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AN INTERNATIONAL INVESTOR'S LEGAL GUIDE

Third Edition

To Business In Virginia

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EDITOR'S NOTE

We are pleased to present the third edition of our International Investor's Legal Guide, which we trust will brief you on some of the most important legal issues affecting an international business investing in Virginia. Blessed with one of the world's finest deep-water ports, with motivated and trained workers and with business-oriented local governments, Virginia is an excellent choice for locating your U.S. operations. We hope that this publication will serve to make your understanding of our state and community more complete.

Our firm has been privileged to represent numerous foreign-owned firms that have established a significant presence in Virginia. From this experience, we can emphatically say that international investors have found Virginia to be a profitable place in which to invest -- and for many of them, an exciting place to make a new home.

If you are interested in any further information concerning the topics addressed in this e-book or other legal issues affecting your investment or business, please feel free to contact us or visit our website at www.kaufcan.com.

Finally, please allow me to thank my colleagues Amy Harman, Nicole Harrell, Alison Lennarz and Anna Richardson Smith for their contributions to this booklet.

Thank you for your interest in Virginia. Welcome to our Commonwealth!

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CHAPTER ONE

Introduction To America's Political And Legal Systems

I. THE FEDERAL GOVERNMENT

As a federal republic, the United States is governed by three layers of government: federal, state and local (either city or county). The U.S. Constitution cedes certain enumerated powers to the federal (or national) government. Among the functions entrusted to the federal government by the Constitution are national defense, foreign relations and regulation of interstate and foreign commerce.

The federal government itself is divided into three co-equal branches: the executive, legislative and judiciary. The executive power is reposed in the President, who serves as Commander in Chief of the military, has veto power over legislation and exerts ultimate authority over each of the executive departments. Each department is headed by a Secretary (or Attorney General in the case of the Department of Justice) appointed by the President, subject to confirmation by the U.S. Senate.

The U.S. Congress, which exercises the legislative power, is divided into the U.S. House of Representatives and the U.S. Senate. There are 435 members of the House who are elected from approximately equal-sized districts across the country (measured by population). In the U.S. Senate, by contrast, each state is entitled to be represented by two senators.

The U.S. Supreme Court, which is at the top of the federal judiciary, is composed of nine justices appointed by the President and confirmed by the U.S. Senate. It is generally conceded that the Supreme Court is the final arbiter on questions of constitutional law and the interpretation of federal statutes.

Under the Supreme Court, there are the federal district courts and 11 federal circuit courts of appeal covering various regions of the country. The federal district courts are trial courts located throughout the eleven "circuits" to hear civil and criminal cases arising under federal law or civil cases arising between residents of different states or between U.S. parties and foreign parties.

The provisions of the U.S. Constitution, the treaties of the United States and the laws enacted by the federal government in accordance with its constitutional powers represent the supreme law of the land, and all states are obliged to comply with such measures. As a general rule, however, most of the day-to-day dealings between business and government still occur at the state and local levels of government, true to the federal form of government envisioned by the 18th Century founders of the United States.

II. VIRGINIA STATE GOVERNMENT

Officially named the "Commonwealth of Virginia" and unofficially referred to as the "Old Dominion," Virginia is the most historic state among the fifty states in the U.S.A. Virginians such as George Washington, Thomas Jefferson and James Madison were leaders in 18th Century America as the original colonies moved toward independence from Great Britain and the creation of the federal republic that endures today under the Constitution.

Like the federal government, power in the Virginia government is spread among three branches: the executive, legislative and judiciary. The chief executive is the Governor, with the authority to propose legislation and to veto legislation passed by the legislature. The Governor also has the primary responsibility for the operations of the various departments of the executive branch.

The Virginia General Assembly exercises the legislative power, and it consists of a Senate and a House of Delegates. In accordance with rulings of the U.S. Supreme Court, both bodies of the Virginia legislature are now apportioned into districts of roughly equal population.

III. LOCAL GOVERNMENT

Cities and counties in Virginia are chartered by the state government. Since Virginia law treats cities as independent political subdivisions, each city has its own separate government, outside the jurisdiction of any nearby counties. Meanwhile, many suburban and rural areas are governed by county governments.

Counties typically are governed by a board of supervisors, the members of which are elected on a county-wide basis, and who in turn appoint a "county administrator." Cities are governed by a city council, which in most cases appoints a professional administrator known as the "city manager" to run the day-to-day operations of local government.

Businesses will typically deal with local city or county governments with respect to zoning matters (i.e., the types of business operations that are permitted in particular locations) and with respect to such fundamental services as fire and police protection. A company also applies to the local government for a business license or a building permit.

Both state and local government agencies are involved in economic development efforts, including the determination of any fiscal incentives that might be offered to potential business investors.

CHAPTER TWO

Forming A Virginia Corporation Or Limited Liability Company

Contributor: Anna Richardson Smith

Although occasionally foreign companies will choose to do business in Virginia through a local branch or in a local partnership, the vast majority of foreign-owned business in Virginia is conducted through a U.S. corporation or limited liability company (LLC).

Both types of legal entities offer their owners considerable protection from individual liability for the debts of the business. There are very few legal restrictions on the citizenship or residency of the owners of a Virginia corporation or limited liability company, nor are there generally any limitations on the percentage of foreign ownership.

I. CORPORATIONS

A. Articles of Incorporation

A Virginia corporation is formed by filing Articles of Incorporation with the State Corporation Commission. The Articles are required to include certain mandatory provisions and may include certain optional provisions:

Mandatory Provisions:

- the corporate name
- the number of authorized shares of stock
- the address of the corporation's initial registered office and the identity of the initial registered agent.

Optional Provisions (examples):

- multiple classes of shares, with different voting rights and different dividend rights
- restrictions on transfer of shares
- "pre-emptive rights" for existing shareholders to subscribe for newly issued shares
- restrictions on distributions to shareholders
- modifications to the statutory right of shareholders to call special meetings
- provision for staggered terms for directors
- special limitations on the powers of directors
- cumulative voting among shareholders for election of directors (so as to guarantee certain minority stockholders the ability to elect a director)
- requirement that a director be removed only for cause
- limitations of liability for officers and directors for money damages in shareholder suits and derivative suits
- liberalized standards for indemnification of officers and directors for legal expenses and liabilities
- modifications of the supermajority shareholder vote normally required to authorize mergers, share exchanges, amendments of the Articles of Incorporation, sale of substantially all of the corporate assets, and dissolution of the corporation.

B. Bylaws

Bylaws are typically adopted by the corporation's directors, but the shareholders may also adopt and amend Bylaws. The board of directors may amend or repeal the Bylaws, unless the Articles of Incorporation reserve this power exclusively to the shareholders or, alternatively, the shareholders adopt a provision in the Bylaws reserving such right exclusively to themselves.

Typical Provisions:

The typical provisions that are contained in the bylaws of a corporation are as follows:

(1) Shareholder Provisions:
- the times and places of annual shareholder meetings and special meetings
- required notices to shareholders for meetings
- quorum requirements for shareholder meetings
- proxy requirements.

(2) Board of Director Provisions:
- the number of directors, including whether the board will have a fixed number or flexible number of directors
- election and removal of directors
- quorum requirements for board meetings
- qualifications necessary for an individual to serve as a director.

(3) Committees:
- authorization of the board to create an executive committee or other committees
- restrictions on the authority of committees.

(4) Officers:
- designation of officers (there are no longer any required officers in Virginia, but corporations typically have at least a president and a secretary).

II. LIMITED LIABILITY COMPANIES

Now recognized in all 50 states of the U.S., limited liability companies (LLCs) offer the same liability protections to its owners (the members) as corporations furnish to stockholders. As a non-corporate entity, however, limited liability companies can have significantly different tax characteristics.

Under the Check-the-Box Rules issued by the Internal Revenue Service (IRS), a United States LLC will normally be classified as a "pass-through" entity unless the member(s) affirmatively elect otherwise. This means that the LLC will not pay income tax itself: the LLC files an "information return" with the IRS and the Virginia Department of Taxation, and the owner(s) pay any tax due on the income of the LLC.

Consequently, if there are two or more owners (the "members") of the LLC, they typically will be taxed like partners in a partnership. If a single individual owns the LLC, he or she will typically be taxed as if it were a sole proprietorship. In the case of an LLC wholly-owned by a foreign corporation, the general rule is that the foreign corporation will be taxed as if it had established a branch in the U.S. (For a general discussion of the tax rules relating to branches, please see Chapter Seven of this Guide.)

A. Articles of Organization

An LLC is formed by filing "Articles of Organization" with the State Corporation Commission. The only information required in the Articles of Organization is the following:
- the name of the LLC;
- the initial registered agent and registered office of the LLC;
- principal place of business of the LLC (i.e., where the records required by the Virginia Limited Liability Company Act are to be kept).

B. Operating Agreement

The operating agreement covers many of the same issues that might be addressed in corporate bylaws or in a corporate stockholder agreement. In addition, the operating agreement may stipulate the circumstances under which the LLC could require the members (i.e., the owners) to make additional capital contributions or guarantee debts of the LLC. If such a requirement is adopted, the operating agreement should also state the consequences for failing to comply.

If the LLC is to be governed by one or more managers (similar to directors and officers of a corporation), then provisions clarifying how managers may be elected and removed should be included. Also, the voting procedures among managers should be stipulated. There is no requirement that an LLC have officers such as a "president" or a "secretary." Therefore, if such positions are desired, appropriate provisions need to be included in the Operating Agreement in order to give designated individuals authority comparable to such corporate officers.

III. FEDERAL AND STATE RESTRICTIONS ON FOREIGN INVESTMENT

Below is a summary of the few significant restrictions on the right of foreign investors to acquire an interest in a U.S. trade or business.

A. Exon-Florio Amendment.

If an industry is considered important for national security purposes, a foreign person may not acquire a controlling interest in an existing U.S. business within that industry unless federal government approval is obtained.

B. Defense Industrial Security Program.

A U.S. company whose operations require security clearances must notify the Defense Investigative Service (DIS) if an agreement is reached under which it could become subject to foreign ownership, control or influence.

C. Radio and Television Licenses.

The Federal Communications Commission (FCC) must issue licenses to radio and television operators. Restrictions apply to foreign ownership of licensees.

D. Maritime Industry.

Only ships built in the United States and carrying U.S. flags are permitted to carry cargo between two points located in the United States. To be a U.S.-flag vessel, ownership and control must rest primarily with U.S. citizens. The vessel need not be built in the United States in order to qualify for the foreign trade between the U.S. and other countries.

E. Fishing.

Consistent with the United Nations Convention on the Law of the Sea, only U.S.-flag vessels built in the United States may fish within the "exclusive economic zone" (EEZ) of the United States. The EEZ is defined as extending 200 nautical miles seaward from the U.S. coastline. The U.S. Department of Commerce may issue permits to foreign-flag vessels for fishing in the exclusive economic zone if there is a reciprocal agreement in place with the foreign vessel's home country.

F. Real Property Ownership.

Virginia law permits foreign persons (as long as they are not declared enemies of the United States) to acquire and inherit real property located in Virginia. However, a court may exercise legal control over the disposition of the property if the foreign person's home country effectively denies Virginia residents the reciprocal right to own and hold property in that country.

G. Mining.

Only U.S. citizens and U.S. domestic corporations may acquire mineral leases from the U.S. Government. Foreign persons may own equity interests in U.S. mining companies if their home countries grant reciprocal privileges to U.S. citizens.

CHAPTER THREE

Immigration

Contributor: Anna Richardson Smith

Immigration of foreign individuals into the United States is administered by U.S. Citizenship and Immigration Services (USCIS), part of the Department of Homeland Security. Though headquartered in Washington, D.C., USCIS has 250 offices around the world. The USCIS district offices responsible for immigration matters in southeastern Virginia are located in Norfolk and Richmond, Virginia.

U.S. immigration law separates employment-based visas into two categories -- immigrant and non-immigrant. A person who possesses an immigrant visa or permanent resident card is typically referred to as having his or her “green card” (although the cards are no longer green); and card-holders may live and work in the U.S. indefinitely. Non-immigrant visas, on the other hand, are for a specified length of time and are usually tied to a specific job at a specific employer.

Even though USCIS is responsible for administering U.S. immigration laws, the U.S. Department of Labor (DOL) is often involved in employment-related immigrations. Many types of employment-based visas require a “labor certification” from the DOL. A labor certification is an offer of employment in the U.S. that DOL has approved for a named alien. The labor certification process is quite time-consuming and burdensome. Accordingly, it is always appropriate to consider if a particular immigrant can qualify for immigration on a basis which does not require a labor certification.

The following are general descriptions of the primary types of visas allowing foreign individuals to work and live in the U.S.

I. NON-IMMIGRANT VISAS

A. B-1 Visitor for Business Purposes/Visa Waiver Program

- Open to aliens who want to engage in business in the U.S. while maintaining employment outside the U.S.
- Alien must: (i) intend to leave the U.S. at the end of their authorized stay; (ii) have permission to enter a foreign country at the end of the stay; and (iii) have adequate finances to carry out the visit’s purpose and then to depart the U.S.
- The maximum length of stay that may be granted is six (6) months.
- Permissible B-1 visa/VWP activities include:
    i. negotiate contracts;
    ii. litigate;
    iii. participate in professional seminars and/or conferences
    iv. undertake research; and
    v. engage in commercial activities that are not gainful employment in the U.S.

NOTE: Canadians have expanded B-1 rights under NAFTA.

- There are no limits on the number of B-1 visas available.
- Persons applying for a B-1 visa at a U.S. Consulate can expect to be asked a number of questions aimed at ascertaining the alien’s intent to return to their foreign residence. A B-1 visa can be obtained at a U.S. Consulate without obtaining pre-approval from USCIS.
- Citizens of thirty-six countries are able to enter the U.S. for business purposes under the Visa Waiver Program (VWP). This allows persons to enter the U.S. for business purposes without a visa for up to 90 days. Japan participates in the VWP; China does not currently participate in the VWP.

B. E-1 Treaty-Trader

If the appropriate treaty is in effect between the U.S. and the alien’s country of citizenship, this visa is available under the following criteria:

- The employer must be engaged in trade. The term “trade” has been interpreted to include international banking, insurance, transportation, etc.

- The volume of trade must be "substantial." Substantial means a continuous flow which should involve numerous transactions over time.
- Such substantial trade must be principally between the United States and the alien's home country (the treaty signatory). "Principally between the United States and the treaty signatory" means that over 50% of the total volume of trade conducted must be between the United States and the treaty signatory.
- The types of employees who may enter the United States to perform services for the employer include: (i) an employee performing supervisory or executive duties, or (ii) an employee serving in a "minor capacity" who has skills "which are essential to the successful operations of the enterprise."
- Japan is a treaty country for E-1 treaty trader purposes; PRC is not a treaty country for E-1 treaty trader purposes, although ROC/Taiwan is a treaty country.
- An E-1 visa can be obtained directly at the appropriate U.S. Consulate without pre-approval from USCIS.

C. E-2 Treaty-Investors

Again, if the appropriate treaty is in effect, this visa will be available subject to the following requirements:

- The investor must make an irrevocable commitment of funds that represents an actual active investment.
- The investment must be substantial, taking into account only those financial transactions in which the investor's own resources are at risk.
- The investment cannot be marginal in nature, that is, one which will only support the investor and his or her family; in most cases it should create job opportunities for United States workers.
- An employee of the investor for whom treaty investor status is sought must fill a key role with the company, as a qualified manager or a specially trained and highly qualified employee necessary for the development of the investment. In effect, the employee must be essential for the company's operations.
- Japan is a treaty country for E-2 treaty-investor purposes; PRC is not a treaty country for E-2 treaty-investor purposes, although ROC/Taiwan is a treaty country.
- An E-2 visa can be obtained directly at the appropriate U.S. Consulate without pre-approval from USCIS.

D. H-1B -- Workers in Specialty Occupations

- The H-1B visa is open to aliens working in occupations that require theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree or higher degree in the relevant specialty (or its equivalent) as a minimum for entry into the occupation in the U.S.
- Must obtain a certified labor condition application from the DOL. In the labor condition application, the employer must attest that: (i) it is offering the H-1B worker the higher of either the actual wage paid to similarly situated employees or the prevailing wage in the geographic area of employment; (ii) the working conditions for the H-1B worker will not adversely affect the working conditions of similarly employed workers; and (iii) the H-1B worker is not being hired as a replacement for a worker currently on strike.
- After receipt of a certified labor condition application, the employer must submit USCIS Form I-129 with "H" Supplement, as well as the appropriate supporting documentation, to USCIS.
- USCIS approval of H-1B status is necessary in order to obtain an H-1B visa at a U.S. Consulate.
- A limited number of new H-1B visas are available each year, as determined by Congress. However, certain individuals are exempt from this cap. The maximum period of stay on this visa is six

years (three years plus renewal for three more years). Individuals can remain in an H-1B status indefinitely once they reach a certain point in the permanent resident process.

E. H-3 -- Temporary Trainees

- A visa status is available to aliens who can demonstrate that the proposed training: (i) is not available in the alien's own country, (ii) will be beneficial to the alien in pursuing a career outside the U.S., and (iii) will not put the alien into a position in the normal operation of the U.S. business that is usually occupied by U.S. citizens or residents. In addition, the alien should not engage in productive employment unless it is incidental to the training.
- There are very detailed guidelines and restrictions for such training programs.
- The alien must file an USCIS Form I-129 with "H" supplement, along with appropriate documentation, at the regional service center for the location where the training will take place. USCIS may approve the petition for a stay lasting up to two years.

F. TN -- Canadian and Mexican Professionals

- For Canadian citizens, a streamlined alternative to H-1B status is the TN visa. Canadian citizens may apply for TN entry directly at the entry port. No prior petition, labor condition application, labor certification or prior approval is necessary. Very advantageous to Canadian professionals.
- Mexican professionals will still require a TN visa, but TN status may be a good option when no H-1B visas are available.
- This visa is open only to persons in the professions listed in the Schedule II to NAFTA.
- Certain documents, including a letter from a prospective employer and proof of professional qualifications, must be presented at port of entry. There is no limit on extension of one year stay applications or the number of TN visas available.

G. L-1 -- Intracompany Transferee.

- An intracompany transferee visa is available for aliens who have worked abroad for one continuous year within the prior three years in a managerial, executive or specialized knowledge capacity, and who are being transferred temporarily to the U.S. to work in an managerial, executive or specialized knowledge capacity. The foreign employer and the U.S. employer must be qualifying, related business entities. For example, a parent-subsidiary relationship is a qualifying relationship. Specific definitions are:
    - Managers -- must manage the organization or a defined department or function of the organization, as well as supervise other managers, hire and fire and exercise discretion over day-to-day operations.
    - Executives -- directs the management of the organization or a major component of the organization, establishes the goals and policies of the organization or such component, receives little supervision and exercises wide discretion.
    - Specialized Knowledge -- means special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interest, and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.
    - An L-1 visa may be granted for a stay lasting up to three years, with potential extensions of four years for managers and executives and two years based on specialized knowledge.
    - Applications for L-1 visas are made on USCIS Form I-129, with "L" supplement (with appropriate supporting documentation) filed with the USCIS. The USCIS must approve the L-1 status before an individual can obtain an L-1 visa at a U.S. Consulate.
- L-1 executives potentially have a quicker route to permanent residence than other non-immigrant visa holders.

II. IMMIGRANT VISAS

A. First Preference (EB-1) -- Priority Aliens

- Qualification – This status is open to aliens who can show that they have extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.
- Labor Certification – A labor certification is not required. A USCIS Form I-140 plus supporting documentation must be filed with the USCIS.
- Availability -- Approximately 40,000 of these visas are available per year. There is typically no backlog for EB-1 visas, even with the per-country cap.

B. Second Preference (EB-2) -- Aliens Who Are Members Of The Professions Holding Advanced Degrees Or Aliens Of Exceptional Ability In The Sciences, Arts Or Business

- Advanced Degree Professionals – The EB-2 is available when the job requires an advanced degree and the alien possesses such a degree. As a practical matter, the threshold educational requirement will be the equivalent of a master's degree from a U.S. college or university.
- Exceptional Ability Alien – The alien must present evidence satisfying at least three of the following seven criteria:
  - vi. an official academic record showing a degree or similar award from a college or other institution of learning relating to the field of learning;
  - vii. at least ten years of full-time experience in the occupation documented by letters from current or past employers;
  - viii. a license to practice the profession or certification for particular profession or occupation;
  - ix. evidence that the alien has commanded a salary commensurate with exceptional ability;
  - x. membership in professional associations;
  - xi. recognition for achievements and significant contributions to the industry or field by peers, government entities, professional or business associations; or
  - xii. other comparable evidence.
- Procedural Requirements – An EB-2 requires a job offer, labor certification and filing a Form I-140 plus supporting documentation with the USCIS.
- Availability – The Department of State limits the number of these visas available each year, but there is a per-country cap. There is a backlog for EB-2 visas for China Mainland born citizens.

C. Third Preference (EB-3)- Skilled Workers, Professionals And Other Workers

- Skilled Workers – Those aliens working in positions that require a minimum of two years of training or experience.
- Professionals – Must possess a baccalaureate degree or foreign equivalent, and the petitioner must demonstrate that such degree is the normal requirement for entry into the profession.
- Other Workers – Aliens in positions that require less than two years of higher education, training or experience.
- Labor Certification – Labor certification is generally required in addition to a job offer. The Labor Certification process requires the employer to demonstrate that there are no U.S. citizens or current permanent residents who are qualified, willing, and available for the position. Form I-140, with necessary supporting documentation, must be filed with the USCIS.

- Availability – The total number of these visas is limited each year according to a per-country cap. There are lengthy backlogs for all categories of EB-3 visas.

While the above represent the most popular employment-based immigrant and non-immigrant visa options, there are many other, more specialized visa options, including categories specifically designed for physicians pursuing residencies and/or fellowships, athletes, artists, musicians, entertainers and religious workers. With all but the most simple immigration matters, skilled legal counsel is an absolute necessity.

CHAPTER FOUR

Employment Law

Contributor: Anna Richardson Smith

Virginia's traditionally conservative views on the employment relationship have favored businesses that are willing to employ Virginia workers. Virginia remains a "right to work" state and continues to adhere to the "employmentatwill" doctrine. In addition, Virginia's statutory and common law protect employers from harm caused by their employees' theft and misuse of confidential or proprietary information, particularly trade secrets. Like businesses in all other states, Virginia businesses must comply with federal employment laws.

I. EMPLOYMENT AT WILL

Virginia's common law provides that, unless otherwise agreed, employees are employed at will, which means that employers or employees may sever the employment relationship upon reasonable notice, with or without cause. Thus, unlike several other states, Virginia employers do not need to establish "good cause" to dismiss an employee absent an agreement between the parties to the contrary. Of course, Virginia employers with the requisite number of employees must comply with federal and state statutory prohibitions against discharge on the basis of race, color, religion, gender, national origin, age, or disability.

Like virtually every other state, Virginia has witnessed some erosion of the employment-at-will doctrine. In 1985, the Supreme Court of Virginia adopted a narrow exception to the employment-at-will doctrine. Specifically, the Court held that an employee may sue for wrongful discharge when the employer's decision to terminate the employee violates a Virginia public policy.

Subsequent court decisions and a statutory revision by the legislature have limited the public policy exception to protect only those employees whose terminations violate public policies articulated in specific Virginia statutes.

II. "RIGHT TO WORK" STATE

Virginia prohibits an employer from requiring its employees to pay union dues or to become union members as a condition of employment, even if a majority of the employees vote to become a union shop. Largely because of Virginia's continued adherence to this "right to work" doctrine, union organizational efforts generally have been limited to industries in which organized labor has traditionally been dominant nationwide (e.g., automobile plants, shipyards, and maritime ports. Virginia is the most northerly located state that has a right-to-work law).

III. PROTECTION OF COMPETITIVE INTERESTS

Under Virginia's common law, employees owe their employers a duty of loyalty, and any breach of that duty, such as competing with the employer while still under its employ, makes the employee vulnerable to legal recourse. The duty remains in effect even following termination of employment in some respects (e.g., this duty prohibits employees from disclosing confidential information about former employers to competitors).

In addition to common law protection, Virginia has enacted the Uniform Trade Secrets Act, which provides employers protection from misappropriation of trade secrets, entitling the employer to recover treble damages and attorney's fees if the employer successfully proves a violation of the Act.

Virginia employers are also able to protect their businesses through contractual restrictions governing their former employees, such as covenants not to compete, covenants not to solicit co-workers to leave for other employment, and covenants not to solicit customers away from their former employer. To be enforceable, covenants not to compete must narrowly and reasonably protect the employer's legitimate business interests, may not unduly restrict an employee from pursuing a livelihood, and must be otherwise consistent with public policy.

IV. ADMINISTRATIVE AND REGULATORY AGENCIES

Like most other states, Virginia has governmental agencies responsible for administering an array of state programs affecting employment. The Virginia Employment Commission oversees the state's unemployment compensation program, under which Virginia employers pay taxes based on the wages paid to employees and historical claims by its former employees. Qualified employees may receive unemployment compensation as long as they actively seek re-employment, up to a maximum of 26 weeks of benefits. Generally, an employee will be "qualified" for benefits unless they voluntarily quit their job without cause or engaged in misconduct.

The Virginia Worker's Compensation Commission administers the Workers' Compensation Act. Most Virginia employers are required to obtain insurance to cover employees in the event of a work-related illness or accident. Recovery under the worker's compensation law is the exclusive remedy available to an employee against his or her employer in the event of such an illness or accident. The amount of compensation is statutorily established for every type of work-related injury or illness.

Virginia also has its own Department of Labor, which enforces the minimum wage and overtime compensation requirements of state and federal law. Further, Virginia has its own Occupational Safety and Health Administration, charged with enforcement, at the state level, of the workplace safety provisions of the U.S. Occupational Safety and Health Act (OSHA) and its related regulations.

V. FEDERAL LAWS

Federal law now covers virtually every aspect of the employment relationship, not only in Virginia, but throughout the nation. It would be impracticable to summarize each federal law that affects Virginia employers. The following summarizes some of the more significant laws.

A. Americans With Disabilities Act (ADA)

The ADA is the most recent federal civil rights law designed to protect employees. It applies to any business with 15 or more employees, and prohibits discrimination against qualified disabled persons in connection with all aspects of employment. The ADA requires employers to provide qualified disabled employees with "reasonable accommodations" if such employees are able to perform the "essential functions" of their job. If such accommodations would impose "undue hardship" on the employer, however, then the employer is excused from liability. Successful plaintiffs who bring suits for violations of their rights can recover compensatory and punitive damages, back pay, equitable relief (including future pay and reinstatement), and attorney's fees.

B. Age Discrimination in Employment Act (ADEA)

The ADEA prohibits discrimination against any worker age 40 or older on the basis of age by all employers having 20 or more employees. Current business trends toward restructuring, cut-backs and reductions in force have increased the significance of the ADEA. Although employees are not entitled to recover punitive damages and vaguely-defined compensatory damages such as "pain and suffering," they may recover back pay, front pay, and attorney's fees under the ADEA. Employees may also recover liquidated (double) damages in the event an ADEA violation is found to be "willful."

C. Title VII of the Civil Rights Act (Title VII)

Enacted in 1964, Title VII provides broad protection from workplace discrimination on the basis of race, color, religion, sex or national origin. It applies to all employers with 15 or more employees.

Lawsuits under Title VII, particularly those alleging sexual harassment, have steadily increased since 1991, when broad compensatory damages (e.g., pain and suffering) and punitive damages were made available for the first time. The potential magnitude of these damages will be limited according to a sliding scale corresponding to the size of the employer. Successful plaintiffs may also recover attorney's fees and, in appropriate cases, obtain equitable relief (e.g., reinstatement).

D. Family and Medical Leave Act (FMLA)

FMLA, which applies to employers with 50 or more employees in a 75-mile radius, provides eligible employees with 12 weeks of unpaid leave during any 12-month period upon the birth or adoption of a child; the need for an employee to care for a son, daughter, spouse, or parent who has a serious health condition; or the employee's absence from work due to his or her own serious health condition. Employees may also be eligible for up to 26 weeks of leave in a 12-month period if necessary to care for covered service members (parents, children, spouses, or other next of kin) who have suffered serious injury or illness. To be eligible, an employee must have been employed for at least 12 months by the employer and have at least 1,250 hours of service during the previous 12 months. Serious health conditions are those that require in-patient care in a hospital, hospice or residential medical care facility, or continuing treatment by a health-care provider.

E. Fair Labor Standards Act (FLSA)

The FLSA governs minimum wage and overtime compensation requirements for virtually all United States employers. Although some states and Washington, D.C. have enacted higher minimum wages, Virginia observes the federal minimum wage (currently, $7.25 per hour). Virginia also observes federal standards regarding overtime pay, requiring payment of 1.5 times the employee's regular rate of pay for all hours worked over 40 in any work week. The overtime pay provisions do not apply to certain "exempt" employees who are paid a salary and serve in executive, administrative or professional positions, or who are employed as outside salesmen. Partial overtime and minimum wage exemptions exist in other limited statutory contexts.

CHAPTER FIVE

Employment Benefits

Contributor: Anna Richardson Smith

With limited exceptions further described herein, U.S. employers generally are not legally required to provide pension or welfare plans. The decision is the employer's whether to offer such benefits to its employees. Rather than mandate benefits, U.S. law provides a number of tax incentives to encourage employers to offer such plans. However, federal law and regulations strictly govern the terms and conditions on which such plans may be offered in order to receive favorable tax treatment.

I. EMPLOYEE BENEFIT PLAN REGULATION

A. ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) regulates pension and welfare plans. For example, ERISA imposes reporting (to the government) and disclosure (to participants and beneficiaries) requirements, as well as mandatory requirements as to funding, participation, vesting and the accrual of benefits. It establishes certain standards for fiduciaries (those with the authority to handle the plan assets) to follow in working with plans; it prohibits certain transactions with plans and their assets; and it mandates specific procedures for the termination of plans. ERISA also provides participants and fiduciaries with remedies to pursue when a plan's terms have been violated or a plan fiduciary has not performed his/her duty. ERISA generally does not apply to plans maintained outside of the United States for nonresident aliens.

B. The Internal Revenue Code (the "Code").

The Internal Revenue Service (IRS), through its enforcement of the Internal Revenue Code ("Code"), regulates employee benefit plans whenever favorable tax treatment is sought. The favorable tax treatment may be an employer's tax deduction; also, it may exist in the deferral or exclusion of benefits from the taxable income of the employee. The Code sets forth particular requirements for pension plans that must be met in order for the plan to be considered tax "qualified," a designation which means that the plan sponsor and the plan participants may receive favorable tax treatment with regard to contributions under the plan. Similarly, the Code specifies the ways in which welfare benefit plans may be structured.

II. QUALIFIED RETIREMENT PLANS

Retirement plans such as 401(k), pension, and profit-sharing are referred to as "qualified" plans because these plans must satisfy complex and formal requirements of the Code. Generally, these rules limit the contributions and/or benefits that a qualified retirement plan may allocate to participants in any given year and ensure that the benefits provided under the plan are allocated in a fair manner between the company's executives and other workers. In exchange for complying with these rules, the employer and its workers enjoy significant tax advantages.

Contributions made by an employer to a qualified plan are tax deductible. The employee who is credited with benefits under a qualified plan, on the other hand, does not pay tax on the contributions until the funds are actually distributed by the plan to him or her. In the meantime, contributions to the plan generate and accumulate earnings on a tax-deferred basis, again until distributed to the employee. In addition, neither the contributions to, nor distributions from, a qualified plan are subject to Social Security and Medicare taxes ("FICA taxes"). The deferral of income taxes and avoidance of FICA taxes create a very powerful savings tool for many employees.

III. HEALTH AND WELFARE PLANS

While retirement plans are a significant part of the benefits package that many employers offer, perhaps the most important benefit provided by many employers is a health and welfare plan.

ERISA preempts state laws that relate to employee benefit plans. A primary exception to that rule is in the area of insurance regulation. State insurance regulation in the area of health coverage is very strict, and therefore group health plans that are fully insured must satisfy state regulations, not ERISA rules.

Many workers are also attracted to an employer by a variety of other types of benefit offerings such as life insurance, accidental death and dismemberment coverage, short and long-term disability plans, and employee assistance programs.

Many of the benefits mentioned in this section, and a few that are not, may be offered through a "cafeteria plan." A cafeteria plan offers employees a "menu" of benefits from which to choose. Benefits chosen by employees through a cafeteria plan are paid with pre-tax dollars, i.e., the amount that employees are required to pay for the benefit is deducted from their pay before any taxes are applied.

The Patient Protection and Affordable Care Act (ACA), passed in 2010, will require employers with 50 or more full-time equivalent employees to offer health insurance to full-time employees beginning January 1, 2015. For purposes of the ACA, a full-time employee is one who works 30 or more hours each week. The law also places certain reporting requirements on all employers, and it requires all employer-provided insurance plans to comply with certain patient protection standards.

IV. NONQUALIFIED DEFERRED COMPENSATION PLANS

A non-qualified deferred compensation (NQDC) plan or arrangement is a contractual promise by an employer to pay a portion of the employee's compensation in the future upon the happening of a specific event, such as death or retirement. NQDC plans are typically provided to senior-level executives in order to provide additional compensation over and above what may be provided to these executives in a qualified retirement plan (due to the limitations on the contributions and benefits mandated by the Code).

CHAPTER SIX

Intellectual Property

Contributor: Nicole Harrell

Intellectual property refers to an area of the law that includes patents, copyrights and trademarks. In general, patents protect inventions and industrial designs; trademarks protect names and symbols identifying a source of goods or services; and copyrights protect artistic or literary works. The need to provide and protect rights in patents, trademarks and copyrights exists because the underlying property may represent a valuable asset to an individual or a business.

I. PATENTS

A. Patent Types

Three types of patents may be granted: (1) a utility patent for any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof, (2) a design patent for any new, original, and ornamental design for an article of manufacture, and (3) a plant patent for any distinct and new variety of plant that is asexually reproduced. A patent cannot be granted for laws of nature, mere ideas, physical phenomena or naturally occurring plants or materials.

B. Scope and Duration of Protection

Granted by the United States Patent and Trademark Office (PTO), a patent constitutes the right to exclude others from making, using, selling or offering for sale the patented invention throughout the United States, or importing the invention into the United States. These rights do not begin when the application is filed, but only when the patent is actually granted. However, after an application is filed, the invention may be marked with the words "patent pending" or "patent applied for."

For utility and plant patents, the term of the patent begins when the patent is granted and expires 20 years from the earliest filing date of the application. For design patents, the term expires 14 years from the date the patent is granted. Utility patents must have periodic maintenance fees paid after the patent is granted, or the patent will be deemed "abandoned."

C. Filing for a Patent

A "filing date" for a patent application may be obtained by filing either a non-provisional or a provisional patent application with the PTO. The provisional application is not examined by the PTO, and will result in an actual patent only if the application is converted to a non-provisional patent application within 12 months of the filing date of the original provisional application.

A regular, non-provisional application receives a filing date and is examined by the PTO to determine, among other things, whether the claimed invention is new, useful and non-obvious. Even if the invention claimed in the patent application satisfies these requirements, a patent may be denied for a variety of reasons. For example, if the invention was published or patented anywhere in the world or publicly used or offered for sale in this country more than one year before the filing date of the application, a U.S. patent will not be granted.

II. TRADEMARKS

A. Trademark Protection

Trademarks and service marks are designs, symbols, words, phrases, smells or sounds that distinguish particular goods or services as coming from a particular source. However, generic terms for a product or service are not eligible for trademark protection.

B. Scope and Duration of Protection

Rights in a trademark arise from use, not mere registration, and last until the owner abandons use the mark. Federal registration of the mark has certain benefits, however, including the following legal effects: (a) constructive notice of the claim of ownership; (b) prima facie evidence of the validity of the mark; (c) nationwide rights; (d) incontestability of the mark after five years of continuous use; and (e) the ability to bring suit for infringement in federal court and to receive statutory damages.

C. Trademark Registration

Federal registration of a trademark may be obtained by filing an application with the PTO based on either actual use of the mark in commerce or a bona fide intent to use the mark in commerce. However, for an application filed on the basis of an intent to use the mark, no registration will be granted until the mark is actually used in connection with the goods or services identified in the application.

Once a trademark application is received by the PTO, it is examined to ensure that the mark is not generic or descriptive of the product, and to ensure that there is no likelihood that the consuming public would be confused as to whether the applicant's goods come from the same source as another registered mark.

III. COPYRIGHTS

A. Copyright Protection

Ideas are not protected by copyright, but expressions of ideas that are embodied in works of authorship and fixed in a tangible medium of expression are eligible for copyright protection. Such works of authorship may include books, computer programs, graphic and sculptural works, music, photographs and movies. Rights under copyright law exist regardless of whether the work is published or unpublished.

B. Scope and Duration of Protection

Copyright protection generally lasts for the life of the author, plus 70 years, and gives the author several exclusive rights to (a) reproduce the work, (b) make derivative works, (c) publicly display or perform certain works, and (d) distribute the work to the public.

C. Obtaining a Copyright

Once a work of authorship is created, a "copyright" automatically exists in the work. However, in addition to the existing copyright in the work, the author may wish to obtain federal registration of the work by filing an appropriate application with the U.S. Copyright Office. Such registration is a necessary prerequisite to filing a lawsuit against an infringer of the copyrighted work. The actual process of registering a copyrighted work is straightforward and inexpensive.

CHAPTER SEVEN

Taxation of Foreign Investment in the U.S. and Virginia

I. FEDERAL INCOME TAXATION

A. Foreign Corporations and Non-Resident Alien

U.S. citizens, U.S. resident aliens and U.S. domestic corporations are subject to U.S. income taxation on their world-wide income. Foreign persons (i.e., non-resident aliens (NRAs) and corporations organized under other countries' laws) are subject to U.S. income taxation only on their "U.S. source income."

A non-citizen is considered a U.S. resident alien if he/she either holds a "green card" (INS Form I-551) obtained in connection with his immigrant visa or meets the "substantial-presence" residency test. This test is satisfied if the alien is physically present in the U.S. for 183 days or more during the taxable year. Alternatively, the "look-back" version of this test will be satisfied if the alien is present for at least 31 days in the current calendar year and the sum of the following equals or exceeds 183 days: (i) all days present in the current calendar year, plus (ii) one-third of the days present in the prior calendar year, plus (iii) one-sixth of the days present in the prior two calendar years..

Even if an alien meets this "look-back" version of the residency test, he or she may still be exempted from U.S. income tax if the alien does not have a green card (nor any application pending) and can establish that, in the current year, the alien has a tax home in a foreign country based on a closer connection to that country than the United States. The alien must notify the IRS that he or she qualifies for this exemption by filing Form 8840.

Whether a partnership, or a limited liability company (LLC) taxed as a partnership, is treated as a U.S. resident is dependent on whether it is engaged in a trade or business in the U.S. In other words, residence is independent of its place of organization or situs. Many U.S. income tax treaties also modify the definition of residence for partnerships and LLCs by looking at all income, even if the income is not from an active trade or business.

B. Fixed or Determinable Annual or Periodic" FDAP" Income

Foreign corporations and NRAs are subject to gross taxation on U.S.-source dividends, interest, rents and royalties (i.e., "fixed or determinable annual or periodic … income" -- FDAP income). The statutory tax rate is 30% of the gross FDAP income paid to the foreign person, but most U.S. income tax treaties with other countries substantially reduce or even eliminate this tax. If applicable, the U.S. person paying the FDAP income or another withholding agent must withhold the tax due on FDAP income and remit the withholding tax to the government. Also, failure to remit and withhold FDAP income could in some cases subject the withholding agent to civil and criminal penalties.

C. U.S. Trades or Businesses

With few exceptions, NRAs are subject to taxation in the U.S. for income derived from personal services performed here.

Foreign corporations are liable for U.S. income tax on their net income that is effectively connected with a U.S. trade or business (ECI). Under the income-tax treaties in effect between the U.S. and many of its trading partners, a foreign company's income will not be considered ECI unless the income is derived from a U.S. "permanent establishment."

A foreign company's mere ownership of stock in a U.S. subsidiary corporation is considered a passive activity and will not, by itself, constitute ECI or income derived from a U.S. permanent establishment.

Rather, dividends earned from this passive investment will be considered FDAP income but, as explained in section E, below, capital gains on the sale of the stock will not be subject to taxation in the U.S.

Unlike FDAP income, ECI or income derived from a U.S. permanent establishment is taxed on a "net" basis, meaning that the foreign taxpayer may deduct from gross income the ordinary and necessary expenses incurred in carrying on the U.S. trade or business.

D. LLCs, Partnerships and U.S. Branches

A U.S. partnership, or a U.S. limited liability company (LLC) taxed as a partnership, must withhold a portion of its U.S. taxable income allocable to foreign owners at the income tax rates that would have applied had the foreign owners earned the income directly in the U.S.

Some foreign corporations pursue their U.S. business through a branch rather than a U.S. subsidiary corporation. However, certain provisions of U.S. tax law may make this approach undesirable. A branch is taxed not only at standard corporate rates on its U.S. source net income, but also must pay a branch profits tax on earnings and profits that are deemed to be (even though not actually) repatriated abroad. The standard "branch profits tax" is withheld at a rate of 30%, but most U.S. tax treaties reduce this rate to the level of the dividend withholding rate.

The calculation of the branch profits tax is very complex, and the rules for determining the "dividend equivalent amount" under the branch profits tax (i.e., the amount that a branch is deemed to repatriate to its head office) may result in accelerating the payment of U.S. tax. Meanwhile, dividends paid by a U.S. subsidiary corporation to a foreign parent, which constitute FDAP income, will not be subject to withholding tax until declared and paid.

E. Capital Gains and Gains from U.S. Real Property

The sale of the U.S. corporation's stock by a foreign person generally will not be subject to U.S. income taxation on any capital gain. However, the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) imposed a tax on capital gains derived by foreign persons from the disposition of "U.S. real property interests" (USRPIs). USRPIs can be either direct ownership of U.S. real property or stock ownership of a corporation which owns U.S. real property. Stock of a U.S. corporation may constitute a USRPI if at least 50% of the value of the corporation's worldwide assets is attributable to its U.S. real property holdings. The tax on gains derived from dispositions of USRPIs can, in some cases, be subject to withholding.

F. Reporting Requirements

The Internal Revenue Service requires a "reporting corporation" to file an annual "information return" on Form 5472 disclosing transactions with a foreign "related party." A reporting corporation is a domestic corporation that is 25% foreign owned, or a foreign corporation that is 25% foreign owned and engaged in a U.S. trade or business. Foreign ownership is measured by the identities of the beneficial owners of the stock.

II. VIRGINIA STATE TAXATION

A. Corporate Income Tax

All foreign and domestic corporations doing business in Virginia must file a corporate income tax return with the Virginia Department of Taxation.

The Virginia corporate tax rate of 6% is applied against the taxable income of a corporation derived from a business, trade or profession located in Virginia. Corporations with income derived from multiple states in the U.S. must allocate their income between Virginia and the other states based on a ratio computed from in-state versus out-of-state sales, payroll and property.

B. Sales and Use Tax

The combined sales and use tax rate is 5% (1% of which is allocated to the locality). Unless an exemption applies, a seller must collect and pay this tax on sales or leases of tangible personal property. If the seller has not collected a sales tax (such as where the seller is out of state), then the purchaser may be liable for payment of a use tax in the same amount.

Manufacturers receive a broad exemption from the payment of sales tax on items used or consumed during production. Other exemptions cover wholesalers and distributors, who do not pay the tax on items they purchase for resale. Virginia sales tax law also includes an extensive list of specific products that are exempt from sales tax.

III. LOCAL TAXATION

A. Real Estate Tax

Cities and counties impose the real estate tax in Virginia against 100% of the assessed fair market value of the property. The tax rate varies from city to city and county to county.

B. Tangible Personal Property Tax

This local tax applies to machinery and equipment; office equipment, furniture and fixtures (of non-manufacturing business); and trucks and automobiles.

Machinery and tools used in manufacturing are usually taxed at a lower rate than the general personal property tax rate. If a manufacturing business is subject to personal property tax on its machinery and tools, then it is exempt from tax on its office equipment, furniture and fixtures.

C. Business, Professional and Occupation License (BPOL) Tax

Local governments may impose the BPOL tax on retail firms, warehousing and distribution concerns, service providers, contractors and other businesses. The tax is applied at each annual renewal of the company's business license. The amount of the tax is computed based on the company's gross receipts during the preceding year. However, local governments are prohibited from imposing this tax on the gross receipts of manufacturers derived from sales by them at wholesale.

The rate at which the BPOL tax is applied can vary dramatically depending on the line of business. A "wholesale merchant" will generally have to pay a tax of 5¢ for each $100 of sales, whereas a "retail merchant” will normally pay around 20¢ for each $100 of sales generated. Wholesale merchants include businesses that sell to other persons only for resale or which sell only to industrial, commercial or governmental users. A “contractor” is generally taxed at a rate somewhere between the rates applicable to retail merchants and wholesale merchants. Again, manufacturers are generally exempt from the BPOL tax.

Revenue that is subject to income taxation in another state is typically not counted in computing BPOL tax in Virginia.

D. Utility Tax.

Virginia’s cities, counties and towns typically levy a modest utility tax on each bill a business receives for electric, gas, water, telephone and sewage service. The state also imposes a tax on the consumer of electricity and natural gas.

CHAPTER EIGHT

Environmental Laws

Contributor: Amy Harman

There are both federal and state laws and regulations aimed at protecting the environment. (Laws are passed by the federal or state government whereas regulations are promulgated by the agency responsible for implementing the specific law. Regulations have the same enforceability as the law, given that they are within the scope of the law.) Most of these laws and regulations require that a company obtain a permit in order to engage in activities that could affect the environment. The permit may specify pollution control limitations, monitoring requirements, and other operational standards. Some of the more significant environmental laws that could apply to facilities in Virginia are discussed briefly below.

I. AIR QUALITY

Air quality is regulated in Virginia under a combination of state and federal laws. The Virginia Department of Environmental Quality (DEQ) has primary responsibility for administering the air pollution control program. Businesses with facilities having operations or equipment which emit an air pollutant need to have a permit from DEQ before constructing or operating their facility.

II. WATER QUALITY

State and federal water-quality laws establish a program for controlling discharges of pollutants to Virginia's surface and ground waters. DEQ is primarily responsible for administering the water quality management program in Virginia. Facilities need to obtain a permit from DEQ before discharging pollutants into state waters from "point" sources, "non-point" sources (including construction activities), or stormwater runoff. Business operations that discharge pollutants into municipal sewers must obtain permits from the municipality and comply with any applicable pretreatment standards. Facilities that handle or store petroleum products may need to prepare spill prevention and response plans.

III. WETLANDS AND NAVIGABLE WATERS

Several federal and state laws may restrict the activities of a company in and near wetlands and other water bodies. Construction of structures in or affecting navigable waterways is also regulated under federal law.

Virginia regulates activities in tidal and nontidal wetlands more broadly than does federal law. A state permit must be obtained for the excavation of wetlands or the discharge of dredged or "fill" material onto wetlands.

IV. USE OF STATE SURFACE AND GROUND WATERS

Certain withdrawals and uses of surface or ground waters are subject to regulation under state law. Activities involving large water withdrawals may be restricted, and in addition require a permit from the state.

V. ABOVE AND UNDER-GROUND STORAGE TANKS

Facilities with above-ground storage tanks (ASTs) having capacities exceeding specified threshold amounts are subject to regulation under state law by the DEQ. Regulated ASTs must be registered with the DEQ and meet certain design and operational standards. Under-ground storage tanks (USTs) are regulated by both federal and state law, and the DEQ has primary responsibility for this program. Facilities with a UST must notify the DEQ of the tank's installation and comply with several design and other technical standards.

VI. HAZARDOUS AND NON-HAZARDOUS WASTE

The generation, storage, transportation, treatment, and disposal of “hazardous” and other non-hazardous wastes in Virginia are governed under several state and federal waste management laws. The DEQ also has primary responsibility for administering this program. Facilities engaging in such activities need to comply with a number of waste management standards. Operations involving the treatment, storage, or disposal of wastes also must obtain a permit from the DEQ. Of course, hazardous wastes are subject to more stringent standards than are non-hazardous wastes.

CHAPTER NINE

Importing and Exporting: Customs and Export Controls

Contributor: Alison Lennarz

I. IMPORTING GOODS INTO THE UNITED STATES

A. Entry

The importation of goods into the United States is regulated by U.S. Customs and Border Protection (CBP). When a shipment of goods reaches the United States, the importer of record (i.e., the owner, purchaser, or licensed customs broker) must file entry documents for the goods with CBP at the port of entry. Ports of entry conduct the daily, port-specific operations such as clearing cargo and collecting duties. Imported goods have not legally entered the U.S. Customs territory until (a) the shipment has arrived within the U.S. port of entry, (b) CBP has authorized release of the merchandise, and (c) duties have been paid.

Upon the importer's presentation of the entry documents, the shipment may be examined, or examination may be waived. If no legal or regulatory violations have occurred, CBP will release the shipment, at which time the importer will deposit the required duties.

Examination of goods and documents determines, among other things:

- The value of the goods for Customs purposes and their dutiable status
- Whether the goods must be marked with their country of origin or require special marking or labeling
- Whether the shipment contains prohibited articles
- Whether the goods are properly invoiced
- Whether the shipment contains more or less than the invoiced quantities
- Whether the shipment contains illegal narcotics

If the importer wishes to postpone release of the goods into the Customs territory (and thereby defer duty), the goods may be placed in a CBP bonded warehouse under a warehouse entry or held in foreign trade zone (FTZ).

FTZs are secure areas such as warehouse facilities or industrial parks located in or near CBP ports of entry, but for legal purposes are considered outside the Customs territory of the United States. Merchandise lawfully brought into a FTZ may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, tested, repaired, sampled, salvaged, relabeled, destroyed, processed, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated or manufactured.

If the merchandise is then re-exported from the FTZ to a destination outside the United States, no duty is assessed. If the goods are sold inside the United States, then duty is payable on the imported items at that time (at either the rate applicable to such items in their imported classification or at the rate applicable to the finished goods, whichever is less).

B. Assessment of Duty

Classification and appraisement are the two most important factors affecting dutiable status. Classification and valuation must be provided by commercial importers when an entry is filed. All goods imported into the United States are subject to duty or duty-free entry in accordance with their classification under the Harmonized Tariff Schedule of the United States. Rates of duty for imported merchandise may vary depending upon the country of origin. Most merchandise is dutiable under "normal trade relations" rates. Merchandise from countries to which these rates have not been extended is dutiable at the full or "statutory" rates. Duty-free status may be available under various conditional exemptions.

One of the more frequently applied exemptions from duty occurs under the Generalized System of Preferences (GSP). The Generalized System of Preferences (GSP) is a preferential program that provides duty-free treatment to products of beneficiary designated countries and territories. In addition, trade agreements, such as NAFTA provide for preferential rates of duty.

Antidumping and countervailing duties are additional duties that may be assessed on imported goods intended for sale in the United States at below-market prices. Dumping is the practice of selling products in the United States at lower prices than those same products would bring in the producer's home market. Dumping also includes selling a product in the United States at a price lower than it costs to manufacture that item.

Countervailing duties may be assessed to "level the playing field" between domestic and imported goods that are subsidized by the foreign producer's government.

To meet the criteria for assessing antidumping or countervailing duties, the imported merchandise must, in addition to being subsidized or sold at less than fair value, also injure a U.S. industry.

C. Prohibited or Restricted Goods

The importation of certain classes of merchandise may be prohibited or restricted to protect the economy and security of the United States, to safeguard consumer health and well-being, and to preserve domestic plant and animal life. Some commodities are subject to an import quota or a restraint under bilateral trade agreements.

In addition to CBP requirements, importations may be subject to the laws and regulations administered by the U.S. Department of Agriculture, the Consumer Products Safety Commission, the Federal Communications Commission and the Food and Drug Administration.

Articles bearing counterfeit trademarks are subject to seizure and forfeiture. Also, items carrying marks that infringe a registered U.S. trademark recorded with CBP are subject to seizure, forfeiture and penalty assessment. Additionally, pirated copies of any item protected by a registered copyright are subject to seizure and forfeiture.

II. EXPORTING FROM THE UNITED STATES

Most export transactions do not require a license from the U.S. government. However, the U.S. government controls the export of sensitive equipment, software and technology as a means to promote national security interests and foreign policy objectives. The exporter is responsible for determining whether the product to be exported requires a license, after identifying which federal department or agency has jurisdiction over the item.

The Department of Commerce regulates the export or re-export of U.S.-origin "dual-use" goods, software and technology through the Export Administration Regulations (EAR). "Dual-use" items have both civilian and military applications.

The Department of Commerce also enforces certain export and re-export controls for foreign policy reasons.

The other significant export-control agencies are the Office of Defense Trade Controls (ODTC) in the U.S. State Department and the Office of Foreign Assets Controls (OFAC) in the U.S. Treasury Department. ODTC administers the International Traffic in Arms Regulations (ITAR), requiring all persons or entities that engage in the manufacture, export or brokering of defense articles and services to be registered with the U.S. government. In addition, exporters of defense articles designated in the U.S. Munitions List must receive a specific export license from ODTC.

OFAC administers U.S. economic sanctions against various countries, including Cuba, Iran, North Korea and Sudan. Trading with nationals of these countries is highly regulated.

The U.S. export control system also relies on catch-all controls to regulate the export of any equipment, software, or technology that would contribute to the proliferation of nuclear, chemical or biological weapons.

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