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Guide to Doing Business

North Carolina

Prepared by Lex Mundi member firm, Womble Bond Dickinson

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Legal Guide to Doing Business in North Carolina

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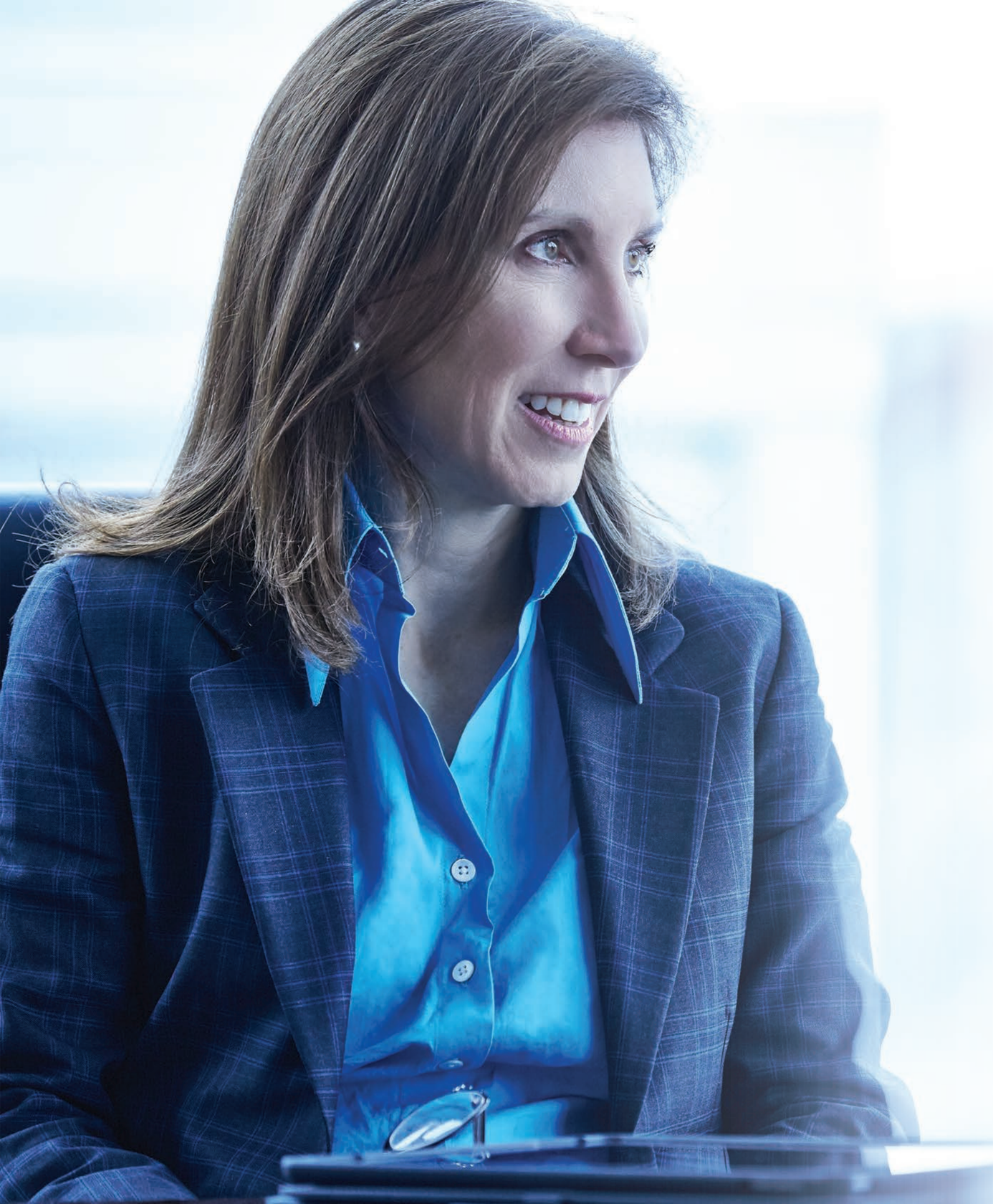
Contributors

Paul Billow
Mary Bennett
Mike Cashin
Brad De Vore
Brandy Davis
Hunter Edwards
Neill Edwards
Randy Hanson
Kurt Lindquist
Jim Phillips
Richard Rainey
Melanie Segraves
Sid Shenoy
Jamie Stone
JD Wooten



Dear Reader

This *Legal Guide to Doing Business in North Carolina* is meant to provide an overview of the rules and regulations applicable to businesses within the state. Womble Bond Dickinson (US) LLP (previously Womble Carlyle Sandridge & Rice, LLP) has been the North Carolina member of Lex Mundi since the founding of the network more than twenty-five years ago.

North Carolina is a global, high-tech destination and a leading area in the United States for business start-ups, relocations and expansions. Once heavily dependent upon the tobacco, textile and furniture industries, North Carolina has transformed itself into a manufacturing, financial services and technology-based economy. Womble Bond Dickinson (US) has offices in the three largest metropolitan areas of the state: Research Triangle of Raleigh, Durham, and Chapel Hill; Metrolina (Charlotte); and the Piedmont Triad of Winston-Salem, Greensboro, and High Point.

Our firm was founded in Winston-Salem, North Carolina in 1876 and has grown steadily along with the region. We represent numerous international corporations that have established operations in the United States as well as US companies doing business abroad. Clients of the firm include businesses and nonprofits in such areas as manufacturing, transportation, telecommunications, energy, technology, financial services, healthcare, life sciences, government and education.

On November 1, 2017, the partners of UK-based Bond Dickinson LLP and US-based Womble Carlyle Sandridge & Rice, LLP combined as equal members in a new firm operating under the name Womble Bond Dickinson. Currently, our combined firm has more than 400 partners and 1,000 lawyers across 8 offices in the UK and 19 offices in the US.

We hope you will find this guide to be an invaluable resource on doing business in North Carolina.

Best Regards,

Betty O. Temple

Betty Temple
Chair, Firm Management Committee

If you would like to learn more about Womble Bond Dickinson, one of the following individuals can either answer your questions or put you in touch with the appropriate person:

Randy Hanson, Greensboro, NC
t: +1 336.574.8070
e: randall.hanson@wbd-us.com

Jeff Hay, Charlotte, NC
t: +1 704.331.4950
e: jeff.hay@wbd-us.com

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Corporations

State of Incorporation

The North Carolina Business Corporation Act, codified at Chapter 55 of the North Carolina General Statutes, was substantially revised and modernized in 1990. As a result, a corporation having its principal facilities in North Carolina will often find it convenient and efficient to incorporate under the laws of North Carolina.

Corporate Formation

A North Carolina corporation may be formed with a minimum of formality. Articles of Incorporation must be signed by one or more incorporators (generally, an attorney or paralegal at the assisting law firm) and filed with the office of the Secretary of State of the State of North Carolina. A filing fee of $125 is required to be paid to the State.[1] If the members of the initial Board of Directors are not named in the Articles of Incorporation, the incorporator elects the initial Board. Thereafter, the incorporator has no function, and the Board of Directors adopts bylaws and conducts other organizational formalities.

Articles of Incorporation

The Articles of Incorporation are a matter of public record. They must specify the name of the corporation, the name of the initial registered agent, the street and mailing address of the initial registered office (including the county), the address of the principal office (including the county), if one exists, the name and address of each incorporator, the number of authorized shares of capital stock, and the designation of any classes of shares and their relative rights.

Other provisions may be included, such as the names and addresses of the initial directors, limitations on the liability of directors, reservation of preemptive rights and granting of cumulative voting. Following the issuance of shares, substantive amendments to the Articles may be made only with shareholder approval. The Articles can be amended by filing Articles of Amendment, restated by filing Articles of Restatement or consolidated into Amended and Restated Articles.

Name

The corporate name must contain the word “corporation”, “incorporated”, “company”, “limited” or an abbreviation of one of these words, and the name must be distinguishable from names of other entities doing business in North Carolina. The Secretary of State’s website has a searchable database of business entity names.

Bylaws

The Bylaws are not a matter of public record. The Bylaws will contain detailed provisions for governance of the corporation, dealing with such matters as meetings of shareholders, meetings of directors, election and authority of officers, and indemnification of directors and officers. The Bylaws may be amended by the directors except for certain specified amendments requiring shareholder approval. These specified amendments generally deal with specialized voting requirements or limits on the powers of the Board of Directors.

1 Expedited filing is available for all Secretary of State filings. Same-day filing is available for an additional fee of $200, and the document must be submitted to the Secretary of State’s office before noon. The Secretary of State also offers 24-hour filing for an additional $100 fee.

Share Capital

Shares of capital stock may be issued for any consideration deemed sufficient by the Board, including services performed or to be performed, or promissory notes. The number of authorized shares specified in the Articles of Incorporation limits the number of shares which may be issued. There is no obligation for a corporation to issue all authorized shares, and there is no obligation on incorporators to put capital into a corporation except to the extent they may contractually obligate themselves to do so. A corporation may issue two or more classes of shares having different rights and preferences.

Meetings of Shareholders and Directors

North Carolina law provides for annual meetings and special meetings of shareholders. Shareholders may also act by unanimous written consent in lieu of meeting. Shareholders may act by written consent of less than all shareholders entitled to vote in certain circumstances involving non-public corporations. Shareholders elect the Board of Directors at the annual shareholder meeting. The Board of Directors, which may consist of one or more directors, elects officers and determines the general business direction and policies of the corporation. Directors need not be citizens or residents of the State of North Carolina or of the United States. Directors may act by unanimous written consent in lieu of meeting. Board meetings may also be conducted by any means by which the directors may simultaneously hear one another, which would include telephone and videoconferences.

North Carolina has rules requiring notice of shareholder and director meetings and governing the conduct of such meetings which are similar to those of most states.

Authority of Shareholders, Directors and Officers

The shareholders must vote on certain fundamental matters, such as mergers, substantive amendments to the Articles of Incorporation, certain Bylaw amendments, the sale of the business and dissolution. Other matters are voted on by the Board, including non-substantive amendments to the Articles of Incorporation, Restated Articles of Incorporation, most types of amendments to the Bylaws, payments of dividends, issuance of capital shares, corporate loans and other significant transactions outside the ordinary scope of the day-to-day business. The Board also elects officers. Officers consist usually of a President, one or more Vice Presidents, a Secretary and a Treasurer. There may also be a Chairman of the Board, a Chief Executive Officer, a Chief Operating Officer, a Chief Financial Officer and one or more Assistant Secretaries and Assistant Treasurers.

Two or more offices may be held by the same person, but no individual may act in more than one capacity where action of two or more officers is required. For example, the same individual usually cannot hold both titles of President and Secretary because certain documents require the Secretary to attest to the President's signature. Officers need not be citizens or residents of the State of North Carolina, or of the United States, but if a business is located in North Carolina there should be a high-ranking corporate officer (e.g., an Executive Vice President or Vice President/ General Manager) on location who has authority to take significant corporate actions in day-to-day operations.

Limited Liability

Corporate shareholders, as such, are generally not liable for corporate obligations unless they agree to guarantee such obligations or unless a court finds that the corporate form should be ignored because the shareholders acted outside the course of prudent business practice.

Annual Reports

Corporations organized in North Carolina or otherwise authorized to do business in North Carolina must file an annual report each year setting forth certain non-financial information, including the names and addresses of its key officers and the nature of the business. Annual Reports can be filed electronically.

Taxation

Corporations are taxable entities, which means that corporate earnings are subject to federal and North Carolina tax. Certain corporations can qualify to be taxed on a modified pass-through basis, but only if they have a maximum of one hundred shareholders, none of whom are non- US persons, and all of whom must be individuals (or a special type of trust). The corporate income tax rate is 6.9%, and the franchise tax rate is $1.50 per $1,000.

Merger/Share Exchange

One or more corporations may merge into another corporation if the Board of Directors of each corporation adopts and its shareholders (if required) approve a plan of merger or plan of share exchange. After the plan of merger or plan of share exchange has been approved, the surviving or acquiring corporation must file Articles of Merger with the Secretary of State. Articles of Merger must contain the name and state of incorporation of each merging corporation, the name of the merging corporation that will survive the merger, a designation of mailing address if the corporation is not authorized to transact business in North Carolina (including a commitment to file any change of address with the Secretary), any amendments to the Articles of Incorporation of the surviving corporation (if a domestic corporation), and a statement that the plan of merger has been approved by each merging corporation. In the case of a share exchange, the Articles of Share Exchange must include the name of the corporation whose shares will be acquired, the name and state of incorporation of the acquiring corporation, a designation of mailing address (and commitment to file any change if the corporation is not authorized to transact business in North Carolina), and a statement that the plan of share exchange has been approved as required by law.

Foreign Corporations

A foreign corporation must obtain a Certificate of Authority from the Secretary of State in order to be authorized to conduct business in North Carolina. This can be accomplished by filing an Application for Certificate of Authority. Foreign corporations are governed by the laws of the state or other jurisdiction in which they were organized. In addition to the certificate of authority, a foreign corporation must maintain a registered office and appoint a registered agent within the state in order to do business in North Carolina.

Professional Corporations

The Professional Corporations Act is codified in Chapter 55B of the North Carolina General Statutes. The Act governs corporations which engage in rendering professional services, and subjects corporations to conditions and limitations, including licensing requirements. A "professional service" is any type of personal or professional service of the public that requires, as a condition precedent to the rendering of the services, the corporation to obtain a license from a licensing board. Examples include: architects, attorneys, public accountants, dentists, optometrists, chiropractors, nurses, veterinarians, podiatrists, psychologists, medical doctors, marriage and family therapists, occupational therapists, speech and language pathologists, professional counselors, engineers, land surveyors, social workers, geologists, foresters, and soil scientists.

Before filing Articles of Incorporation for a professional corporation, the entity should first determine the procedures for the specific licensing board for which the entity wants to be licensed. The Articles of Incorporation

for a professional corporation require the same information as for a corporation, but the professional corporation must list the name of one of the corporation's incorporators who is a licensee of the licensing board that regulates the profession. The Secretary of State also requires a certification by the appropriate licensing board that the shareholder interests of the corporation are in compliance with certain requirements of Chapter 55B. The Articles must contain original signatures[2] and an original of the certificate from the licensing board.

Nonprofit Corporations

The North Carolina Nonprofit Corporation Act, codified at Chapter 55A of the North Carolina General Statutes, governs nonprofit corporations. The Articles of Incorporation for a nonprofit corporation require more detail than the Articles for a corporation. In addition to the requirements outlined above, Nonprofit Articles require a statement that the corporation is a charitable or religious organization (if applicable), a statement regarding whether the corporation will have members, and provisions relating to the distribution of assets upon dissolution. The Articles may also include the purpose of the corporation, the names and addresses of the initial directors, provisions relating to management, the corporation's powers, the rights of its members, and limits on the personal liability of the directors. Nonprofits may have one or more classes of members. If so, the designations, qualifications, rights and obligations of the members must be set forth in the Articles or Bylaws. Nonprofits are not permitted to issue stock.

The North Carolina Department of Revenue does not require a tax-exempt number for nonprofits. The Department of Revenue will issue a tax-exempt letter with proof of Federal exemption, along with a copy of the Nonprofit's Articles and Bylaws.

Unincorporated Nonprofits

Like many other states, North Carolina adopted the Uniform Unincorporated Nonprofit Association Act, which can be found at Chapter 59B of the North Carolina General Statutes. The Act defines unincorporated nonprofit associations as unincorporated organizations consisting of two or more members joined by mutual consent for a common, nonprofit purpose. The Act permits nonprofit associations to receive, hold, and transfer personal and real property. It also limits the liability of members and provides standing to sue and be sued. A nonprofit association may file a statement appointing a registered agent with the Secretary of State, but is not so required.

2 The Secretary of State permits photocopies for most filings.

Partnerships

General Partnership

A general partnership is an association of two or more co-owners operating a business for profit. General partnerships in North Carolina and most states are governed by the provisions of the Uniform Partnership Act, codified at Chapter 59 of the North Carolina General Statutes. Any lawful business may be conducted in the general partnership form.

There is no requirement of formality or registration in the formation of a general partnership, and the terms of a partnership agreement may be written or oral. Good practice dictates a written agreement if the partnership business is substantial. Subject to a partnership agreement, the Act dictates certain rights and duties of the partners. The partnership must register in each county in which it conducts business by filing a Certificate of Assumed Name with the register of deeds of the county. There is no limit on the number of partners that may exist in a general partnership. Both natural persons and business entities (including corporations) may be partners.

In a general partnership, all partners are jointly and severally liable for the acts, debts and obligations of the partnership. While each partner has a right in specific partnership property, the partners may act with respect to partnership property only in accordance with the Uniform Partnership Act and the terms of a partnership agreement. The partnership itself is not a taxable entity, and partnership income, gains and losses pass through to the partners for federal and North Carolina income tax purposes.

There are no publications, annual report or other statutory reporting requirements for general partnerships.

Limited Partnership

A limited partnership is an association composed of one or more general partners with unlimited liability and one or more limited partners who are generally not liable for obligations of the partnership. Limited partnerships in North Carolina and most states are governed by the provisions of the Revised Uniform Limited Partnership Act, codified in Article 5 of Chapter 59.

Limited partners have a passive investment and do not participate actively in management and control of the business of the limited partnership. Management of the partnership's activities is performed by the general partners. If a limited partner participates in the management of the partnership business in substantially the same manner as a general partner, the limited partner will have unlimited liability in the same manner as the general partner. Certain discrete activities for the partnership may be carried out by limited partners without affecting limited partner status, such as acting as a contractor, consultant or surety, or exercising voting rights on certain matters.

Unlike general partnerships, limited partnerships are subject to various registration and other formal requirements. To form a limited partnership, the partners must file a Certificate of Domestic Limited Partnership with the Secretary of State. The Certificate of Domestic Limited Partnership is similar to the Articles of Incorporation for a corporation and is required to contain the name of the limited partnership, the name and address (including county) of the registered agent, the date—if any—on which the limited partnership is to dissolve, the name and address of each general partner, and the address where the limited partnership's records are kept. The limited partnership may also register as a limited liability limited partnership.

The name of a limited partnership is subject to name clearance procedures similar to corporations. A name may not be registered unless it is sufficiently unique to permit separate indexing in the limited partnership records. The limited partnership name may not contain the name of a limited partner unless (i) it is also the name of a general partner or the corporate name of a corporate general partner or (ii) the business of the limited partnership has been carried on under that name before the admission of that limited partner. Further, the name of the limited partnership must contain the words “limited partnership”, the abbreviation “L.P.” or “LP” or the combination “ltd. partnership”.

Subject to the terms of the partnership agreement, a limited partnership may be dissolved upon the written consent of all partners or pursuant to entry of a decree of judicial dissolution.

Assignment of limited partnership interests is permissible unless restricted by the partnership agreement. A partnership interest is recognized as a security, and thus transfers and sales of limited partnership interests are subject to securities laws restrictions.

Foreign Limited Partnership

A limited partnership organized outside of North Carolina must register with the Secretary of State before doing business in North Carolina. This can be accomplished by filing an Application for Registration as a Foreign Limited Partnership. A foreign limited partnership that fails to register will be liable in an amount equal to all fees and taxes which would have been imposed upon the partnership if it had registered, plus interest and penalties. The registration application must set forth the name and address of a registered agent for service of process within North Carolina, as well as certain other required information.

Limited Liability Companies

The North Carolina Limited Liability Company Act was originally enacted in 1993 and was repealed and recodifed in 2014 at Chapter 57D of the North Carolina General Statutes. Limited liability companies (“LLCs”) are an increasingly popular form of business organization in North Carolina.

The popularity of the LLC results primarily from its combination of the limited liability characteristics of a corporation with the “flow-through” tax characteristics of a partnership. Owners of interests in an LLC have the same limited personal liability as shareholders in a corporation, and profits of the business are not subject to taxation at the entity level and instead are only taxed once at the owner level. In the North Carolina LLC Act and for purposes of the following discussion, owners of interests in an LLC are referred to as “members” and the individuals responsible for the management of the LLC are referred to as “managers”.

Formation

As with corporations, an LLC may be formed with relative ease in North Carolina. One or more persons may organize an LLC by filing Articles of Organization with the Secretary of State with a filing fee of $125. The Articles of Organization must specify the name of the LLC, the address and name of each person executing the Articles of Organization, the name and street address (and mailing address if the two are different) (including county) of the LLC’s initial registered agent, and the street address (and mailing address if the two are different) (including county) of the LLC’s principal office.

When the Articles of Organization are filed by the Secretary of State, the proposed organization becomes an LLC and the persons executing the Articles of Organization must identify the initial members.

Name

The name of the LLC must contain the words “limited liability company,” the abbreviation “L.L.C.” or “LLC”, or the combination “ltd. liability co.”, “limited liability co.”, or “ltd. liability company”. In addition, the name of the business must be distinguishable from the name of any other corporation, limited partnership or LLC recorded with the Secretary of State.

Membership

A membership interest is personal property but does not give a member an interest in specific LLC property. A person may become a member by either being identified as a member by the incorporator of the LLC, by acquiring a membership interest directly from the LLC pursuant to the process specified in the operating agreement of the LLC, or, if none, by the unanimous consent of the members. Alternatively, a person may receive an economic interest in an LLC by transfer of the interest from another economic interest owner, directly from the LLC by the unanimous consent of the members, or pursuant to the process specified in the operating agreement. An economic interest owner does not become or exercise any rights of a member other than to receive the economic interest itself, unless the economic interest owner himself consents to becoming a member either as provided for in Articles of Organization or the operating agreement or with the unanimous consent of the members.

A person ceases to be a member of an LLC when that person voluntarily withdraws or is removed in accordance with the Articles of Organization or the operating agreement, enters into certain bankruptcy or insolvency proceedings, or, in the case of an individual, dies or is declared incompetent in a judicial proceeding. A withdrawing member is entitled to any distribution to which he is otherwise entitled under the operating agreement or the Articles of Organization.

Managers

Chapter 57D, even more so than its predecessor, provides significant flexibility for the business of the company to be conducted in accordance with the operating agreement rather than pursuant to specific statutory requirements. Unlike limited partners in a limited partnership, members of an LLC may actively participate in the management of the LLC without losing their limited liability status. Unless otherwise stated in the Articles of Organization or operating agreement, all members are managers of the LLC, along with any other person who is designated as a manager in an operating agreement. If not otherwise specified in the Articles of Organization or the operating agreement, each manager has equal rights and authority in the management of an LLC.

All management decisions must be made in accordance with Articles of Organization or the operating agreement. The manager(s) of an LLC may delegate authority to persons other than the manager(s) to the extent allowed by the operating agreement. The North Carolina LLC Act permits great flexibility in the structure of the management of LLCs.

Contributions/Distributions

A member's contribution to capital may be in the form of any tangible or intangible property or benefit such as cash, services rendered, property, promissory notes or any other binding obligation to contribute such items. The income, gain, loss, deduction, or credit of an LLC is allocated among its members and classes of members, as may be specified in the operating agreement. Members are entitled to interim distributions as specified in the operating agreement or, in the absence of such provisions, as determined by the managers in proportion to the agreed value of the members' contributions. Withdrawing members are entitled to the distributions discussed above.

Annual Reports

LLCs organized in North Carolina or otherwise authorized to transact business in North Carolina must file an annual report each year with the Secretary of State setting forth certain non-financial information, including the names and addresses of its manager(s), the name and street address (and mailing address if the two are different) (including county) of the registered agent, the address and telephone number of its principal office, and a brief description of the nature of its business. An LLC's first annual report does not have to be filed until April 15th of the year following the calendar year in which the company files its Articles of Organization. Annual reports may be filed electronically.

Foreign LLCs

A foreign LLC must obtain a Certificate of Authority from the Secretary of State in order to be authorized to conduct business in North Carolina. This can be done by filing an Application for Certificate of Authority, accompanied by a Certificate of Existence or its equivalent from the foreign jurisdiction. Foreign LLCs are governed by the laws of the state or other jurisdiction in which they are organized. A foreign LLC has the same, but no greater rights and privileges, duties and limitations as a similar North Carolina-based LLC enjoys.

Sole Proprietorship

A sole proprietorship—an individual doing business for his own account—is the most informal form of business organization.

A sole proprietorship may be formed without any expense or formality of organization whatsoever.

A sole proprietorship is not an entity distinct from its owner. Accordingly, the owner will be subject to unlimited liability with regard to the debts of the business. The sole proprietorship is the most widely used mode of business organization for small ventures with limited capital requirements and low growth expectations.

Joint Venture

In North Carolina, a joint venture is not a statutory form of organization. Joint ventures are created as a practical matter, however either by contract among the ventures or through a formal entity.

The latter would take the form of corporations with each joint venturer being a shareholder, limited liability companies with each joint venturer being a member or partnerships with each joint venturer being a partner. Thus, the formalities associated with the creation of a joint venture, and the regulation of the rights and activities of the parties, are the same as discussed above for corporations, limited liability companies or partnerships.

Additional Formalities

No matter what form of organization is selected, the business entity (other than a sole proprietorship or nonprofit association) must obtain a federal taxpayer identification number, and local business permits or licenses may be required.

Other decisions which must be made include, among others, means of providing for workers' compensation, types and extent of property and liability insurance coverage, and types of employee benefit plans and means of funding. If the business is to be conducted under an assumed name, the assumed name must be registered with the register of deeds in each county in North Carolina in which the business is conducted.

Alternative Means of Doing Business

Alternative means of doing business are available to foreign enterprises which desire to introduce products or services into the United States market without actually establishing a business location in the United States, or which merely desire to test the market prior to making a significant financial commitment. Such enterprises frequently enter the United States market through agents or distributors. The following discussion outlines these alternative means of doing business.

Sales Representatives

A sales representative is an individual, corporation, LLC or partnership that solicits orders for another enterprise (the "supplier"), but which does not have authority to accept orders, set prices, negotiate terms and conditions of sale, or otherwise to bind the supplier. The sales representative does not purchase for its own account or for resale. The sales representative can act as an agent to accept offers and enter into binding contracts on behalf of the supplier, but only with express authority to do so. The sales representative usually does not warehouse or distribute any products. Customer orders are accepted by the supplier and then shipped directly to the customer.

Generally, the sales representative enters into a contract with the supplier providing a formula for compensation and designating a sales territory as exclusive or non-exclusive. Compensation is commonly a commission calculated as a percentage of the net sales price of goods shipped, although some representatives receive a fixed salary or a combination of salary and commission.

Commissions are regulated by a statute in North Carolina that requires all outstanding commissions to be paid within thirty days after the effective date of termination of the sales representative for any reason other than malfeasance by the sales representative, and all commissions that become due after termination must be paid within fifteen days after becoming due.

The legal relationship between the sales representative and the supplier is also governed by the common law and other applicable state and federal laws.

The engagement by a supplier of a sales representative is usually structured so that the sales representative is an independent contractor rather than an employee. This structure minimizes the exposure of the supplier to liability for taxes, direct liability for negligent acts by the sales representative, compliance with labor laws and withholding requirements.

Distributors

A distributor is an individual, corporation, LLC or partnership that purchases for its own account for resale within a designated territory.

The distributor normally imports and clears the goods through United States customs, and then stores the goods until they are sold and delivered to the purchaser. Distributors are compensated by the profit derived from resales, and they assume the economic risks of purchasing and reselling the goods.

A distributor is generally independent, and the amount of control which can be exerted by the supplier is limited. For example, state and federal antitrust laws may limit the ability of the supplier to control prices charged by the distributor.

Franchising

Franchising is a flexible method of distribution of goods and services whereby the franchisee operates under the trademark of another.

Franchising is a widely used business technique in the United States, as a significant percentage of all retail sales in the United States are made through franchised outlets. Franchises range from simple seller-customer arrangements to businesses in which the franchisor outfits the franchisee with a complete sales outlet to operate a business under the franchisor's trademark.

There are two different franchise models: product franchises and business format franchises. In a product franchise, the franchisor manufactures (or contracts with another to manufacture for its account) products subject to the terms of the franchise relationship. Examples include soft drink bottling operations and specialty merchandise retail chains.

In a business format franchise, the franchisor does not manufacture a product, but rather licenses a bundle of intellectual property rights that includes the use of a trademark, marketing strategy and method of operation, and may involve the lease of premises, the purchase of supplies and the payment of royalties pursuant to a licensing agreement. Examples include fast-food restaurants, dry-cleaning outlets and hotels.

Franchisors are subject to regulations enacted by the Federal Trade Commission. Unlike many states, North Carolina has not enacted a franchise law, with the exception of cable television services and certain other franchise statutes applicable to specific industries such as the sale of motor vehicles and alcoholic beverages. However, any franchising scheme should be reviewed in light of the North Carolina Business Opportunity Sales Act, a registration and disclosure law which may be applicable depending on the structure of the franchise offer. The North Carolina Business Opportunity Sales Act is codified in Article 19 of Chapter 66 of the North Carolina General Statutes.

Licensing

The United States has a highly developed system of patent, technology and trademark licensing. Foreign businesses frequently seek a United States licensee as a means of building market share with minimal capital requirements. A licensee may be interested in licensing to acquire needed technology or to benefit from the licensor's good reputation. Licensors are generally compensated through the payment of royalties or fees, the amounts of which are negotiable.

Under the licensing option, the licensor has a range of separate rights which may be offered to the licensee, as follows:

- The right to make
- The right to use
- The right to disclose by publication or by sublicense
- The right to lease
- The right to sell

Typically, a foreign licensor enters into a written license agreement with the licensee. License agreements must comply with state and federal antitrust laws designed to minimize the creation of a monopoly. License agreements need not be recorded in the United States Patent and Trademark Office (the "USPTO") or the United

States Copyright Office (the "Copyright Office") unless the license is exclusive. An assignment, grant, exclusive license or conveyance of a patent or trademark itself, however, must be recorded with the USPTO to be effective. Similarly, to be effective, an assignment, grant, exclusive license or conveyance of a copyright must be recorded with the Copyright Office.

Trademarks and service marks used in North Carolina should be registered with the Secretary of State. In order to register a mark, the entity should first use the trademark or service mark within the state, and ensure that no one else has already registered the mark. The entity should then file an Application for Trademark or Service Mark Registration/Renewal, along with three original specimens of the mark being registered and the $75 filing fee. Information required on the application includes the applicant's name and address, a description of the mark, the specific goods or services that the mark will cover, the date the mark was first used anywhere, the date the mark was first used in North Carolina, and a statement that the applicant owns the mark. Once registered, the mark is effective for ten years. However, five years after registration, the holder must submit a specimen to the Secretary of State showing evidence of current use of the mark, as well as a signed statement verifying the use of the mark.

Requirements for Qualification

Qualification

Only "qualified" foreign persons may lawfully transact intrastate business in North Carolina. Thus, before a foreign entity's local office or branch may start doing business, the entity must qualify by obtaining a Certificate of Authority. This can be accomplished by filing an Application for a Certificate of Authority (for corporations and LLCs) or an Application for Registration as a Foreign Limited Partnership (for limited partnerships). This certificate is required in addition to other applicable business permits or licenses.

An entity that fails to qualify under the statute is liable to the State for all fees and taxes which would have been imposed by law upon such entity had it timely applied for and received such permission, plus interest and penalties. In addition, the foreign entity is liable for a civil penalty of ten dollars per day, not to exceed $1,000 per year.

An unqualified entity will also be barred from bringing any action in a North Carolina court based on its intrastate business unless it has qualified prior to trial, although an unqualified foreign entity is permitted to defend itself in any proceeding in the State. An unqualified entity, though, may be sued in North Carolina courts and will be deemed to have consented to their jurisdiction on the ground that it transacted unauthorized intrastate business.

To obtain a Certificate of Authority, a foreign corporation or LLC must file an application form with the North Carolina Secretary of State, together with a filing fee of $250.[3] This form requires disclosure of the company's name, the state or country in which it is incorporated, the date of incorporation and period of existence, the street address (or mailing address if different from the street address) of its principal office and of its registered office in North Carolina (including county), the names and business addresses of its current officers, and the name of its registered agent in North Carolina. For corporations, the document must be executed by the chairman of the Board of Directors or any officer of the corporation. For LLCs, the document must be executed by a manager.

Limited partnerships must file an Application for Registration as a Foreign Limited Partnership with the Secretary of State, with a filing fee of $50. The form requires the name of the limited partnership, the jurisdiction of incorporation and the date of formation, the street address (and mailing address if different) of the principal office, the name and address of the registered agent and registered office in North Carolina (including county), the name and address of each general partner, a list of the names and addresses of all limited partners or the location of the office where such list will be kept, a statement as to whether the entity is a limited liability limited partnership, and the effective date of the registration. The document must be executed by at least one general partner.

A foreign entity must irrevocably consent to be served through a registered agent for service of process and, if the agent becomes unavailable, to service through the Secretary of State. As with North Carolina entities, the registered agent for a foreign entity may be an individual residing in North Carolina, a domestic entity or a foreign entity authorized to transact business in North Carolina.

3 Expedited filing is available for all Secretary of State filings. Same-day filing is available for an additional fee of $200, and the document must be submitted to the Secretary of State's office before noon. The Secretary of State also offers 24-hour filing for an additional $100 fee.

A Certificate of Existence, or comparable document, issued by the appropriate authority in the foreign entity ‘s jurisdiction of incorporation and an English language translation thereof must be filed, together with the application for a Certificate of Authority. Generally, no further inquiries are conducted. Once granted, a Certificate of Authority remains in effect until the foreign entity obtains a Certificate of Withdrawal or until the Secretary suspends the qualification, typically for failure to pay North Carolina taxes or for failure to file the annual report (see following paragraph).

Annual Report

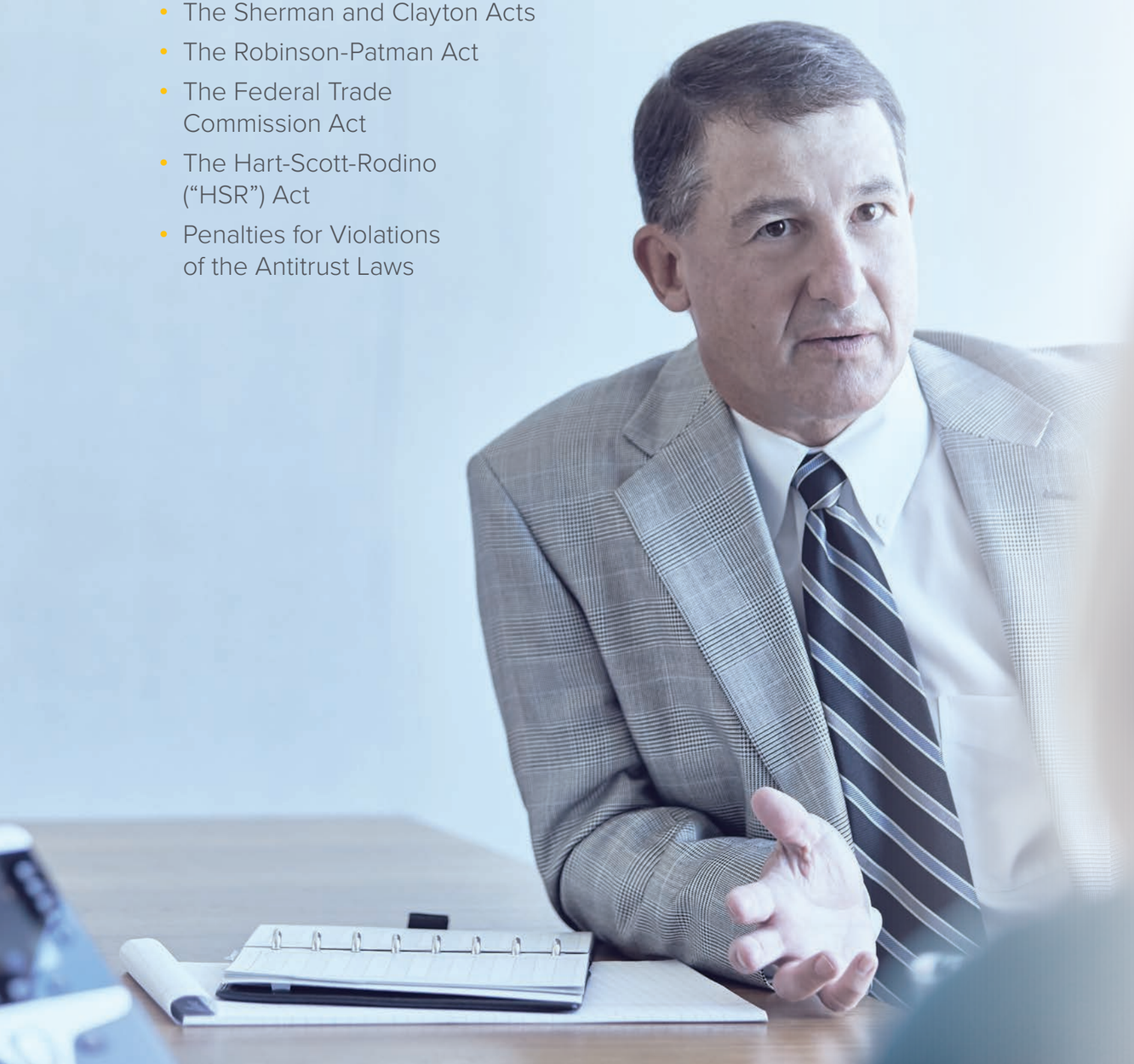
A foreign corporation or LLC qualified to transact intrastate business must file an annual report containing the same information required of a domestic North Carolina corporation or LLC.

Business Name Registration Requirements

A foreign entity that is not qualified to transact business in North Carolina may register its corporate name in order to preserve its unique real name if it later decides to qualify. The name, if available, is registered with the Secretary of State, and registration must be renewed on an annual basis. To register, the foreign entity must file an Application to Register an Entity Name by a Foreign Entity with the Secretary of State, together with a fee of $10.

Trade Regulations

- The Sherman and Clayton Acts
- The Robinson-Patman Act
- The Federal Trade Commission Act
- The Hart-Scott-Rodino ("HSR") Act
- Penalties for Violations of the Antitrust Laws



The Sherman and Clayton Acts

These Acts prohibit contracts, combinations or conspiracies that unreasonably restrain trade, as well as certain monopolies and monopolistic practices.

Agreements Between Competitors

The Acts prohibit, among other things, the following agreements and arrangements between competitors:

- Agreements to fix prices
- Agreements to allocate territories or customers
- Agreements to boycott third parties
- Agreements to restrict output

Agreements involving these types of restraints are conclusively presumed to be unreasonable and therefore considered "per se" illegal under the Acts without further analysis. Of these, price-fixing agreements are considered the most serious and are the most strictly enforced under the statutes. A price-fixing agreement is an agreement among competitors which affects the price at which a product or service is sold. These agreements may be informal and indirect, and a party's mere acquiescence to a price-fixing scheme may constitute a per se violation of the law and create both civil and criminal exposure.

Agreements Between Sellers and Purchasers

The following practices, which typically occur between a manufacturer and its distributors or customers, are held, under certain circumstances, to be illegal vertical restraints of trade:

- Attempts by a manufacturer, dealer or distributor to engage in resale price maintenance
  - A price maintenance arrangement exists where a seller and its customers (such as dealers, distributors, wholesalers, or retailers) agree to maintain the resale price of the seller's goods at a certain level
- Attempts by a manufacturer, dealer or distributor to tie the sale of two distinct products
  - A tying arrangement exists when a seller agrees to sell a product or service (the "tying" product) only if the buyer also purchases a different product or service (the "tied" product) or agrees not to purchase that product or service from any other supplier. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or may have preferred to purchase elsewhere on different terms.
- Attempts by a manufacturer, dealer or distributor to require exclusive dealing or requirements contracts
- Attempts by a manufacturer to limit dealer territories or customers
- Attempts by a manufacturer, dealer or distributor to sell to a purchaser on the condition that the purchaser not use or deal in the goods of a competitor of the seller

Practices such as these are usually governed by the "rule of reason" in which the pro-competitive and anti-competitive effects of the activity are weighed against each other.

Monopolies

The Acts prohibit monopolization and attempts or conspiracies to monopolize. Among other things, courts have found predatory pricing to be evidence of an intent to monopolize. Predatory pricing exists where pricing is set by a seller below an appropriate measure of its cost, with the purpose of preventing new sellers from entering the marketplace or driving existing competitors out of business. There is substantial legal debate regarding the determination of an "appropriate measure of cost".

The Acts also forbid mergers and acquisitions which might tend to create monopolies or to lessen competition.

To enforce the Acts, criminal prosecutions and civil lawsuits may be brought by the United States government. Private individuals and corporate entities may sue for injunctive relief and treble damages if injured by a violation of the Sherman or Clayton Acts.

The Robinson-Patman Act

This Act prohibits a seller from discriminating in price in the sale of its products to customers who compete in the resale of the seller's products where such discrimination adversely affects competition among (i) the seller and its competitors or (ii) the favored customer and its competitors.

The prohibitions of the Act cover only the sale of tangible products and do not extend to services or intangible rights.

The United States government may enforce the Act through either the Justice Department or the Federal Trade Commission. Private individuals and corporate entities may sue for injunctive relief and treble damages if injured by a violation of the Robinson-Patman Act.

The Federal Trade Commission Act

This Act bars "unfair methods of competition" and "unfair and deceptive acts or practices". The Federal Trade Commission is granted broad authority under the Act to determine what constitutes an unfair method of competition or an unfair trade practice.

Among other things, courts have upheld FTC orders finding such acts to include:

- False and misleading advertising
- False disparagement of competitors or their products
- Commercial bribery

Only the United States government may enforce the Federal Trade Commission Act; private individuals and corporate entities may not independently sue for injunctive relief or damages.

The Hart-Scott-Rodino ("HSR") Act

This Act applies to any company proposing to acquire or merge with another company doing business in the United States (or holding assets in the United States) where the parties and proposed transaction meet certain minimum thresholds relating to the size of the parties and the value of the transaction.

If these thresholds are met, the Act requires each party to complete and file a premerger notification report form with the Federal Trade Commission and the Justice Department prior to the acquisition. The parties must then observe the applicable waiting under the Act before consummating the transaction.

Only the United States government may enforce the Hart-Scott-Rodino Act; private individuals and corporate entities may not independently sue for injunctive relief or damages.

Penalties for Violations of the Antitrust Laws

Criminal violations of the antitrust laws can bring felony prison sentences of up to ten years and fines of up to $1 million for individuals. Corporations are subject to fines of up to $100 million or twice the pecuniary gain or economic loss attributable to the unlawful conduct, whichever is greater, for criminal violations. Civil actions under certain of the antitrust laws can allow injured firms and individuals to recover treble damages and attorney's fees.

Under certain circumstances, companies may obtain an exemption from liability under the Sherman, Clayton and Robinson-Patman Acts by applying to the Department of Justice and the Federal Trade Commission. Exemptions are most commonly granted for cooperative research and development projects, and joint ventures for production. Within their discretion, the Federal Trade Commission and the Justice Department may issue advisory opinions as to whether a proposed business policy would violate the antitrust laws.

State Trade Regulations

- State Antitrust Laws in North Carolina
- Unfair and Deceptive Trade Practices/Consumer Protection
- Regulation of Franchises
- Covenants Not to Compete

State Antitrust Law in North Carolina

North Carolina has specific antitrust statutes similar to the federal statutes. A business operating in North Carolina, or whose operations affect North Carolina, is subject to those statutes and must recognize that conduct detrimental to the competitive process may violate those antitrust laws.

Because the federal Sherman Act and the principal North Carolina statutes are substantively identical, most practices which violate the federal law will violate the state laws as well.

North Carolina statutes authorize the North Carolina Attorney General to criminally prosecute any violation of North Carolina's antitrust and unfair competition laws. In addition, the Attorney General can bring civil actions to enforce North Carolina's laws, including actions for injunction.

Finally, the Attorney General can seek to enforce some federal antitrust statutes. The Attorney General has an active Antitrust Unit within its Consumer Protection Division and a track record of aggressively enforcing North Carolina's antitrust laws. Any private individual or business injured by an antitrust violation may initiate a private civil action for monetary damages and, in some cases, injunction under North Carolina's antitrust laws.

Unfair and Deceptive Trade Practices/ Consumer Protection

North Carolina law states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." While the statute does not define the terms "unfair" and "deceptive", North Carolina courts have fashioned exceptionally broad definitions for both terms.

Over the last decade, the North Carolina Attorney General has aggressively enforced this statute. By statute, the Attorney General can seek injunctive relief and substantial civil penalties. North Carolina also allows private parties to file suit, and any person (not only consumers) injured by an unfair or deceptive trade practice may recover treble damages.

Other North Carolina statutes concern specific unfair and deceptive trade practices, including:

- the sending of unsolicited merchandise,
- the use of unfair and deceptive trade names,
- the use of automatic dialing machines and recorded message players,
- unfair or deceptive work-at-home solicitations,
- unfair or deceptive actions by debt collectors,
- unfair or deceptive sales of motor fuel,
- unfair or deceptive insurance practices, and
- unfair or deceptive retail installment sales.

Regulation of Franchises

North Carolina does not regulate the sale of franchises, as such. However, the Business Opportunity Sales Act is written broadly enough to cover the sale of many franchises.

As defined in the act, a "business opportunity" is the sale or lease of products, equipment, supplies or services for the purpose of enabling the purchaser to start a business and in which the seller represents that: (i) the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices; (ii) the seller may, in the ordinary course of business, purchase any or all products produced by the purchaser; (iii) the seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity, or that the seller will refund all or part of the price paid for the business opportunity; or (iv) the seller will provide a sales program or marketing plan to the purchaser that will enable the purchaser to derive income from the business opportunity which exceeds the price paid.

Most, if not all, franchise sales involve a sales or marketing plan, which may include such topics as design and layout of the establishment, uniforms for employees, signs and advertising that mention the franchised name, store hours, products sold and sales techniques. Frequently, franchisors discuss potential sales or profits the franchisee may make. Accordingly, many franchises fall within the definition of "business opportunity" under North Carolina law.

North Carolina's Business Opportunity Sales Act is primarily a "registration and disclosure law". The Act requires registration of business opportunities prior to their offer, as well as disclosure of certain prescribed information which must be delivered to a prospective purchaser within established periods of time before the sale. The Act provides certain limited exemptions from its registration requirements. The Act also prohibits misleading representations made by a seller with respect to the income or earning potential of the business opportunity and requires that such representations be substantiated with documented data made available to the prospective purchaser.

If the seller of a business opportunity uses any untrue or misleading statements in the sale of a business opportunity, or fails to give the proper disclosures in the manner required by the Act, the purchaser may void the contract and be entitled to receive from the seller all sums paid to the seller in connection with the business opportunity.

Covenants Not to Compete

North Carolina courts will enforce covenants not to compete in employment contracts.

In order to be enforceable, such covenants must be (i) in writing, (ii) entered into at the time and as part of the contract of employment, (iii) based upon reasonable consideration, (iv) reasonable both as to time and territory, (v) designed to protect a legitimate business interest of the employer and (vi) not against public policy. In order for a new covenant with an existing employee to be enforceable, there must be additional consideration to the employee in the form of increased salary, promotion, or some other reasonable consideration above and beyond the continuation of employment.

In general, North Carolina courts have been hostile to the enforcement of covenants not to compete, particularly if they are viewed as unduly broad with respect to time or territory. To be valid, the restrictions must be "no wider in scope than is necessary to protect the business of the employer." Because North Carolina courts adhere to a rather strict interpretation of the blue-pencil rule, any covenant deemed to be overbroad risks being thrown out altogether.

For the covenant to be enforced, the employer must show that the protection sought is limited to the protection of its legitimate interests, those recognized interests being either protection against the improper disclosure of confidential business information or securing the employer's customer base. In cases where the covenant's scope, duration or territory is found to be overbroad, the courts will typically attempt to sever the overly broad provisions of the covenant rather than rewrite the covenant in a more reasonable manner. In the event that the covenant is drafted in such a way as to foreclose the possibility of permissibly severing the offending provisions, the court will most often find the covenant altogether unenforceable. In general, North Carolina courts have been more willing to enforce broad agreements not to compete in connection with the sale of a business.

Taxation

- Federal Income Taxation
- State and Local Taxation

Federal Income Taxation

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

Personal Income Tax

Individuals are subject to US income tax on their worldwide income if they are US citizens or resident aliens. Resident alien status is determined under a set of complex rules. Any individual who is not a US citizen, and who does not wish to be taxed as such, and who plans to spend a substantial amount of time in the United States should pay careful attention to these rules. Currently, the highest marginal US individual Federal income tax rate is 39.6% for ordinary income and 20% for long-term capital gains. A nonresident alien generally is subject to tax on dividends from US corporations, as discussed below.

Corporate Income Tax

If a foreign business chooses to operate in the United States through a corporation formed here, that US corporation will be subject to US Federal income taxation on its worldwide income. Dividends from that corporation to foreign shareholders will be subject to US Federal income tax that will be withheld by the US payor. The amount of that tax may be significantly reduced by treaty. US branches of foreign businesses are taxed similarly to US corporations owned by foreign shareholders. US partnerships and limited liability companies withhold and pay the income tax applicable to foreign partners and members at US rates.

State and Local Taxation

State and local taxes have become increasingly important for businesses, both in deciding where to locate a business within the United States, and for ongoing operational planning purposes. At the same time, some states—with North Carolina historically having been a good example— have become increasingly aggressive in offering incentives and tax benefits to attract new businesses. Any foreign business desiring to locate in the United States should explore these benefits.

North Carolina is a business-friendly environment for almost all purposes, and its tax structure has been established accordingly as a general matter. Although North Carolina tax administrators have followed suit with the officials of many other states in taking (overly) aggressive enforcement positions, legislative efforts to curb this activity have proven to be fairly successful. The state General Assembly has also reduced the corporate income tax rate to one of the very lowest in the country. For all of these and many other reasons, state and local tax planning has become a critical part of the business equation.

North Carolina imposes a variety of taxes in various contexts, including income, franchise, sales/use, property, cigarette, motor fuel, gross receipts, real property transfer, insurance premium, utility/carrier, loan agency, installment paper dealer, unclaimed property, employment, tire, soft drink, appliance, retail chain, alcoholic beverage and forest product taxes. As a result in part of litigation by Womble Bond Dickinson (US) LLP, North Carolina no longer imposes an intangible personal property tax. A brief sampling of related economic development tax incentives is treated below.

Personal Income Tax

Generally speaking, North Carolina follows the Federal income tax treatment for state tax purposes, and North Carolina taxable income is calculated using Federal taxable income as its starting point. If an individual has income subject to Federal income tax, he or she may be subject to North Carolina income tax based upon part or full year residency in North Carolina, or based upon the receipt of income derived from (or deemed to have been derived from) North Carolina sources. Thus, individuals owning stakes in businesses that transact business in North Carolina and operate as "pass-through" entities—e.g., partnerships, "S" corporations, and limited liability companies (LLCs) treated as partnerships for Federal tax purposes—may be subject to North Carolina personal income tax. Depending upon the situation, this income may be withheld by the company "at the source" prior to distribution to the individual, or the individual may have to remit the tax to North Carolina himself or herself. North Carolina eliminated its graduated personal income tax rate structure, and reduced the top rate, so that the current rate is 5.499%. No local net income taxes are imposed in North Carolina.

Corporate Income Tax

If a "C" corporation has income subject to Federal income tax, it will be subject to North Carolina income tax if, and to the extent that, it "does business" in North Carolina. For most types of corporations (and other business entities), the extent to which a corporation "does business" in North Carolina has been historically determined by application of a formula which took into account the portion of the corporation's sales, property and payroll sourced to North Carolina, as compared to its aggregate sales, property and payroll, and the sales factor was double-weighted, with the result that businesses with material sales outside of North Carolina were "rewarded" with a lower North Carolina apportionment percentage. This (fact-dependent) "benefit" is increased year-to-year, with increased weight on the sales factor, until 2018 when in-state property and payroll become irrelevant and income is apportioned solely based upon sales. The fact that North Carolina does not impose a "throwback" rule can be a further boon for most businesses: this means that sales of goods to customers, which are shipped to a state that does not tax those sales, are not "thrown back" to North Carolina for inclusion in the North Carolina corporate income tax apportionment formula. As a rare exception to the general rule that North Carolina income tax treatment follows the Federal income tax treatment, the filing of a consolidated corporate income tax return for an affiliated group is not permitted, but it may be required if income would be distorted in the absence of such a consolidation. Similarly, combined corporate income tax reporting for corporate affiliates is neither required nor permitted as an automatic matter, though again the tax authorities may require combined reporting if single entity reporting is determined to be distortive. Unlike some states, North Carolina does not impose a corporate-level tax upon "S" corporations, and (like most states) does not require the filing of a state-level "S" election. The corporate income tax rate has been reduced to one of the very lowest in the country, and is currently set at 3%. As previously stated, no local net income taxes are imposed in North Carolina.

Franchise Tax

In addition to the income tax, corporations (including, in this case, "S" corporations) pay a state franchise tax for the privilege of conducting business in the corporate form in North Carolina. While LLCs that are taxed as partnerships for Federal purposes are not subject to franchise tax per se, a corporate member owning a controlling stake in a limited liability company which does business in North Carolina is required to include its pro rata share of the limited liability company's North Carolina business in its own corporate franchise tax base. Partnerships are similarly not subject to franchise tax, and whether a corporate partner of a partnership (in contrast to a corporate member of an LLC) doing business in North Carolina is itself subject to franchise tax may depend upon the facts. The franchise tax is imposed at the rate of 0.15% of whichever of the following has the greatest value: (i) net worth; or (ii) 55% of the assessed value of tangible personal property and real property that is taxable in North Carolina; or (iii) 100% of the value of the actual investment in North Carolina tangible personal property. However, there is a minimum annual franchise tax of $200.00.

Sales and Use Tax

Unless otherwise exempt, retail sales of tangible property (and certain taxable services) that are sourced to North Carolina are subject to a sales tax. There is a symmetric "use" tax that is designed to impose an identical tax upon use, storage, distribution, or consumption within North Carolina of a previously untaxed, but non-exempt, item. However, as is the case in all other states imposing sales and use taxes, without planning, a "layering" of tax can occasionally occur, so planning is important. While North Carolina does not tax most services, absent careful attention to the manner in which deliverables are both delivered and documented, services may very well become part of the sales taxable base. There are dozens of sales and use tax exemptions (partial and full) that may apply to a given situation, including a full exemption for items purchased for

resale, sizeable “partial” exemptions for certain types of machinery and equipment in certain industries, and still more refundable taxes for certain other types of industries. In the absence of a full or partial exemption, sales or use tax would be imposed at the rate of 6.75% in most of North Carolina’s 100 counties, with a handful of counties taxing at 7.00%, Charlotte/Mecklenberg taxing at 7.25%, and Durham and Orange Counties taxing at 7.5%.

Property Tax

Local governments (cities and counties) in North Carolina support themselves principally through property taxes, which are imposed upon non-exempt real and tangible personal property that has a taxable situs with the applicable locality. As previously mentioned, North Carolina no longer imposes an intangible personal property tax. As with sales and use taxes, there are numerous exemptions from property tax: as one example, business inventories are not subject to the tangible personal property tax. Each city and county adopts its own tax rate each year and applies that rate to the value of each taxpayer’s taxable property to determine the taxpayer’s property tax. The same rate generally applies to both real and tangible personal property. The rates vary from locality to locality; however, North Carolina’s property tax rates are generally considered to be low, probably due in no small part to the fact that the state actually pays for many “local” expenses that, in other states, are instead paid for by the local governments themselves.

Business License Tax

The North Carolina Revenue Act imposes a business license tax on a variety of occupations, including attorneys, physicians, professional engineers, registered land surveyors, architects, photographers, real estate brokers, salespersons and appraisers. A license is a personal privilege to conduct the profession or business and is not transferable.

Economic Development

North Carolina has historically been recognized as one of the top states in terms of economic development. The reasons for this were manifold, but included the availability and size of tax incentives and grants and its generally receptive business climate. As a result of litigation by Womble Bond Dickinson, North Carolina’s watershed tax incentive legislation, the William S. Lee Act, withstood constitutional challenge many years ago and has served as a solid foundation for North Carolina’s current income and franchise tax credit system. The General Assembly recently eliminated many of the income tax-based incentives in tandem with a dramatic lowering of the corporate income tax rate. A list of some North Carolina state and local tax incentives that may be available to businesses locating, expanding or engaging in other qualifying activities in North Carolina (beyond the income, sales/use and property tax features mentioned above) follows: (i) credits for investment in certain activities, (ii) the Job Development Investment Grant (measured by state employment tax withholdings), (iii) property-tax-based grants; and (iv) various other grant funds, notably including the ONE NC Fund and Golden LEAF grants. Other state and/or local tax incentives may apply depending upon the industry or other facts in question. There are a number of technical rules governing eligibility for and retention of economic development incentives in North Carolina. Businesses contemplating application for incentives should work closely with the North Carolina Department of Commerce and seek the guidance of legal counsel with expertise in this field. For example, merely contacting a state or local official in the “incorrect” way can later lead to (a) confidential or otherwise sensitive company/project information becoming publicly available to the press and business competitors, or (b) a charge of illegal unregistered lobbying, or both.

Labor and Employment

- Immigration
- Labor and Employment Statutes
- State Considerations

Immigration

With the globalization of world markets, employers located in the United States often seek to employ foreign personnel.

A variety of permanent and temporary visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the United States employer and the foreign employer.

Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the United States for a temporary time, and often the employment authorization is limited to specific employers, jobs and even specific work-sites. Further guidance on these issues is provided in detail by US Citizenship and Immigration Services within the Department of Homeland Security.

Labor and Employment Statutes

Age Discrimination in Employment Act ("ADEA")	The ADEA forbids employment discrimination against any employee aged forty (40) or older based on that employee's age. The ADEA applies to employers engaged in interstate commerce who employ 20 or more employees.
Americans with Disabilities Act ("ADA")	The ADA proscribes employment discrimination against qualified individuals with a disability based on the existence of a disability, a record of a disability or on the employer's perception that an employee is disabled. Furthermore, the Act requires that employers take reasonable steps to accommodate disabled individuals in the workplace unless such measures would constitute an undue hardship to an employer. This Act applies to employers engaged in interstate commerce who have fifteen or more employees.

Employee Polygraph Protection Act ("EPPA")	The EPPA greatly restricts polygraph testing of employees. The Act applies to all employers engaged in interstate commerce. Exempted are employers whose primary business purpose is running a security service or manufacturing, distributing or dispensing a controlled substance.
Equal Pay Act ("EPA")	The EPA, an amendment to the Fair Labor Standards Act, requires that male and female employees be paid the same when their jobs involve equal skills, effort and responsibility and are performed under similar working conditions in the same establishment. If the minimum wage provision of the FLSA is applicable to one's business, then the EPA is applicable as well.
Fair Labor Standards Act ("FLSA")	The FLSA establishes the minimum wage, overtime and child labor laws for employers engaged in industries affecting interstate commerce, regardless of the number of employees. Few employees are totally exempt from the statute, but coverage issues are complex and not capable of a short summary.
Family and Medical Leave Act ("FMLA")	The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave per year for the birth or adoption of a child, or for the serious health condition of the employee or the spouse, parent or child of the employee. This Act applies to all employers engaged in commerce where the employer employs fifty or more employees.

Federal Contractors

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

Other Federal Regulations

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

National Labor Relations Act and Labor Management Reporting and Disclosure Act	These statutes set forth the guidelines governing labor management relations, as well as certain activities which are independent of the involvement of a labor organization. They apply to all employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act (generally, rail and air carriers) are not subject to these Acts but have significantly different requirements under their own statutory scheme.
Occupational Safety and Health Act ("OSHA")	OSHA is the Act that instituted the mechanism for establishing and enforcing safety regulations in the workplace. It applies to all employers who are engaged in an industry affecting commerce, regardless of the number of employees. In North Carolina, federal OSHA standards apply, but there are additional requirements, as well. North Carolina OSHA enforcement is conducted by the State's Department of Labor.
Title VII of the Civil Rights Act of 1964 ("Title VII")	Title VII is the broad civil rights statute that forbids discrimination in hiring based on race, color, religion, gender and national origin. This prohibition extends to workplace harassment, including sexual harassment, as well as retaliation and pregnancy discrimination. It applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.
Worker Adjustment Retraining and Notification Act ("WARN")	WARN requires employers to give sixty days' notice to their employees of plant closings or mass layoffs. This Act applies to all businesses that employ 100 or more employees, excluding part-time employees. However, the statute has additional limitations on coverage depending on the size of the job site affected and its proximity to other locations of the employer.
Immigration Reform and Control Act ("IRCA")	IRCA requires that employers, regardless of size, inspect and verify documentation establishing the identity and eligibility to work in the United States of every newly hired employee, and makes it unlawful to hire an alien who is ineligible for work in the United States. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under IRCA, as well as for hiring unauthorized workers. IRCA also prohibits employers of four or more workers from discriminating against lawfully admitted aliens.
Fair Credit Reporting Act ("FCRA")	FCRA prescribes the extent to, and manner in which, employers may use credit information in making employment decisions. The FCRA imposes strict guidelines requiring employers to use such credit reports only for a permissible purpose, after disclosure to employment applicants or employees of the intent to seek and use credit information, and after obtaining the written consent of the employee/applicant. The disclosure/consent may not be made a part of the employer's application form. Additionally, employees/applicants must be notified of any adverse decision based in whole or in part upon credit information. Additional requirements apply to investigative consumer reports.

Employee Benefits

Employee Retirement Income Security Act of 1974 ("ERISA")

ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, health care plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA generally preempts state laws governing employee plans and arrangements.

Consolidated Omnibus Budget Reconciliation Act ("COBRA")

Under COBRA, group health plans are required to offer continuation of group health coverage to certain former employees and their covered dependents (known as "qualified beneficiaries") upon the occurrence of certain "qualifying events". COBRA generally provides a maximum continuation period of 18 months. In certain circumstances where a qualified beneficiary is disabled at any time during the first 60 days of COBRA coverage, the period can be extended to 29 months. Also, if certain qualifying events occur during the original 18 months of COBRA coverage, qualified beneficiaries become entitled to receive 36 months of continuation coverage. Employers may require electing qualified beneficiaries to pay the entire premium for COBRA coverage plus a 2% administrative charge. For disabled qualified beneficiaries, premiums may be increased after 18 months to 150% of the plan's total cost of coverage. COBRA contains very specific procedures for notifying qualified beneficiaries of their COBRA rights.arrangements.

Affordable Care Act ("ACA")

The ACA is a federal law that requires most US citizens and legal residents to have health insurance. It creates state-based American Health Benefit Exchanges through which individuals can purchase coverage, with premium and cost-sharing credits available to individuals/families with income between 133-400% of the federal poverty level. The ACA creates separate Exchanges through which small businesses can purchase coverage. The ACA also requires employers to pay penalties for employees who receive tax credits for health insurance through an Exchange, with exceptions for small employers. It is likely that the ACA will be repealed during the Trump administration and replaced with some different form of healthcare law.

Health Insurance Portability and Accountability Act ("HIPAA")

HIPAA amended ERISA (and other federal statutes) in 1996 to establish limitations on the use of preexisting condition exclusions (so-called "portability" rules). HIPAA prevents group health plans or health insurance issuers from imposing a preexisting condition exclusion of more than 12 months (18 months for late enrollees) for coverage of any condition that was present during the six-month period ending on the individual's enrollment date. In addition to various other provisions, HIPAA mandates that preexisting condition limitations generally may not be imposed upon newborns or adopted children under age 18 and may not apply to pregnancy. The preexisting condition exclusion period must be reduced by periods of "creditable coverage" generally defined as periods of continuous coverage the individual has under other health plans. HIPAA also imposes various other requirements on employers and group health plan providers and insurers, such as nondiscrimination and disclosure requirements, special enrollment rights, and special notice obligations.

The HIPAA privacy rules extend privacy protection to all types of "protected health information" held by "covered entities". Covered entities include health plans, health care clearinghouses and health care providers. The HIPAA security rules impose requirements with respect to safeguarding and protecting the confidentiality, integrity and availability of electronic protected health information.

State Considerations

North Carolina remains an employment-at-will state, which means that an employee without a contract for a definite term may be discharged at any time for any reason that does not violate a statute.

There is a judicially-created exception to the employment-at-will doctrine prohibiting discharge for a reason which violates public policy, and this exception has evolved substantially over time.

The General Assembly has enacted the following statutes which govern labor and employment relationships within the state:

Controlled Substance Examination Regulations	This Act regulates the procedures for drug testing in the workplace. All employers in North Carolina are covered by this Act.
Discrimination Against Individuals for Lawful Use of Lawful Products During Non-Working Hours	This statute forbids discrimination based on the use of lawful products, such as tobacco and alcohol, outside of the office. All employers in North Carolina are covered by this provision.
Discrimination Against Individuals with Sickle Cell or Hemoglobin C Trait	This statute prohibits employment discrimination against individuals with the sickle cell or hemoglobin C trait. All employers in North Carolina are covered by this provision.
Employment Security Act	This statute sets forth the rules governing the unemployment system in North Carolina. Employees who become involuntarily unemployed, yet are physically able and available to work and cannot find employment through no fault of their own, are entitled to unemployment compensation benefits. These benefits are paid out of an Unemployment Insurance Fund administered by the state's Employment Security Commission, into which state employers pay taxes based on the number of employees and the employer's history of unemployment compensation liability.
Equal Employment Practices Act	This statute prohibits employment discrimination on the basis of race, sex, religion, national origin and age by employers with fifteen or more employees. The statute does not provide for an enforcement agency, private cause of action or remedies. However, it has been used to establish a public policy exception to the employment-at-will doctrine.

Occupational Safety and Health Act of North Carolina ("OSHANC")	OSHANC is the state equivalent of the federal OSHA statute. This covers all employers in North Carolina except for those employing domestic workers in the residence. mine workers covered under federal acts. maritime workers, workers covered by the Atomic Energy Act, and railroad workers covered under federal Acts.
Parental Leave	Employers must provide four hours of unpaid leave each year to an employee with children in school so the employee can attend his or her children's school-related functions.
Persons with Disabilities Protection Act	This statute, formerly known as the Handicapped Persons Protection Act, prohibits employment discrimination based on an individual's disability. It applies to employers with fifteen or more full time employees working within the state, and imposes similar duties to accommodate workers as the ADA. However, there are distinctions between the PDPA and the ADA, and careful reference to the statutory language is necessary.
Retaliatory Employment Discrimination Act	This Act provides a civil remedy for employees who assert certain claims in good faith and are fired or demoted for doing so. Protected actions include the filing of workers' compensation claims and reporting OSHANC violations. All employers in North Carolina are covered by this Act.
"Right to Work" Act	North Carolina is a "right to work" state that guarantees the right to work without regard to membership or nonmembership in a union. The Anti-Closed-Shop Act prohibits closed shop, union shop, maintenance of membership and compulsory checkoff contracts. Contracts between government and labor organizations concerning public employees are void. Strikes by public employees are prohibited.
Wage and Hour Act	The North Carolina Wage and Hour Act sets the minimum wage and maximum hour regulations for those North Carolina employers not covered by the FLSA. The Act also contains requirements for all North Carolina employers regarding the payment of wages, notification to employees of vacation, sick leave and other policies, and rules governing deductions from wages.
Workers' Compensation Law	The Workers' Compensation Act is meant to provide the exclusive remedy for employees injured on the job without regard to the fault of the employer. Employers who have three or more regular employees are subject to the Act, with certain exceptions. The Act specifies methods for reporting accidents and procedures for compensating employees. If agreement on compensation is not reached, either party may apply to the North Carolina Industrial Commission for a ruling.

Environmental

- Federal Considerations
- State Considerations

Federal Considerations

The Clean Air Act ("CAA")	The CAA regulates air pollutants under federal standards implemented and enforced by the states. The CAA was most recently amended in 1990 to add several new programs, including acid rain control and stratospheric ozone protection programs, coupled with modification of existing programs for attaining the national ambient air quality standards and reducing emissions of hazardous air pollutants. Due to the nature of air pollution and its sources, this program is generally considered to be the most complex of the federal environmental programs. The CAA requires a new operating permit for all "major" air sources, with state administration and enforcement. A significant feature is a permit fee based on tons of pollutants emitted on an annual basis; the permit fees fund and support the state operating permit programs.
The Clean Water Act ("CWA")	The CWA regulates the discharge of pollutants into all navigable waters of the United States. The CWA prohibits the discharge or addition of any pollutant from a point source into the water of the United States unless a permit has been issued. Permits are issued by either the state under an approved state program or by the EPA if the state program has not been approved. The permit limits are based upon EPA's effluent limitations regulations and are incorporated into a National Pollutant Discharge Elimination System ("NPDES") permit. The CWA effluent limitations for industrial dischargers also specify standards for pretreatment for those who discharge to a publicly owned treatment work. In 1990, EPA promulgated rules regarding permits for storm water discharges under the NPDES permit program.

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")

CERCLA, or "Superfund" as it is commonly called, was enacted in 1980 to provide for liability, compensation, cleanup and emergency response for hazardous substances released into the environment, and the cleanup of inactive hazardous waste disposal sites. It also provides a vehicle for EPA to recover for damages to natural resources caused by hazardous substance releases. Since its inception, this statute has generated more litigation and controversy than any other federal legislation.

CERCLA allows the government and others who incur cleanup costs to sue "potentially responsible parties" ("PRPs") for reimbursement of those costs. CERCLA permits EPA to issue orders compelling cleanup of a site, and permits a private citizen to bring an action to compel cleanup of a site. Liability is strict, joint and several, and with little or no regard for causation. By statute, there are four categories of PRPs:

- "Owners or operators" of the contaminated facility. A "facility" is virtually any place in which a hazardous substance is found. The current owner or operator is liable regardless of when the hazardous substance was disposed of at the facility and whether, or not, the present owner or operator did anything to contribute to the disposal.
- "Owners or operators" of the facility at the time of the disposal of the hazardous substances
- Any person who contracted or arranged to have hazardous substances taken to, disposed of, or treated at a facility. This category generally applies to producers and manufacturers.
- Transporters of hazardous substances

There are limited defenses under Superfund, and they are narrowly construed. A PRP can escape liability if it can establish that the hazardous substance release was due solely to an act of war, an act of God or an act of unrelated third parties. This latter "third party" defense does not apply if the damage from hazardous material was caused by an employee or agent of the PRP, or a third party acting in connection with a contract with the PRP.

Resource Conservation and Recovery Act ("RCRA")

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

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

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

State Considerations

EPA is primarily responsible for the oversight of environmental laws, but many responsibilities have been delegated to the states. North Carolina has accepted responsibility for administering these federal policies and has enacted additional legislation of its own.

The North Carolina Oil Pollution and Hazardous Substances Control Act of 1978 ("OPHSCA")

OPHSCA, which is similar to CERCLA, prohibits the discharge of oil or hazardous substances on the lands or waters of the state. "Hazardous substances" under OPHSCA include any substance that may present an imminent and substantial danger to the public health or welfare, and all substances designated hazardous by EPA as of June 1, 1980. OPHSCA requires notification to the appropriate regional office of the Department of Environment and Natural Resources ("DENR") and also requires cleanup. In contrast to most environmental statutes, which extend the cleanup obligation to parties based solely on their status as owners or operators, the cleanup obligation under OPHSCA extends to persons who have "control over" such substances immediately prior to a discharge. Like CERCLA, OPHSCA creates joint and several liability. OPHSCA also provides for strict liability against a liable party for damages to persons or property caused by the discharge of any hazardous substance into the waters of the state. OPHSCA also allows for risk-based corrective action for petroleum releases from above ground storage tanks and other sources. The UST (Underground Storage Tank) Program also allows for risk-based corrective action

The Brownfields Property Reuse Act of 1997

This act was enacted to encourage economic redevelopment of abandoned, idled, or underused property where redevelopment is hindered by actual or possible environmental contamination—"Brownfields property". The Act offers liability protection, tax credits, and flexible cleanup requirements to qualified Prospective Developers and owners of Brownfields property.

The Dry-Cleaning Solvent Cleanup Act of 1997

This act establishes a program for assessment and risk-based remediation of dry-cleaning sites and sets up a cleaning fund from which reimbursement may be sought. Any party who may have liability arising from solvent releases at a dry-cleaning facility may participate in the program.

The North Carolina Inactive Hazardous Sites Act

This act covers those sites in North Carolina contaminated by hazardous substances that are not included on EPA's National Priorities List, which is a prioritized national inventory of hazardous waste sites.

Under this act, if DENR determines there is either a "release" or a "substantial threat of a release" of a hazardous substance or waste, it may order any "responsible party" to conduct necessary monitoring and testing to determine the nature and extent of hazards posed by the site. Responsible parties include those who make, contract, accept, transport, or otherwise arrange for a discharge or deposit of a hazardous substance that results in an inactive hazardous substance or waste disposal site.

The act requires DENR to develop a program for locating, cataloging and monitoring all inactive hazardous substance or waste disposal sites in North Carolina. In order to comply with this mandate, DENR requires any owner, operator or responsible party of such a site to submit data regarding the existence and condition of such sites.

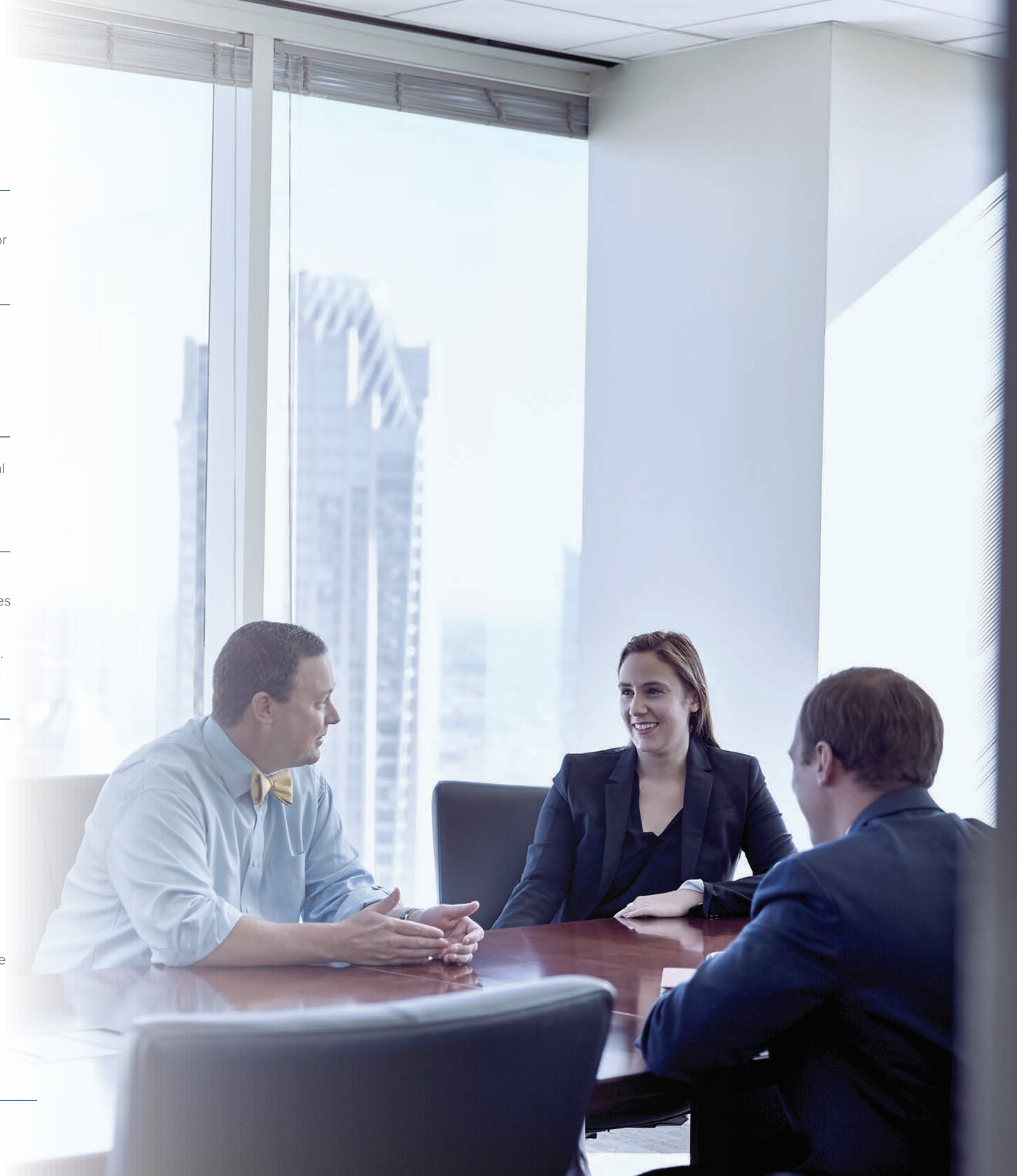
After an inspection of a site, DENR may issue a written declaration that the site endangers the public health or the environment. Based upon such a declaration, DENR may then order any responsible party to develop and implement a remedial action program. If the owner or operator fails to remediate the site, DENR may do so and thereafter sue the responsible parties to recover all costs.

Responsible parties may conduct a voluntary cleanup pursuant to an agreement with DENR. Upon satisfactory completion of a voluntary cleanup, DENR may issue a letter indicating that no further action needs to be taken at the site.

The Leaking Petroleum Underground Storage Tank Statute ("LUST")

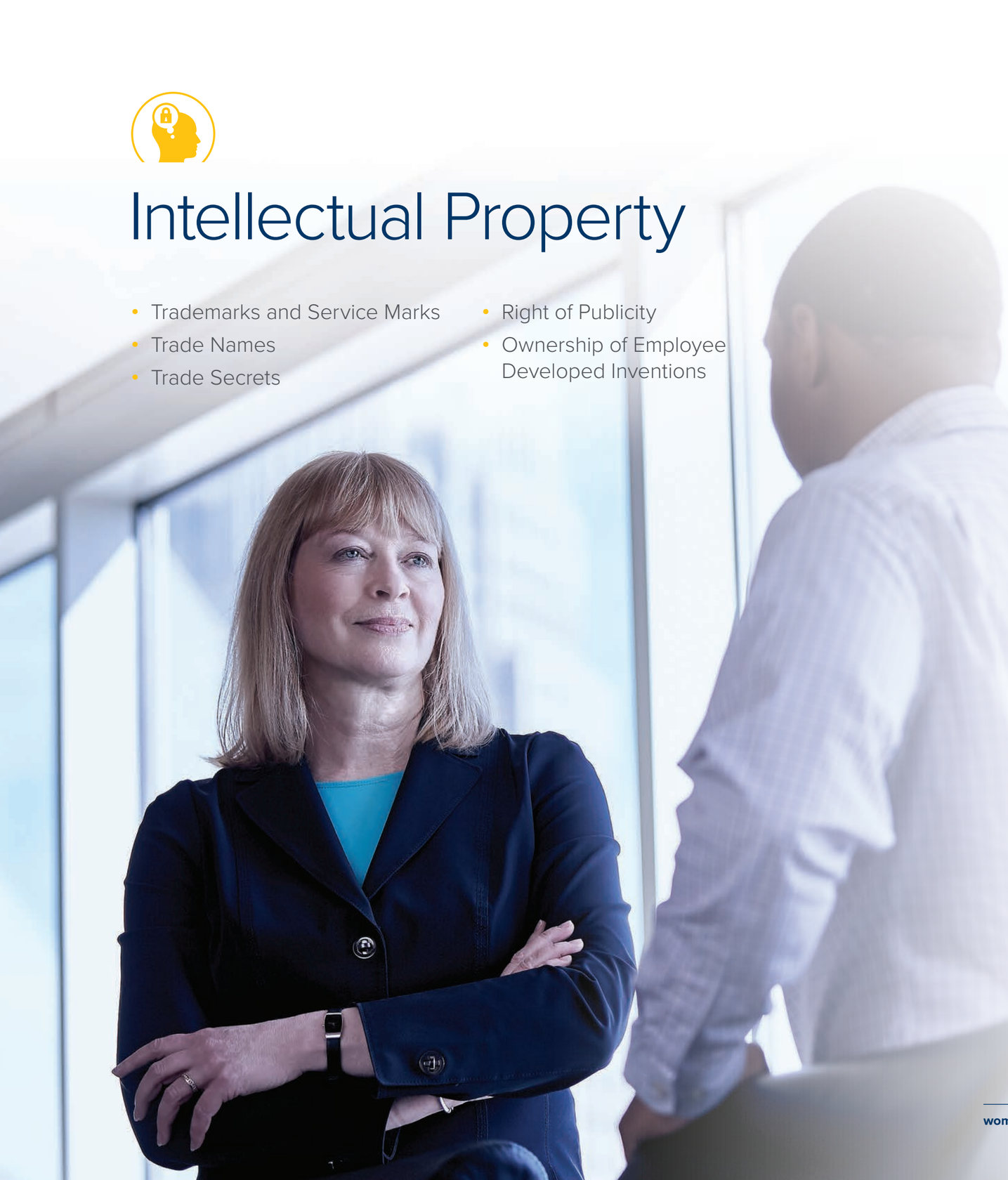
The LUST statute makes funds available to owners and operators of Underground Storage Tanks ("USTs") to help in cleaning up contamination resulting from UST releases. For owners of USTs to be eligible for reimbursement, the owner/operator must register the UST and pay the annual operating fees (premium) required under North Carolina law. All premium obligations fees must be current at the time contamination is discovered, and the contamination cannot result from the owner/operator's willful or wanton misconduct for the owner/operator to be eligible for cleanup funds. Once eligible for funds, the owner/operator will be reimbursed by the state for costs incurred for cleanup in excess of the applicable deductible. The amount of the deductible depends upon when the release or discharge was discovered. No registration fees or deductibles are required for noncommercial USTs.

The North Carolina Water and Air Resources Act	Under this act, the North Carolina Division of Environmental Management ("DEM") is authorized to adopt regulations pertaining to groundwater protection and to administer the NPDES program for surface water protection under the CWA. This act also provides for implementing a system of annual permit fees.
The North Carolina Solid Waste Management Act	This act provides the necessary authority to the Division of Solid Waste Management of DENR to adopt regulations under RCRA, which control the handling, storage and disposal of solid non-hazardous and hazardous waste. This act effectively puts RCRA enforcement control in the hands of the state. Regulations have been adopted.
Animal Waste Management Systems Act	This act establishes a permitting program for animal waste management systems to protect water quality and provide technical assistance to farmers. Permits are required for farms with 250 or more swine, 100 or more confined cattle, or 30,000 or more confined poultry with a liquid animal waste management system.
The North Carolina Environmental Crimes Statutes	These statutes provide for substantial criminal penalties, including prison sentences, for violations of specific environmental statutory provisions. The statutes distinguish between two degrees of felonies as follows: (i) knowing and willful violations, and (ii) knowing and willful violations coupled with knowledge that the violation places another person in imminent danger of death or serious bodily harm. Both felonies carry monetary penalties, the former less severe than the latter.
Risk-Based Environmental Remediation of Sites Program	This statutory program authorizes risk-based cleanup of eligible contaminated sites using site-specific cleanup standards designed to protect public health, safety, welfare and the environment according to current and future anticipated uses of the sites in question. An applicant proposing a risk-based cleanup must submit to DENR a remedial investigation report that provides detailed information on the site, contamination at the site, risks posed by the contamination, location of adjacent properties and any other relevant information. The applicant must also submit a proposed remedial action plan that describes how the site will be cleaned up as well as proof of financial assurance that sufficient funds are available to carry out the cleanup. Where contamination has migrated off site, a cleanup using site-specific remediation standards that exceed unrestricted use standards will require notice to and the written consent of the off-site property owner. When DENR determines that an approved remedial action plan has been implemented and the applicable cleanup standards have been attained, it will issue a determination that no further cleanup is required at the site.



Intellectual Property

- Trademarks and Service Marks
- Trade Names
- Trade Secrets
- Right of Publicity
- Ownership of Employee Developed Inventions



Trademarks and Service Marks

North Carolina provides both common law and statutory protection for trademarks and service marks. Under North Carolina common law, the first party to adopt and use a given mark in connection with goods or services is the owner of the mark and may protect its common law trademark only in geographic areas where it has actually used the mark. The North Carolina Trademark Registration Act specifically preserves common law trademark rights in North Carolina.

A North Carolina trademark registration is effective for a term of ten years and may be renewed for successive ten-year terms. A statement verifying continued use must be filed within six months following the fifth year of each term of a North Carolina registration.

A North Carolina trademark registration is freely transferable and may be assigned in connection with the goodwill of the business that the mark represents. The provisions of the North Carolina Trademark Registration Act do not displace any rights acquired by a trademark or service mark owner under federal or common law (i.e., through use of a mark in commerce without registration). Thus, a North Carolina trademark or service mark registration will not provide superior rights over a preexisting, federally registered mark or a preexisting common law mark.

North Carolina has no state-level trademark dilution statute.

Trade Names

Any person, partnership or corporation that engages in business in North Carolina under an assumed name must file a certificate showing the assumed name with the register of deeds in each county in North Carolina in which such person, partnership or corporation does business.

Reserving and procuring a corporate name in the State of North Carolina or filing a Certificate of Assumed Name will not insulate a party from liability for trademark or service mark infringement.

Trade Secrets

North Carolina provides statutory protection for trade secrets under the Trade Secrets Protection Act.

A trade secret is defined as follows:

> "business or technical information, including but not limited to, a formula, pattern, program, device, compilation of information, method, technique or process that (i) derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

The fact that any trade secret was developed jointly, used by more than one party or licensed to third parties does not negate the existence of a trade secret.

The owner of a trade secret may bring an action for the wrongful acquisition, use or disclosure of the trade secret. Statutory remedies include injunctive relief and monetary damages. Punitive damages and attorneys' fees to the prevailing party may also be awarded in appropriate circumstances. In addition, North Carolina state and federal courts have recognized the doctrine of inevitable disclosure to prevent threatened misappropriation of a trade secret by a former employee of the trade secret's owner and may apply it in certain circumstances in the future.

Right of Publicity

There is no North Carolina statute that addresses the rights of privacy or publicity. North Carolina courts, however, recognize actions for appropriation of an individual's name or likeness for commercial advantage. North Carolina courts also recognize the personal right of privacy, and courts will issue protective orders to guarantee that private information obtained during judicial discovery is not disclosed.

Ownership of Employee Developed Inventions

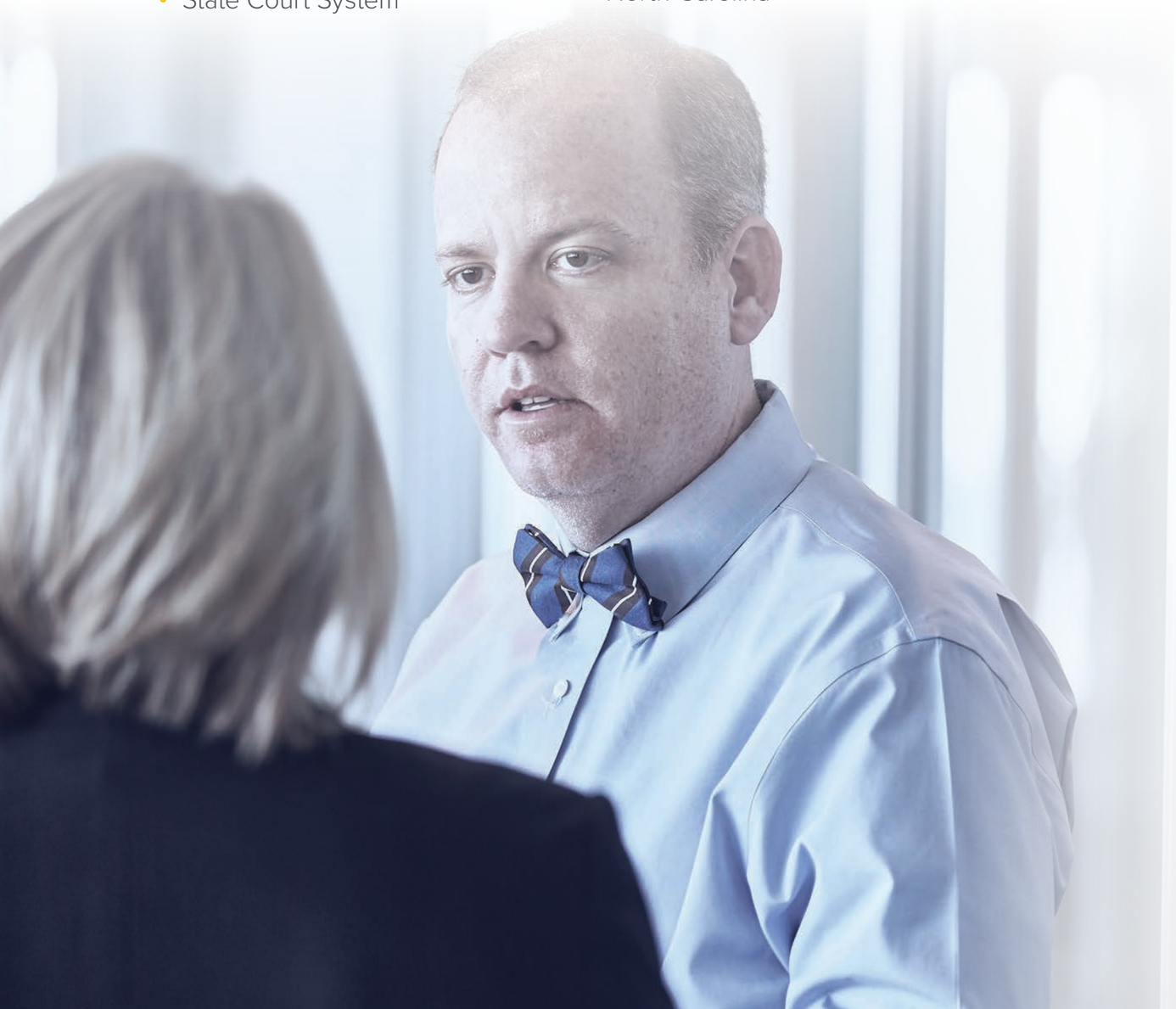
Any provision in an employment agreement which obligates an employee to assign any rights in an invention to the employer does not apply to an invention that the employee develops entirely on the employee's own time without using the employer's equipment, supplies, facilities or trade secret information.

There is an exception for inventions that relate to the employer's business or demonstrably anticipated research or result from work performed by the employee for the employer.

An employer may require in an employment agreement that an employee report to the employer all inventions developed by the employee during the term of employment for the purpose of determining the employer's rights in such inventions.

Dispute Resolution

- Federal Court System
- State Court System
- Arbitration and Mediation in North Carolina



Federal Court System

The trial courts of the federal court system are the US District Courts. The State of North Carolina is divided into three federal districts: the Eastern District, with divisions in Greenville, New Bern, Raleigh and Wilmington; the Middle District, with divisions in Durham, Greensboro, and Winston-Salem; and the Western District, with divisions in Asheville, Charlotte, Bryson City and Statesville.

Each district has federal district court judges who are appointed by the President for life terms upon approval by the US Senate. US magistrate judges, who do not serve a lifetime appointment, can handle a variety of pretrial matters and can, with the consent of the parties, try cases. Appeals are made to the Fourth Circuit Court of Appeals.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the US Constitution and federal statute. They have exclusive jurisdiction over bankruptcy, patent and copyright, foreign consuls and vice-consuls, admiralty and maritime, antitrust, Securities Exchange Act cases, and all actions where the United States is involved, including federal crimes, tort suits brought against the United States, and customs decision review. All other jurisdiction is concurrent with that of the state courts. There are generally three ways to gain access to the federal district courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding $75,000. To be brought in federal court, there must be complete diversity, i.e., each plaintiff must be from a state that is different from that of each defendant. The second basis for jurisdiction involves a federal question, i.e., presenting an issue arising under the Constitution, statutes, or treaties of the United States. The third basis for jurisdiction is the Class Action Fairness Act, which give federal courts jurisdiction over certain types of class actions. If a party's case does not fit within one of the statutorily mandated jurisdictions, there is no recourse in the federal courts.

The workings of the federal district courts are governed by the Federal Rules of Civil Procedure, promulgated by the US Supreme Court and approved by the US Congress. These are a uniform body of procedural rules applicable to every federal district court in the US. Each federal district court also establishes its own rules applicable only to the procedure in that district court. These rules often set forth very specific guidelines for the handling of an action, and counsel must pay close attention to them. Thus, one participating in a suit in federal district court must be aware of that court's local rules as well as the Federal Rules of Civil Procedure.

All three federal districts now allow or require that pleadings be filed electronically, using the CM/ECF System. The procedure for electronic filing varies, so practitioners should consult the local rules. Each district court maintains a website which contains information about the court, electronic filing, local rules and other essential information.

The Federal Rules of Appellate Procedure are a uniform body of procedural rules applicable to all appeals from a federal district court to a federal appellate court. If an appeal is taken from a North Carolina US District Court, the Fourth Circuit's appellate rules and internal operating procedures should be consulted in conjunction with the Federal Rules of Appellate Procedure.

State Court System

North Carolina has a unified, statewide court system called the General Court of Justice. It is comprised of appellate and trial court levels. All of the judicial power of the State, except for impeachments and powers given to administrative agencies, is vested in the General Court of Justice.

State Trial Courts

The state trial court division has two levels of courts—the Superior Courts and the District Courts—spread among approximately sixty judicial districts grouped into four judicial divisions. Except with respect to proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial division is vested concurrently in each division. For the efficient administration of justice, the respective divisions are constituted proper or improper for the trial and determination of specific actions and proceedings.

Superior Courts

Superior Courts have exclusive original jurisdiction for the probate of wills and the administration of decedents' estates. Superior Courts have jurisdiction over all civil cases where the amount in controversy exceeds $10,000, except as otherwise provided below, and all criminal actions that constitute felonies. Superior Courts also retain jurisdiction over the following: (i) actions where the principal relief sought is injunctive relief against the enforcement of any statute, ordinance, or regulation or injunctive relief to compel enforcement of any statute, ordinance, or regulation, (ii) declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation or the enforcement or declaration of any claim of constitutional right, (iii) special proceedings, (iv) quo warranto, (v) condemnation actions and proceedings, (vi) corporate receiverships, (vii) review of decisions of most administrative agencies, and (viii) appeals from the clerk of court to a judge.

A regular, resident Superior Court judge is elected by popular vote in each judicial district, and additional resident judges are elected in the larger districts. These judges are elected to eight-year terms. Further, the resident Superior Court judges are on a rotation system required by the North Carolina Constitution in which each resident judge presides for six-month periods in each court of each district within the judicial division, rotating through all the districts in the division.

District Courts

District Courts have jurisdiction over civil cases where the amount in controversy is $10,000 or less and have jurisdiction over the following types of cases, without regard to the amount in controversy: (i) family law cases; (ii) proceedings to terminate parental rights of any child in the custody of a county social services department or licensed child-placing agency; (iii) any case involving a juvenile alleged to be a delinquent, undisciplined, abused, neglected or dependent; (iv) all criminal actions below the grade of felony; (v) preliminary hearings in felony cases; and (vi) all small claims actions in which the amount in controversy does not exceed $3,000. Jury trials are available in civil cases upon demand. No jury is authorized in criminal cases; however, on appeal to Superior Court, trial shall be de novo, with a jury as provided by law. Appeals of civil cases are to the Court of Appeals.

District Court judges are elected to serve full time for terms of four years.

The District Court has supervisory authority over Magistrates Court. Magistrates are appointed by the Senior Resident Superior Court Judge and serve a term of two years. They have jurisdiction over small claims and have authority to issue arrest and search warrants.

A small claim is defined as a case in which (i) the amount in controversy does not exceed $3,000, and (ii) the principal relief sought is monetary, for recovery of personal property, summary ejectment, or any combination of the foregoing, and (iii) the plaintiff has requested assignment to a Magistrate. Appeals from Magistrate Court decisions are de novo to the District Court.

North Carolina Business Court

The North Carolina Business Court is a specialized forum of the North Carolina State Courts' trial division. Cases involving complex and significant issues of corporate and commercial law are assigned by the Chief Justice of the North Carolina Supreme Court to a special superior court judge who oversees resolution of all matters in the case through trial.

Once a case is designated to the Business Court by the Chief Justice, the Chief Business Court Judge assigns the case to a Business Court judge. There are currently five North Carolina Business Court Judges with courtrooms in Charlotte, Raleigh, Greensboro, and Winston-Salem. The Business Court uses electronic filing and provides written decisions, which has created a useful body of North Carolina business law.

As an administrative division of the General Court of Justice (not a court of jurisdiction), motions and pretrial matters will typically be heard in the Business Court courtroom assigned to the presiding Business Court judge. However, all jury trials will be held in the county of venue where the case was filed. Non-jury trials may be held in a Business Court courtroom, upon the consent of all parties.

Proceedings

In the trial division, there are two types of proceedings: actions and special proceedings. An action is an ordinary proceeding by which a party prosecutes another party for the protection of some right, or the redress of some wrong. Actions can be either criminal, prosecuted by the State against a party charged with a public offense, or civil, covering any action that is not criminal. Special proceeding is the term given to any remedy that is not an ordinary action, as outlined above. An example of such a proceeding would be a petition by an administrator to sell lands for the payment of debts.

All civil actions and proceedings of a civil nature in the Superior and District Courts are governed by the North Carolina Rules of Civil Procedure, which are statutory. There are also General Rules of Practice for the Superior and District Courts which supplement the Rules of Civil Procedure. These rules deal with the form of pleadings, the content of motions, the duration of discovery and similar matters. Additionally, many judicial districts in North Carolina have adopted local rules that vary from district to district.

In North Carolina, a civil action is commenced by filing a complaint with the court, or by having a summons issued with the complaint filed within twenty days of the summons' issuance. A summons is usually issued upon the filing of the complaint, and both the summons and complaint must be delivered to the defendant according to a strict body of rules providing the defendant with his constitutional right of

notice—a procedure called “service of process”. In North Carolina, service upon individuals may be accomplished in several ways: (i) personal service by delivering a copy of the summons and complaint to the defendant, or by leaving the copy at the defendant’s usual place of residence with a person of suitable age and discretion residing there; (ii) by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive process for the defendant; or (iii) by mailing a copy of the summons and complaint to the defendant by registered or certified mail. Service upon partnerships, domestic and foreign corporations, state agencies, and county and city political bodies have similarly detailed rules for service of process which must be strictly followed to ensure valid service of process.

Once the defendant has been properly served, the defendant must then file a response to the complaint, either in the form of a motion or an answer. In the answer, the defendant must admit or deny each allegation contained in the complaint. In addition, the answer must set forth any affirmative defenses to the plaintiff’s allegations. In the answer, the defendant should also allege any counterclaims against the plaintiff. The plaintiff must respond to any counterclaims by filing his own answer, called a “reply”. Once this process, called “pleading”, is complete, the parties will engage in discovery. The purpose of modern discovery is to eliminate any surprise in the adversarial process. Thus, anything relevant to the subject matter of the suit that is not privileged is within the scope of discovery. Information obtained through discovery need not be admissible at trial as long as it is reasonably calculated to lead to the discovery of admissible evidence.

State Appellate Courts

The appellate court division is two-tiered, composed of the North Carolina Court of Appeals and the North Carolina Supreme Court. The Court of Appeals is comprised of fifteen judges, each elected to a term of eight years. This court sits primarily in Raleigh, the State Capital, in three-judge panels, thus allowing multiple cases to be heard at the same time. The Supreme Court consists of a Chief Justice and six associate justices, elected by the voters for eight-year terms. This Court sits only in Raleigh.

Court of Appeals

The North Carolina Court of Appeals has jurisdiction to review decisions by the Superior Courts and District Courts. The Court of Appeals also reviews final judgments by the Industrial Commission, the State Bar in disciplinary proceedings, and the Property Tax Commission.

The Court of Appeals has the power to issue remedial writs necessary for the general supervision and control over proceedings of lower courts. Appeal also lies to this court from any interlocutory order or judgment of a Superior Court or a District Court which affects a substantial right, determines the action and prevents a judgment from which an appeal might be taken, discontinues the action, or grants or refuses the new trial.

Supreme Court

The North Carolina Supreme Court has original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory and the decisions shall be reported to the next session of the General Assembly for its action. An appeal lies of right directly to the Supreme Court in all cases in which the defendant is convicted of murder in the first degree and the judgment of the Superior Court includes a sentence of death. In all other cases, the first appeal must be to the Court of Appeals; however, the Supreme Court may certify certain cases for direct appeal. Like the Court of Appeals, the Supreme Court also has the power to issue remedial writs necessary for the general supervision and control over proceedings of lower courts. Additionally, an appeal of right from the Court of Appeals lies when the decision involves a substantial question arising under the United States Constitution or of the North Carolina Constitution, or in those cases in which there is a dissent at the Court of Appeals level.

Arbitration and Mediation in North Carolina

There are a wide variety of arbitration and mediation services available to those seeking alternative dispute resolution services in North Carolina.

Arbitration

North Carolina has enacted a statute providing for judicial enforcement of agreements to arbitrate. North Carolina also permits judicial enforcement of arbitration awards.

Certain actions are subject to mandatory arbitration. All civil actions filed in the trial divisions which are not assigned to a magistrate and do not exceed $15,000 in damages in toto, exclusive of interest, costs and attorneys’ fees, are subject to court-ordered arbitration, except for class actions, actions calling for injunctive or declaratory relief, family law issues, title issues, wills and estates issues, summary ejectment proceedings, or claims which assert an unspecified amount exceeding $10,000. Additionally, if the parties agree, the court may submit any other civil action to arbitration. The rules of evidence do not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide. The arbitrator is required to file the award with the court. If any party is not satisfied with the arbitrator’s award, a written demand for a trial de novo must be filed within thirty days after the arbitrator’s award. The trial conducted thereafter shall proceed as if there had been no arbitration proceeding beforehand. If no party files a demand for trial de novo within thirty days, the clerk of the court shall enter judgment on the award, which shall then have the same effect as a consent judgment in the action.

North Carolina recently enacted the North Carolina International Commercial Arbitration and Conciliation Act (codified at N.C. General Statutes, Chapter 1, Article 45B). The Act’s purpose is to encourage the use of arbitration or conciliation as a means of resolving international disputes, to provide rules for the conduct of arbitration or conciliation proceedings, and to assure access to the North Carolina courts for legal proceedings ancillary to international dispute resolution.

Mediation

Mediation differs both from litigation and from arbitration in that a mediator does not impose a settlement decision on the parties.

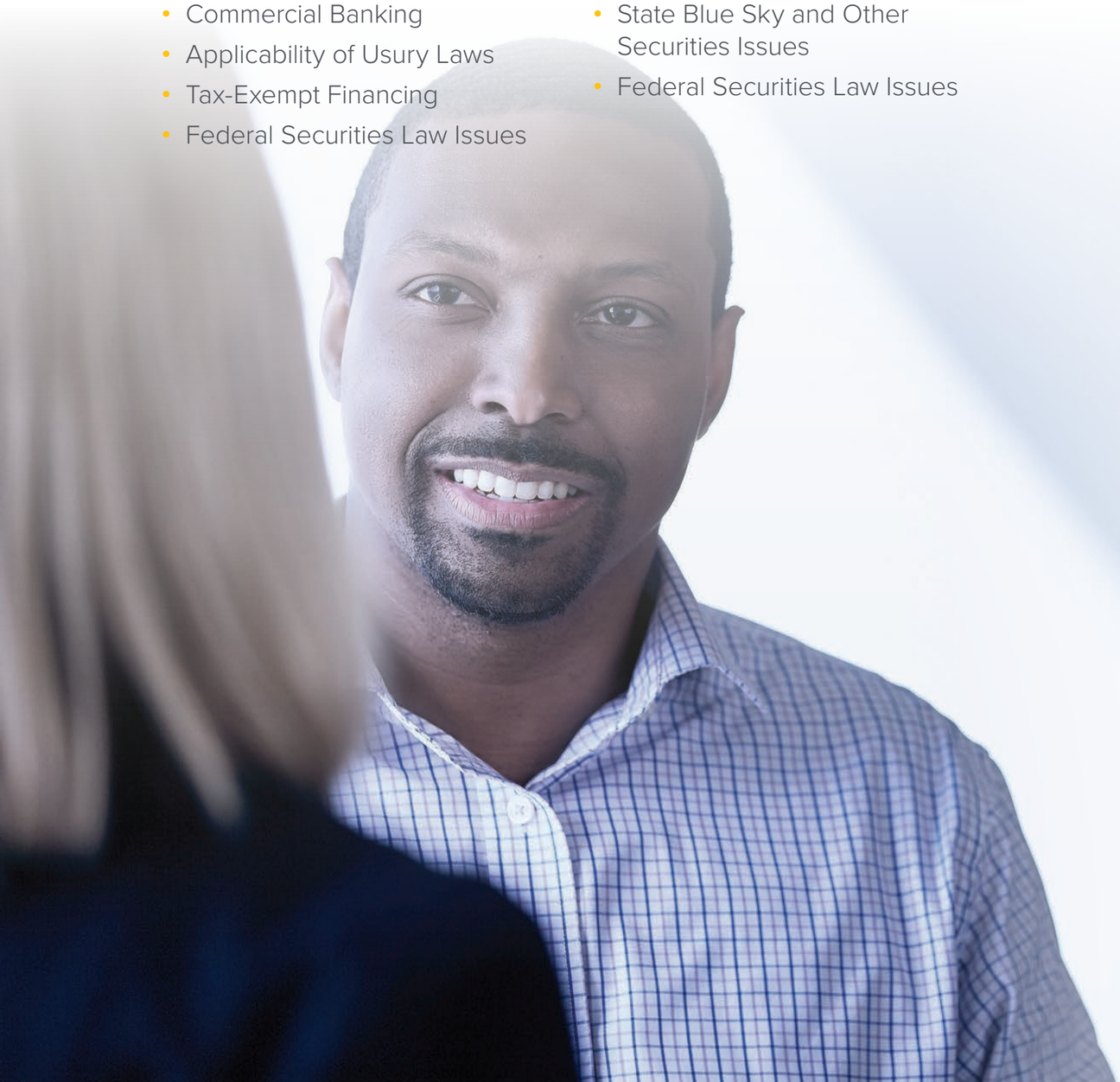
Rather, the mediator is trained to assist the parties in coming to an agreement on a solution to their dispute. Mediation can be useful in a number of different categories of cases and can also be useful when litigation is too expensive or when negotiations between attorneys are not proceeding productively.

North Carolina allows each judicial district to require mediation of all civil superior court cases. Almost all districts now require mediation of civil cases, unless the parties move for an exemption or permission to use another alternative dispute resolution technique. The procedure for selection of a mediator and conducting the mediation is set forth in the Rule Implementing Statewide Mediation Settlement Conferences in Superior Court Civil Actions.

Mediation or Alternative Dispute Resolution for most civil cases is also provided for in the local rules for the Middle District, Eastern District and Western District of the US Federal Courts in North Carolina. The rules for federal court mediations are similar to state practice.

Financing Investments

- Commercial Banking
- Applicability of Usury Laws
- Tax-Exempt Financing
- Federal Securities Law Issues
- State Blue Sky and Other Securities Issues
- Federal Securities Law Issues



Commercial Banking

Several of the largest and most respected US financial institutions are headquartered in North Carolina. In addition, many other lenders based outside of the State have established lending offices and other operations in North Carolina.

North Carolina institutions offer a variety of financing alternatives, including acquisition and working capital loans, real estate construction and term loans, Small Business Administration (SBA) loans, factoring and asset-based loans, debt restructuring, and leveraged leasing transactions. North Carolina banks also offer advice and services in many financial areas that provide cost, tax or risk-reduction benefits. These include tax-advantaged investments, interest rate swaps and other derivative products, bankers' acceptance financing, private placements of debt, and agency services in which the North Carolina bank assembles a group of domestic and/or foreign lenders to offer desired financing. North Carolina institutions offer a variety of international services, including export and import financing and letter of credit and foreign currency transactions.

Applicability of Usury Laws

Chapter 24 of the North Carolina General Statutes governs interest. The legal rate of interest in North Carolina is eight percent, but parties may contract in writing for a different rate of interest.

For loans of $25,000 or less, the maximum allowable rate is the greater of either sixteen percent or the rate for six-month US Treasury bills plus six percent. For loans of more than $25,000, or first mortgage home loans of more than $10,000, the parties may contract in writing for any rate of interest. N.C. Gen. Stat. § 24-9 provides an exemption for "exempt loans" and the parties can agree to any interest rate in an exempt transaction. An "exempt loan" under N.C. Gen. Stat. § 24-9 is a loan in which the loan amount is $300,000 or more; or the borrower is not a natural person; or the loan is obtained by a natural person primarily for a purpose other than a personal, family or household purpose.

Tax-Exempt Financing

Tax-exempt financing offers a potential low-cost financing alternative utilizing both variable rate or fixed rate structures.

Subject to federal tax law and North Carolina statutory requirements, various State of North Carolina governmental units, agencies and special purpose authorities have the authority to issue a variety of tax-exempt bonds for the benefit private parties. For example, private companies engaged in manufacturing or other industrial development projects may be eligible to utilize tax-exempt qualified small issue industrial revenue bonds to finance new capital expenditures for manufacturing projects. Generally, companies benefiting from the issuance of these qualified small issue bonds are limited under federal tax law to $10 million per jurisdiction and $40 million nationwide. Tax-exempt financing is also potentially available to companies financing certain solid and hazardous waste disposal and pollution control projects. Finally, not-for-profit 501(c)(3) organizations may be eligible for tax-exempt financings for the purpose of financing or refinancing building, facilities and equipment used in furtherance of their exempt purposes.

Federal Securities Law Issues

The focus of the United States federal securities laws is to protect the interests of investors and the public by requiring the disclosure of material information in connection with the offer and sale of securities and prohibiting fraud and manipulative practices.

The Securities Act of 1933, as amended (the "1933 Act"), prohibits the offer or sale of a security unless either the transaction is registered with the Securities and Exchange Commission (the "SEC"), the federal agency responsible for administering and enforcing US securities laws, or the transaction or the particular type of security being offered or sold is exempt from registration. In addition, among other things, the Securities Exchange Act of 1934, as amended (the "1934 Act"): (i) requires certain issuers (generally those whose equity securities are held by the public) to provide material information on an ongoing basis by filing with the SEC quarterly, annual and other reports and statements (which the SEC makes available to the public); (ii) regulates the solicitation of proxies and the making of tender offers; (iii) imposes reporting and trading restrictions on directors, certain officers, principal shareholders and other insiders in connection with their personal transactions in securities of the issuer; and (iv) regulates the activities of securities brokers and dealers. The 1933 Act and 1934 Act also prohibit the making of material misstatements or omissions and other fraudulent practices in connection with the purchase or sale of any security, whether or not the transaction is registered with the SEC. Two entirely separate and distinct federal statutes regulate the activities of investment companies and investment advisers.

There are several exemptions from registration under the 1933 Act. Certain exemptions are available based on the type of security issued. For example, exempt securities include securities issued by federal or state governments or related agencies, or by banks, savings and loan associations or similar institutions subject to governmental regulation, and securities issued by nonprofit organizations. Other exemptions are available based on the type of transaction in which the security is issued. One of the most commonly used transaction exemptions applies to transactions that do not involve a "public offering."

The test to determine whether a public offering is involved has not been clearly defined, although the following factors are relevant: the number of offerees and their relationship to each other and the issuer; the size and manner of the offering; the sophistication of the offerees; and the nature and kind of information concerning the offering provided to the offerees. The SEC has adopted certain "safe harbor" rules that, if followed, help to ensure that an offering will be exempt from registration. Certain of these rules are contained in Regulation D promulgated by the SEC pursuant to the 1933 Act. These rules impose objective requirements on the dollar amount of the offering, the number of purchasers and the information that must be provided to purchasers. The rules also place limitations on advertising, solicitation and resales of securities by purchasers. Other commonly used exemptions from registration under the 1933 Act apply to offerings conducted exclusively in the state in which the issuer is organized and does a substantial amount of its business, and to offers and sales of securities of nonpublic issuers made pursuant to employee benefit plans and compensatory employment contracts if the amount of securities offered and sold does not exceed certain dollar limitations and the purpose of the sale is to compensate employees rather than to raise capital for the issuer. Certain of the exemptions referred to above require notice filings to be made with the SEC and state securities regulators.

In addition to the foregoing, issuers may be able to rely on Regulation S for offers and sales of securities that are made in "offshore transactions" as long as no "directed selling efforts" are made in the United States. The Regulation S "safe harbor" from registration applies to both the primary distribution by an issuer (and related parties) and to offshore resales by persons other than an issuer (or related persons).

If no exemption is available and registration is required, a registration statement must be filed with, and declared effective by, the SEC in connection with the offering, and a prospectus containing specified information must be made available to investors.

The SEC's registration forms call for varying levels of financial and other disclosures, depending on the size and type of the issuer.

State Blue Sky and Other Securities Issues

The North Carolina Securities Act

The North Carolina Securities Act (the "NC Securities Act") regulates offers and sales of securities in North Carolina. Commonly referred to as North Carolina's "blue sky" law, the NC Securities Act is based on the Uniform Securities Act, with certain modifications that incorporate several historical North Carolina practices. Like the federal securities laws, the NC Securities Act is designed to protect investors by, among other things, regulating the offer and sale of securities through registration, disclosure and other substantive requirements, and prohibiting fraudulent, manipulative and deceptive practices in connection with the offer or sale of securities. The NC Securities Act, however, is subject to The National Securities Markets Improvement Act of 1996 ("NSMIA"), which was adopted by the US Congress to streamline and reduce duplicative (and in some cases contradictory) fees and requirements under both the federal and state securities laws. NSMIA mandates that "covered securities" (generally, any security listed on a national stock exchange or automated quotation system) will not be subject to any state law, rule, regulation or administrative action that would otherwise require the issuer of such covered security to register the security at the state level.

In general, offers and sales of securities in North Carolina are prohibited, regardless of the size of the offering, unless the security is registered with the North Carolina Secretary of State or the security or the particular transaction is exempt under the NC Securities Act and the federal Securities Act of 1933. If an exemption is not available, an offer or sale of a security may not be made unless it is registered. Even if an exemption is available, notice or other filings (and possibly filing fees) may be required, depending on the type of exemption.

The NC Securities Act identifies fifteen types of securities that are exempt from registration. These include, for example, securities issued or guaranteed by domestic governments and agencies and by certain foreign governments (or agencies) with which the United States currently maintains diplomatic relations; securities listed on certain exchanges or quoted on an automated quotation system operated by a national securities association registered with the SEC; securities issued by banks, savings and loan associations and certain other financial institutions; securities issued by certain public utilities; certain commercial paper; and interests in certain employee benefit plans.

The NC Securities Act also includes nineteen exemptions that are based on the nature of the transaction pursuant to which the offer or sale takes place. These transaction exemptions include certain transactions made in reliance on SEC Regulation D (discussed above); transactions made pursuant to offers to no more than twenty-five persons in the state of North Carolina during any consecutive twelve-month period (as long as the seller reasonably believes that all buyers in North Carolina are purchasing for investment); certain offers and sales to qualified institutional investors; certain offers to an issuer's existing security holders (if no commission or other remuneration is paid for soliciting security holders); transactions made pursuant to a plan approved by the North Carolina Secretary of State after a hearing to determine the fairness of the transaction; and transactions pursuant to certain employee benefit plans.

Any person who offers or sells a security in violation of the N.C. Securities Act's registration provisions, who makes material misstatements in connection with the offer, sale or purchase of a security, or who otherwise engages in fraudulent conduct may be subject to civil and criminal sanctions. The N.C. Securities Act also regulates the activities of dealers, salesmen, investment advisers and investment adviser representatives. Dealers, salesmen, investment advisers and investment adviser representatives are prohibited from engaging in fraudulent practices and may have their registrations revoked or other penalties imposed upon them for violations of the N.C. Securities Act.

Federal Securities Law Issues

The focus of the United States federal securities laws is to protect the interests of investors and the public by requiring the disclosure of material information in connection with the offer and sale of securities and prohibiting fraud and manipulative practices. The Securities Act of 1933, as amended (the "1933 Act"), prohibits the offer or sale of a security unless either the transaction is registered with the Securities and Exchange Commission (the "SEC"), the federal agency responsible for administering and enforcing US securities laws, or the transaction or the particular type of security being offered or sold is exempt from registration. In addition, among other things, the Securities Exchange Act of 1934, as amended (the "1934 Act"): (i) requires certain issuers (generally those whose equity securities are held by the public) to provide material information on an ongoing basis by filing with the SEC quarterly, annual and other reports and statements (which the SEC makes available to the public); (ii) regulates the solicitation of proxies and the making of tender offers; (iii) imposes reporting and trading restrictions on directors, certain officers, principal shareholders and other insiders in connection with their personal transactions in securities of the issuer; and (iv) regulates the activities of securities brokers and dealers. The 1933 Act and 1934 Act also prohibit the making of material misstatements or omissions and other fraudulent practices in connection with the purchase or sale of any security, whether or not the transaction is registered with the SEC. Two entirely separate and distinct federal statutes regulate the activities of investment companies and investment advisers.

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The test to determine whether a public offering is involved has not been clearly defined, although the following factors are relevant: the number of offerees and their relationship to each other and the issuer; the size and manner of the offering; the sophistication of the offerees; and the nature and kind of information concerning the offering provided to the offerees. The SEC has adopted certain "safe harbor" rules that, if followed, help to ensure that an offering will be exempt from registration. Certain of these rules are contained in Regulation D promulgated by the SEC pursuant to the 1933 Act. These rules impose objective requirements on the dollar amount of the offering, the number of purchasers and the information

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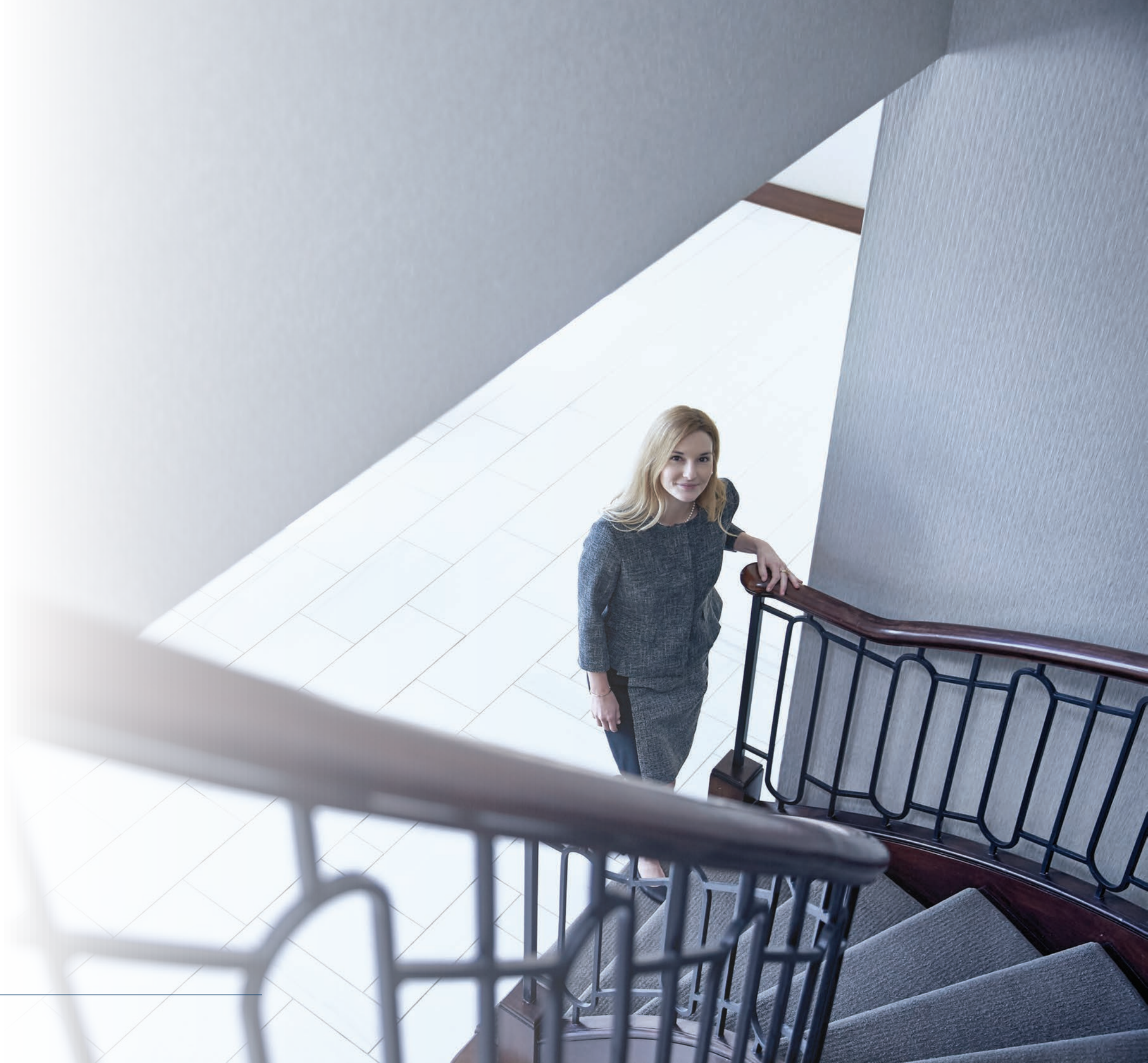
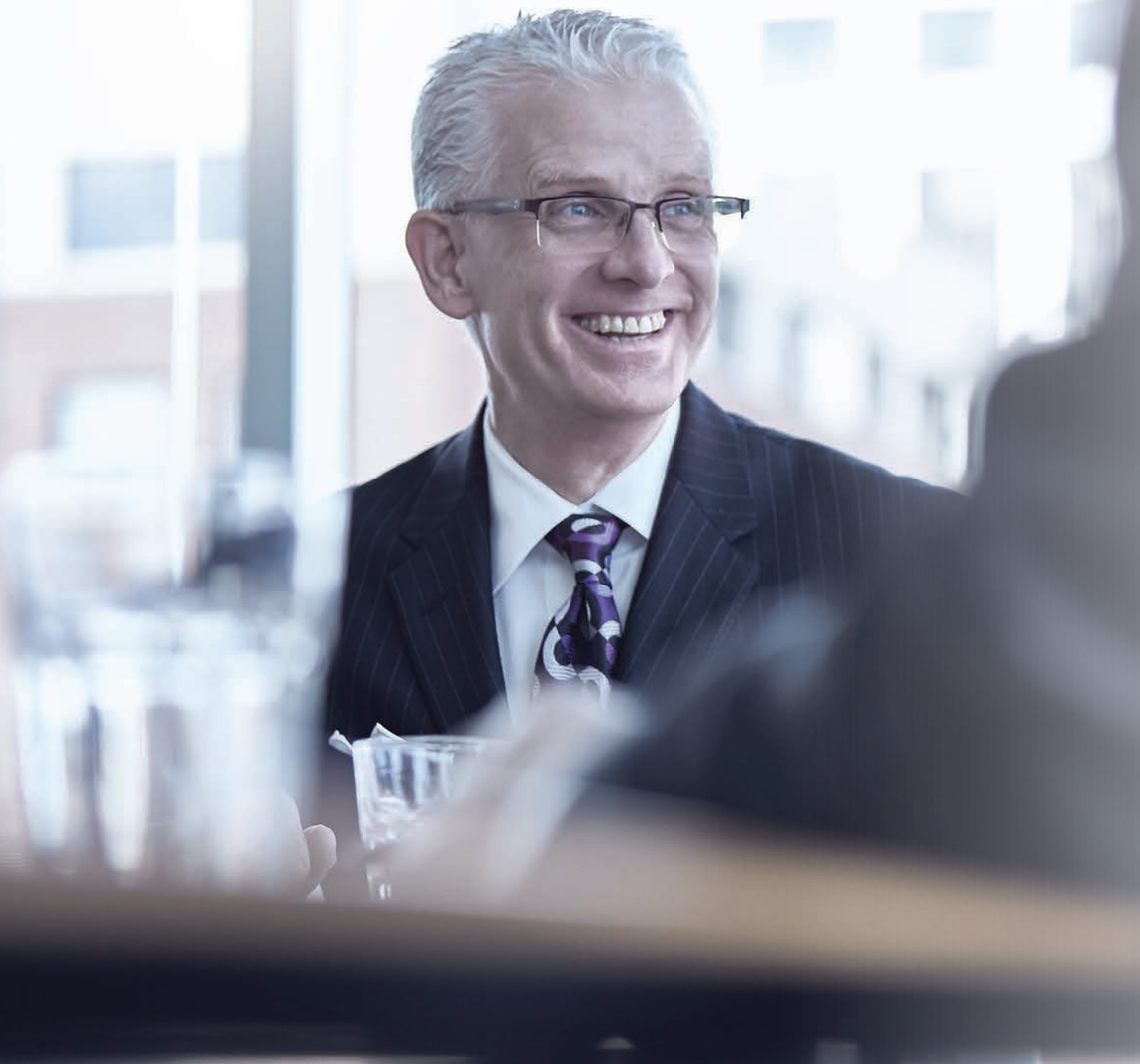


Real Estate

- Real Estate Acquisitions
- Land Use Issues
- Foreclosures
- Leases
- Liens
- Federal Statutes and Regulations



The North Carolina economy continues to benefit from an influx of people moving here for jobs and for a variety of other reasons. This population growth has helped to buffer North Carolina real estate development from much of the economic downturn impacting many states.

Real Estate Acquisitions

By North Carolina statute, those who are not United States citizens are entitled to hold, convey and inherit any interest in North Carolina real property.

In both residential and commercial transactions, contracts usually provide a due diligence period in which the purchaser may conduct due diligence to determine whether it wishes to purchase the property. Typically, the purchaser may terminate the contract within the due diligence period for any reason whatsoever and is entitled to the return of any earnest money deposited upon such a timely termination. The purchaser typically assumes responsibility for all aspects of due diligence, such as conducting a title examination; obtaining a survey; determining if the property can be developed in accordance with the purchaser's plans; assessing compliance with zoning, planning, building and subdivision laws; and determining whether there are environmental issues or wetlands concerns that might hinder the purchaser's planned development. In North Carolina, a purchaser typically assumes responsibility for obtaining any owner's title policy and usually is responsible for payment of the premiums of such title insurance coverage, the rates of which are established and regulated by statute. It is important to note that North Carolina is an attorney state that requires North Carolina licensed attorneys to preside over and conduct all real estate closings, search and opine as to the status of title, and draft real estate conveyance documents, among other tasks.

While the North Carolina Bar Association has developed many standardized forms (including form purchase agreements, deeds and deeds of trust), these forms are typically not used except in residential transactions. Real estate loans are invariably secured by deeds of trust (rather than mortgages) in which a third party trustee holds legal title for the benefit of the lender. North Carolina has anti-deficiency statutes that govern situations in which the seller is financing a sale and is taking back a deed of trust upon the property being sold. These statutes preclude a seller that received a purchase-money deed of trust from pursuing a purchaser for a deficiency in repayment of the purchase price, even where that seller is unable to foreclose under its deed of trust.

North Carolina levies an excise tax on almost all deed conveyances of land, and this tax is customarily paid by the seller. Unlike many other states, however, North Carolina does not impose an intangibles tax on the recording of deeds of trust or mortgages. Unless otherwise provided by contract, property taxes on the real property being sold shall be prorated at closing by and between the seller and buyer of the real property on a calendar-year basis. Nominal recording charges apply for almost all documents recorded in a county's public registry.

Within fifteen days of closing, every purchaser of North Carolina real estate whose seller is not a North Carolina resident must file a Form NC 1099 NRS. This form requires disclosure of the seller's name, address and social security or federal taxpayer identification number, the location of the property, the gross sales price of the property, and any tangible personal property associated with the real property. This requirement applies only if the seller is a nonresident individual or entity, but is not applicable if only the purchaser is a nonresident.

Land Use Issues

In North Carolina, cities and county bodies (acting pursuant to local ordinances enacted pursuant to state statutes) are responsible for enforcement of zoning, planning, building, environmental protection and subdivision laws.

North Carolina law permits conveyances of parcels of land of less than ten acres only if that parcel has been subdivided as shown on a subdivision plat approved by the local governing authority and filed in the local registry. Some jurisdictions within the state have made this requirement more stringent, applying to conveyances of five acres or less. Although not as highly regulated as in certain other southeastern states, the subdivision plat approval process varies widely from one local jurisdiction to the next and can involve a substantial investment of time and resources to accomplish.

North Carolina statutes contain detailed requirements for residential owners' association documents, and several local governments also prescribe text that must be included in such governing documents. In addition, local governments frequently impose stormwater management schemes that must be approved on a development-by-development basis. These stormwater management policies frequently require periodic inspection and maintenance of stormwater systems and reserves for such maintenance and repair. State and local governments also impose certain specifications and requirements for roads that are dedicated for public use.

North Carolina state law also establishes guidelines for enforceable public/private development agreements and agreements concerning reimbursements for public infrastructure improvements installed by private developers. These development agreements are particularly useful where a project involves a substantial investment of public and private funds or where the development is to be accomplished in phases, over a period of time. Pursuant to these development agreements, the governmental authority can assure a developer of the regulations and permitting requirements for future phases of the project.

Foreclosures

North Carolina has not been immune to the economic turbulence in recent years.

A lender that has granted a deed of trust encumbering an owner's real property can foreclose that security interest upon an event of default under the loan secured by the deed of trust. Although a lender can pursue a judicial foreclosure, lenders invariably elect to utilize the alternative statutory nonjudicial foreclosure procedure so long as the required power of sale clause is included in the underlying security instrument. Such nonjudicial foreclosures may occur only after a hearing before a clerk of court and only after the lender satisfies various statutory requirements for foreclosure (including notice to the debtor and any other record owners, and publication of the notice of sale in a local newspaper as detailed by statute). Except in the case of a foreclosure of a deed of trust securing a purchase-money financing, the debtor can be held liable for any loan deficiency remaining following a foreclosure.

Leases

Any lease of real property for more than three years must be recorded in the county where the real property lies to protect the validity such lease against third parties.

Generally, landlords and tenants do not record the entire lease, but rather satisfy this requirement by recording a memorandum of lease that includes the names of the parties to the lease, a description of the property leased, the term of the lease (including any and all extensions, renewals, and options, if any), and a sufficient reference to identify the complete lease agreement. Unlike many other states, however, North Carolina does not impose any form of tax on the recording of memoranda of leases other than nominal recording fees.

Liens

A contractor providing services or materials to a tract has certain lien rights that it may exercise in the event the contractor is not paid. A contractor's lien is effective and has priority over other interests in that real property that are recorded after the contractor first provided such services or materials so long as the contractor follows statutorily required steps to perfect and/or protect its lien rights.

As a general rule, in order to have priority from the date on which materials or services were first furnished, the contractor must file a lien within 120 days after last providing services or materials to a tract and must file a civil action to enforce the lien within 180 days from the date services or materials were last provided. An additional wrinkle to the general rule is recent creation of a mechanics' lien agent system in North Carolina. Generally, a mechanic's lien agent must be appointed by the property owner for any construction project of $30,000 or more in which labor or materials are provided to real property owned by non-public entities. This was intended to minimize the number of previously "hidden liens" that could be imposed on real property by parties having lien rights that are not reflected in the public records at the time of a purchase or refinance of the property. Because mechanics' lien rights "relate back" to the first furnishing of materials or labor (priority of the claim being established as of such date), but no claim of lien previously needed to be filed in the public records until the contractor felt its payment was imperiled and was preparing to file a lawsuit, property could be financed and/or sold without the lender or buyer knowing that a contractor had valid (and higher priority) lien rights against the property. The recently enacted lien laws require that parties having such potential lien rights provide notice to the appointed mechanics' lien agent of such rights prior to a sale or financing in order to maintain priority over lenders and purchasers. This enables closing attorneys, lenders and purchasers to have the ability to address potential lien claimants at closing by reviewing the filings associated with a given property on the www.liensnc.com registration system, where all mechanics' lien agent appointments are filed.

Federal Statues and Regulations

Foreign investors should also be aware that investment in any state (including North Carolina) is also subject to certain federal laws and regulations outlined below.

FIRPTA

The Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") requires foreign investors to file information returns and also imposes withholding requirements on transferees in the disposition of a United States real property interest when the transferor is a foreign person. For purposes of FIRPTA, a "foreign person" is a nonresident alien or a corporation incorporated under the laws of a jurisdiction other than a state, the District of Columbia or territory of the United States at the time of the conveyance of the real property interest. In closings, a seller typically is thus required to certify that it is not a foreign person. If the transferor is a foreign person, the transferee generally must withhold 15% of the amount realized by the non-citizen transferor on the transaction. There are several situations in which withholding is not required or the amount of tax withheld is decreased. Any transferee failing to withhold the tax may be liable for the amount of tax, including penalties and interest. Penalties include a civil penalty of up to 25% of the tax due. A transferee also may be found criminally liable for fraud.

AFIDA

The Agricultural Foreign Investment Disclosure Act of 1978 ("AFIDA") requires all foreign persons and organizations to report the acquisition or transfer of an interest in agricultural land within ninety days of the conclusion of the transaction. Agricultural land includes any area of land exceeding ten acres and producing, on average over the past three years, more than $1,000 annually from farming, ranching, forestry or timber production. Land that is currently idle is still subject to this statutory reporting if it was used as agricultural land within the past five years. Reports must also be filed within ninety days after the date an owner of agricultural land becomes a foreign person or land held by a foreign person becomes agricultural. The foreign person must disclose in these reports extensive personal information in addition to information about the land itself.

The Secretary of Agriculture has the power to investigate whether reports are accurate and to impose penalties. AFIDA provides a maximum civil penalty of 25% of the fair market value of the foreign person's interest in the land in question for failure to submit a report, for submission of an incomplete report, for knowingly submitting a report that is false or misleading or for knowingly failing to maintain the accuracy of a submitted report.

IITSSA

The International Investment and Trade in Services Survey Act ("IITSSA") requires that certain foreign direct investment in the United States be reported to the Bureau of Economic Analysis ("BEA"). Foreign direct investment in the United States includes foreign ownership of real estate and the direct or indirect ownership or control by a foreign person or foreign entity of a 10% or more voting interest in a United States business enterprise.

Any business enterprise which is 10% owned by a foreign person is considered to be a US affiliate. IITSSA requires that US affiliates make annual and quarterly filings with the BEA. United States affiliates must also file an extensive survey every five years, and additional reports may be required, depending on the amount of the investment.

There are several exemptions from the BEA's filing requirements. For example, no filing is required for investment in residential real estate when the investment is exclusively for personal use. There also are exemptions based on the acreage and value of the real estate acquisition or the total assets, annual revenues and net income of the United States affiliate. If the aggregate of such holdings exceeds one or more of the exemption levels, then the holdings must be reported even if individually they could be exempt.

The penalty for violating disclosure or limited access regulations regarding BEA information is a civil penalty of up to $10,000. Willful failure to submit any of the information required can also result in an injunction requiring a report, a fine of not less than $2,500 but not more than $25,000, and up to one year in prison.

Contact Information for Important NC Offices

North Carolina Department of the Secretary of State

Elaine F. Marshall, Secretary of State

+1 919.814.5400

www.sosnc.gov

Corporations Division

Cheri L. Myers, Corporations Director

+1 919.814.5400

www.sosnc.gov/Corporations

Securities Division

Kevin Harrington, Director of the Department of the Secretary of State's Securities Division and Deputy Securities Administrator

+1 800.688.4507

www.sosnc.gov/Sec

North Carolina Department of Revenue

Ronald Penny, Secretary of Revenue

+1 877.252.3052

www.dor.state.nc.us

North Carolina Department of Labor

Cherie K. Berry, Commissioner of Labor

+1 919.807.2796

www.nclabor.com

Occupational Safety and Health Division

Kevin Beauregard, Director

+1 919.807.2900

www.nclabor.com/osha/osh.htm

North Carolina Department of Commerce

Tony Copeland, Secretary of Commerce

+1 919.814.6100

www.nccommerce.com

North Carolina Department of Environmental Quality

Michael Regan, Secretary of the Department of Environmental Quality

+1 919.707.8600

deq.nc.gov

womblebonddickinson.com

WOMBLE BOND DICKINSON

United Kingdom

Aberdeen
13 Albyn Terrace
Aberdeen AB10 1YP

Edinburgh
6th Floor
125 Princes Street
Edinburgh EH2 4AD

Bristol
3 Temple Quay
Temple Back East
Bristol BS1 6DZ

Leeds
1 Whitehall Riverside
Leeds LS1 4BN

London
4 More London Riverside
London SE1 2AU

Newcastle
St Ann's
St Ann's Wharf
112 Quayside
Newcastle Upon Tyne
NE1 3DX

Trinity
One Trinity
Broad Chare
Newcastle Upon Tyne
NE1 2HF

Plymouth
Ballard House
West Hoe Road
Plymouth PL1 3AE

Southampton
Oceana House
39-49 Commercial Road
Southampton
SO15 1GA

United States

Los Angeles, CA
12400 Wilshire Boulevard
Suite 700
Los Angeles, CA, 90025

Orange County, CA
3200 Park Center Drive
Suite 700
Costa Mesa, CA 92626

Palo Alto, CA
2479 East Bayshore Road
Suite 290
Palo Alto, CA 94303

Silicon Valley, CA
1279 Oakmead Parkway
Sunnyvale, CA 94085

Wilmington, DE
222 Delaware Avenue
Suite 1501
Wilmington, DE 19801

Washington, DC
1200 Nineteenth Street NW
Suite 500
Washington, DC 20036

Atlanta, GA
Atlantic Station, 271 17th Street, NW
Suite 2400
Atlanta, GA 30363-1017

Baltimore, MD
100 Light Street
26th Floor
Baltimore, MD 21202

Boston, MA
Two International Place
Suite 2310
Boston, MA 02110

Charlotte, NC
One Wells Fargo Center
Suite 3500, 301 South College Street
Charlotte, NC 28202-6037

Greensboro, NC
300 North Greene Street
Suite 1900
Greensboro, NC 27401

Raleigh, NC
555 Fayetteville Street
Suite 1100
Raleigh, NC 27601

Research Triangle Park, NC
Post Office Box 13069
Research Triangle Park, NC 27709

2530 Meridian Parkway
Suite 400
Durham, NC 27713

Winston-Salem, NC
One West Fourth Street
Winston Salem, NC 27101

Charleston, SC
5 Exchange Street
Charleston, SC 29401

Columbia, SC
1221 Main Street
Suite 1600
Columbia, SC 29201

Greenville, SC
550 South Main Street
Suite 400
Greenville, SC 29601

Charlottesville, VA
201 East Main Street
Suite P
Charlottesville, VA 22901

Tysons Corner, VA
8065 Leesburg Pike
4th Floor
Tysons Corner, VA 22182-2738