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Ohio
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OHIO

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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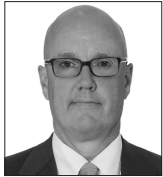
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Thompson Hine LLP has a real estate team of 43 primary and secondary members located across all of its offices: Atlanta, Cincinnati, Cleveland, Columbus, Dayton, New York and Washington, DC. The team's primary practice areas include corporate real estate, including headquarters projects and plant facilities; real estate construction and development; asset management and leasing; financing, investment and capital markets transactions; and tax credits and other government incentives. Drawing from the collective experience of Project Management Consultants, the firm's wholly owned subsidiary, and other practice groups such as construction, bankruptcy, tax, corporate, environmental and business litigation, the firm offers sophisticated counsel on real estate transactions of any

size and complexity. It also provides guidance on real estate litigation and settlement strategies, foreclosures, workouts, bankruptcies affecting other real estate investments, brownfields, eminent domain and land-use matters. We would like to thank these additional authors who contributed: Tom Bethany, Associate/Real Estate; Thomas J. Callahan, Practice Group Leader, Partner/Taxation; Cathryn E. Greenwald, Partner/Real Estate; Bruce G. Hopkins, Partner/Real Estate; William W. Jacobs, Partner/Business Litigation; James C. Koenig, Partner/Taxation; Heather A. Richardson, Counsel/Environmental; Alan S. Ritchie, Partner/Construction; Linda A. Striefsky, Partner/Real Estate; Patrick J. Sweeney, Partner/Construction; and Brian R. Tracy, Associate/Real Estate.

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OHIO LAW AND PRACTICE

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1. General

1.1 Main Substantive Skills

Necessary substantive skills for a lawyer handling a sophisticated commercial real estate transaction include:

- knowledge of applicable real estate law, including federal, state and local laws, rules and regulations;
- understanding of related areas of law, including zoning and entitlements, tax structuring, entity selection and joint ventures, environmental, construction, and public and private financing; and
- experience in structuring and negotiating sophisticated real estate transactions.

Real estate law has become more localized in recent years and subject to increasing regulation, so it is important to have an understanding of and familiarity with local markets and players as well as local law developments and government policies.

1.2 Most Significant Trends

Recent Real Estate Trends in Ohio

The success of any project will depend on a host of factors, including the exact location in a submarket, obsolescence of competing assets, timing of development, and utilization and occupancy. Some general trends are noted below, with many successful projects bucking some of the negative trends in individual circumstances:

- **Industrial/warehouse** : demand for new light industrial/warehouse products across Ohio remains robust, with very low vacancy and rising rents as a result.
- **Multi-family** : the multi-family sector in Ohio has been healthy and continues to grow, with 1,500 units currently under construction in Cleveland, 2,500 in Cincinnati and 4,000 in Columbus, in downtown areas. The multi-family trend is driven largely by millennials seeking to live, work and play in walkable, convenient, diverse and connected neighborhoods. Based on the large inventory coming online in the near future, many expect a normalization of rents and a deceleration in market fundamentals.
- **Retail** : Ohio's retail sector generally tracks the national decline in retail, with many retail stores suffering from the competition of online shopping. Some enclosed malls and other retail centers have been shuttered and converted to other purposes. Nationally, 21 major retailers declared bankruptcy in 2017, contributing to these pressures. On the other hand, Amazon currently has nearly 2 million square feet under construction in Cleveland for two distribution centers, and it has completed similar sized investments in Columbus and Cincinnati (the company recently added 210 acres to its Amazon Air Hub at the Cincinnati/Northern Kentucky Airport).

- **Office**: Ohio's office sector remains relatively stagnant statewide. Despite stable job growth across the state, there has not been a corresponding increase in the development of new office space. Rather, there is an impetus on designing space more efficiently and reducing the size of leased and owned facilities to drive down operating costs.
- **Vacant land**: as the real estate sector remains vibrant, land values have continued to grow at a healthy pace, based on demand for new facilities, including many headquarters projects.
- **Energy**: Ohio's continued energy boom deserves mention as well. A 2017 Cleveland State University study found that a total of USD50.4 billion was invested in the Utica Shale boom in southwest Ohio from 2011 to 2016. Continuing this investment trend, Governor John Kasich announced in late February 2018 that PTT Global Chemical and Daelim Industrial Company, two of Asia's largest petrochemical companies, are on the verge of inking a deal to invest between USD5 billion and USD10 billion to build and operate "one of the most significant projects in the history of Ohio," an ethane cracker complex in Belmont County.

Recent Significant Real Estate Deals in Ohio

Recent deals include:

- **Facebook (New Albany)** : as central Ohio's economy continues to boom, Facebook announced in 2017 that it will build a USD750 million data center in New Albany. Once completed in 2019, the data center is expected to provide jobs for 100 employees.
- **Pincrest (Orange)**: this USD240 million mixed-use development is scheduled to open in spring 2018, and will consist of 150,000 square feet of office space, 400,000 square feet of retail space and 87 luxury apartments.
- **Key Center (Cleveland)** : Key Center was sold to Millennia Cos. for USD267 million and includes a 1.3 million square foot office tower, adjoining Marriott hotel and attached underground parking. Millennia is currently investing some USD30 million in upgrades and enhancements to the project.
- **One University Circle (Cleveland)** : this USD116 million upscale residential project represents a significant investment in University Circle, Cleveland's premier arts and culture district. The new 20-story tower opened in spring 2018 and features 276 units. The 234-foot tower represents the first new high-rise apartment built in Cleveland since the 1970s.
- **Amazon (Northeast Ohio)**: after investing in Southwest and Central Ohio, Amazon recently made some large investments in Northeast Ohio. Its recent investment in Euclid consists of a 1.7 million square foot project. The building will have a footprint of 650,000 square feet – enough land for 11 football fields. Amazon has further indicated

that the former Randall Park Mall site in North Randall will serve as a USD177 million distribution center for the company.

- **Cleveland-Cliffs (Toledo)** : Cleveland-Cliffs Inc. broke ground in April 2018 on a USD700 million hot-briquetted iron production plant in Toledo. The company stated that its new facility will be “one of the world’s most modern and efficient iron making plants.” Approximately 130 people will work at the plant upon its startup, which is expected in summer 2020.

1.3 Impact of the New US Tax Law Changes

The Tax Cuts and Jobs Act (TCJA), effective 22 December 2017, will likely have a positive impact, at least for the short term, on the economy generally and on corporate earnings, and will likely have a corresponding positive impact on commercial real estate investments. Among other things, the corporate income tax rate was reduced to a flat 21%, and the effective income tax rates for certain other non-corporate taxpayers were also lowered.

The TCJA was enacted hastily, and it is too early to assess its long-term impact or its many ambiguities but, on the whole, the real estate industry was treated well in the new legislation, with the following features:

- the retention of 1031 exchanges for real property not held primarily for sale;
- the retention of the maximum capital gains rate at 20%;
- the retention of low income housing tax credits, new markets tax credits and the 20% historic tax credit for the rehabilitation of qualified historic structures; and
- the elimination of the alternative minimum tax for corporations.

Accordingly, foreign investment in real estate continues to flow into the United States.

Additionally, the TCJA contains a bill referred to as the “Investing in Opportunity Act,” which provides all 50 states with the ability to designate certain low-income census tracts in their state as Qualified Opportunity Zones. These zones will be the target of new investment vehicles, which will defer or exclude capital gains taxes for capital gains invested in these designated zones. The final rules and regulations of these vehicles are expected to be released in June 2018, and there may be significant benefits to developers and investors looking to invest in projects in these zones.

2. Sale and Purchase

2.1 Ownership Structures

Ohio recognizes several ownership structures that are capable of holding legal title, including corporations and limited

liability companies (the two most common forms of business entities), as well as individuals, general partnerships, limited partnerships and limited liability partnerships.

There are two items of note under Ohio law: first, when title is held by an individual, that individual’s spouse automatically acquires rights of “dower,” which, as a practical matter, means that whenever real estate owned by the individual is sold or mortgaged, the spouse must join in the execution of the deed or mortgage to release dower rights. Second, with a few exceptions, a “trust” is not a legal entity capable of holding title; rather, title may be held by a person or company acting as trustee for the trust. The exceptions – trusts capable of holding title in their own names – are real estate investment trusts (REITs) and “business trusts,” a particular variety of trusts in which the beneficiaries are holders of transferable shares of beneficial interests in the trust.

2.2 Important Jurisdictional Requirements

Certain disclosures are required in connection with the sale of residential real estate. When property containing one to four dwelling units is sold, the seller must provide the buyer with a state-mandated Residential Property Disclosure Form that discloses defects in the property’s condition. Some transactions are exempt, including sales by court order, among co-owners or family members, or of newly constructed residential real estate. Failure to provide the disclosure form gives the buyer a right to rescind the contract.

Another requirement is the federally mandated disclosure of lead-based paint, which applies to the sale or lease of residential dwellings constructed before 1978. When the federal disclosure form is required, the seller must also provide the purchaser with an EPA-approved lead hazard information pamphlet. Failure to provide the lead-based paint disclosure form prior to contract execution allows the purchaser the opportunity to review the physical condition of the property and later amend the offer at the purchaser’s discretion. A seller who knowingly violates this provision may be liable for statutorily mandated damages and attorney fees.

There are no similar disclosure requirements on the sale of commercial, industrial and other non-residential properties.

2.3 Effecting Lawful and Proper Transfer of Title

Transfers of title are accomplished by recording a deed, which is a two-step process in Ohio. The deed must first be filed in the office of the county auditor, who transfers the ownership on the tax records and collects a transfer tax (as described in **2.10 Taxes Applicable to a Transaction**, below). After the auditor’s office completes the transfer, the deed must be recorded in the county recorder’s office.

The legal description of the property must meet certain standards in order for a deed to be accepted for transfer and

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recording. Properties may not be split from larger parcels without first complying with applicable subdivision requirements. Additionally, if a legal description appears to be out of date and does not meet the standards established by the local county engineer, the county engineer may require an updated survey and legal description. These requirements apply to all types of real estate. Whenever a new legal description is being proposed, it is advisable to submit the description to the county engineer's office for advance approval.

2.4 Real Estate Due Diligence

Real estate due diligence in Ohio is generally the same as in other states, with the main points being as follows:

- reviewing title to the real estate, typically by obtaining a commitment for title insurance;
- obtaining a property survey;
- conducting an environmental assessment;
- conducting physical inspections of the roof and heating system, or obtaining an engineering report on a commercial building;
- for land to be developed, obtaining soil reports and an analysis of governmental requirements applicable to the proposed development;
- reviewing the status of zoning and permits to confirm that the use is lawful; and
- in the case of income-producing property, reviewing financial reports and leases, and confirming the status of commercial leases by obtaining estoppel certificates from the tenants.

In some circumstances, a buyer may wish to obtain a property value appraisal, but normally a buyer makes a judgement as to value before submitting a purchase offer. Appraisals are typically requested as part of a lender's due diligence in financing the property.

As a general rule, lawyers are not involved in physical inspections or financial reviews of income-producing properties, but they are involved in most other aspects, including the title review and survey, environmental assessment, status of zoning and permits, and commercial leases. The lawyer will work with the opposing counsel, title company, surveyor and other professionals to address any issues identified.

2.5 Typical Representations and Warranties for Purchase and Sale Agreements

As mentioned above, sellers of residential properties with one to four dwelling units are required to provide a state-mandated Residential Property Disclosure Form containing representations concerning the property's condition.

In commercial transactions, representations and warranties are the subject of negotiation and have many variations. Typical representations and warranties include statements as to

the seller's authority to enter into and conclude a transaction (if the seller is a corporate or other entity), and representations as to "off-record title matters," which are issues that could affect title to real estate but are not matters of public record, such as whether any work has recently been performed on the property that could give rise to a mechanic's lien, whether any of the property has been leased or other possessory rights have been granted, whether there are any known encroachments of buildings across boundary lines, whether any lawsuits have been threatened, and whether the seller has knowledge of any pending or proposed governmental actions, such as a condemnation or zoning change.

Most commercial purchase agreements will also contain some form of an environmental representation and warranty. At one end of the spectrum, the seller may provide a broad representation and warranty covering environmental matters, while at the other end it may disclaim any representations and warranties, and require that the purchaser assumes all risk and releases the seller from liability. Between these extremes, the seller may provide a representation that is limited to actions occurring during its ownership, or one that is limited to the seller's "knowledge."

Some purchase agreements will contain representations and warranties as to the property's condition, eg, that the roof and mechanical systems are in good working order, that there are no known defects, etc. More commonly, however, the purchaser is given a period of time in which to inspect the property and make its own determination as to the condition. If the purchaser is unsatisfied with the condition, it may elect to terminate the agreement.

In more sophisticated real estate transactions, it is common to negotiate limitations on the time within which breaches of representations and warranties may be claimed and the dollar amount of potential liability. In the absence of a limitation on damages, the rule in Ohio is that the measure of damages for misrepresentation is the difference between the property's value as it was represented and its actual value at the time of purchase (ie, the loss of the "benefit of the bargain"). In some circumstances, courts have permitted the amount of damages to be based on the cost of repairing or replacing misrepresented items. The buyer may also have the right to rescind the contract in lieu of seeking damages for breach. If the rescission occurs after the sale has been concluded, the buyer is usually entitled to a return of all payments made, minus the fair rental value during possession. Rescission is an equitable remedy and, as such, is within the court's discretion.

On residential sales, there is a statutory right of rescission for misrepresentations in the Residential Property Disclosure Form. This right expires either 30 days after acceptance of the offer to purchase or on the date of closing of the sale of the property, whichever is earlier.

2.6 Important Areas of Laws for Foreign Investors

Foreign investors should consider working with an attorney or accountant to determine the type of entity that will hold title to the real estate, because the choice of entity has both tax and liability implications. For example, a pass-through entity may avoid taxation at the corporate level. Limited liability companies and corporations are used to retain liability at the entity level, providing a shield against liability for the investors in that entity.

The investor will also want to know how real estate investments are taxed at the federal, state and local levels.

Finally, it is important to work with local counsel to make sure the buyer obtains a valid title to the property and that all due diligence concerns are addressed, including potential environmental liabilities and the standards applicable to environmental due diligence.

2.7 Soil Pollution and Environmental Contamination

Even if the contamination was caused by a prior owner of the real estate, Ohio laws may make the owner of property from which hazardous substances are released, or threatened to be released, strictly liable to the state of Ohio and third parties for any necessary cleanup costs. Owners and operators of contaminated property may also be liable to the state of Ohio or other parties for damages under state common law.

The allocation of environmental risks is negotiated on a case-by-case basis, depending on a wide range of facts and circumstances, including knowledge of existing conditions, an understanding of who may have caused any historical contamination, planned future development and use, and the measure of risk based on prior use. A seller will generally aim to shift liability to a buyer, and sell property on an “as-is” basis, except perhaps where a seller is completing a plan of ongoing remediation. A buyer may seek to require the seller to retain liability for historical environmental impacts. These contractual provisions, including the terms of buyers’ inspection rights, representations and warranties, indemnities and releases, as well as the terms of recorded restrictions on future use, are often the subject of careful negotiation and drafting.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

Zoning laws are a matter of public record. The local zoning map will indicate the current zoning category, and the zoning code will identify the uses permitted in that category. The zoning law will also identify standards that must be complied with in terms of height, setbacks and a variety of other criteria. To confirm the zoning status, the local government is often willing to provide a letter. The letter, however, may

be very general, so another option available to a buyer is to obtain a zoning endorsement to the title insurance policy.

Development agreements are generally used to document governmental incentives provided as an inducement to construct new improvements or bring new business to an area. Under Ohio law, a governmental agency cannot enter into a contract in which it agrees to zone a property in a particular manner; the normal zoning process must be followed. The development agreement nevertheless serves an important function if the local government is agreeing to assist the project by providing real estate tax abatement, employment tax abatement, public infrastructure improvements or other incentives.

2.9 Condemnation, Expropriation or Compulsory Purchase

In Ohio, a variety of governmental entities hold powers of eminent domain, including the state, counties, cities and special districts such as water and sewer districts and park districts. The process in all cases is mandated by state law. The entity first determines that a taking of land is necessary, and then obtains an appraisal of the land’s value and makes an offer to the owner to acquire the property at the appraised price. If the owner disagrees with the price, the governmental entity may need to file an action to take the land and have the price determined by the court. The owner may contest the value in the court proceeding. Owners sometimes challenge the governmental entity’s determination that the taking is necessary, but courts tend to give legislative authorities considerable discretion in determining necessity.

The most common type of condemnation action is one to establish or widen a public street or to install a water line, sewer line or similar infrastructure improvement. An owner wishing to assess the risk of whether adjoining streets might be widened may ask whether the municipality has a thoroughfare plan that contemplates future improvements.

It is relatively rare for a governmental entity to use its power of condemnation to acquire existing buildings and structures, with the possible exception of dilapidated or nuisance-type properties that are slated for demolition. Occasionally, a municipality will attempt to assemble properties in a particular area to establish a site for economic development. Overall, however, the risk of a property being affected by a significant taking is relatively low.

2.10 Taxes Applicable to a Transaction

When a deed is presented to the county auditor to begin the transfer process, it must be accompanied by a Conveyance Fee Statement signed by the buyer indicating the purchase price for the property. The county auditor then collects a transfer tax, which has two components: the first is a transfer tax of USD1 per USD1,000 of the purchase price, payable to

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the state of Ohio; the second is an additional transfer tax that may be charged by the county, up to USD3 per USD1,000 of the purchase price. Each county decides whether to charge none, part or all of this additional tax, so the total transfer tax varies from USD1 per USD1,000 (in counties where there is no local tax) to USD4 per USD1,000 (in counties that elect to charge the maximum tax allowable). There is also a minor fee of USD0.50 for each parcel of land included in the transfer.

The obligation to pay the transfer tax rests with the seller. Parties to a contract may negotiate for the buyer to pay the tax, but that does not often occur. Certain transactions are exempt from the transfer tax, such as transfers without consideration and transfers to or from a governmental entity.

In Ohio, county recorders charge a per-page fee for recording documents. The current fee is USD28 for the first two pages of any document and USD8 for each additional page. This rate is uniform throughout the state.

Apart from the recording fee, Ohio does not have any transfer or similar tax on mortgages.

In transactions that do not involve a transfer by deed – for example, the sale of shares in a company – the transfer tax does not apply in Ohio. This “loophole” in the transfer tax has led to transactions in which the seller sets up a new entity and transfers the real estate to the new entity (for example, a newly formed limited liability company) for no consideration. This transfer for no consideration is currently exempt from the transfer tax. The seller then sells the membership interests in the new entity, rather than selling the real estate. The second transfer also avoids the transfer tax because no deed is required. Legislation is currently pending in Ohio to close this loophole.

Other than transfer taxes, the largest costs in real estate transfers are typically brokerage commissions, title insurance costs and survey costs. When the seller lists property for sale through a real estate broker, the seller is generally expected to pay the brokerage fee; if the buyer is also represented by a broker, said broker will normally take a share of the fee payable to the seller’s broker, so that none of the brokerage fees are paid directly by the buyer. In Ohio, title insurance costs are established by rule of the Department of Insurance and are not subject to negotiation. The rates vary depending on the amount of coverage. The responsibility for payment of title costs is generally a matter of local custom, and different customs have evolved in different parts of Ohio. In southwestern Ohio (for example, Cincinnati and Dayton), the buyer typically pays the cost of the title, while in central Ohio (Columbus and environs), the seller typically pays the title costs, and in northern Ohio (especially Cleveland), the cost is often divided between the parties.

This cost can also be negotiated between the buyer and the seller. The same is true for survey costs, although there is no similar local custom that applies. If the seller is dividing the property from a larger parcel or has a deficient legal description, the seller is often asked to provide the survey. In most other circumstances, the buyer will determine whether to obtain a survey and will pay the cost.

2.11 Rules and Regulations Applicable to Foreign Investors

Ohio has a registration requirement for real property acquired by non-resident aliens (individuals who are not citizens of and are not domiciled in the United States), which applies if the property is in excess of three acres or has a value greater than USD100,000 (or USD50,000 in the case of mineral interests). The reporting requirement also applies when property is acquired by a corporation or other business entity in which a non-resident alien acquires at least a 10% interest, or in which a combination of non-resident aliens acquires at least a 40% interest. The registration must be made with the Ohio Secretary of State within 30 days of the acquisition.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

The most common form of financing for commercial real estate acquisitions in Ohio is mortgage loan financing, where the debt is secured by a mortgage encumbering the real estate being acquired. Companies acquiring real estate may also obtain mezzanine financing, where the debt is secured by a pledge of the ownership interests in the acquiring company, or other equity arrangements. Both mortgage and mezzanine loan financing can be provided by traditional banks, insurance companies, private equity firms or other providers, although mezzanine financing and equity arrangements more regularly come from private equity firms. Financing for certain types of projects can also be provided through public financing arrangements, such as tax increment financing or government loans or bonds.

3.2 Typical Security Created by Commercial Investors

Mortgage lenders are generally granted a first lien mortgage on the applicable real estate, and they also typically take a security interest in the fixtures, personal property, leases and other rights (such as mineral rights) relating to the real estate. In addition to the mortgage, a lender will typically require a separate assignment of leases and rents, and Uniform Commercial Code (UCC) financing statements for the fixtures and personal property. The mortgage and the assignment of rents should be recorded in the recorder’s office for the county in which the real estate is located. The UCC fixture

financing statement should also be recorded with the county recorder, but the mortgage may serve as the fixture filing if it includes certain language. The UCC financing statement for the personal property should be filed with the secretary of state of the state in which the borrower is organized.

3.3 Regulations or Requirements Affecting Foreign Lenders

Ohio Revised Code Section 5301.254 requires non-resident aliens to file an Ohio Non-Resident Alien Land Registration form under certain circumstances. Additionally, foreign lenders should review laws and regulations and seek guidance on doing business and the tax consequences of operating in Ohio.

3.4 Taxes or Fees Relating to the Granting or Enforcement of Security

No mortgage recording tax is payable upon recordation of the mortgage in Ohio, but payment of a filing fee (based on the number of pages in the document to be recorded) is required in connection with recording of any document. A real estate conveyance fee is payable upon the conveyance of title to real estate, and varies according to county.

3.5 Legal Requirements Before an Entity Can Give Valid Security

In mortgage transactions, a borrower must comply with all requirements set forth in its governing documents in connection with the authorization of the transaction and the execution of the loan documents. In typical mortgage transactions, no consent is required from the state of Ohio. However, there may be additional regulatory requirements for certain types of properties or borrowers, such as public utilities.

3.6 Formalities When a Borrower is in Default

Ohio is a judicial foreclosure state, meaning the exercise of a remedy involving the sale of the underlying property requires the initiation of a foreclosure action, service of the complaint in accordance with Ohio Civil Rules, and a decree of foreclosure entered by the court following any discovery and litigation that may be required. In addition, pre-suit title research by a licensed title insurer is required. Local court rules may also apply, such as county engineer approval of the real property description. Finally, the terms of the loan documents themselves may create pre-conditions to filing. For example, if a pre-condition to exercising remedies under a mortgage is the existence of a default under the loan, and the loan requires a written notice and opportunity to cure, the courts will treat these conditions as prerequisites to filing a foreclosure action.

Upon the filing of a foreclosure action, no other liens may attach. As to liens that attach prior to the foreclosure action, the lender's priority is not dictated by the time of the filing

of the complaint, but rather by the time the lien is recorded with the county recorder.

3.7 Subordinating Existing Debt to Newly Created Debt

The holders of existing secured debt and newly created debt can enter into an agreement to subordinate the existing debt to the newly created debt. Such a subordination agreement is typically recorded in the county where the real estate is located.

3.8 Lenders' Liability Under Environmental Laws

If a lender becomes an owner or operator of contaminated property through enforcement of its lien, it should seek protection under the secured creditor exemption available under Ohio law, which essentially mirrors the federal Comprehensive Environmental Response, Compensation and Liability Act. However, it is not likely that the secured creditor exemption will apply to creditors who participate in the management of the operations, including arranging for the disposal or transport of hazardous substances. Accordingly, lenders should avoid any role in the management of treatment or disposal operations concerning the secured property.

3.9 Effects of Borrower Becoming Insolvent

Outside of bankruptcy, Ohio follows the Uniform Fraudulent Transfer Act (UFTA), under which an obligation or lien that is created for the purpose of hindering other creditors may be avoided. Similarly, if the lien is granted without an exchange of reasonably equivalent value at a time when the borrower is insolvent, such lien may also be avoided.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

Typically, new construction or renovations on existing structures first require a recommendation supporting the project from a municipal planning commission, followed by final approval from a zoning board or the municipality's legislative body, the city council. If there is a significant change in the planned type of use for the property, or if there had been permission for a prior non-conforming use that will be altered by the new construction or renovation, the new proposed plans must be approved by the zoning board and/or city council.

4.2 Regulatory Authorities

Regulations for development are usually reflected in municipal charters, master plans and zoning codes. Typically, there are districts within a city where industrial, commercial or residential buildings are permitted, along with various sub-categories of activities permitted in this type of district,

and specialized plans for uses such as parks or waterfront development.

4.3 Obtaining Entitlements to Develop a New Project

A developer or owner usually submits a request to the city for a new development project or major refurbishment, and then provides a planning commission and/or board of zoning appeals with details about the project and presents details concerning the development request at one or more hearings. After a public hearing, with opportunity for public comment from community members who may support or oppose the proposed project, plans must be approved by planning and zoning bodies and/or city council in order to obtain building and occupancy permits.

4.4 Right of Appeal Against an Authority's Decision

Once a final action has been taken by a zoning board or city council, the party denied approval can appeal to common pleas court and challenge the denial. Most challenges assert that the denial was arbitrary or contrary to the state's constitution.

4.5 Agreements with Local or Governmental Authorities

Except with respect to planned unit development districts, most zoning codes do not expressly require that the developer and governmental agency enter into a separate written agreement in connection with obtaining planning approvals or the issuance of building permits. In many cases, however, development agreements are often entered into between the developer, governmental agencies and local school districts in connection with awarded governmental incentives, such as tax abatement or tax increment financing, public utilities or improvements required to support the project, limitations placed as a result of the approval of a conditional use, or local hiring or prevailing wage requirements.

4.6 Enforcement of Restrictions on Development and Designated Use

Regulations in zoning codes specify the manner and place within a city for different types of development. Enforcement of restrictions may take many forms, such as denial of building permits or occupancy permits, citations from building inspectors for violations of existing regulations, or enforcement by the city in court actions to enjoin activities or compel corrective actions.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Real estate assets in Ohio may be held by corporations, limited liability companies (LLCs), limited partnerships (LPs) or general partnerships (GPs). Each entity form is governed by a separate chapter of the Ohio Revised Code: corporations by Chapter 1701, LLCs by Chapter 1705, LPs by Chapter 1782 and GPs by Chapter 1776. LLCs and LPs are by far the most common entities used to acquire real estate in Ohio.

5.2 Main Features of the Constitution of Each Type of Entity

Each of the four principal entity types in Ohio has unique advantages and disadvantages.

Currently, LLCs are the most common entities utilized to hold title to real estate. An LLC provides limited liability to its owners ("members"), continuity of life, flexibility of allocation of profits and management rights, and the ability to be taxed as a partnership, passing through its tax attributes to its members.

LPs provide a set of structural options very similar to LLCs, but with one very significant difference: the general partner of an LP bears unlimited personal liability for the LP's obligations and debts.

GPs historically were often used to hold real estate because they were easy to establish (no written agreement is required to establish a partnership, although it is highly recommended to prepare a partnership agreement). However, owners have unlimited liability for business debts and judgments, all partners share equally in the rights and responsibilities of managing the business, and each partner is responsible for the acts of the other partners.

Corporations can be used to acquire real estate assets. While relatively simple to establish, it is essential to comply with ongoing corporate formalities in order to retain the advantages of this entity form, including the limited liability of its shareholders. Corporations provide the ability to raise capital through the sale of stock and for limited liability of shareholders for corporation debts and judgments, and owners risk only their investment. The most significant disadvantage is that corporation profits may be taxed twice (at the corporate level and on distributions), because a corporation is treated as a separate entity with no pass-through of tax attributes to its shareholders.

5.3 Tax Benefits and Costs

In general, LLCs, LPs and GPs present the opportunity for pass-through of tax attributes of the ownership of real estate and avoid the potential for double-level tax associated

with the ownership of real estate through a corporation. A corporation may elect to be taxed as a real estate investment trust (REIT) under the Internal Revenue Code, in order to achieve special tax advantages (see **8 Tax** for more general discussion of Ohio-specific tax-related items).

5.4 Applicable Governance Requirements

In order to create a corporation, articles of incorporation must be prepared and filed with the Ohio Secretary of State, providing the authorized number of shares and their par value, and identifying a registered agent for service of process in Ohio. It will also be necessary to prepare a code of regulations (bylaws) providing for the formalities of governance, including meeting and voting rights, for both the board of directors and shareholders.

LLCs require the filing of articles of organization with the Ohio Secretary of State in order to form the entity. An operating agreement provides the various governance provisions, including management rights, rights to distributions and any special voting rights.

An LP requires very similar documentation to an LLC, with a certificate of limited partnership required to be filed with the Secretary of State in order to form the LP. An agreement of limited partnership can address various rights and obligations, but limited partners are not permitted to participate in the management of the LP or they risk losing the limited liability afforded by this entity type.

GPs require no written action or government filings to be created. Unless provided otherwise in a written partnership agreement, each partner is entitled to an equal say in management and voting.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Land may be utilized under lease, license or easement.

A lease is a conveyance of a landlord's present possessory interest in real property or any part thereof for a term of less than the landlord's own term of ownership. Under Ohio law, a lease must contain all material terms of the agreement (ie, consideration, term, premises description). A lease may be written or oral, but to avoid defenses under Ohio's statute of frauds and statute of conveyances, a lease of more than one year must be in writing, and a lease of greater than three years must be both acknowledged by the landlord and the tenant before a notary public and recorded in public land records. In lieu of recording the entire lease, Ohio allows for the recording of a memorandum of lease, but the con-

structive notice is limited to the matters contained in the memorandum.

A license is a personal right (typically revocable and non-assignable) to use or perform some action on the property of another. A license can be either written or oral, and is generally terminable at the will of the licensor; however, a licensor could be subject to damages if the termination is wrongful or if the licensee relied in good faith on the continued existence of the license.

An easement is a right to use another's property for either a definite or indefinite timeframe. Easements are generally created by written agreement, but Ohio courts have recognized other means of creating an easement in the absence of a written agreement or instrument: by prescription where the easement has been non-permissively used in an open, continuous and adverse manner for 21 years; by implication where a conveyance of real property includes whatever is necessary for its beneficial use and enjoyment; by necessity; and, occasionally, by estoppel.

6.2 Types of Commercial Leases

All commercial leases are generally subject to the same legal framework and enforcement, but the typical structure and terms of commercial leases will depend on the type of use, such as office, retail, industrial or other special use.

In an office lease of a multi-tenant building, a tenant will typically pay a fixed base rent plus a proportionate share of any increase in building *operating expenses* over a base year. This would include real estate taxes, insurance, maintenance and repairs, and other operating costs and expenses, which are passed through to the tenant, often on a monthly basis. The tenant can often negotiate a period of free rent and other concessions as an inducement to lease space in the building, including a generous tenant build-out allowance to prepare the space.

Retail leases, on the other hand, will normally set forth a minimum base rent plus a percentage rent based on a store's gross sales. The tenant will also typically pay a share of *common area maintenance* costs to operate the larger retail facility. Retail leases contain a number of unique provisions, including operating covenants, recapture rights, exclusive use provisions, radius clauses, co-tenancy requirements and shared parking provisions.

Industrial leases are often done on a *triple net* basis, meaning a tenant will pay a base rent and all costs of operating, maintaining, owning and insuring the building.

In any lease transaction, there is often a fair amount of negotiation over such issues as maintenance and repair obligations, alterations, assignment and subletting, indemnities,

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compliance with laws, hazardous waste, casualty, insurance, renewal and extension rights, surrender provisions, default and remedies, and many other issues.

In addition, leases may be structured as *ground leases*, where the tenant leases the land and is responsible for the construction of the building, typically under a long-term lease arrangement. Ground leases generally involve a great deal of planning, negotiation and drafting, including careful co-ordination with project lenders to achieve a *financeable ground lease*.

6.3 Regulation of Rents or Lease Terms

Rents and lease terms are not regulated.

6.4 Typical Terms of a Lease

The parties to a commercial lease may contract for each of the above as they choose but, generally, lease terms are most commonly between one and five years, the tenant is typically responsible for maintenance and repairs to the interior spaces only, and rent is typically paid monthly.

6.5 Rent Variation

The parties to a commercial lease may structure rent adjustments as they choose. The most common structure is to set forth periodic increases, either annually or at other intervals (eg, three-year or five-year periods).

6.6 Determination of New Rent

The parties to a commercial lease may structure rent changes as they choose. There is no regulatory framework governing rent increases.

6.7 Payment of VAT

There is no rent tax in Ohio.

Note that Ohio has a Commercial Activities Tax (CAT), an annual tax imposed on the privilege of doing business in Ohio, and which is measured by taxable gross receipts. The CAT applies to most businesses with taxable gross receipts in excess of USD150,000 per year, regardless of organisational structure. Businesses must register with the state of Ohio at its online portal. Taxpayers with taxable gross receipts in excess of USD1 million in a calendar year must file quarterly, while taxpayers with less than USD1 million may file annually. The state uses a tiered minimum tax table to calculate the CAT payable. The annual minimum tax (AMT) for those with under USD1 million in gross receipts is USD150 with no additional tax payable; from USD1 million to USD2 million, the AMT is USD800 and the CAT is 0.26% of taxable gross receipts in excess of USD1 million; from USD2 million to USD4 million, the AMT is USD2,100 and the CAT is 0.26% of taxable gross receipts in excess of USD1 million; and over USD4 million, the AMT is USD2,600 and the CAT is 0.26% of taxable gross receipts in excess of USD1 million.

6.8 Costs Payable by Tenant at Start of Lease

A tenant will typically bear a portion of the build-out costs to prepare the space for its occupancy and will also often make a security deposit to the landlord in order to assure performance of the tenant's obligations. The cost of the tenant build-out will vary considerably depending on the circumstances, but typically the tenant will negotiate a tenant allowance (TI Allowance) whereby the landlord will fund a portion of the improvements. The amount of the security deposit required by a landlord will depend on the tenant's creditworthiness and the measure of risk of performance. The security deposit is often made by issuance of a letter of credit.

6.9 Payment of Maintenance and Repair

A tenant will typically pay for common area costs, either directly or indirectly.

In a "gross lease," the rent payable to the landlord is a gross amount and includes the tenant's obligations for common area charges. The landlord will pay the costs and perform the work associated with common areas, and cover the charges through the tenant's payment of rent.

In a "net lease," the rent payable is net to the landlord, and the tenant will pay (or reimburse the landlord) for additional charges comprising common area expenses, typically on a proportionate basis, based on the square footage of the leased premises in relation to the building's total leasable area.

6.10 Payment of Services, Utilities and Telecommunications

Utility services are frequently metered separately or sub-metered for each tenant, particularly in newer properties. For properties without separate metering, charges may be included in operating expenses and shared among the tenants. Telecommunications are often handled directly by each tenant.

6.11 Insuring the Real Estate That Is Subject to the Lease

Typically, the landlord provides for the insurance on the building and the tenant insures its trade fixtures. The costs can be handled as described in **6.9 Payment of Maintenance and Repair**, above (in a gross lease, the insurance is included in the rent; in a net lease, the insurance costs are reimbursed or paid by the tenant). In a ground lease, the ground lessee will typically maintain the casualty insurance.

Most casualty occurrences (such as fire) are covered by basic "all risk" property insurance policies. Special "riders," often with an additional cost, may be needed to cover particular events such as flood, earthquake or terrorism.

6.12 Restrictions on Use of Real Estate

The landlord may impose any use restrictions it deems appropriate.

Real estate use is also regulated by zoning laws administered at the local level. Zoning regulations vary by jurisdiction, but often provide for alternate zoning classifications and permitted use, such as residential, office, mixed-use, industrial, etc. Land use regulation is a highly localized matter. Zoning regulations may also govern density, setback, height, parking and other features of a project.

6.13 Tenant's Ability to Alter and Improve Real Estate

The parties to a commercial lease may structure rights to alter the property as they choose, and the extent of the landlord's rights to approve a tenant's alteration scope or design is one aspect of the negotiation. Typically, the landlord will impose requirements including approval of plans and specifications, compliance with law, insurance provisions, indemnity, prohibition on structural alterations, the right to approve contractors, and the obligation to remove/restore upon lease expiration.

6.14 Specific Regulations

As noted above, local land use regulations govern the use, design and construction of any buildings or other improvements. There are also state building codes, which will affect construction in applicable cases. An architect or engineer will advise on all such requirements and restrictions.

6.15 Effect of Tenant's Insolvency

Insolvency is governed largely by the US Bankruptcy Code, not state law. The Bankruptcy Code overrides any contract or lease provisions, and so lease provisions addressing what happens in a bankruptcy situation are generally unenforceable and of relatively little significance.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

The forms of security are the same as with any commercial payment obligation and include cash security deposit, lease guarantee and letter of credit.

6.17 Right to Occupy After Termination or Expiry of a Lease

Technically, a tenant does not have a right to continue to occupy real estate after the expiration or termination of a lease. If a landlord acquiesces, however, and does not object to the tenant remaining in the leased premises, and/or continues to accept rent, the parties will likely be deemed to have either extended the lease or, at a minimum, continued the relationship as a tenancy at will.

Commercial leases typically contain a holdover clause indicating that rent increases upon a holdover, often at 125%

to 200% of the rent then in effect, and also provide that the tenant is responsible for actual and consequential damages arising from the holdover.

Under Ohio law, a landlord can evict a tenant by judicial action upon short notice if the tenant remains in possession of the leased premises following the expiration of the lease term.

6.18 Right to Terminate Lease

Under most commercial leases, a landlord may terminate a lease for nonpayment of rent or other material breach of lease obligations. Under a lease, the tenant is typically afforded a short grace period for nonpayment of rent and a longer period (often 30 days after notice) for other nonperformance, such as failure to maintain the property or to operate in accordance with the lease terms.

6.19 Forced Eviction

A tenant can be evicted prior to the lease expiration date based on a default. The circumstances in which a landlord can evict a tenant are typically contained in a written lease; if a lease is silent on those terms, any material breach of a lease is valid grounds for eviction.

If a landlord has grounds to evict a tenant, they must file an eviction complaint in court and appear at an eviction hearing. Depending on the court, these hearings can take place within a couple of weeks after the filing of the complaint. At the hearing, the landlord will provide testimony regarding the tenant's breach of the lease and why an eviction is necessary. The court will usually rule on the eviction at the hearing or issue a written decision shortly thereafter. If the court finds in favor of the landlord, the court then typically gives a tenant a short timeframe to quit and leave the premises (usually from two to 14 days). If the tenant does not comply with that order, the landlord may ask the local sheriff to physically remove the tenant from the leased premises.

6.20 Termination by Third Party

Real property may be taken by eminent domain for public purposes (which is broadly defined) by governmental entities and certain other authorized entities, such as public utilities. Under state law, there are procedures for eminent domain (also referred to as condemnation) to take ownership of property, and such procedures typically include the termination of all leases encumbering the property condemned. The condemning authority must pay the fair market value of the property being acquired; in the absence of a negotiated agreement between the government and the property owner, courts will conduct a trial to determine fair market value, with each party (government and property owner) providing property valuation appraisals and expert witnesses, much like any other trial.

The allocation of condemnation proceeds between landlord and tenant is subject to the terms as negotiated by the parties in the lease.

7. Construction

7.1 Common Structures Used to Price Construction Projects

The most common structures used to price construction projects are cost plus a fee with a guaranteed maximum price and fixed price. Typical factors considered in analyzing the pricing methodology are the complexity of the project, time constraints, the stage of development of design documents and financing requirements.

7.2 Assigning Responsibility for the Design and Construction of a Project

Design-Bid-Build

The owner contracts with the design professional to prepare complete design documents, then retains a single general contractor (or several trade contractors) to build the project, based on those design documents. Design-bid-build projects are typically competitively bid by the owner to multiple contractors to encourage pricing competition. Since the design documents are complete, a fixed-price bid is commonly required. During the construction phase, the design professional reviews the contractor's work for compliance with the design documents, and reviews and certifies the contractor's pay applications.

Construction Manager-at-Risk

The owner retains a design professional as above but also retains a construction manager, often through a competitive proposal process, to provide pre-construction services such as cost estimating, constructability review of the design documents, bid packaging and schedule consulting. At an agreed-to stage of the design, the design professional delivers the interim design documents to the construction manager for pricing. The construction manager becomes the "at-risk" contractor upon the owner's acceptance of the construction manager's guaranteed maximum price proposal for the construction work, and, as such, guarantees the price and schedule and holds all the trade contracts, which are usually competitively bid by the construction manager. During the construction phase, the design professional typically reviews the construction work for compliance with the design documents, and reviews and certifies the pay applications of the construction manager-at-risk.

Design-Build

The owner develops project criteria in the form of preliminary drawings and performance specifications; these documents may be prepared by the owner's in-house design staff or through a third-party design professional. The "criteria documents" are then used to solicit bids from design-build firms to complete the design documents and build the project under a single contract with the owner. The design-build entity may be a single firm (typically a contractor) that subcontracts the design work or a separately formed joint ven-

ture or limited liability company that includes a contractor and a design firm as joint venturers or members.

7.3 Management of Construction Risk

An indemnification from the contractor in favour of the owner covering claims or damages the owner might suffer or incur as a result of the contractor's negligence is typical. The indemnification is usually coupled with the contractor's obligation to add the owner as an additional insured to the contractor's commercial general liability policy for any claims for bodily injury or property damage arising out of the contractor's work at the project site. Like many other states, Ohio has an anti-indemnification statute (O.R.C. § 2305.31), which prevents an owner from requiring a contractor to indemnify the owner for the owner's own negligence.

A construction contract will typically include a general warranty from the contractor that all items furnished and installed by the contractor will be new (unless otherwise specified by the contract documents) and free of defects in materials and workmanship. The contract will most often contain a contractual "duty to correct" defective or incomplete work within one year of substantial completion, although it is not unusual for the parties to negotiate a two-year correction period.

Clauses that waive or limit the overall liability of the contractor or design professional are not unusual in larger contracts, and are enforceable if the clause is conspicuous and the terms are clear and straightforward. Enforceability is determined on a case-by-case basis, and clauses are not enforced if the breaching party was grossly negligent or if the contract is shown to be unconscionable.

Consequential damages are often waived by both parties to the construction or design contract. While "no damage for delay" clauses are typical, they are strictly construed and limited by common-law exceptions (eg, fraud or bad faith) and by O.R.C § 4113.62, which renders such clauses unenforceable if the delay is a proximate result of the owner's act or failure to act.

7.4 Management of Schedule-Related Risk

Liquidated damages are often imposed in order to assure timely completion of the project or key milestone dates. They are enforceable in Ohio if they are not used to penalize a party. Ohio applies the following three-part test when analyzing liquidated damages clauses:

- the amount of actual damages would be uncertain or difficult to prove;
- the amount of liquidated damages is not so "manifestly unconscionable, unreasonable, and disproportionate" as to distort the true intention of the parties; and

- the parties intended for the amount set as liquidated damages to apply in the case of breach.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Performance and payment bonds are required on public construction projects (ie, where the owner is a public government agency) with few exceptions, but they are not normally required by private-party owners on their construction projects. In rare instances, a private-party owner will require a letter of credit for some portion of the contract price (20–40%) in lieu of the bond. Most private-party owners, however, forgo bonds or other financial security instruments to save costs, especially where the contractor has a proven track record of successful job performance and demonstrates that it has sufficient financial strength to sustain a major subcontractor default.

7.6 Liens or Encumbrances in the Event of Non-Payment

In the event of non-payment, contractors, subcontractors, material suppliers, laborers and, in limited circumstances, design professionals have the right to place a “mechanic’s lien” on property that the lien claimant worked on or supplied materials for. Ohio’s mechanic’s lien law (Ohio Revised Code Chapter 1311) specifies the various notice, timing and filing requirements for the preservation and perfection of a mechanic’s lien.

Generally, mechanic’s liens are effective from the date of the recording of a statutory notice of commencement (NOC) or, in the absence of such recording, the date of first visible work of labor or the first furnishing of materials or supplies at the project site. Lien claimants will have priority over a mortgage filed after the effective date of the mechanic’s lien, regardless of when the labor, work or furnishing began (ie, the mechanic’s lien relates back to the recording date of the NOC or the date of first visible work). However, a mortgage that qualifies as a “construction mortgage loan” under O.R.C. § 1311.14 has priority over any mechanic’s liens, even if the mortgage is filed after the NOC is recorded or the construction commenced. The statute details the requirements that must be satisfied to obtain this “super-priority”; for example, the construction mortgage must contain certain information, it must be used to finance improvements or pay off prior encumbrances, and the proceeds of the construction loan must be distributed in the manner dictated in the statute.

Under O.R.C. § 1311.11(C)(1), an owner can “bond off” a mechanic’s lien by filing a petition with the court in the county where the lien is recorded and by providing a bond, cash deposit or other reasonable security equal to 1.5 times the amount of the lien (if the lien is under USD5,000, the bond must be twice the lien value). A bond is typically used and, upon approval of the court, is substituted for the secu-

rity of the mechanic’s lien. The bond remains on file with the court until final disposition of the claim or, if suit is not filed on the claim, upon expiration of a statutory period.

7.7 Requirements Before Use or Inhabitation

A “certificate of occupancy” is typically required. This document certifies compliance with the Ohio Building Code and the applicable local building codes and will outline, among other things, the legal use of the property, the occupant load and any special conditions relating to the use of the property. A typical pre-condition to issuing a certificate of occupancy is sign-off on the completed work by each inspector from the various divisions of the building department (eg, building, plumbing, mechanical, electrical, fire prevention, elevator, health and water pollution control).

8. Tax

8.1 Sale or Purchase of Corporate Real Estate

In Ohio, real estate transfers are subject to a “conveyance fee” or “transfer tax,” composed of a state component (at USD1 per USD1,000) and a county component (up to USD3 per USD1,000). The total tax currently ranges from USD1 to USD4 per USD1,000 in sales price of the real property (land and improvements), depending on the county in which the property is located. So, for example, if the tax rate is USD4 per USD1,000 and the sales price is USD1 million, the conveyance fee would be USD4,000.

By Ohio statute, the seller/grantor is obliged to pay the tax, but this is subject to negotiation in each particular transaction.

There are a variety of exemptions available, including certain related party transfers involving no consideration.

8.2 Mitigation of Tax Liability

To avoid conveyance fee taxes, a transfer of entity interests may be used, if properly structured. The Ohio legislature is currently considering proposals to attempt to address this issue, so indirect transfers may be taxed in the future.

8.3 Municipal Taxes

In Ohio, there is no tax on rents or occupancy.

8.4 Income Tax Withholding for Foreign Investors

Individual investors who are not US residents (ie, who are not US citizens, do not hold a “green card” or do not spend substantial time in the United States (“foreign investors”)) and who have US-source income that is effectively connected with a US trade or business are subject to US federal income tax at graduated tax rates up to 37%. Assuming an IRS Form 1040NR is timely filed, deductions are permitted

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to reduce US-source gross income. Foreign investors who realize US-source investment income (fixed, determinable, annual or periodical (FDAP) income such as interest, dividends and rents) are subject to a 30% withholding rate on such FDAP income, which may be reduced based upon tax treaty provisions, provided the foreign investor furnishes required information to the payor on the IRS Form W-8 series.

The rules for foreign corporations are similar in that a foreign corporation is subject to a flat 21% tax rate on its US-source income that is either effectively connected with a US trade or business or attributable to a permanent establishment in the United States. Assuming an IRS Form 1120F is timely filed, deductions are permitted to reduce US-source gross income. Likewise, foreign corporations are subject to 30% withholding on FDAP (subject to treaty reduction). Certain foreign corporations may also be subject to 30% withholding under the Foreign Account Tax Compliance Act, if they have not registered or if required information is not furnished to either the IRS or the foreign investor's governmental taxing authority. Finally, foreign corporations are subject to a 30% branch profit tax for earnings remitted (or deemed remitted) outside the United States. The 30% branch profit tax rate may be reduced pursuant to an applicable tax treaty.

Foreign investors and foreign corporations that receive income allocations passed through from US partnerships, or that sell US partnership interests, are subject to US withholding tax and information reporting on such allocations or transfers.

Ways to Reduce or Alleviate Such Taxes

Withholding taxes may be reduced based upon the terms of applicable tax treaties between the United States and the foreign person's governmental taxing authority. Tax treaties do not generally provide relief for taxes imposed under the FIRPTA tax regime (discussed below).

How Gains from the Disposition of Real Property are Taxed and how Foreign Investors are Taxed Differently

Pursuant to the Foreign Investment in Real Property Tax Act (FIRPTA), gains from the sale of US real property interests are treated as generating "effectively connected" US-source income and may be taxed to foreign investors at a 20% capital

gains tax rate (or at graduated rates up to 37%) or to foreign corporations at a 21% tax rate. A foreign corporation is also subject to the branch profits tax described above. The buyer must generally withhold 15% of the purchase price to cover the tax liability. The foreign investor or foreign corporation should file a US tax return (IRS Form 1040NR for individuals and IRS Form 1120F for corporations) to report the gain or loss and related tax liability, and the 15% withholding is treated as a payment on the tax liability. Depending on the facts, a foreign investor may have to pay additional US income tax or may be entitled to a refund of part or all of the withholding tax. In addition, the FIRPTA rules can apply to the sale of stock of a domestic corporation that holds substantial real estate.

Exemptions

There are certain exemptions from FIRPTA – for example, sales of publicly traded stock may be exempt from FIRPTA in certain cases.

8.5 Tax Benefits

Non-residential real estate is depreciated on a straight-line basis over 39 years and residential real estate used in a rental activity is depreciated on a straight-line basis over 27.5 years. Certain property is depreciated over 15 years. In some situations, an affirmative election may have to be made to deduct expenses.

US entities may leverage real estate on a tax-deferred basis, but distributions to foreign investors or foreign corporations may be subject to tax under certain circumstances. Recent changes to US tax law have largely eliminated certain tax deferral strategies, including those featuring a so-called "bottom-dollar guarantee."

8.6 Key Changes in Federal Tax Reform

The Tax Cuts and Jobs Act (TCJA) enacted a 20% deduction from taxable income for qualified business income generated by pass-through entities such as partnerships, S corporations and LLCs. The deduction is subject to a limitation based on wages paid by the pass-through entity and/or on a percentage of the unadjusted basis of tangible property used in the business of the pass-through entity. The deduction also applies to ordinary dividends from REITs.

The TCJA placed a limit on the deductibility of interest. Interest deductions are now limited to 30% of the sum of business interest income and EBITDA (earnings before interest, taxes, depreciation and amortisation) (2018–2021) or EBIT (earnings before interest and taxes) (post-2021). An election out is permitted for any real property trade or business, provided the business extends the depreciation term for its real estate assets.

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The TCJA limits tax-deferred like-kind exchanges to real property only.

Transfers of 50% or more of the capital and profits interest of a partnership within a 12-month period will no longer cause a technical tax termination of the partnership. In the past, such a technical tax termination closed the partnership's tax year, cancelled existing tax elections and caused depreciable lives to be reset.