

DELAWARE

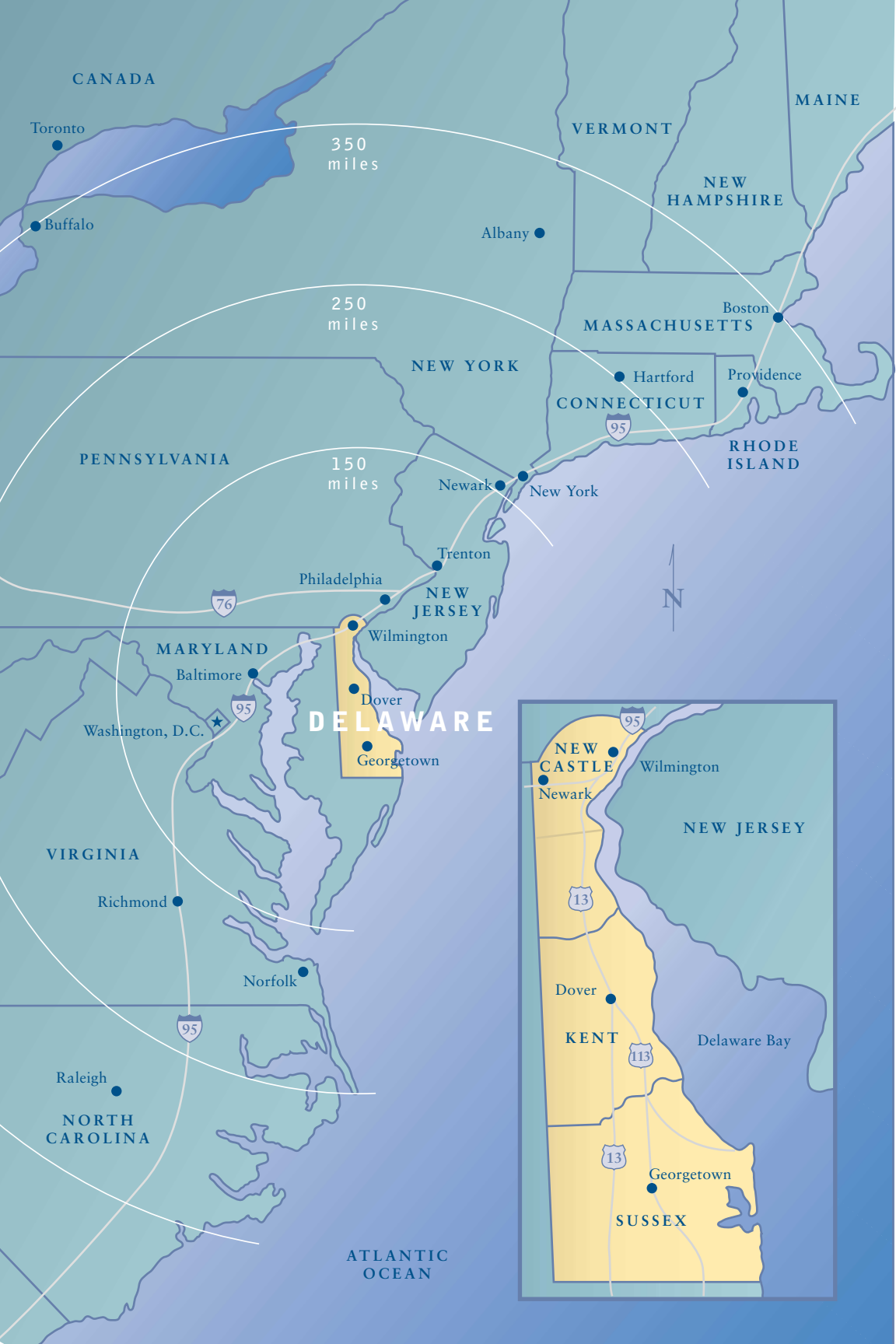
LAWS & PROGRAMS AFFECTING BUSINESS



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RICHARDS, LAYTON & FINGER



DELAWARE

LAWS & PROGRAMS AFFECTING BUSINESS



RICHARDS, LAYTON & FINGER

MARCH 2005

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The image on the front cover of the Declaration of Rights and Fundamental Rules of the Delaware State is reproduced courtesy of the Historical Society of Delaware. The Declaration, adopted September 11, 1776, following the historic vote of the American colonies for independence from Great Britain, reflects the individual liberty and limited government that still guide Delaware today.

Second Edition
First Printing, March 2005

Book Design and Production

RT&E Integrated Communications
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ABOUT THIS GUIDE

This Guide presents an introduction to Delaware and an overview of laws and programs relating to doing business in our State. Our economy is diverse, and our legal framework is intentionally crafted to foster robust business activity. Our widely copied business laws lead the nation in clarity and predictability.

Government in Delaware is committed to the active promotion of business and economic development in the State. The public and private sectors cooperate in this objective. Governmental incentive programs encourage business to build on and expand Delaware's substantial existing industrial and commercial base.

The information in this Guide is presented generally and does not constitute legal, tax or financial advice on any matter. We have not undertaken in this Guide to review federal laws or the federal regulatory environment, which are applicable equally in the various states. We do, however, address in this Guide the Delaware laws and programs of interest to the conduct of business. Specific inquiries should always be referred to appropriate professionals.

ABOUT RICHARDS, LAYTON & FINGER

Richards, Layton & Finger, Delaware's largest law firm, was founded in the early 1900s and offers a full-service local and regional practice and a national and international practice in the areas of corporate law, corporate litigation, alternative entity law, holding company taxation and complex financial transactions. With almost 60% of the Fortune Magazine list of the 500 largest corporations in the United States and about one-half of the corporations listed on the New York Stock Exchange being incorporated in Delaware, the firm's corporate clients tend to be national rather than local. The firm represents corporations, limited partnerships, limited liability companies, statutory trusts and other types of entities in connection with entity governance, mergers and acquisitions, litigation, securities matters and complex financing transactions on an ongoing basis. The firm is active in product liability, intellectual property, environmental, media, real property, employment, administrative and numerous other areas of the law. The firm's tax lawyers handle tax litigation, sophisticated estate planning for individuals and federal and state tax planning for businesses and individuals.

Richards, Layton & Finger lawyers are leaders in the profession and in the community. Members of our firm have held the presidency of the Delaware State Bar Association and numerous offices of the American Bar Association, International Bar Association and other law-related organizations. Members of the firm have become appellate judges in the state and federal systems. Standard reference works on Delaware law have been authored by the firm's lawyers, including a three-volume treatise entitled "The Delaware Law of Corporations and Business Organizations" and separate treatises on limited partnerships entitled "Delaware Limited Partnerships" and on stockholders' meetings entitled "Meetings of Stockholders." One member of the firm was a United States Congressman, Governor of Delaware and a candidate in 1988 for the Republican nomination for President of the United States, while another was Secretary of State of Delaware and head of Delaware's Division of Corporations.

The firm is a member of several associations of independent law firms, giving it global reach. The firm is a member of Lex Mundi, an association of 163 independent law firms with members in 93 countries, 49 U.S. states and ten Canadian provinces. Richards, Layton & Finger is also a member of The State Capital Global Law Firm Group, with members located principally in state capitals. Members of Lex Mundi and The State Capital Global Law Firm Group practice independently and not in a relationship for the joint practice of law.

Listing of areas of practice does not represent official certification as a specialist in those areas.

DELAWARE



AN INTRODUCTION

*Delaware actively encourages
enterprise and investment
through modern laws,
innovative tax structures and
active cooperation between
the public and private sectors.*



Delaware is centered on the eastern seaboard of the United States, approximately midway between New York City to the north and Washington, D.C. to the south. Lying in the heart of the eastern megalopolis, the State is bordered on the north by Pennsylvania and on the west and south by Maryland. To the east, Delaware is separated from New Jersey by the Delaware Bay and enjoys a scenic Atlantic Ocean coast. This location provides unusually good market access.

With a land area of only 1,982 square miles (5,133 sq. km), Delaware ranks 49th in land area among the 50 states. Delaware is the fourth least populated state with approximately 783,000 residents. The State has three counties: New Castle, Kent and Sussex. All of the cities and towns in the State are independent, incorporated municipalities. There are three major cities in the State: Wilmington, the State's legal and financial center; Dover, the State capital; and Newark, the site of the University of Delaware.

Delaware's central location affords rapid access to the major metropolitan areas of the northeast and Mid-Atlantic United States. Nearly one-third of the population of the United States lives within this eastern megalopolis. Interstate and other major highways and frequent passenger rail service provide easy transportation between Wilmington and New York (1 hour, 40 minutes), Washington, D.C. (1 hour, 15 minutes), Philadelphia (30 minutes) and Baltimore (45 minutes). Within a 350-mile (550-km) radius of central Delaware lies every major population center from Boston in the north to Raleigh, North Carolina in the south and Cleveland, Ohio in the west.

Delaware is also well served by air transportation. Delaware's network of public and private airports can readily accommodate commercial and corporate aircraft. Philadelphia International Airport, a major international passenger airport, is 30 minutes from downtown Wilmington. Newark (New Jersey) International Airport and Baltimore and Washington International Airport are accessible by direct rail links, approximately an hour away.

Marine freight transport is served by the Port of Wilmington. As the first inland port on the Delaware River, Wilmington's containerized port is only 65 miles (100 km) from Atlantic shipping lanes. Its deep-water port facilities include modern, economical off-loading and storage facilities. The Port of Wilmington offers potential savings over neighboring ports because of reduced vessel transit time to and from the Atlantic Ocean, high labor productivity and economical handling rates. The Port has ready access to Interstate 495, connecting it to major east-west and north-south interstate arteries. Rail access to the Port is available by Norfolk Southern and CSX Transportation, with railcar loading docks located next to every terminal warehouse.

Delaware is also served by the mainlines of the Norfolk Southern and CSX Transportation railroads. Norfolk Southern's north-south route through Delaware facilitates fast through-service to the vital northeast corridor and connections with CSX Transportation. Most of Delaware's plant sites are adjacent to rail lines or have

rail sidings at the plant location. Rail sidings are easily obtainable in Delaware, as compared to other states in the region, due to the lack of rail congestion. In addition to major carriers, Delaware is also served by a number of short-line railroads.

Delaware has the strongest state economy in the region, led by the chemical, automotive and financial services industries. These industries figure most prominently in the industrialized and commercial northern third of the State. In the southern two-thirds of the State, agriculture is a more vital part of the economy. The poultry industry, corn, soybeans and dairy products contribute significantly to farm income. Almost one-half of the State's land acreage is used for farming.

Delaware has major tourist attractions throughout the State, including unique historic sites, museums, mansions and miles of ocean beaches and bay shoreline.

I. INVESTMENT CLIMATE

Delaware actively seeks and encourages enterprise and investment. To this end, Delaware has evolved the most modern and flexible business organization laws in the United States, adopted modern banking and consumer credit laws, reduced personal income taxes and established a nationwide reputation for an innovative tax structure.

Government Sector. Delaware's state government has three branches: executive, legislative and judicial. The executive power of the government rests in a Governor elected every four years and subject to a maximum of two terms. The legislative power of the government rests in a bicameral General Assembly: a Senate and a House of Representatives. Representatives are elected for two-year terms, while Senators are elected for four-year terms. The judicial power of the State is exercised by a Supreme Court of five justices appointed for twelve-year terms by the Governor, subject to the advice and consent of the Senate, and three principal trial-level courts also composed of appointed, term-limited judges. The judicial system is described more fully in this Guide in Chapter Eight, "**Dispute Resolution—State Court System.**"

Central to Delaware's business and investment climate is the concept of public-private partnership, by which government and the private sector work cooperatively to maximize opportunity and the quality of life available in Delaware. This partnership of Delaware's business and governmental leaders has won overwhelming bipartisan legislative support for programs that strengthen the State's economy.

As a result of these efforts, Delaware's governmental leaders have mandated that no new tax or tax increase can be enacted without a three-fifths majority vote of both houses of the General Assembly, ensured fiscal integrity by limiting State spending to 98% of its

annual revenues, and planned for the future by establishing a fully financed budgetary “rainy day fund” of 5% of the State’s anticipated annual revenue. This fund can be used only in the event of unexpected revenue decreases or to pay for tax reductions.

The public-private partnership also produced legislative initiatives that have repeatedly decreased personal income tax rates, created incentives for financial institutions to locate and operate in Delaware through the passage of the Financial Center Development Act and the Consumer Credit Bank Act, and expanded opportunities for foreign trade through the passage of the Export Trading Company Act. These legislative initiatives, which are more fully described below, have provided Delaware with modern banking, financial and international trade codes.

Delaware’s small size is a substantial factor in government accessibility and responsiveness. Business leaders have easy access to the Governor, local government officials, state legislators and members of the Congressional delegation. Government red tape is minimal. Needed legislative initiatives can be defined, developed and adopted quickly when a new plan benefits both business and the citizens of Delaware generally.

Financial Sector. New financial institutions continue to be granted charters in Delaware. Dozens of major financial institutions have made Delaware their new home, including a number of special-purpose banks formed through new organizations or acquisitions.

The passage of the Financial Center Development Act in 1981 and the Consumer Credit Bank Act in 1983 opened Delaware to interstate banking, introduced an incentive form of bank taxation with regressive rates, and limited the application of usury laws. At the end of 2003, there were 67 banks, trust companies and building & loan associations operating in Delaware regulated by the Bank Commissioner, including a number of national and regional banks. The State is home to three of the largest credit card banks, MBNA America Bank, Chase Bank USA and Discover Bank. Numerous financial institutions in Delaware offer a wide range of financial services to commercial and residential customers. These institutions, which had total assets of over \$219 billion as of 2003, include state-chartered banks, national banks, federal savings banks, State savings banks, building and loan associations, foreign bank representative offices, non-deposit trust companies and limited-purpose trust companies. The State also has many commercial financial companies that make inventory, mortgage, accounts receivable and equipment loans; insurance companies active in commercial, term and mortgage lending; and regional banks offering extensive cash management services, including overnight cash management.

The State also established a Transportation Trust Fund in 1987 to ensure continued funding for Delaware’s infrastructure. Through this and other fiscally conservative efforts, Delaware has become a leader in fiscal management. In 2004, the State received AAA general obligation bond ratings from all three Wall Street rating agencies, a distinction shared by Delaware with only six other states.

Tax Outlook. In addition to its modern, flexible business laws and cooperative spirit between business and government, Delaware offers a number of favorable tax advantages. For example, Delaware has:

- No state or local general sales or use taxes.
- No unitary tax system.
- No personal property or inventory taxes.
- Exemption for certain investment and holding companies from corporate income and gross receipts taxation.
- A favorable tax regime for headquarters management corporations.
- Two approved foreign trade zones that permit deferment of import taxes.
- A regressive bank franchise tax structure declining from 8.7% of bank taxable income up to \$20 million to 1.7% of bank taxable income exceeding \$650 million.
- Experience-rated unemployment compensation tax rates.
- Tax credits for corporate income tax and reductions in gross receipts tax for new and expanding business.
- Property tax relief for new construction and improvements of existing property.
- No fixtures tax.
- Real property taxes that are among the lowest in the nation.
- Public utility tax rebates of up to 50% for qualifying industries.
- Income and mercantile tax exemption for qualified export trading companies.

Labor Outlook. Delaware enjoys abundant labor availability with higher than average productivity and shorter than average duration of unemployment claims.

Steady growth and a healthy participation rate make Delaware's workforce attractive. Delaware's large and growing labor force numbered approximately 427,000 in 2004. Within the past 10 years, the State labor force has grown by 10.6%. Delaware's labor force participation rate closely mirrors national levels, with 65.7% participation overall in Delaware vs. 63.9% for the U.S. Measured by gender, 72.2% of Delaware males are in the labor force vs. 73.5% for the U.S., while 61.9% of Delaware females are in the labor force, compared with 59.5% nationally.

An expanding population base and relatively high labor force participation rates assure Delaware businesses of a growing and available supply of workers, since Delaware's population age 20 and above is expected to increase by 6% in the next five years, and by 11.7% in the next 10 years.

Because Delaware is small, it easily attracts workers from its neighboring states. More than 18,000 people commute to jobs in Delaware from points outside the State. The tables below illustrate the potential workforce available in the State's four primary labor markets.

Potential Labor Supply 1999 (The most recent available data)

Radius	Wilmington	Newark	Dover	Georgetown
10 miles	250,200	134,000	54,500	27,200
25 miles	1,047,300	530,800	174,300	103,400
50 miles	3,269,200	2,214,500	980,200	383,500

A Battelle study of the life science industry found that Delaware was the only state having a specialization in all four bioscience subsectors: agriculture feedstocks and chemicals, drugs and pharmaceuticals, medical devices and equipment, and research and testing. Delaware has the highest concentration of bioscience jobs in the nation. In 2002, Delaware had the second highest percentage of civilian scientists and engineers as a percentage of the workforce. In the same year, the State also ranked second in patents issued per capita. Delaware ranks first in the nation in value of annual exports per capita.

Delaware workers have consistently been very productive. The total value added per worker in 2001, the most recent year for which data are available, was \$232,937. This greatly exceeded the U.S. average of \$165,012. The value added by each worker has also consistently been above the average for that of Delaware's neighbors. Moreover, on average, the duration of unemployment claims in Delaware is approximately two weeks less than the U.S. average and has been, with limited exceptions, significantly lower than the national average since 1980, reflecting the State's stable work environment and the desire of workforce participants to obtain employment.

Living costs in Delaware are substantially below those of the surrounding metropolitan areas in the Northeast Corridor, notwithstanding Delaware's central location. A March 2002 cost-of-living analysis comparing various east-coast and mid-west cities against the nation's "Standard City" (a composite of the living costs in 100 representative U.S. cities) showed Delaware's advantage:

Index of Living Costs 2002

Standard City, USA	100.0	Princeton, New Jersey	120.2
Dover, Delaware	94.1	Philadelphia, Pennsylvania	113.6
Wilmington, Delaware	98.9	Denver, Colorado	109.4
Phoenix, Arizona	101.3	Washington, DC	117.8
Portland, Oregon	106.9	Boston, Massachusetts	128.1
Baltimore, Maryland	108.9	New York, New York	123.7

Source: Runzheimer and Company, Inc., Rochester, Wisconsin, March 2002.

National Recognition. Delaware's pro-business environment and continued solid position for success in the global economy are well recognized beyond the State's borders. *USA Today* in 2004 recognized Delaware as the best financial steward in the nation. In analyzing the financial health of all 50 state governments and assessing how the states managed their finances over a five-year period, *USA Today* gave Delaware top marks in spending restraint, bond-rating status and overall tax system. *Governing* magazine also ranked Delaware number one in financial management. *Business Development Outlook* magazine ranked Wilmington 10th and Dover 12th out of all the metropolitan areas in the United States in the category of best economic environment.

Other accolades include *Expansion* magazine's rating Delaware's workforce training program as the 13th best in the country for skills-based training that helps to ensure retention of employers and a continual stream of skilled workers. CNN recognized Delaware as one of the top tax-friendly states in 2004. Also, Delaware made the top ten pro-business states list in the 2004 Pollina Corporate Real Estate study, which stated, "Delaware is definitely a small state with a lot to offer business. Delaware's overall labor and tax climate make it a must-see location alternative."

II. GOVERNMENTAL BUSINESS INCENTIVE PROGRAMS

Delaware offers an array of business incentive programs, principally through the Delaware Economic Development Office. These range from recruitment assistance and training programs to facilitation of bond financing, loans and venture capital investment.

Employment And Training Services. When the labor market cannot respond to specialized employer needs, or additional skills are necessary because of a particular business situation, the Delaware Economic Development Office provides access to a database with over 100 recognized educational resources that can provide skill training designed to company specifications. Training contracts may be arranged with Delaware colleges

and universities, vocational schools, specialized training centers and independent agencies that provide business, industrial and service-related instruction. Subsidized training programs can also be arranged for new and existing businesses. The amount and type of subsidy are determined by the size of the business, its potential impact on Delaware's economy, the type of training needed and the availability of other training resources. Programs are developed to meet the stated hiring needs and skill levels of specific businesses. Employers maintain total control over selecting the trainer and the training program.

The Delaware Economic Development Office can support short-term classroom or on-site training. Costs for training must be specifically identified and must be essential to the successful implementation of the programs in order for the Delaware Economic Development Office to subsidize them. Matching funds equal to the requested contract amount are contributed by the employer unless otherwise waived by the Director of the Delaware Economic Development Office. This requirement may be waived if the business contributes "in-kind" items or services such as personnel, facilities, equipment, supplies, stipends or other items of value to the program in an amount approved by the Director.

Recruitment Assistance. In support of new and expanding businesses, the Delaware Economic Development Office will help recruit a workforce.

Given the staffing needs and minimum skill requirements that a business determines to be necessary for employment, the Delaware Economic Development Office will coordinate recruitment activities with the Employment and Training Division of the Department of Labor.

The Delaware Economic Development Office. The Delaware Economic Development Office was established in 1981 to lead the State's efforts in business development and tourism promotion. The office's mission is to retain, expand, attract and create jobs that improve the quality of Delawareans' lives. The State has regularly appropriated \$10 million to the Delaware Strategic Fund, which is overseen by The Delaware Economic Development Authority housed under the Delaware Economic Development Office, to provide financial assistance in the form of loans and grants.

New Economy Initiative. The Delaware General Assembly appropriated \$20.5 million to the Delaware Economic Development Office for the 2005 State fiscal year in order to employ a range of new initiatives for retaining and expanding high-paying jobs. The funds are to be used to make the investments necessary to develop a thriving entrepreneurial culture, including the availability of start-up seed funding and a pipeline of support for transferring a high-technology concept to commercial reality. Specific programs to be funded include: Delaware Competitiveness Fund for manufacturers, Emerging Technology Center, Technology-Based Seed Fund, Venture Capital Investment, Clean Energy Center Partnership and Experimental Program to Stimulate Competitive Research.

Tax-Exempt Bond Financing. The Delaware Economic Development Authority provides statewide financial assistance to new or expanding businesses, governmental units and certain organizations that are exempt from federal income taxation by issuing tax-exempt bonds and lending the proceeds of such bonds. The Delaware Economic Development Authority does not guarantee the payment of principal or interest on the bonds, and the full faith and credit of the State of Delaware do not back them up.

Local Government Financing. Delaware has several local governments that complement the financing efforts of the Delaware Economic Development Office.

The City of Wilmington can issue EZ bonds for projects located within that community. Commercial and manufacturing projects are eligible for bond financing up to \$3 million per project.

Manufacturing projects in New Castle County may qualify for financing at tax-exempt rates through the County's Economic Development Revenue Bond Program. The County's annual bond volume limit is \$39.4 million.

Sussex County operates a private activity bond program with a cap of \$15 million each year for industrial projects in Sussex County. The bond process may require as little as five weeks from inception to bond closing.

III. STATE-SUPPORTED INSTITUTIONS OF HIGHER EDUCATION

Delaware supports a number of institutions of higher education. Principal among these are the University of Delaware, Delaware State University and Delaware Technical and Community College.

University Of Delaware. The University of Delaware is a Land-Grant, Sea-Grant, Urban-Grant and Space-Grant institution. The University's main campus is in Newark, and the University conducts additional programs at satellite locations and campuses throughout the State. The University offers more than 100 majors programs through its seven undergraduate colleges: Agriculture and Natural Resources; Arts and Sciences; Business and Economics; Engineering; Human Services, Education and Public Policy; Health and Nursing Sciences; and Marine Studies.

The University's tenure-track faculty includes internationally known scientists, authors and teachers, 87% of whom hold doctorates or other terminal degrees. Among these scholars are recipients of the von Humboldt Award, National Science Foundation Awards, the Evans Biography Literary Award, the Teetor Award of the Society of Automotive Engineers, the Silver Gavel Award of the American Bar Association and the Outstanding Progress in Chemical Engineering Award. Others have received recognition from the National Academy of Science and the National Academy of Engineering and have been

recipients of Rhodes Scholarships and the Fulbright-Hays Award, as well as Woodrow Wilson, Guggenheim, Rockefeller Foundation and J. Paul Getty fellowships.

Relationships with business organizations in the State are strengthened through the University's resource information service groups, such as the Center for Economic Education and the Small Business Development Center. A Center for Financial Institutions Research and Education fosters publicly beneficial interactions with the financial community. The University's College of Business and Economics is fully accredited by the American Assembly of Collegiate Schools of Business. Undergraduate and graduate programs are offered in the areas of accounting, business administration, economics and finance.

The University conducts a wide range of research, both basic and applied. A number of specialized research units contribute to this effort and provide students with the opportunity to conduct research in conjunction with faculty, professional staff and industrial personnel. The University's Undergraduate Research Program encourages undergraduate participation in research projects. The Delaware Research Partnership uses State funds to attract matching grants from industry in support of University research that has the potential to enhance economic development. The University of Delaware Research Foundation works to help the University attract and support talented faculty members in the sciences and engineering.

Among the University's notable specialized programs are several in the chemical, chemical engineering, materials and energy fields. The University's Center for Composite Materials, an internationally recognized interdisciplinary center of excellence for composites education and research, is an example. The Center's 34,000-square-foot Composites Manufacturing Science Laboratory houses state-of-the-art facilities and equipment used by students, faculty, staff, visiting scholars and industrial interns from the United States and abroad. More than 60 graduate and undergraduate students and more than 175 researchers and staff members are currently affiliated with the Center, whose mission is to conduct basic research, educate engineers and provide prompt technology transfers for the composites community.

The Institute of Energy Conversion (IEC), established at the University of Delaware in 1972, is a laboratory devoted to research and development of thin-film photovoltaic solar cells and other photonic devices. IEC was designated a University Center of Excellence for Photovoltaic Research and Education by the U.S. Department of Energy and the National Renewable Energy Laboratory in 1992. Fundamental materials and device research is carried out in parallel with process engineering studies and analysis of film deposition processes. The broad scope of the research and development effort offers opportunity for study in the fields of physics, chemistry, materials science, chemical engineering, mechanical engineering and electrical engineering, as well as collaboration with industrial groups seeking to manufacture and commercialize photovoltaics.

Close collaboration between IEC staff and thin-film photovoltaic industrial partners ensures that the research is relevant to today's technology and includes state-of-the-art process development.

Other cutting-edge University programs with industrial applications arise from Delaware's unique familiarity with the chemical industry. The University's Center for Catalytic Science and Technology, spanning the Departments of Chemical Engineering and Chemistry and Biochemistry, conducts multidisciplinary research in the scientific and engineering principles of catalysis. The Center for Molecular and Engineering Thermodynamics guides the development of new chemical engineering processes and products.

The University also offers programs that draw on Delaware's renowned artistic and industrial heritage. For example, cooperative programs are conducted with the Henry Francis du Pont Winterthur Museum (masters' degrees in art conservation), the Eleutherian Mills-Hagley Foundation (two- to four-year fellowships in the history of industrialization) and Longwood Gardens (masters' degrees in public horticulture).

Delaware State University. Delaware State University, located in Dover, is a State-assisted, Land-Grant, historically African-American institution of higher education. The campus has developed into a modern 400-acre complex. Enrollment is drawn primarily from Delaware, but also includes students from 30 other states, Africa, South America, Asia and the Middle East.

A progressive liberal arts institution, Delaware State is committed foremost to academic excellence and intellectual competence. Freedom of expression and inquiry, the exchange of ideas, cultural activities, intensive classroom instruction and numerous informal events of the learning community combine to ensure that each student receives a quality education. Accredited by the Middle States Association of Colleges and Schools, it offers bachelors' degrees in a number of disciplines. Nationally accredited undergraduate programs are available in the fields of Chemistry, Social Work, Nursing, Airway Science and Hospitality Management. The Office of Continuing Education meets the learning needs of individuals who wish to further their education on a part-time basis. Evening classes are available at the main campus and at other sites throughout the State. Delaware State also offers masters' degrees in Elementary Education, Special Education, Science Education, Business Administration, Social Work, Biology, Chemistry, Physics, Plant Science and Natural Resources.

Delaware Technical And Community College. Delaware Technical and Community College is designed to serve business and industry. With its four campuses located in Delaware's three counties—Wilmington and Stanton Campuses in New Castle County, Terry Campus in Kent County, and Southern Campus in Sussex County—the College is within easy access for all Delaware residents. For over 30 years, the College has been

providing education and training to the Delaware workforce. A broad spectrum of skills and information specialists join the Corporate and Community Programs Division to design and conduct job-specific programs for businesses. The College provides start-up training for newly located businesses and technical training to upgrade the skills of employees in existing companies. It also offers customized courses for the business community, on-site or on-campus.

Unique programs of the College that reflect a close working relationship with business and industry include: Fire Protection, Civil Engineering, Electronics/Electrical Engineering, Business Administration, Accounting, Computer Information Systems, Chemistry, Bioscience, Mechanical Engineering, Safety Management, Office Systems, Industrial Engineering, Dental Hygiene, Nuclear Medicine, Diagnostic Medical Sonography and Nursing.

State and federal funds enable unemployed and underemployed citizens to enter specialized programs to receive job skills training or retraining. As employees reenter the labor market, employers gain employees equipped with current job knowledge and practical work experiences. The College is a statewide provider of many job training and job readiness programs.

IV. CENTERS OF RESEARCH AND TECHNICAL INNOVATION

Delaware is a center for cutting-edge research and technical innovation. It has the second highest concentration of scientists and engineers in the U.S. and an extensive array of research and development activities conducted by manufacturers, research universities and other organizations. Major industrial research and development facilities include those of E.I. du Pont de Nemours and Company (fibers, polymers, agricultural products, industrial and specialty chemicals, electronics and toxicology); Hercules Incorporated (chemistry and engineering); Uniqema, a business unit of ICI Americas, Inc. (chemical research and development supporting Uniqema's activities in the personal care, lubricants, polymers, oil field, specialty cleaning fibers and crop protection industries); Basell Polyolefins, a BASF/Shell business (polyolefin materials and technology); W.L. Gore and Associates, Incorporated (electronic, industrial, fabric and medical products utilizing GORE-TEX® materials); and AstraZeneca (bioscience and pharmaceuticals).

Major research and development activities are also conducted through the University of Delaware's seven colleges. These include its Center for Composite Materials, Center for Catalytic Science and Technology, Center for Climatic Research and Center for Molecular and Engineering Thermodynamics, its Institute of Energy Conversion (one of the world's largest thin-film solar cell laboratories performing research and process development for industry and designated by the Department of Energy as a national

center of excellence in photovoltaic research and education) and its Center for Composite Materials (designated as a partner in an Army Research Laboratory Materials Center for Excellence).

Two Fraunhofer Institute centers are also headquartered in Delaware. The Fraunhofer Center for Manufacturing and Advanced Materials, Delaware, concentrates on metal foams and ultra lightweight materials, metallic nanopowder production and processing, and injection molding of metals and ceramics. The Fraunhofer Center for Molecular Biotechnology concentrates on production of vaccines, therapeutic proteins and enzymes in plants, transient alterations of plant physiology and metabolism, directed evolution to modify and optimize these functions and rapid functional categorization of plant genes.

DELAWARE



BUSINESS ENTITIES

*Delaware's business entity
laws lead the nation.*

Unlike many nations, the United States does not have a single, national law governing the formation and internal governance of corporations and other business entities. Although there is a substantial overlay of federal laws relating to taxation, disclosure, trading of securities and other matters, under the federal system of government the internal structure and governance of business entities is left primarily to state law. U.S. courts look to the laws of the state of formation of the entity rather than the laws of the seat of management or principal place of business. Therefore, the selection of the jurisdiction in which to form the entity is effectively a selection of governing law, and is usually made independently of the place of the entity's operations.

Knowledgeable U.S. and international advisors have long been attracted to Delaware as the forum of choice for formation of business entities. As of August 2004, more than a half a million business entities had their legal homes in Delaware. Counted among these are over 58% of the "Fortune 500" and more than 50% of all U.S. publicly traded entities.

This attractiveness as the forum of choice for the formation of business entities is no coincidence. Since enactment of its first modern General Corporation Law in 1897, Delaware has offered a liberal, flexible and non-restrictive statutory framework that allows investors, entrepreneurs and managers to fashion their business organizations in the most efficient configuration. The State's business laws are constantly reviewed and adapted to new business and financial developments.

The underlying, guiding principle of Delaware's approach is freedom of contract. Businesses are free to choose among different forms of business organization - corporations, general partnerships, limited partnerships, registered limited liability partnerships, statutory trusts and limited liability companies - in order to match the form of organization to the needs of the enterprise and the intended relationships among its owners, creditors and management. Furthermore, within each of these general organizational forms there is a broad range of choice as to allocation of authority and control over financial and governance matters.

Of course, the attractiveness of Delaware is not limited to the modernity and flexibility of its business organization laws. Delaware also benefits from the expertise of its judiciary in corporate and business matters, the positive attitude toward business and innovation of Delaware's legislature and administration, the state-of-the-art capabilities of the Delaware Division of Corporations, the existence of a large, established body of precedent and the general familiarity of Delaware law to corporate practitioners throughout the U.S. and the world. In March 2005, the U.S. Chamber of Commerce's annual poll of corporate counselors and senior litigators found, as in previous years, that Delaware's legal system is the best in the country.

I. CORPORATIONS

The General Corporation Law of the State of Delaware provides the statutory framework governing the formation of Delaware corporations, the basic relationship between corporations and their stockholders, and the internal governance structure of the corporation.

A corporation may be formed to pursue any lawful act or activity, except as may be otherwise provided by the laws or Constitution of Delaware. A corporation has three primary constituents: stockholders, directors and officers and, under certain circumstances, creditors. In general, stockholders are the owners of the enterprise, directors set the policy for the management of the corporation, and officers run the corporation on a day-to-day basis.

The General Corporation Law also permits the formation of non-stock, membership corporations for profit. These corporations are generally subject to the same statutory scheme as ordinary stock corporations, but with certain significant differences. Differences in legal treatment between membership corporations and stock corporations are discussed in this Chapter below under the heading “**Membership Corporations.**” Similarly, Delaware permits the formation of close corporations, which are corporations having, among other things, restrictions on the permissible number of stockholders. Close corporations are described in this Chapter below under the heading “**Close Corporations.**”

Stock Corporations

The most popular form of business organization is the stock corporation. A stock corporation is a corporation organized under the General Corporation Law of the State of Delaware that has the authority under its certificate of incorporation to issue shares of stock representing the equity interests in the enterprise. The decision whether to form a corporation as a stock corporation authorized to issue shares of stock, or as some other type of corporation, is entirely up to the organizers of the enterprise and is not a matter dictated by the State or any governmental authority. Some of the salient features of this form of entity are set forth below.

Formation. The certificate of incorporation is the basic governing document of the corporation. The information that must be included is narrow in scope: the name of the corporation, the name and address of the corporation’s registered agent in Delaware, the purpose for which the corporation is organized (it is sufficient to say that the corporation may engage in any lawful act or activity for which corporations may be incorporated under the General Corporation Law), the number, par value (if any) and terms of the authorized stock, the name and mailing address of the incorporator, and the names and mailing addresses of the persons who are to serve as directors of the corporation if the powers of the incorporator are to terminate upon the filing of the

certificate of incorporation. Every certificate of incorporation is deemed to contain the provisions of the General Corporation Law so it is unnecessary to repeat key provisions of that law in the certificate.

The certificate of incorporation may include any other terms desired in the certificate so long as these are not contrary to the General Corporation Law. Many of the terms of the General Corporation Law may be varied in the certificate of incorporation, and provisions in a certificate of incorporation may be made dependent on facts ascertainable outside of the certificate of incorporation, such as an agreement among the stockholders of the corporation. Accordingly, broad flexibility is possible. For example, the certificate of incorporation may grant the board of directors the power to adopt or amend bylaws; may increase above a majority the number of votes of directors or shares necessary to take board or stockholder action; may grant or deny preemptive rights; may limit the corporation's term of existence (which is otherwise perpetual); may limit or eliminate the liability of directors for acts of simple negligence; may deny the stockholders the ability to act by written consent; and may make any other provision for the management of the business and for the conduct of the affairs of the corporation that does not conflict with the General Corporation Law.

The corporation is formed, and its existence commences, upon the filing of the certificate of incorporation with the Delaware Secretary of State. It is not necessary to obtain judicial or regulatory approval for the incorporation so long as the certificate of incorporation complies in form with the simple requirements of the General Corporation Law. Often it is possible to form a corporation in a matter of hours. The appointment of an initial board of directors and initial officers, adoption of bylaws and issuance of shares complete the organization of the corporation.

Limited Liability. The popularity of the corporate form derives principally from two attributes: the separation of ownership from management and the limitation of liability of the stockholders of the corporation. Unless otherwise provided in the certificate of incorporation, the stockholders of a corporation are not personally liable for payment of the corporation's debts. In other words, absent unusual circumstances justifying disregard of the corporate entity, the stockholder is at risk only to the extent of his investment and no more. This concept is critical to the formation of investment capital.

Capital Structure. Delaware does not impose any minimum capital requirements. A corporation is free to establish the capital structure that best suits its needs. Corporations may issue a single class of stock or multiple classes of stock, as the certificate of incorporation provides. The determination of the number of shares of common stock to authorize is primarily a function of the scope of the distribution contemplated for such stock. For a public corporation, there should be authorized sufficient stock to meet the needs of the initial offering as well as sufficient additional shares for future needs, such as acquisitions, employee stock option programs, stock bonuses and the

like. Where the corporation is authorized to issue more than one class of stock, the certificate of incorporation may grant to the board of directors broad powers to fix by resolution the powers, preferences and rights, and the qualifications, limitations and restrictions thereof, of any class of stock (including common as well as preferred) where not fixed in the certificate of incorporation. This “blank check” power is often included in the certificates of incorporation of public Delaware corporations with respect to preferred stock.

Stock may be voting or non-voting, and shares of one class may be given a greater or lesser number of votes per share than shares of another class. Stock may be common stock, standing last in line in the event of liquidation, or preferred stock with a preference over common stock as to dividends, liquidation or both. The dividend rates of preferred stock may fluctuate in accordance with a formula expressed in the certificate of incorporation or they may be fixed, and stock may be entitled to participate in the earnings of the corporation available for dividends generally or only in a specified portion of those earnings. Stock may be made convertible into shares of a different class and may be made redeemable by the corporation.

Powers. Delaware’s General Corporation Law confers on corporations the power to borrow money, guarantee debts, issue bonds and otherwise incur debt. Although unusual in practice, the General Corporation Law permits corporations to create voting debt, that is, debt that carries with it the authority to vote along with stockholders, so long as the certificate of incorporation so provides.

Dividends. Dividends on common stock are normally payable when, as and if declared by the board of directors, unless restricted in the certificate of incorporation. Dividends on preferred stock are also discretionary unless fixed in the certificate of incorporation. Dividends may be paid out of the net assets of the corporation over and above its capital. (Generally speaking, capital is the aggregate par or stated value of the issued shares.) If no such funds are available, dividends may be paid out of the net profits of the corporation in the year declared and/or the preceding fiscal year, provided that the amount of capital of the corporation following the declaration and payment of the dividend is not less than the aggregate amount of the capital represented by the issued and outstanding stock of all classes of stock having a preference on the distribution of assets. Stockholder approval of proposed dividends is not required, but this requirement may be imposed, if desired, by appropriate provision in the certificate of incorporation.

Management. The business and affairs of Delaware corporations are managed by or under the direction of a board of directors. Members of a board of directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of the corporation’s stockholders. In recognition of the managerial prerogatives granted to directors of Delaware corporations under the General Corporation Law, however, Delaware law generally presumes that, in making business

decisions, the directors of a corporation are disinterested and act on an informed basis, in good faith, with due care and in the honest belief that the action taken is in the best interests of the corporation and its stockholders. Thus, the Delaware courts will not second-guess the business judgments of directors so long as these elements of loyalty and care are present.

The vote of a majority of the directors present at a meeting is necessary to constitute board action unless the certificate of incorporation or bylaws require a greater number. Furthermore, there must be at least a quorum of directors present at the meeting. Unless otherwise provided in the corporation's certificate of incorporation or bylaws, a quorum consists of a majority of the entire board of directors. Directors may also act by written consent unless prohibited by the certificate of incorporation or the bylaws, but in so acting must be unanimous.

The board of directors may consist of as many or as few persons as the certificate of incorporation or bylaws provide. There are no "co-determination" laws, and there is no requirement that any constituency be represented on the board. However, provisions may be made so that the holders of certain series or classes of stock are entitled to elect a specified number of directors, as frequently is the case when investments are made by venture capitalists. In addition, the certificate of incorporation or bylaws may prescribe qualifications for directors, such as requiring that the directors be "independent" of management or that the directors have a certain level of expertise in the industry in which the corporation operates. The entire board is elected annually, unless the certificate of incorporation provides for the board to be divided into classes. If the certificate of incorporation provides for the board to be divided into classes, directors may be elected for more than one year, with only a portion of the board standing for election each year. The board may not be divided into more than three classes, and directors may not be elected for more than three years. Classification of the board provides for continuity on the board of directors, and directors elected to a classified board can be removed only for cause unless the certificate of incorporation otherwise provides. A classified board prevents stockholders from replacing a majority of the board at a single stockholders' meeting. Voting in board elections is not cumulative unless the certificate of incorporation so provides.

The corporation's officers are selected by the board of directors, which also is empowered to remove the officers. Most corporations will have at least a president, treasurer and secretary. The authority of the officers is generally fixed in the bylaws or in resolutions adopted by the directors. The officers exercise operational management over the corporation.

Stockholders. Unless otherwise provided in the certificate of incorporation, stockholders do not manage the corporation. Stockholders elect directors annually and have the power to approve or disapprove significant corporate events, such as amendments

to the certificate of incorporation, sales of all or substantially all of the corporation's assets, mergers, and dissolution. A majority in voting power is required for approval of these matters unless a higher voting requirement is specified in the certificate of incorporation. Directors are elected by plurality vote, and other matters not specified above may be approved by the vote of a majority of the shares present at a meeting at which a quorum is present, unless the certificate of incorporation or bylaws require a greater vote. With the exception of dissolution by unanimous stockholder approval, fundamental corporate changes such as certificate amendments, sale of all or substantially all of the corporation's assets, merger and dissolution may not be authorized by a corporation's stockholders without antecedent board action. Stockholders also have the right to adopt, amend and repeal the corporation's bylaws and to inspect the corporation's and its subsidiaries' books and records for any purpose reasonably related to their interests as stockholders. Stockholders exercise their authority in the form of stockholder resolutions adopted at a meeting, or by written consent (which need not be unanimous) unless the corporation's certificate of incorporation prohibits action by written consent.

Indemnification And Exculpation. Corporations are permitted (and in some cases required) to indemnify directors and officers against liabilities arising out of their official actions. Corporations also may, but are not required to, indemnify employees and agents. Indemnification is not generally permitted for liabilities owed by the directors to the corporation itself, but is available with respect to third-party claims, as well as for derivative actions, against expenses, judgments, fines and amounts paid in settlement, in the case of third-party actions, and expenses only, in the case of derivative actions. Corporations may purchase insurance on behalf of directors and officers that may provide coverage for litigation-related losses that extends beyond the indemnification available under the General Corporation Law. In addition, the certificate of incorporation may contain a provision that eliminates or limits the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision may not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law; (iii) for any liability for declaration of unlawful dividends or unlawful stock repurchases or redemptions; or (iv) for any transaction from which the director derived an improper personal benefit. Many public and private corporations choose to eliminate director liability in its entirety to the fullest extent permitted by law, rather than to limit it to a dollar amount.

Amendments. The certificate of incorporation may be amended as often and in as many respects as the board recommends and the stockholders approve. For example, the certificate of incorporation may be amended to change the corporate name, authorize new classes of stock, reclassify or split the outstanding stock, alter the management structure of the corporation, or change the powers, preferences or special rights of any

class or series of stock. A corporation may include in its certificate of incorporation a provision that only the holders of the affected series or class of stock need vote on an amendment to the terms of such series or class of stock.

Mergers. Of special significance are the provisions of the General Corporation Law relating to mergers. Delaware corporations may merge with other Delaware corporations; may merge with other U.S. corporations; may merge with subsidiary corporations or with limited partnerships, limited liability companies or business or statutory trusts; and may even merge with or into non-U.S. corporations. These provisions make possible a broad range of business combinations, allow for change of the corporate structure to a form of entity best suited to meet the parties' business needs, and provide flexibility to move the legal situs of the corporation as may be needed. The General Corporation Law generally provides for appraisal rights in mergers that entitle a dissenting stockholder to an appraisal of the "fair value" of his shares. A certificate of incorporation also may provide for appraisal rights for any merger or consolidation in which appraisal rights are not otherwise prescribed by the General Corporation Law.

Business Combination Statute. Public corporations have the protection afforded by Section 203 of the General Corporation Law unless the company chooses to opt out of Section 203 in its certificate of incorporation. Section 203 generally prohibits a Delaware corporation whose shares are publicly traded from engaging in any business combination with a stockholder who owns 15% or more of a corporation's voting stock for a period of three years following the date that such stockholder became a 15% stockholder, unless one of a number of exceptions applies, such as prior board approval of the business combination. By imposing a three-year moratorium on business combinations with a 15% stockholder, unless a corporation's board of directors approves the business combination prior to the stockholder becoming a 15% stockholder, Section 203 increases the likelihood that a potential acquiror will negotiate with a corporation's management prior to acquiring a significant block of the corporation's stock. In addition, Section 203 deters two-tiered, highly leveraged takeovers because such acquisitions are frequently financed by junk bonds that are secured by the corporation's assets and intended to be sold upon completion of the transaction to repay the debt.

Dissolution. The General Corporation Law contains specific provisions regarding methods of winding up the affairs of dissolved corporations and distributing assets among creditors and stockholders. These methods are calculated to enable the stockholders and directors of the corporation to limit their post-dissolution exposure to claims of creditors, while at the same time establishing procedures that fairly balance and address the legitimate claims of creditors against the assets of the dissolved corporation.

Taxation. Although a Delaware corporation is subject to U.S. federal taxation just as any other U.S. corporation, the extent to which a corporation will be subject to

Delaware corporate income tax will depend on the nature and extent of the corporation's activities conducted within Delaware and on whether the corporation qualifies for one of a number of specific categories for which special tax treatment is accorded by Delaware law.

At one extreme, a corporation incorporated in Delaware but not doing any business in Delaware and simply maintaining a statutory corporate office in Delaware is exempt from Delaware corporate income tax. The only Delaware tax on such a corporation is the very modest (as low as \$35 per year) Delaware franchise tax. On the other end of the spectrum, a corporation actively engaged in a trade or business, all of the activities of which are conducted within Delaware, would be fully subject to the Delaware corporate income tax on all of its income.

A corporation that conducts business activities partly in Delaware and partly elsewhere is subject to Delaware corporate income tax on only that portion of its income allocated and apportioned to Delaware under rules specifically set out in the Delaware statutes. Unlike some other states, Delaware does not attempt to apply a "unitary" tax approach so as to subject to Delaware taxation a disproportionate amount of the worldwide income of a corporation only a part of whose business activities are conducted within Delaware.

Delaware exempts from its corporate income tax corporations commonly referred to as "Delaware investment companies" (or "Delaware holding companies"). Delaware investment companies are corporations "whose activities within this State are confined to the maintenance and management of their intangible investments...and the collection and distribution of the income from such investments or from tangible property physically located outside this State." For example, a foreign business enterprise desiring to make investments in the U.S. in intangible assets such as stocks, bonds, notes and other debt obligations, patents, trademarks or copyrights could form a Delaware investment company for the purpose of making such investments without subjecting the income therefrom to state-level corporate income tax.

Delaware investment companies are also expressly exempt from the gross receipts taxes imposed on various other business taxpayers. Thus, except for the modest annual franchise tax, corporations meeting the statutory definition of a Delaware investment company can, under the right circumstances, escape all Delaware tax. As a result of these rules, a large number of U.S. companies have established Delaware investment companies to which they have transferred investment portfolios, patents, trademarks or other intangible property for the purpose of eliminating state tax liability on the earnings from those assets. The same opportunity exists for foreign business enterprises that desire to make investments in the United States. (See Chapter Four, "**Delaware Taxation — Corporate Income Tax — Delaware Investment Companies.**")

Domestication And Transfer Of Domicile. Of particular interest to non-U.S. corporations, the General Corporation Law permits such a corporation to become a Delaware corporation simply by filing with the Delaware Secretary of State a certificate of domestication and a certificate of incorporation. The certificate of domestication certifies (i) the date and jurisdiction of the establishment of the non-U.S. corporation, (ii) its name immediately prior to such filing, and (iii) the jurisdiction that constituted its principal place of business immediately prior to such filing and set forth in its certificate of incorporation. Upon such filing, the non-U.S. corporation becomes a Delaware corporation, but with its legal existence being deemed to have commenced on the date when the corporation was first formed or established in its original place of organization outside the United States. The Delaware corporation is, in effect, a continuation of the non-U.S. corporation, and all pre-existing obligations and liabilities continue unaffected by the domestication.

Likewise, Delaware corporations may domesticate out of Delaware into a non-U.S. jurisdiction. This authority facilitates and simplifies the reincorporation of closely held Delaware corporations into jurisdictions outside the United States. Upon effectiveness of domestication of a Delaware corporation out of Delaware to a non-U.S. jurisdiction, the corporation's existence as a Delaware corporation ceases, but without affecting its existing obligations and liabilities.

Although perhaps of lesser interest in the post-Cold War environment, Delaware law also provides an explicit mechanism by which a non-U.S. corporation may temporarily transfer domicile to Delaware in the event of an emergency condition in the corporation's home jurisdiction, such as insurrection, war, foreign domination or expropriation or nationalization of substantial assets.

Close Corporations

A close corporation is a corporation organized under the General Corporation Law, but whose certificate of incorporation also contains provisions requiring that (i) all of the corporation's shares be represented by certificates and held of record by a specified number of persons, not exceeding thirty persons; (ii) all issued shares be subject to one or more of certain specified restrictions on transfer (such as restrictions granting existing stockholders or the corporation the first right to purchase shares proposed to be sold by another stockholder); and (iii) there be no public offering of the corporation's shares within the meaning of the Securities Act of 1933, as amended. The certificate of incorporation of a close corporation may set forth the qualifications of stockholders, either by specifying classes of persons who shall be entitled to be holders of record of stock of any class, or by specifying classes of person who shall not be entitled to be holders of stock of any class, or both.

All provisions of the General Corporation Law are applicable to close corporations except as otherwise provided by the General Corporation Law. Therefore, the discussion below addresses only the areas of difference, and the reader is referred to “**Stock Corporations**” in this Chapter above for generally applicable concepts.

Formation. A close corporation is formed in the same manner as any stock corporation, except its certificate of incorporation must contain a heading stating that it is a close corporation. The certificate of incorporation must also contain the provisions described above restricting the number of stockholders, the transfer of shares and the public offering of shares.

An existing corporation that is not a close corporation may convert into a close corporation by amending its certificate of incorporation to contain the foregoing heading and provisions, except that it must be approved by the holders of at least two-thirds of the shares of each class of the stock of the corporation that is outstanding.

Termination Of Close Corporation Status. A close corporation maintains its close corporation status until it elects to terminate that status, or until any of the provisions required to obtain that status as set forth in the certificate of incorporation have been breached and neither the corporation nor its stockholders have taken statutorily specified steps to remedy such breach. The Delaware Court of Chancery is given authority to issue orders, upon application of the corporation or a stockholder, to prevent loss of close corporation status by enjoining or setting aside the transaction constituting the breach.

Capital Structure. As noted above, the capital structure of a close corporation is limited on the equity side by the restriction that not more than thirty persons may hold the issued shares. The corporation may refuse to record transfers of stock that would violate the applicable transfer restrictions or result in an excessive number of stockholders.

Management. In an ordinary stock corporation, the management of the business and affairs of the corporation is conducted by or under the direction of the board of directors, except to the extent specific management functions are expressly conferred on someone else by the certificate of incorporation. In a close corporation, on the other hand, the certificate of incorporation may provide that the stockholders will manage the business of the corporation directly, in which case no elections of directors are required. Such a provision, if adopted, is required to be noted on every stock certificate to avoid surprise for the unwary. The stockholders are considered for statutory purposes to be the directors, and the stockholders are subject to the liabilities of directors.

Likewise, the stockholders may by written agreement among a majority of them restrict the discretion of directors by providing that the corporation’s stockholders or a third party has managerial authority with respect to the operation of the corporation. The effect of such an agreement is to relieve the directors of, and impose upon the stockholders who are parties to the agreement, liability for managerial acts or omissions

that would otherwise be imposed on directors to the extent and for so long as the management discretion or powers of the board are controlled by such agreement. No written agreement among stockholders of a close corporation nor any provision of the certificate of incorporation or of the bylaws of the corporation that relates to the affairs of the corporation will be held invalid on the ground that it attempts to treat the corporation as if it were a partnership.

A stockholder may apply to the Court of Chancery for appointment of custodians or receivers for a close corporation in the event of certain stockholder or director deadlocks, or if such stockholder has been given the option in the certificate of incorporation to compel dissolution of the corporation. In certain similar situations, the Court of Chancery may appoint a provisional director, but such director must be impartial and may not be either a stockholder or a creditor of the corporation.

Dissolution. In contrast to the dissolution provisions governing ordinary stock corporations, which require approval of a resolution to dissolve either by a majority of the board and thereafter by the holders of a majority in voting power of the shares, or alternatively by unanimous stockholder action, a close corporation may include in its certificate of incorporation a provision granting to any stockholder, or to the holders of a specified number or percentage of the shares, an option to dissolve the corporation at will or upon the happening of a specific event or contingency.

Membership Corporations

Delaware law permits the formation of non-stock, membership corporations, whether or not organized for profit. In this respect, Delaware law is more flexible than the laws of many other jurisdictions, which may restrict the use of membership corporations to non-profit or charitable activities. While not the prevalent form of business organization, non-stock, membership corporations have been used in a number of for-profit or profit-neutral settings, and some very large and well-known enterprises have been established as membership corporations.

Delaware does not have a separate code governing the formation and operation of membership corporations, but instead treats these corporations within the framework of the General Corporation Law that also governs ordinary stock corporations. Therefore, the discussion below addresses the areas of difference in treatment or authority, and the reader is referred to “**Stock Corporations**” in this Chapter above for generally applicable concepts.

Formation. A membership corporation is formed in the same manner as a stock corporation, except that in lieu of stating the authorized number, classes and par value of shares of the corporation, the certificate of incorporation must state that the corporation has no authority to issue shares of capital stock. The conditions of membership in the corporation (if any) must also be stated in the certificate of incorporation, or the certificate may state that such conditions are to be stated in the bylaws.

Limited Liability. Members in a membership corporation are granted the same limitation of liability as stockholders in a stock corporation.

Capital Structure. In view of the absence of authority to issue shares of stock, the statute contains no provisions regarding the capital structure of a membership corporation. Concepts of capital and surplus, which find application in stock corporations in the context of permissible sources for payment of dividends and stock redemptions, have no statutory significance in the context of membership corporations. Hence, the statute is silent on, for example, the sources from which distributions of profits from for-profit membership corporations may be made. As the underlying philosophy of the General Corporation Law is permissive rather than restrictive, the absence of statutory provisions may be taken as granting broad flexibility in this area.

Management. The provisions governing boards of directors in stock corporations are generally applicable to membership corporations. However, the certificate of incorporation of a membership corporation may provide that the business and affairs of the membership corporation shall be managed in a manner other than that applicable to stock corporations. Unless otherwise provided for in the certificate of incorporation or bylaws, membership corporations may hold annual meetings of members in accordance with the procedures governing the holding of annual meetings of stockholders of stock corporations, except that all references in the General Corporation Law to stockholders and the board of directors governing such meetings are deemed to refer to the members and the governing body of the membership corporation, respectively.

Unless otherwise provided in the certificate of incorporation, (i) the affirmative vote of a majority of the members constitutes the act of the membership; (ii) members of the governing body are elected by a plurality of the votes of the members of the corporation; (iii) each member is entitled to one vote; and (iv) if the election of the governing body is not held on the day designated by the bylaws, the governing body has the responsibility to cause the election to be held as soon thereafter as is convenient.

Amendments, Dissolution And Mergers. In contrast to the procedures necessary to amend the certificate of incorporation of a stock corporation, which require approval of the proposed amendment by the board followed by approval of the holders of a majority in voting power of the voting stock of the corporation, in a membership corporation the board has the exclusive power to amend the certificate of incorporation (unless altered by a certificate provision). Likewise, dissolution of the corporation may be authorized by the board alone if there are no members entitled to vote for the election of directors; otherwise, the affirmative vote of a majority of the members having such electoral rights is required.

A non-stock corporation is authorized to merge with another entity, whether or not a membership corporation, and the survivor may be the non-stock corporation or the other entity. To preserve the tax treatment of corporations that are classified as

charitable non-stock corporations, mergers between such corporations and for-profit corporations that would destroy the charitable corporation's charitable status are prohibited. Mergers of non-stock corporations must be approved by a two-thirds vote of the members having the right to vote for the election of directors or, if none, two-thirds of the board.

II. PARTNERSHIPS

A partnership is an association of two or more persons to carry on any lawful business, purpose or activity. Generally speaking, there are two types of partnerships, the general partnership and the limited partnership. The principal difference between these two forms of partnership is that in a general partnership each partner is generally liable for all partnership liabilities, whereas in a limited partnership the limited partners are not so liable.

Delaware has a state-of-the-art limited partnership statute that has been favorably viewed and widely used nationally and abroad because of its flexibility and degree of protection of limited partners from liability for debts of the limited partnership. In keeping with its determination to remain in the forefront of innovation in business laws, Delaware also permits the formation of a limited liability partnership, which is a general partnership in which a partner is not personally liable for the debts of the partnership, and Delaware permits the formation of a limited liability limited partnership, which is a limited partnership in which neither a general partner nor a limited partner is personally liable for the debts of the limited partnership.

General Partnerships

General partnerships are associations of persons who conduct business together, as partners, and who are each subject to joint and several liability for the debts of the partnership. Delaware has adopted a version of the Revised Uniform Partnership Act ("DRUPA"), which contains rules defining many of the rights and obligations of partners to one another as well as provisions governing the relations of partners to persons dealing with the partnership, property rights of partners and dissolution and winding up of the partnership.

Formation. A general partnership can be formed orally, by written agreement, or even by the conduct of coventurers without an express agreement among them to form a formal partnership. To form a partnership it is not necessary to make filings with any governmental agency. However, a general partnership may file a statement of partnership existence with the Secretary of State of the State of Delaware. If a statement of partnership existence is filed, it must include the name of the general partnership, the address of the general partnership's registered office in Delaware and the name and

address of the general partnership's registered agent for service of process in Delaware. The statement of existence may also include other items.

While DRUPA contains provisions governing the rights and obligations of the partners, these provisions are generally subject to alteration by entry into a written partnership agreement. Although the DRUPA provisions may be adequate for smaller or less complex partnerships, it is usually advisable to enter into a written partnership agreement expressly addressing the relationships of the partners to one another, management of the partnership, the partners' obligations to contribute capital to the partnership, sundry tax matters, the partners' entitlements to shares of partnership profits and losses and distributions from the partnership, the partners' entitlements upon dissolution and related matters. If entered into, a written partnership agreement does not need to be publicly filed.

Liability. A defining factor of a general partnership is that each partner is generally liable to creditors of the partnership. While in smaller partnerships this may facilitate obtaining credit, it poses a significant risk to the partners. Some insulation from liability may, however, be gained by utilizing a corporation (or other type of entity offering limited liability) as partner such that only the value of the entity's assets is at risk, and not the entire net worth of the individual who is participating in the partnership through the use of the corporation or other entity.

Management. In the absence of an agreement to the contrary, all partners have equal rights in the management and conduct of the partnership business. As to ordinary matters connected with partnership business, a majority vote is sufficient to decide the matter. However, the partners may by their partnership agreement change this management structure and impose any other structure they deem fit.

Partnership agreements frequently alter the management structure established in DRUPA by creating "managing partners," altering voting rights to be proportional to contributions or some other economic interest, or otherwise. As with most Delaware business forms, the partners of a partnership are granted broad flexibility in ordering the internal affairs of the entity.

Under DRUPA, unless otherwise provided in the partnership agreement, a partner of a general partnership is entitled to inspect the partnership's books and records for any purpose reasonably related to the partner's interest as a partner in the general partnership. In addition, under DRUPA, partners of a general partnership owe the partnership and the other partners fiduciary duties of loyalty and care. DRUPA permits a partnership agreement to modify these duties; however, a partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

Separate Legal Entity. Under DRUPA, unless otherwise provided in the partnership agreement and a statement of partnership existence filed with the Secretary of State of the State of Delaware, a general partnership is a separate legal entity. In addition, unless otherwise provided in the partnership agreement and a statement of partnership existence filed with the Secretary of State of the State of Delaware, a partner of a general partnership is not a co-owner of partnership property and has no interest in specific partnership property.

Capital Structure. Partners are free to establish the capital structure of the partnership. DRUPA does not limit the forms of property that may be contributed to a general partnership. Partners may agree on the contributions that are to be made by each of them, whether or not proportionate to their shares of profits and losses or to their prior contributions. Partners may also agree on their obligations, if any, to make future contributions to the partnership. Partnerships are, of course, permitted to borrow money from partners or third parties or to obtain capital by admitting new partners.

Dissolution. Dissolution of a partnership occurs at the time specified in the partnership agreement or in certain other circumstances. A partnership may also be dissolved by decree of court in certain specified circumstances. Upon dissolution, a partnership is required to wind up its business, liquidate and distribute its assets to its partners.

Taxation. Except in the unusual case where a partnership elects to be taxed as a corporation, a partnership is not itself a taxable entity for either federal or Delaware income-tax purposes. Rather, each partner's share of profits and losses is passed through to the partner for income-tax purposes, whether or not actually distributed to the partner by the partnership. This gives rise to potential tax liability on the part of partners without corresponding cash distributions with which to pay the tax. Partnership agreements typically address and minimize this risk.

A partnership that has filed a statement of partnership existence with the Delaware Secretary of State is required to pay a \$200 annual franchise tax to Delaware.

For additional information concerning the tax consequences of partnerships, see “**Limited Partnerships—Taxation**” in this Chapter below.

Limited Liability Partnerships

Delaware law permits the formation of a form of general partnership known as a Delaware limited liability partnership (a “DLLP”). A DLLP is a type of general partnership in which a partner's general liability is permitted to be restricted. Unless otherwise agreed, a partner of a DLLP, solely by reason of being a partner of the DLLP, is not personally liable for debts of the DLLP incurred while the partnership is a DLLP, whether such debts arise in contract, tort or otherwise. The DLLP itself, of course, remains liable for its own obligations.

In order to become a DLLP, the terms and conditions on which the general partnership is becoming a DLLP must be approved by the requisite vote, and the partnership must file a statement of qualification with the Secretary of State of the State of Delaware. In addition to including the name of the partnership, the address of its registered office in Delaware and the name and address of its registered agent in Delaware, a statement of qualification must also contain the number of partners of the partnership and a statement that the partnership elects to be a limited liability partnership. In order to remain a DLLP, the partnership must file an annual report with the Delaware Secretary of State of the State and pay a fee based on the number of partners of the DLLP. If the DLLP has filed a statement of partnership existence, it must also pay to Delaware an annual \$200 franchise tax.

Limited Partnerships

Since the Delaware Revised Uniform Limited Partnership Act (the “Partnership Act”) was enacted in January 1983, Delaware has increasingly become a major forum of choice for the organization of limited partnerships. The Partnership Act has been amended periodically since its enactment to keep it responsive to the needs of entrepreneurs and business leaders.

There are now over 51,000 limited partnerships that have been formed in Delaware or have redomiciled to Delaware. The advantages of a Delaware limited partnership include the freedom-of-contract principles that underlie the law of business organizations in Delaware, the ease of forming a limited partnership under the Partnership Act and the protections contained in the Partnership Act relating to the liability of limited partners.

Formation. A Delaware limited partnership is formed under authority of the Partnership Act. A limited partnership is formed by two or more persons or entities, with at least one general partner and one or more limited partners. The Partnership Act permits a limited partnership to conduct any lawful business, purpose or activity with the exception of the business of granting policies of insurance, assuming insurance risks or banking.

It is relatively easy to form a limited partnership under the Partnership Act. Generally, if an understanding exists between at least one general partner and one limited partner concerning the formation of a limited partnership, a limited partnership can be formed by the filing of a certificate of limited partnership with the Secretary of State of Delaware. As with Delaware corporations, no judicial or regulatory approval is required to create a limited partnership. The required contents of a certificate of limited partnership are likewise few - the name of the limited partnership, the address of the registered office of the limited partnership, the name and address of the registered agent of the limited partnership in Delaware for service of process and the name and address of each general partner of the limited partnership. Although the original

certificate of limited partnership must be signed by all of the general partners, the limited partners need not be listed and need not sign the certificate.

In addition to the certificate of limited partnership, to organize a limited partnership there must be a partnership agreement. While it is generally recommended that a partnership agreement be a written instrument, the Partnership Act does permit oral partnership agreements. Most limited partnerships, however, are governed by a detailed written partnership agreement. For example, a partnership agreement would typically contain provisions addressing the admission of partners, the partners' capital contributions, the rights and powers of partners, indemnification rights, allocation of profits and losses among the partners, distributions to partners, the business to be conducted by the limited partnership, sundry tax matters and dissolution and winding up of the partnership. In the absence of certain terms of the partnership agreement governing the affairs of the limited partnership, the Partnership Act's default rules will provide such terms. A partnership agreement is not required to be filed with the Delaware Secretary of State or any other governmental agency.

Limited Liability. In a limited partnership, the general partners are generally liable for the debts and obligations of the limited partnership, but the limited partners who do not participate in the control of the business of the partnership have virtually no risk beyond their investment in the limited partnership and are not generally liable for the debts and obligations of the limited partnership.

Management. Typically, the general partners of a limited partnership conduct the day-to-day business and affairs of the limited partnership and are involved in the management of the limited partnership's business. A limited partner is generally a partner of the limited partnership who does not participate in the management of the business but who invests in the limited partnership in exchange for certain economic rights (including the right to participate in the profits of the business venture).

While a general partner has duties (including fiduciary duties) to a limited partnership and to the other partners, such duties can be modified under the terms of a partnership agreement. Specifically, the partnership agreement may expand, restrict or eliminate a general partner's duties, but a partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing. This flexibility is a significant factor favoring the choice of a Delaware limited partnership as a form of business organization.

While a limited partner does not commonly participate in the management of the limited partnership, Delaware allows limited partners to exercise broad democracy rights without being deemed to be participating in the control of the business and thereby sacrifice protection from general liability. For example, a limited partner may be an independent contractor for or transact business with the limited partnership, be an agent or employee of the limited partnership, or be an officer, director or stockholder

of a corporate general partner, without being deemed to participate in control of the business of the limited partnership. In addition, a limited partner of a Delaware limited partnership can consult with and advise general partners on business affairs, can lend money to the limited partnership, can call, request or attend and participate at meetings of the partners, can serve on committees of the limited partnership, can make determinations relating to investments of the limited partnership and can take such other actions as may be specified in the limited partnership agreement without being deemed to be participating in the control of the business of the limited partnership. This is a significant advantage of the Delaware limited partnership statute, since limited partners can be actively involved in monitoring their investments in the limited partnership without becoming liable as general partners. In comparison, the limited partnership statutes of most other states significantly restrict a limited partner's ability to participate in management without losing the protection of limited liability.

Reorganization And Dissolution. The Partnership Act permits Delaware limited partnerships to reorganize with or into other types of business entities. Permitting one type of business organization to be converted into another type of business organization as a result of changed circumstances is an important advantage to using Delaware as the forum for whatever type of business organization is desired. For instance, a Delaware limited partnership may merge with or convert to many other types of business organizations. Many non-United States entities can be domesticated into a Delaware limited partnership, and a Delaware limited partnership can be transferred to or domesticated in many jurisdictions outside of the United States.

Dissolution of a limited partnership will occur at the time or upon the happening of an event specified in the partnership agreement, or upon the written consent of certain of the partners (depending on the terms of the agreement). Dissolution may occur upon the withdrawal of the last general partner, or if at any time there is no limited partner, unless a successor general partner or limited partner, as the case may be, is timely appointed in accordance with the Partnership Act. The limited partnership may also be dissolved on order of a court if it is no longer reasonably practicable to carry on the limited partnership's business.

Taxation. Limited partnerships, like general partnerships, are not ordinarily structured as taxable entities, but rather as conduits or "flow-through entities" for purposes of liability for and payment of income taxes. By comparison, corporate income is potentially subject to "double taxation," once at the corporate level (in other words, the corporate entity is itself taxed) and again at the stockholder level when dividend income is distributed to the stockholders. In contrast, under U.S. federal tax law, a partnership itself is not subject to income tax, but rather the partners are taxed on their distributive shares of the partnership's taxable income. In addition, cash distributions by a partnership are tax free to the partners to the extent of their respective bases in their partnership interests, and excess distributions are normally taxed at capital-gains rates. By

way of contrast, cash distributions by a corporation (other than an S corporation) are taxable to stockholders as ordinary income to the extent of the current and accumulated earnings and profits of the corporation, and excess distributions are considered a return of capital or capital gain. In addition, in a partnership, special allocations of profits and losses may be made for tax purposes that are disproportionate to equity interests, so long as the special allocations have “substantial economic effect.”

Notwithstanding these normal rules of taxation, it is possible for a partnership, whether general or limited, to elect to be taxed as a corporation for both federal and Delaware income-tax purposes. Such an election, although fairly rare, may be desirable in order to achieve a particular tax objective.

A Delaware limited partnership or a foreign limited partnership registered to do business in Delaware is required to pay a \$200 annual franchise tax to the State.

Limited Liability Limited Partnerships

Delaware law permits the formation of a form of limited partnership known as a Delaware Limited Liability Limited Partnership (a “DLLLLP”). A DLLLLP is a type of limited partnership in which a general partner’s general liability is permitted to be restricted. In a DLLLLP, a general partner is not personally liable for the debts of the limited partnership, and no limited partner would have any liability for the debts of the limited partnership even if it participated in the control of the business of the limited partnership. The DLLLLP itself, of course, remains liable for its own liabilities.

In order to form a DLLLLP, a statement of qualification must be filed with the Delaware Secretary of State. An annual report must also be filed in order to maintain a DLLLLP’s status, and an annual fee based solely on the number of general partners must be paid. A DLLLLP must also pay to Delaware an annual \$200 franchise tax.

III. LIMITED LIABILITY COMPANIES

The Delaware Limited Liability Company Act provides for the formation of limited liability companies, or “LLCs,” that, if so desired and properly structured, will qualify for flow-through income-tax treatment. The owners of a Delaware limited liability company, known as “members,” will not generally be liable for the debts and obligations of the LLC. This contrasts with limited partnerships, in which there is no taxation at the entity level but liability is not limited as to the general partners, and with corporations, which provide for limited liability of all stockholders but are taxed at the entity level (except in the case of S corporations).

The Delaware Limited Liability Company Act’s basic approach is to permit members to have the broadest possible discretion in drafting their limited liability company

agreement and to furnish statutory answers only in situations in which members have not expressly included provisions in their limited liability company agreement. Thus, for example, members of an LLC are free to contract among themselves concerning the management of and standards governing the internal affairs of the LLC, including the establishment of classes of members, voting and procedures for holding meetings of members or considering matters without a meeting. The stated policy of the Delaware Limited Liability Company Act is to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements. As a result of this flexible approach, over 250,000 Delaware LLCs have been formed in the eleven years since adoption of the Delaware Limited Liability Company Act.

Formation. A Delaware LLC is a membership entity formed under the authority of the Delaware Limited Liability Company Act. Any natural person, entity or association may be a member of an LLC. In order to form and organize an LLC, there must be a limited liability company agreement (the “LLC Agreement”). The LLC Agreement will govern the internal affairs of the LLC and the conduct of its business. The LLC Agreement is not required to be publicly filed.

While an LLC Agreement is the cornerstone of an LLC, in order to form a Delaware LLC, one or more authorized persons must also execute and file a certificate of formation. Assuming agreement of the parties to form an LLC, the LLC is deemed to have been formed at the time the certificate of formation is filed with the Secretary of State of Delaware. However, the LLC Agreement can be made effective before, at the time of or after filing the Certificate of Formation. A certificate of formation must set forth the name of the LLC, the address of the registered office and the name and address of the registered agent for service of process on the LLC in Delaware. A certificate of formation may include any other matters that the members determine to include in the certificate.

The Delaware Limited Liability Company Act requires disclosure of only the information needed to put the public on notice of the formation of the LLC. Information such as the identity of the members, their addresses, the amounts of their investments, the nature of the business of the LLC and the LLC’s capital structure need not be set forth in a certificate of formation.

A Delaware LLC may carry on any lawful business, purpose or activity, with the exception of the business of granting policies of insurance, assuming insurance risks or banking. An LLC Agreement should contain provisions dealing with the purposes and powers of the LLC, the powers of the LLC’s members and managers and any desired restrictions on particular LLC activities.

Capital Structure And Management. Members may be admitted upon the later to occur of the formation of the LLC or in the manner provided for in the LLC Agreement or, if the agreement is silent, when the person’s admission is reflected in the records of

the LLC. After the formation of the LLC, a person may be admitted in compliance with the LLC Agreement. A person who is not an assignee of a limited liability company interest will, if the LLC Agreement is silent, be admitted to the LLC as a member upon the consent of all of the Members and when that person's admission is reflected in the records of the LLC. In the case of an assignee of a limited liability company interest, if the LLC Agreement is silent, the assignee will be admitted when its admission is reflected in the records of the LLC. The LLC Agreement may provide for different classes or groups of members having differing rights, powers and duties, including differing voting rights. The LLC Agreement may provide for the manner in which profits and losses of the LLC are to be allocated. If the LLC Agreement does not contain a provision effectively allocating profits and losses, the statute provides for profits and losses to be allocated on the basis of the value of the contributions made by each member to the LLC as stated in the records of the LLC.

The members of an LLC manage the LLC unless the LLC Agreement otherwise provides. The LLC Agreement may provide for management by managers rather than by members, and in such case the LLC Agreement may specify the responsibilities of the managers and may create classes or groups of managers having differing managerial rights, powers and duties. The Delaware Limited Liability Company Act provides that to the extent that a member or manager has duties (including fiduciary duties) to an LLC or to another member or manager (i) any such member or manager acting under an LLC Agreement will not be liable to the LLC or to any other members or managers for such member's or manager's good-faith reliance on the provisions of the LLC Agreement, and (ii) a member's or manager's duties and liabilities may be expanded, restricted or eliminated by provisions in an LLC Agreement. It should be noted that the Delaware Limited Liability Company Act does not define the scope of the duty that a member or manager owes to an LLC and to other members or managers. The Delaware Limited Liability Company Act does, however, enable members and managers to modify any such duty by the terms of the LLC Agreement.

Conversion, Merger, Dissolution And Term Of Existence. The Delaware Limited Liability Company Act contains provisions that authorize an LLC to convert to or from another business entity or to merge or consolidate with or into another limited liability company or other business entity.

The Delaware Limited Liability Company Act provides detailed rules relating to the dissolution and winding up of an LLC. A Delaware LLC has perpetual existence unless otherwise provided in the LLC Agreement. Dissolution will also occur on the happening of any event specified in the LLC Agreement as a trigger for dissolution; on the written consent of members who own more than two-thirds of the then-current percentage or other interest in the profits of the LLC; at any time there are no members, unless the continuation of the LLC without dissolution is provided in the LLC Agreement; or by judicial decree.

Taxation. For federal income-tax purposes, an LLC having two or more members will be classified as a partnership unless the LLC elects to be classified as a corporation. An LLC having only one member will be disregarded as a separate entity for federal income-tax purposes, unless it elects to be classified as a corporation. The federal tax classification of an LLC also determines its classification for Delaware income-tax purposes.

A Delaware LLC or a foreign LLC registered to do business in Delaware is required to pay an annual \$200 franchise tax to the State.

Limitation Of Liability. As noted, a fundamental policy of the Delaware Limited Liability Company Act is to protect members and managers of LLCs against liability to third parties. The Delaware Limited Liability Company Act provides that, except as otherwise provided in that Act, the debts, obligations and liabilities of an LLC, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the LLC. In addition, the Delaware Limited Liability Company Act provides that, except as otherwise provided by that Act, no member or manager of an LLC shall be obligated personally for any debt, obligation or liability of an LLC solely by reason of being a member or acting as a manager of the LLC. Thus, regardless of whether a member or manager actively participates in the business of a Delaware LLC, or controls a Delaware LLC, such member or manager will not be generally liable for the debts and obligations of the LLC.

Unlike the limited liability company statutes in most states, the Delaware Limited Liability Company Act specifically provides that a member or manager may agree in an LLC Agreement or other agreement to be obligated personally for any or all of the debts, obligations and liabilities of a Delaware LLC. Although it would be rare for an LLC Agreement to contain such a provision waiving limited liability, this flexible feature of the Delaware Limited Liability Company Act could be useful in an unusual situation.

IV. STATUTORY TRUSTS

Background. Ordinary common law trusts have been used for centuries to preserve and protect title to property and to minimize taxes. The origins of the modern business trust date back to the early part of the 20th century when they were used as a means of holding real property in jurisdictions where corporations were prohibited. Since that time, the business trust evolved and has been adopted as a vehicle for investment or the conduct of business and has been used in connection with many diverse business transactions. However, many of the common law rules of trust law are anachronistic and created uncertainty in the context of modern commercial transactions. In 1988, Delaware enacted the Delaware Business Trust Act, which expressly recognized the trust as an alternative form of business entity and created a statutory framework to govern its existence. The principal purpose of the Delaware Business Trust Act was

to modernize the common law and provide certainty by codifying Delaware law with respect to the use of trusts in business transactions.

In 2000, the name of the Delaware Business Trust Act was changed to the Delaware Statutory Trust Act, and all Delaware business trusts are now referred to as statutory trusts. The name change was not intended to result in any substantive change in Delaware law. Instead, the name change was intended to eliminate any presumption or inference that a trust formed under the Act is a “business trust” for purposes of Title 11 of the United States Code regarding bankruptcy.

A statutory trust is an unincorporated association that is created by a governing instrument under which property is administered or business or professional activities are carried on by one or more trustees for the benefit of the owners of beneficial interests in the trust property. The Delaware Statutory Trust Act applies to any trust that files a “certificate of trust” with the Delaware Secretary of State.

Delaware statutory trusts have been used in many types of structured financing transactions, such as leveraged leases, and in connection with the issuance of trust-preferred and asset-backed securities. The primary objectives in structured financing transactions are to insulate the property in the statutory trust from a lessee or borrower insolvency and to achieve more favorable tax and accounting treatment than would be the case in a conventional financing transaction. Delaware statutory trusts have also been used in connection with the formation of mutual or investment funds and real estate investment trusts, the shares of which are often publicly traded.

Formation. A statutory trust is formed pursuant to a governing instrument and the filing of a certificate of trust with the Delaware Secretary of State. The governing instrument may be referred to as a trust agreement, a declaration of trust or otherwise. There is no requirement that the governing instrument be filed or recorded in Delaware. The certificate of trust must set forth the name of the statutory trust and the name and the business address of at least one trustee who is a resident of or has a principal place of business in Delaware. The statutory trust is formed at the time of filing of the certificate of trust.

A statutory trust created pursuant to the Delaware Statutory Trust Act is a legal entity separate and apart from its trustees and beneficial owners. A statutory trust may carry on any lawful business or purpose. The governing instrument of a statutory trust includes the trust instrument itself, and may include one or more other documents, such as by-laws.

Except to the extent otherwise provided in the governing instrument of the statutory trust, a Delaware statutory trust has perpetual existence, and the death, incapacity, dissolution, termination or bankruptcy of a beneficial owner will not result in the termination or dissolution of the statutory trust. Upon dissolution at the time set forth

in its governing instrument, and after winding up the affairs of the statutory trust, the statutory trust terminates upon the filing of a certificate of cancellation with the Delaware Secretary of State.

Except as otherwise provided in the Delaware Statutory Trust Act and the governing instrument, other Delaware laws pertaining to trusts are applicable to Delaware statutory trusts.

Ownership. Beneficial owners are not required to make any contribution to the statutory trust in order to receive a beneficial interest. Beneficial interests in a statutory trust are “securities” for purposes of Article 8 of Delaware’s Uniform Commercial Code. The beneficial interests in a Delaware statutory trust may be evidenced by the issuance of trust certificates or by any other method, such as book-entry registration, in conformity with the applicable provisions of the governing instrument of the statutory trust. Except as otherwise provided in the governing instrument, a beneficial owner is entitled to an undivided beneficial interest in the property of the statutory trust and may share in the profits and losses of the statutory trust in the manner set forth in its governing instrument. A beneficial owner’s interest in a Delaware statutory trust is deemed to be personal property notwithstanding the nature of the trust property.

The beneficial interests in a Delaware statutory trust may be fashioned to have a broad spectrum of characteristics, free from the traditional constraints of debt and equity interests. Accordingly, new forms of investment securities may be created with separate rights or powers with respect to specified property or obligations of the statutory trust, or profits and losses associated with specified property or obligations, and, to the extent desired, any such investment security may have a separate business purpose or investment objective. A Delaware statutory trust also has many advantages as a “bankruptcy-remote” vehicle. Because the statutory trust is a legal entity separate from its beneficial owners, the property of the statutory trust is not deemed to be the property of the beneficial owners, and no creditor of a beneficial owner has any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of a Delaware statutory trust. Thus, creditors of the statutory trust are more clearly protected from the possibility of a partition of trust property or the premature termination of the statutory trust upon the death, incapacity, dissolution, termination or bankruptcy of a beneficial owner.

Management. The foremost advantage of the statutory trust is flexibility. The Delaware Statutory Trust Act permits the governing instrument of a statutory trust to establish whatever rights and obligations of the trustees, the beneficial owners and other persons as are desired. The governing instrument also may provide rights to any other person, including a person who is not a party thereto. This flexibility provides an advantage over alternative forms of business organizations and common law trusts that often are subject to mandatory provisions.

The business and affairs of a Delaware statutory trust are typically managed by its trustees. The governing instrument of a Delaware statutory trust may also include provisions for officers, employees or other managers of the statutory trust. The governing instrument may also contain provisions defining the rights, duties and obligations of the trustees, the beneficial owners and other persons. For example, the governing instrument may provide for classes, groups or series of trustees or beneficial owners having such relative rights, powers and duties as are desired by the parties to the governing instrument. The governing instrument of the statutory trust may also provide for the taking of any action, including the amendment of the governing instrument, the accomplishment of a merger, consolidation or conversion, or the sale or other disposition of all or any part of the trust property, with or without the vote or approval of any particular trustee or beneficial owner, as the parties may desire.

Merger, Consolidation And Conversion. A Delaware statutory trust may merge or consolidate with, or convert into, any other corporation, limited partnership, limited liability company or other business entity pursuant to procedures set forth in the Delaware Statutory Trust Act. A merger, consolidation or conversion may be pre-authorized, or may be conditioned upon the approval of a specified class or percentage of trustees or beneficial owners or any other person, as set forth in the governing instrument of the statutory trust. If the governing instrument is silent, all of the trustees and beneficial owners must approve the transaction.

Limitation Of Liability. Neither the trustees nor the beneficial owners of a statutory trust will have any personal liability for the obligations of the statutory trust unless otherwise provided in the governing instrument. A beneficial owner is entitled to the same limitation of personal liability extended to stockholders of corporations organized for profit under the General Corporation Law. A trustee, when acting in such capacity, will not be personally liable to any person other than the statutory trust or a beneficial owner for any act, omission or obligation of the statutory trust or any trustee thereof. Moreover, the duties (including fiduciary duties) and liabilities of trustees, officers, employees, managers or other persons may be expanded or restricted by the governing instrument of the statutory trust.

Taxation. There is no Delaware franchise or other annual tax on statutory trusts formed under the Delaware Statutory Trust Act. In accordance with the desire of the parties, a statutory trust may be taxed for federal and Delaware income-tax purposes as a corporation, a partnership, a trust or otherwise. In addition, a Delaware statutory trust may qualify as a financial asset securitization investment trust, a real estate mortgage investment conduit, a real estate investment trust or a regulated investment company under the Internal Revenue Code and thereby receive preferential tax treatment.

V. JOINT VENTURES

A joint venture is a description generally used to denote two or more persons or entities joining together to conduct a specific business. A joint venture may be structured as a corporation, a general or limited partnership, a statutory trust or a limited liability company, depending on the degree of integration, management structure and tax treatment desired. Regardless of the structure of the joint venture, however, certain elements must be present in order for a court to find that a joint venture has been created: (i) equal division of profits and losses, (ii) equal control over the business venture, (iii) equal ownership in the business venture, and (iv) an implicit agreement to engage in the business for mutual benefit.

Delaware entities are often used to structure joint ventures involving international projects or participants. Using a Delaware entity as the joint venture vehicle permits the participants not only great flexibility in structuring the control and economic terms of the venture, but also access to a sophisticated neutral court, the Delaware Court of Chancery, in the event disputes arise over the conduct of the venture or its continuation. In some cases the desire for ready access to an internationally recognized forum that is neither party's "home turf" has been a deciding influence in choosing to form a joint venture vehicle in Delaware, even if the venture itself does no business in Delaware.

Structural and tax issues should be carefully considered and documented to ensure that the terms of the joint venture are consistent with the expectations of the venturers. Issues such as management of the enterprise, control over use or disposition of contributed assets or technologies, required contributions of capital and permitted distributions of profits, permissibility of alienation of the joint venture interests, and dissolution and winding up of the venture should all be addressed. In some instances, public law will provide some of the requisite mechanisms. For example, Delaware law provides specific mechanisms for dissolving a joint venture organized as a corporation having only two equal stockholders, which might differ from the process that would occur if the joint venture were organized as a partnership, statutory trust or LLC. In addition, depending on the choice of structure, joint venturers may be able to limit or modify their fiduciary duties by contract. In other instances, the venturers will be well advised to handcraft the venture to suit its particular circumstances. Delaware law provides an unparalleled degree of freedom to do this, whichever organizational form is chosen.

VI. NON-PROFIT CORPORATIONS AND COOPERATIVES

A Delaware corporation may be structured as a non-profit entity by including in its certificate of incorporation appropriate language to the effect that the corporation is not organized for profit and related language limiting distributions of corporate

assets to members of the corporation whether on dissolution or otherwise. Normally such corporations are formed as membership corporations and are conducted for religious, scientific, charitable or educational purposes.

Although detailed discussion of the tax rules relating to non-profit corporations is beyond the scope of this Guide, it can be noted generally that if certain technical tax rules are followed, a non-profit corporation can achieve exemptions from both federal and Delaware income tax.

An alternate form of business occasionally used is the cooperative. Except in the case of agricultural cooperatives, which are governed by extensive statutory provisions, the term “cooperative” simply denotes a manner of doing business rather than a distinct organizational form. In this respect, a “cooperative” is similar to a joint venture. There are no separate Delaware statutes governing, defining or regulating non-agricultural cooperatives. Such cooperatives tend to be formed as membership corporations, a structure that facilitates the timely distribution of any profits as patronage dividends or refunds. Cooperatives are sometimes organized among otherwise independent businesses to effect cost savings or streamline administrative tasks. For example, businesses may form marketing cooperatives, purchasing cooperatives, cooperatives to handle substantially similar administrative processing functions or for other similar reasons. Anti-trust considerations must always be kept in mind in considering business cooperatives.

Except in the case of cooperatives for specific purposes organized and operated in conformity with specific federal income-tax rules and limitations, the income-tax treatment of a cooperative entity depends upon the form of entity employed, be it corporation, partnership, trust or other type of entity.

VII. SOLE PROPRIETORSHIPS

A sole proprietorship is the simplest form of business enterprise, consisting of a single proprietor conducting business as an individual. A sole proprietorship has no legal existence apart from its owner. No documents are necessary for the formation of a sole proprietorship, although if the business is conducted under a trade or fictitious name, that name will need to be registered, and business licenses may need to be obtained.

Business conducted in this form subjects the owner to unlimited personal liability. Profits and losses of the enterprise are borne directly by the proprietor. Management of the business is entirely within the control of the proprietor, who by definition is the only person with an equity interest in the enterprise. The enterprise itself cannot be sold since there is complete unity between the enterprise and its owner, but the assets used in the enterprise may be sold. A sole proprietorship terminates on the death of the proprietor.

VIII. ALTERNATIVE BUSINESS STRATEGIES

Sales Representatives. Businesses located outside of the State of Delaware may choose to send representatives to Delaware to enter into sales contracts for the sale of goods or services. There is no requirement that such a business maintain an office in Delaware. Sales representatives often work from their homes or maintain temporary housing at a central location. Generally, the only requirements imposed on these businesses are those with respect to qualifying or registering to do business in Delaware (see Chapter Three, “**Trade Regulation.**”) and those generally applicable to the sale of goods under Article 2 of the Delaware Uniform Commercial Code.

Branch Offices. Many businesses establish branch offices in Delaware to conduct business within the State without forming a separate legal entity in Delaware. This has been accomplished with various types of businesses, including law firms and accounting firms. When a branch office is established, the requirements for qualification or registration to do business in Delaware referenced above must be considered.

Distributors. A manufacturing enterprise may also avail itself of the Delaware market through one or more distributors or franchise distributors. The use of a distributor enables the manufacturer to supply and sell its goods in Delaware without establishing a branch office or hiring sales representatives to travel to or reside in the State. Again, the enterprise must consider whether it will be required to qualify or register to do business in Delaware.

DELAWARE



TRADE REGULATION

Delaware's trade regulation laws balance consumer protection and business interests to maintain a healthy marketplace.

I. REQUIREMENTS FOR FOREIGN CORPORATION QUALIFICATION

Before a foreign corporation (one organized anywhere other than Delaware) may do business in Delaware, Delaware law requires that it qualify to do business in the State. The qualification is generally required to be made whether the business proposed to be done in the State will be conducted through or by branch offices, agents or representatives in Delaware.

For a foreign corporation, the process of qualifying to do business in Delaware entails paying a fee and filing with the Delaware Secretary of State a certificate from its jurisdiction of incorporation evidencing its corporate existence and a statement setting forth (i) the name and address of the foreign corporation's registered agent in Delaware, (ii) the assets and liabilities of the foreign corporation as of a date within six months of the filing date, and (iii) the business the foreign corporation proposes to do in the State and a statement that it is authorized to do that particular business in its jurisdiction of incorporation. To maintain its qualification, a foreign corporation is required to file an annual report on or before the 30th day of June in each year. Once the foreign corporation meets the qualification requirements, the Delaware Secretary of State issues a certificate of qualification, which is *prima facie* evidence of the right of the foreign corporation to do business in Delaware. When a foreign corporation registers to do business in Delaware, the corporation consents to the general jurisdiction of Delaware courts.

Delaware law provides for a number of exceptions to the requirement of qualification. Qualification is not required where a foreign corporation merely (i) is in the mail order business accepting orders outside of Delaware and filling them with goods shipped into Delaware, (ii) employs salespersons to solicit orders in Delaware, with all orders approved and all goods shipped from outside Delaware, and with no sales, repairs or replacements made from stock located in Delaware, (iii) delivers equipment to locations within Delaware pursuant to a contract made outside Delaware, where installation of the equipment requires skilled supervision and such supervision is furnished pursuant to the contract, (iv) is engaged in Delaware in business activities that are wholly interstate in character, (v) is an insurance company, (vi) creates, as borrower or lender, or acquires evidences of debt, mortgages or liens on property, or (vii) secures or collects debts or enforces any rights in property securing the same.

Foreign corporations that do business in Delaware without having first qualified are subject to fines. A foreign corporation transacting business without having qualified will also be deemed to have appointed the Delaware Secretary of State as its agent for service of process in any action against it in Delaware arising out of any business transacted by it in Delaware. In addition, a non-qualified foreign corporation doing

business in Delaware is not permitted to bring any action, suit or proceeding in Delaware until it has been qualified and has paid all fees, penalties and franchise taxes for the time it did business in Delaware without authority.

II. REGISTRATION REQUIREMENTS FOR FOREIGN LIMITED PARTNERSHIPS, LIMITED LIABILITY COMPANIES AND STATUTORY TRUSTS

In order for a foreign limited partnership, limited liability company or statutory trust (one organized anywhere other than Delaware) to do business in the State, it must comply with the provisions of Delaware law requiring registration with the Delaware Secretary of State.

To register, a foreign limited partnership must pay a fee and file with the Delaware Secretary of State an application for registration, executed by a general partner, setting forth (i) the name of the foreign limited partnership (and any other name it proposes to do business under in Delaware), (ii) the jurisdiction and date of its organization and a statement that it validly exists as a limited partnership under the laws of the jurisdiction where it was organized as of the date of filing, (iii) the nature of the business to be conducted in Delaware, (iv) the address of its registered office and the name and address of its registered agent in Delaware for service of process, (v) a statement that the Delaware Secretary of State is appointed the agent of the foreign limited partnership for service of process under certain circumstances, (vi) the name and address of each general partner, and (vii) the date on which the foreign limited partnership commenced or will commence to do business in the State.

A foreign limited liability company desiring to register in Delaware must pay a fee and file an application for registration with the Delaware Secretary of State. The application must set forth (i) the name of the foreign limited liability company (and any other name to be used by it to do business in Delaware), (ii) the jurisdiction and date of its formation and a statement that, as of the filing, it validly exists as a limited liability company under the laws of the jurisdiction of its formation, (iii) the nature of the business to be conducted in Delaware, (iv) the address of its registered office and the name and address of its registered agent in Delaware for service of process, (v) a statement that the Delaware Secretary of State is appointed its agent for service of process under certain circumstances, and (vi) the date on which business in Delaware commenced or will commence.

A foreign statutory trust desiring to register in Delaware must pay a fee and file an application for registration with the Delaware Secretary of State. The application must set forth (i) the name of the foreign statutory trust (and any other name to be used by

it to do business in Delaware), (ii) the jurisdiction and date of its formation and a statement that, as of the filing, it validly exists as a statutory trust under the laws of the jurisdiction of its formation, (iii) the nature of the business to be conducted in Delaware, (iv) the address of its registered office and the name and address of its registered agent in Delaware for service of process, (v) a statement that the Delaware Secretary of State is appointed its agent for service of process under certain circumstances, and (vi) the date on which business in Delaware commenced or will commence.

If a foreign limited partnership, limited liability company or statutory trust fails to register as described above, it cannot maintain any action, suit or proceeding in Delaware until it cures its failure to register and pays all fees and penalties for the time it did business in Delaware without having registered. A fine may be imposed for each year or part of a year during which a failure to register continues.

III. USURY LAWS

Delaware law provides only limited usury restrictions. There is no limitation on the rate of interest that may legally be charged where (i) the borrower is a corporation, limited partnership, statutory trust, business trust, limited liability company or association or joint stock company having any of the powers and privileges of corporations not possessed by individuals or partnerships, or (ii) the amount of money loaned or used exceeds \$100,000 and repayment is not secured by a mortgage against the principal residence of the borrower. An individual who has guaranteed the obligations of a corporate borrower may not assert a usury defense, because Delaware law prevents the corporate borrower from doing so.

The State's limited usury restrictions do not apply to loans made by Delaware banks, trust companies, depository institutions organized under federal law and having their principal place of business in Delaware or lenders licensed under Delaware's Licensed Lender Statute. As a result, Delaware has become a center for lending by consumer institutions that issue credit cards because these institutions are permitted to "export" this absence of usury restrictions to credit relationships with customers nationwide.

For the few commercial situations where Delaware's usury restrictions are applicable, the lender may charge interest at any rate agreed upon in writing not in excess of 5% over the Federal Reserve discount rate, including any surcharge thereon. In the event the rate of interest charged exceeds the lawful rate, the borrower is not required to pay the excess and can, at his option, retain and deduct the excess from the amount of any debt. If the entire debt is paid with interest exceeding the lawful rate and the borrower brings an action to recover within one year of payment, the borrower may recover the greater of three times the amount of the excess interest or \$500.

IV. BUSINESS LICENSES

In order to engage in most categories of business or occupation in Delaware, a Delaware business license must be procured. The annual fees for these licenses vary, depending on the business or occupation and the number of branch offices. In addition, there is normally an additional license fee based on taxable gross receipts or rental payments that varies in rate and amount of allowable exclusions depending on the particular business or occupation. (See Chapter Four, “**Delaware Taxation — Gross Receipts Taxes.**”)

V. RESTRICTIONS ON SPECIFIC PROFESSIONS

Delaware prescribes standards and restrictions for a wide range of specific professions and occupations. The statutory framework establishes licensing, certification, qualification and permitting requirements, sets standards for professional schools and establishes self-governing boards responsible for overseeing the activities of practitioners under their jurisdiction.

Set forth below is a list of some of the more common occupations regulated by Delaware law:

Accountant	Operator of Adult Entertainment Establishment
Architect	Operator of Hotel, Restaurant or Place of Entertainment
Barber	Optometrist
Chiropractor	Pawnbroker
Clinical Social Worker	Pharmacist
Cosmetologist	Physical Therapist
Deadly Weapon Dealer	Physician
Dentist	Plumber
Dietitian	Podiatrist
Electrical Contractor	Private Investigator
Funeral Service Provider	Professional Counselor
Geologist	Professional Engineer
Land Surveyor	Psychologist
Landscape Architect	Real Estate Broker
Massage/Bodywork Practitioner	Speech Pathologist
Nurse	Veterinarian
Nursing Home Administrator	
Occupational Therapist	

VI. BUSINESS NAME REGISTRATION

Delaware law provides that any person, firm or association engaging in business in Delaware under a trade or fictitious name must file a certificate with the Prothonotary (clerk of the Superior Court) of each county in which such business is being conducted. The purpose of this requirement is protection of consumers from the activities of otherwise unidentifiable persons or organizations engaging in business under other names. The requirement has been held to apply to corporations doing business under fictitious trade names. By analogy, the requirement would also apply to any statutory entity, including a limited partnership, limited liability company or statutory trust, doing business under a trade or fictitious name that is different from the name recited in its certificate of organization or formation.

The registration certificate is a standardized form and includes the disclosure of the trade or fictitious name to be used and the names of the owners of the business. Failure to file may result in a fine.

VII. WARRANTIES

Sellers of goods within Delaware need to be aware of the provisions of Delaware law governing warranties. A warranty is a promise or agreement by the seller that the seller has good title to an article or good or that an article or good has certain qualities. In this context, Delaware law provides for warranties of title, warranties of quality, an implied warranty of fitness for a particular purpose and implied warranties arising from a course of dealing or usage of trade.

Generally under Delaware law, a contract for sale includes a warranty by the seller that the seller has good title to the goods being transferred, that the transfer is rightful and that the goods are delivered free from any lien or encumbrance of which the buyer has no knowledge. Warranties of title may be excluded or modified only by specific contract language or by circumstances giving the buyer reason to know the seller has no title or that the seller is transferring only such title as the seller has.

A seller may create an express warranty by affirming a fact or making a promise to the buyer relating to the goods that becomes a part of the basis of the transaction between them. In addition, product descriptions and samples or models of the goods that similarly become a part of the basis of the transaction create express warranties that the goods will conform.

Certain warranties about goods may also be implied in a transaction, unless modified or excluded. Where the seller is a merchant of goods of the kind being sold, the seller is deemed to warrant that the goods are merchantable. Delaware law provides standards for determining merchantability and for effectively modifying or excluding an

implied warranty of merchantability. Where the seller has reason to know that the buyer will use the goods for a particular purpose and that the buyer is relying on the seller's skill or judgment to select goods suitable for such purpose, the seller is deemed to warrant that such goods will be fit for such purpose. Again, Delaware law provides standards for effectively modifying or excluding the warranty.

The warranties described above extend to the immediate buyer and, in some cases, to third parties. The justification for extending warranties to third parties is that the seller, by marketing its product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it. Thus, a seller's warranty, whether express or implied, extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by a breach of such warranty.

In an action based on breach of warranty, Delaware law requires the buyer to show not only the existence of the warranty but also that the warranty was breached and an injury or loss was thereby sustained. If these elements are proven, there are certain remedies available to the buyer, including monetary damages or specific performance of the contract.

VIII. CONSUMER PROTECTION

Business in Delaware must be conducted with Delaware's consumer protection laws in mind. These laws protect consumers from the intentional false advertisement of goods. They also prohibit any person engaged in Delaware in the production, manufacture or distribution of any commodity from intentionally engaging in price discrimination for the purpose of destroying competition. Deceptive trade practices such as passing off goods or services as those of another, deceiving the public with respect to the origin of the goods or representing that goods are original or new if they are altered, reconditioned, used or reclaimed are prohibited. Fines may be imposed for violations, and a Delaware court may also award injunctive relief. Similar Delaware law provisions apply with respect to deceptive business practices and unfair trade practices in the insurance industry and the telemarketing industry.

Businesses involved with retail installment sales of goods or services are regulated by laws that impose requirements concerning what is to be included in a retail installment sales contract, insurance, delinquency charges, service charges, refinancings and monthly statements of account.

IX. REGULATION OF FRANCHISES

Delaware law protects franchise distributors who are economically dependent upon the sale of the franchisor's products and who have used their efforts in promoting the products. A franchise distributor who is "unjustly" terminated may be entitled to damages or an injunction, which may be issued under principles of equity. "Unjust" termination includes, among other things, the franchisor's failure to renew the franchise agreement without cause, the franchisor's charging unreasonable or excessive rent for the lease of real or personal property and the franchisor's failure to renew the lease of such property except upon the payment of unreasonable or excessive rent. Proof of monetary damage, loss of profits or intent to deceive is not required. A Delaware court may also award reasonable attorneys' fees and expenses for unjustly terminating a franchise.

Some states have passed somewhat more intrusive laws imposing greater restrictions on franchise operations. For example, the laws in some states impose on both parties a "duty of good faith" in the performance and enforcement of a franchise agreement. Delaware has not yet chosen to enact laws such as these.

X. STATE ANTI-TRUST LAW

Delaware's anti-trust statute supplements the substantial anti-trust provisions of federal law. The purpose of the Delaware statute is to promote the public benefits of a competitive economic environment based upon free enterprise. The State anti-trust law protects trade and commerce from unlawful restraints, price discrimination, price fixing and monopolies. It is not, however, intended to prohibit the existence of labor organizations and other associations formed for the purpose of mutual help. In addition, the statute does not forbid any conduct or arrangement approved or required by a regulatory board of Delaware or the United States, or a non-profit corporation, trust or organization established for religious or charitable purposes (but only to the extent that the activity is religious or charitable in nature). The penalties for a violation of the Delaware anti-trust statute may include monetary civil penalties, equitable relief, or both. The Attorney General of Delaware may bring suit on behalf of all natural persons residing in the State for a violation of this statute.

DELAWARE



TAXATION

Unique incentives in Delaware's tax laws make it a recognized center for investment activities and financial services.

This section contains a general summary of those provisions of Delaware tax law most relevant to investment and business activities in the State. The discussion that follows is necessarily general in nature and is not intended to be an all-inclusive analysis of Delaware tax statutes, rules and regulations.

I. PERSONAL INCOME TAX

Residents

Definition Of Residency. Since an individual who is considered to be a State resident is subject to Delaware personal income tax on his worldwide income, while a nonresident is subject to Delaware tax only on Delaware-source income, the determination of whether an individual is a resident of the State is critical. An individual is considered to be a Delaware resident if either (i) he is domiciled in the State, or (ii) he both “maintains a place of abode” in Delaware and spends an aggregate of more than 183 days of the taxable year in the State. An individual is considered to have a Delaware domicile if the State is the place he intends to be his permanent home and to which he intends to return whenever he may be absent. Therefore, an individual who is a permanent resident of another jurisdiction and who is temporarily present in Delaware for business or investment activities will not be classified as a Delaware domiciliary. Further, even if such an individual maintains a place of abode in Delaware, he will not be subject to Delaware personal income tax as a State resident if he is not physically present within the State for more than 183 days during the taxable year. An individual who is present in a foreign country for at least 495 full days in any consecutive 18-month period during which such individual is not present in Delaware for more than 45 days, who does not maintain a permanent place of abode in Delaware at which his spouse, children or parents are present for more than 45 days, and who is not an employee of the United States government (including service in the armed forces) is not considered a Delaware resident during such 18-month period.

Similarity To Federal Taxation. The computation of the Delaware income-tax liability of a State resident is relatively simple and straightforward since Delaware “piggybacks” on the federal income-tax system. Delaware taxable income is equal to federal adjusted gross income, with certain modifications discussed below, and less the deductions and personal exemptions allowed by Delaware law.

Delaware Modifications. Delaware law requires a number of additions to and subtractions from federal adjusted gross income in computing Delaware adjusted gross income. The principal additions include: (i) interest exempt from federal income tax on obligations issued by other states and their political subdivisions, (ii) percentage depletion of oil and gas wells to the extent in excess of cost depletion, and (iii) any net operating loss carryback allowed for federal purposes in excess of \$30,000.

The more significant subtractions from federal adjusted gross income include (i) interest on obligations issued by the United States and its instrumentalities, (ii) refunds of Delaware income tax, (iii) \$2,000 (\$4,000 for a joint return) if certain conditions of age or disability and maximum income are satisfied, (iv) \$2,000 of pension and certain other retirement income (\$12,500 if age 60 or older), (v) social security benefits paid by the United States, to the extent included in federal adjusted gross income, and (vi) a carryforward deduction for net operating losses that were precluded from being carried back in previous years because of Delaware's \$30,000 annual limit on net operating loss carrybacks.

Deductions. A Delaware resident may either itemize deductions or claim a standard deduction. The standard deduction is \$3,250, except that in the case of a husband and wife the standard deduction is \$6,500 if a joint return is filed. The standard deduction is increased by \$2,500 for an individual age 65 or over and by \$2,500 for an individual who is blind.

If an election is made to itemize deductions, a Delaware resident's itemized deductions are equal to the sum of his itemized deductions allowable on his federal return, with certain modifications. The principal modifications require reduction of federal itemized deductions by the amount claimed as a deduction for (i) Delaware income taxes, and (ii) income taxes paid to other states and the District of Columbia if a Delaware credit is claimed for such taxes. A husband and wife may elect to itemize deductions only if both do so.

Personal Credits. A Delaware resident is allowed a credit of \$110 for each personal exemption allowable for federal income-tax purposes. A Delaware resident age 60 or over is allowed an additional \$110 credit.

Tax Rates. Delaware personal income tax is computed by applying a progressive rate schedule against Delaware taxable income, computed in the manner described above. The lowest rate is 2.2%, and the maximum rate, imposed on Delaware taxable income exceeding \$60,000, is 5.95%.

Credits. A number of credits against the Delaware personal income tax are available. A credit is allowed for taxes paid to states other than Delaware (or paid to the District of Columbia) on income derived from sources in such other states, subject to limitations. A Delaware credit is also allowed for 50% of the child and dependent care expense credit allowable for federal income-tax purposes. In addition, credits against the Delaware personal income tax are provided for (i) donations of land for conservation or historic preservation purposes, (ii) expenditures incurred in the rehabilitation of historic structures, (iii) certain combinations of capital investment and increased employment in the State, (iv) certain reductions of waste release, processing of waste materials and use of recycled materials certified by the Department of Natural Resources and Environmental Control and by the Delaware Economic Development Office,

(v) qualified investment in certain qualified State businesses certified by the Delaware Economic Development Office, and (vi) qualified research and development expenses. (For a more detailed description of certain of these credits, see “**Corporate Income Tax—Credits**” in this Chapter below.)

Nonresidents

An individual not considered a Delaware resident under the definition discussed above is subject to the personal income tax of the State only on his Delaware-source income. The method of computing the State tax requires, however, that there be taken into account a nonresident’s income from all sources. More specifically, the Delaware income tax of a nonresident individual is computed in the same manner as if he were a State resident (*i.e.*, without regard to source of income), but the amount of tax so computed is then multiplied by a fraction, the numerator of which is the nonresident’s “modified Delaware source income” and the denominator of which is his Delaware adjusted gross income. Delaware adjusted gross income for a nonresident is computed in the same manner as the Delaware adjusted gross income of a resident (*i.e.*, federal adjusted gross income with Delaware modifications). Modified Delaware source income, the numerator of the fraction, is federal adjusted gross income (with the Delaware modifications) only to the extent derived from sources within the State. The effect of this formula is to subject a nonresident’s Delaware-source income to the same State tax rate as would be applicable if all of his income were from Delaware sources.

Sources Of Income. In computing a nonresident’s modified Delaware source income, only those items of income, gain, loss and deduction entering into his federal adjusted gross income that are derived from Delaware sources (and that portion of the Delaware modifications that relate to Delaware-source income) are taken into account. Items considered to have a Delaware source include those attributable to (i) wages, salaries and other compensation (other than from pensions) received as an employee for personal services rendered in Delaware (or attributable to employment in Delaware not required to be performed elsewhere), (ii) the ownership or disposition of any interest in real or tangible personal property in the State (including dividends received from a real estate investment trust attributable to rent from, or gain from the disposition of, Delaware real property), (iii) a business, trade, commerce, profession or vocation carried on in Delaware, and (iv) winnings from pari-mutuel wagering derived from the conduct of pari-mutuel activities within Delaware. A nonresident’s modified Delaware source income also includes his distributive share of Delaware-source partnership and S corporation income and deductions and his share of the Delaware-source income and deductions of an estate or trust of which he is a beneficiary.

Income From Intangibles. Delaware law provides a favorable rule relating to income from intangible personal property, including interest, dividends, annuities and gains from the disposition of intangible personal property. Such income is treated as having

a Delaware source “only to the extent such income is from property employed by the taxpayer in a business, trade, commerce, profession or vocation carried on in the State.” Moreover, intangible assets that are treated as held for investment for federal income-tax purposes are not treated as so employed by the taxpayer unless they constitute integral parts of the taxpayer’s regular trade or business operations. Thus, a nonresident individual’s gains from the sale of stock, bonds or other securities would be subject to Delaware taxation only if such stock, bonds or other securities were employed by such individual in a Delaware trade or business, which would rarely be the case. As another example, interest income received by a nonresident on a bank or brokerage account maintained in Delaware would not be considered Delaware-source income unless the acquisition, management and disposition of such account constituted an integral part of the taxpayer’s regular Delaware trade or business. Further, a nonresident’s distributive share of partnership or S corporation income derived from intangible personal property would be considered Delaware-source income only to the extent such property was employed by the partnership or S corporation in a Delaware trade or business. These rules make Delaware an attractive jurisdiction for the management of portfolio investments and other intangible personal property.

Withholding

Every Delaware employer paying wages or other compensation to a resident or to a nonresident who is subject to Delaware income tax is required to withhold tax from such wages or other compensation and pay over the amount withheld to the State.

County And Municipal Income Taxes

Counties in Delaware do not have the power to impose any tax upon income. Additionally, except for the State’s largest city, Wilmington, no municipality has the power to impose an income tax.

The City of Wilmington imposes an “earned income tax” at the rate of 1.25% on (i) the salaries, wages, commissions and other compensation of individuals who are City residents, regardless of the place where services are performed, (ii) the salaries, wages, commissions and other compensation of individuals who are not Wilmington residents for work done or services rendered in the City, and (iii) the net profits of businesses and professions conducted by Wilmington residents or conducted within the City by nonresidents. The Wilmington earned income tax is imposed on individuals, partnerships, associations and other unincorporated enterprises.

II. CORPORATE INCOME TAX

Delaware imposes a flat 8.7% corporate income tax on business and investment activity within the State. Federal taxable income, with certain modifications described below, is the base for the Delaware corporate income tax. Since Delaware does not employ a unitary tax system, income allocable to non-Delaware sources is not subject to the Delaware tax. Consolidated and combined returns are neither required nor permitted in Delaware.

Modifications

The more significant additions to federal taxable income in computing Delaware taxable income include (i) interest on obligations issued by other states and their political subdivisions, (ii) income taxes paid to any state (including Delaware) or political subdivision, (iii) percentage depletion of oil and gas wells to the extent in excess of cost depletion, (iv) losses from the sale or other disposition of securities issued by the United States or its instrumentalities or by Delaware or its political subdivisions, and (v) any net operating loss carryback allowed for federal purposes in excess of \$30,000.

The more significant subtractions from federal taxable income in computing Delaware taxable income include (i) dividends, interest and royalties for which foreign tax credit is allowable for federal income-tax purposes, (ii) interest income from securities issued by the United States or its instrumentalities, (iii) interest income from advances, loans and contractual transactions between corporations subject to the Delaware corporate income tax that are eligible to file a consolidated federal income-tax return, provided that the paying corporation does not deduct such interest in computing its Delaware taxable income, (iv) gains from the sale or other disposition of securities issued by the United States or its instrumentalities or by Delaware or its political subdivisions, (v) up to \$5,000 of the cost of renovating a building to remove features that restrict use by physically handicapped persons, and (vi) net operating losses that were precluded from being carried back in previous years because of Delaware's \$30,000 annual limit on net operating loss carrybacks.

Allocation Rules

Delaware has not adopted the Uniform Division of Income for Tax Purposes Act, and Delaware law contains specific allocation rules that allocate certain categories of income specifically to Delaware or to another state. Income specifically allocated under these rules is not subject to apportionment under the three-factor formula discussed below. The specific allocation rules allocate (i) rents and royalties (less related expenses) from tangible property to the state in which the property is physically located, (ii) patent

and copyright royalties (less related expenses) to the state or states in which the product or process protected by the patent is manufactured or used, or in which the publication protected by the copyright is produced or printed, (iii) gains and losses from the sale or other disposition of real property to the state in which such property is physically located, (iv) gains and losses from the sale or other disposition of depreciable tangible property to the state where the property is physically located or normally used in the taxpayer's business, and (v) interest income (including discount), less related expenses, to the state where the transaction took place that resulted in the creation of the obligation with respect to which the interest was earned. These allocation rules can in appropriate circumstances result in income being allocated, for Delaware purposes, to other states even though such income is not subject to tax in such other states.

Apportionment Rules

If a corporation conducts its entire business operations within Delaware, all of its Delaware taxable income not subject to the specific allocation rules discussed above is apportioned to Delaware. For those corporations conducting interstate businesses, unallocated corporate income is apportioned to Delaware on the basis of an equally weighted three-factor formula that averages the ratios of (i) Delaware real and tangible personal property to total real and tangible personal property, (ii) Delaware wages, salaries and other compensation paid to employees within the State to total wages, salaries and other compensation paid to all employees, and (iii) gross receipts from Delaware sources to total gross receipts. The resulting apportionment percentage is applied to a corporation's entire Delaware taxable income, excluding specifically allocated income.

Credits

Delaware law provides a number of credits against its corporate income tax (and also against its personal income tax), including the following credits of particular interest to businesses:

Economic Development Credits. A \$400 credit for each new qualified employee and an additional \$400 credit for each \$100,000 of qualified investment are available for minimum investments of \$200,000 in a new or expanded facility resulting in the creation of five or more jobs. These tax credits have a 10-year life and are available to (i) manufacturers, (ii) wholesalers, (iii) laboratories or similar facilities for the purpose of scientific, agricultural or industrial research, development or testing, (iv) computer processors or data preparation or processing service providers, (v) engineering service providers, (vi) providers of consumer credit reporting services, (vii) wholesale sellers of computer software, (viii) providers of telecommunications services, (ix) providers of aviation services, and (x) administration, management and support operations (including marketing) for any of the preceding activities.

Targeted Area Credits. The 10-year Economic Development Credits are increased to \$650 for each new qualified employee and \$650 for each \$100,000 of qualified investment if the new or expanded facility is located on or in (i) real property owned by the State or any of its political subdivisions or agencies, (ii) real property owned by non-profit organizations organized and operated solely for the purpose of fostering economic development within Delaware, (iii) any area approved by the U.S. Department of Commerce as a general purpose foreign trade zone, or (iv) any of 30 specified low-income “1990 Delaware census tracts,” as defined by the U.S. Department of Commerce, Bureau of the Census, which are located throughout the State (the Delaware Economic Development Office has maps available of the designated census tracts).

Brownfield Credits. In the case of a new or expanded facility located on a “brownfield” (defined as a vacant or unoccupied site that the taxpayer reasonably believes may be environmentally contaminated), the \$400 Economic Development Credits are increased to \$650 credits and the \$650 Targeted Area Credits are increased to \$900 credits. For either type of brownfield credit, amounts expended by the taxpayer for environmental investigations and remediations of the brownfield are treated as additional qualified investment.

Credits For Commercial Or Retail Activities In Low-Income Census Tracts. A taxpayer engaged in a commercial or retail activity in any of 30 specified low-income census tracts can qualify for the 10-year Economic Development Credits of \$400 for each new qualified employee and \$400 for each \$100,000 of qualified investment.

Green Industry Credits. Manufacturers that reduce chemical wastes by at least 20% or other wastes by at least 50% can qualify for \$400 tax credits for each 10% reduction. These credits have 5-year lives. In the case of (i) manufacturers at least 25% of whose raw materials are recycled materials or materials removed from the solid waste stream, (ii) taxpayers engaged in the business of processing materials removed from the solid waste stream for resale as raw materials to manufacturers, and (iii) taxpayers engaged in the business of collecting materials for recycling and distributing recycled materials, Economic Development Credits are available at the increased rate of \$650 for each new qualified employee and \$650 for each \$100,000 of qualified investment (or at the rates of \$900/\$900 if in a targeted area).

Research And Development Credits. For taxable years ending before 2006, a taxpayer may, subject to certain limitations, elect a credit for amounts paid or incurred for research and development equal to (i) 10% of the excess of the taxpayer’s total Delaware qualified research and development expenses for the taxable year over its “base amount,” as defined for federal income-tax purposes but limited to Delaware expenses and Delaware activities, or (ii) 50% of Delaware’s apportioned share of the taxpayer’s federal research and development tax credit calculated using the alternative incremental credit method. Unused credits may not be carried back but may be carried forward 15 years.

Exemptions From Tax

Delaware law provides complete exemption from State corporate income tax for specific types of corporations or for corporations whose activities within Delaware are limited to certain prescribed activities. Among the more significant exemptions from Delaware corporate income tax are the following:

- A corporation maintaining a statutory corporate office in Delaware but not doing business within the State. As a result of this exemption, a corporation incorporated under the General Corporation Law of Delaware whose only other connections with Delaware are its Delaware registered agent and Delaware registered office is exempt from the State income tax (and all other Delaware taxes other than the corporate franchise tax).
- A Delaware investment company, as further described below.
- A corporation having in effect a valid election under Subchapter S of the United States Internal Revenue Code. Although an S corporation is exempt from Delaware corporate income tax, an S corporation doing business in Delaware that has any nonresident stockholders is required to make estimated personal income tax payments to Delaware on behalf of such nonresident stockholders.
- An entity that is registered as an investment company under the federal Investment Company Act of 1940.
- An entity that qualifies under federal tax law as a real estate investment trust (REIT).
- An entity that qualifies under federal tax law as a real estate mortgage investment conduit (REMIC).
- An insurance company paying Delaware tax on gross premiums, as further described below.
- A banking organization subject to the Delaware bank franchise tax, as further described below.
- A building and loan association subject to the Delaware building and loan association franchise tax.
- A captive insurance company subject to the Delaware tax on premiums, as further described below.

Delaware Investment Companies

The exemption of Delaware investment companies from State corporate income tax (and also from State gross receipts tax) is a feature of Delaware law that has been utilized by more than 7,500 companies (including many “Fortune 500” and foreign-based multinational companies) as a means of reducing state income taxes. The statutory definition of Delaware investment companies is:

Corporations whose activities within this State are confined to the maintenance and management of their intangible investments or of the intangible investments of corporations or statutory trusts or business trusts registered as investment companies under the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-1 et seq.) and the collection and distribution of the income from such investments or from tangible property physically located outside this State. For purposes of this paragraph, “intangible investments” shall include, without limitation, investments in stocks, bonds, notes and other debt obligations (including debt obligations of affiliated corporations), patents, patent applications, trademarks, trade names and similar types of intangible assets.

A corporation’s qualification as a Delaware investment company is dependent on the nature and extent of the activities engaged in by such corporation within Delaware. So long as a corporation limits its activities within the State to holding and managing its intangible investments and collecting and distributing the income from such intangible investments (or from tangible property physically located outside of the State), complete exemption from Delaware corporate income tax is available.

Delaware investment companies have been used in a wide variety of ways to reduce state income taxes. Among the more common uses of Delaware investment companies are the following:

- The holding of stock, bonds, notes, certificates of deposit and other portfolio assets. The dividends, interest and other income received by a Delaware investment company from such assets are exempt from Delaware corporate income tax and can avoid income taxes imposed by other states.
- The holding of patents, trademarks, copyrights and other intellectual property, and the licensing of the use of such intellectual property in exchange for the payment of royalties or license fees. Not only is there exemption from Delaware income tax for such royalties and license fees, but also the licensee, under appropriate circumstances, may be able to deduct the royalty or license payments in computing its liability for state income tax in those jurisdictions in which the licensee is subject to tax.

- The sale of unwanted intangible assets without Delaware income tax on any gain from such sale and without, in appropriate circumstances, income taxes that might otherwise be imposed upon such gain by other states.
- The making of loans to an affiliate, thereby generating, in appropriate circumstances, an interest-expense deduction to the affiliate in its domiciliary jurisdiction without the interest received by the Delaware investment company being subject to Delaware income tax.

Headquarters Management Corporations

A headquarters management corporation (“HMC”), although not exempt from Delaware tax, is subject to a favorable tax regime in Delaware that could make this new type of entity an attractive alternative for a business seeking to reduce its overall state tax liability. An HMC, in addition to engaging in the traditional activities of a Delaware investment company of maintenance and management of intangible investments, can also provide services to affiliated entities. Taxable income from an HMC’s investment activities is nominally subject to tax at a rate of 4%, and taxable income derived from providing services to affiliates (or managing the intangible investments of affiliates) is nominally subject to tax at a rate of 8.7%. However, the resulting Delaware tax liability of an HMC can be reduced in each of its first 10 years of qualification as an HMC by up to an aggregate 99% reduction (i) at the rate of 20% for each full-time employee of the HMC in Delaware, and (ii) at the rate of 2% for each \$7,500 of qualified expenditures in Delaware. In addition, a \$400 credit is allowed in each of the first five years in which an HMC employs five or more qualified employees for each such employee who is a new employee. An HMC is, however, subject to an annual minimum tax of \$5,000 and must also pay to the State a \$5,000 annual license fee. An HMC is exempt from the payment of gross receipts tax.

Banking Organizations

In lieu of the Delaware corporate income tax, a bank, trust company, other banking organization and any subsidiary corporation of a banking organization is liable for a Delaware franchise tax on “taxable income.” For this purpose, “taxable income” is defined as 0.56% of net operating income before taxes, with certain modifications. The Delaware bank franchise tax employs a regressive rate schedule with a maximum rate of 8.7% of “taxable income” not in excess of \$20 million and a minimum rate of 1.7% of “taxable income” in excess of \$650 million. Since the tax may be computed on a basis that consolidates the income of a banking organization with the income of its subsidiary corporations, the tax advantage of this regressive rate schedule can be maximized.

Insurance Companies

In lieu of the Delaware corporate income tax, an insurer doing business in Delaware, other than a captive insurance company, a workmen's compensation insurer or a wet marine and transportation insurer, is liable for a general premium tax of 1.75% on net premiums from policies covering Delaware risks. Most insurers chartered under Delaware law (other than certain mutual insurers) having annual gross receipts of \$1 million or more are also required to pay annual Delaware "privilege taxes" ranging from a minimum of \$10,000 to a maximum of \$95,000.

Captive Insurance Companies

In lieu of the Delaware corporate income tax, a captive insurance company is liable for a tax on gross premiums collected or contracted for on policies or contracts of insurance covering property and risks in the State and on property and risks situated elsewhere upon which no premium tax is otherwise paid. The Delaware tax on captive insurance companies employs a regressive tax-rate schedule, with a maximum rate of 7/10 of 1% on the first \$20 million of written premiums, and with a minimum rate of 1/10 of 1% of written premiums exceeding \$60 million. Two or more captive insurance companies under common ownership and control are taxed as a single captive insurance company, thereby maximizing Delaware's regressive tax-rate advantage.

III. CORPORATE FRANCHISE TAX

A corporation incorporated in Delaware, if not exempt, is required to pay an annual franchise tax to the Delaware Secretary of State on or before the first day of March.

Exempt Corporations

Delaware law provides that a number of classes of corporations are exempt from the franchise tax. The more significant exemptions are for banking corporations, savings banks and building and loan associations.

Methods Of Computing Tax And Rates

The Delaware corporate franchise tax is computed under two alternative methods. A Delaware corporation may elect the method that produces the lesser amount of tax.

Authorized Shares Method. Under this method, the franchise tax is determined solely by reference to the number of shares of capital stock authorized in a Delaware corporation's certificate of incorporation. The minimum annual tax under this method is \$35 where authorized capital does not exceed 3,000 shares, and the maximum tax is \$112.50 plus \$62.50 for each 10,000 shares, or part thereof, in excess of 10,000 authorized shares.

Assumed Par Value Capital Method. Under this method, the tax is determined under a formula by reference to a Delaware corporation's number of authorized shares of capital stock without par value, number of authorized shares of capital stock with par value and total gross assets.

Minimum And Maximum Tax. Regardless of which of the two methods is used, in no case will the franchise tax for a full taxable year be more than \$165,000 or less than \$35. The minimum \$35 tax can be assured by limiting the number of shares of capital stock, whether with or without par value, authorized in a Delaware corporation's certificate of incorporation to 3,000. Where a corporation has not been in existence during an entire year, the amount of tax otherwise due, as computed in the manner described above, is prorated for the portion of the year during which the corporation was in existence.

Regulated Investment Companies. The franchise tax paid by a Delaware corporation that is a regulated investment company for federal income-tax purposes is the least amount of tax computed under the authorized shares method, the assumed par value capital method or \$250 for each \$1 million, or part thereof, of its average gross assets (the mean of gross assets on January 1 and December 31). The maximum franchise tax payable by a regulated investment company is \$75,000.

IV. GROSS RECEIPTS TAXES

In order to conduct business within Delaware, most occupations and businesses are required to obtain a license from the State. (See Chapter Three, “**Trade Regulation—Business Licenses.**”) Although annual license fees are minimal, most types of businesses are also required to pay a gross receipts tax. This subsection addresses the gross receipts taxes applicable to those types of commercial enterprise of most general interest. Readers are cautioned that various specific categories of businesses are subject to State gross receipts taxes that are not discussed below.

General Occupational And Services Tax

A tax equal to 0.384% is imposed by Delaware on the aggregate monthly gross receipts, less a \$50,000 monthly deduction, of every person engaged in one of a lengthy list of enumerated occupations and on every other person engaging “in any service industry, business, calling or profession” not included within one of the enumerated occupations. “Gross receipts” for purposes of this tax is defined as “total consideration for services rendered, goods sold, or other income-producing transaction within this State, including fees and commissions.” A number of occupations and businesses are specifically exempt from payment of the general occupational and services gross receipts tax, including most notably Delaware investment companies, headquarters management

corporations, banks, insurance companies, public utilities, savings and loan and building and loan associations, non-profit organizations exempt from federal income tax, real estate mortgage investment conduits and Delaware statutory trusts registered as investment companies under the Investment Company Act of 1940.

Manufacturers' Tax

A person engaged in manufacturing in Delaware is liable for a State tax equal to 0.180% of aggregate monthly gross receipts, less a monthly deduction of \$1 million. For purposes of this tax, "gross receipts" includes, in general, all proceeds received for products manufactured in whole or in part within the State if such products are sold to another person, or the fair market value of any such products consumed by the manufacturer or an affiliate. If products are manufactured only partially in Delaware, gross receipts are apportioned on the basis of the ratio of manufacturing costs within Delaware to total manufacturing costs.

Retail And Wholesale Merchants' Taxes

Wholesalers. A "wholesaler" is, in general, a person selling or exchanging goods for the purpose of resale by the person acquiring such goods. A wholesaler is liable for Delaware tax in an amount equal to 0.384% of aggregate monthly gross receipts, less a \$50,000 monthly deduction. For purposes of the wholesalers' tax, "gross receipts" is defined to include total consideration received from sales of tangible personal property physically delivered within Delaware. Special rates are applicable to food processors (0.192%) and commercial feed dealers (0.096%), both with the standard \$50,000 monthly threshold.

Retailers. A "retailer" is defined, in general terms, as a person selling or exchanging goods "on the assumption that the purchaser of such goods has acquired the same for ultimate consumption or use and not resale." A retailer is subject to a tax of 0.72% of aggregate monthly gross receipts, less a \$50,000 monthly deduction. For purposes of the retailers' tax, "gross receipts" is defined to include total consideration received for all goods sold or services rendered within the State. Special rates are applicable to restaurant retailers (0.624%), grocery supermarkets (0.384% on first \$2 million per month and 0.72% thereafter), and farm machinery retailers (0.096%), all with the standard \$50,000 monthly threshold.

Gross Receipts Tax Reductions

Taxpayers qualifying for Economic Development Credits (see "**Corporate Income Tax — Credits**" in this Chapter above) also qualify for reductions in the general occupational and services, manufacturers' and retail and wholesale merchants' gross receipts taxes during the 10-year life of the Economic Development Credits. Such categories

of gross receipts taxes are reduced by 90% for the year in which the new or expanded facility is placed in service, and the reduction decreases (generally by 10%) in each of the succeeding 9 years. In the case of taxpayers qualifying for Targeted Area Credits, such gross receipts taxes are eliminated completely for the first 5 years and are subject to percentage reductions in each of the next 9 years.

Contractors' Tax

A "contractor" is defined, in general terms, to include any person engaged in furnishing labor or both labor and materials in connection with any construction, alteration, repair or demolition of any type of structure. The definition includes both contractors and subcontractors, but a contractor can exclude from gross receipts amounts paid to a subcontractor who is himself subject to the contractors' tax if there is a written agreement between the contractor and the subcontractor setting forth the exact sums payable to the subcontractor. A contractor is liable for Delaware tax equal to 0.624% of aggregate monthly gross receipts, less a monthly deduction of \$50,000. For purposes of the contractors' tax, "gross receipts" generally includes all sums received for any work done or materials supplied in connection with any real property located in Delaware.

Affiliated Finance Company Tax

For purposes of Delaware's system of gross receipts taxation, a corporation classified as an "affiliated finance company" constitutes a special class of taxpayer that is exempt from the normal gross receipts taxes but is subject to a flat annual fee, ranging from \$10,000 to \$50,000, based on the corporation's "capital, surplus and retained earnings, or equivalent accounting terms, as set forth in the company's certified financial statements." An "affiliated finance company" is defined as a corporation substantially all of whose activity within Delaware is limited to the issuance of commercial paper or other debt obligations and the use of the proceeds to make loans to, or to purchase receivables from, one or more of its "affiliated corporations" (defined as two or more corporations that are members of a controlled group of corporations for federal income-tax purposes). The exemption from normal gross receipts taxes for affiliated finance companies makes Delaware an attractive jurisdiction for a parent corporation seeking to establish a financing subsidiary. This is particularly true in light of the Delaware corporate income-tax exclusion of interest income received from an affiliated corporation that does not deduct such interest in computing its Delaware taxable income.

V. PROPERTY TAXES

No State-level tax is imposed on any real or personal property in Delaware. In addition, no county or municipality is authorized to assess *ad valorem* taxes on personal property.

Real estate is subject to county property taxes, school district property taxes, vocational school district taxes and, if located within an incorporated area, municipal property taxes. The total property tax burden depends on the tax rate, the property assessment and the assessment ratio, and these factors vary from location to location within Delaware. In general, the effective tax rate ranges from 0.4% to 1.2% of market value. Delaware real property taxes are significantly below the national average and those imposed in surrounding states. Indeed, real estate taxes in Delaware are among the lowest of any state.

Delaware employs the same real estate tax structure for both commercial and residential property. Therefore, Delaware businesses can take advantage of the same low property tax rates that homeowners enjoy.

No tax is imposed on inventories by the State or any county or municipality.

VI. SALES AND USE TAXES

Delaware does not impose a general sales or use tax. Further, counties and municipalities within the State are not authorized to assess a general sales or use tax. Consequently, retailers in Delaware enjoy a significant tax advantage over retailers in surrounding states.

Taxes On Specific Products And Services

A very limited number of specific products and services are subject to special Delaware taxes, including taxes on the sale or use of cigarettes (27.5 mills per cigarette, being 55 cents per 20-cigarette pack) and other tobacco products (15% of wholesale price), gasoline (23 cents per gallon, with exemptions for certain sales), alcoholic beverages (different rates on beer and wine and various rates on other spirits depending upon alcohol content), public accommodations (8% of the room charge) and motor vehicles (2.75% of purchase price).

Use Taxes On Leases Of Tangible Personal Property

The State imposes a use tax on lessees of tangible personal property. Leases of a number of categories of property are excepted, including household furniture, fixtures and furnishings and hospital and medical equipment. If this use tax is applicable, it is imposed at the rate of 1.92% of the rent under a lease, for the use within Delaware, of tangible personal property. In addition, lessors of tangible personal property are subject to a lessor's tax at the rate of 0.288% of lease rental payments received in excess of \$150,000 per quarter.

Realty Transfer Tax

The State imposes a tax of 2% of value upon the transfer of real estate. Unless otherwise agreed by the parties, the realty transfer tax is shared equally by the grantor and grantee. The Delaware statute provides a lengthy list of specific real estate transactions that are exempt from the State transfer tax.

State law authorizes municipalities to impose realty transfer taxes of up to 1.5%, and most municipalities have done so. Similarly, counties are authorized to impose realty transfer taxes of up to 1.5% with respect to property in their unincorporated areas. All 3 counties in the State have imposed 1.5% taxes. Where a transfer of real estate is subject to either a municipal or a county transfer tax of the full 1.5% allowable, the realty transfer tax payable to the State is reduced from 2% to 1.5%, making the aggregate transfer tax that is payable 3% of value.

DELAWARE



LABOR AND EMPLOYMENT

Delaware's employment laws avoid burdensome restrictions while protecting the rights of employees.

I. EQUAL EMPLOYMENT OPPORTUNITY

Delaware's Fair Employment Practices Act ("FEPA") prohibits employment discrimination on the basis of race, color, age, religion, sex, national origin, genetic information or marital status. FEPA is modeled after the federal equal opportunity laws and governs employers employing four or more persons within Delaware. Delaware permits employees who work for employers with four or more employees to sue in Delaware's Superior Court after the exhaustion of administrative remedies, including receipt of a Delaware Right to Sue notice. FEPA is the exclusive remedy for state employment discrimination claims. FEPA further clarifies that an employee is barred from bringing suit based on the same alleged unlawful discriminatory employment practice in both federal and State court, but rather must select one forum or the other.

Delaware prohibits discrimination against handicapped persons under its Handicapped Persons Employment Protection Act ("HPEPA"). HPEPA governs employers with 15 or more employees.

II. HIRING

Medical Exams. Under HPEPA, employers are prohibited from requiring a prospective employee to undergo a medical examination unless an offer of employment, conditioned upon passing the exam, is outstanding.

Polygraph Exams. Delaware employers are prohibited from requiring employees or prospective employees to take polygraph examinations as a condition of employment or continuation of employment.

Misrepresentations. Employers may be liable for damages as a result of misstatements concerning the terms and conditions of employment made at the time an employee is hired.

Strike Breakers. Delaware statutes make it unlawful for any person not directly involved in a labor strike or lockout to recruit any person for employment or to secure or offer to secure for any person employment when the purpose of such action is to have that person take the place of an employee involved in a labor strike.

III. TERMS AND CONDITIONS OF EMPLOYMENT

Personnel Files. In Delaware, an employee has a right to inspect his or her personnel file during regular business hours, subject to certain conditions. The employee may take notes of the contents of the file, but there is no requirement that the employee be permitted to make copies of the contents.

Wages And Hours. Under Delaware's Wage Payment and Collection Act, an employer must pay wages by cash or check on regular paydays at least once each month. An employer may also pay an employee using a paycard if the paycard permits an employee to withdraw the entire amount of his paycheck on his pay date in one transaction that is not subject to a fee. If an employer, without reasonable grounds, fails to pay wages, the employer may be held liable for liquidated damages in an amount equal to the wages not paid. Withholding of wages is generally prohibited except as specifically provided in the Act. Different rates of pay based on sex are prohibited. Written notification must be given to an employee concerning the rate, time and place of payment. Employers also have to provide notice of sick leave, benefits and comparable matters. There are statutory rules governing payment of wages and benefits that cannot be waived by private agreement. Wage and hour records must be kept for three years.

Garnishment Of Wages. Delaware law protects 85% of an employee's net wages from attachment by his creditors, and only one attachment can be honored at a time. An employee may not be dismissed because his wages have been attached.

Jury Duty. Delaware law prohibits an employer from discharging, threatening to discharge or otherwise intimidating or coercing an employee because of jury duty. Violation may subject an employer to a fine.

Wire Tapping And Electronic Communications. Generally, Delaware law prohibits monitoring telephone calls absent consent by one party. Similarly, electronic mail may not be intercepted during transmission without the prior consent of one of the parties to the communication. However, no employer, or employer's agent, may monitor or otherwise intercept any telephone conversation or transmission, electronic mail transmission or internet access or usage of or by an employee unless the employer provides a daily electronic notice or a one-time written notice that is acknowledged by the employee in writing. Violations of these prohibitions are subject to a penalty of \$100 per violation.

Clean Air Act. Delaware prohibits smoking in any indoor enclosed area to which the general public is invited or permitted, including all work places.

Drug And Alcohol Testing. Delaware allows non-discriminatory, pre-employment drug testing for all private employment positions and mandates testing for certain positions such as nursing home applicants. Generally, for public employees a balance of privacy rights and governmental concern will be utilized to determine the appropriateness of drug testing during employment. Correctional employees and school bus drivers, however, are subject to random testing. There are no specific statutory limitations on alcohol testing.

Meal Breaks. In general, an employer must allow an employee an unpaid meal break of at least 30 consecutive minutes if the employee works 7.5 or more consecutive hours. However this may be modified by a collective bargaining agreement or other written employer-employee agreement. There are also statutory exceptions to the general rule for professional education employees working directly with children, instances in which compliance would compromise public safety, and certain enumerated employer-driven requirements.

IV. TERMINATION OF EMPLOYMENT

Delaware follows the traditional rule that a hiring for an indeterminate period is terminable at any time without cause. However, there are some general exceptions. First, the right to discharge at-will employees has been restricted under federal statutes such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Family and Medical Leave Act, as well as state statutes such as HPEPA and FEPA. Second, if an employee alleges that he was discharged for refusing to violate a federal, State or local law or alleges that the discharge was for reporting an employer violation of a federal, State or local law, the employee may be protected. (See “**Protection For Whistleblowers**” in this Chapter below.) Third, an employer may, under certain circumstances, be contractually obligated to the employee through the use of employment handbooks and other similar documents. Fourth, an employer may not discharge an employee for exercising certain statutory rights, such as filing a workmen’s compensation claim or refusing to take a polygraph test. Fifth, if an employee alleges that he was discharged for refusing to violate a professional code of conduct governing the employee’s profession, the employee may be protected. Finally, the implied covenant of good faith present in every employment contract, at-will or otherwise, provides an avenue for wrongful termination claims, but those claims are very narrowly limited to violations of public policy, misrepresentation by an employer of a material fact, an employer’s use of superior bargaining power to withhold past compensation and falsifying records to create fictitious reasons for terminating an employee.

Protection For Whistleblowers. All Delaware employees are protected from being discharged, threatened or otherwise discriminated against because they report to a public body or their employer the violation of a local, State or federal law that has occurred or is about to occur. Similarly, an employee cannot be discriminated against because he is requested to participate in an investigation, hearing or inquiry or because he refuses to violate a federal, State or local law or regulation.

Notification. There are no statutes in Delaware requiring advance notification of termination of employment.

Wage Payment And Collection. Employers are obligated to pay at the time of termination of employment the employee's wages, which may include bonuses. Payments are required to be made either at the time the employee is terminated, or on the next regularly scheduled payday as if the employee had not been terminated. However, an employer has 30 days after termination to make payment of any owed benefit and wage supplements (such as reimbursement for expenses, health, welfare and retirement benefits, and vacation, separation or holiday pay).

Unions. Employees have the right to bargain collectively with employers through representatives of their own choosing in order to change wages or other conditions of work. Public employees have the right to organize, but not to strike.

Sale Of Business. Delaware law requires that collective bargaining agreements covering employment in Delaware be honored after the sale of a business. Employees can recover wages, liquidated damages and attorneys' fees.

V. MISCELLANEOUS

Unemployment Compensation. Generally, an unemployed individual is eligible for unemployment compensation if he (i) has registered at an employment office to work, (ii) has made a claim for benefits, (iii) is able to, available for and actively seeking work, and (iv) has during his base period been paid wages equal to not less than 36 times his weekly benefit. Disqualifications for benefits include (a) voluntary termination of employment by the employee without good cause attributable to such employment, (b) discharge for just cause, (c) refusal to accept work for which the employee is reasonably fitted, (d) strikes, (e) receipt of unemployment benefits from another governmental entity, (f) fraudulent statements to the Delaware Department of Labor, (g) incarceration, (h) physical inability to work, (i) temporary break in employment because of participation in athletic events, and (j) illegal alien status.

Workmen's Compensation Act. The Delaware Industrial Accident Board has jurisdiction over cases arising under the Workmen's Compensation Act ("WCA"). No wage compensation can be awarded unless the claimed injury arises out of and is sustained in the course of employment and incapacitates an employee from earning full wages for three days. An employee will be compensated beginning on the fourth day of incapacity. However, if the incapacity extends to seven days or more, the employee is entitled to wage compensation from the first day of injury. If an employee is permanently injured, compensation is due to the employee without regard to his earning power, and the employer must also pay for medical services regardless of the period of incapacity. Occupational diseases are also covered under the WCA. It is unlawful for an employer to discriminate or retaliate against an employee because the employee claimed or attempted to claim workers' compensation benefits from the employer.

Specific provisions for total or partial disability from work and schedules for permanent disability, disfigurement and death benefits are contained in the WCA. A successful employee is entitled to attorneys' fees in the amount of 30% of the compensation award or ten times the average weekly wage in Delaware as announced by the Delaware Secretary of Labor at the time of the award, whichever is less.

The WCA applies to both the employer and employee in any employment where one or more employees are engaged, except as specifically provided otherwise. The WCA does not apply to household workers who earn less than \$750 in cash in any three-month period, and only applies to farm workers if the employer carries insurance to pay for benefits.

Every employer must be insured by an approved insurer, or furnish proof of its ability to pay direct compensation, and must periodically present evidence of such coverage or ability to pay to the Delaware Industrial Accident Board.

Child Labor Law. Generally, a child must be at least 14 years of age to be employed in Delaware. However, the minimum age for some occupations is 16 years, and 18 years for others. The Child Labor Law governs hours of work and requires work certificates before an employer can employ a minor.

Delaware Right To Know Law. "Right to know" legislation has been enacted in Delaware that grants employees exposed to hazardous chemicals in the workplace the right to know to what chemicals they are exposed. The Delaware standards mirror federal OSHA regulations. Employers are required to provide training for employees on how to protect themselves from chemical hazards in the workplace. Penalties for violation may be imposed.

DELAWARE



ENVIRONMENTAL LAW

Delaware's environmental laws balance the interests of responsible development and the protection of Delaware's quality of life.

I. ENVIRONMENTAL AGENCY AND LAW ENFORCEMENT

The Department of Natural Resources and Environmental Control (“DNREC”), the primary Delaware environmental agency, issues all major State environmental permits and develops and enforces State environmental statutes and regulations. DNREC enforces State environmental statutes and regulations through notices of violation, administrative orders, and judicial proceedings for injunctions, civil penalties and criminal penalties. DNREC also has broad authority to notify parties of environmental violations and to order abatement of such violations. If an imminent environmental hazard is present, DNREC has authority to undertake emergency cleanup itself and recover from the responsible party the costs incurred.

DNREC is also empowered to require independent audits of “chronic violators” and of facilities where the operator has been found guilty, pled guilty, or pled no contest to any crime involving a violation of environmental standards that resulted in serious physical injury or serious harm to the environment. Additionally, such facilities may be subjected to early submissions of information, and a statement by the chief operating officer that all disclosures were complete and accurate may be required and increased penalties for violation may be imposed.

Environmental permits and zoning approval are required by counties and/or municipalities. Zoning approval generally requires a municipal or county environmental review for commercial or industrial development. The extent of the review depends upon the county or municipality and the size of the proposed development. Projects potentially affecting the Delaware River Basin are subject to approval by the Delaware River Basin Commission. Coastal projects may also require approval under the Coastal Zone Act. (See “**Coastal Zone And Beach Management**” in this Chapter below).

II. AIR POLLUTION

Delaware has adopted a State implementation plan in conformity with the federal Clean Air Act. A permit must be obtained through DNREC for any equipment, facility or air contaminant control device that will emit or prevent the emission of an air contaminant. DNREC also administers the Title V permitting program under the federal Clean Air Act pursuant to delegated authority from the federal Environmental Protective Agency (“EPA”).

III. COASTAL ZONE AND BEACH MANAGEMENT

DNREC regulates the industrial development of Delaware's coastal zone by implementing the Delaware Coastal Zone Act. New or expanded manufacturing uses in the coastal zone require permits issued by DNREC. Heavy industry and bulk transfer facilities are not allowed in the coastal zone, but other non-manufacturing uses are not affected by this Act.

Development on Delaware's beaches is also controlled, and written approval and/or a permit is required for alteration of beaches or dunes and construction on or adjacent to a beach.

IV. HAZARDOUS WASTE

Delaware has enacted the Hazardous Waste Management Act, comparable to the federal Resource Conservation and Recovery Act, that extensively regulates the treatment, storage and handling of hazardous substances and that provides penalties for violations. Persons generating, transporting or storing hazardous waste within Delaware must report the action to DNREC, along with specific information about the waste and its storage and disposal. Discharges of hazardous wastes must be promptly reported and abated.

V. HAZARDOUS SUBSTANCE SITES

The Delaware Hazardous Substance Cleanup Act complements the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") by authorizing cleanup of sites where there has been a release of a hazardous substance. A State "superfund" has been created to fund site cleanup in a manner similar to CERCLA. The State statute applies to a wide spectrum of substances, including substances routinely disposed of by commercial entities. Cost recovery for cleanup actions can be imposed against owners or operators of hazardous substance sites, as well as those persons contributing to a site by owning, sending or transporting the hazardous substances.

VI. BROWNFIELDS

Voluntary cleanup of contaminated, unoccupied industrial and commercial sites ("brownfields") is encouraged by State-funded matching grants for environmental assessment and remediation costs, releases from liability and tax incentives. (See Chapter Four, "**Delaware Taxation — Corporate Income Tax — Credits**," regarding tax credits made available for remediation).

Delaware has enacted provisions within the Delaware Hazardous Substance Cleanup Act similar to the federal brownfields law (the Small Business Liability Relief and Brownfields Revitalization Act of 2002) regarding prospective purchasers, innocent landowners and contiguous properties, although entry into a DNREC-negotiated prospective purchaser agreement is necessary in order to benefit from the liability release. Additionally, in 2004, Delaware enacted a Brownfields Development Program that allows brownfields developers to conduct investigations and/or development activity at a facility with protection from liability for existing contamination by entering into a Brownfields Development Agreement with DNREC.

VII. EXTREMELY HAZARDOUS SUBSTANCES

The handling, use and storage of toxins, explosives and flammables/combustibles are regulated under the Delaware Extremely Hazardous Substances Risk Management Act. That Act requires registration of facilities involved in extremely hazardous substances, implementation of a risk-management program, documentation and review of equipment and procedures, special training, incident investigation, inspection and auditing. Delaware's extremely hazardous substances program is similar in scope and content to the comparable federal program, but applies lower thresholds for inclusion of substances in the State reporting scheme.

VIII. LAND CONSERVATION AND PRESERVATION

The Delaware Land Protection Act authorizes the protection and conservation of natural and cultural resources as well as the preservation of biological habitats and recreation areas. That Act enables the State to acquire, permanently dedicate and protect certain land in furtherance of conservation.

IX. SOLID WASTE

Solid waste storage, collection, transportation, processing, transfer and disposal are extensively regulated by DNREC and the Delaware Solid Waste Authority. Facilities and activities subject to such regulation include sanitary landfills, industrial landfills, dry waste disposal facilities, resource recovery facilities, transfer stations and special wastes handling. Solid waste facilities are regulated by a permitting procedure that includes a public hearing phase for new sites. The regulations also specify the minimum environmental protection requirements for landfills and other disposal sites.

Infectious waste generated by infectious waste generators must be disposed of in accordance with special procedures. Infectious waste means those wastes that may cause human disease and may be reasonably suspected of harboring human pathogenic organisms, or may pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. Included in this definition are blood and other body fluids, human tissue, special cultures, laboratory wastes, discarded pharmaceutical products and discarded needles and syringes.

X. OCEAN DUMPING

Any disposal of solid wastes into the ocean waters of Delaware, the Delaware Bay, inland bays and certain waters of exceptional recreational or ecological significance is prohibited by the Delaware Solid Waste Dumping Elimination Act. Fines are authorized for negligent violators, and imprisonment is authorized for knowing violators.

XI. RECYCLING

Beverage Containers. To reduce the volume of non-degradable litter, Delaware law requires beverage containers to be returnable and consumers to be charged a deposit of not less than five cents for each container. Aluminum cans are excepted from this law. Any glass beverage container must be recyclable or refillable.

Plastics. Plastic bottles and rigid plastic containers distributed, sold or offered for sale in Delaware must be labeled with a code identifying the resin type used to produce the structure of the container.

State Recycling Effort. Under the Delaware Waste Minimization/Pollution Prevention Act, additional recycling measures have been mandated. Recycling centers for numerous materials have been established throughout the State, and waste minimization has been promoted through various media.

XII. STORAGE TANKS

The Delaware Underground Storage Tank Act was enacted to regulate the installation, operation and abandonment of underground storage tanks in order to prevent the leakage of petroleum products and other hazardous liquids that results in degradation of the groundwater. This Act applies to tanks containing petroleum products or any of a number of other substances defined in CERCLA. Excepted from the statute

are septic tanks, pipelines, surface pits and lagoons, storm water and wastewater collection systems, and storage tanks in an underground area if the tanks are situated upon or above the surface of the floor.

The Jeffrey Davis Aboveground Storage Tank Act was enacted to regulate the installation, operation, inspection, monitoring and cleanup responsibilities associated with releases from, and financial responsibilities for, aboveground storage tanks. The requirement to register aboveground tanks and the yearly registration fee schedule varies in accordance with tank size. With a few exceptions, all aboveground storage tanks greater than 250 gallons in capacity are subject to regulation under this Act. Excepted from the statute are heating oil tanks for consumptive use on the premises less than 1,100 gallons in capacity, propane tanks, tanks for use on a farm less than 1,100 gallons in capacity, tanks used solely to store motor fuel or motor oil for non-commercial purposes (also less than 1,100 gallons in capacity), and tanks installed on a temporary basis.

XIII. WATER POLLUTION

Delaware has instituted a water permit program consistent with the regulations, guidelines and priorities of the federal Clean Water Act. DNREC oversees water permit issuance, as well as compliance, monitoring and enforcement under the permit program. Water quality standards and permit procedures are regulated by the State's Regulations Governing Control of Water Pollution and Surface Water Quality Standards. DNREC has also issued Total Maximum Daily Load regulations for many of the surface waters in the State that are not attaining applicable surface water quality standards.

Water wells, underground injection control, storm water discharges associated with industrial activity, operation of wastewater treatment facilities and pollution of water by oil discharge are all separately regulated by DNREC.

XIV. WETLANDS

The Delaware Wetlands Act was enacted to prevent the loss of State wetlands to unregulated activities. This Act sets forth a permitting system designed to preserve remaining Delaware wetlands. Wetlands areas have been mapped, and activities such as construction, draining and dredging in the wetlands may only be commenced after approval by DNREC. DNREC, the EPA and the U.S. Army Corps of Engineers are all involved in the review of proposed projects in wetlands areas.

XV. SPILL REPORTING

State law mandates that any person who causes or contributes to the discharge of an air contaminant into the air, a pollutant into surface water or groundwater or onto land, or the disposal of solid waste in excess of any reportable quantity must report such an incident to DNREC at the earliest opportunity after the discharge has occurred. Under certain circumstances, notification of the local Emergency Planning Commission is also required. Permits issued to operating facilities typically contain additional and more extensive reporting requirements. These requirements are in addition to any reporting requirements under federal law.

XVI. ENERGY

Delaware has enacted the Delaware Energy Act establishing a State Energy Office (“SEO”) within DNREC. The purpose of SEO is, in part, to encourage and promote energy conservation, the use of renewable and alternative energy technologies, and to administer the monies in the Green Energy Fund. The monies in the Green Energy Fund are administered as grants and loans for the development, promotion and support of renewable or alternative energy technology in the State.

DELAWARE



INTELLECTUAL PROPERTY

*State rules supplement
federal protection of
intellectual property.*



I. PATENTS

The federal patent system allows a patent to issue for inventions that are useful, novel and non-obvious. A patent allows the inventor to exclude others from using, making and selling the invention for a limited time in exchange for full disclosure of the invention. Any state statute that purports to give an inventor extended protection for his or her invention runs counter to the federal patent policy and would likely be held invalid. Delaware has no statute that undertakes to govern patentable inventions.

The United States District Court for the District of Delaware sitting in Wilmington has developed a national reputation for the adjudication of patent disputes. It has in place various procedures and orders for the prompt resolution of such disputes.

State law applies in a patent context when the licensing of a patent is involved. In Delaware, fundamental rules of contract construction apply equally to the construction of patent licenses. In granting a license, the patentee can retain any of the rights to make, sell and use the invention, while conveying others.

II. CERTAIN TECHNOLOGY AND BUSINESS DISPUTES

In 2003, the Delaware Court of Chancery was by statute granted jurisdiction over actions involving certain technology disputes, and that Court was also authorized to engage in confidential mediation of many types of complex business disputes. The Court of Chancery has jurisdiction to hear and determine “technology disputes” when: (i) the parties have consented to jurisdiction by agreement or stipulation; (ii) one party is a business entity; (iii) one party is a Delaware business entity; (iv) no party is a “consumer;” and (v) in actions involving solely a claim for monetary damages, the amount in controversy is not less than \$1 million.

A “technology dispute” is defined as a dispute arising out of an agreement and primarily relating to: (i) the purchase or lease of computer hardware; (ii) the development, use, licensing or transfer of computer software; (iii) technology of a complex or scientific nature (*i.e.*, biological, pharmaceutical or agricultural) that has commercial value or the intellectual property rights pertaining thereto; (iv) the creation or operation of internet websites; (v) the rights or electronic access to electronic, digital or similar information; or (vi) the support or maintenance of the above. The law provides that the Court of Chancery shall interpret the term “technology dispute” liberally to provide an expeditious and expert forum for the handling of technology disputes. To this end, the Court of Chancery has established rules and set filing fees and other costs for the processing of technology disputes. Neither punitive damages nor a jury trial is available for a technology dispute presented for determination in the Court of Chancery.

The 2003 statute also expanded the Court of Chancery's jurisdiction to hear business disputes if the parties request that a member of the Court of Chancery act as a mediator. The Court of Chancery obtains jurisdiction when: (i) the parties have consented by agreement or stipulation to the mediation; (ii) at least one party is a business entity; (iii) at least one party is a Delaware entity; (iv) no party is a "consumer;" and (v) in the case of disputes involving solely a claim for monetary damages, the amount in controversy is not less than \$1 million. Mediation proceedings are considered confidential and are not a matter of public record. The statute allows the Court of Chancery to define those types of cases that are eligible for submission as a business dispute, with the statute giving the Court broad rule-making authority to effectuate the statute's intent. (See also Chapter Eight, "Dispute Resolution—State Court System—Trial Courts—The Court of Chancery.")

III. TRADEMARKS AND SERVICE MARKS

The Delaware Trademark Act, derived from the Model State Trademark Act, generally provides that any person who adopts and uses a distinctive trademark or service mark in Delaware may register the mark with the Delaware Secretary of State and obtain legal protection of that mark. Registration of a mark may be limited by the pre-existing rights of another.

The Delaware Trademark Act applies to any mark not immoral, deceptive, scandalous, disparaging, containing the flag or coat of arms or other insignia of a municipality, state, or nation, containing the name, signature or portrait of any person without his consent, primarily geographically descriptive, primarily merely a surname, or resembling a mark previously registered or used.

Registration of a mark is obtained by application to the Delaware Secretary of State. Information required includes the type of goods or services for which the mark will be used, the class in which such goods or services fall, the manner in which the mark will be used, the date when the mark was first used anywhere, the date when the mark was first used in Delaware by the applicant or his predecessor in business, and a signed statement by the applicant stating that he is the owner of the mark and that no other person has the right to use the mark. The application must be accompanied by a specimen or facsimile of the mark in duplicate and a filing fee of \$25 payable to the Secretary of State. A certificate of registration will be issued upon payment of an additional \$10 fee. The duration of a registered trademark or service mark is ten years (renewable for successive periods of ten years, upon application filed within six months prior to the expiration of the prior term, for a fee of \$25).

Registration of a trademark or service mark yields protection against any usage or copying by others without consent. The Delaware Trademark Act authorizes the use of injunctions to protect against infringement, as well as court-ordered destruction of counterfeit marks. An infringing party may be liable for profits derived from the mark and damages suffered by the registrant.

The Delaware Trademark Act does not contain a provision for the reservation of a mark with intent to use it in the future. Additionally, the required distinctiveness of a mark is not necessarily established by proof of continuous use of the mark for any specified period of time preceding registration.

The Delaware Trademark Act also contains an anti-dilution provision. This protects against likelihood of injury to business reputation or of dilution of the quality of a registered mark, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

IV. COPYRIGHTS

Delaware has not enacted a State copyright law nor any other law protecting original works of authorship. The federal Copyright Act generally subjects state laws to federal preemption. However, Delaware courts recognize a State common law action for unfair competition. For original works of authorship, this could affect the “passing off” situation—where a person attempts to sell his goods under the pretense that they are someone else’s original goods.

V. TRADE SECRETS

Delaware has adopted the Uniform Trade Secrets Act. The Delaware Act protects the ownership of “trade secrets,” defined as information, including a formula, pattern, compilation, program, device, method, technique or process, that:

- (a) Derives independent economic value...from not being generally known to, and not readily ascertainable by other persons...; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

An action for misappropriation of a trade secret must be brought within three years after the misappropriation has been or should have been discovered by the exercise of reasonable diligence. The Delaware Act authorizes injunctive relief for actual or threatened misappropriation. Complainants also may seek monetary damages for actual loss and unjust enrichment. Exemplary damages are available for willful and malicious misappropriation in the amount of twice the actual damages. The prevailing party may recover attorneys' fees for claims and motions made in bad faith and for those misappropriations deemed to be willful and malicious. Delaware courts will take reasonable precautions to protect under the Delaware Act trade secrets that are the subject of litigation.

VI. USE OF DELAWARE INVESTMENT COMPANIES

As described in Chapter Four, “**Delaware Taxation—Corporate Income Tax—Delaware Investment Companies,**” State law provides an exemption from Delaware corporate income tax and gross receipts tax for corporations whose activities within Delaware are limited to the maintenance and management of their intangible investments and the collection and distribution of the income from such investments. These corporations, known as Delaware investment companies, have often been used to hold intellectual property as part of a plan to reduce overall state income taxes. Royalty fees or license payments received by a Delaware investment company for the use of its intellectual property under a license arrangement not only can qualify for exemption from Delaware tax but also may generate a state income-tax deduction for the licensee in its home state.

The Delaware Division of Revenue has issued rulings recognizing the Delaware tax-exempt status of Delaware investment companies holding such intellectual property assets as patents, patent applications, inventions, know-how, trademarks, service marks, trade names, copyrights, trade secrets and mask works. As a consequence, many companies have established Delaware investment companies to hold their intellectual property assets and thereby achieve significant savings in state income taxes.

DELAWARE



DISPUTE RESOLUTION

Delaware's efficient courts are nationally known for expertise in corporate, business and commercial law.



I. STATE COURT SYSTEM

Delaware has an efficient and professional court system that is nationally and internationally prominent in a number of areas, including particularly the areas of corporate, business and commercial law. Judges are appointed, not elected, thus insulating the judiciary from undue political and special-interest influence. Indeed, Delaware judges are specifically prohibited from engaging in political campaigns and other political activity.

The structure of the Delaware court system lends itself to the prompt and expert disposition of cases. There is no intermediate court of appeals between the trial-level courts of general jurisdiction and the highest court of appeals, facilitating prompt final adjudication of disputes. The jurisdiction of the trial-level courts is divided so that certain types of business disputes are heard by sophisticated judges, rather than juries composed of laymen, facilitating predictability and expertise in the disposition of cases. This judicial system and Delaware's widely recognized high level of judicial expertise and legal stability are contributors to Delaware's attractiveness as a place to organize and to conduct business.

In 2005, for the fourth year in a row, a U.S. Chamber of Commerce study ranked Delaware first in providing a legal climate that attracts business. The State led the field in nine of the ten categories of the Chamber study of the perceived fairness and reasonableness of the states' litigation environments, and ranked second in the tenth.

Overview Of State Court System

The Delaware judicial system consists of the Supreme Court, Court of Chancery, Superior Court, Family Court, Court of Common Pleas, Justice of the Peace Courts and Alderman's Courts. The Delaware Constitution of 1897 also established a Court on the Judiciary with power to censure, remove or retire judicial officers for misconduct or failure to perform duties.

The Supreme Court is the highest court in the State. The Court of Chancery and the Superior Court are the trial-level courts of general jurisdiction, appeals from which are directly to the Supreme Court. The Family Court exercises jurisdiction over matters of domestic relations and most offenses involving juveniles. The remaining courts are courts of limited jurisdiction, as described below.

The Supreme Court

The Supreme Court is the highest appellate court in Delaware and has final appellate jurisdiction in civil appeals from final judgments, discretionary appellate jurisdiction over interlocutory appeals in civil cases and final appellate jurisdiction in criminal appeals where the sentence exceeds certain minimums. The Supreme Court has additional jurisdiction with respect to writs of prohibition, *quo warranto*, *certiorari* and *mandamus*.

The Supreme Court consists of five justices, one of whom is the Chief Justice. The Chief Justice is responsible for the administration of all courts of the State.

Justices of the Supreme Court are appointed by the Governor, subject to the advice and consent of the Delaware Senate, for twelve-year terms. Justices must be citizens of Delaware learned in the law.

The Supreme Court, along with the Court of Chancery (described below), is nationally and internationally regarded as having particular expertise in issues of corporate law, including mergers and acquisitions, shareholder rights, fiduciary relations and director liability. Its decisions often form the basis for development of jurisprudence in other states on these subjects. On average, appeals to the Supreme Court are resolved, from date of filing to final disposition, in approximately 200 days. However, the Court is accustomed to hearing expedited appeals where circumstances warrant, and such appeals are typically resolved in a much shorter time, often a matter of days.

The Supreme Court has additional constitutional jurisdiction to hear and determine questions of law certified to it by other Delaware courts, the Supreme Court of the United States, a Court of Appeals or District Court of the United States or the highest appellate court of any other state. This jurisdiction has been invoked to determine, for example, issues of Delaware corporate law certified by courts in which cases involving Delaware corporate law are pending.

In addition to its appellate function, the Supreme Court operates through a number of separate agencies in its administration of the lower courts and the Delaware bar. These include the Board on Professional Responsibility and the Office of Disciplinary Counsel, which enforce Delaware's ethical rules governing the conduct of lawyers; the Board on the Unauthorized Practice of Law, which ensures that law is practiced only by duly admitted professionals; the Board of Bar Examiners, which conducts the testing and oversees the procedures for admission to the State bar; the Commission on Continuing Legal Education, which administers the continuing legal education requirements applicable to members of the Delaware bar generally; the Supreme Court Rules Committee, which monitors and, where appropriate, recommends changes in the practice rules of the Supreme Court; and other agencies.

Trial Courts

As noted above, the lower courts of Delaware are divided into courts of general jurisdiction and courts of limited jurisdiction. With respect to the trial courts of general jurisdiction, Delaware is one of the few states that has maintained the historical separation of law and equity that existed in English jurisprudence at the time of the American Revolution. This separation of jurisdiction has had a substantial and favorable effect on the development and stability of corporate and business law in Delaware and, by extension because of the influence of Delaware law, across the United States.

The Court Of Chancery. The Court of Chancery has jurisdiction to hear and determine all causes and matters in equity and to grant traditional equitable remedies such as injunctions, reformation, rescission, specific performance, accountings and the like. The general equity jurisdiction of the Court of Chancery derives from the jurisdiction of the English High Court of Chancery as it existed at the time of the separation of the American colonies from the English Crown, but its jurisdiction has been substantially supplemented by statutory grants of jurisdiction over specific subject matters.

The Court of Chancery consists of one Chancellor and four Vice Chancellors. The Chancellor and Vice Chancellors are appointed by the Governor, subject to the advice and consent of the Senate, for twelve-year terms. In view of the particular expertise expected of the Court of Chancery in corporate and other fiduciary matters, the Chancellor and Vice Chancellors historically have been experienced and sophisticated practitioners familiar with these areas at the time of their selection.

Litigation in the Court of Chancery consists largely of corporate and partnership matters, trusts, estates and other fiduciary matters, commercial and contractual matters and real estate disputes. The Court of Chancery hears cases without a jury and has no jurisdiction to award punitive damages.

The internationally recognized expertise of the Court of Chancery in resolving complex corporate disputes was established in the early part of the 20th century and continues unabated today. The Court of Chancery is not subject to the backlogs or the distractions of criminal and tort cases that affect the litigation process in other jurisdictions. This results in part from its limited subject-matter jurisdiction, which promotes greater specialization and expertise in its judges and the lawyers who practice before it. The structure of the Court of Chancery and the nature of practice before it thus lend themselves to expeditious proceedings and prompt, expert resolution of cases, particularly where injunctive relief is sought.

To further enhance the Court of Chancery's status as the preeminent forum for the resolution of complex commercial disputes, the Court of Chancery also has been given jurisdiction over certain "technology disputes," including disputes involving solely claims for money damages (which would otherwise be excluded from the Court's traditional equity jurisdiction) and the power to mediate technology and other complex business disputes so long as the parties have consented to have the matter determined by the Court of Chancery. The types of commercial technology disputes that may be submitted to the Court of Chancery for determination or mediation include disputes relating to intellectual property rights and computer, pharmaceutical and biological technologies. If the dispute involves only claims for monetary damages, the Court will have jurisdiction to hear or mediate it only if the amount in controversy is \$1 million or more. The availability of a "mediation only" proceeding in the Court of Chancery

over these types of technology and business disputes is intended to facilitate a voluntary resolution of complex business disputes between parties in an efficient and expert forum. (Details of the Court's jurisdiction in such matters are discussed in Chapter Seven, "**Intellectual Property — Certain Technology And Business Disputes.**")

The Court of Chancery also has limited appellate jurisdiction, hearing appeals from specified state agencies, such as the Securities Commissioner. Appeals from the decisions of the Court of Chancery are directly to the Delaware Supreme Court.

The Superior Court. The Superior Court is the State's trial-level court of general jurisdiction hearing matters of law, as opposed to equity matters, which are heard by the Court of Chancery. The Superior Court has State-wide jurisdiction over civil and criminal cases and hears, for example, cases of personal injury, libel and slander, contract claims, professional malpractice, products liability and property cases such as mechanics' liens, condemnations, mortgage foreclosures and certain landlord-tenant disputes. The Superior Court's authority to award damages is not subject to a monetary maximum, and trial by jury is available as at common law. The Superior Court has exclusive criminal jurisdiction over felonies and most drug offenses, except those heard in Family Court involving minors. The Superior Court also has jurisdiction over involuntary commitment proceedings.

Civil cases in which the monetary damages sought are less than \$100,000 are required to be submitted to arbitration. In this process, an arbitrator is selected by the Superior Court from a list of practicing attorneys or appointed by agreement of the parties. The arbitrator presides over a hearing on the claims of the parties and issues a written order that becomes a judgment of the Superior Court if there is no request for a trial *de novo* by one of the parties. If there is such a request, the case proceeds as if there had been no arbitration. (See also "**Arbitration And Mediation — Arbitration**" in this Chapter below.)

The Superior Court exercises appellate jurisdiction in appeals from the Court of Common Pleas, Family Court (adult criminal cases) and more than 50 administrative agencies. These appeals are heard on the record, whereas appeals to the Superior Court from the Alderman's Courts and Justice of the Peace Courts are heard as trials *de novo*.

The Superior Court consists of 18 judges, one of whom is the President Judge. Superior Court judges are appointed by the Governor, subject to the advice and consent of the Senate, for twelve-year terms. The judges are drawn from a wide background of experience in the legal profession, reflecting the varied nature of the cases that come before the Superior Court. The judges are divided between those who primarily hear civil cases and those who primarily hear criminal cases. Civil cases are assigned to a single judge for the duration of the case.

Family Court. The Family Court is a unified State-wide court having jurisdiction over matters of juvenile delinquency, child neglect, dependency, child abuse, adult misdemeanor crimes against juveniles, child and spousal support, paternity, custody and visitation, adoptions, terminations of parental rights, divorces and annulments, property divisions, specific performance of separation agreements, guardianships over minors and intra-family misdemeanor crimes. The Family Court does not have jurisdiction over adults charged with felonies or minors charged with first or second degree murder, rape or kidnapping. Appeals are to the Delaware Supreme Court, with the exception of adult criminal cases, which are appealed to the Superior Court.

The Family Court provides for arbitration in certain circumstances. Arbitration is an informal proceeding in which a trained arbitration officer attempts to resolve juvenile delinquency cases involving minor charges and selected adult misdemeanor cases. In this non-adversarial proceeding, the arbitration officer, after reviewing the charges and listening to the respective positions of the parties, issues a disposition specifying conditions, such as probation or restitution, that must be met by the defendant within 90 days. A defendant who fulfills the dispositional terms does not have a formal finding of guilt. The complainant or defendant may request a review of the disposition by a Deputy Attorney General within ten days of the arbitration proceeding.

Family Court judges are appointed by the Governor, subject to the advice and consent of the Senate, for twelve-year terms.

Court Of Common Pleas. The Court of Common Pleas has State-wide jurisdiction in civil actions where the amount involved in the complaint does not exceed \$50,000. However, there is no limitation on the amount involved in counterclaims. All civil cases in the Court of Common Pleas are heard without a jury. Arbitration is required in cases where the demand is between \$15,000 and \$50,000, similar to the procedure in the Superior Court described above.

The Court of Common Pleas has criminal jurisdiction over all criminal misdemeanors occurring in the State, other than drug-related cases and misdemeanors occurring in the City of Wilmington. Jury trials in criminal cases are available.

The Court of Common Pleas consists of nine judges, appointed by the Governor for twelve-year terms, subject to the advice and consent of the Senate.

Justice Of The Peace Courts. The Justice of the Peace Courts have jurisdiction over civil cases in which the amount in controversy does not exceed \$15,000. Justice of the Peace Courts are authorized to hear certain misdemeanors and most motor vehicle cases (excluding felonies) and may act as committing magistrates for all crimes. Civil appeals may be taken *de novo* to the Court of Common Pleas. The subject-matter jurisdiction of the Justice of the Peace Courts is shared with the Court of Common Pleas.

Justices of the Peace are nominated by the Governor and confirmed by the Senate for terms of four years. In addition to the Justices of the Peace (currently 57 in number), the Governor nominates a Chief Magistrate, subject to Senate confirmation.

Alderman's Courts. Alderman's Courts are authorized by the town charters of certain municipalities and have jurisdiction only within their own town limits. There are 11 active Alderman's or Mayor's Courts. When a town is without a Court or an Alderman for any period of time, its cases are transferred to the nearest Justice of the Peace Court.

The jurisdiction of an Alderman's Court is limited to misdemeanors, traffic offenses, parking violations and minor civil matters. The specific jurisdiction of each court varies with the town charter (which is approved by the State General Assembly). Appeals are taken *de novo* to the Superior Court.

The selection, number, tenure and qualifications of Aldermen are determined by the towns themselves. A few Aldermen serve full-time, but most are part-time judges.

II. SUMMARY PROCEEDINGS FOR MAJOR COMMERCIAL DISPUTES

Delaware has adopted a special set of rules and procedures designed to allow major commercial litigation to be resolved expeditiously and cost-effectively by an experienced judge from either the Superior Court or the Court of Chancery. Procedures in these cases are greatly simplified, discovery is curtailed, there are no jury trials or punitive damages and long delays are effectively precluded. Summary or expedited proceedings are intended to alleviate the delays and risks of jury trials encountered by businesses in major commercial litigation while assuring litigants a neutral and sophisticated dispute resolution forum.

Eligibility For Treatment As A Summary Proceeding In The Superior Court. There are several criteria for an action to be eligible for treatment as a Summary Proceeding in the Superior Court. There must be at least \$100,000 in controversy as to one party, although upon application of the parties the court may in its discretion agree to apply the Summary Proceedings rules to actions involving lesser amounts. One party must be a Delaware citizen, corporation or other business entity. All of the parties to a Summary Proceeding must agree to the matter being tried as such. This agreement may preexist the dispute, such as by inserting a provision in an agreement that any dispute arising under the agreement will be litigated in the Delaware Superior Court as a Summary Proceeding. In addition, the nature of the claim must be contractual or commercial; claims asserting personal, physical or mental injury may not be brought as Summary Proceedings. Neither punitive damages nor a jury trial is available in a Summary Proceeding.

Commencement. Where all parties consent in advance of the filing of a complaint to the treatment of the litigation as a Summary Proceeding, the action may be filed as such. The complaint must contain a statement of the amount in controversy, that one of the parties is a Delaware citizen or entity and that the defendant has agreed to submit to the Court's jurisdiction for Summary Proceedings. Alternatively, an action previously filed in Superior Court or in any other court may be transferred to the Superior Court and converted into a Summary Proceeding if the action could have been brought initially as a Summary Proceeding.

Discovery. One of the principal features of Summary Proceedings is the availability of only limited discovery. Each party is limited to ten interrogatories and requests for admission, and depositions are limited to the other side's identified witnesses and affiants and four other persons. The Summary Proceedings rules require certain mandatory discovery. Litigants are required at an early stage of the proceedings to identify the documents they intend to rely upon at trial, the witnesses they intend to call at trial and all persons consulted in preparation of the complaint or answer. The Summary Proceedings rules contain express discovery cut-offs: all depositions must be completed within 120 days from filing of the last answer, all fact discovery must be completed within 180 days from filing of the last answer and all expert discovery must be completed within 60 days after completion of the fact discovery .

Trial. Where litigants choose to employ live witnesses at trial, trial is to commence within 30 to 60 days after the close of discovery and is to be completed within five trial days. The parties simultaneously file post-trial briefs. If the parties elect to forego witnesses at trial and instead submit briefs upon which the court will make factual findings, trial consists of oral argument held within one week from the close of briefing. In either case, the court's decision is to be rendered 30 days after the trial or 30 days after oral argument, if oral argument occurs, so that final decisions should be rendered not more than ten months to one year from the filing of the complaint.

Appeals. Cases treated as Summary Proceedings may be appealed directly to the Delaware Supreme Court. No interlocutory appeals may be taken in a case being treated as a Summary Proceeding. Appeals from cases tried as Summary Proceedings are expedited.

Expedited Proceedings In The Court Of Chancery. Expedited proceedings are available for almost any suit brought in the Court of Chancery in which such treatment is shown to be necessary. Typically, the party seeking expedited proceedings will need to show good cause as to why the litigation schedule should be expedited or summary in nature.

Delaware's General Corporation Law contains certain provisions that confer jurisdiction on the Court of Chancery to resolve specific corporate disputes and enforcement of specific corporate rights. Some of these provisions are explicitly designated as a summary proceeding and others have been consistently treated as such notwithstanding the absence of explicit language in the statute.

Unlike the Superior Court, the procedures for presenting a request for expedited proceedings, and the procedures for conducting the litigation once the matter is expedited, are not specifically set forth in the Court of Chancery Rules. Rather, when the need for expedited treatment arises, the Court will be requested to expedite the case. If the Court decides that the matter should be expedited, it will enter an order so providing, which may include fixing a specific time for the filing of any responsive pleadings or motions, authorizing and setting dates for accelerated discovery, scheduling the dates for any pretrial briefing and setting a final hearing or trial date. Such expedition, and the prompt resolution of disputes it implies, have been a hallmark of the Court of Chancery and have contributed to the Court's attractiveness as a forum for resolving disputes.

III. ARBITRATION AND MEDIATION

Compulsory Arbitration. Actions that are filed in the Delaware Superior Court and seek monetary damages in amounts less than \$100,000 are subject to compulsory arbitration. The arbitration is compulsory only in the sense that the parties must participate in the arbitration process. Thereafter the arbitrator's decision can be appealed and the matter will be heard in the Superior Court *de novo*. (Actions brought in the Justice of the Peace Courts and Courts of Common Pleas are not subject to compulsory arbitration. However, those courts have jurisdictional limits of only \$15,000 and \$50,000, respectively.)

After a plaintiff files an action that is subject to the compulsory arbitration rules and the defendant has answered and has not asserted a counterclaim for more than \$100,000, the case is assigned to the Superior Court Arbitration Unit. Thereafter, a list of three potential arbitrators is sent to the parties. Each party is allowed to strike one potential arbitrator. The remaining arbitrator is assigned and typically schedules a hearing within 60 days from the date of his assignment. The arbitrator is a member of the Delaware Bar who has no professional relationship with the parties or their attorneys.

The parties must produce to opposing counsel and the arbitrator all documents upon which they will rely at the hearing at least ten days prior to the hearing. There is typically no discovery prior to the hearing.

At the hearing, the parties, their attorneys and the arbitrator are present. The parties may call as many witnesses as they wish, although a typical hearing is usually completed within a few hours. Parties may subpoena witnesses before the hearing. The hearing may or may not be transcribed, as desired by the parties.

The hearing is conducted like a mini-trial with opening and closing statements and direct and cross examination. While conducting the hearing, the arbitrator is bound by the Rules of Civil Procedure as to the attendance of witnesses and to the production of documents. The Delaware Uniform Rules of Evidence are used as a guide to the admissibility of evidence, although the constraints of the Rules are typically relaxed. Testimony other than by the parties is discouraged. Instead, the parties typically utilize written reports and statements from both expert and fact witnesses. The arbitrator must issue an order setting forth his decision and award, if any, within five days after the hearing.

Within 20 days after receipt of the arbitrator's decision, either party may file an appeal *de novo* with the Superior Court. No evidence of the arbitration hearing is permitted to be introduced in any subsequent trial. If the parties do not appeal, either party may move to file the arbitrator's decision as a final judgment.

If an appeal is filed, the case proceeds almost as if the arbitration had not occurred. However, if the party who files an appeal does not achieve a more favorable result at trial than he did at the arbitration stage, that party must pay the fees and costs of the arbitration, including the arbitrator's fee, but excluding attorneys' fees. If a plaintiff obtains a favorable verdict in excess of the arbitrator's order and the defendant was the party who appealed, interest accrues from the date of the arbitrator's order.

Voluntary Arbitration. Delaware has adopted the Uniform Arbitration Act. Under that Act, the Delaware Court of Chancery has jurisdiction to enforce a written agreement to submit to arbitration and to enter judgment on an award arising from such an agreement. In enforcing the agreement or entering judgment on an award, the Court of Chancery does not pass upon the merits of the dispute underlying the arbitration agreement. A party seeking to compel an arbitration pursuant to a written agreement may file a complaint in the Court of Chancery.

A party may also file a complaint in the Court of Chancery seeking to enjoin arbitration on the ground that a valid agreement to arbitrate was not made or has not been complied with or that the claim sought to be arbitrated is time-barred. Where there is an issue subject to arbitration in a pending proceeding, the application to compel arbitration can be made in the pending action. Where there is a pending action in any other court of Delaware involving an issue subject to arbitration, an order to

arbitrate issued in the Court of Chancery has the effect of staying the other action in Delaware. If the Court of Chancery orders the parties to proceed with arbitration, and the parties or the written agreement do not specify a method of appointment of an arbitrator, the Court of Chancery may appoint one or more persons to serve as arbitrator. The arbitrator will schedule a hearing at which the parties may be represented by counsel. The arbitrators, by majority vote if more than one is appointed, will deliver to each party a copy of the award. The Court of Chancery will confirm the award upon application by either party within one year from the date of the award, unless grounds are presented for vacating or modifying the award. The Court of Chancery has no authority to vacate an award based on substantive legal merits unless the record shows that the arbitrator knew the controlling law, but chose to ignore it.

If the award is confirmed and is for other than money damages, it is entered as a final judgment with the Register in Chancery. If the award is for money damages, it is docketed with the Prothonotary's Office of the Superior Court and becomes a lien upon the real estate of the debtor in the county in which the judgment is docketed. A party may enforce an award entered as a final judgment in the same manner as if it were entered in a civil action.

Mediation. Delaware provides statutory authority allowing corporations to bind themselves to mediate disputes involving at least \$100,000 in controversy. Corporations that have filed the requisite certificate with the Secretary of State of Delaware consenting to mediate disputes may bind other parties to this form of alternative dispute resolution by including clauses in commercial contracts requiring mediation of such disputes.

The Chancellor or Vice Chancellor presiding over a proceeding pending in the Court of Chancery may refer the matter or designated issues within the matter to mediation with the consent of the parties. The mediator may be a sitting Chancellor or Vice Chancellor with no involvement in the case or some other independent mediator. Under the voluntary mediation process, even if the mediator is a sitting Chancellor or Vice Chancellor, the mediator serves only as an intermediary to facilitate resolution of the dispute and has no power of adjudication and no power to impose any sanction or penalty on the parties. The parties may consent to voluntary mediation during any stage of the proceeding. By allowing the parties the opportunity to have the matter mediated by a sitting judge with broad experience in the complex business disputes that regularly come before the Court of Chancery, the parties may have a higher level of confidence in the mediation process and consider it a valuable option to help resolve the conflict.

Mediation in the Court of Chancery (whether of a technology dispute or of a more general business dispute) is a confidential proceeding. There is no formal discovery in connection with a mediation proceeding, but the mediator may request that the parties exchange, or provide the mediator with, documents or other materials that may facilitate settlement.

In the context of technology and other complex business disputes that fall within the Court of Chancery's jurisdiction over "mediation only" proceedings, the mediator will ordinarily set a date for the mediation conference within 15 days after the Court receives the petition for mediation. The mediation conference will occur within 60 days after the petition is filed. The parties need not be engaged in litigation before filing a petition for mediation, but may agree to submit their dispute to mediation after litigation commences. The Court of Chancery will appoint a mediator from among the Court's eligible mediators, such as the other sitting judges and masters of the Court, or another independent mediator with that mediator's prior consent. If mediation fails and the parties resort to litigation in the Court of Chancery, the mediator is disqualified from adjudicating the dispute.

Neutral Assessment. Parties involved in a proceeding in the Superior Court in which the plaintiff seeks money damages in an amount less than \$100,000 may elect to use Neutral Assessment as an alternative to arbitration. This non-binding alternate dispute resolution process has been successfully used to seek assessments or evaluations and possible settlements in cases headed for arbitration. Neutral Assessment is a technique in which an impartial party, a neutral assessor, examines the evidence in the case, listens to the parties' positions, and then gives the parties his evaluation of the case. The process enhances communication between the parties about their claims and evidence, provides an assessment of the merits of the case by the neutral expert, helps to identify and clarify central issues in dispute, and assists with discovery and motion planning or with an informal exchange of key information.

Within ten days of the action being referred, a neutral assessor is appointed either by the parties or by the Court. The list of active neutral assessors consists only of those members of the Delaware Bar registered with and approved by the ADR Section of the Delaware State Bar Association in conjunction with the Court. A neutral assessment hearing must then be scheduled within 30 days of appointment or stipulation and held by the neutral assessor within 120 days after scheduling.

Prior to the hearing, the parties are each required to serve upon the neutral assessor a hearing statement, along with any supporting exhibits for the neutral assessor to review. At the hearing, each party presents its evidence and arguments informally to the neutral assessor. The assessor provides an evaluation of the case to the parties, including an estimate of the likelihood of liability, the dollar range of damages and an assessment of the strengths and weaknesses of each party's case. The neutral assessor provides reasoning to support these assessments, and identifies areas of agreement, clarifies and focuses issues and encourages the parties to reach a settlement.

If the parties are unable to reach a settlement at the conclusion of the hearing, the action will proceed as though a written demand for a trial *de novo* in an arbitration was filed by a party.

DELAWARE



FINANCIAL SERVICES

Innovative and flexible banking and financial services laws have established Delaware as a national financial center.



I. FINANCIAL INSTITUTION OVERVIEW

Delaware is an established national financial center. Despite Delaware's small size, there are more than 70 state or federally-chartered financial institutions in Delaware offering a wide range of financial services to commercial and retail customers, both in Delaware and across the United States. Many of these financial institutions offer active commercial loan and other credit programs. Delaware is home to many of the largest credit card issuers in the United States, such as MBNA America Bank and Chase Bank USA.

Entry into the Delaware banking market under Delaware law may be accomplished through the *de novo* formation of a banking entity, by acquisition of an entire bank, or by an interstate merger transaction (which includes a merger, consolidation, or an asset purchase involving an out-of-state bank and a bank located in Delaware). Delaware generally permits, with the prior approval of the Delaware Bank Commissioner, out-of-state bank holding companies or their subsidiaries to acquire or retain ownership or control of banks located in Delaware. Only "existing Delaware banks" may engage in an interstate merger transaction with an out-of-state bank if the resulting bank from such transaction will be an out-of-state bank. An "existing Delaware bank" is a Delaware state or national bank the initial Delaware charter or authorization of which to conduct a banking business in Delaware bears an effective date not less than five years prior to the effective date of the interstate merger transaction. Any branches of a disappearing Delaware bank in an approved interstate merger transaction resulting in an out-of-state bank may be retained by the resulting out-of-state bank as interstate branches. The Delaware Banking Code does not permit, however, interstate branching in Delaware through the original establishment of a branch office in Delaware by an out-of-state bank, or by acquisition solely of a branch office of a bank.

II. ADVANTAGES OF DELAWARE FINANCIAL INSTITUTIONS

Financial Center Development Act. Delaware is an established financial center due in great part to the enactment of legislation that modernized its banking laws in order to create a Banking Code that recognizes both commercial practices and the future needs of providers of commercial and consumer credit in a changing environment. The Financial Center Development Act (the "FCDA"), enacted in 1981 and expanded in 1984, permitted the acquisition of newly established Delaware state-chartered or national banks located in Delaware by an out-of-state bank holding company or its subsidiary so long as certain specified conditions were satisfied, which conditions could be waived by the Delaware Bank Commissioner. Many local banks were formed under this legislation.

Usury And Exportation Of Interest Rates. Since the passage of the FCDA, Delaware banks have not been subject to usury limitations under Delaware law in extending credit to customers. The combination of Delaware law and federal law enables Delaware banks to export interest rates across state lines free of the usury limitations imposed by most other jurisdictions. For this reason, many Delaware banks market their commercial and consumer bank products on a nationwide basis.

Regressive Tax Rate Structure. Banking organizations in Delaware enjoy a low, regressive tax rate structure that decreases from 8.7% to 1.7% of taxable income as taxable income increases. (See Chapter Four, “**Delaware Taxation—Corporate Income Tax—Banking Organizations.**”)

Innovation In Permissible Activities. Delaware is a proven leader in innovation within the financial services industry. Delaware was among the first states to permit banks to engage in securities and insurance underwriting activities. Delaware state-chartered banks are also granted other broad activity powers under State law. In some circumstances, enumerated powers granted to Delaware state-chartered banks under the Delaware Banking Code are broader than those granted to national banks under the National Bank Act. Of course, because the deposits of Delaware state-chartered banks are insured by the Federal Deposit Insurance Corporation, reference to federal law restrictions is necessary before acting under any powers granted by Delaware law. Delaware state-chartered banks formed by act of the Delaware General Assembly prior to the enactment of the State corporation law for banks and trust companies may enjoy even broader powers than those enumerated in the Delaware Banking Code.

Advantageous Trust Laws. Delaware banks and trust companies are able to offer personal and statutory trust products that offer significant advantages to clients over the laws of other states. (See Chapter Two, “**Business Entities—Statutory Trusts,**” and Chapter Eleven, “**Personal Wealth Management.**”)

III. TYPES OF DELAWARE FINANCIAL INSTITUTIONS

State-Chartered Banks And Trust Companies. In 1933, the Delaware Banking Code was established to provide a statutory framework for forming state-chartered banks and trust companies with general banking powers, and if desired, trust company powers. Delaware state-chartered banks and trust companies are granted broad powers under the Delaware Banking Code.

Limited-Purpose Trust Companies. In 1982, Delaware enacted legislation permitting the formation of limited-purpose trust companies that do not have general banking powers. The legislation was intended to resolve an ambiguity in the Delaware Banking Code as to whether trust company powers may be granted without general banking powers. As of August 2004, there were 14 State-chartered limited-purpose

trust companies in Delaware. Some Delaware limited-purpose trust companies have been formed by high net-worth individuals or families to operate as private trust companies for self-management and administration of trusts, while others have been formed by providers of personal trust services to offer the benefits of Delaware trusts to their clients worldwide. Still others have been formed by major banking organizations to offer corporate trust services. Delaware limited-purpose trust companies cannot accept deposits or make loans and are not considered “banks” under the federal Bank Holding Company Act of 1956, as amended.

Credit Card Institutions. Delaware state-chartered “credit card institutions” that have limited powers may be formed under Delaware law. In particular, a credit card institution may (i) only engage in credit card operations, (ii) not accept demand deposits or deposits that a depositor may withdraw by check or similar means for payment to third parties or others, (iii) not accept any savings or time deposits of less than \$100,000, (iv) maintain only one office that accepts deposits, and (v) not engage in the business of making commercial loans. In addition, a credit card institution may not be a “bank” as defined in the federal Bank Holding Company Act of 1956, as amended. A credit card institution may convert to a bank upon application to and approval by the Delaware Bank Commissioner. Notwithstanding the statutory authority to establish limited-purpose “credit card institutions,” it is more typical to form a Delaware bank capable of exercising full banking powers and limit the bank’s permissible activities in its charter to qualify it for an exception from the definition of a “bank” under the federal Bank Holding Company Act of 1956, as amended.

State Savings Banks. In 1997, as part of the Banking Industry and Financial Services Act of 1997, Delaware instituted a separate chartering framework for the formation of State-chartered savings banks. Delaware state-chartered savings banks have powers similar to those of Delaware state-chartered banks and trust companies, but must comply with the qualified thrift lender test and restrictions on amounts of commercial loans.

Foreign Bank Branches, Limited-Purpose Branches And Agencies. In 1986, Delaware enacted the Foreign Banking Development Act, which allows a foreign bank to establish and maintain a foreign bank branch, a foreign bank limited-purpose branch or a foreign bank agency, and to conduct certain types of banking business in Delaware. Once a foreign bank has obtained a certificate of authority, it may establish and maintain a foreign bank branch, a foreign bank limited-purpose branch or foreign bank agency in Delaware and engage in a general banking business.

A foreign bank agency may not accept deposits from citizens or residents of the United States or act as a fiduciary. A foreign bank agency may, however, maintain for the account of others credit balances incidental to or arising out of the exercise of its lawful powers. In addition, the Delaware Bank Commissioner has the authority to adopt regulations that, notwithstanding the statutory limitations on a foreign bank

agency's general banking powers, would authorize a foreign bank agency to accept any deposit, or exercise any other power that it could if it were operating in Delaware as a federal agency pursuant to the federal International Banking Act of 1978. The Delaware Bank Commissioner has adopted such a regulation. A foreign bank limited-purpose branch may, in any event, accept deposits that would be permissible for a corporation organized under Section 25A of the Federal Reserve Act.

A foreign bank may operate a representative office in Delaware, so long as the representative office obtains a license from the Delaware Bank Commissioner, engages in representational functions on behalf of the foreign bank and does not conduct a banking business. To obtain such a license, the foreign bank must submit an application to the Delaware Bank Commissioner. The Delaware Bank Commissioner will issue a license to the foreign bank to establish and maintain a representative office in Delaware if the Delaware Bank Commissioner determines, among other things, that the foreign bank and the management proposed for its Delaware representative office are each of good character and sound financial standing, and the management of both the foreign bank and its representative office is adequate.

Other Types Of Delaware Financial Institutions. Delaware's Banking Code permits financial businesses to obtain licenses to conduct specific financial activities in Delaware other than through the bank or trust company chartering process, including with respect to general consumer lending activities (which may be conducted by Delaware licensed lenders without usury limitations), acting as a mortgage loan broker, the sale and cashing of checks, drafts and money orders, the transmission of money, financing the sale of motor vehicles, and the transportation of money and other valuables.

IV. STRUCTURED FINANCE AND SECURITIZATION TRANSACTIONS

Delaware is a leading jurisdiction for structured finance and securitization transactions. There are several statutory advantages in Delaware that have led to its preeminence in these areas. The Delaware Limited Liability Company Act, the Delaware Statutory Trust Act and the Delaware Revised Uniform Limited Partnership Act provide for the formation of legal entities that permit contractual flexibility. As a result, practitioners can tailor Delaware limited liability company agreements, statutory trust agreements and limited partnership agreements to provide for "bankruptcy-remote" entities that are favorably received by rating agencies and investors.

In connection with many securitization transactions, receivables such as mortgage debts, leases, loans or credit card balances are sold by originators to Delaware bankruptcy-remote entities, which in turn issue securities backed by such assets. Delaware has a unique statute that is intended to facilitate such transactions, the Asset-Backed Securities

Facilitation Act. Under this Act, to the extent set forth in the transaction documents relating to a securitization, any property, assets or rights purported to be transferred, in whole or in part, in the securitization transaction are deemed to no longer be the property, assets or rights of the transferor. This Act assists practitioners in structuring transactions as “true sales” under Delaware law.

In order to provide more clarity and confirm existing law and practice in the context of Delaware’s securitization industry, Article 9 of the Delaware Uniform Commercial Code was recently amended to add an additional safe harbor for identifying certain types of collateral typically involved in securitization transactions. Under that new provision, a financing statement sufficiently indicates the collateral that it covers if the collateral is chattel paper, instruments, accounts or general intangibles and: (i) the financing statement provides a description of one or more records in the possession or control of the secured party that identify the specific collateral; (ii) the financing statement indicates that the items described on the record or records in the possession or control of the secured party are chattel paper, instruments, accounts or general intangibles, or otherwise indicates the nature of the items on the record or records by general description or category; and (iii) the record or records contain confidential information (such as credit card numbers) or a description of 100 or more specific accounts, chattel paper, instruments or general intangibles. This new safe harbor simplifies the preparation of financing statements in connection with certain securitization transactions.

V. INSURANCE AND CAPTIVE INSURERS

Transacting insurance business in Delaware, as elsewhere, is significantly regulated. The principal regulation of insurance companies in the United States is left to the states. This deference to state regulation of insurance companies is guaranteed by the federal McCarran Act. States generally have adopted a comprehensive, detailed framework for the regulation of all aspects of transacting insurance.

The Delaware Insurance Code provides the statutory framework governing the transacting of insurance in Delaware. In each state, including Delaware, the principal goal in the regulation of insurance companies chartered (in insurance parlance, “domiciled”) in that state is to ensure their financial health and soundness in order to protect policyholders wherever they might be located. Therefore, the fundamental financial health and soundness of insurance companies domiciled in Delaware but selling insurance in any of the other 49 states (or abroad), is principally a matter for Delaware. On the other hand, regulation of the financial health and soundness of insurance companies domiciled in other states but selling insurance in Delaware is principally a matter for the states of domicile of such insurance companies.

In addition to states having the principal regulatory responsibility for insurance companies domiciled in their own states, most states, including Delaware, provide additional regulations for the transacting of insurance business within each of the respective states, even though the principal regulation of the financial health and soundness of such insurance companies might be elsewhere. For example, insurance companies domiciled in other states, before transacting insurance in Delaware, must receive a Certificate of Authority from the State. There are certain exceptions to this Certificate of Authority requirement, including the investigation of claims, transactions under a particular insurance policy subsequent to the issuance of the policy governing only subjects of insurance not resident or located within the State of Delaware, surplus lines coverage, reinsurance and underwriting membership in a regulated insurance exchange. None of these activities occurring in Delaware requires a Certificate of Authority. In addition, before an insurance company wherever domiciled may sell insurance in Delaware, the insurance company must normally file with the Delaware Insurance Commissioner a copy of the form of each policy to be executed and delivered in the State.

All insurers domiciled in Delaware or domiciled elsewhere and transacting insurance business in Delaware must meet certain capital funds requirements as provided in the Delaware Insurance Code. They also must pay certain taxes (generally based upon the amount of premiums collected for policies sold in Delaware) and keep on file with the Delaware Insurance Commissioner copies of their financial statements and any examinations made upon them by the Insurance Commissioners of other states. The basic insurance tax in Delaware is 1.75% on net premiums on policies written in the State. There are certain exceptions and graduated taxes, particularly for employer-owned insurance policies. Insurers issuing workers' compensation policies or employer liability risks in the State pay a different tax. Insurance companies domiciled in Delaware that do not write 50% of the total premium on property or persons residing in Delaware and that have minimal employees in the State, are assessed an annual privilege tax that ranges between \$10,000 and \$95,000 per year, depending upon the size of the insurance company.

Delaware is an attractive jurisdiction in which to form a captive insurance company—an insurance company owned or controlled by a traditional operating company. Captive insurance companies have gained favor throughout the United States in recent years as an alternative method of managing the increasingly unpredictable traditional insurance markets. Captive insurance companies can provide traditional operating companies with additional administrative efficiencies, greater management and control and flexibility of investment policies in connection with meeting their insurance requirements. In order to streamline the formation of captive insurance companies, Delaware adopted its Captive Act in 1984 to permit the formation of Delaware captives

without the usual incorporation requirements and minimal capital requirements. In 1990, Delaware amended the Captive Act to reduce premium taxes on Delaware captive insurance companies and to permit associated groups of captive insurance companies to consolidate premium taxes to take advantage of Delaware's regressive captive premium tax structure. (See Chapter Four, "**Delaware Taxation — Corporate Income Tax - Captive Insurance Companies.**")

In Delaware, the Insurance Commissioner is the chief officer of the State charged with the regulation of insurance activities. The Insurance Commissioner, under Delaware's Constitution, is elected to a four-year term at the general election. The Insurance Commissioner is also the head of the Delaware Department of Insurance and has broad, general powers to enforce and execute the duties of the Delaware Insurance Code. The powers of the Insurance Commissioner include the power to make reasonable rules and regulations with respect to insurance companies, to issue orders with respect to their operations, to enforce lawful orders through the Attorney General of the State, to conduct investigations and examinations of insurers and to regulate Delaware insurance agents generally.

The Delaware Insurance Code also gives to the Insurance Commissioner broad powers to seize control of a Delaware insurer when the Insurance Commissioner believes that such insurer is impaired or potentially insolvent and powers to rehabilitate or, under certain circumstances, liquidate such insurer. Delaware insurance companies subject to rehabilitation or liquidation orders generally have a right to a hearing before the Insurance Commissioner and also the right to appeal an order of the Insurance Commissioner to the Delaware Superior Court. The liquidation of insurance companies domiciled in Delaware is subject to the Uniform Insurers Liquidation Act, a part of the overall Delaware Insurance Code. As its name implies, the Delaware Uniform Insurers Liquidation Act is similar to liquidation acts in other states.

The Department of Insurance is organized into several sections as follows:

Bureau Of Examination, Regulation And Guaranty. To ensure reliable insurance coverage at reasonable rates for Delaware consumers, the Bureau:

- Reviews applications to do business in Delaware.
- Monitors the financial operations of the 1,500 foreign and 150 domestic insurers currently licensed in Delaware.
- Monitors the market conduct of insurers operating in Delaware.
- Approves or contests insurers' rate filings.
- Rehabilitates or liquidates financially impaired insurers.

Consumer Services And Investigations Division. To protect the welfare of insurance consumers, the Division:

- Provides information on how to make decisions that can lower the cost of insurance and increase the value consumers receive.
- Assists consumers in resolving conflicts with insurance companies, health coverage providers, and agents.
- Provides arbitration hearings as a low-cost alternative to civil litigation to resolve disputed consumer claims.
- Investigates concerns regarding all types of insurance and utilizes consumer input to review market trends and statute and rule violations, and to develop changes to the insurance law.

Product Licensing And Continuing Education Division. To ensure competency and ethical conduct by insurance agents, brokers, limited agents, adjusters, appraisers and consultants, the Division:

- Develops and administers tests for entry into the field.
- Maintains permanent records on the current 33,000 insurance professionals.
- Administers the Continuing Education Program.
- Provides consumers information about the licensing status of a producer.

Fraud Prevention Bureau. To reduce the cost of insurance fraud to consumers, the Bureau:

- Investigates property and casualty, auto, life, health, workers' compensation, provider and agent insurance fraud.
- Provides a focal point for the anti-fraud efforts of insurance company investigators, law enforcement agencies, and prosecutors to achieve a cooperative and coordinated approach to the detection, investigation and prosecution of insurance fraud.

VI. STATE BLUE SKY AND OTHER SECURITIES ISSUES

For the commercial enterprise seeking to raise the financing necessary to start, continue or expand its business, federal and state securities law compliance is an important matter to consider. Delaware is one of the approximately 37 states that has enacted a state securities statute patterned after the Uniform Securities Act. However, the Delaware Securities Act, enacted in 1973 and amended several times since, contains many variations from the Uniform Securities Act.

Under the Delaware Securities Act, no “security” may be offered or sold in the State unless registered under such Act or an exemption from registration applies. The Delaware Securities Act makes it unlawful for a person to commit fraud in the offer, sale or purchase of a “security.” The Delaware Securities Act also regulates the activities of broker-dealers, investment advisers and agents that transact business in the State.

Offer Or Sale Of Securities In Delaware. To determine whether the Delaware Securities Act would apply to proposed fund-raising activities, one must consider whether an “offer” or “sale” of a “security” would occur in Delaware. The Delaware Securities Act defines “security” broadly to include, without limitation, any note, stock, treasury stock, bond, debenture, evidence of indebtedness or investment contract. This definition is similar to that used in the federal Securities Act of 1933, as amended.

Two very common approaches to raising financing are the issuance by an entity of its equity or debt instruments. These instruments are generally included in the Delaware Securities Act’s definition of “security.”

Exemptions From Registration. Certain types of securities are exempt from registration under the Delaware Securities Act. For the commercial enterprise, its securities would be exempt from registration if, among other things, (i) the enterprise is in one of certain specified businesses and is subject to the jurisdiction of the Interstate Commerce Commission or is a registered holding company under the federal Public Utility Holding Company Act of 1935, (ii) such securities are listed on certain exchanges including, without limitation, the New York and the American Stock Exchanges, (iii) the enterprise is a not-for-profit organization, (iv) such securities constitute short-term commercial paper, or (v) such securities are traded pursuant to the National Association of Securities Dealers Automated Quotations National Market System.

Certain types of transactions are also exempt from registration under the Delaware Securities Act. In order for some of the transactional exemptions to apply, a prescribed notice must be filed with, and a fee must be paid to, the office of the Delaware Securities Commissioner. These transactional exemptions include, among other things, (i) offers and sales in compliance with Rule 505 or 506 of federal Regulation D, (ii) offers to sell to existing security holders if certain specified conditions are met, (iii) limited offerings, (iv) offers and sales to institutional investors, and (v) offers and sales to accredited investors.

For the commercial enterprise, one of the more important exemptions to registration exists for transactions exempt from registration under the federal Securities Act of 1933 under Rule 505 or 506 of Regulation D promulgated thereunder (including the sale of federal covered securities in a private offering under Rule 506). The enterprise issuing and selling the securities must file with the Delaware Securities Commissioner a copy of federal Form D and Form U-2, Uniform Consent to Service of Process, within 15 days after the first sale of a security in Delaware.

Another important exemption is the limited-offering exemption. This exemption applies only if offers are directed to not more than 25 purchasers in Delaware (although certain persons are not included in calculating the number of purchasers) during any 12-month period. The offering of the securities may not be made by means of general solicitation or general advertising, and each offeree must be a related person or the enterprise must have a reasonable basis to believe that each offeree has the financial experience and knowledge to evaluate the securities or has the financial assets to bear the economic risk of the loss of an investment in the securities. The enterprise must file with the Delaware Securities Commissioner federal Form D (if the form is being filed by the enterprise with the U.S. Securities and Exchange Commission (the "SEC")) or Delaware Form D-1 not later than 15 days after the first sale of securities in Delaware or within six months after the commencement of the offering, whichever occurs first.

Any offer or sale by the enterprise to an institutional investor will be exempt from registration. Institutional buyers include accredited investors (as defined in Rule 501 of Regulation D), qualified institutional buyers (as defined in SEC Rule 144A), and corporations, partnerships, trusts or other entities having a net worth of at least \$5 million. Likewise, offers and sales to accredited investors are exempt. This exemption is not available for certain development-stage enterprises.

Registration. An offering of securities may be registered in Delaware by coordination or by qualification. Registration by coordination is available for securities being registered with the SEC and involves the filing with the Delaware Securities Commissioner of a copy of the registration statement filed with the SEC and certain other forms and the payment of a fee. The registration becomes effective once the federal registration statement is effective, the Delaware registration statement has been on file for ten days, and a statement about offering prices and underwriting discounts and commissions is on file with the Delaware Securities Commissioner, unless a stop order is in effect or proceedings for such an order are pending.

Registration by qualification is available for any security and involves the filing with the Delaware Securities Commissioner of a registration statement containing certain prescribed information and certain other forms and the payment of a fee. Registration is effective upon order by the Delaware Securities Commissioner. Delaware law requires that the filer of a registration statement file quarterly reports as long as the registration is effective and file, with respect to securities registered by qualification, audited quarterly and annual financial reports for a period of three years after the effective date of the registration.

DELAWARE



REAL ESTATE

Understanding local laws and customs is key to a successful Delaware real estate transaction.



I. PURCHASE AND SALE OF REAL ESTATE

The laws and customs governing the purchase and sale of real estate in Delaware do not vary greatly from those of most other states. Although Delaware has some peculiarities in this regard, more often those peculiarities vary from county to county or between municipalities within the State. Understanding the laws or customs in a particular locality can be more important to the success of a real estate transaction than State laws.

Role Of Brokers And Consultants

Because local custom is so important, professional consultants (such as attorneys, brokers and planners) generally provide a valuable service in these transactions. A company new to Delaware will usually contact a real estate broker for both the purchase and leasing of property. Generally, the broker remains the agent of the seller as a matter of Delaware law, even though the broker may be retained by the purchaser to locate and help negotiate for possible properties. On the other hand, where the broker is the purchaser's agent, the broker is responsible for making certain disclosures of the broker's role as agent for the purchaser. Brokers can also serve in a dual agency relationship with the seller and purchaser.

Typical Contract Terms

The negotiation of sales contracts or options can follow many paths and take many forms. No standardized forms of contracts or options are used throughout the State, although some of the counties have industry-standard contracts for residential sales, and most commercial contracts or options routinely contain certain types of provisions. For example, most contracts allow a purchaser a period of time within which to examine the physical condition and other aspects of the property and within which to arrange the financing necessary to purchase the property. During this period, the purchaser might examine the title to the property, have a structural engineer inspect the property or perform an environmental audit of the property for compliance with environmental laws. During this period of examination and inspection, the purchaser is often not at risk for the purchase price and, if the examination or inspection discloses an unacceptable condition, the purchaser may have the right to terminate the contract.

There are also some customary allocations of risks and costs that are generally found throughout the State. For example, the purchaser will usually obtain its own examination of title insurance, at its cost. The purchaser will usually prepare the transfer documents at its cost and pay for recording the transfer documents in the land records.

Delaware law requires that contracts for the sale of undeveloped land, or that provide for seller financing, contain certain terms and conditions specified by statute.

Title Insurance

Delaware is characterized as an attorney-agency state for title insurance. In other words, title insurance is obtained from and written by attorneys in private practice who are acting as agents for one or more title insurance companies. Delaware is also a filed-rate state in that the rates for title insurance filed with the State by an insurance company are not subject to further negotiation by the insurance company. Not all title insurance companies have filed the full range of ALTA endorsements, and some endorsements typically available in other states are not routinely available in Delaware.

Transfer Taxes

Most transfers of real property in Delaware are subject to realty transfer tax. Transfer tax is payable at the time the transfer document (usually a deed) is recorded in the appropriate recording office. The State and many of the other political subdivisions imposing a realty transfer tax have their own reporting forms that are filed with the transfer document at the time of recording and payment of the transfer tax.

In most jurisdictions within Delaware, the transfer-tax liability is divided equally between the purchaser and the seller in the absence of any agreement by the parties to the contrary. (See Chapter Four, “**Delaware Taxation—Sales and Use Taxes—Realty Transfer Tax.**”)

Registration And Regulation

Aside from federal requirements, such as the Foreign Investment in Real Property Tax Act of 1980, as amended, there are few regulations of purchases and sales imposed at the State or local level. Although there may be requirements for the registration of a foreign corporation, foreign limited partnership or other entity under other applicable laws governing those entities (including the need for certain foreign entities to register if they are to own real property in Delaware), and although the tax laws may impose certain obligations, no State law obligates foreign entities that are purchasing or selling real estate to register that purchase or sale with any State or local agency. Other State laws should be reviewed, however, in order to determine the requirements with respect to registration of various entities. Those might include the qualification of a foreign corporation to do business in the State or the filing of a “fictitious name” certificate for an entity in the Office of the Prothonotary of the county in which such entity will be owning and operating real estate. State environmental laws do not require registration or notice as part of real estate transfers, other than requirements that may apply to the transfer or change of ownership of facilities or equipment that are subject to operational permits.

II. LAND USE AND DEVELOPMENT

Each of the three Delaware counties and most of the incorporated municipalities throughout the State have separate, and often very different, zoning, subdivision and land development regulations. The differences relate not only to different types of zoning classifications, but also to different procedures for rezonings, different types of development plan requirements, formats and procedures and different scopes of those various regulations. Delaware has virtually no State-wide land-use regulation other than environmental and environmental-related regulation (e.g., Underground Storage Tank Act, Coastal Zone Act, wetlands regulations, storm water management controls, etc.). The process of rezoning or obtaining subdivision or land development plan approvals is, therefore, primarily a localized process.

The diverse state of zoning and other land-use regulation throughout Delaware does not usually result in insurmountable difficulties in obtaining rezonings or other land-use approvals. It does mean, however, that the process must be approached carefully and with knowledge of the particular regulations and practices of the jurisdiction in which the property is located.

The decentralization of much of the land-use regulation in Delaware may result in convenience for the property owner or developer. Depending upon the locality, most permits and approvals will be generated by, or at least coordinated through, a single office for an entire real estate development project. Recent changes to State law allow for a streamlined approval process from state agencies. All of this can mean ease, efficiency and cost-effectiveness.

III. LEASING

All forms of real estate leasing are common in Delaware, including land or ground leases. Delaware's Residential Landlord-Tenant Code applies to most, but not all, residential real estate rental agreements. Short-term beach rentals, for example, are not covered by that Code. A Commercial Landlord-Tenant Code applies to most commercial real estate rental agreements. For purposes of that Code, rental agreements generally include all commercial and industrial leases, but not land or ground leases. The scope of this Code is very limited, and it imposes few practical constraints on the parties' freedom to contract as they wish. Farm leases are governed by a separate statute.

There is no form of lease in general use throughout the State, although there are industry-created forms in general circulation. Leases are based on the form of lease employed by an individual landlord or negotiated by the parties.

DELAWARE



PERSONAL WEALTH MANAGEMENT

Delaware's favorable trust laws, preeminent judicial system, flexible investment rules and tax advantages make Delaware a center for personal wealth management.



I. INTRODUCTION

Delaware long ago developed a body of trust and tax laws that have led people from throughout the United States and abroad to establish trusts in the State. Several of the provisions discussed below are not unique to Delaware, but the existing body of State law coupled with Delaware's ongoing efforts to maintain a salubrious trust climate continue to make it the best place to have personal trusts. For example, Delaware is an attractive location for many trusts because, unlike most other states, Delaware does not impose an income tax on, or require the filing of a return to report, non-Delaware source ordinary income accumulated in or capital gains incurred by an irrevocable resident trust, provided that no remainder beneficiary lives in the State. Accordingly, an irrevocable trust without a Delaware remainder beneficiary will not be subject to any Delaware income tax because all income will either be distributed (which will result in a distributions deduction) or will be accumulated (which will result in a deduction for Delaware purposes). Similarly, trusts are frequently located in Delaware in order to minimize court costs and to preserve confidentiality. Trust administration ordinarily is not supervised by the Delaware courts, and this practice can produce substantial savings in accounting and other court costs over the duration of a trust. However, if judicial involvement is required (for example, when the proper interpretation of the governing instrument is uncertain or a fiduciary is believed to be acting in breach of a duty), prompt and efficient relief is available in the Delaware Court of Chancery.

II. PERPETUAL TRUSTS

In 1995, Delaware enacted legislation that permits stocks, bonds, and other personal property to remain in trust forever. Real property held in trust continues to be governed by a 110-year limitation, enacted in 1986, when the common law rule against perpetuities for real and personal property was repealed in Delaware. This limitation can be avoided, however, by placing real property in a limited liability company or family limited partnership and then placing the LLC or partnership interests in trust. Interests in those types of entities are personal property under Delaware law, and thus not subject to the 110-year limitation. Thus, Delaware is one of only several states that permit the creation of a perpetual trust for other than charitable or similar purposes. An individual thinking about creating a trust to attempt to obtain the benefit of the GST exemption from the federal generation-skipping transfer tax for as long as legally possible should consider Delaware.

III. DIRECTION TRUSTS

Delaware has an established practice of permitting someone other than the trustee to make investment decisions for particular assets (e.g., closely held stock) or with the hope of maximizing the trust's investment performance. Delaware law facilitates the

use of investment advisers by making it clear that a trustee may follow the direction of an adviser authorized by the governing instrument to give such direction without breaching the trustee's fiduciary responsibility and that the trustee will be liable for doing so only in cases of willful misconduct. To recognize this diminished responsibility, Delaware corporate trustees customarily charge lower fees to administer direction trusts than trusts over which they have investment responsibilities.

Even if a trust does not provide for the appointment of a direction investment adviser, a trustee may hire an agent to advise it concerning trust investments. Because the trustee is responsible for the agent's performance, however, Delaware corporate trustees do not charge less to administer trusts for which they have hired agents.

IV. EFFECTIVE ASSET PROTECTION

Delaware long has enforced spendthrift trusts. Under Delaware's statute, a creditor of a beneficiary of such a trust has only such rights to the trust property as are afforded the creditor by the terms of the instrument, and no limit is placed on the amount that may be sheltered from creditors' claims. Although the courts have created an exception for obligations to support a spouse, Delaware law provides virtually complete protection from the claims of creditors of a beneficiary other than the settlor. Unlike the law in some other states, Delaware law bars a creditor from seizing the interest of a beneficiary even when the beneficiary commits a willful tort.

V. ASSET PROTECTION TRUSTS

Under Delaware's Qualified Dispositions in Trust Act, a person may create an irrevocable Delaware trust (i) that should not be reachable by creditors, and (ii) from which he still may benefit. Such a trust may also be structured to be a completed gift for federal gift-tax purposes and to be excludable from the settlor's gross estate for federal estate-tax purposes.

To take advantage of the Delaware Qualified Dispositions in Trust Act, the settlor must make a "qualified disposition," which is a disposition by a settlor to a "qualified trustee or qualified trustees" by means of a "trust instrument." The qualified trustee must be an individual (other than the settlor) who resides in Delaware or any entity authorized by the law of Delaware to act as a trustee. Provided that there is at least one Delaware trustee, it is possible to appoint individual co-trustees who do not reside in Delaware or non-Delaware corporate co-trustees. The qualified trustee or qualified trustees must maintain or arrange for custody in Delaware of some of the trust property, maintain records for the trust, prepare or arrange for the preparation of fiduciary income-tax returns, or otherwise materially participate in the administration of the trust. The "trust instrument" must provide that Delaware law governs the validity,

construction and administration of the trust, specify that the trust is irrevocable and contain a spendthrift clause. The terms of the trust may permit the settlor to retain (i) a special testamentary power of appointment, (ii) the power to veto distributions, (iii) the right to receive current income distributions, (iv) the right to receive annual payments of up to 5% of the principal of the trust, (v) the right to receive payments from a charitable remainder unitrust, or (vi) the right to receive principal distributions under an ascertainable standard.

The Delaware Qualified Dispositions in Trust Act bars original actions and actions to enforce judgments, including judgments entered elsewhere, and it requires any action involving a Delaware asset protection trust to be brought in the Delaware Court of Chancery. Any action to set aside a qualified disposition must be based on the Delaware Uniform Fraudulent Transfers Act. If a creditor's claim arose before the qualified disposition was made, the creditor must bring suit within four years after the qualified disposition was made or, if later, within one year after the creditor discovered (or should have discovered) the qualified disposition. A creditor must prove by clear and convincing evidence that such transfer was fraudulent.

VI. TOTAL RETURN UNITRUSTS

In 2001, Delaware became the first state to enact a total return trust statute. Under the Delaware statute, a trustee may convert an income trust to a unitrust, reconvert a unitrust to an income trust, or change the percentage used to calculate the unitrust amount and/or the method used to determine the fair market value of the trust. One procedure applies if the trustee is a disinterested trustee, and another procedure applies if there is an interested trustee. A unitrust payout allows the trustee to pay a specified percentage of the fair market value of the trust annually to the current beneficiary (rather than just the "income" from the trust), thereby affording the trustee greater investment flexibility and protection under Delaware's prudent investor rule.

A disinterested trustee may convert an income trust to a unitrust without court approval if it adopts a written policy, satisfies notice requirements, and does not receive written objections. Notice of the proposed conversion must be sent to (i) the trustor, if living, (ii) all living persons who are currently receiving or are eligible to receive income distributions, (iii) all living persons who would receive principal if the trust were then terminated, and (iv) all advisors or protectors. At least one current income beneficiary and one contingent remainderman must be legally competent in order for the notice to be effective under the statute.

An interested trustee may convert an income trust to a unitrust without court approval if the policy, notice and objection requirements described above are satisfied and if it appoints a disinterested person to determine the unitrust percentage and

related matters in a fiduciary capacity. The trustee's notice must contain the disinterested person's determinations.

A trustee may always petition the Court of Chancery for guidance if it is unable to convert the trust to a unitrust under the above procedures, either because a beneficiary objects or because a competent beneficiary is not in the current or next generation, or if the proposed unitrust payout is greater than 5%. (The statute provides that the unitrust percentage must be a reasonable current return from the trust and must be between 3% and 5%). The trustee may decide how to account for and value illiquid assets, select the number of prior periods, if any, to use in calculating the unitrust percentage, and determine whether the current beneficiary or the trust will pay income tax attributable to capital gains incurred to make unitrust distributions. Under the Delaware statute, the trustee is not personally liable if it makes the "wrong" decision. Procedures and computer software have been developed to implement the statute.

The Delaware statute provides that conversion of a trust to a total return unitrust is a matter of trust administration and that the statute is available to trusts administered in Delaware under Delaware law. Thus, if moving a trust results in a change in the law that governs its administration to Delaware law (either pursuant to the terms of the trust instrument or specific language in a court order), the trust will be able to take advantage of the statute.

VII. PRIVATE FOUNDATION LAWS AND PROCEDURES

Most states have addressed issues of non-profit corporate governance through the adoption of separate non-profit corporation acts. Only four states—of which Delaware is one—govern non-profit corporations by for-profit corporation laws.

Most state non-profit corporation acts do not provide a general standard of care applicable to the directors of non-profit corporations and do not provide clear guidance that the duties of such directors are similar to those of their for-profit counterparts. Even in the few states where there is no separate non-profit corporation act, distinctions may still be drawn between the fiduciary duties of directors of non-profit corporations and the fiduciary duties of directors of for-profit corporations. In many states, further case law development has been and will be required to clarify the extent to which corporate rather than trust law principles will apply.

A donor should consider creating his private foundation as a Delaware non-profit corporation because Delaware law provides clear guidance on the fiduciary duties applicable to directors, flexible standards of corporate governance, and minimal governmental interference with the activities of charitable entities. (See Chapter Two, "**Business Entities—Corporations—Membership Corporations.**")

DELAWARE



ADMINISTRATIVE LAW AND REGULATION OF STATE AGENCIES

*Delaware administrative
laws balance the need
for regulation with
an efficient economy.*

Delaware state government provides a vast array of services to its citizens and others having contact with the State. In 1969, Delaware adopted a cabinet form of government, reorganizing into a more streamlined governmental system many boards and commissions of the State that had existed for decades. Each cabinet department is headed by a cabinet secretary. Major cabinet departments include the Departments of State; Transportation; Safety and Homeland Security; Health and Social Services; Correction; Labor; Natural Resources and Environmental Control; Agriculture; Children, Youth and Their Families; Technology and Information; Finance; and Administrative Services. Each State department is typically divided into various divisions, each headed by a division director. The division directors generally report to the cabinet secretary.

Delaware also has certain ancillary agencies, boards and commissions not part of the cabinet departments or only loosely affiliated with cabinet departments. Major ones include the Public Service Commission, the State Bank Commissioner, the Delaware Economic Development Office, the Board of Education, the Election Commissioner, the Compensation Commission, the Human Relations Commission, the Public Defender, the Office of the Child Advocate and numerous boards and commissions regulating professions and other matters.

Certain Delaware offices created by the Delaware Constitution remain independent within the executive branch of government. These include the Attorney General, the Insurance Commissioner, the Auditor of Accounts and the State Treasurer.

Reflective of the State's small size, state government in Delaware has broader responsibilities than in most states. For example, unlike many states, Delaware's education system operates at the State level and is not a county or municipality service. Similarly, corrections, prisons, welfare, roads, highways and transportation and criminal prosecution are all handled by State-level agencies. As a result, by comparison to other states, Delaware's state-level operating budget (including the elementary and secondary education budget and the highway budget) is higher on a per-capita basis than in most states.

All State agencies and departments, and most boards and commissions, have the power to issue rules and regulations necessary for their respective operations, to enforce such rules and regulations and otherwise to manage operations consistent with the broad purposes of Delaware law. Most State agencies, in the adoption of rules and regulations and in decisions involving potential violations, are generally subject to the Delaware Administrative Procedures Act. However, certain agencies, including the General Assembly, the courts, municipalities and other political subdivisions and school districts, are not subject to that Act. Generally, the Administrative Procedures Act provides a framework and guidelines for the adoption of rules and regulations by State agencies, boards and commissions and procedures for making case decisions. Parties aggrieved by a case decision of a State agency generally may appeal for relief to the Superior Court of the State of Delaware or, in some cases, the Delaware Court of Chancery. Appeals of case decisions are on the record without a trial *de novo*.

In administering the laws of Delaware, State employees, officers and officials are subject to the State Employees', Officers' and Officials' Code of Conduct. The Code of Conduct was enacted to help ensure propriety and to preserve the public's confidence and trust in public employees, officers and officials. Generally, the Code of Conduct prohibits conflicts of interest, requires certain financial disclosures and creates the Delaware Public Integrity Commission to issue and enforce rules with respect to the Code of Conduct.

The Division of Research of Legislative Counsel is charged with compiling, maintaining and publishing the Register of Regulations of the State of Delaware. The Registrar is an employee of the Division of Research of Legislative Counsel charged with the day-to-day responsibility of maintaining the Register of Regulations. The Registrar has the power and responsibility to require all State agencies to submit copies of proposed regulations to the Registrar as well as subsequent amendments, repeals and additions. The Registrar also has the power and authority to advise agencies as to the form and style of the regulations in order to provide general uniformity.

State agencies generally are also subject to the Delaware Freedom of Information Act. The Freedom of Information Act designates certain records as public records and provides for their general availability to the public. The Freedom of Information Act also generally requires open meetings for most State agencies, boards and commissions. However, neither the Delaware General Assembly nor any caucus, committee or sub-committee thereof is subject to the Freedom of Information Act. Also exempt from the provisions of that Act are the University of Delaware and Delaware State University, except for the Boards of Trustees of those educational institutions. The Freedom of Information Act provides that certain records are not deemed public records and are, therefore, not generally available to the public, including medical records, student records of educational institutions, trade secrets, criminal or civil investigatory files, criminal or civil records, intelligence files by law enforcement agencies, records that disclose the identity of contributors to charitable organizations, records involving labor and collective bargaining negotiations, inmate records of the Department of Corrections and investigative files maintained by the Violent Crimes Compensation Board.

The open-meeting provisions of the Freedom of Information Act generally require prior notice of meetings, their agendas and the ability of individual citizens to attend and present views. Under certain circumstances, a public body may hold an executive session closed to the public, but formal votes on public business are not allowed in executive sessions. The open-meeting provisions of the Delaware Freedom of Information Act do not apply to grand juries, petit juries, the Board of Pardons and Parole, the Violent Crimes Compensation Board or the deliberations of the Human Relations Commission, the Industrial Accident Board and the Tax Appeals Board involving case decisions.

Delaware also provides a detailed scheme of regulation for the delivery of services to Delaware citizens by organizations deemed to be monopolies. In Delaware, the regulation of such entities is the responsibility of the Public Service Commission. The Public Service Commission has five members appointed by the Governor and confirmed by the Senate and has a full-time staff and is housed within the Department of Administrative Services. The Delaware Public Service Commission generally regulates the provision of electrical services, telephone services, water services, and taxi cab and limousine services, and has certain responsibilities with respect to the regulation of car dealerships and a limited role in the regulation of cable television services.

DELAWARE



PRINCIPAL ECONOMIC
DEVELOPMENT AND
BUSINESS ASSISTANCE
AGENCIES

*Agencies and
organizations providing
assistance to businesses
are readily accessible.*

Set forth below are addresses and contact numbers for economic development agencies, Chambers of Commerce and other organizations that provide assistance to persons seeking to establish businesses in Delaware:

I. ECONOMIC DEVELOPMENT AGENCIES

Delaware Economic Development Office

99 Kings Highway
 P.O. Box 1401
 Dover, Delaware 19901
 (302) 739-4271
 (302) 739-5749 (fax)
www.state.de.us/dedo

New Castle County Economic Development Council

630 Churchman's Road
 Suite 201
 P.O. Box 11247
 Wilmington, Delaware 19850-1247
 (302) 737-4343, Extension 230
 (302) 737-8450 (fax)
www.nccedc.com

City of Wilmington

Office of Economic Development

City/County Building, 3rd Floor
 800 French Street
 Wilmington, Delaware 19801
 (302) 576-2120
 (302) 571-4326 (fax)
www.ci.wilmington.de.us

Central Delaware Economic Development Council

P.O. Box 576
 Dover, Delaware 19903
 (302) 678-3028
 (302) 678-0815 (fax)
www.cdcdc.org

Sussex County Department of Economic Development

9 South DuPont Highway
P.O. Box 589
Georgetown, Delaware 19947
(302) 855-7770
(302) 855-7773 (fax)
www.sussexcounty.net

II. ADDITIONAL STATE GOVERNMENT OFFICES

Department of State

Townsend Building
401 Federal Street
Suite 3
P.O. Box 898
Dover, Delaware 19903
(302) 739-4111
(302) 739-3811 (fax)
www.state.de.us

Division of Corporations

Townsend Building
401 Federal Street
Suite 4
P.O. Box 898
Dover, Delaware 19903
(302) 739-3077
(302) 739-3812 (fax)
www.state.de.us/corp

Delaware Insurance Department

841 Silver Lake Boulevard
Dover, Delaware 19904
(302) 739-4251
(302) 739-5280 (fax)
www.state.de.us

Office of the State Bank Commissioner

555 E. Loockerman Street
Suite 210
Dover, Delaware 19901
(302) 739-4235
(302) 739-1492 (fax)
www.state.de.us

Division of Revenue

820 North French Street
Wilmington, Delaware 19801
(302) 577-8200
(302) 577-8202 (fax)
www.state.de.us/revenue

**III. CHAMBERS OF COMMERCE
AND OTHER ORGANIZATIONS**

Delaware State Chamber of Commerce

1201 North Orange Street
Suite 200
P.O. Box 671
Wilmington, Delaware 19899-0671
(302) 655-7221
(302) 654-0691 (fax)
www.dsc.com

The Committee of 100

First Federal Plaza
Suite 512
Wilmington, Delaware 19899
(302) 654-6115
(302) 654-1556 (fax)
www.committeeof100.com
com100@committeeof100.com

New Castle County Chamber of Commerce

630 Churchman's Road
Suite 201
P.O. Box 11247
Wilmington, Delaware 19850-1247
(302) 737-4343
(302) 737-8450 (fax)
www.ncccc.com

Small Business Development Center Network

University of Delaware
Delaware Technology Park
1 Innovation Way
Suite 301
Newark, Delaware 19711
(302) 831-1555
(302) 831-1423 (fax)
www.delawaresbdc.org

Central Delaware Chamber of Commerce

435 North DuPont Highway
Dover, Delaware 19901
(302) 734-7513
(302) 678-0189 (fax)
www.cdcc.net

Service Corporation of Retired Executives

824 North Market Street
Suite 610
Wilmington, Delaware 19801
(302) 573-6552
(302) 573-6060 (fax)
www.score.org

Greater Georgetown Chamber of Commerce

P.O. Box 1
Georgetown, Delaware 19947
(302) 856-1544
(302) 856-1577 (fax)
www.georgetown.coc.com

Small Business Administration

824 North Market Street
Suite 610
Wilmington, Delaware 19801
(302) 573-6382
(302) 573-6060 (fax)
www.sba.gov



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www.rlf.com