



Montana

Prepared by Lex Mundi member firm,
Crowley Fleck PLLP

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MARCH 2015

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I. INTRODUCTION

“I’m in love with Montana. For other states I have admiration, respect, recognition, even some affection. But with Montana it is love. And it’s difficult to analyze love when you’re in it.”

– John Steinbeck, *Travels with Charley: In Search of America*

(A) ABOUT CROWLEY FLECK PLLP

Crowley Fleck PLLP (“Crowley Fleck”) is one of the oldest and largest firms in our region. The firm counts over 150 lawyers practicing in the areas of commercial litigation, insurance defense litigation, natural resources, mining, and energy law, healthcare, commercial transactions, banking and finance, creditors rights, real estate transactions and development, tax and estate planning and administration, intellectual property matters, employment law, governmental affairs and lobbying. The firm has offices throughout Montana, North Dakota, and Wyoming, including offices in Billings, Bozeman, Butte, Helena, Kalispell, and Missoula, Montana; Bismarck and Williston, North Dakota; and Casper, Cheyenne, and Sheridan, Wyoming.

The firm traces its beginning to 1895, when W. M. Johnston established his law practice in an office across from the Northern Pacific Depot in Billings, Montana. As its reputation grew over the ensuing decades, so did the firm. The firm began by serving the legal needs of a wide variety of clients, from local families to small business owners, from family farmers and ranchers to local lending institutions, from local hospitals and physician groups to energy pioneers, power generators, and mining interests. We continue to serve the same clients today, joined by national and international businesses representing virtually every industry with interests in our region. To better serve the increasingly diverse and complex needs of our clients, the firm established offices in Helena, Montana (1991), Kalispell, Montana (1997), Bozeman, Montana (2000), Missoula, Montana (2003), Butte, Montana (2011), and in Williston, North Dakota (1996).

On January 1, 2009, Crowley Fleck became the name of the firm formed by the combination of Crowley, Haughey, Hanson, Toole & Dietrich PLLP and Fleck, Mather & Strutz, Ltd. of Bismarck, North Dakota. The Fleck firm had been founded in 1945 by Alvin C. Strutz, later Chief Justice of the North Dakota Supreme Court, and Clifford Jansonius, who later served as a North Dakota District Judge. Ernest R. Fleck joined them in 1948. With this combination, Crowley Fleck established itself as a true regional law firm serving clients throughout the Northern Rockies region of Montana, North Dakota, and Wyoming. To perfect this vision, the firm has since established offices in Casper, Cheyenne, and Sheridan, Wyoming. The firm, therefore, now meets the governmental and regulatory needs of its clients through offices in the capital cities of Montana, North Dakota, and Wyoming.

The firm counts among its partners and former partners lawyers of formidable ability and integrity, dedicated to the profession and to public service. Crowley Fleck lawyers contribute thousands of hours of pro bono legal services to those in need, serve on state bar association boards, committees, and commissions, ABA committees, in the Wyoming State Legislature, and on countless local charitable and nonprofit boards. In 1953, then partner William J. Jameson was elected President of the American Bar Association and in 1973 received the ABA’s highest

honor, the ABA Medal. Our commitment to a tradition of public service in our profession and in our communities forms the foundation of our firm.

For more information about the firm, our attorneys, practice areas, and locations, please visit crowleyfleck.com.

(B) PURPOSE AND USE OF GUIDE

This guide is intended to provide a general introduction to Montana law with regard to conducting business within the State of Montana. It also provides a general overview of certain Federal and tribal laws that may be applicable to Montana businesses. Although we have generally summarized the law in Montana, this guide does not provide a comprehensive review or analysis of Montana, Federal or tribal law. As noted throughout this guide, the analysis and discussion of Federal law has been prepared and provided by Lex Mundi to Crowley without independent investigation by our firm.

Crowley Fleck prepared this guide for the reader's information, but these materials are not legal advice. Crowley Fleck does not intend these materials to create, nor does the reader's receipt of them constitute, an attorney-client relationship. Online readers should not act upon this information without first obtaining direct professional counsel. Specifically, please do not send Crowley Fleck any confidential information without first speaking with one of our attorneys and obtaining permission to send Crowley Fleck information.

II. GEOGRAPHY

(A) GEOGRAPHY, LOCATION AND CLIMATE

Montana, the fourth largest state by area, is geographically diverse, ranging from Rocky Mountains in the West to Great Plains in the East. Western Montana mountain ranges form part of the Continental Divide and the headwaters of majestic rivers, which eventually flow into the Atlantic, Pacific, and Arctic Oceans. Rolling hills, wide river valleys, and grasslands characterize the Eastern side of the State. Montana is home to natural spectacles ranging from glaciers and blue ribbon trout streams to immense fossil formations.

Montana's two extreme temperatures, -70°F and 117°F, may appear daunting, however, average daytime temperatures typically range from 28°F, in January, to 84.5°F, in July. Each season is unique and different. Average annual rainfall ranges from 13-18 inches, while average annual snowfall ranges from 20-50 inches. Montana's landscape and climate are ideal for outdoor enthusiasts.

For more information about Montana and its attractions, please see visitmt.com.

(B) CULTURAL AND ETHNIC BACKGROUND

Historically, Montana has been home to Native Americans, cowboys, gamblers, loggers, miners, farmers, and ranchers. The modern descendants of these original pioneers and homesteaders still live in the state. In fact, Montana has seven federally recognized reservations

home to at least eleven different tribal cultures and many ranching families still live on the land their ancestors homesteaded in the late 1800's.

(C) INVESTMENT CLIMATE

Montana is a great place to do business and has a healthy economy. Montana's total GDP is \$44,040,000 despite a total population of 1,015,165. The current unemployment rate is 4.8% compared to the national unemployment rate of 6.5%. Most Montanans are employed in one of the major industries, which include: agriculture, tourism, manufacturing, mining, and service. Additionally, many entrepreneurs make Montana their home and operate small businesses here. In 2013, Montana was ranked first for startup businesses by the [Kauffman Foundation](#). The [Tax Foundation](#) ranked Montana seventh in the 2014 State Business Tax Climate Index. According to the [U.S. Chamber of Commerce](#), Montana attracts skilled laborers and international firms and ranks first in growth in self-employed individuals.

(D) MONTANA IN THE NATIONAL HEADLINES

Montana has made the headlines for a wide variety of reasons in the recent years. First, Senator Max Baucus was confirmed as the U.S. Ambassador to China. Second, Montana was the first state to pass an email and location-tracking privacy bill, which requires a probable cause warrant before investigators can search personal private electronic devices. Third, Montana was ranked fifth in the 2014 Forbes Happiest State Rankings. Most recently, Monica J. Lindeen, the Montana State Auditor and Commissioner of Securities and Insurance, became the President elect of the National Association of Insurance Commissioners (NAIC). Ms. Lindeen assumed this position on January 1, 2015.

III. BUSINESS ENTITIES

(A) CORPORATIONS

(1) Formation

The current address and contact information for Montana's Secretary of State and Department of Commerce is as follows:

Montana Secretary of State
P.O. Box 202801
Helena, MT 59620-2801
Phone: (406) 444-3665
Fax: (406) 444-3976
Website: sos.mt.gov

Montana Department of Commerce
P.O. Box 200501
Helena, MT 59620-0501
Phone: (406) 841-2700
Fax: (406) 841-2701
Website: commerce.mt.gov

Montana corporations are governed by the Montana Business Corporation Act ("MBCA"). Mont. Code Ann. § 35-1-112, *et seq.* A domestic corporation is formed by filing articles of incorporation with the Montana Secretary of State. Mont. Code Ann. § 35-1-220. A prescribed form can be found on the Secretary of State's [website](#). The articles of incorporation must include (1) the name of the corporation, (2) the class and number of shares the corporation is authorized to issue, (3) the name and street address of the corporation's registered agent, and

(4) the names and mailing addresses of each incorporator. Mont. Code Ann. § 35-1-216. The corporate name must be distinguishable from other business's names within the state and must include the word "corporation" or some other word or abbreviation with similar meaning. Mont. Code Ann. § 35-1-308.

At least one class of shares with unlimited voting rights must be authorized by the articles of incorporation, and such shares are usually entitled to receive the net assets of the corporation upon dissolution. Mont. Code Ann. § 35-1-618. The articles of incorporation may also authorize classes of shares (i) with special, conditional or limited voting rights, (ii) that are redeemable or convertible, (iii) with the right to cumulative or non-cumulative distributions, and (iv) with preference to distributions. *Id.* By default, shareholders may cumulate their votes and do not have pre-emptive rights unless the articles of incorporation provides otherwise. Mont. Code Ann. §§ 35-1-531, -535. Such default provisions may be changed by including an express statement providing otherwise in the articles of incorporation. Generally, all shares within a class must have identical preferences, limitations, and rights to those of other shares of the same class, but a series within that class may provide other preferences, limitations and rights. Mont. Code Ann. §§ 35-1-618, -619.

The articles of incorporation may also include (1) the names and addresses of those who are to serve on the board of directors, (2) the purpose for which the corporation was formed, (3) the powers of the corporation, its directors and shareholders, (4) the par value for the authorized shares, (5) the extent of personal liability on the shareholders for the corporate debts, and (6) any provision required or permitted to be set forth in the bylaws, provided any such provisions are not inconsistent with the law. Mont. Code Ann. § 35-1-216(2). Unless the articles of incorporation provide otherwise, the corporation has the purpose of engaging in any lawful business. Mont. Code Ann. § 35-1-114.

The articles of incorporation may limit or eliminate the liability of a director to the corporation or its shareholders for money damages resulting from any action taken or any failure to take action as a director, except for (i) liability for the amount of any financial benefit to which the director is not entitled, (ii) intentional infliction of harm on the corporation or the shareholders, (iii) the authorization of an unlawful distribution, or (iv) an intentional violation of criminal law. Mont. Code Ann. § 35-1-216(2).

The corporation's existence commences upon the filing of the articles of incorporation unless a delayed effective date is provided. Mont. Code Ann. § 35-1-219. By default, the corporation has perpetual existence and all powers necessary or convenient to carry out its business and affairs. Mont. Code Ann. § 35-1-115.

During the incorporation process, businesses may adopt a business name, but they may not use the same name as another business. Incorporators should contact the Business Services Bureau of the Secretary of State's Office at (406) 444-3665 to confirm that a potential name is not already in use. Alternatively, incorporators may search for a business name at the Secretary of State's [website](#). If the name is available, applicants may simply designate it in the articles of incorporation and file with the Montana Secretary of State. Applicants may also reserve a name for 120 days if they are not yet ready to file their articles of incorporation. The reservation cannot be renewed beyond the initial 120 days. A prescribed form to reserve a business name

can be found at the [website](#). The current fee to reserve a business name is \$10. Applications for name reservations should be mailed to the Montana Secretary of State's Office.

A corporation's governing documents may be amended after initial formation. Unless the articles of incorporation provide otherwise, certain corporate amendments require either a board or shareholder vote, or both. Certain amendments to the articles of incorporation may be made by the board of directors without shareholder approval, and amendments of more significance generally require shareholder approval. Mont. Code Ann. §§ 35-1-225 to -228. Any amendments and restatements of the articles of incorporation must be delivered to the Secretary of State. Mont. Code Ann. §§ 35-1-230, -231.

(2) Management

Once the corporation is established, the initial board of directors must hold an organizational meeting to appoint officers and adopt bylaws. Mont. Code Ann. § 35-1-222. If the initial board of directors is not named in the articles of incorporation, the incorporators must hold a meeting to elect directors. Provided they are consistent with the applicable law and the articles of incorporation, the bylaws may contain any provision for managing the business and regulating the affairs of the corporation. Mont. Code Ann. § 35-1-236. The shareholders or the board of directors may amend the bylaws without one another's approval. Mont. Code Ann. § 35-1-234.

All corporate powers must be exercised by or under the authority of the board of directors. Mont. Code Ann. § 35-1-416. The board of directors is responsible for managing the business and affairs of the corporation. *Id.* However, the articles of incorporation or a shareholder agreement may limit the board's discretion or powers. Mont. Code Ann. § 35-1-416, 820. Certain actions require shareholder approval. For example, the corporation may participate in a merger or share exchange after the board of directors adopts an action plan and it is approved by the shareholders. Mont. Code Ann. §§ 35-1-813 to -819; see [mergers](#) below. The board of directors must get shareholder approval before selling substantially all of the corporation's assets outside of the regular and usual course of the corporation's business.

The number of directors and how they are elected is usually set forth in the articles of incorporation or bylaws. Mont. Code Ann. § 35-1-419. Generally, directors serve on the board until the next annual shareholders' meeting with staggered terms permitted if there are nine or more directors. Mont. Code Ann. §§ 35-1-421, -422. All directors are required to act in good faith, under the duty of care, and in the best interests of the corporation. Mont. Code Ann. § 35-1-418. Directors are also to act under a duty of loyalty by avoiding conflicts of interest. However, a director's conflicting interest transaction may not be enjoined if (i) the conflicting interest is fully disclosed and approved by the disinterested directors, (ii) the conflicting interest is fully disclosed and approved by the shareholders, or (iii) the transaction is determined to be fair to the corporation, judged according to the circumstances at the time of the commitment. Mont. Code Ann. §§ 35-1-461 to -464. Directors may be removed at any time by a two-thirds vote of the shares entitled to vote at an election of directors, unless the articles of incorporation or bylaws provide otherwise, or by a judicial proceeding. Mont. Code Ann. §§ 35-1-424, -425.

Subject to any limitations provided in the articles of incorporation, the board of directors may authorize and the corporation may make distributions to its shareholders unless (i) the corporation would not be able to pay its debts as they become due in the usual course of business after such distribution or (ii) the corporation's total assets would be less than the sum of its total liabilities plus the amount needed to satisfy shareholders' preferential rights if the corporation were to be dissolved at the time of the distribution. Mont. Code Ann. § 35-1-712. A director may be held personally liable if such director approves an unlawful distribution, but such director may seek contribution from all other directors who approved the unlawful distribution and from each shareholder who accepted the distribution knowing it to be unlawful. Mont. Code Ann. § 35-1-713.

A corporation has officers designated in the bylaws or appointed by the directors. Mont. Code Ann. § 35-1-441. Generally, the officers are responsible for the daily operations of the corporation and perform their duties as set forth in the bylaws, or at the direction of the directors or an authorized officer. Mont. Code Ann. § 35-1-442. A corporation must have delegate to at least one officer (generally, the secretary) the responsibility to prepare minutes of the directors' and shareholders' meetings and authenticates corporate records. Mont. Code Ann. § 35-1-441. Like directors, officers are required to act in good faith, under the duty of care, and in the best interests of the corporation. Mont. Code Ann. § 35-1-443. An officer may resign or may be removed by the board of directors at any time, with or without cause. Mont. Code Ann. § 35-1-444.

Detailed provisions setting forth mandatory, allowable and court-ordered indemnification procedures for directors, officers, employees, and agents can be found in Mont. Code Ann. §§ 35-1-452 to -457. Generally, to receive permissible indemnification, the individual must have engaged in good faith conduct, and in a manner the individual reasonably believed to be in the best interest of the corporation. Mont. Code Ann. § 35-1-452(1). Mandatory indemnification is required when a director is wholly successful on the merits or otherwise. Mont. Code Ann. § 35-1-453.

(3) Shareholders

The MBCA provides extensive rules for shareholder meetings with provisions addressing notice requirements, record date for vote entitlement, shareholders' lists, proxy voting, quorum voting, voting agreements, and shareholder agreements. Mont. Code Ann. §§ 35-1-516 to -533, -820. Shareholder derivative actions, discussed below, are also governed by the MBCA. Mont. Code Ann. §§ 35-1-541 to -550.

Generally, a shareholder is not personally liable to the corporation or its creditors. If a shareholder is active in the corporation, they are still not personally liable to the corporation or its creditors, but they may become personally liable for their own acts or conduct, unless the articles of incorporation provide otherwise. If a shareholder is not active in the corporation, they are not personally liable unless the court disregards the corporate entity ("piercing the corporate veil") or the shareholder agrees to assume personal liability in writing. Mont. Code Ann. § 35-1-534.

As previously stated, every corporation must have a secretary or other officer who maintains the corporate records. See [management](#) above. Generally, the shareholders have a right to inspect such records including the meeting minutes from shareholder and director meetings, financial statements, the list of shareholders, and the corporation's charter papers including the articles of incorporation and bylaws. Any shareholder requesting to inspect or copy such records must do so in good faith and give advanced written notice indicating the purpose behind such inspection. The corporation is only obligated to allow such inspection during regular business hours at the principal office. Mont. Code Ann. §§ 35-1-1106, -1107.

Shareholders may also bring a derivative action on behalf of the corporation when a valid cause of action exists that the corporation has refused to pursue. Before commencing a derivative action, the shareholder must make an advance written demand upon the corporation to pursue such action. Furthermore, a derivative action may be dismissed if a majority of disinterested directors or a majority of an appointed independent panel makes a good faith determination that the maintenance of the derivative proceeding is not in the best interests of the corporation. Mont. Code Ann. §§ 35-1-541 to -547.

As previously noted, certain major transactions require shareholder approval after a proposal by the board of directors. See [management](#) above. If a shareholder dissents from the proposed action, the dissenting shareholder has the right to receive payment of the fair value of their shares after giving written notice before the meeting of their intent to assert their dissenters' rights and the shareholder abstains from voting on such proposed action. Mont. Code Ann. §§ 35-1-826 to -832.

(4) Corporate Taxation

Unless a valid "S corporation election" (discussed below) is made, a corporation's taxable income is taxed at the entity level for federal and state tax purposes. In Montana, all income, gains, losses and deductions are reported by the entity on a CLT-4 Form which can be found on the Montana Department of Revenue's [website](#). However, there is a layer of double taxation for corporations because shareholders are also taxed on the receipt of any dividends or distributions from the corporation.

Montana has adopted the Multistate Tax Compact. See Mont. Code Ann. § 15-1-601, *et seq.* Therefore, in Montana, a corporation engaging in business activity in multiple states may be required to allocate and apportion its income among the multiple states for state tax purposes. Mont. Code Ann. § 15-31-301.

For federal tax purposes, a closely held or small business corporation can make an "S corporation election," allowing the corporation to be taxed similar to a pass-through entity. See § 1362 of the Internal Revenue Code of 1986, as amended (the "Code"). Generally, to be eligible for the S corporation election, a corporation must not have: (i) corporations, nonresident aliens, partnerships, or certain trusts as shareholders, (ii) more than 100 shareholders, or (iii) more than one class of stock with identical rights to distribution and liquidation proceeds with differences in voting rights disregarded for this purpose. See Code § 1361. If an S corporation election is made, the corporation is generally not taxed at the entity level. Instead, items of income, deductions, losses and credits are allocated to shareholders, for reporting purposes, on a

pro-rata basis. *See* Code §§ 1363 and 1366. For state tax purposes, a small business corporation electing pass-through taxation will file a Form CLT-4S accompanied with a Schedule K-1 showing what allocations were made.

(5) Mergers, Exchanges & Sale of Assets

Mont. Code Ann. § 35-1-813 governs corporate mergers. This section provides that one or more corporations in the State of Montana may merge into another corporation if each corporation's board of directors adopts a plan of merger and if its shareholders approve the plan (if the shareholders are required to do so). The plan of merger must include the name of each corporation planning to merge as well as the name of the "surviving corporation into which each other corporation plans to merge, the "terms and conditions of the merger," and "the manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving corporation or any other corporation or into case or other property in whole or part." Mont. Code Ann. § 35-1-813(2)(a)-(c). The plan may include amendments to the articles of incorporation of the surviving corporation and any other relevant provisions related to the merger.

Mont. Code Ann. § 35-1-814 governs share exchanges. Generally, a corporation is allowed to acquire all of the shares of another corporation so long as the "board of directors of each corporation adopts and its shareholders, if required ... approve the exchange." The plan of exchange must include the name of the acquiring corporation and the corporation from which the shares will be acquired from, the name of the "terms and conditions of the exchange," and the "manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring corporation or any other corporation or for cash of other property in whole or part." Mont. Code Ann. § 35-1-814(2)(a)-(c). Any other provisions relating to the exchange may also be included.

Under the MBCA, the directors generally must notify the shareholders from both the surviving and acquiring corporations about the planned merger or share exchange. The shareholders' notification must include a statement regarding the purpose of the meeting and a summary of the plan of merger or share exchange, which may be included as an attachment. Generally, shareholder approval for the planned merger or share exchange is required. Mont. Code Ann. § 35-1-815. The directors must recommend the plan – unless a conflict of interest bars them from doing so – and the shareholders must approve the plan for the merger to move forward. Unless the articles of incorporation or board of directors provide otherwise, a two-thirds majority must approve the plan of merger or share exchange. A simple majority is allowed if appropriately provided for in the articles of incorporation. *Id.*

Once the plan has been approved or adopted by the board of directors, the surviving corporation must file with the Montana Secretary of State articles of merger or share exchange that include the merger plan or share exchange plan, a statement about whether shareholder approval (from any corporation related to the merger) was required and the "designation, number of outstanding shares, and number of votes entitled to be cast by each voting group entitled to vote separately on the plan as to each corporation and either the total number of votes cast for and against the plan ... or the total number of undisputed votes cast for the plan ... and a statement that the number cast for the plan by each voting group was sufficient for approval by

that voting group.” Mont. Code Ann. § 35-1-816. A merger is effective when the articles of merger are filed with the Secretary of State’s Office.

Upon merger, “title to real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment,” and the surviving corporation takes on all liabilities of each acquired corporation. Mont. Code Ann. § 35-1-817(b)-(c). A merger does not limit or prevent pending legal proceedings from continuing against the acquired corporation. As an alternative, the surviving corporation may be substituted for the acquired corporation instead. Mont. Code Ann. § 35-1-817(d).

Generally, the board of directors may determine to sell, lease, exchange or otherwise dispose of all or substantially all of the corporation’s assets in the ordinary course of business without shareholder approval. Mont. Code Ann. § 35-1-822. If such a transaction is outside of the ordinary course of business, then generally shareholder approval will be required. Mont. Code Ann. § 35-1-823.

If the corporation proposes to take any action by merger, share exchange, or the sale or other transfer of all or substantially all of the corporation’s assets which requires shareholder approval, then dissenter’s rights are triggered for any shareholders who do not consent to such action. See Mont. Code Ann. §§ 35-1-827 to -839. Upon proper notice and exercise, a dissenter is generally entitled to fair value for the dissenter’s shares. Mont. Code Ann. § 35-1-834.

(6) Dissolution and Liquidation

Dissolution of a corporation may occur by (i) a majority approval of the incorporators or initial directors before any shares have been issued or before business activities have commenced, (ii) a proposal by the board of directors to dissolve that is approved by a majority or two-thirds vote of the shareholders, or (iii) a judicial dissolution. See Mont. Code Ann. §§ 35-1-931, -932, -938. After the proper authorization is obtained, the corporation is dissolved by filing articles of dissolution with the Secretary of State. Mont. Code Ann. § 35-1-933. The corporation may revoke its dissolution within 120 days of filing the articles of dissolution by following the proper procedures of Mont. Code Ann. § 35-1-934. Upon dissolution, a corporation continues its existence but may not carry on any business except what is necessary to wind up and liquidate its business and affairs, including collecting its assets, discharging its liabilities, disposing of property, and distributing any remaining property to its shareholders. Mont. Code Ann. § 35-1-935. Known and unknown claims against the dissolved corporation may be discharged by following the procedures in Mont. Code Ann. §§ 35-1-936, -937. Dissolution does not transfer title to the corporation’s property, heighten or lower the standard of conduct imposed on its directors or officers, change voting requirements, prevent the commencement of a proceeding against the corporation, or discharge the corporation from any tax liability. Mont. Code Ann. § 35-1-935.

(7) Foreign Corporations

A foreign corporation may not transact business in Montana until it obtains a certificate of authority from the Secretary of State. Mont. Code Ann. § 35-1-1026. A foreign corporation is not considered to be transacting business in Montana by participating in a legal proceeding,

maintaining bank accounts, selling through independent contractors, acquiring indebtedness, or transacting business in interstate commerce. *Id.* The application for a certificate of authority can be found on the Secretary of State's [website](#). A \$70 filing fee must also be submitted with the application. The certificate gives the foreign corporation all rights and privileges that a domestic corporation enjoys under Montana law. Mont. Code Ann. § 35-1-1030. A foreign corporation transacting business without a certificate of authority will prevent the corporation from commencing or maintaining a proceeding in any court of Montana. Mont. Code Ann. § 35-1-1027.

(8) Professional Corporations

Generally, professional corporations are organized for the purposes of rendering professional services and supporting services thereto within a single profession. Mont. Code Ann. § 35-4-205. Special provisions for professional corporations are found under the Montana Professional Corporation Act ("MPCA"). Mont. Code Ann. § 35-4-109, *et seq.* However, the provisions of the MBCA still apply to foreign corporations except to the extent they are inconsistent with the MPCA.

A professional corporation is formed by filing articles of incorporation, conforming to those of the MBCA, with the Secretary of State. Mont. Code Ann. § 35-4-208. The corporate name must contain "professional corporation" or "P.C.," and may not contain any abbreviation that is deceptively similar to that of another type of business. Mont. Code Ann. § 35-4-206. A professional corporation is only permitted to engage in the type of profession set forth in the articles of incorporation. Mont. Code Ann. § 35-4-402.

Only individuals or entities licensed to render the same type of professional services as that of the professional service corporation may become a shareholder, and each shareholder may only transfer their shares to such individuals or entities. Mont. Code Ann. § 35-4-301. Furthermore, at least one-half of the directors and officers, excluding the secretary and treasurer, must be qualified professionals with respect to the corporation at all times. Mont. Code Ann. § 35-4-209.

An employee of the professional corporation who renders professional services is liable for any negligent or wrongful act or omission in which such employee personally participate to the same extent as a sole practitioner. Mont. Code Ann. § 35-4-404. The professional corporation itself is also liable for any negligent or wrongful acts or omissions. *Id.* The amount of personal liability for shareholders remains the same as that indicated in the MBCA. *Id.*

A professional corporation may merge or consolidate with another corporation only if all the shareholders of each corporation are qualified to be a shareholder of the surviving corporation. Mont. Code Ann. § 35-4-501. If a professional corporation ceases to render the type of professional services listed in the articles of incorporation, the corporation may amend the articles with the Secretary of State, conform its corporate name to the MBCA, and continues its corporate existence under the provisions of the MBCA. Mont. Code Ann. § 35-4-502.

(9) Close Corporations

Montana has enacted the Montana Close Corporation Act (“MCCA”). Mont. Code Ann. § 35-9-101, *et seq.* The MBCA and MPCA apply to close corporations to the extent they are not inconsistent with the provisions of the MCCA. Mont. Code Ann. § 35-9-102. Generally, a close corporation is a smaller corporation that is able to operate without the strict corporate formalities. A corporation must elect close corporation status by including an express statement indicating such election in the articles of incorporation. Mont. Code Ann. § 35-9-103. If an existing corporation wishes to make a close corporation election, the articles of incorporation must be amended to include an express statement indicating an election for close corporation status, and such amendment must be approved by two-thirds of each class of shareholders. *Id.* A Montana close corporation may not have more than twenty five (25) shareholders at any given time. *Id.*

In a close corporation, the transfer of shares is significantly restricted, and usually, the corporation enjoys rights of first refusal on any transfer of ownership unless the articles of incorporation provide otherwise. Mont. Code Ann. §§ 35-9-202 to -203. Any prohibited share transfers are deemed ineffective. Mont. Code Ann. § 35-9-204. If a shareholder is deceased, the executor or administrator of such deceased shareholder’s estate may require the corporation to purchase all of the decedent’s shares if an express statement is included in the articles of incorporation adopting specific provisions of the MCCA. Mont. Code Ann. §§ 35-9-205 to -208.

All the shareholders of a close corporation are free to form shareholder agreements to regulate the corporate powers, management of the business and affairs, and relationships among the shareholders, including eliminating the board of directors if approved by all shareholders. Mont. Code Ann. §§ 35-9-301 to -302. The MCAA specifically provides that the lack of corporate formalities in a close corporation is not in itself a ground for imposing personal liability on the shareholders for liabilities of the corporation. Mont. Code Ann. § 35-9-306.

Any plan of merger, share exchange, or sale of substantially all of the corporation’s assets not made in the usual course of business requires approval of at least two-thirds of the votes of each class of shares. Mont. Code Ann. § 35-9-401.

A shareholder may seek relief from the court if the directors or those in control have acted (i) in a manner that is illegal, oppressive, fraudulent or unfairly prejudicial, or (ii) are deadlocked in the management of the corporate affairs and the corporation will suffer irreparable injury as a result. Mont. Code Ann. § 35-9-501. The court may order relief it deems necessary including specific performance, forced purchase of the shareholder’s shares, or even judicial dissolution in extreme situations. Mont. Code Ann. § 35-9-502 to -504.

Close corporation status may be terminated by a two-thirds approval of each class of shares and by amending the articles of incorporation to delete the express statement electing such status. Mont. Code Ann. § 35-9-402. Once close corporation status is terminated, the corporation is subject to all the applicable provisions of the Montana Business Corporation Act and the Montana Professional Corporation Act. Mont. Code Ann. § 35-9-403.

(B) PARTNERSHIPS

(1) General Partnerships

(a) Formation

Montana enacted the Uniform Partnership Act (“UPA”). Mont. Code Ann. § 35-10-101, *et seq.* Generally, a partnership is formed by the association of two or more persons to carry on as co-owners of a business for profit regardless of whether they intended to create a partnership. Mont. Code Ann. § 35-10-202. Two or more persons may share in gross returns without creating a partnership, but the sharing of profits creates a presumption of a partnership unless the profits are received in payment of a debt, services, rent, annuity, interest, or the sale of property. *Id.*

In Montana, general partnerships are not required to register with the Secretary of State unless the partnership is operating under an assumed business name. See [ABN](#). A written or oral partnership agreement may be formed among the partners to govern relations between the partners and between the partners and the partnership. Mont. Code Ann. §§ 35-10-102(6), -106. Unless the partnership agreement provides otherwise, the UPA governs relations among the partners and between the partners and partnership. *Id.* Certain non-waivable provisions exist under the UPA that may not be waived in a partnership agreement including, among others, the duty of loyalty, duty of care, obligation of good faith and fair dealing, power to withdraw as a partner, and power to expel a partner. Mont. Code Ann. § 35-10-106.

(b) Management

Each partner in a Montana general partnership has equal rights in the management and conduct of the partnership’s business. Mont. Code Ann. § 35-10-401. Each partner has the power to bind the partnership if acting in the ordinary course of the partnership’s business unless the partner lacked authority to act and the third party knew the partner lacked such authority to act. Mont. Code Ann. § 35-10-301. The partnership may file a certified statement of partnership authority with the Secretary of State that indicates the authority of each partner to act for the partnership including any limitations, and this statement has the effect of putting any third party of notice of any limitations on a partner’s ability to act on behalf of the partnership. Mont. Code Ann. § 35-10-310.

A partnership must maintain books and records, and each partner has a right to access such books and records. Mont. Code Ann. § 35-10-402. All partners owe a duty of loyalty and a duty of care to the partnership and the other partners. Mont. Code Ann. § 35-10-405. Under the duty of loyalty, generally a partner must account to the partnership for any benefit derived from acting on behalf of the partnership that is rightfully owed to the partnership, refrain from dealing with the partnership on behalf of a third party with an adverse interest to the partnership, and refrain from competing with the partnership in the conduct of the partnership’s business. *Id.* Under the duty of care, generally a partner must refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law. *Id.* Furthermore, in discharging such duties, generally the partner must act under the obligation of good faith and fair dealing. *Id.* Although these duties may not be eliminated, the partnership agreement may

determine the standards for evaluating a partner's performance under such duty. *Id.* A duty is not violated merely because the partner's conduct furthers a personal interest of the partner. *Id.*

If a partner breaches the partnership agreement or a duty owed to the partnership and the partnership is harmed as a result, the breaching partner may be held personally liable to the partnership. The partnership may commence an action against the breaching partner seeking, among other things, the specific enforcement of a right, the dissociation of the partner's interest, or the right to compel dissolution of the partnership. Mont. Code Ann. § 35-10-408, -409.

(c) **Property and Distributions**

All property acquired by or transferred to the partnership is property of the partnership and not property of the partners individually. Mont. Code Ann. § 35-10-203. Generally, property is presumed to be that of the partnership if it is purchased with partnership assets or if the name of the partnership is included on the instrument transferring title to the property. *Id.* Partners have no transferrable interests in the partnership property. Mont. Code Ann. § 35-10-508.

Each partner owns a transferrable interest in the partnership consisting of the partner's interest in distributions. Mont. Code Ann. § 35-10-509. The partnership tracks the ownership interest of the partners by maintaining capital accounts for each partner. The capital account increases by the partner's contributions and share of profits and decreases by distributions, share of losses, and share of liabilities. Mont. Code Ann. § 35-10-401. A partner's transferrable interest is reachable by creditors and may be subject to charging orders which constitute a lien on the judgment debtor's transferrable interest in the partnership. Mont. Code Ann. § 35-10-505.

Generally, partners are free to transfer their partnership interests without causing a dissolution or winding up of the partnership. Mont. Code Ann. § 35-10-510. However, the transferee of a partner's transferrable interest is not entitled to participate in the management or conduct of the partnership business, access the partnership account information, or inspect the books and records of the partnership. *Id.* The transferee of the partnership interest is only entitled to receive distributions based on their respective interest and to receive distributions upon the dissolution and winding up of the partnership. *Id.*

(d) **Liability and Limited Liability Partnership Registration**

In a general partnership, the partnership is liable for the injury caused by a wrongful act or omission of a partner acting in the ordinary course of business of the partnership or with the authority of the partnership. Mont. Code Ann. § 35-10-305. Unless the partnership registers as a limited liability partnership, all partners are jointly and severally liable for the debts and obligations of the partnership, including tortious conduct committed by a partner in the ordinary course of the partnership business, unless otherwise agreed by the claimant or provided by law. Mont. Code Ann. § 35-10-307. Therefore, a claimant may bring an action against the partnership and any or all of the partners who are personally liable for the obligations of the partnership in the same or a separate action. Mont. Code Ann. § 35-10-312. A judgment cannot be satisfied from the partner's personal assets, unless the judgment is obtained against the partner and not just against the partnership. *Id.*

Under Montana's UPA, a general partnership can become a limited liability partnership by filing a prescribed registration form with the Secretary of State and by paying a \$20 filing fee. Mont. Code Ann. § 35-10-70. See [Montana LLP](#). In Montana, a "limited liability partnership" includes both domestic and foreign limited liability partnerships. Mont. Code Ann. § 35-10-102(4). The name of a limited liability partnership must contain the words "limited liability partnership" or some abbreviation thereof. Mont. Code Ann. § 35-10-703. A renewal registration for limited liability partnership status must be filed every five (5) years with the Secretary of State. Mont. Code Ann. § 35-10-715.

A partner of a limited liability partnership is not liable, directly or indirectly, for any debts or obligations arising when the partnership was registered as a limited liability partnership. Mont. Code Ann. § 35-10-307. However, a partner of a limited liability partnership remains liable for their own negligence or wrongful conduct including such acts committed by a person under the partner's direct supervision and control. *Id.*

(e) Partnership Taxation

Both general and [limited partnerships](#) (discussed below) are flow-through entities for federal and state tax purposes. The partnership itself is not taxed at the entity level and is only required to file information returns with the Internal Revenue Service and the Montana Department of Revenue. In Montana, a partnership must file an informational return on Form PR-1 (found on the Montana Department of Revenue's [website](#)) every tax year. The profits and losses of the partnership are passed through to the partners who report the partnership income on their individual returns. A Schedule K-1 should be filed by the partnership every year to show the allocations.

In general partnerships, unless the partnership agreement provides otherwise, each partner is entitled to an equal share of partnership profit and losses. Mont. Code Ann. § 35-10-401. If the partnership agreement provides for special allocations, profits and losses may be allocated among the partners unequally. However, to be respected by taxing authorities, such special allocations must satisfy applicable requirements.

In limited partnerships, unless the partnership agreement provides otherwise, profits and losses are allocated to partners on a pro-rata basis (the portion of each partner's partnership interest). Like general partnerships, the limited partnership agreement may provide for special allocations, but such special allocations must satisfy applicable requirements to be respected.

(f) Dissociation and Dissolution

A partner may be dissociated from the partnership upon, among other things, (i) notifying the partnership of his or her express will to withdraw, (ii) an event agreed to in the partnership agreement, (iii) the partner's expulsion pursuant to the partnership agreement, (iv) judicial expulsion, or (v) the partner's death. Mont. Code Ann. § 35-10-616. A partner's dissociation is wrongful if it is in breach of an express provision of the partnership agreement or the dissociation occurs before the expiration of the partnership's term, provided it is not an at-will partnership. Mont. Code Ann. § 35-10-617. A partner who wrongfully dissociates from the partnership is liable to the partnership and other partners for any damages caused by the

dissociation. *Id.* If the dissociation of a partner does not result in dissolution of the partnership, the partnership must purchase the dissociated partner's interest in the partnership in accordance with detailed requirements of the UPA. Mont. Code Ann. § 35-10-619. The dissociated partner remains liable for any partnership obligations occurring before the dissociation. Mont. Code Ann. § 35-10-621.

A partnership is dissolved upon (i) a partner's notice of his or her express will to withdraw from the at-will partnership, (ii) the expiration of the term in a partnership for a definite term, (iii) the occurrence of an event agreed to in the partnership agreement unless all of the partners agree to continue the business, (iv) the occurrence of an event making it unlawful to continue the business, or (v) a judicial dissolution. Mont. Code Ann. § 35-10-624. After dissolution, the partnership is not terminated until the winding up of the business is completed. Mont. Code Ann. § 35-10-602. All partners remain liable to the partnership and other partners for liabilities incurred by the partnership before dissolution. Mont. Code Ann. § 35-10-628. In winding up the partnership's business, the accounts must be settled among the partners. First, the assets of the partnership are applied to discharge its obligations to creditors, including partners who are creditors. Second, the profits and losses resulting from the liquidation of the partnership assets are credited to the partners' accounts. Then, the partnership makes distributions to each partner in an amount equal to that partner's account balance. If a partner has a negative account balance, that partner must contribute that amount to the partnership. Mont. Code Ann. § 35-10-629.

(2) Limited Partnerships

(a) Formation

Montana has enacted the Uniform Limited Partnership Act ("ULPA"). Mont. Code Ann. § 35-12-501, *et seq.* A limited partnership has one or more general partners and one or more limited partners. Mont. Code Ann. § 35-12-504(11). A limited partnership is formed by filing a certificate of limited partnership with the Secretary of State. Mont. Code Ann. § 35-12-601. A prescribed form can be found at the Secretary of State's [website](#). The certificate must include (i) the name of the limited partnership containing the phrase "limited partnership" or an abbreviation thereof, (ii) the information of the registered agent, (iii) the name and business mailing address of each general partner, (iv) whether the limited partnership is a limited liability limited partnership, and (v) any additional information required by the provisions of the ULPA. *Id.* The certificate must also be signed by all of the general partners. Mont. Code Ann. § 35-12-604. To maintain limited partnership status, the certification must be filed every five (5) years. Mont. Code Ann. § 35-12-610.

A written or oral partnership agreement may be formed among the partners to govern relations between the partners and between the partners and the partnership. Mont. Code Ann. § 35-12-504(13), 515. Unless the partnership agreement provides otherwise, the ULPA governs relations among the partners and between the partners and partnership. *Id.* Certain non-waivable provisions exist under the ULPA that may not be waived in a partnership agreement including, among others, the power to sue and be sued, the signature requirements for certain documents, the right to access information, the duty of loyalty, the duty of care, the obligation of good faith

and fair dealing, the power to withdraw as a partner, and the power to expel a partner. Mont. Code Ann. § 35-12-515.

A foreign limited partnership must register with the Secretary of State before transacting business in Montana. Mont. Code Ann. § 35-12-1302. A prescribed form may be found at the Montana Secretary of State's [website](#). The laws of the state where the foreign limited partnership is organized governs the relations among the partners and limited partnership, and determines the liability of partners for obligations of the foreign limited partnership. Mont. Code Ann. § 35-12-1301

(b) Management

As previously stated, a limited partnership has at least one general partner and one limited partner. Each general partner has an equal right to participate in the management and conduct of the limited partnership. Mont. Code Ann. § 35-12-809. Any matters relating to the activities of the limited partnership may be decided by a majority of the general partners; however, the consent of all general partners is required for amendments to the partnership agreement, amendments to the certificate, and the sale of substantially all of the limited partnership's assets not done in the ordinary course of business. *Id.* A general partner acts as an agent for the limited partnership, and any acts done by a general partner in the ordinary course of the partnership's business binds the limited partnership unless the general partner did not have authority to act and the third party had notice that the general partner lacked such authority to act. Mont. Code Ann. § 35-12-806. Acts of general partners which are not apparently for carrying on in the ordinary course of business only binds the partnership if the act was actually authorized by all other partners. *Id.*

General partners only owe a duty of loyalty and a duty of care to the partnership and the other partners. Mont. Code Ann. § 35-12-811. Under the duty of loyalty, a general partner must account to the partnership for any benefit derived from acting on behalf of the partnership that is rightfully owed to the partnership, refrain from dealing with the partnership on behalf of a third party with an adverse interest to the partnership, and refrain from competing with the partnership in the conduct of the partnership's business. *Id.* Under the duty of care, a general partner must refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law. *Id.* Furthermore, in discharging such duties, the general partner must act under the obligation of good faith and fair dealing. *Id.* The partnership agreement may not eliminate these fiduciary duties but the partnership agreement may determine the standards for evaluating a general partner's performance under such duty. *Id.* A duty is not violated merely because the general partner's conduct furthers a personal interest of the partner. *Id.*

Unlike general partners, a limited partner has no right or power to act for or bind the limited partnership. Mont. Code Ann. § 35-12-706. Limited partners of a limited partnership do not have any fiduciary duties to the limited partnership or the other partners. Mont. Code Ann. § 35-12-707. Generally, a limited partner has minimal power to participate in the management of the limited partnership. Limited partners do, however, have the right to access information of the limited partnership including information regarding the state of the partnership's activities, the partnership's financial condition, and any other information that is just and reasonable. Mont. Code Ann. § 35-12-705.

(c) Property and Distributions

Like general partnerships, all property acquired by or transferred to the limited partnership is property of the partnership and not property of the general or limited partners individually. Partners have no transferrable interests in the partnership property; they only have a transferrable interest in their ownership interest of the limited partnership. Mont. Code Ann. § 35-12-1106. A partner's transferrable interest is reachable by creditors and may be subject to charging orders which constitute a lien on the judgment debtor's transferrable in the partnership. Mont. Code Ann. § 35-12-1103.

Generally, partners are free to transfer their partnership interests without causing a dissolution or winding up of the partnership. Mont. Code Ann. § 35-12-1107. However, the transferee of a partner's transferrable interest is not entitled to participate in the management or conduct of the partnership business, access the partnership account information, or inspect the books and records of the partnership. *Id.* The transferee of the partnership interest is only entitled to receive distributions based on their respective interest and to receive distributions upon the dissolution and winding up of the partnership. *Id.*

A partner of a limited partnership does not have a right to a distribution until the dissolution or winding up of the limited partnership. Mont. Code Ann. § 35-12-1001. Partners in a limited partnership only have the right to distributions in cash. Mont. Code Ann. § 35-12-1005. When and if a partner becomes entitled to receive a distribution, the partner has the status of a creditor of the limited partnership. Mont. Code Ann. § 35-12-1006. Similar to corporations, the limited partnership may not make a distribution if, after such distribution, (i) the partnership would not be able to pay its debts as they become due in the ordinary course of business, or (ii) the limited partnership's total assets would be less than the sum of its total liabilities plus the amount needed to satisfy preferential rights if the partnership were to be dissolved at the time of the distribution. Mont. Code Ann. § 35-12-1010. If a limited partner consents to a wrongful distribution, the consenting general partner may be held personally liable to the limited partnership. Mont. Code Ann. § 35-12-1011. Furthermore, a partner who knowingly receives a wrongful distribution may also be held personally liable to the limited partnership. *Id.*

(d) Liability and Limited Liability Limited Partnership Registration

All general partners are jointly and severally liable for all obligations of the limited partnership arising while acting as a general partner. Mont. Code Ann. § 35-12-803. Furthermore, unless the limited partnership registers as a limited liability limited partnership, all general partners are jointly and severally liable for the debts and obligations of the partnership, including tortious conduct committed by a general partner in the ordinary course of the partnership business, unless otherwise agreed by the claimant or provided by law. Mont. Code Ann. § 35-12-807. Therefore, a claimant may bring an action against the limited partnership and any or all of the general partners who are personally liable for the obligations of the partnership in the same or a separate action. Mont. Code Ann. § 35-12-808. However, a judgment cannot be satisfied from the general partner's personal assets unless the judgment is obtained against the general partner and not just against the limited partnership. *Id.*

In contrast, limited partners are not personally liable, directly or indirectly, for an obligation of the limited partnership solely by reason of being a limited partner even if the limited partner participates in the management and control of the limited partnership. Mont. Code Ann. § 35-12-703.

Under Montana’s ULPA, a limited partnership can become a limited liability limited partnership by filing a prescribed registration form with the Secretary of State and by paying a \$20 filing fee. Mont. Code Ann. § 35-12-601. See the [website](#). The name of a limited liability limited partnership must contain the words “limited liability limited partnership” or some abbreviation thereof. Mont. Code Ann. § 35-12-505. A renewal registration for limited liability limited partnership status must be filed every five (5) years with the Secretary of State. Mont. Code Ann. § 35-12-610.

In effect, registering as a limited liability limited partnership relieves general partners of any personal liability, directly or indirectly, for any debts or obligations arising solely by reason of being or acting as a general partner when the limited partnership was registered as a limited liability limited partnership. Mont. Code Ann. § 35-12-803.

(e) Dissociation and Dissolution

A general partner may be dissociated from the limited partnership upon, among other things, (i) notifying the limited partnership of their express will to withdraw, (ii) an event agreed to in the partnership agreement, (iii) the general partner’s expulsion pursuant to the partnership agreement, (iv) judicial expulsion, or (v) the general partner’s death. Mont. Code Ann. § 35-12-1018. A general partner’s dissociation is wrongful if it is in breach of an express provision of the partnership agreement or the dissociation occurs before the expiration of the limited partnership’s term, provided it is term limited partnership. Mont. Code Ann. § 35-12-1019. A general partner who wrongfully dissociates from the partnership is liable to the partnership and other partners for any damages caused by the dissociation. *Id.* Upon dissociation, a general partner’s right to participate in the management of conduct of the limited partnership’s activities terminates, and the general partner’s duty of loyalty and care continue only with regard to matters arising before the dissociation. Mont. Code Ann. § 35-12-1020. Upon dissociation, the dissociated general partner owns their transferrable interest as a mere transferee. *Id.* The dissociated general partner remains liable for any partnership obligations occurring before the dissociation. Mont. Code Ann. § 35-12-1022.

Except as otherwise provided by statute, a limited partner does not have the right to dissociate before the expiration of a term limited partnership. Mont. Code Ann. § 35-12-1016. A limited partner may dissociate from the limited partnership upon the same events as a general partner. *Id.* Upon dissociation, a dissociated limited partner has no further rights as a limited partner. Mont. Code Ann. § 35-12-1017. Like a dissociated general partner, a dissociated limited partner holds their ownership interest as a mere transferee. *Id.*

A limited partnership is dissolved upon (i) the happening of an event specified in the partnership agreement, (ii) the consent of all general partners and of limited partners owning a majority of the rights to receive distributions, (iii) the dissociation of a general partner, (iv) the passage of 90 days after the dissociation of the limited partnership’s last limited partner unless

the limited partnership admits at least one limited partner before the end of the 90 days, (v) the signing and filing of a declaration of dissolution by the Secretary of State, or (vi) judicial dissolution. Mont. Code Ann. § 35-12-1201, 1202. After dissolution, the limited partnership is not terminated until the winding up of the business is completed. Mont. Code Ann. § 35-12-1205. In winding up the limited partnership's business, the accounts must be settled among the partners. First, the assets of the partnership are applied to discharge its obligations to creditors, including partners who are creditors. Second, the profits and losses resulting from the liquidation of the partnership assets are credited to the partners' accounts. Then, the partnership makes distributions to each partner in an amount equal to that partner's account balance. If a partner has a negative account balance, that partner must contribute that amount to the partnership. Mont. Code Ann. § 35-12-1205, -1216.

(C) LIMITED LIABILITY COMPANY

(1) Formation

A limited liability company is a business entity with blended components of corporate and partnership structures, including limited liability and pass-through taxation. Montana has enacted the Montana Limited Liability Company Act ("MLLCA"). Mont. Code Ann. § 35-8-101, *et seq.* A limited liability company ("LLC") is a legal entity formed by one or more persons upon the signing and filing of articles of organization with the Secretary of State. Mont. Code Ann. §§ 35-8-201, -205, -206. A prescribed form can be found at the Secretary of State's [website](#). The articles of organization must include: (1) the name of the LLC containing the words "limited liability company" or some abbreviation thereof, (2) whether the LLC is a term company and the length of the term, (3) the business mailing address of its principal office, (4) the name and address of the company's registered agent, (5) whether the company will be managed by managers or its members and the names of those individuals, (6) whether the members will be liable for the company's debts, and (7) any other provision, not inconsistent with the law, that the members wish to set forth. Mont. Code Ann. § 35-8-202.

The members of the LLC may form an operating agreement, whether written or oral, to govern the conduct of the business and affairs of a LLC and the relations among the members, managers and the company that is binding upon all of its members. Mont. Code Ann. § 35-8-102(23). The operating agreement may not unreasonably restrict access to information and records, eliminate the duty of loyalty, unreasonably reduce the duty of care, eliminate the obligation of good faith and fair dealing, vary the right to expel a member, prevent judicial dissolution, or restrict the rights of a member's distributional interest. With the exception of the non-waivable provisions, the default rules of the MLLCA only apply if a particular issue is not addressed in the operating agreement.

(2) Management

A limited liability company may be either member-managed or manager-managed. Unless the articles of organization or the operating agreement provide otherwise, each member in a member-managed LLC has equal rights in the management and conduct of the company's business and most general, day-to-day company matters may be decided by a majority of the members. Mont. Code Ann. § 35-8-307. If the LLC is member-managed, members act as agents

of the LLC and have the power to bind the company in the ordinary course of business unless the member acting has no authority to act and the third party has notice that the member lacks authority. Mont. Code Ann. § 35-8-301.

Managers of a manager-managed LLC are elected or appointed by its members and generally serve until another manager is elected or appointed to replace them. Mont. Code Ann. § 35-8-307. Unless the articles of organization or the operating agreement provide otherwise, each manager in a manager-managed LLC has equal rights in the management and conduct of the company's business and most general, day-to-day company matters may be decided by a majority of the managers. *Id.* If the LLC is manager-managed, only managers have the ability to act as agents for the LLC and bind the company in the ordinary course of business unless the manager acting has no authority to act and the third party has notice that the manager lacks authority. Mont. Code Ann. § 35-8-301.

Regardless of whether the LLC is member-managed or manager-managed, the following actions, among other things, require the consent of all members unless the articles of organization or the operating agreement provide otherwise: (i) amendment of the operating agreement, (ii) authorization or ratification of acts that would otherwise violate the duty of loyalty, (iii) amendment of the articles of organization, (iv) making interim distributions, (v) the admission of a new member, (vi) the consent to dissolve the company, or (vii) the merging with another entity. Mont. Code Ann. § 35-8-307.

In both a member-managed LLC and a manager-managed LLC, the members and managers, respectively, owe duties of loyalty and care to the company and its members. Mont. Code Ann. § 35-8-310. The duty of loyalty requires the acting member or manager to account to the company for any benefit derived as a result of their position, to refrain from competing with the company, and to refrain from dealing with the company on behalf of a person with an adverse interest. *Id.* Under the duty of care, an acting member or manager must refrain from engaging in grossly negligent or intentional misconduct. A member of a manager-managed LLC does not, solely by reason of being a member, owe duties of loyalty or care to the company or its members. *Id.*

The company itself has an obligation to keep general business records and information at its principal place of business. Mont. Code Ann. § 35-8-405. Regardless of whether the LLC is member-managed or manager-managed, all members have a right to reasonably request access to records and information of the company. *Id.*

(3) Property and Distributions

Unless the articles of organization or the operating agreement provide otherwise, members share distributions equally. Mont. Code Ann. § 35-8-601. Furthermore, members do not have the right to request distributions in kind, only cash distributions. Mont. Code Ann. § 35-8-603. The company cannot make a distribution if, after the distribution, the company would not be able to pay its debts as they become due in the ordinary course of business or the company's total assets would be less than the sum of its liabilities plus the amount needed to make distributions to those with preferential rights upon dissolution. Mont. Code Ann. § 35-8-

604. A member or manager who authorizes a wrongful distribution may be held liable to the company for the amount of the wrongful distribution. Mont. Code Ann. § 35-8-605.

Any property transferred to or acquired by the LLC is property of the LLC and members have no specific interest in the LLC's property. Mont. Code Ann. § 35-8-701. Members of a LLC own a distributional interest in the LLC which is considered personal property. Mont. Code Ann. § 35-8-703. The distributional interest of a member may be reached by judgment creditors who may seek a charging order constituting a lien on such member's distributional interest. Mont. Code Ann. § 35-8-705. Generally, a member may transfer his/her distributional interest to a transferee. Mont. Code Ann. § 35-8-707. However, a transferee, by virtue of the transfer, is only entitled to the distributions the transferor would be entitled to. *Id.* A transferee does not become a member as a result of the transfer unless all of the members consent or the transferor gives the transferee the right to the transferee to become a member in accordance with the operating agreement. *Id.*

(4) Liability

Generally, members and managers of a LLC are not personally liable for a debt, obligation or liability of the LLC solely by reason of being a member or manager. Mont. Code Ann. § 35-8-304. Furthermore, the failure of the LLC to conduct itself within the usual corporate formalities in exercising its company powers or management is generally not a ground for imposing personal liability on the members or managers. *Id.* Generally, members are only liable for the debts, obligations or liabilities of the LLC if the articles of organization provide for such liability and the member to be liable has consented in writing to be held liable. *Id.*

An action may be brought by or against the LLC in its own name. Mont. Code Ann. § 35-8-1101. The LLC itself is liable for loss or injury resulting from a wrongful act or omission of a member or manager acting in the ordinary course of business of the LLC or with the authority to act. Mont. Code Ann. § 35-8-306.

(5) Tax Considerations

The taxation of a LLC depends on the number of members and certain elections. If an LLC has only one member, the LLC will be treated as a disregarded entity for tax purposes and the operations of the LLC will be reported on the sole member's tax return similar to a sole proprietorship. If the LLC has more than one member, then generally the members will elect to treat the LLC similar to a partnership for tax purposes. Like partnerships, a Montana multi-member LLC must file an information return on Form PR-1 every tax year. The multi-member LLC itself is not taxed on its profits and losses. For reporting purposes, unless the operating agreement provides otherwise, the profits and losses are allocated to the members in proportion to their ownership interest in the company. Like partnerships, a multi-member LLC can make special allocations which are subject to complex tax rules, and the LLC must complete a Schedule K-1 for each member every year showing what allocations were made.

(6) Dissociation and Dissolution

A member may be dissociated from the LLC upon, among other things, (i) notifying the LLC of his or her express will to withdraw, (ii) an event agreed to in the operating agreement,

(iii) the partner's expulsion pursuant to the operating agreement, (iv) judicial expulsion, or (v) the member's death. Mont. Code Ann. § 35-8-803. A member's dissociation is wrongful if it is in breach of an express provision of the operating agreement or the dissociation occurs before the expiration of the LLC's term. Mont. Code Ann. § 35-8-804. A member who wrongfully dissociates from the LLC is liable to the LLC and other members for any damages caused by the dissociation. *Id.* If the dissociation of a member does not result in dissolution of the LLC, the LLC must purchase the dissociated member's interest in the LLC in accordance with detailed requirements of the MLLCA. Mont. Code Ann. § 35-8-808. The timing of the purchase requirement may vary if the LLC is an at-will LLC or term LLC. *Id.*

A LLC is dissolved upon (i) the consent of the number of members specified in the operating agreement, (ii) the expiration of the term specified in the operating agreement, (iii) the occurrence of an event agreed to in the operating agreement, (iv) the occurrence of an event making it unlawful to continue the business, or (v) a judicial dissolution. Mont. Code Ann. § 35-8-901. In winding up the LLC's business, the accounts must be settled among the members. First, the assets of the LLC are applied to discharge its obligations to creditors, including members who are creditors. Second, the profits and losses resulting from the liquidation of the LLC's assets are credited to the members' accounts. Then, the LLC makes distributions to each member in an amount equal to that member's account balance. Final distributions are made to the members in the proportions which the members share distributions. Mont. Code Ann. § 35-8-905.

(7) Foreign Limited Liability Company

A foreign LLC may not transact business in Montana until it obtains a certificate of authority from the Secretary of State. Mont. Code Ann. § 35-8-1001. A foreign LLC is not considered to be transacting business in Montana by, among other things, maintaining bank accounts, holding meetings of the members or managers, selling through independent contractors, and creating or acquiring indebtedness within the state. *Id.* An application setting forth the statutory requirements must be filed with the Secretary of State. Mont. Code Ann. § 35-8-1003. The prescribed form of the application for a certificate of authority can be found on the Secretary of State's [website](#). A \$70 filing fee must be submitted with the application. The certificate of authority gives the foreign LLC all rights and privileges that a domestic LLC enjoys under Montana law. Mont. Code Ann. § 35-8-1008. A foreign LLC's failure to obtain a certificate of authority will prevent the LLC from commencing or maintaining a proceeding in any court of Montana. Mont. Code Ann. § 35-8-1002.

(8) Professional Limited Liability Company

A LLC may designate itself as a Professional Limited Liability Company ("PLLC") only for the purpose of rendering professional services within a single profession. Mont. Code Ann. § 35-8-1301. For an LLC to obtain status as a PLLC, the LLC must indicate its desire to be treated as such in its articles of organization. The name of a professional limited liability company must contain the words "professional limited liability company" or some abbreviation thereof. *Id.*

Only individuals or entities licensed to render the same type of professional services as that of the PLLC may be a member of the PLLC. Mont. Code Ann. § 35-8-1304. Furthermore,

at least one-half of the managers of a PLLC, must be qualified professionals with respect to the PLLC at all times. Mont. Code Ann. § 35-8-1303.

An individual who renders professional services as a member or employee of a PLLC is liable for any negligent or wrongful act or omission in which such individual personally participates to the same extent as a sole practitioner. Mont. Code Ann. § 35-8-1306. The PLLC itself is also liable for any negligent or wrongful acts or omissions. *Id.* The amount of personal liability for a member remains the same as that indicated in the MLLCA. *Id.*

(D) SOLE PROPRIETORSHIP

A sole proprietorship is a type a business where an individual owns all the assets and operates the business in their own individual capacity. A sole proprietorship is not a legal entity, and, therefore, does not need to register with the Secretary of State. However, if the individual is operating the business under an assumed business name, the individual may register the assumed business name with the Secretary of State. The prescribed form for an assumed business name can be found on the Secretary of State's [website](#). Montana does not have any statutes specifically governing sole proprietorships.

A sole proprietorship is managed by the individual owner and does not have any formal management guidelines to abide by. The primary disadvantage of operating a sole proprietorship is that the individual owner is personally liable for all debts and obligations of the business. Therefore, creditors of the sole proprietorship can reach the individual owner's personal assets in the event of a judgment. An individual owner may consider forming a limited liability company in order to protect themselves from personal liability of business debts and obligations.

Since a sole proprietorship is not a legal entity, the sole proprietorship itself is not subject to taxation. The individual owner reports and is taxed on all profits, gains, losses and deductions of the business. If an individual owner chooses to form a single member LLC in order to protect themselves from personal liability (and does not elect to be taxed like a corporation), the business will be disregarded for tax purposes and will be taxed like a sole proprietorship.

(E) JOINT VENTURES

(1) Formation Generally

The law governing joint ventures is usually not a product of statute, but “is purely a creature of American courts.” 48A C.J.S. Joint Ventures § 1. Joint ventures are “generally described as an association of two or more persons to carry on a single business enterprise by profit.” *Id.* Montana does not contain a specific statutes governing joint ventures, but the Montana Supreme Court has identified the elements that must be present for a joint venture to exist: (1) an express or implied agreement or contract creating the joint venture; (2) a common purpose among the parties; (3) community of interest; and (4) an equal right of control of the venture. *Brookins v. Mote*, 292 P.3d 347 (Mont. 2012). Montana courts seem to apply partnership law principles to the relationship between joint venturers and the duties joint venturers owe to one another. *See, e.g., Murphy v. Redland*, 583 P.2d 1049 (Mont. 1978).

(2) Mining Partnerships

Mining partnerships are sometimes classified as a type of joint venture. 58 C.J.S. Mines and Minerals § 468. Unlike joint ventures, however, statutory law governs mining partnerships in Montana. Mont. Code Ann. §§ 35-13-101 to 35-13-208. A mining partnership is formed “when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.” Mont. Code Ann. § 35-13-101. While courts in some states have found that mining partnerships can be formed in the context of oil and gas development, Montana courts do not appear to have addressed this issue. An express agreement between the partners is not necessary for a mining partnership to form. Mont. Code Ann. § 35-13-102. Also, not all partners need to agree to a course of action; agreement among partners that collectively hold a majority of the partnership’s shares or interest is sufficient to “bind” the partnership “in the conduct of its business.” Mont. Code Ann. § 35-13-202. However, neither a partner nor an agent of the partnership can bind the partnership via contract without express authority from the partners. Mont. Code Ann. § 35-13-201.

Profits and losses are divided among the partners proportionately, based on the size of each partner’s share of ownership. Mont. Code Ann. § 35-13-204. If one of the partners sells his or her interest, the partnership does not dissolve and the purchaser of the interest becomes a member of the partnership. Mont. Code Ann. § 35-13-206. The mining ground worked by the partners is property of the partnership – regardless of whether partnership funds were used to purchase it – and all partners have liens on partnership property that cover the debts the partnership owes to creditors, including debts to partners. Mont. Code Ann. §§ 35-13-203, -205. An agreement among the partners to not impose these liens will have no effect. Mont. Code Ann. § 35-13-205. A purchaser of an interest in a mine that the partnership is working is declared, by statute, to be on notice of all liens on partnership property. Mont. Code Ann. § 35-13-208. However, it is possible for a purchaser of an interest in mining ground to take the interest free of any existing liens, if the purchaser “purchased in good faith for a valuable consideration without notice of the lien.” Mont. Code Ann. § 35-13-207.

(F) NONPROFIT CORPORATIONS AND COOPERATIVES

(1) Nonprofit Corporations

(a) Formation

Montana non-corporations are governed by the Montana Nonprofit Corporation Act (“MNCA”). Mont. Code Ann. § 35-2-113, *et seq.* The corporate existence of a nonprofit begins when articles of incorporation are filed by the Secretary of State. Mont. Code Ann. § 35-2-214. One or more people may act as incorporators for the nonprofit by “delivering articles of incorporation to the Secretary of State for filing.” Mont. Code Ann. § 35-2-212. In addition, the filing must conform to the requirements listed in Mont. Code Ann. § 35-2-119. The articles of incorporation must: (1) provide a name for the corporation (which must conform to the requirements listed in Mont. Code Ann. § 35-2-305); (2) state the type of nonprofit – a public benefit, mutual benefit, or religious corporation – that is being created; (3) provide information on the corporation’s registered agent, as specified in Mont. Code Ann. § 35-7-105(1); (4) list the name and business mailing address of each incorporator; (5) specify whether the nonprofit will

have members; and (6) provide for the distribution of the nonprofit's assets upon dissolution. Mont. Code Ann. § 35-2-212(1). The articles of incorporation can also provide additional information, such as the purpose the nonprofit is being organized for, but this information is not mandatory. Mont. Code Ann. § 35-2-212(2). Each incorporator, along with any director named in the articles of incorporation, must sign the document. Mont. Code Ann. § 35-2-212(4). The Secretary of State's office provides a [form](#) that can be used to file articles of incorporation for a nonprofit, and charges a \$20 filing fee. See link provided below for more information.

Once the nonprofit is incorporated, the incorporators (or the initial directors, if any were named) must hold an organizational meeting and adopt a set of bylaws. Mont. Code Ann. §§ 35-2-216, -217. The organizational meeting must also elect a board of directors, if none have been named, and appoint corporate officers. Mont. Code Ann. § 35-2-216. An annual report on the nonprofit's activities must be filed with the Secretary of State's office, along with a \$15 filing fee, using a [form](#) that can be found on the office's website. Mont. Code Ann. § 35-2-904.

Unless provided otherwise, a nonprofit corporation "has perpetual duration" and has the same powers that an individual has to "do all things necessary or convenient to carry out its affairs." Mont. Code Ann. § 35-2-118(1). The statute provides a long list of explicit powers, such as the power to sue and the power to sell its property. *Id.* However, the articles of incorporation can limit or take away any of the powers enumerated in the statute. *Id.* A nonprofit corporation cannot issue shares of stock. Mont. Code Ann. § 35-2-118(2).

(b) Members

Part 5 of the MNCA governs membership in a nonprofit corporation, although a nonprofit is not required to have members. Mont. Code Ann. § 35-2-512. If the organization does have members it must hold an annual meeting where members have an opportunity to vote on any matters requiring approval of the members. Mont. Code Ann. § 35-2-526. The officers of the organization must also present a report to the members on "the activities and financial condition of the corporation." *Id.* Members also have the right to inspect the records of the organization, if the demand for inspection is made "in good faith and for a proper purpose." Mont. Code Ann. § 45-2-907.

(c) Management

All nonprofit corporations must have a board of directors, and generally "all corporate powers are exercised by or under the authority of the board." Mont. Code Ann. § 35-2-414. However, members and individual directors have the ability to challenge board and officer decisions through the filing of a derivative lawsuit. Mont. Code Ann. §§ 35-2-1301 to -1307. There must be at least three members of the board of directors, with terms of office lasting a maximum of five years. Mont. Code Ann. §§ 35-2-415, -419. If the nonprofit has members, they must elect the directors at their annual meeting. Mont. Code Ann. § 35-2-417. The MNCA imposes three general duties on directors: to act in good faith, to act "with the care an ordinarily prudent person in a similar position would exercise under similar circumstances," and to act in what the director reasonably believes to be the corporation's best interests. Mont. Code Ann. § 35-2-416(1). The MNCA also provides rules on director removal and on the procedure for board

meetings, but a nonprofit can alter most of these rules in its bylaws. *See* Mont. Code Ann. §§ 35-2-421 to -424 and §§ 35-2-427 to -433.

The rules regarding nonprofit corporate offices are also generally set by each corporation's bylaws. The default rule provided by statute is to have at least three: a president, secretary, and treasurer. Mont. Code Ann. § 35-2-439. The MNCA imposes the same general duties on officers that it does on directors. *Compare* Mont. Code Ann. § 35-2-441(1) *with* Mont. Code Ann. § 35-2-416(1). The MCA also allows the nonprofit in certain circumstances to indemnify directors, officers, and employees who have been made a party to a legal action because of their role in the corporation. Mont. Code Ann. §§ 35-2-446 to -454.

(d) Merger and Dissolution

Delivering articles of dissolution to the Secretary of State can dissolve a nonprofit, but the procedures for dissolution depend on whether or not the nonprofit has members. Mont. Code Ann. § 35-2-723. If there are members, the dissolution must be approved by the directors, by the members at a meeting called for that purpose, and by any third party whose approval is necessary under the nonprofit's bylaws. Mont. Code Ann. § 35-2-721. If there are no members, a majority of the directors can approve the dissolution. Mont. Code Ann. § 35-2-720. In both cases, the MNCA imposes notice requirements for dissolution meetings and requires that the nonprofit must adopt a plan indicating "to whom the assets owned or held by the corporation will be distributed after all creditors have been paid." Public benefit and religious corporations must notify the Attorney General when they dissolve and, after the nonprofit's assets have been dispersed, must provide the Attorney General with information on every non-creditor who received assets. Mont. Code Ann. § 35-2-722. A nonprofit can also be dissolved by court order. Mont. Code Ann. §§ 35-2-728 to -731.

The MNCA allows for the merger of nonprofit corporations, but places restrictions on public benefit and religious corporations that seek to merge with a mutual benefit or business corporation. Mont. Code Ann. §§ 35-2-608, -609. If such a merger involving a public benefit or religious corporation takes place, the assets of the nonprofit (or other assets of equivalent value) must be distributed as if the corporation had dissolved. Mont. Code Ann. § 35-2-609(1)(d)(i). In addition, the members of a public benefit or religious corporation may not "receive or keep anything as a result of a merger other than a membership in the surviving... corporation." Mont. Code Ann. § 35-2-609(3).

(e) Foreign Nonprofit Corporations

Foreign corporations may apply to the Secretary of State's office for a certificate of authority, which allows the corporation to transact business in Montana. Mont. Code Ann. § 35-2-821. The application for a certificate of authority can be found on the Secretary of State's [website](#) and can be filed for a \$20 fee. The certificate gives the foreign corporation all the rights and privileges that a domestic corporation receives under Montana law. Mont. Code Ann. § 35-2-824. However, this certificate is not necessary for "transacting business in interstate commerce." Mont. Code Ann. § 35-2-820.

(f) Religious Corporations Sole

Montana law allows a religious office within a church, such as a bishop, to conduct business as a corporation. This type of corporation is addressed in the Montana Religious Corporation Sole Act, codified at Mont. Code Ann. § 35-3-101, *et seq.* The articles of incorporation must name the church creating the corporation sole, the name of the person currently holding the office that is being incorporated, a description of the territory of the office, and the provisions that will be followed for filling the office when it becomes vacant, among others. Mont. Code Ann. § 35-3-202. This type of corporation is generally governed by the MNCA, except for any place where the MNCA is inconsistent with the Montana Religious Corporation Sole Act. Mont. Code Ann. § 35-3-102.

(g) Cemeteries and Mausoleums

Title 35, Chapter 20 of the Code governs cemetery associations. These associations must incorporate by filing a written certificate containing a name for the association, the names of the attendees of the association's organizational meeting, the names of the elected trustees, and provisions for future trustee elections. Mont. Code Ann. § 35-20-103. After incorporation, these associations have "the general power and privileges of corporations." Mont. Code Ann. § 35-20-104. In addition, a cemetery association has the ability to take land for cemetery use through eminent domain. *Id.* Each association must also create a permanent fund for care, maintenance and improvement of the cemetery grounds. Mont. Code Ann. § 35-20-301. The principle of the fund must "remain intact and inviolate," while the association may use the income earned on the principle. Mont. Code Ann. § 35-20-311.

Private, non-profit mausoleums are governed by Title 35, Chapter 21 of the Code. These organizations "have the same powers granted by law to nonprofit corporations in general." Mont. Code Ann. § 35-21-805. A mausoleum-columbarium authority cannot do business in the state without incorporating as a nonprofit. Mont. Code Ann. § 35-21-804.

(2) Cooperative Associations

(a) Formation

Under Title 35, Chapter 15 of the Montana Code Annotated, two or more people can form a cooperative association for any of the following purposes: conducting trade, "carrying out any branch of industry," purchasing and distributing commodities, or borrowing and lending money for industrial purposes. Mont. Code Ann. § 35-15-201. A cooperative association has "all powers necessary to carry into effect the objects for which [it] may be formed," including the right to sue and be sued, own property, and borrow money. Mont. Code Ann. § 35-15-103. The incorporation statement must list the proposed name of the association; its capital stock; where it is located; the duration of the association, which may be perpetual; and the "branch of industry" of the activities the association plans to carry out. Mont. Code Ann. § 35-15-201. The Secretary of State's office charges a \$20 fee to file the incorporation document.

After filing, the Secretary of State issues licenses to the incorporators, permitting them to take subscriptions to the capital stock of the new association. Each subscriber receives one, and only one, share of the association's common stock; the common stock may be divided into

different classes with different values, but all common stock must have the same voting rights. Mont. Code Ann. §§ 35-15-202, -401. The association is also permitted to issue preferred stock with no voting rights. Mont. Code Ann. § 35-15-401. After the subscription to the capital stock is filled, the common stock holders hold an initial meeting where they elect directors and adopt a set of bylaws. Mont. Code Ann. § 35-15-203. A report on the initial meeting must be filed with the Secretary of State's office; it is only after this report is filed that the association is authorized to engage in business. Mont. Code Ann. § 35-15-204.

(b) Management

The association's board of directors must have at least three members. Mont. Code Ann. § 35-15-304. Only stockholders are eligible to be elected to the board. *Id.* There must be at least four officers – a president, vice-president, secretary, and treasurer – but the duties of the secretary and treasurer may be combined into a single office. *Id.* Only directors are eligible for the offices of president and vice-president. *Id.*

(c) Distributions

Statutes set a maximum size for the dividends the association issues, and mandates that a percentage of the profits remaining after dividends are issued are to be set aside in a reserve fund and in an educational fund “to be used for teaching cooperation.” Mont. Code Ann. § 35-15-411. If an association does not pay a dividend, a majority of the capital stockholders may petition a Montana district court to dissolve the association. Mont. Code Ann. § 35-15-412. In addition, two-thirds of the voting stockholders may at any time authorize the sale of all of the association's assets. The Code also allows two or more cooperative associations to merge into a single entity. Mont. Code Ann. §§ 35-15-501 to -505.

(3) Agricultural Associations

An agricultural association may be formed under Title 35, Chapter 16 of the Code, by ten or more holders of title to “agricultural, horticultural, or farm lands” with an aggregate value of at least \$75,000, for the purpose for promoting, processing, storing, or marketing the farm products they produce. Mont. Code Ann. § 35-16-201. Incorporation for this type of association requires a court order; the members of the proposed association must file a petition in the district court in the county that the lands of the members are located in, along with a \$1,000 bond. Mont. Code Ann. § 35-16-202. The clerk of the district court gives notice of the hearing on the petition to the public. Mont. Code Ann. § 35-16-203. At the hearing, if the judge finds that the petition “substantially complies with the requirements” for agricultural associations in Montana law, the court will issue an order stating that the association has the right “to be created and become a body corporate.” Mont. Code Ann. § 35-16-204(1). The court's order is then filed with the Secretary of State's office – who then issues a certificate of incorporation – and with the Recorder's Office for the county or counties the association is located in. Mont. Code Ann. § 35-16-204(2). The Secretary of State's office will charge a \$20 filing fee.

Upon issuance of the certificate of incorporation, the association is considered “a quasi-public corporation for the promotion of public welfare,” and possesses “all of the powers and authority of bodies corporate under the corporation laws of the State of Montana.” Mont. Code

Ann. § 35-16-204(3). Within thirty days of the issuance of the certificate, the association must provide notice to its members regarding an initial meeting, where the members must adopt and record bylaws for the association. Mont. Code Ann. §§ 35-16-205 to -208. The members also elect a board of at least directors, all of whom must be members of the association and “resident agricultural freeholder[s] in the State of Montana.” Mont. Code Ann. §§ 35-16-312 to -315.

The mortgage or bonded debt of the association constitutes a lien on the members’ lands included in the association. Mont. Code Ann. § 35-16-401. To incur such debts, the association’s directors must pass a resolution authorizing a specific amount of debt and stating the purpose for its creation. Mont. Code Ann. § 35-16-402. The directors must then file a petition in district court, requesting that the court allow the debt to be incurred. Mont. Code Ann. §§ 35-16-403, -404. All of the members of the association must be served written notice of the court hearing, and at the hearing the court must determine if “the objects and purposes for which the money is sought are within the legitimate objects and purposes” of the association. Mont. Code Ann. § 35-16-404. Individual members have the right to object to the petition; if a majority of the members object to the petition in writing, the court will dismiss the proceeding. *Id.*

(4) Cooperative Agricultural Marketing

Nonprofit cooperative associations for agricultural marketing are governed by Title 35, Chapter 17 of the Code. An agricultural marketing cooperative may be formed by any five or more persons “engaged in the production of agricultural products.” Mont. Code Ann. § 35-17-104. These cooperatives have the power to process, market, and sell the agricultural products produced by its members; supply or sell equipment and supplies to its members; and finance any of these activities, among other powers. Mont. Code Ann. §§ 35-17-105, -106.

The information required in a cooperative’s articles of incorporation is set out in Mont. Code Ann. § 35-17-202(1). The articles of incorporation must be filed with the Secretary of State’s office, which will charge a \$40 filing fee. Mont. Code Ann. § 35-17-202(3). Only persons “engaged in the production of the agricultural products to be handled by or through the association” are eligible to become members. Mont. Code Ann. § 35-17-301. The cooperative is governed by a board of directors with a minimum of five members, all of whom must be members. Mont. Code Ann. § 35-17-311. However, any action passed by the board may, on the demand of a majority of the board, also be sent to the full membership for approval in a referendum. Mont. Code Ann. § 35-17-314.

The cooperative may require members to sell some or all of their agricultural products “exclusively to or through the association;” these agreements are, by statute, not considered to be illegal restraints of trade under Montana law. Mont. Code Ann. §§ 35-17-401, -402. The marketing agreements entered into by the cooperative may be filed for record with the county recorder, and “such recordation shall operate as constructive notice of the agreement and of the rights of the association and of its successors and assigns.” Mont. Code Ann. §§ 35-17-403 to -406.

(5) Rural Cooperative Utilities

Title 35, Chapter 18 of the Code allows for the formation of cooperative organizations that provide electricity, telephone, cable television, or internet services to rural areas. “Rural area” is defined by statute. Mont. Code Ann. § 35-18-102(6). The powers of these cooperatives are set out in Mont. Code Ann. § 35-18-106. Incorporation of the cooperative requires five or more natural persons to serve as incorporators, unless the cooperative is being formed by the merger of two or more smaller cooperatives. Mont. Code Ann. § 35-18-202. The articles of incorporation must satisfy the listed requirements of Mont. Code Ann. § 35-18-203, and must be filed with the Secretary of State’s office, which charges a \$40 fee.

To become a member of the cooperative, a person must agree “to use electrical energy, electrical energy delivery services, or telephone service as provided by the cooperative’s bylaws.” Mont. Code Ann. § 35-18-301. The cooperative is governed by a board of trustees, consisting of a minimum of five trustees, elected by the members. Mont. Code Ann. § 35-18-311. Only a trustee can serve as an officer of the cooperative. Mont. Code Ann. § 35-18-314. The duties of trustees and officers are set out in Mont. Code Ann. § 35-18-325.

(G) ALTERNATIVES

(1) Branch Office

If a foreign entity maintains a branch office in Montana, the business should review the requirements discussed above for foreign entities. Maintaining a branch office in Montana is likely sufficient to require the foreign entity to obtain a certificate of authority from the Secretary of State.

(2) Licensing and Franchising

Montana franchise law is relatively undeveloped, but there are various references to these agreements are made in the statutes. For a general discussion on governmental franchises in Montana, see [Governmental Franchise](#) and Mont. Code Ann. §§ 7-5-4301, *et seq.* In Montana, a franchisor/franchisee relationship between a beer wholesaler and a brewer can be inferred by certain actions, even in the absence of a formal agreement, and Montana courts have the power to “enjoin the cancellation or termination” of such a franchise relationship. Mont. Code Ann. §§ 16-3-224, -225. Similarly, Montana statutes specifically address what constitutes “good cause” for terminating or not renewing a car dealer’s franchise. Mont. Code Ann. § 61-4-207. Certain licensing requirements for dealers in manufactured homes, including homes sold under a franchise agreement with the manufacturer, are provided in Title 61. Mont. Code Ann. § 61-12-901. Title 30, Chapter 11, Part 8 governs franchise agreements involving farm implement dealerships, while Part 9 of the same chapter governs construction equipment dealerships.

(3) Sales Representative

Generally, a sales representative is a person who solicits business for a company in a given geographic area. Montana does not have separate statutory authority governing sales representatives. However, the statutes contain various references to sales representatives. For example, the licensing requirements for professional employer organizations note that an

organization domiciled out of state is not eligible for a less expensive “restricted license” if it maintains a sales representative in Montana. Mont. Code Ann. § 39-8-202(9)(b).

IV. TRADE REGULATIONS

All information provided in Section IV(A) and Section IV (B) was prepared and provided to Crowley Fleck by Lex Mundi.

(A) FEDERAL ANTITRUST LAW

The antitrust laws of the United States are primarily reflected in five federal statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Act.

(1) The Sherman Antitrust Act of 1890

The Sherman Act is divided into two primary sections. Section 1 prohibits contracts, combinations, and conspiracies made in restraint of trade. Section 2 prohibits unilateral and combined conduct that monopolizes or attempts to monopolize trade. Under the Sherman Act, some restraints are “per se” unreasonable (such as price-fixing agreements between competitors) and others are subject to analysis under a “rule of reason” (such as some restrictions placed on a distributor by a manufacturer). Restraints subject to the “per se” rule are never permitted, while those governed by the “rule of reason” test will be evaluated on a case-by-case basis.

(2) The Clayton Act of 1914

The Clayton Act prohibits certain specific anticompetitive activities. For example, the Act prohibits some corporate mergers, exclusive dealing contracts, and agreements under which one product is sold subject to the requirement that the purchaser also buy another product from the seller (known as a “tying” arrangement).

(3) The Robinson-Patman Act of 1936

The Robinson-Patman Act prohibits a seller from discriminating (or inducing others to discriminate) among competing purchasers in the price charged for commodities “of like grade and quality.” While the Act focuses on price discrimination, it also addresses other concerns such as discriminatory advertising allowances.

(4) The Federal Trade Commission Act

The FTC Act declares unlawful “unfair methods of competition” and “unfair or deceptive acts or practices”.

(5) The Hart-Scott-Rodino Antitrust Improvements Act of 1976

The Hart-Scott-Rodino Act requires that, under certain circumstances, a company proposing to merge with or acquire another company must give prior notice of the proposed

acquisition to the Federal Trade Commission and the Justice Department. Failure to report may result in very substantial fines.

(6) Enforcement

Private individuals and corporations may bring lawsuits under the Sherman Act, the Clayton Act and the Robinson-Patman Act. Remedies may include injunctive relief, treble damages and attorney fees. The government may enforce the Sherman Act through criminal prosecutions and civil suits. In addition, the government may enforce the Clayton Act and the Robinson-Patman Act through the FTC or the Justice Department. Only the government can enforce the Federal Trade Commission Act and the Hart-Scott Rodino Act.

(B) REGULATION OF INTERNATIONAL TRADE AND INVESTMENT

Foreign investments in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. statutes and related regulations. The following discussion outlines some of the more important aspects of these laws which might be relevant to someone investing in or trading with entities located in the U.S.

(1) Restrictions on Foreign Investment

Under a statutory provision commonly referred to as the Exon-Florio Amendment (Section 721 of Title VII of the Defense Production Act of 1950, as added by Section 5021 of the Omnibus Trade and Competitiveness Act of 1988), the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the United States. Congress has indicated that the term “national security” is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

The statute sets out a timetable for investigations of transactions which can take up to 90 days to complete. The President or his designee has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to decide whether to undertake a full-scale investigation of the transaction. The President has delegated the authority to make investigations pursuant to the Exon-Florio Amendment to the Committee on Foreign Investment in the U.S. (“CFIUS”), an interagency committee made up of representatives of various executive branch agencies. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency.

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete an investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair the national security. If the President makes such determination, Exon-Florio empowers the President to take any action which the President deems appropriate to suspend or prohibit the

transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses which require a facility security clearance in order to perform contracts involving classified information. Under Department of Defense regulations, foreign ownership may cause the Department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD5220.22-R). Assuming that a foreign owner will be in a position to “effectively control or have a dominant influence over the business management of the U.S. firm,” the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a “special security agreement” approved by the Department of Defense and designed to preclude the disclosure of classified information to the foreign owner of other foreign interests.

(2) Reporting Requirements for Foreign Direct Investment

All foreign investments in a U.S. business enterprise which results in a foreign person owning a 10% or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis, a part of the U.S. Department of Commerce. Pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. §§ 3101-3108) and the regulations promulgated thereunder (15 C.F.R. § 806), such reports must be made within 45 days after the investment transaction. Depending on the site of the entity involved, quarterly, annual and quintennial reports may be required thereafter.

(3) The International Investment and Trade in Services Survey Act

The International Investment and Trade in Services Act (“IISA” or the “Act”), passed in 1976, authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. The IISA’s primary function is to provide the federal government with the information necessary to formulate an informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IISA, international investments are divided into two classifications – direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated the power to collect data on direct investments to the Bureau of Economic Analysis (“BEA”), a part of the Department of Commerce, and on portfolio investments to the Department of Treasury.

A “foreign person” is any person who resides outside the U.S. or is subject to the jurisdiction of a country other than the U.S. A “direct investment” is defined as the ownership or control, directly or indirectly, by a person of 10% or more of the voting interests in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because the IISA further defines “business enterprise” to include any ownership in

real estate, any foreign investor's direct or indirect ownership of U.S. real estate constitutes a "direct investment" and falls within the requirement that reports be filed with the BEA.

Unless an exemption applies, a report on Form BE-13 must be filed with the BEA within 45 days of the date on which a direct investment is made. The form collects certain financial and operating data about the investment, the identity of the acquiring entity and certain information about the ultimate beneficial owner. In addition, a Form BE-14 must be filed by any U.S. person assisting in a transaction which is reportable under Form BE-13. The purpose is, obviously, to ensure that those required to file a Form BE-13 do so.

(4) The Agricultural Foreign Investment Disclosure Act of 1978

The Agricultural Foreign Investment Disclosure Act ("AFIDA" or the "Act") of 1978 requires all foreign individuals, corporations and other entities to report holdings, acquisitions and dispositions of U.S. agricultural land occurring on or after February 1, 1979. The Act contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the Secretary of Agriculture to determine the nature and magnitude of this foreign investment. Unlike the reports filed under the International Investment Security Act of 1976, reports filed under AFIDA are not confidential but are available for public inspection.

For the purposes of the Act, a "foreign person" is (i) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (ii) a corporation or other legal entity organized under the laws of a foreign country; and (iii) a corporation or other legal entity organized in the U.S. in which a foreign entity, either directly or indirectly, holds 5% or more of an interest. The definition of "agricultural land" is any land in the U.S. which is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding more than a 5% interest in the ownership entity.

(5) Export Controls

In general, U.S. export controls are more stringent and restrict a wider array of items than the export controls of most other countries. (See the Export Administration Act of 1979, as amended, 50 U.S.C. App. 2401-2420 and the regulations promulgated thereunder 15 C.F.R. §§ 730-799.) Except for exports to U.S. territories and possessions, and in most cases, Canada, all exports from the U.S. are subject to an export "license." An export license is an authorization which allows the export of particular goods or technical information. Two basic types of licenses exist, general licenses and individual validated licenses.

There are many types of general licenses. These are authorizations which are generally available and for which it not necessary to submit a formal application. They cover all exports

which are not subject to a validated license requirement. Most exports can be made under one of these general classifications.

In contrast, individual validated licenses are required for those items for which the U.S. specifically controls the export for reasons of national security, foreign policy or short supply. If the export of a specific product to a specific destination is subject to an individual validated license requirement, it is necessary to apply for and obtain such a license from the Office of Export Administration, an office within the U.S. Department of Commerce, prior to the export. Certain commodities cannot be exported to any country without an individual validated license, while certain other commodities may require a validated license only for shipment to specified countries.

For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs in the U.S. Thus, if disclosure of information is subject to a validated license requirement, the disclosure may not be made to a foreign national without first obtaining the necessary validated license, whether or not the disclosure is to occur outside the U.S.

(6) Foreign Trade Zones

Foreign trade zones are areas in or adjacent to ports of entry which are treated as outside the customs territory of the U.S. In order to expedite and encourage trade, goods admitted into a foreign trade zone are generally not subject to the customs laws of the U.S. until the goods are ready to be imported into the U.S. or exported. These foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, exhibiting and reshipment of merchandise. Foreign trade zones are created pursuant to the Foreign Trade Zones Act (19 U.S.C. § 81a-u) and are operated as public utilities under the supervision of the Foreign Trade Zones Board. Under the Foreign Trade Zones Act, the Board is authorized to grant to public or private corporations the privilege of establishing a zone. Regulations covering the establishment and operation of foreign trade zones are issued by the Foreign Trade Zones Board, while U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.

(7) Anti-dumping Law

The U.S. anti-dumping law (19 U.S.C. §§ 1671-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry, or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the “dumping margin” is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price which is less than their “foreign market value” (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.

The Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. The International Trade Commission makes the determination of whether such sales cause or threaten material injury to a U.S. industry.

(C) STATE CONSIDERATIONS

(1) Montana Antitrust Laws

In addition to the Montana Unfair Trade Practices and Consumer Protection Act of 1973 (“CPA”), discussed below, Montana has adopted general statutory protections against unfair trade practices. Mont. Code Ann. §§ 30-14-201 to -226. These statutes are liberally constructed to “safeguard the public against the creation or perpetuation of monopolies and foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented.” Mont. Code Ann. § 30-14-201. Any director, officer, agent or any person assisting in a violation is equally liable “with the person or business for whom or which he acts.” Mont. Code Ann. § 30-14-203.

Under these protection statutes, it is an unlawful restraint on trade for any person, business entity or otherwise to enter into an agreement for the purpose of price fixing or “regulating the production of an article of commerce.” Mont. Code Ann. § 30-14-205. It is also unlawful to restrict trade for the purpose of limiting production, increasing or reducing prices, controlling prices, bid rigging, creating a monopoly or entering into an agreement “which binds any person not to manufacture, sell, or transport an article of commerce below a common standard or which keeps such article or transportation at a fixed or graduate figure or by which the price of such article is settled so as to preclude unrestricted competition.” Mont. Code Ann. § 30-14-205.

Specifically, it is unlawful for any business to discriminate between different localities by buying, selling or furnishing articles at a lower rate in one locality than in another with the intent of destroying a competitor. This includes any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is effected in violation of the intent of this section. Mont. Code Ann. §§ 30-14-207, -208. Furthermore, Montana law prohibits sales at less than cost for the purpose of injuring a competitor. Mont. Code Ann. § 30-14-209.

Any party injured by a violation of these statutes may bring a suit to enjoin the guilty party from continuing illegal practices and may seek damages. Mont. Code Ann. § 30-14-222.

(2) Montana Franchise Regulations

For a general description of certain franchise regulations in Montana, see the discussion at [Section III\(G\)\(2\)](#) above.

(3) Montana Consumer Protection Laws

The CPA adopted by Montana prohibits unfair methods of competition and deceptive acts in the conduct of any trade or commerce. Mont. Code Ann. § 30-14-103. In construing and enforcing this provision, due consideration and weight will be given to the interpretations of the federal trade commission regarding the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1).

Montana will pursue violators of consumer protection laws. Whenever the Montana Department of Justice has reason to believe that a violation of a consumer protection law is taking place, it has the authority to issue a temporary injunction to restrain that action and impose a civil penalty of up to \$10,000. Mont. Code Ann. § 30-14-142.

Consumers are also encouraged to take legal action against businesses and people that violate any consumer protection law. Mont. Code Ann. § 30-14-133. A court is authorized to award damages for the greater of actual damages or \$500. Additional fines and penalties, up to \$10,000, may be assessed against people and businesses who engage in unlawful practices against an “older person” or against a “developmentally disabled person.” Mont. Code Ann. § 30-14-144.

Under Montana law, consumer gift certificates do not terminate, and an issuer is prohibited from reducing the value of the cards by charging dormancy fees. If the original value of the certificate is greater than \$5 and the remaining balance is less than \$5 and the possessor request the balance in cash, then the issuer is obligated to redeem the certificate for cash. Mont. Code Ann. § 30-14-108.

Consumers are protected against high pressure personal solicitation sales under Title 30, Chapter 14, Part 5. Before any personal solicitation takes places, each seller shall clearly disclose the individual seller’s name and the name of the organization that the seller represents. Mont. Code Ann. § 30-14-503. When the initial contact is made in person, the seller must also show the potential buyer an identification card that states the seller’s name and the name of the business or organization that the seller represents. The disclosures required by this section must be made before asking any questions or making any statements except an initial greeting. Failure to provide the information required by this section could be punished by a civil fine of up to \$1,000 for each violation. The buyer may also cancel a personal solicitation sale until midnight of the third business day after the day on which the buyer has signed the agreement. Mont. Code Ann. § 30-14-504.

The home inspection industry is also regulated to protect consumers. A home inspector must issue a home inspection report to a client after completing a home inspection unless the client agrees in writing to release the home inspector from this obligation. Mont. Code Ann. § 30-14-1004.

Wheelchair consumers are protected against nonconforming wheelchairs. Wheelchair manufacturers are required to provide a warranty to consumers. An express warranty must last for a minimum of 1 year. If no express warranty is given, then an implied warranty lasting 2 years will take effect from the time the wheelchair is delivered. Mont. Code Ann. § 30-14-1203.

Telemarketers are required to register with the state. Montana prohibits telemarketers from engaging in unfair, deceptive, or fraudulent practices. Specifically, telemarketers are prohibited from using threatening, intimidating, or profane or obscene language; engaging any person repeatedly or continuously with behavior a reasonable person would consider annoying, abusive, or harassing; or initiating a telemarketing call to a person who has stated previously that he does not wish to receive solicitation calls from that seller or telemarketer. Mont. Code Ann. § 30-14-1412. Also, telemarketers may not make phone calls to individuals who have asked to be put on the do not call list. Mont. Code Ann. § 30-14-1602.

Montana laws aim to impede identity theft. Businesses that operate in Montana are required to disclose security breaches that could lead to the theft of individual identity. Additionally, businesses are required to prudently manage customer information and prevent that

information being disclosed to unauthorized persons. Consumers are given the right to bring an action against businesses that violate the Montana Consumer Protection Act and may recover the greater of \$5,000 or three times actual damages. Mont. Code Ann. § 30-14-1713.

V. TAXATION

(A) FEDERAL TAXATION

(1) Corporate Level Income Tax

Federal corporate income taxes are not affected by where a business chooses to locate in the United States. A detailed review of federal corporate level income taxation is beyond the scope of this guide.

(2) Individual Income Tax

Federal individual taxes may depend on whether the individual is a U.S. citizen or resident alien. A detailed review of federal individual income taxation is beyond the scope of this guide.

(B) STATE TAXATION

(1) Individual Income Tax

All Montana residents are subject to taxation on all taxable income, including income received from sources outside Montana, after making allowances for deductions and exemptions. Mont. Code Ann. §§ 15-30-2103, -2112. The income tax rates for individuals range from 1% to 6.9% depending on what graduated tax bracket the individual's income falls within. Mont. Code Ann. § 15-30-2103. The income ranges for each tax bracket are adjusted yearly to account for inflation. *Id.*

Nonresidents who earn income within Montana are also subject to taxation by the State of Montana. Nonresidents calculate their total taxable income in the same manner as residents do, but the total taxable income is then multiplied by the ratio of Montana source income to total income from all sources in order to arrive at Montana taxable income. Mont. Code Ann. § 15-30-2104.

An individual may offset their tax liability if they qualify for certain tax credits including, among others, the following: capital gains credit, credit for taxes paid outside the state, energy-conserving investment credit, alternative motor vehicle fuel credit, university or college foundation contribution credit, residential property tax credit for the elderly, preservation of historic buildings credit, adoption tax credit and caring for the elderly credit. *See* Mont. Code Ann. § 15-30-2301, *et seq.*

(2) Business Entity Tax

For a discussion of business entity taxation in Montana, refer to the applicable subsections under [Section III](#).

(3) Franchise Tax

The corporate income tax discussed in [Section III\(A\)\(4\)](#) is Montana's franchise tax imposed on corporations for the privilege of doing business in Montana. Under the franchise tax, a corporation's net income is taxed at 6.75%. Mont. Code Ann. § 15-31-121. Certain corporations with international business activity who make a "water's-edge election" are taxed at 7%. *See* Mont. Code Ann. §§ 15-31-121, -322. Any corporation subject to tax in Montana must pay a minimum tax of \$50 each taxable year. Mont. Code Ann. § 15-31-121.

As discussed in the Section III(A)(4), corporations with multistate activities are required to allocate and apportion its income under the Multistate Tax Compact. However, a corporation that only makes sales in Montana, does not own or rent real estate or tangible personal property in Montana, and has annual gross sales in Montana that do not exceed \$100,000, may elect to be taxed under the alternative corporate income tax. Mont. Code Ann. § 15-31-122. Under the alternative corporate income tax election, a corporation is only required to pay a tax of .005% of gross sales made in Montana during the taxable year. Mont. Code Ann. § 15-31-122.

(4) Property Tax

All property within the State of Montana is subject to taxation except as otherwise provided by law. Mont. Code Ann. § 15-6-101. Any personal property tax applied to property belonging to, in the possession of, or under the control of a business is considered a "business equipment tax." Mont. Code Ann. § 15-6-122.

(a) Classifications

For purposes of imposing a property tax, property is classified according to twelve different classes. *See* Mont. Code Ann. §§ 15-6-131 to -193. Each class has a different tax base and tax rate for imposing the property tax. *Id.*

(b) Exemptions

Certain property is exempt from property taxation. Tax exempt property includes:

- (1) Property owned by the government, certain nonprofit or charitable organizations, and certain educational organizations (Mont. Code Ann. § 15-6-201);
- (2) Freeport merchandise and business inventories (Mont. Code Ann. § 15-6-202);
- (3) Real and personal property owned and used by veterans organizations or incompetent veterans (Mont. Code Ann. § 15-6-203);
- (4) Money and credits (Mont. Code Ann. § 15-6-204);
- (5) Land used in or held for state water conservation projects (Mont. Code Ann. § 15-6-205);
- (6) Irrigation and drainage facilities and systems (Mont. Code Ann. § 15-6-206);
- (7) Certain agricultural products and agricultural land (Mont. Code Ann. § 15-6-207);
- (8) Certain minerals extracted from mining including low-production thresholds (Mont. Code Ann. § 15-6-208);
- (9) Some land and buildings owned by a nonprofit community service organization (Mont. Code Ann. § 15-6-209);

- (10) Certain disabled or deceased veterans' residences (Mont. Code Ann. § 15-6-211);
- (11) Down-hole equipment in oil and gas wells (Mont. Code Ann. § 15-6-213);
- (12) Property used exclusively for filming motion pictures or television commercials (Mont. Code Ann. § 15-6-215);
- (13) Improvements made to commercial buildings to allow handicap access (Mont. Code Ann. § 15-6-216);
- (14) Vehicles of certain healthcare professionals (Mont. Code Ann. § 15-6-217);
- (15) Intangible personal property (Mont. Code Ann. § 15-6-218);
- (16) Personal property and other certain property (Mont. Code Ann. § 15-6-219);
- (17) Certain agricultural processing facilities including machinery and equipment (Mont. Code Ann. § 15-6-220);
- (18) Residential rental property dedicated to providing affordable housing to low-income tenants (Mont. Code Ann. § 15-6-221);
- (19) Certain portions of residential and commercial property and improvements (Mont. Code Ann. § 15-6-222);
- (20) Timber (Mont. Code Ann. § 15-6-223);
- (21) Portions of non-fossil energy generations (Mont. Code Ann. § 15-6-224);
- (22) Certain small electrical generation equipment (Mont. Code Ann. § 15-6-225);
- (23) Railroad-owned property leased to government or nonprofit organizations (Mont. Code Ann. § 15-6-227);
- (24) Certain property subject to registration fees (Mont. Code Ann. § 15-6-228);
- (25) Certain land adjacent to transmission line right-of-way or easement (Mont. Code Ann. § 15-6-229); and
- (26) Certain tribal property (Mont. Code Ann. § 15-6-230).

(c) Assessment

The Montana Department of Revenue is responsible for assessing all property subject to taxation. Mont. Code Ann. § 15-8-101. Property subject to taxation is assessed, based on its market value (i.e. value at which property would transfer between willing seller and willing buyer), between January 1 and the first Monday of August each year. Mont. Code Ann. §§ 15-8-111, -201.

A taxpayer may submit an application to the county tax appeal board for reduction in valuation of property on or before the first Monday of June or 30 days after receiving notice of appraisal, whichever is later. Mont. Code Ann. §§ 15-15-101, -102. Upon receipt of an application and before a reduction in valuation is granted, the county tax appeal board must examine the person, under oath, who is applying for such a reduction in valuation. Mont. Code Ann. § 15-15-103.

(d) Payment and Penalties

Property tax payments are due to the county treasurer in two installments: (1) first one-half of the taxes imposed for the calendar year must be paid by the later of November 30 each year or within 30 days after the tax notice is postmarked, and (2) the second one-half of the taxes imposed for the calendar must be paid by May 31 of the following calendar year. Mont. Code Ann. § 15-16-102. Any amount not paid by due dates are considered delinquent, and 5/6ths of

1% interest accrues per month until paid, along with a 2% penalty is imposed on the delinquent taxes. *Id.* Each year, the county treasurer notifies the county clerk and reporter of all delinquent taxes to be recorded. Mont. Code Ann. §§ 15-16-301, -302.

(e) Liens

Unless provided otherwise in other provisions of the Montana statutes, all taxes due have the effect of a judgment against the person and a lien on the property to which it was assessed. Mont. Code Ann. § 15-16-401, *et seq.* Furthermore, the county treasurer has the ability to sell the tax lien to a third party in accordance with the provisions of Mont. Code Ann. § 15-17-101, *et seq.*

(5) Sales and Use Taxes

Under Montana law, a sales tax is imposed on the sale of property or services for accommodations or campgrounds and vehicle rentals. Mont. Code Ann. § 15-68-102. The term “accommodations” refers to lodging facilities including hotels, motels, resorts, dormitories, condominium inns, dude ranches, hostels and bed and breakfast facilities. Mont. Code Ann. § 15-68-101(1). A 3% sales tax is imposed on the sale property or services for accommodations and campgrounds, and a 4% sales tax is imposed on the base rental charge for vehicle rentals. Mont. Code Ann. § 15-68-102. The purchaser of such services or property pays the sales tax to the seller who is responsible for holding all sales taxes collected in trust for the state. *Id.*

A use tax is imposed upon a person using property or services for accommodation or campgrounds or rental vehicles which was: (i) acquired outside this state as a result of the transaction that would have been subject to the sales tax had it occurred within this state, (ii) acquired within the boundaries of an Indian reservation within Montana that would have been subject to a sales tax had it occurred outside the Indian reservation within the state, or (iii) was not initially subject to the sales or use tax but, because of the buyer’s subsequent use of the property or services, is subject to the sales or use tax. Mont. Code Ann. § 15-68-102. For accommodations and campgrounds, a use tax equal to 3% of the value of the property or services used is imposed on the purchaser. *Id.* For rental vehicles, a use tax equal to 4% of the value of the property or services used is imposed on the purchaser. *Id.*

A seller of such property or services shall obtain a permit before engaging in the business of selling property or services for the use of accommodations, campgrounds, or rental vehicles. Mont. Code Ann. § 15-68-401.

(6) Estate Tax

As of 2014, a federal estate tax is only imposed on estates with combined gross assets exceeding \$5,340,000. *See* 26 U.S.C. § 2010. Prior to December 31, 2004, a Montana imposed a state level estate tax in the amount of the maximum credit for state death taxes allowed against the federal estate tax. However, in 2004 the federal credit for state death taxes does not apply to estates of decedents dying after December 31, 2004. Therefore, an individual’s estate is not subject to a Montana estate tax if the decedent died after December 31, 2004. Mont. Code Ann. § 72-16-905.

For federal and state tax purposes, an individual's estate is also subject to an estate income tax. 26 U.S.C. § 641 and Mont. Code Ann. § 15-30-2152. Therefore, an estate may need to file an estate tax return and an estate income tax return.

(7) Alcohol and Tobacco Taxes

Montana imposes an excise tax on the sale of liquor in state liquor stores and on liquor purchased outside the state by carriers, airlines and railroads, for consumption within Montana. Mont. Code Ann. § 16-1-401, 402. The liquor excise tax rate ranges from 3% to 16% depending on the amount of proof gallons the company sold nationwide. *Id.*

A license tax is also imposed on all liquor brought into the state. Mont. Code Ann. § 16-1-404. The license tax rate ranges from 2% to 10% of the retail selling price depending on how much liquor the company manufactured and sold nationwide in the preceding tax year. *Id.* An importer or seller of beer or wine is also subject to a beer and wine tax which is calculated based on the volume of beer or wine sold. Mont. Code Ann. § 16-1-406 to 411.

A cigarette and tobacco tax is imposed on the purchaser of cigarettes or other tobacco products including moist snuff. Mont. Code Ann. § 16-11-111. The wholesaler collects, and later distributes to the State of Montana, a \$1.70 tax on every package of cigarettes and a tax of 50% of the wholesale price on all other tobacco products. *Id.*

(8) Tribal Taxation

As sovereign nations, tribes have the authority to tax certain entities engaging in business within a tribal reservation and certain transactions occurring within the boundaries of a tribal reservation or between an individual and a tribal member. Each tribe has the authority to write its own tax code. More information on tribal law in Montana can be found at the Montana Indian Law [website](#).

VI. LABOR AND EMPLOYMENT

The information provided in Section VI(A) was prepared and provided to Crowley Fleck by Lex Mundi.

(A) FEDERAL CONSIDERATIONS

(1) Immigration

With the globalization of world markets, employers located in the United States often seek to employ foreign personnel. A variety of permanent and temporary visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the United States employer and the foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the United States for a temporary time and often the employment authorization is limited to specific employers, jobs, and even specific work sites.

(a) Permanent Residency (the “green card”)

Permanent residency is most commonly based on family relationships, such as marriage to a United States citizen, or offer of employment. Permanent residence gained through employment often involves a time-consuming process that can take several years to obtain. Therefore, employers considering the permanent residence avenue for an alien employee should ascertain the requirements for that immigration filing prior to bringing the employee to the United States.

(b) Temporary Visas

The following are the most commonly used temporary visas:

(i) E-1 Treaty Trader and E-2 Treaty Investor Visas

These are temporary visas for persons in managerial, executive or essential skills capacities who individually qualify for or are employed by companies that engage in substantial trade with or investment in the United States. E visas are commonly used to transfer managers, executives or technicians with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its United States location. Generally, E visa holders receive a five-year visa stamp but only one-year entries at any time.

(ii) H-1A and H-1B Specialty Occupation Visas

H-1 B visas are for people in specialty occupations that require at least a bachelor’s degree.

Examples of such professionals are engineers, architects, accountants, and, on occasion, business persons. Initially, H-1B temporary workers are given three-year temporary stays with possible extensions of up to an aggregate of six years. H-1B visas are employer-and job-specific. H-1 A visas are for registered nurses only.

(iii) L-1 Intracompany Transferee Visas

Most often utilized in the transfer of executives, managers or persons with specialized knowledge from international companies to United States-related companies, L-1 visas provide employer-specific work authorization for an initial three-year period with possible extensions of up to seven years in certain categories. As in the case of certain E visa capacities, some L managers or executives may qualify for a shortcut in any permanent residence filings.

(iv) B-1 Business Visitors and B-2 Visitors for Pleasure

These visas are commonly utilized for brief visits to the United States of six months or less. Neither visa authorizes employment in the United States. B-1 business visitors are often sent by their overseas employers to negotiate contracts, to attend business conferences or board meetings, or to fill contractual obligations such as repairing equipment for brief periods in the United States. B-1 or B-2 visitors cannot be on the United States payroll or receive United States-source remuneration.

(v) TN Professionals

Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include some medical/allied health professionals, engineers, computer systems analysts, and management consultants. TN holders are granted one-year stays for specific employers and other employment is not allowed without prior INS approval. Particularly with regard to Canadians, paperwork required for filing these requests is minimal.

(vi) F-1 Academic Student Visas Including Practical Training

Often foreign students come to the United States in F-1 status for academic training or M-I status for vocational training. Students with F-1 status can often engage, within certain constraints, in on-campus employment and/or off-campus curricular or optional practical training for limited periods of time. Vocational students cannot obtain curricular work authorization but may receive some post-completion practical training in limited instances.

(vii) J Exchange Visitor Visas

These visas are for academic students, scholars, researchers, and teachers traveling to the United States to participate in an approved exchange program. Training, not employment, is authorized. Potential employers should note that some J exchange visitors and their dependents are subject to a two-year foreign residence requirement abroad before being allowed to change status and remain or return to the United States.

(viii) O-1 and O-2 Visas for Extraordinary Ability Persons

O-1 and O-2 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim. Also included in this category are those persons who assist in such O-1 artistic or athletic performances.

(ix) P-1 Athletes/Group Entertainers & P-2 Reciprocal Exchange Visitor

These temporary visas allow certain athletes who compete at internationally recognized levels or entertainment groups who have been internationally recognized as outstanding for a substantial period of time, to come to the United States and work. Essential support personnel can also be included in this category.

(x) Other

There are a number of other non-immigrant visas categories that may apply to specific desired entries.

When planning to bring foreign personnel to the United States, United States employers should allow several months for processing by the Immigration and Naturalization Service, as well as the Department of State and Department of Labor. Furthermore, employers should be

aware that certain corporate changes, including stock or asset sales, job position restructuring, and changes in job duties, may dramatically affect (if not invalidate) the employment authorization of foreign employees.

(2) Labor and Employment Statutes

(a) Age Discrimination in Employment Act (“ADEA”)

The ADEA forbids discrimination based on age in employment decisions. The ADEA applies to employers engaged in interstate commerce who have twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

(b) Americans with Disabilities Act (“ADA”)

The ADA proscribes discrimination in employment based on the existence of a disability. Furthermore, the Act requires that employers take reasonable steps to accommodate disabled individuals in the workplace. This Act applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

(c) Employee Polygraph Protection Act (“EPPA”)

The EPPA greatly restricts polygraph testing of employees. The Act applies to all employers engaged in interstate commerce. Exempted are employers whose primary business purpose is running a security service or manufacturing, distributing or dispensing a controlled substance.

(d) Equal Pay Act (“EPA”)

The EPA was an amendment to the Fair Labor Standards Act and is designed to promote equal pay for men and women who do the same jobs. Therefore, if the minimum wage provision of the FLSA is applicable to one’s business, then the EPA is applicable as well.

(e) Fair Labor Standards Act (“FLSA”)

The FLSA establishes the minimum wage, overtime and child labor laws for employers engaged in industries affecting interstate commerce, regardless of the number of employees.

(f) Family and Medical Leave Act (“FMLA”)

The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave per year for the birth or adoption of a child or the serious health condition of the employee or the spouse, parent or child of the employee. This Act applies to all employers engaged in commerce where the employer employs fifty or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.

(g) Federal Contractors

Employers that are federal contractors or subcontractors, depending on the type and size of their contracts, may have affirmative action obligations under Executive Order 11246 and the Vocational Rehabilitation Act. Certain federal contractors are also covered by the Drug-Free Workplace Act.

(h) Other Federal Regulations

Many employers operate in industries that are regulated by federal agencies. For example, the Department of Transportation requires employers to drug test employees who drive motor vehicles of over 26,000 pounds. Employers in regulated industries must be aware of any requirements imposed by federal or state regulations.

(i) National Labor Relations Act and Labor Management Reporting and Disclosure Act

These statutes set forth the guidelines governing labor-management relations. They apply to all employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts.

(j) Occupational Safety and Health Act (“OSHA”)

OSHA is the act that established the mechanism for establishing and enforcing safety regulations in the workplace. It applies to all employers who are engaged in an industry affecting commerce, regardless of the number of employees.

(k) Title VII

Title VII is the broad civil rights statute that forbids discrimination in hiring based on race, religion, gender and national origin. It applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

(l) Worker Adjustment Retraining and Notification Act (“WARN”)

WARN requires employers to give sixty days notice to their employees of plant closings or mass layoffs. This Act applies to all businesses that employ 100 or more employees, excluding part-time employees, and to businesses that employ 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

(m) Immigration Reform and Control Act (“IRCA”)

IRCA requires that employers verify employment authorization for all employees hired on or after November 6, 1991. Employers are subject to significant fines and penalties for failure

to comply with documentation requirements under IRCA, as well as for hiring unauthorized workers or discriminating against persons who appear or sound foreign.

(3) Employee Benefits

(a) Employee Retirement Income Security Act of 1974 (“ERISA”)

ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, health care plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA generally preempts state laws governing employee plans and arrangements.

(b) Consolidated Omnibus Budget Reconciliation Act (“COBRA”)

COBRA requires employers to make continuing coverage under medical reimbursement and health care plans available to certain terminated employees, at the cost of the employees. The usual period for which this coverage must be continued is eighteen months. COBRA contains very specific procedures for notifying terminated employees of their COBRA rights.

(B) STATE CONSIDERATIONS

(1) Labor Relations

The Department of Labor and Industry has extensive authority over almost all aspects of employment and labor laws. Administrative Rules of Montana (“ARM”) 24.1.101(1), Mont. Code Ann. § 39-1-102. The Department has assigned specific areas of control to several divisions and separate bodies within the Department.

The Employment Relations Division regulates Workers’ Compensation, and administers wage and hour laws, and certain occupational safety laws. ARM 24.1.101(4)(c). The Labor Standards Bureau administers Montana laws relating to hours of labor, conditions of labor, minimum wage and overtime, payment of wages, collection of wages, child labor, and prevailing wages.

Montana is not an “at will” state. Under the Wrongful Discharge from Employment Act (“WDEA”), after the probationary period (employer may specify the time frame or a default 6 month period is provided by statute), an employer must have good cause to discharge an employee. An employer is free to discharge an employee for any reason within this probationary period. Mont. Code Ann. § 39-2-904. In other words, at-will employment can exist only in that probationary period.

(2) Workforce Drug and Alcohol Testing Act

An employee may be subject to testing for controlled substances if that individual is occupied in a hazardous work environment, a security position, or a position affecting public

safety or health. An employer may conduct substance testing if the employer has a written policy in place, meeting specific criteria. Those written policies and procedures must be available for review by all employees 60 days before the terms are implemented or changed. If faced with a positive test, an employee has the right of rebuttal, and can request additional testing of a split sample (but will bear the cost if additional test is positive). Mont. Code Ann. §§ 39-2-207, -209.

The State of Montana allows for the use of medical marijuana for registered cardholders. Mont. Code Ann. § 50-46-301 (“Montana Medical Marijuana Act”). However, it was specifically written into the Act that employers are not prohibited from including specific provisions prohibiting the use of marijuana in employment contracts. In addition, the current version of the statute specifically states that nothing in the Act “may be construed to require...an employer to accommodate the use of marijuana by a registered cardholder.”

(3) Lie Detector Testing

An employer may not require an employee to take a lie detector test as a condition to employment. Mont. Code Ann. § 39-2-304.

(4) Child Labor

The Montana child labor laws (Mont. Code Ann. Title 41, Chapter 2) establish the hours that children may work and identify hazardous occupations where they may not work (unless specifically exempted). Certain restrictions apply according to age:

Under 14 years of age - Any minor under the age of 14 may not be employed in or in connection with an occupation.

Minors 14 and 15 years of age – Unless enrolled in a special program, a minor aged 14 or 15 may not be employed during school hours. There are numerous restrictions on what employment a minor between 14 or 15 years may hold. Prohibited occupations include most types of manufacturing, industrial and agricultural occupations (unless exempt), and any prohibited occupations for minors 16 to 17 years old.

A minor 14 or 15 years of age may not be employed before 7 am or after 7 pm, but may be employed until 9 pm when school is not in session. When school is in session, these minors may not be employed more than 3 hours per day and no more than 18 hours per week. When out of school, a minor between 14 or 15 years old may work up to 8 hours per day and up to 40 hours per week.

Minors 16 and 17 years of age – There are numerous restrictions on the type of employment that a minor aged 16 or 17 may hold. Many of the restrictions center around manufacturing or industrial-specific occupations. Working as an apprentice or student-learner acts as an exception to these restrictions. Mont. Code Ann. § 41-2-107.

There are multiple exemptions from the provisions of the Child Labor Standards Act for minors working in agricultural occupations.

(5) Hours of Labor

With several exceptions, an employee may not work for more than 40 hours in a workweek without receiving time-and-a-half for any time worked in excess of 40 hours. Mont. Code Ann. § 39-3-405. However, the 40 hour workweek does not apply for farm workers or for seasonal recreation workers. Depending on the occupation, there are particular hour and overtime limits that apply (for example, hoisting engineers, bus drivers, underground miners, and retail workers).

(6) Wages

(a) General

As of January 1, 2015, the state minimum wage in Montana is \$8.05 per hour. Mont. Code Ann. §§ 39-3-404, -409. An employer must pay wages in lawful currency, by check or by electronic funds transfer (if employee consents in writing). Mont. Code Ann. § 39-3-204. An employer must make an itemized statement listing the specific deductions and their amounts on an employee's paycheck. Mont. Code Ann. § 39-3-101. It is unlawful to compensate women less than what is paid to men for equivalent service in any occupation. Mont. Code Ann. § 39-3-104.

(b) Unpaid Wages Claims

In Montana, an employee who is due unpaid wages must file a wage claim within 180 days of delay in payment. Mont. Code Ann. § 39-3-207. An employer who fails to pay wages is guilty of a misdemeanor and the State of Montana imposes a mandatory penalty of 110% of the unpaid wages, in addition to the wages due, and may award related fees and costs. Mont. Code Ann. § 39-3-206. In other words, if an employee succeeds in a wage claim, an employer is responsible for twice the amount of wages due, and may be responsible for attorney's fees and court costs.

(c) When Wages Are Due

If an employee separates from employment, the employer must pay all unpaid wages the next regular payday, or fifteen days from the date of separation (whichever date is earlier). When an employee is terminated for good cause or laid off, all of the employee's unpaid wages are due and payable immediately (unless the employer has a written policy in place to provide otherwise). If an employee is discharged on allegations of theft, the employer may withhold the amount to cover the theft from employee's final paycheck if the employee agrees, in writing, or, if the employer reports the theft with law enforcement within seven days and meets other specific conditions. Mont. Code Ann. § 39-3-205.

(7) Mineral and Oil Industry Employees

For employees working in the oil and mineral industries, the same above rules about

wages due upon termination apply. Additionally, the wage claim process similarly applies to these employees. Mont. Code Ann. § 39-3-501.

(8) Organized Labor

Montana is not a “right to work” state. Under Montana law, labor unions are prohibited from acting in only very limited circumstances. Sole proprietorships or partnerships of two members who own a retail or amusement establishment (and their immediate family members) may work in those establishments without interference by any union. However, this doesn’t apply to establishments selling beer or liquor. Any union or member that does violate these provisions is subject to a \$50 fine.

It is unlawful for a third party to hire strikebreakers. Mont. Code Ann. § 39-33-201. Employers may not employ, enter into agreements to procure, or advertise for strikebreakers to fill the spots of disputing laborers. Employers who hire strikebreakers (or try to procure them) may be fined between \$1,000 and \$5,000 or by 1-2 years in prison. An employer who advertises for strikebreakers can be fined between \$100 and 500, or up to 30 days in jail. The Wrongful Discharge from Employment Act does not apply to employees covered by a written collective bargaining agreement. Mont. Code Ann. § 39-2-912. Except for collective bargaining agreements for public employees (covered by the Collective Bargaining For Public Employees Act, Mont. Code Ann. § 39-31-101, *et seq*), collective bargaining agreements must be interpreted according to federal, not state law.

(9) Labor Disputes

An injunction may not be granted in labor disputes except in those circumstances where an injunction would be granted in a non-labor dispute between other parties. Mont. Code Ann. § 27-19-103.

If trade or labor unions establish a lawful boycott, they may give a warning and this warning does not constitute a threat converting the boycott into an unlawful conspiracy (unlawful conspiracy is grounds for an injunction).

(10) Discriminatory and Unfair Employment Practices

The Human Rights Bureau investigates and resolves complaints of unlawful discrimination. The Montana Human Rights Commission is composed of five members of the public, appointed by the governor, to hear appeals of complaints of alleged discrimination.

Montana’s anti-discrimination employment law is very closely modeled after its federal counterpart (Title VII of the Civil Rights Act), and applies to all employers, without regard to size. However, fraternal, charitable, or religious organizations do not have to comply, unless they were organized for private profit or to provide services on a nonmembership basis. The Montana Human Rights Act prohibits discrimination in employment on the basis of race, creed, religion, color, national origin, age, disability, marital status, or sex. Mont. Code Ann. § 49-2-303. The Montana Human Rights Act also prohibits retaliation against a person supporting the anti-discrimination law, and likewise forbids an employer from aiding, coercing or attempting to discriminate.

(11) Workers' Compensation

The Montana Workers' Compensation Act generally provides the exclusive remedy for an employee who suffers an injury in the scope of his or her employment. Mont. Code Ann. § 39-71-411. All employers with four or more employees (one or more employees for construction industry employers) must provide worker's compensation insurance for their employees. There are some limited exemptions from this requirement, but the worker's compensation benefits are the only benefits available for an employee injured in an "on the job accident".

(12) Unemployment Benefits

Generally, employers in Montana must contribute to the Unemployment Insurance Fund for calendar years when the employer pays employees wages. These contributions are not to be deducted from individual employee's wages. Unemployment Insurance Employers must contribute to an unemployment compensation fund. When an employee is granted unemployment compensation benefits, whether those payments are counted against the employer's account depends on several factors, one of which is how long the employee worked for the employer. Employees terminated within 90 days of hire may receive unemployment benefits, but those payments are traditionally not taxed to the employer.

The purpose of unemployment compensation is to provide benefits to those who are unemployed through no fault of their own. Therefore, to be eligible for payments, an applicant generally must either (1) have quit for good cause attributable to his or her employer or (2) have been terminated for reasons other than serious misconduct connected with his or her work. In addition, an applicant must be available and actively looking for work during the entire period of benefits, and (1) must have been paid total wages for employment in the base period in an amount not less than 1 ½ times the wages earned in the calendar quarter in which wages were highest during the base period; or equal to or greater than 50% of the average annual wage described in Mont. Code Ann. 39-51-2201, (2) be unemployed for a waiting period of one week; (3) make a claim for benefits for each week of unemployment; (4) have registered to work and continue to report to the employment office; (5) be available and able to work; and (6) actively seek, but be unable to obtain work in four of the last five quarters. Mont. Code Ann. § 39-51-2105.

Unemployment benefits come from taxes paid by employers on wages of their workers. These taxes are put in a special trust fund that is used solely to pay unemployment benefits to workers who lose their jobs through no fault of their own. The benefits are intended to be temporary to help people with basic needs while seeking new employment. Most employers pay contributions under the experience rating provisions of the law at a rate of 2.7 to 5.4% of their total payroll. The employer's contribution rate depends on its individual benefit ratio (benefits charged to its account for a certain period divided by its total payroll for the same period) as well as the level of funding of the Unemployment Compensation Fund.

To be "unemployed," individuals must perform no services in a given week and receive no remuneration. In situations where individuals receive payments from their employers for periods in which they render no personal services, e.g., back pay awards, holiday and vacation

pay, certain severance payments or employer funded disability pay, they are not “unemployed” and are not entitled to unemployment benefits. Public, charitable, or educational organizations should look to Mont. Code Ann. § 39-51-2108 for more details about payments of benefits specific to such organizations.

Disputes with regard to Montana unemployment insurance benefit laws are heard by the Board of Labor Appeals. The Board of Labor Appeals is a three member quasi judicial board appointed by the governor of Montana.

VII. ENVIRONMENTAL LAW

The information provided in Section VII(A) was prepared and provided to Crowley Fleck by Lex Mundi.

(A) FEDERAL CONSIDERATIONS

(1) Resource Conservation Recovery Act (“RCRA”)

RCRA’s primary goal is to control the generation, transportation, storage, treatment and disposal of hazardous waste. The administration of RCRA has been delegated to a number of states by statute and, therefore, the states regulate most aspects of hazardous waste management within their borders. 42 U.S.C. § 6901, *et seq.*

By statute, the disposal of hazardous waste is prohibited except in accordance with a permit. Section 7003 of RCRA authorizes the Federal Environmental Protection Agency (the “EPA”) to bring suit against any person or entity contributing to the handling, storage, treatment or disposal of a hazardous waste in a manner presenting an imminent and substantial endangerment to health or the environment.

RCRA was amended in 1984 by the Hazardous and Solid Waste Amendments of 1984, which added new requirements pertaining to groundwater contamination. Currently, a permit for a treatment, storage or disposal facility must detail required corrective action for any release of hazardous waste from any solid waste management unit, regardless of when the waste was placed on the site.

(2) The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”)

CERCLA, or Superfund as it is commonly called, was enacted in 1980 to provide for the clean-up of abandoned disposal sites. It also provides a vehicle for the EPA to recover for damage to natural resources caused by hazardous substance releases. This statute has possibly generated more litigation and controversy in the past decade than any other federal legislation. 42 U.S.C. § 9601, *et seq.*

CERCLA allows the government and private parties to sue “potentially responsible parties,” or PRP’s for reimbursement of clean-up costs caused by releases, actual or threatened, of hazardous substances. Liability is strict, joint and several, with little or no regard for causation. By statute, there are four categories of persons liable for clean-up costs:

- “Owners or operators” of the contaminated facility. A “facility” is virtually any place in which a hazardous substance is found. The current owner or operator is liable, regardless of when the hazardous substance was disposed of at the facility and whether the present owner or operator did anything to contribute to the release.
- “Owners or operators” of the facility at the time of release of the hazardous substances. Any person who contracted or arranged to have hazardous substances taken to, disposed of, or treated at a facility. This category generally applies to generators and manufacturers.
- Transporters of hazardous substances.

There are limited defenses under Superfund that are narrowly construed. A PRP can escape liability if it can establish that the hazardous substance release was caused solely by an act of war, an act of God, or an act of unrelated third parties. This latter “third party” defense does not apply if the damage from hazardous substances was caused by an employee or agent of the PRP, or a third party acting in connection with a contract with the PRP.

(3) The Clean Air Act (“CAA”)

The CAA regulates air pollutants under federal standards implemented and enforced by the states. The Act was amended in 1990 to add several new programs, including acid rain control and stratospheric ozone protection programs, coupled with modification of existing programs for attaining the national ambient air quality standards (“NAAQS”) and reducing emissions of hazardous air pollutants. Because of the nature of air pollution and its sources, this program is generally considered to be the most complex of the federal environmental programs. 42 U.S.C. § 7401, *et seq.*

Under the Act, air emissions are regulated through various controls. EPA is expected to issue standards for 150 to 200 industrial source categories of air pollutants by the year 2000. The sources that will be affected range in size from large petrochemical complexes to neighborhood dry cleaners.

The CAA, as amended, requires a new operating permit for all “major” air sources, with state administration and enforcement. A significant new feature is a permit fee based on tons of pollutants emitted on an annual basis; the permit fees are to fund and support the state operating permit programs.

(4) The Clean Water Act (“CWA”)

The CWA regulates the discharge of pollutants into all navigable waters. The CWA prohibits the discharge of any pollutant into the water of the U.S. unless a permit has been issued. Permits are issued by either the state under an approved state program or by the EPA if the state program has not been approved. The permit limits are based upon EPA’s effluent limitation regulations and are incorporated into a National Pollutant Discharge Elimination System (“NPDES”) permit. 33 U.S.C. § 1251, *et seq.*

The CWA effluent limitations for industrial discharges will also specify standards for pretreatment for those who discharge to a publicly owned treatment work. In 1990, EPA

promulgated new rules regarding permits for storm water discharges under the NPDES permit program.

(B) STATE CONSIDERATIONS

(1) Montana's Environmental Organizations

There are a number of organizations that advocate for greater environmental protection in Montana including:

Alliance for the Wild Rockies
P.O. Box 505
Helena, MT 59624
406-459-5636

Montana Wildlife Federation
P.O. Box 1175
Helena, MT 59624
406-458-0227

Alternative Energy Resources Organizations
432 N Last Chance Gulch St.
Helena, MT 59601
406-443-7272

Montanans Against Toxic Burning
P.O. Box 1082
Bozeman, MT 59771
406-586-6067

American Wildlands
P.O. Box 6669
Bozeman, MT 59771
406-586-8175

National Center for Appropriate Technology
PO Box 3838
Butte, MT 59702
406-494-4572

Blackfoot Legacy
4981 Hwy. 200
Ovando, MT 59853
406-783-5607

National Parks Conservation Association
Box 824, 432 N. Last Chance Gulch
Helena, MT 59624
406-495-1560

Buffalo Field Campaign
P.O. Box 957
West Yellowstone, MT 59758
406-646-0070

National Wildlife Federation
2020 Tired Man Road
Billings, MT 59101

Cabinet Resource Group
P.O. Box 238
Heron, MT 59844
406-847-2024

Native Action
P.O. Box 409
Lame Deer, MT 59043
406-477-6390

Citizens for a Better Flathead
P.O. Box 771
Kalispell, MT 59903
406-756-8993

Natural Resources Defense Council
401 N. Last Chance Gulch
Helena, MT 59601
406-442-3261

Clark Fork Coalition
P.O. Box 7593
Missoula, MT 59807
406-542-0539

Cold Mountain, Cold Rivers
P.O. Box 7941
Missoula, MT 59807
406-728-0867

Ecology Center
801 Sherwood St; Suite B
Missoula, MT 59802
406-728-5733

Five Valleys Land Trust
P.O. Box 8953
Missoula, MT 59807
406-549-0755

Flathead Audobon Society
P.O. Box 9173
Kalispell, MT 59904
406-752-7026

Flathead Lakers
P.O. Box 70
Polson, MT 59860
406-883-1346

Flathead Resource Organization
P.O. Box 278
Pablo, MT 59855
406-644-2511

Friends of the Bitterroot
P.O. Box 442
Hamilton, MT 59840
406-363-5410

Friends of the Missouri Breaks
Montana Building - 224 W. Main, Ste. 280

Nature Conservancy
32 S. Ewing; Ste. 215
Helena, MT 59601
406-443-6735

North Fork Preservation Association
80 Beaver Drive
Polebridge, MT 59928
406-888-5084

Northern Plains Resource Council
220 South 27th Street, Suite A
Billings, MT 59101
406-248-1154

Oil & Gas Accountability Project
P.O. Box 7193
Bozeman, MT 59771
406-587-4473

Organizations United for Rivers and Streams
2968 Georgina Dr
Billings, MT 59102

Our Montana
207 N. 28th St., #C10
Billings, MT 59101
406-259-4600

Park County Environmental Council
P.O. Box 164
Livingston, MT 59047
406-222-0723

Pryors Coalition
P.O. Box 22045
Billings, MT 59104

Public Lands and Water Access Association
3028 Avenue E.

Lewistown, MT 59457
406-538-8506

Friends of the Rocky Mountain Front
P.O. Box 763
Choteau, MT 59422
406-466-2750

Great Bear Foundation/Ursid Research
Center
802 E Front St
Missoula, MT 59802
406-829-9378

Greater Yellowstone Coalition
P.O. Box 1874
Bozeman, MT 59771
406-586-1593

Headwaters Montana
P.O. Box 4310
Whitefish, MT 59937

Keystone Conservation
P.O. Box 6733
Bozeman, MT 59771
406-587-3389

Montana Audubon
P.O. Box 595
Helena, MT 59624
406-443-3949

Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
406-443-2520

Montana Land Reliance
P.O. Box 355
Helena, MT 59624
406-443-7027

Billings, MT 59102
406-656-0384

Rim Country Land Institute Eastern Office
P.O. Box 41, Rocky Mountain College
Billings, MT 59102
406-238-7439

Rim Country Land Institute Western Office
70 Hanging Tree Gulch
Clancy, MT 59634
406-933-5700

Rocky Mountain Elk Foundation
P.O. Box 8249
Missoula, MT 59807
406-523-4524

Sierra Club – Bitterroot Mission Group
1201 S. 2nd Street W.
Missoula, MT 59801
406-549-1142

Sierra Club – Montana Field Office
P.O. Box 9283
Missoula, MT 59807
406-549-1142

Sonoran Institute
201 S Wallace, Box 12
Bozeman, MT 59715
406-587-7331

Trout Unlimited – Western Water Project
321 E. Main; Suite 411
Bozeman, MT 59715
406-522-7291

Western Organization of Resource Councils
220 South 27th Street, Suite A
Billings, MT 59101
406-252-9672

Montana League of Rural Voters
P.O. Box 522
Billings, MT 59103
406-869-1939

Montana Native Plant Society
P.O. Box 8783
Missoula, MT 59807

Montana River Action Network
304 N. 18th Avenue
Bozeman, MT 59715
406-587-9181

Montana Smart Growth Coalition
P.O. Box 543
Helena, MT 59624
406-449-6086

Montana State Parks Foundation
P.O. Box 474
Livingston, MT 59047

Montana Trout Unlimited
P.O. Box 7186
Missoula, MT 59807
406-543-0054

Montana Water Trust
140 S. 4th Street W. Ste 1
Missoula, MT 59801
406-721-0476

Montana Wilderness Association
30 South Ewing
Helena, MT 59601
406-443-7350 x1

Whirling Disease Foundation
P.O. Box 327
Bozeman, MT 59771
406-585-0860

Wilderness Society
503 W. Mendenhall
Bozeman, MT 59715
406-586-1600

Wildlands CPR
P.O. Box 7516
Missoula, MT 59807
406-543-9551

WildWest Institute
P.O. Box 7998
Missoula, MT 59807
888-732-2658

Women's Voices for the Earth
P.O. Box 8743
Missoula, MT 59807
406-543-3747

Yellowstone River Forum
623 Avenue B
Billings, MT 59102
406-259-4600

Yellowstone River Parks Association
2409 2nd Avenue North
Billings, MT 59101
406-248-1400

(2) Montana's Environmental Laws

(a) Environmental Policy and Protection Generally – Montana Environmental Policy Act

The policy for Montana's environmental statutes is to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans. This is done in cooperation with the federal government, local governments and other concerned public and private organizations. Mont. Code Ann. § 75-1-103.

There is an environmental rehabilitation and response account in the state special revenue fund provided for in Mont. Code Ann. § 17-2-102. Generally, monies collected from fines, penalties, reimbursements, and interest is deposited into the account. Money in the account is available to the Department of Environmental Quality ("DEQ") and is generally used for reclamation or revegetation, remediation, and responding to imminent threat of substantial harm to the environment, public health or public safety. Mont. Code Ann. § 75-1-110.

(b) Environmental Impact Statements

Each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment in Montana shall include a detailed statement with the information required by Mont. Code Ann. § 75-1-201 (e.g., the environmental impact of the proposed action, adverse effects that cannot be avoided if the proposal is implemented, alternatives to the proposed action, etc.). Additional requirements with regard to the environmental impact statements, including time for public comment and appeal to agency decisions, are also contained in Mont. Code Ann. § 75-1-201. The costs associated with the environmental impact statement are generally the responsibility of the person who applies to a state agency for a permit, license, or other authorization requiring an environmental impact statement. Mont. Code Ann. § 75-1-205.

(c) Air Quality

It is the public policy of Montana to achieve and maintain levels of air quality that will protect human health and safety and, to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state, and facilitate the enjoyment of the natural attractions of this state. The Clean Air Act of Montana was enacted to further this policy. Mont. Code Ann. § 75-2-102.

(i) Classifying and Reporting Air Contaminant Sources

Any person operating or responsible for the operation of air contaminant sources of any class for which the rules of the Board of Environmental Review may require reporting is required to make reports containing such information as may be required concerning location,

size and height of contaminant outlets, processes employed, fuels used, and the nature and time periods or duration of emissions and any other matter relevant to air pollution which is available or reasonably capable of being assembled. Mont. Code Ann. § 75-2-201.

(ii) Board to Set Emission Levels

The Board of Environmental Review is responsible for establishing limitations for the levels, concentrations, or quantities of emissions of various pollutants from any source necessary to prevent, abate, or control air pollution. Mont. Code Ann. § 75-2-203.

(iii) State Regulations No More Stringent Than Federal Regulations

The Board of Environmental Review or DEQ may not adopt a rule to implement the Montana environmental statutes that is more stringent than the comparable federal regulations or guidelines that address the same circumstances, subject to certain exceptions. Mont. Code Ann. § 75-2-207.

(iv) Permits For Construction, Installation, Alteration, or Use

The Board of Environmental Review is charged with the responsibility to issue, modify, suspend, revoke, and renew environmental permits. Generally, an owner or operator must file for a permit not later than 180 days prior to construction, installation, or alteration begins. However, certain exceptions apply. For example, the owner or operator of an oil or gas well facility is generally required to file the permit application with the DEQ within 60 days after the initial well completion date. Mont. Code Ann. § 75-2-211.

(v) Additional Permitting Requirements

An applicant for a permit is required to pay the fee prescribed by the Board of Environmental Review sufficient to cover the reasonable costs in reviewing such applications, implementing and enforcing permits, monitoring compliance with permits, preparing applicable regulations and guidance, and providing support, among other things. Mont. Code Ann. § 75-2-220.

(vi) Variances - Renewals - Filing Fees

A person who owns or is in control of a plant, building, structure, process, or equipment may apply to the Board of Environmental Review for an exemption or partial exemption from rules governing the quality, nature, duration, or extent of emissions of air pollutants. The application for such a variance must be accompanied by certain information, and such application may be granted if the proposal does not danger public health or safety and compliance with the rules would result in undue hardship. Mont. Code Ann. § 75-2-212.

**(vii) Commercial Hazardous Waste Incinerators -
Additional Permit Requirements**

The DEQ requires the owner or operator of an existing commercial hazardous waste incinerator or an applicant for an air quality permit for a commercial hazardous waste incinerator to submit a plan that requires the cessation of the burning of hazardous waste if site-specific monitoring determines that inversion conditions, as defined by department rule, exist. The DEQ considers the proximity of the commercial hazardous waste incinerator to populated areas when determining the appropriate plan content. The plan must include a site-specific ambient air quality and meteorological monitoring program in order to establish the conditions under which the burning of commercial hazardous waste must be halted and conditions under which the burning of commercial hazardous waste may be resumed. Conditions of the plan must be incorporated as a condition of the facility's permit.

(viii) Small Business Stationary Sources

A small business stationary source may be designated as such for purposes of receiving assistance from the small business stationary source technical and environmental compliance assistance program if the stationary source does not emit more than 100 tons per year of all air pollutants and: (a) is a major stationary source as defined in Subchapter V of the federal Clean Air Act, 42 U.S.C. § 7661, *et seq.*; (b) emits 50 tons or more per year of an air pollutant; or (c) emits more than 75 tons per year of all air pollutants. Mont. Code Ann. § 75-2-108.

(ix) Asbestos Control Act

The DEQ is responsible for adopting rules establishing standards and procedures for accreditation of asbestos-related occupations and control of the work performed by persons in asbestos-related occupations. Generally, such rules must be consistent with federal law. Mont. Code Ann. § 75-2-503.

(d) Radon Control – Montana Radon Control Act

Montana requires a radon disclosure statement to be provided prior to or contemporaneously with an offer for the purchase and sale of inhabitable real property. Mont. Code Ann. § 75-3-606. Generally, a radon test is performed and the results are provided in a report. In order to be publicly listed by the DEQ as proficient in a radon-related occupation, a person must pass a United States Environmental Protection Agency proficiency examination approved by the department. Mont. Code Ann. § 75-3-603. The results of measurements of radon gas or radon progeny performed by a person may be reported to the DEQ. The report may include the radon levels detected and the location and description of the building.

(e) Water Quality

(i) Policy

It is the public policy of Montana to: (1) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses; (2) provide a comprehensive

program for the prevention, abatement, and control of water pollution; and (3) balance the inalienable rights to pursue life's basic necessities and possess and use property in lawful ways with the policy of preventing, abating, and controlling water pollution in implementing the program referred to in (2) above. Mont. Code Ann. § 75-5-101.

(ii) Special Applicability

Water quality regulations apply to drainage or seepage from all sources, including from artificial, privately owned ponds or lagoons, if such drainage or seepage may reach other state waters in a condition which may pollute the other state waters. Mont. Code Ann. § 75-5-104.

(iii) State Regulations No More Stringent than Federal Regulations

Generally, Montana regulations may not be more stringent than federal regulations or guidelines addressing the same circumstances regarding water quality. Mont. Code Ann. § 75-5-203.

(iv) Classification and Standards of State Waters

The Board of Environmental Review is responsible for establishing the classification of all state waters in accordance with their present and future most beneficial uses, creating an appropriate classification for streams that, due to sporadic flow, do not support an aquatic ecosystem that includes salmonid or nonsalmonid fish; and formulates and adopts standards of water quality, giving consideration to the economics of waste treatment and prevention. Mont. Code Ann. § 75-5-301.

(v) Nondegradation Policy

The DEQ may not authorize degradation of high-quality waters unless it has been affirmatively demonstrated by a preponderance of evidence to the DEQ that: (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation; (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters; (c) existing and anticipated use of state waters will be fully protected; and (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity. Mont. Code Ann. § 75-5-303.

(vi) Adoption of Standards

The Board of Environmental Review adopts pretreatment standards for wastewater discharged, effluent standards, toxic effluent standards and prohibitions. The Board also establishes standards of performance for new point source discharges and adopts rules necessary to ensure the primacy of the DEQ to regulate cooling water intake structures under 33 U.S.C. § 1326(b).

(vii) Nonsignificant Activities

Under Montana law, certain categories or classes of activities are not subject to the provisions of the nondegradation policy because of their low potential for harm to human health or the environment. Mont. Code Ann. § 75-5-317.

(viii) Issuance of Permits

The DEQ is responsible to issue, suspend, revoke, modify, or deny permits to discharge sewage, industrial wastes, or other wastes into state waters, consistently with rules made by the Board of Environmental Review. The DEQ examines plans and other information needed to determine whether a permit should be issued or suggest changes in plans as a condition to the issuance of a permit. The DEQ also specifies in any permit any limitations imposed as to the volume, strength, and other significant characteristics of the waste to be discharged and establishes certain reclamation requirements sufficient to prevent pollution of state waters during and after operation of the project or activity for which a permit is issued. Mont. Code Ann. § 75-5-402.

(ix) Cleanup Orders

The DEQ may issue an order to a person to clean up any material that the person or the person's employee, agent, or subcontractor has accidentally or purposely dumped, spilled, or otherwise deposited in or near state waters and that may pollute state waters. Mont. Code Ann. § 75-5-601.

(x) Prohibited Activities

In Montana, it is unlawful to: (a) cause pollution of any state waters or to place or cause to be placed any wastes where they will cause pollution of any state waters; (b) violate any provision set forth in a permit or stipulation; (c) site and construct a sewage lagoon less than 500 feet from an existing water well; (d) cause degradation of state waters without authorization; or (d) violate any order or provision of the Water Quality statutes in Montana. Mont. Code Ann. §§ 75-5-303, -605.

It is unlawful to carry on certain activities without a current permit from the DEQ, including: (a) construction, modification, or operation of a disposal system that discharges into any state waters; (b) construction or use of any outlet for the discharge of sewage, industrial wastes, or other wastes into any state waters; or (c) the discharge sewage, industrial wastes, or other wastes into any state waters. Mont. Code Ann. § 75-5-605.

In addition to the foregoing, Montana statutes limit the introduction of phosphorous into water bodies to help prevent excessive growths of algae and the negative impacts therefrom. Mont. Code Ann. § 75-5-902.

(xi) Water Quality Assessment

To provide a comprehensive program for the prevention, abatement, and control of water pollution, the DEQ performs water quality assessments to monitor state waters to accurately

assess their quality and, when required, to develop total maximum daily loads (“TMDL”) for those water bodies identified as threatened or impaired. Mont. Code Ann. § 75-5-701.

The DEQ and the TMDL advisory group are responsible to prioritize water bodies for TMDL development. TMDLs are designed to help define solutions to water quality standards and designated beneficial uses. More information can be found at the TMDL [website](#). Mont. Code Ann. § 75-5-702.

(f) Public Water Supply

(i) Policy

Montana public policy aims to protect, maintain, and improve the quality and potability of water for public water supplies and domestic uses. Mont. Code Ann. § 75-6-101. The Board of Environmental Review and the DEQ are responsible for setting standards for public water, developing monitoring and reporting requirements for owners and operators, examining waters to determine their quality and safety; and advising on the construction of systems for water supply, drainage, wastewater, and sewage. Mont. Code Ann. §§ 75-6-103, -104.

(ii) Prohibited Acts

In Montana, a person may not: (1) construct, alter, extend, or operate a system of water supply or water distribution that is intended to be used as a public water supply system without a proper permit; (2) operate or maintain a public water supply system that exceeds a maximum contaminant level established by the DEQ without a proper exemption or approved variance; or (3) violate any provision, condition or requirement of Public Water Supply statutes or approval issued pursuant to such statutes. Mont. Code Ann. § 75-6-112.

(g) Aquatic Ecosystem

Montana has adopted statutes to provide adequate remedies and protection of the aquatic ecosystem within Montana. Montana’s natural rivers and streams and the lands and property immediately adjacent to them are to be protected and preserved to be available in their natural or existing state, except as may be necessary and appropriate after due consideration of all factors involved. Mont. Code Ann. § 75-7-102. Montana’s lakeshores are similarly protected. A person who proposes to do any work that will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore must first secure a permit for the work from the local governing body. Mont. Code Ann. § 75-7-204. In 1983, Montana instituted a separate commission, known as the Flathead Basin Commission Act, charged with the duty to protect the existing high quality of the Flathead Lake aquatic environment, the waters that flow into, out of, or are tributary to the lake, and the natural resources and environment of the Flathead basin.

(h) Waste and Litter Control

(i) Purpose

Montana statutes were enacted to encourage the good management of solid waste and the conservation of natural resources through the promotion or development of systems to collect,

separate, reclaim, recycle, and dispose of solid waste for energy production purposes when economically feasible and to provide a coordinated state solid waste management and resource recovery plan. Mont. Code Ann. § 75-10-101.

(ii) The Montana Solid Waste Management Act

Public policy in Montana is aimed to control solid waste management systems to protect the public health and safety and to conserve natural resources whenever possible. Mont. Code Ann. § 75-10-202. The Solid Waste Management Act was enacted to provide adequate remedies for the protection of the environment and to prevent unreasonable depletion and degradation of natural resources. The DEQ is responsible for adopting and enforcing rules governing solid waste management systems. Mont. Code Ann. § 75-10-204.

(iii) Montana Hazardous Waste Act

The purpose of the Montana Hazardous Waste Act is to establish requirements the safe use and management of used oil and the generation, storage, transportation, treatment, and disposal of hazardous wastes pursuant to the federal Resource Conservation and Recovery Act of 1976. Mont. Code Ann. § 75-10-402. A person is required to obtain permits prior to constructing or operating a hazardous waste management facility. Mont. Code Ann. § 75-10-406. Certain record keeping and reporting requirements may be imposed by the DEQ. Mont. Code Ann. § 75-10-409. Any person may be restrained or enjoined by a Court for the improper handling, storage, treatment, transportation, or disposal of any used oil or hazardous waste and may be subject to monetary penalties and cleanup orders issued by the DEQ. Mont. Code Ann. §§ 75-10-415 to -417. Any person that desires to generate, store, transport, treat, or dispose of used or hazardous wastes within Montana should take caution to obtain all required permits and to comply with all statutory, regulatory, and other conditions (whether federal, state or local).

(i) Underground Storage Tanks

Montana enacted the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources caused by leaking underground storage tank systems. Any business seeking to acquire, construct, utilize or close an underground storage tank should take caution to obtain all necessary permits, licenses and inspections. Mont. Code Ann. § 75-11-202. Violations of the act may lead to administrative or civil penalties.

(j) Landscape Management

(i) Outdoor Advertising

Outdoor advertising is restricted in Montana. The purpose of such restrictions is to promote the safety, convenience, and enjoyment of travel on and protection of the public investment in highways within Montana and to preserve and enhance the natural scenic beauty or aesthetic features of the highways and adjacent areas. Mont. Code Ann. § 75-15-102. Nonconforming advertising is considered a public nuisance. Mont. Code Ann. § 75-15-133. A person who violates any provision of such restrictions is guilty of a misdemeanor. Mont. Code Ann. § 75-15-134.

(ii) Junkyards

Generally, no person is allowed to establish, operate, or maintain a junkyard, any portion of which is within 1,000 feet of the nearest edge of the right-of-way of any interstate or primary highway, without obtaining a license. Mont. Code Ann. § 75-15-211. However, certain exceptions apply to certain junkyards (e.g., junkyards screened by objects, fences or other appropriate means so as to not be visible). Mont. Code Ann. § 75-15-215. A person seeking to establish, operate, or maintain a junkyard should contact the Montana Department of Transportation for more information. Mont. Code Ann. § 75-15-214.

(k) Transboundary Pollution

Montana adopted the Uniform Transboundary Pollution Reciprocal Access Act to provide remedial measures for a person in a reciprocating jurisdiction who suffers from actual or threatened pollution originating in Montana. Mont. Code Ann. § 75-16-104. “Reciprocating jurisdictions” are generally other states that have enacted the uniform act or substantially equivalent acts. Mont. Code Ann. § 75-16-102.

(l) Major Facility Siting

Montana enacted the Major Facility Siting Act to provide statutory guidance with respect to the location, construction, and operation of electric transmission facilities, pipeline facilities, or geothermal facilities. Mont. Code Ann. § 75-20-102. The DEQ is responsible for issuing a certificate of compliance prior to the commencement of construction of a facility, and the facility must be constructed, operated and maintained in conformity with the certificate. Any person seeking to locate, construct, or operate an electric transmission facility, pipeline facility, or geothermal facility within Montana should take caution to obtain all required certificates or permits and to comply with all statutory, regulatory, and other conditions (whether federal, state or local).

(m) Alternative Energy Loans

Montana maintains a special revenue account called the alternative energy revolving loan account to the credit of the DEQ. The alternative energy revolving loan account consists of money deposited into the account from air quality penalties and money from any other source. The purpose of the account is to provide loans to individuals, small businesses, units of local government, units of the university system, and nonprofit organizations for the purpose of building alternative energy systems to generate energy for their own use, for net metering, and for capital investments by those entities for energy conservation purposes, when done in conjunction with an alternative energy system. The amount of the loan cannot exceed \$40,000 and must be paid within 10 years. Mont. Code Ann. § 75-25-101.

VIII. INTELLECTUAL PROPERTY

All information provided in Section VIII(A) was prepared and provided to Crowley Fleck by Lex Mundi.

(A) FEDERAL LAW

(1) Copyright Law

This area is governed exclusively by federal law. Title 17, U.S.C.

Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to use, distribute, modify and display the work. Generally, works are entitled to copyright protection for the life of the author plus 50 years. However, as to works made for hire, copyright protection is for the shorter of 75 years after publication or 100 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright and may be liable for actual or statutory damages and subject to injunctive relief.

(a) Copyrightable Works

Works of authorship that qualify for copyright protection include literary works, musical works (including lyrics), dramatic works, choreographic works, audiovisual works, pictorial, graphic and sculptural works, sound recordings and architectural works. The Computer Software Copyright Act of 1980 expressly made computer software eligible for copyright protection, a point previously in doubt. The precise scope of copyright protection for computer software has not yet been fully defined. Constantly developing technology is likely to present many new issues, presently unforeseen. All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in some tangible form; there must be a physical embodiment of the work so that the work can be reproduced or otherwise communicated. Second, the work must be the result of original and independent authorship. The concept of originality does not require that the work entail novelty or ingenuity, concepts of importance to patentability.

(b) Advantages of Copyright Registration

Copyright protection automatically attaches to a work the moment that the work is created. However, "registration" of the work with the U.S. Copyright Office provides advantages. A certificate of registration is prima facie evidence of the validity of the copyright, provided registration occurs not later than five years after first publication. With respect to works whose country of origin is the U.S., registration is a prerequisite to an action for infringement. With respect to all works, regardless of the country of origin, certain damages and attorneys' fees relating to the period prior to registration cannot be recovered in an infringement action. Registration also is a useful means of providing actual notice of copyright to those who search the copyright records.

(c) Copyright Registration Application Process

In order to obtain registration of copyright, an application for registration must be filed with the U.S. Copyright Office. The application must be made on the specific form prescribed by the Register of Copyrights and must include the name and address of the copyright claimant, the name and nationality of the author, the title of the work, the year in which creation of the work was completed, and the date and location of the first publication. In the case of a work

made for hire, a statement to that effect must be included. If the copyright claimant is not the author, a brief statement regarding how the claimant obtained ownership of the copyright must be included. An application must be accompanied by the requisite fee, and a copy of the work must be submitted.

(d) Copyright Notice

Until 1989, all publicly distributed copies of works protected by copyright and published by the authority of the copyright owner were required to bear a notice of copyright. A copyright notice is no longer mandatory, but a copyright notice is still advantageous. For example, the defense of “innocent infringement” is generally unavailable to an alleged infringer if a copyright notice is used. If a copyright notice is used, the notice should be located in such a manner and location to sufficiently demonstrate the copyright claim. The notice should consist of three elements. First should be the symbol of an encircled “C,” or the word “copyright,” or the abbreviation “copr.” Second should be the year of first publication. Third should be the name of the copyright owner.

(e) Works Made for Hire

In a “work made for hire” the employer is presumed to be the author. Authorship is significant because a copyright initially vests in the author. The parties can rebut the presumption of employer authorship by an express written agreement to the contrary. The term “work made for hire” applies to any work created by an employee in the course and scope of employment. On occasion there is dispute as to whether a work created by an employee arose from the employment. Employers often require execution of a formal employment agreement under which the employee expressly agrees that all copyright rights will belong to the employer. A similar agreement is also advisable in connection with the engagement of an independent contractor to perform copyrightable services for a business, but the employer should be aware that only certain types of works may be considered a “work made for hire” when created by an independent contractor. If the particular matter cannot be a “work made for hire,” the employer should negotiate an agreement for the assignment of the copyright by the independent contractor.

(f) Copyright Protection for Foreign Authors

Copyright protection is available under U.S. law for foreign authors until the copyrightable work is published. If the work has been published, the availability of continued U.S. copyright protection is dependent upon the location of the publication and the nationality or domicile of the author. Copyright protection continues in the U.S. subsequent to publication if publication by the foreign author occurs in the U.S., or occurs in a country that is a party to the Universal Copyright Convention or to the Berne Convention, or occurs in a country named in a Presidential copyright proclamation. If the work is first published by a foreign author outside the U.S., continued copyright protection in the U.S. is only available if the foreign author is either a domiciliary of the U.S. or a national or domiciliary of a country that is party to a copyright treaty to which the U.S. is also a party. A person is generally a domiciliary of the country in which the person resides with the intention to remain permanently.

(2) Patents

This area is governed exclusively by federal law. Title 35, U.S.C.

One who invents or discovers a new machine or device or a new manufacturing process may be able to obtain a U.S. patent. A U.S. patent provides the inventor with the exclusive right for a specified time to make, use, import, offer to sell, or sell in the U.S. the patented invention. A patent provides the holder with a limited monopoly on the use of the patented invention. A valid patent forecloses use of the patented invention by any other party, even if another party independently conceives the identical invention.

(a) Utility Patents

A utility patent generally governs the functional aspects of a machine, manufacturing process, or composition of matter is enforceable beginning at the grant of the patent and ending 20 years (plus up to 5 more years for certain delays) after the filing date of the regular patent application. A design patent, which covers the design or appearance of an article of manufacture, is enforceable for 14 years from the granting date of the patent. A provisional patent, which is filed before a regular patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a regular patent application. Anyone without authority from the patent holder who makes, uses, imports, or sells in the U.S. the patented invention during the life of the patent is considered to “infringe” the patent and may be liable for damages.

(b) Effect of Foreign Patents

A foreign patent is generally not enforceable in the U.S. Furthermore, an invention that is the subject of a foreign patent cannot be the subject of a U.S. patent, unless an application for a U.S. patent is filed within one year following issuance of the foreign patent. Accordingly, an inventor who holds a foreign patent and who fails to apply for a U.S. patent within one year from the date of issuance of a foreign patent will usually have no recourse against others who use the invention in the U.S.

(c) Patentability under Federal Patent Statutes

To be eligible for a federal utility patent, an invention must fall into one of the classes of patentable subject matter set forth in the United States patent statutes. These classes are machines (e.g., a mechanism with moving parts), articles of manufacture (e.g., a hand tool), compositions of matter (e.g., a plastic), and processes (e.g., a method of refining). An improvement falling within any of these classes may also be patentable. Discoveries falling outside these categories are not patentable, unless some other statutory provision applies. In addition to being within one of the four classes and being fully disclosed, a utility invention must also be:

- (1) “novel,” in that it was not previously known to or used by others in the United States or printed or described in a printed publication anywhere
- (2) “non-obvious” to a person having ordinary skill in the relevant art
- (3) “useful,” in that it has utility, actually works, and is not frivolous or immoral.

(d) Design Patents

A design patent may be obtained for the ornamental design of an article of manufacture. A design patent offers less protection than a utility patent, because the patent protects only the appearance of an article, and not its construction or function. A plant patent may be obtained by anyone developing a new variety of a sexually reproduced plant, such as a tree or flower. Some plants may also be protectable with a utility patent or under the Plant Variety Protection Act, administered by the United States Department of Agriculture. In order to determine novelty and, hence, patentability of an invention, it is often useful to search the records of the U.S. Patent and Trademark Office. There one may examine all U.S. patents, many foreign patents, and a large number of technical publications. A patent search is customarily performed by a patent attorney or by an individual with similar technical training, sometimes referred to as a patent agent. A patent attorney or patent agent may be asked to render an opinion regarding the patentability of a particular invention. An inventor can then make an informed decision as to whether to proceed with the cost of an actual patent application.

(e) Patent Application Process

A U.S. patent application must be filed with the U.S. Patent and Trademark Office. A complete patent application includes four elements. First, the application must include the “specification.” The specification is a description of what the invention is and what it does. The specification can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period. Second, the application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English the oath or declaration must be in a language that the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included. After a proper application is filed, the application is assigned to an examiner with knowledge of the particular subject matter. The examiner makes a thorough review of the application and the status of existing concepts in the relevant area to determine whether the invention meets the requirements of patentability. The patent review process takes from 18 months to three years. Rejection of a patent application by the examiner may be appealed to the Board of Patent Appeals. Decisions of the Board of Patent Appeals may be appealed to the federal courts. Provisional patent application requirements are less stringent than a regular patent application. The oath or declaration of the inventor and claims are not required and the application is held for the 12-month period without examination.

(f) Markings

After a patent application has been filed, the product made in accordance with the invention may be marked with the legend “patent pending” or “patent applied for.” After a patent is issued, products may be marked “patented” or “pat.,” together with the U.S. patent number. Marking is not required, but it may be necessary to prove marking in order to recover damages in an infringement action.

(g) Rights to Patented Inventions

Disputes sometimes arise between employers and employees over the rights to inventions made by employees during the course of employment. Because of this, employers often require employees to execute formal agreements under which each signing employee agrees that all rights to any invention made by the employee during the term of employment will belong to the employer.

(3) Trademarks

This area is governed by both state and federal law.

A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination. A trademark should not be confused with a trade name. Although the same designation may function as both a trademark and a trade name, a trade name refers to a business title or the name of a business; a trademark is used to identify the goods manufactured by the business. A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

(a) Selection of Trademark

A manufacturer should carefully consider the trademark selected for its merchandise. The level of protection against infringement of a trademark varies with the “strength” or “uniqueness” of the trademark. “Descriptive” marks are the weakest and least defensible. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A “fanciful” mark, the strongest type of mark, is a coined name that has no dictionary definition. Evaluation should also include consideration of the likelihood of success in obtaining federal and state registrations of the trademark. Selection of a trademark should be accompanied by a trademark search to determine whether another manufacturer has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and there are businesses that specialize in trademark searches. Actual and potential trademark conflicts should be avoided, lest the manufacturer become involved in an expensive infringement lawsuit. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.

(b) Advantages of Trademark Registration

Under the trademark laws of the United States, the principal method of establishing rights in a trademark is actual use of the trademark. “Registration” of a trademark is not legally required but can provide certain advantages. Federal registration of a trademark is presumptive evidence of the ownership of the trademark and of the registrant’s exclusive right to use of the mark in interstate commerce, strengthening the registrant’s ability to prevail in any infringement action. Federal registration is also a prerequisite for bringing a lawsuit under the federal trademark laws. After five years of continued use of the mark following federal registration the registrant’s exclusive right to use of the trademark becomes virtually conclusive. Federal

registration may assist in preventing the importation into the U.S. of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.

(c) Federal Registration Application Process

Federal trademark registration requires that a trademark application be filed with the U.S. Patent and Trademark Office. The application must identify the mark and the goods with which the mark is used or is proposed to be used, the date of first use, and the manner in which it is used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and three specimens of the mark as it is actually used. After the application is filed, it is reviewed by an examiner who evaluates, among other matters, the substantive ability of the mark to serve as a valid mark and the possibility of confusion with existing marks. If the examiner rejects the application, the examiner's decision can be appealed to the Trademark Trial and Appeals Board. An adverse decision by that body can be appealed to federal court. If the application is approved, the mark is published in an official publication of the Patent and Trademark Office. Opponents of the registration have thirty days after publication, or such additional time as may be granted, to challenge the registration. If no opposition is raised, or if the opponent's claims are rejected, an applicant whose mark is already in use receives a "certificate of registration." An applicant whose trademark is proposed for registration before actual use receives, upon approval of the application, a "notice of allowance." An application who receives a notice of allowance must within six months of the receipt of the notice furnish evidence of the actual use of the trademark. The applicant then is entitled to a certificate of registration. Failure to furnish evidence of the actual use of the mark within the time allowed results in rejection of the application. 15 U.S.C. § 1051, *et seq.*

(d) Post-Certificate Federal Procedures

A certificate of trademark registration, issued by the Patent and Trademark Office, remains in effect for ten years. However, registration expires at the end of six years, unless the registrant furnishes evidence of continued use of the trademark. The initial ten-year term of a certificate of registration can be renewed within the term's last six months for an additional ten-year term by furnishing evidence of continued use of the mark and paying a fee. After at least five years of continuous use of a trademark following the receipt of a certificate of registration, a registrant can seek to have the status of the trademark elevated from "presumptive" evidence of the registrant's exclusive right to use of the trademark to virtually conclusive evidence of an exclusive right. To do so, the registrant must furnish the Patent and Trademark Office with evidence of continuous use of the trademark for at least five years. Additionally, there must not be any outstanding lawsuit or claim that challenges the registrant's rights to use the mark.

(B) STATE CONSIDERATIONS

(1) Service Marks & Trade Marks

(a) Acceptable Contents

Montana provides statutory protection for trademarks and service marks. Mont. Code Ann. § 30-13-301, *et seq.* Trademarks can be any word, name, symbol, or device used by a

person to identify and distinguish the goods of one person, including a unique good, from the goods of others. Service marks can be any word, name, symbol, or device used by a person to identify and distinguish services of one person, including a unique a service, from the services of others. There are several statutory limitations on what may be used as a trademark or service mark. Mont. Code Ann. § 30-13-303.

(b) Registration & Renewal

The Montana Secretary of State provides prescribed [forms](#) for registration, renewals or changes with respect to a trademark or service mark. The applicant is required to include 3 specimens showing how the mark is being used and a filing fee of \$20.00 per class. Marks may be renewed after 5 years within 3 months of the expiration of the mark. More information can be found on the Secretary of State's [website](#).

(c) Dilution

The owner of a mark that is famous in Montana is entitled, subject to the principles of equity and upon terms that seem reasonable to the court, to an injunction against another person's commercial use of a mark or trade name if the use begins after the mark has become famous and causes dilution of the distinctive quality of the mark and may obtain other relief as provided in this section. Mont. Code Ann. § 30-13-334.

(d) Assignment

Any mark and its registration may be assigned in conjunction with the good will of a business. Mont. Code Ann. § 30-13-315. An assignment must be written and may be filed with the Secretary of State for a \$20 filing fee. The Montana Secretary of State provides a prescribed [form](#) for such assignment. Upon filing, the Secretary of State issues a new certificate in the name of the assignee for the remainder of the term of the current registration. A purchaser or assignee of a mark should take caution to timely file such assignment because an assignment of any registration is void as against any subsequent purchaser for valuable consideration without notice unless it is filed within 3 months after the date of the assignment or prior to the subsequent purchase. Mont. Code Ann. § 30-13-315.

(e) Infringement and Remedies

Anyone who improperly uses, reproduces, counterfeits, copies or imitates a registered mark without consent commits the offense of trademark counterfeiting and may be held liable in a civil action. Mont. Code Ann. §§ 30-13-333, -338. Any owner of a registered mark may file a suit to restrain or enjoin the manufacture, use, display, or sale of any counterfeits or imitations of the mark. The mark registrant, however, is generally not entitled to recover any profits or damages unless the acts have been committed with knowledge that the mark is intended to be used to cause confusion or mistake or to deceive. Mont. Code Ann. §§ 30-13-333, -335.

(2) Trade Names (Assumed Business Names)

A trade name is any business name other than the full, true, and correct name of a person. In Montana, a persona may apply for a trade name, commonly referred to as an assumed business

name, with the Montana Secretary of State for a \$10 filing fee. The Secretary of State offers a prescribed [form](#) for registering an assumed business name. An assumed business name that is the same or not distinguishable from a business name already registered or from any corporate name, limited partnership name, limited liability company name, limited liability partnership name, trademark, or service mark registered or reserved with the Secretary of State cannot be registered. Registration of an assumed business name is effective for a term of 5 years from the date of registration, but may be renewed for another 5 year term. Mont. Code Ann. § 30-13-201, *et seq.*

(3) Trade Secrets

Montana adopted the Uniform Trade Secrets Act. Mont. Code Ann. § 30-14-402, *et seq.* The act protects trade secrets, which are defined generally as information or software, including a formula, pattern, compilation, program, device, method, technique, or process, that (i) derives independent economic value from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Mont. Code Ann. § 30-14-402. Impermissible use of another person's trade secrets can be enjoined and subject to user to monetary liability. Mont. Code Ann. §§ 30-14-403, -404.

IX. DISPUTE RESOLUTION

All information provided in Section IX(A) was prepared and provided to Crowley Fleck by Lex Mundi.

(A) FEDERAL COURT SYSTEM

The trial courts of the federal court system are the U.S. District Courts. Each district has four federal district court judges who are appointed by the President for life terms upon approval by the United States Senate. Appeals in Montana are to the Ninth Circuit Court of Appeals.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the U.S. Constitution and federal statute. They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, and federal crimes, federal torts, and customs. All other jurisdiction is concurrent with that of the state courts. There are generally two ways to gain access to the federal district courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding \$75,000. To be brought in federal court, there must be complete diversity, i.e., none of the plaintiffs may be a citizen of the same state as any of the defendants. The second primary basis involves a federal question, i.e., presenting an issue arising under the Constitution, statutes, or treaties of the United States. If a party's case does not fit within one of the statutorily mandated jurisdictions, there is no recourse to the federal courts.

The workings of the federal district courts are governed by the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court and approved by the U.S. Congress. These are a uniform body of procedural rules applicable to every federal district court in the U.S. Each

federal district court also establishes its own rules applicable only the procedure in that district court.

These rules often set forth very specific guidelines for the handling of an action, and close attention must be paid to them. Thus, one participating in a suit in federal district court must be aware of that court's local rules as well as the Federal Rules of Civil Procedure.

(B) STATE COURT SYSTEM

Montana's state court system can generally be divided into state district courts, the Montana Supreme Court, and courts of limited jurisdiction (e.g., water court).

(1) Montana's Trial Court System

Montana's trial courts consist of 56 county district courts sitting in 22 judicial districts and served by 46 district court judges. Montana district court judges are elected and serve six year terms. The district courts of Montana exercise appellate jurisdiction over some of the courts of limited jurisdiction while exercising original jurisdiction in:

- (a) all criminal cases amounting to a felony;
- (b) all civil and probate matters;
- (c) all cases at law and in equity;
- (d) all cases of misdemeanor not otherwise provided for; and
- (e) all special actions and proceedings that are not otherwise provided for.

In addition, Montana district courts retain jurisdiction to hear appeals from administrative agencies within Montana (e.g., appeals from the State Tax Appeal Board (STAB) with regard to tax appeals).

(2) Montana's Appellate Court

Montana's appellate court is the Montana Supreme Court. It consists of a chief justice and six associate justices who are elected in statewide elections for 8 year terms. The Supreme Court has original jurisdiction to review petitioner's ballot statements for initiated measures and the attorney general's ballot statements for referred measures. The Montana Supreme Court's appellate jurisdiction extends to all cases at law and in equity. The Montana Supreme Court also regulates the Montana Rules of Civil Procedure.

(3) Montana's Courts of Limited Jurisdiction

Montana also has various courts of limited jurisdiction including: a water court, justices' courts, municipal courts, city courts, and small claims courts. The water court has exclusive jurisdiction over the adjudication of water rights in Montana. The justices' courts can hear claims for less than \$12,000 while small claims court can hear claims for less than \$7,000. Most appeals from the courts of limited jurisdiction go to district courts.

X. FINANCING INVESTMENTS

(A) TAX EXEMPT FINANCING

There are opportunities in Montana to obtain tax exempt financing through various public bond issuances. Montana state and local governments have the ability to issue general obligation bonds by pledging the full faith and credit and taxing powers of the state to the bond issuance. Mont. Code Ann. § 17-5-802. Montana can also issue revenue bonds for funding various activities throughout the state. Mont. Code Ann. § 17-5-911. These programs allow the state to issue tax exempt bonds for myriad purposes including funding highway repair and construction, coal severance initiatives, or any capital improvement. Mont. Code Ann. § 17-5-117.

Montana also has an Infrastructure Loan Program. Mont. Code Ann. § 15-31-301. The purpose of this fund is to invest in and support new and local businesses for the purpose of fostering growth in Montana. Funds received by businesses essentially operate as loans, but, for tax purposes, payments are treated as deductible user fees. This allows businesses to deduct both principal and interest payments from the taxable base. More information can be found at the Board of Investments [website](#).

(B) COMMERCIAL BANKING OPPORTUNITIES

Currently, Montana has around 57 chartered banks, credit unions, and trust companies with various branches throughout the state. These banks are comprised of in-state and out-of-state banks. A current list of Montana state chartered companies can be found at the [website](#) maintained by the Division of Banking and Financial Institutions. Banks are also subject to constant supervision by the State of Montana, and banks must keep their accounting books available for state review so that the financials of each bank can be verified. Mont. Code Ann. § 32-1-211. Banks must also submit periodic reports for review. Mont. Code Ann. § 32-1-211.

The State Banking Board has the responsibility to make final determinations with regard to applications for authorization of new banks. Mont. Code Ann. § 32-1-202. In approving a new bank or a new branch of an existing bank in Montana, the State Banking Board will consider whether there is public necessity and demand for a new bank, whether the bank will have adequate leadership to ensure the bank is soundly operated, and whether the bank will have a sufficient volume of business to ensure solvency. Mont. Code Ann. § 32-1-203. A public hearing must be conducted upon all applications in accordance with the Montana Administrative Procedures Act. Mont. Code Ann. § 32-1-204.

(C) OUT-OF-STATE FINANCIAL INSTITUTIONS

There are several regional and national financial institutions located in Montana. A list of all banking institutions with Montana licenses can be found at the [website](#) maintained by the Division of Banking and Financial Institutions.

(D) PROMINENT FOREIGN BANKS

Montana has few foreign banks operating within its borders.

(E) STATE SECURITIES ISSUES

(1) Registration of Securities

Securities may not be sold in Montana unless those securities are properly registered or are exempt from registration. Mont. Code Ann. § 30-10-202. Securities must be registered by one of the following methods: notice, coordination, or qualification. For a list of specific securities that must be registered by these methods, see Mont. Code Ann. §§ 30-10-203 to -205. In each case, a registration fee must be paid prior to filing an application in accordance with Mont. Code Ann. § 30-10-209.

(2) Registration Exemptions

The Securities Act of Montana provides that certain securities and transactions are exempt from the above registration processes. Mont. Code Ann. § 30-10-104. The types of securities qualifying for exemption are similar to the Uniform Act guidelines; however consult Mont. Code Ann. §§ 30-10-104, -105 for a complete list of exempt securities and exempt transactions. In all cases, the burden of proving exemption falls on the person claiming the exemption. Mont. Code Ann. § 30-10-106.

(3) Broker-Dealer, Investment Advisor Registration

It is unlawful for a person to transact business in Montana as a broker-dealer, salesperson, or investment advisor, except for exempt transactions, unless the person is registered in Montana. Mont. Code Ann. § 30-10-201. “Broker-dealer” means any person engaged in the business of effecting transactions in securities for the account of others or for the person’s own account. Mont. Code Ann. § 30-10-103. “Investment advisor” means a person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. Mont. Code Ann. § 30-10-103. “Salesperson” means an individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect sales of securities. Mont. Code Ann. § 30-10-103.

(4) Antifraud Provisions

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, in, the State of Montana, to employ any scheme to defraud, make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading, or engage in any act, practice, or course of business that operates as fraud or deceit upon any person. Mont. Code Ann. § 30-10-301 (1). The commissioner of Montana has the responsibility to enforce antifraud provisions of the Montana Code. Mont. Code Ann. § 30-10-304. The Montana Securities Commissioner has the power to investigate suspected fraudulent activity, issue an injunction, and impose a fine up to \$5,000 per violation. Mont. Code Ann. § 30-10-305.

XI. REAL ESTATE

(A) OWNERSHIP

(1) Holding Title

Montana has no statutory limits on who may hold title in the state.

(2) Individual Ownership of Property

Generally, all individuals have the right to possess property in Montana. There are no statutory restrictions on the ownership of property in Montana. However, minors typically cannot acquire property, but generally such property is held for the benefit of the minor in a fiduciary capacity, such as a trust, custodial account, or guardianship and conservatorship.

(3) Ownership of Property by a Business Entity

Generally, a domestic corporation, limited liability company or partnership may own real property in Montana without restriction. Foreign entities, such as foreign corporations, limited liability companies and certain forms of partnerships, may not transaction business or own real property in Montana until such entity acquires a certificate of authority from the Montana Secretary of State. For some exceptions to the general rule, see [Mont. Code Ann. § 35-1-1026](#), [Mont. Code Ann. § 35-12-1309](#), and [Mont. Code Ann. § 35-8-1001](#).

(B) CONCURRENT OWNERSHIP

Montana law generally recognizes two forms of common ownership: (1) joint tenancies, (2) tenancies in common. Montana does not recognize tenancy by the entirety. See *Lurie v. Sheriff of Gallatin County*, 2000 MT 103, 299 Mont. 283, 999 P.2d 342.

(1) Joint Tenancy

A joint interest, also known as a joint tenancy, is where several persons share an equal interest to a title, which is created in a single transfer, and is *expressly declared* in the will or transfer to be a joint tenancy. Mont. Code Ann. § 70-1-307. Joint tenancies include the right of survivorship of each joint tenant, where upon the death of a joint tenant their property is divided equally among the surviving joint tenants. See *Hennigh v. Hennigh*, 131 Mont. 371, 309 P.2d 1022 (Mont. 1957). Joint tenancy can be advantageous as upon the death of one tenant there is no need to probate, because the interest in the property transfers automatically upon death.

(2) Tenancy in Common

An interest in common, also known as tenancy in common, is an interest owned by several persons, not as a joint tenancy. Mont. Code Ann. § 70-1-313. Tenants in common may convey their interests in the property upon death through such tenant's will or by intestacy, instead of automatically transferring to a surviving joint tenant(s). Also, unlike joint tenants, tenants in common do not have to own equal shares in the property.

Montana has a presumption of in favor of a tenancy in common and every interest created in favor of several persons, including a husband and wife, is an interest in common unless in its creation the interest is declared to be a joint interest. Mont. Code Ann. § 70-1-314. Therefore, absent an express declaration of joint tenancy, a tenancy in common will be created. See *Matter of Estate of Shaw*, 259 Mont. 117, 855 P.2d 105 (Mont. 1993).

(C) SPOUSAL RIGHTS

(1) Death or Separation

If spouses own property as joint tenants, in the event of a death of one spouse, the deceased spouse's interest in the property automatically transfers to the surviving spouse. For property that is not owned as joint tenants, the property will be disposed of according to the deceased spouse's will or the intestacy laws of Montana (provided, however, the deceased spouse did not have an effective "beneficiary deed" to transfer such property). Certain elections and statutory allowances may be available to a surviving spouse as well. See, generally, Mont. Code Ann. §§ 72-2-221 to -230, and Mont. Code Ann. §§ 72-2-412 to -415.

Montana is not a community property state. In the event of a proceeding for dissolution of marriage, legal separation or division of property, Montana courts will equitably apportion the property between the parties according to the facts and circumstances of the marriage and the parties. Mont. Code Ann. § 40-4-202. In order for property acquired before the marriage to be subject to the equitable apportionment, the non-acquiring spouse must have contributed to the property's preservation, maintenance, or increase in value. See *In re Marriage of Lundstrom and Scholz*, 2010 MT 261, 358 Mont. 318, 245 P.3d 25. Further, in Montana, an equitable division does not require an equal division. See *Collins v. Collins*, 2004 MT 365, 342 Mont. 500, 104 P.3d 1059.

(2) Mortgage

A mortgage in Montana needs only to be executed by the owner of the real property. Certain owners of real property in Montana may establish a homestead, which is generally exempt from execution. The homestead will not protect the property, however, when the mortgage is executed by the husband and wife, or by the unmarried party, or when the mortgage is executed and recorded before the declaration of the homestead. Mont. Code Ann. § 70-32-202.

(D) PURCHASE AND SALE OF PROPERTY

(1) Purchase Agreements

Contracts involving real property generally must be in writing to satisfy the statute of frauds. Mont. Code Ann. § 28-2-903; see also Mont. Code Ann. § 70-20-101. Real property purchase agreements should contain all of the essential elements of a contract. For example, the purchase agreement should include the names of all parties, a description of the property, the interest to be conveyed, purchase price, date of closing, any representations and warranties, and any conditions precedent to the sale. The parties may need to make, or should consider making,

disclosures in certain transactions (e.g., water rights disclosure, lead based paint disclosure, mold disclosure, etc.).

(2) Fraud Protection

As set forth above, contracts involving real property generally must be in writing to satisfy the statute of frauds. Montana law generally states that any instrument affecting an estate in real property made with the intent to defraud is void against any purchaser for value. Mont. Code Ann. § 70-20-401. However, a party that is a bona fide purchaser in good faith for value will acquire good title to the property. See, e.g., *Benson v. Diehl*, 228 Mont. 199, 745 P.2d 315 (Mont. 1987).

(3) Taxes

Real property is subject to property taxes, which will have to be paid by either the buyer or the seller of the real estate (*see* State Taxation, Section IV, Subsection B). The apportionment of taxes is negotiable between the buyer and seller, and is typically set forth in the purchase agreement. Since parties commonly wish to have each party pay the taxes for the time in which they own the property, the taxes are typically are prorated based on the date of closing in the purchase agreement or the date possession actually changes hands.

XII. MISCELLANEOUS

(A) QUALIFICATION TO DO BUSINESS

(*See also* Section II: Business Entities, *supra*.)

(1) Domestic Entities

To become a domestic business entity in Montana, a business must meet certain regulatory and statutory requirements. Below is a non-exhaustive checklist for creating a business entity in the state:

- (a) Determine the business structure.
- (b) Reserve a business name.
- (c) File organizational documents with the Secretary of State's Office. Prescribed forms can be found at the Secretary of State's [website](#).
- (d) Apply for a tax identification number (if needed).
- (e) Apply for professional licenses.
- (f) Apply for local licenses.
- (g) Apply for Workers' Compensation.
- (h) File an annual report with the Secretary of State's Office.

(2) Foreign Entities

Before transacting business in Montana, a foreign business entity must register with or obtain a certificate of authority from the Montana Secretary of State. Foreign businesses must have a resident

agent located in Montana. Foreign business entities that fail to take such actions may not maintain any action, suit or proceeding in any court in Montana.

(B) LICENSING AND REGULATORY REQUIREMENTS

The State of Montana does not require that all businesses have a business licenses. However, many businesses must be registered and licensed with the state. For example, professional and occupational businesses must obtain state licenses, and so must agricultural, construction, and gambling businesses. Montana also requires extractive industry business to obtain permits prior to conducting exploratory or other activities within the state. For a list of certain state licenses, see the Department of Revenue's [website](#). Many cities and counties require local licenses for businesses operating within their boundaries and it is recommended to check with each city and county prior to conducting any business.

(C) MONTANA USURY LAWS

In Montana the legal rate of interest may not exceed greater than 15% or an amount that is 6 percentage points higher than the interest rate charged by certain banks. Mont. Code Ann. § 31-1-107. Lenders that are regulated or established by the Montana government or federal government are exempt from the usury interest rate limitations. Mont. Code Ann. § 31-1-112. Regulated lenders may include: banks, building and loan associations, savings and loan associations, trust companies, credit unions, credit associations, consumer loan licensees, deferred deposit loan licensees, residential mortgage lender licensees, development corporations, bank holding companies, mutual or stock insurance companies, or subsidiaries of any of the above entities. Mont. Code Ann. § 31-1-111.

(D) RESTRICTIONS ON SPECIFIC PROFESSIONS

The regulation of specific professions is delegated to a regulatory board. Each of these regulatory boards is under the jurisdiction and supervision of the Commissioner of Labor and Industry. The boards that govern the various professions are granted authority under Title 37 of the Montana Code. Title 37 contains the full list of authorized governing boards.

Each board governs the actions of that profession by promulgating regulations concerning the practice of that particular profession. These regulations are found in Title 24 of the Administrative Rules of Montana, which contain a separate section for each board. The breadth of regulation varies heavily from profession to profession. There are also a number of general administrative regulations that are applicable to every profession. These are located in the beginning of Title 24, with the profession specific regulations listed below.

Professional corporations can also conduct activities in Montana as long as they file articles of incorporation with the board of the profession they practice in. These organizations are required to abide by the regulations promulgated by the examining board of that profession. In addition, they must comply with the applicable business laws.

(E) NOTICE OF BUSINESS ACTIVITIES

A specific business activity report is not required by Montana law. However, there are some general requirements that must be satisfied to maintain compliance with state law. For example, most business organizations are required to file formation documents and annual reports with the Montana Secretary of State.

(F) BUSINESS NAME REGISTRATION

Mont. Code Ann. § 35-1-308 requires a business name to be distinguishable from the name of another business currently on file with the Secretary of State. A registered business name must be sufficiently distinctive from another registered business name so that it does not cause confusion in an absolute or linguistic sense. The Secretary of State's [website](#) has a Business Entity Search function, which allows an individual to search existing names to determine whether a particular name is available. A fee of \$20 is required to apply for a business name. A business name can be reserved 120 days prior to filing organizational documents. A \$10 fee is required to reserve name. However, this name reservation does not allow the business to transact business or conduct affairs prior to completing the other business formation requirements.