



DOING BUSINESS IN NEW HAMPSHIRE

A Legal Guide for Out-of-State and Foreign Businesses

SPBG

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DISCLAIMER

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This material reflects the laws in effect in December 2011. Due to the changing nature of these laws, this material should not be used as a final authoritative legal source.

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INTRODUCTION

New Hampshire, like other American states and international jurisdictions, is part of the world economy. Interstate and international business is continuously growing and the ability to conduct transactions across jurisdictions is the key to our future. Out-of-state businesses have been operating in New Hampshire for many years. New Hampshire provides great flexibility and many advantages to businesses operating here. International companies, as well as corporations and business entities from other states, doing business in New Hampshire have adopted a variety of strategies. Limited liability companies have become popular and are used frequently. Tax structures in New Hampshire are attractive, but subject to change regularly.

New Hampshire is known for its climate of welcoming businesses and helping them to do business here. Its tax laws are among the most favorable in the nation. Its corporate law, continuously revised to welcome businesses and protect investors, is among the most progressive in the nation. Our securities laws, environmental laws and employment laws are continuously revised to keep New Hampshire in the forefront of national trends.



Recent developments in New Hampshire law have had a positive impact upon foreign investors considering New Hampshire as a site for business activity. The opening of the International Trade Resources Center in Portsmouth, New Hampshire, brought together federal and state organizations to deal with international trade and New Hampshire business.

The Department of Resources and Economic Development has committed its resources to enhancing business opportunities and the local Chambers of Commerce help new participants accomplish their goals.

The Manchester-Boston Regional Airport provides non-stop or one-stop service to any important national or international destination and services over three million passengers annually.

This book is designed to inform out-of-state and non-U.S. business enterprises in a general manner about critical legal issues they will confront in New Hampshire. Prior to doing business in the state, prospective New Hampshire enterprises should consult legal and tax advisors. Sheehan Phinney Bass + Green, a full-service business law firm with offices in Manchester, Concord and Hanover New Hampshire, as well as Boston, Massachusetts, is dedicated to helping businesses find effective solutions to their questions. We welcome inquiries and stand ready to assist in any business venture.

Welcome to New Hampshire!

ABOUT NEW HAMPSHIRE

Statehood:	June 21, 1788, the 9th state
Capital:	Concord
Total Area:	44th among states, 24,217 sq km (9,350 sq mi)
Total Population:	42nd among states, 2010 census - 1,316,470
Population Density:	147 people per sq mi (2010)
Economy:	Gross State Product - \$61.6 million (2010) Personal income per Capita -\$42,831 (2009)
Largest cities in 2010:	Manchester: 109,565 Nashua: 86,494 Concord: 42,695

WHY NEW HAMPSHIRE

New Hampshire offers both residents and businesses alike a superior environment to both live and work.

Reasons to do business in New Hampshire:

- Low tax burden
- Ranked #11 in New Economy Index
- Educated and skilled workforce
- Proximity to interstate highways, national and international airports
- Limited state government

Reasons to live in New Hampshire:

New Hampshire has been listed as the *Most Livable State in the U.S.* since 2005 and was once again ranked first in 2011 (CQ Press). It is continually ranked as both the healthiest and safest states, offering an exceptional quality of life.

- One of the lowest crime rates in the nation
- High quality health care
- Excellent schools
- Affordable housing
- Beautiful scenery, from mountains to coastline
- Year round recreational activities
- Cultural opportunities



LABOR AND EMPLOYMENT LAW IN NEW HAMPSHIRE

New Hampshire still has a favorable business climate. Of all the New England states, New Hampshire's economy has been the strongest during the recent recession and forecasts suggest that this vitality and resilience will continue with a strong recovery. Out of state companies and others with an interest in New Hampshire should be aware, however, of some of the ways labor and employment matters are treated in this state. New Hampshire has no comprehensive legislative or administrative plan for governing private sector employee relations. Instead, there are scattered state laws, administrative regulations and judicial decisions regarding employment and related matters. There are, of course, federal laws, administrative regulations, and judicial decisions that regulate aspects of employment in New Hampshire. However, this section will focus only on issues where New Hampshire's labor and employment laws differ from, or are stricter than, federal standards.

Until a generation ago, New Hampshire employers had virtually unfettered discretion to establish the terms and conditions of employment, including the right to discharge employees for any reason whatsoever without notice. Since the 1970's the New Hampshire Legislature has adopted several workplace laws that have changed the employment relationship in meaningful ways. During the same time, in addition to many new federal laws, regulations and federal court decisions, the New Hampshire Supreme Court has issued important decisions in workplace cases. As a result, employers in New Hampshire no longer have the same discretion in hiring, advancement and termination decisions. While this traditional concept of "employment-at-will" has not been totally abrogated in New Hampshire, it has been significantly modified over the years. This chapter sets forth some of the more important aspects of the modified at-will employment relationship and the increasing regulation of the employment relationship in New Hampshire.

PROTECTIVE LEGISLATION

INTRODUCTION

Although there are several laws dealing with employment and labor matters in New Hampshire, there is one section of state law appropriately labeled "Protective Legislation." (RSA 275 *et. seq.*). This section of state law includes wage and hour provisions, as well as other workplace rules and regulations. A few of the more significant of these laws are outlined below.

Soliciting Help During Labor Trouble

New Hampshire is not a "Right to Work" state. A legislative initiative in 2011 to make the state the first New England state to adopt a Right to Work law fell short of the required votes to override the Governor's veto. However, New Hampshire does have several laws dealing with unions and labor disputes. By way of example, during a strike, lockout or other labor action, an employer may advertise for employees to fill the places of strikers, but the advertisement and solicitation must plainly and explicitly state that a strike, walkout or other labor disturbance exists. (RSA 275:11).

Holidays

New Hampshire doesn't have traditional "Blue Laws" like neighboring Massachusetts. However, it does have laws that deal with work on holidays and Sundays. Employees cannot be required to work in any mill or factory on any legal holiday, except to perform work as is both absolutely necessary and can lawfully be performed on the Lord's day. The Lord's day is defined as Sunday. Individuals who violate this law may be guilty of a misdemeanor and businesses that violate this law may be convicted of a felony. (RSA 275:28, 29; 288:2; 332-D:1).

Making Up Time

In New Hampshire employers cannot require or request any employee engaged in any occupation to work more hours in any one day than is limited by law, in order to make up for lost time because of a legal holiday. (RSA 275:31).

Sunday Work/Day of Rest

Beyond holiday work, employers cannot require an employee to do his or her usual work on a Sunday, unless the employee is allowed during the next ensuing six (6) days to have twenty-four (24) consecutive hours without labor. Employers who violate this provision may be subject to a fine for each infraction. (RSA 275:28; 32; and 33). No employer in New Hampshire may operate any such business on a Sunday unless it has first posted, in a conspicuous place, on the premises a schedule containing a list of employees who are required or allowed to work on Sunday and designated a day of rest for each in the ensuing week. In addition, the employer must promptly file a copy of the schedule and every change to it with the New Hampshire Department of Labor. No employee shall be required or allowed to work on the day of rest designated for him or her. Again, violations of this law may subject the employer to a fine for each infraction. (RSA 275:33).

Exceptions to Sunday Work Laws

The provisions of RSA 275:32 and 33 do not apply to the following types of jobs: janitors; watchmen; firemen employed at stationary plants; caretakers; employees whose duties on Sunday include: setting sponges in bakeries; caring for live animals or caring for machinery and plant equipment; those engaged in the preparation, printing, publication, sale or delivery of newspapers or periodicals with definite on-sale newsstand dates; employees engaged in farm or personal service; employees engaged in a labor called for by an emergency which could not have been reasonably anticipated; employees engaged in the canning of perishable goods; employees engaged in any work connected with theatres, motion picture theatres, hotels and restaurants, retail stores in resort areas, cabins and inns; and employees of telegraph and telephone offices.

Days of Work Defined

In all contracts relating to labor, eight (8) hours of actual work shall be taken to be a day's work unless otherwise agreed by the parties. This provision, however, does not apply to classes of labor (e.g., youth employment) for which the law provides limits on the number of hours a minor may work in a day and in a week. (RSA 275:30; 276-A:4 *et. seq.*).

Work Breaks, Lunch or Eating Period

Work breaks (other than a lunch or eating period) are not required under New Hampshire law. However, an employer may not require an employee to work more than five (5) consecutive hours in a work day without granting the employee a thirty (30) minute lunch or eating period, except if it is feasible for the employee to eat during performance of the employee's work, and the employer permits this activity. (RSA 275:30-a). The New Hampshire Department of Labor's Administrative rules require employers to note on the daily time records for hourly, and salaried, non-exempt, employees when they take their meal break each day. While the Department of Labor permits employees to waive their meal break that waiver should be in writing and exceptions should show up in daily time records.

Special Provisions for Women and Children

Antiquated laws providing protective legislation for women and children as a special class of employees were repealed during the last 15-20 years because other laws and administrative regulations provided adequate protection. However, RSA 276-A and administrative regulations from the New Hampshire Department of Labor still provide for special measures to be taken when employing children, regulating types of employment, and hours of work. In some instances, New Hampshire's Youth Employment laws are stricter than federal child labor laws. By way of example, our state laws contain a provision requiring youth in school to obtain a certificate from the school principal indicating a "satisfactory level of academic performance." Other youth employees must also have a parental authorization on file. These must be completed and be on file before the youth commences work for the employer.

WAGE PROTECTION LAWS

New Hampshire's wage laws (RSA 275:42-55) and administrative regulations (Lab. 801.01 *et seq.*) are enforced by the New Hampshire Department of Labor. This section of Protective Legislation covers subjects such as: the requirement of the weekly or other scheduled payment of wages; the payment of wages within seventy-two (72) hours after an employee is involuntarily discharged from the employment; compensation for vacation pay, personal days, holiday pay, sick pay, and employee expenses, when such benefits are considered wages due in accord with employer practice or policy; permitted deductions from salary and other wages; the unlawful withholding of wages; the maintenance of payroll records and personnel files; and, enforcement/penalty provisions. Some of those sections are highlighted below:

Required Wage Payments

Unless otherwise permitted by the Department of Labor, every employer must pay all wages due employees within eight (8) days, including Sunday, after the expiration of a week in which the work is performed, on a regular payday designated in advance by the employer. (RSA 275:43, I).

Electronic Funds/Direct Deposit/Pay Card

Wages must be paid, when due, in lawful U.S. currency. If wages are paid to employees through an electronic fund transfer, direct deposit, or pay card employers must do so at no cost to the employee. If an employer elects to pay employees through electronic fund transfer, direct deposit, or pay card, the employer must also offer employees the option of being paid by check drawn on a local bank, convenient to the employees' place of work; and employers are required

to make arrangements at the banks for the cashing of the checks in the full amount due to the employee, again, with no check cashing fee charged to the employee if the employee doesn't have an account at that bank. (RSA 275:43,I).

Weekly Pay

Employers are required to have weekly pay periods unless, upon written request to the Commissioner of the Department of Labor, on a form provided by the Department, (showing good and sufficient reason) the employer is permitted to pay less frequently than weekly. The maximum pay period permitted by law is monthly and then, only upon approval from the Commissioner of the Department of Labor. That approval must be obtained in advance from the Commissioner. It may, once granted, also be withdrawn by the Department of Labor, if the employer fails to satisfy the eligibility criteria. (RSA 275:43 I, II; Lab 803.2 [b], [c] and [d]).

Payment of Pension Fund Contributions

As noted above, all wages are generally to be paid within eight (8) days from the week in which they are earned. The only exception is for payments in the form of health and welfare fund or pension fund contributions required pursuant to a health and welfare trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement, adopted for the benefit of employees and agreed to by the employer. Those payments shall be paid within thirty (30) days of the date of demand for such payment. (RSA 275:44 V, and RSA 275:43 I).

Payment for Other Benefits when Due

Vacation pay, severance pay*, personal days, holiday pay, sick pay and payment of employee expenses, when such benefits are a matter of employer practice or policy, or both, shall be considered wages and paid when due. (RSA 275:42, III and 275:43).

** Severance pay claims may not be enforced by the New Hampshire Department of Labor if they are deemed to be covered, and therefore preempted, by ERISA.*

Cost of Employment-Related Medical Exams

While federal law (e.g. ADA) permits employers to require employees to submit to job-related medical exams during employment, under New Hampshire law, the applicant or employee cannot be required to pay the cost of such exams. (RSA 275:3).

Minimum Reporting Pay

On any day an hourly employee reports to work at an employer's request, the employee shall be paid not less than two (2) hours pay at the employee's regular rate of pay. However, if an employer makes a good faith effort to notify an employee not to report to work, the employer shall not be liable to pay wages.

If the employee reports to work after the attempts to contact him/her are unsuccessful, or if employer is prevented from making notification, the employee shall perform whatever duties are assigned by the employer when the employee reports to work. (RSA 275:43-a)*.

** This section does not apply to counties or municipalities. This section has also been found not to apply to part-time employees who are routinely scheduled to work for periods of less than two (2) hours per day of shift.*

Overtime

Overtime premiums for hours worked beyond the statutory standard of forty (40) hours in a workweek are generally covered by federal law (Fair Labor Standards Act or FLSA). New Hampshire has a little known overtime law that applies to employers who are not covered by the FLSA. That law, RSA 279:21, which is buried in the state's minimum wage law, provides that employees, working for employers covered by this state law, with the following exceptions, shall, in addition to their regular compensation, be paid at the rate of time and one-half for all time worked in excess of forty (40) hours in any one week: Exempt from the overtime law are employees of seasonal, amusement or recreational employees, which: (1) Do not operate for more than seven (7) months in any calendar year; or (2) During the preceding calendar year, its average receipts for any six (6) months of such year were not more than 33 1/3 percent of its average receipts for the other six (6) months of such year. In order to meet the requirements of this exception, the establishment in the previous year shall have received at least 75 percent of its income within six (6) months. The six (6) months, however, need not be six (6) consecutive months.

Exemptions from New Hampshire's state overtime law also include any employee of employers covered under the provisions of the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. section 201, et seq.).

Payment of Wages After Discharge of Employee

Whenever an employer discharges an employee, all wages due to the employee must be paid in full within seventy-two (72) hours. (RSA 275:44 I).

Payment After Employee Resigns

Whenever an employee voluntarily resigns, the employer must pay the employee's wages no later than the next regular pay day, except, if an employee gives at least one pay period's notice of his or her intention to quit, then the employer shall pay all wages earned by the employee within seventy-two (72) hours. (RSA 275:44 II).

When Employee Is Suspended After Labor Dispute or is Laid Off

Whenever an employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the employer shall pay the employee all wages due not later than the next regular pay day all wages earned at the time of the suspension or layoff. (RSA 275:44 III).

Penalties for Failure to Pay Wages When Due

If an employer willfully and without good cause fails to pay an employee wages, as required under RSA 275:44, that employer may be additionally liable to the employee for liquidated damages of up to 100 percent of the unpaid wages. Attorney's fees may also be awarded to a successful wage claimant. (RSA 275:53 III).

Warning and Opportunity to Correct Violation

The New Hampshire Department of Labor, as a result of a recent change in the law, must now give employers a written warning of state wage violations and thirty (30) days to correct the violation before assessing civil penalties. This warning is not available to employers who, in the opinion of the Labor Commissioner, intend to cause harm, pose a threat to public safety, or are in violation of the following state wage laws: failure to pay employees in full or on time (RSA 275:43); payment of wages by checks drawn on financial institutions not convenient to the employee (RSA 275:43, I(e)); failure to pay final wages (RSA 275:44); failure to pay amounts withheld to pay child support; continuation of wage withholdings for cancelled insurance benefits; illegal withholdings for damage to employer property; violation of RSA 275-A:4-a regarding employment of illegal aliens; and requiring employees to perform illegal activities under threat of job loss. (RSA 273:11-a)

Personal Liability for Officers

The definition of an employer includes individuals, in addition to traditional business entities. In recent years, the New Hampshire Supreme Court has ruled that officers (e.g. President, Vice President, CEO, CFO, COO, etc.) who knowingly direct or permit a company to violate state wage payment laws could be found personally liable for the payment of the wages.

Prime Contractor's Responsibility for Wage Payments

Employers and contractors may be civilly liable to employees of contractors or subcontractors engaged in the performance of work under a contract for the payment of wages, exclusive of liquidated damages, as required by RSA 275:43, 44 and 45, whenever and to the extent that the employer of such employees fails to pay such wages to those employees. (RSA 275:46)

Improper Withholding of Wages Prohibited

Generally, employers may not withhold or divert wages due to employees. Wages may be withheld or diverted only if the employer has a written authorization by the employee for lawful deductions accruing to the benefit of the employee, or if deductions are pursuant to any department rules and regulations. (RSA 275:48). In recent years, (changes effective January 2005, 2006 and 2011), the list of permitted withholdings has increased to include deductions for: contributions to cafeteria plans or flexible spending plans; voluntary payments for child care fees, parking fees and pharmaceutical items, gift shop and cafeteria items purchased on site of a hospital by hospital employees; voluntary installment loan payments; voluntary repayment after accidental overpayment of wages by an employee; voluntary repayment of tuition advances for non-required educational costs; and deductions for repayment of balances on borrowed leave time. The most recent change to the law permits employers to deduct from wages for any purpose as long as the request is from the employee, in writing and is for the employee's benefit. The employer cannot gain financial advantage from the deduction and the deduction must not be for something the employee needs to perform his/her work for the employer.

Salaried Employees

Payment of wages on a salary basis, similar to provisions under Federal wage laws, means the employee regularly receives, each pay period, a predetermined or fixed amount of money which

is not subject to reduction because of variations in the quality or quantity of the work (with a few exceptions) in that pay period. (RSA 275:42 VI; RSA 275:43-b).

Employers may, similar to provisions under federal wage laws, make deductions from the compensation of salaried employees for disciplinary suspensions, bereavement leave, family or medical leave, or certain (vacation not sick leave) voluntarily-requested leaves.

In addition, employees may not be paid full salary when: the employee performs no work in a workweek; the employee is hired after the start of the workweek; the employee quits before the end of a pay period by the employer; or if the employee is discharged for cause.

Finally, employers may offset any amount received by a salaried employee for jury duty, witness fees or military pay. (RSA 275:43 - b I, II, III).

Notice to Employee - Rate of Pay and Place of Payments

Every employer shall, at the time of hiring, notify each employee of the rate of pay and day and place of payment. Employers shall also notify employees of any changes in those arrangements in advance of any such changes. (RSA 275:49). Department of Labor Administrative Rules require that the employee sign the document acknowledging receipt.

Employment Policies Provided or Posted

Every employer shall make available to its employees, in writing or through a posted notice maintained in the place accessible to its employees, employment practices and policies with regard to vacation pay, sick leave, and other fringe benefits. (RSA 275:49 III).

Statement of Payroll Deductions

Every employer shall furnish each employee with a statement of deductions made from the employee's wages under RSA 275:48 for each pay period such deductions are made. (RSA 275:49 IV).

Sales Commissions

Commissions are considered wages and must be paid when due. (RSA 275:42).

Employers should outline how sales commissions are calculated, when that payment is due, what is due upon termination of employment and when those commissions will end.

Written commission agreements are required for all sales representatives who are not employed (e.g. manufacture sales representatives) by the company. (RSA 339-E:1).

If employers permit sales employees to take an advance or draw against anticipated commissions, the employer is permitted to reconcile the advance or draw against commissions earned. Commissions in excess of the draw are due as wages. Employers are permitted to carry forward negative balances to the next ensuing period. However, employers may not, if a reconciliation results in a negative balance, recover overdrafts in an employee's final check. (RSA 275:42 VII). In those cases, employers may still have the option of pursuing a collective action in a court of competent jurisdiction.

Employee Expenses

An employee who incurs expenses in connection with his or her employment and at the request of the employer, except those expenses normally borne by the employee as a precondition of employment, which are not paid for by wages, cash advance, or other means from the employer, shall be reimbursed for the payment of the expenses within thirty (30) days of the presentation by the employee of proof of payment. (RSA 275:57) Claims to recover unpaid expenses can be brought as a wage claim at the Department of Labor or in a court of competent jurisdiction. An employer who willfully violates the provisions of this section may be assessed interest and a civil penalty for up to \$1,000 per violation.

Time Records

Every employer in New Hampshire is required to keep a true and accurate record of the hours worked by every employee and the wages paid to those employees. (RSA 279:27; Lab 803.04 [f]). Those records must be available, upon request, for inspection by the Department of Labor.

Those records must include: payroll information for all employees, except for employees who are exempt under 29 U.S.C. section 213(a) of the Fair Labor Standards Act, showing the time work began and ended each work day, including any bona fide meal periods. Individual pay sheets or time cards must support that information.

Time records with entries that are altered shall be signed or initialed by the employee whose time record was altered.

Employers may not make use of automated time keeping devices or software programs that can be altered by an employer without the knowledge of the employee, or that do not clearly indicate that a change was made to the record. (RSA 279:27; RSA 275:49, VI). This regulation applies to all employers.

These time records must be preserved and stored for a period of no less than four (4) years.

Time Limit on Wage Claims

Effective, Jan. 1, 2006, wage claims under state law may be submitted to either the New Hampshire Department of Labor or the appropriate State Superior Court within thirty-six (36) months of the alleged violation. (RSA 275:51; RSA 275:53).

PERSONNEL RECORDS AND FILES

EMPLOYMENT RECORDS

Every employer must keep records, including wage and hour records, of each of its employees, preserve such records, and provide them to the New Hampshire Department of Labor upon request. (RSA 275:49 IV).

Employee Access to Personnel Files

Every employer must provide employees and former employees, upon request, reasonable opportunity to inspect the employee's personnel file. Employers must also, upon request, provide

a copy of all or a portion of the employee's file and may charge a reasonable fee related to the cost of complying with such a request. (RSA 275:56 I).

A "personnel file" is defined by the New Hampshire Department of Labor's Administration Rules as: any and all personnel records created and maintained by an employer and pertaining to an employee including and not limited to employment applications, internal evaluations, disciplinary documentations, payroll records, injury reports and performance assessments, whether maintained in one or more locations, unless such records are exempt from disclosure under RSA 275:56 III, or are otherwise privileged or confidential by law. (Lab.802.07).

Peer evaluations, letters of recommendation and notes not generated or created by the employer are not included in the definition of "personnel file". (Lab.802.07).

Changes to Personnel Files

If an employee disagrees with any information contained in his/her personnel file, and the employee and employer cannot agree upon removal or correction of such information, then the employee may submit a written statement explaining his or her version of the information together with information supporting such a version. This statement must be disclosed whenever the disputed portion of the file is disclosed to a third party. (RSA 275:56 II).

Exceptions to Access and Disclosure Rules

Employers are not required to disclose information in an employee's personnel file if that employee is, at the time of the request, the subject of an investigation, or if that disclosure would prejudice law enforcement, or if it is information related to a government security investigation. (RSA 275:56 III).

NEW HAMPSHIRE'S LAW AGAINST DISCRIMINATION

STATUTORY PROVISIONS

New Hampshire's law against discrimination in many ways parallels federal laws (e.g. Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Family and Medical Leave Act) that prohibit workplace discrimination, but there are some ways in which New Hampshire's anti-discrimination laws are unique. (RSA 354-A). Some of those differences are as follows.

Threshold Number of Employees

New Hampshire's law against discrimination applies to employers with six (6) or more employees. Included are private employees, as well as the state and all of its political subdivisions, boards, departments and commissions. Certain charitable, religious, and educational employers are exempt from this law. Federal discrimination laws have higher thresholds for jurisdiction (fifteen (15) to fifty (50) employees depending on the statute). (RSA 354-A:3, V).

Scope of Employer Discrimination

New Hampshire's workplace discrimination laws prohibit employment discrimination because of the age, sex, sexual orientation, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual. This includes the refusal to hire an employee or to bar or to discharge from employment such protected individuals or to discriminate against any such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. (RSA 354-A:8, I; NH Admin. Rules, Hum. 401. 01).

Differences with the Scope of Federal Discrimination Statutes

It is important to note several differences between New Hampshire and federal nondiscrimination laws. First, New Hampshire law provides that marital status is protected; there is no similar protection under federal law. Second, unlike federal law, there is no requirement under New Hampshire law that an individual be at least forty (40) years old to file an age discrimination complaint. Third, New Hampshire law prohibits discrimination on the basis of disability, and like the federal law (*e.g.*, ADA), New Hampshire law requires employers to reasonably accommodate applicants or employees with disabilities. Unlike the ADA (now the ADAAA) and the attendant regulations adopted by the U.S. Equal Employment Opportunity Commission (EEOC), New Hampshire's Human Rights Commission hasn't adopted Administrative Rules or regulations to provide employers with guidance on terms such as reasonable accommodation or other employer obligations under state disability law.

Finally, New Hampshire law prohibits discrimination on the basis of "sexual orientation." Sexual orientation is defined as "having or being perceived as having an orientation towards heterosexuality, bisexuality, or homosexuality." There are currently no similar protections under federal law.

Limits on the Use of Information in Job Application

New Hampshire law also states that ". . . it shall be an unlawful discriminatory practice for an employer to print or circulate any statement, advertisement or publication, or to use any application or to make any inquiry which expresses, directly or indirectly, any limitation, specification or discrimination as to age, sex, sexual orientation, race, color, marital status, physical or mental disability, religious creed or national origin or any intent to make any such limitation, specification or discrimination in any way on the ground of age, sex, sexual orientation, race, color, marital status, physical or mental disability, religious creed or national origin, unless based upon a bona fide occupational qualification; provided, however, that nothing in that Act shall limit an employer after the offer of hire of an individual from inquiring into and keeping records of any existing or preexisting physical or mental conditions." (RSA 354-A:7, III).

Violations of Discrimination Laws

Because most violations of Title VII of the Civil Rights Act of 1964 are also violations of New Hampshire law against discrimination, the federal agency which enforces Title VII, the Equal Employment Opportunity Commission (EEOC), has an arrangement with the New Hampshire Commission for Human Rights whereby most complaints are investigated, at least initially, by the state agency.

EMPLOYEE MANUALS AND ENFORCEABLE CONTRACTS

EMPLOYEE MANUALS/HANDBOOKS

Enforceable Contracts

In the last twenty years there have been several court cases concerning employment policies and employee handbooks. The issue central to most of these cases is whether or not statements contained in those materials are enforceable contracts. The majority of courts across the country have ruled that statements in handbooks and manuals give the employee an enforceable contract right against the employer. For example, a statement in an employee manual that an “employee will be fired only for just cause” changes the at-will nature of employment and prohibits the employer from firing the employee without establishing just cause

The prevailing theory is that, once an employer announces a policy (presumably hoping to attain certain benefits from a boost in employee morale), the employer cannot then at its whim treat the promises contained in the policy as illusory. Once the employer has created an expectation of benefits, procedures or protections, it must live up to its word.

Written Policies

Written policy issues were addressed by the New Hampshire Supreme Court in the case of *Panto v. Moore Business Forms, Inc.* 130 N.H. 730 [1988] Panto apparently quit his job when his position at Moore was changed. He claimed that under a written layoff and recall policy he was entitled to up to three months pay and other benefits such as health, dental and group life insurance. The employer claimed the policy did not apply to him because he was not laid off at the time the policy was announced, and he continued employment for several months after his job was changed. *Panto* relied on the majority of cases from other states to support his claim that the policy gave him an enforceable contract right. In a decision written by David Souter, dated August 9, 1988, the New Hampshire Supreme Court held that an employment policy regarding deferred compensation is enforceable as a contractual obligation if the employee complies with its terms. However, Souter added: “. . . Moore could simply have avoided the entire issue by announcing in the written policy itself that it was not an offer or a policy enforceable as a contractual obligation.”

Effect of Disclaimers

Based upon *Panto* and other recent decisions, it appears that the New Hampshire Supreme Court is inclined to rule that employee handbooks and policy manuals are more than mere statements of policy to be changed at the will of the employer. Although disclaimer language such as the language cited by the court in *Panto* is helpful, in a recent case, the New Hampshire Supreme Court revisited this issue and found that such disclaimers will be narrowly construed. *Butler v. Walker Power, Inc.* 137 N.H. 432 [1993].

In more recent cases, *Dillman v. New Hampshire College* 150 N.H. 431 [2003], the New Hampshire Supreme Court found that in spite of an Employee Handbook with other wise appropriate and enforceable disclaimer language, an employee could advance a claim for breach of contract when handbook and separate employer contract terms were confusing, inconsistent or contrary.

Therefore, employers with operations in New Hampshire are well advised to use caution in any benefits, rights, privileges or procedures stated as a policy in an employment manual or other document or statement. The best rule is to put nothing in writing and promise nothing orally unless the employer is prepared to fulfill the commitment.

WRONGFUL DISCHARGE AND RELATED CLAIMS

MODIFIED AT-WILL DOCTRINE

New Hampshire Rule

New Hampshire has adopted a “modified employment-at-will” doctrine meaning that if the employee does not have the benefit of a contract, or other agreement that may constitute a contract, he or she may be treated as an at-will employee and will be subject only to those limitations imposed by the federal and state legislatures, employee contracts and manuals and common law (judicial limitations). That is, unless an employment contract or employee handbook restricts the grounds or procedures for discharge, the employee may be terminated for any lawful reason without notice.

Historical Perspective

The laws passed by Congress and the New Hampshire Legislature have significantly modified the employment-at-will concept. One of the first pieces of legislation to modify that relationship was the 1938 Fair Labor Standards Act (FLSA), which, although it did not significantly curtail the discretion of the employer when discharging employees, did establish federal requirements for minimum wages, overtime compensation and child labor. Eventually, beginning in the 1960s, Congress adopted a variety of laws prohibiting employers from basing employment decisions on race, color, national origin, religion, sex, age and disability. The earliest of these was the Civil Rights Act of 1964, which prohibited discrimination in employment on the basis of race, color or national origin. The most recent is the ADA, passed by Congress in the summer of 1990.

Employment Contracts and Employee Manuals

The second source of modification to the traditional employment-at-will concept has been collective bargaining and other forms of employment contracts. The National Labor Relations Act (NLRA), passed by Congress in 1935, and amended substantially since, permits employees in the private sector to organize for the purposes of collective bargaining with their employers. In many instances, pursuant to the rights provided by the NLRA, employees have won important concessions to curtail the ability of employers to discharge employees. Many state legislatures, including New Hampshire, have extended the rights of collective bargaining to employees in the public sector. In addition, as mentioned earlier, employee manuals and individual employment contracts are now far more common than they were several decades ago.

JUDICIAL LIMITATIONS

RECOGNITION BY NEW HAMPSHIRE COURTS

The third source of modification to the concept of employment-at-will are decisions by the New Hampshire state courts. The courts of many states, including New Hampshire, have adopted a

variety of causes of action which permit discharged employees to bring lawsuits against their former employers for damages. These developments are discussed in greater detail below.

Wrongful Discharge in New Hampshire

In 1981, the New Hampshire Supreme Court recognized the cause of action now commonly known as “wrongful discharge.” In the case of *Cloutier v. A & P Tea Co., Inc.*, 121 N.H. 915 [1981] the court held that an employer would be liable for damages for terminating employees for performing an act that public policy would encourage or for refusing to do an act that public policy would discourage.

Further, the plaintiff must establish that the employer was motivated by bad faith or malice. A major issue in most wrongful discharge cases is whether the discharge implicates a matter of “public policy.” It is well settled in New Hampshire that the public policy at stake in a case does not need to be a part of any statutory or regulatory provision. [Note: Other states, including Massachusetts, have modified their position on the public policy element, requiring that the alleged violation be anchored in a statutory right.] Rather, it is sufficient to allege generalized concepts of public policy. The New Hampshire Supreme Court has held that the issue of whether public policy is involved in discharge is usually a question left to the jury. (*Cilley v. NH Ball Bearings, Inc.* 128 N.H. 401 [1986]). Although in certain circumstances where the presence or absence of such public policy is clear, the court may take the question away from the jury. (*Short v. SAU 16* [1992]). Some of the situations that might give rise to a claim of wrongful discharge are as follows:

- an employee is fired for filing a workers’ compensation claim;
- an employee is fired for reporting a dishonest act of the employer;
- an employee is fired for refusing to lie to an investigation officer;
- a personnel director is fired for criticizing the employer’s hiring practices as discriminatory;
- a store manager is fired for refusing to carry cash receipts to the bank without an armed guard;
- an employee is fired for refusing to seek some exemption from jury duty; and
- a financial officer is fired for refusing to misrepresent the financial condition of the company.

In recent years the New Hampshire Supreme Court and Federal Courts, applying New Hampshire law, have decided cases that indicate a tightening of the “public policy” concept in wrongful discharge cases (*e.g.*, *Short v. SAU 16* [1992]). Subsequent cases will have followed this trend.

Remedies Available for Wrongful Discharge

The New Hampshire Supreme Court, unlike the courts in several other jurisdictions, appears to have given a rather expansive interpretation of the types of remedies available for wrongful discharge. That is, it appears that a discharged employee in New Hampshire may secure damages beyond just back pay and attorney’s fees. For example, the discharged employee may be able to recover front pay and other types of compensatory damages. However, if the employee’s claim is based on impermissible discrimination for which a claim could be made under Title VII, then the

employee cannot recover separately for wrongful discharge. *Smith v. F.W. Morse*, (1996), citing *Wenners v. Great State Beverages, Inc.* (1995). Although not expressly stated in the *Smith* case, the same rule precluding a wrongful discharge claim should apply equally when an employee's claim is based on forms of discrimination other than those precluded under Title VII, such as disability (ADA) and age (ADEA). More recently New Hampshire courts have found that when asserting that a former employee's wrongful discharge action is preempted by a statutory remedy that argument must be supported by sufficient evidence of remedies under state or federal law. See *Weeks v. Wal-Mart Stores, Inc.*, 2010 DNH 165, 2010 U.S. Dist. LEXIS 97206, (D.N.H. Sept. 16, 2010) and *True v. DJQ Enterprises, Inc.*, 2011 DNH 33, 2011 U.S. Dist. LEXIS 20842 (D.N.H. Mar. 2, 2011).

Other Recognized Causes of Action

In addition to wrongful discharge, New Hampshire has recognized related causes of action available to a discharged employee including: intentional infliction of emotional distress, intentional interference with economic relations, implied duty of good faith and fair dealing, fraud/misrepresentation, and defamation.

NEW HAMPSHIRE WHISTLEBLOWER'S PROTECTION ACT

New Hampshire law prohibits retaliation against employees who alert their employer or others to an alleged law violation (RSA 275-E).

Prohibited Activity by Employers

Employees cannot be fired for reporting employer violations of federal, state or local "law or rule," participating in proceedings or court actions involving allegations of employer violations or refusing to carry out illegal employer directions.

Employee Responsibilities Under Whistleblower's Law

Employees must act in "good faith" and have reasonable cause to believe the employer is violating a law or rule. The employee should first bring the alleged violation to the attention of the employer. The employee should also make a "reasonable effort" to use any internal grievance procedure before filing a complaint under the statute.

Enforcement Procedures

An employee alleging a violation of this law may obtain a hearing before the New Hampshire Commissioner of Labor. Following the hearing, the Commissioner may render an "appropriate" order that may include reinstatement, back pay, payment of fringe benefits, seniority rights, and "injunctive relief." Decisions of the Commissioner may be appealed to the New Hampshire Supreme Court.

OCCUPATIONAL HEALTH AND SAFETY ISSUES

SAFETY AND HEALTH OF EMPLOYEES

Department of Labor

The New Hampshire Department of Labor has jurisdiction over nearly every aspect of the regulations affecting employment in the state. With regard to the safety and health of employees, several statutes and Administrative Regulations such as: Occupational Health (RSA 140); Smoking in the Workplace (RSA 155:50 *et. seq.*); Safety and Health of Employees (RSA 277); Toxic Substances in the Workplace (RSA 277-A); and Workers' Compensation (RSA 281-A) address a variety of standards and procedures intended to protect employees in the workplace.

Reinstatement after Injury/Illness

The Workers' Compensation Act was amended in early 1994 to require employers to require the reinstatement of injured workers to their jobs within eighteen (18) months after the date of the injury. While there are some exceptions, employers need to be aware of this obligation.

Light Duty

Employers in New Hampshire are required to establish a temporary alternative duty program to assist employees with workplace injuries when they return to work.

Safety Committees and Reports

Employers with five (5) or more employees must form safety (joint loss management) committees composed of representatives from management and labor to develop and administer workplace safety programs, alternative work programs that encourage injured employees to return to work and programs for continuing education on workplace safety.

Employers with ten (10) or more employees must prepare a written safety program with employer rules and regulations and policies and procedures for discipline for safety violations. Employers must file a summary of developments under the plan with the Department of Labor on a bi-annual basis. (RSA 281-A:64).

Safety Appliances

In mercantile and manufacturing establishments employing one or more persons, the employer must provide certain safety appliances and safeguards such as medical/first aid chests, proper toilet facilities, as well as reasonable hygienic and sanitary conditions for their employees. Inspectors from the Department of Labor investigate complaints, and violations must be corrected or penalties will be assessed, including an order to stop work.

Occupational Health

An occupational health unit exists in the Department of Labor and that office has the authority to develop comprehensive policies and conduct programs for evaluation of hazards associated with use of chemical or physical agents. (RSA 125).

Workers' Right to Know Law

Because of the proliferation of toxic substances in the workplace which pose a growing threat to the health and safety of employees, and the difficulty and expense of monitoring these potential hazards, the New Hampshire legislature determined that employers were often in the best position to detect toxicity and provide employees with information concerning the nature and potential hazard of certain substances.

Similar to federal laws on the same subject, New Hampshire laws require the use of Material Safety Data Sheets. These must accompany any toxic substance manufactured, formulated, transported or distributed in the state of New Hampshire. Employers are required to keep such information on file, post the same as a warning in certain workplaces, and provide it to employees within seventy-two (72) hours of the request.

Employers must notify all employees of their rights under the law and provide education and training programs for all employees routinely exposed to toxic substances.

If any employee who requests information about a toxic substance does not receive that information within five (5) working days, he/she may refuse to work with that substance until the employer provides that information. Employers are prohibited from discriminating against or retaliating (*e.g.*, discharge) against prospective or current employees for exercising their right under the law.

Smoking in the Workplace

New Hampshire has an Indoor Smoking Act which allows employers and places of public accommodation to ban smoking unless it can be effectively segregated from nonsmoking areas. New Hampshire also has a law that prohibits employers from discrimination against smokers and users of tobacco products in employment. This has been read to suggest employers can't refuse to hire smokers or tobacco users.

Termination of Employment

In New Hampshire, absent a union contract clause or employment policy that requires otherwise, no notice or reason for termination is required, as a matter of law when an employee is terminated. However, if the former employee files a claim for unemployment benefits, the employer must respond to the Department of Employment Security with, among other things, the effective date, reason for the employee's separation from employment, and the wages and other payments to the employee upon or following separation.

New Hampshire's Mini-WARN Act—Layoff/Termination Notices and Benefits

Like its federal counterpart the Worker Adjustment and Retraining Notification Act (WARN) which provides notice requirements for employers who create significant job losses with a plant shut down or mass layoffs, New Hampshire adopted its own Mini WARN Act effective January 1, 2010. That law required employers to provide sixty (60) days advance written notice before significant employment losses, including mass layoffs and plant closings. However, unlike the federal law which covers those with 100 or more employees, New Hampshire's WARN Act covered employers with 75 or more full-time employees or 75 or more employees who in the aggregate work at least 3,000 hours per week, excluding overtime. In 2011 (effective January

2012) this law was amended to cover employers with a minimum of 100 or more full-time employees.

While this threshold is now aligned with the federal WARN Act, other aspects of this state law are still very different. New Hampshire employers should note that the state law's application to parent companies is much stricter than the federal law. Under New Hampshire's WARN Act, a mass lay off is defined as one resulting in the loss of jobs during a 30-day period for at least 250 workers or at least 25 workers if they constitute a third of the workforce. A plant closing is defined as a permanent or temporary shutdown resulting in at least 50 job losses. For purposes of counting employees under this section, part-time employees are excluded. Like the federal law, under certain circumstances, the minimum number of employees to meet these definitions will be triggered by aggregating two or more events at a single site, which occur within a 90 day period.

In the event that New Hampshire's WARN Act's notification provisions are triggered, the employer must provide the written notice to employees and their representatives, the New Hampshire Labor Commissioner, the Attorney General, and the chief elected official of each municipality in New Hampshire where the plant closing or mass layoff occurs. Employers who meet the threshold requirements of the New Hampshire and federal law must comply with both. Under both laws, the notice must contain the elements required by federal WARN.

The new law has real teeth. Employers who fail to comply with New Hampshire WARN Act will be liable for back pay and lost benefits for each employee who was entitled to notice, costs and reasonable attorney's fees, as well as civil penalties of up to \$2,500, plus \$100 per employee for each of non-compliance. The Labor Commissioner may also place a lien on the business revenues and all real and personal property of the employer as well as hold a parent corporation liable.

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IMMIGRATION AND FOREIGN VISITOR ACCESS

The globalization of business and investment opportunities in recent years has resulted in a growing number of visits to the United States by foreign investors, business executives, managers and others. In addition, employers in the U.S., because of great demands and scarcities of certain types of skilled labor in the domestic market, are looking beyond our shores with greater frequency. To enter and remain in the United States, foreign nationals must qualify for and obtain one of several available immigrant or nonimmigrant visas. As described below, there are many different types of visas available to foreign nationals who are visiting the United States temporarily for business purposes, or who are relocating to the United States permanently.

Foreign nationals seeking entry into the United States may apply for immigrant or nonimmigrant status, depending upon the purpose of their visit and the length of stay desired. Temporary stays in the United States generally are covered by nonimmigrant visas, whereas permanent residency (so-called “green card” status) is granted by the issuance of an immigrant visa.

Visa petitions generally are processed either by the United States consulate located in the beneficiary’s home country or by the United States Citizenship and Immigration Service (USCIS), the federal agency with primary responsibility for immigration matters. In certain instances, the United States Department of State, the United States Department of Labor and the New Hampshire Department of Employment Security may also become involved in the visa petition process.

NONIMMIGRANT VISAS

A variety of nonimmigrant visas are available to foreign nationals who intend to stay in the United States only temporarily. Most, but not all, nonimmigrant visas require sponsorship by a United States employer. The following is a brief description of some of the most common nonimmigrant visas used by foreign nationals doing business in New Hampshire, including the B, E, L, H and F visa categories, as well as TN status for Canadian and Mexican nationals.

B VISA FOR BUSINESS VISITORS AND TOURISTS

By far the vast majority of foreign nationals who enter the United States do so under the B visa category. The B-1 visa allows foreign business visitors to enter the United States for short periods to attend business meetings and conferences, negotiate contracts, conduct research and engage in commercial transactions on behalf of an overseas employer. The United States has implemented a visa waiver program that permits business travelers from certain countries to enter this country under B-1 status without obtaining a visa in advance. The B-2 visa is used to foreign tourists entering the United States as visitors for pleasure.

Visits to the United States under either the B visa or the visa waiver program must be temporary and cannot involve employment by a United States employer (on a salaried or an independent contractor basis) or enrollment in an academic study program. While in this country, the business traveler must: maintain a foreign residence; maintain a valid passport; receive all compensation, if applicable, from a foreign employer; refrain from engaging in any productive employment; and intend to leave the United States at the expiration of his or her stay.

If the individual intends ultimately to immigrate to the United States (seeking a green card or United States citizenship), the B visa category should not be used to gain initial access to the United States because a subsequent request for permanent residency may be considered fraudulent, due to the failure to disclose the individual's true purpose in seeking admission in B status. It may appear that the applicant sought to circumvent immigration procedures and will likely be denied.

The B visa generally will be granted for three to six months, with a maximum period of one year. Extensions of temporary stay for a B visa can be granted in increments not to exceed six months.

In addition to the B-1 visa category, which is generally much easier to obtain than other nonimmigrant visas, the United States government has established a Visa Waiver Program (VWP) for nationals of countries with good "track records" for tourists and business persons who abide by the terms of their admission to this country and who do not work or overstay their permitted visits. Citizens of thirty-six countries have been included in this program. Periods of stay under this program are limited to ninety days, and other limitations apply, but if these requirements fit within an individual's travel plans, the convenience and timesaving advantages gained by avoiding the United States Consulate can be significant.

E VISAS FOR TREATY TRADERS AND INVESTORS

Foreign nationals who wish to stay in the United States for longer periods of time should consider the E visa category, which is available for so-called "Treaty Traders" (E-1 visa) and "Treaty Investors" (E-2 visa). The E visa category is quite desirable because it allows for the longest durations of stay available under nonimmigrant visa categories.

Foreign investors may qualify for E visa status only if there is a treaty of commerce and navigation or a bilateral investment treaty in existence between the United States and the applicant's home country. Depending upon the terms of the treaty, the applicant may be eligible for the E-1 visa or the E-2 visa, or both.

Under the E-1 visa, the foreign national (a Treaty Trader) must come to the United States to carry on substantial trade, principally between the treaty country and the United States. Under the E-2 visa, the foreign national (a Treaty Investor) must develop and direct an enterprise in which the foreign national has actively invested, or is investing, a substantial amount of capital in the United States. There is no minimum dollar amount necessary in order for the investment to be considered substantial. However, it must be proportional to the total value of the enterprise in question or an amount normally considered necessary to establish a viable enterprise of the type contemplated. Furthermore, the investment only qualifies if it places the investor's own assets at risk. The USCIS and the United States State Department have promulgated regulations regarding such matters.

Employees of firms engaged in substantial trade or investment with the United States also can qualify for Treaty Trader or Treaty Investor status provided that the employer and/or its ownership are nationals of the same treaty country as the employee. The employee must either perform executive or supervisory duties within the organization or have skills essential to the operation of the organization.

L-1 VISAS FOR INTRA-COMPANY TRANSFEREES

The L-1 visa covers intra-company transferees who have worked abroad for a branch, subsidiary, parent or affiliate of a United States business operation continuously for at least one year (in the last three years before the petition is filed) before being transferred to the United States. The applicant must show that the purpose of entry into the United States is to continue to render services to the same employer (or an affiliate) in a capacity that is managerial or executive or that involves specialized knowledge. The L-1 has recently come under increased scrutiny by USCIS, and petitions require substantial, detailed documentation of the various requirements applicable to this nonimmigrant visa category.

An L-1 visa holder may remain in the United States for a period not to exceed either five (5) or seven (7) years, depending upon the L-1 category. Initial L-1 visas are generally issued for three (3) years. When the U.S. business is a new or “start-up” enterprise, the initial L-1 visa is issued for one (1) year. Extensions are liberally granted up to a total of five (5) or seven (7) years.

H VISAS FOR TEMPORARY WORKERS AND TRAINEES

There are three commonly used categories of visas for temporary employees: the H-1B visa (temporary employment in a specialty occupation); the H-2B visa (temporary employment of skilled or unskilled foreign nationals in temporary or seasonal positions); and the H-3 visa (temporary training in an established company training program).

The H-1B visa is appropriate for foreign nationals who wish to enter the United States temporarily to fill what are generally considered to be “professional” occupations. Thus, the H-1B visa is used most frequently by members of a profession, high-ranking executives and specialists with advanced degrees. In fact, this category has been extremely popular with high-technology employers because of a shortage of programmers, software engineers, and system analysts in the United States. A bachelor’s degree is the minimum entry level requirement for the H-1B visa.

The petition and approval process for H-1B visas can be considerable. Employers must demonstrate, through an application process involving the United States Department of Labor, that, among other things, the employer will pay the H-1B worker regional prevailing wage for this job and that such employment will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

The USCIS limits the number of H-1B visas issued each year. Once the annual cap is reached, employer sponsors and their intended employees must wait for the next round of visas, which begins each year on October 1. The earliest possible date to file the petition is April 1, for an October 1 start date.

H-1B visas are usually granted for up to three (3) years and may be extended for up to three (3) additional years. In recent years, the USCIS has reached its annual quota on H-1B visas by approximately early winter.

An H-2B visa generally is appropriate for companies seeking to bring a foreign national into the United States to perform temporary services or labor, for a temporary position provided that it

can be established that American citizens cannot be found to perform the same work. For these purposes, a “labor certification” must be obtained from the Department of Labor prior to filing the H-2B visa petition.

The H-2B visa may be issued for an initial period of up to one (1) year, and can be extended, with a maximum total length of stay of up to three (3) years. It is more typical that the visa be issued for less than a year, as these visas are intended for seasonal, peak load or other traditionally temporary needs.

An H-3 visa is commonly used by foreign nationals seeking admittance to the United States to enroll in established training programs. An H-3 visa allows training in most areas of business, whether such training is on-the-job or in the classroom. The foreign national’s time in the United States must be devoted to the training program and if the trainee performs any productive work for the company it must be incidental and ancillary to the training program.

In order to qualify for the H-3 visa, the training program must provide knowledge and experience that is unavailable in the trainee’s country and there must be no intention regarding employment in the United States by either the employer or the trainee. The maximum length of stay in the United States is two (2) years.

OTHER CATEGORIES

STUDENTS AND EXCHANGE VISITORS

An F visa (student visitor) may be granted to foreign nationals enrolled in a full course of academic study in the United States. The applicant must be proficient in English or be enrolled in English classes, and must have sufficient means for support during the intended period of study. The applicant must maintain an overseas residence to which he or she intends to return.

Under the F-1 visa category, students may work for United States employers, (even after graduation) as part of an approved practical training program related to their course of study. This work permit is generally limited to a total of twelve (12) months including any practical training before graduation. Certain graduates in the fields of science, technology, engineering, and mathematics (STEM), provided additional criteria are satisfied, may apply for a 17-month extension of the practical training employment authorization commonly known as OPT.

TN STATUS

TN status is available to certain professional Canadian and Mexican citizens under the North American Free Trade Agreement (“NAFTA”). NAFTA allows individuals engaged in designated professions to apply for this status at the port of entry (for Canadians) or a U.S. consulate abroad (for Mexicans). TN status may be granted for periods of up to three (3) years, and there is no limit on the total period of stay in this status so long as the alien continues to demonstrate his or her ongoing compliance with the associated requirements.

IMMIGRANT VISAS

Long-term business plans in the United States, or the presence of family members in this country, may lead foreign nationals to consider obtaining permanent residency in the United States (so-called “green card” status). There are three basic types of immigrant visas: family-based visas; employment-based visas; and investment-based visas.

Family-based immigrant visas may be granted to immediate relatives of United States citizens and permanent residents and certain other qualifying relatives. The procedures for obtaining such a visa are relatively straightforward but, in certain categories, the waiting periods for these visas can be lengthy (e.g., several years).

In contrast, employment-based visas are often more difficult and time-consuming to obtain due, in part, to the requirement (in some instances) that a “labor certification” be obtained from the Department of Labor certifying that there are insufficient American workers able, willing and qualified to perform the applicant’s intended work in the United States and that the employment of the applicant will not adversely affect United States working conditions.

There are various preference categories of applicants for employment-based visas, including priority workers (executives and managers of multinational corporations, professors, researchers and those with extraordinary ability in the sciences, arts, education, business or athletics); professionals; pre-certified workers (skilled and unskilled workers, where the Department of Labor has certified that there exists a shortage of qualified American workers in that field); and other workers.

BUSINESS INVESTOR PREFERENCE

In addition to the other employment-based immigrant visas, an investment-based visa category allows permanent residency for investors coming to the United States to invest in a new or existing business.

The investor is required to invest a significant amount of capital in this country (generally \$1,000,000, but this amount is reduced to \$500,000 if the investment is made in a rural area or in a specially targeted high-unemployment area), and the venture must create at least ten (10) full-time American jobs within two (2) years. Certain other significant restrictions apply as well.

EFFECT OF NAFTA

The United States, Mexico, and Canada have entered into a North American Free Trade Agreement (NAFTA), which provides for expedited admission of business persons of each country into the other countries. Effective since January 1, 1994, NAFTA affects four (4) categories of nonimmigrant visas by easing, somewhat, the requirements for Canadians and Mexicans seeking entry into the United States under: B-1 business visitors; TN professions; E traders and investors; and L-1 intra-company transferees visa categories.

As with the eligibility requirements and petition procedures involved with these nonimmigrant visa categories and the above-mentioned immigration categories, to avoid delays, foreign businesses should contact legal counsel as soon as possible to assist them with the review and

implementation of business plans which call for the entry of foreign nationals into the United States. It is also very helpful to engage the services of legal counsel who know and understand state and federal laws regulating and affecting such businesses.

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INTELLECTUAL PROPERTY LAW

Ideas, inventions, expressions, and secrets: their protection is fundamental to the conduct of business. In order to obtain the best available protection, it is important to keep in mind the differences between the scopes of protection afforded by patent, trademark, copyright, and other intellectual property law concepts, including the interplay between domestic and foreign rights. Care should be taken to see that such rights are preserved.

TRADEMARKS AND SERVICE MARKS

Trademarks and service marks are words, designs, or combinations of these elements, which serve to distinguish one company's goods or services from those of another. The exclusive right to use a mark in connection with particular goods or services arises from the first use of the mark, and such use ultimately is a prerequisite of registration and other statutory protections. The owner of a trademark may prevent others from using confusingly similar marks that might mislead a purchaser as to the source of the goods.

State and federal acts in the United States, as well as international treaties, protect trademarks and service marks. Federal protection is afforded under the Lanham Act, and, in New Hampshire, protection is provided by New Hampshire's adoption of the Model State Trademark Act. Because the interplay of state, federal and international laws and treaties is complex in this area, a trademark owner is encouraged to consult with counsel in order to ascertain the appropriate steps to obtain and maintain protection of its marks.

Marks that are designed for local use, and which will not be used in interstate commerce, may be adequately protected with just a state registration of the mark.

Registration, along with providing certain beneficial presumptions with regard to validity and ownership of the mark, provides certain priority rights as well and also serves as constructive notice to all potential users of a mark that the registrant claims exclusive rights to that mark. In the United States, it is the use of a mark, not registration, which gives priority of right. However, with respect to federal registrations, priority as to later users runs from the date the application is filed and is typically nationwide in scope. Also, registration may give rise to certain statutory remedies as well.

If a company wishes to obtain regional or national protection, it should consider federal registration of its marks. Federal registration can be obtained for those marks that already have been used in interstate commerce. If the mark has not yet been used, but there is good faith intent to use the mark in commerce in the near future, an Intent to Use application may be filed with the United States Patent and Trademark Office (PTO).

Foreign applicants, provided their country of origin is a party with the United States to a trademark convention or extends reciprocal rights to United States nationals by law, may base their federal registrations upon ownership of a foreign registration. Such foreign applicants also may claim priority in the United States based upon a foreign application, provided their United States application is filed within six months of filing of the foreign application. An application to

register a foreign trademark must be accompanied by a statement of bona fide intent to use the mark in the United States, but does not require prior use within the United States.

When selecting a mark, and before investing substantial efforts in developing name recognition of the mark, a company should consult with counsel and have a trademark search performed. A preliminary search consisting of examining existing federal and local trademark registrations may be undertaken to see if a proposed mark might be confusingly similar to another applied for or registered mark. If this search turns up no conflicting marks, then a broader search should be performed to determine whether there are conflicting marks, whether registered or unregistered, in any of the states. Search companies provide this service; these companies examine numerous sources for conflicting marks.

The strongest trademarks will be those that are arbitrary, coined, or suggestive rather than merely descriptive. Marks are not registrable under federal law if, among other things, they: are likely to be confused with another mark previously used in United States and not abandoned, or that is registered in the PTO; are merely descriptive or misdescriptive of the applicant's goods or services; consist of immoral, deceptive or scandalous matter; are disparaging against or suggest a false connection with persons living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute; consist of the name, signature or portrait of a living individual without such individual's consent; or incorporate the flag or coat of arms of the United States, a state, municipality or foreign nation.

Care should be taken to avoid using merely descriptive marks, and especially generic terms, which cannot serve as trademarks. For example, the term "PC" has become a generic term referring to personal computers, and would, thus, not be registrable.

Foreign words are translated into their English equivalents for purposes of trademark office review. Therefore, merely using a foreign equivalent for an unregistrable English language mark would not qualify such mark for registration.

Prior to registration, the use of the mark should be accompanied by the TM symbol for products or SM symbol for services, thus identifying the company's claim to the rights in the mark prior to registration. Once federal registration has been obtained, the symbol ® should be used. However, the ® symbol should not be used in states or countries where the mark is not registered.

Registrations are obtained federally through the PTO. Applications should be on the PTO form, and electronic filing is encouraged. Specimens of the mark as it is being used in interstate commerce must be submitted in order to obtain registration. The PTO will examine the application and, if it does not find any conflicting marks and otherwise determines that the mark itself is appropriate for registration, will publish the mark in the Official Gazette to provide notice of the mark to those who might wish to oppose the application. Owners of marks who believe the proposed mark conflicts with their mark(s) may file a notice of opposition within thirty days of publication.

Assuming no opposition, or that such opposition is unsuccessful, a federal trademark registration will subsequently issue. The process generally takes a minimum of twelve to eighteen months.

After a mark has been federally registered for more than five years, a certificate of continued use must be filed to maintain registration of the mark. An affidavit of incontestability also should be filed, preventing certain challenges to registration and the mark. Federal registrations are generally effective for ten years, and may be renewed provided the mark is still in use.

State registration is available for both service marks and trademarks. As a prerequisite to registration in New Hampshire, the mark must have been used within the state. The New Hampshire trademark law contains exceptions to the registrability of a mark similar to those found in the federal trademark law.

Once an owner has determined that there are no conflicting registrations, it may file an application for registration with the New Hampshire Secretary of State on the appropriate form together with the required fee. As with federal registrations, state registrations are effective for ten years. State registrations may be renewed at any time within six months prior to the expiration of the, then, current term.

In New Hampshire, a party securing a registration by fraud will be liable for damages to any party injured thereby. Additionally, an infringer will be subject to injunctive relief, liable for damages, and/or payment of its profits from the infringing activity to the aggrieved party (except that profits and damages are not recoverable under the statute unless the infringing acts were committed with the knowledge that the infringing mark was intended to be used to cause confusion or mistake or to deceive). Infringing articles may be seized and destroyed.

By statute, likelihood of injury to business or reputation or of dilution to the distinctive quality of a mark registered under New Hampshire law, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief, even absent competition between the parties or confusion as to the source of the goods or services.

Nothing in the New Hampshire trademark statute will adversely affect the rights or enforcement of rights in marks acquired in good faith at any time under the common law. Likewise, a registrant's right to prosecute under any penal law of this state is not affected by the enumeration of any rights or remedies under the state trademark law.

Both state and federal trademarks may be assigned together with that part of the goodwill and business associated with the mark. So-called "naked assignments" (assignments without associated good will) not only are ineffective, but also jeopardize continued exclusive rights to a mark. Assignments should be recorded with the Secretary of State for state registrations, and the PTO for federal registrations.

TRADE NAMES

Trade names of certain entities are regulated in New Hampshire under RSA 349. A sole proprietor doing business in this state under a name other than his own must register the trade name of the business. Likewise, partnerships, trusts and associations doing business in New Hampshire must register their names as well. Business name registration requirements for other types of entities such as corporations and limited liability companies are governed by statutes dealing with those entities, except where those entities are doing business under names different than the names under which the entity is registered. Failure to comply with the requirements of

the trade name law results in a violation for natural persons and a misdemeanor for any other entity. Securing a registration by fraud results in a misdemeanor for natural persons and a felony for all others, along with liability for damages to the person aggrieved by the misconduct.

The secretary of state will not allow registration of a trade name that it considers confusingly similar to a previously registered or reserved trade name absent consent by the holder of the registration or reserved name. Similarly, the secretary of state will refuse registration of trade names that are the same as, or deceptively similar to, any agency or instrumentality of the United States or this state, or any subdivision thereof, or any political party, absent consent from a duly authorized representative of the same.

Registered trade name owners have available, by statute, remedies in the nature of injunctive relief and recovery of defendant's profits from the wrongful interference or infringement. Seizure and destruction of infringing materials is also available to the court. Nothing in the statute adversely affects the rights or the enforcement of rights in trade names acquired in good faith at any time under common law.

TRADE SECRETS

Trade secrets are, generally, information used in a business which gives a company an advantage over competitors who do not know that information. Trade secrets can consist of formulas, customer lists, or methods of operation, and may also consist of a combination of elements which are individually in the public domain yet together provide some advantage not otherwise known.

In order to be protected, trade secrets must not be generally known, and the owner must take reasonable steps to preserve the secrecy of the information. The degree of protection will vary depending upon the efforts that were expended developing the secrets, how valuable the secrets are, how difficult it would be for another party to develop the information contained in the secrets, and how carefully the owner preserves the secrecy of the information.

Trade secrets can be protected by contract. Moreover, in the employment context, in addition to a general duty of loyalty owed by employees to their employers, contractual obligations to preserve trade secrets are generally enforceable. Such contracts should be entered into prior to employment, but may, with suitable consideration, be enforceable if entered into later. The scope of contractual trade secret protection may not be so broad as to prevent an employee from using his or her ordinary skills and experience in another job.

Employers should follow reasonable measures to preserve the secrecy of their trade secrets, including, but not limited to, limiting access to the secrets and proper identification of secret materials.

In New Hampshire, trade secret common law has been superseded by adoption of the Uniform Trade Secrets Act. It does not affect contractual remedies, however. The Act provides for injunctive relief to protect both actual and threatened misappropriation. Actions for trade secret misappropriation in New Hampshire must be brought within three years after the misappropriation is discovered.

PATENTS

In reality, there are only two ways to protect ideas – keep them secret or patent them. Patents are governed by federal law. The types of patents include utility patents, design patents, and plant patents. Business methods also may receive patent protection.

COPYRIGHTS

Like patents, federal law governs copyrights in the United States (although New Hampshire has certain statutory protections for uncopyrighted works as discussed below). Unlike patents, copyrights protect expressions of ideas, and not the ideas themselves. Expressions can include written materials, artistic works, audio-visual material, and computer programs. However, ideas, procedures, methods of operation, certain databases, principles, and inventions are not protected by copyright. Under United States copyright law, a copyright vests in the author or authors of a work upon reduction of the expression to a tangible medium. Since March 1, 1989, no filing with the Copyright Office or notice is required for the creation of the initial copyright, but it remains advisable for an author to register works to receive the benefit of statutory damages and attorneys' fees, and to include the copyright notice on works to take away an innocent infringement defense.

One area of particular concern is the development of copyrightable materials by employees and consultants. Works created by an employee within the scope of his or her employment are generally considered to be “works for hire” in which the copyright is owned by the employer. Works for hire do not require an assignment of copyright from the employee to the employer. It is important to distinguish such works for hire by employees from works created by non-employees under contract, or by employees outside of the scope of their employment. Such works are the property of the author absent a specific written agreement to the contrary. Absent such an agreement, or an outright assignment, the author retains the copyright. Care should be taken to make sure that a written work for hire agreement actually qualifies as such under the copyright law. It is always advisable for a work for hire agreement to contain an assignment provision as well.

The owner of a copyright (whether the author or owner by assignment) obtains, generally, the exclusive right to reproduce the work and prepare derivative works, distribute copies, to perform or display work publicly, and to authorize others to do any of the foregoing. These rights can be parceled out by grant of limited licenses or transferred in whole. Exclusive licenses must be in writing and signed by the owner of the rights. Nonexclusive rights do not have to be in writing. Transfers of ownership should be recorded with the United States Copyright Office.

Federal law also recognizes a limited defense to copyright infringement under the doctrine of “fair use.” Whether or not a use by another is a “fair use” is heavily fact driven and requires examination of certain factors, including the purpose and character of the use (including whether the use is for commercial or nonprofit educational purposes), the nature of the copyrighted work, the amount of the work used in relation to the whole, and the effect upon the potential market for or value of the copyrighted work.

While registration of a copyright is not required, it is a prerequisite to a lawsuit to enforce the copyright. Moreover, failing to register in a timely manner can result in the loss of certain

statutory benefits arising from registration, such as the right to recovery of statutory damages and attorneys' fees. Registration is generally a simple process, requiring merely a small fee and the completion of some relatively simple forms. In addition, one or two copies (depending upon the circumstances) of the best edition of the work typically must be deposited with the application for registration.

While the formalities of copyright notice are no longer required on newly created works under the Berne Convention (to which the United States is a party), practitioners continue to recommend such notice. The form of such notice should be the symbol © or the word "copyright," followed by the year of first publication and the name of the owner of the copyright. In the case of compilations, or derivative works incorporating previously published material, the year date of the first publication of the compilation or derivative work is sufficient. Additionally, it is recommended that the words "all rights reserved" be included, particularly if the work is to be published in certain foreign jurisdictions, especially South and Central America. Inclusion of such notices has the effect of eliminating any claim by an infringing party of innocent infringement.

In general, a copyright for works created after January 1, 1978 subsists from its creation and exists for the life of the author, plus seventy years after the author's death. Works created prior to January 1, 1978 have varying terms depending upon when they were created and other factors set forth in the Copyright Act. Works made for hire generally have a duration of ninety-five years from the year of first publication, or 120 years from the date of creation, whichever expires first.

New Hampshire has a specific statute, RSA 352:1, that makes it unlawful for any person to publish, produce, print, or sell or offer to sell, certain works that have not been copyrighted, or, with respect to certain works, printed, published, or offered for sale, without first obtaining the consent of the owner thereof. Violation of this law constitutes a misdemeanor.

Additionally, New Hampshire law, RSA 352-A, prohibits any person from knowingly transferring or causing to be transferred to any article on which sounds are recorded, with the intent to sell or cause the article to be sold or to be used for profit, any sounds existing in articles on which sounds are recorded, such as records, tapes, or film, or any performances, whether live or transmitted by radio, television or other means, without the prior express written consent of the owner or performer, as the case may be. Furthermore, it is unlawful for any person to advertise, sell, or offer for sale, or to distribute or possess for such purpose, any article on which sounds are recorded, if the person knew or should have known that such article embodies any sounds transferred from an article on which sounds are recorded or embodies any performance, without the prior express written consent of the owner or performer. Possession of five or more duplicate copies, or twenty or more individual copies, of such recorded articles, if produced without the prior express written consent of the owner or performer, creates a rebuttable presumption that the articles are intended for sale or distribution in violation of the law.

This law concerning copying of recorded devices does not apply to motion pictures or sound recordings initially fixed on or after February 15, 1972. Likewise, the law does not apply to a person who transfers or causes to be transferred any sounds intended for or in connection with: broadcast or telecast transmissions or related uses so long as the transferor is engaged in licensed

radio or television broadcasting; archival purposes; or home or personal use not involving compensation or profit.

Every recorded device sold or possessed for the purpose of sale by any manufacturer, distributor, wholesale or retail merchant must contain on its packaging the name and address of the manufacturer and the name of the actual performer, artist or group. The term “manufacturer” does not include the maker of the casing or cartridge itself, or the physical medium used on which to make the recording.

The copying of recorded devices law does not add to or take away from the rights of parties in civil litigation. However, the statute provides criminal penalties, both in the nature of a class B felony or a misdemeanor depending upon the violation. Offending articles also may be seized and ultimately forfeited and destroyed by the appropriate law enforcement agency, upon order of the court.

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ENVIRONMENTAL LAW

Starting in the 1970s and continuing into the 21st Century, the United States Congress has enacted a comprehensive set of environmental laws regulating virtually every potential impact on the environment resulting from manufacturing and other commercial activity. In addition, the United States Environmental Protection Agency (EPA), the department of the federal government responsible for implementing and enforcing federal environmental laws, has promulgated more than 18,000 pages of regulations. The provisions of these federal laws establish minimum national requirements and compliance standards for companies doing business in this country, as well as for state and local governments and federally owned and operated facilities.

At the same time, under independent state authority, many states have created equivalent, or in some cases more stringent, environmental regulatory programs. As with the federal programs, they regulate all manner of discharges and releases of pollutants to the environment, *i.e.*, land, water and air, in addition to the recycling, treatment, storage and disposal of hazardous and other types of waste products. In recent years, many states, including New Hampshire, have enacted or strengthened laws protecting natural resources such as aquifers, groundwater, wetlands, rivers and lakes. At the same time, New Hampshire, as well as the U.S. Congress, has enacted new laws with special liability limitations and incentives to promote the redevelopment and reuse of contaminated properties, often called “Brownfields.”

The combination of more stringent regulatory schemes and efforts to promote Brownfields redevelopment has meant that facility siting decisions must be carefully planned. Other key elements of these federal and state programs that are important to business are the facility inspection, monitoring and reporting requirements, waste minimization and management requirements, and employee training requirements.

Depending on the nature of a firm’s business activities (and the amount of advance planning undertaken prior to the initiation of operations), environmental compliance can be costly both in terms of equipment and labor. Noncompliance, however, can be even more costly. The enforcement arsenal of the federal and state regulators includes agency orders, court injunctions, monetary penalties, and criminal sanctions. To provide businesses with the economic incentive to pursue compliance, most federal and state penalty policies are modeled to recapture, at a minimum, any economic benefit gained through the avoidance of regulatory requirements. Moreover, in recent years there has been increased emphasis by both federal and state authorities on criminal sanctions for violations of regulatory requirements, especially against corporate officials and employees participating in or purposefully ignoring illegal activity.

In short, firms seeking to do business in New Hampshire, or any of the other forty-nine states, will be confronted with federal and state environmental regulatory programs that are comprehensive, demanding and complex. While difficult, environmental compliance can be achieved with the commitment of management, planning and patience.

OVERLAPPING STATE AND FEDERAL JURISDICTION

In New Hampshire the Department of Environmental Services (DES) is the state agency primarily responsible for administering and enforcing environmental laws. In some instances, however, there may be dual regulation of the same activity by state and federal authorities. Fortunately, most federal environmental acts allow the EPA to delegate primary responsibility for program implementation and enforcement to state agencies that have legal authority under state law to implement environmental regulatory programs that are at least as stringent as the comparable federal program. Activities frequently encountered in New Hampshire where federal permits are usually required in addition to review or permitting by New Hampshire authorities include: industrial point source discharges to streams and other water bodies, storm water runoff at industrial and construction sites, and impacts to wetlands greater than three acres. In still other cases, the acts may vest the regulatory authority directly with state authorities or allow the EPA to simply defer to more stringent state regulation. Ensuring total compliance with all applicable environmental laws requires that each aspect of a facility's construction or operation be reviewed separately to determine what standards apply, what permits are required, and what agency or agencies have regulatory oversight.

DEPARTMENT OF ENVIRONMENTAL SERVICES

New Hampshire's top environmental officials are the Commissioner and Assistant Commissioner of DES and the directors of the Divisions of Air Resources, Waste Management, and Water within DES. They work closely with citizen councils appointed by the Governor to develop the rules implementing state and federally delegated statutory requirements. One of the distinctive features of the environmental regulatory system in New Hampshire is the accessibility of these top officials to the regulated community. When the DES was created in 1987, its name was consciously chosen by the state legislature. To this day, DES strives to remain responsive to the needs of New Hampshire's corporate citizens. As an example, it maintains a Public Information and Permitting (PIP) Unit within the Office of the Commissioner designed to process permit applications in a coordinated manner and to provide a ready source of information about DES' functions and requirements. The DES maintains a web site that can be accessed at www.des.state.nh.us. The DES staff generally will work closely with businesses to achieve compliance. However, if DES's deficiency notices and orders are ignored, it will utilize various enforcement mechanisms to obtain compliance. In so doing, the DES works closely with the Environmental Protection Bureau of the state Attorney General's Office, also known as the New Hampshire Department of Justice.

SITE ACQUISITION AND DEVELOPMENT ENVIRONMENTAL SITE ASSESSMENTS

Under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and its state law analogue, RSA147-B, the current owner of a site upon which hazardous substances or hazardous wastes have come to be located is liable for cleanup and restoration of the site. This liability is imposed simply as a result of the party's status as the current owner of the property. However, "innocent" landowners can avoid liability, and bona fide prospective purchasers can also limit their liability. To be entitled to these defenses, the prospective purchaser must, prior to purchase, undertake "all appropriate inquiry" into the

previous ownership and uses of the property and any potential contamination that may have resulted.

The result is that most purchasers of commercial and industrial property retain professional engineering firms to conduct environmental site assessments prior to site acquisition. Moreover, because of certain liability protections that may be available to lenders holding security interests in, or foreclosing upon, such property, most lending institutions will not allow real property to be used as collateral without first evaluating the results of an environmental site assessment. Unlike some states, however, there is no mandated requirement in New Hampshire to undertake such a site investigation prior to consummating a transaction.

New Hampshire has a Brownfields Program, RSA 147-F, which encourages the redevelopment and reuse of contaminated sites by providing liability protections to parties who address or agree to address environmental contamination at a property. A Brownfields Cleanup Revolving Loan Fund, administered by DES, as well as other financing programs and tax abatement opportunities, may make “brownfields” attractive sites for the development of new businesses.

SUCCESSOR LIABILITY

Liability for the expense of remediating existing contamination can also be incurred upon the acquisition of an existing corporate entity. This usually occurs as a result of a merger with or acquisition of the outstanding stock of a corporation that has cleanup responsibilities under applicable state or federal law. Successor liability may be avoided where only the assets of the prior corporation were acquired. However, exceptions to this general rule have been developed in state and federal courts, especially where the successor corporation merely continues to run the same business as before.

LAND USE CONTROLS

While state and federal environmental laws may establish certain minimum operating standards and conditions for business, and minimum siting criteria in the case of hazardous waste treatment, storage or disposal facilities (TSDF), solid waste collection, processing and disposal facilities and development adjacent to surface waters, New Hampshire’s towns and cities regulate land uses through local ordinances. Most New Hampshire communities have plans projecting future residential, commercial and industrial growth within their city and town limits (master plans). To implement these master plans, communities enact ordinances that divide their community into distinct zones and identify the allowable land uses for each zone (zoning ordinances).

Most zoning ordinances provide for some exceptions within the ordinance itself (special exceptions) and for discretionary waivers of certain provisions by zoning boards of adjustments in cases of “undue hardship” (variances).

Local site review regulations also exist in most New Hampshire communities. These regulations govern the manner in which commercial and industrial sites may be developed. They address such issues as: building heights and setbacks; vehicular access, circulation and parking; walls, fences and landscaping; provision of sewer, water and other utilities; lighting and fire protection.

As a general rule, state or federal environmental regulations will supersede inconsistent community zoning ordinances and site plan regulations. On the other hand, two areas of increasing concern and conflict regarding the siting and operation of industrial and commercial facilities regulated primarily by local ordinances are odor and noise. While several New Hampshire communities identify specific compliance thresholds, odor and noise are outside the scope of DES regulation.

WETLANDS

Often a major issue affecting site development is the presence of wetland areas. Currently, “wetlands” are broadly defined by federal and state regulators. In accordance with the current national policy of “no net loss” of wetlands, federal and state regulations provide many protections for wetlands, including privately owned wetlands. Before any wetland can be dredged or filled, a permit must be obtained. If the project is classified as a “major impact” project (*e.g.*, a project in “prime wetlands,” sand dunes or tidal wetlands or which disturbs 200 feet of a stream), and is located in or adjacent to navigable waters of the United States, a permit will be required from the United States Army Corps of Engineers as well as from the DES. Projects involving less than three acres of wetlands or otherwise classified as “minimum impact” projects will generally require only a DES permit. Usually, permits will be granted only where wetland impacts cannot be avoided, the wetland is of marginal utility or minimally impacted, all reasonably available steps have been taken to minimize impacts, and the site developer agrees to replace “in kind” any adversely impacted wetlands.

SHORELAND PROTECTION/ALTERATION OF THE TERRAIN

Degradation of surface water habitat and physical alteration of water and shoreland habitat have been identified as two of the most significant risks to New Hampshire’s environment. To combat these threats, New Hampshire has instituted two permit programs that regulate development near rivers, streams and other surface water bodies. The Comprehensive Shoreland Protection Act places several restrictions on shorefront and riverfront development including minimum lot sizes, setbacks, and limitations on the removal of existing woodland buffers. Variances are available to site owners in certain circumstances. Also, based on existing and historical patterns of development, municipalities may request that the DES grant exemptions from the Act’s requirements. In addition to shoreland protection requirements, DES requires a permit for any alteration of the terrain resulting from construction activity that disturbs an area in excess of 100,000 square feet. The primary purpose of this permit is to ensure that “best management practices” are in place to control erosion and sediment runoff during site construction. In protected shoreland areas, the disturbance threshold is reduced to 50,000 square feet.

AIR POLLUTION PERMITS AND OFFSETS

Amendments to the federal Clean Air Act in 1990 enhanced the ability of the federal and state governments to control air pollution from both new and existing facilities in several ways. One of the major impacts from these amendments in New Hampshire was an expanded set of state rules in 1993 increasing the number of new facilities (and modifications at existing facilities) subject to air pollution permitting and offset requirements. These rules ensure that business expansion will not worsen existing air pollution (ozone, in particular) by requiring those major

sources subject to regulation to obtain reductions in existing air emissions to offset projected emissions resulting from new construction or facility expansion or to accept permits with facility-wide total emission caps. In New Hampshire, the types of businesses most affected by these requirements are those that have the potential to emit moderate amounts (*i.e.*, greater than 50 tons annually) of volatile organic compounds (VOCs) and oxides of nitrogen (NOx).

For new construction or modifications at major sources, this usually means that, in addition to obtaining a permit prior to construction or modification, offsetting emission reductions must be achieved at some other company's existing New Hampshire facility. The New Hampshire legislature has created emission credits trading programs to encourage facilities with existing emissions to reduce them below mandated levels and thereby create an "emissions credit" that could be sold on the open market to new businesses coming to New Hampshire in need of emission offsets. The DES has developed regulations to facilitate the trading of VOC and NOx "emissions credits."

WATER

Most sections of New Hampshire are generally blessed with ample supplies of clean surface water and groundwater for business and industry. However, as development and population in certain sections of the state have continued to increase over the past few decades, particularly in the south central and southeastern parts of New Hampshire, it has become clear that water supplies are not infinite. Extensive hydrogeological review, public notice and hearings, and DES permit for Large Groundwater Removal are required for proposed withdrawals of groundwater in excess of 57,600 gallons per day. Similarly, though specific regulatory standards are not yet in place, a landowner's riparian or littoral rights to withdraw water from streams and other surface water bodies is not unlimited. Businesses and industries with high water demands need to be especially careful when making siting decisions.

OPERATIONAL CONSIDERATIONS

SOLID WASTE DISPOSAL

Despite a firm's most aggressive efforts to reduce the volume of its solid waste through recycling, it almost inevitably will generate some solid waste that requires disposal. While the EPA has promulgated regulations establishing certain minimum standards for sanitary landfill construction and operation, state and local authorities otherwise regulate the collection and disposal of solid waste. Because of the cost and the disposal restrictions imposed on the use of municipally owned disposal facilities by local authorities (which may vary from community to community), many businesses make independent arrangements with local waste haulers and private disposal facilities.

For the most part, refuse or waste recycling in New Hampshire is voluntary. Many communities promote recycling aggressively. In fact, there is no state law mandating commercial businesses or industry (or any person) to recycle any particular item of waste. In order to use some public waste management facilities, however, waste separation is required as a matter of local law. In addition, New Hampshire has enacted laws that restrict the sales and

disposal of certain types of batteries and mercury-added products and the use of certain toxics (*i.e.*, heavy metals such as lead, cadmium, mercury and hexavalent chromium) in packaging and packaging components.

HAZARDOUS WASTE MANAGEMENT

One of the most closely regulated aspects of commercial business and industry in the United States is the management and disposal of those wastes deemed to be “hazardous.” In this area, the EPA’s regulatory authority flows from the Resource Conservation and Recovery Act (RCRA) and New Hampshire’s from RSA 147-A, Hazardous Waste Management. Pursuant to these acts, federal and state authorities have generated lists of hazardous wastes and set forth specific tests and standards to determine if a waste should be classified as hazardous because of its basic characteristics. Once generated, hazardous wastes must be specially managed and tracked from “cradle to grave.”

In New Hampshire, the EPA has delegated in large part to the DES the primary responsibility for regulating the management of hazardous wastes. Consequently, it is the DES, in most instances, that sets facility operational standards; performs facility inspections; issues permits, deficiency letters and compliance orders; and initiates enforcement actions when required. In addition, the EPA has delegated to the DES primary responsibility for overseeing hazardous waste cleanups at RCRA regulated facilities. However, the EPA retains independent authority to exercise any of the foregoing powers upon notice to the DES.

For those firms generating hazardous wastes the requirements and restrictions are many. The DES requires the establishment of special storage areas pending transportation and final disposal. Special containers and markings, spill plans and containment areas, frequent inspections of areas where hazardous wastes are managed, and special employee training are also required. If in-house treatment of such wastes (as opposed to recycling, which is encouraged) occurs, or if they are stored on-site longer than ninety days, a permit imposing even stricter requirements is required. Conversely, the restrictions imposed on so-called small quantity generators are less severe.

Where hazardous wastes must be shipped off-site, a multi-copy manifest must be prepared. No legitimate hazardous waste transporter or treatment or disposal facility will accept such wastes without a properly completed manifest.

Once prepared and executed, one copy of the manifest must be filed with DES. In addition, from these manifests hazardous waste generator fees are assessed based on the amount of wastes generated. These fees are used to support the state hazardous waste regulatory program. Lastly, state law also places upon a firm’s employees a duty to report to the state any violation of the state’s hazardous waste management law.

WASTEWATER MANAGEMENT

The preferred method of disposing of domestic and industrial wastewater is by discharge into a sewer collection system served by a publicly owned treatment works (POTW). Although many communities in New Hampshire operate POTWs, some communities have none or they service

only a portion of the municipality. Where access to a POTW is unavailable, a business must obtain a permit to discharge its wastewaters to either the groundwater or nearby surface waters.

Groundwater discharge permits are issued by the DES. However, because fifty percent of New Hampshire's communities rely on groundwater as a source of drinking water, they are difficult to obtain if the wastewater discharge contains anything other than domestic sewage. For reasons related to federal funding, New Hampshire has not sought delegation of EPA's authority to issue surface water discharge permits under the National Pollutant Discharge Elimination System (NPDES). Therefore, a permit to discharge to surface waters requires both state and federal permits.

Where a POTW exists, the municipality is responsible for obtaining the NPDES permit covering all discharges from the POTW. However, to ensure that the POTW is operated properly and can meet its permit conditions, the federal Clean Water Act (CWA) requires industry to "pre-treat" its industrial wastewater prior to discharge into the POTW's collection system. Pursuant to the CWA, the EPA has promulgated effluent standards for certain industries. In addition, the CWA and certain provisions of state law allow communities to establish local pretreatment limits for the specific industrial wastewater discharges occurring in the community. These limits are usually found in a community's sewer use ordinance. Because POTW operation, sludge disposal practices, quality and quantity of the receiving waters and the types of industry contributing wastewaters to the POTW vary from community to community, local limits also vary.

UNDERGROUND AND ABOVEGROUND STORAGE TANKS

The federal requirements governing underground storage tanks (USTs) are found in RCRA. However, in New Hampshire the EPA has delegated full regulatory responsibility to the DES. Businesses owning or operating underground storage facilities for hazardous waste, or hazardous materials or petroleum products with a total on-site storage capacity greater than 110 gallons, are required to obtain a permit from the DES. Similar permit requirements apply to aboveground storage tanks (ASTs). Permits address such issues as tank construction, as well as tank monitoring and leak detection requirements. Also, owners and operators of USTs or ASTs that leak or have leaked are held strictly liable for the resulting contamination of soils and groundwater. Because purchasers of sites with USTs or ASTs become liable for any existing contamination emanating from those sites, the search for preexisting USTs or ASTs should be a significant component of a pre-acquisition environmental site assessment. New Hampshire has several Petroleum Reimbursement Funds, statutory insurance programs and third party damages for sites with leaking USTs or ASTs.

AIR POLLUTION CONTROLS

According to New Hampshire law, permits are required from the DES's Air Resources Division for all Title V sources, as well as for any "device" or "non-Title V source" that contributes to air pollution. Title V sources are stationary sources of air pollution subject to regulation under Title V of the federal 1990 Clean Air Act amendments. This is a permitting program that has been implemented on a nationwide basis and can involve significant permitting costs. In many states, like New Hampshire, the EPA has delegated the primary responsibility for implementing the Title V program to state air pollution control agencies. Generally speaking, Title V sources are

“major sources” of air emissions. However, the definition of what constitutes a “major source” varies somewhat throughout the United States depending, in part, on the overall air quality of the region. In the northeastern United States, a “major source” generally includes facilities such as those that have the potential to emit 50 tons or more of VOCs or NO_x or 25 tons or more of certain designated “hazardous air pollutants” (HAPs) annually.

In addition to Title V sources, New Hampshire also regulates “devices” and “non-Title V sources.” Although the statutory definitions for these terms are very broad, the rules of the DES Air Resources Division specify the particular types and sizes of “devices” and “non-Title V sources” for which permits must be obtained prior to construction and operation. Assistance in determining what kind of permit a source or device may require can be found at the DES’s web site at www.des.state.nh.us/ard/whatprmt.htm. Moreover, while the EPA has retained some permitting authority, it has delegated to the DES most of the responsibility for administering and processing permits for facilities located in New Hampshire.

Another important aspect of New Hampshire’s regulation of air pollution is the DES’s “regulated toxic air pollutant” or RTAP program. As part of its construction and operating permits program, the DES requires sources to demonstrate through the use of emission factors and predictive modeling that concentrations of individual compounds emitted by a facility meet certain health-based concentration limits at the source’s property boundary called “ambient air limits.” The DES has established 24-hour and annual ambient air limits for over 700 compounds. If the uncontrolled RTAP emissions from a source cannot meet the ambient air limits at the compliance boundary, state law and DES rules require the source to achieve compliance by making physical changes to lower RTAP concentrations at the compliance boundary, install air pollution control equipment, or use substitute materials that meet ambient air limits.

For planning purposes, any business or industry that discharges to the outdoor atmosphere any soot, ashes, dust, fumes, gas, mist, odor, or toxic, radioactive or particulate matter should anticipate that a permit may be required and should review carefully the DES’s rules to determine if its atmospheric discharges exceed the established thresholds. Where possible, businesses will want to avoid “major source” designation. Also, in addition to permit application review fees for new sources, New Hampshire’s Air Permitting Program also requires that all permitted sources emitting regulated air pollutants pay annual fees based on their actual emissions.

INSURANCE

In New Hampshire as in most other states, current comprehensive general liability policies in most instances exclude from coverage bodily injury and property damage arising out of the actual or threatened release or escape of pollutants. Also excluded from coverage is any loss or expense incurred in responding to governmental directives to test for, remove, cleanup or contain pollutants. There are, however, various new insurance products available through an increasingly competitive market that will provide protection against such risks as environmental cleanup costs, remediation project cost overruns, and third party damage claims.

CONCLUSION

For all the complexities of environmental compliance, the majority of New Hampshire's corporate citizens are generally in compliance. To maintain compliance requires the vigilance of management and the dedication of experienced staff and consultants. Fortunately for New Hampshire, not only are its regulators sophisticated and dedicated, but they also are accessible and have demonstrated a willingness to work with businesses to achieve environmental compliance.

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CORPORATIONS AND LIMITED LIABILITY COMPANIES

In the United States, there are several forms of business entities through which to conduct operations, e.g., sole proprietorship, general partnership, limited partnership, limited liability company, trust, business corporation, professional corporation, voluntary corporation or branch of a foreign entity.

The most appropriate choice in any particular instance will depend upon the specific type of business operations contemplated, as well as other factors, such as: the expectations of investors, potential exposure to personal liability, tax and securities law considerations, ease of management, long-term exit strategies, etc. Each form of business entity has advantages and disadvantages that must be weighed carefully in the context of the specific business venture.

Business corporations are often used to conduct for-profit business operations in the United States because of their characteristic of limited liability, i.e., the owners of the corporation (shareholders) generally are not exposed to the liabilities or obligations of the corporation. In contrast, if the business is operated as a sole proprietorship or as a general partnership, the owners generally are exposed to personal liability for obligations of the business. If a limited partnership is used, at least one partner must be exposed to personal liability for the obligations of the business. Like a business corporation, a limited liability company, if properly structured, offers limited liability for owners. Of course, the tax treatment accorded to each of these entities and their owners is substantially different and must be considered before deciding upon the most appropriate form of entity. In general, the different types of entities are either subject to entity taxation, i.e., their profits are subject to tax imposed on the entity, or subject to pass-through treatment, i.e., their profits are attributed directly to the owners and only subject to tax in the hands of the owners.

Provided below is an overview of the New Hampshire law governing the formation and operation of business corporations and limited liability companies. New Hampshire also has laws governing sole proprietorships, partnerships, including limited liability partnerships, voluntary corporations and investment trusts.

BUSINESS CORPORATION ACT

The New Hampshire Business Corporation Act, “the Act,” was adopted effective January 1, 1993 to govern the formation and activities of business corporations doing business in this state. The Act is codified in RSA Chapter 293-A. It is modeled after the Revised Model Business Corporation Act, which has been adopted in different forms in many other states. The Act provides for flexibility in the formation, management and capitalization of corporations in New Hampshire. The law was designed to make the state more attractive to out-of-state and foreign entities and investors and to be friendly to small and medium-sized businesses. The summary which follows is a brief description of certain provisions of the existing Act. It is not intended to be an exhaustive analysis of the Act and New Hampshire’s corporate law.

As of the date of this summary (December 2011), efforts are underway to adopt a revised version of the Business Corporation Act modeled on the 4th Edition of the Model Business Corporation Act. If adopted, the revised Act would change several of the rights and obligations described below. Readers are cautioned to check the status of the Act before relying on the following summary.

LIABILITY FOR PRE-INCORPORATION TRANSACTIONS

Persons purporting to act as, or on behalf of a corporation, knowing there was no corporation, are jointly and severally liable for all liabilities they incur while so acting.

FORMATION OF THE CORPORATION

Corporate existence begins with the filing of the Articles of Incorporation (or, if a later date is set forth in the Articles of Incorporation, on that later date as long as it is not more than 90 days after filing). Incorporators may include one or more persons; “persons” include both natural persons and entities.

THE ARTICLES

The Articles of Incorporation must be filed with the Secretary of State and must include the corporate name, the number of authorized shares, the name and address of the corporation’s registered agent and its offices, and the name and address of each incorporator. The Articles, among other permissive provisions, may set forth the names and addresses of the initial directors, the purposes for which the corporation is established, provisions limiting the liability of directors or officers, and provisions relating to the rights, preferences, and limitations of shares of the corporation. The acceptance of the Articles by the Secretary of State is conclusive proof that the incorporators have satisfied all statutory conditions.

PURPOSES AND POWERS

A business corporation in New Hampshire may engage in any lawful business, unless a more limited purpose is set forth in the Articles. However, corporations formed under the Act are prohibited from certain activities, including banking, the construction and maintenance of railroads, the business of making contracts for the payment of money at a fixed date or upon a contingency and the business of a trust company, among other prohibitions.

Unless its Articles provide differently, every business corporation organized in New Hampshire has perpetual duration and has the same powers as an individual to conduct its business and affairs.

CORPORATE NAME

In New Hampshire, the corporate name must contain the word “Corporation,” “Incorporated” or “Limited,” or the abbreviation “Corp.,” “Inc.,” “Ltd.” or words or abbreviations of similar meaning in other languages. The corporate name must not be the same as, or deceptively similar to, the name of any other domestic corporation or entity or foreign corporation or entity organized or authorized to do business in this state. The New Hampshire Secretary of State generally takes a more expansive view than other states of whether a proposed corporate name is

deceptively similar to an existing name. Persons proposing to form a new business corporation are encouraged to check if the name is acceptable to the Secretary of State by filing a name reservation in advance of the contemplated incorporation date. An appropriate corporate name may be reserved (for a period of 120 days) by filing an application to reserve the name with the Secretary of State.

REGISTERED AGENT

Each corporation must maintain a registered office and a registered agent located in New Hampshire. The registered agent is the agent to be served with claim-related documents in the event of litigation or for any other lawful purpose.

ORGANIZATIONAL MEETING

After the incorporation process is completed, either the incorporators or the initial directors must hold an organizational meeting to elect directors (if not named in the Articles), appoint officers, adopt bylaws and carry on other business. The organizational meeting may be held inside or outside the state of New Hampshire or by written consent.

BYLAWS

A business corporation is required to adopt bylaws which prescribe the rules for the management and internal affairs of the corporation. The bylaws may contain any provision which is not inconsistent with law or with the Articles.

AMENDING THE ARTICLES OR BYLAWS

A corporation may amend its Articles of Incorporation at any time to add, change or delete a provision. In certain instances, the Board of Directors is authorized to adopt amendments to the Articles without shareholder approval. However, in most instances the Board of Directors must submit the proposed amendments to the Articles to the shareholders with a recommendation that the amendments be adopted. Each shareholder must receive notice of the amendments, whether or not the shareholder is entitled to vote. Once the required shareholder votes have been received, the corporation must file Articles of Amendment with the Secretary of State, at which time the amendments will become effective.

Unless required by the Articles or the Act, an amendment to the Articles requires the vote of a majority of the shares entitled to vote on the amendment. Shareholders may be entitled to vote as a separate voting group if the amendment concerns certain items specified in the Act, including an increase or decrease in the number of authorized shares of that class, a change in the rights and preferences of the shares of that class or the creation of a new class of shares having equal or superior rights to receive distributions.

The bylaws of a corporation may be amended or repealed by the Board of Directors, unless the Articles reserve this power exclusively to the shareholders, or unless the shareholders, in amending or repealing a particular bylaw provision, specifically state that the Board may not amend or repeal that provision of the bylaws. The bylaws may also be amended or repealed by the shareholders.

RECORDS AND REPORTS

A corporation must maintain certain records at its principal office, including its Articles of Incorporation and bylaws, minutes of all shareholders' meetings, and copies of resolutions adopted by the Board. Shareholders of a corporation have a statutory right to inspect and copy certain of these corporate records, provided that at least five business days notice is given to the corporation.

In addition, shareholders have a right to inspect and copy additional records if the shareholder states a proper purpose. The purpose must be described with reasonable particularity and the records to be inspected must be directly connected to such purpose. The right of a shareholder to inspect records may not be abolished or limited by a corporation's Articles or bylaws.

A corporation must also provide annual financial statements to each shareholder within 120 days after the close of its fiscal year. If the financial statements are reported upon by a public accountant, then the public accountant's report must accompany them. If the financial statements are not prepared by a public accountant, then a statement by the president of the corporation (or the person responsible for the corporation's accounting records) must be included.

Each domestic and foreign corporation authorized to transact business in the state must file an annual report with the Secretary of State setting forth: (1) the name of the Corporation and the state or country under whose law it is incorporated; (2) the address of its registered office and the name of its registered agent at that office in the state; (3) the address of its principal office; (4) the names and business addresses of its directors and principal officers; (5) a brief description of the nature of its business; and (6) the signature of an officer, director, or any person authorized by the Board of Directors to execute the annual report.

SHARES AND DISTRIBUTIONS

SHARES GENERALLY

The Act eliminates the traditional references to "common" and "preferred" stock, although those designations are frequently used. Instead, the preferences, limitations and relative rights, as well as the number of shares, of each class of authorized stock must be described in the Articles prior to issuance of any such class of shares. In any event, each corporation must have at least one class of shares issued and outstanding that has unlimited voting rights and which is entitled to receive the net assets of the corporation upon dissolution. To the extent applicable, the preferences, limitations and relative rights of any series or class of shares must be described in the Articles, including voting rights, redeemability and convertibility, distribution and dividend preferences, and liquidation and dissolution preferences. If authorized in the Articles, the Board of Directors may determine the preferences, limitations and relative rights of any series or class of shares prior to issuance; otherwise such prerogative is reserved to the shareholders. If the Board determines the rights of a series or class of shares, the corporation must file an amendment to the Articles specifying those rights prior to the issuance of the shares.

SUBSCRIPTION AND ISSUANCE

Prior to incorporation, a prospective investor may subscribe to shares pursuant to a subscription agreement. Despite the pre-incorporation status of the corporation, a subscription agreement is a contract between the subscriber and the corporation.

Without regard to par value and stated capital, the Board is required to determine the adequacy of consideration for shares. Consideration for shares may consist of any tangible or intangible property or benefit, including cash, promissory notes, services performed, contracts for services to be performed in the future or other securities of the corporation. Shares to be issued for consideration of future payments pursuant to a note, future services pursuant to a contract, or other future benefit may be escrowed until the benefit is actually received; if not received, such shares may be cancelled in whole or in part.

Fractional shares are authorized by the Act.

SHARE DIVIDENDS AND OPTIONS

A corporation may distribute, pro rata and without consideration, a share dividend among the shareholders of the same series or class of shares. The corporation may also issue rights, options or warrants for the purchase of shares upon terms and to persons (including officers, directors and employees without the necessity of shareholder vote), as the Board of Directors deems appropriate. However, certain tax and regulatory concerns may require shareholder approval of option grants.

CERTIFICATES AND INFORMATION STATEMENTS

Issued shares may, but need not be, represented by stock certificates. If the corporation is authorized to issue more than one class or series of shares, the designations, relative rights, preferences and limitations must be summarized on the front or back of each certificate, or the certificate must state that the corporation will provide such information without charge upon written request. If shares are issued without a certificate, the corporation must deliver to the shareholder a written statement of the information required on a certificate, a so-called “information statement.”

Restrictions on the transfer of shares set forth in the Articles, bylaws or a shareholder agreement are valid and enforceable against the holder or transferee of shares, if the restriction is reasonable and is noted conspicuously on the front or back of the certificate or is contained in the information statement.

PREEMPTIVE RIGHTS AND SHARE ACQUISITION

Unless the Articles provide otherwise, shareholders do not have preemptive rights to acquire the corporation’s unissued shares. However, any preemptive rights authorized by the Articles must be granted on uniform terms and conditions so as to provide each existing holder a fair and reasonable opportunity to acquire a proportional amount of previously unissued shares, unless the Articles expressly provide otherwise.

Unless the Articles provide otherwise, shareholders have no preemptive rights with respect to shares issued as compensation, shares issued to satisfy compensatory conversion or option rights, shares issued within six months after incorporation or shares sold for other than cash.

A corporation may acquire its own shares, and shares so acquired constitute authorized, but unissued, shares. However, if the Articles prohibit the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the Articles (which may be adopted by the Board without shareholder action).

DISTRIBUTIONS

Under the Act, distributions include not only dividends and distributions in the classic sense, but also purchases and redemptions of a corporation's own shares. Distributions may be made in cash, property or by the incurrence of debt. Distributions must be authorized by the Board of Directors, subject to any restrictions in the Articles, and directors may have liability for improper distributions.

Distributions can be made without regard to earned and capital surplus, stated capital and other accounting concepts. However, distributions can be made only upon a determination that the corporation will be solvent after giving effect to the distribution. A corporation is solvent if it is able to pay its debts as they become due in the usual course of business, and its total assets exceed its total liabilities. Liabilities include any preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution, unless the Articles otherwise provide. In determining solvency, the Board of Directors may rely on financial statements prepared on the basis of accounting practices and principles that are reasonable, or on a fair valuation or other method reasonable under the circumstances.

Once declared, distributions are treated as liabilities which are on a par with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement.

SHAREHOLDERS

MEETINGS

Annual meetings of shareholders must be held as specified in the bylaws. Unless otherwise specified, the corporation's principal office (rather than the registered office) shall be the site of the annual meetings. The failure to hold an annual meeting does not affect the validity of any corporate action.

Special meetings of the shareholders may be held upon the call of the Board of Directors, the call of the person(s) authorized by the Articles or bylaws, or upon written demand of the holders of at least 10 percent of all votes entitled to be cast on any issue to be considered at the proposed special meeting. The Act expressly states that only business within the purposes described in the meeting notice may come before a special meeting.

Shareholders may take action without a meeting as evidenced by one or more written consents executed by all shareholders, or if expressly permitted by the Articles, by the minimum number of shareholders required to take such action at a duly convened meeting. In the event action is

authorized by the written consent of less than all of the shareholders, the corporation must provide to both voting and non-voting shareholders entitled to notice who did not consent in writing, prompt written notice of the action accompanied by whatever material would have otherwise accompanied a notice of meeting and a notice of dissenter's rights, when appropriate, not later than ten days after the action was taken.

NOTICE AND WAIVER

A corporation must notify shareholders entitled to vote of the date, time and place of annual and special meetings not less than ten days and not more than sixty days before the meeting. Unless required by the Articles or bylaws, a notice of an annual meeting need not state the purpose(s) for the meeting. By contrast, a notice of special meeting must state the purpose(s) for which the meeting is called.

Each share is generally entitled to one vote unless otherwise provided in the Articles. A shareholder may vote by proxy by executing and delivering an appointment form to the secretary or other corporate officer or agent authorized to tabulate votes. An appointment is effective upon delivery and is valid for eleven months, unless a longer period is expressly provided in the form. A proxy is generally revocable, but may be irrevocable if the appointment form conspicuously notes that it is irrevocable and the appointment is coupled with an interest, as set forth in the Act. When the interest is extinguished, an irrevocable proxy of this nature is revoked. Death or incapacity of the shareholder appointing a proxy does not invalidate the proxy unless notice of the death or incapacity is received by the secretary or authorized officer before the proxy exercises authority under the appointment.

The presence of a majority of the votes entitled to be cast on a matter by each voting group constitutes a quorum of that group, unless the Articles or the Act provide otherwise. A quorum, once established, continues for the balance of the meeting, despite the departure of shareholders or an adjournment, unless a new record date is established for the adjourned meeting.

Unless the Articles or the Act require a greater number of affirmative votes, a proposed action is adopted if the favorable votes cast exceed the negative votes cast by each voting group, if separate voting groups are required by the Articles in the Act, otherwise the shares vote together as a single class.

The Articles may provide for cumulative voting for directors; otherwise directors are elected by a plurality of the votes cast.

VOTING TRUSTS, VOTING AGREEMENTS AND SHAREHOLDERS' AGREEMENTS

Voting trusts, voting agreements and shareholders' agreements are permitted under the Act. A voting trust may empower the voting trustee to vote or otherwise act for the participants under the trust. A voting trust is effective for only ten years, unless properly extended in writing. A voting agreement is a written agreement which provides for the manner in which shareholders will vote their shares. A voting agreement is not subject to the provisions governing voting trusts and is specifically enforceable.

Shareholders' agreements may be incorporated into the Articles or the bylaws, or be set forth in a separate written agreement. Shareholders' agreements are valid for only ten years, unless provided otherwise. A shareholders' agreement set forth in the Articles or bylaws must be approved by all persons who are shareholders at the time the agreement is entered into. A shareholders' agreement that is included in a separate written agreement must be signed by all of the shareholders at the time the agreement is entered into.

The existence of a shareholders' agreement must be conspicuously noted on the stock certificates or, if no certificates are issued, in the information statements. A purchaser of shares without actual or constructive knowledge of the existence of a shareholders' agreement may rescind the purchase, provided such a rescission action is commenced by the earlier of ninety days after discovery of the existence of the agreement or two years from the date of purchase.

Once the shares of a corporation are publicly traded, a shareholders' agreement is automatically terminated. To the extent director authority or power is limited by a shareholders' agreement, the directors shall be relieved of liability for acts or omissions related to such limited authority or power, and the persons in whom such authority is vested will be responsible.

DIRECTORS AND OFFICERS

BOARD OF DIRECTORS

The management of a business corporation is vested in its Board of Directors, except if the management is vested in the shareholders under a shareholders' agreement which meets the statutory requirements. Directors need not be residents of New Hampshire or shareholders of the corporation, except as otherwise prescribed in the Articles, bylaws, or a shareholders' agreement.

The number of directors must be specified or fixed in accordance with the Articles or bylaws. Without shareholder approval, the Board has the authority to increase or decrease the number of directors up to a change in the composition of the Board of thirty percent, if the Board has the power to fix or change the number of directors pursuant to the Articles or bylaws. Any change exceeding thirty percent requires approval of the shareholders. The Articles or bylaws may establish a minimum and maximum number of directors. Either the shareholders or the Board may fix or change the number of directors within that range. If the Articles authorize different classes of shares, the Articles may also provide for the election of all or a specified number of directors by the holders of one or more authorized classes of shares as a separate voting group.

Directors are elected annually unless their terms are expressly staggered. The Articles may provide for the staggering of the terms of the directors into 2 or 3 groups if there are nine or more directors. Despite the expiration of a director's term, the director continues to serve until a successor is elected and qualified, or until there is a decrease in the number of directors. The term of a director elected to fill a vacancy expires at the next shareholder meeting at which directors are elected and not at the expiration of the term of his or her predecessor.

A director may be removed by the shareholders of the corporation at a meeting called for the purpose of removing the director. The director may be removed with or without cause, unless the Articles require removal of a director for cause. If the director was elected by a voting group,

only those shareholders within that voting group may participate in a vote to remove that director. A director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him. If cumulative voting is authorized, the director may not be removed if the number of votes sufficient to elect the director under cumulative voting is voted against the removal.

Unless the Articles or bylaws provide otherwise, the Board may fix the compensation of directors.

BOARD MEETINGS

Regular and special meetings of the Board of Directors may be held within or outside of the State of New Hampshire. Meetings of the directors may be in person or through the use of any means of communication by which all directors participating may simultaneously hear each other. Unless the Articles or bylaws provide otherwise, action may be taken by unanimous consent without a meeting.

Unless the Articles or bylaws provide otherwise, regular meetings of the Board may be held without notice of the date, time, place or purpose(s) of the meeting. A special meeting may be held, provided that the meeting is preceded by at least two days written notice of the date, time, and place of the meeting. Such notice need not describe the purpose(s) of the special meeting unless the Articles or bylaws require otherwise. Notice may be waived by a director before or after such meeting if such waiver is in writing, signed by the director and filed with the corporate records. Notice may also be waived by a director's attendance unless the director objects to the meeting and does not thereafter vote at the meeting.

Unless the Articles or bylaws require otherwise, a quorum of the Board of Directors consists of a majority of the fixed number of directors, or a majority of the number of directors prescribed if the corporation has a variable sized board. The Articles or bylaws may authorize a quorum of the Board of Directors to consist of no fewer than one-third of the fixed or prescribed number of directors. If a quorum is present and a vote is taken, the affirmative vote of a majority of the directors present constitutes the act of the Board, unless the Articles or bylaws require the vote of a greater number of directors.

Unless the Articles or bylaws provide otherwise, a Board may create one or more committees and must appoint at least two directors to serve on any such committee. A duly constituted committee may exercise all of the powers of the Board with certain exceptions, including authorizing a distribution, proposing to the shareholders any action requiring shareholder approval, and filling vacancies on the Board.

STANDARDS OF CONDUCT

A director must discharge his or her duties in good faith, with the care an ordinarily prudent person in a similar position would exercise and in a manner the director reasonably believes is in the best interests of the corporation. In discharging his or her duties, a director is entitled to rely upon the information and reports of the officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented, legal counsel, public accountants and other persons as to matters the director reasonably believes are within the

person's professional or expert competence; or upon a committee of the Board of Directors of which he or she is not a member if the director reasonably believes the committee merits confidence.

A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect financial or other interest. A conflict of interest transaction is not voidable solely because of a director's interest in the transaction if (i) the material facts of the transaction and the conflict of interest are disclosed or known to the Board, or to a committee of the Board, which approves the transaction; (ii) the material facts and the conflict of interest are known to the shareholders entitled to vote thereon, and they approve the transaction; or (iii) the transaction is fair to the corporation.

A corporation may not lend money to or guarantee the obligations of a director of the corporation, unless either the loan or guarantee is approved by a majority of the votes represented by the outstanding shares of all classes voting as a single voting group (except shares that are owned by or voted under control of the benefited director), or the Board determines that the loan or guarantee benefits the corporation and the Board approves the specific loan or guarantee or approves a general plan related thereto. A director's loan or guarantee is enforceable against the director despite the fact that the obligation has been entered into by the corporation without shareholder or Board of Director approval.

A director who votes for a distribution to the corporation's shareholders in violation of the Act or the Articles may be personally liable to the corporation in the amount that the distribution exceeds that which could have lawfully been distributed, if it is established that the director has not performed his or her duties in accordance with the statutory standards of conduct. There is a two year statute of limitations for actions for unlawful distributions.

OFFICERS

Officers have the authority to perform the duties set forth in the bylaws or as delegated by the Board of Directors. One person may hold one or more offices. Non-director officers are held to the same standards of conduct as directors in discharging their discretionary duties.

The Board of Directors may at any time remove an officer with or without cause unless a contract with the corporation requires otherwise. The appointment of an officer does not in itself create contract rights. Likewise, an officer's removal does not affect the contract rights of the officer with the corporation and an officer's resignation does not affect the corporation's contract rights with the officer.

INDEMNIFICATION

The Act grants to corporations the authority to indemnify and advance expenses to a present or former director if the director acted in good faith and the director reasonably believes, in the case of conduct in his or her official capacity with the corporation, that his or her conduct was in the best interests of the corporation, and in all other cases, that his or her conduct was at least not opposed to the corporation's best interests. In the case of any criminal proceeding, a corporation may indemnify a present or former director if the director has no reasonable cause to believe his or her conduct was unlawful. Permissive indemnification of a director can only be made after a

determination by the Board, by a committee of the Board, by special legal counsel, or by the shareholders, depending upon the circumstances, that the director has met the applicable standards of conduct. Any determination of the reasonableness of expenses shall be similarly determined. The corporation may not indemnify a director in connection with a derivative proceeding in which the director was found liable to the corporation, or any proceeding in which the director was found to be liable on the basis that he or she derived an improper personal benefit.

In addition, a corporation must indemnify a director in the event of a wholly successful defense of any proceeding to which the director was a party because of his or her present or former status as a director of the corporation, unless the Articles provide otherwise. Upon application of a director, a court may order indemnification with regard to the payment for or reimbursement of reasonable expenses incurred by a director, under certain limited circumstances.

An officer who is not a director is entitled to indemnification and advancement of associated expenses if the officer was wholly successful in the defense of any proceeding to which he or she was a party because he or she was an officer of the corporation, unless otherwise limited by the Articles. Likewise, a non-director officer may apply for court ordered indemnification to the same extent as a director.

A corporation may indemnify and advance expenses to an employee or agent of the corporation who is not a director to the extent consistent with public policy and in a manner provided by the Articles, bylaws, general or special action of the Board of Directors or contract.

CORPORATE TRANSACTIONS

MERGER AND SHARE EXCHANGE

A business corporation may merge into another corporation if the Board of Directors of each corporation adopts and its shareholders, if required, approve a plan of merger. One corporation may acquire all of the outstanding shares of one or more classes or series of another corporation (a “share exchange”) if the Board of Directors of each corporation adopts and its shareholders, if required, approve the exchange.

After adopting the plan of merger or share exchange, the Board is required to recommend the plan to the shareholders, unless the Board determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for this determination to the shareholders. Unless the Act, the corporation’s Articles of Incorporation, or the Board of Directors require a greater vote, the plan of merger or share exchange must be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan by that voting group. In some circumstances, separate voting by voting groups may be required. If the corporation has multiple classes of stock outstanding, unless each class is to be treated identically in the merger or share exchange, the classes may have the right to vote as separate voting groups. Where voting involves different voting groups, the merger or share exchange will only be approved if each group approves the matter by the required vote.

When a merger takes effect, every other corporation party to the merger ceases to exist as a separate entity and title to all real estate and other property owned by each such corporation is vested in the surviving corporation. Likewise, the surviving corporation has all of the liabilities of each corporation party to the merger. The shares of the non-surviving corporation(s) are converted into the right to receive the cash, shares or other consideration specified in the plan of merger.

A parent corporation owning at least 90 percent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary.

A foreign corporation may merge with one or more New Hampshire corporations if the merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger. A foreign corporation may enter into a share exchange with one or more New Hampshire corporations if the corporation whose shares will be acquired is a New Hampshire corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated.

SALE OF ASSETS

Unless the Articles of Incorporation require it, shareholder approval is not needed for a corporation to sell, lease, exchange, or otherwise dispose of its property in the usual and regular course of business. Likewise, unless the Articles require it, shareholder approval is not needed for a corporation to mortgage, pledge, dedicate to the repayment of indebtedness, or otherwise encumber any or all of its property, whether or not in the usual and regular course of business, or to transfer any or all of its property to a corporation all of the shares of which are owned by the transferring corporation. However, unless the Articles require a greater vote or a vote by voting groups, the majority vote of all of the shares entitled to vote is required for a corporation to sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, other than in the usual and ordinary course of business.

DISSENTERS' RIGHTS

Shareholders are entitled to dissent from certain corporate actions and obtain payment of the fair value of their shares if the corporate action is one of those set forth in the Act, such as a merger, share exchange, sale of all or substantially all of a corporation's assets or certain amendments to the Articles of Incorporation. As soon as the proposed corporate action is taken, or upon receipt of a payment demand, the corporation must pay each dissenter who has complied with the Act the amount the corporation estimates to be the fair value of his or her shares, plus accrued interest.

If a dissenter believes that the amount paid is less than the fair value of his or her shares, or that the interest due was incorrectly calculated, or, if the corporation has failed to make payment to the dissenting shareholder, the dissenter may notify the corporation of his or her own estimate of the fair value of the shares and amount of interest due and demand payment of this estimate less any payment previously made by the corporation on its estimate. The dissenters' rights provisions of the Act also include various technical requirements that must be followed by the

corporation and a dissenting shareholder. If such a situation remains unsettled, the corporation may commence a proceeding and petition the court to determine the fair value of the shares and accrued interest. The corporation must make all dissenters (whether or not residents of New Hampshire) whose demands remain unsettled parties to the proceeding.

DISSOLUTION

Once shares have been issued and business has commenced, a business corporation may be dissolved by the Board with the approval of the shareholders. The Board must adopt a plan of dissolution, which it must recommend to the shareholders, and the shareholders must vote to approve the plan of dissolution by a majority of all of the votes entitled to be cast, unless a greater vote or a vote by voting groups is required by the Articles of Incorporation or the Board of Directors as a condition to such dissolution. A dissolved corporation continues its corporate existence but may not carry on any business except as appropriate to wind up and liquidate its business and affairs.

A corporation may be administratively dissolved by the Secretary of State if, for two consecutive years, the corporation does not pay its franchise taxes or file its annual report, among other grounds. A corporation which has been administratively dissolved continues its corporate existence but may not carry on any business except as necessary to wind up and liquidate its business and affairs. An administratively dissolved corporation may apply to the Secretary of State for reinstatement within three years of the effective date of the dissolution.

LIMITED LIABILITY COMPANY ACT

Like many states, New Hampshire adopted a Limited Liability Company Act (“ the LLC Act”), effective July 1, 1993, to govern the formation and activities of limited liability companies organized under the state’s law. The LLC Act is codified in RSA Chapter 304-C. The LLC Act provides for great flexibility in the formation, management and capitalization of limited liability companies in New Hampshire through virtually complete “freedom of contract.” With the “check the box” selection of partnership or corporate federal tax treatment, for many, LLCs are the entity of choice.

The summary which follows is a brief description of certain provisions of the LLC Act. It is not intended to be an exhaustive analysis of the law or the tax treatment of LLCs.

As of the date of this summary (December 2011), efforts are underway to adopt a revised version of the Limited Liability Company Law modeled on provisions of the Delaware Act and the Revised Model Limited Liability Company Act. If adopted, the revised LLC Act would change several of the rights and obligations described below. Readers are cautioned to check the status of the LLC Act before relying on the following summary.

FORMATION OF THE LLC

A limited liability company (LLC) is easily organized by filing a Certificate of Formation with the New Hampshire Secretary of State. Although the Certificate of Formation need only contain the name of the LLC, the nature of its business, and its registered agent and office, it may include a specific dissolution date and information regarding management of the LLC, among other

things. The name of the LLC cannot be the same as, or deceptively similar to, the name of any other domestic entity or foreign entity authorized to do business in the state, and must contain the words “Limited Liability Company” or “L.L.C.” or similar abbreviation. The New Hampshire Secretary of State generally takes a more expansive view than other states of whether a proposed LLC name is deceptively similar to an existing name. Persons proposing to form a new LLC are encouraged to check if the name is acceptable to the Secretary of State by filing a name reservation in advance of the contemplated formation date. An appropriate name may be reserved (for a period of 120 days) by filing an application to reserve the name with the Secretary of State.

One person may file the Certificate of Formation, and LLCs may have one owner, or “member,” as they are known under the LLC Act.

OPERATING AGREEMENT

An LLC should have a limited liability company agreement, also known as an operating agreement, even if the LLC has a single member. The operating agreement must be executed by the member(s). The operating agreement may govern the conduct of the LLC’s business and the management of its affairs. The operating agreement will ordinarily address the allocation of profits and losses; distributions among members; the relative rights, powers and duties of members; the management of the LLC, whether by members or one or more managers; and the transferability of limited liability company interests, among other things. The “freedom of contract” is manifested in the vast flexibility presented in the operating agreement.

In the event the operating agreement does not address certain of these aspects, the LLC Act provides for certain “default provisions” which will otherwise be effective in governing the affairs of the LLC and its members.

PURPOSES AND POWERS; REGISTERED AGENT

Like corporations, every LLC organized under New Hampshire law may engage in any lawful business unless a more limited purpose is set forth in the Certificate of Formation. LLCs are expressly prohibited from certain activities, including banking, the construction and maintenance of railroads, the business of making contracts for the payment of money on a fixed date or upon a contingency, or a surety, indemnity or safe deposit company. Except as limited in the operating agreement, an LLC has broad powers to do all of the things necessary or convenient to carry out its business and affairs.

Also, like corporations, each LLC must maintain a registered office and a registered agent in the state. The registered agent is the person to receive service of process in the event of litigation or for any other lawful purpose.

MEMBERS

Those parties that hold an ownership interest in the LLC are referred to in the LLC Act as “members.” In contrast to S corporations, the other “pass through” entity with broad limited liability, LLCs are more flexible on ownership issues. LLCs are not restricted in the number or type of members. Members may be individuals or business entities, including corporations,

general partnerships, limited partnerships and other limited liability companies. Foreign investors may be members in LLCs. LLCs may have multiple classes of memberships such as “income members,” “capital members” or “preferred members,” among others. The lack of ownership restrictions make LLCs extremely attractive.

The operating agreement may provide for classes or groups of members having such relative rights, powers and duties as the agreement may provide. Likewise, the operating agreement may provide for the elimination of certain voting rights of certain classes or groups of members relative to the taking of any particular action, including amendment of the operating agreement. Certain members or specified classes or groups of members may vote separately or collectively with other classes or groups of members as specified in the operating agreement. The operating agreement should also indicate the manner in which members vote, more specifically on a per capita, number, financial interest, class, group or any other basis. The LLC Act permits membership voting in person or by proxy and action may be taken without a meeting by written consent.

Unless the operating agreement provides otherwise, generally the affirmative vote or approval of more than one-half by number of the members is required to decide any matter connected with the business of the LLC. The affirmative vote or approval of all members is required to amend the operating agreement unless the agreement provides otherwise.

MANAGERS

Management of an LLC is vested in all members unless the operating agreement or the Certificate of Formation expressly provides otherwise. A manager may hold a designated office or title and shall have the responsibilities as set forth in the operating agreement. The operating agreement may provide for classes or groups of managers having different rights, powers and duties. The operating agreement may grant to certain identified managers or a specified class or group of managers the right to vote separately with all other classes or groups of managers. Voting by managers may be on a per capita, number, class, group or other basis. If management is vested in the managers, the affirmative vote, approval or consent of more than one-half the number of managers is required to take action, except as otherwise provided in the operating agreement. Except in the case of acts of gross negligence or willful misconduct, an operating agreement may eliminate or limit the personal liability of a member or manager for monetary damages to the LLC for breach of any statutory duty to the LLC.

MEETINGS

For an LLC in which management is not vested in all members, the LLC, within thirty days of a written demand by any member, must conduct a meeting to consider the affairs of the LLC and take action permitted by law. At any such meeting, the persons having management of the LLC must report on the affairs of the LLC and make available written information regarding: (i) the business and financial condition of the LLC as required to be documented or filed by law; (ii) a copy of the LLC’s federal, state and local income tax returns; (iii) a current list of the names and addresses of each member and manager of the LLC; (iv) a copy of the operating agreement and Certificate of Formation and all amendments to each; and (v) true and full information regarding the amount of cash and a description and statement of agreed value of other property or services

contributed by each member or which each member has agreed to contribute in the future in consideration for their ownership interests.

A member is entitled to this same information upon reasonable demand for any purpose reasonably related to the member's interest as a member of the LLC. Managers have the right to review this information for purposes reasonably related to their position as a manager. Regular meetings of the members may be held as they otherwise deem appropriate.

CONTRIBUTIONS AND DISTRIBUTIONS

The contribution of a member to the capital of the LLC may be in the form of cash, property, services rendered or a promissory note or other obligation to contribute cash or property or to perform services in the future. For contributions other than cash, the persons having management of the LLC shall state in dollars the value for the contribution. Promises by members to contribute to the LLC are enforceable only if set forth in writing and signed by the member.

The profits and losses of the LLC are allocated among the members or among classes or groups of members as provided in the operating agreement. If the operating agreement is silent, profits and losses are allocated on the basis of value of the contributions made by each member as of the date of contribution. Distributions from LLC are allocated among the members or among classes or groups of members in the manner provided in the operating agreement. If the operating agreement is silent, distributions are made on the basis of value of the contributions made by each member as of the date of the contribution. An LLC may not make a distribution to its members to the extent that, at the time of the distribution, the liabilities of the LLC exceed the fair value of the assets of the LLC.

A membership interest is intangible personal property. A member has no direct interest in the property of the LLC. Except as otherwise provided in the operating agreement, a membership interest is assignable, in whole or in part, provided the assignee shall not generally be entitled to participate in the management and affairs of the LLC or to exercise any rights or powers of a member. Assignment of an LLC interest entitles the assignee to certain financial interests only in the LLC, in contrast to the transfer of stock in a corporation whereby the voting rights attributable to the stock also pass to the transferee.

Although an LLC may elect to be treated as a partnership for federal tax purposes, for state tax purposes, each LLC is subject to applicable New Hampshire taxes at the entity level. Under New Hampshire tax law, an LLC may be subject to the New Hampshire interest and dividends tax to the extent that distributions exceed what would be considered reasonable compensation for members who provide services to the LLC. In addition, an LLC whose primary asset is real estate may be treated as a real estate holding company, in which case, the transfer of its membership interests may be subject to the New Hampshire real estate transfer tax.

MERGER AND CONVERSION

An LLC may merge into one or more other business entities, provided that such business entity, foreign or domestic, is authorized by applicable statute to merge with an LLC. Unless otherwise provided in the operating agreement, an LLC that is party to a proposed merger must approve the merger agreement by a consent of not less than one-half the number of the members. The merger

agreement must contain the names of the business entities that are parties to the merger, the name of the surviving entity, the terms and conditions of the merger, the manner and basis for converting ownership interests, amendments to governing instruments of the surviving business entity that are to be effectuated by the merger, and any other provisions that are deemed appropriate.

The surviving business entity must deliver to the Secretary of State a Certificate of Merger which sets forth: (i) the name and jurisdiction of formation of each business entity to the merger; (ii) that the agreement of merger has been approved and executed by each business entity; (iii) the name of the surviving business entity; (iv) the effective date and time of the merger; (v) that the agreement of merger is on file at the place of business at the surviving business entity; (vi) that a copy of the agreement of merger will be furnished upon request and without cost to any person holding an interest in any business entity to the merger; and (vii) if the surviving entity is not organized under the laws of New Hampshire, a statement that the surviving business entity will accept service of process through the Secretary of State.

Upon the effective date of the merger, the surviving entity possesses all rights, privileges, immunities and powers of all entities to the merger, subject to the restrictions, disabilities and duties of each of the entities. All property, real and personal, and all debts due for whatever account including promises to make capital contributions are vested in the surviving entity without further act or deed. The surviving entity is liable for all liabilities and obligations for each of the entities to the merger.

Any existing business entity may convert to an LLC by approving a plan of conversion in the manner and by the vote required by the laws applicable to that business entity. The plan of conversion must set forth the terms and conditions of the conversion of the ownership interests of the converting business entity into interests in the LLC or cash or other consideration. Upon approval of the plan of conversion, the converting business entity must file a Certificate of Conversion setting forth an outline of the conversion and a Certificate of Formation with the New Hampshire Secretary of State. The conversion takes effect upon the effective date and time set forth in the certificate of conversion.

Prior to proceeding with a plan of merger or conversion, tax planning should be completed to assure all tax implications have been considered.

DISSENTERS' RIGHTS

A member of an LLC who complies with the provisions of the LLC Act is entitled to dissent from and obtain payment of the fair value of the member's LLC interest in the event of a merger of the LLC, the consummation of a plan of conversion of the LLC, or in the event of an amendment to the operating agreement which alters or abolishes a right in respect of distributions, alters or abolishes a right to voluntarily withdraw or alters or abolishes any right of a member to vote on any matter.

DISASSOCIATION AND DISSOLUTION

A person ceases to be a member of an LLC on the occurrence of any of the following "disassociation events:" (i) a member withdraws by voluntary act; (ii) a member is removed as a

member; (iii) a member makes an assignment for the benefit of creditors, files a voluntary petition in bankruptcy, is adjudicated bankrupt or insolvent, or other actions similar thereto; (iv) upon a member's death or upon entry of a court order that the member is incompetent; or (vi) the occurrence of certain events.

The LLC is dissolved and its affairs thereafter must be wound up upon the first to occur of the following: (i) the occurrence of an event specified in the operating agreement; (ii) unless otherwise provided in the operating agreement, the written consent of a majority of the members; (iii) upon the entry of a decree of judicial dissolution.

An LLC may also be administratively dissolved by the Secretary of State for failure to file annual reports or pay annual fees for two consecutive years, or if the LLC is without a registered agent for sixty or more days.

Upon the dissolution of the LLC, the business and affairs of the LLC must be wound-up by the members or managers who have authority prior to dissolution, or provided that there is willful misconduct by such members or managers, by the Superior Court. The persons winding up the business affairs of LLCs have very broad powers to do so.

FOREIGN CORPORATIONS DOING BUSINESS IN NEW HAMPSHIRE

Foreign corporations doing business in New Hampshire must first obtain a certificate of authority to transact business in the state from the Secretary of State and designate a registered agent within the state, upon whom process can be served. Foreign corporations are not automatically considered to be doing business in the state in a number of instances, including (i) defending or maintaining any proceeding; (ii) holding meetings of its Board of Directors or shareholders; (iii) maintaining bank accounts; (iv) maintaining offices or agencies for the transfer, exchange or registration of the corporation's own securities; (v) selling through independent contractors; (vi) soliciting or obtaining orders, if the orders require acceptance outside the state before they become contracts; (vii) creating or acquiring indebtedness, mortgages and security interests in real or personal property; (viii) securing or collecting debts or enforcing mortgages and security interests; and (ix) owning, without more, real or personal property in this state. The fact that a foreign corporation's activities are not sufficient to require qualification under the Act does not preclude a determination that such entity is subject to taxation in New Hampshire. (See New Hampshire Taxation, in Taxation Section.)

FOREIGN LIMITED LIABILITY COMPANIES

Foreign limited liability companies doing business in New Hampshire must first file an application for registration as a foreign limited liability company, setting forth the name of the foreign LLC, the jurisdiction of its formation, the nature of its business and the name and address of its registered agent. Foreign LLCs are not considered to be doing business in this state in a number of instances, including: (i) defending or maintaining any court proceeding; (ii) holding meetings of members or managers; (iii) maintaining bank accounts; (iv) maintaining offices or agencies for the transfer, exchange or registration of the foreign LLC's securities; (v) selling through independent contractors; (vi) soliciting or obtaining orders, if the orders require

acceptance outside the state before they become contracts; (vii) creating or acquiring indebtedness, mortgages and security interests in real and personal property; (viii) securing or collecting debts or enforcing mortgages and security interests; (ix) owning, without more, real or personal property in this state; and (x) conducting an isolated transaction that is completed within thirty (30) days and is not intended to be a course of repeated transactions of a like nature. Nonetheless, a foreign LLC may still be subject to taxation in New Hampshire even if it is not required to qualify to transact business as a foreign LLC.

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TAXATION

New Hampshire's tax laws are regarded as among the most favorable in the nation. There is no state personal income tax. Nor is there a general sales or consumption tax. Interest and dividend income of residents is taxed at 5 percent; and net business profits attributable to New Hampshire are taxed at 8.5 percent. In addition, there is a tax imposed on all business enterprises at the rate of three-quarters of 1 percent of the total interest, dividends and compensation paid by the enterprise. But, in order to properly evaluate potential investments in New Hampshire, foreign investors need to become familiar with the tax laws of this state and of the United States generally.

The United States tax system provides relatively favorable treatment of foreigners who invest capital in the United States, often imposing no tax whatsoever upon certain types of investments. The United States continues to rely heavily on foreign capital to finance much of its public and private investments. The United States tax system clearly has been designed to encourage such foreign investments in the United States.

This chapter provides an overview of the taxation of foreign and out-of-state investors in New Hampshire. It describes the different United States taxing regimes (income, gift and estate) applicable to resident and nonresident alien individuals. It also describes the basics of New Hampshire's tax laws as applied to foreign and out-of-state investors in this state.

UNITED STATES INCOME TAX CONSIDERATIONS

Whereas the United States taxes the entire worldwide income of its citizens, residents, domestic corporations and other domestic entities (United States persons), it taxes only the United States source income of nonresident aliens, foreign corporations and other foreign persons (foreign persons). Moreover, certain types of investments in the United States (principally interest income and capital gains derived from financial assets) are totally exempt from United States taxation when earned by foreign persons.

Thus, several threshold questions arise when a foreigner considers an investment in New Hampshire or in the United States generally:

- Will the taxpayer (individual, corporation or other entity) be treated as a United States person or as a foreign person?
- If the taxpayer is a foreign person, will the investment generate United States source or foreign source income, or will such income be exempt from taxation?
- If the income is not exempt, what portion will be subject to taxation by the United States and/or New Hampshire, and at what rate(s)?

UNITED STATES PERSON OR FOREIGN PERSON?

The United States taxing system generally is more favorable to foreign persons than to United States persons. Since alien individuals who are United States residents are taxed as United States persons, it is usually advantageous for aliens to avoid United States resident status.

The determination of whether an individual is a United States citizen or an alien is based upon his or her status under the United States Constitution and the immigration and nationality laws. The determination of whether an alien is a United States resident is made on the basis of two tests: the “green card” test and the “substantial presence” test.

Under the green card test, an alien is considered a United States resident from the moment he is admitted as a lawful permanent resident until his residence is judicially or administratively determined

to have been abandoned. The substantial presence test is met (*i.e.*, the alien will be treated as a United States resident) if, in a given calendar year, the alien is physically present in the United States 183 days or more; or 31 days or more, provided the alien is deemed to have been physically present 183 days or more in the current and preceding two calendar years (based upon a special weighted formula). Foreign individuals present in the United States for thirty days or less in the current year generally are not treated as United States residents, although there are exceptions.

Foreign corporations and certain other entities created under foreign law are treated as foreign persons. The term foreign corporation includes any association, joint stock company, or insurance company that is not created or organized in the United States or under the laws of the United States, a state, or the District of Columbia. A partnership is resident in the United States if it is engaged in a trade or business in this country. The determination of whether an estate is resident or nonresident is made on the basis of several factors, including the residence of the trustees, the location of the trust assets, the countries of formation and administration, and the nationality and residence of the grantor and beneficiaries. The determination of whether a trust is resident or nonresident is made on the basis of two factors: A trust is domestic if a United States court exercises primary supervision over the administration of the trust, and one or more United States fiduciaries have the authority to control all substantial decisions of the trust. In some circumstances, foreign partnerships, trusts and other unincorporated entities may be treated as corporations for United States tax purposes.

UNITED STATES SOURCE, FOREIGN SOURCE OR EXEMPT INCOME? TAX RATES, ETC.

The United States generally taxes foreign persons only on certain types of United States source passive income (United States Passive Income) and on income effectively connected with a trade or business conducted by the foreign person in the United States (United States Business Income).

Generally speaking, United States Passive Income includes interest, dividends, royalties, rents, salaries and similar amounts which are fixed, determinable, annual or periodical (so-called FDAP income) not effectively connected with the conduct of a trade or business by the foreign person in the United States. However, United States Passive Income subject to taxation does not include United States source capital gains of foreign persons (other than gains from the sale of United States real property) or interest income from a variety of United States portfolio debt investments.

United States Passive Income earned by a foreign person is taxed at a flat 30 percent rate on the gross amount of such income, *i.e.*, before deductions. However, this rate often is reduced to between 0 percent and 15 percent pursuant to the network of income tax treaties currently in place between the United States and other countries. The tax on United States Passive Income, when imposed, generally must be withheld by the payor at the time of payment.

In contrast, United States Business Income earned by a foreign person is subject to a completely different taxing regime by the United States. Such income is subject to United States income tax at the regular graduated rates applicable to United States persons to the extent that it is effectively connected with the conduct of a trade or business by the foreign person in the United States. The regular United States tax rates for individuals range from 10 percent to 35 percent and for corporations range from 15 percent to 35 percent (and up to 39 percent for certain levels of taxable income). In some circumstances, individuals and corporations also may be subject to an alternative minimum tax. Unlike the tax on United States Passive Income (which is based on gross income), the tax on United States Business Income is imposed on the net amount, *i.e.*, income less deductions.

The scope and extent of the foreign person's activities in the United States determines whether he will be considered engaged in a trade or business in this country. A single isolated act or transaction may or may not be sufficient to support the finding of a trade or business, depending upon the totality of the circumstances. It is important to note that a foreign person may be deemed to be engaged in a United States trade or business if he has one or more agents in the United States with discretionary authority over the foreign person's business activities in this country, or if the foreign person is a partner (even a limited partner) in a partnership that is engaged in a United States trade or business.

Income tax treaties between the United States and other countries often shield what might otherwise be United States Business Income from United States taxation provided that the foreign person does not maintain a "permanent establishment" in the United States, *i.e.*, a United States fixed base of operations to which the income is attributable.

Foreign corporations that undertake business operations in the United States through an unincorporated division rather than through a United States corporate subsidiary may be required to pay a branch profits tax on income effectively connected with the conduct of a trade or business within the United States. This is in addition to the corporate income tax and the alternative minimum tax (if applicable). The branch profits tax is imposed at the rate of 30 percent (or a lower treaty rate, if applicable) of the business income that is repatriated from the United States divisional operations.

Although the mere ownership of real estate in the United States by a foreign person does not constitute engaging in the conduct of a trade or business, any additional activity beyond mere ownership may cause the foreign person to be considered engaged in a United States trade or business. Pursuant to a special election, foreign persons may treat income from real estate investments in the United States as United States Business Income.

Foreign persons are subject to United States income tax on dispositions of United States real property interests. Any gain or loss on such a disposition is treated as United States Business

Income. A United States real property interest may consist of a direct interest in United States real property, or of an indirect interest (*i.e.*, ownership of an interest in a corporation holding United States real property).

The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) imposes certain withholding requirements with respect to the disposition of United States real property by a foreign person. FIRPTA generally requires that the purchaser withhold 10 percent of the proceeds when the seller of the United States real property (including an interest in a United States real property holding company) is a foreign person. The foreign seller must file income tax returns and pay tax on the sale because the gain generally is treated as if it were effectively connected with a United States trade or business.

A foreign person generally will not be deemed to be engaged in a United States trade or business because of trading in stock, securities, or commodities in the United States for his own account, provided that the foreign person does not maintain a permanent establishment in this country to which the income from such activities is attributable. This is so whether the investments are made by the foreign person directly or indirectly (*e.g.*, through its employees or a resident broker, agent, custodian, etc.) and whether or not any such employee or agent has discretionary decision-making authority. However, certain dealers and others whose principal business is trading may be deemed to be engaged in a United States business by virtue of their trading activities.

The performance of personal services within the United States at any time during the taxable year generally constitutes engaging in a United States trade or business.

As was previously mentioned, the United States provides a complete exemption from taxation for interest income earned by foreign persons from certain types of portfolio debt investments. Such exempt income includes interest paid on bank deposits, original issue discount on obligations with a maturity of 183 days or less, interest paid on Eurobonds issued by United States corporations and interest on many other public and private United States debt obligations.

ADDITIONAL INCOME TAX CONSIDERATIONS

In order to prevent taxpayers from manipulating their United States tax liabilities through related party transactions, the Internal Revenue Service (the federal agency responsible for enforcing the United States tax laws) has broad authority to reallocate income and deductions among related parties if their transactions are not undertaken at “arm’s-length” prices, *i.e.*, at prices that unrelated parties dealing with one another would charge. Thus, transfers between related parties require careful planning, particularly in the case of intangible property (*e.g.*, patents, trademarks, computer software, and other technical information) for which it can be difficult to ascertain a true “arm’s-length” price. Related parties potentially subject to these rules may be able to enter into an Advance Pricing Agreement with the Internal Revenue Service to avoid reallocations on audit.

UNITED STATES GIFT AND ESTATE TAX CONSIDERATIONS

The applicability of United States estate and gift tax rules depends upon the residency of a foreign individual. Provided that the foreign individual is not a United States resident at the time of his death, estate and gift taxes are imposed only with respect to a limited class of property situated in the United States. However, a foreign individual who is a United States resident at the time of his death will be taxed on all of his property, wherever it is located.

For estate and gift tax purposes, an individual's domicile is the sole determinant of United States residency. A foreign individual will be considered to have a United States domicile where, at the time of his death, he was living in the United States with no definite intention of leaving. The general rules governing the imposition of United States gift and estate taxes on nonresident individuals are often modified by estate tax treaties between the United States and other countries.

The estate of a nonresident foreign individual is taxed on the transfer of tangible and intangible property situated or deemed situated in the United States. Stock in a foreign corporation, if owned by a nonresident foreign individual, is automatically deemed to be situated outside the United States; stock in a domestic corporation is deemed situated within the United States. Because of these rules, nonresident foreign individuals frequently attempt to structure their investments to avoid estate tax on United States stocks by holding them through a foreign corporation.

The United States imposes the same estate tax rates on United States citizens, resident aliens and nonresident aliens. For decedents dying in 2011 and 2012, these rates range from 18 percent to 35 percent, with a \$5 million exemption and a step-up in basis of assets for income tax purposes. These rates will sunset at the end of 2012, unless Congress acts to avoid that result. If Congress does not act, the top rate will be 50%, with a \$1 million exemption and a step-up in basis of assets for income tax purposes. Beneficiaries of estates are not subject to tax on a received bequest.

Nonresident foreign individuals are subject to United States gift tax only if property they gift is United States real estate or tangible personal property situated in the United States at the time of the gift. A nonresident foreign individual is not subject to tax on a gift of intangible property, such as stock. For gift tax purposes, cash is treated as tangible personal property. Nonresident foreign individual donors are entitled to an annual exclusion of \$13,000 per year per donee for gifts of a present interest (indexed for inflation). However, they are not allowed the gift exemption allowed to US citizens and residents. For gifts made after 2012, the top rate will be 50%. The donee is not subject to tax on a received gift.

NEW HAMPSHIRE TAXATION

BUSINESS PROFITS TAXES

Every business organization having business activity within the state of New Hampshire is subject to the Business Profits Tax, which is imposed at the rate of 8.5 percent on the taxable business profits attributable to this State. However, a business with gross business receipts of less

than \$50,000 does not have to file a return. The term business organization includes corporations, partnerships, proprietorships, business trusts and other unincorporated forms of doing business. The New Hampshire Investment Trust, an entity used by many mutual funds, and any other type of business entity is exempt from the Business Profits Tax if it meets the requirements of a “qualified investment company. To be a qualified investment company, a business organization must be a regulated investment company, a regulated investment company as defined for federal income tax purposes, an organization that is an investment company under the Investment Company Act of 1940; or an organization that would be an investment company under the Investment Company Act of 1940 but for the exception from investment company status provided by section 3(c)(1) or 3(c)(7) of said that Act. In addition, it must limit its activities to investment or other activities consistent with its organizational purpose and those incidental to or in support of such activities and it must file an election as required under New Hampshire law.

If the business organization’s activities are restricted to the State of New Hampshire, then the Business Profits Tax will apply to all of the business profits generated by its activities. If the business organization engages in business activities and derives business profits from both within and without the State of New Hampshire, then its income is apportioned among the jurisdictions in which it does business. The allocation or apportionment formula used to determine the business organization’s New Hampshire tax liability is based upon the amounts of the business organization’s property, payroll and a weighted sales factor of 2 attributable to New Hampshire relative to the amounts attributable to other jurisdictions.

A business organization’s New Hampshire taxable business profits generally are calculated by making certain modifications to its United States taxable income. However, when two or more related business organizations are engaged in a so-called “unitary” business, a part of which is conducted within the State of New Hampshire by one or more members of the group, the determination of the New Hampshire taxable business profits is made on the basis of a combined return for all of the members of the unitary group. A portion of the unitary group’s combined business profits are then allocated to New Hampshire, based upon the combined property, payroll and a double weighted sales factor of the group’s members. New Hampshire has adopted the so-called “water’s edge” unitary method which generally looks only to the business profits of the unitary group earned within the continental boundaries of the United States.

Various credits are allowed against a business organization’s liability for Business Profits Tax. These include credits for the Business Enterprise Tax (described below), and for new job creation in New Hampshire.

BUSINESS ENTERPRISE TAX

New Hampshire imposes a second type of tax on New Hampshire businesses known as the “BET” or Business Enterprise Tax. The BET is imposed on all types of business enterprises (*e.g.*, corporations, S corporations, partnerships, limited liability companies, proprietorships, trusts, etc.), other than New Hampshire Investment Trusts and entities that are expressly made exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. However, even tax-exempt organizations may be subject to the tax to the extent that they engage in so-called “unrelated” business activities.

The BET is imposed at the rate of three-quarters of 1 percent (0.75 percent) of the “taxable business enterprise value” of every business enterprise having gross business receipts in excess of \$150,000 (or having an enterprise value tax base over \$75,000). The taxable business enterprise value means the sum of all compensation paid or accrued, interest paid or accrued, and dividends paid by the business enterprise, after special adjustments and after apportionment (if applicable).

The special adjustments which are permitted include a deduction of an amount equal to dividends received from another business enterprise which have previously been included in the payor enterprise’s taxable enterprise value tax base and subjected to the BET; and, in the case of a proprietorship, a deduction of such amount of compensation from self-employment as are retained for use in the business enterprise (provided such amounts are not included in the compensation deduction taken for Business Profits Tax purposes).

In the case of a business enterprise that has business activities both within and without the State of New Hampshire, an apportionment formula is applied to determine the tax base (*i.e.*, the taxable enterprise value tax base), so as to allocate to New Hampshire a fair and equitable proportion of the total tax base.

Amounts paid under the BET may be credited against certain other New Hampshire taxes, including the Business Profits Tax, the Insurance Premium Tax and the Utility Franchise Tax.

REAL ESTATE TRANSFER TAX

New Hampshire, like most states, imposes a tax on the transfer of real estate and interests therein (such as leases with a term of 99 years or more). The relevant statutory sections are contained in NH RSA Chapter 78-B and the regulations adopted by the New Hampshire Department of Revenue Administration provide some guidance. The rate is \$7.5 per thousand (0.75%). The tax is payable by both the transferor and transferee for a total tax burden of \$15 per thousand (1.5%). The tax is based on the fair market value of the real estate, not necessarily the price paid. Assumption of existing debt by the buyer does not reduce the tax. There are certain exemptions, such as transfers pursuant to a divorce, death, gifts, transfers among tax-exempt organizations and certain transactions with governmental bodies.

The transfer tax applies not only to transfers of real property itself, but also to transfers of transferable interests in real estate holding companies. A real estate holding company is an organization that is engaged principally in owning, holding, selling, or leasing real estate and that owns real estate or an interest in real estate within the state of New Hampshire. On its face, the tax applies to the transfer of ownership interests from one owner to another, the transfer from one individual to a business entity and from a business entity to its owners. Imposition of the tax is not dependent on the transfer of a controlling interest as in some states and the DRA has attempted to broadly define “transferable” in the administrative rules. It makes no difference whether the owners of the new entity are the same as the original entity, as in a conversion of entity form (e.g., general partnership converting to an LLC), or whether the transaction would be exempt from federal tax.

New Hampshire does require the filing of a declaration of consideration form with the Department of Revenue Administration. There are two (2) forms, one for traditional real estate transfers, and one for transfers of transferable interests in real estate holding companies.

NO PERSONAL INCOME, SALES, VALUE-ADDED OR CONSUMPTION TAXES

New Hampshire does not impose personal income taxes on individuals; nor does it impose a general sales tax, or value-added or consumption taxes.

INTEREST AND DIVIDEND TAXES

New Hampshire imposes a 5 percent tax on the gross amount of interest and dividend income received by resident individuals, partnerships, associations, trusts, and fiduciaries. Each taxpayer is entitled to an exemption for the first \$2,400 of such income during any taxable year.

INHERITANCE TAXES

New Hampshire imposes an estate tax to absorb the state's tax credit allowed for United States federal estate tax purposes.

MISCELLANEOUS TAXES

New Hampshire imposes a variety of other property and excise taxes. For example, the State imposes taxes on the sale of alcoholic beverages, tobacco and gasoline, and on charges for meals and for occupancies of rooms in hotels and similar establishments.

Businesses may also be subject to various business license taxes and fees generally regulatory in nature and imposed in addition to all other taxes. These license fees or taxes depend upon the type of business activity carried on, *e.g.*, insurance, banking, telecommunications, etc.

Local governments may tax real estate and tangible personal property located within their taxing jurisdictions.

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SECURITIES LAW

Securities laws under the U.S. federal system operate in parallel at the federal and state levels. The federal Securities Act of 1933 generally governs the offer and sale of securities, while the Securities Exchange Act of 1934 regulates corporate governance, disclosure and financial reporting, solicitation of proxies, and tenders offers by and for publicly-traded companies, as well as public trading of securities. In addition, each state has adopted “blue sky” laws governing the offer and sale of securities, fraud in the sale of securities, and the licensure of broker-dealers and investment advisers located in or affecting that state. A state’s blue sky laws may apply to an offer or sale of securities if the issuer is incorporated under the state’s laws, has a headquarters or other facility in that state, or seeks to sell its securities to residents of that state. As part of an offering, an issuer typically must consult federal law and several states’ laws to ensure compliance.

REGULATORY AUTHORITIES

At the federal level, the securities laws are administered by the U.S. Securities and Exchange Commission (SEC), with its headquarters in Washington, DC and regional offices throughout the country. At the state level, securities laws are administered by state agencies with different names and organizational mandates. In New Hampshire, the blue sky law is codified in the Uniform Securities Act (New Hampshire Act), RSA Ch. 421-B, and is administered by the Bureau of Securities Regulation (Bureau), an agency which operates under the auspices of the New Hampshire Department of State.

WHAT IS A SECURITY?

Under the New Hampshire Act, the term “security” is broadly defined to include not only shares of stock in a corporation, but also promissory notes, participations in profit-sharing agreements, certain membership interests in limited liability companies, partnership interests in a limited partnership, investment contracts, certificates of deposit and various other instruments. As a result, the New Hampshire Act has broad applicability to a wide range of transactions.

REGISTRATION AND EXEMPTION

A business which seeks to offer and sell its securities is required under both federal and state securities laws to either register the issuance of the securities or secure an available exemption from the registration requirements. In practice, a registration of securities is a lengthy and expensive process which involves the hiring of specialized counsel and qualified auditors and submission to scrutiny by regulators and stock exchange officials. In most cases, the issuer will seek to take advantage of an available exemption from registration to avoid most of the expense and effort of registration. However, fitting an offering within the terms of several federal and state exemptions can also be a complex task. Experienced counsel must determine which states’ laws apply to the offering, then ensure compliance with often-different conditions imposed by the relevant laws. While certain types of securities are categorically exempt, such as securities offered under certain conditions by non-profit organizations, most exempt offerings are conducted under a transactional exemption, *i.e.*, only the sale transaction is exempt and resales must be structured to meet the conditions of an exemption.

In a typical exempt offering, the issuer must refrain from making a general solicitation to the public and must instead carefully target the offering to sophisticated investors who are deemed under the law to have the resources to look after their own interests in the transaction and who must purchase the securities for investment and not for resale. Once the securities have been issued to investors, they have the status of “restricted securities” and may only be resold through a registration or another available exemption from the registration requirements.

The New Hampshire Act specifically recognizes the federal preemption of state blue sky laws for securities which are issued in a private placement transaction meeting the requirements of SEC Rule 506 under the Securities Act. In order to claim the benefit of this federal preemption, the issuer must file with the Bureau a copy of the federal Form D filing, together with a consent to service of process, and a short-form issuer-dealer license application within 15 days of the first sale to or from the state.

The New Hampshire Act includes transactional exemptions for isolated sales, preincorporation subscriptions, securities issued in merger transactions and various other situations, subject to compliance with various technical requirements and filings. An issuer considering a private offering of securities in, to or from New Hampshire should consult with an experienced securities law practitioner to ensure compliance with the applicable conditions and filing requirements.

ISSUER-DEALER, INVESTMENT ADVISER AND BROKER-DEALER LICENSURE

The New Hampshire Act also requires persons and entities which serve certain broadly-defined functions to obtain licensure as an issuer-dealer, broker-dealer or investment adviser. A company offering its securities in either a registered or exempt offering must typically review whether it will be required to obtain an issuer-dealer license for itself and the individuals involved in the offering. Certain exemptions from the issuer-dealer licensure requirements may be available; experienced counsel should be consulted.

A person who gives advice regarding investments in securities may be required to obtain an investment adviser license from the Bureau and to register with the SEC under the federal Investment Advisers Act. Among other things, the license requires passing an exam conducted by the National Association of Securities Dealers (NASD) and the observance of various recordkeeping requirements.

A person who engages in or arranges securities transactions for others may be required to obtain a broker-dealer license from the Bureau and to register with the SEC under the federal Securities Exchange Act. Contrary to popular belief, a person need not work with a major brokerage firm for broker-dealer licensure to be required. For example, private placement agents, finders and others who derive compensation (particularly commission compensation) from a securities transaction must look into the applicable broker-dealer requirements. Broker-dealer licensure also requires passing an NASD exam and various ongoing compliance requirements.

ANTIFRAUD CONSIDERATIONS

The federal and state systems for regulation of securities transactions require issuers of securities to disclose all material information to investors. Material information is information about a

particular issuer or transaction that a reasonable investor would view as significantly altering the total mix of information upon which the investor must make his or her investment decision. Federal and state securities laws contain several broad antifraud provisions which regulators and private parties may use against an issuer or other person buying or selling a security who has made a material misstatement or omission in connection with the transaction.

An issuer or other person buying or selling a security which has committed a material misstatement or omission may be ordered by the Bureau to rescind the transaction and return the money or securities to the affected investors. Similarly, a private party may also sue for rescission or another measure of legal damages if an investment does not yield the expected returns. For an early stage company, such a remedy can prove crippling. Even for a mature company, the price of rescission can be high and can negatively impact its reputation and regulatory standing. In order to avoid an antifraud claim, issuers of securities typically prepare a disclosure document to investors (typically called a private placement memorandum), even though federal and state laws may or may not specifically require such a document in order to satisfy the requirements of an exemption.

TAKEOVER LAWS

Many states' corporate and securities laws include provisions which seek to regulate corporate takeovers. New Hampshire has enacted a so-called first generation anti-takeover statute, which is codified in RSA Ch. 421-A (Takeover Act). The Takeover Act requires a person who makes a takeover bid for a company incorporated in, or having certain operations in, New Hampshire, or which has a specified level of ownership among New Hampshire residents to provide certain disclosures to the Bureau, which then reviews and either clears or orders suspension of the takeover bid. The Takeover Act operates in tandem with the federal tender offer rules under the Securities Exchange Act of 1934. The Takeover Act is complex and contains a number of statutory and caselaw exemptions; experienced counsel should be consulted regarding compliance.

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FOREIGN TRADE ZONES

A FOREIGN-TRADE ZONE (FTZ) is an area, designated by the Department of Commerce, Foreign-Trade Zone Board, and under the supervision of the United States Customs and Border Protection (CBP), which, for purposes of duty assessment, are considered to be outside the commerce of the United States. Therefore, import duties are not paid on merchandise while in an FTZ. They are the United States' version of what are known internationally as "Free Trade Zones." Typically, these special geographic areas are in, or adjacent to, United States Ports of Entry (*e.g.*, Pease International Tradeport located in Portsmouth, New Hampshire).

There are numerous benefits of operating within an FTZ. These benefits include reducing, deferring or, possibly, even eliminating customs duties and excise taxes on imported goods that are processed, assembled, or manufactured within an FTZ. A wide range of products may be moved through an FTZ under these favorable conditions, including beer and wine, chemicals, clothing, computer components, food stuffs, medical supplies, office equipment, semiconductors, sporting goods, tires, vehicles, and watches.

Foreign merchandise may enter an FTZ without payment of duties or government excise taxes if their entry is for purposes of storage, re-export, manufacture, assembly, repackaging, display, testing, repair, or similar uses. If the final product is eventually exported from the United States, no duty or excise tax is levied. If the final product is formally entered into United States commerce, duties are due only at the time of transfer from the FTZ site and formal entry into the United States. This allows companies to manage their cash flow by keeping funds available for operating needs while the merchandise remains in the FTZ. There is no limit on the length of time that merchandise may remain in an FTZ. Moreover, the actual duty paid (assuming the merchandise formally enters United States commerce) may be calculated at the lower of: (a) the duty rate applicable to the foreign inputs, or (b) the duty rate applicable to the finished product manufactured or assembled in the FTZ.

The following are two examples of ways in which a manufacturer can benefit by the use of an FTZ. Note that there are a wide variety of other scenarios that can result in similar benefits to a wide-variety of non-manufacturing enterprises.

(1) **Duty Exemption on Re-exports.** If a manufacturer or processor imports a raw material, component or part into an area of the United States that is not a designated FTZ, it is often required to pay a duty, even if the raw material, component or part is incorporated into a final product that is then immediately exported. However, if a foreign raw material, component or part is imported directly into an FTZ and incorporated into a final product, and that final product is then exported outside the territory of the United States, no duty is ever imposed.

(2) **Relief from Inverted Duties.** In certain circumstances, there is an import duty relationship that penalizes companies for manufacturing their product in the United States. This occurs when an imported raw material, component or part carries a higher duty rate than the finished product. When this is the case, an importer of the finished product pays a lower duty rate than a manufacturer of the same product in the United States. This gives the importer an unfair and unintended advantage over the domestic manufacturer. The FTZ program levels the playing field

in these circumstances. The following hypothetical is illustrative: a manufacturer located within an FTZ imports a motor (which carries a 4 percent duty rate) and uses it in the manufacture of a vacuum cleaner (which is free of duty); when the vacuum cleaner leaves the FTZ and enters United States commerce, the duty rate on the motor drops from the 4 percent motor rate to the free vacuum cleaner rate; by participating in an FTZ, the vacuum cleaner manufacturer has eliminated duty on this component and, therefore, reduced the component cost by 4 percent.

The Foreign-Trade Zones Board (consisting of the Secretaries of Commerce and Treasury) in Washington, DC, licenses and regulates FTZs and sub-zones with assistance from CBP. Zone grantees (as defined below) are responsible for the administration of FTZs and sub-zones.. Typically, an FTZ provides leasable storage and distribution space in general warehouse type buildings with access to all modes of transportation. Many FTZs are part of an industrial park with multiple lots on which FTZ users can often construct their own facilities.

Although FTZs were introduced in the United States almost a century ago, businesses did not begin utilizing the benefits of an FTZ on a widespread basis until the 1970s. In 1970 there were only seven general purpose FTZs in the United States with a total annual dollar volume of slightly over \$200 million. Currently, there are over 160 FTZs (and over 260 sub-zones) in the United States doing an estimated \$400-600 billion in annual business. Significantly, some 2,500 firms operating under FTZ procedures employ over 300,000 persons.

NEW HAMPSHIRE'S DESIGNATED FOREIGN TRADE ZONE

The Pease Development Authority, Division of Ports and Harbors (the PDA) is the grantee for Foreign-Trade Zone No. 81. This grant was made in 1982. Since then, five sites have been designated within this particular FTZ, as follows:

- Site 1 consists of 10 acres within the PDA's deep-water port facility on Portsmouth Harbor, Portsmouth, New Hampshire. It is comprised of two multipurpose buildings totaling 50,000 square feet for warehousing display and processing operations.
- Site 2 consists of 75 acres at the Portsmouth Industrial Park on Lafayette Road in Portsmouth, New Hampshire. In addition to its proximity to major highways, the Boston & Maine Railroad has approximately 1,760 feet of rail line running through the site, as well as a rail spur to an existing 165,000-square-foot warehouse.
- Site 3 consists of a 50-acre development in Dover, New Hampshire.
- Site 4 consists of the Manchester Airport (the third largest cargo airport in New England) and adjacent industrial/commercial areas. It is within a mile of Interstate 93 and Interstate 293.
- Site 5 consists of 2,095 acres of industrial-zoned land offering an 11,300-foot runway at the Pease International Tradeport.

SUB-ZONES

In those instances where the location of an FTZ site is not convenient or economically feasible for use by potential users, sub-zone applications may be made by the FTZ grantee in New Hampshire, the PDA) on behalf of potential sub-zone operators. Sub-zones are generally allowed only in instances where the particular sites within an existing FTZ are fully utilized or the sites are commercially inconvenient for a potential user.

Potential users of an FTZ or an FTZ sub-zone must be approved by the FTZ grantee and CBP. Typically, the grantee will make a joint application on behalf of a potential user to both the FTZ Board and CBP. The application submitted on behalf of a potential user can be specific as to an isolated use, or can be as broad as the user deems appropriate in light of its intended operations. As a practical matter, there is very little difference between operating as an FTZ sub-zone and operating as a site within the FTZ.

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REGULATORY RESOURCES

There are a number of governmental agencies and private organizations in New Hampshire which assist foreign and out-of-state businesses seeking to do business in this state. A partial list follows:

PEASE DEVELOPMENT AUTHORITY DIVISION OF PORTS AND HARBORS

555 Market St.
PO Box 369
Portsmouth, NH 03802
603.436.8500
Fax: 603.436.2780

The Pease Development Authority's Division of Ports and Harbors administers New Hampshire's designated foreign trade zone.

DEPARTMENT OF RESOURCES AND ECONOMIC DEVELOPMENT (DRED)

172 Pembroke Road
PO Box 1856
Concord, NH 03302-1856
603.271.2411
Fax: 603.271.2629
www.dred.state.nh.us

DRED functions with four primary divisions under the executive direction of the commissioner. The divisions are: Forests and Lands, Parks and Recreation, Economic Development, and Travel and Tourism.

DIVISION OF ECONOMIC DEVELOPMENT (DED)

172 Pembroke Road
PO Box 1856
Concord, NH 03302-1856
603.271.2341
Fax: 603.271.6784
www.nheconomy.com

DED is comprised of two offices: Business and Industrial Development and International Commerce. The offices focus on promotional activities both nationally and internationally, as well as business support services within the state.

DIVISION OF TRAVEL AND TOURISM DEVELOPMENT (DTTD)

172 Pembroke Road
PO Box 1856
Concord, NH 03302-1856
603.271.2665
Fax: 603.271.6870
www.visitnh.gov

DTTD works with the state's seven travel regions to increase visitation and travel and visitor expenditures in order to expand business activity and employment throughout the state. DTTD is responsible for advertising and public relations; literature publication and distribution; management of the State's Joint Promotional Program; and research to monitor and measure the impact of travel and tourism to the state.

OFFICE OF BUSINESS AND INDUSTRIAL DEVELOPMENT (OBID)

172 Pembroke Road
PO Box 1856
Concord, NH 03302-1856
603.271.2591
Fax: 603.271.6784
www.nheconomy.com

OBID works to expand opportunities in New Hampshire through the attraction of new business and the retention and expansion of existing businesses. OBID is organized into two work groups: Retention and Expansion Work Group and the Recruiting Work

ABOUT THE FIRM

THE FIRM

Sheehan Phinney is a full-service business law firm providing a broad range of sophisticated legal services to clients in traditional and emerging areas of law. Our diverse client base includes local and regional businesses, institutions and municipalities, as well as national and international businesses.

With offices in the major business centers in New Hampshire and Massachusetts, our firm is strategically positioned to serve this thriving part of New England.

HOW WE PRACTICE

Our goal is to understand and pursue our clients' ultimate business objectives - a simple concept, but one that we never take for granted. No matter how many times we have worked in a particular area, we know that each client's needs are unique. For 75 years, understanding our clients' businesses and helping to identify and define their best approaches to a problem has earned us the trust, confidence, and loyalty of our clients, who rely on us not just as their lawyers, but as their counsel.

WHY SHEEHAN PHINNEY?

Clients come to us for the depth of our expertise and the longstanding and trusted relationships we have cultivated within the business community and at all levels of government throughout New England.

Our clients also benefit from our affiliation with the Sheehan Phinney Capitol Group, which offers government relations and legislative lobbying services throughout New England and in Washington, D.C.

Finally, our membership in Lex Mundi, the premier international network of top law firms, ensures that we can provide our clients with seamless and immediate local legal representation to advance their business interests in any city around the world.

AREAS WE PRACTICE

Affordable Housing

Alternative Dispute Resolution

Bankruptcy and Insolvency

Business Formation and Succession Planning

Business Litigation

Commercial Contracts - Domestic and
International

Communications and Broadcasting

Construction Law

Corporate Law and Governance

Criminal Law

Distressed Assets

Education

Entertainment, Media and Publishing

Environmental and Energy

Estate Planning and Probate

Family Law

Government Relations

Health Care

Immigration

Intellectual Property and Technology

International Law

Labor, Employment and Employee Benefits

Mergers and Acquisitions

Not-for-Profit, Charitable and Religious
Institutions

Patents

Personal Injury

Private Companies and Professional Practices

Public Finance

Real Estate and Finance

Retirement Plans and ERISA

Securities and Venture Capital

Taxation

Zoning, Planning and Land Use

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