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Chapter I

Structure of the U.S. Legal System

This chapter is intended to summarize for a foreign investor selected portions of the U.S. legal system with which he will most likely be required to contend in organizing a business enterprise or other investment in the United States. Subsequent chapters will deal with specific types of transactions and investments, and appropriate use will be made there of the terms and concepts summarized in this chapter and in Chapter II dealing with U.S. taxation of foreign investors. Accordingly, even an investor who is generally familiar with the legal and tax climate in the United States should review these first two chapters.

The Federal System

The United States, unlike most areas of similar economic size elsewhere in the industrialized world, is not divided by customs, language, or tariff barriers. However, this apparent uniformity does not reflect the variety of regulations with which the investor must comply in the various states where he will conduct business or make other investments. This is due to the U.S. federal system of government, under which the U.S. Constitution parcels out only specified powers exclusively to the federal government, such as the powers to control imports and exports, to regulate immigration, and to protect patents and copyrights.

All other powers, particularly those pertaining to the regulation and the taxation of local business enterprises, are shared by the federal and state governments, with all residual power ultimately vested at the *state* level. Each state government may — and generally does — delegate certain of its powers to local authorities, consisting principally of city and county governments. Accordingly, the type and manner of regulation and taxation will almost certainly vary according to the place where a business enterprise will operate or another type of investment will be made. For example, as described further below, if an enterprise is to operate in more than one state, obtaining qualification to do business in one state will not automatically entitle the investor to operate that same business in other states.

Once steps have been taken to comply with state and local regulations,

it is necessary to consider also federal regulation and taxation. The remainder of this chapter will not describe all basic state, local, and federal regulations, but instead will summarize selected principal areas of such regulation which may be relevant to organizing business and other investments from abroad in the United States.

It should be noted that a detailed explanation of the federal and state judicial systems and procedures for conducting legal actions is not attempted here. However, certain legal remedies and penalties are noted here and in subsequent chapters dealing with specific types of transactions and investments by foreign persons.

Principal Forms of U.S. Business Enterprises

The principal types of U.S. business enterprises which an investor may choose to employ may conveniently be divided into two categories: (1) those where all participants are personally liable for the obligations of the business; and (2) those where certain or all of the participants can limit the extent of their liability, generally to the respective amounts which they have originally invested or agreed to invest in the enterprise.

Business Forms with Unlimited Liability

The principal forms of business enterprise in this category are the sole proprietorship, the general partnership, and the unincorporated joint venture.

The sole proprietorship. This is the simplest of all forms of enterprises: an individual person is the direct owner of the assets of the business and is wholly responsible for its liabilities. There are no special laws applicable to the establishment of such an enterprise; one need only obtain the business licenses and permits necessary for conducting the particular business activity, such as described further below.

Responsibility for operation of the sole proprietorship lies with the owner, subject to any delegation of responsibility he may choose to make. A sole proprietorship ceases to exist at the will of the owner or upon his death, disability, insolvency, or legal incapacity. No formalities generally are required in selling the business; however, certain state jurisdictions may require that notice be given to creditors, for example, by publication in a newspaper of general circulation.

While there is no limitation on the size of such a business, sole proprietorships tend to be relatively small since their assets are necessarily limited to the resources of individual owners, and unlimited liability may create a serious risk to their economic security.

The general partnership.[1] A partnership is defined broadly as an association of two or more persons — whether individuals, corporations, or other legal entities — to carry on as co-owners a business for profit. Unless the formal requirements of organizing a corporation or limited partnership are complied with, the association usually is considered a general partnership. Where the partnership is a general partnership, all partners have unlimited liability for the debts of the business.

Once two persons agree to join the business, the Uniform Partnership Act, as adopted and/or amended by the state where the business is carried on, automatically becomes applicable. This act regulates the rights and duties among the partners in the absence of a partnership agreement. For example, general partners usually are presumed to share equally in the profits and losses of the business, have equal rights to participate in the management and conduct of the business, have the right to veto the admission of additional partners, and have the power by any one partner acting alone to buy and sell assets and enter into other contracts on behalf of the partnership during the usual course of its business. However, such rights may be modified or totally eliminated as to any partner under the partnership agreement. While the partnership agreement may so limit a partner's ability to contract on behalf of the partnership, such agreement will not be binding on third parties with whom that partner may deal, unless such parties are actually aware of the existence of the limitation.

Certain aspects of the general partnership relationship cannot be altered by agreement. For example, each partner generally has the right to examine partnership books and records and to receive accurate information from the other partners to the best of their knowledge as to matters affecting the partnership. More significantly, it is well established that the relationship among partners is of a fiduciary nature, so that one partner or group of partners may not gain an advantage over co-partners by unfair means. This covenant of fair dealing is implicit in every general or limited partnership relationship and may not be removed by mutual agreement of the partners. Similarly, the partnership agreement may provide for the expulsion of a partner, leaving the business to the remaining partners, if there are provisions for fairly and adequately compensating the expelled partner for his interest.

A general partnership may buy, sell, and own property, and may sue and be sued in its own name. Partnership property may also be held for the partnership in the name of a partner or other person.

A general partnership usually is dissolved by the death, bankruptcy, or express will of any partner, by termination of the term of the partnership as specified in the partnership agreement, or by the expulsion of any partner pursuant to the agreement. The partnership agreement may regulate in advance the time and manner of dissolution. However, each partner has the right to dissolve the partnership at any time and demand

an accounting of partnership assets, even in contravention of the agreement. In such a case, however, that partner may be liable to the remaining partners for breach of contract. The remaining partners ordinarily may continue the business in the partnership's name, provided they compensate the withdrawing partner for his interest, less any damages due from him.

When a general partnership is dissolved, ordinarily a notice of dissolution must be published in a newspaper of general circulation in each place where the partnership operated its business, and an affidavit evidencing such publication must then be filed with the appropriate county clerk or other authority. There are no sanctions for failing to comply with these requirements; however, absent such notification, each of the partners may continue to have power on behalf of the partnership to take actions for which the other partners may be liable.

The unincorporated joint venture. This type of business association is quite similar to the general partnership, differing primarily in the duration and scope of the enterprise. Whereas a partnership generally involves the operation of an ongoing business, requiring a substantial sustained effort by one or more of the partners, an unincorporated joint venture involves a single undertaking or a series of related undertakings, not requiring the full-time effort of one or more of the venturers. Like a partnership, such a joint venture is created by the implied or express agreement of the parties, and their mutual rights and duties are similar. However, due to the limited scope of the enterprise, such joint venturers usually are considered to have less power to bind each other with respect to third parties than do the members of a general partnership.

Business Forms Involving Limited Liability

The principal forms of business enterprises in this category are the limited partnership and the general business corporation.

The limited partnership.[2] A limited partnership is a business association with the attributes of a general partnership having, however, one or more limited partners. A limited partner is not bound by the obligations of the partnership beyond the investment he has obligated himself to make in the business; each general partner is, however, personally liable for all partnership obligations. While each limited partnership must have at least one general partner, it is not necessary that this be an individual; a corporation, itself an entity of limited liability, may be the general partner of a limited partnership. A corporation may also be a limited partner.

Unlike the case of a general partnership, under the Uniform Limited Partnership Act as adopted and/or amended by each state, there are strict requirements for forming a limited partnership. Persons desiring to enter into a limited partnership usually must execute a certificate containing the

following information: (1) the name of the partnership; (2) the character of the business; (3) the location of the principal place of business; (4) the name and address of each partner, designating specifically the general and limited partners; (5) the duration of the partnership; (6) the amount of cash and value of other property contributed by each limited partner (a limited partner's contribution generally may *not* consist of services); (7) any additional contribution to be made by the limited partners in the future; (8) the time, if agreed upon, when the contribution of each limited partner must be returned; (9) the share of the profits which each limited partner is to receive; (10) the right, if any, of limited partners to name a substituted general partner; (11) any right of the partnership to admit additional limited partners; (12) any priority of one limited partner over the others; (13) the right, if given, of the remaining general partners to continue the business upon the death of any general partner; (14) the right of any limited partner to receive property other than cash upon dissolution; and (15) the right of any limited partner to participate in major partnership decisions.

This certificate generally must be filed with the county recorder or other specified authority where the principal place of the partnership's business is located. If the partnership has places of business or property in other counties or other subdivisions in the same state, copies of the certificate may have to be filed there also. Failure to do so may mean that third parties dealing with the partnership will not be bound by the agreement limiting the liability of the limited partners. Moreover, qualification as a limited partnership under the law of one state will not automatically result in similar qualification in other states where the partnership may be doing business; a business must take steps to establish itself as a limited partnership in every state in which it plans to operate.

The general partners are responsible for the operation of the business of the limited partnership. Limited partners may not participate in management and control of the business; if they do so, they risk becoming liable as general partners. A limited partner may, however, participate in major decisions of the partnership, such as election or removal of partners, termination of the business, or amendment of the partnership certificate. Limited partners may lend money and transact other business with the partnership and, with some restrictions, may claim with other creditors a *pro rata* share of the assets should the business become insolvent.

A limited partnership is dissolved broadly in the same manner and for the same causes as a general partnership. The death, disability, or bankruptcy of a limited partner does not, however, dissolve the partnership. A limited partner's interest is freely assignable to third parties. However, unless the assignee becomes a substituted limited partner by consent of the remaining partners, he is entitled only to a share

of the profits of the business commensurate with his interest and may not inspect partnership books and records or participate in any partnership decisions.

The general business corporation.[3] The corporation is the most extensively regulated form of U.S. business enterprise. However, corporations are used primarily to assure limited liability to all participants, continuity of existence regardless of the death or disability of any shareholder, and certain tax advantages.

Corporations are chartered pursuant to specific laws in each state. While the federal government has the power to grant corporate charters, it does so only in special circumstances. A corporate charter need be obtained from one state only; the corporation may thereafter do business in other states, provided it complies with local qualification procedures. While state laws differ in material respects regarding corporations, the general regulation involved may be summarized as follows:

Initially, a name must be selected by the proposed incorporators and approval of the same sought from the Secretary of State or other appropriate authority of the state. Such approval normally is given if the name is not inherently deceptive or so similar to that of another corporation as to cause confusion. Many jurisdictions further require that the proposed name contain the term "incorporated" or "company" or abbreviations thereof, or another word implying limited liability. The name, once approved, should be reserved by payment of a nominal fee for a sufficient period to permit completion of the process of incorporation.

The actual incorporation process may be undertaken by any individual, partnership, association, or corporation. While some states require at least three incorporators, the modern trend — adopted by California, Delaware, and New York, for example — is to require no more than one incorporator. While the persons on whose behalf the corporation is established may themselves act as incorporators, this is not required; in fact there are organizations in every state which will, for a fee, undertake the incorporation process.

The incorporators must file with the Secretary of State or other appropriate state authority a document which may, depending on the state, be called the articles of incorporation, the certificate of incorporation, or a similar title. The articles generally must contain the following: the name of the corporation; a statement of the purposes and powers of the corporation; the name and address of a person who is to serve as agent for service of process; and the classes of stock authorized to be issued, the number of shares authorized in each class, and any preferences or qualifications applicable to such stock. The articles also may contain provisions limiting the sale of stock to certain classes of persons, placing other reasonable restrictions on the the sale or hypothecation

of stock by the shareholders, or requiring a greater than usual vote of shareholders for certain corporate actions, and any other lawful provisions with respect to the management or conduct of the corporation's business. Filing of the articles must be accompanied by a fee and, often, by the first year's state corporation or franchise tax, an annual levy on the corporation which is payable regardless of whether it conducts any business.

Filing of the articles effects the initial establishment of the corporation. The next step is for the incorporators to hold a meeting to adopt the by-laws of the corporation and elect the first board of directors. The by-laws are not filed or published, but constitute the internal regulations by which the corporation is to operate, and generally may be amended from time to time by the directors. They deal with such matters as the rules for conducting shareholders' and directors' meetings, the number and qualification of the officers and directors and the length of their terms and definition of their powers and responsibilities, issuance and transfer of stock, declaration of dividends, and determination of the fiscal year of the corporation.

The directors are the individuals responsible for making fundamental decisions with respect to the operation of the corporation's business. Many states require that corporations have at least three directors; however, certain states make an exception in the case of closely held corporations having one or two shareholders, in which case the number of directors may be one or two, respectively.

Once the directors are elected, the incorporators resign and the directors then hold (or continue) their meeting, appointing the officers of the corporation, issuing stock to the shareholders, and taking such other administrative steps as seem appropriate. The officers are the individuals responsible for day-to-day operation of the corporation's business; they generally include a president, one or more vice presidents, a secretary, and a treasurer. All of these posts need not necessarily be held by different individuals, although state laws may prohibit certain offices being held by the same individual. The officers serve at the will of the directors and may be discharged by them at any time with or without cause. However, an officer discharged without good cause will remain entitled to compensation or damages under any employment contract which he may have with the corporation.

Corporate stock generally may be issued for cash, property, or services. The board of directors determines the value of the property or services exchanged for the corporation's stock and, absent a showing of fraud, this valuation is binding on the corporation. The issuance, sale, and purchase of stock — as of securities of any enterprise — is closely regulated by both state and federal securities laws, which are discussed further below.

A further requirement in a number of states is the filing of a certificate with the Secretary of State or other appropriate authority setting forth the names and addresses of the directors and officers of the corporation, and designating an agent for receiving service of legal process in case a suit should be brought against it. This agent may be either an individual residing in the state or, often, another corporation which has taken steps to qualify as a proper agent.

Once the corporation has been fully established, it is considered a legal entity separate from its shareholders with the capacities to acquire, own, and use property, to enter into and enforce contracts, and otherwise to carry on business activities. Debts incurred by the corporation are its responsibility alone, and the shareholders, directors, and officers will not normally be personally responsible for these obligations. In order to preserve this limited liability, however, it is necessary that the corporation be treated by the parties as a separate entity rather than as a vehicle for conducting the shareholders' personal affairs. The shareholders, directors, and officers should scrupulously observe formalities in dealing with the corporation's assets. All major decisions concerning the conduct of the business should be taken only pursuant to a written resolution of the directors and/or shareholders. Books and records of the corporation should be kept carefully and assets owned by the corporation should be differentiated clearly from those owned by shareholders. Shareholders may lend money to the corporation or borrow from it, and may enter into employment contracts calling for the payment of adequate salaries by the corporation. However, any such transactions between the corporation and its shareholders must be clearly documented. Similarly, any profits paid to shareholders as dividends should be authorized out of proper reserves by a resolution of the board of directors.

One of the principal advantages of incorporation in Delaware is that many of such corporate formalities are simplified, within certain limits, under Delaware law. In addition, a closely held corporation may be able to employ somewhat simplified procedures under Delaware or other state laws.

Corporate directors owe to the shareholders fiduciary duties of care and of loyalty in making decisions pertaining to corporate business. They must exercise independent judgment in the conduct of the business and generally may not shift this ultimate responsibility to others by executing powers of attorney or by other means. They may not put the interests of one group of shareholders over that of another, nor their own interests before those of the corporation. A director may be personally liable for losses incurred as a result of his failure properly to fulfill these duties.

Shareholders elect and remove directors, amend the articles of incorporation, and vote on any substantial change in the structure of the corporation. While a majority vote of the shareholders normally is

sufficient, the interests of minority shareholders may be protected under certain state laws by requiring a two-thirds or other larger vote to take certain steps, such as a change in the number of directors or shares outstanding. In addition, such a greater than majority requirement for a particular decision often will be specified in the articles.

In order to qualify to conduct active business in another state, a corporation generally is required to obtain permission from the state's Secretary of State or other appropriate state authority. This is obtained by the filing of a petition stating the corporate name, the state of incorporation, the location of the principal office of the corporation, the location of its principal office within the new state, and the name of an agent for service of process within the new state. A certificate of good standing from an official in the state of incorporation and possibly a copy of its articles of incorporation must accompany the application, together with a filing fee and, often, the first year's franchise tax. A certificate of qualification may not be issued where the name of the corporation may cause confusion with a business name previously reserved in the new state. The most common significant state penalty for conducting business without the required qualification is denial of the corporation's power to institute judicial actions there to enforce claims.

A corporation ceases to exist by merger into another corporation in accordance with state law or by dissolution. Merger occurs when the assets and liabilities of the corporation are acquired by another corporation and the shareholders of the merged corporation receive the stock of the surviving corporation in exchange for their original stock. A merger must be approved by the board of directors of each corporation and by the shareholders of the merged corporation — and often of the surviving corporation as well. Shareholders of the merged corporation who object to the merger usually are entitled to require the corporation to purchase their stock at fair market value.

A corporation may be dissolved by the vote of its board of directors together with the approval of a certain percentage of its shareholders, usually those holding a majority of the voting power. The corporation also may be dissolved by order of a court upon the petition of a certain number of its directors or a certain portion of its shareholders. The grounds for such involuntary dissolution generally include (1) a deadlock among shareholders or directors preventing the business of the corporation from being carried on or (2) fraud, mismanagement, abuse of authority, or persistent unfairness toward the shareholders by those in control of the corporation or (3) waste of the property of the corporation by the officers or directors. In certain of these situations, the court alternatively may appoint an outside individual to manage corporate affairs for a limited period.

General Business Tax and License System

This section briefly lists the principal elements of the U.S. tax and license system with which any U.S. business enterprise must comply.

Federal Taxes and Regulation

Income taxes.[4] Federal income tax rates on individuals, estates, and trusts are graduated from zero for an unmarried individual earning no more than $2,300 of taxable ordinary income per year to 70% for annual taxable income in excess of $108,300. However, in the case of most individuals the maximum tax rate which may be imposed on earned income, *i.e.*, income obtained from personal efforts rather than from passive investments, is 50%. In addition, only four-tenths of long-term capital gains from assets held more than one year generally are taxed to such persons.

Income taxes imposed on corporations are less finely graduated, amounting to 17% of annual taxable ordinary income up to $25,000, 20-40% of income between $25,000 and $100,000, and 46% of all income over $100,000. Long-term capital gains generally are taxed at 28%.

In addition, for all such persons, certain items of so called tax preference income are subject to an additional minimum tax of 10-25% (15% in the case of a corporation). Numerous deductions for business expenses, depreciation of property and equipment, natural resource depletion, and the like are permitted in determining taxable income. Investment tax credits of 10-20% for investments in certain property used in the United States, job tax credits, and other credits may reduce the actual tax payable. State and local income, property, and certain other taxes — but not non-business motor vehicle fuel taxes — also are deductible for federal income tax purposes.

Since a sole proprietorship is not considered a taxable entity separate from its owner for income tax purposes, it is not required to file an income tax return or pay such taxes. Following each quarter of an individual owner's taxable year — almost without exception, the calendar year — he must file a report with the U.S. Internal Revenue Service estimating his tax liability for that period and enclosing a tax payment in that amount. After the end of his tax year, he must file a detailed statement of his income and computation of his tax liability, and pay any additional sum he may owe. If he has overestimated his tax liability, he is then entitled to a refund of the overpayment.

A partnership, whether general or limited, is not considered a taxable entity separate from its partners. However, the partnership must file an annual return showing its income, which is then apportioned among the partners. Unless the partners have identical fiscal years, the tax year of the

partnership generally must be the calendar year. Under certain circumstances, joint owners of an inactive real property investment may elect out of treatment of the venture as a partnership for income tax purposes. Like the individual owner of a sole proprietorship, each partner must make estimated tax payments during the year on his total income from all sources, including the partnership, and then file a tax return at the end of the year, reconciling the actual tax liability with the estimated payments.

A corporation is considered a taxable entity separate from its shareholders. Thus, a corporation must make quarterly estimated income tax payments and then file a final income tax return at the end of its tax year. This year generally may be determined by the corporation's own election upon its commencement of business. Payments made to employees as reasonable salaries, or to creditors as interest at arm's length rates, generally are deductible by the corporation. However, dividends paid to shareholders out of corporate earnings and profits are not deductible, nor does the shareholder receive any credit for corporate taxes already paid on the distributed income. Under certain circumstances, as discussed in Chapter II regarding U.S. taxation of foreign investors and in other chapters, the U.S. Internal Revenue Service may seek to treat even a limited partnership as an association taxable as a corporation — particularly where the sole general partner is a corporation without substantial net worth independently of its interest in the partnership.

Certain small corporations with no more than 15 shareholders may elect to avoid taxation as separate entities, with profits and losses of the business credited and charged directly to the shareholders for federal income tax purposes. It should be noted, however, that such election may not be made where any of the shareholders is a corporation or is a nonresident alien of the United States for income tax purposes, or where the corporation has substantial passive income (including rents) or foreign income.

Gift and estate taxes.[5] The Tax Reform Act of 1976 established a unified system of federal taxation of gifts and estates of individuals. For U.S. citizens and for aliens domiciled in the United States, the rates of tax are graduated from 18% for a cumulative value of gifts and estate of up to $10,000 for an individual, to 70% of the excess of such value over $5 million. Various exclusions, deductions, and credits are provided — for example, an exclusion of $3,000 in gifts each calendar year to each donee, a marital deduction for certain gifts to the donor's spouse, a credit against estate tax for certain state death taxes, a marital deduction for certain property passing to the decedent's spouse, a deduction for certain farm and closely held business holdings, and a lifetime credit against the unified gift and estate tax of $47,000 ($38,000 and $42,500 in 1979 and 1980, respectively). The gift tax is payable by the donor for gifts made in

each calendar quarter, and the estate tax by the decedent's executor. In the case of a gift, or of an inheritance after 1979, the recipient's basis in the property for federal tax purposes remains that of the donor or decedent, except that upon inheritance the basis is increased to at least the fair market value of the property on December 31, 1979, subject to certain adjustments.

In addition, a federal tax similar to the estate tax is imposed on certain generation-skipping transfers.

Chapter II deals at greater length with the particular income, gift, and estate taxation of foreign persons.

Employment taxes. Any U.S. business which hires employees is required to comply with provisions of the tax laws applicable specifically to employers. A new business which intends to hire employees must request the assignment of an employer identification number by the U.S. Internal Revenue Service. All payments made by the business with respect to employment taxes are then handled in an account bearing that number. Federal employment taxes are of three kinds: (1) employee withholding, (2) unemployment insurance contributions, and (3) social security contributions.

(1) *Employee withholding.* Each employer is required to deduct from the salaries or wages of his employees the amount which the latter are assumed to owe in federal income taxes, under certain formulae based on compensation levels. The money is then periodically paid to the federal government. Failure to follow these procedures scrupulously, or misuse of the money withheld, may result in civil and criminal penalties.

(2) *Unemployment insurance.* Each employer is required to pay an excise tax amounting to a small percentage of salaries and wages paid during the year, as a contribution to a federal unemployment insurance fund. However, the employer may deduct therefrom any payments made to an approved state unemployment insurance fund. Unlike withholding taxes, which are a contribution by the employee, unemployment insurance is paid totally by the employer, over and above salaries or wages paid to employees.

(3) *Social security contributions.* Federal law requires both employers and employees to contribute to a federally operated old age and disability pension and hospital insurance plan. Each year, a certain tax rate is imposed for such contribution, and one-half of the amount is deducted by the employer from the salary payable to the employee while the other half is paid directly by the employer. Similarly to withholding taxes, these sums must be paid to the federal government on a periodic basis.

Excise taxes. Federal taxes are imposed on consumption of certain goods and services and business enterprises involved in the United States in the sale of such goods and services must comply with federal regulations

for the collection and remittance of such revenues. Among these are motor vehicles and their component parts, petroleum products, firearms, alcoholic beverages, tobacco, certain communications facilities, and commercial transportation of persons by air.

Customs duties. The federal duties on goods imported into the United States vary according to a number of factors — such as the country of origin and the type of goods involved — and are subject to a complex system of assessment, levy, and collection. There is no similar levy on the exportation of goods, since this is constitutionally prohibited. Import activities are treated separately in Chapter V, as are certain export activities in Chapter VIII.

Business licenses. Unlike the states, the federal government does not engage in general licensing and similar regulation of businesses. However, federal licenses are required for enterprises engaged in special areas, for example, the operation of radio or television stations, operation or ownership of ships or aircraft, manufacturing and interstate shipping of pharmaceuticals, and importation or exportation of certain commodities. Certain of such matters are discussed in greater detail in Chapter VI dealing with establishment of a new enterprise by a foreign investor, and in Chapters V and VIII on import and export activities.

Environmental and consumer protection regulations. The United States has in recent years become increasingly concerned with possible damage to the natural environment caused by various activities of human society. In 1970 the Environmental Protection Agency was created and charged with promulgating and enforcing environmental quality standards.[6] The Agency has, *inter alia,* established such standards with regard to air pollution — for example, sulphur oxides, carbon monoxide, photochemical oxidants, hydrocarbons, nuclear radiation, and solid waste matter — water pollution, pesticides, nuclear radiation, and solid waste disposal. In particular, such standards set the maximum level of emissions from various manufacturing facilities. It has also mandated adoption of plans in each state to deal with air pollution. Government actions which may have environmental impact — including the issuance of discretionary permits for private activities — may require an environmental impact report in advance. While the extensive details of these and related regulations cannot be described here, the potential investor in the United States — particularly in a manufacturing facility — should investigate the application and cost of such requirements.

Numerous federal laws, regulations, and government authorities also regulate business enterprises which furnish consumer products — goods or services — to the public. The Federal Trade Commission is particularly active in this area. Its enforcement authority applicable generally to such business includes, for example, consumer credit regulations which restrict any business extending credit to consumers, as well as any business

which reports on the creditworthiness of consumers; regulations restricting the language and extent of express warranties and waivers of implied warranties; and regulation of false advertising.

As to specific consumer products and industries, for example, the Consumer Products Safety Commission promulgates for various products sold to the public minimum safety standards governing performance, composition, contents, design, construction, finish, and packaging, as well as requiring appropriate warning labels or instructions to assure safe operation. The Food and Drug Administration governs the content and labeling of foods, drugs, cosmetics, and therapeutic devices; the Federal Trade Commission regulates labeling of nonfood and nondrug products; and the U.S. Department of Agriculture oversees food quality. The U.S. Department of Transportation administers motor vehicle quality and safety laws. In addition, the Council on Wage and Price Stability administers currently *voluntary* price and wage guidelines.

State Taxes and Regulation

Income taxes. Not every state has an income tax. However, most of the highly industrialized states — such as New York, California, Illinois, and Pennsylvania — do levy taxes on income; Texas is perhaps the only notable exception. While it is difficult to generalize, many states which levy an income tax tend to follow the model of the federal tax law, including taxation of individual residents on worldwide net income at graduated rates. In addition, as mentioned above, corporations usually are subject to a minimum annual franchise or similar tax on state income. Tax rates vary significantly among the states, as does the degree of graduation, *i.e.*, the rate at which the percentage of taxation increases with income, but may often reach 9-10%. Because such taxes are deductible for federal income tax purposes, the effective additional rate usually is reduced substantially.

A different problem arises in determining which portion of corporate income is subject to tax in a specific state. Certain states, such as California, employ a unitary tax method which may require presentation of the worldwide income of domestic and foreign affiliated enterprises, of which the state's portion is then calculated based on the portion of worldwide assets, payroll, and sales in the state.

Gift and inheritance taxes. Most states have a gift tax and/or an inheritance or similar tax. While it is difficult to generalize, the rates for both taxes often are similar within a given state. However, these taxes may include not only general exclusions similar to the $3,000 per year per donee exclusion under the federal gift tax, but also numerous specific exclusions and/or rate variations for different recipients depending on their relationship to the donor or decedent. It should be noted that such an

inheritance tax usually is payable by each heir, rather than being the liability primarily of the executor or estate.

Chapter II deals with certain aspects of such state income, gift, and inheritance or similar taxation relevant to foreign persons.

Employment taxes. Those states which levy an income tax normally require an employer to withhold such tax from employees' salaries or wages. In addition, the state may require tax payments for the benefit of unemployment or disability insurance funds to be paid by the employer, withheld from the paychecks of employees, or made by a combination of the two. Before commencing business, a new employer should contact the state authority which administers the collection of these taxes for assignment of an account number and instructions on withholding and payment of these taxes.

Sales taxes. If a business enterprise sells goods to the public, it will normally be required to collect sales taxes levied by the state. The taxes generally amount to a small percentage of the sale price and are collected from the customer. Before commencing business, the seller must obtain a permit from the state entitling it to collect these taxes. The state may require the posting of a bond to secure proper remittance of the collected taxes as a condition for issuing the permit. The seller is required to maintain records of the taxes collected and to turn the collections over to the state on a quarterly or other periodic basis. The state authorities may audit these books and records from time to time, to ensure that all the collected taxes have been properly remitted.

Exceptions to such taxes generally include a bulk sale of all of an enterprise's business and goods to a single purchaser. However, a sale of stock of an incorporated enterprise may be subject to stock transfer tax.

Motor vehicle taxes. Each state licenses the operation of motor vehicles belonging to its residents. Such licenses are renewable on a yearly basis and involve the payment of a license tax, usually graduated according to the value of the vehicle.

Special commodity taxes. Each state may levy taxes on specific commodities such as alcoholic beverages, cigarettes, and motor vehicle fuel. Businesses involved in the sale of these commodities are required to collect such taxes and turn them over to the state.

Special business taxes. Many states impose special taxes on certain types of businesses, such as banks and insurance companies. Although it is practically impossible to generalize with respect to such taxes, their principal features can be determined relatively expeditiously under any particular state's laws.

Business licenses. Certain types of businesses require licenses from the states where they intend to operate. For example, many states require automobile dealers, retail sellers of petroleum, and sellers of alcoholic

beverages to obtain state licenses; the list of such businesses varies from state to state.

Requirements for obtaining such state licenses may be quite stringent, especially where such licensed activities require the collection of revenues on behalf of the state. For example, to obtain an automobile dealer's license, one may have to provide the names, personal histories, and fingerprints of the persons managing the proposed business and information concerning the business bank account and the property on which the proposed dealership will be located, and one may have to post a bond or deposit. An investigation then may be made of the premises before a license may be issued. A similarly cumbersome process usually is required to obtain or transfer a license for the sale of alcoholic beverages.

License requirements for banking, insurance, and certain other highly regulated industries are discussed further in Chapter VI regarding establishment of a new business enterprise.

Professional licenses. Where the business enterprise dispenses professional services to the public, each state will normally require an individual providing the services to obtain a professional license. Accountants, architects, attorneys, medical doctors and other medical practitioners, and real estate brokers are licensed in virtually every state. Many other professions — for example, investment advisers as noted further below — also require licenses in many states.

Professional licenses generally are more difficult to obtain than business licenses because they require a specialized education, the passing of an examination, and/or certain prior experience. Holding such a professional license in one state does not normally entitle the licensee to practice the profession in another state, except in certain occasional transactions.

Environmental and consumer protection regulations. As noted further above, one aspect of federal environmental protection policy requires that each state promulgate and enforce plans for air pollution control. The stringency of such plans in any particular state depends on the level of human and industrial pollutants, natural pollution sources, and meteorological conditions which mitigate or exacerbate pollution effects.

In addition to these plans, many states have their own environmental protection and impact report laws. A state may, for example, require motor vehicles and other air pollution sources to carry filtering equipment not mandated by federal laws, or limit construction in coastal or other areas where rare animal species or other natural resources may be endangered, or regulate the use of waterways for solid wastes, or control noise or population density or permit such controls by local authorities.

States also generally have extensive usury and other regulations for

consumer protection, frequently more stringent than federal regulations. Usury limits on interest rates often will not apply to corporate borrowers, and will have higher limits for banks and other institutional lenders. Other general regulations apply in the areas of credit reporting, consumer warranties, and product safety. Additional regulations may deal with specific products or industries — for example, construction of swimming pools, contracts for health studio services, or motor vehicle repair shops. The possible application of these regulations should be investigated before an investment is made in an enterprise providing any consumer goods or services.

Local Taxes and Regulation

Sales taxes. A separate sales tax may be imposed by local authorities in addition to the sales tax imposed by the state. The seller of goods will be required to collect this tax also, and turn such collections over to the local government directly or to state authorities who then return the funds to local authorities.

Property taxes. Local authorities normally levy annual taxes on the ownership of property located within the boundaries of their respective jurisdictions as percentages of the values at which they assess the property. Both real property and personal property or inventory normally are subject to tax, although certain nonbusiness and other personal property may be specifically excluded. Where property is situated within a city, the tax rate may reflect levies by both the city and the county within which the city is located. Special purpose assessment districts also may levy annual charges on real property within each district. Property taxes create a lien on the taxed property, and failure to pay such taxes can result in sale of the property in satisfaction of the lien.

Miscellaneous taxes. Local authorities may impose a variety of other taxes. Among these are taxes on the transfer of real property, on use of certain utilities such as gas, telephone, and electricity, on hotel rooms, and on the sale of certain commodities such as cigarettes.

Business licenses. Before commencing any type of business it is generally necessary to obtain a business license from the local authorities. These are the municipal government, if the business is within the boundaries of a city or town or, in other cases, the county or similar unit of government. Obtaining and maintaining a business license generally involves the payment of a tax. This tax may be imposed at a flat rate, or may vary with the type of business, or its gross receipts or other measure of business volume.

Fictitious name filing. An unincorporated business enterprise — such as a sole proprietorship or partnership — which is to be operated under a name other than that of the owners generally is required to file a fictitious name statement with the clerk of the county or other appropriate

authority where the business is to operate. Such statement generally must contain the name of the business and the names and addresses of its principals and is required to be published in a local newspaper of general circulation.

Zoning, subdivision, and building permits. Local authorities generally control the use of real property by zoning various parts of the city or county or other unit for specific uses — perhaps the best known major exception being the city of Houston, Texas. For example, commercial establishments cannot be operated on property zoned for residential development and industrial buildings may not be constructed where the zoning plan calls for recreational facilities. The zoning plan generally also includes restrictions on the occupation density of new buildings and /or their height. If incorrectly zoned property is acquired, it is possible in certain circumstances to obtain a zoning variance or nonconforming use permit. However, this can be expensive and time consuming.

Separate local permits generally are required in order to subdivide property into lots or condominiums. In addition, building permits in compliance with local building and fire codes must be obtained for new construction.

Each of these steps may be complicated by state *and* local environmental quality laws that require environmental impact reports and/or hearings before the relevant permit may be issued.

Health and safety regulations. Local authorities generally enforce various regulations for local health and safety. For example, during new building construction the structure will be inspected by local authorities to ensure compliance with applicable regulations and a certificate of compliance or occupancy must be obtained before the building may be occupied. Changes in regulations also may require improvements in fire safety to existing structures.

Operation of hazardous machine systems and storage and use of flammable or hazardous materials often are regulated. Similarly, health and hygiene regulations and inspections govern the operation of restaurants and other public eating and drinking establishments.

Securities Laws

Both the federal government and the states extensively regulate the issuance and trading of securities. Securities usually are broadly defined to include, for example, shares of stock, notes, bonds, and any other evidence of indebtedness or of a participatory interest in a business

enterprise, whether or not evidenced by a written instrument. There are various statutory and other exemptions from such definitions. However, in the case of a purchase or sale of an equity interest or evidence of indebtedness of a business enterprise, a securities law issue usually exists.

Federal Regulation

The two principal U.S. statutes regulating securities transactions at the federal level are the Securities Act of 1933[3] (the "1933 Act") and the Securities Exchange Act of 1934[4] (the "1934 Act"). The former act principally regulates the conduct of issuers of new securities, while the latter act principally regulates trading of securities which have already been issued. In addition, a number of other federal statutes pertain to various aspects of securities investment, as noted further below.

The Securities Act of 1933. The 1933 Act requires, among other things, that issuers of securities register them prior to issuance with the Securities and Exchange Commission (the "SEC"), the agency charged with administering the federal securities laws. Certain types of securities and types of transactions are exempted from this portion of the 1933 Act. However, similar state regulation still may be applicable.

(1) *Exemptions.* The 1933 Act is inapplicable to transactions which do not involve an issuer, underwriter, or dealer in securities. These transactions constitute normal securities trading and are regulated by the 1934 Act discussed below.

In addition, the 1933 Act is inapplicable to the sale of securities which are part of an issue offered and sold only to residents of a single state. This exemption is applicable only where the issuer of the securities is a resident of and does business within the state; if the issuer is a corporation, it must be incorporated in the state as well as do business there. The SEC has promulgated rules which define more specifically the terms of this exemption, and any proposed issuance should be scrutinized in light of these rules to determine whether the exemption applies.

A further exemption from the registration requirements applies to securities issues not involving a public offering. What constitutes a public offering in contrast to a private offering can be a difficult question. However, the SEC has provided certain standards which define a private offering essentially as one where no advertising or other broad based sales techniques are used, the offer is made to individuals who are experienced in business and are able to bear the economic risk of the investment, the offerees are given the opportunity to make inquiries of the issuer concerning the securities, no more than 35 persons purchase the securities, and certain restrictions are placed on retransfer of the securities by the purchasers.

Another important exemption from the 1933 Act's registration

requirements covers exchanges between the securities issuer and its existing securities holders, if no commission or other remuneration is paid for soliciting such exchanges.

In addition, it is possible under so called Regulation A to issue up to $1.5 million worth of securities to the public by filing with the SEC certain documents which are less extensive than those required generally under the 1933 Act. Such exemption is available only with respect to certain issuers and types of securities.

There are also several special exemptions from the registration requirements covering (a) securities of governments and banks, (b) commercial paper, (c) securities of charitable organizations, and (d) insurance policies and annuity contracts.

(2) *Registration requirements.* If none of the exemptions discussed above is applicable, an issuer may not sell or offer securities unless they have first been registered with the SEC. The registration statement must contain information pertaining to the registrant's properties and business, a description of the significant provisions of the securities to be offered for sale and their relationship to the registrant's other capital securities, information about the management of the registrant, and financial statements certified by an independent public accountant.

After the registration statement has been filed, the securities may be offered for sale by certain limited means. However, no sales may actually be completed until the effective date of the registration statement; this is a minimum of 20 days after the date of filing, but usually is further extended. During this period, the statement is examined by the SEC for accuracy and completeness. If a problem is found, the registrant is required to amend the registration. The SEC's concern with respect to the registration process under the 1933 Act is that prospective purchasers be provided information on all matters which may be significant to an investor (other than matters particular to each investor's own situation) in his decision whether to make the investment. The SEC determines only that the registration statement contains the items of information required by its rules, and does *not* verify the accuracy or completeness of the substantive information or make any judgment as to whether the securities are a sound or prudent investment.

After the effective date of the registration statement, the securities may be offered for sale by any means and sales may be consummated so long as each offeree receives before such consummation a prospectus incorporating required information from the registration statement. The registration statement must be further amended to reflect any material changes in financial data or other facts during the offering. The SEC may suspend the registration if it later discovers material misstatements in the registration statement, and individuals making willful misstatements in the registration statement may be subject to criminal penalties. Moreover,

individuals who are responsible for such misstatements may be liable for damages suffered by investors who relied on the erroneous information in purchasing the securities.

(3) *Antifraud provisions.* Notwithstanding any exemption from registration requirements or compliance with such requirements, the 1933 Act separately prohibits use of the channels of interstate commerce or the mails to make fraudulent misstatements or to use any other fraudulent device in the offer or sale of *any* securities. Persons violating this provision are subject to criminal penalties.

The Securities Exchange Act of 1934. The 1934 Act regulates the trading of securities subsequent to their issuance. Its coverage is limited principally to those securities listed and registered for public trading on the national securities exchanges and to unlisted equity securities of corporations and other issuers — so called Section 12 (g) issuers — having assets in excess of $1 million and at least 500 shareholders (or 300 shareholders after reaching the 500 point). Securities which do not meet these requirements may be traded without reference to federal regulation, except with respect to the 1933 Act's antifraud provisions noted above and the 1934 Act's rules against deception and misuse of inside information discussed further below.

(1) *Registration requirements.* Securities subject to the 1934 Act must be registered by the issuer with the SEC. The registration statement must include a description of the issuer's business, its management, and its capital structure, and must be accompanied by a financial statement certified by an independent public accountant. Following the original registration, periodic reports — for example, on Forms 8-K and 10-K — must keep current the information in the original report.

(2) *Proxy solicitation requirements.* Proxies are authorizations given by shareholders to third parties instructing those parties to exercise the shareholders' voting rights in a specified manner when such holders are not present at shareholders' meetings. For example, the directors of publicly traded corporations frequently solicit proxies from shareholders prior to a scheduled meeting of shareholders for the purpose of approving or disapproving proposed actions affecting the operating structure of the corporation. With respect to those corporations subject to the 1934 Act, a proxy solicitation must be accompanied by a proxy statement which notifies the shareholder of the matters to be acted on at the proposed meeting, advises him of any rights with respect to such actions, and identifies the persons soliciting the proxy, their connection with the corporation, and their interest, if any, in the outcome of the matter to be decided. If the proxy solicitation is made on behalf of the corporation's management and relates to an annual meeting where directors are to be elected, the solicitation must further be accompanied by an annual report describing the condition of the corporation, together with corporate

financial statements for the two previous fiscal years, with the statement for the latest year being certified by an independent public accountant.

False or misleading statements in proxy solicitation materials are prohibited by law. Prior to distribution of the materials, copies must be filed with the SEC to determine whether they comply with its disclosure requirements. However, the SEC does not purport to pass on the merits of the matters to be voted on or to verify the accuracy or adequacy of the substantive statements made.

(3) *Short swing profits by insiders.* With respect to corporations and securities subject to the 1934 Act, each director, officer, and any person owning 10% or more of an outstanding class of such an equity security must file a statement with the SEC detailing his ownership of the corporation. An additional statement must be filed with the SEC for each month where such ownership has changed.

These individuals — commonly termed insiders — also are prohibited from profiting by purchase and sale of their stock, if such a purchase and sale occur within six months of each other. It should be noted that it does not matter, for the purposes of this rule, whether the sale follows the purchase or the purchase follows the sale (for example, where the shares have decreased in market price in the interim). Nor is there any necessity to show use of inside information or intent to defraud by the insider. The rule operates mechanically, without regard to such factors. Any profits which the insider has made in contravention of this rule accrue to the benefit of the corporation, and the corporation itself or any of its shareholders may bring suit to recover such profits.

(4) *Deception and nondisclosure of information.* The 1934 Act also prohibits the use of manipulative or deceptive devices in connection with the purchase or sale of *any* securities. This prohibition is *not* limited to securities listed on a national securities exchange or those of corporations having over $1 million in assets and at least 500 shareholders.

Rules promulgated by the SEC under the 1934 Act — particularly Rule 10b-5 — and court decisions have interpreted the statute's terms to prohibit not only fraud as understood under common law in the purchase and sale of securities, but also the making of material misstatements, or the *failure* to state material facts where such facts are necessary to avoid misleading the other party. This latter prohibition has been further refined to cover the purchase or sale of securities on the basis of secret or inside information not available to the general public. While generally this involves insiders such as officers, directors, and key employees who are in possession of such inside information, the statutory prohibition is not limited to such individuals. In particular, outside individuals who have received such information from insiders, in a manner calculated to keep it from becoming public, have been held to violate this rule where they bought or sold securities on the basis of the information.

Persons violating these rules may be subject to criminal penalties. The SEC also may seek an injunction from a federal court ordering the cessation of such prohibited practices. In addition, a civil action may be brought by purchasers or others to recover profits made by use of a deceptive device or inside information.

(5) *Margin, securities exchange, and other rules.* The 1934 Act also regulates margin requirements, *i.e.*, the use of credit in the purchase of securities, and requires certain internal corporate control systems. In addition, it establishes registration procedures for the various securities exchanges, securities brokers and dealers, and brokers' associations. Such exchanges and associations in turn have adopted extensive regulations governing their listed issuers and members.

Other principal securities acts. Various other principal federal acts regulate certain aspects of securities investments. The Investment Company Act of 1940[9] requires enterprises engaged primarily in the business of investing, reinvesting, and trading securities, whose own securities are held by the public, to register with the SEC, to make public certain financial information, and to comply with certain other restrictions.

Similarly, the Investment Advisers Act of 1940[10] requires, with certain exceptions, that individuals or firms engaged for profit in the business of advising others respecting securities transactions must register with the SEC and conform to certain standards designed to protect investors.

The Trust Indenture Act of 1939[11] prohibits the offer of debt securities to the public pursuant to trust indentures under which more than $1 million of securities may be outstanding, unless certain requirements protecting the investors are met. The Public Utility Holding Company Act of 1935[12] specifically regulates the issuance of securities by public utility companies. Finally, the Securities Investor Protection Act of 1970[13] provides for the orderly liquidation of brokerage firms and protection of their customers.

State Regulation

The purchase and sale of securities also is extensively regulated at the state level. State securities regulations vary so widely, however, that the description here can only summarize the principal types of regulation which may be encountered. It should be noted that federal registration provides no general exemption from state securities laws, nor does compliance with one state's laws provide compliance with the requirements of another state where the securities may be issued or traded.

State securities regulation can be divided into three principal categories: (1) requirements — often referred to as Blue Sky laws — that securities be registered or licensed prior to issuance or trading, (2)

antifraud provisions, and (3) registration and licensing requirements for certain persons engaged in the securities business. The great majority of states have a combination of all three of these types.

Registration of securities. The type of action required before securities may be issued or traded will vary with the state and with the securities in question. Generally this will involve an application with the Commissioner of Corporations or other appropriate authority, which must include detailed information concerning the business structure of the issuer and its products, past performance, and management, and must be accompanied by supporting documents such as audited financial statements. In certain states, the filing of the registration statement alone is sufficient to commence trading the securities unless the state authority takes affirmative action to stop such trading. In the great majority of states, however, neither sales nor offers of securities may be commenced until permission is obtained from the appropriate authority.

The standard for granting such permission frequently is stated in terms of whether the sale is in the public interest, or is fair, just, and equitable. Accordingly, unlike the case of federal law where *disclosure* is the primary purpose of registration, under most state securities statutes disclosure is merely the first step enabling the state authority to pass judgment on the fairness of the proposed investment.

Most state securities statutes exempt from the registration requirement government securities, short term commercial paper, bank and trust company securities and, particularly, securities listed on national securities exchanges. In addition, certain types of transactions are exempted, frequently including private placement of debt securities, private resale by an owner of securities, and purchase or sale of interests in certain partnerships and joint ventures. However, under certain circumstances an alternative authority — for example, the Commissioner of Banking in the case of bank securities, or the Commissioner of Real Estate in the case of real estate ventures — may enforce registration requirements.

Many states now exempt the issuance of stock in new closely held corporations owned, for example, by 10 or fewer shareholders, where no public offering is made in connection with the sale and certain restrictions are placed on retransfer of the stock. Generally, however, the issuer must file a notification of the transaction with the appropriate state securities authority, and the stock may not be retransferred without permission from that authority.

Most states also use abbreviated registration procedures for securities registered under federal law, for which the required application is substantially less extensive than otherwise. In addition, no affirmative permission may then be necessary to issue or trade the securities,

compliance being automatically obtained upon compliance with federal securities registration law.

Antifraud provisions. Most states have provisions under which fraud in the purchase or sale of securities is made a criminal offense, and the Attorney General or other appropriate authority of the state is given broad powers to investigate suspected fraudulent practices and seek to have them enjoined by court proceeding. Unjustified refusal to cooperate in such an investigation may itself result in criminal penalties.

Fraud is defined quite broadly under such statutes. It generally includes deceptive practices, the making of false statements in the purchase or sale of securities, and violation of any statute relating to the sale of securities, including any federal statute. In addition, persons who purchase securities as a result of such fraudulent practices may recover damages; in certain states, they may recover against a surety bond which must be filed in connection with the sale of securities in the state.

Registration of persons engaged in the securities business. Almost every state requires registration — often with the Commissioner of Corporations — of persons who are engaged in business as brokers or dealers in securities. Applicants generally are required to provide information on their financial responsibility and reputation, plus information concerning the proposed business. Registration may be denied if the regulatory authority determines that the applicant does not meet requirements or that the proposed plan of business is unfair, unjust, or inequitable to the public. Many states also require such safeguards as bonding or minimum capital.

Registrants usually are required to notify the regulatory authority of any subsequent change in the plan or character of the business from that described in the registration application, and to comply with periodic financial reporting and bookkeeping requirements. Registrations generally must be renewed annually on the basis of fairly elaborate renewal applications. The regulatory agency normally is given the power to suspend or revoke the registration of brokers or dealers whose conduct falls short of the statutory requirements.

Many states now regulate not only securities brokers and dealers but also investment advisers, *i.e.*, individuals in the business of advising investors as to securities purchases and sales. By comparison to federal law, state regulation may contain fewer exemptions from this registration.

Antitrust Laws

In the United States, antitrust laws have been enacted largely with the view that enhanced competition will assure efficiency in the allocation of

goods and services. The federal government has been more active than the states in enforcing antitrust laws, although state legislation usually also is applicable and the states are becoming more vigorous in this area. The separate area of unfair competition covers other practices viewed as improper in the operation of a business, and primarily is a matter of state law which must be examined specifically where business is to be conducted.

This section focuses on federal antitrust laws and, following a brief summary of the substantive statutes, discusses in light of U.S. judicial decisions interpreting the statutes certain arrangements which generally involve consideration of antitrust prohibitions.

Federal Antitrust Statutes

The principal federal antitrust statutes are the Sherman Act, the Clayton Act, including the Robinson-Patman Act which amended it, and the Federal Trade Commission Act.[14] Two other statutes, the Antitrust Civil Process Act and the Antitrust Procedures and Penalties Act, deal primarily with procedural matters.[15]

The Sherman Act, enacted in 1890, is the oldest of the federal antitrust statutes, and broadly prohibits (1) all contracts, combinations, or conspiracies in restraint of trade or commerce; and (2) monopolization of or attempts to monopolize any portion of interstate trade or commerce. In addition to substantial criminal penalties, goods which are transported interstate pursuant to a contract declared illegal by the act are subject to forfeiture. Furthermore, government and private actions to obtain injunctions and civil damage suits, including suits for triple monetary damages and attorneys' fees and other legal expenses by private parties, are permitted.

The Clayton Act, enacted in 1914, primarily prohibits any of the following where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the United States: (a) price or related discrimination by the seller between purchasers of goods of like grade and quality, this portion being the Robinson-Patman Act added in 1936; (b) tying of the sale or lease of one product to the purchase of a second product; (c) entry into certain commercial transactions with the condition or understanding that one of the parties will henceforth refuse to deal with a competitor of the other party; and (d) direct or indirect acquistion of the whole or any part of the share capital or assets of one corporation by another corporation. The act provides for government and private civil monetary damage suits, government and private suits to obtain injunctions, and criminal penalties in certain cases.

The Clayton Act also exempts from the operation of all of the federal antitrust laws labor, agricultural, and horticultural organizations created

for the mutual help of their members and not conducted for profit — *i.e.*, principally labor unions and agricultural cooperatives.

The Federal Trade Commission Act, also enacted in 1914, establishes the Federal Trade Commission — referred to further above in connection with consumer protection regulations — with broad powers to prohibit individuals, partnerships, or corporations (with certain exceptions) from using unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The Commission may order persons to cease and desist from practices violating these prohibitions and, once such an order becomes final, may institute action to collect up to $10,000 for each violation.

Specific Arrangements

Price fixing. Unlike the anticartel laws of many countries, the British Restrictive Trade Practices Act, and the competition law of the European Economic Community, U.S. antitrust laws as interpreted by judicial decisions make price fixing and similar cartel arrangements unlawful *per se* — *i.e.*, no economic rationale, no matter how persuasive, will justify such an arrangement. This rule applies to all arrangements among competitors which have the purpose *or* effect of directly or indirectly inhibiting price competition. Maximum as well as minimum price arrangements are invalidated. For example, an arrangement whereby large oil refiners undertook to buy and store gasoline offered by smaller producers to stabilize the market price for gasoline has been held a *per se* violation. Even so called fair trade prices mandated by state laws may be invalid.[16] However, where the purpose is not to affect prices *and* the effect on prices is not the principal effect, courts generally will not prohibit an arrangement.

Horizontal market division. Another activity viewed as a *per se* violation is division of a market among competitors. For example, in the leading judicial decision in this area, the U.S. Supreme Court invalidated an arrangement whereby operators of independent supermarket chains entered into a program which utilized, *inter alia,* market division in order to compete more effectively with larger regional and national supermarket chains.[17]

As in the case of price restraints, where market division is neither the purpose of the arrangement *nor* its principal effect, courts will determine under what is referred to as the rule of reason whether the anticompetitive effects are outweighed by procompetitive effects. However, if the parties to the arrangement wield substantial power in the relevant market, a *per se* analysis is likely to be applied.

Boycott or concerted refusal to deal. A third activity held to be *per se* illegal is a boycott or concerted refusal to deal. Such a boycott takes place

when two or more business enterprises interfere with the essential relationships of competing businesses to force them out of the market. This may occur, for example, by inducing common suppliers not to provide the competing businesses with goods required in their businesses, or by inducing common customers not to purchase from the competing businesses. It is not necessary to show that an intentional boycott will have an adverse effect on competition.[18] Conversely, arrangements which have the principal effect of interfering with the market relationships of competitors, even if not so intended, are *per se* illegal. For example, where an association of retail lumber dealers circulated among its members a list of those wholesalers who engaged in retail sales, from which a wholesaler could have his name removed only on giving assurances that he would discontinue selling at retail, the arrangement was invalidated even though there was no agreement among the retail dealers to boycott wholesalers who were on the list.[19] Furthermore, it is no justification for a boycott that the objects of the boycott also are engaged in wrongful or tortious conduct.[20]

However, not all concerted activity which may exclude certain competitors from a market is *per se* invalid. For example, the *per se* rule was inapplicable where a cement manufacturers' association gathered and circulated credit and other information about contractors who purchased cement, even though this prevented certain contractors from having their orders filled.[21]

Other horizontal market arrangements. Various horizontal arrangements among competitors additional to those discussed above have been determined to violate U.S. antitrust laws. For example, an arrangement by several large producers of corrugated industrial containers for the exchange of price information violated Section 1 of the Sherman Act, because this exchange of price information tended to stabilize prices — albeit at a low level — since the industry was dominated by relatively few large firms.[22]

Efforts by various industries to standardize products or terms of trade have likewise been invalidated from time to time.[23] Such standardization is a complex area requiring particularly careful consideration of antitrust issues.

It should be noted that Section 8 of the Clayton Act prohibits simultaneous directorships on the boards of competing corporations.

Resale price maintenance. Not only horizontal arrangements among competitors but vertical arrangements between business enterprises at different points in the production and distribution chain may involve antitrust prohibitions. For example, resale price maintenance where the manufacturer or distributer of the product requires businesses further in the distribution chain — generally at the retail level — to sell the product

at a set price has been determined to be *per se* illegal, even where the arrangement involved setting a maximum price to be charged by retailers.[24]

On the other hand, merely suggesting the price at which retailers should sell the product, provided no pressure is brought on retailers who refuse to comply with the suggested price, advertising the availability of the product at the suggested price, and printing the suggested price on packages containing the product, all have been permitted.

Territorial resale restrictions. A territorial resale restriction where a business enterprise — generally the manufacturer — permits resale by a business further in the distribution chain — generally a distributor or retailer — only to customers located within a given territory was held just a few years ago to be *per se* unlawful. This rule came under considerable criticism, and in a recent case the U.S. Supreme Court overruled the earlier decision so that such restraints are not now *per se* violations.[25] Nonetheless, courts still may find such arrangements to be in violation of U.S. antitrust laws under the rule of reason in any particular instance where competition is substantially impaired.

Tying arrangements. Tying takes place where the supplier of the tying product — whether goods or services — conditions its sale or lease to customers on the simultaneous purchase or lease of a second tied product. Such an arrangement generally violates U.S. antitrust laws, although the simple existence of a tie is not illegal. Under current judicial interpretation the supplier usually must have significant market power with respect to the tying product, and the market for the tied product must be substantially affected by the tie.[26] Market power in the tying product generally can be shown where the product is patented, copyrighted, or significantly differentiated by potential purchasers from similar products of other suppliers. Proof that commerce in the tied product is affected substantially can include tied sales which are significant in dollar volume, or which constitute a significant portion of sales in the tied product. However, it may be shown that a package of goods and services constitutes a single product, in which case the supplier can insist on selling it as a unit rather than as two or more products.

Special problems arise where the tying product is patented or copyrighted. For example, it is illegal to condition the license of a copyright on acceptance of a license for an additional copyright. Similarly, with certain exceptions, the licensor of a patent may not insist that the patented product be used only in conjunction with other goods manufactured by him, or that the licensee simultaneously purchase a license for other patents as well.[27] In addition, since a patent or copyright is a monopoly granted by the federal government, an attempt at tying may be viewed as an abuse of that monopoly even where an antitrust violation is not involved, and a court may in such event refuse to enforce the license royalty agreement, effectively denying patent or copyright protection.

Certain antitrust aspects particular to license agreements are noted further in Chapter IV respecting licensing activities.

Price discrimination. One of the few specific prohibitions in the federal antitrust statutes is that under the Robinson-Patman Act against price discrimination, as noted further above. Prohibited differences in price may occur even if the monetary price charged is the same, if related allowances or facilities such as delivery terms, return privileges, credit terms, ancillary services, or other significant terms of the two transactions differ. Likewise inclued are the payment or receipt of price concessions in the form of brokerage commissions, and the provision of services or advertising allowances between purchaser and supplier other than on proportionally equal terms. The law also prohibits the reverse practice where a large purchaser extracts a more advantageous price from suppliers than do its smaller competitors, and purchasers generally are prohibited from inducing suppliers to engage in any prohibited discriminatory pricing practices. The prohibition applies even where the price advantage simply offsets costs of the purchaser in performing functions advantageous to the supplier.[28]

These price discrimination prohibitions apply only to goods and other tangible personal property — intangible property, services, and other products are not covered. Moreover, the two goods sold at different prices must be of like grade and quality and any differences between them must be trivial in nature. A price difference may be justified to the extent it reflects actual cost differences. The supplier also may show that the change in price was in response to changed market conditions between two sales — for example, in order to meet increased competition.

Even where price discrimination exists, if the favored businesses do not thereby enjoy a competitive advantage, such discrimination is not unlawful.[29] The question whether the effect of a particular price discrimination is substantially to lessen competition or tend to create a monopoly, as required by the statute, is perhaps the most difficult issue in this area. Where an enterprise slashes prices drastically, even below costs, to drive competitors out of business, the law clearly is violated.[30] Where less predatory discrimination results in attracting business away from competitors, generally a further showing either that a significant reduction in the number of sellers has taken place or that the industry has otherwise become more concentrated is required.

Acquisitions and mergers. The acquisition of a controlling interest in the assets or shares of a U.S. corporation, whether effected by merger or otherwise, is treated separately in Chapter VII. Accordingly, considerations under Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act in connection with such an acquisition are discussed at that point, as are the premerger notification requirements of the federal government.

Labor Laws

U.S. laws regulating the relationship between an employer and his employees fall roughly into two categories: (1) those regulating the rights of employees to organize and bargain collectively with the employer; and (2) those regulating the wages, terms, and conditions of employment.

Regulation of Labor Organizations and Bargaining

The federal government generally has pre-empted this area so that state regulation is largely precluded. The principal federal labor policy is provided by the National Labor Relations Act (the "NLRA").[31] The NLRA first assures to employees the rights (1) to form, join, or assist labor organizations; (2) to bargain collectively with the employer; and (3) to engage in concerted activity for the purpose of collective bargaining or mutual aid and protection. These rights are discussed in further detail below. In addition, the obligations of the employer under the NLRA are (a) not to interfere with any of the foregoing rights of his employees, and (b) to bargain in good faith with any union which a bargaining unit of his employees designates as its exclusive bargaining representative.

The NLRA also establishes the National Labor Relations Board (the "NLRB") charged with enforcing these rights and obligations. The application of federal labor laws, and hence the jurisdiction of the NLRB, extend to employers engaged in commerce or activities which affect commerce, and all but the smallest employers probably fall within this reach. However, the NLRB may in its discretion refuse to exercise jurisdiction, and in such cases the matter generally is left to state authorities. Where the NLRB exercises jurisdiction, it has broad powers to impose sanctions if it determines that a violation of applicable law constituting an unfair labor practice has occurred. The sanctioned party may obtain review by the federal circuit court in the judicial circuit where the employer is located, and the ruling of this court is subject to discretionary review by the U.S. Supreme Court.

The right to form, join, or assist labor organizations. The bargaining unit organizing process by a labor union generally commences when a union representative contacts a business's employees to obtain their signatures on union authorization cards which express support for the union. When at least 30% of a proposed unit have so signed, the union may request the NLRB to conduct a certification election by secret ballot to determine whether a majority of the unit wishes the union to represent all employees in the unit exclusively in bargaining with the employer. If two or more unions are involved, the union which obtains a majority of the votes cast becomes the bargaining unit's representative.

The goal of the law here is to assure employees' freedom in deciding

whether to join the union without coercion from either the employer or the union. Accordingly, during the union organizing process, the employer may not place pressure on employees either to refuse to sign union authorization cards or to vote against the union in the certification election by, for example, repeatedly interrogating them to determine whether they favor the union or engaging in surveillance to establish which of them are engaged in union support activity. The employer may not increase employee wages and other benefits in response to the organizing effort, since this is economic coercion to vote against the union. The employer may not punish employees who engage in union organizing activity by discharging them, lowering their pay, making their employment unpleasant, or threatening them with reprisals.

On the other hand, both the employer and the union are permitted to inform employees of the disadvantages and advantages of union membership. Accordingly, the employer is free to express to employees his view of unions — for example, that union memership will not be in their interests. He may also inform employees of his rights in dealing with the union, including the right to replace employees who strike at the behest of the union and the right to close the business if the union is elected, and of any negative consequences for the business from the union's election so long as such stated consequences are based on facts. He generally may disseminate such information to employees in work areas during working hours, while excluding the union from doing so.

The union similarly is prohibited from placing pressure on employees by, for example, threatening them with physical or economic reprisals for failure to support it. It may disseminate information to employees on the employer's premises — except in work areas during work hours — on the same basis as may other persons, so that the employer may not discriminate against union organizers if he permits access to other persons. The union also may distribute literature outside the employer's premises and may establish pickets there carrying union placards, but may not block ingress and egress to the employer's premises in doing so.

In the event of a possible unfair labor practice, either the employer or the union may petition the NLRB for relief. If the NLRB makes a factual determination that such a practice has occurred, it may order the offending party to desist from the wrongful activity. It may impose other sanctions as well — for example, to set aside the result of a completed certification election where the wrongful conduct may have exerted a decisive influence on the vote.

If the union is certified, it remains the exclusive bargaining representative of the unit until the members seek its decertification. The union also may be challenged periodically by other unions, in which event the unit may elect to keep its current union representation or switch to one of the new unions.

The right to bargain collectively with the employer. Once the union has been certified as the bargaining representative, the employer is required to bargain in good faith with the union as to wages and employment conditions of all employees in the bargaining unit, and may not bargain with individual employees or groups of employees within the unit. The subjects of such collective bargaining fall into three categories: (1) mandatory, (2) permissive, and (3) prohibited. Mandatory subjects of bargaining are wages, hours, and other terms and conditions of employment such as retirement and pension benefits, holidays, work assignments, safety rules, and procedures for settling disputes under the collective bargaining agreement. Permissive bargaining subjects are those more distantly removed from the terms of employment but in which employees nonetheless may have an interest, such as the employer's business practices, location of work facilities, plans to merge with another business, and the size and composition of the supervisory personnel force. The employer cannot be required under the NRLA to negotiate a permissive subject, and may arbitrarily and capriciously refuse to do so. Prohibited bargaining subjects include matters which by law either must be or may not be included in the collective bargaining agreement. For example, a provision recognizing the union as the bargaining unit's representative must be included in the contract if requested by the union. A provision requiring the employer to discriminate by race or sex in hiring employees is illegal and may not be included.

During collective bargaining, neither party is required to concede to all of the other's demands. However, each must deal reasonably with the other, make honest attempts to reach compromises, and not make unrealistic offers and refuse to make any concessions. Similarly, a party may not continue shifting positions when agreement is imminent, or engage in other dilatory tactics. A party's failure so to bargain in good faith is an unfair labor practice, and the other party may seek sanctions against the same from the NLRB.

If an impasse occurs despite such good faith, each side also has various economic weapons. The union may call a strike, picket the premises of the employer, and/or call a boycott of the employer's products as discussed further below. On the other hand, the employer may lock out employees. If the union calls a strike, the employer also may hire temporary or permanent replacements as discussed below, poll striking employees to determine whether they support the union, or unilaterally increase wages to induce strikers to return to work. However, such increased wages may not exceed amounts offered to the union during the bargaining.

After the execution of the collective bargaining agreement, both sides must deal with each other in good faith in its interpretation and enforcement. The employer's breach of a collective bargaining agreement

with respect to a mandatory bargaining subject constitutes an unfair labor practice subject to sanctions by the NLRB. On the other hand, the employer's breach of a contract with respect to a permissive bargaining subject does not constitute an unfair labor practice, although the employer may be sued in court for breach of contract. In addition, most collective bargaining agreements designate specific procedures for resolving disputes or grievances. For example, if an employee believes the employer has denied him rights under the agreement by, for example, discharging or failing to promote him, a union representative generally will attempt to resolve the grievance informally with the employer's representatives. If this fails, under the agreement the grievance normally proceeds to arbitration by an impartial third party. The parties generally may not by-pass arbitration by suing for breach of contract, because courts will not take jurisdiction of matters which the parties have contractually committed to arbitration. Even where the alleged breach also constitutes an unfair labor practice, the NLRB also generally leaves the resolution to the arbitrator. The prevailing party may obtain enforcement of the arbitrator's decision by an appropriate state or federal court, if the court is satisfied that the arbitrator acted within the authority granted in the agreement.

The right to engage in concerted activity. Employees may act in concert to place economic pressure on the employer to accede to their demands by striking, picketing, and/or inducing a boycott of the employer's products, subject to certain limitations and rules as described briefly below:

(1) *Strikes.* Generally a strike and other tactics must be directed strictly against the particular employer by so called primary activity, and it is illegal to undertake secondary activity against another person — for example, a supplier, customer or competitor of the employer — in the hope that the other person will in turn exert economic pressure on the employer. However, if the other person is economically aligned with the employer, or cooperates with the employer in resisting the union, a strike against that person is not prohibited.

A strike must not be violent, as defined rather pragmatically by determining whether physical injury or property damage is likely to result. For example, a sit-down strike where employees occupy the employer's premises and refuse to work or to leave generally is illegal. In addition, the union may not call a strike within 60 days after giving notice to the employer of its intention to renegotiate an existing collective bargaining agreement, so that the union must attempt negotiation for that period before resorting to a strike. Likewise the employer may not initiate a lockout during this 60-day period. Also prohibited are partial or intermittent strikes, and work slowdowns, so that employees are not permitted to stay on the job and disrupt the employer's operations.

Likewise prohibited are strikes to compel the employer to discriminate against certain employees for any reasons — for example, to compel reticent employees to join the union — or strikes to promote featherbedding by forcing the hiring of additional employees who will not perform substantial services.

Striking employees generally are not entitled to be paid by the employer during their strike. However, they are considered to continue as employees during the strike, and afterwards are entitled to be reinstated to their former positions without loss of job seniority or other perquisites *if* their positions are still available. In this connection, the employer may hire replacements during the strike and generally need not discharge them to make room for striking employees once the strike is over. However, this is not true if the strike is in protest of an unfair labor practice by the employer rather than to place economic pressure on the employer during bargaining, because in that case striking employees must be guaranteed the right to return to their jobs even if this means discharging the replacements. It is also an unfair labor practice to discharge striking employees and *then* to hire replacements, because this is viewed as punishment of the striking employees. Any other discrimination against employees on the basis of their participation in a strike also is an unfair labor practice.

All of these rights of employees apply only if the strike has been properly called and the striking employees have not engaged in prohibited activities. For example, if a minority of employees walk off their jobs without the union's sanction or if employees engage in violence, partial strikes, or work slowdowns, such employees may be discharged summarily by the employer.

(2) *Picketing.* Picketing by individuals standing or walking outside the entrances to the employer's premises, generally carrying signs and placards, is permitted for two principal objectives: first, to inform others that the employer is engaged in a labor dispute and attract support for the employees' cause; and second, to induce others — particularly members of labor unions aligned with the union posting the pickets — not to cross the picket line to enter the employer's premises for purchases, deliveries, or performance of work, with resulting detriment to his business.

However, similarly to strikes, secondary picketing is prohibited except against an ally of the employer. In addition, mass picketing whereby individuals are physically constrained from entering the premises and picketing coupled with violence or threats of violence constitute unfair labor practices and are prohibited.

(3) *Boycotts.* Employees may inform the public that the employer is engaged in a labor dispute and attempt to induce the public not to purchase his goods or services. They may also advertise that such goods are being distributed by another person if this does not induce a work

stoppage or interfere with deliveries to that person, and may post pickets outside the premises of the second person to inform the public of the boycotted goods if such picketing is not coercive and specifies precisely which goods are being boycotted.

Regulation of Wages and Employment Conditions

Minimum wages and maximum hours. The federal government establishes the minimum wage rate payable to employees by any employer. This currently is $2.90 per hour and, unless changed by intervening legislation, will rise to $3.10 per hour for the year starting January 1, 1980, and $3.35 per hour for 1981. In addition, federal law sets the maximum work week at 40 hours. If an employer wishes to have employees work in excess of 40 hours per week, he must pay them at least one and one-half times the wage rate at which they are normally employed. The various exemptions to these provisions include those employed in executive, administrative, and professional capacities, and many small retail establishments whose business primarily is intrastate.[32]

The federal minimum wage and maximum hour laws are pre-emptive in the sense that no state may pass laws setting a lower wage or longer hours. However, states may pass wage and hour standards which are more stringent than the federal. This generally should be investigated with respect to specific professions and classes of employees, such as minors and handicapped persons.

Health and safety conditions. Both the federal and the state governments extensively regulate health and safety conditions in employment. The principal federal statute is the Occupational Safety and Health Act of 1970,[33] which is applicable to all employees engaged in commerce. Regulations under the act set health and safety standards in various occupations, and the U.S. Secretary of Labor or his representative is directed to inspect and investigate places of employment to assure that the standards are met. However, the U.S. Supreme Court has held recently that the employer may refuse access to his premises unless the inspector has obtained a warrant from an appropriate court.[34]

If a minor violation of the regulations is found, a citation may be issued informing the employer of the nature of the violation and specifying the time allowed to effect a remedy. For more substantial and willful violations, civil and criminal penalties may be imposed. If a violation involves immediate danger of death or serious physical harm to employees, an injunction may be obtained in federal court against continued violation by the employer.

State regulation in this area frequently is more extensive and detailed than federal regulation. Violations may result in criminal and civil penalties, and it is prudent to obtain information on such regulations from

the industrial safety board of each state where the enterprise's employees will work.

Employment discrimination. Under federal law, an employer is specifically prohibited from discriminating on the basis of race, sex, religion, or national origin in hiring, in setting compensation, or in establishing other terms, conditions, or privileges of employment.[35] This applies to both overt and covert discrimination, so that, for example, physical or other criteria which appear to be sex neutral but in fact are designed to discriminate against a particular sex are illegal. With respect to religious discrimination, the employer must take reasonable steps to accommodate the religious preferences of employees and normally may not penalize an employee for actions mandated by his religious beliefs — for example, refusing to work during a religious holiday or sabbath.

As to all of the above criteria except race, a narrowly defined exception permits discrimination necessitated by a *bona fide* requirement of the work to be accomplished. For example, a state prison may refuse to hire women as prison guards in male penitentiaries, since in that environment females would be subject to particular danger not applicable to men. On the other hand, a requirement that prison guards be of a minimum height and weight which discriminates heavily against women applicants may be prohibited because no direct relationship has been shown between the ability to perform the duties of a prison guard and such height and weight requirements.[36]

An individual who believes he has been subjected to illegal discrimination may apply for relief to the Equal Employment Opportunity Commission, which will investigate and seek to mediate the controversy. If this proves unsuccessful, the employee then may sue the employer in federal court. If the employer is found to have engaged in prohibited discrimination, he may be ordered to hire, promote, or reinstate the aggrieved individual *and* to pay such compensation as the individual would have earned had the discrimination not taken place. In addition, the court may require the employer to pay the legal expenses of the employee, and award the employee additional punitive damages. Furthermore, since such illegal discrimination — whether by an employer or a union — is considered an unfair labor practice, the employee also may pursue remedies available from the NLRB.

Finally, under federal law, an employer may not because of age discharge, refuse to hire, or otherwise discriminate against individuals over 40 years of age but less than 70.[37] This statute is designed particularly to prevent forced retirement of individuals at any age less than 70.

Additional employment regulations. Various additional federal and state laws regulate employment terms. For example, if the employer wishes to establish a pension plan for his employees, he must comply with

the provisions of the federal Employee Retirement Income Security Act of 1974[38] which, *inter alia*, requires purchase of insurance from a federal agency to assure the solvency of the plan.

In addition, state laws may, for example, require payment of employee wages no less frequently than twice a month or limit the term of a labor contract to, for example, seven years. Such laws also may substantially limit restrictions which the employer may place on competition by a former employee, even if the employee agrees to such restrictions in writing. Accordingly, the prospective employer must investigate in detail to ensure compliance with all such special federal and state employment regulations.

Protection of Intellectual Property

In the United States, four types of intellectual property are protected: (1) patents, (2) trade secrets, (3) copyrights, and (4) trademarks and service marks. Patents and copyrights are regulated almost exclusively by federal law, protection of trade secrets is a matter of state law, and trademarks and service marks are regulated by both federal and state law.

Patenting of Inventions

The most complete protection for an invention is that secured by a patent from the U.S. Patent and Trademark Office (the "Patent Office"). Obtaining such a patent may be a complicated, costly, and time consuming process, particularly in light of the requirements for patentability and the procedures discussed below. However, the successful patentee obtains a monopoly on the invention with certain rights against persons who copy the invention without obtaining a license, as also summarized further below.

Requirements for patentability

(1) *Categories of inventions.* The federal Patent Act of 1952 (the "Patent Act") provides that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition or matter, or any new and useful improvement thereof, may obtain a patent therefor . . .".[39] Unless an invention can be classified in one of these five categories, a patent will be unavailable regardless how novel or useful it may be. While the precise definition of these categories is complicated and will not be attempted here, items *not* patentable include, for example: discoveries of scientific principles and of natural phenomena, such as the use of sulphuric ether as an anesthetic during surgical operations; novel ways of organizing or operating a business; and most computer programs,

because they are considered to involve merely common mental steps to perform calculations.[40]

(2) *Application by inventor.* If an invention falls within one of the patentable categories, several other requirements must be met before the patent can be obtained. Application for the patent must be filed by the individual who actually conceives the invention, even if he has given up all or part of his rights in the invention or has been hired by another to create the invention. If more than one individual participates in the conception, construction, or testing of the invention, all with an active role in the inventive process must sign the patent application.

(3) *Novelty.* The Patent Act provides a monopoly only for the *first* inventor; thus, it denies a patent either if the invention has been known or used by others in the United States, or if the invention has been patented or described in a printed publication in the United States *or* a foreign country, *before the invention by the patent applicant.*[41] This is referred to as the requirement of novelty. It is quite narrow, because to fail under this standard the invention must have been anticipated by an identical device, not merely one which is a close approximation.

Where two applications are filed claiming the same invention, the Patent Office will undertake what is referred to as an interference proceeding to determine which party first conceived the invention and reduced it to practice. Approximately one in 20 to 25 patents is engaged in such a proceeding.[42] The first party to file an application, or senior party, is given a substantial procedural advantage since the burden of proof is placed on the second or junior party. For determining such filing priority, the date of filing for a patent in one of certain foreign countries which afford similar privileges for U.S. applications is used, if the U.S. application has been filed within one year (or, in the case of certain countries, 20 months) after that foreign application.[43]

(4) *Timely application.* The Patent Act also requires timely application; thus, it provides that no patent may be obtained either if the invention has been in public use or sale in the United States, or if the invention has been patented or described in a printed publication in the United States *or* a foreign country, *more than one year prior to the date of the U.S. patent application.*[44] Unlike the novelty requirement, violation of this timeliness requirement may result from action of other inventors *or* of the applicant himself. For example, it is not permissible to accept firm orders for sales of items embodying the invention more than one year prior to application for the patent. However, the inventor need not seek a patent before he is convinced of the efficacy of the invention, and may test an invention including public participation in such testing, may apprise the public that the invention is in development, and may seek to determine who may be interested in purchasing the invention.[45]

Yet another requirement denies a U.S. patent to any person who has

obtained a patent in a foreign country prior to application for a U.S. patent, if the foreign patent application was filed more than one year prior to filing the U.S. application.[46] The sum of these two requirements is as follows: (a) application for a foreign patent should if possible not be made more than one year before the date of the U.S. patent application; and (b) if such a foreign application has been made more than one year previously, all measures should be taken to avoid actual issuance of the foreign patent before filing the U.S. patent application.

Finally, if the invention was created in the United States, it is illegal to file a foreign patent application for it prior to applying for a U.S. patent, or within six months after the U.S. application, unless a special license is obtained from the Patent Office.[47]

(5) *Obviousness.* Perhaps the most stringent and yet most nebulous requirement in the Patent Act is that an invention not be obvious to an individual with ordinary skill in the art to which the subject matter of the patent application pertains, because the monopoly granted by the patent system is not available for small and insignificant changes which any competent technician could have devised.[48] Because many inventions with the benefit of hindsight appear obvious, certain collateral factors may be examined in determining obviousness including, *inter alia,* whether substantial efforts have been expended by others unsuccessfully in seeking to solve the same problem and whether the invention has been a commercial success.[49]

(6) *Utility.* As quoted further above from the Patent Act, an invention also must be useful to be patentable. Generally such utility is clear from the nature of the invention. However, this requirement may be applied to deny patentability, for example, for a chemical compound which has no present use. When a use for such an invention is discovered, a use patent probably can be obtained for that specific purpose. In addition, where the invention may only be used for purposes contrary to public health, safety, or morals, a patent will be denied for lack of utility. For example, a machine for producing heroin might fall within this category.

Patent prosecution procedures. An inventor who believes that his invention meets patentability requirements generally consults a specialized patent attorney to undertake a search to determine the state of prior art and assess the likelihood of success of a patent application, and to prepare the application and arrange for preparation of appropriate drawings. The application is filed with the Patent Office, and thereafter the applicant may inscribe the words "Patent Pending" on each item he markets embodying the invention to warn potential imitators that the invention may become subject to U.S. patent protection.

The Patent Office determines — including through any appropriate

interference proceeding as noted further above — whether the invention meets the patentability requirements of the Patent Act, and in such event the patent is issued. The average time period for such processing is approximately two years. During that time the Patent Office may request modifications in the patent application to ensure compliance with the Patent Act. If the Patent Office denies a patent, appeal is available in federal courts.

Once the U.S. patent is granted, the patentee should inscribe the patent number on each item he markets embodying the invention, as notice to any who would copy the invention.[50]

Patent rights and remedies. Once a U.S. patent is obtained, the patentee has the exclusive right to make, use, and sell the patented invention in the United States for a period of 17 years.[51] He may manufacture and sell products using the patented invention, or assign his rights in the patent to another party. Such an assignment must be in writing, and should be recorded with the Patent Office because an unrecorded conveyance is void against a subsequent purchaser who acquires the same rights without notice of the prior assignment.[52]

The patentee also may license others to make, use, and/or sell the patented invention, either exclusively or on a shared basis, in all or parts of the United States. Such arrangements involving patents and other technology are considered in detail in Chapter IV dealing with licensing activities.

If a person produces, uses, or sells an invention subject to a valid patent and neither is the owner of the patent nor has obtained a license for such use, that person may be subjected to a civil action for infringement of the patent by the patentee, his assignees, and/or his licensees.[53] Infringement occurs even where a patent licensee exceeds the terms of his license by, for example, manufacturing more than permitted or selling in a territory not covered by the license. Anyone using a product acquired from an infringer also is an infringer, whether or not the user is aware of the infringement. Any such action must be brought in federal court, and must consider two separate issues: (1) whether the patent is valid, and (2) whether an infringement has occurred.

Every patent issued by the Patent Office is presumed valid,[54] but this may be rebutted by showing that the Patent Office failed to consider fully the state of the relevant art when issuing the patent. While statistics vary depending on the area within the United States where suit is brought, it is fair to say that *well over one-half of the patents litigated are held to be invalid* — mostly on the issue of obviousness.[55]

As to the second question, infringement clearly is established if the accused item is identical to the patented invention. Where the accused item varies in certain respects from the patented one, the original claims of the

patent contained in the patent application define the essential elements of the patented invention and delineate the area of potential infringement. Hence, artful drafting of these claims can be crucial to avoid overclaiming which results in invalidation, and underclaiming which makes the patent ineffective to stop infringements.

Upon a determination that the patent is valid and has been infringed, the court may use various remedies such as an injunction against further infringement, compensation by payment of reasonable royalty for use made of the invention, and in an exceptional case award to the prevailing party of certain legal expenses. However, monetary damages may not be provided for infringements committed more than six years prior to commencement of the infringement suit.[56]

Protection of Trade Secrets

An alternative and increasingly popular means of protecting an invention is to maintain it as a trade secret under state laws rather than obtaining a federal patent for it, due to several reasons. First, unlike patent law which seeks to encourage complete and speedy disclosure of the invention, trade secret laws protect and encourage the secrecy of the invention. Second, the potential subject matter of a trade secret is not as narrowly limited as is the subject matter of a patent and may include, for example, methods of doing business, customer lists, credit ratings, blueprints, architectural plans, tables of data, information regarding manufacturing techniques, and other nonpatentable matters. Because a trade secret need not meet the stringent standard of nonobviousness applicable to a patentable invention, generally any information not publicly known which gives one business enterprise a competitive advantage over another is the proper subject of such a secret. Third, while a U.S. patent allows the inventor precisely 17 years of exclusivity, trade secrets can and have been maintained for hundreds of years.[57] Fourth, protection under trade secret laws avoids the cost, delay, and uncertainty of patent prosecution — which is particularly important where the value of the invention is marginal or its useful life is likely to be short.

There are, however, several drawbacks to reliance on trade secret laws. First, such laws do not protect against independent discovery of the same invention, whereas a patent gives protection even against independent inventors. Second, once the secret is made public, all protection is lost. Accordingly, maintenance of the secret may require restrictions on employees and methods of doing business in order to safeguard the secret, which may interfere significantly with efficient operation of the business. Third, certain inventions by their nature are difficult to maintain as trade secrets. For example, a mechanical device often is easy to subject to reverse engineering to discover its secret, whereas a chemical compound may be difficult.

State tort laws generally give the owner of the trade secret a legal action against (1) persons who disclose the secret without authorization, and (2) persons who take advantage of the secret learned through improper means. For example, the employer who entrusts an employee with the secret may sue the employee if the latter proceeds to manufacture by use of the secret, or discloses the secret to a competitor. Similarly, suit may be brought against a competitor who uses the secret obtained by stealing it or by inducing an employee to disclose it. If the owner's suit is successful, he may obtain monetary damages as well as an injunction to enforce the other party to secrecy. In such a suit the owner generally must show confidential disclosure of the secret with the understanding that it would not be used for other than specific purposes, the fact that the recipient of the secret was not previously aware of it, and an understanding between the parties that the owner would be compensated if the recipient made use of the secret. Accordingly, it is prudent for the owner to secure a written agreement on these matters signed by both parties before a valuable trade secret is disclosed.

Copyrights

The federal Copyright Act (the "Copyright Act") which became effective January 1, 1978, substantially modernized this area by, *inter alia,* incorporating advances of reproduction technology, and federal regulation of copyrights now almost excludes state regulation. More specifically, the Copyright Act protects against copying by unauthorized persons of "original works of authorship fixed in any tangible medium of expression."[58] These include literary works; musical works including accompanying words; dramatic works including accompanying music; pantomines and choreographic works; pictorial, graphic and sculptural works; motion pictures; and sound recordings.

Protection under the Copyright Act is acquired by placing all three of the following on every copy of a protectable work published by authority of the copyright owner in the United States or elsewhere: (1) the symbol ©, the word "Copyright", or the abbreviation "Copr.";[59] (2) the year of the first publication of the work; and (3) the name of the owner of the copyright.[60] Failure to place these on a published work bars legal action for copyright infringement against any person misled by the omission.

In addition to compliance with marking requirements, it is prudent for the owner to register the copyright immediately with the U.S. Copyright Office in order to obtain statutory damages and other specific rights under the Copyright Act. This is obtained by application to the Register of Copyright including information on the copyright claimant and the work sought to be copyrighted, accompanied by two copies of the best edition of the work. In order to obtain maximum protection under

...ct, registration should be effected within three ...ation of the work.[61] It should be noted that works f... ... persons of certain foreign countries which a... ...ntion with the United States enjoy this same U.S. pro... ...S. persons first published in the United States.

The copyright vests initially in the author of the wo... ...se of a work made for hire, the employer or ot... ...issioned the work is considered the author unless a ... ...ment is executed by the parties. Ownership may b... ...le or in part by execution of a written instrument, ...ded in the Copyright Office to provide constructive ... ...n who subsequently attempts to obtain similar ... original copyright owner, and such a transfer or license m... ...similar instrument.[62]

The exclusivity under the Copyright Act continues fo... ...uthor and for 50 years after his death.[63] In the event ... ...f the work during this period, the copyright owner m... ...eral court to recover either actual monetary damages s... ... infringement *or* statutory damages. Statutory da... ..., subject to the discretion of the court, from $250 to $... ...gement. However, if the infringement is willful, the... ... up to $50,000. In addition, an injunction a... ...gement and an order for impounding and dest... ...ging copies of the work may be obtained. The ... the infringer to pay the legal expenses of the co... ...y, willful infringement of a copyright for purposes... ...ntage or private financial gain is a criminal offense pun... ... to $10,000 and/or imprisonment for up to one yea... ...civil *or* criminal action must be commenced within ... ...ate of infringement.[64]

Trademarks and Service Marks

Both the federal government and the states pro... ...emarks. In general, a trademark consists of either w... ...h by repetitive or constant use and/or through a... ...me associated in the minds of the public with the pa... ...rprise, so that use of the same mark by other busines... confusion as to the source of the goods. Parallel protectio... the federal government and by many states to a business ... does not produce goods but instead dispenses services, ... use of any service mark readily identified with its services ...orded by these laws varies in large measure with the na... ...lf because generally a fanciful, nondescriptive mark ... associated with only one business than a descriptive on...

"General Foods" must compete for the public's attention in substantially the same market with "General Mills" and "Best Foods."

Once in use within a particular state, a trademark and often a service mark may be registered with the appropriate state authority, generally the Secretary of State. Such registration statutes vary significantly from state to state, as do the protection given marks and the remedies against infringers, and the applicable law in each state where marked goods or services are to be marketed should be examined.

A trademark used on goods in interstate or foreign commerce also may be registered with the Patent Office under the federal Lanham Act of 1946.[65] The application must contain a description of the mark, state the types of goods as to which it is used, specify the date when it was first used in interstate or foreign commerce, and be accompanied by a drawing of the mark and the appropriate application fee. The registration remains in force for 20 years and may be renewed for like periods. Any mark consisting of words, pictures, or a combination of both may be registered unless it contains one or more of the following: (1) matter which is immoral, deceptive, or scandalous, or which disparages or falsely suggests a connection with individuals, living or dead, institutions, beliefs, or national symbols, or brings them into contempt or disrepute; (2) the flag of the United States or of any state or subdivision thereof or of a foreign country, or the coat of arms or insignia of the same; (3) the name, image, or identifying signature of any living individual without his consent, or the portrait of a deceased President of the United States during the life of his widow without her written consent; (4) matter which so resembles a mark previously registered or in use by another person that it is likely to cause confusion or to deceive the public with respect to the origin of the goods of the applicant; (5) matter which is merely descriptive, or is misdescriptive of the goods; (6) matter which is merely geographically descriptive of the origin of the goods; or (7) a word which is primarily merely a surname. However, a mark falling within one or more of the last three of these exclusions may nonetheless be registered, if it is shown to have become distinctive of the applicant's goods in commerce.

Federal trademark registration is desirable for several reasons. First, such registration provides constructive notice throughout the entire United States that the mark is claimed by the applicant. Second, the federal registrant has the option of bringing an infringement suit in either federal or state court, whereas if no federal registration is effected, such a suit must be brought if at all in state court. Similarly, other rights available to a federal registrant differ from those available under many state laws and in certain respects can be broader. Third, a mark registered with the Patent Office may then be registered fairly readily in many foreign countries, while state registration does not confer this benefit. Fourth — as noted further in Chapter V below dealing with import activities — most

federally registered trademarks also may be filed with the U.S. Department of the Treasury to cause the Customs Service to prevent importation of goods bearing infringing marks.

A trademark or service mark may be assigned or licensed by its owner. However, care must be taken that actual use in commerce is not discontinued, because the mark then may be considered abandoned and any rights in it to have ceased. Registration of a mark also must be renewed occasionally. For example, in the case of federal trademark registration it is necessary six years after issuance to file with the U.S. Commissioner of Patents and Trademarks an affidavit stating that the mark has continued in use.

If a registered mark is infringed, remedies under state laws may vary. In the case of a federally registered trademark, the court is empowered under federal law to issue an injunction against further infringement, order destruction of any infringing marks still in the infringer's possession, and require the infringer to pay monetary damages to the owner of the mark.

General Regulation and Reporting of Foreign Investments

Federal Regulation

Unlike most countries, the United States generally does not regulate investments from abroad. However, under the federal Foreign Assets Control Regulations pursuant to the Trading with the Enemy Act, all U.S. investments and other transactions with persons of certain listed countries require licenses from the U.S. Department of the Treasury.[66] The federal Alien Property Custodian Regulations under the same act also provide that, in time of declared war with any country, the U.S. property of persons of that country will vest in a federal official.[67]

It should also be noted that major investments by foreign governments or others having substantial implications for U.S. national interests are reviewed by an interagency Committee on Foreign Investment which is chaired by the Department of Treasury. This committee also monitors foreign investment trends in the United States.[68]

Any federal restriction on foreign investments may be limited by equal protection, due process, and other rights under the U.S. Constitution. However, these are more likely to benefit individual employees and other persons lawfully present within the United States, rather than nonresident alien individuals and foreign legal entities.

Any such restriction also may be subject to treaty rights of foreign persons from specific countries under, for example, a treaty of friendship, commerce, and navigation which grants the right to invest or engage in business on the same basis as applies to U.S. persons, or which grants such rights as are afforded the most favored nationals of any other country.[69]

Federal Reporting

First, pursuant to statutory authority the Bureau of Economic Analysis of the U.S. Department of Commerce gathers certain financial data regarding: (1) foreign direct investments in the United States, (2) international transactions in royalties and fees between U.S. persons and unaffiliated foreign persons, and (3) revenues for carrying imports to the United States and expenditures in the United States by shipping and air transport operators of foreign nationality.[70]

The direct investment reporting generally is imposed with respect to U.S. business enterprises in which foreign persons have direct investments defined as direct or indirect ownership by one foreign person of 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. enterprise. The establishment or acquisition of a U.S. business enterprise with, *inter alia,* total assets of more than $500,000 must be reported by the foreign person, the U.S. enterprise, and certain U.S. intermediaries. In the case of a joint venture whose capitalization (including loans from the venturers) exceeds $500,000, the U.S. person entering the venture generally is required to report even if the foreign venturer owns less than a 10% interest. Quarterly reports and industry classification questionnaires also are required when total assets, net sales or gross operating revenues, *or* net income after taxes of the U.S. reporter exceed $5 million (positive or negative). In addition, annual reports and five-year benchmark surveys covering these and certain lesser investments have been and are likely to continue to be required by the Department. Such reports are not, however, generally disclosed to the public.

Special exemptions include real estate held exclusively for personal use, and airline, shipping and similar facilities providing services only to their own operations. In addition, it should be noted that, for example, limited partners are not considered to have a direct investment in the partnership because they do not have general voting rights, although they are considered to have a portfolio investment.

Particularly in connection with such reporting requirements, the separate supplement to this volume contains selected forms which should be reviewed carefully, *inter alia,* for disclosure requirements and similar regulations affecting foreign investors.

The royalty and fee reporting requirements cover transactions which

involve international transfers of intangible assets and proprietary rights with unaffiliated foreign persons, primarily to monitor U.S. balance of payments. The *U.S.* persons having agreements with such foreign persons to buy or be provided with (or sell or provide) patents, trademarks, techniques, franchises, or the like are required to report annually within 90 days after the close of any calendar or other fiscal year in which combined such payments *and* receipts are $25,000 or more.

Second, under statutory authority the U.S. Secretary of the Treasury has promulgated regulations for reporting of portfolio and other investments by foreign persons.[71] These regulations apply to two groups: (a) U.S. issuers of securities; and (b) U.S. holders of record, *i.e.*, persons subject to the jurisdiction of United States — such as U.S. brokerage firms — who hold U.S. securities for or on behalf of foreign persons. U.S. issuers include issuers of U.S. equity and debt securities with assets of $50 million or more if not engaged in banking, or assets of $100 million or more if so engaged. Also included is *any* other issuer of U.S. securities with total assets of $2 million or more, which has evidence that any of its securities are under foreign ownership. All such issuers must maintain certain records and may be required to submit reports from time to time. U.S. holders of record of more than $50,000 in value of U.S. securities for foreign persons similarly are required to maintain records for possible examination and may also be required to submit reports from time to time. The latest such reports were those due in March 1979.

It should also be noted that, under the Foreign Agents Registration Act of 1938,[72] all persons acting as agents in the United States for a foreign person, including a foreign enterprise or government, must register with the U.S. Department of Justice. This requirement may apply even to attorneys and other professional advisers if they engage in lobbying or similar activity to influence policy other than in the course of established government agency or judicial proceedings. In this connection, it should likewise be noted that a foreign national (but not a lawfully admitted resident alien) is prohibited from making campaign contributions to a candidate for U.S. political office.[73]

Furthermore, general federal and state taxation of foreign persons, as described separately in Chapter II, may require annual or more frequent reporting.

State Regulation

The principal general state law restrictions affecting equally all investments from abroad are those on inheritance by foreign persons. These not only may limit that one method of foreign acquisition of U.S. investments, but may discourage U.S. investment by any nonresident alien individual who may wish to bequeath his holdings to other foreign

persons. Such states may be divided into two principal categories: (1) those which prohibit inheritance in case of local judicial determination that the heir's country will deprive him of his inheritance (potentially applicable especially to communist controlled countries) — including Connecticut, Massachusetts, New Jersey, New York, and Wisconsin; and (2) those that prohibit inheritance in case of a determination that the heir's country would not reciprocally permit a U.S. person to inherit from one of its own domiciliaries — including Iowa, Nebraska, North Carolina, and Wyoming. A few states impose other inheritance restrictions — for example, Kansas requires that an alien heir be eligible for U.S. citizenship. On the other hand, certain state statutes provide that, if a general state restriction on foreign ownership of particular property applies, a foreign heir nevertheless will have a substantial period to dispose of the property.[74]

While the U.S. Supreme Court has invalidated the application of such an Oregon inheritance statute where the state court commented critically on the political system of the foreign country involved, generally this has not been interpreted to invalidate the application of existing such foreign deprivation and reciprocity statutes where limited to a mechanical reading of foreign law.[75]

Other state restrictions on foreign investments — with the exception of real estate and natural resource restrictions which are discussed specifically in Chapter III — often have been invalidated or subjected to narrow judicial interpretation under the equal protection clause of the Fourteenth Amendment, or the foreign relations and other provisions of the U.S. Constitution. While nonresident aliens and foreign legal entities enjoy fewer constitutional benefits than persons lawfully present within the United States, such *state* discrimination generally may run afoul of the federal conduct of U.S. foreign relations.[76]

Such state law restrictions also may be specifically invalidated by the federal Civil Rights Act of 1964[77] if based on race or national origin.

Special Rules

In addition to the general regulation and reporting requirements above, special federal and state regulation and reporting of foreign investments in U.S. agricultural and other real estate and natural resources are discussed in Chapter III. Special national limitations on imports are covered in Chapter V. Foreign investment limitations in certain industries and other selected aspects of new U.S. business enterprises are discussed in Chapter VI. Furthermore, certain reporting considerations in connection with foreign portfolio investments in U.S. stocks and debt securities are explored in Chapter IX.

Footnotes to Chapter I

1. *See generally* Uniform Partnership Act.
2. *See generally* Uniform Limited Partnership Act.
3. *See generally* Model Business Corporation Act.
4. *See generally* I.R.C. Subtitle A, especially §§1, 11.
5. *See generally* I.R.C. Subtitle B, especially §§2001-2057, 2201-2209, 2501-2622; I.R.C. §1023.
6. 35 Fed. Reg. 15623; *see, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§4321 *et seq.*; Environmental Quality Improvement Act of 1970, 42 U.S.C. §§4371 *et seq.*; Fair Credit Reporting Act of 1970, 15 U.S.C. §§1681 *et seq.*; Truth in Lending Regulations, 12 C.F.R. Part 226; 15 U.S.C. §§2301 *et seq.* The increasingly controversial area of nuclear power and materials is governed substantially by the Nuclear Regulatory Commission. *See, e.g.*, 42 U.S.C. §§5841 *et seq.*
7. 15 U.S.C. §§77a-77aa.
8. 15 U.S.C. §§78a-78hh.
9. 15 U.S.C. §§80a-1 through 80a-52.
10. 15 U.S.C. §§80b-1 through 80b-21.
11. 15 U.S.C. §§77aaa-77bbbb.
12. 15 U.S.C. §§ 79-79b.
13. 15 U.S.C. §§78aaa-78*lll*.
14. 15 U.S.C. §§1-7, 12-27, 41-58.
15. 15 U.S.C. §§1311-1314; 15 U.S.C. §§1-3, 16, 28, 29; 47 U.S.C. §401; 49 U.S.C. §§43-45.
16. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Consumer Goods Pricing Act of 1975, Pub. L. 94-145 (Dec. 12, 1975), 89 Stat. 101.
17. United States v. Topco Assocs., 405 U.S. 596 (1972).
18. *See* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
19. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).
20. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963); Fashion Originator's Guild of America v. F.T.C., 312 U.S. 457 (1941).
21. Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925).
22. United States v. Container Corp. of America, 393 U.S. 333 (1969).
23. *See, e.g.*, Milk & Ice Cream Can Inst. v. F.T.C., 152 F. 2d 478 (7th Cir. 1946); Bond Crown & Cork Co. v. F.T.C., 176 F. 2d 974 (4th Cir. 1949); National Macaroni Mfrs.' Ass'n v. F.T.C., 345 F. 2d 421 (7th Cir. 1965); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930); United States v. First Nat'l Pictures, Inc., 282 U.S. 44 (1930).
24. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968); Keifer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
25. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977).
26. *See* United States v. Loew's, Inc., 371 U.S. 38 (1962); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).
27. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942). *But see, e.g.*, Dehydrating Process Co. v. A. O. Smith Corp., 292 F. 2d 653 (1st Cir. 1961), *cert. denied*, 368 U.S. 931 (1961).
28. *See* Mueller Co. v. F.T.C., 323 F. 2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).
29. *See* Minneapolis-Honeywell Regulator Co. v. F.T.C., 191 F. 2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).
30. *See, e.g.*, Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).
31. 29 U.S.C. §§151 *et seq.*
32. *See generally* 29 U.S.C. §213.
33. 29 U.S.C. §§651-678.
34. Marshall v. Barlow's, Inc., 98 S.Ct. 1816 (1978).
35. *See generally* 42 U.S.C. §§2000c through 2000e-17.
36. Dothard v. Rawlinson, 433 U.S. 321 (1977).
37. 29 U.S.C. §§621-634.
38. 29 U.S.C. §§1001-1381.
39. 35 U.S.C. §101.

40. *See, e.g.*, Morton v. New York Eye Infirmary, 17 Fed. Cases 879 (S.D.N.Y. 1862); Gottschalk v. Benson, 409 U.S. 63 (1972).

41. 35 U.S.C. §102(a).

42. A. Seidel, *What the General Practitioner Should Know About Patent Law and Practice* 71 (3d ed. 1975).

43. 35 U.S.C. §119; *see also* Patent Cooperation Treaty, Pub. L. 94-131, 89 Stat. 685 (entered into force January 24, 1978). These countries include, *inter alia*, Algeria, Argentina, Australia, Austria, the Bahamas, Belgium, Benin, Bolivia, Brazil, Bulgaria, Cameroon, Canada, Central African Republic, Chad, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Estonia, Finland, France, Gabon, Federal Republic of Germany, German Democratic Republic, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Kenya, Korea, Latvia, Lebanon, Liechtenstein, Luxembourg, Malagasy, Malawi, Malta, Mauritania, Mauritius, Mexico, Monaco, Morocco, Nauru, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Papua New Guinea, Paraguay, the Philippines, Poland, Portugal, Romania, San Marino, Senegal, South Africa, Southern Rhodesia, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, U.S.S.R., United Kingdom, United Republic of Tanzania, Upper Volta, Uruguay, Vatican City, Vietnam, Western Samoa, Yugoslavia, Zaire, and Zambia.

44. 35 U.S.C. §102(b).

45. *See, e.g.*, City of Elizabeth v. Nicholson Pavement Co., 97 U.S. 126 (1877).

46. 35 U.S.C. §102(d).

47. 35 U.S.C. §§184-186.

48. 35 U.S.C. §103.

49. *See, e.g.*, Graham v. John Deere Co., 383 U.S. 1 (1966).

50. 35 U.S.C. §287.

51. 35 U.S.C. §271(a). Unlike certain other countries, the United States does not require the payment of a tax to maintain the life of the patent.

52. 35 U.S.C. §261.

53. 35 U.S.C. §281.

54. 35 U.S.C. §282.

55. *See* Comment, "A Market-Oriented Revision of the Patent System," 21 U.C.L.A. L. Rev. 1042. 1061-1063 (1974).

56. *See generally* 35 U.S.C. §§283-286.

57. The formula for Smith's black coughdrops apparently is over 100 years old; the secret metallurgical process used to manufacture the best grade of cymbals has been kept a secret in the same family for centuries. A. Seidel, *supra* note 42, at 134.

58. 17 U.S.C. app. §102(a).

59. If the copyrighted work is a phonorecord, the symbol Ⓟ must be used instead. *See* 17 U.S.C. app. §402(b).

60. 17 U.S.C. app. §401(b). In addition, it is the responsibility of the copyright owner to deposit two copies of the best edition of the work with the U.S. Library of Congress within three months after publication. However, this deposit requirement is expressly excluded as a condition of copyright protection. 17 U.S.C. §407.

61. *See* 17 U.S.C. app. §§408-409, 411-412; Universal Copyright Convention. Two copies of the best edition of the work must accompany the application only for a work first published in the United States. For an unpublished work, or a work first published outside the United States, only a single such copy need be submitted.

62. *See* 17 U.S.C. app. §§201, 203-205.

63. 17 U.S.C. app. §302(a). This period applies to works created after January 1, 1978, and only to those which are not anonymous or pseudonymous; somewhat different time limits are provided for other works. *See* 17 U.S.C. app. §§302-304.

64. *See* 17 U.S.C. app. §§502-507.

65. 15 U.S.C. §§1051, *et seq.* Several trademark conventions also apply.

66. 50 U.S.C. §§1 *et seq.*; 31 C.F.R. Parts 500, 515, 530; *see also* 31 C.F.R. Part 520. These countries currently include Cambodia, Cuba, North Korea, North and South Vietnam, the People's Republic of China, and Rhodesia. However, the President of the United States announced that, effective January 1, 1979, the United States recognized the government of the People's Republic of China as the sole legal government of China. *See* Memorandum of Dec. 30, 1978, 44 Fed. Reg. 1075.

67. 8 C.F.R. Parts 501-510.

68. E.O. 11858, 3 C.F.R. (1975).

69. *Cf.* United States-Argentina Treaty of Friendship, Commerce and Navigation of 1853, Art. IX; United States-Saudi Arabia Treaty of General Relations of 1933, Art. II. The multilateral Code of Liberalization of Capital Movements adopted by the Organization for Economic Cooperation and Development, of which the United States is a member, does not provide for mandatory rules. *See, e.g.*, G. Baldwin, "Protection of the Property and Person of the Foreign Investor," *Current Legal Aspects of Foreign Investment in the United States* (1976); W. Grimes & P. Williams, "Limitations Imposed by the Constitution and Treaties of the United States on the Treatment of Foreign Direct Investment," *Foreign Investment in the United States* (1977).

70. 15 C.F.R. Parts 802-806. These are required under the International Investment Survey Act of 1976, 22 U.S.C. §§3101-3108. Previous studies of foreign direct investments and foreign portfolio investments in the United States under the Foreign Investment Study Act of 1974, Pub. L. 93-479, have already been completed by the Department of Commerce and the Department of the Treasury. In addition, a survey of international leasing transactions, including transactions between U.S. and unaffiliated foreign persons, was undertaken for 1975 and may be incorporated in five-year benchmark surveys by the Department of Commerce. *See* 15 C.F.R. Part 805.

In even earlier such federal and other surveys, foreign direct investment often was defined as a 25% or greater interest in the voting stock or an equivalent interest in the U.S. enterprise.

71. 31 C.F.R. Part 129.

72. 22 U.S.C. §§611 *et seq. But see* Att'y Gen. of the United States v. Covington & Burling, 411 F. Supp. 371 (D.D.C. 1976), 430 F. Supp. 1117 (D.D.C. 1977).

73. 18 U.S.C. §324.

74. *See, e.g.*, F. Morrison, "Limitations on Alien Investment in American Real Estate," 60 Minn. L. Rev. 621, 637-638 (1976).

75. *See* Zschernig v. Miller, 389 U.S. 429 (1968); F. Morrison, *supra* note 74, at 646-650; W. Weber, "Foreign Direct Investment in United States Real Estate: Xenophobic or Principled Reaction?" 28 U. Fla. L. Rev. 491, 515-516 (1976).

76. *See* G. Baldwin, *supra* note 69; W. Grimes & P. Williams, *supra* note 69.

77. Pub. L. 88-352 (July 2, 1964), 78 Stat. 255. However, with respect to discrimination based generally on alienage, see, *e.g.*, 42 U.S.C. §2000e-1.