

New and Expanding Business in Alabama

Prepared by



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INTRODUCTION

With the location of such well-known companies as Mercedes Benz, Honda, Boeing, Toyota, and ThyssenKrupp in recent years, Alabama has succeeded in raising its profile in the economic development community while, at the same time, improving the standard of living for its residents. Although these successes are relatively recent, they are only the most visible results of the efforts of a number of citizens, public officials, and economic development organizations over many years to make Alabama an attractive place for new and expanding businesses. Founded in 1922, Balch & Bingham LLP has participated in the economic development of Alabama in a variety of roles including:

- representation of industrial and commercial clients in the identification, negotiation, and realization of tax and other incentives for new investment in the State;
- preparation of legislation creating many of the incentives currently available to new projects in the State;
- representation of the State, the Alabama Development Office, and/or the Economic Development Partnership of Alabama in the successful efforts to attract such companies as Mercedes Benz, Honda, Boeing, ThyssenKrupp, IPSCO Steel, and TRICO Steel; and
- service as bond counsel for taxable and tax-exempt bond issues to finance industrial and commercial projects and to fund state-sponsored industrial and economic development programs.

We recognize that when locating major new investments, companies evaluate a number of factors that are beyond the scope of this brochure, including the prevailing business climate, the development of public infrastructure, the quality of the public educational system, the availability and sophistication of the potential workforce, access to raw materials, suppliers and customers, and quality of life issues for their employees. In these materials, we will summarize certain other matters which are important in the site selection process including the State's existing business tax structure, available tax and non-tax incentives for economic development, and the use of taxable and tax-exempt bonds to finance industrial and commercial projects. We will also describe the process for obtaining necessary environmental permits for new projects, the current labor and employment climate in the State, intellectual property issues, and various business entities that companies may use when locating in the State.

BUSINESS ENTITIES

One of the first steps for any company locating in Alabama is to determine the type of business entity that will be used. The type of business entity chosen will determine how the business will be operated, what type of liability protection will be provided, how the business will be taxed, and who can take part in ownership. There are several choices and each has its advantages and disadvantages.

For-Profit Entities

Sole Proprietorship

A sole proprietorship is a business owned and managed by one person, who is personally liable for all business debts and obligations. For tax purposes, the owner and his or her business are one entity, meaning that business profits are reported and taxed on the owner's personal tax return.

Corporation

Corporations are governed by the Alabama Business Corporation Act, codified at Ala. Code §§ 10-2B-1.01 *et seq.* A corporation is a distinct legal entity. Thus, a corporation can open a bank account, own property, and do business, all under its own name. The main advantage of a corporation is that its owners, known as stockholders or shareholders, are not personally liable for the debts and liabilities of the corporation.

The Internal Revenue Service (the "IRS") and the Secretary of State allow for a corporation to be taxed as either a C corporation or an S corporation. A C corporation is taxed at two levels. The corporation must first pay a corporate tax on its corporate income and then it distributes profits to its stockholders who must pay tax on the dividends. To avoid the double taxation of a C corporation, incorporators may make a special election to be taxed as an S corporation, which is a pass-through entity taxed like a partnership or a sole proprietorship. The corporate profits pass-through to the owners, who pay tax on the profits at their individual tax rates.

Unless a delayed effective date is specified, a corporation's existence begins when articles of incorporation are filed with the probate judge of the county in which the corporation is to have its initial registered office for filing. The Alabama Secretary of State requires for-profit corporations to reserve a corporate name before filing their articles of incorporation. Alabama law requires that certain information be included in the articles of incorporation. For instance, the articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and, prior to the issuance of shares of a class, the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. The State also permits optional provisions to be integrated into the articles of incorporation. For example, a corporation may adopt bylaws that contain provisions for managing the business and regulating the affairs of the corporation. Generally, a corporation's board of directors adopts initial bylaws unless the right to adopt them is reserved to the shareholders in the articles of incorporation.

Each corporation must have a board of directors, which must include at least one director. All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in a shareholder agreement. Directors of a corporation owe duties of loyalty and care to the corporation. Generally, this means the directors must act in good faith, with reasonable care, and in the best interest of the corporation. A corporation's bylaws or its board of directors may appoint officers that typically oversee the day-to-day operations of the corporation.

The shareholders of a corporation are required to meet at least annually. Annual shareholders' meetings may be held in or out of state at the place stated in or fixed in accordance with the bylaws. A corporation may also hold special shareholders' meetings. A corporation must notify shareholders in writing of the date, time, and place of each annual and special shareholders' meeting no fewer than 10 nor more than 60 days before the meeting date. Unless the articles of incorporation or bylaws provide otherwise, shareholders and directors may act without a meeting if the action is taken by all the shareholders or directors, as applicable.

Pursuant to the Revised Alabama Professional Corporation Act, codified at Ala. Code §§ 10-4-380 *et seq.*, incorporators may choose to incorporate as a professional corporation. Domestic professional corporations may be organized only for the purpose of rendering services which may lawfully be performed only pursuant to a license issued by a state court, state regulatory licensing board, or other like agency pursuant to state laws. A domestic professional corporation may issue shares only to individuals who are authorized to render a professional service permitted by the articles of incorporation of such professional corporation.

Partnership

Unlike a corporation, a partnership is not considered a separate and distinct legal entity. Profits and losses are passed through to the partners in accordance with their partnership interests and reported on their individual income tax returns. There are several different partnership forms, including: (i) the general partnership; (ii) the limited partnership ("LP"); (iii) the limited liability partnership ("LLP"); and (iv) the professional limited liability partnership.

A general partnership is an association of two or more persons to carry on as co-owners a business for profit, whether or not the persons intended to form a partnership. General partners share equal rights and responsibilities in connection with the management of the business, and any individual partner can bind the entire group to a legal obligation. Each individual partner assumes full responsibility for all of the business's debts and obligations. Even though general partnerships in Alabama are formed without any formal procedures, they are still subject to the Alabama Uniform Partnership Act (1996) (the "AUPA"), codified at Ala. Code §§ 10-8A-101 *et seq.* Thus, to avoid any unwanted default rules of the AUPA, partners should enter into a partnership agreement, whereby they can establish the terms and conditions of the partnership relationship.

LPs are governed by the Alabama Limited Partnership Act of 1997 (the "ALPA"), codified at Ala. Code §§ 10-9B-101 *et seq.* To form a LP, a certificate of limited partnership must be delivered to the judge of probate of the county in which the registered office is located.

Every LP has two types of partners—general partners and limited partners. General partners control the daily operations of the business and assume the debts and obligations of the business. Limited partners may contribute capital to the partnership but do not participate in the daily operations of the business. A LP allows limited partners to restrict their personal liability to the amount of their contribution. Partners in a LP should consider entering into a partnership agreement to avoid any unwanted default rules of the ALPA.

LLPs are governed by the registered LLP sections of the AUPA. To become a LLP, a partnership shall file with the judge of probate in the county in which the partnership has its principal office, and with the Alabama Secretary of State, a registration stating the name of the LLP, the address of its principal office, a brief statement of the LLP's business, and a statement that the partnership thereby registers as a LLP. LLPs operate like a LP, but give each member an equal voice in managing the business and protect all members from personal liability, except to the extent of their investment in the LLP.

Professional LLPs are governed by Ala. Code § 10-8A-1010. A professional LLP may only render professional services within a single profession and may not engage in any business other than rendering the professional services which it was formed to render. Every individual who renders professional services as a partner or an employee of a professional LLP shall be liable for any negligence or wrongful act or omission in which the individual personally participates to the same extent the individual would be liable if the individual rendered the services as a sole practitioner.

Limited Liability Company

Limited liability companies (“LLCs”) are governed by the Alabama Limited Liability Company Act, codified at Ala. Code §§ 10-12-1 *et seq.* The use of LLCs is becoming increasingly popular because they combine the personal liability protection of a corporation with the tax benefits of a partnership. In other words, the owners (or members) of an LLC not only avoid personal liability for its debts and liabilities but also have the benefit of being taxed only once on their profits. Additionally, LLCs are more flexible than an S corporation.

One or more persons may form an LLC by filing articles of organization with the probate judge of the county in which the initial registered office of the LLC is located. In addition, most LLC members adopt an operating agreement in order to avoid the statutory default rules that are applicable in the absence of having an operating agreement.

An LLC may be managed by either members or managers. In a member-managed LLC, managerial control and binding authority are vested in all of the members of the LLC. In a manager-managed LLC, only the appointed managers may vote on management decisions of the LLC. Managers may or may not also be members of the LLC. The articles of organization may grant to all or certain identified members or managers or a specified class or group of members or managers the right to vote separately or with all or any class or group of members or managers on any matter.

An LLC may be organized to render professional services, provided that it only renders one specific type of professional service. A professional LLC may render professional services

in Alabama only through individuals permitted to render those services in Alabama. A member's interest in a professional LLC may be voluntarily transferred only to a person who is licensed or registered to render the professional services for which the professional LLC was organized.

Nonprofit Entities

Nonprofit Corporations

Nonprofit corporations are governed by the Alabama Nonprofit Corporation Act, codified at Ala. Code §§ 10-3A-1 *et seq.* Nonprofit corporations may be exempt from federal and state income tax if they include certain provisions in their articles of incorporation and receive a determination letter from the IRS granting tax-exempt status. Incorporators must file articles of incorporation with the probate judge of the county in which the corporation is to have its initial registered office. The articles of incorporation must set forth the name of the corporation, its period of duration, the purpose or purposes for which the corporation is organized, a statement regarding whether the corporation will have members, the location and mailing address of its initial registered office and the name of its initial registered agent at such address, the number of directors constituting the initial board of directors and the names and addresses of the initial directors, the name and address of each incorporator, and any other provisions concerning the internal affairs of the corporation, including any provision for the distribution of assets on dissolution or final liquidation. Unlike for-profit corporations, the Alabama Secretary of State does not require nonprofit corporations to reserve a corporate name before filing their articles of incorporation.

Nonprofit Associations

Nonprofit associations may be formed under the Alabama Unincorporated Nonprofit Association Act (the "AUNAA"), codified at Ala. Code §§ 10-3B-1 *et seq.* Although the AUNAA does not require any formal procedures to start a nonprofit association, a nonprofit association may acquire and transfer property in its name, and is considered a legal entity separate from its members for purposes of determining and enforcing rights, duties, and liabilities in contract and tort.

Qualifying to do Business in Alabama

A foreign corporation, i.e., any corporation incorporated in any state other than Alabama, may not transact business or maintain a proceeding in Alabama until it obtains a certificate of authority from the Alabama Secretary of State. All contracts or agreements made or entered into in Alabama by foreign corporations prior to obtaining a certificate of authority to transact business in Alabama shall be void at the action of the foreign corporation or by any person claiming through or under the foreign corporation by virtue of the contract or agreement. Conversely, the failure of a foreign LLC or LLP to register in Alabama does not impair the validity of any contract or act of a foreign LLC or LLP and shall not prevent the foreign LLC or LLP from defending any action or proceeding in any court in Alabama. However, a foreign LLC or LLP shall not maintain any action or proceeding in any court in Alabama until it has filed an application for registration.

CURRENT TAX STRUCTURE APPLICABLE TO BUSINESSES IN ALABAMA

The following discussion summarizes the general business taxes applicable to entities doing business in Alabama.

Corporate Income Tax

The Alabama corporate income tax is imposed on each foreign or domestic corporation which is (i) domiciled in Alabama, (ii) licensed or qualified to do business in Alabama, (iii) doing business in Alabama, or (iv) deriving income from sources within the State. The tax is imposed annually on the net taxable income of a corporation at a flat rate of 6.5% for taxable years beginning after December 31, 2000.

Alabama net taxable income is determined by allocating and apportioning income to Alabama. Alabama apportioned income is determined using an equally weighted three-factor apportionment formula which includes traditional property, payroll, and sales factors.

Alabama does not, in general, impose an entity-level tax on S corporations, LLCs, or partnerships treated as pass-through entities under federal tax law. Partners, members, or shareholders may be subject to Alabama's personal income tax on their distributive or prorated shares of income. The top marginal personal income tax rate is 5%.

Key Points:

- The corporate income tax rate is 6.5%.
- Alabama's corporate income tax has been substantially conformed to federal corporate tax law.
- Alabama allows consolidated income tax reporting for all corporations having nexus with the State.
- Alabama allows a deduction for federal income taxes paid.
- The Alabama tax classification of an LLC follows the federal tax classification.
- Alabama has adopted the Multistate Tax Compact ("MTC"), the Uniform Division of Income for Tax Purposes Act ("UDITPA"), and most of the MTC's regulations.
- Alabama requires composite returns and composite payments on behalf of certain non-resident members of subchapter K entities.

Business Privilege Tax

The business privilege tax is a tax on the apportioned net worth of all corporations, limited liability entities ("LLEs"), and disregarded entities which do business in Alabama or are organized, incorporated, qualified, or registered under the laws of Alabama.

The privilege tax accrues on January 1 of each year and is due 2½ months after the beginning of the taxable year for corporations, 3½ months after the beginning of the taxable year for LLEs, and no later than the time its owner is required to file the return for disregarded entities. A new entity must calculate the tax on the day it is organized or first does business in the State and is allowed to prorate the tax based on the number of days it does business during the short taxable year. Business privilege tax returns for 2007 state that initial returns are due within 2½ months of incorporation or qualification to do business in Alabama.

- Tax Rates - tax rates are graduated and based on federal taxable income apportioned to Alabama:

<u>Prior Year's Taxable Income</u>	<u>Tax Rate</u>
Less than \$1	\$0.25 per \$1000
\$1 to \$200,000	\$1.00 per \$1000
\$200,000 to \$500,000	\$1.25 per \$1000
\$500,000 to \$2,500,000	\$1.50 per \$1000
\$2,500,000 and over	\$1.75 per \$1000

- Tax Caps - the minimum amount of tax is \$100. The maximum amount of tax for most taxpayers is \$15,000. For insurance companies subject to premium taxes, the maximum amount of tax is \$3,000,000.
- Tax Caps for Financial Institutions - for financial institutions subject to the financial institution excise tax, the minimum amount of tax varies based on the total amount of Alabama deposits. The maximum amount of tax is 3,000,000.
- Family Limited Liability Entities - the tax on a qualified family limited liability entity is no greater than \$500 if it makes an annual election.
- Consolidated Reporting - not allowed.

Sales and Use Taxes

The state general sales tax rate on retail sales of tangible personal property is 4%. Machinery and equipment used in a manufacturing process is subject to a reduced rate of 1.5%. In addition, local counties and municipalities may also levy sales and use taxes.

The use tax is a complementary tax to the sales tax. Alabama use tax is imposed on the storage, use, or other consumption of tangible personal property in the State. Local counties and municipalities may also impose a use tax. The use tax is not imposed if the property is subject to the Alabama sales tax. In contrast to the sales tax which requires the seller to collect and remit the tax, the purchaser is subject to the use tax and must remit the tax to the proper state, municipal, or county authorities.

There are several sales and use tax exemptions. Some of the major exemptions include the following purchases:

- Wholesale Sales - purchases for resale are exempt.
- Pollution Control Equipment - all equipment and materials purchased primarily for the control, reduction, or elimination of air or water pollution are exempt.
- Raw Materials - raw materials used by manufactures or compounders as an ingredient or component part of the manufactured or compounded product are exempt.

Utility Gross Receipts Tax

The Alabama utility gross receipts tax is imposed on every utility furnishing electricity, domestic water, natural gas, telegraph services, and telephone services in Alabama. Local counties and municipalities may also levy a utility gross receipts tax. Although this is a direct tax on the utility service purchaser, it is collected by the utility service provider, with liability for payment of the tax remaining with the proper state, municipal, or county authorities.

The tax is due monthly on the gross sales or gross receipts from the sale of taxable utility services in Alabama at the following rates:

- For electricity, domestic water, or natural gas:

If monthly gross sales or gross receipts respecting a person are:

Not over \$40,000

Over \$40,000 but not over \$60,000

Over \$60,000

The tax is:

4% of such gross sales or gross receipts

\$1600 plus 3% of the excess over \$40,000

\$2200 plus 2% of the excess over \$60,000

- For telegraph and telephone services, 6% of such gross sales or gross receipts.

There are several exemptions and exclusions from the utility gross receipts tax, including the following:

- Wholesale sales.
- The furnishing of electricity, natural gas, or domestic water for use or consumption by, in, or for the direct production, generation, processing, storage, delivery, or transmission of electricity, natural gas, or domestic water.
- The furnishing of electricity to a manufacturer or compounder for use in an electrolytic or electrothermal manufacturing or compounding process.

- The furnishing of natural gas to a manufacturer or compounder as a chemical raw material in the manufacturing or compounding of tangible personal property, but not as fuel or energy.
- The furnishing of natural gas to be used by a manufacturer or compounder to chemically convert raw materials prior to the use of the converted raw materials in an electrolytic or electrothermal manufacturing or compounding process.
- The furnishing of utility services through the use of a prepaid telephone calling card.

Leasing or Renting of Tangible Personal Property Tax

Alabama imposes a privilege tax on each person engaging or continuing in the business of leasing or renting tangible personal property within the State. Counties and municipalities may also impose such a tax at the local level. The general rate at the state level is 4% of the gross proceeds from the leasing or renting of tangible personal property. There is a reduced rate of 1.5% of the gross proceeds from the leasing or renting of automotive vehicles, truck trailers, semitrailers, or house trailers, and a reduced rate of 2% of the gross proceeds from the leasing or renting of linens and garments.

Property Taxes

All real and personal property located in Alabama is subject to property taxes, unless specifically exempted. The State millage rate on both real and personal property is limited by the Alabama Constitution to 6½ mills or \$6.50 per \$1000 of assessed value. Counties, cities and school districts may also impose property taxes and these local rates vary.

The owner of real property and tangible personal property with situs in Alabama on October 1 of each year is assessed property taxes. All taxable property must be assessed with the tax assessor in the county in which the property is located between October 1 and December 31 of each year. Alabama arrives at an assessed value for property based upon four different classifications: (i) business property is assessed at 20% of its appraised value; (ii) utility property is centrally assessed at 30% of its appraised value; (iii) agricultural, forest, and residential property, and historic buildings are assessed at 10% of appraised value; and (iv) private passenger automobiles and trucks are assessed at 15% of appraised value.

Major statutory property tax exemptions include the following:

- Inventory - inventories of goods, wares, and merchandise for sale are not subject to property tax. Inventories of raw materials for use as an ingredient or component part of a manufactured or compounded product are also exempt.
- Pollution Control Equipment - all equipment and materials purchased primarily for the control, reduction, or elimination of air or water pollution are exempt.

INCENTIVES FOR THE LOCATION OF NEW AND EXPANSION PROJECTS

Since the adoption of the Cater Act in 1949 by which Alabama became one of the first states in the nation to permit industrial revenue bond financing, Alabama has created a number of tax and non-tax incentives to encourage new industrial and commercial facilities in the State. The most commonly used programs offered throughout the State are summarized below.

ADO Notification

The Alabama Development Office (“ADO”) is the department of State government primarily responsible for recruiting new industry to the State. ADO must be notified in advance of any new or expansion project for which any of the following incentives will be requested:

- capital investment credits;
- site preparation grants;
- funding for access roads and bridges through the Alabama Industrial Access Road and Bridge Corporation;
- training and other assistance from the Alabama Industrial Development Training Program exceeding \$1,000,000 annually; or
- any other direct or indirect payment from the State whether in cash, in kind, or otherwise.

The ADO Director must be notified, either orally or in writing, about the general parameters of a project if an entity is considering locating or expanding a facility at a site within the State and intends to claim any of the incentives listed above. This initial notification must be made as soon as the project’s parameters are generally known or when a site has been identified. This requirement of state law is intended to establish ADO as the focal point for allocating industrial and economic incentives in the State and to permit the State to allocate its limited economic development resources more efficiently.

Tax Abatements

Subject to certain geographical and jurisdictional limitations and qualifications, cities, counties, and public industrial authorities may grant abatements of ad valorem (property) taxes, sales and use taxes, and certain mortgage and recording taxes, with respect to real and personal property acquired to establish or expand qualifying industrial and research enterprises in Alabama. To qualify, the business enterprise must be included in Standard Industrial Classification (“SIC”) (or equivalent North America Industry Classification Systems, “NAICS”) Major Groups 20-39 (manufacturing enterprises), 50 (wholesale trade of durable goods), or 51 (wholesale trade of non-durable goods), Industrial Group No. 737 (computer programming, data processing, and other computer related services), or Industry Nos. 0724 (cotton ginning), 4613 (refined petroleum pipelines), 8731 (commercial physical and biological research), 8733 (non-commercial research organizations), or 8734 (testing laboratories). In addition, eligible enterprises also include trades or businesses described in NAICS Subsector 493 (warehousing or

storage), Industry Number 488310 (port and harbor operations), or Industry Number 488320 (marine cargo handling), if the trade or business is to be conducted on premises in which the Alabama State Port Authority has an ownership, leasehold, or other possessory interest and such premises are used as part of the operations of the Alabama State Port Authority.

There are no minimum investment criteria for new projects. Expansions of existing projects may qualify if the capital cost is at least equal to the lesser of 30% of the original project cost or \$2,000,000. Only the non-educational portions of all property taxes and sales and use taxes at the county and city levels may be abated, with the result that the amount available for abatement will vary from city to city and from county to county, depending upon their local tax structure. The sales and use tax abatement provides a one-time savings on equipment, materials, and other tangible personal property purchased for the construction and equipping of a qualifying facility. The property tax abatement may run for a period of up to 10 years. The beginning and ending dates of the property abatement period depend upon whether bonds are issued to finance the project, the date of acquisition, and the economic life of the property. For large projects, the opportunity exists to maximize potential savings by structuring the exemption period to correspond to stages or phases of project completion.

The granting of these abatements is discretionary with the city, county, or industrial authority involved, although in our experience, most localities in the State are willing to grant the maximum abatements for projects which will create new and better employment opportunities. Certain procedures must be followed to assure that the abatements are validly granted including adoption of a proper resolution by the granting entity and the execution and filing of an appropriate abatement agreement.

Site Preparation Grants

The State Industrial Development Authority (“SIDA”) administers a program of grants which are available to counties, municipalities, and certain public corporations and authorities to defray a portion of the cost of site preparation and other expenditures for qualifying projects. Projects must involve industrial, warehousing, or research activities (i.e., must fall within one of the SIC Code categories described above for tax abatements) or must qualify as a headquarters facility. Grants are based upon a sliding scale percentage of the total capital costs of the qualifying project, with a maximum grant of \$150,000, and must be used by the grantee for: (i) preparation of a means of access to the site; (ii) site drainage; (iii) surveying, clearing, and excavation; (iv) rehabilitation of buildings and other structures; and (v) other necessary or appropriate site preparation work.

Capital Credits

Alabama provides a capital credit to companies that invest in certain projects located in the State. The capital credit is an annual income tax credit equal to 5% of a project’s capital costs each year for a 20-year period. Any unused portion of an annual credit may not be carried forward to future years or back to previous years. In many cases, the capital credit can effectively eliminate Alabama income taxes applicable to income generated by the project. To qualify for the credit, a project must: (i) fall within certain manufacturing, warehousing, research, publishing, or computer service NAICS codes or constitute a headquarters facility;

(ii) involve a capital investment of at least \$2,000,000 (\$1,000,000 for a small business addition or \$500,000 for a project located in a favored geographic area); (iii) create jobs for at least 20 new employees (15 for a small business addition or 5 for a project located in a favored geographic area); and (iv) provide an average wage base of at least \$8 per hour (or \$10 per hour including benefits).

The credit was expanded in 2001 to include projects located in favored geographic areas that meet the criteria listed above. All enterprise zones and certain less developed counties are included in the definition of favored geographic areas. A list of favored geographic areas can be obtained from the Alabama Department of Revenue.

A headquarters facility is defined as a facility that will serve as the national, regional, or state headquarters for an investing company that conducts significant business operations outside the State and will serve as the principal office of the principal operating officer of the qualifying project. The term principal operating officer is defined as the person with chief responsibility for the daily business operations of the qualifying project.

The credit is applied to the Alabama income tax liability generated by or arising out of the qualifying project (“Project Income Taxes”). Project Income Taxes are determined pursuant to an allocation agreement between the investing company and the Alabama Department of Revenue. An allocation agreement will employ a property-payroll-sales formula, a property-payroll formula, or a separate accounting method to compute the Alabama taxable income attributable to the project.

The taxable income determined by the allocation agreement may be earned by investing companies that are C corporations, S corporations, partnerships, LLCs, etc. which do not have to be domiciled in Alabama. If the investing company is a flow-through entity (e.g., a partnership), the owners (e.g., the partners) that incur Project Income Taxes will receive the benefit of the credit.

The term of the capital credit is 20 years, beginning on the date that the qualifying project is placed in service. Where a project involves multiple phases of investment, the capital credit may be claimed for the project as a whole. Thus, the entire investment in a phased project may qualify for the credit even if one or more separate phases would not independently qualify. If the ownership of a qualifying project is transferred after the project is placed in service, the new owner can receive the capital credit for the remainder of the 20-year period.

Because of the large size of the capital credit relative to the Alabama income taxes produced by the project, the credit will usually provide an effective “exemption” from Project Income Taxes. Thus, the net benefit of the capital credit depends on the Alabama income taxes generated during the first 20 years of operations conducted at the qualifying project.

- In order to claim the credit, Form INT must be filed with the Alabama Department of Revenue prior to the date the project is placed in service. This form provides an estimate of the project’s capital costs, projected new employees, and projected payroll. Later, Form INT-2 is filed to report the project’s actual investment, new employees, and payroll.

- For multi-phase projects, Form INT must be filed before the first phase is placed in service, and the credit cannot be utilized until the last phase is placed in service.

At a 5% rate for 20 years, the cumulative total of the gross annual capital credits will equal the cost of the project (5% of project cost x 20 years = 100% of project cost). The example below assumes a \$10,000,000 project which generates \$1,000,000 in annual income.

Credit Computation

Capital Costs	\$10,000,000
Rate of Credit	<u>x 5%</u>
Capital Credit	<u>\$ 500,000</u>

Net Benefit Computation*

	<u>Without Capital Credit</u>		<u>With Capital Credit</u>	
	<u>Federal</u>	<u>Alabama</u>	<u>Federal</u>	<u>Alabama</u>
Gross Income	\$ 1,000,000	\$ 1,000,000	\$ 1,000,000	\$ 1,000,000
Tax Deduction	<u>(43,870)</u>	<u>(325,084)</u>	<u>(-0-)</u>	<u>(340,000)</u>
Net Income	956,131	674,916	1,000,000	660,000
Tax Rate	<u>x 34%</u>	<u>x 6.5%</u>	<u>x 34%</u>	<u>x 6.5%</u>
Gross Taxes	325,084	43,870	340,000	42,900
Less: Capital Credit	<u>n/a</u>	<u>-0-</u>	<u>n/a</u>	<u>(500,000)**</u>
Net Taxes	<u>\$ 325,084</u>	<u>\$ 43,870</u>	<u>\$ 340,000</u>	<u>\$ -0-</u>
Total taxes without capital credit			\$ 368,954	
Total taxes with capital credit			<u>(340,000)</u>	
Net annual benefit of credit			<u>\$ 28,954</u>	
Total benefit for 20 years:			<u>\$ 579,078</u>	
Present value of tax benefit at 6%:			<u>\$ 332,100</u>	
Present value as a percentage of project costs:			<u>3.32%</u>	

* This simplified computation provides a gross estimate of a cross-accrual of tax deductions between the federal and Alabama income tax returns in order to determine the total tax benefit of the capital credit. Actual results may differ.

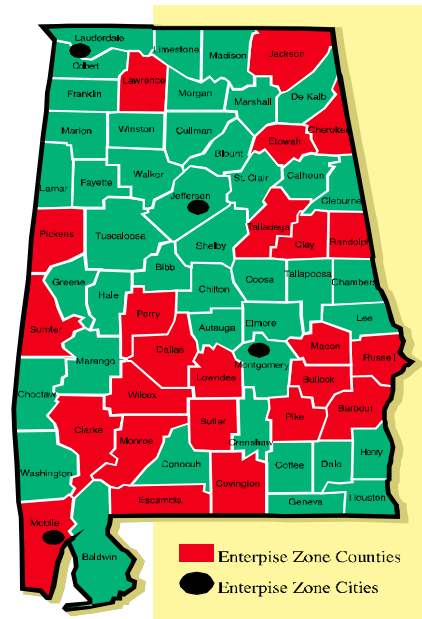
** Alabama law does not provide for any carryforward or carryback of the unused portion of the annual capital credit. In most cases, the entire amount of the capital credit cannot be fully utilized each year because it is limited to Alabama income tax liability.

Exemptions for Pollution Control Equipment

Machinery, equipment, and materials used or constructed primarily for the control, reduction, or elimination of air or water pollution are exempt from all property taxation in the State. The purchase of all such equipment, machinery, and materials is also exempt from sales and use taxation.

Enterprise Zones

Twenty-seven (27) enterprise zones, consisting of 24 counties and 3 cities, have been established throughout the State to encourage the construction of new facilities and the creation of new employment opportunities in those areas. To qualify for the incentives available under the enterprise zone program, a company must: (i) be located in an enterprise zone; (ii) must fall within SIC Codes 20-42, 44-49, or consist of major warehousing, distribution centers, or headquarters facilities for those types of industries; (iii) must expand its labor force, make new capital investment, or prevent a loss of employment; (iv) may not have reduced employment elsewhere in Alabama to expand into an enterprise zone; and (v) must be approved for participation by the appropriate local governmental unit. Qualifying projects may receive credits against State income taxes, up to a maximum of \$2500 per permanent new employee, as follows:



- Income Tax Credit - 80% credit against state income taxes due from operations within the zone in the first year, reducing to 20% in the fifth year, if at least 30% of new permanent employees were previously unemployed for at least 90 days.
- Investment Tax Credit - further credits against state income taxes equal to 10% of first \$10,000 invested, 5% of next \$90,000, and 2% of remaining investment.
- Employee Training Credit - a credit of up to \$1000 per new permanent employee for expenses of employee training.

Additionally, for projects in which at least 35% of the employees reside in the enterprise zone and were either unemployable or were previously receiving public assistance, and which give preferences to Alabama suppliers, contractors, and labor, certain additional sales and use tax and income tax exemptions may be available. Certain other non-tax incentives may also be available. Eligibility for any of these benefits is subject to compliance with specific regulations of the Alabama Department of Economic and Community Affairs (“ADECA”).

AIDT Employee Screening, Hiring, and Training

One of the most valuable and successful non-tax incentives offered by the State to new and expanding industries is the program of employee screening, hiring, and training administered by Alabama Industrial Development Training (“AIDT”), an agency of state government. The State has offered these types of programs since 1971 and, particularly in recent years under the leadership of Ed Castile, Director of AIDT, has received consistently favorable reviews from client industries.

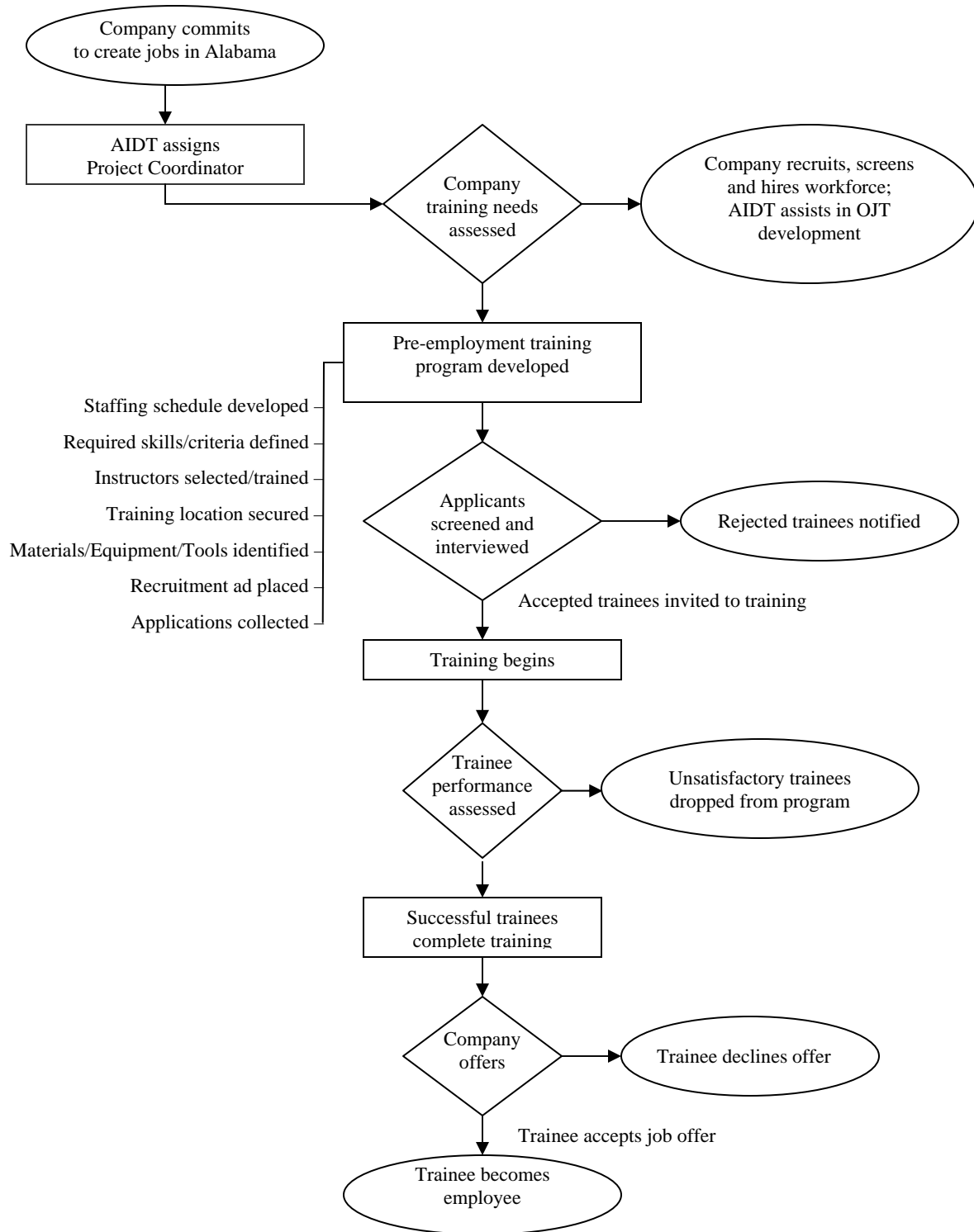
Workforce Development

Once a company has committed to construct or expand a facility in the State which will meet AIDT’s criteria for jobs and wages, AIDT is available to provide a variety of training programs at no cost to the company:

- recruiting, assessing, and training potential employees;
- developing and producing training materials;
- providing a location and the necessary equipment for the training program; and
- other customized services.

Throughout the process, AIDT works closely with the employer to identify the skills, knowledge, and behavior sought for potential employees, to structure the training program content, to identify suitable instructors (frequently company personnel), to determine the location and scheduling of training, and to identify the materials, tools, and equipment necessary for the particular training assignment. AIDT then advertises the training opportunity and recruits candidates who meet the company’s criteria, typically receiving 2500 applications for 50 candidates invited to interviews and 25 selected to attend the training program. Those who are selected typically attend 3 to 4 hour sessions twice a week for 10 weeks, providing 60 to 80 hours of exposure to each candidate so that they can be evaluated on the basis of attitude, character, work ethic, teamwork, and the ability to learn. Candidates who successfully complete the training program are available for hire by the company. The company is not obligated to offer positions and the candidates are not obligated to accept positions with the company. However, the personal investment and commitment required of each candidate to attend and complete the training program generally produces a pool of potential employees who are not only qualified and trained, but motivated as well.

AIDT Workforce Development Process



Other AIDT Programs

AIDT also offers other programs that are too numerous to describe in detail in this brochure. They include, however, management training programs teaching leadership fundamentals, Zenger-Miller training programs, TQM, and ISO 9000 certifications. In addition, AIDT's programs in Business Process Reengineering and Technology Integration ("BPRTI") have proven valuable to many companies wishing to reengineer and modernize their manufacturing processes, develop new products, and establish or improve integrated information networks.

Additional information about AIDT and its programs can be obtained from AIDT in:

Montgomery - (334) 242-4158
Huntsville - (256) 461-7550
Mobile - (251) 432-3336

Federal Tax Incentives for Renewal Communities

The Federal Renewal Community Program provides federal tax incentives for businesses located in a designated renewal community. The Department of Housing and Urban Development established three renewal communities in Alabama, thus enabling businesses in Alabama to benefit from the program. The Alabama renewal communities are: (i) Greene/Sumter – covering all of Greene and Sumter counties; (ii) Southern Alabama – covering significant portions of Butler, Conecuh, Dallas, Hale, Lowndes, Marengo, Monroe, Perry, and Wilcox counties; and (iii) Mobile – covering portions of municipalities in the Mobile/Prichard area. The federal tax incentives for renewal communities generally include:

- Wage Credits for Employing Renewal Community Residents - businesses operating in a renewal community can receive up to a \$1500 federal tax credit for every new or existing employee who lives and works in the designated area. Special credits are available for the employment of high-risk youths.
- Commercial Revitalization Deduction - deductions can be taken for revitalization expenditures for certain buildings in renewal communities.
- Increased Section 179 Deduction - qualified businesses can receive an increased deduction under Section 179 of the Internal Revenue Code of 1986, as amended, of up to \$35,000 of the cost of certain qualified property, such as equipment and machinery.
- Capital Gains Exclusions - certain businesses operating in a renewal community are exempt from capital gains taxes if they acquire or start a business in a renewal community, provided that the property is held for at least 5 years.

CAPCO Program

In April 2002, the State enacted Ala. Act 2002-429 which created the Certified Capital Company ("CAPCO") program. This program, administered by the Alabama Development

Office, is designed to promote investment in Alabama-based businesses by offering insurance companies an incentive to commit investment dollars to venture capital funds that have been certified as CAPCOs. The CAPCOs, in turn, must invest their money in businesses having less than 100 employees that are headquartered in Alabama and engage primarily in research and development, the manufacturing, processing, or assembly of products, or the provision of services. Insurance companies investing in CAPCOs receive a dollar-for-dollar tax credit of up to \$15,000,000 against premium tax liability incurred under the Alabama Insurance Code.

By enacting Ala. Act 2002-429, the State authorized the allocation of up to \$100,000,000 of premium tax credits. Such credits may be claimed over an 8-year period beginning in 2006. In June 2007, the State amended Ala. Act 2002-429 by enacting Ala. Act 2007-472, which again authorized up to \$100,000,000 of premium tax credits. Pursuant to Ala. Act 2007-472, a certified investor may take up to 5% of the vested tax credits in any year beginning in 2010, and up to 17.5% beginning in 2014. Any unused tax credits authorized under both acts may be carried forward indefinitely until the tax credits are used up.

Other Incentives

For some projects, the state and local governments are occasionally willing to offer incentives beyond those that are provided for by existing legislation and programs. Obviously their willingness to do so depends upon: (i) the perceived benefits of the project to the state and local economies; (ii) the type of industry involved; (iii) the availability of a source of funding; and (iv) legal restrictions on the power of the State and its political subdivisions to assist private enterprise. In appropriate cases, industries have sought and received: land to serve as the site for their project; assistance in the clearing, grading, and other preparation of industrial sites; utility services including electricity, water, sewer, gas, and telephone; public road access; relocation allowances for existing employees; additional training expenses beyond that provided by AIDT; and special legislative tax benefits. The availability of these types of incentives must be evaluated on a case-by-case basis through negotiation between the industry and appropriate state and local officials.

BOND FINANCING

The State of Alabama adopted legislation in 1949 authorizing municipalities to create industrial development boards to serve as conduit issuers of industrial revenue bonds as a means of financing industrial projects on attractive terms. Since then, additional legislation has authorized a number of other types of public authorities, each with its own powers, limitations, and jurisdiction, but all with the purpose of providing a method of finance which, in appropriate circumstances, may be considerably more attractive than traditional financing methods. The issuance of these types of bonds is subject to state and federal law, in particular federal tax law as it applies to tax-exempt bonds. In general, public authorities are available throughout the State with the ability to issue the various types of “private activity bonds” (e.g., small issues for manufacturing facilities; solid waste disposal bonds; and bonds for sewage disposal facilities) for which tax-exempt treatment is available under the Internal Revenue Code of 1986, as amended. Under certain circumstances, tax-exempt financing may be available for other types of projects as well.

Most bonds benefiting private industry in Alabama are issued by industrial development boards created by municipalities (“IDBs”) or by industrial development authorities created by counties (“IDAs”). In many respects, these two types of public corporations function in much the same manner: their bonds are “limited obligation” or “revenue” bonds secured solely by the credit of the private enterprise benefiting from the financing (and any applicable credit enhancement, such as a bank letter of credit); the board or authority plays an important role in the recruitment of the industry and the issuance of the bonds, but then occupies a passive role throughout the life of the financing; and, so long as it is not in default, the private enterprise has complete control over (and responsibility for) the design, construction, operation, and maintenance of the project. The statutes applicable to IDBs and IDAs are flexible enough to accommodate almost any financing terms that may be proposed by the company or its financial advisors although the most common structures are long-term fixed rate bonds or variable rate “lower floaters” with credit enhancement and bondholder put features. In the case of IDBs, legal title to the project is generally held by the board, and the project is leased to the company under a lease arrangement that results in the company being treated as the owner of the project for federal income tax purposes. The company is generally granted the option to purchase the project for a nominal price once the bonds have been retired. IDAs have the flexibility to loan the proceeds of their bonds directly to the company, thereby avoiding the necessity of a lease. In either case, the lease agreement or the loan agreement serves as the primary source of payment of the bonds.

Under the current provisions of the Internal Revenue Code of 1986, as amended, two common types of tax-exempt bonds that can benefit private industry are “small issue bonds” for manufacturing facilities, and “exempt facility bonds” to finance sewage and solid waste disposal facilities.

Although most bonds issued by IDBs and IDAs for private industry are structured as tax-exempt bonds, taxable bonds may also be issued for projects which qualify under state law but, for any number of reasons, do not qualify for tax-exempt financing. Although taxable bonds are not as common as they were prior to 1992 (when complete exemptions for property and sales taxes were available for bond-financed property), they may nonetheless be attractive in some

situations, either as a means of financing the non-qualifying portion of an otherwise exempt facility or as a means of accessing the variable rate credit enhanced market.

Public authorities in Alabama can also issue special assessment bonds to finance improvements paid for from assessments against the benefited property. Bonds can also be issued by public authorities payable from fees, charges, rentals, and licenses levied on the use of the project financed with the bond proceeds. These authorities can issue taxable bonds, and, under certain circumstances, tax-exempt bonds (e.g., for roads, sewers, and other improvements of a public nature) for a wide variety of projects.

Small Issue Manufacturing Facility Bonds

The following is a brief outline of some of the principal federal tax requirements applicable to tax-exempt small issue bonds for manufacturing facilities:

Manufacturing Facility Requirement

At least 95% of the net bond proceeds must be used to provide a “manufacturing facility,” i.e., a facility used in the manufacturing or production of tangible personal property (including processing resulting in a change in the condition of such property), and no more than 25% of the net bond proceeds may be used to provide facilities which are “directly related and ancillary” to a manufacturing facility.

Issue Size and Capital Expenditure Limit

The aggregate face amount of the bond issue may not exceed \$10,000,000. In addition, the face amount of the bond issue plus the amount of capital expenditures made by any person during the 6-year period beginning 3 years prior to the date of the issue and ending 3 years after such date, with respect to any facility located in the same municipality (if the project is in a municipality) [or in the same county, but not in any municipality (if the project is in an unincorporated area of the county)] of which the company or any related person is a principal user, may not exceed \$20,000,000. To avoid double counting, the facilities financed by the bonds are not counted again as capital expenditures. If the size of the bond issue is \$1,000,000 or less, the \$10,000,000 capital expenditure limitation does not apply.

\$40,000,000 Limitation

The face amount of the bond issue, when added to the face amount of any other small issue bonds, exempt facility bonds, and qualified redevelopment bonds outstanding anywhere in the United States on the closing date and attributable to the company or related persons, cannot exceed \$40,000,000.

95% Test

At least 95% of the “net proceeds” from the sale of the bonds must be used to finance costs for the acquisition, construction, or improvement of land or property of a character subject to the allowance for depreciation.

2% Issuance Cost Limitation

No more than 2% of the proceeds of the bonds may be used to finance “issuance costs” (e.g., underwriter fees, legal fees, trustee fees, printing costs, accounting fees, etc.). Issuance costs in excess of the 2% limitation must be paid directly by the company.

Official Intent Resolution

With certain minor exceptions for some types of “preliminary expenditures,” bond proceeds may not be used to pay or to reimburse the company for expenditures made more than 60 days prior to the date of the “official intent” resolution adopted by the issuer.

Volume Cap Allocation

An allocation of “volume cap” must be obtained from the State Industrial Development Authority (“SIDA”) (except for refunding issues). See discussion below under the heading “Volume Cap.”

Public Hearing

Federal law requires that a public hearing be held at least 14 days after the giving of published notice apprising the community of the proposed financing and the nature and the location of the project. Following the public hearing, both the issuer of the bonds and an appropriate elected official or legislative body with jurisdiction over the project must approve the bonds.

Acquisition of Existing Property

As a general rule, bond proceeds may not be used to acquire used property. However, bond proceeds may be used to acquire an existing building (and equipment already therein) if qualifying rehabilitation expenditures are made (i) in an amount at least equal to 15% of the portion of the costs of acquiring such building (and the equipment therein) financed with the bond proceeds and (ii) within 2 years after the later of the date on which the building is acquired and the date on which the bonds are issued.

Maturity Limitation

The weighted average maturity of the bonds may not exceed 120% of the average reasonably expected economic life of the facilities being financed.

Arbitrage Rebate

Most simply stated, the company, on behalf of the issuer of the bonds, must rebate to the United States Treasury the excess (if any) of the amount actually earned on the investment of “gross proceeds” of the bonds over the amount which would have been earned if those investments had a yield equal to the yield on the bonds. However, the company may avoid rebate liability by expending the bond proceeds in accordance with the so-called “6-month” or “18-month” spend-down exceptions.

Solid Waste Disposal and Sewage Bonds

Exempt facility bonds issued to finance solid waste disposal or sewage facilities are subject to the rules contained in the previous heading beginning with the subheading “95% Test.” In addition, at least 95% of the net bond proceeds must be spent to acquire or construct qualifying sewage or solid waste disposal facilities.

Volume Cap

As is true in most states, the amount of state “volume cap” available in Alabama for tax-exempt bonds is often inadequate to cover the total volume of financing proposed in each calendar year. Based on the most recent population statistics, Alabama’s annual volume cap is \$393,367,335. State law provides that 25% (\$98,341,834) is set aside for use by the Alabama Housing Finance Authority and 10% (\$39,341,834) is set aside for use by the Alabama Higher Education Loan Corporation, in each case until December 24 of each year. After these two set-asides, 35% of the state cap (\$137,678,567) is reserved for issuers of qualified small issue bonds to finance manufacturing facilities, 15% (\$59,005,100) is reserved for exempt facility bonds, and the remaining 15% (\$59,005,100) is to be allocated in the discretion of SIDA. Applications for allocations are submitted by proposed bond issuers throughout the calendar year and, under policies adopted by SIDA, may continue in effect from year to year until an allocation is received. In Alabama, volume cap allocations are made on a first-come, first-served basis in response to applications filed by issuers. Under the current policies, no more than \$20,000,000 of volume cap will be granted for any single project. A fee equal to 1/10 of 1% of the amount requested must be submitted along with an application. When made, allocations are good for a period of 60 days and can generally be extended for an additional 45 days upon request and upon payment of an additional fee of 1/20 of 1%.

Special Assessment Bonds

Alabama municipalities and counties are authorized to form improvement districts that can levy assessments against the land within the district to pay for improvements benefiting land within the district. The assessments serve as a lien against the property to secure the payment of the assessment. Improvement districts are authorized to issue bonds payable from the assessments levied by the district, which provides a means to raise the revenue needed to pay the costs of the improvements. The bonds may also be secured by guarantees, letters of credit, or other credit enhancement as may be provided by the district, an owner of property within the district, or any other person.

Improvement districts are frequently used for residential and commercial real estate development projects where the developer finances the cost of improvements through bonds issued by the district and secured by the special assessments. Individual parcels can then be sold, if the developer so chooses, subject to the assessments levied to pay the bonds. Special assessment bonds can be issued as taxable bonds and, under certain circumstances, as tax-exempt bonds (e.g., for roads, sewers, and other improvements of a public nature).

Cooperative Improvement District Bonds

Cooperative improvement districts can be formed by two or more municipalities, counties, certain types of public authorities, or some combination thereof. A cooperative improvement district has the power to undertake any project that any of the entities forming the district has the power to undertake. Capital improvement districts can issue bonds payable from the revenues of the district, and the bonds may also be secured by guarantees, letters of credit, or other credit enhancement as may be provided by the district or any other person. Capital improvement districts have the authority to charge fees, rentals, and licenses for services rendered by the district or facilities provided by the district from any of its projects, and such fees, rents, and licenses can be used to pay the operating costs of the district and debt service on bonds. The ability to impose fees, rents, and licenses makes cooperative improvement districts a possible financing vehicle for some types of private projects. Cooperative improvement district bonds can be issued as taxable bonds and, under certain circumstances, as tax-exempt bonds (e.g., for roads, sewers, and other improvements of a public nature).

ENVIRONMENTAL PERMITTING

With limited exceptions, environmental regulation and permitting in Alabama is a “one stop” system with the Alabama Department of Environmental Management (“ADEM”) having responsibility for the issuance and enforcement of all environmental permits and associated regulations. ADEM administers all of the major federal environmental programs, including the federal Clean Air Act, Clean Water Act, Resource Conservation & Recovery Act, and the Safe Drinking Water Act. ADEM’s consistent philosophy has been to obtain all necessary legislative authorization and funding to administer and execute all environmental regulation programs required under federal law. ADEM strives to do so in a fashion that is consistent with, but no more stringent than, the standards of those federal programs or comparable programs in other states. This puts Alabama industries on an equal footing with competitors in other states.

Balch & Bingham LLP’s Environmental & Natural Resources practice group represents a wide range of clients on an ever-expanding number of environmental and natural resource issues. In all respects, our practice group provides first-class legal counseling to our clients and vigorous legal representation before governmental agencies and the courts. With twenty-one attorneys focused exclusively on environmental law, the group constitutes one of the largest full-time environmental practice groups in the South. The group is chaired by Steve McKinney.

For more information about Balch & Bingham LLP’s Environmental & Natural Resources practice group, please contact Steve McKinney at (205) 226-3496 or smckinney@balch.com.

Departmental Organization

The seven members of the Alabama Environmental Management Commission are appointed by the Governor for staggered 6-year terms, and each member must possess specific statutory qualifications for his or her appointment. The Commission is responsible for developing environmental policy, hearing administrative appeals of ADEM actions, adopting ADEM regulations, and selecting an ADEM Director. In 2005, the Commission hired former Alabama Office of Water Resources Director Onis “Trey” Glenn to serve as ADEM’s Director. As Director, Mr. Glenn is the final authority on all administrative actions taken by ADEM, including the issuance of permits. All other ADEM employees are state merit system employees, who report to the Director.

ADEM is divided into the following five divisions: Permits and Services, Air, Water, Land, and Field Operations. Each of these divisions operates under the authority of a “Chief,” and is further subdivided into branches and sections. Russell Kelly is the current Chief of the Permits and Services Division, Ron Gore is the current Chief of the Air Division, James McIndoe is the current Chief of the Water Division, Gerald Hardy is the current Chief of the Land Division, and Steve Jenkins is the current Chief of the Field Office Operations Division.

The Office of the Director houses the Public Affairs Office, ADEM’s Ombudsman, and the Office of General Counsel. The Permits and Services Division coordinates permit applications and file reviews, and provides administrative support for the permitting process. The Field Operations Division has field offices in Mobile, Montgomery, Birmingham, and

Decatur, from which ADEM field staff can promptly investigate complaints and respond to spills.

Air Regulation in Alabama

Alabama has an EPA-approved State Implementation Plan and EPA has generally delegated to ADEM the authority for implementing and enforcing the federal Clean Air Act (“CAA”). Jefferson County, where the City of Birmingham is located, and the City of Huntsville have elected to establish a local air pollution control program which must be at least as strict as ADEM’s air pollution program. Any business or industry seeking to locate or expand in Alabama must obtain the appropriate air permits from the ADEM Air Division (or one of the two local programs) if proposed activities would result in regulated air emissions. ADEM’s air regulations are based on, and similar to, federal air regulations.

Prior to initiating any construction or modifications to equipment which may cause the emission of air pollutants, the owner must apply to ADEM for a construction permit which, when issued, has a duration of 2 years. Following construction, ADEM will issue an operating permit upon inspection of the equipment by ADEM or based on a certification by a professional engineer. However, a major new source or a major modification to an existing source requires that an authorization to construct be obtained prior to construction or modification. Specific permit limits will depend upon the type of emission source, size of emission source, and location of the facility.

For more information on issues relating to air regulations and permitting in Alabama, please contact Grady Moore at (205) 226-8718 or at gmoore@balch.com.

Regulation of Solid and Hazardous Wastes

ADEM’s Land Division, through its Solid Waste Branch and its Resource Compliance and Recovery Act (“RCRA”) Branch, regulates most aspects of solid and hazardous waste in Alabama. Alabama law allocates the responsibility for solid waste management in the State between ADEM and the Alabama Department of Public Health. ADEM has responsibility for regulating the treatment, processing, and disposal of solid waste, while the Health Department controls the collection and transportation of solid waste. Alabama law allows counties and cities in Alabama to collect and dispose of solid waste themselves or to contract with private corporations to perform those tasks.

Waste storage and transportation activities are controlled in accordance with the type of waste being transported. Thus, the storage and transportation of medical wastes, for example, receive individual attention in the regulations. In addition, ADEM has adopted standards and procedures for the siting of industrial, inert, and municipal solid waste landfills. In general, however, a business or industry locating in Alabama need only concern itself with subscribing to a solid waste collection service, and not to the relatively complex solid waste regulations. Solid waste disposal fees in Alabama are normally lower than such fees in other parts of the country.

Alabama has established a statewide program to provide for the safe management of hazardous wastes. EPA has delegated authority to ADEM to operate the federal solid waste program in Alabama, and ADEM has adopted by reference most aspects of EPA’s solid waste

regulations. Specific hazardous waste regulations govern the actions of persons who generate or transport hazardous wastes, and persons who own or operate a hazardous waste treatment, storage, or disposal (“TSD”) facility. In view of the associated complex regulatory and permitting scheme, businesses or industries seeking to transport hazardous waste or operate a TSD facility in Alabama should be careful to obtain a complete understanding of those requirements. Even businesses which do not intend to operate a TSD facility may nevertheless discover that their routine activities classify them as “generators” of hazardous waste.

ADEM also operates the State’s underground storage tank (“UST”) program. Under the State’s UST program, the “owner or operator” of an underground storage tank has the responsibility for complying with the UST regulations. This responsibility includes registering every tank covered by the UST program with ADEM and paying certain tank fees and Trust Fund fees. Every subsequent owner of those tanks must reregister with ADEM. Additionally, owners and operators must report any suspected release, spill, or overflow with any corrective action that was taken. Any tank that stores petroleum or a hazardous substance as defined by Superfund and has 10% or more of its volume beneath the surface is covered by the UST program. In the event of a leak or spill from a registered tank, the Alabama Trust Fund may provide some financial relief for clean up costs and/or liability for eligible owners or operators of a UST that have maintained the UST according to ADEM regulations.

For more information on issues relating to solid and hazardous waste regulations and permitting in Alabama, please contact Matt Bowden at (205) 226-8712 or mbowden@balch.com.

Brownfields Regulations in Alabama

In May 2001, Alabama enacted the Alabama Land Recycling and Economic Redevelopment Act to address the development of property with actual or perceived contamination (i.e., brownfields). ADEM has issued regulations outlining the procedures by which certain owners of qualifying property may voluntarily assess and remediate such properties in exchange for limitation of liability for past environmental actions. For example, under the Brownfield Development Tax Abatement Act, any person owning or considering purchasing a brownfield for development may be eligible for an abatement from state, city, or county property taxes if he agrees to comply with a Voluntary Cleanup Program governed by ADEM.

For more information on issues relating to brownfields programs in Alabama, please contact Jim Noles at (205) 226-8767 or jnoles@balch.com.

Water Regulation in Alabama

Under the Clean Water Act, ADEM has the authority to establish “designated uses” for all navigable surface waters in the State, which vary depending upon the given water body’s historic use, expected future use, and water quality. ADEM determines water quality criteria which apply to the various use classifications and then establishes certain applicable minimum water quality standards. Presently, more than 99% of Alabama’s surface waters meet the standards applicable to waters designated “fish and wildlife.” Any business or industry seeking to locate in Alabama which would be directly discharging any pollutant into the navigable waters must obtain a discharge permit from ADEM. Generally, discharge permits require the use of a

certain level of pollution control technology to limit pollutants in a facility's discharge. These requirements may be more stringent where the facility discharges into waters which do not meet applicable water quality standards. ADEM also has a general discharge permit program for storm water discharges, which requires industries which conduct land disturbance activities involving one or more acres to apply for coverage under the general storm water permit and adopt measures to control erosion and sedimentation.

ADEM has established a separate permitting system for those indirect dischargers who discharge pollutants to a publicly owned waste water treatment plant. These permits contain their own set of discharge limitations as well as monitoring and reporting obligations. ADEM has also promulgated regulations covering the injection of treated wastewater into wells in order to protect Alabama's drinking water. These regulations require any industry or business which is seeking to inject wastewater into any subsurface to obtain a special Underground Injection Control ("UIC") permit. Any business or industry involved in the construction of facilities which will be used for injection purposes must similarly apply for a permit.

With respect to the discharge of dredged or fill material into waters of the United States (generally referred to as wetlands permitting), such activities are regulated primarily by the U.S. Army Corps of Engineers (the "Corps"). Although there are several different permitting programs set forth in the Corps' regulations pertaining to wetlands, ADEM's only involvement is providing water quality certification for each individual permit and for the issuance or reissuance of nationwide or regional permits. Although water quality certification by ADEM is but one condition to the issuance of a permit by the Corps, the Corps generally cannot issue the permit if ADEM denies the certification to a particular activity.

For more information on issues relating to water regulations and permitting in Alabama, please contact Rob Fowler at (205) 226-8733 or rfowler@balch.com.

Permit Appeals

Even after ADEM has issued a permit, individuals may seek review of the permit before the Alabama Environmental Management Commission. Under ADEM regulations, any person "aggrieved" by an administrative action of ADEM—including ADEM's issuance of a permit—may file a request for a hearing to contest the action with the Commission within 15 days following the "aggrieved" person's receipt of notice of the action. Under ADEM regulations, an "aggrieved" person is anyone having suffered a threatened or actual injury cause by ADEM's action. Persons making such requests are called "petitioners" and the requests themselves are called "petitions."

ADEM's General Counsel's Office defends any ADEM action challenged by a petitioner, but interested private parties—such as a person holding a challenged permit—may intervene in the proceeding. Any hearing on a petition will be before the Commission itself, or more likely, before a designated Hearing Officer. Following a hearing before a Hearing Officer, the Hearing Officer will provide a recommendation to the Commission concerning the subject of the petition. The Commission is then required to make a final decision on the petition.

Any order of the Commission modifying, approving, or disapproving an ADEM administrative action constitutes a "final action" of ADEM and is appealable to the Alabama

Circuit Court. Any such appeal must be filed within 30 days following issuance of such order. Any final decision of the Circuit Court, in turn, may be appealed to the Alabama Court of Civil Appeals and, finally, to the Alabama Supreme Court.

For more information on issues relating to ADEM permit appeals, please contact Matt Bowden at (205) 226-8712 or mbowden@balch.com.

Endangered Species and Land Development

The federal Endangered Species Act (“ESA”) gives the U.S. Fish & Wildlife Service (“FWS”) the authority to protect threatened and endangered species and their habitats throughout the United States. Once the FWS has formally listed a species as threatened or endangered, it is unlawful to intentionally or negligently harm the species or its critical habitat. Violations of this prohibition can trigger stiff civil penalties and even criminal sanctions, including 1 year in prison. The ESA can therefore have serious impacts on any land development project where threatened and endangered species may be located. However, a landowner may obtain an “incidental take permit” from the FWS allowing him to go forward with any development of his property even if the activity or development may harm an endangered species or its habitat, under certain conditions. To obtain an incidental take permit, the landowner must present an acceptable habitat conservation plan to FWS. Preparing an adequate habitat conservation plan can be a complex and time-consuming undertaking, and FWS has wide discretion in determining whether to grant an incidental take permit.

Federal agencies have an independent obligation to consult with FWS before taking any action—including the issuance of a permit or license to a private party—that may have a negative impact on any threatened or endangered species or its habitat. A landowner who needs a dredge and fill permit from the Corps before developing wetlands, for example, should anticipate that the Corps will first need to consult with FWS if threatened or endangered species are possibly in the area before the Corps can issue the permit. FWS has the authority to place mandatory conditions on the action designed to minimize any harm to the species at issue, or to prohibit the action entirely.

For more information on issues concerning endangered species and land development, please contact Stephen Gidiere at (205) 226-8735 or sgidiere@balch.com.

Regulation of Cultural and Historic Resources

The span of human history in Alabama ranges from as early as 6500 B.C. (as exemplified by the Russell Cave National Monument, in northeastern Alabama) to the most recent accomplishments of the Space Age. Such a wealth of history, however, requires businesses and industries to pay careful attention to those federal, state, and local laws and regulations that relate to historic and cultural resources.

At the federal level, the most relevant statute is the National Historic Preservation Act of 1966 (“NHPA”). The NHPA requires federal agencies (such as the U.S. Army Corps of Engineers, the Federal Energy Regulatory Commission, and the Federal Communications Commission) to “take into account” the potential effect of their issuance of a license or permit on those properties “included in or eligible for inclusion in the National Register of Historic

Places.” As a practical matter, such “tak[ing] into account” involves archaeological assessments (and possible mitigation) and consultation between the relevant federal agency, the permit applicant, the Alabama Historical Commission (which serves as the State Historic Preservation Officer), the federal Advisory Council on Historic Preservation, and, if applicable, Tribal Historic Preservation Officers.

At the state level, site development activities may require compliance with such laws as Alabama’s Underwater Cultural Resources Act and Alabama’s statute regarding the removal and reburial of cemeteries and human remains. Furthermore, some properties may be protected by preservation or conservation easements while, at the same time, some properties may qualify for lower property tax rates by virtue of their historic status.

Finally, at the local level, the most relevant regulations can be found in relation to local Historic Districts. Although specific requirements may vary among municipalities, construction or renovation activities within such districts may require the approval of a municipality’s Historical Commission or Architectural Review Board prior to being issued a building permit.

For more information on legal issues associated with historical and cultural issues in Alabama, please contact Jim Noles at (205) 226-8767 jnoles@balch.com.

Land Use Regulation – Planning and Zoning

In conjunction with obtaining the needed environmental permitting, our practice group also has expertise in working with local municipal and county governments in obtaining the correct zoning for new development or redevelopment of an area. In building this practice area, many of our individual attorneys have developed extensive relationships with local governmental leaders and support staff which can be beneficial to our clients in obtaining a speedy resolution of such matters.

In Alabama, all municipalities have been provided with the authority to enact zoning; however, most county governments have not. To enact zoning, the local government must establish a “comprehensive plan” dividing the territory within its corporate limits into separate zoning districts delineating business, industrial, and residential zones and require all territory within its limits to be subject to zoning regulation. To accomplish this, a local government may establish a planning and zoning commission. It is the function and duty of the planning and zoning commission to make and adopt a master plan for the physical development of the city or county. The master plan is basically a planning tool and does not have the power of an ordinance; although, it does have a certain legal status which must be adhered to in developing the respective areas of the city or county. The planning and zoning commission also governs the construction of streets, parks, open space, or other public improvements and the regulation of subdivision plans, plats, and development. Importantly, the authority of the planning and zoning commission is advisory only and may not replace the authority of the city council or county commission in enacting zoning ordinances or amendments.

A local government may also establish a board of adjustment which has the following powers: (i) to hear and decide appeals of alleged errors in any order, requirement, decision, or determination made by the zoning administrator or an administrative official in the enforcement of zoning ordinances or regulations; (ii) to hear and decide special exceptions to terms of an

ordinance; and (iii) to hear requests for variances from the terms of ordinances or to special conditions that would result in unnecessary hardship if the ordinance is enforced. Unlike zoning authority, which is considered a legislative act, the actions of a board of adjustment are considered to be quasi-judicial and a statutory appeal to the local circuit court is provided. The appeal is required to be made within 15 days from the final judgment of the board of adjustment and is taken by filing a written notice of appeal with the board. Simultaneously, a complaint is normally filed with the local circuit court identifying the order of the board of adjustment from which the appeal is taken. The action is tried de novo by the circuit court and can be before a jury.

Beyond a doubt, the most frequently litigated zoning issues involve the validity of zoning changes or amendments, i.e., rezoning, to the comprehensive plan and zoning ordinances. Generally, the rezoning procedure in Alabama is as follows. An application to rezone a particular site is presented to the city clerk, the zoning administrator, or other office designated in the local ordinances or regulations. Along with the application, local ordinances typically require the payment of a filing fee, the filing of a site plan, a description of the property, its proposed use, and the relationship of the property to the adjoining property.

Upon the filing of the rezoning application, most local governments initially refer the rezoning request to the planning and zoning commission who will set a hearing date which will be advertised as required by statute. In addition, notices of the proposed rezoning and public hearing will be mailed to adjoining landowners. The planning and zoning commission will conduct its own fact finding and review of the zoning request. At this stage, many local governments will often meet in informal work sessions where the applicant will be questioned about various areas of concern and will often be called upon to agree to concessions to lessen the impact to surrounding property owners. These meetings are open to the public but are not public hearings. However, at the noticed public hearing, the applicant and the public are permitted to present their views to the planning and zoning commission.

After the public hearing, the planning and zoning commission will draft its final report to the city council or county commission. It should be remembered that the local government is not bound by the recommendations of the planning and zoning commission, nor is it even necessary for the planning and zoning commission to make any specific recommendation for or against adoption. The law merely requires that the planning and zoning commission consider and issue a report on the application before the local government can act.

Upon receipt of the planning and zoning commission's final report, the local government will refer the application to a sub-committee and set a hearing date for a public hearing on the ordinance. The sub-committee will report its recommendation regarding the application to the city council or county commission prior to the public hearing. At the public hearing, the applicant and the public are again given an opportunity to present their views. The local government may then either approve the zoning application by enacting a new ordinance attaching a new zoning classification to the property or deny the request.

For more information on planning and zoning regulations in Alabama, please contact Rob Fowler at (205) 226-8733 or rfowler@balch.com.

LABOR AND EMPLOYMENT

Alabama is a right-to-work state, offering businesses locating here a largely unorganized workforce. State court judges are elected and vary widely in their philosophies. Disputes are more likely to be litigated than resolved through union organization or collective bargaining; however, properly drafted and applied employment policies may prevent or defeat many claims, and, in many situations, mandatory individual arbitration policies are enforceable and offer an alternative to most court proceedings.

Introduction

Of course, federal labor and employment regulations apply in Alabama just as they would in any other state. In comparison with other states, the relative lack of state regulation of the employer-employee relationship in Alabama makes Alabama a favorable legal environment in which to do business.

Alabama has no comprehensive state employment discrimination or human rights law, but the State has adopted the Alabama Age Discrimination in Employment Law, which allows an employee to sue for age discrimination in state court. The State's retaliatory discharge law provides uncapped jury damages for employees who are terminated for seeking workers' compensation or making certain types of safety complaints. Other state statutes forbid termination for jury service, or for being garnished for child support. There is no state family leave law, no mini-WARN Act, and no state wage and hour law, but there is a child labor regulation. Drug testing is largely unregulated. Federal OSHA covers Alabama workplaces. Workers' compensation offers lifetime medicals and indemnity recovery based either upon impairment or lost earning capacity in most instances.

Accommodating Disabilities

Alabama offers employers a variety of funding sources for making buildings accessible under ADA Title III and accommodating applicants and employees under ADA Title I.

Agency Relations

The NLRB, EEOC, OSHA Region 4, OFCCP, and DOL Wage and Hour Division all have offices in Birmingham. The State Department of Industrial Relations (unemployment compensation and WARN notification) is located in Montgomery, as is the State Department of Labor, the agency to which the 30-day strike notice is given.

Application

Alabama has no special rules governing inquiries of potential employees at the application stage. State law enables employers who include appropriate language in their application forms to take advantage of certain workers' compensation defenses for testing positive for drugs or not cooperating with the test, or for fraudulently concealing preexisting conditions if not disclosed at the post-offer stage.

Arbitration

Both state and federal courts in Alabama have upheld agreements requiring arbitration of employment disputes even when the employee is terminable at will.

At-Will Employment and Exceptions

Absent a collective bargaining agreement or other contract of employment, employment in Alabama is presumed to be at-will. An employment contract may be created by a poorly drafted employee handbook that fails to include an appropriate disclaimer or by offers of lifetime employment. Alabama does not recognize a “public policy” exception to at-will employment, but there are specific statutory exceptions that prohibit the discharge of an employee for service on a jury, filing a claim for workers’ compensation benefits, or reporting violations of safety rules. Alabama law also provides job protection for volunteer firefighters and emergency medical personnel.

Drug Testing

Alabama private sector employers have the right to conduct drug testing based upon reasonable suspicion, workplace accident, or even at random, except to the extent prohibited by federal law. There is no state restriction on drug testing beyond the invasion of privacy tort, which may be avoided by a well-drafted policy communicated to employees before testing commences. Employers who provide employees with certain notice may deny workers’ compensation benefits to injured employees who test positive for illegal drugs or fail or refuse to cooperate with the drug test.

Employment Torts

Like most other states, Alabama courts recognize the employment-related torts of invasion of privacy, intentional infliction of emotional distress, negligent/wanton supervision, and negligent/wanton retention, which may arise in the context of sexual harassment or workplace violence. Those claims, as well as assault and battery theories, often fail because the conduct is deemed to be outside the line and scope of employment. Alabama courts do not recognize the tort of negligent infliction of emotional distress. In addition, workers’ compensation may provide the exclusive remedy for an employee if the claim involves a physical injury or touching.

Equal Employment

Alabama has no state human rights agency or comprehensive civil rights law. The Alabama Age Discrimination in Employment Act tracks the federal age discrimination law, except that an employee or applicant need not file with the EEOC before going to court.

Handbooks

An employer’s unilaterally promulgated policies that are sufficiently specific may be treated as contractually binding unless the employer includes a disclaimer stating that the policies do not create contractual rights.

Professional Employer Organizations

Employee leasing companies (also known as “Professional Employer Organizations” or “PEOs”) must be registered with the Department of Industrial Relations in order to conduct business in Alabama. When a PEO is utilized, Alabama law requires that certain notices be individually provided to employees and posted in the workplace.

Retaliation

Alabama provides a right of action to recover damages to those who have been terminated in retaliation for jury service, having wages garnished for child support, making a workers’ compensation claim, or reporting certain kinds of safety violations.

Safety and Health

Federal OSHA has jurisdiction over Alabama; there is no state plan. The northern half of the State is governed by the Birmingham Area office; the portion of the State to the south of Montgomery is governed by the Mobile Area office. SafeState in Tuscaloosa is a federally-funded entity that conducts inspections and notifies employers of OSHA of problems without charge.

Restrictive Covenants

Alabama courts generally will enforce non-competition, non-solicitation, and non-disclosure agreements between an employer and a non-professional employee, provided: (i) the employer has a protectable interest; (ii) the restrictions in the agreement are reasonable in time and geographic scope, and (iii) the restriction imposes no “undue hardship” on the employee. If the restrictions are deemed overly broad, Alabama courts will revise or “blue pencil” the agreement.

The Alabama Trade Secrets Act also provides protection against the misappropriation of an employer’s trade secrets.

Strike Notice

The State agency to be notified 30 days before striking at the expiration of the collective bargaining agreement is the Alabama Department of Labor.

Taping

Alabama is a one-party taping state. Taping is lawful as long as at least one party to the conversation is aware that the conversation is being taped.

Unemployment

Unemployment benefits are not available to employees on strike, to employees who are terminated for dishonest or criminal conduct, or to employees who are terminated for misconduct after warning. An employer dissatisfied with a Department of Industrial Relations

unemployment compensation award has administrative appellate review by the Department of Industrial Relations, and may start over and challenge the award in court if dissatisfied with the agency's decision on appeal. However, even agency unemployment decisions not reviewed by courts may prevent the unsuccessful party from bringing or defending against a claim that the termination decision was unlawful.

Unions

Being a right-to work state, Alabama law provides that no employee may be required as a condition of employment to become or remain a member of a union, or to pay any type of fee to a union. Unions must file copies of bylaws and financial reports with the Alabama Department of Labor. Plant construction is almost always accomplished open shop.

Wage and Hour

There is no state family and medical leave, but Alabama law does require employers to allow up to one hour of leave for voting. There is no state equivalent of the Worker Adjustment Retraining Notification Act ("WARN"), and federal WARN's requirement for notice to state government before a plant closing or mass layoff is to be given to the Alabama Department of Economic and Community Affairs.

Workers' Compensation

Alabama has no workers' compensation commission. Disputed claims are tried to judges without juries in trial courts of general jurisdiction. Medical benefits run for the employee's life, and are subject to bill screening and utilization review regulations set forth by the Department of Industrial Relations. Indemnity benefits for partial disability are capped at \$220 per week for up to 300 weeks, while indemnity benefits for total disability are limited by the State's Average Weekly Wage and run for the life of the employee. Employers have the option to require injured employees to undergo vocational rehabilitation. Employers of five or more employees, which are obligated to provide for workers' compensation, may satisfy this obligation either by purchasing insurance, establishing sufficient security under Department of Industrial Relations regulations to qualify as "self-insured," or by joining a self-insured workers' compensation fund. Making a false workers' compensation claim is a class C felony.

INTELLECTUAL PROPERTY

There are many ways in which you should protect the intellectual property of your company, including its trademarks, copyrights, patents, and trade secrets. Given the changing technological landscape resulting from the expansion of the Internet, it is increasingly more difficult to apply laws that are designed to protect intellectual property.

Intellectual Property

Intellectual Property is every much an asset of a company as are its cash and real property. Intellectual property is in some ways an intangible property, in the sense that it is a knowledge-based resource where the value of that resource is not necessarily locked in a single tangible item. The main categories of intellectual property are:

Trademarks

Trademarks are source identifiers that tie a particular word, shape, color, smell, or any combination of such elements to a particular product or service and the company that creates them. Trademarks are the subject of both state and federal law. Every business has at least one trademark: its name or brand. Companies should be aware that merely reserving a name with the Secretary of State's Office is not all the protection or assurance a company may wish to have. Before adopting a trademark, company name, or brand identity for a product or service, it is often helpful for a company to clear the trademark by performing a careful evaluation of other potentially similar trademarks. An opinion letter of legal counsel can be very helpful in the event that the company is later challenged about its trademarks. Clearing a trademark can help a company to avoid an expensive and potentially embarrassing false start. Companies should be careful to steer clear of "famous" trademarks under the Trademark Dilution Revision Act of 2006. This Act provides protection for "famous" trademarks even when they are used for goods or services in different industries.

Copyrights

Copyrights are original works of authorship in a tangible medium of expression. They exist in all manner of textual, creative, artistic, sound, visual, architectural, and many other forms of authorship. Federal statute preempts all state laws involving copyrights. Companies that have original works, such as photographs, art, logos, videos, software, or anything else created by a contractor, should be careful to have such work made under a work-for-hire agreement. Otherwise, the company may find itself in a dispute about the scope of an implied license.

Trade Secrets

Trade Secrets are a feature of state law. Often, trade secrets are referred to as the "poor man's patent." The Alabama statute on trade secrets defines a trade secret as information (i) used or intended for use in a trade or business, embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process; (ii) not publicly known and not generally known in the trade or business of the person asserting it as a trade secret; (iii) not readily ascertained or derived from publicly available information; (iv) that is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and (v) that has significant economic value. Another way of thinking of trade secrets is as valuable, non-public

business information that a company undertakes reasonable efforts to keep secret. Alabama law is designed to have a lower threshold for the definition of “trade secrets,” meaning that information that might not meet the definition of a “trade secret” under the laws of other states may still qualify as a trade secret under Alabama law.

Most companies have trade secrets they will wish to protect through contracts, good security procedures, exit interviews, locked containers, marking requirements, policies, passwords, and a whole host of other procedures. Likewise, companies may find it useful to adopt procedures that guard against employees wrongfully bringing to the company trade secrets belonging to others.

Patents

Patents relate to useful objects. They are defined in federal law as any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof. Usually, companies do not create much patentable material but instead license it from others. For example, computer software or hardware often is subject to patent protection. The company will want to have appropriate representations, warranties, and indemnities from the licensor so the company is protected.

Data Compilations

With the advent of valuable data compilations and computer databases, the law has recently changed to address the unauthorized use of such databases. The principal statute used to address such unauthorized access is the Computer Fraud and Abuse Act (the “CFAA”). It will be important for the company to make sure that it has policies, procedures, and agreements in place to make it clear as to the scope of authorized use of its computer networks and databases.

Right of Publicity

A little known but nonetheless important part of intellectual property is the right of publicity, known in Alabama as the right of privacy. In substance it relates to an individual’s right to control his or her name or likeness. For example, in a famous case in California, the game show personality Vanna White successfully sued a defendant who was using a computerized version of her likeness without her authorization.

In Alabama, it may be possible for a person who is not famous to make a similar claim. However, the law on non-famous individuals exercising a right of publicity is not well developed. Nevertheless, companies will want to be careful about using recognizable images of famous people, especially living famous people.

Whenever the company is asked to engage in transactions involving the above items, it would be important to address the intellectual property issues that are associated with such works. A company may find itself the creator and owner of intellectual property such as its brand identity (trademarks), its customer and contact list (trade secrets), and its data compilations (Computer Fraud and Abuse Act). Also, the company may find itself a user or a licensee of intellectual property as is often the case with software (copyrights and patents) and advertising using voiceovers (rights of publicity). When the company is the owner of intellectual property, it needs to consider its protection and enforcement policies and procedures. When the company is

the licensee of intellectual property, it needs to understand the scope of its license, the duration of its license, events of default, and the like.

Internet Issues

The Internet is open to many possibilities for companies but at the same time has created a whole new set of issues relating to data integrity, means by which companies respond to complaints, efforts by third parties to piggy back on a company's Internet domain name, griping on the Internet by current or former employees as well as others, use of the Internet by current employees to transfer information to themselves, and opportunities to inadvertently infringe on the copyrights and trademarks of others. Each of these situations calls for its own individual response.

Hacking

Companies should be conscientious of updates to their software including anti-hacking patches and best practices relative to "strong" passwords such as periodic changes of passwords as well as deactivating the passwords of departing employees. Such steps will greatly improve a company's ability to guard against a hack or a "brute force" attack (robotic effort to guess passwords).

However, if a hack occurs, the company should have in place its emergency response plan. One of the thornier issues with respect to a company's response to a hacking episode is that the efforts needed to bring the company up to full operational capability may make it more difficult, if not impossible, to determine the full extent of the hack or the identity of the hacker. The earlier the competent hacking expertise can be brought to bear, the better it is for the company. Hacking is violative of the Computer Fraud and Abuse Act. However, many companies find it useful to investigate the hack first before reporting it to law enforcement. Moreover, depending on the scope of the hack and the type of information that may have been affected, a company may incur a disclosure obligation that could include providing free monitoring services to the affected individuals.

Digital Millennium Copyright Act ("DMCA")

This statute covers many things not necessarily limited to the Internet. However, from a company's perspective, one of the more useful features of the DMCA is its Directory of Service Provider Agents for Notification of Claims of Infringement ("Service Provider List") located at <www.copyright.gov/inlinesp/list/index.html>. The application to have your agent added to this list is at <www.copyright.gov/onlinesp/agent.pdf>.

The usefulness of this site to a company is that if a company posts the appropriate registration on the Service Provider List, it can avail itself of the "notice and take down" provisions of the DMCA. Those provisions provide that if a company finds that it has improperly posted the content of others on its website, an individual who objects to the material will first be required to contact the representative listed on the Service Provider List. This gives a company the opportunity for a low-cost resolution of a potentially expensive and legally thorny issue.

Cybergripping

This is a technique used by individuals to complain about the company over the Internet. There are a variety of means by which such complaining can take place including a “gripe site” complaining about the company or the individuals in the company. It is a common practice to post such sites on <www.[company name]sucks.com>. To some extent, complaining about a business is protected activity under the First Amendment of the U.S. Constitution.

An effort to use the courts to shut down genuine free speech will likely be viewed with disfavor by a court. However, there are forms of “cybergripping” that are likely not protected by the First Amendment. For example, if the griper misappropriates trade secrets and then attempts to post them on a gripe site, that activity might be subject to successful court action. Also, if a cyber griper hacks into a company’s computer system or uses a “brute force” attack to obtain e-mail addresses and then send a blanket gripe message to all employees, this too may be violative of a number of rights the company has, including its rights under the Computer Fraud and Abuse Act, as well as trespass and privacy.

Cybersquatting and Typosquatting

Cybersquatting is a technique used by gadflies, would-be sellers of domain names as well as individuals attempting to increase web traffic to other websites. It involves adopting a closely similar domain name in hopes that an Internet user will type in the wrong address. For example, instead of registering <www.balch.com> (the legitimate domain for the author of this article’s law firm) instead, a “cybersquatter” would register <www.balchandbingham.com>.

Companies can protect themselves to a certain extent by registering close variants of their domain names; however, at some point this becomes cost prohibitive. If a cybersquatter attempts to sell the close variant of the company’s own domain name back to the company, the company may have a cause of action under the Anticybersquatting Protection Act (the “ACPA”). This act, as well as the Uniform Dispute Resolution Policy (the “UDRP”) required by the Internet comparison of Assigned Names and Numbers for all accredited Internet Registrars, provide low-cost alternatives to the company to resolve issues associated with cybersquatting.

The ACPA has substantial remedies ranging from \$1000 to \$100,000 as well as injunctive relief. The ACPA and the UDRP are complementary, meaning that the company can pick a court action or a dispute resolution. However, using the UDRP could leave the door open for litigation by a dissatisfied defendant. The company will have to use its own business judgment about whether the expense associated with dealing with a cybersquatter is worthwhile and, if so, whether the ACPA or the UDRP is the appropriate vehicle for such a dispute.

The ACPA encourages domain name registrars to adopt policies protecting trademarks. However, such policies need only cover trademarks registered with the U.S. Patent and Trademark Office (the “USPTO”). A response to cybersquatting will necessarily also include a review of the registrar’s policy to prohibit domain names that are confusingly similar to, or dilutive of, another’s trademark. Given the statutory bias in favor of registered trademarks, a company should give serious consideration to registering its name or a trademark with the USPTO. The protections for registered trademarks against cybersquatting are considerable.

Indeed, a court will prohibit “typosquatting,” that is, the deliberate misspelling of a trademark to promote confusion and capitalize on inadvertent consumer error.

Scope of Unauthorized Access

It is a distressingly more common tactic for soon-to-be-departing employees to use the fact of their authorized access to a company’s database to transmit information to themselves that the soon-to-be-former employee believes might be useful at his or her future employment.

Monitoring all e-mail traffic by all employees would be a daunting, if not impossible, task. However, two low-cost techniques can be helpful to the company to alert them to such a situation. First, the company should adopt a policy that makes it clear that an employee’s authorization is only to use information solely for the benefit of the company. Information is not to be taken, transmitted, or copied for purposes of assisting employees in their roles as employees of some other entity. Likewise, the company may wish to adopt a processing procedure to review the employee’s recent Internet and e-mail activity. While neither of these techniques are foolproof, they can often alert the company to a potential data breach.

Copyrights and Internet Service Providers

Companies may post their own independently-created content on websites. As a content creator, a company may find its website the target of copyright infringement. Regrettably, those who use the Internet to infringe on copyrighted materials of others sometimes have geographic or practical barriers to pursuing a worthwhile legal action against them. Some copyright claimants have sought to obtain relief from Internet service providers. However, such legal action by a company against a service provider could be blocked by the Online Copyright Infringement Liability Act (“OCILLA”). OCILLA provides “safe harbors” for service providers that satisfy the requirements for (i) knowledge, (ii) financial benefit, and (iii) notice.

Trademarks and “Rights of Publicity” on the Internet

Companies should be careful not to suggest inadvertently an affiliation that does not exist by using the trademarks of another company. Sometimes a company can make such a connection by “deep linking” into another website. “Deep linking” is a link from one website into one of the interior pages (not the home page) of another. Such “deep linking” can be problematic if the third party website is “framed” by a border that makes it look as though the company and the third party are affiliated with one another.

Companies should likewise be careful about comparative advertising or the use of the logos or trademarks of another. Careful and documentary support for the comparisons may be helpful in defending against a false advertising claim. Also, disclaimers and explanations as to how the comparison was conducted could be helpful.

Finally, companies should be careful about using the names or likeness of others. Many states, including Alabama, have protections for individuals against the unauthorized use of their name or likeness. These protections are sometimes called rights of publicity. In Alabama, they are called rights of privacy. Companies should be especially careful about using the name or likeness of famous living people or people who have passed away in the last 50 years. With

people who are not (yet) famous, it is helpful to obtain a release to use their pictures, names, or likenesses.

False Advertising

Trademark law is designed in part to increase consumer efficiency by allowing a mark to identify a good or service with its source, a producer, or provider. Liability for infringement on a particular trademark is based upon the likelihood for consumer confusion. Federal law protects consumers from such confusion through the regulation of what is known as “false advertising.”

The Lanham Act creates liability for those who, in commercial advertising or promotion, use:

- Any word, term, name, symbol, or device in connection with goods, services, or both; or
- Any false designation of origin, false or misleading description of fact, or false or misleading representation of fact

which misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods or services.

The advertising can either be facially false or, while literally true, likely to mislead in the context in which it is used. Once an advertisement is deemed literally false, there is no need for the plaintiff to show actual consumer deception. If the advertisement is simply misleading, the plaintiff must present evidence of consumer deception, such as consumer surveys or expert testimony. No matter the category into which the false advertising belongs, the court must look at each instance of false advertising in the context of the greater whole, with the burden on the plaintiff to show that context.

Alabama law also prohibits a number of deceptive acts in trade or commerce, including many which could be considered false advertising, though they are not directly labeled as such. Alabama has enacted a version of the Deceptive Trade Practices Act that generally prohibits deceptive advertising. The Alabama Deceptive Trade Practices Act creates a private cause of action, giving a private party plaintiff standing as long as that plaintiff suffered monetary damages as a result of the defendant’s unfair or deceptive acts or practices.

The critical question in any federal trademark case is whether there is any likelihood of confusion between the senior mark and the allegedly infringing mark. Generally, an unfair competition claim covers a broader spectrum of behavior than a trademark infringement claim but requires the intent to deceive in addition to the likelihood of confusion or deception that is central to the trademark inquiry.

The most likely scenario where a company might encounter false advertising liability would be if a company infringed on a competitor’s mark by using a confusingly similar mark in the company’s comparative advertising. A company could also conceivably incur civil liability under the Lanham Act and unfair competition law if it used a trademark in conjunction with and in furtherance of an advertising campaign that disseminated false or misleading information.

FIRM PROFILE



BALCH & BINGHAM LLP

Alabama • Georgia • Mississippi • Washington, D.C.

Balch & Bingham LLP is one of the oldest and largest law firms in the State with approximately 250 lawyers working in offices located in Birmingham and Montgomery (the State's capital); Gulfport and Jackson, Mississippi; Atlanta, Georgia; and Washington, D.C. Our clients, consisting primarily of businesses, business owners, and units of state and local government, are served by experienced lawyers in many different practice areas.

For many years, we have been significantly involved in the establishment of new and expanding businesses in Alabama. Our practice includes work in the following areas:

- state and local tax incentives;
- non-tax incentives;
- bond financing;
- other forms of financing, including commercial bank loans, venture capital, and equity issues;
- labor and employment matters relating to hiring and training a new workforce;
- construction contracting;
- environmental permitting;
- organization of corporations, partnerships, LLCs, and other forms of business entities;
- antitrust, competition, and trade regulation;
- real estate transactions; and
- drafting of legislation and regulations governing state economic development programs and tax incentives.

We have assisted in the negotiation, documentation, and realization of state and local incentives for the following projects, among others:

- Mercedes Benz – automobile assembly plant;
- Honda Motor Co. – automobile assembly plant;
- ThyssenKrupp – steel processing facility;
- The Boeing Company – Delta IV rocket booster assembly plant;
- IPSCO Steel – steel plant;
- Office Max – regional warehouse/distribution facility;

- Norbord Industries – wood products plant;
- Target Stores – regional warehouse and distribution facility;
- Steelfab, Inc. – steel manufacturing plant;
- Kimberly-Clark Corporation – various pulp and paper projects;
- Amoco Fabrics Company – textile manufacturing plant;
- Amoco Chemicals Company – chemical manufacturing plant;
- General Motors Corporation – electronic parts assembly plant;
- Wright - K Technology – electronics plant;
- TRICO Steel Company – steel manufacturing plant;
- Louisiana Pacific Corporation – building products plant;
- Teksid Aluminum Components, Inc. (a subsidiary of Fiat S.p.A.) – automobile engine blocks;
- AP Technoglass (a subsidiary of Asahi Glass Company, Limited) – automotive glass products;
- Toyota Motor Manufacturing – automobile engine plant;
- Oris Automotive Parts AL, Ltd. – automobile parts manufacturing and assembly plant;
- Marubeni Metal Blanking, Inc. – automotive stamping facility;
- Celebrate Alabama – retail resort and entertainment destination;
- PSL North America – pipe manufacturing and coating facility;
- Surgical Care Affiliates – specialty surgical services provider;
- Infinity Property & Casualty Corporation – personal automobile insurance provider;
- National Steel Car – rail car manufacturing facility; and
- Northrop Grumman / EADS – KC-30 tanker aircraft production center.

For further information about our experience and qualifications in any of the areas described in this booklet, please contact:

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The Alabama State Bar requires the following: "No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers."

The information in this brochure is a general guide to Alabama state laws pertaining to doing business in Alabama and is based on information available as of April 1, 2008. This brochure should not be relied upon in any specific factual situation, does not cover all laws and regulations that might apply, and does not address U.S. federal law issues. It is not intended to cover all laws or regulations that may be applicable to a specific factual situation. If you have questions or specific issues to be resolved, you should contact a lawyer authorized to practice in Alabama.

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