fixed or variable rate. In the past

several years, banks have advanced alternative structures that can result in a lower cost of capital for the borrower.

A successful alternative taxable financing structure has been the variable rate demand note. Over time, the use of the variable rate structure for tax-exempt industrial development bonds led to the development of a market for taxable variable rate demand notes. These notes may be issued by any type of business entity, and even by an individual, with the backing of a rated bank direct-pay letter of credit. The notes may be sold in the public markets and have afforded many borrowers access to an inexpensive source of capital. The up-front cost is usually higher to close such a loan, and there are ongoing costs associated with maintaining the letter of credit and with periodic remarketing of notes. Many borrowers find, however, that the low interest rates afforded in this market, based on historical averages, make it an attractive option. As described above with respect to tax-exempt financings, any borrower wishing to avoid interest rate risk can solicit a swap provider to hedge against rising interest rates.

A number of Alabama-based commercial banks and investment banks have extensive experience with this structure, and our firm has been a leader in its use. This structure can accommodate both secured and unsecured loans.

ASSISTANCE BY STATE AND LOCAL GOVERNMENT

Many businesses seeking to enter or expand in Alabama desire state or local government support and incentives as a part of their financing. There are certain benefits state and local governments can clearly provide. For further discussion, see the Incentives for New and Expanding Business Section of this guide (see page 15).

Amendment 772 to the Alabama Constitution is an important economic development tool which significantly expands the power of cities and counties to provide direct financial incentives to businesses. Amendment

772 specifically empowers counties and cities to, among other things, lend their credit to or grant public funds and things of value to any individual, firm, corporation, or other business entity for the purpose of promoting the economic and industrial development of the county or municipality. Regardless of whether the requested public assistance takes the form of a bond issue which generates an up-front capital investment in a project or, alternatively, consists of a shared tax revenue arrangement payable over time (in which, for instance, a developer may bear the costs of an up-front capital investment in return for sharing future tax revenue within the project), such public assistance may be constrained by debt limit provisions in the Alabama Constitution.

Amendment 772 expands the powers of local governments by permitting them to become indebted for the purpose of promoting economic and industrial development in an amount not exceeding fifty percent of the assessed value of taxable property located within the jurisdiction of such local government. However, Amendment 772 is ambiguous with respect to whether the provision applies to counties or cities previously covered by a local constitutional amendment granting more limited powers for economic development purposes. Until the Alabama Supreme Court interprets the relationship between Amendment 772 and a more limited local constitutional amendment, bond counsel normally will require such bonds or warrants to be validated pursuant to Alabama law. A validation proceeding is an expedited judicial proceeding which requires approximately six to eight weeks from beginning to end.

COOPERATIVE DISTRICTS AND IMPROVEMENT DISTRICTS

Two chapters of the Alabama Code facilitate economic development financings which are supported by targeted public revenues. Ala. Code §§ 11-99A-1 *et seq.* allows the formation of special municipal improvement districts that have the power to issue bonds to finance public infrastructure improvements within the district. These bonds will be payable out of special property assessments levied on the owners of

the land within the district based on the estimated increase in value of the land resulting from the special benefits derived from the improvements. Municipal improvement districts are often important vehicles to facilitate the development of public infrastructure for new commercial, residential, or mixed-use developments.

Ala. Code §§ 11-99B-1 *et seq.* allows the formation of cooperative improvement districts by cities and counties that have the power to issue bonds to finance improvements of any nature, type, or description which any member of the cooperative district is authorized by law to own, acquire, construct, or finance. Since cities and counties under Amendment 772 have the power to finance virtually any type of project, cooperative improvement districts have the same power. Principal and interest on bonds issued by a cooperative improvement district are payable out of revenues derived from payments by members of the district to the district and/or fees or charges for the use of the financed improvements. Such fees may include, for example, targeted fees measured as a percentage of gross sales (similar to sales taxes). Eligible improvements are not limited to public infrastructure, so cities and counties may participate in a wide range of private projects through these means.

SECURED TRANSACTIONS

The Uniform Commercial Code (“UCC”) governs most commercial transactions, and has been adopted in similar form by every state in the U.S. One of the many issues governed by the UCC is how to define the rights and remedies of secured creditors and debtors. This relationship is addressed in Article 9 of the UCC. In general, Article 9 establishes the process by which certain types of property (excluding real estate) may be used to secure obligations of debtors. The resulting liens (or security interests) are typically recorded in a central filing index in the relevant state and are open to access by the general public.

Article 9 of the UCC has been revised to reflect uniform revisions proposed for consideration and enactment by the Permanent Editorial

Board for the Uniform Commercial Code, with support from the American Law Institute and the National Conference of Commissioners on Uniform State Laws (“Revised Article 9”). Revised Article 9 represents the first major change in the law of secured transactions since similar revisions were adopted in 1972. Revised Article 9 primarily expands the scope of the law to encompass many transactions that have become popular in the secured financing industry and to encourage the transition to electronic transactions. Some Alabama-specific provisions, such as an exclusion from Article 9 of security interests created by many public entities, are carried forward in Alabama’s version of Revised Article 9.

REAL ESTATE

The laws and customs governing real estate transactions in Alabama are fairly consistent with the real estate laws of most states in the U.S. Nonetheless, Alabama real estate law does contain certain peculiarities. This section includes a discussion of some of the real estate related issues that are unique to Alabama.

REAL ESTATE TRANSACTIONS

Real property is conveyed in Alabama primarily pursuant to one of three types of deeds: (1) general warranty deed, (2) statutory warranty deed, or (3) quitclaim deed. The general warranty deed provides for a transfer of property with a broad warranty of title by the seller. The statutory warranty deed is utilized pursuant to Ala. Code § 35-4-271 and is generally a more limited conveyance of title. The quitclaim deed conveys real property without any warranties of title. In Alabama, real estate is typically conveyed pursuant to legal descriptions in the form of a government survey, metes and bounds, or recorded subdivision plat.

Alabama law requires that instruments conveying real estate adhere to certain formalities. The instrument must contain the name and address of the individual preparer of the instrument not just the name of the law firm. The state and county in which the subject real estate is located should be stated in the upper left hand corner of the instrument, while the state and county of execution must be stated above the notary acknowledgment. Any conveyance of land or interest in such land by an individual grantor must contain a recitation of the grantor's marital status. The spouse of an individual grantor must sign the instrument of conveyance only if the property is the grantor's homestead. If not, the preparer should add a recital that the property is not the homestead of the grantor.

One witness is required for any conveyance, unless the grantor cannot write, in which case two witnesses are required. A notary acknowledgment serves as a witness and also makes the document self-

proving when recorded. Purported execution in the name of a corporation by certain officers, including the president, vice-president, or secretary, constitutes prima facie evidence of due authorization. No corporate seal is required, but the use of a corporate seal dispenses with the need for proof of due authorization, subject to rebuttal.

All deeds should be recorded in the county in which the real property is situated and should include the appropriate address for tax notices and the name and address of the person to whom the deed should be returned after recording.

Pursuant to the provisions of Ala. Code § 40-22-1, Form RT-1 must be completed and accompany any deed, bill of sale, or other instrument of like character which conveys any real or personal property or any interest therein. The purpose of this form is to attest to the purchase price of property when the conveyance instrument is presented for recordation. No further documentation or proof of the actual purchase price or actual value of the property is required.

MORTGAGES

The formalities for a mortgage are basically the same as the formalities described above for other conveyances. However, mortgages in Alabama have certain additional requirements. For example, foreclosure by power of sale is not available in Alabama unless it is specifically provided for in the mortgage. Also, there is a one-year statutory right of redemption for all mortgages foreclosed in Alabama. The redemption price is the amount of the foreclosure sales price, with interest at the rate allowed by law on money judgments, plus permanent improvements, taxes, insurance premiums, and any valid lien or encumbrance discharged. The right of redemption may not be waived prior to foreclosure.

RECORDING FEES AND TAXES

Recording fees in Alabama are generally two dollars and fifty cents per page and one dollar per additional grantor, grantee, mortgagor, or

mortgagee in excess of two each. Some counties have additional local fees. Deed tax is generally fifty cents per five hundred dollars or a fraction thereof, based on the value of the property conveyed. Where a deed and mortgage are recorded simultaneously, there is a credit against the deed tax for the amount on which the mortgage tax is paid. Appropriate recitals should be included in the deed and mortgage to take advantage of the credit. For example, a deed should recite “\$_____ of the purchase price of the above-described property was financed with the proceeds of a mortgage loan closed simultaneously herewith.” A mortgage should recite as follows: “[t]he proceeds of the loan secured by this mortgage were applied to the purchase price of the above-described property, which was conveyed to the mortgagor simultaneously herewith.” The deed tax is also applicable to leases and is computed based on the future rentals discounted to present value in accordance with a schedule kept by the probate judge. The tax is payable on lease assignments.

Mortgage tax is generally fifteen cents per one hundred dollars or a fraction thereof, based on the amount of secured indebtedness. Financing statements are typically subject to the mortgage tax when filed in the probate office, but not when filed with the Alabama Secretary of State. Documents filed as additional security to recorded instruments on which the tax has already been paid are not subject to additional tax. A mortgage may be amended without the payment of additional tax so long as the maturity date is not extended in the amendment (in which case the entire debt then outstanding is taxed again) and the mortgage amount is not increased in the amendment (in which case only the increase is taxed).

In transactions involving debt that is secured by property located outside of Alabama in addition to property located within Alabama, an allocation proceeding is provided for by statute. The allocation proceeding requires that a mortgage tax petition be presented to the Alabama Department of Revenue and that the Alabama Department of Revenue issue an order allocating the relative values of property located in Alabama as compared

to the value of all of the property securing the debt. This determination of the percentage of the value of the property located in Alabama is then applied to the total amount of debt secured in order to determine the amount of debt upon which the mortgage tax rate of fifteen cents per one hundred dollars of debt, or a fraction thereof, will be applied.

In the case of any sale or transfer of real property and related tangible personal property located in Alabama by a non-resident of Alabama, the buyer shall be required to withhold a tax for individual buyers equal to three percent of the purchase price or consideration paid for the sale or transfer, and for corporate, partnership, or unincorporated association buyers or transferees equal to four percent of the purchase price or consideration paid for the sale or transfer. Any buyer or transferee who fails to withhold such amount shall be personally liable for the amount of the tax. Alabama residents (both individuals and entities) are not subject to the withholding provisions of Ala. Code § 40-18-86. A buyer may request an Alabama resident seller to complete Form NR-AF1 found on the Alabama Department of Revenue website as proof of residency for the buyer's records.

LANDLORD AND TENANT

Alabama law recognizes the following kinds of tenancy: tenancy for life, tenancy for years, month to month tenancy, tenancy at will, and tenancy at sufferance. Leases for over one year must be in writing, and a leasehold estate cannot be created for a term longer than ninety-nine years. Leases with a term longer than twenty years are void after such twenty-year period unless the lease or a memorandum thereof is recorded within one year after execution. As a general rule, tenancies for terms of less than one year may be terminated by giving the tenant ten days' notice in writing. If tenancy is to be terminated for breach of lease, termination may also be accomplished by giving ten days' notice in writing of such termination.

Residential leases entered into after January 1, 2007 are governed by Alabama's Uniform Residential Landlord and Tenant Act, set forth at

Ala. Code §§ 35-9A-101 *et seq.* Under this act, if a tenant breaches the rental agreement, or acts in a manner affecting the health and safety of the premises, the landlord may deliver written notice to terminate the lease to the tenant, and the rental agreement will terminate after fourteen days from receipt of the notice if the breach is not remedied. However, if a tenant fails to pay rent when due, and the tenant fails to pay rent within seven days after receipt of the landlord's written notice to terminate the lease for non-payment, then the landlord may terminate the rental agreement at the expiration of the seven-day period.

TITLE INSURANCE

A title insurance policy on real estate in Alabama must be issued by a person or agent who is domiciled in, or is otherwise a bona fide resident of and resides in, Alabama or is a partnership, association, corporation, or other legal entity properly organized or existing under the laws of Alabama. Title companies are required to file their rates for title insurance premiums and endorsements with the commissioner of insurance. Premium rates charged by title insurance companies are regulated by the commissioner of insurance. Extended coverage endorsements to title insurance policies issued in Alabama are typically available from Alabama title insurers. Most of the standard title policy endorsements are available in Alabama.

FINANCING ASSISTANCE AND INCENTIVES

For a discussion on the potential use of cooperative and improvement districts to assist in the financing of certain real estate projects located in Alabama, see the Bonds and Other Financing Section of this guide (see page 67). For a general discussion on various real estate and other incentives that may be available to new and expanding businesses in Alabama, see the Incentives for New and Expanding Businesses Section of this guide (see page 15).

HEALTH CARE

Both federal and state laws have been enacted to regulate the provision of health care services. A summary of the health care landscape in Alabama follows.

GENERAL

The U.S. has a complicated health care system that is subject to detailed and strictly enforced state and federal regulations. Federal health care programs for the elderly and disabled have generally been established under the Medicare program, while joint state and federal programs for individuals with low income are established under the Medicaid program. Under these programs, a large number of state and federal rules and regulations have been promulgated, including: fraud, abuse and false claims, self-referral laws, rules relating to emergency treatment, including who can and who cannot be refused such treatment, privacy and security rules, and accreditation rules for health care providers eligible to receive payment from the Medicare and Medicaid programs. Some of these rules and regulations are discussed below.

FALSE CLAIMS ACT

The federal False Claims Act (“FCA”) protects against abuse of government programs, such as Medicare and Medicaid. The FCA allows private individuals with knowledge of past or present fraud committed by federal contractors against the government to bring suit on the government’s behalf. These suits are generally referred to as *Qui Tam* or whistleblower lawsuits, and individuals filing claims under the FCA may receive a portion of any recovered damages.

In addition to the FCA, Alabama law allows prosecutors to bring criminal actions against any person who, with intent to defraud or deceive, knowingly makes or assists in the preparation of any false statement, representation, or omission of a material fact in any claim or application

for any payment from the Medicaid Agency. Criminal penalties include both fines and imprisonment.

PHYSICIAN SELF-REFERRAL PROHIBITION

Alabama’s Medicaid program prohibits false statements or representations of material fact in any claim or application for payments on medical benefits from the Medicaid Agency generally, as well as kickbacks or bribes. Moreover, any person who solicits, receives, offers, or pays any remuneration of any kind in exchange for the referral of any person for services or in return for “purchasing, leasing or ordering any good, facility, service, or item [or for recommending one of the aforementioned acts] for which payment may be made in whole or in part by the Medicaid Agency, or its agents,” shall be guilty of a felony and subject to a maximum fine of ten thousand dollars and/or imprisonment between one and five years.

HEALTH CARE AUTHORITIES

While there are several alternatives to the organizational structure of hospitals, many nonprofit hospitals in Alabama are established by counties or municipalities pursuant to the Alabama Health Care Authorities Act. Such hospitals exist as governmental entities and are subject to a distinct set of rules related to their organization and operation.

CERTIFICATE OF NEED

Most institutional health care providers are required to obtain a Certificate of Need (“CON”) before constructing, establishing, or acquiring new healthcare facilities. The Alabama State Health Planning and Development Agency (“SHPDA”) is an agency of the State of Alabama designated to administer the CON program to assure that only those health care services and facilities that fulfill a need of the community are offered or developed in the state. SHPDA administers the CON program through a system of mandatory reviews of new institutional health services as defined in the legislation.

In addition, the Alabama Department of Public Health works with the Centers for Medicare and Medicaid Services, along with the affiliated contractor, regarding licensure and certification issues.

HEALTH CARE PROVIDERS IN ALABAMA

Many hospitals in Alabama are nonprofit hospitals. However, because of increasing budgetary and price pressures, the health care landscape in Alabama includes many for-profit and nonprofit joint ventures. These types of joint ventures often raise issues relating to the tax exempt status of nonprofit hospitals. In addition to tax laws, health care entities regularly confront anti-trust issues, employment labor issues, real property issues, and other general corporate matters.

Birmingham, Alabama is the center of operations for many health care providers and companies. The University of Alabama at Birmingham Medical Center (“UAB Medical Center”) is internationally known for its clinical programs in pulmonary and cardiovascular surgery, as well as cancer and diabetes research. Other internationally recognized health care programs that operate out of Birmingham include the Baptist Health System, a large faith-based system of hospitals and physicians, and the American Sports Medicine Institute, which regularly attracts sports celebrities for highly specialized treatment.

UAB Medical Center and Southern Research Institute, a nonprofit research organization located in Birmingham, have spawned a number of medical research and high-technology industries. Southern Research Institute is recognized internationally for the discovery and evaluation of anticancer therapeutics, as well as the evaluation of antiviral and antimicrobial drugs, biologics, and vaccines.

RECENT LEGISLATION

The Patient Protection and Affordable Care Act (“PPACA”), a U.S. federal statute enacted in 2010, embodies an expansion of the U.S. healthcare system. The PPACA is principally aimed at increasing

Medicaid eligibility for low-income individuals. On June 28, 2012, the Supreme Court of the United States upheld the constitutionality of most of the PPACA in *National Federation of Independent Business v. Sebelius*. However, the Court ruled that state governments are not required to participate in the expanded Medicaid program in order to receive existing levels of Medicaid funding. Alabama's governor has said that he opposes expanding Medicaid under Alabama's fee-for-service program in which health care providers are paid for each service.

Effective in 2014, the Alabama Medicaid program will divide the state into eight Medicaid regions to be served by provider-dominated regional care organizations ("RCOs"). Within these regions, the Alabama Medicaid Agency must certify at least one RCO, but each region must be capable, as determined by Medicaid's actuary, of supporting at least two RCOs. The RCOs will enter into a contract with Medicaid to provide medical services to Medicaid beneficiaries. Payments are made to the RCOs on a per-beneficiary basis, regardless of the care received or services rendered. If the cost of care exceeds the payments made by Medicaid, then the RCO must absorb the loss. If the cost of care is below the payments made, then the RCO would keep the surplus. The RCO program is in its beginning stages, and regulations setting forth more details are anticipated.

ALABAMA BLUE SKY AND OTHER SECURITIES ISSUES

Any person or business organization seeking to raise funds for starting, continuing, or expanding its business must comply with both the federal and state securities laws. The Alabama Securities Act set forth at Ala. Code §§ 8-6-1 *et seq.* (“Alabama Securities Act”), based upon the Uniform Securities Act with material variations, regulates the offer and sale of securities in Alabama. In addition, the Alabama Securities Act regulates broker-dealers and investment advisors. Under the Alabama Securities Act, no security may be offered or sold in Alabama unless it is registered with the Alabama Securities Commission (“Securities Commission”) or is exempt from registration. Alabama is a merit state, meaning that the supervising authority may revoke a registration of securities that fully and accurately discloses all required material information if it determines that it would be unfair, unjust, or inequitable to offer the securities to the citizens of Alabama.

DEFINITION OF SECURITY

Under the Alabama Securities Act, “security” is defined broadly and includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, investment contract, or any instrument of any kind commonly known as a security. The definition includes, but is not limited to, such specific items as annuity contracts (unless issued by an insurance company), bankers’ shares, trustees’ shares, investment participating bonds, investment trust debentures, units, shares, bonds, and certificates in, for, respecting, or based upon any form of securities or collateral. In addition, it includes subscriptions and contracts covering or pertaining to the sale or purchase on the installment plan of any security or subscriptions or contracts covering or pertaining to the sale or purchase of a beneficial interest in title to property, profits, or earnings, or any right to subscribe to any of the foregoing.

REGISTRATION OF SECURITIES

All securities not exempted from the registration requirements must be registered with the Securities Commission before being offered or sold, unless such security is a “covered security” as defined in § 18(b) of the Securities Act of 1933. The filing fee is forty dollars, plus a registration fee of one tenth of one percent of the aggregate offering price of the registered securities to be offered in Alabama, but the registration fee shall in no case be more than one thousand five hundred dollars nor less than one hundred dollars. All applicants for registration of securities must submit a related prospectus containing significant financial and other information about the company and the offering so that the supervising authority may determine if the offering satisfies the Alabama Securities Act’s requirements.

Registration by Notification

A security may be registered by notification in cases where (1) the issuer and any predecessors have been in continuous operation for at least five years, there has been no default in debt or dividend payments in the current year or within the previous three years, and the issuer and any predecessors have average net earnings of five percent of the amount of the securities in the preceding three fiscal years; (2) the security is being registered for non-issuer distribution and any security of the same class has previously been registered under the Alabama Securities Act or the security being registered was originally issued pursuant to an exemption from registration; or (3) the security is a national market system security under § 11A of the Securities Exchange Act of 1934.

Registration by Coordination

A security may be registered by coordination if a registration statement in connection with the same offering has been filed under the Securities Act of 1933.

Registration by Qualification

Any security may be registered by qualification.

EXEMPTIONS

The Alabama Securities Act contains both security exemptions and transactional exemptions. The burden of proving the exemption is on the person claiming it.

Security Exemptions

Certain types of securities are exempt from registration under the Alabama Securities Act solely because they fall within the list of securities specified by the Alabama Securities Act as exempt from registration. Therefore, a transactional exemption does not have to be perfected to escape the registration requirements. The security exemptions cover any security:

(1) issued or guaranteed by the U.S., any state or any political subdivision thereof, or any instrumentality of one or more of the foregoing;

(2) issued or guaranteed by Canada, a Canadian province or any political subdivision thereof, or any other foreign government with which the U.S. maintains diplomatic relations;

(3) issued by and representing interest in or debt of, or guaranteed by, any bank organized under the laws of the U.S. or any bank, savings institution, or trust company organized and supervised under the laws of Alabama;

(4) issued by and representing interest in or debt of, or guaranteed by, any federal savings and loan association or any building and loan or similar association organized under the laws of Alabama;

(5) issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under the laws of Alabama;

(6) issued or guaranteed by certain regulated railroads, other common carriers, public utilities, or their holding companies;

(7) issued by a nonprofit person organized exclusively for a religious, educational, or charitable purpose after notice to the Securities Commission specifying the terms of the offer;

(8) issued by an issuer registered as an open-end management investment company or investment trust under § 8 of the Investment Company Act of 1940; or

(9) that qualifies as a national market system security under § 11A of the Securities Exchange Act of 1934 or that is listed or approved for listing on a national securities exchange.

Exempt securities also include short-term commercial paper (less than nine months) and investment contracts issued in connection with an employee's stock purchase, pension, profit sharing, or similar benefit plan.

Transactional Exemptions

Certain transactions are exempt from registration under the Alabama Securities Act. The person selling the securities must comply with the specific requirements of the transactional exemption in order to avoid the registration requirements.

One of the most popular transactional exemptions for issuers is the limited offering exemption set forth at Ala. Code § 8-6-11(a)(9). This statutory exemption applies to offerings where there are ten or fewer purchasers, wherever located, during any period of twelve consecutive months. For this exemption to apply, the issuer must reasonably believe that all buyers are purchasing for investment and not for distribution, no commission or remuneration may be paid for soliciting prospective buyers, and no public advertising or general solicitation may be used in connection with the issuance. The statute provides for a presumption of investment intent if certain conditions are met. The Securities Commission may, by order, increase the number of purchasers in a transaction to which this exemption applies. The Alabama Securities Act provides for an

exemption from securities dealer and salesman registration for an offering that satisfies Alabama's statutory limited offering exemption.

The rules of the Securities Commission also provide an exemption from registration for offers or sales of securities made to no more than twenty-five persons in Alabama, other than certain institutional investors, in a twelve-month consecutive period, provided that certain other conditions set forth in the rule are satisfied. The rules likewise provide for an exemption from securities dealer and salesman registration for an offering that satisfies this rule-based exemption.

Offerings conducted under Rule 506 of federal Regulation D preempt Alabama's registration provisions pursuant to § 18 of the Securities Act of 1933. The Alabama Securities Act, however, does require an issuer relying on federal Rule 506 to file a manually executed SEC Form D with the Securities Commission, pay a filing fee, and submit a consent to service of process that may be a Form U-2. Additionally, commissions and finders' fees for soliciting prospective purchasers in Alabama may only be paid to broker-dealer agents who are registered in Alabama. The Alabama Securities Act does not recognize offerings under Rule 504 of federal Regulation D.

BROKER-DEALER AND INVESTMENT ADVISOR REGISTRATION

Under the Alabama Securities Act, all broker-dealers and investment advisors must be registered in order to transact business in Alabama. Similarly, dealers, issuers and investment advisors may not employ agents or representatives unless the agents and representatives are registered. Investment advisors need not register if their only clients are specified institutional investors, or unless they have no place of business within Alabama and do not, during any twelve-month consecutive period, engage in the advisory business with more than five persons, exclusive of specified institutional investors. All broker-dealers and investment advisors must maintain net capital of not less than fifty thousand dollars

and ten thousand dollars, respectively. However, in lieu of the net capital requirements, the Securities Commission will accept a bond of not less than fifty thousand dollars. Furthermore, unless exempt, broker-dealers and investment advisors that maintain custody over client funds or that have discretionary authority over customer accounts must file a surety bond in the amount of fifty thousand dollars in addition to maintaining the net capital requirements. Investment advisors generally may not charge performance-based compensation, although certain limited relief is available. All broker-dealer registered representatives and investment advisor representatives must also pass a written examination in order to demonstrate knowledge of the securities business, although waivers may be granted in some cases. Finally, broker-dealers and investment advisors must exercise diligent supervision over all securities activities of their associated persons.

ANTI-FRAUD PROVISIONS

The primary anti-fraud provision of the Alabama Securities Act set forth at Ala. Code § 8-6-17(a) makes it unlawful for any person, in connection with the offer, sale, or purchase of a security, to (1) employ any device, scheme, or artifice to defraud; (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

STATE AGENCIES

Alabama Department of Commerce

401 Adams Avenue – 6th Floor
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Phone: 334.242.0400
www.madeinalabama.com

Attorney General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36104
Phone: 334.242.7300
www.ago.state.al.us

AL State Banking Department

Center for Commerce, Suite 680
401 Adams Avenue
Montgomery, Alabama 36130-1201
Phone: 334.242.3452
www.banking.alabama.gov

Board of Public Accountancy

RSA Plaza, Suite 226
770 Washington Avenue
Montgomery, Alabama 36104-3807
Phone: 334.242.5700
www.asbpa.alabama.gov

Contractors Licensure Board

2525 Fairlane Drive
Montgomery, Alabama 36116
Phone: 334.272.5030
www.genconbd.alabama.gov

Department of Agriculture & Industries

1445 Federal Drive
Montgomery, Alabama 36196
Phone: 334.240.7171
www.agi.alabama.gov

Department of Conservation and Natural Resources

64 North Union Street, Room 468
Montgomery, Alabama 36130
Phone: 334.242.3486
www.outdooralabama.com

Department of Economic & Community Affairs

401 Adams Avenue
Montgomery, Alabama 36130
Phone: 334.242.8672
www.adeca.alabama.gov

Department of Environmental Management

1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
Phone: 334.271.7700
www.adem.state.al.us

Department of Finance

600 Dexter Avenue, Suite N-105
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Phone: 334.242.7160
finance.state.al.us

Department of Industrial Relations

649 Monroe Street
Montgomery, Alabama 36131
Phone: 334.242.8990
www.labor.alabama.gov

Department of Insurance

201 Monroe Street, Suite 1700
Montgomery, Alabama 36104
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www.aldoi.gov

Department of Labor

649 Monroe Street
Montgomery, Alabama 36131
Phone: 334.242.3460
www.labor.alabama.gov

Department of Public Safety

500 Dexter Avenue
Montgomery, Alabama 36130
Phone: 335.242.4394
www.dps.alabama.gov

Department of Revenue

50 North Ripley Street
Montgomery, Alabama 36104
Phone: 334.242.1170
www.ador.alabama.gov

Department of Transportation

1409 Coliseum Boulevard
Montgomery, Alabama 36110
Phone: 334.353.6554
www.dot.state.al.us

Emergency Management Agency

5898 County Road 41
Clanton, Alabama 35046-2160
Phone: 205.280.2200
www.ema.alabama.gov

Forestry Commission

513 Madison Ave
Montgomery, Alabama 36104-3631
Phone: 334.240.9300
www.forestry.state.al.us

Health Planning and Development Agency (SHPDA)

RSA Union Building
100 North Union Street, Suite 870
Montgomery, Alabama 36104
Phone: 334.242.4103
www.shpda.state.al.us

Office of Workforce Development

135 South Union Street
Montgomery, Alabama 36104
Phone: 334.293.4700
www.accs.cc/index.cfm/workforce-development/workforce-councils/

Oil and Gas Board

420 Hackberry Lane
Tuscaloosa, Alabama 35401
Phone: 205.349.2852
www.ogb.alabama.gov

Public Service Commission

100 North Union Street, Suite 836
Montgomery, Alabama 36104
Phone: 334.242.5218
www.psc.state.al.us

Secretary of State

Office of the Secretary of State
RSA Union Building
100 North Union Street, Suite 770
Montgomery, Alabama 36104
Phone: 334.242.7200
Phone (UCC Division): 334.242.5324
Phone (Corporate Division): 334.242.5324
www.sos.alabama.gov

Securities Commission

Alabama Securities Commission
401 Adams Avenue, Suite 280
Montgomery, Alabama 36104
Phone: 334.242.2984 or 800.222.1253
www.asc.alabama.gov

State Port Authority

1901 Ezra Trice Blvd
Mobile, Alabama 36603
Phone: 251.441.7194
www.asdd.com

Surface Mining Commission

1811 2nd Ave #2
Jasper, Alabama 35501
Phone: 205.221.4130
www.surface-mining.state.al.us

For more information on any Alabama state agency,
visit www.alabama.gov.

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