



LOUISIANA LENDING LAW
A Guide for Commercial Lenders
and Businesses



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and Businesses

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INTRODUCTION

Non-Louisiana based commercial lenders, equipment lessors and their attorneys continue to be mystified by Louisiana law. Many believe that Louisiana law is a strange anachronism of antiquated civil law principles that should have been abandoned years ago.

There is no reason for this type of apprehension. While Louisiana law is admittedly in many respects different from the law of other states, it is not that different. This is particularly true with regard to the Louisiana laws governing commercial transactions, many of which have been substantially modernized in recent years.

The purpose of this booklet is to remove some of the uncertainty surrounding Louisiana law by providing guidance to commercial lenders, equipment lessors and their attorneys contemplating extensions of credit and leases to Louisiana borrowers and lenders.

BASIC LEGAL STRUCTURE

General Law – The Louisiana Constitution and Civil Code

The general law of Louisiana is found in the Louisiana Constitution and in the Louisiana Civil Code, which has been substantially revised in recent years.

The Louisiana Civil Code establishes basic principles of law — called “Articles” — that regulate through general rules all aspects of civil relationships and rights. Specific areas addressed include:

- **contracts and contract rights**
- **property and property rights**
- **successions and donations**
- **marriage, divorce and community property rights**
- **sales**
- **leases**
- **real estate mortgages**
- **suretyship (personal guaranties)**
- **partnerships**

Statutory Law – The Louisiana Revised Statutes

Louisiana has an extensive body of statutory law. The Louisiana Revised Statutes consist of 51 separate “Titles,” including:

- **Title 3: Agriculture**
- **Title 6: Banks and Financial Institutions**
- **Title 9: Civil Code Ancillaries (supplementing the Louisiana Civil Code)**
- **Title 10: Louisiana UCC**
- **Title 12: Corporations**
- **Title 22: Insurance**
- **Title 32: Motor Vehicles**
- **Title 51: Trade and Commerce**

Procedural Law – The Code of Civil Procedure

Louisiana has a separate Code of Civil Procedure that governs civil (non-criminal) lawsuits, foreclosures, garnishments, sequestrations and attachments, and deficiency judgments. Title 13 of the Revised Statutes supplements the Louisiana Code of Civil Procedure.

Administrative Law

A number of Louisiana state agencies and boards have rule making and regulatory authority. These agencies and boards include the Louisiana Office of Financial Institutions (regulating banks, savings and loan associations, credit unions, finance companies, as well as securities issuers, brokers and dealers), the Louisiana Department of Insurance (regulating insurance companies, insurance agents and brokers), the Louisiana Department of Environmental Quality, and the Louisiana Department of Revenue and Taxation. Administrative rules and regulations are published in the Louisiana Register.

Local Law

There are 64 Louisiana parishes (the equivalent of counties), each with its own governmental authority(ies), ordinances and rule making procedures.

The Louisiana Court System

Each Louisiana parish has its own parish or city courts with limited small claims jurisdiction. There are forty judicial district courts with both civil and criminal jurisdiction. The City of New Orleans (consisting of all of Orleans Parish) has a separate Civil District Court and Criminal District Court, each with its own clerk. The City of New Orleans also has a separate Recorder of Conveyances and Recorder of Mortgages.

There are five Louisiana Circuit Courts of Appeal with jurisdiction over both civil and criminal cases. The Louisiana Supreme Court is the highest court in the state and is located in New Orleans.

Louisiana has three federal district courts: the United States District Court for the Eastern District of Louisiana located in New Orleans; the United States District Court for the Middle District of Louisiana located in Baton Rouge; and the United States District Court for the Western District of Louisiana located in Shreveport, Monroe, Alexandria, Opelousas, Lake Charles and Lafayette.

The United States Court of Appeals for the Fifth Circuit (with jurisdiction over Louisiana, Mississippi and Texas) is headquartered in New Orleans.

AUTHORITY

Required Qualifications to do Business – The Louisiana Foreign Corporations Law

It is not generally necessary for lenders and businesses that are not based in Louisiana to qualify to do business in Louisiana in order to:

- **Sell goods to Louisiana customers through the mails and other means of interstate commerce;**
- **Make loans or extensions of credit to Louisiana borrowers;**
- **Have access to Louisiana courts (La. R.S. § 12:302).**

Out-of-state lenders and businesses with offices or employees in Louisiana, as well as out-of-state equipment lessors leasing personal property to Louisiana customers, must first qualify to do business under the Louisiana Foreign Corporations Act. (La. R.S. §§ 12:301, et seq.). To do so, a foreign corporation must make appropriate filings with the Louisiana Secretary of State, maintain a registered office in Louisiana, and designate a registered agent for service of process.

Licensing Requirements

As a general rule, non-Louisiana based lenders and equipment lessors are not required to be licensed in order to engage in permissible lending and leasing activities in Louisiana. There are certain exceptions:

- **Non-Louisiana state chartered savings and loan associations may not engage in certain types of business activities in Louisiana without first obtaining a certificate of authority from the Office of Financial Institutions (La. R.S. §§ 6:892, et seq.).**
- **Motor vehicle manufacturers and lessors are required to be licensed by the Louisiana Motor Vehicle Commission (La. R.S. §§ 32:1251, et seq.).**

- **Consumer finance lenders making loans subject to the Louisiana Consumer Credit Law (La. R.S. §§ 9:3510, et seq.). are required to be licensed by the Office of Financial Institutions.**
- **Motor vehicle sales finance lenders making loans and purchasing vehicle retail installment sales contracts subject to the Louisiana Motor Vehicle Sales Finance Act (La. R.S. §§ 6:951, et seq.). are required to be licensed by the Louisiana Motor Vehicle Commission.**

Taxation

Out-of-state lenders extending credit in Louisiana, and out-of-state equipment lessors leasing equipment to Louisiana lessees, are generally subject to Louisiana corporate franchise and income taxes to the degree and extent that they employ assets in Louisiana and receive interest and lease income from Louisiana customers. As a limited exception, non-Louisiana based banks, savings and loan associations, insurance companies and certain types of foreign trusts are exempt from Louisiana taxation to the extent that they limit their lending activities in Louisiana to those listed in La. R.S. § 12:302(K).

All out-of-state lenders, businesses and equipment lessors doing business in Louisiana are responsible for the collection and remittance of applicable state and parish sales, use and lease taxes.

FUNDAMENTALS

Louisiana Contract Law

The basis of Louisiana contract law is found in the “Obligations” articles of the Louisiana Civil Code (La. Civ. Code arts. 1756, et seq.). Louisiana contract law is similar to that applicable in other states, with most differences being no greater than those that typically exist among common law states.

Louisiana Uniform Commercial Code “UCC”

As in the case of other states, the Louisiana UCC establishes basic rules in the area of secured lending and financial transactions (Articles 1, 3, 7, 8 and 9) and eliminates many state law idiosyncrasies, such as the statute of frauds and applicable statutes of limitation. Louisiana has adopted all of the UCC, with the exception of UCC Article 2 “Sales,” UCC Article 2A “Leases,” and UCC Article 6 “Bulk Sales.” The Louisiana law of sales is found under the “Sales” articles of the Louisiana Civil Code (La. Civ. Code arts. 2438, et seq.). Louisiana equipment leases are subject to the Louisiana Lease of Movables Act (La. R.S. §§ 9:3011, et seq.).

Louisiana Promissory Notes

The Louisiana laws applicable to promissory notes are found in Article 3 of the Louisiana UCC (La. R.S. §§ 10:3-101, et seq.) and in the general “Obligations” articles of the Civil Code (La. Civ. Code arts. 1756, et seq.).

Louisiana promissory notes tend to be more lengthy and complete than those in other states. This is primarily based on custom and practice among Louisiana lenders and also is due to the fact that certain fees and charges in Louisiana must be contracted for in order to be recovered, including attorneys fees, late or delinquency charges, and prepayment penalties.

INTEREST AND USURY

General Rule – No Usury Limits

Business, commercial and agricultural purpose loans and other extensions of credit are exempt from Louisiana conventional interest rate or usury limitations. This includes business, commercial and agricultural purpose loans to individuals and sole proprietorships, as well as loans to corporations, partnerships, limited partnerships, limited liability companies and other business entities (La. R.S. § 9:3509(A)).

Exception – Post Default Interest

As a special exception, La. R.S. § 9:3509(B) limits the ability of a lender to prospectively increase the contractual interest rate following the borrower's default under an otherwise fixed rate commercial purpose loan. The statute limits post-default interest rates to a maximum of 21 percent, or 3 percent over the fixed contractual interest rate prior to default, whichever is greater. For smaller commercial loans with an initial principal balance of \$250,000 or less, post-default interest is limited to the greater of 18 percent, or 3 percent in excess of the fixed contractual interest rate. This post-default interest rate limitation applies only to fixed rate simple interest business or commercial purpose loans and does not extend to variable rate commercial loans or to consumer purpose loans.

Methods of Interest Assessment

Interest may be assessed on commercial purpose loans on either a simple interest or a precomputed interest basis. If the borrower prepays a precomputed interest loan prior to maturity, or if the loan is accelerated as a result of the borrower's default, the lender is required to grant a rebate of unearned precomputed interest based upon an actuarial method of calculation. Rebates under the Rule of 78's are permitted only if they are contractually provided for under the borrower's note.

When Interest May Begin to Accrue

There is a special Louisiana statute (La. R.S. § 9:3506.1) that prohibits the assessment of interest on a real estate secured loan prior to the date that the loan proceeds are made available for disbursement to or on behalf of the borrower. This prohibition

applies to both consumer and commercial real estate loans, although there is a carve-out exception for consumer residential mortgage loans subject to a right of rescission under Federal Reserve Regulation Z.

Points and Other Prepaid Loan Fees

Points and other prepaid loan and commitment fees are permitted in Louisiana and are not subject to refund or rebate if for some reason the loan is not closed or if the loan is prepaid in full prior to maturity.

There is also a special Louisiana statute (the Louisiana Advanced Fee Loan Law, La. R.S. §§ 9:3574.1, et seq.) that limits the ability of otherwise non-exempt lenders to charge and collect certain types of fees in advance of the issuance of a binding loan contract. This statute applies to commercial loans, whether or not secured by real estate (La. R.S. § 9:3774.3(1)).

Additional Fees and Charges

There are no limitations on the amount of additional fees and charges that may be assessed in connection with commercial purpose loans or other extensions of credit.

As an exception, prepayment penalties on loans secured by mortgages on certain types of rural properties are limited to a maximum of 5 percent in the first year, 4 percent in the second year, 3 percent in the third year, 2 percent in the fourth year, and 1 percent in the fifth year (La. R.S. §§ 9:5321, et seq.).

Collection of attorney's fees, late or delinquency charges and prepayment penalties must always be contracted for in Louisiana in order to be recovered.

CONFLICT OF LAWS RULES

The Louisiana Civil Code contains comprehensive conflict of laws rules (La. Civ. Code arts. 3515, et seq.). Louisiana courts are instructed to apply the laws of the state whose policies would be most seriously impaired if that state's law were not applied to the particular issue, with the court taking into consideration:

- **The pertinent contacts of each state to the transaction, including the place of negotiation, execution and performance, the location of the object of the contract, and the place of domicile, residence or business of the parties;**
- **The nature, type and purpose of the contract;**
- **The relationship of each state to the parties and the dispute; and**
- **The policies and needs of facilitating the orderly planning of transactions, the promotion of multi-state commercial business, and the protection of one party from the undue imposition of the other (La. Civ. Code art. 3537).**

Choice of Law Covenants

The courts are also instructed to honor contractual choice of law covenants whereby the parties agree that the substantive laws of another state will govern the transaction. Nevertheless, Louisiana courts may refuse to honor choice of law covenants in contracts that would otherwise be governed by Louisiana law when the laws of the chosen state conflict with Louisiana public policy considerations (La. Civ. Code art. 3540).

Choice of law covenants apply only to substantive law and do not extend to laws governing remedies and enforcement of rights. Louisiana courts will always apply Louisiana procedural and remedial law under such circumstances.

Use of Standard Multi-State Form Contracts

Many out-of-state businesses and lenders opt to use standardized multi-state contracts, leases and security agreement forms when entering into transactions with Louisiana customers. These contracts traditionally include choice of law covenants adopting the substantive laws of other states. Although it is acceptable to use such standardized multi-state contract forms in many areas, such as letters of credit and UCC security agreements, there are certain differences in Louisiana law, particularly in the remedies area, that mandate the use of special “Louisiana addenda” to such standard form contracts.

TYPES OF BORROWERS

Corporations

Louisiana corporations are subject to the Louisiana Business Corporation Law (La. R.S. §§ 12:1, et seq.), which is derived from the Delaware model statute. Title 12 of the Louisiana Revised Statutes also contains separate chapters applicable to foreign and professional corporations.

It is advisable to obtain a good standing certificate from the Louisiana Secretary of State when making a loan to a corporate borrower. It is also essential to obtain a corporate borrowing resolution certified by the borrower's secretary or assistant secretary when making a loan to a corporation secured by a real estate mortgage. This is necessary in order to foreclose against corporate assets using Louisiana executory process foreclosure procedures.

Partnerships

There are three types of partnerships recognized in Louisiana: (1) ordinary business partnerships; (2) limited partnerships, which are sometimes referred to in Louisiana as partnerships in commendam; and (3) registered limited liability partnerships.

Louisiana partnerships are subject to the "Partnership" articles of the Louisiana Civil Code (La. Civ. Code arts. 2801, et seq.), supplemented by certain provisions of Title 9 of the Louisiana Revised Statutes (La. R.S. §§ 9:3401, et seq.). Section 9:3421, et seq. of the Louisiana Revised Statutes also govern the procedures under which foreign partnerships may qualify to do business in Louisiana.

It is advisable to obtain a certificate of good standing from the Louisiana Secretary of State when making a loan to a partnership borrower. It is also necessary to obtain a certified copy of the partnership's Articles or Agreement of Partnership in order to foreclose against partnership assets utilizing Louisiana executory process procedures.

Partners in an ordinary business partnership, as well as general partners in a limited partnership or a Louisiana partnership in commendam, are individually liable for partnership debts on a “virile share” or “by-heads” basis (La. Civ. Code art. 2817). Consequently, it is generally advisable to require the personal guarantees of individual partners when making a loan or leasing equipment to a Louisiana partnership.

Limited Liability Companies

Louisiana LLCs are subject to the Louisiana Limited Liability Company Act (La. R.S. §§ 12:1301 et seq.). LLC Articles of Organization must be filed with the Louisiana Secretary of State. Louisiana LLCs are required to have a registered office in Louisiana as well as a registered agent for service of process.

When making a loan to a Louisiana LLC, it is advisable to obtain a due registration certificate from the Louisiana Secretary of State as well as a certified copy of the LLC’s Articles of Organization. It is also necessary to obtain some type of LLC agreement or resolution signed by the members/owners of the company. This is necessary in order to foreclose against LLC owned assets utilizing Louisiana executory process procedures.

Individual owners of an LLC are not liable for company debts. Consequently, it is generally advisable to obtain personal guarantees from LLC owners when making a loan or leasing equipment to a Louisiana LLC.

Proprietorships and Individuals

Loans and equipment leases to proprietorships are treated in the same manner as loans and leases to the individual owners of the business. Trade names are subject to registration with the Louisiana Secretary of State (La. R.S. §§ 51:211, et seq.).

Business, commercial and agricultural purpose loans to individual borrowers and proprietorships are exempt from applicable Louisiana conventional interest rate or usury limitations as a result of La. R.S. § 9:3509(A).

Community Property Laws

Lenders and equipment lessors must take the effects of the Louisiana community property laws into consideration when contemplating making loans and leases to, or accepting personal guarantees from married Louisiana individuals.

Louisiana has an equal management community property system of laws similar to that in effect in California and Arizona. Under the “Community Property” articles of the Louisiana Civil Code (La. Civ. Code arts. 2334, et seq.), each spouse has the full authority acting alone to enter into debt obligations binding and obligating any and all present and future community property that may exist between husband and wife (La. Civ. Code art. 2346).

Whenever a married Louisiana individual applies for and obtains credit in his or her own name, the borrower binds and obligates not only his or her separate property, but also any community property that may then exist or that subsequently may come into existence. The contracting spouse may not, however, bind and obligate the non-borrowing spouse’s separate property to the extent that any separate property exists.

- **“Community Property” includes any and all property that either spouse acquires during the existence of marriage (other than by inheritance or donation). This includes both spouses’ earnings (La. Civ. Code art. 2338).**
- **“Separate Property” includes any property that was owned by either spouse at the time of marriage or that was separately donated to or acquired by inheritance during the existence of the marriage (La. Civ. Code art. 2341).**

Additionally, either spouse acting alone has the right to grant a security interest affecting community owned property without the consent or concurrence of the other spouse. There are four exceptional circumstances when the concurrence of the non-borrowing spouse is required.

- **The sale or lease of or the granting of a mortgage on community owned real estate (not limited to the family home).**
- **The granting of a UCC security interest on consumer goods located in the family home.**
- **The granting of a UCC security interest in jointly titled property.**
- **The granting of a security interest in all or substantially all of the assets of a community owned business (other than that of a corporation, partnership or LLC) (La. Civ. Code art. 2347).**

Most creditors obtain the non-borrowing spouse's concurrence by requiring the spouse to intervene in the borrower's real estate mortgage or in the borrower's UCC security agreement. Customarily, the non-borrowing spouse also waives any homestead and other exemptions from seizure to which he or she may be entitled under applicable law.

Property Exempt From Claims of General Competitors

Certain assets in Louisiana are exempt from seizure to satisfy the claims of general unsecured creditors. These include, by way of example, the first \$25,000 in equity in the family home, furniture and personal household items, tools of the trade, and the proceeds and cash surrender value of life insurance and annuity contracts (La. R.S. § 13:3881 and La. R.S. § 20:01).

REAL ESTATE LENDING

Property Rights

Property rights in Louisiana are subject to the “Property” articles of the Louisiana Civil Code (La. Civ. Code arts. 448, et seq.).

Leases

Real estate leases in Louisiana are subject to the “Lease” articles of the Louisiana Civil Code (La. Civ. Code arts. 2668, et seq.).

Differences in Terminology

Different terminology is used in Louisiana to describe similar real estate concepts applicable in common law states.

- **“Real property” in Louisiana is referred to as “immovable property.”**
- **“Personal property” in Louisiana is referred to as “movable property.”**
- **“Easements” in Louisiana are referred to as “servitudes.”**
- **“Fee simple” ownership in Louisiana is referred to as “full ownership.”**
- **“Life estates” and “estates for years” in Louisiana are referred to as “usufructs.”**

Louisiana Real Estate Mortgages

Real mortgages in Louisiana are subject to the “Mortgage” articles of the Louisiana Civil Code (La. Civ. Code arts. 3278, et seq.), supplemented by certain provisions of Title 9 of the Louisiana Revised Statutes (La. R.S. §§ 9:5101, et seq.).

There are three different forms of contractual or “conventional” real estate mortgages recognized in Louisiana:

- **ordinary conventional real estate mortgages;**
- **collateral real estate mortgages; and**
- **multiple indebtedness mortgages. Louisiana does not recognize deeds of trust.**

Ordinary Conventional Mortgages

An ordinary conventional mortgage may effectively secure only a single one-time extension of credit evidenced by a promissory mortgage note. An ordinary conventional mortgage will not effectively secure multiple loans or other extensions of credit on a cross-collateralization basis, nor will an ordinary conventional mortgage effectively secure multiple loan advances on a revolving line of credit basis.

There are two basic documents under an ordinary conventional mortgage: (1) the real estate mortgage itself, and (2) a real estate mortgage note or notes. The real estate mortgage must contain a full description of the mortgage note, including the note’s amount and maturity date. Although no longer required, the mortgage note may also contain a special “stamp” or legend identifying or linking the mortgage note with the mortgage. This is known as a “paraph” and is headed by the Latin inscription “ne varietur.” On occasion the mortgage note may be referred to as the “ne varietur note.”

Collateral Mortgages

A collateral mortgage is a special type of conventional real estate mortgage that has traditionally been used to secure multiple extensions of credit on a cross-collateralized basis, multiple loan advances extended on a revolving line of credit basis, as well as single one-time extensions of credit (La. R.S. §§ 9:5550, et seq.).

There are four documents typically used under a collateral real estate mortgage set:

- (1) the collateral mortgage itself (a requirement), which secures;**
- (2) a collateral mortgage note (a requirement) payable to “bearer” on “demand,” with the collateral mortgage note generally being in an amount greater than the secured indebtedness, and with the collateral mortgage note then being pledged to the lender/mortgagee under;**
- (3) a security agreement prepared in accordance with Louisiana UCC Article 9, which contains contractual language to the effect that the borrower/mortgagor is pledging and granting a security interest in the collateral mortgage note to secure not only the primary extension of credit, but also any and all other present and future indebtedness that the borrower may owe to the lender on a cross-collateralization basis, with such indebtedness typically being evidenced by; and**
- (4) one or more “hand notes” executed by the borrower.**

The lien of a collateral mortgage will secure subsequent loan advances, as well as unrelated extensions of credit on a cross-collateralization basis, with retroactive priority back to the date the original mortgage was recorded in the public records, provided that:

- The collateral pledge agreement provides that the pledge of the collateral mortgage note secures other or future indebtedness on a cross-collateralization basis;**
- The collateral mortgage note is held continuously in pledge by the mortgagee;**
- The mortgage is granted in good faith and not in an attempt to fraudulently defeat the interests of other creditors; and**
- The initial loan advance was made at the time the mortgage was granted or, at minimum, an enforceable commitment to extend credit to the borrower existed at that time.**

Collateral mortgages are widely used in Louisiana, even in connection with single one-time extensions of credit when it may otherwise be appropriate to use an ordinary conventional real estate mortgage.

Multiple Indebtedness Mortgages

Multiple indebtedness mortgages serve the same purpose as collateral real estate mortgages and may secure multiple extensions of credit on a cross-collateralization basis as well as multiple loan advances under a secured revolving line of credit (La. Civ. Code art. 3298).

A multiple indebtedness mortgage differs from a collateral mortgage in that there is no need for a collateral mortgage note or for a collateral pledge agreement. The mortgage directly secures multiple extensions of credit or multiple loan advances on a line of credit basis.

Multiple indebtedness mortgages are widely used in Louisiana, even in connection with single one-time extensions of credit when it may otherwise be appropriate to use an ordinary conventional real estate mortgage.

Formalities of Louisiana Real Estate Mortgages

In order to be valid and enforceable, a Louisiana real estate mortgage must satisfy the following requirements:

- **the mortgage must be in writing;**
- **the mortgage must be signed by the mortgagor;**
- **the mortgage must contain appropriate appearance language, including the mortgagor's marital status if an individual;**
- **the mortgage must contain a description of the secured indebtedness, including the amount and maturity date of the mortgage note, if applicable;**

- **in the case of a collateral mortgage, the mortgage must state the fact that the collateral mortgage note is payable “on demand”;**
- **in the case of a multiple indebtedness mortgage, the mortgage must state the maximum amount of indebtedness that the mortgage secures;**
- **the mortgage must contain a full legal description of the mortgaged property, including the street address of the property to the extent appropriate (however, the street address alone is insufficient); and**
- **if the mortgage is taken on the mortgagor’s personal residence, the mortgage should contain a waiver of homestead exemption**

Authentic vs. Acknowledged Form of Mortgage

Real estate mortgages may be executed either in “authentic form” in the presence of a notary public and two witnesses, or in “acknowledged form” in the presence of two witnesses, one of whom subsequently appears before a notary to execute a separate acknowledgment included in the mortgage document. Most Louisiana real estate mortgages are executed in authentic form, since executory process foreclosure remedies are available only in connection with authentic forms of mortgages and only these forms are self-proving.

Ne Varietur

Conventional real estate mortgage and collateral mortgage notes are no longer required to be paraphed “ne varietur” for identification with the borrower’s mortgage in order for the lender to be entitled to foreclose against the mortgaged property utilizing Louisiana executory process procedures. While some notaries continue to paraph conventional real estate mortgage notes and collateral mortgage notes “ne varietur” for identification with the mortgage, this practice is customary rather than required.

It is neither necessary nor proper to paraph promissory notes secured by Louisiana multiple indebtedness mortgages for identification with the mortgage.

Recordation

In order to be effective against third parties, a Louisiana real estate mortgage must be recorded (filed) in the mortgage records of the parish where the mortgaged property is located. In all but Orleans Parish (the City of New Orleans), real estate mortgages are recorded with the local clerk of court. In Orleans Parish real estate mortgages are recorded with the Recorder of Mortgages.

Once properly recorded, an ordinary conventional mortgage will remain valid and effective as to third persons for a period of ten (10) years following its execution. If the mortgage note has a payment term of nine years or longer, a recorded mortgage describing the mortgage note's maturity date will remain valid and effective for a period of six years following the note's described maturity date (La. Civ. Code art. 3329).

Once properly recorded, a collateral mortgage or a multiple indebtedness mortgage will remain valid and effective as to third persons for a period of ten (10) years following execution (Also art. 3329).

To continue the validity and effectiveness of a Louisiana real estate mortgage, it is necessary to "reinscribe" the mortgage by filing a simple written notice of reinscription with the appropriate filing office setting forth the name of the mortgagor, the name of the mortgagee, the recordation number of the original mortgage, and a statement that the mortgage is being reinscribed (La. Civ. Code art. 3333). Once properly reinscribed, a Louisiana mortgage will continue to be valid and effective for an additional ten (10) year term (La. Civ. Code art. 3334).

Cancellation of Mortgages

A mortgage lender has no obligation to cancel the mortgage once the secured indebtedness is fully satisfied. In Louisiana, the borrower has the responsibility to cancel the mortgage. When a mortgage loan has been paid in full, the lender is required to return the paraphed mortgage note or collateral mortgage note to the borrower marked "paid in full" or "cancelled." If the note has not been paraphed, the

lender may be requested to provide an act of cancellation. The lender must do this within thirty (30) days of the date the loan is paid or prepaid (La. R.S. § 9:5385). The borrower may then cancel the mortgage by filing a notice of cancellation, together with the cancelled note, with the proper filing officer (La. R.S. § 9:5167).

Special procedures must be followed to cancel a mortgage when the mortgage lender is unable to locate the original mortgage note or when the mortgage note has for some reason been destroyed (La. R.S. §§ 9:5167(E) and 9:5168). There are also special procedures that apply to cancellation of multiple indebtedness mortgages (La. R.S. § 9:5557).

Assignment of Mortgages

Whenever a mortgage note is transferred or assigned from one creditor to another, the borrower's real estate mortgage is automatically transferred with the note without any further action or formality on the part of the assignee creditor (La. Civ. Code art. 3312). Specifically, it is not necessary for the assignee creditor to file some type of notice of assignment in the mortgage records in order for the transfer to be complete and effective. Nevertheless, many creditors choose to file such assignment notices, and we particularly recommend that these notices be filed when the mortgage being assigned is a multiple indebtedness mortgage.

Whenever a real estate mortgage note payable to "order" is being transferred from one creditor to another, it is generally thought to be necessary that such a transfer be evidenced in authentic form (i.e., under a written instrument signed in the presence of a notary and two witnesses) in order to preserve the assignee creditor's right to foreclose under the mortgage utilizing Louisiana executory process procedures. This requirement only applies to transfers of "order" promissory notes secured by Louisiana ordinary conventional real estate mortgages and does not apply to transfers of notes payable to "bearer" or to mortgage notes secured by Louisiana collateral real estate mortgages or by multiple indebtedness mortgages.

Default and Foreclosure Remedies

Louisiana law generally prohibits self-help remedies following borrower defaults as being contrary to Louisiana public policy considerations. Louisiana also does not permit the exercise of default remedies under “powers of sale.”

There are two primary remedies available to a secured mortgage lender following the borrower’s default and acceleration of the underlying mortgage note: (1) ordinary collection actions; and (2) the commencement of an executory process foreclosure.

Ordinary Collection Actions

A mortgage lender may file an ordinary collection lawsuit against the borrower and obtain a final judgment for the amount of the secured indebtedness, with the judgment further recognizing the validity and enforceability of the mortgage. The lender may then enforce its judgment by having the mortgaged property seized by the sheriff of the parish where the property is located and then sold at judicial sale after due advertisement and public notice. It is also possible to have the mortgaged property seized prior to judgment by use of prejudgment attachment or sequestration procedures.

Executory Process Foreclosures

In the alternative, a mortgage lender may foreclose against the mortgaged property under Louisiana executory process procedures. Executory process is a quick method of foreclosure authorized under Louisiana law (La. Code Civ. Proc. arts. 2631, et seq.). Following the borrower’s default and the lender’s election to accelerate maturity of the underlying mortgage note, the lender may file an executory process petition before a court of competent jurisdiction in the parish where the mortgaged property is located. After presenting a prima facie case, the lender may obtain a court order or “writ” directing the sheriff of a parish to seize the mortgaged property and then to sell the property at judicial sale after proper advertisement and public notice. The borrower is then notified of the property’s seizure and has the opportunity within a specific time period to attempt to enjoin the foreclosure sale.

Executory process remedies are available only if the mortgage is executed in authentic form in the presence of a notary and two witnesses, and the mortgage contains a consent to foreclosure under Louisiana executory process procedures, including a confession of judgment and an acknowledgment of indebtedness on the part of the borrower/ mortgagor.

Right to Collect a Deficiency

Deficiencies are subject to the Louisiana Deficiency Judgment Act (La. R.S. §§ 13:4106, et seq.). For a mortgage lender to be entitled to collect a deficiency from the borrower, it is necessary that the mortgaged property be sold at judicial sale with the benefit of appraisal for at least two-thirds of its appraised value. If no one bids two-thirds of the property's appraised value at the initial judicial sale, the lender may elect to halt the sale and re-advertise the property. The property may then be sold at a second judicial sale for any amount, in which event the creditor must give the borrower credit in an amount equal to one-half of the property's appraised value.

In order to collect a deficiency following a Louisiana executory process foreclosure, it is necessary for the mortgage lender to file a separate ordinary collection lawsuit against the borrower before a court of competent jurisdiction and to obtain a final judgment for the deficiency amount.

Transfer in Lieu of Payment

It is common for a defaulting borrower to offer to transfer ownership of the mortgaged property to the mortgage lender in lieu of payment of all or a stipulated portion of the secured indebtedness. This is sometimes referred to as a "giving in payment" or "deed in lieu of payment." In Louisiana, this is known as a "dation." (La. Civ. Code arts. 2655, et seq.). Transfers in lieu of payment or "dations" are permitted in Louisiana, with the primary drawback being that the mortgage lender acquires the property subject to liens of the borrower's other secured creditors

As a general rule, a dation will result in the lender waiving or foregoing any right to collect a deficiency from the borrower following the eventual sale of the property. As a limited exception, La. R.S. § 13:4108.1 permits the parties to a commercial

transaction to agree contractually that the borrower will remain liable for a stipulated deficiency amount.

Special Types of Mortgages

Construction loans are generally secured by Louisiana collateral mortgages or multiple indebtedness mortgages; although it is permissible for a staged advance construction loan to be secured by an ordinary Louisiana conventional real estate mortgage.

Louisiana Civil Code Article 3286(4) permits the mortgaging of leasehold interests.

Assignments of Leases, Rents and Profits

A special Louisiana statute (La. R.S. § 9:4401) permits a borrower to grant a security interest in real estate leases, rents and profits. Such an assignment of rights may be incorporated in the borrower's mortgage or granted in a separate assignment document. To perfect a security interest in real estate leases, rents and profits, it is necessary to record (file) the borrower's mortgage in the mortgage records of the appropriate parish, or alternatively, the lender must file the borrower's separate assignment document in the conveyance records of the parish where the leased property is located. The conveyance records are kept separately from the mortgage records in which real estate mortgages are recorded.

Lien Searches/Title Insurance

When making a Louisiana real estate loan, that is secured by Louisiana real estate, it is the current practice for lenders to obtain title insurance, which is available in Louisiana from many attorneys and the various title insurance companies with offices in Louisiana. Basic coverage premiums are established by state regulation, and the standard ALTA forms are approved for use in Louisiana.

PERSONAL PROPERTY LENDING

Louisiana UCC Article 9

Louisiana was the last state to enact Article 9 of the UCC. The Louisiana version of UCC Article 9 (La. R.S. §§ 10:9-101, et seq.) went into effect on January 1, 1990, and applies to personal property security interests granted on and after that date. Revised UCC Article 9 became effective in Louisiana on July 1, 2001.

Modified and Enhanced Version of UCC Article 9

The Louisiana UCC is a modified version of the Code that was changed to reflect certain essential differences between the Louisiana civil law system and the common law system in effect in other states. The Louisiana UCC also contains certain enhancements to the standardized multi-state version of the Code.

Differences in Scope and Coverage

The scope and coverage of the Louisiana UCC is somewhat different from that in effect in other states. For example, the Louisiana version of UCC Article 9 applies to security interests in:

- **The cash surrender value and proceeds of life insurance policies;**
- **Rights under judgments;**
- **Rights under individual tort claims; and/or**
- **Rights under personal deposit accounts.**

Exclusions

The Louisiana UCC excludes the following types of security interests from coverage under the statute:

- **Security interest in standing timber, which is considered to be a type of real (immovable) property interest in Louisiana; and**
- **Security interest in “fixtures” that are already attached to estate.**

Security Interest in Standing Timber

Standing timber in Louisiana remains subject to mortgage as a form of real estate. To perfect a security interest in standing timber, it is necessary: (1) to file an original or certified copy of the mortgage in the local parish real estate mortgage records, and (2) to file a UCC-1f “effective financing statement” in the agricultural central registry maintained with the Louisiana Secretary of State. A UCC-1f may be filed at the lender’s option with the clerk of court of any of the sixty-four (64) Louisiana parishes (or with the Recorder of Mortgages for the Parish of Orleans). UCC-1f forms may not be filed directly with the Louisiana Secretary of State.

Limited Definition of “Fixtures”

The Louisiana UCC limits the definition of “fixtures” to goods that are to be installed on or to be attached to a building or to be placed on the land so as to become an “integral part” of the real estate within the context of Civil Code article 465. Unlike the multi-state version of the Code, the Louisiana definition of “fixtures” does not extend to goods that have already been installed or attached so as to become a part of the reality. (La. UCC § 9-312(2)) Post-attachment fixtures in Louisiana may only be encumbered by a Louisiana real estate mortgage.

The Louisiana UCC also limits the definition of “fixtures” to goods that primarily are used for business or commercial purposes. (La. UCC § 9-312(1)(a)) Consumer purpose fixtures are excluded from coverage under the Louisiana UCC and may only be subject to a Louisiana real estate mortgage on the property as a whole.

UCC Filing Rules

Louisiana has a “local filing/central registry” UCC filing system. UCC-1 financing statements must be filed on the local parish level and may not be filed directly with the Louisiana Secretary of State. A financing statement may be filed with any of the sixty-four (64) Louisiana parish clerks of court or for the City of New Orleans, with the Recorder of Mortgages for the Parish of Orleans. Secured lenders have the option of filing UCC-1 financing statements in any local parish of their choice. There is no

requirement that UCC financing statements be filed in the parish where the debtor resides or where the collateral is located. Dual filings in more than one parish are never required in Louisiana. Once a filing has been made in any single parish, it is effective on a state-wide basis. This is possible since the local filing officer electronically transmits the filed information directly into the Secretary of State's master UCC computer index.

Exemption – Titled Motor Vehicles

As an exception, UCC filings affecting titled motor vehicles (automobiles, trucks, mobile homes and boat trailers) must be made with the Louisiana Department of Public Safety and Corrections, Motor Vehicle Division, which will then note the lender's perfected lien on the vehicle's certificate of title pursuant to the Louisiana Motor Vehicle Certificate of Title Act (La. R.S. §§ 32:701, et seq.) . UCC-1 financing statements filed with the Louisiana Department of Public Safety must contain a description of each secured vehicle, including the vehicle's make or manufacturer, year of manufacture, model, body style, and manufacturer's serial or identification number.

UCC-1 financing statements affecting new and used motor vehicle inventory, as well as motor vehicle inventory subject to lease or short-term rentals, are not subject to filing with the Louisiana Department of Public Safety. Inventory filings of this type are treated in the same manner as filings made with respect to other types of UCC collateral and may be made at the lender's option with any of the sixty-four (64) Louisiana parish clerks of court or with the Recorder of Mortgages for the Parish of Orleans.

Crops and Farm Products

UCC-1f "effective financing statements" affecting crops and other types of farm products may be filed at the lender's option with any of the sixty-four Louisiana parish clerks of court (or alternatively with the Recorder of Mortgages for the Parish of Orleans). The filing officer will then electronically transmit the filed information to the Louisiana Secretary of State, which maintains the agricultural central registry

for the State of Louisiana. It is not necessary to file UCC-1f effective financing statements in the parish where the crops are grown or the secured farm products are located. Once properly filed in any parish, agricultural filings are valid on a state-wide basis.

Fixture Filings

Fixture filings are made in the same manner as ordinary UCC-1 filings. Fixture filings in Louisiana are not included in the local parish real estate mortgage records, but are instead indexed in the Secretary of State's master UCC computer system.

Where to File Subsequent UCC-3 Forms

While lenders have the option of filing UCC-1 financing statements in any of the sixty-four Louisiana parishes, the lender must return to the same parish when filing a UCC-3 form as an amendment, continuation statement, assignment, termination statement or partial release.

UCC Lien Searches

The Louisiana UCC provides that lenders may request a state-wide UCC search by filing a UCC-11 form with the clerk of court of any of the sixty-four Louisiana parishes or with the Recorder of Mortgages for the Parish of Orleans. UCC search requests may not be directly submitted to the Louisiana Secretary of State.

Filing and other Fees

The basic fee for filing a UCC-1 financing statement is \$30.00. Additional fees may be assessed depending on the circumstances. Termination fees must generally be prepaid in advance at the time the debtor's UCC-1 financing statement is filed. Termination fees need not be prepaid in advance in connection with financing statements affecting titled motor vehicles filed with the Louisiana Department of Public Safety.

UCC Remedies – No Self-Help Remedies

The Louisiana UCC does not permit traditional self-help repossession remedies with regard to non-possessory goods. Self-help remedies are generally prohibited in Louisiana as being contrary to state public policy consideration.

NOTE: Self-help remedies are available in certain limited circumstances with respect to motor vehicle collateral, and as a result of post default workout and forbearance agreements.

Out-of-state lenders and other businesses are warned not to attempt to pursue self-help remedies against non-possessory goods located in Louisiana, even with regard to UCC-secured collateral moved from other states. Offending lenders may be exposed to potential civil penalties for wrongful repossession, as well as potential criminal penalties based on theft, conversion and trespass.

Executory Process Foreclosure Remedies

The preferred method of foreclosing against non-possessory goods in Louisiana is by:

- Filing an appropriate executory process foreclosure action against the debtor before a court of competent jurisdiction; and
- After presenting a prima facie case before the court, obtaining a writ of seizure and sale; and
- Instructing the sheriff of the parish where the goods are then located to seize the goods, and, after appropriate delay and advertisement, sell the goods at judicial sale.

The Louisiana UCC contains a non-standard § 9-629, which provides for executory process foreclosure remedies with regard to security interests affecting non-possessory goods. The executory process foreclosure rules are more liberal than those applicable to Louisiana real estate mortgages.

Consent to Executory Process Foreclosure

It is necessary for a secured lender to include contractual provisions in its UCC security agreement under which the debtor consents to the exercise of executory process foreclosure remedies following default, and also under which the debtor confesses judgment in favor of the secured lender for the full amount of the secured indebtedness.

Deficiency Judgment Act Inapplicable

There is no requirement that a secured lender sell UCC-secured goods or other collateral at public or private sale, or at judicial sale as a result of an executory process foreclosure, with the benefit of appraisal, in order to preserve the lender's right to collect any resulting deficiency from the debtor. The Louisiana Deficiency Judgment Act (La. R.S. §§ 13:4106, et seq.) does not apply to the exercise of default remedies under the Louisiana UCC

EQUIPMENT LEASING

Louisiana has not adopted Article 2A of the UCC. Louisiana has its own equipment leasing code, the Louisiana Lease of Movables Act (the “LMA”) (La. R.S. §§ 9:3301, et seq.).

Scope and Coverage

The LMA is a comprehensive equipment leasing code that governs consumer purpose as well as business or commercial purpose “true” and “financed” leases of equipment located or to be located in Louisiana. The LMA also includes special rules applicable to short-term rentals of equipment for terms of less than four months.

The LMA defines a “financed lease” in the same manner as UCC Article 2A. This is the same criteria to be applied under the Louisiana UCC when determining what constitutes a “lease intended as security” (LMA § 3306(12) and La. UCC § 1-201(37)).

A “true lease” is defined under the LMA as a lease that does not satisfy the requirements of a “lease intended as security” under La. UCC § 1-201(37) of the Louisiana UCC (La. R.S. § 9:3306(26)).

The LMA defines a “consumer lease” as a lease of equipment to an individual lessee to be used primarily for personal, family or household (consumer) purposes, where the total amount payable under the lease does not exceed \$25,000. (La. R.S. § 6:3306(9)) A “commercial lease” is defined as an equipment lease that is primarily entered into for business, commercial or agricultural (non-consumer) purposes (La. R.S. § 9:3306(6)).

Emphasis of the LMA

The LMA does not attempt to regulate the basic contractual relationship and obligations between lessor and lessee. These rules are provided under the “Lease”

articles of the Louisiana Civil Code (articles 2668, et seq.), which apply to leases of personal (movable) property in addition to leases of real (immovable) property.

The primary emphasis of the LMA is to regulate the various fees and charges that may be assessed in connection with both consumer and commercial purpose true and financed leases, as well as to limit the remedies available to equipment lessors following the lessee's default

Fees and Charges

The following fees and charges are to some extent regulated or limited by the LMA:

- **Interest rate charges that are capitalized into consumer purpose financed leases (LMA § 3312(A));**
- **Additional lease related charges (LMA § 3313);**
- **Late or delinquency charges (LMA § 3314);**
- **Deferral charges (LMA § 3315);**
- **Early termination charges (LMA § 3316); and**
- **End of lease charges (LMA § 3317)**

Default Remedies

The LMA provides for optional, non-cumulative remedies following the lessee's default. The lessor has the option following the lessee's default under a true lease of either:

(1) accelerating payment under the lease and filing suit against the lessee to collect the amount of accelerated rentals, plus any past due payments as provided under La. R.S. § 9:3319; or

(2) canceling the lease, recovering possession of the leased equipment, and attempting to recover such additional liquidated damages as may be

contractually provided under the lease agreement, as provided under La. R.S. § 9:3320-3328. The lessor may not seek to collect accelerated payments under the lease and also to cancel the lease and recover possession of leased equipment (La. R.S. § 9:3318(A)).

Prohibition Against Self-Help Repossession

The lessor is prohibited from attempting to recover possession of the leased equipment under any form of self-help repossession (La. R.S. § 9:3329(A)). Violations of this prohibition are subject to both criminal and civil penalties under La. R.S. § 9:3529(C).

As a limited exception, Section 3330 of the LMA permits the lessor to file suit against the lessee and to obtain a court order permitting the lessor to take possession of leased equipment in a peaceable manner. (La. R.S. § 9:3330) To obtain this type of order, the lessor must convince the court that (1) the lessee has breached his obligation under the lease to maintain and protect the leased equipment, or to use the leased equipment in a proper and lawful manner, and (2) the leased equipment is then in a position of jeopardy of loss, damage, destruction or seizure. The lessor must also post an appropriate bond. Once the lessor obtains possession of the leased equipment, the lessor must deliver the leased equipment to the sheriff of the parish where the equipment is then located. The lessor may only fully recover possession of the leased equipment after going through the additional procedures required under the statute.

MINERAL FINANCINGS

Mineral Mortgages

Louisiana has extensive oil, gas and other mineral deposits. Mineral leases, mineral servitudes and mineral royalties are considered to be real property and are subject to being mortgaged in favor of third-party lenders. A mortgage of a mineral right must contain a full description of the mineral interest being encumbered together with a full legal description of the affected property. Mineral right mortgages must be filed in the mortgage records of the parish where the minerals are located.

Louisiana UCC Security Interests

Once minerals have been severed from the ground and reduced to possession, they are subject to being encumbered under the Louisiana UCC. UCC-1 financing statements affecting severed minerals and mineral generated “accounts” must contain a full legal description of the real property from which the minerals were derived. UCC-1 financing statements may be filed at the lender’s option in any of the sixty-four Louisiana parishes. There is no requirement that the UCC financing statements affecting mineral interests must be filed in the parish where the minerals were mined or originated.

Assignment of Mineral Related Rental and Royalty Payments

The rights of a land owner or mineral servitude owner to receive rents are considered to be a real property right that is exempt from coverage under the Louisiana UCC. To perfect a Louisiana security interest in mineral rentals, the borrower’s security agreement must be filed in the conveyance records of the parish where the minerals are mined or otherwise originate (La. R.S. § 9:4401).

Statutory Liens

Louisiana also has a special Oil, Gas and Waterwell Lien Act (La. R.S. §§ 9:4861, et seq.) that gives laborers and suppliers a statutory lien against produced minerals and

mineral related “accounts.” This lien dates from the time that the labor, services or supplies were provided, and will have priority over any mortgage or UCC security interest perfected after that date.

OTHER LAWS OF INTEREST

Louisiana Law of Sales

Louisiana law applicable to sales is found in the “Sales” articles of the Louisiana Civil Code (La. Civ. Code arts. 2438, et seq.). Louisiana has not adopted Article 2 of the UCC. The Louisiana Bulk Sales Law was repealed in 1990 as no longer being necessary.

Louisiana Suretyship laws

Louisiana law applicable to loan guarantees is found in the “Suretyship” articles of the Louisiana Civil Code (La. Civ. Code arts. 3035, et seq.). As a general rule, it is not necessary to modify standardized multi-state loan guaranty forms for use in Louisiana.

Louisiana Fraudulent Conveyance Law

Louisiana law applicable to fraudulent conveyances is found in the “Revocatory Action” articles of the Louisiana Civil Code (La. Civ. Code arts. 2036, et seq.). The maximum time period (statute of limitations) for the filing of a Louisiana fraudulent conveyance or revocatory action (outside of bankruptcy) is within one (1) year of the time the creditor learns or should have learned of the transfer or event, or within three (3) years of its occurrence, whichever is first (La. Civ. Code art. 2041).

Louisiana Environmental Laws and Regulations

Louisiana has extensive laws and regulations governing environmental matters. These laws and regulations are administered and enforced by the Louisiana Department of Environmental Quality.

There is a special Louisiana statute (La. R.S. § 30:2281) that grants the State, through the Department of Environmental Quality, a superpriority lien to secure state expenditures incurred in connection with removal of hazardous waste and other materials. This “superlien” has priority over prior perfected mortgages to the extent

that the fair market value of the affected property is enhanced as a result of the State's clean-up or remedial efforts. The State's environmental superlien must be recorded (filed) of record in the mortgage records of the parish where the affected property is located.

Louisiana Private Works Act

The Louisiana Private Works Act (La. R.S. §§ 9:4901, et seq.) gives building contractors, sub-contractors, laborers, materialmen and suppliers the right to assert a lien against a building that is being constructed. If certain conditions are satisfied, a prior recorded construction mortgage in favor of a third-party lender may prime this type of lien.

Lenders for construction loans typically require a statutory "no work" affidavit from a registered engineer or surveyor or architect to protect the mortgage from being outranked by materialman's liens.

Lender Liability Legislation

The Louisiana legislature has enacted a number of statutes in an effort to limit the ability of borrowers to assert spurious lender liability claims

As a general rule, punitive damages may not be awarded in Louisiana, thus removing one of the primary incentives for the filing of lender liability lawsuits. Nevertheless, it is possible for an aggrieved borrower to attempt to convince a Louisiana court to apply the laws of another state to the transaction to the extent that the laws of that state permit punitive damage awards (application of the Louisiana conflict of law rules under Civ. Code art. 3546).

The definition of "good faith" under Louisiana UCC § 1-203 was amended to limit the ability of aggrieved borrowers to assert "good faith and fair dealing" lawsuits against Louisiana lenders. Section 1-203 of the Louisiana UCC effectively defines "good faith" as "the absence of bad faith," with "bad faith" being defined as a wanton or

malicious act or failure to perform (consistent with Louisiana Civil Code arts. 1996 and 1997).

Louisiana has a special “parol evidence rule” (La. R.S. §§ 6:1121, et seq.), which provides that a borrower may not bring a lender liability claim against a creditor based upon an alleged oral agreement or understanding between the parties. The statute also requires that all fundamental agreements between lenders and borrowers be reduced to writing and be signed by all parties in interest.

There is an additional Louisiana statute (La. R.S. § 6:1124) that limits the ability of borrowers and other bank customers to assert implied fiduciary duty claims against banks and other financial institutions. This statute provides that no financial institution or officer or employee thereof will be deemed to be acting as a fiduciary, or have a fiduciary obligation or responsibility to a customer or to a third party (other than to shareholders of the institution), unless there exists a written agency or trust agreement under which the financial institution specifically agrees to act and perform in such a capacity. The statute also establishes a one (1) year statute of limitations for the filing of breach of fiduciary duty claims against financial institutions and their officers and employees.

The material in this booklet raises numerous and complex issues. If you have specific questions, *please contact an attorney in the firm’s [Business Group](#).*



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