# Doing Business in Massachusetts

## A Guide to U.S. and Massachusetts Law for Non-U.S. Businesses

FOLEY HOAG LLP


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## Introduction

This guide is intended to provide foreign business-people with an introduction to the basic kinds of laws and regulations that affect the conduct of business in the United States, and particularly in The Commonwealth of Massachusetts. The discussion under each heading is intended to provide general guidance. As one might expect, this is not an exhaustive description of all provisions of federal, state and local law with which a non-U.S. business operating in Massachusetts might be required to comply. The laws and regulations described in this guide are subject to interpretation by courts, may be affected or preempted by U.S. federal statutes or regulations, and may themselves be amended or repealed. Particular businesses or industries may also be subject to specific legal requirements not referred to in this guide.

For these reasons, you should not rely solely upon this guide when planning the details of a specific transaction or undertaking. Instead, the pertinent details of any transaction or business project involving Massachusetts should be reviewed thoroughly by qualified Massachusetts counsel.

## The U.S. Federal System (Levels of Government)

The laws and regulations affecting the conduct of business in Massachusetts discussed below flow from sources at three basic levels: federal, state and municipal.

### U.S. Federal Law

Federal law derives from the United States Constitution and from statutes enacted by the United States Congress and approved by the President. Federal law usually applies everywhere in the United States and prevails over conflicting state or municipal law (but federal and state laws governing the same subject often coexist without conflict, and in those cases both laws may apply). Most federal statutes are enforced by one or more administrative agencies, which often have authority to adopt regulations that interpret or even expand on the underlying statutes. For example, the federal laws governing public offerings of securities and tender offers for control of publicly-held companies are administered by the Securities and Exchange Commission. In some areas, such as defining fraudulent and deceptive practices in the sale of securities, the statutes leave the definitions entirely to the regulations of that Commission. Other important federal agencies are referred to in the text of this guide.

### Massachusetts Law

Massachusetts law derives from the Massachusetts Constitution and from statutes enacted by the Massachusetts Legislature (formally named the Great and General Court) and approved by the governor. It applies only in Massachusetts and prevails over conflicting municipal regulations. Massachusetts law is also administered by a variety of state-level administrative agencies, many of which have authority to adopt regulations. Massachusetts law and regulation are important in, among other areas, real estate law, corporate organization, public health and safety, environmental and labor law, and consumer protection.

### Municipal Law

Municipal law derives ultimately from Massachusetts state statutes conferring specific powers on cities and towns. It is usually expressed in bylaws, ordinances, or regulations adopted by any of a variety of municipal bodies. It is most significant in the areas of land-use planning and public health and safety enforcement.

At each of the three levels, the government imposes some form of taxation to support its operations. The principal sources of federal revenues are personal and corporate income taxes, a variety of excise taxes and customs duties. The principal sources of Massachusetts

revenue are personal and corporate income taxes and a smaller variety of excises. The principal sources of municipal revenue are real estate taxes, an excise on motor vehicles and financial aid from the state government.

## Lawyers in the United States

American lawyers are licensed, or "admitted to practice," by the individual states and by the federal courts in separate federal judicial districts. In most states, there is no formal distinction between branches of the profession — as there is, for example, between barristers and solicitors in the United Kingdom. Many individual lawyers and some firms choose to specialize or concentrate their practices in particular areas of the law; but most firms of any significant size in the principal urban centers stand ready to provide legal advice and, if necessary, representation in legal proceedings in most or all of the areas of concern to businesses entering the United States.

Similarly, the various terms that lawyers use to describe themselves — such as "attorney," "counsel," "counselor" and simply "lawyer" —do not reflect any formal differences in status or specialty.

# Forms of Doing Business in the United States

An important initial choice facing a person wishing to do business in the United States is the form of business through which to conduct U.S. operations. The choice of business form must be carefully considered in light of the specific concerns of a particular business venture. The results in terms of tax treatment, exposure to contract and tort liability, and efficiency and methods of governance will vary significantly in many circumstances depending upon the form of business chosen. There is no single best choice of business form in the abstract; the different business forms each have their own advantages and disadvantages.

The creation, management and powers of the different forms of business are governed by state rather than federal law. Additionally, the offer and sale of securities implicate both state and federal securities laws. This section briefly summarizes the characteristics of certain forms of business.

Remember that the appropriate choice of business form varies with the plans and goals of any specific business venture. The business form is appropriately chosen only after the venture is formulated and should be tailored to fit the venture. The use of hybrid entities, which combine the characteristics of two or more of the

business forms described below, allows businesses even further flexibility in choosing a form of business closely matched to their individual needs.

## Joint Venture

Although the term "joint venture" is merely a generic term used to indicate the existence of a working relationship between parties that join together in a common enterprise, a joint venture may be conducted through a legally constituted entity, such as a corporation, partnership or limited liability company. Joint ventures are discussed in more detail later.

## Corporation

Each state has its own corporation statute, but the statutes are generally quite similar from state to state. A U.S. corporation doing business in Massachusetts, or any other state, may be organized under the Massachusetts Business Corporation Act or under the analogous law of another jurisdiction. (See "Forming the Corporation," below.) A corporation may be either publicly-held or privately-held. Publicly-held and privately-held corporations are created and governed under the same state corporation laws and are subject to identical U.S. income tax treatment. The distinction between the two relates not to the form of entity but essentially to the application of state and federal securities laws. A publicly-held corporation is one in which the shares are offered and sold to the public at large. A privately-held corporation generally has relatively few shareholders, and its shares may not be transferred as freely.

A principal advantage of doing business in corporate form is that the shareholders of a corporation are insulated, in most instances, from personal liability for the obligations of the corporation. Additionally, the corporation has a perpetual existence; it does not dissolve upon the death or withdrawal of a sole stockholder. In most cases, ownership shares of a corporation can be transferred relatively easily, particularly so in the case of a public corporation. Also, the case law governing corporations is well developed and hence relatively more predictable than the case law applicable to other forms of business.

There are some disadvantages to doing business in corporate form. Most corporations in the United States are subject to a "double taxation" system under which income of the corporation is taxed at the corporate level, and distributions of earnings to shareholders trigger a second income tax at the shareholder level. (Certain corporations -- generally called "S corporations" -- may elect to be treated as flow-through entities for U.S. income tax purposes, and can partially or

completely avoid the "double taxation" regime, but such corporations may not have foreign owners and are subject to a number of other restrictions.) Distributions by a U.S. corporation to a non-U.S. shareholder are generally subject to a U.S. withholding tax of 30 percent (unless reduced by an applicable income tax treaty). Ownership of stock in a U.S. corporation does not, however, generally subject a non-U.S. person to U.S. income tax return filing obligations. Also, the state corporation statutes circumscribe the organizational and operational flexibility of corporations and the allocation of rights, responsibilities and economic benefits and burdens. In addition, corporations are subject to certain formal record-keeping and reporting requirements. In the case of publicly-held corporations, administrative costs are particularly high as a result of the need for them to comply with the complex and rigorous federal securities regulation scheme under the Securities Act of 1933 and the Securities Exchange Act of 1934.

Privately-held corporations are the most common form of business entity in the United States. The publicly-held corporate form is generally the appropriate choice for businesses that require access to large amounts of capital from the vast U.S. capital market.

Corporations are discussed in more detail below.

## Sole Proprietorship

A sole proprietorship is simply an individual engaging in business for himself or herself. No statute governs the organization of a sole proprietorship. However, any person engaged in business under a name other than his or her own generally must file a fictitious name certificate with the office of the clerk in every town in Massachusetts in which the business has an office.

The principal advantages of this form of doing business are administrative simplicity and autonomy. The owner of a sole proprietorship is his or her own boss. No one else has the right to participate in management. However, the owner may, by contract, delegate authority or surrender control. The administrative costs associated with a sole proprietorship are generally less than those associated with other forms of business.

The principal disadvantage of this form of doing business is potentially unlimited liability. In the absence of any contract to the contrary, a sole proprietor is personally liable for all obligations of the business to the full extent of his or her personal and business assets. In addition, a sole proprietor is liable not only for torts personally committed, but also for those committed by any employees of the business.

Because a sole proprietorship ends upon the death of the proprietor, this form of business organization has no continuity of existence. The interest of a sole proprietor in the business is freely transferable, subject to laws that, in general, prevent the interest of business creditors from being defeated by the sale of the business.

A sole proprietorship is disregarded for U.S. income tax purposes. Accordingly, a sole proprietor must report the income and expenses of the business directly on his or her U.S. income tax return and pay any resulting U.S. income tax.

## General Partnership

A general partnership is a collaboration of two or more persons — by written or oral agreement — for the purpose of engaging in ongoing business activities. General partnerships are governed to a limited extent by state statutory law but, for the most part, the relationships among the partners are governed by the terms of the partnership agreement. A general partnership is not generally itself subject to U.S. income tax; instead, the U.S. income tax consequences of the general partnership's activities are passed through to the partners, who generally must pay U.S. income taxes on their allocable share of the general partnership's income, regardless of whether the partnership actually makes any distributions to its partners. Additionally, a partner in a U.S. partnership is treated, for U.S. income tax purposes, as if the partner were directly engaged in the business of the partnership. As a result, a non-U.S. partner will be required to file U.S. income tax returns, and pay U.S. income tax, because of the partner's participation in the partnership if the activities of the partnership constitute the "conduct of a U.S. trade or business" for U.S. income tax purposes. (See "Effectively Connected Income (ECI)," below.) Consequently, non-U.S. persons generally avoid direct participation in a general partnership that is likely to be treated as being engaged in a U.S. trade or business for U.S. income tax purposes.

The primary advantage of general partnerships is that they permit great flexibility in the allocation of rights, responsibilities, and economic benefits and burdens among the partners. General partnerships allow a number of partners to pool resources while maintaining a great deal of flexibility in deciding how to run their business, and how to distribute gains and losses for tax purposes.

There are a number of disadvantages to the general partnership form. First, a partner in a general partnership is jointly and severally liable for all partnership obligations to the full extent of such partner's business and personal assets.

Second, the flexibility provided by the formation of a general partnership can result in difficult negotiations and complex partnership agreements. Such complex agreements, along with an elaborate taxing scheme and complex accounting, cause the administrative costs associated with a general partnership to be higher than those associated with some other forms of business. Additionally, the withdrawal of a partner can be cumbersome, and any such withdrawal from a Massachusetts general partnership results in the legal dissolution of the partnership. As a general rule, partnerships become increasingly unwieldy as the number of partners increases.

## Limited Partnership

A limited partnership is a partnership created by written or oral agreement that provides for at least one general partner, who is responsible for managing the partnership, and at least one limited partner, who is usually a passive investor. Limited partnerships organized in Massachusetts must file a Certificate of Limited Partnership with the Massachusetts Secretary of the Commonwealth.

The principal advantage of a limited partnership is that it combines, to some extent, the flexibility of a general partnership with limited liability for the limited partners (but not the general partners) similar to what they would have as shareholders of a corporation. The administrative costs associated with a limited partnership are generally comparable to those associated with a general partnership. A limited partnership is taxed in the same manner as a general partnership. Thus, a limited partnership is not generally subjected to U.S. income tax itself; instead, the U.S. income tax consequences of a limited partnership's activities are passed through to its partners, who generally must pay U.S. income taxes on their allocable share of the limited partnership's income, whether or not the limited partnership actually makes any distributions to its partners. Both general and limited partners of a limited partnership are treated, for U.S. income tax purposes, as if they were directly engaged in the business of the limited partnership, and therefore will be required to file U.S. income tax returns, and pay U.S. income tax, as a result of their participation in the partnership if the activities of the partnership constitute the "conduct of a U.S. trade or business" for U.S. income tax purposes. (See "Effectively Connected Income (ECI)," below.) Consequently, non-U.S. persons generally avoid direct participation in a limited partnership that is likely to be treated as being engaged in a U.S. trade or business for U.S. income tax purposes. The general partners have flexibility in managing the enterprise within the confines of the

partnership agreement and state law. Limited partners are not responsible for partnership debts and liabilities beyond the amount of their investments. Additionally, since limited partners are simply passive investors, an increase in the number of limited partners does not make the partnership unwieldy to the same extent as an increase in the number of partners in a general partnership.

One disadvantage of a limited partnership is that limited partners are greatly restricted in the involvement they may have in the day-to-day management of the business enterprise. To protect themselves, limited partners often insist that the limited partnership agreement restrict the ability of a general partner to take certain key actions without the approval of the limited partners, such as the disposition of major assets. Therefore, important decision-making in limited partnerships can be slow. Further, limited partnership interests generally are securities, and therefore the offer and sale of those interests are subject to the requirements of state and federal securities laws.

Unlike a general partnership, the death, withdrawal or expulsion of a general partner does not automatically result in the statutory dissolution of a limited partnership.

## Limited Liability Company (LLC)

A limited liability company (LLC) is an entity organized under state law that combines certain advantages of a partnership (a single level of U.S. income taxation at the owner level) and a corporation (limited liability to owners of the entity).

Key features of an LLC include:

***Flow-Through Tax Treatment***

An LLC with only one member is generally disregarded for U.S. income tax purposes, and the single member must report and pay U.S. income taxes on the LLC's taxable income as if that member conducted the activities of the LLC itself. An LLC with more than one member is generally treated as a partnership for U.S. income tax purposes. As a partnership, an LLC is not generally subject to U.S. income tax itself; instead, the U.S. income tax consequences of the LLC's activities are passed through to its owners (who are referred to as "members"), who must pay U.S. income taxes on their allocable share of the income, whether or not the LLC actually makes any distributions to its members. Additionally, a member of an LLC is treated, for U.S. income tax purposes, as if such member directly engaged in the business of the LLC. As a result, a non-U.S. member of an LLC will be required to file U.S. income tax returns, and pay U.S. income tax, because of the member's

participation in the LLC if the LLC's activities constitute the "conduct of a U.S. trade or business" for U.S. income tax purposes. (See "Effectively Connected Income (ECI)," below.) Consequently, non-U.S. persons generally avoid direct participation in a LLC that is likely to be treated as being engaged in a U.S. trade or business for U.S. income tax purposes.

An LLC may elect to be treated as a corporation for U.S. income tax purposes, in which case the flow-through treatment discussed above would not apply.

***Limited Liability***

LLC members receive protection from the obligations of an LLC similar to that enjoyed by corporate shareholders.

***Flexible Management***

LLC members may participate actively in the management of the LLC. Alternatively, management of the LLC may be delegated to a manager or group of managers who may or may not be members.

***Flexible Capital Structure***

An LLC may issue multiple classes of ownership interests, may have an unlimited number of owners and is not constrained as to the types of owners who may hold interests.

These features make LLCs well-suited both for investment vehicles and for operating businesses in circumstances where the limited liability of all owners is important and where the freedom of planning the distribution and allocation of LLC income and losses is desirable.

One disadvantage of LLCs is that there is not a well-developed body of case law dealing with LLCs. As a result, the legal rules applicable to this area may be somewhat less predictable. The administrative costs associated with an LLC, assuming it elects to be taxed as a partnership, are generally comparable to those associated with a general partnership.

## Business Trust

A business trust (often referred to as a "Massachusetts business trust" because its use first became common in Massachusetts) is a hybrid entity that combines the characteristics of a corporation, a partnership and a trust. A business trust is a form of business organization in which property is held and managed by trustees for the benefit of the owners of the enterprise. The trustees are appointed under a declaration of trust or other trust instrument, which also describes the trust property and establishes procedures for the management of the trust and its business. The owners, who receive transferable certificates of beneficial

interest in the trust property, may be referred to as the "shareholders" of the business trust. A business trust that is created under Massachusetts law is required to file its declaration of trust with the Massachusetts Secretary of the Commonwealth and with the city or town clerk of every municipality in which the trust maintains a usual place of business.

The business trust form was developed initially to achieve limited liability for certain real estate businesses for which local law made the corporate form substantially unavailable. The popularity of the business trust as a vehicle for new open-ended investment companies is due to its flexibility and the simplicity of its organization and operation.

The business trust has certain advantages normally found in the corporate form. First, it has perpetual existence (based on an early Massachusetts Supreme Judicial Court case). Unlike a general partnership, a business trust does not terminate if owners die or withdraw. A second advantage of a business trust is a limit on the potential liability faced by owners. The shareholders of the trust are liable for trust obligations only up to the amount of their investments in the trust. The trustees themselves face potentially unlimited liability, but that liability may be limited by the trust instrument and possibly by the general Massachusetts trust statute that limits a trustee's liability on contracts properly entered into in the trustee's fiduciary capacity unless the trustee failed to reveal his or her representative capacity and identify the trust estate in the contract. Finally, as in the case of limited partnership interests, shares in a business trust are freely transferable except as restricted by the agreement establishing the entity and federal and state securities laws.

One disadvantage of a business trust is that only the trustees may participate in the active management of the enterprise (the shareholders are in a position similar to that of limited partners in a limited partnership). Another disadvantage is that statutory law governing business trusts is less developed than that governing corporations or partnerships. Therefore, one has less guidance in determining how a court might answer a question relating to business trusts. Also, interests in business trusts are generally deemed to be securities for the purposes of state and federal securities laws.

Unless a business trust elects to be taxed as a corporation for U.S. income tax purposes, it is generally taxed as a partnership. As such, the business trust is not generally subject to U.S. income tax itself; instead, the U.S. income tax consequences of the business trust's activities

are passed through to its shareholders, who must pay U.S. income taxes on their allocable share of the income, whether or not the business trust actually distributes any income to its shareholders; and a shareholder of a business trust is treated, for U.S. income tax purposes, as if the shareholder directly engaged in the business of the business trust. As a result, non-U.S. shareholders of a business trust that has not elected to be treated as a corporation for U.S. income tax purposes will be required to file U.S. income tax returns because of their participation in the business trust if the business trust's activities constitute the "conduct of a U.S. trade or business" for U.S. income tax purposes. (See "Effectively Connected Income (ECI)," below.) Consequently, non-U.S. persons generally avoid direct participation in a business trust that has not elected to be treated as a corporation for U.S. income tax purposes but that is likely to be treated as being engaged in a U.S. trade or business for U.S. income tax purposes. Use of the business trust form by non-U.S. concerns is somewhat uncommon, but may be appropriate in special circumstances.

## Branch of a Foreign Entity

One can do business in the United States as a branch of a foreign business entity. In Massachusetts, as in most jurisdictions, a simple filing with the Massachusetts Secretary of the Commonwealth is required of a foreign entity wishing to transact business within the state.

The principal advantage of transacting business as a U.S. branch of an existing foreign entity is that organizational expenses are kept to a minimum since no new entity needs to be created. The disadvantage, however, is that doing business in such a form exposes the entity's non-U.S. assets to claims arising out of activities of the U.S. branch as well as possible application of a U.S. branch profits tax and the obligation to file U.S. income tax returns. (See "Methods of Business Operation and Repatriation of Earnings.")

## General Procedural Requirements

### *Annual Reports*

Massachusetts corporations, limited partnerships, limited liability companies and business trusts must file with the Massachusetts Secretary of the Commonwealth a report of condition or "annual report" each year and must also make filings with the Massachusetts Secretary of the Commonwealth upon the occurrence of certain events. The annual reports require disclosure of information about officers and directors (in the case of corporations), general partners (in the case of limited partnerships), managers if any (in the case of limited liability companies) and trustees (in the

case of business trusts), but do not require disclosure of the identity of equity holders. Failure to file annual reports can result in imposition of fines and, if the failure continues for a period of time, in the involuntary dissolution of an entity by the Massachusetts Secretary of the Commonwealth.

***Qualification in Massachusetts***

As a condition to its conducting business in Massachusetts, a foreign corporation, limited partnership or limited liability company (that is, one organized under the laws of any jurisdiction other than the Commonwealth of Massachusetts) must file with the Massachusetts Secretary of the Commonwealth a foreign corporation certificate, application for registration as a foreign limited partnership or application for registration as a foreign limited liability company, as the case may be. Failure to file the necessary certificate or application can result in the imposition of fines and will prevent the entity in question from bringing suit in any Massachusetts court (at least until the necessary certificate or application has been filed). Foreign corporations, limited partnerships and limited liability companies are also required to file annual reports with the Massachusetts Secretary of the Commonwealth.

***Using an Assumed Name***

Any person or entity that conducts business in Massachusetts under an assumed name (that is, any trade name or title other than his, her or its own legal name) must file, with the city or town clerk of each municipality in which it maintains an office, a certificate (often referred to as a "doing business" or DBA certificate) stating his, her or its legal name. (No such certificate needs to be filed for a corporation doing business under its true corporate name.)

***Issuing Shares and Other Securities***

Both federal law and Massachusetts law regulate the offering or sale of securities. In this connection, the term "securities" includes many forms of investment in an enterprise and is not limited to the purchase of stock. Filings may need to be made with appropriate government agencies and specified disclosures may need to be made to prospective investors before securities can be offered or sold to certain classes of persons. For this reason, a non-U.S. business proposing to seek outside financing for a venture in the United States should consult with qualified counsel before initiating contacts with prospective investors to ensure compliance with applicable federal and state securities law.

## Corporations

Most U.S. businesses are organized as corporations, which are limited liability joint-stock companies with powers to act as legal "persons" separate from their shareholders. Some businesses, particularly professional service organizations and private investment funds, may be organized as general or limited partnerships, limited liability companies or limited liability partnerships. Some other businesses may be organized as so-called Massachusetts business trusts, with powers similar to corporations but a legal structure founded on fiduciary law. All of those forms and others are available to businesses operating in Massachusetts. (See the preceding section entitled "Forms of Doing Business in the United States.") This section is a brief summary of the legal formation and operation of a corporation.

### Forming the Corporation

The form of entity often chosen by non-U.S. businesses is the corporation, since, among other things, the corporate form provides protection for its owners against liabilities incurred in the business; a corporation generally does not cause its owners to be subject to taxation in the United States; a corporation can be organized quickly and relatively inexpensively; and a well-established body of statutes and case law permits the rights and responsibilities of the corporation, its owners and management, and persons with whom it deals to be ascertained with relative clarity and certainty. A corporation is also a convenient and efficient vehicle through which to obtain outside financing (subject to compliance with applicable federal and state securities laws).

Corporations in the United States are created under state (rather than federal) law. A corporation doing business in Massachusetts may be organized under the Massachusetts Business Corporation Act or under the corporation law of another state, such as Delaware. Many U.S. companies (including many doing business in Massachusetts) choose to incorporate under Delaware law. Publicly-held companies in particular may wish to take advantage of particular features of Delaware corporation law, which, for example, may permit added flexibility in matters of corporate governance such as stockholder voting or provide protection against hostile takeovers.

Those provisions may provide little or no advantage, however, to a non-U.S. firm that has a wholly-owned subsidiary in the United States. You should consult with qualified Massachusetts counsel before selecting Delaware or another state as the jurisdiction in which to organize a corporation that will do business in Massachusetts.

An important preliminary step in organizing a corporation under the Massachusetts Business Corporation Act is, of course, to choose a name for the corporation. The name should be sufficiently distinguishable as to avoid confusion with any other corporation or entity organized or qualified to do business in Massachusetts and must contain a term such as "Corporation," "Incorporated" or "Inc." identifying the business as a corporation. It is advisable to arrange for a search to confirm that the desired name is available and, if so, to reserve it in advance with the Massachusetts Secretary of the Commonwealth.

A Massachusetts corporation is organized by filing Articles of Organization with the Massachusetts Secretary of the Commonwealth, accompanied by payment of a relatively modest filing fee. The information required to be included in the Articles of Organization is specified by the Massachusetts Business Corporation Act and is not extensive. The Articles must be signed and filed by one or more incorporators, who may or may not be employees or principals of the non-U.S. stockholder. It is not necessary to disclose in the Articles (or otherwise) the identity of the stockholders. The Articles of Organization become effective, and the corporation comes into existence, immediately upon filing of the Articles with the Massachusetts Secretary of the Commonwealth, unless a later date is specified. The entire process can be accomplished within a matter of days, if necessary.

Contemporaneously with filing the Articles of Organization, the incorporators elect initial directors of, and adopt bylaws for, the new corporation. The persons elected as the initial directors then typically adopt other preliminary resolutions, for example, electing initial officers, directing the opening of a bank account, approving forms of corporate seal and stock certificate, and authorizing the issuance of capital stock of the corporation to its stockholder or stockholders. The day-to-day management of the corporation is carried out by its officers, under the general supervision of the board of directors. The board of directors appoints the officers of the corporation, generally annually. Also, the stockholders of the corporation hold an annual meeting during which directors are elected for the ensuing year. Meetings of the stockholders and directors of a Massachusetts corporation may be held within or outside of the United States. However, it is not necessary to hold formal meetings of the stockholders or board of directors because, under the Massachusetts Business Corporation Act, any action that can be taken at such a meeting can also be taken by a telephone meeting or unanimous written consent of the stockholders or directors, as the case may be, without holding an

actual meeting. The stockholders may even act by less than unanimous written consent, if the corporation's Articles of Organization specifically permit it and certain requirements as to prior notice to nonconsenting stockholders are fulfilled.

A Massachusetts corporation need not have more than three directors, and it may have fewer if permitted by its Articles of Organization (though it may, if desired, have more). In any case, a corporation with only a single stockholder need not have more than one director. Directors are not required to be officers, employees or stockholders of the corporation, nor do they need to be residents or citizens of the United States. The officers of the corporation must, by statute, include a president, a treasurer and a secretary; any number of vice presidents and other officers are also permitted. Officers may, but need not, be directors, and one person may serve in one or more of the statutory offices as well as act as a director. Officers need not be stockholders or U.S. residents or citizens. However, the corporation must have a registered office and registered agent in Massachusetts. The registered agent can be an individual, including any officer of the corporation, whose business office is also the registered office of the corporation.

Shares of stock in a Massachusetts corporation may be owned by any natural person, corporation or other entity, including non-U.S. citizens or entities. There is no statutory minimum investment for a Massachusetts corporation, and, subject to certain limitations, stock can be issued for cash, promissory notes, services or other property. (Be aware, however, that inadequate capitalization of a Massachusetts corporation may risk loss of the limitation of liability of its shareholders, a phenomenon known as "piercing the corporate veil.")

A Massachusetts corporation can own or deal in real estate or any other form of property and, with limited exceptions (for example, the practice of law, medicine or another profession), can engage in almost any business activity.

## Record Keeping and Filing Requirements

To maintain the limited liability of its shareholders, a Massachusetts corporation must observe the formalities of corporate form, such as holding regular meetings (or actions by written consent) of its shareholders and directors, maintaining corporate minutes and stock records, proper accounting for the property of the corporation, and avoiding commingling of funds of the corporation with those of its shareholders. A Massachusetts corporation must also file annual reports with the Massachusetts Secretary of the Commonwealth

as described in the previous section on "Forms of Doing Business in the United States."

## Joint Ventures

A foreign business that wants to do business in the United States may desire the assistance of a U.S. business in areas such as manufacturing, marketing or product distribution, particularly if the foreign business has not previously operated in the United States. In that situation, the foreign business may find it advantageous to enter into a joint venture with the U.S. business. A properly structured joint venture will enable a foreign business to obtain assistance in needed areas, obtain guidance and gain experience in conducting business in the United States, and make contacts in the U.S. business community. The foreign business may then, in the future, proceed on its own, either with a new business activity or by buying out the interest of its U.S. venture partner.

A joint venture arrangement may be tailored to fit any business, whether in the real estate, manufacturing, retail, service or any other sector of the U.S. economy (with limited exceptions for certain regulated industries in which foreign participation may be restricted). Massachusetts law permits great flexibility in structuring joint venture arrangements. Joint ventures are, however, complex arrangements requiring the consideration, analysis and resolution of legal issues in a diverse range of specialties, including tax, antitrust and intellectual property. Foreign businesses considering a joint venture arrangement should carefully select U.S. legal counsel with the experience and expertise to advise them in these areas.

### Structure

As previously mentioned, a joint venture is not a specific type of legally constituted entity, as is a corporation, partnership or limited liability company, but is merely a generic term used to indicate the existence of a working relationship between parties that join together in a common enterprise. The manner in which the parties join together may vary and will be determined by a number of factors. For example, if the foreign business does not require substantial assistance, requires assistance in a narrowly defined area or requires assistance for only a short period of time, its strategy should probably be to enter into a contract with a U.S. company to provide the services required. If, however, the foreign business requires more substantial services and desires to establish a longer-term relationship with the U.S. business, the better strategy would be to form a joint venture entity to conduct the business.

The foreign business will want to be insulated from liability for financial obligations and for liabilities

arising from the conduct of the U.S. business, while at the same time being active in management and controlling the business. As discussed in "Forms of Doing Business in the United States", general partners of a partnership are liable for the partnership's obligations, and limited partners of a limited partnership avoid liability only if they do not participate in the control of the business. As a result, a foreign business seeking both insulation and active management and control should not enter into a partnership directly with its U.S. joint venturer.

There are two general approaches most advantageous to the foreign business in organizing a joint venture. The first approach is for the foreign business to organize a U.S. subsidiary corporation. That corporation would then form a partnership or limited liability company with the U.S. joint venturer. The second approach is the formation of a U.S. corporation jointly owned by the foreign business and the U.S. joint venturer. A foreign business that uses either approach and, in fact, maintains an arms-length relationship with the joint venture would generally achieve its goal of insulation from liabilities arising from the business of the joint venture. In addition, the foreign business would generally not be subject to the jurisdiction of U.S. courts. There are, however, exceptions. For example, a foreign business may subject itself to jurisdiction over product-liability claims in the U.S. merely by sending its goods to the United States. A foreign business whose products are sold or used as components in products that are sold through a joint venture in the United States should consult U.S. legal counsel to determine whether, regardless of the form of joint venture entity selected, it is prudent for the foreign business to maintain product-liability insurance.

Regardless of the legal form chosen to conduct the joint venture, the terms of the venture should be negotiated and documented in detail. Although legal counsel will include standard provisions developed through experience to protect the foreign business, there are many areas that will require negotiation. The joint venture documents should, for example, explicitly describe each party's present and future contributions to the venture in terms of capital, management, technology, intellectual property rights, manufacturing facilities, product distribution and the like; each party's ownership interest in, and rights to receive distributions of profits of, the venture; the duration and manner of winding up the venture; governance of the venture; a mechanism for dispute resolution, particularly in the case where each venturer has an equal ownership interest and there are restrictions on transfer of the ownership interests. Depending on its long-term U.S. strategy, the foreign business

may also find it advantageous to negotiate, at the inception of the venture, a right to buy out its U.S. joint venturer in the future.

### Certain Income Tax Considerations

U.S. income (including withholding) tax consequences will be a significant consideration in the type of joint venture entity selected.

If the joint venture is conducted through a corporation, the joint venture's income will be subject to a "double taxation" system under which the income of the corporation will be taxed at the corporate level, and distributions of earnings to shareholders generally will trigger a second income tax at the shareholder level. Distributions by a U.S. corporation to non-U.S. shareholders are generally subject to a U.S. federal income withholding tax of 30 percent (unless reduced by an applicable income tax treaty). Ownership of stock in a U.S. corporation does not, however, generally subject a non-U.S. person to U.S. tax return filing obligations.

If the joint venture is conducted through a partnership (which, for U.S. tax purposes, generally also includes a multi-member limited liability company), the partnership is not generally subject to income tax itself; instead, the income tax consequences of the partnership's activities are passed through to its partners, who must pay taxes on their allocable share of the income, whether or not the partnership actually distributes any income to its partners. Additionally, a partner of a U.S. partnership is treated, for tax purposes, as if the partner directly engaged in the business of the partnership. As a result, non-U.S. partners of a partnership may be required to file U.S. tax returns because of their participation in the partnership if the partnership's activities constitute the "conduct of a U.S. trade or business" for U.S. tax purposes (see "Effectively Connected Income" below). An income tax treaty (if any) between the United States and the country of the non-U.S. joint venturer may affect the tax liability (including the applicability of withholding taxes) with respect to income that the non-U.S. joint venturer receives (or is deemed to receive) from any joint venture entity.

## Business Financing

This section of the guide is a brief description of some of the more common types and sources of financing generally available to establish and finance the U.S. operations of a foreign business. Both U.S. and Massachusetts law allow great flexibility in tailoring financing packages to the needs of particular industries and to individual businesses within those industries. Financially astute business people working with experienced legal counsel will be able to structure a financing package that is appropriate for the particular business and can be implemented within the

framework of U.S. and Massachusetts laws and the requirements of lenders and investors.

The following discussion does not address tax considerations that may be relevant, and very important, to cross-border equity and debt financing transactions. For a general overview of certain U.S. federal and Massachusetts income tax matters, see "Taxation", below.

## Equity Financing

All businesses require an adequate level of equity capital. What is adequate varies by industry and by the circumstances of a particular company within an industry. A business that anticipates substantial borrowing to finance its start-up costs and operations will need to satisfy its lenders that it is adequately capitalized. The amount of equity capital should be finally determined only after presentation to, and approval by, prospective lenders of a pro forma balance sheet for the business.

As a general matter, the U.S. does not restrict the flow of funds between the U.S. and other countries. Subject to applicable reporting requirements described under "Regulation of International Trade and Investment", funds may be brought into the U.S. without limitation as to amount and, together with any profits earned, may be repatriated without restriction as to amount. Thus, a foreign business may bring into the U.S. funds needed to capitalize its U.S. operations, and funds that are no longer needed in the business or that are realized when the business is wound up may be repatriated and converted into foreign currency at then prevailing exchange rates.

A foreign business that desires to retain sole ownership of its U.S. operations will provide all the equity capital for the business. However, various sources of equity capital are available to foreign businesses. Commercial banks in the U.S. do not provide equity capital. Investment banking firms, however, may be a source of equity capital, not only investing their own funds, but also arranging for investment of equity funds by their customers. This source of equity capital will generally be available only if the foreign firm is an established business. Most of the major investment banking firms in the U.S. operate on an international basis, enabling a foreign investor to arrange equity financing in the U.S.

Equity capital raised from others to establish a business in the U.S. in the form of a corporation will take the form of either common stock or preferred stock. Although Massachusetts law permits the creation of different classes of common stock, a purchaser of common stock would have the same rights per share to dividends and distributions as the foreign business holder of common stock of a U.S. corporation. It is more likely that a third-party equity investor will want to

purchase a class of preferred stock, which will entitle the holder to a return on the investment and possibly a fixed yield on that investment before any amounts are paid to the foreign parent if the business is wound up, and which may entitle the holder to a specified level of dividends before any are paid to the holders of common stock. The preferred stock issued in such a transaction will likely be convertible into common stock at an agreed conversion rate, or may entitle the holder to participate with holders of common stock in dividends and other distributions after the preferred stockholder has been paid the preferential dividends and distributions to which it is entitled. Equity financing may also be raised for businesses established in other forms, as described above, in which case somewhat comparable distinctions between types of equity interests can be achieved but, except in certain industries, the complexity of doing so often makes it prohibitive.

Issuing equity securities involves negotiation of many issues, including dividend and liquidation rights and preferences, voting rights, preferred stock conversion rights, rights to appoint representatives to the board of directors, information reporting, affirmative and negative operating covenants, remedies in the event of failure to make preferred payments when due, rights to participate in future financings of the business, rights to participate in sales of shares by other equity holders, and rights of first refusal if either the foreign concern or U.S. investor desires to sell its shares. It is likely that the U.S. investor will, in addition, want to provide an exit strategy for its investment. This might take the form of an option to require the purchase of the U.S. investor's shares after some period of time or upon the occurrence of an agreed event, a right to participate in a public offering of shares by the corporation, or a right to require the corporation to register the public sale of the U.S. investor's shares. Legal counsel experienced in negotiating equity placements will be familiar with the many pitfalls in negotiating these and other issues that arise in private equity placements.

Venture capital, although a major source of equity capital in the U.S. for smaller and developing businesses, may not be an attractive financing alternative for a foreign business seeking to operate in the U.S. Venture capitalists have traditionally preferred rapid-growth businesses with the potential of a public offering or sale of the business to a strategic buyer and are unlikely to be interested in long-term investments. In addition, venture capitalists will ordinarily demand a high degree of control to protect their investment and can be expected to react relatively quickly and insist on changes when a business does not perform as expected. They may also insist on provisions giving them control of the board of

directors or actual ownership control in the event of default. Finally, given the inherent risk in venture capital investing, high returns on investments are necessary to balance the successes with the failures in the venture capitalist's portfolio. Consequently, the cost of venture capital financing tends to be quite high.

With some exceptions, the public securities markets are generally most appropriate for mature businesses, although market conditions will at times allow less developed businesses with high growth potential to make initial public offerings at an earlier stage of development. The public securities markets are highly regulated under a system based on the concept of full disclosure of all material information. A company that offers its securities to the public is subject to extensive public reporting requirements, both at the time of the offering and on an ongoing basis.

"Insiders," including officers, directors and significant equity holders, may trade in securities of their company only on the basis of information available to the general public and are subject to various other securities trading restrictions.

## Debt Financing

Debt financing is available to satisfy business needs at various stages of growth from start-up to maturity. The U.S. debt market is segmented, with different lenders providing different types of loans, and some lenders specializing in providing financing to businesses in specific industries. A foreign concern must be careful to select lenders that are knowledgeable about the foreign concern's industry and capable of structuring a financing package that suits its particular needs. Some of the more common types and sources of debt financing are described here.

### *Asset-Based Loans*

Asset-based loans generally provide short-term credit in the form of demand loans, seasonal lines of credit or single purpose loans for the purchase of specific assets. Often the amount of financing available is based on a percentage of various types of assets owned by the borrowing company.

Working capital financing is often obtained through asset-based loans made against percentages of the borrower's accounts receivable and/or inventory accepted by the lender as collateral. The lender may also take a security interest in other assets that the lender will not include in computing the borrowing base for loans to the borrower. Commercial banks and commercial credit companies are the most common sources of this type of financing.

Another type of asset-based lending, equipment financing, may be available both to finance the purchase of new equipment and to realize cash from existing equipment. While maximum loan

value and more advantageous financing terms will be available for the financing of new equipment, lenders will often provide financing against a percentage of the value of existing equipment. The types of assets that may be financed in this manner extend beyond conventional equipment and machinery and include furniture, office partitions and virtually any other fixed assets. Typical sources of this type of financing are commercial banks, commercial finance companies and leasing companies. In addition, sellers of fixed assets often provide direct financing to their customers.

***Term Loans***

For more mature companies with predictable cash flow, banks, insurance companies and pension funds provide longer-term loans. Long-term loans may have either floating or fixed rates of interest. These loans are can be secured or unsecured depending on the borrower's financial strength, and long-term lenders rely heavily on extensive affirmative and negative covenants, including financial ratios (largely based on the company's EBITDA), that set forth parameters within which the borrower must conduct its business. Long-term loans are generally used to fund working capital needs and to finance acquisitions and expansions of capital assets.

***Subordinated Loans***

Subordinated loans, sometimes referred to as "mezzanine" loans, are term loans that are subordinated in right of payment (and, if the loans are secured, in lien priority) to other loan obligations of the borrower, often obligations for loans from secured creditors and banking institutions. The term "subordination" has little intrinsic legal meaning. The terms of subordination must be carefully negotiated in detail between the senior and subordinated lenders and must clearly set forth the relative priorities of the different lenders to the cash flow and assets of the borrower and the circumstances under which the subordinated lender is entitled to receive payments and exercise its remedies as a creditor both generally and in the event of a payment or other default on its loan.

Because of the inherently greater risk that results from subordination, subordinated lenders require a considerably higher return than do senior lenders. Particularly in the case of earlier-stage companies, the near-term projected cash flow may not be sufficient to pay all the interest on both the senior and the subordinated debt. In these situations, the subordinated lender may be willing to permit payment of a portion of its interest on a current basis and to defer payment of the balance to a time when the borrower's projections reflect adequate cash availability. The subordinated

lender is likely to require that any deferred interest itself bear interest at an agreed rate, typically by adding it to the principal of the loan. In addition, often only part of the subordinated lender's return will be reflected in the interest rate. The balance of the return is more speculative and is provided by "equity kickers," often in the form of warrants to purchase common stock of the borrower at a favorable price. In appropriate situations, a borrower's capital structure may include more than one class of subordinated debt. In that event, the terms of subordination of the more junior lenders will be negotiated separately with both the senior lender and the holders of the more senior subordinated debt.

Subordinated debt financing is generally provided by venture capital funds that focus on later-stage growth companies, specialized mezzanine lending funds and insurance companies. Because this debt is subordinate to the borrower's senior debt, senior lenders will often view it as equity in performing their credit analysis.

***Trade Credit***

Trade credit is so oriented toward a single purpose and so short-term that it is often overlooked as a source of capital for general purposes. However, to the extent that a company is able to obtain credit from its suppliers and convert the merchandise purchased into cash to pay the suppliers within the credit term, it reduces its need to borrow from banks and commercial credit companies. The stage of development of a business has a significant effect on its ability to obtain trade credit. In the start-up phase, trade credit will be established based on financial condition, while later, emphasis will shift to consistency of earnings and the payment record of the business. A more mature business with a supplier's confidence may be able to negotiate credit terms, although suppliers are limited in this respect by the Robinson-Patman Act, which prohibits discrimination in price, terms or conditions of sale among buyers who compete with each other. (See "Antitrust and Trade Regulation")

***Public Securities Markets***

Debt financing in the public securities markets is available to mature borrowers of substantial sums. This type of financing is generally long-term, may be secured or unsecured and may be at either a fixed or variable interest rate. While the cost of money tends to be lower and operating covenants tend to be less restrictive in publicly placed debt than in privately placed debt, the cost of issuance and ongoing transaction and reporting costs tend to be significantly higher in the public markets. In addition, the interests of holders of publicly-issued debt are represented by a trustee with fiduciary responsibilities, who generally can agree to amendments or to waivers of default only with the approval of a specified percentage of the debt

holders. As a result, issuers of publicly-held debt will encounter less flexibility and greater delay in dealing with defaults as well as with amendments or waivers necessitated by changes in business circumstances.

## Labor and Employment Relations

Productive and skilled employees are essential for the success of any business. Massachusetts is fortunate in having a highly-educated and disciplined workforce. When recruiting people to staff a business, it is important to be familiar with the basic rules of labor and employment law in the United States in the following areas: hiring employees; establishing the terms, conditions and benefits of their employment; and terminating employees. Each of these areas is discussed briefly here.

### Hiring

Most employees in the U.S. do not have written employment contracts. They are hired to work on what is known as an "at-will" basis. This means that they are not employed for any definite period of time, and either the employee or the employer may terminate the employment relationship without prior notice at any time and for any reason, as long as the reason is not an unlawful one. Employers who want to employ persons on an at-will basis should have their employment application forms, offer letters, employee handbooks and any written personnel policies and procedures reviewed by a lawyer to ensure that they do not inadvertently create enforceable contracts of employment for a particular term.

With respect to initial employment applications, Massachusetts law generally prohibits employers from asking questions about an applicant's "criminal offender record information," which includes information about criminal charges, arrests, and incarceration. On the other hand, employment applications used in Massachusetts must contain specific language (1) advising the applicant that it is unlawful for employers to require or administer a polygraph test as a condition of employment; (2) inviting applicants to list their verifiable volunteer work along with their employment history; and (3) advising applicants about Massachusetts' prohibition on discrimination on the basis of genetic information.

Some employees, such as high-level executives, may have written employment contracts that establish a particular period of employment and describe the terms and conditions of the employment relationship. Those contracts are usually drafted with the assistance of counsel.

Other employees (for example, hourly paid workers in certain manufacturing jobs) are represented by labor unions that have negotiated collective bargaining agreements, which set the

terms and conditions of the employment relationship. The number of employees represented by labor unions in the U.S. has been declining in recent years, and it is unusual for labor unions to represent employees who work for high-technology and many other businesses in Massachusetts.

Employers in the U.S. are prohibited by both federal and state laws from discriminating in the hiring of employees on the basis of race, sex (including pregnancy), age (applies to people 40 years and older), color, religion, national origin or genetic information. Federal and state laws also prohibit discrimination against qualified handicapped persons who are able to perform the essential functions of a job with or without reasonable accommodations. Massachusetts state law also prohibits discrimination based on a person's ancestry, sexual orientation, gender identity, and military service.

A federal law, the Immigration Reform and Control Act, makes it unlawful to employ aliens in the U.S. who do not have appropriate visas authorizing them to work. A separate section on "Immigration" describes the types of visas available under U.S. law.

Larger employers (those with 50 or more employees) that do business with the federal government and have a contract in excess of $50,000 may have to prepare written "affirmative action plans" in an effort to recruit and promote qualified women and minorities in their workforces.

## Terms and Conditions of Employment

For the most part, employers in the U.S. are free to determine the compensation and benefits for their employees without any regulation by the government. There are, however, some important exceptions to this general rule, as described more fully below.

### *Personnel Records Laws*

Employers with 20 or more employees must retain employees' personnel records without deletions of information (except by mutual agreement of the employer and the employee) for 3 years after termination of employment. Personnel records must include the following: the name, address, and date of birth of the employee, a job title and description, a rate of pay and other compensation, the employee's start date, the employee's job application and other related materials, any written performance evaluations, any written warnings or documents relating to disciplinary action, any waivers signed by the employee, and any termination notices.

All employers are required to give notice to an employee within 10 days of placing in the employee's personnel records any information to the extent that the information is, has been used,

or may be used to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action. Upon written request, an employee (including a former employee) is entitled to review his or her personnel records during normal business hours and to request a copy of the records within 5 days of the written request. If the employee disagrees with something in his or her records and the employee and the employer cannot agree on removal or correction of the information, the employee can submit a written statement explaining the employee's position that must then become a part of his or her personnel records.

***Privacy and Data Security***

The Massachusetts Privacy Act prohibits "substantial or serious interference" with an individual's privacy. Whether an employer's inquiry into an employee's personal affairs is a violation of the Massachusetts Privacy Act depends on the balancing of the employer's legitimate business interest in the information against the intrusion into the employee's reasonable expectation of legitimate privacy. The Privacy Act may be implicated in cases of employee drug-testing, searches by employers, and employer surveillance. All of those scenarios are evaluated under a balancing test. An employer should seek the advice of counsel concerning these matters.

In addition, Massachusetts has enacted a data security law and related regulations that apply to any individual, company or organization that collects or maintains personal information in connection with employment or the sale of goods or services. "Personal information" includes names of Massachusetts residents in combination with their Social Security numbers, state driver's license numbers, identification card numbers or financial account numbers. Those holding such information are required to adopt a comprehensive, written information security program that adopts reasonable security measures to safeguard this personal information. The regulations provide that the plan must contain a number of specific requirements, but also require that the plan must be tailored to the particular business and the type and amount of personal information in its possession.

Unlike in many other countries, there is no single, comprehensive US law controlling the security and use of personal information. Rather, protection exists under a mix of federal and state laws and case law, often relating to particular industries and types of information (e.g., financial, education, genetics, health care).

***Wages***

A federal law, the Fair Labor Standards Act, requires most employers to pay their employees a minimum wage ($7.25 per hour, effective July 24, 2009). Additionally, it requires employers to pay overtime premiums at the rate of one and one-half times an employee's regular rate of pay for all hours worked in excess of 40 in a week. Except in the case of minor children, there is no limit on the number of hours that employees can work in a week as long as they receive one full day of rest (usually Sunday) in each seven-day period. Certain salaried employees who are employed as executives, professionals or administrative personnel are exempt from these minimum wage and overtime pay requirements.

Massachusetts law is essentially the same as the federal law concerning these matters, with a few exceptions. The Massachusetts minimum wage was increased to $9.00 per hour, effective January 1, 2015. The Massachusetts minimum wage will increase to $10.00 per hour effective January 1, 2016, and $11.00 per hour effective January 1, 2017. By law, the Massachusetts minimum wage must be at least $0.50 per hour higher than the effective federal minimum rate. The exemptions from Massachusetts' minimum wage and overtime requirements also differ from those under federal law.

Under Massachusetts law, employers may elect to pay employees on a weekly or bi-weekly basis. Employers may pay certain employees – including exempt employees and nonexempt employees who are paid on a salary basis for a workweek of substantially the same number of hours from week to week – semi-monthly or, with the employees' consent, monthly. In all cases, employees must be paid within 6 days of the end of the employer's pay period.

***Workers' Compensation for Injured Employees***

In Massachusetts, as in every other state, employers must provide workers' compensation benefits to employees who are injured during the course of their employment. These benefits are typically provided through private insurance that the employer obtains at or before the time employees are first hired. The cost of the insurance is determined by factors such as the size of the employer's payroll, the nature of the business (for example, construction, manufacturing or office work) and the employer's prior record concerning benefits paid to injured employees. The benefits that injured employees receive are set by law. The benefits are the employee's sole remedy for work-related injuries or illnesses, and employees may not bring court claims against their employers for additional benefits. It is illegal to retaliate against or

terminate an employee for filing a workers' compensation claim.

### *Unemployment Compensation for Terminated Employees*

Employers must also pay a quarterly contribution to fund unemployment compensation benefits for employees who are terminated involuntarily. Each employer's quarterly contribution is determined by a variety of factors, including the size of the employer's payroll, the number of employees, the employer's individual claims experience and how much money the state needs to fund the program.

### *Vacations and Holidays*

Neither federal nor Massachusetts law requires an employer to provide employees with either vacation time off or vacation pay. It is common, however, for employers to provide employees with paid vacation time. The amount of paid vacation a particular employee receives is typically determined by his or her length of service or position. It is not unusual for employees to receive from one to four weeks of paid vacation time in a year.

Time off for holidays is regulated by state law only. In Massachusetts, most employers are required to allow employees to take off the entire day on five holidays (Memorial Day in May, Independence Day on July 4, Labor Day in September, Thanksgiving Day in November and Christmas Day on December 25) and to take off half a day in the morning on two days (Columbus Day in October and Veterans Day in November). Employers are not required by law to pay employees for holiday time off, but it is a well-established custom to do so. Employers sometimes pay overtime premiums to those who are required to work on a holiday, although in Massachusetts such premium pay is generally only required as a matter of law for people who work in retail establishments on New Year's Day, Memorial Day, Independence Day, Labor Day, Columbus Day or Veterans Day. Many employers are also required to allow employees to take unpaid time off on Sundays, with exemptions from this law for certain businesses. Retailers must pay time and a half to their hourly employees on Sundays.

### *Health Insurance*

Under the federal Patient Protection and Affordable Care Act of 2010 (often called the ACA or "ObamaCare"), certain employers are required to provide health insurance benefits for their employees, and other employers do voluntarily provide some type of group health insurance coverage in order to attract and retain capable employees. The ACA generally does not affect employers with fewer than 50 employees (full-time or part-time). Employers with fewer than 25 employees, though not penalized under federal law for failure to provide health coverage, will be eligible for a tax credit if they do. Should a company have more than 50 employees, the new federal legislation will apply, and the company

should seek assistance in complying with its many parts. The cost of such insurance can vary substantially. Typically, an employer pays either a percentage of or all the cost of the insurance.

A state law, the Massachusetts Health Care Reform Act, strongly encourages employers to provide group health insurance for their employees. An employer with 11 or more full-time employees that does not offer group health insurance and does not make a "fair and reasonable" contribution toward the premiums for such insurance may be subject to an annual surcharge of up to $295 per employee. A contribution is considered "fair and reasonable" if at least 25% of the employer's full-time workers are enrolled in the firm's health plan. Alternatively, a company meets the standard if it offers to pay at least 33% of the premium cost for individual coverage under the group health plan. Employers with 50 or more employees, however, must show both that 25% or more of the employer's full-time workers are enrolled in the company's health plan and that it offers to pay at least 33% of the premium cost of an individual health plan.

Further, employers may be subject to an additional surcharge if its employees or their dependents receive free health services from the state. The law also requires every employer with 11 or more employees to offer a "cafeteria plan," a benefit plan that allows employees to make pretax contributions to be used toward health care costs. This law is complex and requires special legal assistance to ensure that it is applied correctly.

Employers who employ 11 or more full-time equivalent employees are required to file an Employer Health Insurance Responsibility Disclosure (HIRD). The disclosure includes whether the employer offers health insurance, whether it makes a contribution towards the premium cost, and whether it maintains a cafeteria plan. In addition to the Employer HIRD, employers are required to collect an Employee HIRD from all employees who decline employer-sponsored health insurance and/or participation in the cafeteria plan.

Once an employer adopts a plan that provides health benefits for employees and/or their dependents, there are federal and state laws that establish certain requirements for these plans. For example, there is a federal law that applies to employers with 20 or more employees called the Consolidated Omnibus Budget Reconciliation Act (COBRA), which allows terminated employees and certain other participants in group health plans to continue their coverage at their own expense after they leave their employment. There is also a state law known as mini-COBRA

that applies to companies in Massachusetts with two to 19 employees.

***Leaves of Absence***

A federal law, the Family and Medical Leave Act of 1993 (FMLA), requires employers with 50 or more employees to allow eligible employees up to 12 weeks of unpaid leave in a 12-month period for one or more of the following reasons: (1) the birth and care of a newborn child of an employee; (2) the placement with an employee of a son or daughter for adoption or foster care; (3) to care for an immediate family member (spouse, child or parent) with a serious health condition; or (4) to take medical leave when an employee is unable to work because of a serious health condition. During FMLA leave, an employer must maintain an employee's group health insurance coverage with the same terms as before the leave began. Upon return from FMLA leave, an employee must be restored to his or her original job or an equivalent job.

The FMLA also requires that covered employers allow eligible employees to use up to 12 weeks of FMLA leave for a "qualifying exigency" arising out of a covered family member's active duty or call to active duty in the Armed Forces in support of a contingency plan or operation or active duty in the regular Armed Forces when that family member is deployed to a foreign country. Additionally, in certain circumstances, employers must permit an employee who is the spouse, son, daughter, parent, or next of kin of a member of the Armed Forces to take up to 26 weeks of leave in a single 12-month period to care for a member of the Armed Forces with a serious injury or illness.

Massachusetts employers who are subject to the FMLA are also subject to a law known as the Small Necessities Leave Act (SNLA). Under this law, employers must permit eligible employees to take a total of 24 hours of leave in a 12-month period, in addition to leave under the FMLA, to participate in school activities directly related to the educational advancement of an employee's child, such as parent-teacher conferences or interviewing for a new school; to accompany the child to routine medical or dental appointments, such as check-ups or vaccinations; and to accompany an elderly relative of the employee to routine medical, dental or other appointments for professional services relating to the elder's care, such as interviewing at nursing or group homes.

Massachusetts employers with 50 or more employees also must provide up to 15 days of job-protected leave during a 12-month period to an employee who is or whose covered family member is a victim of abusive behavior. Such leave may be used to address issues directly related to the abusive behavior, including seeking or obtaining medical attention, counseling, victim

services or legal assistance; securing housing; obtaining a protective order; appearing in court before a grand jury; meeting with a district attorney or other law enforcement official; or attending child custody proceedings. This leave may be paid or unpaid at the employer's discretion.

Massachusetts requires that employers with 6 or more employees give 8 weeks of unpaid parental leave to eligible full-time employees for the purpose of childbirth or for adopting a child under 18 years of age (or under 23 if the child is mentally or physically disabled). Parental leave can be paid at the employer's discretion. Parental leave runs concurrently with any FMLA leave for which the employee may be eligible.

Finally, Massachusetts employer must provide their employees with earned sick time. Massachusetts law requires that all employers allow employees to accrue at least 1 hour of sick time for every 30 hours worked, up to 40 hours per calendar year. For employers with 11 or more employees, the sick time must be paid. Employees may use sick time when required to miss work (1) to care for a physical or mental illness, injury or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse; (2) to attend routine medical appointments of the employee or the employee's child, spouse, parent, or parent of a spouse; (3) to address the effects of domestic violence on the employee or the employee's child; or (4) to travel to and from an appointment, pharmacy or other location related to the purposes listed above. The law and its implementing regulations contain specific rules regarding the accrual, use and payment of earned sick time, the intersection of earned sick time with employers' other paid leave policies and employers' recordkeeping and disclosure requirements under the law.

***Retirement Benefits***

Under the Social Security program administered by the federal government, all employers must withhold a percentage of each employee's wages each pay period and forward those amounts, together with an additional wage-based tax paid by employers, quarterly to the federal government to fund retirement and other benefits.

It is also fairly common for employers to voluntarily provide some type of program to enable employees to accrue retirement benefits. Retirement and other benefit programs are regulated by a federal law known as the Employee Retirement Income Security Act (ERISA). It has recently become more common for employers to establish plans that enable themselves and/or their employees to make tax-deferred contributions to individualized retirement benefit plans. This is a complex area of the law that requires special legal assistance.

### *Life and Other Insurance*

Employers sometimes voluntarily provide group term life insurance, accidental death and dismemberment insurance and/or long-term disability insurance for their employees at either the employer's or the employee's cost.

### *Safety and Health*

There is a federal law called the Occupational Safety and Health Act (OSHA) that establishes minimum safety standards that employers must follow. Depending on the nature of the business, compliance with these regulations may require significant effort.

### *Labor Unions*

Another federal law, the National Labor Relations Act (NLRA), protects employees from discrimination or termination for engaging in collective activities or organizing to form labor unions for the purpose of bargaining with their employer about wages, hours of work or other terms and conditions of employment. When a union represents employees, many of the wage and benefit policies that are described above as voluntary may become subject to collective bargaining with the union and may become mandatory under an agreement negotiated with the union. This is a complex law, and special legal assistance is required if, for example, you are acquiring a business that has union-represented employees.

### *Protecting an Employer's Assets*

Employers sometimes require employees to sign certain written agreements as a condition of obtaining employment in order to protect the employer's confidential information, to secure the employer's right to certain intellectual property or to prohibit employees from leaving their employment and going into competition with them. Such agreements are particularly important and common for employers that are engaged in high technology businesses. Employment agreements concerning patents, inventions, copyrights, noncompetition, confidential information, conflict of interest rules and similar matters are usually drafted with the assistance of a lawyer.

## Terminating Employees

"At-will" employees (that is, employees who do not have employment contracts for a particular term or who are not covered by union-negotiated collective bargaining agreements) may be terminated at any time and for any reason, as long as the reason is not an unlawful one. There are no particular procedural requirements that must be followed in terminating an at-will employee. It is unlawful to discharge an employee because of his or her race, sex (including pregnancy status), age (applies to people 40 years and older), color, religion, national origin, disability or handicap (if the person is qualified to perform the essential functions of the job with or without reasonable

accommodations) or membership in any other category protected by law. In Massachusetts, at-will employees may not be terminated for refusing to perform an unlawful act (such as committing perjury) or for performing important public duties (such as serving on a jury).

Employers are not required to inform terminated employees, either verbally or in writing, of the reason for their termination, although it is customary to do so. It is important that an employer give the complete and honest reason for an employee's termination if it chooses to give a reason.

Employees who are covered by union-negotiated collective bargaining agreements ordinarily can be terminated only for "just cause."

In Massachusetts, terminated employees are entitled to receive all of their wages, including any accrued but unpaid holiday or vacation pay, at the time of their termination. An employer cannot withhold from a former employee's paycheck sums it believes are owed to it by the employee, unless there is a definite amount of money at issue and there can be no dispute that the money is owed.

Employers must give separated employees a specific unemployment compensation claim-filing information pamphlet issued by the Department of Unemployment Assistance (DUA) as soon as practicable, but within a period not to exceed 30 days from the last day of compensable work performed. The DUA requires employers to fill in the company's name, address and DUA Employer Account Number (EAN) on the pamphlet.

Terminated employees are not ordinarily entitled to receive severance pay. Some employers voluntarily provide severance pay to terminated employees, particularly if the termination resulted from a "layoff," a workforce reduction due to the elimination of redundant positions or for other economic reasons. Plans that provide employees with severance pay should be reproduced in writing and conform to certain other requirements in ERISA.

There is a federal law called the Worker Adjustment and Retraining Notification Act (WARN) that requires employers with 100 or more full-time employees to provide 60 days' written notice to employees or their union representatives and other officials in the event of a plant closing or mass layoff at a single site of employment. Massachusetts also has a plant-closing law that applies to employers with 50 or more employees and, in the event of either a full or partial plant closing, requires the continuation of group health insurance coverage — with the same terms as

before the closing — for 90 days after employees are terminated.

As noted above, involuntarily terminated employees are ordinarily entitled to unemployment compensation benefits, which are paid directly by the state government. Additionally, under COBRA and/or the Massachusetts mini-COBRA law, terminated employees and their dependents may be entitled to continue their group health insurance coverage at their own expense for 18, 29 or 36 months depending on the event triggering the entitlement to coverage.

## Immigration

The system for regulation of foreign nationals coming to the U.S. is administered by the U.S Citizenship and Immigration Services, the U.S. State Department and the U.S. Department of Labor. To enter and remain in the U.S., a foreign national must qualify for and, in most instances, obtain a visa. Broadly speaking, these visas fall into two categories: temporary nonimmigrant visas and permanent resident visas.

### Temporary Nonimmigrant Visas

Nonimmigrant visas are issued to foreign nationals who are coming to the U.S. for a temporary purpose and will maintain a permanent residence abroad. A nonimmigrant visa permits a foreign national to enter the U.S. for a specific purpose and for a limited period of time. Most classes of nonimmigrant visa do not permit the foreign national to work in the U.S., and many require advance approval from the U.S. Citizenship and Immigration Services (USCIS).

**The most common visa categories utilized by foreign nationals are:**

- **B-1:** Visitor for business purposes coming to the U.S. on a short trip for a foreign employer. Typically, an individual's initial admission in this status is limited to a maximum of six months. This visa status does not normally authorize an individual to work for a U.S. employer. The U.S. has implemented a visa waiver program that enables foreign nationals of many countries to enter the U.S. in B-1 status without obtaining a visa in advance.
- **B-2:** Temporary visitor for pleasure (tourist). The visa waiver program available to nationals of certain countries also applies to the B-2 visa category.
- **H-1B:** Foreign national in a "specialty occupation" that normally requires attainment of at least a bachelor-level degree, coming to the U.S. to perform services requiring such skills. In addition, the employer must make certain attestations concerning wage levels and conditions of employment. USCIS must

approve a petition in advance, and the maximum length of stay in H-1B status is typically six years. There is also an annual "cap" on the number of H-1B petitions that can be approved each year and, for the past several years, USCIS has reached that cap.

- **H-2:** Other skilled workers who are coming temporarily to the U.S. and who will not displace a U.S. worker. Entry in H-2 status requires prior approval of a labor certification application by the Department of Labor, as well as prior approval by USCIS. The maximum length of stay is typically one year.
- **H-3:** Foreign national coming to the U.S. to complete a formal training program, which can include programs maintained by U.S. employers. The principal activity in the training program cannot be productive employment. Prior approval by USCIS is required, and the length of stay is defined by the duration of the program.
- **L-1:** Intracompany transferee who is an executive, manager or individual possessing specialized knowledge of an international company's products or operations. The individual must have worked abroad for the company or an affiliate for at least one year in the immediately preceding three years. Prior approval by USCIS is required, and the maximum period of stay is five to seven years.
- **TN-1:** This visa status is available only to Canadian and Mexican nationals pursuant to the North American Free Trade Agreement (NAFTA). It permits qualified Canadian and Mexican professionals to enter the U.S. without first obtaining prior USCIS approval or a visa. "Professionals" generally include individuals within certain job categories listed in NAFTA.
- **0:** Foreign national of "extraordinary ability" in the sciences, arts, business or education, as demonstrated by sustained national or international acclaim. This requires advance approval by USCIS. An individual can be admitted in this status for whatever period of time is required to complete the purpose of his or her trip.
- **P:** Performing artists and athletes who perform at an "internationally recognized" level. Advance USCIS approval is required, and the foreign national is admitted for the period required for his or her performance.
- **E-1:** Foreign national coming to the U.S. pursuant to a treaty of trade or commerce to foster international trade between the U.S. and his/her native country. To qualify, there

must be a treaty of trade between the U.S. and the foreign employer's country, the individual must have the same nationality as the employer, and there must be substantial trade by the company between the U.S. and that country. The U.S. consulate in the foreign country can approve these visas, and there is no fixed limit on how long the individual can remain in the U.S.

- **E-2:** Foreign national coming to the U.S. pursuant to a treaty of trade between the U.S. and his/her native country in connection with a substantial U.S. investment. Again, there must be an appropriate treaty of trade, the visa can be issued by the U.S. consulate without prior USCIS approval, and there is no fixed limit on the length of stay.
- **E-3:** A special visa category available to Australian nationals under a U.S.-Australia treaty. The substantive requirements for this category are similar to the H-1B category described, but the process of obtaining the visa does not require advance USCIS petition approval and there is a separate annual cap for this category.
- **F-1:** Students coming to the U.S. to pursue a course of study leading to a degree. The individual is admitted for the duration of his/her studies and, in certain circumstances, can receive authorization to work.
- **J1:** Exchange visitor coming to the U.S. for purposes of an international exchange of knowledge. These programs require prior approval from the U.S. Information Agency and, in some instances, participants in such a program must return to their native country for two years after completion of the program. J-1 exchange visitors may be eligible to work in certain circumstances.

## Permanent Residence

A permanent resident visa allows a foreign national to live and work indefinitely in the U.S. A foreign national can seek permanent resident status on the basis of a qualifying job offer from a U.S. employer, a qualifying investment in the U.S. or a qualifying relationship with a U.S. citizen or permanent resident. Because there is a limited number of permanent resident visas available each year in many categories, there can often be a substantial waiting period to obtain permanent residence. To qualify for permanent resident status on the basis of a job offer, a foreign national must fit into one of the following categories.

- **Priority Workers:** Individuals with extraordinary ability in the arts, sciences, education or business; outstanding professors and researchers; and certain

executives and managers of multinational companies.

- **Professionals:** Individuals holding an advanced degree (not a bachelor's degree) and individuals of exceptional ability.
- **Skilled Workers:** Individuals with a bachelor's degree or who will perform duties that normally require at least two years of specific training or experience.
- **Other Workers:** Low-skilled or unskilled labor.

For individuals in the latter three categories the employer must normally first obtain a labor certification from the U.S. Department of Labor (USCIS can waive the labor certification process for professionals whose employment is deemed to be in the "national interest"). To do so, the employer must demonstrate, through the completion of prescribed recruitment activities, that there are no qualified U.S. workers available to undertake the work. The Department of Labor has an automated "PERM" labor certification program, in order to expedite the processing of labor certification applications.

Investors: To qualify for permanent residence on the basis of an investment in the U.S., a foreign national must invest at least $1 million (this requirement is reduced to $500,000 if the investment is made in certain economically disadvantaged areas) in a new venture that can be expected to employ at least ten U.S. workers within two years. Alternatively, the investment could also be made in an existing business that is in economic trouble. To obtain permanent residence through a qualifying investment, the foreign national must file a petition with USCIS documenting the amount and nature of the investment.

Relationship to a U.S. Citizen or Permanent Resident: The final avenue for obtaining permanent residence is through a qualifying relationship to a U.S. citizen or permanent resident. Spouses, parents (if the child is over 21) and minor children of U.S. citizens are classified as "immediate relatives" and are immediately eligible for permanent residence. Other groups that may be eligible to seek permanent residence on this basis are:

- **First Preference:** Unmarried sons and daughters of U.S. citizens.
- **Second Preference:** Spouses and unmarried children of permanent residents.
- **Third Preference:** Married sons and daughters of U.S. citizens.
- **Fourth Preference:** Brothers and sisters of adult U.S. citizens.

To obtain permanent residence on this basis, the U.S. relative must obtain approval by USCIS of a petition to classify the foreign national as a

qualifying relative. In many categories, there is a significant waiting period before the foreign national can become a permanent resident of the U.S.

### Employer Sanctions

Since 1986, federal law has made it unlawful for an employer to employ a foreign national who is not authorized to work. Federal law also imposes on employers an affirmative duty to verify and record on an 1-9 form the identity and status of every new employee. At the same time, the law prohibits employers from discriminating on the basis of national origin, citizenship status or impending citizenship status. Violation of any of these provisions can result in substantial civil penalties and, in extreme cases, criminal penalties.

## Protection of Intellectual Property

Many companies count intellectual property among their most valuable assets. The acquisition or right to use intellectual property is the force driving many business transactions today. Increasingly, lenders and financiers look to a company's intellectual property assets to support its financing needs.

Under federal and Massachusetts law, these intellectual property assets may be protected as patents, copyrights, trademarks or trade secrets. Some assets can also be protected by principles of unfair competition. Some types of intellectual property may be eligible for more than one form of protection. For example, computer programs are often subject to patent, copyright and trade secret protection, and their names may be protected as trademarks.

### Categories of Protection

***Patent Law***

Patents are exclusively matters of federal law, governed by the 1952 Patent Act, as amended. The Patent Act provides for three types of patents:

- Utility Patents: Protect the utilitarian aspects of a process, machine, manufacture or composition of matter.
- Design Patents: Protect the ornamental external design of an article of manufacture.
- Plant Patents: Protect only distinct and new varieties of asexually reproduced or cultivated nontuberous plants.

*Eligibility for Patent*

According to the Patent Act, "any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof," may be patented. The Patent and Trademark Office of the Department of Commerce (PTO) issues patents after evaluation of applications submitted by inventors. To be eligible for a patent, an inventor must demonstrate that the invention, design or plant is novel and non-obvious.

- Novelty*:* The novelty requirement will be satisfied in the U.S. if (a) the applicant was the first to invent the invention; (b) the invention was not known or used in the U.S. or patented or published in any country, before the date of creation by the applicant; and (c) the invention was not in public use or on sale in the U.S. more than one year prior to filing the application for patent.
- Non-obviousness**:** An invention is "non-obvious" when the differences between the invention and the previously known body of knowledge are such that the invention would not have been obvious to a person having ordinary skill in the art.

Additionally, patent applications must provide written description sufficient to enable those skilled in the art to make and use the invention, also referred to as the written description and enablement requirements. These requirements ensure that the patentee has fully disclosed the invention to the public in exchange for the grant of patent rights.

### *Patent Owner's Rights*

A patent provides the patent owner with the right to exclude others from making, selling or offering to sell, or using the patented invention. Additionally, the patent protects the patent owner from the unauthorized importation of the invention into the U.S. or the importation of a product that is made abroad under a process patented in the U.S. It is important to recognize that a patent does not give a patent owner the affirmative right to make, use, or sell the claimed invention.

The duration of patent protection differs for the different types of patents.

- Utility and plant patents filed after June 8, 1995: 20 years from the filing date. The patent may be extended due to patent office delays under certain circumstances, referred to as patent term adjustment (PTA). Additionally, extension of patent term may be available, due to delays in obtaining FDA regulatory approval.
- Utility and plant patents filed or issued before June 8, 1995: The longer of 20 years from the filing date or 17 years from the issue date.
- Design patents: 14 years from the issue date.

Unlike some foreign jurisdictions, there is no working requirement or compulsory licensing for U.S. patents in most cases.

### *International Conventions Concerning Patents*

The U.S. is a party to the Paris Convention, the Union for the Protection of New Varieties of Plants (UPOV) and the Patent Cooperation Treaty (PCT).

The Paris Convention and the UPOV, as they apply to botanical plant varieties, accord the citizens of each member state national treatment and a right of foreign priority. National treatment gives citizens of member states access to foreign patent protection to the same extent as nationals of the foreign state. Foreign priority entitles inventors in member states to the benefit of an earlier filing date if a counterpart patent application was filed abroad, provided that a later application is filed within the priority period, which is one year under the Paris Convention.

The PCT establishes a mechanism for initially filing a single uniform international patent application (PCT application). PCT applications are a popular and cost effective means of preserving patent rights in multiple important jurisdictions. A PCT application is "nationalized," or filed as an application in individual countries or regional patent offices, 18 months after filing. Thus, a PCT applicant has an additional 18 months to evaluate patentability and marketability of the invention prior to investing money in applications in many foreign jurisdictions.

It is important for patent applicants to be aware that in most foreign jurisdictions, any public disclosure that occurs prior to the application's priority date is considered prior art. This is in contrast to the United States, which as discussed above provides a one-year grace period in which certain prior art events can occur without damaging patent rights. For example, Europe requires absolute novelty and allows no grace period to file a patent application once a public disclosure has occurred. Therefore, applicants seeking international patent protection must avoid any public disclosure of the invention prior to the application's priority date.

### *Trademark Law*

Trademark protection is provided by both federal and state law and is founded on the common law notion that a business has a right to the exclusive use of those marks which distinguish its goods or services from those of others. Unlike trademark rights in most countries, this right is based on the business's use of the mark; there is no registration requirement. A business that uses a mark in commerce can prevent others from subsequently adopting and using confusingly similar marks for related goods or services, even without registering the mark. However, one may apply for registration of a mark, at both state and federal level.

#### *Types of Marks*

A mark is typically a name or word capable of identifying and distinguishing goods or services of one source from those of other sources. A mark can also be a:

- phrase
- fragrance

- symbol or logo
- telephone number
- graphic design
- series of sounds
- set of numbers
- series of letters
- distinctive design of a product container
- distinctive combination of colors

This list is by no means exhaustive. However, functional features of a product are not entitled to trademark protection, nor are the generic names of goods or services.

### *Registration of Marks*

***Federal Law***. A trademark that is in use in interstate or foreign commerce may be registered under the federal trademark law, known as the Lanham Act. A business may also apply to register a mark before it begins to use the mark. An application to register a mark before it has been used must be based upon an honest intention to use it. In that case, rights in the mark will be retroactive to the date of application if the mark is ultimately registered; registration cannot occur until actual use begins. Generally, before a mark can be registered, it must be approved by the Patent and Trademark Office, and the registration application must be not successfully opposed by any other person.

Upon receipt of an application for registration, the PTO will conduct an examination to determine whether the mark is eligible for registration. A mark will be refused registration on the federal Principal Register for the following reasons, among others:

- It is confusingly similar to a previously used or registered mark that is not yet abandoned
- It lacks distinctiveness because it is merely descriptive or geographically descriptive, or is primarily a surname, and the mark has not acquired distinctiveness through use
- It is a common descriptive or generic name for goods or services
- It is scandalous or disparaging
- It is an insignia of a governmental entity
- Without consent, it identifies a living individual or a deceased president during his widow's life

Registration on the federal Principal Register provides the registrant with the following rights, among others:

- The presumptive right to exclusive ownership of the mark
- The presumptive right to exclusive use of the mark in commerce in connection with

the specified goods and services during the initial ten-year term and any renewal terms

- The right to use the registration symbol

Merely descriptive marks and mere surnames may be eligible for registration on the federal Supplemental Register. The "®" registration symbol may be used with marks registered on the Supplemental Register as well as marks registered on the Principal Register.

Use of the registration symbol ® acts as constructive notice to an infringer and may allow the registrant to recover profits and damages from an infringer without giving actual notice of registration. The registration term is ten years, although the registration will be cancelled if the owner of the mark does not submit a statement, between the fifth and sixth anniversaries of registration, attesting that the mark is still in use with the goods and/or services for which it has been registered.

***Massachusetts Law***. A trademark owner may apply to the Office of the Secretary of State in Massachusetts for registration of any mark that is used in Massachusetts. Registration is often more easily obtained at the state level because the mark need not be in use in interstate commerce and the examination of the application by the state trademark office is not particularly rigorous. The restrictions on registration of a mark are similar to the federal restrictions listed above. The registration term is ten years. Both federal and Massachusetts law provide limited protection against dilution of the distinctive quality of particularly strong or famous marks.

### *Copyright Law*

Copyrights are exclusive rights in works of artistic or intellectual expression.

#### *Eligibility for Copyright*

Copyright protection is available for original works of authorship fixed in a tangible medium of expression. These include literary works (such as books, articles, computer software code, lyrics, and catalogs), musical works, dramatic works, pictorial, graphic and sculptural works (such as works of fine, graphic and applied art, technical drawings, diagrams and models), motion pictures and other audiovisual works, sound recordings, and architectural works.

#### *Copyright Owner's Rights*

Copyright protects the owner from the unauthorized copying, distribution, performance and display of the work and unauthorized creation of translations and other derivative works. Copyright law distinguishes between an idea and an expression of an idea. Only the expression is protected. Thus, copyrights do not protect the owner from use by others of any idea, procedure, process, system, method of operation, concept,

principle or discovery revealed by the copyrighted work.

### *Vesting of Rights*

Copyrights in a work automatically vest in the author or joint authors when the work is first set down in tangible form. No registration or filing is necessary. Copyrights remain vested in the author or authors for the duration of the copyright unless they are transferred by written assignment.

An employer will be the author of a work, and therefore hold the copyrights in the work, in the special case of a "work made for hire." A work made for hire is:

- a work prepared by an employee within the scope of his/her employment; or
- a work prepared by a non-employee, if the work falls within certain enumerated categories (including contributions to collective works, supplementary works such as book forewords and afterwords, and test questions and answers) and the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

If a person commissions a work but the work does not constitute a "work made for hire", the party creating the work may nevertheless agree to assign copyright to the party commissioning the work. Since many consultants, advertising agencies, independent contractors and other non-employees create works that do not fall within the enumerated categories for a "work made for hire", ownership of copyrights in such works must be obtained by an express written assignment.

### *Duration of Copyrights*

The duration of copyright protection depends upon who the author is, when the work was created and when federal copyright protection was first obtained. For works created on or after January 1, 1978, the following terms apply (the term may not be extended).

- A work of an individual author is protected for the life of the author plus 70 years.
- Joint works prepared by two or more authors are protected for the life of the last surviving author plus 70 years.
- Anonymous works, pseudonymous works and works made for hire are protected for 95 years from the date of publication or 120 years after creation, whichever is shorter.

### *Formalities*

It is not necessary to register a copyrighted work or to annotate the work with a copyright notice in order to enjoy copyright protection. However, there are certain benefits to registration and notice.

A copyright notice, consisting of the word "copyright", "copr." or the copyright symbol "©"; the year of first publication; and the copyright owner's name, can prevent inadvertent infringement and prevent an infringer from mitigating damages by claiming innocent infringement.

Registration, while not required, is still a prerequisite for copyright infringement actions for works first published in the U.S., for perfecting security interests in copyrights, for recording transfers of copyright so as to give constructive notice of the transfer, and for recording the copyright with the U.S. Customs and Border Protection. Registration provides a presumption in favor of the owner's title to the work and entitles the owner to claim statutory damages and attorney's fees in some infringement actions and other benefits.

### *Moral Rights*

Protection for moral rights (or droit moral) is much more limited in the U.S. than in some other countries. The 1990 Visual Artists Rights Amendment to the Copyright Act grants to the author of a work of visual art the rights of attribution and integrity for the life of the author, without granting such rights to any other type of copyrightable work. The right of attribution allows an author to claim authorship of a work and to prevent the use of his or her name in a work of visual art that the author did not create. The right of integrity allows an author to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation or other modification of the work that would be prejudicial to the author's honor or reputation.

The Massachusetts Art Preservation law, though partially preempted by the Visual Artists Rights Amendment to the Copyright Act, provides protection for rights of attribution and integrity in fine art during the author's lifetime and for 50 years after his or her death.

### ***Mask Works***

Mask works, such as the two-dimensional and three-dimensional features of the shape, pattern and configuration of the layers of a semiconductor chip product, are accorded sui generis protection under Chapter 9 of the Copyright Act. Mask works are not afforded the same protection as copyright works; timely registration is required and the duration of protection is limited to two years from the earlier of registration or first commercial exploitation anywhere in the world. A mask work may not be reproduced, imported or distributed without the authority of the owner.

### *Trade Secret Law*

Massachusetts provides civil and criminal statutory protection for trade secrets. As is the case in other states, trade secrets are also protected by Massachusetts common law.

A trade secret may consist of any formula, pattern, device or compilation of information or other know-how that is used in a business and gives that business an opportunity to obtain an advantage over competitors that do not know or use it.

Trade secrets commonly include formulae for chemical compounds, processes of manufacture, patterns for machines or other devices, confidential business information such as new product lines or marketing initiatives and customer lists. Indeed, in the U.S. anything may be a trade secret, as long as it is maintained in secrecy and provides a competitive advantage.

Six factors are commonly used in determining whether particular information is a trade secret: (1) the extent of disclosure of the information inside the business; (2) the extent of disclosure outside the business; (3) the measures taken to prevent disclosure of the secret; (4) the value of the information; (5) the effort or funds expended to develop the information; and (6) the difficulty or ease with which the information could be legally acquired or duplicated by others.

#### *Protection of Trade Secrets*

The distinguishing characteristic of trade secrets is their secrecy. Therefore, protection requires that those who know the secret agree or are otherwise obligated not to disclose it. The number of authorized people aware of the secret does not affect protection of the trade secret, as long as none of them discloses it to anyone else. Trade secrets are generally protected through written nondisclosure agreements with employees, written license and nondisclosure agreements with authorized users, and establishing and carrying out secrecy policies and practices.

If a trade secret is disclosed or used by an unauthorized party, its owner or licensee can bring either a civil or criminal action for trade secret misappropriation. Relief for trade secret misappropriation is more variable and in some cases broader in the U.S. than in many other countries.

### *Unfair Competition Law*

Both federal and state law prohibit the misappropriation and misuse of intellectual property under a theory of unfair competition.

***Federal Law.*** Section 43(a) of the Lanham Act, the federal law protecting trademarks, specifically prohibits the use of false designations of origin and false descriptions or representations of goods or services in commerce.

Both the person who creates the false designation or description and the person having knowledge of the false designation or description who causes or procures the goods or services to be transported or used in commerce may be civilly liable for violation of this section. Any person doing business in the falsely designated area or any person who believes that he or she is likely to be damaged by use of the false description may bring a civil action against the false designator.

***Massachusetts Law***. Massachusetts General Laws Chapter 93A prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. For business plaintiffs, its application is limited to acts or practices that occur substantially and primarily in Massachusetts. A practice will be unfair if it:

- Is within the penumbra of some common law, statutory or other established concept of unfairness;
- Is immoral, unethical, oppressive or unscrupulous;
- Causes substantial injury to competitors or other businesspeople; and
- Is oppressive or otherwise unconscionable in any respect.

It has been said that for business-to-business conduct to be unfair or deceptive under Massachusetts law, the conduct "must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce."

The misappropriation of a trade secret or trademark may come within the purview of this broad unfair competition law.

## Transfer of Proprietary Rights

### *Copyrights*

The transfer of copyrights in a work, or any copyright, requires a written document referencing the copyrights and signed by the owner of the copyrights conveyed. To be effective against subsequent conflicting transfers, the copyrights must be registered with the U.S. Copyright Office and the transfer must be recorded in the Copyright Office Register within the specified time period.

### *Patents*

A signed written document is also required to transfer a patent, any interest in a patent or a patent application. To be effective against subsequent purchasers or mortgagees, the instrument must be recorded in the Patent Assignment Division of the PTO within the specified time period.

### *Trademarks*

A trademark may be assigned only with the goodwill associated with the mark. A pending application for federal registration based on intent

to use may be assigned only if the applicant has an ongoing and existing business, and the assignee succeeds to the business of the applicant. Assignment of federal registration of a mark or an application for registration requires a signed written instrument. To be effective against subsequent purchasers or mortgagees, the document must be recorded in the Trademark Assignment Division of the PTO within the specified time period.

### *Trade Secrets*

Trade secrets are not a title-based form of property and therefore are often difficult to identify as assets. A person seeking to obtain rights in a trade secret will want to describe the asset in the transfer documentation. The transfer documentation usually includes the agreement of the transferor not to disclose the trade secret to anyone else and an assignment of the transferor's rights to enforce the confidentiality obligations of employees, customers and others who may have had access to the secret. There is no system for registering such rights or recording such documents.

### *Partial Transfers and Licenses*

Written instruments are desirable, but not necessarily required, to establish an enforceable license of intellectual property rights. Licenses are not generally transferable without the consent of the licensor.

### *Security Interests*

A consensual lien or pledge intended to secure a debt or other obligation creates a "security interest" subject to the Massachusetts Uniform Commercial Code (UCC). The secured party should perfect its security interest by filing in accordance with the UCC. To do this, generally notice in the form of a financing statement must be filed in the Office of the Secretary of State of the appropriate state; filing may be performed electronically. Federal filing is required to perfect a lien against registered copyrights and may be necessary or desirable for other types of intellectual property. Care must be taken in creating a security interest to avoid jeopardizing rights in the intellectual property or creating a transfer where none is intended.

## Privacy, Data Security and Electronic Communications

### *Massachusetts Data Security Laws and Regulations*

Massachusetts has adopted broad legislation to safeguard the "personal information" of Massachusetts residents. Any business, individual or agency that receives, maintains, processes of accesses personal information about a resident of Massachusetts is covered by the laws. For the purposes of these laws, "personal information" is defined as a person's full name in combination with (i) Social Security number, (ii)

driver's license number or state identification card number, or (iii) financial account number, credit card or debit card number.

All persons or entities covered by the law have three primary obligations:

- Develop, implement, maintain and monitor a "comprehensive written information security program" designed to protect personal information. The program must comply with detailed standards set forth in the Massachusetts regulations.
- Provide a written notification when the person or entity knows or has reason to know there has been a security breach with respect to personal information.
- Dispose of personal information so that personal information cannot be read or reconstructed after documents have been thrown away.

***The Graham-Leach-Bliley Act (1999)***

The act regulates the disclosure of nonpublic personal information by financial institutions. Disclosure of information is prohibited unless the customer has received notice of the institution's policies and practices regarding disclosure and been given the opportunity to opt out.

***The Health Insurance Portability and Accountability Act (1996)***

The federal Health Insurance Portability and Accountability Act, and regulations issued pursuant to that act, collectively known as HIPAA, regulate the use and disclosure of health and medical information by entities such as healthcare providers and health insurance plans (and sometimes pharmaceutical and medical device manufacturers, and laboratories). Generally, all HIPAA "protected health information" must be kept confidential, and may not be used or disclosed except for treatment, payment for treatment or healthcare operations. HIPAA's restrictions also apply to business partners and services providers, through Business Associate Agreements.

***The Children's Online Privacy Protection Act ("COPPA") (1998)***

COPPA is a federal law that prohibits collection of personal information from children younger than age 13 without parental consent. It requires operators of websites directed to children younger than age 13 that collect personal information from the children to provide proper notice of the collection of the information, appropriate consent to collect the information, and access to it by parents upon request. COPPA also requires the information collected to be limited to only that which is reasonably necessary to track online activity and to be protected by reasonable procedures. The FTC has specific guidance for businesses on how to comply with COPPA. If a website operator is in compliance with an FTC-approved guideline by a self-regulatory industry organization, it may qualify for the safe harbor provision of COPPA.

***The Electronic Communications Privacy Act (1996)***

This federal act protects the privacy of e-mail or other electronic communication over the Internet. Specifically, the act protects against unauthorized access, interception or disclosure of private electronic communications by government or individuals.

***Internet Privacy Policies***

The misuse of personal information on the Internet is a significant concern for many consumers. Thus, a company doing business on the Internet may wish to post a privacy policy on its website to increase consumer confidence. If a company is doing business with consumers residing in California, California law requires the posting of a privacy policy that meets certain minimum standards. A privacy policy will usually disclose:

(1) the type of information collected and how it will be used;

(2) the identity of any third parties to whom the information will be disclosed;

(3) how individuals can review the information and have it corrected or deleted; and

(4) how individuals can opt out of having their information collected.

In addition to these guidelines, there may be other requirements based on the content or industry of the company's site. It is essential that any policy adopted be carefully followed. The Federal Trade Commission (FTC) often takes action against companies that disregard their own published privacy policies.

***Restrictions on Electronic and Other Communications***

A number of federal and state laws regulate the sending of electronic communications by businesses. The federal CAN-SPAM Act requires that any unsolicited commercial e-mail messages include an opt-out mechanism and certain notices. In contrast to the notices required for unsolicited commercial e-mail, most unsolicited faxes are prohibited entirely, unless the sender has an existing business relationship with the recipient. The FTC's Telemarketing Sales Rule regulates marketing telephone calls, and in particular prohibits most unsolicited telephone calls to telephone numbers listed on the national Do Not Call registry.

## Real Estate

Purchasing real estate in Massachusetts is not particularly difficult. While Massachusetts, like every other state, has its own peculiarities, they do not make Massachusetts an unfriendly place to do business. There is little regulation of real estate transactions on the federal level and, except for environmental laws and the regulation of certain aspects of interstate land sales, the federal government does not interpose itself in local real estate transactions. As described under

"Reporting Requirements for Foreign Direct Investment", the federal government does require that certain real estate transactions be reported, but there is no regulation of, or interference in, the transactions.

There are no restrictions in Massachusetts on the ability of foreign individuals or foreign business entities to acquire and hold real estate. In fact, a "foreign corporation" is considered to be any corporation that has not been organized in Massachusetts, whether it is organized in another state or a foreign country. A foreign corporation, but not a foreign individual, must file a certificate with the Massachusetts Secretary of State setting forth certain pertinent facts concerning the corporation and appointing the Secretary of State as its attorney for service of process; thereafter, it must make file annual informational reports with the Massachusetts Secretary of State and pay an annual filing fee. While a foreign corporation must comply with the forms of conveyance required in Massachusetts, its authority to make a conveyance is governed by the rules imposed upon it by the jurisdiction where it is created. There are no restrictions or registration requirements in Massachusetts for foreign individuals, whether they are resident or nonresident aliens, who purchase real estate.

## The Real Estate Transaction

The process of buying real estate involves three principal steps: negotiating the contract, arranging for the financing and acquiring the title, all of which are discussed briefly here. The following section highlights certain practical issues that are peculiar to the U.S., in general, and to Massachusetts, in particular.

***Negotiation***

Typically, a company establishing a facility or investing in real estate in Massachusetts will either purchase or lease real estate. In either case, the first contact a company has will probably be with a real estate broker. While occasionally a buyer will hire its own broker, in most cases the seller engages a broker as agent to market the property to prospective buyers. The broker's fee is computed as a percentage (usually 5 to 10%) of the purchase price. It is easy for the buyer to think, mistakenly, that the real estate broker has the buyer's best interests in mind, since the buyer is the one who contacts the broker and asks to be shown the properties that are available. However, the broker is the seller's agent and, therefore, has an obligation to generate the highest purchase price possible. There is nothing inappropriate about this, but it is wise to remember that, absent a special agreement, the broker works for the seller and the broker's fee increases with the price.

Once the buyer identifies a property that fits its requirements, the buyer tenders a written Offer to Purchase to the seller through the real estate broker. Oral agreements to buy and sell real estate are not enforceable. Some purchasers prefer to submit a "letter of intent," which outlines the proposal business terms of the transaction. If the seller agrees to the offer, the seller will countersign the letter. Such letters of intent are usually, by their terms, not binding on either party. The Offer to Purchase is binding, although it often includes a condition that the parties will negotiate in good faith a fuller, more complete contract called a "Purchase and Sale Agreement" that incorporates the business terms of the Offer to Purchase.

The lawyers for the buyer and the seller usually negotiate the terms of the Purchase and Sale Agreement. A deposit, typically 5% to 10% of the purchase price, is paid by the buyer to an escrow agent at the time the Purchase and Sale Agreement is signed. In addition to including the basic business terms (location of property, purchase price, etc.), the Purchase and Sale Agreement often includes a number of conditions to the buyer's obligation to purchase the property. For example, the buyer may not want to buy if there is a hazardous waste problem, if the local zoning regulations do not permit the intended use of the property or if the buyer cannot obtain satisfactory financing. Therefore, the buyer makes its obligations contingent upon these conditions being satisfied. The seller will expect the buyer to request contingencies but, because the seller will not want to keep the property off the market too long, it will insist that the buyer either waive the contingencies or terminate the agreement within a relatively short time period. A buyer often has three to four weeks to investigate and decide whether or not to proceed with the purchase.

In buying real estate, the buyer must consider the condition of the land and the uses to which it may be put. This is why the buyer needs to include contingencies in the Purchase and Sale Agreement. A careful buyer will want to evaluate the condition of the land and any buildings and improvements that are located on the land. A buyer should have an engineering inspector assess the physical condition of the buildings and improvements. In addition, a buyer should have an environmental consultant test the soil and the structures for the presence of hazardous waste. Due to the complexity of environmental laws (see "Environmental Regulation") and the very high penalties that are payable if there are violations, it is extremely important that the buyer be satisfied with the environmental condition of the property before it is unconditionally committed to the transaction. Under many environmental laws, an owner may be liable for an environmental

condition simply because it owns the land, without regard to who caused the problem.

The buyer will also want a lawyer to evaluate the zoning code of the municipality where the land is located. Each city or town in Massachusetts has a zoning code or bylaw that divides the municipality into districts and establishes the uses and dimensional requirements which are permitted in each district. For example, a municipality may require that manufacturing facilities be located only in a certain area. In addition, a municipality will require that the facility conform to height, lot coverage, setback from lot boundaries and other dimensional requirements. The zoning code will also regulate the minimum number of parking spaces that must be provided, the location, size and design of signs and, often, the landscaping or other decorative amenities. Where the proposed project will not conform to the requirements of the zoning code, the buyer may, if the code permits it, apply for a variance or special permit, each of which allows the buyer to do something that otherwise would not be permitted under the zoning code. In extreme cases, the buyer may ask the municipality to rezone the property, which requires amending the zoning code and is a lengthy and often difficult process.

***Financing***

At the same time the buyer is investigating the condition of the property and the local regulations, it may also be seeking to finance the acquisition costs, unless it plans to pay for all of them out of its own funds. The most common sources for financing are commercial banks and insurance companies. For certain kinds of property, such as low-income housing, state or federal assistance may be available. A prospective lender will request a substantial amount of information, in advance, about both the buyer and the property. The lender will ask for financial statements, tax returns and other financial records. The lender's counsel will investigate the title to the property and the property's compliance with the requirements of the local zoning laws. The lender will require a survey and information about the property's compliance with environmental laws and regulations. If the buyer is a corporation, the lender will also require evidence that the entity has been properly formed, has been registered with the Massachusetts Secretary of State and has the authority to borrow and repay the loan.

The term of the loan and the promise to repay the borrowed money is set forth in a promissory note, which the buyer signs. The principal security for the repayment of the loan is a mortgage of the real estate. While some states use an instrument called a deed of trust to secure the repayment of the money, Massachusetts lenders use a mortgage. By granting a mortgage to the lender, the buyer is, in effect, conveying the property to

the lender as security for the repayment of the loan. Once the debt has been repaid, the lender discharges the mortgage and relinquishes its interest in the property. This is a theory which is particular to Massachusetts. In most states, a mortgage simply creates a lien on the land to secure the repayment of the debt. In practice, the result is the same in Massachusetts.

If the buyer defaults and does not pay the amount due under the promissory note, the lender may foreclose its mortgage and sue the buyer under the note for the repayment of the loan. After certain statutory notices are sent to the owner and to anyone else who has an interest in the property, the property is sold by the lender at a public auction. Anyone who produces the required deposit may bid; the money received at the auction is applied to the repayment of the debt. Where the high bid is not sufficient to repay the outstanding balance of the loan, there is a deficiency, which the lender may collect by suing the buyer. Unless the mortgage otherwise prohibits it, the lender may purchase the property at the auction.

***Acquisition of Title***

The actual transfer of title occurs at the "closing." Usually the buyer, the seller, their lawyers and the lawyer for the lender all meet to "close," which means finalizing the loan, transferring title from the seller to the buyer and paying the balance of the purchase price (after being credited with any deposit previously paid) to the seller. These all occur simultaneously since the buyer will not pay the purchase price without obtaining title to the property, the seller will not transfer the title without the buyer's paying the purchase price, and the lender will not provide the buyer with the money to pay the seller unless the buyer can provide the lender with a security interest in the real estate. Since title is actually transferred at the closing, the seller wants to be assured of payment in good funds. Therefore, the buyer must make arrangements, in advance, to have the funds available in a bank account from which the money may be sent by wire transfer directly to the seller's or an escrow agent's bank account. At the closing, the seller transfers title to the property to the buyer by delivering a deed. The buyer signs the loan documents, including the mortgage. The lender's lawyer records the deed and the mortgage in the Registry of Deeds and disburses the purchase price, including the loan proceeds. Prior to the closing, the lender's lawyer would have made a search of records in the Registry of Deeds to confirm that the seller actually owns the land that the buyer is purchasing. After the closing, the lender's lawyer completes the title search and, if there have been no other transfers or liens, the lawyer records the deed and the other documents. The land records for Massachusetts are organized on a county-by-county basis, and

instruments concerning real estate are recorded in the Registry of Deeds for the county where the land is located.

Real estate lenders require their borrowers to purchase title insurance to insure the lender's security interest in the real estate. Prior to the closing, the lender's counsel will have searched the land records to determine who owns the property, whether there are liens that must be satisfied, whether there are any restrictions on the use of the property imposed by prior owners, and whether anyone else has the right to use all or part of the property (e.g., an easement) in a way that interferes with the buyer's intended use. Once the lender's lawyer is satisfied that there are no problems and that the seller can convey good title to the property, the lender's lawyer will certify the title to the title insurance company. In turn, upon payment of a one-time insurance premium, the title insurance company will issue a lender's title insurance policy, which insures the priority of the lender's security interest as a lien against the real estate and, if the buyer pays a small additional premium, will issue an owner's title insurance policy, which insures the ownership interest of the buyer. Should the title be other than as stated in the title insurance policy, the title insurance company will reimburse the buyer and the lender to the extent of their loss but not, subject to certain exceptions, in excess of the face amount of the title insurance policy.

***Real Estate Leases***

A business enterprise locating in Massachusetts might prefer not to tie up its funds by purchasing real estate, or the property in which the business enterprise is interested may not be available for sale. One solution is for the would-be purchaser to lease the property from the owner, if the owner is agreeable. The owner of the real estate and the interested business entity would negotiate a lengthy and complicated document, called a "lease," which gives (i) the tenant (the business entity) the right to use the leased property, (ii) provides that the landlord (the owner of the real estate) is to receive a set amount of periodic rental payments, and (iii) defines the other conditions under which the tenant may use the property. The lease must be in writing to be enforceable. The lease describes who is responsible for maintaining the property, obtaining insurance and rebuilding the property if there is a fire or other casualty loss. A "net lease" is a lease where the tenant is responsible for all costs — repairs, replacements, insurance, real estate taxes — connected with the leased property. The goal is that the rent is net to the landlord; in other words, pure profit.

Commercial leases are typically for five to ten year terms, although shorter and longer terms are sometimes available. Often a tenant will negotiate

an option that requires the landlord, upon the tenant's request, to extend the term of the lease if the tenant agrees to pay a new rent equal to the fair market rent for the leased property at the time the term is extended. Many leases also require that, as part of the rent, the tenant pay a proportionate share of the building's operating costs and real estate taxes. If the landlord is in a strong negotiating position, it may also require that the tenant pay an increase in rent each year based upon increases in the Consumer Price Index (CPI) or some other economic indicator. In many retail leases, the tenant also pays percentage rent, which is computed as a percentage of the tenant's sales. If a lease is for a term of seven years or longer, the tenant should record a Notice of Lease in the Registry of Deeds to put third parties on notice of the tenant's interest in the real estate.

## Massachusetts Practice

### *Transfer Taxes on Real Estate*

Massachusetts, which taxes the right to transfer title to real estate, requires that excise tax stamps be affixed to all deeds, instruments or writings whereby any land or interest in land is sold, transferred, assigned or otherwise conveyed, and where the consideration is over $100. The total tax rate is $2.28 per $500 of consideration or a fraction thereof (except in Barnstable County, which is essentially Cape Cod, where the total tax rate is $3.06 per $500 of consideration or a fraction thereof). The seller is responsible for payment of the tax. The seller is permitted to deduct from the purchase price the value of any liens and encumbrances not being satisfied so that the tax is imposed only on the equity being transferred. The tax is collected at the Registry of Deeds for the county in which the land is located by requiring the seller to purchase documentary tax stamps in the appropriate amount, which are affixed to the deed before it is recorded. The tax does not apply to any instrument or writing (such as a mortgage) given to secure a debt or to any instrument or writing to which the state, a city or town, or the U.S. or any of their agencies are a party.

### *Land Bank Fees in Dukes and Nantucket Counties*

By two special acts, the Massachusetts Legislature has established Land Bank Commissions for Dukes County (the island of Martha's Vineyard) and Nantucket County (the island of Nantucket). The Land Banks are public organizations established to collect a 2% transfer fee on real estate transferred in the county; the tax is to be used to protect the counties' natural resources through the acquisition of open space. The 2% transfer tax, which is computed on the purchase price, is due upon the transfer of any real property interest, and payment is the

responsibility of the buyer, even though the buyer and seller may contract otherwise. The fee must be paid at the appropriate Registry of Deeds by certified, bank cashier's or attorney's client escrow fund check at the time of transfer and the Land Bank stamp must be affixed to the deed before it is accepted for recording. Certain types of transactions such as transfers to a government entity, gifts or contributions of real estate to form a corporation, are exempt from the tax.

***Nominee Trusts***

Unlike most other states, Massachusetts permits an owner of real estate to hold title in the name of a nominee or realty trust. This provides a number of advantages to a foreign investor. In an ordinary trust, legal title to the assets is in the name of the trustee, and the equitable title (or benefit) is in the name of the beneficiary. The trust instrument ordinarily identifies the trustee and the beneficiary and provides that the trustee is to manage the asset for the benefit of the beneficiary.

A nominee trust, on the other hand, is created to hold title to real property for the benefit of undisclosed beneficiaries. The trustee has no power to deal with the trust property except as, and when, directed by the beneficiaries. Typically, the trust instrument, which identifies the trustee but not the beneficiaries, is recorded in the Registry of Deeds for the county where the land is located. The trust provides that the beneficiaries and their respective percentages of beneficial interest in the trust are listed in a separate schedule of beneficial interests, which is on file with the trustee. Unlike an ordinary trust, where the trustee has discretion, and perhaps a duty, to act independently, the nominee trust specifically provides that the trustee may act only at the direction of the beneficiaries. This can create a problem for third parties dealing with the trust, because the authority for the trustee's actions depends upon direction from the undisclosed and unidentified beneficiaries. This is not something an outside party can readily confirm. The nominee trust provides that a third person dealing with the trust may conclusively rely on any act undertaken by the trustee and, in addition, may rely on any certificate signed by the trustee for the truth of any matter stated therein. Therefore, if the trustee signs a certificate that states it was authorized to take a certain action, a third party may rely on this. A nominee trust also often provides that the beneficiaries may terminate the trust at any time and, upon termination, title to any assets owned by the trust vests in the beneficiaries.

There are a number of potential benefits where a nominee trust is used as a title-holding entity:

- *Nondisclosure of owner.* Using a nominee trust avoids having to publicly

disclose the name of the actual owner of the property. There are any number of reasons why an owner may prefer this.

- *Confidentiality of business matters.* The true owner may be a business entity, for example, a partnership, which is established by an agreement that the participants would prefer to keep confidential. By using a nominee trust, the true business arrangement between the parties need never be disclosed on the public record.
- *Avoidance of creditors.* An owner may find it advantageous to own property in a name that is not familiar to its creditors. Although there are other ways to accomplish this, and although a determined creditor can, through litigation, discover the true nature of the ownership, the nominee trust is an inexpensive and simple first line of defense.
- *Transfer of interests without public disclosure.* Because the beneficial interests do not appear in the public record, shares may be transferred freely without public disclosure. Where there is a sale, the buyer selects a new trustee and the beneficial interests are assigned to the new owner. (Note that even such an off-the-record transfer requires the payment of transfer taxes.) This approach can be useful when a buyer wants to avoid showing a transfer of title, for example, in assembling a large parcel of land. Another situation where it is useful is when a transfer by deed would cause a mortgage to become due (a due-on-sale clause). Some due-on-sale clauses are drawn in such a way that they will not be triggered by a transfer of beneficial interests.
- *Facilitates transfer.* The use of a nominee trust facilitates the acquisition, holding and transfer of interests in certain situations. First, where there are numerous owners, it might be unwieldy to collect all the signatures every time there is a transaction. If title is held by a nominee trust, only the trustees need to sign. Second, it may be difficult to deal with the property if an owner dies or becomes incapacitated. While the trustee would need the cooperation of the estate or legal guardian, the trustee is able to act without lengthy probate delays. Third, there are considerable problems in Massachusetts if a general partnership or joint venture takes title in its own name. In either case, the partnership or venture agreement should be recorded, making

the business arrangement a public document, and every change in the identity of the partners and every amendment to the agreement would also have to be recorded. Using a nominee trust is much less cumbersome. Fourth, someone residing outside of Massachusetts might want to avoid the need for an ancillary probate administration in Massachusetts if he dies. By using a trust, he can provide that his beneficial interest passes by his will without the need for a Massachusetts probate proceeding.

- *Emergency situations.* When it is necessary to acquire title before the purchasing parties can negotiate the intricacies of a business arrangement, the parties can take title in the name of a trust. The original beneficiary can transfer the beneficial interest to a business entity to be formed later.
- *Facilitates corporate transactions.* A corporation that acquires real estate must often produce corporate votes, certificates of legal existence and other ancillary documents concerning its organization and the authority of its officers to act. A third party dealing with the trust need only rely on the authority of the trustee to act and, therefore, will not require the various documents ordinarily required of a corporation. (Note that use of a trust does not necessarily mean that corporate transfer taxes will not be due.)
- *Foreign corporate transactions.* It is very inconvenient for nonresident aliens to acquire title in the name of non-U.S. (and especially off-shore) corporations. Such corporations often have structures and characteristics that are different than U.S. corporations and cannot produce the types of documentation necessary for a U.S. real estate transaction. For example, a non-U.S. corporation might not be able to produce an instrument signed by its president and treasurer because it has managing directors and does not recognize those offices. Another example would be where a non-U.S. corporation could not adequately establish its legal existence because of a difference in registration requirements. Where a nominee trust is used, it is not necessary to look behind the authority of the trustee. (Note that use of a trust will not avoid the requirements of federal tax withholding laws, since most experienced lawyers will require a trust to certify that it

is not a non-foreign person for federal tax purposes.)

There are potential drawbacks to using a nominee trust, but, on the whole, anyone who uses one will be no worse off for having done so. First, for certain reasons based on common law trust principles, Massachusetts courts may ultimately find that a nominee trust is, in fact, not a trust at all but an agency relationship where the trustee is merely an agent for the true owner, the beneficiary. Second, the beneficiary is probably personally liable to the creditors of the trust, so a nominee trust should not be viewed as a shield against creditors. Third, although the trust provides that the trustee can act only at the direction of the beneficiaries, the trust instrument puts third parties on notice that they may rely upon any action taken by the trustee without checking further. Thus, the beneficiary assumes the risk that the nominee will not act dishonestly.

### *Limited Liability Companies*

More and more frequently, buyers choose to acquire and hold title to real estate in a Massachusetts limited liability company (LLC). A Massachusetts LLC offers many of the same advantages as a nominee trust including non-disclosure of the owners of the LLC and facilitation of transfer of interests in the LLC without public disclosure. In addition, unlike a nominee trust, a Massachusetts LLC offers the owners of the LLC protection from personal liability to the creditors of the LLC. However, unlike a nominee trust, a Massachusetts must file an annual informational report with the Massachusetts Secretary of State and pay an annual filing fee (currently $500). (see, "Forms of Doing Business in the United States" for additional information on LLCs).

## Environmental Regulation

Environmental laws affect a wide variety of business operations and land use development projects in Massachusetts. Regulation occurs at the federal, state and local levels and the laws are administered by a variety of agencies and boards. The many potentially applicable laws, combined with overlapping jurisdictions of regulatory authorities, make this field of law highly specialized and replete with traps for the unwary.

Massachusetts' environmental laws combine regulatory controls with self-monitoring by industry, market-based incentives to achieve reductions in emissions of pollutants, and a streamlined approach to permitting. Many of the laws that affect development rights limit discharge of pollutants, regulate handling of chemicals and require cleanup of contaminated properties have been in effect since the 1970s and 1980s. These years of experience have produced a body of interpretation that provides helpful guidance to businesses. Massachusetts regulatory agencies have also

learned from experience. Recently, for example, they have taken steps to further streamline and consolidate permitting requirements and to offer incentives to businesses willing to cleanup or redevelop contaminated properties.

Because U.S. environmental law imposes strict liability for environmental problems, in contrast to the fault-based system that characterizes most U.S. law, it is particularly critical that companies remain abreast of the many regulations potentially applicable to their operations. The challenge for those doing business in the U.S. and Massachusetts — and many companies in environmentally sensitive businesses have met that challenge and thrived — is to conduct their business in a profitable manner while taking steps to minimize potential environmental liabilities. Meeting this challenge can be difficult because, while Massachusetts has made significant strides toward more market-based regulations, its environmental regulations in many areas, both on the books and as interpreted by dedicated agency employees, remain among the most stringent in the country.

The following discussion provides an introduction to U.S. and Massachusetts environmental laws. Some apply to ongoing businesses, others only to land use development projects. Some apply regardless of whether a business uses or disposes of large quantities of hazardous substances. Each set of laws and regulations has a multitude of exemptions and exclusions, which may, if applicable, dramatically alter the financial impact of the law to a particular business or transaction. Important interpretive guidance and official policy materials may have similar effect. Reference to the appropriate statutes, regulations and guidance documents is imperative to determine their applicability to a specific situation. Consultation with competent and knowledgeable environmental counsel and technical experts is strongly recommended. (The federal Securities and Exchange Commission's rules and interpretive guidance regarding the disclosure of certain environmental matters by publicly held companies will not be discussed here.)

## Minimizing and Managing Risks

The stiff penalties (including fines and, in some cases, prison terms) for violations of environmental laws and the enormous cost associated with compliance with certain of these regulations and with cleanup of contaminated soil and groundwater focus attention on environmental matters for both ongoing businesses and purchasers of businesses or property. Careful planning can minimize and manage these risks.

Because U.S. environmental laws have a broad liability net, a company acquiring a business or

real property — and often its lender — are advised to conduct an environmental due-diligence investigation to discover whether the business has committed violations or the property is contaminated and, if so, to allocate the risks by agreement between the buyer and the seller (and sometimes the financing entity). For example, contracts could provide for indemnities or escrow accounts to fund costs of assessment and corrective action. An environmental due diligence effort helps to ensure that the buyer's acquired assets or real property are not later devalued as a result of subsequently discovered environmental problems. Obviously, the latter problem is also of significance to the buyer's lender.

An acquiring company and its legal counsel often engage an environmental consultant to assist in the due diligence effort. In many cases, the consultant will combine a property contamination investigation with an operational compliance evaluation aimed at investigating whether the facility or business has all necessary environmental permits and is in compliance with its permits and applicable laws, in some cases including environmental laws beyond the scope of this summary. In appropriate cases, the due diligence investigation may include an assessment of worker safety.

The market for environmental insurance has grown significantly in recent years, and a significant part of these risks can often be minimized through use of the various insurance products currently available. Massachusetts has also created an insurance pool that can decrease the cost of such insurance for eligible buyers. Finally, because the legal standards governing liabilities for successor and parent corporations careful attention should be paid to business organization and structure issues so as to minimize the number of potentially liable entities.

## The Key Regulatory Agencies

The Environmental Protection Agency (EPA) is the federal agency with primary responsibility for environmental matters. The EPA oversees implementation of federal laws regulating management and disposal of hazardous waste, protection of water quality and wetlands, air pollution, cleanup of contaminated properties under the Superfund statute, and other environmental issues. EPA's main headquarters is in Washington, D.C., but considerable permitting and enforcement power is delegated to the EPA's various regional offices. Jurisdiction over Massachusetts falls to EPA's New England Regional Office, headquartered in Boston.

The Massachusetts Department of Environmental Protection (DEP) implements and enforces most

of the Commonwealth's environmental laws, which are often, but not always, similar to federal law. The state laws are intended to supplement the federal laws, and in some areas are more stringent. In some cases, the Massachusetts laws operate in lieu of the related federal scheme; in other cases, the federal and state systems operate together. DEP is headquartered in Boston, and it also has four fairly autonomous regional offices located throughout Massachusetts. DEP is one of several agencies within the Executive Office of Energy and Environmental Affairs (EOEEA). Among other functions, EOEEA directly administers the environmental impact review process required by the Massachusetts Environmental Policy Act (MEPA). MEPA, discussed below, is of critical importance to many projects and activities proposed in the Commonwealth.

In Massachusetts, municipalities also exercise significant control over environmental issues through their Conservation Commissions, Planning Boards, Zoning Boards and Boards of Health. Cities and towns derive their authority both from local bylaws and from delegated state or federal laws.

## Contaminated Property: Cleanup and Liability Issues

The federal law governing identification and cleanup of property contaminated by hazardous substances is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), popularly known as the "Superfund" law, 42 U.S.C. §§ 9601, et seq. Superfund's impact on the business community has been enormous, largely due to the law's broad imposition of liability without regard to fault. Under Superfund, each business that generated or disposed of hazardous substances on a property may be called to bear the cost of investigation and cleanup regardless of whether the disposal activities complied with legal requirements in effect at the time.

Generally speaking, each of the responsible parties is jointly and separately liable for the response costs of investigating and remediating contaminated sites, at least to the government. As a result, a financially healthy or "deep pocket" defendant is potentially exposed to the entire cost of site assessment and remediation. Superfund's liability is retroactive, covering activities that occurred even before the law was adopted.

The risks under Superfund are offset somewhat by incentives designed to limit or eliminate liability in certain situations. For example, the federal government offers "Brownfields" grants to help

finance cleanup and redevelopment of some types of contaminated properties. In 2002, Congress passed amendments to Superfund to further encourage development of Brownfield properties. So long as new buyers perform "all appropriate inquiry", they generally will not be liable under federal law for contamination at the purchased property. In addition, through "prospective purchaser agreements", the EPA may assure lenders, owners and buyers that the federal government will not pursue actions against them if the properties have been cleaned up.

Massachusetts, like many states, has a liability and cleanup scheme similar to the federal Superfund, referred to as Chapter 21E and the Massachusetts Contingency Plan (MCP). Most contaminated properties in Massachusetts are cleaned up under Chapter 21E and the MCP, rather than under CERCLA. Chapter 21E establishes a broad obligation to report the presence of site contamination — whether it occurred in the past or in the present, and whether suddenly or gradually through industrial use. Once contamination is discovered, it must be investigated and cleaned up in accordance with requirements and procedures set forth in the MCP.

Under the MCP, which has a "privatized" system, legally responsible parties must engage Licensed Site Professionals (LSPs) to assess contamination and risk and to design and implement a cleanup. The responsible party must conduct a phased process of assessment and, unless the site is determined to pose no significant risk, proceed through selection, implementation and completion of an appropriate remedial action. DEP conducts both random and targeted audits to ensure compliance with the MCP.

The Massachusetts program offers several clear advantages over the cleanup programs of some other jurisdictions. For example, the MCP contains objective standards against which a cleanup can be measured. These make it easier to determine whether a site is a serious problem as well as to determine when cleanup is done. The MCP also allows varying levels of cleanup depending on the allowable uses of the property; land that will be used only for commercial or industrial purposes need not be as "clean" as property that will be used for residential purposes. Finally, the privatized system largely allows parties to control their own schedule for cleanup.

Massachusetts has gone further than the federal government to encourage cleanup and redevelopment of contaminated property. In 1998, the legislature amended Chapter 21E specifically to encourage Brownfields redevelopment.

The statute provides that innocent owners, known as "eligible persons", receive certain liability endpoints once the property has been cleaned up.

Such eligible persons are also protected from most third-party claims. In addition, innocent tenants, known as eligible tenants and downgradient property owners are generally exempted from liability. Finally, secured lenders are given even clearer statutory protection under Chapter 21E's lender liability provisions.

The statute now also provides significant financial incentives for cleanups. Cleanups by innocent parties may be eligible to receive certain tax benefits. Other cleanups may be eligible for grants or assistance in obtaining loans. Finally, the state has created a mechanism for buying insurance against cleanup cost overruns at favorable rates.

Although these incentives are important, they do not resolve all the concerns regarding contamination or potentially contaminated property. Hence, potential owners, occupants or developers of real estate are well advised to evaluate with care the environmental condition of properties they are considering for purchase or use.

## Regulation of Hazardous Waste and Other Toxic Substances

### *"Cradle-to-Grave" Regulation of the Generation, Transport, Treatment, Storage, Recycling and Disposal of Hazardous Waste*

The federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. (RCRA), is designed to help prevent the need for costly property cleanups by controlling the nation's hazardous waste from the point of generation through its subsequent transportation, storage, treatment and disposal — or from "cradle to grave." To meet this mandate, the EPA has promulgated complex regulations to control hazardous waste. (40 C.F.R. Parts 260 et seq.)

Massachusetts has enacted its own hazardous waste regulatory scheme, which is codified in Chapter 21C of the state's General Laws. Most elements of the Chapter 21C program operate in lieu of the federal program in Massachusetts. Massachusetts, like many other states, has designed its program to be both broader and more stringent than the minimum federal requirements.

It is the waste generator's responsibility to determine whether or not its waste streams are regulated under RCRA and Chapter 21C. There are two major categories of regulated hazardous waste: waste streams specifically listed by DEP ("listed wastes"), such as wastewaters from electroplating operations; and wastes that exhibit one or more of the characteristics of toxicity, ignitability, reactivity or corrosivity ("characteristic wastes"). Chapter 21C's listed wastes encompass not only materials regulated by the federal RCRA, but also additional materials such as used oil, certain PCB-containing wastes and hazardous wastes that are being recycled. Some other waste categories are exempt from Massachusetts regulation.

Once material has been identified as a regulated hazardous waste, the generator is subject to various waste management requirements depending on the amount of hazardous waste generated in any given month.

These restrictions include the time period during which the waste may be stored without a permit, the manner in which it must be drummed and labeled, the paperwork documenting its transportation, storage and disposal by licensed facilities, and prohibitions against its disposal in landfills.

Massachusetts regulations also contain a number of specialized provisions, which address either particular types of operations or particular waste streams. For example, the Chapter 21C regulations provide for special permits for research and development activities conducted for the purpose of developing new treatment or recycling technologies. There are also separate regulations for the handling of cathode ray tubes in televisions or computer terminals and products that may contain mercury, such as fluorescent light ballasts.

Keep in mind that even a material not formally classified as a hazardous waste may require special handling and disposal. These materials include asbestos, medical waste and materials from contaminated site cleanup that are not otherwise considered hazardous waste.

Finally, different regulations apply for transporters of hazardous waste and for owners and operators of landfills and hazardous waste treatment, storage and disposal facilities.

***Regulation of Toxic Substances***

Apart from the "cradle-to-grave" hazardous waste programs outlined above, other laws regulate the production, use and disposal of so-called toxic substances, even if they are not wastes. Among the substances which the federal government regulates under the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq., and regulations issued at 40 C.F.R. Part 761 are polychlorinated biphenyls (PCBs). TSCA also regulates the introduction of certain new chemicals into the marketplace.

***Asbestos***

Asbestos was commonly used in building products and in industry until the late 1970s and must be handled carefully when buildings are renovated or demolished. Asbestos is regulated by a variety of federal and state laws including the federal Clean Air Act, which defines asbestos as a Hazardous Air Pollutant. The Occupational Safety and Health Administration (OSHA) has promulgated rules governing occupational exposure to asbestos. These rules mandate that increasingly stringent controls and work practices be applied to each of four classes of increasingly hazardous activity and require employers to inform employees of the presence and location of building materials that

are presumed to contain asbestos (PACM), as well as confirmed asbestos-containing materials (ACM), unless the building was built or renovated after 1979.

Massachusetts regulations require notice to federal, state and local government agencies prior to undertaking asbestos-related building demolition and renovation activities, establish safe work practices for such activities and govern the management and disposal of removed asbestos. In addition, the Massachusetts Department of Labor has issued regulations governing the licensing of firms and the certification of workers engaged in asbestos-related removal, containment or encapsulation work.

***Underground and Aboveground Storage Tanks***

A number of federal and Massachusetts statutes and regulations impose a variety of requirements on the owners and operators of underground and aboveground storage tanks used to contain flammable substances, hazardous substances or hazardous wastes. These myriad requirements govern notification of a tank's presence and regulate tank installation and operation, reporting of releases, spills and leaks, cleanup of associated contamination, and financial responsibility requirements for tank owners and operators. These laws include the Resource Conservation and Recovery Act, previously discussed, and the federal Clean Water Act.

The Massachusetts DEP implements the various federal and state requirements for tanks in Massachusetts. The regulations address tank construction, installation, operation and the mitigation of fire hazards associated with tanks containing flammable liquids. These regulations apply to underground and aboveground tank systems. In some respects, they impose stricter requirements on tank owners than do the federal regulations. For example, Massachusetts requires that installation, storage and removal permits be obtained from the local fire department for all tanks containing flammable substances. These regulations also require notice to the local fire department and DEP in the event of a release from a tank.

Chapter 21E, discussed above, does not directly regulate tanks but does require owners and operators to address the release or threat of release of oil or hazardous materials (flammable and nonflammable) to the environment. Notification and cleanup standards are contained in the Massachusetts Contingency Plan, discussed above. Chapter 21E also imposes broad liability upon tank owners and operators and others legally responsible for investigation and

cleanup costs associated with a release from a tank system.

Massachusetts has established an Underground Storage Tank Petroleum Product Cleanup Fund, intended to facilitate cleanups of releases at dispensing facilities by providing partial reimbursement for costs and expenses incurred as a result of releases of petroleum products from underground storage tanks. A dispensing facility is a business that stores petroleum products and dispenses them directly to motor vehicles and boats as fuel. Eligible claimants may be reimbursed certain allowable costs and expenses incurred as a result of responding to an eligible release or paying a final judgment for injury or property damage. In order for a release to be eligible, the owner or operator must have paid all fees in full prior to applying to the fund and must have notified DEP of the release and received a DEP tracking number. The claimant must demonstrate that the facility was in full compliance with all applicable laws and regulations at the time of the release.

## Water Pollution Control NPDES Permits and Wastewater Pretreatment Requirements

Several federal and state laws are intended to prevent or limit the discharge of pollutants into surface waters. The most notable of these are Chapter 21 of the Massachusetts General Laws and the federal Clean Water Act, 33 U.S.C. § 1251 et seq. These federal and state programs operate coextensively.

In general, specified categories of industrial dischargers are subject to technology-based effluent standards established by EPA. National Pollutant Discharge Elimination System (NPDES) permits are issued to individual industrial dischargers for direct discharges of their process wastewaters and other designated non-contact waters to surface waters. Massachusetts has established a variety of surface water quality standards, which are maintained and enforced in part through NPDES permits.

Indirect discharges of effluent to municipal or other publicly owned treatment works (POTWs) are regulated through industry-specific, as well as generally applicable, pre-treatment standards, which must be met prior to the discharge of effluent to a POTW. Typically, new point sources of such discharges are regulated more stringently than existing sources.

Discharges to groundwater are regulated by Massachusetts water quality programs to ensure that state-mandated groundwater quality standards are maintained.

Storm water run-off associated with industrial activities and construction sites is also regulated under the federal and state clean water acts.

Under EPA regulations, a facility may need a site-specific permit, issued in a manner similar to the basic NPDES program. However, in many cases, facilities will be eligible for coverage under a general permit issued by EPA. To be covered by a general permit, a facility must submit a Notice of Intent (N0I) in order to be covered by the permit, to develop and implement storm water pollution prevention plans and to conduct site inspections. The general permits do not authorize mixed or non-storm water discharges, nor do they exempt permittees from spill notification requirements in the event of a release of hazardous substances into a discharge. The permit for discharges associated with industrial activities requires quarterly monitoring for certain types of facilities.

Massachusetts also regulates some storm water discharges on a case-by-case basis, focusing on discharges contaminated by contact with certain substances or potentially contaminated due to industrial locations. EPA has recently considered significant extensions of their storm water regulatory programs in Massachusetts. These potential new programs may have significant impact on existing property owners, as well as on redevelopment and new developments.

## Air Pollution Control

An overlapping system of federal and state laws is designed to limit the emission of airborne pollutants from industrial facilities (Clean Air Act, 42 U.S.C. §§ 7401 et seq., as amended; Chapter 111, §§ 142A – 142O of Massachusetts General Laws). DEP's air pollution control regulations appear at 310 C.M.R. Parts 6.0 – 8.0 et seq. The air pollution control programs discussed in this summary concern facilities that are known as stationary sources. The federal and state programs also extensively regulate mobile sources of air pollutants, such as automobiles. The federal and state regulatory scheme governing air pollutants are exceedingly complex, particularly for larger sources of air pollution.

A wide variety of air pollutants are regulated. Six air pollutants are subject to National Ambient Air Quality Standards (NAAQS) (sulfur dioxide, carbon monoxide, ozone, nitrogen dioxide, lead, and particulate matter). In addition to standards for these "criteria" pollutants, EPA is continuing to develop standards for hazardous air pollutants (HAPs). Massachusetts is also paying more attention to carbon dioxide and other greenhouse gas emissions. Greenhouse gas emissions from large power plans are now regulated through the Regional Greenhouse Gas Initiative, of which Massachusetts is a part. Massachusetts also regulates greenhouse gas emissions through its MEPA program, discussed below, and may be developing economy-wide greenhouse gas regulations over the next few years.

It is important to recognize that a wide variety of new sources require air permits, and that those permits must be in place before construction can begin on those sources. Obviously, air permits are required for major generators of air emissions, such as power plants, but they can also be required for much smaller sources, including emergency backup generators, laboratory operations and heating boilers. Most air permits are issued by the Massachusetts DEP, but the EPA often participates in the permitting process. EPA and DEP must both issue an approval for new major sources of air pollution.

A variety of regulatory programs can apply to individual sources. For example, even many relatively small sources of air pollution require a permit from the DEP issued under its air pollution control regulations at 310 CMR 7.00. A Prevention of Significant Deterioration (PSD) permit must be obtained from DEP before a major source of regulated air pollutants is constructed or modified in a significant manner. Under certain circumstances, these large sources also must obtain approvals from DEP under the New Source Review program, which requires the most stringent emission control technology and often requires the purchase of emission "credits" from other sources to "offset" the new emissions created by the new source. The New Source Performance Standards program (NSPS) imposes technology-based limitations on designated types of new facilities or industrial operations. Large sources of hazardous air pollutants are subject to the other programs so as to achieve Maximum Achievable Control Technology (MACT) standards. Finally, large sources of air pollutants are also required to obtain an operating permit. Basically, the operating permit program works to collect in one permit for each regulated facility all the various air pollution control requirements applicable to that facility.

## Community "Right-to-Know": Mandated Information Disclosure

The federal Emergency Planning and Community Right-to-Know Act (EPCRA) was enacted primarily in response to the 1984 Bhopal chemical release disaster. (EPCRA is similar to the European Union's Seveso Directive, the most recent iteration of which, Seveso III, was adopted on July 4, 2012. See Council Directive 2012/18, On the Major Accident Hazards Involving Dangerous Substances, 2012 O.J. (L 197)). Businesses covered by EPCRA are generally required to notify state and local emergency planning entities of the identities and quantities of regulated hazardous chemicals and toxic chemicals, that are used or kept at their facilities or released to the environment. Notification is by annual filing of Material Safety Data Sheet (MSDS) forms or chemical lists, inventory reports and toxic chemical

release reports. EPCRA also requires regulated businesses to notify federal, state and local authorities immediately of accidental releases of hazardous chemicals.

Chapter 111F is the Massachusetts EPCRA equivalent. It requires facilities to make hazardous chemical information available to DEP and to the public. Unlike EPCRA, the chemical substances regulated under Chapter 111F have been collected in a single list, the Massachusetts Substances List, found at 105 C.M.R. § 670, Appendix A. This list is revised annually.

## Toxic Substance Use Reduction

The federal government and many states are increasingly providing industry with incentives and mandates to reduce the use of toxic chemicals in industrial processes. The Pollution Prevention Act of 1990 (PPA), 42 U.S.C. §§ 13101 et seq., makes pollution prevention or reduction at the source a national policy and directs EPA to promote source reduction activities. Owners and operators of facilities required to file Toxic Chemical Release Reports under EPCRA are required to include toxic chemical source reduction and recycling information that is then made available to the public. EPA uses the industry-provided information to identify future pollution prevention opportunities.

The Massachusetts Toxics Use Reduction Act (TURA) represents the state's approach (Chapter 211) to reducing toxics use. Unlike traditional "command and control" legislation, TURA allows and encourages the regulated community to determine how to achieve this goal. In addition, TURA's requirements have been coordinated to some degree with the above-described federal right-to know reporting requirements and forms, although TURA's coverage of industrial categories is broader than the federal law.

TURA has two major purposes. The first, similar to the federal PPA, is to develop detailed information about the use of toxic and hazardous chemicals by certain firms in Massachusetts. The second aims to force a reduction in use of toxic and hazardous chemicals in the Commonwealth, by requiring certain toxics users to submit plans for reducing their use of toxic and hazardous substances and generation of toxic by-products without shifting risks among workers, consumers or parts of the environment. Such users must measure and report on their use of toxics on an annual basis and must update their plans every other year. Certain users may opt either to develop a Resource Conservation Plan or implement an Environmental Management System in lieu of continuing to update Toxic Use Reduction Plans.

## Development and Construction Projects

Much of the preceding has focused on requirements that most often apply to larger industrial or commercial facilities or contaminated properties. However, there are a host of federal and state laws that apply more broadly to the development, construction and expansion of facilities, regardless of whether those facilities generate wastes, emit pollutants or lie on contaminated land.

In addition to conventional land use and zoning laws, which are primarily administered at the local level, key state statutory and regulatory frameworks relevant to project development include the Massachusetts Environmental Policy Act, the Wetlands Protection Act, Massachusetts General Laws Chapter 91 (addressing use of tidelands) and the Coastal Zone Management Act. Requirements for on-site sewage treatment under Title V may also be significant to these projects. Land use development projects are often subject to legal challenges by project opponents. Although legislation was enacted in 2006 to streamline the resolutions of these challenges, project proponents are well advised to evaluate the possibility of appeals as part of any development strategy.

## The Massachusetts Environmental Policy Act

The Massachusetts Environmental Policy Act (MEPA) is administered by the EOEEA and provides for comprehensive review and mitigation of the environmental impacts of projects or other activities that are subject to permits from state agencies. (MEPA is similar to the National Environmental Policy Act, which requires development of Environmental Impacts Statements (EISs) for major federal projects that may significantly affect the environment, and to the European Union Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment. See Council Directive 2011/92, 2011 O.J. (L 26), as amended by Council Directive 2014/52, 2014 O.J. (L 124). Until the MEPA process is concluded, a state agency may not issue a permit to, or provide funding for, a MEPA-covered project. Not all projects are subject to MEPA review; only projects that require state action, financial assistance or a state permit and are over a certain size or impact threshold (e.g., number of new parking spaces or amount of impervious surface created) must go through the process.

If a project is subject to MEPA, a project proponent first must prepare and file an Environmental Notification Form (ENF) with EOEEA. The ENF provides information about the

project's scope and potential environmental impacts, and is subject to public review and comment. For smaller projects with low impacts, submission of the ENF is all MEPA requires. However, for others, the regulations require preparation of a much more detailed review, called an Environmental Impact Report (EIR). Generally, project proponents are required to prepare both draft and final EIRs. The purpose of the EIR is to provide a detailed description of the project and its impact on the environment as well as any proposed mitigation measures intended to reduce environmental impacts, and a description of alternatives to the project and the environmental impacts of each alternative.

After the draft EIR is reviewed and commented on by various agencies and the public, the secretary of EOEEA will issue a written statement summarizing the comments and areas of concern. The project proponent then must submit a final EIR that incorporates and responds to the secretary's comments and demonstrates that all feasible measures will be taken to avoid or minimize project-related environmental impacts. The final EIR is again subject to public review and must be found adequate by the secretary. Once the secretary's review is complete, other agencies may then proceed to issue permits for or otherwise act on the proposed project.

## Wetlands Protection and Coastal Zone Management

The federal Clean Water Act regulates the discharge or placement of dredged or fill material into federally-protected "navigable waters." A permit from the U.S. Army Corps of Engineers (Section 404 Permit) is required for most discharges of dredge or fill material. "Waters of the United States" include most wetland areas; "waters" and "wetlands" have been broadly interpreted. This interpretation gives the Corps of Engineers, and often EPA, a significant regulatory role in development projects in or near federal wetland areas. However, in 2001, the Supreme Court narrowed federal government jurisdiction under Section 404, in a ruling that concluded that isolated wetlands are not waters of the United States. A 2006 Supreme Court decision has created further uncertainty regarding the need for Section 404 permits for some wetlands. EPA has recently promulgated a new rule to define "waters of the United States", which some people view as expanding EPA's jurisdiction over wetlands, though EPA disagrees. The rule is controversial and is currently subject to legal challenges.

In Massachusetts, the Army Corps administers Section 404 through the Massachusetts Programmatic General Permit (PGP). The PGP categorizes dredge and fill activities by impact, requiring additional screening or individual permits

for activities entailing impact above certain thresholds. According to the Corps, most projects approved by local conservation commissions under Massachusetts Wetlands Protection Act also will be below the federal thresholds for Category 1 non-reporting projects. These may proceed under authorization of the PGP without application or notification to the Corps.

The Massachusetts wetlands and coastal zone protection system is extensive. The State's "Wetlands Protection Act," Chapter 131, § 40, requires public review and authorization by the appropriate local conservation commission of activities — such as removal, filling, dredging or alteration that will or could alter wetlands and floodplain areas. Amendments to the Wetlands Protection Act in the mid-1990s extended protection to certain land near rivers, even if not otherwise subject to the WPA. DEP has promulgated regulations to implement this Act at 310 C.M.R. § 10.00 et seq. In general, unless an activity that will or could adversely affect certain protected interests in critical areas can be adequately conditioned to meet DEP's regulatory standards, the activity will be prohibited. Certain limited projects, generally maintenance of or improvement to existing structures or emergency response activities, are subject to somewhat more relaxed standards. The law allows a person to seek in advance a determination whether a particular area is protected by the Act. The regulations also establish requirements for work to be conducted within a 100-foot buffer zone surrounding certain geographic features such as coastal or freshwater wetlands, beaches, dunes, ponds and lakes.

It is also worth noting that municipalities have authority under state law to enact their own wetlands bylaws, so long as they are at least as stringent as the state regulations, and that about half the towns and cities in Massachusetts have done so. Therefore, a developer should determine whether a municipality has its own bylaws and whether they may be more stringent than the state regulations. Either way, the developer will apply first to the local Conservation Commission for approval.

Massachusetts regulates activities within the so-called Coastal Zone separately from — and in addition to — regulation under the Wetlands Protection Act. Therefore, activities within the Coastal Zone may be subject to regulation under both the Wetlands Protection Act and the Coastal Zone Management (CZM) Office. The CZM Office has two sets of responsibilities: it implements requirements under the federal Coastal Zone Management Act, 16 U.S.C. § 1451 et seq., and under the distinct regulatory program pursuant to the Massachusetts statute, M.G.L. Chapter 21A, § 4A. Initially, the CZM Office's responsibilities

are to define the limits of the Coastal Zone. The CZM Office has also promulgated a series of policies regarding development in the Coastal Zone (301 CMR 20-00 et seq.). Massachusetts gives effect to CZM policies through existing permit and management programs and by promulgating CZM regulations under such enabling acts as those governing wetlands and water pollution control.

Thus, state permitting agencies must review the applicable CZM policies before issuing state permits to projects located in the Coastal Zone, and certain statutes require licensing agencies to obtain an opinion from the CZM office that a project is consistent with CZM policies prior to issuance of a license. Similarly, federal regulations require that, before projects requiring federal licenses can be constructed within the Coastal Zone, project proponents must obtain from state authorities a determination that the project is consistent with applicable state policies. The Massachusetts CZM Office has responsibility for making federal consistency determinations, based on review of the project in light of applicable CZM policies.

## Ocean Management Act

Activities conducted within the Commonwealth's jurisdictional waters (within 3 miles of the coastline) are also subject to the Ocean Management Plan. The Plan, which was the first of its kind nationwide, was authorized by the Massachusetts Oceans Act of 2008. It amounts to zoning of the ocean aimed at channeling off-shore activities (for example, liquefied natural gas terminals, offshore renewable energy facilities, and sand and gravel mining) into designated areas and reinforcing protections in other areas such as Ocean Sanctuaries. The Plan does not establish new regulatory process, but rather guides existing regulatory decision-making.

## Chapter 91

Finally, under Chapter 91, the state regulates developments in tidelands, which may be a somewhat misleading term to the uninitiated. Tidelands includes former tidelands that may have been filled at any time, even hundreds of years ago. The state government retains an ownership interest in these filled tidelands and has promulgated regulations governing development in tidelands. See 310 CMR 9.00 et seq. The general thrust of the regulations is to protect the public's rights in these tidelands and, generally, to maximize the extent to which they are preserved for water-dependent uses.

## Title V

Title V is applicable to all septic systems currently in use, to the design and construction of new systems, and to the expansion and upgrade of

systems. No new, upgraded or expanded system may be used without a Certificate of Compliance from the local Board of Health. Existing systems with a design flow of between 10,000 to 15,000 gallons per day (gpd) are considered "large systems" and may be required to obtain a groundwater discharge permit under the state water quality regulations. New construction with a design flow exceeding 10,000 gpd cannot be approved under Title V and must obtain a groundwater discharge permit.

Under Title V, systems must be inspected for compliance at or within two years prior to the time the title to the property is transferred. Certain locational criteria, such as specified distance in relation to surface water supplies or private water supply wells, automatically trigger upgrade requirements. Obvious failures, such as backup or ponding, also trigger upgrade requirements. If a system is found to be failing, it must be upgraded within two years to maximum feasible compliance with Title V. In evaluating what must be done to achieve maximum feasible compliance, the local Board of Health must consider economic feasibility of upgrading in addition to physical possibility.

## A Note About Environmental Litigation

Any summary of American environmental law would not be complete without mentioning the important role of environmental litigation both in enforcing the various laws and in reimbursing injured parties for legally compensable injuries. In addition, it is important to recognize the impacts of challenges to environmental permits in the overall project development process.

Actions to establish liability for cleanup costs, as well as penalties for violations, can be brought in both federal and Massachusetts courts under many of the environmental statutes described in this summary. Many of these statutes not only provide for suits by governmental agencies, but also allow other private parties — such as landowners, other affected persons or concerned citizens — to sue to enforce legally established environmental law requirements.

In addition, certain statutes and the common law of Massachusetts allow private parties to sue for property damages (which may include the reduced value of land) and injunctive relief in many situations involving environmental contamination of land, water or air. The common law also allows suits for personal injuries caused by exposure to toxic or otherwise harmful substances. Potential causes of action (e.g., theories of liability) include claims of negligence, trespass and nuisance.

Recently, there has been increasing litigation activity relating to indoor air pollution, which are not pervasively regulated under existing environmental law.

One advantage to doing business in Massachusetts is that this is the only state in the entire United States where so-called punitive or exemplary damages cannot be awarded absent express statutory authorization. In addition, the normal rule in Massachusetts and throughout the United States is that each party to litigation pays its own attorneys' fees, win or lose; the victor's litigation expenses are not ordinarily reimbursed by the loser. However, under some environmental statutes, the loser is required to pay the winner's attorneys' fees, especially in suits brought by citizens' groups or where the loser is shown to have unreasonably failed to acknowledge its legal responsibilities.

Apart from litigation relating to environmental compliance or responsibility for cleanup costs, most of the permits and approvals discussed in this section may be appealed by the party that applied for the permit and by other aggrieved parties. Many of the regulatory programs require the initial appeal of a permit or approval to be filed with an administrative agency, rather than in court, though judicial appeal is ultimately available. Appeals can often be costly and time-consuming, and in many instances the project cannot proceed until the appeals have run their course. Even though Massachusetts legislation enacted in 2006 was intended to speed the resolution of challenges, any developer of a project that requires approvals would be well advised to consider the likelihood of an appeal and the impacts to the project in the event of an appeal.

## Taxation

The following is a general overview of certain U.S. federal and Massachusetts income tax considerations that may be relevant to non-U.S. persons doing business in the United States. All tax rates set forth in this discussion are the rates as in effect in 2015. Such rates are subject to change.

### U.S. Federal Income Taxation

U.S. federal taxation of business income earned by a non-U.S. person can produce significantly varied results, depending upon the form, nature and extent of such non-U.S. person's activities in the United States.

#### *The Residency Rules*

The United States subjects all non-U.S. persons who become U.S. tax residents to net progressive rate taxation on their entire worldwide income, regardless of source. Non-U.S. persons who are not U.S. tax residents, however, are subject to U.S. federal income tax only on income derived

from U.S. sources. Therefore, from a tax perspective, non-U.S. persons (including corporations and individuals) will generally find it advantageous to avoid U.S. tax residency.

### *Tax Residency for Corporations*

Corporations are treated as U.S. tax residents (that is, "domestic" entities) only if they are formed under the laws of the United States, any one of the states or the District of Columbia. Thus, non-U.S. persons operating

in the corporate form are assured of non-U.S. tax residency so long as the corporation is formed outside the United States.

### *Tax Residency for Individuals*

A non-U.S. individual who possesses a "green card" granting him or her permanent residency in the United States is automatically a U.S. tax resident. A non-U.S. individual who does not have a green card may also be a U.S. tax resident if he or she spends sufficient time in the United States to have a substantial presence here. Substantial presence is calculated on a modified day-count basis.

### *Special Considerations for Partnerships, Disregarded Entities and Other Transparent Entities*

Although partnerships, disregarded entities and other entities that are transparent for U.S. federal income tax purposes (which generally also can include limited liability companies) may be treated as "domestic" entities because they were formed under the laws of the United States, any one of the states or the District of Columbia, such entities are not generally subject to U.S. federal income tax; rather, the U.S. federal income tax consequences of these entities' activities are passed through to their owners. Accordingly, if an entity is treated as a transparent entity for U.S. federal income tax purposes, the U.S. federal income tax treatment of an owner of such entity will generally depend upon the tax status of the owner and the activities of the entity.

## ***U.S. Federal Income Taxation of Non-U.S. Persons who are not U.S. Tax Residents***

In general, a non-U.S. person that is not a U.S. tax resident is subject to U.S. federal income taxation only on U.S.-source income. The taxation of U.S.-source income depends on whether the income is considered "fixed or determinable, annual or periodic" (FDAP) income, or income that is "effectively connected" with a U.S. trade or business (ECI).

### *Fixed or Determinable, Annual or Periodic (FDAP) Income*

Most U.S.-source passive income, such as dividends, interest, rent, royalties and annuities, is subject to U.S. federal income taxation as FDAP income. FDAP income generally is not subject to U.S. net progressive taxation, and a non-U.S. person who is not a U.S. tax resident and who

receives FDAP income generally is not required to file U.S. federal income tax returns to report such income, unless the FDAP income is effectively connected with the non-U.S. person's conduct of a U.S. trade or business (see the discussion under the heading "Effectively Connected Income" below). Rather, the gross amount of FDAP income is subject to a flat 30 percent U.S. federal withholding tax. A recipient of FDAP income who is a qualified resident of a country with which the United States has a tax treaty may be able to reduce this withholding tax rate to 5 to 15 percent in the case of dividends, and in some cases eliminate the tax completely for interest or royalties. In general, capital gains realized by a non-U.S. person who is not a U.S. tax resident from the sale of U.S. property (including shares of a U.S. corporation) generally are not considered U.S.-source income, and therefore are not subject to U.S. federal withholding tax under the FDAP rules. (See, however, the discussions under the headings "Income Derived from the Disposition of U.S. Real Property Interests" and "Foreign Account Tax Compliance Act (FATCA)," below.)

### *Effectively Connected Income (ECI)*

Income from both U.S. and non-U.S. sources that is earned by non-U.S. persons who are not U.S. tax residents is subject to the net progressive U.S. federal income tax if it is effectively connected with the conduct of a U.S. trade or business (so-called "effectively connected income," or ECI). Importantly, a non-U.S. person who is not a U.S. tax resident, but who engages in the conduct of a U.S. trade or business, must file U.S. federal and state income tax returns; a non-U.S. person who is not a U.S. tax resident and who has only FDAP income is generally not required to file such returns. ECI is subject to U.S. federal income tax at rates as high as 35 percent for corporations and 39.6 percent for individuals; in addition, for non-U.S. corporate investors, ECI can attract an additional "branch profits tax" of 30 percent on the net after-income-tax amount. (See the discussion under the heading "The Branch Operation," below.)

The first step in analyzing whether U.S.-source income is ECI is to determine whether the non-U.S. individual or entity is engaged in the conduct of a U.S. trade or business. Relevant factors include the level, nature, continuity and regularity of the non-U.S. person's activities in the United States. The activities of a U.S. dependent agent (but generally not the activities of a U.S. independent agent) may be attributed to a non-U.S. principal in this context.

If the activities involved rise to the level of a trade or business, the second step is to determine whether the income in question is effectively connected with the conduct of that trade or

business. This analysis can often be quite complicated, since there is no requirement that the income be a direct product of the trade or business in order for it to be deemed ECI.

ECI can be active or passive income. Thus, a dividend received by a non-U.S. person that is not a U.S. tax resident from a U.S. corporation would normally be FDAP income and therefore taxed (through withholding) at the flat rate of 30 percent. If the dividend were ECI, however, it would be taxed at rates as high as 35 percent for corporate investors and 39.6 percent for individual investors. Since ECI taxation is based on net income, however, applicable deductions may be taken against the gross amount of the income (for example, the dividend received deduction may be available to the corporate investor). As with FDAP income, treaties can significantly affect the tax treatment of ECI. Under the model treaty, upon which most U.S. tax treaties are based, ECI can be taxed under the normal progressive rate structure only if the income is attributable to a permanent establishment maintained by the non-U.S. person in the United States. A permanent establishment requires a greater level of activity than a trade or business, usually involving the existence of a fixed presence in the United States, such as a factory, store, office or other place of management.

*Income Derived From the Disposition of U.S. Real Property Interests*

Non-U.S. entities and individuals that own U.S. real property interests are subject to the Foreign Investment in Real Property Tax Act (FIRPTA), which automatically treats income realized upon a sale of a U.S. real property interest by a non-U.S. person that is not a U.S. tax resident as ECI. U.S. real property interests include direct ownership (and indirect ownership through entities that are transparent for U.S. federal income tax purposes) of real property located in the United States and any interest in a domestic corporation that is a U.S. Real Property Holding Corporation (USRPHC). A domestic corporation generally is a USRPHC if 50 percent or more of the fair market value of its business and real estate assets consists of U.S. real property interests.

U.S. federal income tax laws offer non-U.S. persons who are not U.S. tax residents the opportunity to make an irrevocable election to treat all income derived from a U.S. real property interest — not merely sale income automatically treated as ECI — as ECI, whether or not the non-U.S. person is, in fact, engaged in a trade or business in the United States and such income is attributable to such trade or business. Since FIRPTA will automatically treat the income from the sale of the property as ECI, non-U.S. persons subject to FIRPTA may find it advantageous to

make this election, thereby allowing them to offset income derived from the property with the costs of producing such income. If the election is not made, rental or other income derived from the property will generally be FDAP income against which no deductions are allowed, yet any gain realized upon disposition of the property will be ECI under FIRPTA and thus fully taxable.

### *Foreign Account Tax Compliance Act (FATCA)*

FATCA generally imposes a 30 percent U.S. federal withholding tax on U.S.-source FDAP income that is paid or allocated to certain non-U.S. entities (including "foreign financial institutions" and certain "non-financial foreign entities"), unless such non-U.S. entities establish that they are compliant with or exempt from FATCA. Foreign financial institutions generally are required to register with the IRS, collect and provide to U.S. or non-U.S. tax authorities information regarding direct and, in some cases, indirect U.S. account holders of such institutions, and provide withholding agents with certifications (generally on IRS Forms W-8) that such entities are exempt from FATCA withholding. Non-financial foreign entities generally are required to provide withholding agents with certifications (generally on IRS Forms W-8) regarding whether such entities have any substantial direct or indirect U.S. owners. Beginning on January 1, 2019, the scope of FATCA withholding will be expanded to include gross proceeds from a sale or other disposition of property that could produce U.S.-source FDAP income. Amounts withheld under FATCA with respect to income that is also subject to the general U.S. withholding rules, discussed above, will be applied against and reduce the amount of such other U.S. federal withholding tax.

## ***Sourcing Rules***

With certain minor exceptions, the United States will only impose taxes on a non-U.S. individual's or entity's U.S.-sourced income. Therefore, the sourcing of a non-U.S. person's income is crucial to any analysis of his, her or its potential U.S. tax liability.

### *Sales of Personal Property*

Generally, the source of gains from the sale of personal property is the tax residence of the seller. Thus, if the seller is not a U.S. tax resident, any gains from the sale of personal property, including shares of corporate stock (not including shares of a corporation that is a USRPHC), will be sourced outside the United States, even though the sale may take place within the United States. Sales of inventory, depreciable personal property and intangibles, however, do not fall under this general rule and instead have their own particular sourcing provisions.

### *Sales of Real Property*

Gain on the disposition of real property is sourced at the property's location. Thus, if the property is located in the United States, any gain from its sale

would be U.S.-sourced and automatically ECI under the provisions of FIRPTA. In addition, gain on the disposition of shares of a U.S. corporation that is a USRPHC is treated as U.S.-sourced and automatically ECI under FIRPTA.

### *Certain Other Sourcing Provisions*

Interest and dividends are generally sourced at the residence of the distributing bank, corporation or other payer. Rental and royalty income is generally sourced at the location of the property that is the subject of the lease or license.

## ***Non-U.S. Corporations—Methods of U.S. Business Operation and Repatriation of Earnings***

The method by which earnings and profits of a U.S. business can be repatriated to a non-U.S. corporate owner is a major concern. The tax implications to a non-U.S. corporate owner of operating a business through a branch, as opposed to a corporate subsidiary, can be significant.

### *The Branch Operation*

In order to minimize the tax differences between doing business in the United States through a corporate subsidiary, as opposed to operating through a U.S. branch office, the United States has instituted a "branch profits" tax on the U.S. branch operations of a non-U.S. corporation. This operates as a second-level tax, similar to the tax imposed on dividends paid by a subsidiary corporation. Therefore, in addition to the normal first-level net progressive U.S. federal income tax levied on the branch's profits as ECI, a flat 30 percent U.S. federal income tax is also imposed on those same profits (reduced by the first level tax already paid), but only to the extent that the profits are not reinvested in the U.S. branch's business. Accordingly, the branch profits tax has the effect of putting the earnings and profits of a U.S. branch of a non-U.S. corporation that are deemed to be remitted to the non-U.S. corporation on par with the earnings and profits of a U.S. corporate subsidiary that are distributed by such subsidiary to its non-U.S. parent.

If a non-U.S. corporation that operates a U.S. branch is a qualified resident of a country with which the United States has an income tax treaty, and such treaty contains a valid nondiscrimination clause, the non-U.S. corporation will be fully exempt from the branch profits tax when it repatriates its earnings from its U.S. branch to its home office outside the United States. The United States has income tax treaties containing variations of nondiscrimination clauses with many countries. Unfortunately, certification requirements prevent a privately-held company from easily demonstrating that it is a qualified resident under most of these treaties. Furthermore, it may be more administratively difficult to track earnings and profits and otherwise calculate branch profits tax liability for a branch

than it is to compute and track dividend distributions of a corporate subsidiary. Accordingly, unless an overriding non-U.S. tax goal exists, or the business mandates the use of a U.S. branch, non-U.S. corporations should consider incorporating a U.S. subsidiary for their U.S. business operations.

### *The Corporate Subsidiary Operation*

Non-U.S. corporations may find it beneficial to do business in the United States through a domestic corporation.

The corporate subsidiary form of doing business may offer the non-U.S. corporate owner certain tax advantages over the branch form, including greater control over the repatriation of earnings and profits, as determined for U.S. federal income tax purposes. As discussed above, when a non-U.S. corporation conducts its U.S. business operations through a branch, the branch profits tax is automatically imposed on the branch's earnings and profits that are not reinvested in the U.S. business for any given year. In contrast, the non-U.S. parent of a U.S. corporate subsidiary will not be exposed to a second level of U.S. federal income tax until the U.S. corporate subsidiary actually distributes its earnings and profits to its non-U.S. parent, at which time the 30 percent FDAP withholding tax would apply (subject to rate reduction under an applicable tax treaty, if any).

Doing business in the United States through a corporate subsidiary also allows a non-U.S. corporate owner to finance its investment through debt rather than equity. Debt financing can present many advantages over equity financing. For example, many U.S. tax treaties reduce FDAP withholding rates on interest beyond the reductions available for dividends (e.g., zero percent on interest in some cases, compared to 5 percent or 15 percent on dividends).

The greatest advantage afforded through debt financing is that interest payments made by the U.S. corporate subsidiary are deductible, while dividend payments are not. The deductibility of interest payments, however, is subject to a number of limitations. For example, under U.S. earnings-stripping rules, U.S. corporations paying interest to non-U.S. related parties may be denied, in whole or in part, a deduction for such payments.

In order to trigger these earnings-stripping limitations, the following four conditions must be met. First, the U.S. corporation paying the interest must be related to the non-U.S. recipient of the interest payments. Under U.S. federal income tax law, the non-U.S. recipient and the U.S. corporate subsidiary are related if the non-U.S. recipient owns more than 50 percent of either the vote or value of the U.S. subsidiary corporation's outstanding stock. Second, the earnings-stripping rules apply only to

the extent that the non-U.S. recipient is exempt from U.S. withholding tax on the interest income under an income tax treaty. For example, if the applicable treaty reduces the U.S. withholding tax on interest to 10 percent from the FDAP withholding rate of 30 percent, two-thirds of the interest paid will be deemed exempt from U.S. withholding tax and thus subject to the earnings-stripping limitations. Third, the U.S. corporate subsidiary must be thinly capitalized, which means that its debt-to-equity ratio must exceed 1.5 to 1. Finally, the U.S. corporate subsidiary must have "excess interest expense," that is, the subsidiary's net interest expense (interest expense offset by interest income) must be greater than 50 percent of its adjusted taxable income.

The earnings-stripping rules deny the U.S. subsidiary corporation an interest deduction to the extent of its excess interest expense. A disallowed deduction may be carried forward indefinitely and deducted in a future year to the extent the subsidiary does not exceed the earnings-stripping limitations in the future year.

The earnings-stripping limitations present some potential traps for the unwary non-U.S. parent attempting to maximize the advantages of debt financing over equity financing. First, the debt-to-equity ratio rule limits the usefulness of debt financing in producing interest deductions for repatriation payments. Second, the earnings-stripping limitations can apply not only to debt owed by the U.S. corporate subsidiary to a non-U.S. parent, but also to debt the subsidiary owes to an unrelated bank lender, if that debt is guaranteed by the non-U.S. parent. Even a simple assurance of repayment by the non-U.S. parent may trigger this rule.

### *Transfer Pricing Rules*

A non-U.S. corporation with a U.S. subsidiary will inevitably conduct a variety of transactions with that subsidiary, such as loans of money, personal and real property transactions and performance of services. These transactions present the possibility of significant U.S. tax avoidance through pricing schemes. For example, a non-U.S. parent incorporated in a country with lower tax rates than those of the United States may try to sell inventory to its subsidiary distributorship in the United States at an artificially inflated price in order to minimize the subsidiary's U.S. tax liability on sales of the inventory.

In order to curb this kind of U.S. tax avoidance, the United States has enacted transfer pricing rules. These rules allow the U.S. Internal Revenue Service (IRS) to reapportion income and deductions between the U.S. subsidiary and its non-U.S. parent if it determines that they have not conducted their transactions in an arm's-length fashion (that is,

generally in a manner consistent with the commercial practice of unrelated parties). In the past, the IRS has experienced difficulties enforcing the transfer pricing rules because of a perceived "information gap" in obtaining non-U.S. parent business records. In response to this, the United States now imposes potentially burdensome information reporting and recordkeeping requirements on non-U.S.-owned corporations, supported by substantial monetary and other penalty provisions to ensure compliance. Non-U.S. investors who own U.S. business operations should pay careful attention to these information reporting and recordkeeping rules.

## Massachusetts Taxation

Taxes levied by the Commonwealth of Massachusetts include a personal income tax, sales tax and corporation excise tax, all of which are collected by the state government. In addition, cities and towns assess property taxes.

### *The Corporate Tax Regime*

The Massachusetts corporation excise tax is essentially a fee imposed on corporations for the privilege of doing business in the state. It is calculated partially on the basis of property owned by a corporation and partially according to the corporation's net income. The property component of the tax is assessed at the rate of $2.60 per $1,000 of value of the applicable property base located in Massachusetts. The income component is assessed at the rate of 8 percent of net income allocated to Massachusetts, whether or not the income is distributed to shareholders. In computing net income, deductions are allowed for ordinary and necessary business expenses; special tax incentives, such as accelerated depreciation rules and an investment tax credit for purchases of depreciable property, are also available.

Corporations that operate solely in Massachusetts are fully subject to taxation by the state. In contrast, corporations that do not operate solely within Massachusetts (that is, multi-state and multinational corporations) are subject to Massachusetts taxation only to the extent of their property situated within Massachusetts on the last day of the taxable year and their income allocated to Massachusetts in such taxable year. For the income component of the tax, the state uses a three-factor income apportionment formula to determine the portion of a multi-state or multinational corporation's net income that is taxable in Massachusetts. The elements of this formula consist of a property factor, a sales factor (double-weighted) and a payroll factor. Manufacturing companies use only the sales factor instead of the standard three-factor apportionment formula; this ordinarily results in lower Massachusetts tax liability for manufacturing companies.

***Special Corporate Incentives***

*Investment Tax Credit*

Corporations engaged in manufacturing, research and development, agriculture and commercial fishing in Massachusetts generally may claim a 3 percent investment tax credit based on the cost of depreciable real and personal property, to the extent such property is both used and located in Massachusetts. The credit offsets state corporation excise tax liability, and both non-U.S. and domestic corporations doing business in Massachusetts are eligible for it.

*Dividends Received Deduction*

Massachusetts generally permits corporations to deduct from their net income 95 percent of the value of all dividends received from other corporations, unless the corporate shareholder owns less than 15 percent of the voting stock of the corporation that paid the dividend.

*R&D Tax Credit*

Massachusetts grants a tax credit for non-U.S. and domestic corporations that engage in research and development in the state. Like the investment tax credit, the R&D credit is available to offset a corporation's excise tax liability, but it is limited to a percentage of the qualified research expenses incurred in any given year.

***Other Massachusetts Taxes***

For personal income tax purposes, Massachusetts taxes ordinary income and long-term capital gain at a flat rate of 5.15 percent and short-term capital gain at a flat rate of 12 percent. The Massachusetts Constitution prevents the state government from instituting progressive tax rates, so all personal income is taxed at these flat rates.

Property taxes are collected by Massachusetts cities and towns on the full fair cash value of real and personal property located in such localities. By special constitutional amendment, Massachusetts has limited the property tax rate that a locality can levy to 2.5 percent of the aggregate assessed value of all property subject to tax by such locality. This special constitutional amendment, called Proposition 2½, also restricts the ability of cities and towns to increase their property tax rates, thereby stabilizing the property tax burden.

## Antitrust and Trade Regulation

Both the U.S. and Massachusetts have enacted extensive laws and regulations aimed at preventing and punishing unreasonable restraints on trade, monopolistic practices and unfair competition. Generally, transactions that involve commerce in more than one state and international commerce are governed by federal laws. However, Massachusetts's broad unfair-competition law is often invoked in areas in which federal law does not

govern or to provide remedies beyond those available under federal law.

## Federal Law

U.S. antitrust laws include the Sherman Act, the Clayton Act and the Robinson-Patman Act. The Sherman Act prohibits contracts, combinations and conspiracies that unreasonably restrain trade. Certain restraints on trade, most notably price-fixing agreements among competitors, are "per se" unreasonable. Certain other restraints, for example, controls placed by manufacturers on the sales activities of distributors, are usually governed by the "rule of reason," in which the procompetitive and anticompetitive effects of the activity are weighed against each other. The Sherman Act also prohibits monopolization, attempted monopolization and conspiracies to monopolize. The U.S. government may bring both criminal prosecutions and civil lawsuits to enforce the Sherman Act. The Sherman Act can apply to wholly extraterritorial conduct if it is intended to and does have a substantial effect in the U.S.

The Clayton Act prohibits certain specific anticompetitive activities. For example, it prohibits a seller with market power in one product from forcing a customer to buy a second product in order to purchase the first product, so-called tying. It also prohibits mergers and acquisitions that would tend to lessen competition in a given area of commerce. The Robinson-Patman Act prohibits discrimination (and inducing others to discriminate) in the price charged for commodities of "like grade and quality" to competing buyers, and certain discriminatory advertising allowances, brokerage payments and services rendered in connection with the purchase of goods. Given the complexity of the law in these areas, potential violations of the Clayton Act and Robinson-Patman Act must be assessed on a case-by-case basis. The U.S. government has the power to enforce both Acts through either the Justice Department or the Federal Trade Commission.

Private individuals and corporations that are injured by violations of the U.S. antitrust laws, including the Sherman Act, Clayton Act or the Robinson Patman Act, may sue for injunctive relief, three times their actual damages and their attorneys' fees. Companies seeking to engage in certain cooperative research, development or production joint ventures may apply to the Department of Justice and Federal Trade Commission and may, under the proper circumstances, obtain an exemption from liability for treble damages and attorneys' fees.

U.S. antitrust policy is also promoted through the Federal Trade Commission (FTC) Act and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The FTC Act is intended to protect U.S.

consumers, domestic industry and exporters from "unfair methods of competition" and "unfair or deceptive arts or practices." The FTC has broad authority to determine what constitutes an unfair method of competition or an unfair trade practice. U.S. courts have upheld FTC cease-and-desist orders that enforce antitrust laws and similar policies (for example, orders relating to mergers, acquisitions and joint ventures), and orders that prohibit false representations about products and other similar practices. Under appropriate circumstances, the FTC will issue advisory opinions as to whether a particular business policy would violate the FTC Act.

The Hart-Scott-Rodino Act requires that companies proposing to acquire companies that do business in the U.S. or assets located in the U.S. must, under certain circumstances, report such proposals to the FTC and the Justice Department prior to the acquisition. Whether reporting is required depends on a formula related to the size of the acquiring company and the size of the assets being acquired. Failure to report may lead to fines of up to $16,000 per day. The current nonrefundable filing fee is $45,000 to $280,000, depending on the size of the transaction. It must be paid by the acquiring party for each proposed transaction to which Hart-Scott-Rodino applies. Like the FTC Act, Hart-Scott-Rodino may only be enforced by the U.S. government.

## Massachusetts Law

Although private lawsuits may not be brought to enforce the FTC Act, the Massachusetts unfair competition statute, Massachusetts General Laws, Chapter 93A, broadly defines unfair trade practices to include all activities that are prohibited by the FTC Act and other activities adjudged to violate the principles of fair competition. Chapter 93A provides for civil actions by private parties and injunctive relief, up to three times actual damages, statutory damages and attorneys' fees. Many U.S. states have similar statutes. For example, one of the largest verdicts in a lawsuit in U.S. history was obtained in the Pennzoil v. Texaco case that was brought under the Texas unfair trade practices statute. The Supreme Judicial Court of Massachusetts has held that consumers who purchase products indirectly from antitrust violators have standing to recover damages under Chapter 93A, even though they are barred from recovering under federal law by the Illinois Brick rule.

## Practical Applications

Even among U.S. lawyers, antitrust is regarded as a particularly complex area of the law. As a rule of thumb, upon entering the U.S. market, foreign companies with market power in a given area of

commerce should have the structure of their proposed U.S. activities reviewed for antitrust compliance by an experienced attorney. Companies that have market power through ownership of patents, copyrights or unique trade secrets should be particularly aware of the relationship between the intellectual property and antitrust laws, in that use of intellectual property rights to enhance a company's market power in other areas of commerce may, under certain circumstances, result in forfeiture of the intellectual property rights and civil liability.

Agreements with competitors and agreements with suppliers and vendors that affect competition should also be carefully reviewed. For example, certain communications among competitors that are legal abroad may be prohibited in the U.S.

The FTC's presale disclosure rule, 16 C.F.R. § 436, applies to offers or grants of franchises. Generally speaking, this rule requires that a franchisor provide potential franchisees with certain prescribed disclosure documents, that the documents be provided at the prescribed time, and that the franchisor abide by rules concerning representations and claims about the actual or potential sales, income or profits of existing or proposed franchise operations. Unlike many other states, Massachusetts does not currently have a generally applicable law that requires all franchisors to register disclosure documents with state authorities. Disclosure laws may apply in particular industries.

Companies engaged in business and asset acquisition (including exclusive patent licenses) should ascertain whether they need to do a Hart-ScottRodino filing. Joint venturers engaged in cooperative research, development and production might wish to register with the Justice Department.

With respect to unfair competition laws, particularly until a company becomes familiar with local business practices, it may wish to seek legal advice about the legality of marketing and selling techniques that have a direct impact on competitors or consumers. For example, U.S. law may require disclosure of certain facts by the seller to the buyer about property being sold prior to completion of the sale. Failure to provide full disclosure of the appropriate information may subject the seller to treble damages for an unfair trade practice.

## Regulation of International Trade and Investment

Foreign investment in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. statutes and related regulations. The following discussion outlines some of the more important aspects of

these laws, which might be relevant to someone investing in or trading with entities located in the U.S.

## Restrictions on Foreign Investment

Under a statutory provision commonly referred to as the Exon-Florio Amendment (50 U.S.C. app. § 2170), as amended by the Foreign Investment and National Security Act (FINSA) of 2007, the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons that could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to national security. The United States Congress has indicated that the term "national security" is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry. The President has delegated his authority to make investigations pursuant to the Exon-Florio Amendment to the Committee on Foreign Investment in the U.S. (CFIUS), an interagency committee made up of representatives of various executive branch departments.

Under the Exon-Florio Amendment and its implementing regulations (31 CFR § 800), CFIUS has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to review the transaction and decide whether to undertake a full-scale investigation. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency. However, companies which do not file voluntarily risk costly and burdensome divestments if CFIUS initiates its own review of a completed, unreported transaction and the President ultimately makes a determination that the transaction threatens national security. CFIUS may, in its discretion, fully investigate any transaction it reviews. An investigation is mandatory if the transaction could result in the control by a foreign government of any party engaged in interstate commerce, or if the transaction would result in both the control of any “critical infrastructure” of the United States by a foreign person and a potential impairment to U.S. national security. Only a joint determination by the Secretary of the Treasury and the lead agency in charge of the review that the transaction will not impair national security can avert a mandatory investigation.

If, at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete its investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days to decide whether there is credible

evidence that leads him to believe that the foreign interest exercising control might take action to impair national security. If the President makes such a determination, the President can then take any action that he deems appropriate to suspend or prohibit the transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses that require a facility security clearance in order to perform contracts involving classified information or even to perform pre-contract activities, such as preparing bids or proposals or entering into negotiations, if classified information is involved. Under Department of Defense regulations, foreign ownership may cause the department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD 5220.22-R, Industrial Security Regulation). Assuming that a foreign owner will be in a position to effectively control or have a dominant influence over the business management of the U.S. firm, the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a special security agreement approved by the department and designed to preclude the disclosure of classified information to the foreign owner or other foreign interests (see DOD 5220.22-M, National Industrial Security Program Operating Manual).

## Reporting Requirements for Foreign Direct Investment

All foreign investments in a U.S. business enterprise that result in a foreign person owning a 10 percent or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis (BEA), a part of the U.S. Department of Commerce, pursuant to the International Investment and Trade in Services Act (22 U.S.C. §§ 3101-3108). The Agricultural Foreign Investment Disclosure Act of 1978 (7 U.S.C. §§ 3501-3508) requires foreign investors to report acquisitions and dispositions of U.S. agricultural land.

## The International Investment and Trade in Services Act

The International Investment and Trade in Services Act (IITSA) authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. IITSA's primary function is to provide the federal government with the information necessary to formulate an informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool to obtain the data

necessary to analyze the impact of such investments on U.S. interests.

Under IITSA and the regulations promulgated thereunder (15 C.F.R. §806), international investments are divided into two classifications — direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated his power to collect data on direct investments to the BEA, and on portfolio investments to the Department of the Treasury.

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

Foreign investments must be reported to the BEA on a version of Form BE-13 if the investment reaches the 10% voting interest threshold and the amount of the transaction is at least $3 million. Transactions covered by the various BE-13 Forms include acquisitions of U.S. business enterprises, the establishment of new entities within the U.S., and the development of new facilities within the U.S. Reports are due 45 days after the transaction occurs. If the size of the investment does not meet the $3 million threshold but the 10% threshold is met, the foreign investor can file a Form BE-13 Claim for Exemption instead of one of the other longer BE-13 Forms. If the BEA contacts the foreign investor, the foreign person or entity must make a filing even if the investment does not meet the reporting thresholds.

Unless an exemption applies, a report on Form BE-605 must be filed with the BEA for a U.S. company in which a foreign person directly owns a 10 percent or greater voting interest within 30 days of the close of each calendar or fiscal quarter (45 days for the fourth quarter) including the quarter in which a U.S. affiliate is established, acquired, liquidated, sold or inactivated. Additionally, non-exempt U.S. affiliates must file one of three types of a Form BE-15 annual report. These forms collect certain financial and operating data about the investment, the identity of the foreign entity and certain information about the ultimate beneficial owner. Exempt companies must file both an exemption from filing a BE-605 form and a Form BE-15 Claim for Exemption.

The BEA has also reinstated reporting requirements in connection with its BE-10 Benchmark Survey, which collects comprehensive statistics on U.S. companies' investments abroad every five years. All U.S. companies that own, whether directly or indirectly, at least 10% of a foreign affiliate are required to participate in the survey regardless of size and to provide both financial and operational data. The information is kept confidential and is used only for analytical or statistical purposes. The BEA also conducts quarterly and annual surveys regarding U.S. companies' investments outside the U.S., but only companies contacted by the BEA are required to respond.

## The Agricultural Foreign Investment Disclosure Act of 1978

The Agricultural Foreign Investment Disclosure Act (AFIDA) and its implementing regulations (7 CFR § 781) require all foreign individuals, governments, corporations and other entities to report holdings, acquisitions and dispositions of U.S. agricultural land. AFIDA contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the Secretary of Agriculture to determine the nature and magnitude of this foreign investment. Unlike the reports filed under the International Investment and Trade in Services Act, reports filed under AFIDA are not confidential but are available for public inspection.

For the purposes of AFIDA, a "foreign person" is (1) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (2) a corporation or other legal entity that is either organized under the laws of a foreign country or has its principal place of business outside the U.S.; (3) a corporation or other legal entity organized in the U.S. in which a foreign person, either directly or indirectly, holds 10 percent or more of an interest; or (4) a foreign government. The definition of "agricultural land" is any land in the U.S. that has been used within the past five years for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form FSA-153 to the Secretary of Agriculture within 90 days of acquiring or transferring any interest, other than a security interest, in agricultural land. The report requires rather detailed information, including the identity, country of organization and principal place of business of the foreign acquiring entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. Foreign ownership entities which file a Form FSA-153 must also provide the legal name and address of each foreign person holding a 10 percent or greater

interest in the ownership entity. The Secretary of Agriculture may also request further information regarding all such named foreign persons. Upon transfer, foreign transferors of agricultural land must file a Form FSA-153 which includes the citizenship or country of organization and principal place of business of the transferee. Civil penalties for the late, incomplete or misleading filing of a Form FSA-153 can reach up to 25% of the fair market value of the reporting person's ownership interest in the agricultural land.

## Export Controls

In general, U.S. export controls are more stringent and govern a wider array of transactions than the export controls of most other countries, even with respect to non-military "dual-use" commodities and technology. (See the Export Administration Regulations (EAR) originally promulgated under the Export Administration Act of 1979, as amended, at 15 CFR §§730-799, and the International Traffic in Arms Regulations (ITAR) promulgated under the Arms Export Control Act, as amended, at 22 CFR §§120-130). Except for exports to U.S. territories and possessions, exports from the U.S. may be subject to an export license. An export license is a government authorization that allows the export of particular goods or technical information. Licenses are required for those items for which the U.S. specifically controls exports for reasons of national security, foreign policy or short supply.

Under the EAR, a wide array of license exceptions is available for exports to many countries, persons and entities. An exporter should first obtain the proper classification of a commodity or technology to be exported under U.S. regulations in order to determine if an export license is required and, if so, which of the many exceptions may apply to the transaction. If a license exception is not available for the export of a specific product or specific data to a specific destination, person or entity, it is necessary to apply for and obtain a license from the Bureau of Industry and Security (BIS) of the U.S. Department of Commerce prior to the export. Certain commodities and technologies cannot be exported to any country without an individual license, while others may require a license only for shipment to specified countries. For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs entirely within the U.S. Thus, if disclosure of information is subject to a license requirement, it may not be made to a foreign national without first obtaining the necessary license, whether or not the disclosure is to occur outside the U.S. This aspect of the export control regime often leads to unexpected restrictions on hiring and sharing of information.

In addition, the ITAR contain both registration and licensing requirements for entities manufacturing, selling, or brokering defense articles or services. These regulations are overseen, and licenses are granted, by the Directorate of Defense Trade Controls (DDTC) of the U.S. Department of State.

U.S. export control regulations have been revised to permit many commodities formerly requiring a license to be exported pursuant to license exceptions. Despite the revisions, however, licenses will continue to be required for many commodities, and the procedures for obtaining such licenses will continue to be time-consuming.

Regulations and federal laws implementing U.S. sanction regimes (both unilateral and treaty-based) may also restrict transactions with, and provision of services to, certain countries, persons or entities. These sanctions are administered and enforced by the Office of Foreign Assets Control (OFAC) of the U.S. Department of Treasury, and are based on U.S. foreign policy and national security goals. (See the Foreign Assets Control Regulations codified in 31 CFR §§ 500-599). In certain situations, OFAC provides permission through its licensing program to engage in otherwise prohibited transactions and conduct trade with embargoed countries or groups of individuals and entities against whom sanctions are in place. More information about OFAC and its licensing procedures can be found online on OFAC's Resource Center page.

## Foreign Trade Zones

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

## Antidumping and Countervailing Duties

The U.S. antidumping law (19 U.S.C. §§1673-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the "dumping margin" is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price that is less than their foreign market value (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.

The U.S. countervailing duty law (19 U.S.C. §§1671-1671h; 1675-1677) also imposes a duty on imported merchandise which was manufactured or exported to the U.S. with subsidies provided by foreign governments. Such subsidies take various forms, such as direct cash payments, credit against taxes, loans with artificially low interest rates or other terms more favorable than market conditions. By imposing countervailing duties, U.S. law protects domestic industries against unfair competitive advantage, which foreign manufacturers and exporters receive from subsidized programs. Unlike antidumping duties, depending on the country from which the subsidy merchandise originates, countervailing duties may sometimes be imposed without application of a material injury test.

For purposes of both the antidumping and countervailing duty laws, the U.S. Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. or its manufacture, production or export to the U.S. has been subsidized. The U.S. International Trade Commission makes the determination of whether such sales cause or threaten material injury to a U.S. industry.

## Resource Listing for Massachusetts

**Cambridge Chamber of Commerce**
859 Massachusetts Avenue #A
Cambridge, MA 02139
Telephone 617.876.4100
Fax 617.354.9874
ccinfo@cambridgechamber.org
www.cambridgechamber.org

**Greater Boston Chamber of Commerce**
265 Franklin Street, 12th Floor
Boston, MA 02110
Telephone 617.227.4500
Fax 617.227.7505
info@bostonchamber.com
www.bostonchamber.com

**Massachusetts Biotechnology Council**
300 Technology Square, 8th Floor
Cambridge, MA 02139
Telephone 617.674.5100
Fax 617.674.5101
info@massbio.org
www.massbio.org

**Massachusetts Department of Corporations**
McCormack Building
One Ashburton Place, 17th Floor
Boston, MA 02108
Telephone 617.727.9640
Fax 617.742.4538
corpinfo@sec.state.ma.us
www.sec.state.ma.us/cor/coridx.htm

**Massachusetts Department of Revenue**
100 Cambridge Street
Boston, MA 02114
Telephone 617.626.2300
Fax 617.626.2330
dlslaw@dor.state.ma.us
www.mass.gov

**Massachusetts Development Finance Agency**
99 High Street
Boston, MA 02110
Telephone 617.330.2000
Telephone 800.445.8030
Fax 617.451.3429
www.massdevelopment.com

**Massachusetts Office of Business Development**
10 Park Plaza, Suite 3730
Boston, MA 02116
Telephone 617.973.8600
Fax 617.973.8554
www.mass.gov/mobd

**Massachusetts Office of Travel & Tourism**
10 Park Plaza, Suite 4510
Boston, MA 02116
Telephone 617.973.8500
Telephone 800.227.MASS (U.S. & Canada)
Fax 617.973.8525
vacationinfo@state.ma.us
www.massvacation.com

**Mass Technology Leadership Council, Inc.**
20 Mall Road, Suite 151
Burlington, MA 01803
Telephone 781.993.9000
Fax 781.993.9009
admin@masstlc.org
www.masstlc.org

**Massachusetts Office of International Trade and Investment (MOITI)**
10 Park Plaza, Suite 4510
Boston, MA 02116
Telephone 617.973.8650
Fax 617.457.7851
www.mass.gov/moiti

FOLEY HOAG LLP

www.foleyhoag.com