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FOREIGN BUSINESS IN SOUTH CAROLINA: *A Legal Overview*



Published by
The South Carolina State Development Board
and
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Columbia, South Carolina

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The law firm of Berry, Dunbar, Daniel, O'Connor, Jordan and Eslinger is an established Columbia firm which specializes in international business law and transactions. Their clients include corporations from across Europe, the Far East, and the United States. This unique expertise has been an ideal source in preparing this book.

James V. Dunbar, Jr. is the senior partner in charge of international business at Berry, Dunbar, Daniel. He is considered an authority on the special needs of foreign companies doing business in the United States. He is a member of many international organizations and is a frequent lecturer in Europe on various aspects of International Law. He is a member of the South Carolina and American Bar Associations, and the American Immigration Lawyers Association.

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TABLE OF CONTENTS

Introduction: Foreign Business in South Carolina.....	3
Bringing Your Business to South Carolina	
What Form Should Your Business Take.....	7
Factors to Consider When Choosing a Form of Business	11
Business Incentives	13
The South Carolina Business Corporations Act.....	17
Financing Your Business in South Carolina	31
Foreign Investment in the United States	34
Operating Your Business in South Carolina	
United States Antitrust Law	39
Import Controls	45
Intellectual Property Rights	51
Taxation on Foreign Persons Investing in South Carolina	58
The People in Your Business	
United States Immigration Laws.....	67
Labor and Employment Law	76
Appendix A	
State Agencies and Departments	85
Appendix B	
Federal Agencies and Departments	87
Glossary	94
Index	97

DEDICATION

“To all who labor at the practice of
International Law and Business.”

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Introduction: Foreign Business in South Carolina

This book is intended to give you an overview of relevant business laws of South Carolina and the United States. We want to show you how those laws might affect you and your company when you decide to do business in South Carolina. What we have done is to take the questions that new businesses ask most often and put the answers together in one easy reference book. Our aim is to make it simpler for your company to decide whether coming into South Carolina is the right move for you. When you do decide to come into the state, this book can give you guidance on where to go, what to do, and who to turn to.

Included in this book are a number of handy reference materials. In the back are lists of federal and state agencies that you may need to contact. If your questions need more detailed information than we have provided, you need only call the appropriate agency or department included on the list.

Another helpful aid is a glossary of terms. Sometimes an American word or phrase can be difficult to translate. The glossary is intended to define some of the many legal and business terms that are used in this book.

The book is intended as an overview of the laws which will affect your business here in South Carolina. It also is meant as an introduction to the business climate of the state. A good business climate means providing a good place to live, to work, and to grow. From the beaches to the mountains, South Carolina presents a willing and capable work force, flourishing communities, and competitive costs. When it comes to your business, South Carolina offers the finest in business climates as well as quality of life for your employees.

The state is geographically divided into 3 distinct regions: the Piedmont, the Midlands, and the Lowcountry, offering wide choices of locales for your business's growth.

The Piedmont area of South Carolina is located in the northwestern portion of the state. It includes the cities of Greenville and Spartanburg, two mid-sized cities, both of which are growing in national stature and international renown. The city of Greenville is home to many international companies, from tires to textiles to telecommunications. The Piedmont also boasts of Clemson University, a nationally-known educational institution, nestled in the foothills of the Blue Ridge Mountains. Charlotte's Douglas International Airport, hub for Piedmont Airlines, is within an hour of any location within the Piedmont.

Columbia, the state's capital city, is located in the Midlands of South Carolina. The downtown area of the capital is a masterpiece of urban planning, with its wide streets and geometric, rectangular design. In the heart of the city is the University of South Carolina, home of a nationally-recognized Masters in International Business program. Columbia Metropolitan Airport provides air service connections to locations around the country. If traveling by car, access to our surrounding states is easy from any of 3 major interstate highways which converge in Columbia.

Sun, sand, and surf are only a part of the attraction of the Lowlands area of South Carolina. The Lowlands encompasses the coastal and southern regions of the state including Myrtle Beach, Georgetown, and Charleston, plus Beaufort and Hilton Head. Interstate I-95 bisects the area, carrying traffic north and south, reaching from Maine to Florida. Two more interstate highways flow from east to west, joining the Lowlands to the balance of the state.

The people of South Carolina share a strong work ethic. The pride in accomplishment and desire to achieve is evident

throughout the work force.

We'd like you to come see South Carolina and explore all that we have to offer, both for you and your business. We think you'll like it here. But, more than that, we think you'll find that South Carolina is a great place to do business.



Bringing Your Business to South Carolina

What Form Should Your Business Take?

When deciding whether to bring your business to South Carolina, one important consideration will be the legal form that your venture will take. The form will determine how you get started; what kinds of documentation you'll need and where to file it; what liabilities you may be facing; and permission needed to commence business.

The information in this section is provided to introduce you to the various forms of business ventures and to give you an idea of their purpose and function. This is not an in-depth look at every law which will affect your business. However, it should give you sufficient guidance so that, as you plan, you'll have a good, basic understanding of the options available.

There are five types of business organizations that are most often used by foreign businesses in South Carolina: (1) branch operations; (2) distributorships; (3) partnerships; (4) joint ventures; and (5) U.S. subsidiary corporations. The specific needs of your business will determine which type of organization is best suited to you.

Branch Operations

Opening a branch office in South Carolina creates a direct presence for your company in the United States. The typical branch office operates under the same name, using the same policies, and offering the same services or products as the parent company. Its creation is simple. The parent company, through its representative in the United States, registers its

name in the state. The registration means the parent company will be “doing business as” that named company, and is commonly referred to as simply obtaining a “d/b/a.” The representative can then rent or purchase office space from which to conduct business. Once the branch office is established, it will be subject to reporting requirements and governmental controls similar to other types of businesses.

The branch operation is a simple way to do business in the United States. Some important considerations must be understood. This type of office maintains a direct presence in the United States. A direct presence means that the parent corporation, not just the U.S. part of the corporation, may become subject to additional tax, regulatory, and reporting requirements. The parent company may also be subject to lawsuits in the United States. This increase in liability for the parent company must be considered when deciding whether to open a branch office or to create some other kind of business arrangement.

Distributorships

Oftentimes, a producer or manufacturer of goods wishes only to import its goods and distribute them to sales locations in the United States. In a distributorship arrangement, a parent corporation will enter into a contract with an American distributor who acts as an agent for the parent corporation and distributes, or sells, the goods to other sales organizations in the U.S.

The most important aspect of a distributorship is to have a definitive written agreement that spells out the rights and obligations of each party. Most provisions are fairly standard. Sample agreements, which have been time tested, are readily available from knowledgeable attorneys.

Partnerships

A partnership is generally defined as 2 or more persons or entities associated as co-owners of a business, with the intent to make a profit.

Most often, partnerships involve only general partners. Each general partner participates fully in the management of the business and shares in the profits. Each general partner is also fully responsible for any debts of the business.

A partnership can include a limited partner. He is called "limited" because he has a limited management role in the partnership, and his responsibility for business debts is limited to the amount of money he has already contributed to the business, or to the amount of money he has agreed to contribute.

Forming a partnership is easy to do and sometimes can be done unintentionally. Persons become partners by associating themselves as co-owners of a business. This can be done through a written agreement which spells out the rights and duties of each partner. It can also be done without a complete written agreement. You should be aware of this potential occurrence when entering any kind of business agreement.

Because of the possibility of personal liability of each partner, a partnership must be carefully researched before you enter a partnership agreement.

Joint Venture Agreements

A joint venture is a temporary partnership formed for a single purpose. Because of its nature and characterization as a partnership, joint ventures are often treated by the courts in the same way as a partnership. Each party to the

agreement is subject to the same unlimited liability as a general partner in a partnership. A joint venture is different from a partnership since it is usually of limited, short duration. A general partnership is usually formed to last longer.

The agreement is usually drafted by the attorneys who represent each party. It is based on the general understanding reached between the parties on the purpose and method for conducting the business. Among other things, the agreement may set out:

- 1) the rights and obligations of each party;
- 2) the kind of business to be carried out;
- 3) the division of profits;
- 4) the responsibility for management of the business;
- 5) how changes can be made to the agreement;
- 6) the duration of the agreement; and
- 7) how the agreement can be ended.

These specifics provide the framework within which your business will work.

The contract is signed by both parties to the agreement and formally binds each party to its terms.

Subsidiary Corporations

A subsidiary corporation is one in which another corporation, the parent, owns a majority (or all) of the stock of that subsidiary. In this way, the parent corporation has control over the subsidiary but risks only a portion of its assets in that subsidiary.

The most common reason for creating a subsidiary is to limit the potential liability of the parent corporation. Courts will recognize that the subsidiary is separate from the parent

if the parent corporation follows these general guidelines:

- 1) both corporations are adequately funded;
- 2) formal corporate procedures are followed for both corporations individually;
- 3) each corporation is held out to the public as a separate enterprise;
- 4) the funds of each corporation are kept apart and not commingled; and
- 5) the parent corporation does not dominate the subsidiary corporation only to advance the parent corporation's interests.

By following these guidelines, a parent corporation should be able to maintain its separate status and not be subject to any liability through its subsidiary.

A corporation is fairly easy to form, and, once formed, it can exist indefinitely. A later section of this chapter will go into detail about corporations - from their creation, through their operation, to their dissolution.

Factors to Consider When Choosing a Form of Business

Liability

When you begin to do business in South Carolina, you will ordinarily have an employee or a representative prepared to work for you here in the U.S. who will act as your agent. This agent will often have the power to enter into a contract on your behalf. Because the agent has, or appears to have, the authority to act on your behalf, your company is presumed to have authorized the action. This action creates contract liability on the part of your company, and your company becomes liable for the terms of that contract. Since entering

contracts is a common duty of an agent, it is advisable to be selective when choosing this person to represent you here in South Carolina.

A second kind of liability which can arise in ordinary business activities is tort liability. A "tort" is an act (or acts) that causes injury to another person. All individuals are responsible for their own acts which cause injury. If your employee or agent causes harm to another while he is working for you and performing his job, your company can also be held responsible.

Liability can extend beyond the actual cost of the damage. Damages called "consequential" or "incidental" can also be included. These are costs which are indirectly related to the damage, such as lost wages. In addition, "punitive" damages might also be assessed. These damages are awarded by a court as a means of punishing the offending party.

Liability can be limited in several ways. Under South Carolina corporate statutes, a shareholder, officer, or director cannot be liable for actions of the corporation. However, partners in a partnership are liable for actions of their business. Forming a corporation can prevent this potential for personal liability.

It is important to pay particular attention in the area of products liability. Some U.S. courts have held foreign manufacturers liable for injuries caused by their products which they manufactured and then imported into the United States. For companies which will be importing manufactured goods into the U.S., it is advisable to carry adequate products liability insurance.

Liability, from whatever source, should be one consideration when preparing to do business in the United States. It is an important aspect, though it should not be the sole deciding factor.

Disputes and Dispute Resolution

In any business arrangement, disputes can sometimes arise. These disputes can be avoided before they occur by including a reference to “dispute resolution” in your original contract. By addressing the possibility of disputes in your initial agreement, you can avoid the unnecessary time and expense of a lengthy court battle later on.

The methods of resolution most often used are arbitration and buyout.

Arbitration is the settling of a dispute between two parties by a neutral, disinterested third party. This person is usually named in the original agreement as a member of a sanctioned arbitration group. The dispute is presented informally to the arbitrator who decides the issue. The arbitrator’s decision is binding on the parties. Settling a dispute by arbitration can avoid long waits on congested court calendars and the expense of a court trial.

Another alternative is to include a buyout provision in your original contract. The purpose of a buyout provision is to allow a dissatisfied shareholder or partner to sell his portion of the company to the other shareholder or partner. This option can be useful for resolving dissention or deadlocks between shareholders or partners.

These are only two of many specific considerations that must be analyzed before deciding on the final form that your business will take. Other factors will include taxes and individual needs of your company. You should consult an experienced attorney who will be able to guide you in making this decision.

Business Incentives

The State of South Carolina offers many incentives to

businesses to locate here. Among these are the Special Schools training program, research parks, industrial parks, and many state-sponsored financing programs.

The Special Schools program provides training for specific assignments in new or expanding businesses. The program is operated through the State Board for Technical and Comprehensive Education and has been in operation for over 25 years.

This unique start-up training program offers short-term training to potential employees for specific tasks. The Special Schools staff, working with your company to establish an appropriate program, will plan and schedule training that fits your specific requirements. The training programs are scheduled so that completion of the program will coincide with the opening of the new or expanding facility. When the training is complete, a trained work force will be ready to get to work.

If your company already has a trained work force in science or technology, SCRA's Research Parks could be an important incentive. The South Carolina Research Authority (SCRA) coordinates a research park system designed to attract and support technological business and industry in the state.

The system consists of 3 park locations: Columbia, Clemson, and Charleston. Each park is situated near a technical research university and is designed to maintain a campus atmosphere throughout the park. The proximity of these research-oriented universities to the parks fosters strong interaction between the participating companies and the technical programs of the universities. The Carolina Research Park, located just outside Columbia, is already home to the Dana Corporation. Clemson's park overlooks Lake Hartwell in the Piedmont area of South Carolina. The Charleston Research Park, the newest of the 3 parks, opened in late 1988.

Designed to be both aesthetically pleasing and technologically functional, the parks require that participating companies conform to the park's design specifications. Common areas are provided to enhance the natural beauty of the sites. Roads and utilities are already in place.

To become a part of one of these parks, 15% or more of a company's employees must be scientists or engineers. Qualified firms can either purchase or lease a suitable site in a park. Flexible financing arrangements are available through the SCRA.

Industrial parks throughout the state have space available for new or expanding business. Unlike research parks, participation in industrial parks generally carries no strict requirements.

Currently, there are over 40 industrial parks actively seeking occupants. Size of the parks varies from 100-300 acres per park. Size of single lots within each park will depend on the specific needs of the company - one company may need only an acre, while another may need 20 or more acres. The company purchases a lot from the park in the size needed. Most parks have utilities in place, though some do not. The cost of a lot in a park which has utilities in place will probably be slightly higher than a similar lot located outside a park.

Industrial parks are usually created by a governmental authority such as a city or county. Some are independent, privately operated parks. Still others are jointly operated by public and private entities.

Financing for technology-based and other businesses is available in many forms in South Carolina. Industrial revenue bonds and the Jobs Economic Development Authority (JEDA) program are two major programs offering



financial assistance and incentives. These and other financing options are discussed at length in the section on Financing Your Business in South Carolina.

The South Carolina Business Corporations Act

Corporate law is based on statutory law passed by the state legislature and may vary slightly from state to state. In early 1988, the South Carolina General Assembly adopted the new South Carolina Business Corporations Act. Modeled closely after the Uniform Business Corporations Act, this Act provides an attractive legal climate to foreign businesses who may be moving to South Carolina, while it also simplifies the role of attorneys and other corporate advisors.

The intention of this new act was to reorganize, modernize, and simplify the existing statute. This new act simplifies the processes associated with incorporation and provides greater guidance for its use through comments that are included in the act itself.

The material in this section will provide you with an overview of the Act. In a cursory fashion, it will guide you through the initial formation, the necessary functions, and the on-going requirements of a corporation formed in South Carolina. Beginning with the actual incorporation process, you'll find out what meetings must be held and what forms must be filed. Lists of reporting agencies located in the appendices of this book will tell you where to file.

This section also discusses many other technical aspects of the corporation and its components. Individual sections on shares and shareholders, and directors and officers cover the procedural areas of a corporation. Latter sections deal with the substantive aspects, up to and including the dissolution

of the corporation.

Explanations of many of the terms used here are contained within the text. However, some of the terminology used may not be familiar to you. In addition to explanations in the text, there are definitions included in the glossary in the back of the book.

Forming a Corporation

A corporation can be formed by any person, corporation, or partnership, or any combination of these entities. In South Carolina, only one person is needed to incorporate a business. That person is called the initial incorporator. This initial incorporator will fill out and file the articles of incorporation and first report of the corporation. This person does not have to be an owner, officer, or director of the corporation. Often a corporation is formed by an initial incorporator who is paid to prepare and file the articles of incorporation. After the first meeting of the directors, the initial incorporator will no longer be associated with the corporation.

The articles and first report are filed in the corporate division of the South Carolina Secretary of State's office. There is a small fee charged which covers the cost of researching the availability of the corporate name and administrative work. When the Secretary of State issues its certificate of incorporation, the formation is complete.

Articles of Incorporation

The articles of incorporation must include

- (1) the name of the corporation;
- (2) the number of shares it is authorized to issue;
- (3) the name and address of the corporation's initial registered agent; and
- (4) the name and address of each initial incorporator.

Additional information which may be placed in the articles includes names and addresses of initial directors; the purpose of the corporation; the powers of the corporation or its board; specific provisions for management; par value of authorized shares of stock; and an indemnification provision.

Preparation and filing of the documents can be done in approximately a week and faster in an emergency. The "effective date" of the corporation is the day on which the certificate of incorporation is granted. This can be a significant date. Many times a new corporation will have made arrangements before its effective date, for instance to rent an office or buy property. Since the agreements were reached before the corporation existed, the corporation is not bound by them. The person who signed the agreement is liable for its terms. At the organization meeting, these preincorporation agreements can be adopted by the board of the new corporation.

Where to Incorporate

Absent very unusual circumstances, and in light of the fact that the corporate law of most states is very similar, a company should be incorporated in the state where it has its principal office. This results in saving of administrative time and costs.

Organization Meeting

The first step after incorporating is to hold an organizational meeting of the Board of Directors. At this meeting, officers are elected, bylaws are adopted, shares of stock are authorized for issue, preincorporation contracts are approved, a bank is selected, and a corporate seal is approved. This meeting usually follows a pre-arranged format in order to avoid any possible future problems.

Bylaws

A corporation's bylaws are the rules and regulations by which it governs itself. They are required by statute and are adopted at the organizational meeting. The bylaws need not be made public and can ordinarily be changed without a lengthy approval process. The only statutory requirement for bylaws is that they be consistent with the law and with the corporation's articles of incorporation.

Purpose and Powers

The "purpose" of a corporation is the general nature of the business that it is going to conduct. A corporation in South Carolina has the statutory purpose of "engaging in any lawful business." This purpose can be limited in the articles to a more specific one.

The "powers" of a corporation are the methods the corporation can use to achieve its purpose. The statute gives each corporation general powers. These include the powers to sue and be sued; to buy or sell property; to make contracts; to borrow and lend money; and other powers normally associated with conducting a business.

"Ultra vires" powers are those which are outside the authority of the corporation. If a corporation's activities are thought to be ultra vires, only a shareholder or the attorney general of the state of incorporation can bring suit against the corporation to enjoin or stop that activity.

Name

The corporation's name must include a designation clearly showing that it is a corporation. This can be "corporation," "company," "incorporated," "limited," "corp.," "co.," "inc.," or "ltd." The only other requirements are that the name must not be the same as or too similar to another

corporate name, and it cannot imply that its business is different from that stated in its articles.

Research and registration of a name is usually done before the articles are filed to be sure that the chosen name is available. It is possible to reserve a corporate name for up to 120 days by filing a name reservation form.

Registered Office and Registered Agent

Every corporation must maintain a registered office in the state where it is incorporated, and must have a registered agent in that state. This can be its own office and employee. However, most often it is the corporation's attorney and the attorney's office. A street address is required.

The reason for having a registered office and agent is to provide a permanent location and representative in the state of incorporation which the corporation has authorized to receive or answer legal or government requirements. This includes receipt of service of process and other legal notices. Delivery by mail to the street address listed as the registered office constitutes legal notice. Therefore, it is important that the street address be one to which mail can be delivered.

Shares and Shareholders

Classes and Series of Shares

A "share" of a corporation represents a proportionate ownership interest in that corporation. Owning a share is often called owning stock in the corporation. It is evidenced by the issuance of a stock certificate by the corporation.

A share does not represent ownership of the corporation's property. Ownership of a share entitles its owner to:

- (1) receive a portion of the corporation's earnings;
- (2) participate in the control of the corporation; and

- (3) receive a proportional share of all the corporation's assets when the corporation is dissolved.

There are 2 primary classes of shares: common and preferred. Many corporations issue only common stock. Holders of common shares have voting rights and normally will share equally in distributions. Preferred shares generally have no voting rights. They usually yield a set percentage as a yearly dividend. The term "preferred" refers to the fact that they will receive their dividends before any common shareholders can receive any distribution of earnings.

A corporation issues different classes of shares in an effort to limit control of the corporation while expanding its levels of investment.

Share Dividends

When a corporation has earnings or profits, it may decide to distribute some of those earnings to its shareholders. Dividends are the cash or property that a corporation distributes to its shareholders. These distributions can be made as long as the corporation can still pay its debts when due.

Restrictions on Transfer

Shares in a corporation can usually be transferred freely. This ability to sell shares is a valuable right and enhances the value of the shares. In some circumstances, however, it may be beneficial to restrict the transferability of shares. This restriction can be used to limit the availability of the shares on the open market and to maintain close control on the business operations. Restrictions of this kind must be agreed to either in the articles, or the bylaws, or by separate agreement.

Preemptive Rights

Preemptive rights are the rights of a current shareholder to purchase a proportionate share of new shares that a corporation might issue. The purpose of preemptive rights is to preserve the shareholders' proportionate interest in the corporation.

These rights are provided by statute. They can be varied or eliminated in the articles of incorporation.

Redemption

Redemption is the purchase of a corporation's shares by the corporation itself. Once repurchased by the corporation, these redeemed shares can be reissued unless the articles state otherwise. Most often, preferred shares are the subject of redemption.

Shareholders Meetings

Though not required to, shareholders should meet once a year in an annual meeting. Generally, new board members are elected at this meeting, and other business authorizations and approvals are made at that time. Failure to hold shareholders meetings over a long period of time tends to show that the corporate identity has been disregarded.

Special meetings can be called by the president, the board, or the board chairman. They can be called for any reason as long as the reason is clearly stated in a written notice to shareholders. The notice must be mailed at least 10 days before the planned meeting, but no more than 60 days before the meeting. Notice generally may be waived by the shareholder.

Certain shareholder action can be accomplished without a meeting. All shareholders who are entitled to vote need to

sign a written consent. If the consent is unanimous, no additional approval is necessary.

Voting

Voting is an important, necessary part of the corporate life. Each share of the corporation has one vote, unless the articles state otherwise. This means that a shareholder who owns 100 shares has 100 votes. When directors are elected, voting methods can be changed to allow for broader participation by minority shareholders.

A shareholder can vote either in person or by proxy. A “proxy” is a written appointment of an agent to vote shares on behalf of the shareholder. Once written and signed, a proxy statement is valid for up to 1 year or until it is revoked. If a corporation has a good faith belief that the proxy is invalid, it may reject the proxy.

A quorum is the minimum number of persons needed to be present at a meeting in order to conduct business. A majority of the votes entitled to be cast constitutes a quorum. This number can be set for a different requirement by a specific statement in the articles, however, the number can never be less than 1/3 of the total votes available.

If a quorum is present at a meeting, actions need only receive more votes in favor than votes opposed in order to pass.

When electing directors, a corporation may decide to allow cumulative voting. Cumulative voting means that each share is entitled to one vote for each director to be elected. For example, if you own 100 shares and there are 5 directors to be elected, you would have 500 votes.

Voting Trusts and Agreements

A voting trust is a written agreement among shareholders

to place the voting control of their shares in the hands of a trustee while retaining all other ownership rights of the shares. This means that the shareholder continues to receive the benefits of his shares, such as dividends, while the trustee casts all votes that belong to the shares he represents. A voting trust is intended to concentrate control of the corporation in a few people while allowing the benefits of share ownership to flow to many more. A voting trust can last for up to 10 years.

A voting agreement takes place between 2 or more shareholders. It is a signed agreement that the shareholders will vote their shares in a particular way. These agreements are generally limited to a single vote or purpose and provide each shareholder with greater control.

Shareholder Suits

When a shareholder believes that a corporation is not being run properly, he can bring suit against the corporation. There are 2 types of suits he could bring: direct or derivative.

A *direct suit* is brought by a shareholder against the corporation. It is often used to enforce shareholders rights to vote and to inspect records; to compel payment of dividends; or to protect preemptive rights. In a direct suit, if the shareholder wins, any money judgment goes to him.

A *derivative suit* is brought by a shareholder on behalf of the corporation. It is often exercised to recover damages resulting from improper actions by management, or to recover improper distribution of dividends. In a derivative action, any money judgment is paid to the corporation.

Inspection Rights

Most shareholders have the right to inspect corporate records. Depending on the type of records, certain

prerequisites may apply. Requests generally must be made in writing 5 days beforehand. Any shareholder can inspect articles, bylaws, and other basic documents. To inspect accounting records or shareholder records, the requesting shareholder must explain the purpose for the inspection and must make his demand in good faith.

A corporation is required to provide financial statements for the most recent fiscal year if a shareholder makes a written request for it.

Directors

Directors are members of the corporation's board and have the legal responsibility of exercising control over the officers and affairs of the corporation. Directors have no individual authority to act for the corporation. Any authority rests in the board as a group and must be exercised collectively.

The number of directors that a corporation will elect is decided in either the articles or the bylaws. It most often consists of a set number of members, however arrangements can be specified to allow for a variable board size.

Directors are elected at the annual shareholders meeting. Normally they are elected for only a one-year term and must be re-elected to serve each year. The articles or bylaws may allow for staggered terms. This means that a director would be elected for a term of more than a year, but every year at least one director would be up for re-election.

The board conducts its business at regular meetings which need no notice, or at special meetings for which advance notice must be sent. The board can take action without meeting if all directors agree to the action in writing. The action becomes final when the last director has signed.

A quorum of directors at a board meeting consists of a

majority of the current board members. This number can be changed by a statement in the articles or bylaws but can never be lower than 1/3 of the total members of the board. The board can only act when there is a quorum present at the meeting. An absent director can participate in the meeting by means of a telephone conference call but may not vote by proxy.

A director may resign his position at any time. The shareholders can remove a director from office at any time without stating a reason unless the articles require that a reason be specified. Anytime a resignation or removal creates a vacancy on the board, that vacancy can be filled by either the board or the shareholders.

Directors must perform their duties to the corporation in a way that is in the best interests of the corporation. He can, in good faith, rely on the expert advice of professional counsel and other members of the board in performing these duties.

There may be occasions when a conflict of interest may arise. A conflict of interest is defined as a transaction in which a director has a direct or indirect personal interest. Whenever a director has a financial interest in the other side of a corporate transaction, or is an officer, director, or trustee of the other side of a transaction, a conflict is present. If he participates in the transaction, it can be voided by the corporation. However, if the transaction was fair to the corporation, or if it was authorized by a majority of the other directors, the transaction will stand.

Liability and Indemnification of Directors and Officers

Directors and officers are limited in any liability to which they might be subjected in a derivative suit. However, if an officer or director broke the law, knowing he was doing so, his liability is not limited.

Indemnification refers to the responsibility on the part of the corporation to make good any loss or damage incurred by a director or officer because of his position with the corporation or his acts for the corporation.

If the director or officer

- (1) uses his informed business judgment
- (2) in the good faith performance of his duty, and
- (3) believes his actions to be in the best interests of the corporation,

the corporation can indemnify him if he becomes the subject of a suit based on those actions. Indemnification is mandatory if the director or officer wins the suit completely. If the director or officer wins only a part of the suit, he is entitled to a partial indemnification. Even if he loses the suit, the judge in the matter can, at his discretion, order the indemnification of the officer or director.

The corporation may advance money to a director or officer to cover expenses if they agree that his actions were appropriate under the circumstances.

Many corporations now maintain indemnification to protect them in the event that these problems arise.

Merger, Share Exchange, Sale of Corporate Assets

A fairly common occurrence among corporations is a merger. A merger occurs when 2 companies agree to combine all their assets. The title to all assets vests in one corporation which continues in existence. The other company ceases to exist. A plan to merge must be adopted by the board of directors of both corporations and must be approved by their shareholders.

A simpler method of acquiring another company is a share exchange. In a share exchange, one corporation acquires all

of the outstanding shares of another corporation by trading its own shares for the shares of the second company. This plan must be adopted by the board of directors of both corporations and must be approved by their shareholders.

A third method of acquiring another company is to purchase that company's assets. The company being acquired must receive shareholder approval unless the sale is in the usual and ordinary course of business. If the sale is in the ordinary course of business, no approval is necessary. Following the asset sale, both corporations remain in existence.

A corporation may wish to create a wholly-owned subsidiary without having to acquire an existing company. This can be done by filing new articles of incorporation for a new company, and issuing all its shares to the original corporation.

Dissenter's Rights

If a corporation is planning a merger, share exchange, or sale of its assets, the shareholders who are entitled to vote on the plan can dissent from the proposed plan. This right to dissent also arises when the corporation amends the articles and the amendment adversely affects the shareholders. When this dissenter's right arises, it allows the shareholder to turn over his shares to the corporation and receive the fair market value for them.

The procedure regarding dissenter's rights is spelled out very specifically in the Business Corporations Act. Failure to follow its requirements exactly can result in the loss of the dissenter's rights.

Dissolution

A corporation normally is given a perpetual existence - it

can go on forever. However, circumstances may come up where the corporation may need to end.

If a corporation has been in existence and operating, it can be dissolved by the board. The board must first submit a proposal for dissolution to the shareholders. The shareholders must approve of the dissolution by a 2/3 majority. The board is then free to dissolve the corporation. However, the board may reconsider and choose to maintain the corporation.

If a corporation has not yet begun business or issued stock, incorporators or directors can dissolve the company by submitting a form to the Secretary of State indicating their approval of the dissolution plan.

Once the corporation is dissolved, it continues to exist until its business and affairs are concluded. If there are any outstanding debts or claims against the corporation, the corporation must inform the holders of those debts or claims that the corporation is dissolving and make provisions to pay the claims and debts. The corporation must also publish a public notice of its dissolution to alert any unknown claimants that the corporation is about to dissolve.

A corporation can be dissolved if it fails to follow the statutory guidelines of the Business Corporations Act. A court can dissolve a corporation if it is shown that the corporation is or has been violating the law.

Conclusion

The South Carolina Business Corporations Act is a comprehensive piece of legislation that is intended to make doing business in South Carolina easier.

Although the Act has made the law more understandable, it is highly recommended that you consult with your attorney at length before beginning your new corporation. There are a

great many varied aspects to a corporation and it is important that your business be as closely tailored to your specific needs as possible.

Financing Your Business in South Carolina

A number of ways are available to help finance your business in South Carolina. The State offers programs in Industrial Revenue Bonds, the Jobs-Economic Development Authority (JEDA), and Community Development Programs. The United States government sponsors federal programs for financial assistance as well. This section will introduce you to these programs and how you can become involved in them.

South Carolina Programs

Each of the following programs should be discussed with your lawyer or banker who should be in a position to advise you on them and help you with negotiations.

Industrial Bond Financing

Industrial revenue bonds are issued by local city or county governments. They are intended as aids in promoting economic development in the state.

Industrial revenue bonds are generally secured by specific property of the corporation. This means that if the corporation fails to repay the loan, that specific property is either given over or sold to pay off the amount owed. Backup security such as a letter of credit from a parent corporation may also be required.

Terms of the bonds usually range from 10 to 25 years but can extend to as much as 40 years. Interest rates are

negotiated between the purchaser of the bond and the corporation. Income on these bonds is generally nontaxable to the owner, and the interest rates are usually lower than conventional rates (now generally a percentage of the Prime Interest Rate).

The use of proceeds of Industrial Revenue Bonds is limited to purchase of land, buildings, and equipment, and may not be used for operating expenses. Prior to entering leases or signing contracts based on the use of an Industrial Revenue Bond, an inducement letter must be obtained from the county issuing the bond.

Jobs-Economic Development Authority (JEDA)

The purpose of the South Carolina JEDA program is to encourage business and industry to create new permanent jobs through a program of loans, investments and promotions.

JEDA loans are geared specifically for manufacturing, industrial, and service businesses - excluding food and retail business. The money can be used to purchase land, to build new facilities, to renovate existing facilities, to purchase equipment or raw materials, and, in some locations, to provide working capital.

Terms of a JEDA loan cannot exceed 15 years. Interest rates are fixed and depend on the prime rate. The range of interest rates is from 85% of the prime rate to the prime rate plus 1%, however, it can never go below 8.5%. The amount of the loan can be up to a maximum of \$250,000 and is based on a figure of up to \$10,000 per new job created.

Community Development Program

The Community Development Program is administered through the Governor's Office and provides another method

of funding. Through this office's loans program, business and industry are offered access to funds to pay for construction. A specific requirement of the program is that 51% or more of the borrower's employees are at low and moderate income levels.

The term of the loan cannot exceed 15 years and includes a negotiable interest rate. A commercial lender must provide an irrevocable letter of credit in which that lender agrees to replace the state's liability in 12 months.

United States Government

Small Business Administration

The Small Business Administration (SBA) sponsors programs of significance in financing a new company in South Carolina.

First of these is the SBA 502 loan program. This program provides loans to help finance new plant construction, purchases of machinery and equipment, and land purchases and improvements. These loans are based upon the creation of jobs. The maximum amount which can be borrowed is up to 40% of the total project cost but cannot exceed \$500,000.

The second SBA program is the Guaranteed Loan Program. Guarantees of up to \$500,000 can be obtained from the SBA. This guarantee cannot exceed 90% of the total amount loaned. The loans must be arranged through commercial lenders.

Conclusion

The South Carolina Development Board maintains a "one-stop" agency which provides additional information and instructions for doing business in South Carolina. Contacting this agency before getting started will be very

helpful to your preparations. The agency has available a full complement of pamphlets and information on financing and incentives for businesses in the State. Your specific needs can be addressed by talking to a representative of the Development Board and looking over this informative material.

The agency can be reached by calling 1-(800)-922-6684 in South Carolina.

Foreign Investment in the United States

Speaking on foreign investment in the United States, Alexander Hamilton, first U.S. Secretary of the Treasury, said "rather than be judged a rival, it ought to be considered as a most valuable auxiliary; conducing to put in motion a greater quantity of productive labor and a greater proportion of useful enterprise than could exist without it."

Since those words were first written, foreign investment in the United States has been on the rise. The information presented here is intended to familiarize you with the technical side of foreign investment in the United States, and how you can become a part of the ever-increasing area of foreign investment.

Besides opening up a business here in South Carolina, there are a number of different ways to invest here. Direct investment, international trade in services, portfolio investments, and investments in land are some of these. This section will focus on these different forms of foreign investment and their reporting requirements and other restrictions.

Foreign Direct Investment

The International Investment and Trade in Services

Survey Act (IITSSA) allows information to be collected about foreign investments. It provides information to the U.S. government for use in statistical analyses. Information collected under IITSSA is confidential and not for public disclosure.

Foreign direct investment refers to foreign ownership of real estate, and foreign control or ownership of a United States business. If a foreign person owns or controls more than 10% of a U.S. business, it is classified as a foreign direct investment.

The Commerce Department through its Bureau of Economic Analysis (BEA) is responsible for gathering information on foreign direct investments. Initial reports are required for each new investment. Quarterly and annual reports also must be filed regularly. The BEA conducts a benchmark survey which covers a 5-year period of foreign direct investments. The most recent of these benchmark surveys was conducted in 1988.

Certain types of direct investments require additional paperwork. Some investments are excluded from these reporting requirements. Because of the ever-changing nature of these requirements, it is best to consult with your attorney about your specific needs before proceeding with a direct investment in the United States.

Foreign Portfolio Investments

Investments that are not direct often fall under the designation of foreign portfolio investment. Portfolio investments include ownership of U.S. securities, and ownership of a limited partnership.

The Treasury Department is responsible for gathering information on foreign portfolio investments. Specific requirements vary and can be obtained through your

attorney or representative in the United States.

International Trade in Services

International trade in services includes trade in intangibles such as entertainment, construction, transportation, insurance, banking, design, and legal services.

The Bureau of Economic Analysis of the Commerce Department is responsible for gathering information on international trade in services. Annual reports are generally required of all persons who participate in this type of trade. Quarterly reports are required of certain companies involved in transportation. A lawyer who is experienced in this area will be able to tell you about the latest requirements and how they will affect your company or proposed business.

Foreign Investments in U.S. Real Estate

The Agricultural Foreign Investment Disclosure Act (AFIDA) requires reports within 90 days of any transfer of property to a foreign person. Unlike the reports for foreign direct investment, these reports are not confidential and can be viewed by the public.

The Agricultural Stabilization and Conservation Service (ASCS) is responsible for collecting the information. The reports are filed in the ASCS office in the county where the property is located. Failure to file a report can result in a fine that equals up to 25% of the value of the land.

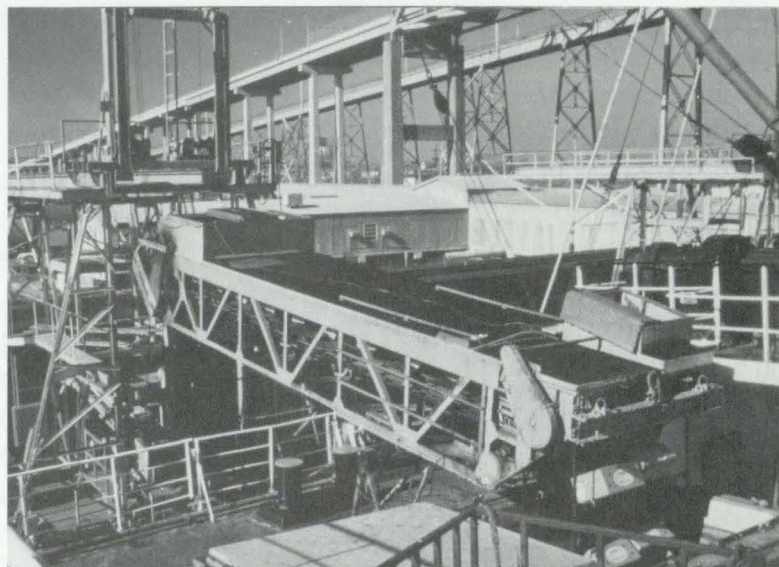
Agricultural land is that land which is used for farming, ranching, or lumber production. Some exceptions apply. To find out if your planned purchase falls under an exception, contact your attorney.

A foreign investor in real estate in the United States will

ordinarily need to file a report to the U.S. Internal Revenue Service when the interest is conveyed. Tax is withheld at that time. Income tax returns must be filed. A tax attorney or specialist can be more detailed on how the tax reporting system will apply to your specific situation.

Conclusion

Reporting requirements for foreign investment are complex and often are subject to change. It is important to find out and follow the specific rules which apply to you and your company. The guidance of an attorney who practices in foreign investments will be invaluable to you later on.



Operating Your Business in South Carolina

United States Antitrust Law

Antitrust legislation in the United States has the main purpose of promoting free competition among businesses. The origins of U.S. antitrust law date back to the late 1800s with the passing of the Sherman Act. Its intent was to prevent concentrations of economic power in “trusts,” thus arose the term “antitrust.”

Today’s antitrust legislation is found primarily in four U.S. acts: the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the FTC Act. These statutes aim to prevent large concentrations of economic power which might weaken or stifle free competition.

Free and open competition in the marketplace has always been a hallmark of the U.S. economic community. Agreements or contracts that tend to restrain this free trade are illegal and unenforceable under the antitrust laws. This section will focus on these laws as well as other pertinent legislation and introduce you to antitrust law in the United States.

Sherman Act

Section one of the Sherman Act prohibits contracts, combinations, and conspiracies in unreasonable restraint of trade. Some actions of a company, simply by their performance, are illegal under the Act. Commonly referred to as “per se” violations, these include (1) price fixing; (2) market allocations; (3) boycotts; and (4) tying arrangements.

Price fixing is an agreement among competitors to maintain a common maximum and minimum price for similar goods or services. If such an agreement is made, it is a

violation of section one. The agreement need not be formal or even written, the fact that a participant knew of the plan and participated in it is sufficient proof of its existence.

The term 'price fixing' encompasses a number of different kinds of agreements. It refers generally to joint activities among competitors which involve setting, maintaining, or limiting prices. It includes agreements on such things as price negotiation, nonadvertisement of products, simultaneous price changes, resale prices, and certain other price control techniques.

Another form of price control is *market allocation*. Competitors may agree not to compete against each other in certain specified areas. These areas might be geographic, or can refer to kinds of products or types of customers. Anytime 2 or more competitors agree to divide particular markets in a certain way among themselves, it is an automatic violation of section one of the Sherman Act.

Agreements between wholesale operations and their retail sales outlets which restrict markets are sometimes acceptable under section one. Before attempting to enter into an agreement of this type, however, it would be advisable to talk to your attorney.

A *boycott* is the refusal to deal with a particular buyer. If only one seller refuses to deal with a buyer, no violation occurs. However, if that one seller got together with other sellers who also refused to deal with a buyer, there will be a violation. The difference is that the Sherman Act doesn't allow combined or concerted efforts in restraint of trade - single or unilateral actions of one business are not affected by the Act. Therefore, a single seller could boycott a single buyer without breaking the law, but if a group of sellers boycott a single buyer, they have all broken the law.

Sometimes a seller may want to sell a product on the

condition that the buyer also buy a second product. This is known as a *tying arrangement*. If the seller has great economic power in the first product, or if interstate commerce of the second product is greatly affected, the arrangement automatically violates section one. Other tying arrangements, though not an automatic violation, will be looked at closely by a court and may still be considered a violation. If your marketing approach plans to include some type of tying arrangement, it would be advisable to consult with your attorney before proceeding.

Section 2 of the Sherman Act prohibits *monopolies* or attempts to monopolize. A monopoly occurs when one group controls all, or nearly all, of the available market for a particular product or service. The controlling group can be one single company, or a number of companies who have agreed to exclude all other current or potential competition.

If a controlling group has monopoly power and abuses that power in the marketplace, they will have violated section 2 of the Act. *Monopoly power* means that a particular controlling group has attained 75% control of the market. If that monopoly power is used to engage in *unfair conduct*, then section 2 has been violated. Unfair conduct does not have a decisive definition. It includes such activities as exclusion of competitors, pricing below marginal costs, and other price control measures.

Violations of the Sherman Act are criminal acts and can be punished by fines and jail sentences. Persons injured by those violations are entitled to sue for damages and can be awarded 3 times the actual amount of the loss (treble damages).

Clayton Act

The Clayton Act is intended to supplement and strengthen the Sherman Act. It provides for civil penalties, not criminal

ones, and allows for treble damages to be assessed. The Clayton Act deals with tying arrangements, exclusive dealing arrangements, and mergers.

Tying arrangements under the Clayton Act are treated and analyzed in much the same way as they are under the Sherman Act. There must be the sale of one item (in which the seller has great economic power) conditioned on the purchase of a second item (and interstate commerce of this second item is greatly affected by the tie-in).

An *exclusive dealing arrangement* arises when a seller requires that a buyer purchase only his products and none from his competitors. If the arrangement substantially lessens competition or if it tends to create a monopoly, it is prohibited.

When two corporations decide to combine their assets it is generally known as a *merger*. If a merger has the result of greatly diminishing competition or if it tends to create a monopoly, it will violate the Sherman Act. When two competitors in a specific market decide to merge, it is often looked on very carefully for possible violations of this section. In some cases, prior government approval is necessary.

Robinson-Patman Act

The Robinson-Patman Act prohibits price discrimination in the interstate sale of goods. *Price discrimination* means that a seller offers his goods to certain purchasers at special low prices and does not offer those prices to any other purchasers on the same terms. The purpose of this act is to protect small, independent enterprises from being forced out of business by large companies. It is intended to assure that sellers treat small businesses no differently than they treat large ones.

The key components of a violation of the Robinson-Patman

Act are

- (1) that a person has sold goods interstate at different prices to different purchasers;
- (2) that the goods were alike in grade and quality; and
- (3) that the effect of the sale was to substantially lessen competition or tended to create a monopoly, or adversely affected competition.

There are instances when price discrimination is acceptable. First, if there is a cost justification for the difference and second, if the difference is a measure to meet the competition.

Federal Trade Commission (FTC) Act

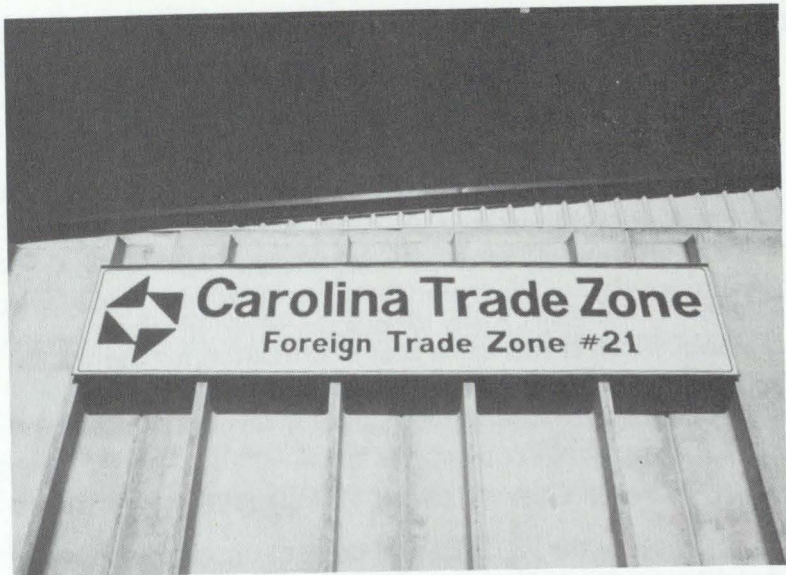
The purpose of the FTC Act is to prevent unfair methods of competition and unfair trade practices. It was adopted to supplement the Sherman and Clayton Acts. Many actions which would not reach the extent of becoming a violation of those Acts could very well be a violation of the FTC Act.

Violations of the FTC Act include false or misleading advertising; passing off goods as those of another competitor; false or inadequate labeling; lotteries or gambling schemes; and many other potentially unfair or misleading practices.

These violations are investigated, and complaints are filed by the Commission. The Commission has the power to enter a "cease and desist" order which requires the offending company to stop its unfair practices. An order by the Commission can be appealed to the United States Court of Appeals.

South Carolina Unfair Trade Practices Act

In addition to U.S. laws on antitrust and unfair trade, the state of South Carolina has adopted its own legislation. Sometimes called the "Little FTC Act," the South Carolina



Unfair Trade Practices Act prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. This state statute specifically requires that the action have an effect on public interest.

Conclusion

Antitrust law is central to U.S. business and economic development. Maintaining free and open competition in trade and industry is the main goal of these laws. This section has provided only a glimpse of the many sides of antitrust law. Every day new court decisions are made which reflect new aspects of antitrust law. Your attorney will be prepared with the latest and best information for you and your company and it is best to consult them in your planning.

Import Controls

Very early, South Carolina recognized the importance of international trade. Now, nearly 2000 businesses use the port facilities in South Carolina. Almost 900 manufacturing companies export products from our ports, while about 550 manufacturing companies import raw materials or manufactured components.

In 1986, South Carolina's three ports handled an estimated 5.5 million tons of cargo. These 3 ports, at Charleston, Port Royal and Georgetown, serve businesses inside and outside the state engaged in international trade. The port of Charleston is currently the 7th-ranked container port in the United States, and 3rd largest container and general cargo port on the U.S. East Coast. It operates 4 separate terminals: 2 all-container facilities, one for breakbulk cargo and one general cargo terminal.

There are 3 Foreign Trade Zones (FTZs) in South Carolina. One is located near Charleston in Summerville, another is in Columbia near the airport. The third FTZ, located at Greenville-Spartanburg, is currently inactive. FTZs permit businesses to bring in goods or raw materials, and process and store them without paying duty unless they are shipped into the United States. Goods which are re-exported are not subject to duties.

The information presented in this section is an overview of the controls that the United States government places on imports. It includes general descriptions of the procedures to follow when importing goods into the U.S. Specific information such as duties and limitations are subject to wide variation and are not included as part of this material. After you become acquainted with the general procedures regarding imports, you may be in need of more information. Listed in the appendices in the back of this book are addresses and phone numbers for U.S. Customs in Charleston, the International Trade Commission in Columbia, the Office of the U.S. Trade Representative, and the International Trade Administration. Contact them for more information after reading this section or discuss the matter with your attorney.

Procedures

Entry of goods into the United States is governed by the U.S. Customs Service, a division of the Treasury Department. Customs offices are located at ports of entry across the United States. The procedures for importing goods into the U.S. begins with the Customs service and their office at the port of entry.

The normal entry procedure for imported goods consists of the following steps:

- (1) arrival of goods at the port of entry;

- (2) submission of entry documentation and submission of entry summary documentation;
- (3) examination of goods by Customs official;
- (4) payment of estimated duty;
- (5) Customs authorization for delivery; and
- (6) release of goods.

Entry documentation includes several forms and papers. The Customs Form must be properly filled out and filed. It must be accompanied by evidence of the right to make entry. A commercial invoice is necessary which includes a description of the goods, its quantity, and value, plus it must contain the appropriate item number for those goods as listed in the U.S. tariff schedules. In some instances a packing list will be required. Specific types of goods or destinations will require additional entry documentation. The most current information on entry documentation requirements can be obtained from the Customs Service, a commercial customs broker, or from your attorney.

Once entry documentation is filed, the importer must arrange for an examination of the goods. If he has not already done so, he can submit his entry summary documentation at this point. Entry summary documentation is different from entry documentation and consists of the information which is necessary for Customs to assess duties, to gather statistics on imported goods, and to determine whether applicable laws and regulations have been followed.

The examination of goods is done by selecting a representative quantity of the goods. The examination checks for value, proper markings, prohibited articles, quantities, and special legal requirements for those goods. The proper duty amounts are determined based on the value of the goods and their tariff classification. Normally the value will be the transaction value of the goods, or of identical or similar goods. Transaction value is the price actually paid

for the goods, plus packing costs, commission, royalties, or other costs associated with sale and transport. If the goods do not have a transaction value, a value will be deduced or computed by the best available means.

From the value of the goods, the Customs officer will determine its classification and the duty applicable to it. This duty is an estimated amount. This estimated amount must be deposited with Customs. Final determination of the actual amount due will be made by Customs when the goods are liquidated or sold.

Once the deposit of the estimated duty is paid and the examination is complete, the goods will be released, as long as the invoice is correct and the release is not prohibited by law. Certain goods do not require examinations and can be released if a bond is filed with Customs.

The Customs Service has a procedure which allows for immediate release of a shipment in certain cases. The importer must submit an application for a Special Permit for Immediate Delivery before the goods arrive at the port of entry. If approved, the goods will be released soon after their arrival. Within 10 days after the goods are released, estimated duties must be paid and entry summary documentation submitted.

If the estimated duty is thought to be incorrect, it can be challenged by filing a petition with the Secretary of the Treasury. Any person who deals in or makes the same type of goods that are the subject of the duty can file a petition.

Limitations

Several special limitations apply to imports into the United States. These include quotas, prohibitions on certain items, necessity of a mark, prohibitions on trade with certain countries, and Buy American restrictions. These

restrictions can be very important to an importer. The following information briefly outlines their requirements.

A "quota" is a limit on the actual numbers of goods which can be imported into the United States. Two types of quotas are currently in place; absolute quotas and tariff-rate quotas. An absolute quota sets a maximum limit on the number of items which can be imported over a period of time. Tariff rate quotas specify a maximum limit but will vary from one specified time period to another. These quotas are maintained by Customs. However, it is possible that other U.S. agencies or departments may regulate specific goods. Investigation of possible other influences on quotas should be made before making plans to import. Agencies which may have regulations in effect include the U.S. Department of Agriculture, the Bureau of Alcohol, Tobacco, and Firearms, the Food and Drug Administration, the Environmental Protection Agency, and the Federal Trade Commission.

Certain items are absolutely prohibited. These prohibited goods include obscene, immoral, or seditious items, and items that are made by convicts or forced labor. A check with other U.S. governmental departments and agencies will reveal other restricted items.

Any item that enters the United States must be designated by a mark showing its country of origin. Additional duty may be assessed if no mark is included, and the mark must still be placed on the items before they will be released.

Imported goods often bear a trademark registered in another country or are the subject of a foreign patent or copyright. Any trademark on an imported item must not mislead the public regarding the goods' country of origin. If protection is sought for the goods based on the foreign copyright, patent, or trademark, restrictions and requirements will apply. Refer to the section in this book on intellectual property for an overview of how to obtain

protections in the United States.

Certain countries are prohibited from trading with the United States. Trade with some of these countries can be done only by special license from the U.S. Department of Treasury. Before proceeding with an arrangement to import from a particular country, especially if that country is a Communist-bloc country or is one where hostilities are occurring, it is advisable to check for the latest trade prohibitions.

Import Competition and Unfair Practices

A significant part of U.S. import competition laws involves antidumping legislation. Antidumping laws are intended to stop the practice of "dumping" goods into the U.S. market for sale at a price which is below that charged in the country of origin.

The Tariff Act of 1930 imposes an antidumping duty on merchandise which is likely to be sold at less than its fair value if a U.S. industry is likely to be harmed by the importation. The additional duty is equal to the difference between the sale price of the goods sold in the U.S. and the sale price of the goods in the country of origin.

Countervailing duty laws were passed in response to trade subsidies that some exporting countries were giving to their native businesses in order to help them to be more competitive internationally. The laws are intended to counter these trade subsidies. The duty which the laws impose is equal to the net amount of the subsidy.

In addition to antidumping and countervailing duties, the Tariff Act of 1930 addresses certain other unfair methods of competition. Specifically, the Act refers to protections of intellectual property. It prohibits trade practices which are unfair to U.S. patents, trademarks, and copyrights, and

prohibits activities such as false advertising and misappropriating trade secrets. If any of these violations are found, the Trade Commission has the authority to exclude, either completely or in part, the entry of those goods into the United States. Alternatively, the Commission could simply order the offending company to stop the unfair activities if the activities are viewed as less harmful.

Conclusion

The laws governing imports into the United States cover a vast network of considerations. Specific requirements and limits will depend on the exact facts and circumstances regarding the goods to be imported. This section has introduced a number of different aspects of U.S. import controls. In-depth analysis of your particular plans must be made before proceeding. Your attorney will be able to fill in the necessary information as it relates to your specific situation.

Intellectual Property Rights

Intellectual Property refers to intangible, yet valuable, assets including such things as original writings, artistic designs, architectural plans, manufacturing processes, and inventions. Under several federal laws, many of these assets can be protected from unauthorized use.

The material in this section will discuss patents, trademarks, copyrights, and trade secrets. It is intended to acquaint you with each different type of intellectual property and what protections are available for each.

Patents

A patent is a protective registration which grants an

exclusive right to make, use, or sell a novel invention. It creates a limited monopoly on that invention for a period of 17 years.

A patent is obtained by submitting an application to the U.S. Patent Office. Normally, before an application is submitted, the inventor will have a patentability search performed by a registered patent attorney. This process takes anywhere from a few weeks to a few months, depending on the complexity of the invention. The search is intended to discover similar inventions and should let the inventor know if his invention is novel, and whether he should go ahead with his application. If the invention is not novel, the Patent Office will not issue a patent.

Once a patentability search is concluded, an application can be filed. The application consists of a detailed written description of the invention and how it was created or built, a technical drawing of the invention, and claims regarding its function or use. If the patentability search uncovered any prior art of other similar inventions, those must be included with the application. The application must be clear and concise enough so that a person of ordinary skill in that field could make and use the invention.

All information disclosed to the patent office is confidential during the application process.

During the application process, a series of office actions will ordinarily be issued. These are preliminary reports and recommendations made prior to the final decision on granting of the patent. If the patent is not granted, the inventor can appeal the decision.

Before going ahead with a patent application, some important factors should be considered. A patent application can take anywhere from 18 months to 3 years. Its costs can range from less than \$1000 into many thousands of dollars.

While the application is being considered and before a patent is granted, the invention is not protected by patent law. Another consideration is the marketability, or profit potential, for the invention if a patent is issued. All these factors: cost, time, protection, marketing; will help you to decide if a patent application is the right move for you to make.

Once the patent has been granted, the use, sale, or manufacture of the invention is prohibited in the United States unless the patent owner gives his consent. If the patent owner discovers that the invention has been used, sold, or made without his consent, he can go to court to stop the practice and can sue for damages which may have resulted.

An invention will be protected during the application process only against use by someone who had notice of the impending patent. The designation "Patent Pending" should be included on the invention if it is used or marketed to the public during the application process. By including those words, notice of the patent is given to anyone who encounters the invention. No protection exists after the patent expires.

Royalties are the fees paid to the owner of a patent for the use of his invention. The ownership of a patent normally rests with the person who invented it. If the inventor was an employee who is expected to develop new inventions for the company, then the patent belongs to the company. If the employee develops a new invention on the job but it is not his position to develop new inventions, then the patent belongs to him. However, in that case the employer retains an interest in the patent and has a non-exclusive right to use the invention, royalty-free.

After the Patent Office has granted a patent, maintenance fees must be paid. Fees are due on 3 occasions: 3 1/2 years after issue; 7 1/2 years after issue; and 11 1/2 years after

issue. The amount of the fees vary depending on the status of the owner of the patent.

Trademarks

A trademark is a protective registration of a distinctive mark which identifies a particular product or company. A trademark is often used as the symbol for that product or company and generates public recognition.

Rights to a particular trademark are established by use and registration of the mark.

A foreign business which has registered a mark in another country can base a U.S. application on the existence of the foreign registration. If no foreign registration exists, the procedure for registration of a mark is the same as for any other application.

In order to register a mark, the mark must first be used to identify a product or company in interstate commerce. A company will need to keep records of its use of the mark, from the day it was first used, on what products it was used, and in what manner it was used. This information will be included with the written application which is submitted to the U.S. Patent and Trademark Office. The application must also include an application fee and a drawing of the mark. The application will be reviewed and a search of trademark office records will be conducted. If the mark satisfies the requirements of the office and is not too much like any other existing mark, then an office action will be issued approving the registration. Once approved, the office allows 5 years for interested parties to oppose the registration.

After approving the registration, the U.S. Patent and Trademark Office issues a certificate of registration. This registration provides protection for the mark. If the mark is used by anyone else without the owner's permission, the

owner can go to court to stop them from using it and may also seek monetary damages from them.

A trademark is indicated by an "R" in a circle beside the mark, ®. Before it is registered, the mark should be indicated by a small "TM" beside it.

Five years after the mark is registered, a notice must be sent to the U.S. Patent and Trademark Office to declare that the mark is still being used. Failure to send the notice will result in cancellation of the registration.

Registration is limited to 20 years and must be renewed at that time. Through renewals, the registration can last forever.

Copyrights

A copyright is a protective registration of the works of artists and authors which gives them the exclusive right to publish their work or to determine who may publish their work. Copyrights can be obtained for any original works which are "fixed in a tangible medium of expression." This reference includes literature; musical scores, lyrics, or arrangements; dramatic works; choreography; computer programs; sculpture; paintings; sound recordings; and motion pictures. A copyright cannot be obtained for any "idea, procedure, process, system, method of operation, concept, principle or discovery."

A copyright gives exclusive rights to its owner to reproduce the work, distribute copies for sale, and to perform or display the work publicly. The copyright owner is free to sell or transfer any of those rights to another person, as long as the transfer is carried out in writing.

A copyright lasts for the life of its owner plus 50 years. The owner is usually its author or creator. However, if a work is done "for hire," the owner of the copyright will be the person

who hired the author or creator. "For hire" means that the author is an employee and the work was created during his employment and for the employer. Works that are commissioned are not ordinarily considered "for hire."

A copyright notice must be included on the work when it is published. The notice consists of a "C" in a circle, ©, or the word "copyright," followed by the year of publication, and the name of the copyright owner. An example of a copyright notice is included at the front of this book.

Formal registration of the work is not required, however registration is recommended. In order to bring a suit and recover damages based on the copyright, it must be registered with the Copyright Office.

Registration is a simple process. A short application must be completed and a copy of the work sent in to the office along with a fee for each application. Several works can be included on a single application if the works are of a similar nature. For instance if they are all literary works, or if they are all computer programs, they could be included in the same application.

The United States participates in several treaties and agreements with other countries regarding copyright protections. Specific applications will depend on the country of origin and the date of first publication.

Trade Secrets

Many businesses operate using secret or confidential information. This information might include lists of customers, secret formulas, processes, or methods of production that are vital to the successful operation of the business. These are commonly referred to as trade secrets and involve information that is received and held in confidence by those employees who are required to have the

information in order to perform their job.

Employees may not disclose their knowledge of these trade secrets. If an employee does give out this information, he may be prosecuted under the National Stolen Property Act if the secret was in a tangible form, or, if the secret was in an intangible form, he can be sued in a civil court for violating his duty of loyalty to the company.

Trade secrets are often inventions which could be patented. It is up to the business to decide whether a patent or trade secret protection would be more suitable. Several factors should be considered. Trade secrets last indefinitely. Patents expire after 17 years. When a patent expires, the invention is no longer protected. A trade secret can be protected for as long as it remains secret. If another person independently discovers or creates your invention, he cannot use it if you have patented it. If it is merely a trade secret, that developer is free to use it, the owner of a trade secret has no protections against its use.

If a business plans to claim trade secret protection for their confidential ideas and information, it should follow certain guidelines.

- (1) disclosure of trade secrets should be restricted to only those employees who must have the information in order to perform their jobs;
- (2) any employee who has access to trade secrets should sign a confidentiality agreement making them personally liable if they disclose the information;
- (3) ensure that employees are informed of the importance of keeping trade secrets confidential; and
- (4) all trade secrets should be marked as confidential and kept locked in a safe location.

Conclusion

Different protective devices are suited to different situations. An in-depth look at your specific needs will guide you in deciding on the appropriate method to protect your ideas, inventions, and secrets. Carefully analyze your needs before committing your resources to a particular course of protection. Consulting an attorney can give you a great deal of guidance in this very important aspect of your business.

Taxation on Foreign Persons Investing in South Carolina

When you choose the form that your business will take, it is important to look at the tax consequences of your choice. Different business organizations are taxed differently from others. A partner is taxed on his percentage of the total income from the partnership's business. Generally, a partner can also deduct from his personal taxes the losses incurred through the business. These deductions apply if the partner has participated in operating the business, and the business is not a rental activity.

A corporation pays its own taxes. Its shareholders are not taxed on the income until it is distributed. When the income is distributed as a dividend, however, the earnings will be taxed a second time. This is often called double-taxation since the earnings are taxed once when they are earned by the corporation, and are taxed again when those earnings are distributed and received by the shareholders. A tax accountant or tax attorney can help you decide which structure will be best for your company.

Applicable tax treaties between the United States and your country will also affect the amount of tax you or your company will be required to pay.

Every person who invests in South Carolina is subject to

both United States and South Carolina tax law. This section will provide a broad overview of the different types of taxes which can affect you and your business.

Although this discussion will focus mainly on the more important aspects of taxation, it is intended to help you plan ahead for the possible consequences of different types of business investment.

The end of this section deals exclusively with the many tax advantages offered here in South Carolina. You're sure to note the strong message of encouragement sent by the state to businesses through our tax laws. Compare the South Carolina tax laws with those of other states. It's likely that you'll be impressed by our commitment to business and industry.

United States Federal Taxation

Residency

Individuals who are not U.S. citizens but who are subject to U.S. tax laws are taxed based in part on whether or not they are U.S. residents. Nonresidents are generally taxed only on certain income derived from a business they have operated inside the United States. Residents are taxed on their income worldwide, whether or not they are U.S. citizens. Complex reporting requirements and extensive rules apply to U.S. residents that do not apply to nonresidents. It is common for a foreign investor to prefer to maintain his status as a nonresident in order to simplify his tax reporting and payment.

The Internal Revenue Service (IRS) has devised 2 separate methods to determine whether a foreign investor is a resident. First, if the investor has been issued a "green card," he is considered a resident for tax purposes. Second, if the investor has maintained a substantial presence in the U.S.,

he will be considered a resident. U.S. tax treaties with foreign countries may provide a different definition of resident for tax purposes. Generally, most U.S. tax treaties state that a person becomes a U.S. resident for tax purposes under the “substantial presence” test.

“Substantial presence” refers to the amount of time the investor has spent in the United States. If he has spent 183 days or more in the United States during the current year, he is automatically a resident. If he has spent 183 days or more in the United States over the last 3 years, at least 31 of which were in the current year, he will probably be considered a resident. An investor who meets this test may prove he is not a resident by showing a closer personal and economic connection to another country, including the payment of taxes to another home country.

An ordinary taxable year begins and ends with each calendar year. However, an investor can be subject to taxation as a resident for only a partial year. Residency status begins on the day a green card is issued or, if residency is determined by their presence in the U.S., residency status begins on the first day of that year in which he was present in the U.S.

Status as a resident will end if the investor no longer meets the substantial presence test. If an investor ends his residency status and then resumes U.S. residency within 3 years, he may be subject to taxation on certain income earned during that period.

Whether determined to be a resident or not, any foreign investor who make money in the United States is subject to U.S. taxation unless exempt through a tax treaty provision.

Business Income

A foreign investor who has earned money through

engaging in a U.S. trade or business will be taxed on that business income. Tax forms, known as returns, must be filed by any foreign investor who earns income from a trade or business in the United States.

The IRS determines whether or not a person has engaged in a U.S. trade or business. They will look to the nature and regularity of the investor's activities. A foreign individual or corporation who is a partner in a partnership or who has agents or employees in the United States who have discretion over his U.S. activities will be considered to be engaged in a U.S. trade or business.

In some instances, an income tax treaty may apply. In that case, the business income may not be subject to U.S. tax. This exemption will not apply if the investor has a permanent U.S. base of operations such as a store, office, or factory.

Some income from real estate is classified as business income. This includes income generated by real estate development, or ownership of many different properties. Profit earned from the sale of real estate, also called real property, is classified as business income. The sales of purchase options, corporate assets, and mineral deposits are sometimes classified as sales of real property. Taxes on sales of real property are collected from both the foreign seller and from the buyer. Under a complicated process, the buyer will reserve a portion of the purchase price as tax and send it to the IRS.

Payment for personal services performed in the United States is generally treated as engaging in a U.S. trade or business. Personal services include such things as consulting work and other intangible types of services rendered. Certain exceptions to this tax treatment will apply especially if there is an applicable tax treaty.

The mere trading of stocks, securities, or commodities for a person's own account does not constitute having engaged in U.S. trade or business. If the trade is not for personal investment but is for the business of trading, it will be considered engaging in a U.S. trade or business.

Foreign investors who operate a branch office in the United States may be subject to business income tax if they withdraw income from the branch operations. This branch profits tax can be reduced if a tax treaty applies. It can be avoided by creating a corporate subsidiary rather than operating a branch office in the U.S.

Non-Business Income

Certain income earned in the U.S. by a foreign investor, though not subject to business income tax, may be taxable as non-business income. Normally subject to a 30% tax, the amount of tax may be reduced substantially if a tax treaty applies. The tax on non-business income is normally withheld from the foreign investor out of the income due to him. The amount held back is submitted directly to the IRS.

Non-business income includes such things as dividends, interest, royalties, and rent. Rental income, however, can be treated as business income if the foreign investor chooses. The tax rate might be lower for business income. Expenses can be deducted from business income which may reduce the overall tax owed even further.

Estate Taxes

In selecting the form of your business and who shall own it, federal estate tax laws must be given consideration. The estate tax is imposed on the privilege of transferring property at a person's death. The amount of the tax is determined by the value of the property owned at the date of death.

Nonresidents who own property located in the United States are potentially subject to the federal estate tax. All stock owned by nonresident individuals in U.S. corporations, and all partnership interests owned by nonresident individuals in partnerships engaged in business in the U.S. are subject to federal estate tax.

The U.S. has estate tax treaties with several countries which may reduce the amount of estate tax due.

South Carolina State Taxation

In addition to U.S. taxes, companies operating in South Carolina are subject to corporate income tax, property tax, and sales and use tax. If a corporation is not subject to federal income tax because of an applicable tax treaty, then the corporation is not subject to South Carolina income tax either. South Carolina is trying to maintain a fair and reasonable level of taxation for corporations in the state. In addition to a balanced tax base, the state offers tax incentives to encourage businesses to choose South Carolina as a base of operations.

South Carolina corporate income tax of foreign corporations is based on the total amount of income earned or derived from within the state. If a corporation has income from other U.S. sources, the taxable income is based on a ratio of the total income to the amount attributed to South Carolina.

Real and personal property in South Carolina is taxed at the local level, not by the state. A tax assessor will appraise real and personal property to determine its value for tax purposes. Real property used for manufacturing, however, is appraised by the State Tax Commission to assure uniform treatment of manufacturing facilities. Tax rates for real and personal property vary among individual counties and are expressed in terms of "mills." A mill refers to the amount of

tax to be paid per \$1000 of assessed value. For example, a tax rate of 97 mills means that property assessed at \$1000 would pay \$97 tax.

State sales tax applies to all retail sales, leases, or rentals of tangible personal property. A state use tax applies to storage, consumption, or use of tangible personal property used or brought into the State. Either one or both the sales and use taxes may apply in a specific situation. However, both taxes will never be assessed together to the same transaction. The tax rate for each is 5%. Raw materials for production, repair parts, production machinery, and industrial fuels are exempt from both sales and use taxes as a manufacturer's exemption.

South Carolina also imposes an estate tax similar to the federal estate tax. However, South Carolina estate tax applies only to property located within the state. For South Carolina estate tax purposes, stock in a South Carolina corporation and a partnership interest in a partnership doing business in South Carolina are considered to be located in the state. After June 30, 1991, South Carolina provides a credit against South Carolina estate taxes for estate taxes paid to other states, though not for federal estate taxes paid.

In some cases, a company may be able to pay a fee instead of taxes for a certain number of years. A company which is investing at least \$85 million in capital investments can negotiate with the county for this arrangement. If approved, it will establish a fee that the company will pay instead of paying taxes. The fee will not be affected by tax increases or other variables during the term of the arrangement.

Many tax incentives are available to new or expanding companies in South Carolina. These incentives include temporary limited exemptions from property taxes, exemptions from local taxation for pollution control devices, tax credits for new jobs created, and certain tax exempt

financing. There are currently no local sales taxes, no local income tax, no inventory taxes, no taxes on intangible personal property, no state real or personal property tax, and no wholesale sales tax. These and other incentives reflect the concern that South Carolina has for corporations doing business here.

Conclusion

Taxation will be an important concern when you decide to do business in South Carolina. The information in this section provides merely an overview of the full picture regarding taxation. Each individual business will need to decide for itself how best to conduct itself, with taxes being only one factor of many to be considered. Consulting with a tax attorney or accountant will help you plan the tax aspects of your business.



The People In Your Business

United States Immigration Laws

Before you begin doing business in South Carolina, it will be necessary to consider the personnel needs of your company. It is important to set out an immigration plan for the people you may wish to transfer from your own business operations overseas.

In order to enter the United States, a visa is required. If you plan to employ individuals who are not U.S. citizens, they will need a work visa. It is highly recommended that you consult an attorney to help you establish an immigration plan, and to work with the Immigration and Naturalization Service (INS). U.S. immigration laws are complex. Advance planning is critical to the success of your immigration plan.

There are 2 types of visas: a non-immigrant or temporary visa; and an immigrant or permanent visa. The purpose for which you or your employee are coming into the country will have a bearing on the type of visa you should seek. Additionally, the need for either a lengthy stay or a brief visit will affect the type of visa you will need. This brief overview will help you in understanding and preparing for the process of obtaining visas.

Non-Immigrant Visas

The majority of the time, a company's personnel needs can be met by using non-immigrant visas for its foreign employees or advisors. Most non-immigrant visas are issued for a limited period of time and are not intended for persons planning to remain in the U.S. However, an individual may enter the U.S. with a non-immigrant visa and later apply for permanent residency while here. Several

different categories of non-immigrant visas are available:

B-1	Business Visitor
B-2	Visitor for Pleasure
E-1	Treaty Trader
E-2	Treaty Investor
F-1	Student
H-1	Professional of distinguished merit
H-2B	Skilled or unskilled labor
H-3	Training
J-1	Exchange Visitor
L-1	Executive, manager, specialized knowledge

The appropriate visa for you or your employee will depend on the specific needs of your company and the individual seeking the visa.

B Visas

B category visas cover foreign visitors for business (B-1) and foreign visitors for pleasure (B-2). B visas are the most common and allow temporary, short visits to the United States for a variety of purposes. Any visits to the United States under a B visa cannot involve U.S. employment or educational pursuits.

Business visitors admitted under a B-1 visa are allowed to stay only as long as necessary to conduct their business. Most B-1 visas are approved for the length of time requested, subject to a limit of 6 months. Visitors for pleasure, B-2, automatically receive 6 months.

There are five main requirements when applying for a B visa:

- (1) the visit must be of limited duration;
- (2) the visitor must intend to leave the United States at the end of his stay;

- (3) the visitor must maintain a foreign residence which he does not intend to abandon;
- (4) the visitor must have sufficient funds to support him during his visit; and
- (5) the visitor must engage only in legitimate activities relating to business or pleasure during his stay.

The B visa can be obtained at a U.S. Consulate abroad. It does not need prior approval from the Immigration and Naturalization Service (INS).

The application for a B-1 visa must have a “bona fide nonimmigrant intent.” This means that he has a clear intention of returning to his own country as soon as his business is complete. This intent can be shown by permanent employment or business connection to the home country, or other strong ties to the home country.

E Visas

E category visas allow business persons from certain countries into the United States for extended periods of time to oversee a business that either (a) is engaged in trade between the U.S. and a foreign state or (b) is a major investment of that business in the U.S. The key requirement is that there must be a treaty of trade or commerce between the U.S. and that business’s country allowing for these nonimmigrant E visas.

A business person entering under an E visa is allowed an initial stay of up to one year. This period can be extended almost indefinitely year by year, as long as the same activity is engaged in. Application for an E visa is made through the U.S. Consulate.

There are 3 main required elements for an E visa application.

- (1) a treaty between the United States and the foreign country;
- (2) the business's majority ownership is held by nationals of that foreign country; and
- (3) each employee who is seeking an E visa must be a national of that foreign country.

In addition, an E visa applicant must have an intention to return to their home country at some future date when their visa expires. If any of these elements are missing, an E visa will not be granted.

The following countries currently have treaties with the United States allowing for both E-1 and E-2 visas:

Argentina	Japan	South Korea
Austria	Liberia	Spain
Belgium	Luxembourg	Suriname
China (Taiwan)	Netherlands	Switzerland
Colombia	Norway	Thailand
Costa Rica	Oman	Togo
Ethiopia	Pakistan	United Kingdom
France	Paraguay	West Germany
Honduras	Philippines	Yugoslavia
Italy		

Countries who participate in treaties allowing only E-1 treaty traders include:

Bolivia	Finland	Israel
Brunei	Greece	Latvia
Denmark	Ireland	Turkey
Estonia		

F Visas

Persons who wish to study in the United States, including elementary school to post-doctorate, will typically need an F-1 student visa.

The F-1 requirements and application process have been recently revised. Basic requirements for obtaining an F-1 visa include:

- (1) full-time enrollment in an academic, not vocational, program;
- (2) the school is approved by the Attorney General for attendance by foreign students;
- (3) proficiency in English, or enrollment in English language courses leading to proficiency;
- (4) financial ability to cover costs during entire course of study; and
- (5) maintenance of a foreign residence.

Application for an F-1 visa is made by first obtaining a certificate of eligibility from the school where the student intends to enroll. That certificate plus an application and supporting documentation is submitted to the U.S. Consulate for approval. If the foreign person is present in the U.S. on the basis of a different visa, application is made directly to the INS. F-1 visas for persons already present in the U.S. are not as easy to acquire as F-1 visas from the U.S. Consulate at a person's home country.

The original certificate of eligibility states how long a student needs to complete their program of study and will determine how long he may stay in the United States. If this date passes and the student has not completed his studies, he may be eligible for a brief extension.

H Visas

The category of H visas is reserved for workers who will be temporarily employed in the United States. The four categories of H visas refer to the different levels of education, training, or experience a particular employee has and to the level of employment he is seeking. The three categories of H visas which are most applicable will be discussed here. H-2A

visas, which cover agricultural workers, are not included. Information on H-2A visas can be obtained from the INS.

The maximum initial stay under an H visa is 3 years. Extensions up to a maximum of 2 additional years are possible. Only in extraordinary circumstances would a 6th year be allowed.

H-1 visas carry certain requirements which include:

- (1) the applicant must be a professional, or he must possess distinguished merit in his field;
- (2) the position to be filled must require someone of the applicant's specific qualifications;
- (3) if a license is required, the applicant must have such a license;
- (4) the employer intends to hire the applicant on a temporary basis; and
- (5) the applicant intends to leave the United States after he completes the job, and maintains a foreign residence.

To be considered a professional, the person's field must be one for which a college degree is the minimum entry level requirement, and the applicant's qualifications must meet the minimum standard set for that field. Examples include registered nurses, scientists, engineers, systems analysts, and some business executives. If a person possesses "distinguished merit" in a field which is not included among professional fields, he may also qualify. Distinguished merit refers to a person whose skills or recognition in his field far exceed normal skills or recognition.

Application for an H-1 visa is an exact process. It begins with the preparation of a petition, obtaining a company letter in support of the petition, and gathering documents that support the letter and the petition. The petition describes the applicant, his qualifications, the description of the job for

which he is applying, wages, hours, and benefits. The company letter reaffirms a temporary offer of employment, describes the company, outlines the applicant's background and how it relates to the position offered, and describes the terms of employment. Other support documentation might include an evaluation of education, special credentials, letters confirming employment or experience, and other evidence of merit and qualification.

Unlike the H-1 visa, skilled and unskilled workers may qualify for temporary nonimmigrant status under an H-2B visa. This status is often used to fill temporary positions for which U.S. employees are unavailable. An H-2B visa is granted only for the period of time that his temporary services are needed but cannot exceed 3 years.

The following requirements must be met for an H-2B application:

- (1) there are no qualified, unemployed U.S. workers available for the job;
- (2) the position is temporary;
- (3) the employer intends to hire the applicant only temporarily; and
- (4) the applicant intends to return to his home country and maintains a foreign residence.

The Department of Labor must certify that there are no available U.S. workers for the position. This process can last several months.

An H-3 visa is available for foreign workers who come to the U.S. to participate in an established company training program. An H-3 visa is valid for the term of the training but is almost always limited to less than 2 years. A person in the United States on an H-3 visa may not work while he is in the U.S. unless the work is incidental to the program.

Family members are automatically included under each of the above H visa categories, classified as an H-4 visa. Under this visa classification, employment is not authorized.

J Visas

The J-1 visa covers exchange visitors to the United States. The applicant must be participating in a U.S. government approved Exchange Visitor Program for the purpose of studying, doing research, or gaining experience in their field.

A certificate of eligibility is issued to the applicant by a sponsor. The applicant takes the certificate and other support materials to the U.S. Consulate to apply for his J-1 visa. A J-1 visa is valid for up to 18 months.

L Visas

The L-1 visa is for employees who are executives or managers or who have specialized knowledge in their field. It is limited to persons who have been employed by the company at a foreign office for at least a year before the application is made.

This visa is issued for an initial period of up to 3 years and it can be extended for 2 additional years. Only under extraordinary circumstances will the visa be extended for a 6th year. This is almost never granted by INS.

The following requirements must be met for L-1 visa applicants:

- (1) the employee has worked abroad full-time for the company for at least 1 year;
- (2) the overseas company must be specifically related to the U.S. company seeking to employ the applicant;
- (3) the company is doing business in both the United States and the foreign country at the same time;

- (4) the employee was employed abroad in an executive or managerial position or one involving special knowledge;
- (5) the employee will be filling an executive or managerial position or one involving special knowledge;
- (6) the employee is qualified for the position based on past education and experience; and
- (7) it is the intent of both employer and employee that the position is temporary.

The application process for obtaining an L-1 visa is an exact process. A petition must be prepared, a company letter in support of the petition must be obtained, and documents in support of the petition must be gathered. These papers and the application fee are submitted to the INS. Once approved, the employee can seek entry by taking a copy of his application, the INS approval, an application form, his passport, photo, and application fee to the U.S. Consulate.

Immigrant Visas

There will be occasions when an employer will wish to obtain permanent residency for one of its employees. The United States has set up a preference system for both business and family permanent resident applicants as follows:

- (1) *1st Preference* - unmarried sons and daughters of U.S. citizens. 20% of total number of visas per year.
- (2) *2nd Preference* - spouses, and unmarried sons and daughters of permanent immigrants. 26% of total number of visas per year.
- (3) *3rd Preference* - members of the professions or persons of exceptional ability in the arts or sciences. 10% of the total number of visas per year.

- (4) *4th Preference* - married sons and daughters of U.S. citizens. 10% of total number of visas per year.
- (5) *5th Preference* - brothers and sisters of U.S. citizens. 24% of total number of visas per year.
- (6) *6th Preference* - skilled and unskilled labor in short supply. 10% of total number of visas per year.
- (7) *Nonpreference* - all other immigrants.

Applicants under the 3rd and 6th preference must obtain a labor certification from the Department of Labor before a visa can be obtained. Certain categories of employment receive an automatic labor certification where the United States Government has previously determined that a shortage exists in these categories. In other categories, a formal labor certification process must be filed. Upon arrival, the company can petition for residency for its employee. Again following approval, the application itself is subject to a quota system, based on the date of the original approval. This entire process is complicated and should be undertaken on advice of counsel to have the best chance of success.

Conclusion

Immigration planning for business is often ignored by foreign companies until after they have made specific business plans for their United States operations. This is a mistake if foreign workers or executives figure significantly in these plans. The immigration process is difficult and time-consuming. In most cases, desired results can be achieved, but early prior planning is essential. Consulting a qualified attorney here is recommended.

Labor and Employment Law

As you establish your company in South Carolina, you will be hiring U.S. workers. When that time comes, you will need

to be familiar with the applicable labor laws.

Nearly all of the laws governing labor and employment are federal laws and regulations. They cover a wide range of considerations including wages and benefits, workplace safety, and discrimination based on age, sex, race, color, religion, national origin, or handicap.

The material which follows discusses the major federal laws which will affect your business. Although South Carolina has a right to work law and fewer than 5% of the labor force belongs to a union, a brief discussion of labor unions is also included.

Wages, Hours, and Benefits

Several United States statutes govern wages, hours, and benefits of employees in American companies. The 3 most significant ones are the Fair Labor Standards Act (FLSA), the Employee Retirement Income Security Act (ERISA), and the Consolidated Omnibus Budget Reform Act (COBRA).

The Fair Labor Standards Act (FLSA) presents a straightforward set of requirements which are, however, subject to many exemptions and regulations. The Act requires that the employer keep accurate records of the hours worked by each employee. Employees must receive a regular hourly wage for each hour worked, up to 40 hours per week. The hourly wage cannot be below the federally mandated minimum hourly wage, currently \$3.35 per hour. If an employee works more than 40 hours in a week, all hours over 40 are considered overtime and are paid at 1 1/2 times the regular hourly wage.

Requirements set out in FLSA cannot be taken away through individual agreement or labor union contract.

ERISA governs employee benefit plans run by employers. It applies to any industry that affects commerce. The complete Act spells out in detail how employee benefit plans

must be operated, including pension and retirement plans, health benefits, vacation benefits, life insurance, and severance plans. There is no requirement that these benefits be provided, nor at what level they should be maintained. ERISA only states that, if a company chooses to provide these types of benefits, it must comply with the Act's provisions for maintaining and operating the plans.

COBRA creates a special protection for employees who are no longer employed by the company. The reason for leaving the company is irrelevant. If the company provided health benefits to the employee, it is required that the company allow those former employees to keep their health benefits. The benefits must extend for an additional 18 months from the last date of employment. The former employee is required to pay the cost of the insurance.

Workplace Safety

The purpose of the Occupational Safety and Health Act (OSHA) is to assure safe and healthy working conditions in United States businesses. Under the Act, each employer is required to provide a workplace that is free from recognized hazards that are likely to cause injury or death. OSHA is administered by the Occupational Safety and Health Administration (also known as OSHA).

The Act is extremely long and very detailed. It describes its requirements explicitly and sets up procedures for inspection, investigation, and enforcement. It establishes methods for warning employees of possible exposure to dangerous chemicals.

If OSHA finds that a company has violated one of its rules or if a violation has caused the injury or death of an employee, OSHA has the power to impose civil and criminal penalties. These can range from fines to imprisonment.

The exhaustive nature of the Act does not allow for any specific treatment here. For your particular questions, contact OSHA or consult with your attorney.

Discrimination

U.S. laws prohibit discrimination in employment that is based on race, color, sex, religion, national origin, age, or handicap. Several major employment laws refer to these concerns.

Title VII of the Civil Rights Act of 1964, better known as simply Title VII, prohibits discrimination by employers based on race, color, religion, sex, or national origin. The Act applies to all businesses with 15 or more employees. Discriminatory treatment includes refusal or failure to hire, segregation, termination (firing), or other discriminatory treatment related to pay, conditions of employment, or privileges.

The Equal Employment Opportunity Commission (EEOC) is the enforcing agency for Title VII. The EEOC will investigate accusations of illegal conduct and attempt to reconcile the problem. If the problem cannot be remedied, the EEOC or the individual involved can sue the offending employer.

Executive Order 11246 is similar to Title VII. It, too, prohibits discrimination by employers based on race, color, religion, sex, or national origin. It applies to any employer who is doing business with the U.S. government.

The Order has a provision for "affirmative action." This means that an employer subject to the Order must establish a plan to hire and promote women and minorities. The Order is enforced by the Office of Federal Contract Compliance.

The Equal Pay Act (EPA) requires that men and women receive equal pay for equal work. Work that requires

substantially the same skill and education levels must be compensated at an equal rate of pay. Certain exceptions apply to special plans based on seniority, merit, production, or other factors not related to sex.

The EPA applies to businesses of 2 or more employees whose business affects interstate commerce. It is administered by the EEOC.

Under the Age Discrimination in Employment Act (ADEA), employers are prohibited from discriminating against persons because of their age. Exceptions can be made only where age is a legitimate qualification for the job. The Act protects employees who are 40 years old or older. It applies to all businesses employing 20 or more people. Discriminatory practices which are prohibited include refusal or failure to hire, termination (firing), or segregation. It is administered by the EEOC.

Handicapped persons are protected under the Rehabilitation Act. The Act applies to all employers who have contracts with the U.S. government for amounts of \$2,500 or more. If the employer has 50 or more employees and over \$50,000 in U.S. government contracts, it must also develop an affirmative action plan to hire and promote the handicapped.

Handicaps range from certain diseases, alcohol addiction, and chronic back problems to other more commonly recognized physical and mental handicaps. Employers must make reasonable accommodations for the handicapped to help them in jobs that they otherwise are qualified to perform. The Rehabilitation Act is administered by the Office of Federal Contract Compliance Programs.

An employee who leaves his position to join the military, or who is a member of a military reserve and is required to take part in occasional training exercises cannot lose his job

because of this military activity. When his military activities are over, he is entitled to an opportunity to return to his former position. The employee must not suffer a loss in seniority or status upon his return.

Government contractors are required to hire and promote military service veterans from the Vietnam era. Under the Vietnam Era Veterans Readjustment Act, any employer who has 50 or more employees and U.S. government contracts in excess of \$50,000 must prepare an affirmative action plan for hiring and promoting Vietnam era veterans.

Labor Unions

The state of South Carolina has adopted a right to work law. This law allows employees to choose whether or not to join a union. An employee cannot be required to join a union in order to work in a particular field or for a particular business. Union membership in South Carolina is currently the lowest in the nation. Less than 5% of South Carolina workers are union members.

The National Labor Relations Act covers collective bargaining for public and private companies. It regulates such practices as labor strikes and management lock-outs. The Act specifically allows employees to form or join a union if they desire, and to collectively bargain with their member's employers.

Employers may not prohibit unions from organizing and must not act to undermine a union. Employers are, however, allowed to campaign against a union so long as their actions are not coercive. The Act requires that an employer bargain with a Union if the employees choose to have a union represent them.

Because of the length and complexity of the Act, it is advisable for you to form specific questions about your

company and how the Act might affect you. Your attorney will be able to guide you in working within its bounds.

Conclusion

As your business prospers in South Carolina and you begin to hire U.S. employees, it will become subject to the U.S. government labor laws. Your attorney or the administering agency for each Act will be able to answer your specific questions and give you guidance in working most efficiently and productively with your employees.

This book has been written with you, the businessman, in mind. It is intended as an introduction to those rules and regulations which will affect you as you begin to do business here in South Carolina.

We hope that the information contained in this book is helpful for planning legal aspects of your doing business in South Carolina. We look forward to welcoming you here as a new business in our state.

South Carolina State Development Board

Berry, Dunbar, Daniel, O'Connor,
Jordan and Eslinger, attorneys
and counselors at law



APPENDIX A

State Agencies and Departments

Agriculture Department, Marketing Division
F & V Market News
P.O. Box 13531-0531
State Farmers Market
Columbia, SC 29201
(803) 737-3012

Chamber of Commerce, SC
NCNB Tower, Suite 520
P.O. Box 11278
Columbia, SC 29211
(803) 799-4601

Development Board, SC State
Business Development and Assistance Division
International Business Development Division
P.O. Box 927
Columbia, SC 29202
(800) 922-6684 (toll-free in SC)
(803) 734-1400

Jobs-Economic Development Authority (JEDA)
1203 Gervais St.
Columbia, SC 29201
(803) 734-1470

Labor Department, SC
Landmark Center
3600 Forest Dr.
P.O. Box 11329
Columbia, SC 29211
(803) 734-9600

Secretary of State, SC
Wade Hampton Office Bldg.
P.O. Box 11350
Columbia, SC 29211
(803) 734-2161

South Carolina Research Authority
Robert E. Henderson
P.O. Box 12025
1310 Lady St., Room 811
Columbia, SC 29211
(803) 799-4070

South Carolina Tax Commission
Columbia Mill Bldg.
301 Gervais St.
P.O. Box 125
Columbia, SC 29214
(803) 734-1880

Workers Compensation Commission, SC
1612 Marion St.
Columbia, SC 29202
(803) 737-5700

APPENDIX B

Federal Agencies and Departments

Agricultural Stabilization and Conservation Service
Department of Agriculture
P.O. Box 2415
Washington, DC 20013
(202) 447-5237

Agriculture, Department of
14th Street and Independence Ave., SW
Washington, DC 20250
(202) 447-2791
(202) 447-8001

Alcohol, Tobacco, and Firearms, Bureau of
Department of the Treasury
1200 Pennsylvania Ave., NW
Washington, DC 20226
(202) 566-7135

Alcohol, Tobacco, and Firearms, Bureau of
Southeast Regional Office
Robert E. Daugherty, Director
3835 Northeast Expwy.
Atlanta, GA 30340

Antitrust Division
Department of Justice
10th Street and Pennsylvania Ave., NW
Washington, DC 20530
(202) 633-2421

Architectural and Transportation Barriers Compliance
Board

Room 1010, Switzer Bldg.
330 C Street, SW
Washington, DC 20202
(202) 245-1591

Bureau of Economic Analysis
Department of Commerce
Washington, DC 20230
(202) 523-0777

Civil Rights, Commission on
1121 Vermont Ave., NW
Washington, DC 20425
(202) 376-3812

Commerce, Department of
14th St. between Constitution Ave. and E St., NW
Washington, DC 20230
(202) 377-2000
(202) 377-5485

Copyright Office
Washington, DC
(202) 479-0700
(202) 287-9100 (forms request)

Customs Service, United States
Southeast Regional Office
200 E. Bay St.
Charleston, SC 29401
(803) 724-4312

Energy, Department of
1000 Independence Ave. SW
Washington, DC 20585
(202) 586-5000

Environmental Protection Agency
401 M. St., SW
Washington, DC 20460
(202) 382-2090

Environmental Protection Agency
Region IV Regional Office
Jack E. Ravan, Administrator
345 Courtland St., NE
Atlanta, GA 30365

Equal Employment Opportunity Commission
2401 E St., NW
Washington, DC 20507
(800) 872-3362
(202) 634-6922

Export Administration Review Board
Room 3888, Herbert C. Hoover Bldg.
14th St. and Pennsylvania Ave., NW
Washington, DC 20230
(202) 377-3775

Federal Communications Commission
1919 M St., NW
Washington, DC 20554
(202) 632-7000

Federal Communications Commission
Southeast Regional Office
Carl E. Pyron, Regional Director
Rm. 433, 1365 Peachtree St., NE
Atlanta, GA 30309

Federal Labor Relations Authority
500 C St., SW
Washington, DC 20424
(202) 382-0711

Federal Trade Commission
Pennsylvania Ave. at 6th St., NW
Washington, DC 20580
(202) 326-2222

Federal Trade Commission
Regional Office
Paul K. Davis, Director
1718 Peachtree St., NW
Atlanta, GA 30367

Food and Drug Administration
Department of Health and Human Services
5600 Fishers Lane
Rockville, MD 20857
(301) 443-1544
(301) 443-2894

Immigration and Naturalization Service
Department of Justice
425 I St., NW
Washington, DC 20536
(202) 633-4316
(202) 633-4330
(202) 633-4354

Immigration and Naturalization Service
Southern Regional Office
311 N. Stemmons Fwy.
Dallas, TX 75207

International Trade Commission, US
701 E St., NW
Washington, DC 20436
(202) 523-0161

Interstate Commerce Commission
12th St. and Constitution Ave., SW
Washington, DC 20423
(202) 275-7119

Labor, Department of
200 Constitution Ave., NW
Washington, DC 20210
(202) 523-8165

Labor, Department of
Region IV Regional Office
1371 Peachtree St., NE
Atlanta, GA 30367
(404) 347-3256
(404) 347-3324

Mediation Board, National
1425 K St., NW
Washington, DC 20572
(202) 523-5920

Mediation and Conciliation Service, Federal
2100 K St., NW
Washington, DC 20427
(202) 653-5290

National Labor Relations Board
1717 Pennsylvania Ave., NW
Washington, DC 20570
(202) 655-4000

National Labor Relations Board
Field Office
Martin M. Arlook, Regional Director
101 Marietta St., NW
Atlanta, GA 30323
(404) 221-2896

Occupational Safety and Health Administration
Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
(202) 523-8017

Occupational Safety and Health Administration
Regional Office
Karen A. Mann, Acting Administrator
1375 Peachtree St., NE
Atlanta, GA 30367
(404) 881-3573

Office of Federal Contract Compliance Programs
Office of the Director
Department of Labor
Room C-3325
200 Constitution Ave., NW
Washington, DC 20210
(202) 523-9475

Patent and Trademark Office, US
Office of Public Affairs
Washington, DC 20231
(703) 557-3341

Patent and Trademark Office, US
Operations
2021 Jefferson Davis Hwy.
Arlington, VA 20231

Workers Compensation Program
Regional Office
Richard Robinette, Wage and Hour Div. Administrator
Donald Webster, Federal Contract Compliance
Administrator
Floyd G. Ansley, Workers Compensation Programs
Administrator
1371 Peachtree St., NE
Atlanta, GA 30367

GLOSSARY

board of directors or *board*: those persons elected by the shareholders of a corporation to make policy decisions regarding the operation of that corporation.

branch operation: a local business operation established by a foreign business which is operated outside that business's home country.

distributorship: a business arrangement between a local seller (distributor) and a foreign business to sell goods locally.

documentation: forms, papers, letters, and other written materials which serve as proof of ownership or origin.

foreign business: a company whose principal office is located outside the United States and who is currently conducting or is planning to conduct its business in the United States.

immigrant: a person who enters the United States and obtains a permanent visa with the intention to remain permanently in the United States.

indemnification: in the case of liability, a third party takes responsibility for payment of an obligation.

international law: refers to those laws which cover any transactions, agreements, or other dealings between sovereign nations.

joint venture: a temporary partnership, usually entered into through a written agreement between 2 businesses to conduct a single business operation.

liability: an obligation to perform, pay, or provide certain acts, sums, or services.

non-immigrant: a temporary visitor to a sovereign country who maintains a residence in his home country and intends to return there at some later date.

parent corporation: any corporation which owns another company or corporation is considered a parent corporation to that subsidiary corporation.

partnership: two or more persons who are in association as co-owners of a business with the intent to make a profit.

prime rate: the interest rate which a bank or other lending institution will offer to its preferred commercial borrowers.

products liability: an obligation to reimburse a consumer or user of a product who was injured as a result of using that product.

service of process: the delivery of papers which state that the person to whom the papers are delivered is the subject of a lawsuit.

shareholder: a person who owns a share of stock in a corporation.

statute: a law which has been passed or adopted by a state legislature or by the United States legislature.

statutory: obligations or requirements which are determined according to a specific statute or law.

transnational law: refers to those laws which cover any transactions, agreements, or other dealings between individuals or companies whose business crosses international borders.

visa: a document issued by a sovereign government which allows visitors to enter the country and remain for a specified period of time.

waiver: giving up of a right.

wholly-owned subsidiary: one corporation whose stock is owned entirely by another, usually larger, corporation.

INDEX

Antitrust Law	39
Articles of Incorporation	18
Branch Operations	7
Business Corporations Act	17
Business Incentives	13
Business Income Taxation	60
Bylaws	20
Classes and Series of Shares	21
Clayton Act	41
Community Development Program	32
Copyrights	55
Directors	26
Discrimination	79
Disputes and Dispute Resolution	13
Dissenter's Rights	29
Dissolution	29
Distributorship	8
Estate Taxes	62
Federal Agencies and Departments	87
Federal Trade Commission Act	43
Financing	31
Foreign Direct Investment	34
Foreign Investments in U.S. Real Estate	36
Foreign Portfolio Investments	35
Form of Business	7
Forming a Corporation	18
Glossary	94
Immigrant Visas	75
Immigration Laws	67
Import Competition and Unfair Practices	50
Import Controls	45
Import Limitations	48
Indemnification of Directors	27

Industrial Bond Financing	31
Inspection Rights.....	25
Intellectual Property Rights	51
International Trade in Services	36
Introduction	3
Jobs-Economic Development Authority	32
Joint Venture Agreements	9
Labor and Employment Law	76
Labor Unions.....	81
Liability	11
Liability of Directors and Officers	27
Merger.....	28
Name	20
Non-Immigrant Visas	67
Organization Meeting	19
Partnerships	9
Patents	51
Preemptive Rights	23
Purpose and Powers	20
Redemption of Shares	23
Registered Agent	21
Registered Office	21
Restrictions on Share Transfers	22
Robinson-Patman Act	42
Sale of Corporate Assets	28
Share Dividends.....	22
Share Exchange	28
Shareholder Suits	25
Shareholders Meetings.....	23
Shares and Shareholders	21
Sherman Act	39
Small Business Administration	33
South Carolina State Taxation.....	63
State Agencies and Departments	85
Subsidiary Corporations.....	10

Taxation	58
Trade Secrets	56
Trademarks	54
Unfair Trade Practices Act of S.C.	43
U.S. Federal Taxation.....	59
Voting Shares.....	24
Voting Trusts and Agreements.....	24
Wages, Hours, and Benefits.....	77
Where to Incorporate	19
Workplace Safety	78

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