

Utah

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Utah

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Introduction

As with all jurisdictions within the United States, certain laws, regulations, and other legal requirements must be met to start, operate, and maintain a successful business in Utah. This chapter discusses, among other things, information and instructions on how to start a business, regulations that need to be complied with, and sources of assistance.

Establishment of Enterprises

Organizational Structures

Business activity in Utah may be conducted through a variety of permitted organizational structures. Utah law specifically permits the following business organization structures:

- Sole proprietorship;
- General partnership;
- Limited partnership;
- Corporation;
- Professional corporation;
- Non-profit corporation; and
- Limited liability company.

Corporation

In General

A corporation is a legal person and a legal entity that is separate and distinct from its owners (called shareholders) and its managers (called the board of directors). Its life is unaffected by the retirement or death of its shareholders, officers, and directors. A corporation is a person under the Constitution of the United States, and like natural persons, it is protected from unreasonable

searches and seizures and is guaranteed due process and equal protection under the law.

It also has free speech rights. A corporation has its own domicile and its own place of residence, which locations determine, in part, whether a state may constitutionally impose its laws on the corporation. Chapter 10a of Title 16 of the Utah Code Annotated, referred to as the Utah Revised Business Corporation Act, governs all issues concerning corporations in Utah.

Formation

A corporation is only created by permission of the State of Utah by filing articles of incorporation with the Utah Department of Commerce, Division of Corporations and Commercial Code. At a minimum, the articles of incorporation must include:

- The name of the corporation;
- The purpose or purposes for which the corporation is formed (which may include any lawful activity for which a corporation may be formed);
- The number of shares the corporation is authorized to issue (if more than one class of shares is authorized, each class must be designated, along with a description of the preferences, limitations, and relative rights of each class);
- The name and address of each of the incorporators;
- The Utah street address of the corporation's initial registered office and the name of its initial registered agent at such address; and
- The signature of each of the incorporators.¹

Immediately before or after formation, Utah corporations often adopt bylaws to supplement the articles of incorporation by defining more precisely the powers, rights, and responsibilities of the corporation, its board of directors, and its shareholders and by stating other rules under which the corporation and its activities will be governed. Utah law, however, does not require a corporation to adopt bylaws.²

If bylaws are adopted, they will usually state the authority of the officers and the directors, specifying what they may do and may not do; the time and place at which the annual shareholders' meetings will be held; the procedure for calling special meetings of shareholders; and the procedures for shareholders' and directors' meetings. The bylaws also may make provisions for special committees of the board of directors, defining their membership and the scope

¹ Utah Code Annotated, s 16-10a-202(1).

² Utah Code Annotated, s 16-10a-206. If bylaws are not adopted, or if issues relating to the activities of the corporation are not addressed in the articles or the bylaws, the provisions of the Utah Revised Business Corporation Act will govern the activities of the corporation.

of their activities. The bylaws also set up the required procedures for the transfer of shares, the maintenance of share records, and for the declaration and payment of dividends.³

Shareholders' Meeting

Utah law requires that a corporation hold a meeting of shareholders annually at a time stated in or fixed in accordance with the corporation's bylaws. The shareholders' meeting may be held in or out of the State of Utah at a place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual meetings of a corporation must be held at the corporation's principal office. Failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws, however, does not affect the validity of any corporate action or work a forfeiture or dissolution of the corporation.⁴

Utah law also permits a special meeting of the shareholders to be held upon the call of the corporation's board of directors or by a person or persons authorized by the bylaws to call a special meeting. A meeting also may be convened if the holders of shares representing at least 10 per cent of all the votes entitled to be cast on any issue to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting, stating the purpose or purposes for which it is to be held.

As with annual shareholders' meetings, special meetings of the shareholders may be held in or out of the State of Utah at the place stated in or fixed in accordance with the bylaws of the corporation. If no such place is stated or fixed, however, Utah law requires that special meetings be held at the principal office of the corporation.⁵

Notice must be given to a corporation's shareholders of the date, time, and place of each annual and special shareholders' meeting. The notice must be given no fewer than 10 days and no more than 60 days before the date of the meeting.⁶ While notices of annual shareholders' meetings do not require a description of the purpose or purposes for which the meeting is called, notices of special shareholders' meeting are required to include such a description.⁷

Utah law permits any action that may be taken at an annual or special meeting of shareholders to be taken without a meeting and without prior notice, provided that one or more written consents setting forth the action so taken are signed by the holders of outstanding shares with at least the minimum number of votes that

3 Utah Code Annotated, s 16-10a-206.

4 Utah Code Annotated, s 16-10a-701.

5 Utah Code Annotated, s 16-10a-702.

6 Utah Code Annotated, s 16-10a-705(1).

7 Utah Code Annotated, s 16-10a-705(2) and (3).

would be necessary to authorize or take the action at a meeting at which all shares entitled to vote on the action were present and voted.⁸

Board of Directors

In General. Utah corporations must generally have a board of directors, with members of the board of directors commonly being elected at each annual meeting of the shareholders.⁹ The board of directors is the unit ultimately responsible for managing the business and affairs of the corporation.

Composition. A board of directors is generally required to consist of at least three individuals; however, before any shares of the stock corporation are issued, a corporation's board of directors may consist of only one individual. Additionally, after shares of a corporation are issued, the board of directors may consist of a number of individuals equal to or greater than the number of shareholders of the corporation. Thus, for example, if there are only two holders of a corporation's shares, the corporation is permitted to have only two directors.¹⁰

The only requirement Utah law places on those who may be elected as directors is that a director must be a natural person. While a corporation's articles of incorporation or bylaws may prescribe further qualifications that a director must meet, further qualifications are not required. Unlike other jurisdictions, Utah law does not require that a director be a resident of the State of Utah or a shareholder of the corporation.¹¹

Function and Manner of Taking Actions. The duty of the directors of a corporation is to take actions to further the interests and business of the association and to conserve its property.¹² Such actions must be approved by a majority of directors present at board meetings, unless otherwise provided in the corporation's articles or bylaws.¹³ No action can be taken, however, unless there is a quorum of directors present.¹⁴ Utah law defines a quorum as a majority of

⁸ Utah Code Annotated, s 16-10a-704.

⁹ Utah Code Annotated, s 16-10a-801 (requiring that every corporation have a board of directors, except that a corporation with a shareholders' agreement authorized by the Utah Revised Business Corporation Act may dispense with or limit the authority of the board of directors).

¹⁰ Utah Code Annotated, s 16-10a-803(1)(b).

¹¹ Utah Code Annotated, s 16-10a-802.

¹² *Nicholson v Evans*, 642 P.2d 727 (Utah 1982). If a corporation has a board of directors, all corporate powers must be exercised by, or under the authority of, and the business and affairs of the corporation managed under the direction of, the board of directors. Utah Code Annotated, s 16-10a-801(2).

¹³ Utah Code Annotated, s 16-10a-824(3). Although the Utah Revised Business Corporation Act does not prescribe in detail formal requirements for board meetings, the meetings do have to take place.

¹⁴ Utah Code Annotated, s 16-10a-824(1).

directors, unless a greater number or lower number is set forth in the articles of incorporation or the bylaws. Under Utah law, in no event may a quorum be less than one-third of the directors of the corporation.¹⁵

Fiduciary Duties

In General. As defined by Utah law, directors have basic legal obligations or duties that arise from their ultimate responsibility for the business and interests of the corporation. The duties set both the general standards of conduct for a director to follow and also the reviewing standards for a court to use in determining whether a director's behavior has been proper in a particular circumstance. The most important duties required by Utah law are the duty of good faith, the duty of care, and the duty of loyalty.¹⁶

Duty of Good Faith. The duty of good faith can be defined as a director's promise not to consciously abdicate his duties or intentionally do anything to injure the business or interests of the corporation or its shareholders. Utah law generally allows shareholders to sue for violation of this duty.

For instance, the Utah Supreme Court has explained that it is 'well established precedent that the bylaws of a corporation, together with the articles of incorporation, the statute under which it was incorporated, and the [shareholder's] application, constitute a contract between the [shareholder] and the corporation', and that a 'covenant of good faith and fair dealing exists' between [a corporation] and [its shareholders].¹⁷ With that said, however, a claim against individual directors is generally barred in Utah because a contract between a shareholder and a corporation is not a contract between a shareholder and the board of directors.¹⁸ However, a director who acts in bad faith can become liable for a corporation's breach of contract.¹⁹

Courts have attempted to define the duty of good faith in more detail. A Delaware court, in litigation over severance paid by The Walt Disney Company to its president, considered the meaning of the duty of good faith. The Chancellor of the court explained:

'Upon long and careful consideration, I am of the opinion that the concept of intentional dereliction of duty, a conscious disregard for one's responsibilities, is an appropriate (although not the only) standard for determining whether fiduciaries have acted in good faith. Deliberate indifference and inaction in the

¹⁵ Utah Code Annotated, s 16-10a-824(2).

¹⁶ Utah Code Annotated, s 16-10a-840(1).

¹⁷ *Ute Indian Tribe of the Uintah & Ouray Reservation v Ute Distribution Corporation*, 2012 U.S. App. LEXIS 245 (10th Cir. 5 Jan. 2012).

¹⁸ *Ute Indian Tribe of the Uintah & Ouray Reservation v Ute Distribution Corporation*, 2012 U.S. App. LEXIS 245, *41-42 (10th Cir. 5 Jan. 2012).

¹⁹ *Ute Indian Tribe of the Uintah & Ouray Reservation v Ute Distribution Corporation*, 2012 U.S. App. LEXIS 245, *42 (10th Cir. 5 Jan. 2012).

face of a duty to act is, in my mind, conduct that is clearly disloyal to the corporation. It is the epitome of faithless conduct. A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. There may be other examples of bad faith yet to be proven or alleged, but these three are the most salient.²⁰

While not controlling law in Utah, the Delaware court's discussion of the duty of good faith in *In re The Walt Disney Co. Derivative Litigation* may be helpful in better understanding and delineating a director's duty of good faith toward a Utah corporation.

Duty of Care. Utah law is different than most other jurisdictions in that directors are required to perform their duties in good faith, with 'the care of an ordinarily prudent person in a like position would exercise'.²¹ The reference to 'an ordinarily prudent person' embodies long traditions of the common law, in contrast to suggested standards that might call for some undefined degree of expertise, such as 'ordinarily prudent businessman'. The phrase recognizes the need for innovation, essential to profit orientation, and focuses on the basic attributes of common sense, practical wisdom, and informed judgment. And the phrase 'in a like position' recognizes that the 'care' under consideration is that which would be used by the 'ordinarily prudent person' if he were a director of the particular corporation.

The process by which a director becomes informed will vary, but the duty of care requires every director to take steps to become informed about the background facts and circumstances before taking action on the matter at hand. In relying upon the performance by management of delegated or assigned duties, a director may depend upon the presumption of regularity, absent knowledge or notice to the contrary.²² A director also may rely on information, opinions, reports, and statements prepared or presented by others.²³ Furthermore, a director of a Utah corporation is not expected to anticipate the problems which the corporation may face, except in those circumstances where something has occurred to make it obvious to the director that the corporation should be addressing a particular problem.

20 *In re The Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 755–756 (Del. Ch. 2005).

21 Utah Code Annotated, s 16-10a-840(1).

22 Utah Code Annotated, s 16-10a-801.

23 Utah Code Annotated, s 16-10a-840(2). A director is permitted to rely upon outside advisers, including not only those in the professional disciplines customarily supervised by state authorities, such as lawyers, accountants, and engineers, but also those in other fields involving special experience and skills, such as investment bankers, geologists, management consultants, actuaries, and real estate appraisers.

In satisfying their duty of care, directors are given wide discretion within which to act without fear of liability under the 'business judgment rule'.²⁴ The business judgment rule recognizes that courts are ill-equipped to second-guess the validity of complex business decisions made by directors. As long as there is no gross negligence, willful misconduct, or intentional infliction of harm on the corporation, decisions made by directors are generally protected.

Essentially, the business judgment rule recognizes that directors should be able to exercise their 'business judgment' without fear of liability as long as they are exercising their judgment in good faith. The rule, however, has never been absolute and it has important exceptions.

The business judgment rule does not apply in self-interested transactions where directors stand on both sides of a transaction or have a personal financial interest in a transaction. Also, the rule only applies when a judgment has been made. When courts say that they will not interfere in matters of business judgment, it is presupposed that judgment (i.e., reasonable diligence) has in fact been exercised. The rule does not apply where directors have either abdicated their function or, absent a conscious decision, failed to act. This exception exists because the rule was intended to give directors wide latitude in making business decisions, not to permit the abdication of their responsibilities. Finally, the business judgment rule does not apply where the directors have failed to act with the care required under Utah law.²⁵

Duty of Loyalty. Directors have a fiduciary duty of loyalty to their corporation and its shareholders.²⁶ They are obligated to use their ingenuity, influence, and energy, and to employ all the resources of the corporation to preserve and enhance the property and earning power of the corporation, even if the interests of the corporation are in conflict with their own personal interests.²⁷ This duty extends to all of the corporation's assets, including its subsidiary corporations. The Utah Supreme Court has held that:

'The duty of the directors of a corporation is to further the interests and business of the association and to conserve its property. Any action on the part of directors looking to the impairment of corporate rights, the sacrifice of corporate interests, the retardation of the objects of the corporation, and more especially the destruction of the corporation itself, will be regarded as a flagrant breach of trust on the part of the directors engaged therein.'²⁸

24 The Utah legislature codified the business judgment rule in Utah Code Annotated, s 16-10a-840. *C&Y Corp. v General Biometrics, Inc.*, 896 P.2d 47, 55 (Utah Ct. App. 1995).

25 *Resolution Trust Corp. v Hess*, 820 F. Supp. 1359, 1367 (Dist. Utah 1993) (discussing the fiduciary duties of directors in a trust corporation).

26 *Nicholson v Evans*, 642 P.2d 727, 730 (Utah 1982); *Branch v Western Factors, Inc.*, 502 P.2d 570 (Utah 1972); *Elggren v Woolley*, 228 P. 906 (Utah 1924).

27 *Nicholson v Evans*, 642 P.2d 727, 730 (Utah 1982).

28 *Glen Allen Mining Co. v Park Galena Mining Co.*, 296 P. 231 (Utah 1931).

Pursuant to this fiduciary duty of loyalty, the so-called ‘corporate opportunity doctrine’ forbids a corporate director from acquiring for his own benefit an opportunity that would have been valuable and germane to the corporation’s business, unless that opportunity is first offered to the corporation and declined by a disinterested board of directors or disinterested shareholders or, where that is not possible, the transaction is judged according to the circumstances at the time of the transaction as fair to the corporation.²⁹ This duty applies to whatever could be of value to the enterprise to which the fiduciary owes a duty. Utah law provides for a detailed procedure the board of directors should follow in approving any transaction in which any director has an interest.³⁰

Liability and Indemnification

In General. Utah law permits both voluntary and mandatory indemnification of directors. Voluntary indemnification is addressed in Section 902 of the Utah Revised Business Corporation Act, while mandatory indemnification is addressed in Section 903.

Voluntary Indemnification. The Utah Revised Business Corporation Act sets the outer limits for which voluntary indemnification is permitted. Conduct that does not meet the explicit standards set forth in the Utah Revised Business Corporation Act is not eligible for voluntary indemnification. Specifically, a corporation may indemnify an individual made a party to a proceeding because such individual is or was a director if that individual’s conduct was in good faith, if the individual reasonably believed that his conduct was in (or not opposed to) the corporation’s best interests, and, in the case of any criminal proceeding, that he had no reasonable cause to believe that his conduct was unlawful.³¹

However, a corporation may not voluntarily indemnify a director in connection with a proceeding by (or on behalf of) the corporation in which the director was adjudged liable to the corporation. A corporation also is prohibited from voluntarily indemnifying a director in connection with any other proceeding alleging the director derived an improper personal benefit (whether or not involving action in his official capacity) and in which proceeding the director was adjudged liable on the basis that he derived an improper personal benefit.³²

Mandatory Indemnification. Utah law also addresses certain situations in which a corporation must indemnify its directors. The basic standard for

29 Utah Code Annotated, s 16-10a-850(1); *Nicholson v Evans*, 642 P.2d 727, 730–731 (Utah 1982) (‘To avoid the distortion of self-interest, a director who desires to acquire a corporate opportunity for his own benefit should make full disclosure and submit any questions of fact, such as the corporation’s interest or financial or legal ability, to the impartial judgment of others.’).

30 Utah Code Annotated, s 16-10a-850–853.

31 Utah Code Annotated, s 16-10a-902(1).

32 Utah Code Annotated, s 16-10a-902(4).

mandatory indemnification is that the director has been ‘successful, on the merits or otherwise, in the defense of any proceeding, or in the defense of any claim, issue, or matter in the proceeding’³³ Thus, Utah law preserves a director’s right to indemnification against expense and fees incurred in connection with the successful defense of any claim, issue, or matter in any proceeding to which the director was a party by reason of being a director of the corporation.³⁴

Utah law also permits court-ordered indemnification in two situations. First, a director entitled to mandatory indemnification may enforce that entitlement by a judicial proceeding. Second, a director who claims to be fairly and reasonably entitled to indemnification in view of all the circumstances may request the court to order appropriate indemnification. In either case, the court must satisfy itself that the person seeking indemnification is properly entitled to it. A corporation may limit a director’s right to request court-ordered indemnification by a provision prohibiting it in the corporation’s articles of incorporation. In the absence of such a provision, however, the court has general power to grant indemnification.³⁵

Limited-Liability Companies

In General

A limited-liability company is a newer form of business entity that combines the operational flexibility and tax status of a general partnership with the limited liability protection traditionally associated with corporations. A limited liability company has far greater operational flexibility than either a corporation or a limited partnership. Chapter 2c of Title 48 of the Utah Code Annotated, referred to as the Utah Revised Limited Liability Company Act, governs all issues concerning limited liability companies in Utah.³⁶

Utah’s Revised Limited Liability Company Act was recently replaced in its entirety by a modified version during the 2011 General Session of the Utah legislature. The new Utah Revised Uniform Limited Liability Company Act affects the formation and regulation of limited liability companies in the State of Utah and is expected to take effect on 1 July 2012. All new limited liability companies that are formed on or after 1 July 2012 will be subject to these new regulations, while existing limited liability companies will not be affected until 1 January 2014. However, existing limited liability companies may choose to opt into the new regulations any time before 2014. At the time of writing, the Utah Revised Limited Liability Company Act is in force, and this discussion is based on that law.

33 Utah Code Annotated, s 16-10a-903.

34 Utah Code Annotated, s 16-10a-903.

35 Utah Code Annotated, s 16-10a-905.

36 The Utah Revised Limited Liability Company Act is located at Utah Code Annotated, ss 48-2c-101 *et seq.*

Formation

A limited liability company is only created by permission of the State of Utah by filing articles of organization with the Utah Department of Commerce, Division of Corporations and Commercial Code. At a minimum, the articles of incorporation must include:

- The name of the limited liability company;
- The purpose or purposes for which the limited liability company is formed;
- The name and address of the initial registered agent of the limited liability company;
- The name and street address of each organizer who is not a member or manager;
- If the limited liability company is to be manager-managed, a statement that the company is to be managed by a manager or managers and the names and street addresses of the managers who are to serve; and
- If the limited liability company is to be member-managed, a statement that the company is to be managed by its members and the names and street addresses of the members who are to serve.³⁷

Immediately before or after formation, Utah limited liability companies often adopt operating agreements to supplement the articles of organization by more precisely defining the management of the company, the business or purpose of the company, the conduct of the company's affairs or the rights, duties, powers, and qualifications of and relations between and among the members, the managers, the members' assignees and transferees, and the limited liability company.³⁸ Utah law, however, does not require a limited liability company to adopt an operating agreement.

Management

A Utah limited liability company may be managed by its members or the members may choose managers to manage the operations of the company. Managers may consist of members, non-members, or a combination of both.

Utah law does not require limited liability companies to hold annual meetings or to comply with the many operational restrictions imposed upon corporations. However, if meetings of members are allowed or required under the articles of organization or operating agreement, then, unless otherwise provided in the articles of organization or operating agreement, a meeting of members may be called by any manager in a manager-managed limited liability company or by members in any limited liability company that hold at least 25 per cent interest

³⁷ Utah Code Annotated, s 48-2c-403.

³⁸ Utah Code Annotated, s 48-2c-502.

in profits of the company. Any business may be transacted at any meeting of members which is properly called.

Notice of a meeting of members must be given to each member at least five days prior to the meeting and must give the date, place, and time of the meeting. Notice of a meeting of members may be given orally or in writing or by electronic means. The person calling the meeting may designate any place within or without the State of Utah as the place for the meeting.

Only persons who are members of record at the time notice of a meeting is given are entitled to receive notice or to vote at the meeting. However, a fiduciary such as a trustee, personal representative, or guardian will be entitled to act in such capacity on behalf of a member of record if evidence of such status is presented to the limited liability company. A surviving joint tenant also will be entitled to receive notice and act when evidence of the other joint tenant's death is presented to the limited liability company.

A quorum, consisting of members holding at least 51 per cent interest in the profits of the limited liability company, must be present in person or by proxy at a meeting of members for any business to be transacted. The members present at any meeting at which a quorum is present may continue to transact business notwithstanding the withdrawal of members from the meeting in such numbers that less than a quorum remains.

A member may participate in and be considered present at a meeting by (or the meeting may be conducted through the use of) any means of communication by which all persons participating in the meeting may hear each other or otherwise communicate with each other during the meeting. Voting at a meeting will be determined by percentage interests in the profits of the limited liability company. To be effective, a proxy must be in writing and signed by the member and must be filed with the secretary of the meeting before or at the time of the meeting and will be valid for no more than 11 months after it was signed, unless otherwise provided in the proxy.³⁹

Fiduciary Duties

Utah law specifies a default standard with respect to the standard of care and degree of loyalty imposed upon members and managers of a limited liability company. That general standard is that neither a member nor a manager is liable or accountable in damages or otherwise to a limited liability or the members 'for any action taken of failure to act on behalf of the [limited liability] company unless the act or omission constitutes gross negligence [or] willful misconduct'.⁴⁰ However, if a higher standard of conduct is established in the limited liability company's articles of organization or operating agreement, a

³⁹ Utah Code Annotated, s 48-2c-704.

⁴⁰ Utah Code Annotated, s 48-2c-807; P.C. Regehr, *Utah Limited Liability Company Forms and Practice Manual* (Data Trace Publishing Company, 2008), at p. 7-53.

member or manager will be held to that higher standard.⁴¹ Notwithstanding the general standard, with regard to conflict of interest or self-dealing transactions, the default rule is that:

‘(2) Each member and manager shall account to the [limited liability] company and hold as trustee for it any profit or benefit derived by that person without the consent of members holding a majority interest in profits in the [limited liability] company, or a higher percentage of interests in profits provided for in the [limited liability] company’s articles of organization or operating agreement, from:

‘(a) any transaction connected with the conduct of the [limited liability] company’s business or winding up of the [limited liability] company; or

‘(b) any use by the member or manager of company property, including confidential or proprietary information of the [limited liability] company or other matters entrusted to the person in the capacity of a member or manager.’⁴²

Utah’s common law principles of agency and fiduciary duties also will apply to those who act on behalf of a limited liability company, but such principles do not establish the precise nature and extent of duties in all cases where agency authority exists.⁴³ Therefore, it is proper and good practice for a Utah limited liability company’s operating agreement to define and set forth the duty and standard of care imposed on managers and members in various circumstances.⁴⁴

For example, if a limited liability company is managed by its managers, the operating agreement should specify whether the managers have the duty of care specified in the Utah Revised Limited Liability Company Act or, alternatively, the same standard of care and duty of loyalty as directors of a corporation or the standard of care and duty of loyalty of general partners of a partnership.⁴⁵

Liability and Indemnification

In General. Utah permits the discretionary and mandatory indemnification of members and managers in a limited liability company.⁴⁶ Indemnification, however, can be limited in the articles of organization. If such a provision is

41 Utah Code Annotated, s 48-2c-807(1)(c).

42 Utah Code Annotated, s 48-2c-807.

43 P.C. Regehr, *Utah Limited Liability Company Forms and Practice Manual* (Data Trace Publishing Company, 2008), at p. 7-53.

44 P.C. Regehr, *Utah Limited Liability Company Forms and Practice Manual* (Data Trace Publishing Company, 2008), at pp. 7-53–7-54.

45 P.C. Regehr, *Utah Limited Liability Company Forms and Practice Manual* (Data Trace Publishing Company, 2008), at p. 7-54.

46 Utah Code Annotated, ss 48-2c-1801 and 48-2c-1809.

located in the articles of organization, then such a limitation cannot be overridden by the operating agreement, a resolution, or a contract.⁴⁷

Discretionary Indemnification. Utah law permits a limited liability company to indemnify an individual made a party to a proceeding because that individual is or was a manager against liability incurred in the proceeding if the individual's conduct was in good faith; the individual reasonably believed that his conduct was in the company's best interest or not opposed to the company's best interest; and, in the case of any criminal proceeding, the individual had no reasonable cause to believe that his conduct was unlawful.⁴⁸

However, a limited liability company is not permitted to use its discretion to indemnify a manager in connection with a proceeding by (or on behalf of) the limited liability company in which the manager was adjudged liable to the limited liability company.⁴⁹ Additionally, a limited liability company may not indemnify a manager in connection with any proceeding charging that the manager derived an improper personal benefit, whether or not involving action in his official capacity as a manager of the limited liability company, in which proceeding the manager was adjudged liable on the basis that he derived an improper personal benefit.⁵⁰

Discretionary indemnification is not permitted, unless the indemnification is authorized by the limited liability company and a determination has been made that indemnification of the manager is permissible under Utah law.⁵¹ The required determination must be made in one of three ways:

- By the managers through a majority vote (only by those managers not a party to the proceeding will be counted);
- By special legal counsel selected by a majority vote of the managers of the company who are not parties to the proceeding or, if there is no legal counsel, by members holding a majority interest in the profits of the company, not counting any interest held by the manager who is a party to the proceeding; or
- By the members holding more than 50 per cent interest in the profits of the limited liability company, not counting any interest held by the manager who is a party to the proceeding.⁵²

Authorizations are handled in a different manner. Particularly, '[u]nless authorization is required by the operating agreement, authorization of indemnification . . . shall be made in the same manner as the determination that indemnification . . . is permissible'. However, 'if the determination that

47 Utah Code Annotated, s 48-2c-1809(1).

48 Utah Code Annotated, s 48-2c-1802(1).

49 Utah Code Annotated, s 48-2c-1802(4)(a).

50 Utah Code Annotated, s 48-2c-1802(4)(b).

51 Utah Code Annotated, s 48-2c-1806.

52 Utah Code Annotated, s 48-2c-1806(2).

indemnification . . . is permissible is made by special legal counsel, authorization of indemnification . . . shall be made by those entitled . . . to select legal counsel'.⁵³

Members of a limited liability company may be indemnified by the company to the same extent as a manager.⁵⁴ Utah law also permits a limited liability company to indemnify a member who is not a manager to a greater extent than permitted for an individual who is solely a manager, as long as such indemnification is 'not inconsistent with public policy and if provided for by its articles of organization, operating agreement, general or specific action of its managers or members, or contract'.⁵⁵

Mandatory Indemnification. Utah law also requires that a manager or member that is successful, on the merits or otherwise, in the defense of any proceeding or in the defense of any claim, issue, or matter in the proceeding to which such member or manager was a party, must have mandatory indemnification against reasonable expenses incurred by the manager or member in connection with the proceeding or claim.⁵⁶ Utah courts also have limited authority to enforce mandatory indemnification. A member or manager successful in a proceeding may apply to a court, to another decision maker conducting the proceeding, or to another court of competent jurisdiction for indemnification by the limited liability company.⁵⁷ Upon reviewing the application, a court may order indemnification.⁵⁸

Acquisition of Enterprises

Forms of Acquisition

There are three principal ways to acquire a business in Utah. Specifically, businesses may be acquired through an asset acquisition, an equity acquisition, and a merger.

Asset and Equity Acquisitions

In an asset acquisition, the buyer acquires specific assets and liabilities of the target company as listed in the asset purchase agreement, which is the contract that governs the purchasing of the specific assets and liabilities. After the deal closes, the buyer and seller maintain their corporate structures and the seller retains those assets and liabilities not purchased by the buyer. In equity

53 Utah Code Annotated, s 48-2c-1806(3).

54 Utah Code Annotated, s 48-2c-1807(2).

55 Utah Code Annotated, s 48-2c-1807(3).

56 Utah Code Annotated, ss 48-2c-1803 and 48-2c-1807.

57 P. C. Regehr, *Utah Limited Liability Company Forms and Practice Manual* (Data Trace Publishing Company, 2008), at p. 7-60.

58 Utah Code Annotated, s 48-2c-1805.

acquisitions, the buyer acquires the target company’s equity (e.g., stock, units, partnership interests, and the like) from the selling equity holders. The buyer acquires all of the target company’s assets, rights, and liabilities. Following the transaction, the target company maintains its corporate existence and becomes a subsidiary of the buyer.

Mergers

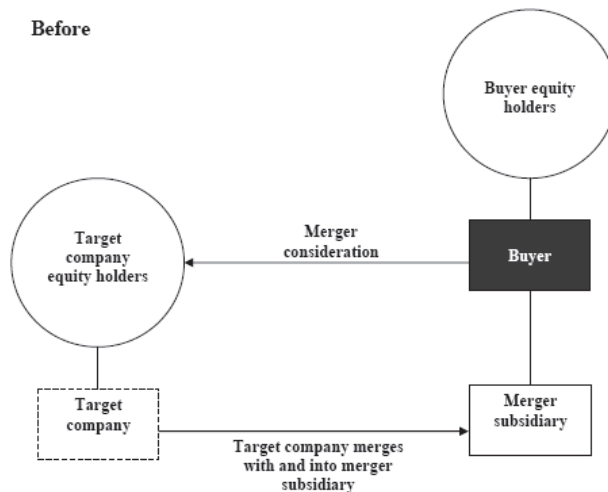
In General

A merger is an equity acquisition in which two companies combine into one legal entity. The surviving entity assumes all the assets, rights, and liabilities of the extinguished entity. The merger process is governed by laws of the states of formation of the parties to the merger. The principal categories of mergers are direct mergers and indirect mergers. Direct mergers are typically structured as forward mergers (they also can be structured as reverse mergers so that the target company survives, but this is not common). Indirect mergers are structured as forward triangular mergers or reverse triangular mergers and are often used by buyers to shield themselves from the target company’s liabilities.

Permitted Merger Structures

In General. Utah law does not prohibit direct or indirect mergers. The most common merger structures, however, are the forward merger, the forward triangular merger, and the reverse triangular merger, which are discussed in turn.

Forward Merger. In a forward merger, the target company merges with and into the buyer, the buyer assumes all of the target company’s assets, rights, and liabilities by operation of law, and the target company ceases to exist as a separate entity. Figure 1 represents a forward merger.



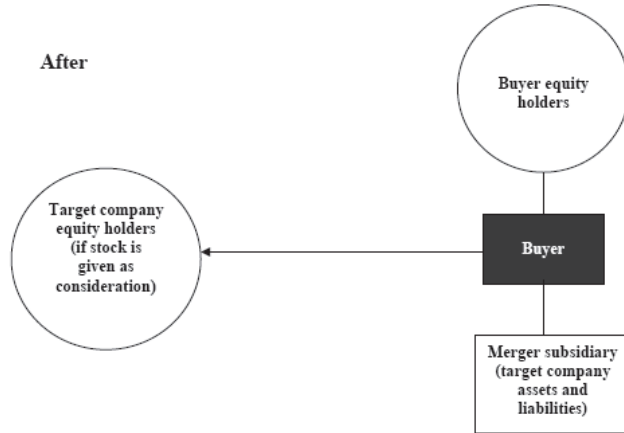
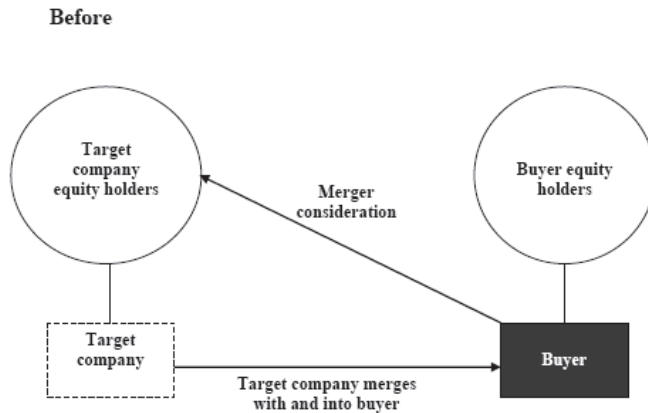


Figure 1: Forward merger.

Forward Triangular Merger. A forward triangular merger is an indirect merger where the buyer uses a merger subsidiary (which can be an existing or newly formed subsidiary) to acquire the target company. The target company merges with and into the merger subsidiary, the merger subsidiary assumes all of the target company’s assets, rights, and liabilities by operation of law, and the separate existence of the target company is extinguished. Figure 2 represents a typical forward triangular merger.



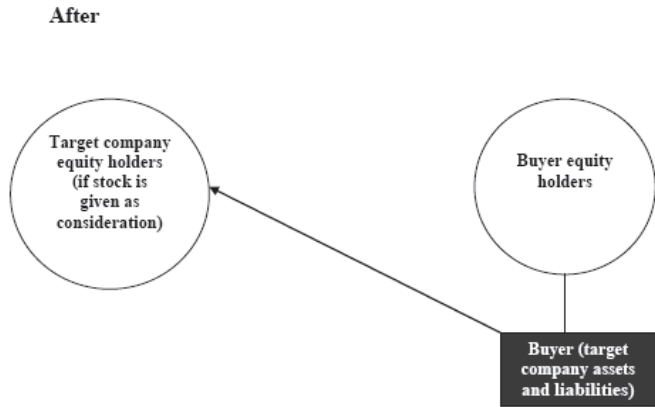
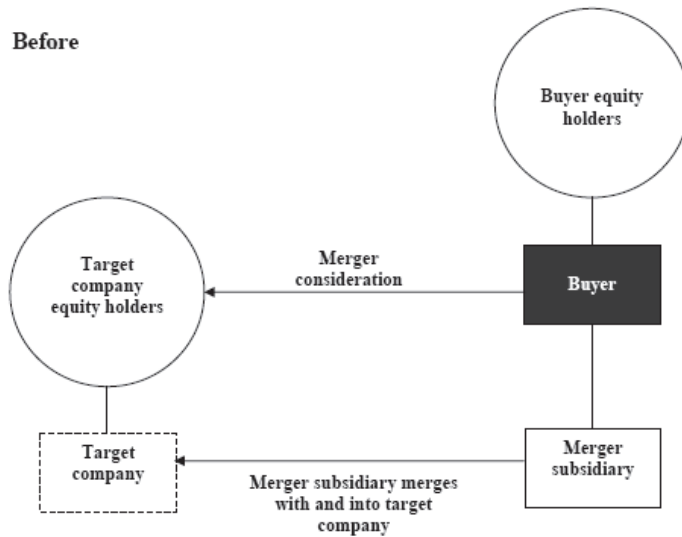


Figure 2: Forward triangular merger.

Reverse Triangular Merger. In a reverse triangular merger (also an indirect merger), the buyer’s merger subsidiary is merged with and into the target company and the target company survives the merger and becomes the buyer’s subsidiary. The principal advantage to this structure is that it typically does not require third-party consents, as the target company is the surviving entity (unless the relevant agreements contain change-of-control provisions). Figure 3 represents a typical reverse triangular merger.



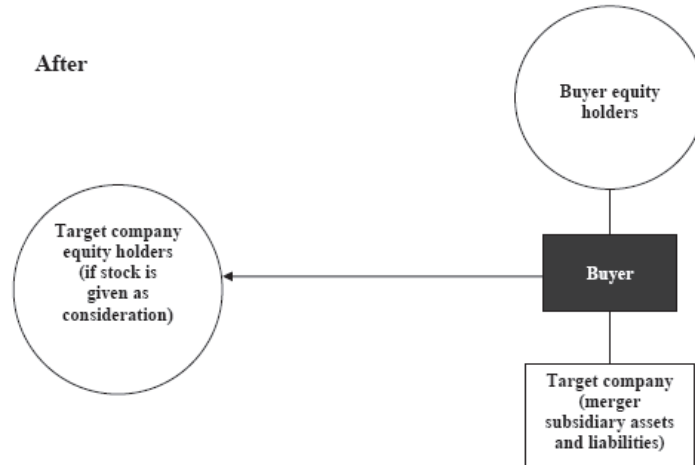


Figure 3: Reverse triangular merger.

Utah Law on Merger of Corporations

Like most states, Utah law authorizes a statutory merger, to be accomplished by the adoption of a plan of merger and, if required, approval by the shareholders of the corporation.⁵⁹ To accomplish the merger, articles of merger must be filed with the Utah Department of Commerce, Division of Corporations and Commercial Code.

The articles of merger formally make the terms of the transaction a matter of public record, and the effective date of the articles is the effective date of their filing, unless a delayed effective date is utilized. The articles of merger must describe whether the plan was submitted to the vote of one or more voting groups of the participating corporations entitled to vote separately on the plan. If the plan was submitted, the articles of merger must state either the total votes in favor of and against the plan or a statement that the plan was approved by at least the number of undisputed votes required to approve the merger or share exchange by each voting group of each participating corporation entitled to vote separately on the plan.⁶⁰ On the effective date of merger, the surviving corporation becomes vested with all the assets of the disappearing corporations and becomes subject to their liabilities.

Under Utah law, there are virtually no restrictions or limitations on the terms of a statutory merger. Shareholders of the disappearing corporations may receive securities of the surviving corporation, securities of a third corporation (e.g.,

⁵⁹ Utah Code Annotated, s 16-10a-1101(1). Adoption of a plan of merger must be pursuant to Utah Code Annotated, s 16-10a-1101(2). Shareholder approval is not always required.

⁶⁰ Utah Code Annotated, s 16-10a-1105.

shares issued by the parent of the surviving or disappearing corporation), or cash or other property. Some of the holders of a single class of shares may be required to accept securities or properties, while the remaining holders may be compelled to accept different securities, property, or cash.⁶¹ The capitalization of the surviving corporation may be restructured in the merger or its articles of incorporation may be amended by the articles of merger in any way deemed appropriate. Any other provisions considered necessary or desirable with respect to the merger may be included in the plan of merger.

On the effective date of merger, every disappearing corporation that is a party to the merger disappears into the surviving corporation and the surviving corporation automatically becomes the owner of all real and personal property and becomes subject to all the liabilities, actual or contingent, of each disappearing corporation. Additionally, all pending litigation is continued.⁶²

Utah Law on Merger of Limited Liability Companies

As with corporations, Utah law permits any entity to convert to a Utah limited liability company upon receiving approval of the conversion as set forth in applicable law or by the document, instrument, agreement, or other writing that governs the internal affairs of the converting entity,⁶³ and by filing articles of conversion and articles of organization that satisfy the requirements of the Utah Revised Limited Liability Company Act.⁶⁴

As with corporations, Utah law permits that one or more limited liability companies may merge with one or more other entities, if each company and entity that is a party to the merger approves a plan of merger and if the merger is permitted by the various state statutes governing each entity. The entity that survives may be a limited liability company or other entity.⁶⁵

The plan of merger must set forth the name and type of each entity planning to merge; the name and type of the entity that will survive; the terms and conditions of the merger; and the manner and basis of converting the ownership interests of each owner into ownership interests or obligations of the surviving entity or any other entity, or into cash or other property in whole or in part.

61 If any shareholders of any party to the merger are to receive different shares or money or property under the plan of merger, the rights of those shareholders after the articles of merger are filed are limited to their rights under the plan of merger or their rights under the Utah Revised Business Corporation Act, Part 13. Utah Code Annotated, s 16-10a-1106(1)(f).

62 Utah Code Annotated, s 16-10a-1106(1).

63 Utah Code Annotated, s 48-2c-1404. However, if applicable law or the document, instrument, agreement, or other writing that governs the internal affairs of the entity desiring to convert to a limited liability company does not provide for the manner of approving the conversion, the unanimous consent of the owners of the converting entity is required to approve the conversion and the new operating agreement.

64 Utah Code Annotated, s 48-2c-1401.

65 Utah Code Annotated, s 48-2c-1407(1).

Moreover, if any party to the merger is an entity other than a limited liability company, any additional information required for a merger by the statutes governing that entity must be included in the plan of merger.⁶⁶ Additionally, the plan of merger may set forth amendments to the articles of organization of a limited liability company (if that company is the surviving entity) and any other provisions relating to the merger.⁶⁷

Dissenters' Rights

Under Utah law, a shareholder is entitled to dissent from and obtain payment of the fair value of shares held by him in the event of the consummation of a plan of merger to which the corporation is a party, or the consummation of an exchange of shares, or the sale of substantially all of the property of the corporation in an asset sale.⁶⁸

'Fair value' is to be determined immediately before the effectuation of the corporate action instead of the day prior to the date of the shareholder vote, as is the case with most other state statutes that address the issue. The use of this day preserves a dissenter's prior rights as a shareholder until the effective date of the corporation action, rather than leaving the dissenter in a zone where former rights have been lost but new ones have not yet been attained. Ultimately, Utah corporate law does not address the definition of 'fair value', but leaves to the parties (and to the courts) the details by which 'fair value' is to be determined within the broad outlines of the definition. A shareholder's ability to dissent and obtain payment for his shares is the exclusive remedy for that shareholder, unless the transaction is unlawful or fraudulent.⁶⁹

Utah basically adopts the New York formula as to exclusivity of the dissenters' remedy. The theory underlying the 'exclusive' nature of the remedy is that when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous and persuades a court that this is correct. As dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. Thus, in general terms, an exclusivity principle is justified.

However, the prospect that a shareholder may be 'paid off' does not justify a corporation proceeding in an action unlawfully or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in the articles of incorporation prohibiting it, by deception of shareholders, or in violation of a fiduciary duty, the court's freedom to intervene should be unaffected by the presence or absence of dissenters' rights under Utah law.⁷⁰

66 Utah Code Annotated, s 48-2c-1407(2).

67 Utah Code Annotated, s 48-2c-1407(3).

68 Utah Code Annotated, s 16-10a-1302(1).

69 Utah Code Annotated, s 16-10a-1302(5).

70 Commentary to the Utah Revised Business Corporation Act, s 1302.

Acquisition of Realty

Acquisition Procedure

The major components in acquiring real estate include entering into an agreement which governs the acquisition, preparing to close the acquisition, and actually closing the acquisition.

Real Estate Purchase Contracts

Parties will often enter into a contract which will identify the property to be purchased,⁷¹ the terms under which the property will be purchased, and the conditions to be fulfilled by the time the actual transaction takes place. The real estate purchase contract is mostly intended to govern the parties' rights for a period while the parties prepare to actually transfer the property for consideration.⁷²

For this purpose, the Utah Real Estate Commission and the Office of the Attorney General of Utah have prepared and approved a sample Real Estate Purchase Contract.⁷³ The sample Real Estate Purchase Contract⁷⁴ does not have to be used by private parties. However, if parties decide to use the sample contract, they should be aware that the sample contract is best suited for use in residential real estate transactions, but can be adapted for any type of real property interests.⁷⁵

Utah's sample contract contains no restrictions against assignment by either party, so it is considered unconditionally assignable.⁷⁶ Under Utah law, if parties to a real estate contract include provisions prohibiting assignment without written permission but do not include provisions for forfeiture in case of such unapproved assignment, the transaction remains in effect, but the assignor may be liable for any damages occasioned by the improper assignment.⁷⁷

71 *Rhodes v Dep't of Transp.*, 193 P.3d 632, 634 (Utah App. 2008) (holding that the land description was adequate to satisfy the statute of frauds, although the documents detailing the contract between the parties described the property as the land remaining in the possession of the defendant after a sale).

72 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc. 2010), s 13.03, at p. 388.

73 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.03, at p. 388.

74 The sample contract can be found at:
http://realestate.utah.gov/realestate/real_forms.html.

75 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.03(a), at p. 388.

76 *Hadlock v Showcase Real Estate Inc.*, 680 P.2d 395 (Utah 1984); *Black Enterprises v M-B Super Tire Market, Inc.*, 499 P.2d 1294 (Utah 1972); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.03(a)(2), at p. 391.

77 *Murray First Thrift and Loan Co. v Stevenson*, 534 P.2d 909 (Utah 1975).

Utah law permits parties to a real estate contract to include express warranties. However, if a contract specifies that purchasers accept the property in an as-is condition at the time of the acquisition and that there are no representations, warranties, covenants, or agreements between the parties with reference to the property, the purchasers will not be able to assert that implied warranties were included in the real estate purchase contract, unless such warranties are implied by law in every such contract.⁷⁸

Closing Preparations

In General

Between signing the real estate purchase contract and completing the closing, prospective purchasers of real property conduct certain examinations before acquiring the real property from the seller. This examination requires the prospective purchaser to conduct a search of the land title records to specifically determine that the seller has a deed apparently conferring title as represented by the seller, and that the seller's own deed arises out of a predecessor in interest who also appears to have good title and whose own predecessors likewise appear in the land title records with valid titles. Thus a 'chain of title'⁷⁹ is sought in the land title records.

Recording Systems and Indexes

The recording of a real estate conveyancing document in Utah is not essential to the document's validity or to its ability to achieve the transaction represented in the document.⁸⁰ Recording is extremely important, however, as a form of protection against others who may claim a conflicting or prior interest in the same land. Not surprisingly, Utah has adopted specific legal rules relating to the recording of real property interests, to determine those priorities and resolve those conflicts.⁸¹

Utah has adopted a 'race-notice' recording system. A 'race-notice' system basically provides that the second purchaser of a real property will prevail over the first purchaser of the same real property only if the second purchaser records first and also had no actual or constructive notice of the first purchase at the time of the second purchase. Stated in another way, each document not recorded is void as against any subsequent purchaser of the same real property, or any

78 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.03(a)(5), at p. 392.

79 *Salt Lake City v Silver Fox Pipeline Corp.*, 5 P.3d 1206 (Utah 2000); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(i), at p. 398.

80 *Larson v Overland Thrift & Loan*, 818 P.2d 1316 (Utah App. 1991); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(ii), at p. 398.

81 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(ii), at p. 398.

portion of it, if the subsequent purchaser purchased the property in good faith and for a valuable consideration⁸² and if the subsequent purchaser's document is duly recorded first.⁸³

Notwithstanding this provision, recording in Utah is not intended to determine the rights of parties who have actual notice of the real property transaction at issue.⁸⁴ Furthermore, constructive notice dates from the time of recording, not from the time of execution of the deed.⁸⁵

Title Records and Title Searches

Under Utah law, an unrecorded conveyance of land is valid as between the parties and as to all parties with notice of the transaction.⁸⁶ As mentioned previously, priority among recorded documents affecting the same parcel of land, or any portion of such parcel, is determined by the date of recording to the extent that such date is the time from which notice is imparted.⁸⁷

As such, a purchaser of real estate should take the necessary actions to appropriately record the document effectuating a transfer of real property.

Under Utah law, a document relating to real property is entitled to be recorded in the county where the real property is located if a certificate of acknowledgment, certificate of the proof of execution, or a jurat or other notarial certificate 'contains the words "subscribed and sworn" or their substantial equivalent, that is signed and certified by the officer taking the acknowledgment, proof, or jurat . . .',⁸⁸

Title examination requires that all documents in a chain of title be located and evaluated — the ultimate question being whether a 'marketable record title' can

82 This is another way of expressing the requirement that the second purchaser must be without actual or constructive notice of the first purchase. *Smith v Tyler*, 982 P.2d 89 (Utah 1999); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(ii), at p. 399.

83 Utah Code Annotated, s 57-3-103; *Wilson v Schneider's Riverside Golf Course*, 523 P.2d 1226 (Utah 1974).

84 *Le Vine v Whitehouse*, 109 P. 2 (Utah 1910); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(ii), at p. 399.

85 *Utah Farm Prod. Credit Association v Wasatch Bank*, 734 P.2d 904 (Utah 1986); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(ii), at p. 399.

86 *Crowther v Mower*, 876 P.2d 876 (Utah App. 1994); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(iv), at p. 400.

87 *Utah Farm Prod. Credit Association v Wasatch Bank*, 734 P.2d 904 (Utah 1986); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(ii), at p. 399.

88 Utah Code Annotated, s 57-3-101; D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(iv), at pp. 400–401.

be shown in the record.⁸⁹ The question of marketable title has been blended into and somewhat superseded by the Marketable Record Title Act adopted by Utah.⁹⁰ Utah's Marketable Record Title Act⁹¹ states:

'Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 40 years or more, will be deemed to have marketable record title to such interest [subject to certain exceptions].

'A person will be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than 40 years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in:

'(1) the person claiming such interest or

'(2) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.'⁹²

The intended effect of Utah's Marketable Record Title Act is to render of no effect all interests recorded prior to an 'unbroken chain of title . . . for forty years or more'.⁹³ The most recent recorded document that qualifies to be part of the chain of title and is in effect at least 40 years before the time at which marketability is to be determined is often times referred to as the 'root of title'.⁹⁴ Individuals examining title to real property need not be concerned with documents predating the root of title, because such documents no longer affect the title under Utah law.⁹⁵ Nevertheless, if an individual who holds an interest that predates the root of title wishes to preserve the interest against the nullifying effects of the Marketable Record Title Act, the Act authorizes such individual to file a notice of claim of interest.⁹⁶

89 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(1)(v), at p. 402.

90 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(2), at p. 402.

91 Utah Code Annotated, s 57-9.

92 Utah Code Annotated, s 57-9-1.

93 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(2), at p. 403.

94 Utah Code Annotated, s 57-9-8(5); D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(2), at p. 403.

95 Utah Code Annotated, s 57-9-3; D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(2), at p. 403.

96 Utah Code Annotated, ss 57-9-2, 57-9-4, and 57-9-5; D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.04(a)(2), at p. 403.

Closing and Acquisition of Title

Title to real property will be transferred at closing through a deed. Utah law authorizes and describes the effects of two types of deeds: the warranty deed and the quitclaim deed. Utah law provides a very brief form of warranty deed, followed by a lengthy description of the legal language that is implied when the statutory form or its equivalent is used. This approach makes it unnecessary to recite the extensive legal language in each deed.⁹⁷ The statutory warranty deed form consists of the following elements:

- Name and place of residence of the grantor;
- Name and place of residence of the grantee;
- Statement that the grantor ‘conveys and warrants’ the land to the grantee;
- Statement of consideration;
- Description of land, including county of location; and
- Signature of the grantor.⁹⁸

The term ‘conveys and warrants’ signifies that the grantor not only conveys fee simple title, but does so with the five following warranties:

- The grantor lawfully owns fee simple title to and has the right to immediate possession of the premises;
- The grantor has good right to convey the premises;
- The grantor guarantees the grantee and the grantee’s heirs and assigns in the quiet possession of the premises;
- The premises are free from all encumbrances; and
- The grantor and the grantor’s heirs and personal representatives will forever warrant and defend the title of the premises in the grantee and grantee’s heirs and assigns against all lawful claims whatsoever.⁹⁹

A quitclaim deed has the effect ‘of conveyance of all right, title, interest, and estate of the grantor in and to the premises therein described and all rights, privileges, and appurtenances thereunto belonging, at the date of the conveyance’.¹⁰⁰ The statutory quitclaim deed form consists of the following elements:

- Name and place of residence of the grantor;
- Name and place of residence of the grantee;

⁹⁷ Utah Code Annotated, s 57-1-12.

⁹⁸ D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.05(b)(1)(i), at p. 424.

⁹⁹ D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.05(b)(1)(i), at p. 424.

¹⁰⁰ Utah Code Annotated, s 57-1-13; *Johnson v Bell*, 666 P.2d 308 (Utah 1983).

- Statement that the grantor quitclaims¹⁰¹ the property to the grantee;
- Statement of consideration;
- Description of land, including county of location; and
- Signature of the grantor.¹⁰²

A deed is effective only upon actual or constructive delivery to the grantee.¹⁰³ The delivery itself is effective if it is done only with the intent and effect of transferring the grantor's control over the deed.¹⁰⁴ Delivery is presumed if a deed has been recorded.¹⁰⁵ If the grantee has a recorded deed in possession, a valid, non-conditional delivery is presumed;¹⁰⁶ however, non-delivery is presumed if the grantor retains possession of the deed or, under some circumstances, if the grantor retains possession of the property.¹⁰⁷ Notably, under Utah law, delivery is not complete until it is knowingly accepted by the grantee or the grantee's agent.¹⁰⁸

Taxation

Types of Taxes

Businesses operating in Utah may be subject to several types of taxes, including individual income tax, corporate tax, property tax, withholding tax, and sales and use taxes. Each of these is discussed in turn.

101 The term 'quitclaim' signifies that the grantor is conveying to the grantee only the title and interest held by the grantor — carrying no warranties — without recourse by the grantee unless other enforceable commitments regarding the title have been made to the grantor. D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.05(b)(1)(i), at p. 425.

102 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.05(b)(1)(i), at p. 425.

103 *Jacobs v Hafen*, 875 P.2d 559.

104 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.05(b)(6), at p. 431; *Estate of Jackson v Jackson*, 2001 Utah App. 223 (Utah App. 12 July 2001) (delivery requires that the grantor relinquish physical control of the original deed or have present intent to be permanently divested of the title); *Warburton Family Trust v Pedockie*, 2000 Utah App. 272 (Utah App. 5 Oct 2000) (delivery of warranty deed without intent to make a present conveyance); *Tanner v Carter*, 20 P.3d 332 (Utah 2001) (delivery of warranty deed without intent to make a present conveyance).

105 *Jacobs v Hafen*, 875 P.2d 559.

106 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.05(b)(6), at p. 431; *Bertoch v Gailey*, 208 P.2d 953 (Utah 1949).

107 D. A. Thomas and J. H. Backman, *Utah Real Property Law* (Matthew Bender and Company, Inc., 2010), s 13.05(b)(6), at p. 431; *Controlled Receivables, Inc. v Harman*, 413 P.2d 807 (Utah 1966); *Fuller v First Security Bank of Utah*, 348 P.2d 930 (Utah 1960).

108 *Santaquin Mining Co. v Highroller Mining Co.*, 71 P. 77 (Utah 1902).

Individual Income Tax

Individuals who earn or receive income from a Utah source, who live in or who have a residence in Utah, must file an individual income tax return to determine the amount of the individual's income that is taxable and owed to Utah.

Utah does not require filing and payment of estimated individual income tax, but does provide forms for taxpayers who would like to pay quarterly estimated tax. Estimated tax payments must be sent with a prepayment form.¹⁰⁹

Corporate Franchise Tax and Income Tax

C Corporations

A 'C corporation' refers to any corporation that, under United States income tax law, is taxed separately from its owners. Corporate franchise tax is a tax on the privilege or right to do business in Utah and is based on net income and imposed on every corporation registered to do business in Utah, except for certain exempt corporations. Corporation income tax is imposed on corporations not otherwise subject to the corporation franchise tax and that derive income from sources within Utah. Corporations incorporated outside Utah that have no fixed place of business in Utah but derive income from activities occurring in Utah or in connection with Utah customers are subject to the corporation income tax.

The corporate franchise tax and corporate income tax rates are the same. The Utah corporate tax rate is 5 per cent of the corporation's Utah net taxable income, with a minimum of US \$100 per corporation. The minimum tax applies regardless of whether a corporation actually earns a profit or conducts any business. Utah corporate franchise tax and income tax returns are due on the fifteenth day of April for calendar filers and the fifteenth day of the fourth month following the end of a tax year for fiscal filers.

S Corporations

To qualify for S corporation status, a corporation must meet several requirements that qualify it as a small business. The corporation must:

- Be a domestic corporation;
- Have only allowable shareholders (which may include individuals, certain trusts, and estates, but which may not include partnerships, corporations, or non-resident alien shareholders);
- Have no more than 100 shareholders;
- Have one class of stock; and
- Not be an ineligible corporation (e.g., certain financial institutions, insurance companies, and domestic international sales corporations).

¹⁰⁹ Form TC-546: Income Tax Prepayment, and Form TC-40: Utah Individual Income Tax Return, issued by the Utah State Tax Commission.

S corporations that have filed a timely election with the Internal Revenue Service under Section 1362(a) of the Internal Revenue Code are considered 'pass-through entities' for tax purposes. The income earned by S corporations is passed through to the shareholders and the shareholders must report and pay tax on Utah income accordingly. S corporations must file a Utah S corporation return, but are not subject to the US \$100 minimum franchise tax.

Corporate Tax Prepayments

Corporations with a tax liability of US \$3,000 or more in the current tax year, or with a tax liability of US \$3,000 or more in the previous tax year, must make estimated tax payments. Payments are due on the fifteenth of the fourth, sixth, ninth, and twelfth months of the tax year. Penalties apply on underpayments, late payments, and late filings.¹¹⁰

Pass-Through Entities

A pass-through entity is an entity whose income, gains, losses, deductions, and credits flow through to partners, members, and shareholders for federal tax purposes. For purposes of Utah withholding, pass-through entities include general partnerships, limited partnerships, and limited liability partnerships; limited liability companies if classified as a partnership for federal income tax purposes; and S corporations. Estates and trusts are not considered pass-through entities for Utah withholding purposes.

Pass-through entities must withhold Utah income tax on income from Utah sources for non-residential individual partners, members, shareholders, and for all general partnerships, limited liability partnerships, limited liability companies, S corporations, C corporations, estates, and trusts.

Pass-through entities file information returns and provide their partners, members, and shareholders with a Schedule K-1 showing the Utah income and withholding passed through to the partner, member, or shareholder. The partner, member, or shareholder will use the information from the Schedule K-1 to file and pay their income taxes.¹¹¹

Property Tax

Generally, Utah counties may assess a tax on both real and tangible personal property located within the county. Real property includes land, buildings, and other improvements. Personal property includes furniture, fixtures, machinery, equipment, supplies, and other similar property, but does not include inventory held for resale. Certain property is exempt from property tax assessment,

110 Form TC-559: Corporate Tax Payment Coupon, and Form TC-20: Utah Corporation Franchise or Income Tax Return, issued by the Utah State Tax Commission.

111 Publication 68, *Pass-through Entity Withholding*, issued by the Utah State Tax Commission.

including property used exclusively for religious, charitable, or educational purposes.¹¹²

Personal property taxes are generally due on 15 May. Real property taxes are billed by 1 November and must be paid by 30 November.

Withholding Tax

Employers located inside Utah who pay wages, and employers located outside Utah who pay wages to Utah residents, must register with the Utah State Tax Commission to get a state withholding tax account. State withholding taxes are paid on a monthly basis and filed on a quarterly basis if the employer is withholding an average of US \$1,000 a month or US \$12,000 a year.

The payment is due on or before the last day of the month following the end of each monthly period. The return is due on or before the last day of the month following the end of each quarterly period. For example, the January payment is due on or before the last day of February, and the first quarter (January–March) filing is due on or before the last day of April.¹¹³

Employers may be exempt from Utah withholding requirements if they do business in Utah for 60 days or less in a calendar year and have Utah State Tax Commission approval.

An employer who does business for more than 60 days must withhold taxes for the entire period, unless good cause can be shown, in which case, the Utah State Tax Commission may extend the exemption for 30 days.¹¹⁴

Sales and Use Taxes

In General

Sales and use taxes are transaction taxes. This means that the transaction is taxed, not the actual goods or services. The buyer is the actual taxpayer. Sales and use taxes are ‘trust fund taxes’, because the seller holds the tax in trust for Utah until paid to the Utah State Tax Commission.

The funds may not be used for any other purpose. Sales tax and use tax have the same exemptions and tax rates. Either sales tax or use tax applies to any transaction, but not both.

Sales tax is applied to retail sales and leases of tangible personal property, products transferred electronically, and certain services. The seller collects sales

112 Utah Code Annotated, s 59-2-1101.

113 However, employers withholding less than US \$1,000 on average per month or US \$12,000 on average a year are required to file and pay on a quarterly basis. Returns and payments are due on or before the last day of the month after the end of each quarterly period.

114 Utah Code Annotated, s 59-10-402(2).

tax from the buyer and pays it to the Utah State Tax Commission monthly, quarterly, or annually.¹¹⁵

Use tax is applied to purchases of tangible personal property, products transferred electronically, and certain services when sales tax is due but not collected by the seller. A buyer without a sales tax account pays use tax to the Utah State Tax Commission. Examples of use tax due include using items from resale inventories; buying goods or services tax-free for personal or business use (e.g., advertising supplies, office or shop equipment, computer hardware and software, office supplies, and other similar items); and buying products from unlicensed, out-of-state sellers.

Sales Tax License and Filing and Reporting Requirements

Every seller with an established presence in Utah must have a Utah sales tax license.¹¹⁶ Sales tax licenses are not transferable. Businesses that typically must register for a sales tax license include retailers selling tangible goods, products transferred electronically, or services; wholesalers purchasing resale inventory; manufacturers; leasing companies; and consumers such as professional firms and construction contractors.

Once a business has registered with the Utah State Tax Commission for the collection of sales and use tax, a return must be filed whether or not sales tax or use tax is due. Penalties and interest apply to late returns, underpayments, and late payments. Filing frequency is determined by the Utah State Tax Commission and based on the amount of annual sales tax or use tax liability.

Records

Every retailer, lessor, or person doing business in Utah must keep complete records used to determine their sales tax or use tax liability. Business records must be kept for three years from the date a tax return is filed. Records must be made available to the Utah State Tax Commission in their original format (paper or electronic).

The records should show all gross receipts from Utah sales or rental payments from leases of tangible personal property, products transferred electronically, or services. The records also must show deductions and exemptions claimed in sales tax returns and show all bills, invoices, and similar proof of all tangible personal property bought for sale, consumption, or lease in Utah. The records also should include original supporting documents (such as bills, receipts,

115 Utah Code Annotated, s 59-12-103; Utah Administrative Code, R865-12L, R865-19S, and R865-21U.

116 Businesses may obtain a Utah sales tax license by submitting Form TC-69: Utah State Business and Tax Registration, or registering online at osbr.utah.gov to apply for a license.

invoices, cash register tapes, and other similar records) and all schedules or working papers used to prepare tax returns.¹¹⁷

Rates

The sales and use tax rates vary depending on the location of a business. Cities and counties may impose additional related taxes. Generally, the local tax rate is combined with the state tax rate for collection and reporting to the Utah State Tax Commission. Tax rate charts for every combined (state and local) tax rate in Utah are available on the Utah State Tax Commission's website.¹¹⁸

Exemptions

Utah law provides several exemptions from sales and use tax.¹¹⁹ There are three types of sales tax exemptions, which are based on entity (exemption certificate required for sales to an exempt entity), use (exemption certificate required), and product (exemption certificate not required).

An entity-based exemption is determined by who buys or sells the product, whereas a use-based exemption is determined by the buyer's use of the product. A product-based exemption is determined by the type of product.

Bankruptcy

Article I, Section 8, of the United States Constitution grants to Congress the authority to 'establish . . . uniform Laws on the subject of Bankruptcies throughout the United States'.¹²⁰ During the past 200 years, Congress has passed and repealed several bankruptcy laws. In 1898, Congress passed the Bankruptcy Act of 1898, which reformed bankruptcy laws in the United States. The bankruptcy code in the United States has been amended several times since 1898, with the most recent amendment occurring in 2005 through passage of the Bankruptcy Abuse Prevention and Consumer Act, codified in Title 11 of the United States Code.

In Utah, as in all states, federal bankruptcy law governs bankruptcy practice, but applicable state law plays an important role in bankruptcy law. Bankruptcy law defers to state law on issues such as property ownership, priority of claims, and exemptions.

Thus, it is important for any bankruptcy practitioner to not only be familiar with the bankruptcy code, but to also be familiar with applicable state law.

117 Utah Administrative Code, R865-19S-22. Utah Administrative Code, R861-1A035 states additional record-keeping requirements.

118 At tax.utah.gov.

119 Utah Code Annotated, s 59-12-104.

120 Special thanks to Douglas P. Farr of Snell & Wilmer, L.L.P. for his valuable input on Utah law addressing bankruptcy issues.

A debtor may file bankruptcy under a variety of chapters within Title 11, including Chapter 7, Chapter 9, Chapter 11, Chapter 12, Chapter 13, and Chapter 15. When a debtor files for bankruptcy relief under any of these chapters, a bankruptcy estate is established and the property of the estate is determined by federal bankruptcy law.¹²¹ If there are questions about whether certain property is the property of the debtor's estate, however, courts will look to state code or common law to determine whether this is so.

Similarly, when multiple creditors assert secured claims against the same property, bankruptcy courts will look to state law to determine priority. In Utah, priority is established in different ways for different types of property. Priority of a secured claim on real property is established by record notice. The first creditor to record its security interest against the property in the official records of the county where the real property sits has a first-priority claim on the property.

Another example where bankruptcy law defers to state law is in the exemptions a debtor may claim. When a debtor files a bankruptcy petition, it also files its schedule of assets and liabilities. A debtor may exempt some of its property from execution under the state law where the debtor was domiciled during the 730-day period preceding the petition date.¹²²

In Utah, the exemption statutes are contained in the Utah Exemptions Act.¹²³ The Utah Exemptions Act dictates what property can be claimed as exempt and the limits on these exemptions. The bankruptcy code allows creditors to object to a debtor's claim of Utah exemptions, but any objection must be based on a misapplication of the Utah Exemptions Act.

In sum, businesses in Utah must be familiar with Title 11 of the United States Code, but they also must be familiar with Utah state law in this respect. In Utah, there is only one bankruptcy court, the Bankruptcy Court for the District of Utah. More information about Utah's bankruptcy court can be found on the official website of the Bankruptcy Court.¹²⁴

Securities

In General

Both federal and state laws regulate the offer and sale of securities. While stocks and bonds are commonly understood to fit within the definition of securities, Utah law actually defines securities much more broadly than just stocks and bonds. Securities also include items such as promissory notes, limited partnership interests, limited liability company interests, and oil and gas

121 United States Code, Title 11, s 541.

122 United States Code, Title 11, s 522(b)(3).

123 Utah Code Annotated, ss 78-23-1 *et seq.*

124 At <http://www.utb.uscourts.gov/>.

partnerships. In fact, a security can be any transaction in which one person gives money to another with the agreement that the money will be returned with a profit.¹²⁵

A company often needs capital to advance its idea, product, or service. To raise that capital, a company will offer either equity or debt in the company to third-party investors.

Generally, these equity and debt interests are securities and must be registered, be exempt from registration, or be a federal covered security. Whether registered, exempt, or a federal covered security, issuers must comply with the appropriate securities laws and rules.

Corporate Finance and Securities Registration Requirements

In General

To issue a security so that a business may raise capital, whether debt or equity, that security must meet one of three requirements outlined in the Utah Uniform Securities Act.¹²⁶ Specifically, the security must be registered with the State of Utah, the security or transaction must be exempted under Utah law, or the security must be one that is a federal covered security for which a notice filing is made.¹²⁷

General Registration with the Utah Security and Exchange Commission

In General. Utah law permits registration of a security under Utah law by either coordination or qualification. A registration statement may be filed by the issuer of the securities, by another person on whose behalf the offering is to be made, or by a licensed broker-dealer.¹²⁸ The person filing a registration statement must pay the appropriate filing fee.¹²⁹

The registration statement must contain certain specific information, including the amount of securities to be offered in Utah, the states in which a registration statement or similar document in connection with the offering is or is to be filed, and an adverse order, judgment, or decree entered in connection with the offering by the regulatory authorities in each state or by a court or the Securities and Exchange Commission.¹³⁰ A registration statement filed with the Utah Division of Securities is effective for one year. In specific circumstances, a

125 Utah Code Annotated, s 61-1-13(1).

126 Utah Code Annotated, s 61-1-14.

127 Utah Code Annotated, s 61-1-7.

128 Utah Code Annotated, s 61-1-11(1). The registration application to be filed is a Form U-1: Uniform Application to Register Securities.

129 Utah Code Annotated, s 61-1-11(2).

130 Utah Code Annotated, s 61-1-11(3). However, under the Utah Code Annotated, s 61-1-11(5), the Utah Division of Securities may permit the omission of an item of information or document from a registration statement.

registration statement may be amended after its filing so as to increase the securities specified to be offered and sold.¹³¹

Every application for registration and every issuer that proposes to offer a security in Utah through any person acting on an agency basis must file with the Utah Division of Securities an irrevocable consent, appointing the Utah Division of Securities or the director of the Utah Division of Securities to be its attorney, to receive service of any lawful process in any non-criminal suit, action, or proceeding against the issuer after the consent has been filed, with the same force and validity as if served personally on the person filing the consent.¹³²

Registration by Coordination. A security for which a registration statement or a notification under Regulation A has been filed under the federal Securities Act of 1933 may be registered in Utah by coordination.¹³³ Registration by coordination, in addition to the general information requirements addressed above, requires the inclusion of additional information and documents with the registration statement.

Specifically, a registration statement by coordination must contain a copy of the disclosure statement, with any existing amendments, filed under the Securities Act of 1933.¹³⁴ Additionally, if the Utah Division of Security so requests, the following also may be required to be filed with a registration statement:

- A copy of the articles of incorporation and bylaws or their substantial equivalents, currently in effect;
- A copy of any agreements with or among underwriters;
- A copy of any indenture or other instrument governing the issuance of the security to be registered;
- A specimen or copy of the security; and
- Any other information or copies of any documents filed under the Securities Act of 1933.¹³⁵

Registration by Qualification. Securities should be registered by qualification when no other method is available. A registration statement filed with the Utah Division of Securities by qualification must contain certain material and

131 Utah Code Annotated, s 61-1-11(10). As with an initial registration statement, the person filing an amendment must pay the requisite registration fee.

132 Utah Code Annotated, s 61-1-26(7). The irrevocable consent to be filed is a Form U-2: Uniform Consent to Service of Process.

133 Utah Code Annotated, a 61-1-9(1).

134 Utah Code Annotated, s 61-1-9(2). The registration statement also must include an undertaking to forward all future amendments to the disclosure statement promptly and in any event not later than the first working day after the day they are forwarded to or filed with the Securities and Exchange Commission, whichever occurs first.

135 Utah Code Annotated, s 61-1-9(3).

information in addition to the general required information previously discussed,¹³⁶ including a copy of the prospectus.

The prospectus is generally the offering document used by the issuer and the underwriters to market an offering registered with the Utah Division of Securities. The preliminary prospectus is a required disclosure to be submitted to the Utah Division of Securities with the registration statement. The final prospectus is an updated version of the preliminary prospectus that contains all final offering information and reflects amendments to the registration statement subsequent to the date of the preliminary prospectus. Two copies of the final prospectus must be filed by the issuer within 10 working days after the effective date of the registration statement.¹³⁷

As a condition of registration, a copy of the prospectus must be given to each person to whom an offer is made, before or concurrently with the first written offer made to the person, the confirmation of any sale made by or for the account of such person, and payment pursuant to any such sale or delivery of the security pursuant to any such sale, whichever occurs first.¹³⁸

Denial, Suspension, and Revocation of Registration

After a registration statement is filed with the Utah Division of Securities, a stop order that denies effectiveness to or suspends or revokes the effectiveness of any securities registration statement may be issued by the Utah Division of Securities for various reasons. Such reasons may be that the registration statement is incomplete in a material respect or contains a statement that was, in the light of the circumstances under which it was made, false or misleading with respect to a material fact, among other reasons.¹³⁹

Additionally, the Utah Division of Securities may deny, suspend, or revoke the effectiveness of a registration statement if any provision of the Utah Uniform Securities Act is willfully violated in connection with the offering by:

- The person filing the registration statement;
- The issuer or a partner, officer, or director of the issuer or a person occupying a similar status or performing similar functions;
- A person directly or indirectly controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or
- An underwriter.¹⁴⁰

136 A list of additional information to be included with the registration statement in regard to a registration by qualification is provided in Utah Code Annotated, s 61-1-10.

137 Utah Administrative Code, R164-10-2(B)(3).

138 Utah Code Annotated, s 61-1-10(4).

139 Utah Code Annotated, s 61-1-12(1).

140 Utah Code Annotated, s 61-1-12(1).

Exemptions from Utah Registration Requirements

Securities need not be registered with the Utah Division of Securities if an exemption applies to the sale of the securities. The burden of proving an exemption under the Utah Uniform Securities Act is upon the person claiming the exemption or exception.¹⁴¹ Utah law provides 31 exemptions from registration.¹⁴² The Utah Division of Securities has created six additional exemptions by rule. Furthermore, several of the statutory exemptions have been expanded by rule.

Utah law divides exemptions into two groups: exemptions for securities themselves, based on the type of security being offered or sold, and exemptions for specific types of transactions (regardless of the type of security being offered or sold).¹⁴³ Some exemptions may be used by issuers only, while other exemptions are limited to non-issuers.

An ‘issuer’ means a person who issues or proposes to issue a security or has outstanding a security that it has issued. With respect to a pre-organization certificate or subscription, ‘issuer’ means one or more promoters of the person to be organized. ‘Issuer’ also means one or more persons performing the acts and assuming the duties of a depositor or manager under the provisions of the trust or other agreement or instrument under which the security is issued with respect to interests in trusts, including collateral trust certificates, voting trust certificates, certificates of deposit for securities, and with respect to shares in an investment company without a board of directors.

With respect to an equipment trust certificate, a conditional sales contract, or similar securities serving the same purpose, ‘issuer’ means the person by whom the equipment or property is to be used. With respect to interests in partnerships, general or limited, ‘issuer’ means the partnership itself and not the general partner or partners.

Finally, with respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payment out of production under the titles or leases, ‘issuer’ means the owner of the title or lease or right of production, whether whole or fractional, who creates fractional interests therein for the purpose of sale. A ‘non-issuer transaction’ or a ‘non-issuer distribution’ means a transaction or a distribution that is not directly or indirectly for the benefit of the issuer.

Furthermore, some exemptions may be used by either issuers or non-issuers. Some exemptions require a filing with the Utah Division of Securities to claim the exemption, while other exemptions are self-executing and do not require a filing. Regardless of whether an exemption is self-executing, a request for confirmation may be filed for any exemption. Table I contains a list of exemptions that require a filing.

¹⁴¹ Utah Code Annotated, s 61-1-14.5.

¹⁴² Utah Code Annotated, s 61-1-14.

¹⁴³ Utah Code Annotated, s 61-1-14(1) and (2).

Table I: Statutory and Rule Exemptions Under Section 61-1-14

Statute/ Rule	Description	Type	Available to	Filing Required	Term
(1)(a)	Government	Security	Issuer and non-issuer	Self-executing	Indefinite
(1)(b)	Foreign government	Security	Issuer and non-issuer	Self-executing	Indefinite
(1)(c)	Depository institution	Security	Issuer and non-issuer	Self-executing	Indefinite
(1)(d)	Public utility	Security	Issuer and non-issuer	Self-executing	Indefinite
(1)(e)	Exchange listed	Security	Issuer and non-issuer	Self-executing	Duration of listing
(1)(f)	Non-profit organization	Security	Issuer and non-issuer	Self-executing	Indefinite
(1)(g)	Employee benefit plan	Security	Issuer and non-issuer	Self-executing	Duration of investment contract
(1)(h)	Registered investment company	Security	Issuer and non-issuer	Self-executing	12 Months
(1)(i)	Discretionary	Security	Issuer and non-issuer	Filing required	Varies
(2)(a)	Isolated	Transaction	Non-issuer	Self-executing	Duration of transaction
(2)(b)	Manual listing	Transaction	Non-issuer	Filing required, with exceptions	See R164-14-2b(F)
(2)(c)	Unsolicited	Transaction	Non-issuer	Self-executing	Duration of transaction
(2)(d)	Underwriter	Transaction	Issuer	Self-executing	Duration of transaction
(2)(e)	Real estate	Transaction	Issuer	Self-executing	Duration of transaction
(2)(f)	Court ordered	Transaction	Non-issuer	Self-executing	Duration of transaction
(2)(g)	<i>Bona fide</i> pledgee	Transaction	Non-issuer	Self-executing	Duration of transaction
(2)(h)	Institutional investor	Transaction	Issuer and non-issuer	Self-executing	Duration of transaction
(2)(i)	Pre-organization subscription	Transaction	Issuer	Self-executing	Duration of transaction
(2)(j)	Existing securities holder	Transaction	Issuer	Self-executing, with filing available	Duration of transaction
(2)(k)	Red herring	Transaction	Issuer	Self-executing if registration pending	Duration of transaction
(2)(l)	Dividend of issuer	Transaction	Issuer	Self-executing	Duration of transaction
(2)(m)	Secondary trading	Transaction	Non-issuer	Filing required	See R164-14-2m(F)

Statute/ Rule	Description	Type	Available to	Filing Required	Term
(2)(n)	Non-public offering	Transaction	Issuer and non-issuer	Self-executing unless seeking safe harbor	Life of offering
(2)(o)	Sale of condominium or time share	Transaction	Issuer and non-issuer	Self-executing	Duration of transaction
(2)(p)	Merger and reorganization	Transaction	Issuer	Filing required	Duration of transaction
(2)(q)	Limited offering	Transaction	Issuer	Self-executing	Duration of transaction
(2)(r)	Commodity contract	Transaction	Issuer and non-issuer	Self-executing	Duration of transaction
(2)(s)	Fairness hearing	Transaction	Issuer	Filing and hearing required	Duration of transaction
(2)(t)	Judicially approved exemption	Transaction	Issuer	Self-executing	Duration of transaction
(2)(u)	Federal covered advisor	Transaction	Non-issuer	Self-executing	Duration of transaction
(2)(v)	Discretionary	Transaction	Issuer and non-issuer	Filing required	Duration of transaction
R164-14-2v	MJDS – secondary trading	Transaction	Non-issuer	Self-executing	Duration of transaction
R164-14-21v	Solicitation of interest (testing the waters)	Transaction	Issuer	Filing required	Duration of transaction
R164-14-23v	Foreign securities – secondary trading	Transaction	Non-issuer	Self-executing	Duration of transaction
R164-14-24v	Internet solicitations	Transaction	Issuer	Self-executing	Duration of transaction
R164-14-25v	Accredited investor	Transaction	Issuer	Filing required	Duration of transaction
R164-14-26v	Reorganization involving certain federal covered securities	Transaction	Issuer	Self-executing	Duration of transaction

Statute/ Rule	Description	Type	Available to	Filing Required	Term
R164-14-27v	Compensatory benefit plan	Transaction	Issuer	Self-executing	Duration of transaction
R164-4-8	Crossborder trading	Transaction	Issuer and non-issuer	Filing required	Duration of transaction

There are no exemptions from the anti-fraud provisions of the Utah Uniform Securities Act. An exemption only permits a person to offer for sale a security without registering the security. Accordingly, individuals offering or selling exempt securities may have additional disclosure requirements to satisfy the anti-fraud provisions.¹⁴⁴

Federal Covered Securities

A security need not be registered with the Utah Division of Securities under Utah law if the security is a federal covered security for which a notice filing has been made.¹⁴⁵ A federal covered security is a security that is a covered security under Section 18(b) of the Securities Act of 1933 or the rules or regulations promulgated under this Act.

The Utah Uniform Securities Act gives the Utah Division of Securities the authority to require notice filings with respect to covered securities under Section 18(b)(2), (3), or (4) of the Securities Act of 1933.¹⁴⁶ Currently, Utah law only has a notice filing requirement for covered securities under Section 18(b)(2) (investment companies) and 18(b)(4)(D) (rule 506 offerings) of the Securities Act of 1933.¹⁴⁷

All remaining covered securities may be offered or sold in Utah without registration or a notice filing. A required notice filing is effective for one year and is required to be renewed annually in order to continue to offer or sell the federal covered securities for which the notice was filed.¹⁴⁸

Currency Regulation, Capital and Profit Transfer, and Investment Incentives

The regulation of currency is governed by laws of the United States, and not by the laws of the State of Utah. In the United States, federal law generally preempts state law. Matters such as capital, profit, and investment incentives are generally restricted by federal and state tax and securities laws, which are very

¹⁴⁴ Utah Code Annotated, s 61-1-1.

¹⁴⁵ Utah Code Annotated, s 61-1-7.

¹⁴⁶ Utah Code Annotated, s 61-1-15.5.

¹⁴⁷ Utah Administrative Code, R164-15.

¹⁴⁸ Utah Code Annotated, s 61-1-15.5(1)(d).

fact-specific in their application. (Utah state taxation and securities issues have been discussed in the sections ‘Taxation’ and ‘Securities’, respectively.)

Competition Law

Legislative Framework

Competition law is legislation that promotes or maintains market competition by regulating anti-competitive conduct by companies. Such legislation is referred to as 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. Utah’s Constitution and the Utah Antitrust Act, like the federal antitrust laws, prohibit conspiracies to restrain trade and attempts to monopolize trade or commerce.

Utah also has enacted several other laws which assist in regulating trade within the state, including specialized price discrimination laws, the Utah Unfair Practices Act, the Unfair Competition Act, and the Utah Consumer Sales Protection Act

Utah Antitrust Act

The Utah legislature’s purpose in enacting the Utah Antitrust Act was to encourage free and open competition in the interest of the general welfare and economy of the State of Utah by prohibiting monopolistic and unfair trade practices, combinations, and conspiracies in restraint of trade or commerce, and by providing adequate penalties for the enforcement of its provisions.¹⁴⁹

The Utah Antitrust Act essentially mirrors the federal Sherman Act in both language and purpose, prohibiting any contract, combination, or conspiracy that restrains trade or commerce.¹⁵⁰ Utah law also prohibits any person from monopolizing, or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize, any part of trade or commerce.¹⁵¹

Notwithstanding the purpose of the Utah Antitrust Act, Utah law provides several exceptions under which certain activities are not prohibited. Specifically, activities not prohibited are those related to qualifying public utilities, insurers, securities dealers, state or national banking institutions, state or federal savings and loans associations, municipalities, and emergency medical service providers.¹⁵²

Under the Utah Antitrust Act, the Utah Attorney General may investigate suspected violations of the Act’s provisions and also may institute appropriate

149 Utah Code Annotated, s 76-10-912(2).

150 Utah Code Annotated, s 76-10-914(1).

151 Utah Code Annotated, s 76-10-914(2).

152 Utah Code Annotated, s 76-10-915(1).

actions, including those for injunctive relief and damages, regarding any suspected violations.¹⁵³ Utah law also permits private action to be brought for injunctive relief and damages by any person injured or threatened with injury in such person's business or property.¹⁵⁴ Any person succeeding in a private action is entitled to an award of three times the amount of damages sustained, plus the cost of suit and reasonable attorneys' fees. However, if a court determines that a judgment in the amount of three times the damages plus attorneys' fees and costs will directly cause the insolvency of the defendant, the court is required to reduce the amount of judgment to the highest sum that would not cause the defendant's insolvency.¹⁵⁵

Specialized Price Discrimination Laws

Utah law prohibits any person from willfully making or publishing any false statement, spreading any false rumor, or employing any other false or fraudulent means or device with the intent of affecting the market price of any kind of property.¹⁵⁶ Any person committing any of these prohibited actions is required to be fined not less than US \$500 and no more than US \$4,000 for each offense.¹⁵⁷

Utah Unfair Practices Act

Utah's Unfair Practices Act broadly prohibits all unfair methods of competition in commerce or trade.¹⁵⁸ The Division of Consumer Protection may take any action to prevent any person (except banks and common carriers and other public utilities) from using unfair methods of competition in commerce or trade.¹⁵⁹ Specifically, the Unfair Practices Act prohibits the advertisement of goods that one is not prepared to supply;¹⁶⁰ discrimination between purchasers;¹⁶¹ the receipt or payment of a commission, brokerage, or similar payment exceeding the actual cost of services rendered in connection with the sale or purchase of goods, wares, or merchandise;¹⁶² and below-cost sales.¹⁶³

Notwithstanding the specified prohibited acts, the provisions of Utah's Unfair Practices Act do not apply to any sale made when the goods are damaged or deteriorated in quality when prior notice of this is given to the public. The provisions of the Act also do not apply to any sale that is made in good faith in

153 Utah Code Annotated, ss 76-10-915(1) and 76-10-918.

154 Utah Code Annotated, s 76-10-919(1)(a).

155 Utah Code Annotated, s 76-10-919(1) and (2).

156 Utah Code Annotated, s 76-10-902.

157 Utah Code Annotated, s 76-10-905.

158 Utah Code Annotated, s 13-5-2.5(1).

159 Utah Code Annotated, s 13-5-2.5(2).

160 Utah Code Annotated, s 13-5-8.

161 Utah Code Annotated, s 13-5-3(5).

162 Utah Code Annotated, s 13-5-3(2).

163 Utah Code Annotated, s 13-5-3.

an endeavor to meet the legal prices of a competitor selling the same article, product, or commodity in the same locality or trade area.¹⁶⁴ Utah law permits any act in violation of the Unfair Practices Act to be enjoined.¹⁶⁵ Additionally, any person injured by an act in violation of the Unfair Practices Act may recover damages.¹⁶⁶

Utah Unfair Competition Act

Utah law permits any person injured by unfair competition to bring a private cause of action against a person who engages in unfair competition.¹⁶⁷ Any person injured by unfair competition may recover actual damages, costs, and attorneys' fees, and, if a court determines that the circumstances are appropriate, punitive damages.¹⁶⁸ However, a person may not bring an unfair competition action against a depository institution or an entity that controls a depository institution, is controlled by an entity that controls a depository institution, or is controlled by a depository institution.¹⁶⁹

Utah Consumer Sales Practices Act

Utah has enacted several laws aimed at protecting the rights of consumers. Foremost is the Utah Consumer Sales Practices Act, which prohibits deceptive acts or practices by a supplier in connection with a consumer transaction.¹⁷⁰

The Utah Consumer Sales Practices Act defines a 'consumer transaction' as a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance) to, or apparently to, a person for primarily personal, family, or household purposes or purposes that relate to a business opportunity. In terms of a transfer of disposition, a 'consumer transaction' includes an offer, a solicitation, an agreement, or performance of an agreement. A charitable solicitation also is regarded as a consumer transaction.

The Utah Consumer Sales Practices Act, however, does not apply to an act or practice required or specifically permitted by or under federal law, or by or under Utah law. The provisions also do not apply to a publisher, broadcaster, printer, or other person engaged in the dissemination of information or the

164 Utah Code Annotated, s 13-5-12.

165 Utah Code Annotated, s 13-5-14.

166 Utah Code Annotated, s 13-5-14.

167 Utah Code Annotated, s 13-5a-103(1)(a). Utah's Unfair Competition Act defines 'unfair competition' as an intentional business act or practice that is unlawful, unfair, or fraudulent and that leads to a material diminution in value of intellectual property and is one of the following: malicious cyber activity; infringement of a patent, trade mark, or trade name; a software license violation; or predatory hiring practices (Utah Code Annotated, s 13-5a-102(4)).

168 Utah Code Annotated, s 13-5a-103(1)(b).

169 Utah Code Annotated, s 13-5a-103(2).

170 Utah Code Annotated, s 13-11-4.

reproduction of printed or pictorial matter, so far as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated the Utah Consumer Sales Practices Act.¹⁷¹ Civil actions and even class actions may be maintained by a consumer to remedy any violations of the Utah Consumer Sales Practices Act by a solicitor.¹⁷² Under Utah law, consumers also have the right to cancel a direct solicitation sale within three business days.

Intellectual Property Protection

Applicable Legislation

Intellectual property generally consists of copyrights, patents, and trade marks, and is governed by both federal and state law. Copyright law is exclusively governed by federal law and basically provides the author of a copyrightable work with certain specific exclusive rights to use, distribute, modify, perform, and display the work.

Patent law is entirely governed by federal law and generally provides the inventor of a new machine, device, or process with the absolute right, for a specified time, to make, use, import, offer to sell, or sell the invention in the United States. Trade mark law, however, is governed by both federal and state law.

Trade Marks and Service Marks

Under Utah law, a trade mark can be any word, term, name, symbol, design, or device or any combination of words, terms, names, symbols, designs, or devices used to identify and distinguish the goods sold by a person from those manufactured or sold by others. Likewise, a service mark under Utah law is any word, term, name, symbol, design, or device, or combination of words, terms, names, symbols, designs, or devices, that identify and distinguish the services of one person from the services of another.¹⁷³

A trade mark or service mark distinguishing one's goods or services from another's goods or services may be registered in Utah by filing an application for registration.¹⁷⁴ The application must be filed with, and on forms provided by, the Utah Division of Corporations and Commercial Code. There are several exceptions that will not permit the registration of a trade mark or service mark

¹⁷¹ Utah Code Annotated, s 13-11-22(1).

¹⁷² Utah Code Annotated, s 13-11-19.

¹⁷³ Utah Code Annotated, s 70-3a-103(1). The Utah Division of Corporations and Commercial Code maintains, and is required to maintain under Utah law, a database that enables a user to file an application to electronically register a mark, manage existing marks owned by the user, and search for registered marks; Utah Code Annotated, s 70-3a-501.

¹⁷⁴ Utah Code Annotated, ss 70-3a-301 and 302.

even when such trade marks and service marks are distinguishable from the trade marks and services marks of others. For example, a mark may not be registered if it:

- Consists of or comprises immoral, deceptive, or scandalous matter;
- Consists of or comprises matter that may disparage or falsely suggest a connection with a person, institution, belief, or national symbol;
- Consists of or comprises the flag or coat of arms or other insignia of the United States, any state, any municipality, or any foreign nation;
- Consists of or comprises the name, signature, or portrait identifying a particular living individual, except by the individual's written consent; or
- Resembles another trade mark or service mark previously used in the state and is likely to cause confusion with that trade mark or service mark.¹⁷⁵

The application must include the name and business address of the person applying for registration. The application also must specify the goods or services on which or in connection with which the trade mark or service mark is used, the mode or manner in which the trade mark or service mark is used on or in connection with those goods or services, and the class¹⁷⁶ into which those goods or services fall.

Furthermore, the application must state the date when the trade mark or service mark was first used anywhere, the date when it was first used in Utah by the applicant, and that the applicant is the owner of the service mark or trade mark and that the mark is in use.

Utah law also requires the applicant to certify that, to the applicant's knowledge, no other person has registered the mark, either federally or in Utah, or has the right to use the mark, in the mark's identical form or in such near resemblance to the mark as to be likely to cause confusion, mistake, or deception.

Finally, the application must be accompanied by two specimens showing the mark as actually used and a drawing of the mark, along with the appropriate filing fee.¹⁷⁷

Registration of a trade mark or service mark entitles its owner to exclusive use of the mark within Utah, subject to any prior rights of pre-existing users. A registration is valid for five years from the date of registration.¹⁷⁸ A registration may be renewed for additional five-year periods by filing an application with the division at least six months before the expiration of the registration and by submitting the appropriate filing fee.¹⁷⁹

¹⁷⁵ Utah Code Annotated, s 70-3a-301(1).

¹⁷⁶ As described in Utah Code Annotated, s 70-3a-308.

¹⁷⁷ Utah Code Annotated, s 70-3a-302.

¹⁷⁸ Utah Code Annotated, s 70-3a-305(1).

¹⁷⁹ Utah Code Annotated, s 70-3a-305(2).

Utah law prohibits use of a reproduction, counterfeit, copy, or colorable imitations of a registered trade mark or service mark without the consent of the owner of the mark or in connection with the sale, distribution, offering for sale, or advertising of any goods or services on which, or in connection with which, that use is likely to cause confusion, mistake, or deception as to the source of origin, nature, or quality of those goods or services.¹⁸⁰

Under Utah law, an owner of a trade mark or service mark is permitted to seek injunctive relief and compensatory damages suffered or profits derived from the wrongful manufacture, use, display, or sale of its trade mark or service mark.¹⁸¹

Trade Secrets

The protection of trade secrets is distinctly a state-controlled area of law. Utah adopted the Uniform Trade Secrets Act in 1989, which protects information that derives economic value from not being known to the public and is the subject of reasonable efforts to maintain its secrecy. A ‘trade secret’ may be information, including a formula, pattern, compilation, program, device, method, technique, or process.¹⁸²

The Uniform Trade Secrets Act also prohibits actual or threatened misappropriation of trade secrets.¹⁸³ A ‘misappropriation’ means the acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means, or disclosure or use of a trade secret of another without express or implied consent.¹⁸⁴

The Utah Uniform Trade Secrets Act provides for injunctive relief if a trade secret is misappropriated or there is a threat that a trade secret will be misappropriated.¹⁸⁵

A trade secret is not protected against discovery by fair and honest means, such as independent invention, accidental disclosure, or reverse engineering.¹⁸⁶ Utah law also provides for award of monetary damages — covering both actual loss and unjust enrichment — caused by the misappropriation.¹⁸⁷

If the misappropriation is ‘willful and malicious’, a court may award twice the exemplary damages.¹⁸⁸ Attorneys’ fees also may be awarded if willful and malicious misappropriation exists.¹⁸⁹

180 Utah Code Annotated, s 70-3a-402(1)(a).

181 Utah Code Annotated, s 70-3a-404.

182 Utah Code Annotated, s 13-24-2(4).

183 Utah Code Annotated, s 13-24-3(1).

184 Utah Code Annotated, s 13-24-2(2).

185 Utah Code Annotated, s 13-24-3.

186 Utah Code Annotated, s 13-24-2.

187 Utah Code Annotated, s 13-24-3(4).

188 Utah Code Annotated, s 13-24-4(2).

189 Utah Code Annotated, s 13-24-5.

Under Utah law, misappropriation is not limited to the initial act of inappropriately acquiring trade secrets, but also includes the use (and continuing use) of the trade secret. An individual need not even gain an advantage from acquisition or disclosure of the trade secret for misappropriation to occur.¹⁹⁰

A person may not claim misappropriation of a trade secret if that person has made no effort to treat the information as secret.¹⁹¹ Thus, it is important for an organization to take significant steps to keep its information secret. Such measures may generally include requiring employees to sign confidentiality and non-disclosure agreements, using the words 'Secret' or 'Confidential' to mark sensitive information or communications, and reminding employees to keep confidential applicable communications. An action for misappropriation must be brought within three years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered.¹⁹²

Employment Inventions

Utah has adopted the Employment Inventions Act, which permits an employer to require an employee to sign an employment agreement that assigns or licenses to the employer any or all of the employee's rights and intellectual property in an employment invention. Utah law defines an 'employment invention' as an invention that is:

- Conceived, developed, reduced to practice, or created by an employee on his employer's time or with the aid, assistance, or use of any of his employer's property, equipment, facilities, supplies, resources, or intellectual property;
- The result of any work, services, or duties performed by an employee for his employer;
- Related to the industry or trade of the employer; or
- Related to the current or demonstrably anticipated business, research, or development of the employer.¹⁹³

However, employers are not permitted to require an employee to sign an employment agreement assigning or licensing to the employer the employee's rights and intellectual property in an invention that is created by the employee entirely on his own time and is not an employment invention.¹⁹⁴

However, an employer may require an employee to sign a separate agreement other than an employment agreement that requires the employee to assign or license, or to offer to assign or license, to such employee's employer any or all

190 Utah Code Annotated, s 13-24-2(2)(a) and (b).

191 Utah Code Annotated, s 13-24-2(4).

192 Utah Code Annotated, s 13-24-7.

193 Utah Code Annotated, ss 34-39-2 and 34-29-3.

194 Utah Code Annotated, s 34-39-3.

of the employee's rights and intellectual property in or to an employment invention.¹⁹⁵

Employment Law

Applicable Legislation

There are specific state and federal laws that apply to employers in regards to the employment of individuals. Employers and employees not covered by federal standards are covered by state standards. If they are covered by both a federal and a state standard on the same question, the stricter standard applies. This section, however, only considers Utah state law.

Utah Antidiscrimination Act

The Utah Antidiscrimination Act applies to any employer with 15 or more employees. It prohibits an employer from refusing to hire, promote, discharge, demote, or terminate any person, or from retaliating against, harassing, or discriminating in matter of compensation or in terms of privileges and conditions of employment against any person otherwise qualified because of race, color, sex, pregnancy (and childbirth or pregnancy-related conditions), age (if the individual is 40 years of age or older), religion, national original, or disability.¹⁹⁶

New Hire Reporting

Utah state law requires all employers to report new employees to the state New Hire Registry. This information is used to locate individuals who are delinquent in their child support payments. It also is used to detect and prevent the unlawful receipt of public assistance and unemployment insurance payments.

Employers are required to report the following information within 20 days of hiring a new employee: the employee's name, address, and social security number; the employer's name and address; and the federal employer identification number.

Employers in Utah may report new hires by mailing or faxing one of the following: a copy of an employee's withholding allowance certificate (Form W-4); computer printouts or other printed information that provides all the mandatory data elements; or the Utah New Hire Registry Reporting Form (Form 6). Alternatively, employers may report new hires by submitting the required information on diskette, magnetic tape cartridge, or electronically through the

¹⁹⁵ Utah Code Annotated, s 34-39-3(2). Under the Utah Code Annotated, s 34-39-3(5), the employee's employment or the continuation of the employee's employment is sufficient consideration to support the enforceability of such an agreement.

¹⁹⁶ Utah Code Annotated, s 34A-5-106(1)(a)(i).

New Hire Registry website.¹⁹⁷ Employers who employ workers in more than one state have the option of reporting all new hires to a single state.

Wages

In General

The payment by an employer of wages in Utah is governed by several statutes. Addressed below are the Utah Minimum Wage Act and provisions of Utah law dealing with the payment of wages.

Utah Minimum Wage Act

The Utah Minimum Wage Act of 1990¹⁹⁸ establishes a state minimum wage for employees who are not covered by a federal minimum wage. When not covered by a federal minimum wage, the minimum wages that apply in Utah are US \$7.25 per hour for adults and for minors; and US \$2.13 per hour and tip credit for tipped adults and minors, plus additional amounts from the employer, if necessary, to reach US \$7.25 per hour

Employers must keep payroll records of employees covered by the Utah Minimum Wage Act, showing names, addresses, and dates of birth. Such records also must show hours worked and wages paid to all covered employees. Employers must maintain these required records for three years.¹⁹⁹ However, Utah law provides several circumstances under which employers need not follow the requirements of the Utah Minimum Wage Act.²⁰⁰

Payment of Wages

Employers must meet certain established requirements for the payment of wages to employees, both during employment and upon the termination of employment.²⁰¹ An employer must pay the wages earned by an employee at regular intervals, but in periods no longer than semi-monthly.²⁰²

Generally, employers must pay for services rendered during a pay period within 10 days after the close of that pay period.²⁰³ Wages must be paid in full to an employee in lawful money of the United States, by a check or draft on a depository institution that is convertible into cash on demand at full face value or by electronic transfer to the depository institution designated by the employee.²⁰⁴

197 At <https://jobs.utah.gov/newhire>.

198 Utah Code Annotated, ss 34-40-101 *et seq.*

199 Utah Code Annotated, s 34-40-201.

200 Utah Code Annotated, s 34-40-104.

201 Utah Code Annotated, ss 34-28-1 *et seq.*

202 Utah Code Annotated, s 34-28-3(1)(a).

203 Utah Code Annotated, s 34-28-3(1)(b).

204 Utah Code Annotated, s 34-28-3(1)(e).

Additionally, among other things, Utah law establishes an employer's responsibilities regarding electronic payroll deposits, lawful deductions from paychecks, payroll records, and final paychecks.²⁰⁵ Utah law also provides specific provisions governing wage disputes²⁰⁶ and private rights of action by employees to recover unpaid or improperly withheld or deducted wages.²⁰⁷

Child Labor Laws

Under Utah law, youths under 16 years of age are not permitted to work in excess of four hours in one school day, or before 5:00 a.m. or after 9:30 p.m., unless the next day is not a school day. Youths under 16 years of age also are prohibited from working in excess of eight hours in any 24-hour period.

Youths that are 14 and 15 years of age can work in non-hazardous occupations such as at retail stores, restaurants, fast food outlets, and service stations and in lawn care, janitorial, and other occupations not determined harmful by the Utah Labor Commission. Furthermore, under Utah law, minors under 18 years of age generally may not be employed or permitted to work in any hazardous occupation.

Utah Occupational Safety and Health Act

Utah law requires that all employers with one or more workers comply with the Utah Occupational Safety and Health Act.²⁰⁸ The Utah Occupational Safety and Health Act generally requires that every employer furnish its employees with employment and a place of employment which are free from recognized hazards that are likely to cause death or serious physical harm to their employees.²⁰⁹

Utah also requires that employers comply with occupational safety and health standards promulgated under the Utah Occupational Safety and Health Act. Employees also are required to comply with standards, rules, regulations, and orders issued under the Utah Occupational Safety and Health Act applicable to employees' actions and conduct.²¹⁰

Employers are required to report to the Utah Occupational Safety and Health Division within eight hours of occurrence of any work fatality, serious or significant injury, or illness at their workplace. Employers also are required to investigate all work-related injuries or occupational diseases. If the injury or occupational disease results in medical treatment, loss of consciousness, loss of work, restriction of work, or transfer to another job, an Employer's First Report of Injury or Occupational Disease must be submitted to the Utah Labor

205 Utah Code Annotated, ss 34-28-1 *et seq.*

206 Utah Code Annotated, s 34-28-6.

207 Utah Code Annotated, s 34-28-5(1).

208 Utah Code Annotated, ss 34A-6-101 *et seq.*

209 Utah Code Annotated, s 34A-6-201(1).

210 Utah Code Annotated, s 34A-6-201.

Commission within seven days. First aid cases need not be submitted unless a physician is required to file a report.²¹¹

Utah's Worker's Compensation Act

Utah law generally requires that an employer who employs one or more workers or operatives regularly in the same business must obtain workers' compensation insurance covering every employee.²¹² By covering employees under the Utah's Worker's Compensation Act, the employer generally is ensured immunity from lawsuits due to any job-related injury or illness.

Utah Employment Security Act

Any individual or business entity that pays wages becomes subject to the Utah Employment Security Act for the quarter in which the wages are paid.²¹³ Such an individual or business entity must file quarterly contribution reports and make quarterly payments to the Utah Department of Workforce Services. An employer must report all wages, regardless of the amount.²¹⁴

Any amounts collected by the Utah Department of Workforce Services are paid to workers who are unemployed through no fault of their own. To become eligible for benefits, unemployed workers must make a claim for benefits, register for work at an employment office, be able and available to work, be actively seeking work, and meet the wage amount requirements.²¹⁵

An employer is required to keep true and accurate work records for each pay period for each worker. The records must contain the employee's name and social security number, place of employment, the date hired, the date and reason for separation from work, the ending date of each pay period, and the total amount of wages paid for each pay period, showing separate and daily time cards or time records kept in the regular course of business.²¹⁶ Each employer must, for a period of at least three calendar years, preserve and make available for inspection all records with respect to employment performed in its service.²¹⁷

Investment Financing

While most new businesses are initially financed by personal investments from the owner of a business, it is often necessary to obtain outside financing from

211 Utah Code Annotated, s 34A-6-301.

212 Utah Code Annotated, ss 34A-2-103 and 34A-2-201.

213 For purposes of the Utah Employment Security Act, wages include payments made in cash or any other medium, such as merchandise, gratuities, or exchange of services (Utah Code Annotated, s 35A-4-208).

214 Utah Administrative Code, R994-302-101 *et seq.*

215 Utah Code Annotated, s 35A-4-403(1).

216 Utah Code Annotated, s 35A-4-312(1); Utah Administrative Code, R994-312-101(2).

217 Utah Administrative Code, R994-312-101(1).

other sources. The two most common types of outside financing are debt financing and equity financing.

Debt financing relies on borrowed capital that must be repaid. Debt financing for a business may be obtained from a number of resources, including private lenders and financial institutions. The Utah Department of Financial Institutions maintains lists of the names and addresses of all commercial lending institutions authorized to do business in the state.²¹⁸

Equity financing can be obtained privately, publicly, or through venture capital funds. This type of financing allows investors to buy into the ownership of a business. While equity financing provides capital on a permanent basis with no repayment of principal or interest required, there also are disadvantages associated with such financing: the dilution of ownership control of the business, the sharing of profits, and conflicts of interest between the business founder and outside investors.

With both debt financing and equity financing, a business must ensure that it adheres to all appropriate federal and state securities laws. (Utah-specific securities laws and issues have been discussed in the section ‘Securities’.)

²¹⁸ These lists can be found at www.utah.dfi.gov.

