

*This paper presents a general overview and is not intended as legal advice. For legal advice, consult a lawyer of your own choosing about your situation.*

## TRADEMARKS AND SERVICE MARKS

### INTRODUCTION

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In North Carolina, you may gain protection to distinguish the appearance of your products and services from others. This is important in the mediation of disputes of ownership and prevention of others from producing similar products that are indistinguishable by customers. These protections are primarily for marks, farm names, and brands.

### MARKS

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A mark is a way that you may distinguish your product from others to prevent imitation. N.C. Gen. Stat. § 80-1, Definitions (2012). There are two types of marks you may gain legal protection when used in North Carolina: service marks; and trademarks.

A “service mark” is a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of another. N.C. Gen. Stat. § 80-1, Definitions (2012). It is said to be used in North Carolina in two circumstances. First, if it is used or displayed in the sale or advertising of services currently being rendered in North Carolina. *Id.* Second, if the service is offered or available to be rendered in North Carolina. *Id.* This means that whether the service is currently being rendered or is available in the future then you are able to prevent others from using the same mark to represent the service in North Carolina.

A “trademark” is any word, name, symbol, or device or any combination adopted thereof and used by a person to identify goods made, sold, or distributed by others. N.C. Gen. Stat. § 80-1, Definitions (2012). It is said to be used in North Carolina when the goods are currently sold or otherwise distributed in the State. *Id.* It may be placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto. *Id.* If the nature of the goods makes placement impractical, then on documents associated with the goods is acceptable. *Id.* The difference between the two types of marks is whether the mark is used to distinguish a service, a service mark, or used on goods that will be distributed to a customer, a trademark.

### MARK REGISTRATION

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In order to register either mark you must first use the mark. N.C. Gen. Stat. § 80-3, Application for registration (2012). Although there is no prescribed length of time that the mark must be used in North Carolina before you register it, you must prove that you are currently using the mark to be allowed to register it. *Id.* The registration process requires completing an Application for Trademark or Service Mark Registration along with a non-refundable, seventy-five dollar (\$75.00) fee and three original specimens of the mark. *Id.* The three original specimens of the mark may be repeats of the same object.

For the initial mark registration you will need to provide the following information:

- The name and business address of the person applying for registration; and, if a corporation, the state of incorporation. *Id.* If the application for registration relates to a mark used in connection with goods, the application should list either the address of your principal place of business in North Carolina or a place of distribution and usage of the goods in this State. *Id.* If the application for registration relates to a mark used in connection with services, you should list a physical location at which the services are being rendered or offered in this State. *Id.*
- The goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with the goods or services and the class in which the goods or services fall. *Id.*
- The date when the mark was first used anywhere and the date when it was first used in this State by you, your predecessor in business, or by another under your control. *Id.*
- A statement that the you are the owner of the mark, that the mark is in use, and that to the best of the knowledge of the person verifying the application, no other person has registered in this State, or has the right to use the mark in this State either in the identical form thereof or in such near resemblance thereto as to be likely to cause confusion, or to cause mistake, or to deceive. *Id.*

The Secretary will then establish a classification of goods and services from what you stated in the application for convenience of administration. N.C. Gen. Stat. § 80-9, Classification (2012). When a single application includes goods or services that fall within multiple classes, the Secretary may require payment of an extra fee for each class. *Id.*

If the Secretary finds that you are not entitled to registration, the Secretary will advise you of the reasons the mark is not entitled to registration. N.C. Gen. Stat. § 80-3.1, Examination of application (2012). You will then have a reasonable period of time, specified by the Secretary, in which to reply or to amend the application. *Id.* If you reply and amend the application, the Secretary then will reexamine the application. *Id.* This procedure may be repeated until either: the Secretary finally refuses registration of the mark; or you fail to reply or to amend the application within the specified period. *Id.*

Upon compliance with all of the requirements, the Secretary will deliver a certificate of registration to you. N.C. Gen. Stat. § 80-4, Certificate of registration (2012). The registered mark is effective for ten years from the date of registration. N.C. Gen. Stat. § 80-5, Duration and renewal (2012). The mark is then renewable for successive terms of ten years by application. *Id.* The renewal application must be filed within six months prior to the expiration of any term with a renewal fee of thirty-five dollars (\$35.00). *Id.*

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## VERIFICATION

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Within six months following the expiration of five years from the date of registration, or the last renewal of registration of the mark, you must submit a specimen showing evidence of current use of the mark and a signed statement verifying the use of such mark on a mandatory form to be furnished by the Secretary of State. N.C. Gen. Stat. § 80-5, Duration and renewal (2012). Failure to submit this verification and specimen showing evidence of current use is grounds for cancellation of the registration of the mark by the Secretary of State. *Id.*

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## ASSIGNMENT

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Any mark is assignable to others when sold with the business in which the mark is used, or with the part of the business connected with use of and symbolized by the mark. N.C. Gen. Stat. § 80-6, Assignment (2012). Assignment must be by instruments in writing duly executed and may be recorded with the Secretary upon the payment of a fee of twenty-five dollars (\$25.00). *Id.* Upon recording of the assignment, the Secretary will issue in the name of the assignee a new certificate for the remainder of the term of the registration or of the last renewal thereof. *Id.* An assignment of any registration is void as against any subsequent purchaser for valuable consideration without notice, unless it is recorded with the Secretary within three months after the date thereof or prior to subsequent purchase. *Id.* This is significant in the situation that you are sold a business that uses a mark and you don't record in three months. If someone else buys the business or the mark without knowledge of you as the true owner, then they are protected from suit against you for using the mark.

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## FARM NAMES

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Any owner of a farm in North Carolina may have the name of their farm, together with a description of their lands to which said name applies recorded in the office of the register of deeds of the county in which the farm is located. N.C. Gen. Stat. § 80-33, Registration of farm names authorized (2012). The cost of registration for a farm name is one dollar (\$1.00). N.C. Gen. Stat. § 80-37, Fees for registration (2012). The register of deeds will then furnish to you a proper certificate setting forth the name and descriptions of the lands. N.C. Gen. Stat. § 80-33, Registration of farm names authorized (2012). This will prevent others from establishing a farm with the same name as yours.

You may not register a name of a farm that has been used in connection with another farm as to be general knowledge in the same county prior to March 5, 1915, unless the desired name has also been used prior to March 5, 1915. N.C. Gen. Stat. § 80-35, Distinctive name required (2012). In this event, two or more farms in the same county may be registered with the same name with some prefix or suffix added to distinguish them. *Id.*

When a recorded owner of a farm transfers by deed or otherwise the entire farm, the registered farm name will also be transferred. N.C. Gen. Stat. § 80-38, When transfer of farm carries name (2012). If the owner only transfers a portion of the farm, then the registered name will not be transferred to the purchaser unless so stated in the deed or conveyance. *Id.*

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## CANCELLATION

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When any owner of a registered farm desires to cancel the registered name, they must state on the margin of the record of the register of the farm name the following: "This name is canceled and I hereby release all rights thereunder." N.C. Gen. Stat. § 80-39, Cancellation of registry; fee (2012). This must then be signed by the person canceling the farm name and attested by the register of deeds. *Id.* The register of deeds will charge a fee of twenty-five cents (\$0.25) to attest, which should be paid to the county treasurer. *Id.*

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## BRANDS

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A “brand” is an identification mark permanently affixed into the hide of livestock by a hot iron or an extremely cold brand known as a “freeze brand.” N.C. Gen. Stat. § 80-58, Definitions (2012). Brands are used to discourage livestock theft by allowing for the voluntary individual registration of brand marks for certain livestock. N.C. Gen. Stat. § 80-57, Purposes (2012). Livestock included are cattle, horses, ponies, mules, and asses. *Id.*

The Commissioner of Agriculture of North Carolina records livestock brands and maintains a record of them. N.C. Gen. Stat. § 80-59, Responsibility and authority of Commissioner of Agriculture; application for registration; transfer of ownership of brand (2012). Properly branded livestock puts the public on notice of ownership. *Id.* The brands must be recorded with the clerk of the board of commissioners of the county where the livestock resides. *Id.* This record will be used to settle disputes of ownership of livestock.

Brands and earmarks may only be applied to livestock of a certain age:

- Horses may be branded after 18 months old;
- Hogs and sheep may be earmarked after six months old; and
- Cattle may be branded or earmarked after 12 months old.

N.C. Gen. Stat. § 80-45, Owners of stock to register brand or marks (2012). The Board of Agriculture has authority to establish reasonable rules and regulations regarding the registration and protection of livestock brands, including, but not limited to, the location of and the size of brand marks. N.C. Gen. Stat. § 80-61, Rules and regulations (2012).

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## REGISTRATION OF LIVESTOCK BRANDS

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Any person desiring the exclusive use of a brand must make application to the Commissioner of Agriculture on the prescribed forms and pay a fee. N.C. Gen. Stat. § 80-62, Fees for recording (2012). The Commissioner is authorized to collect a fee of twenty-five dollars (\$25.00) for the recording of each new brand, or for rerecording of each brand. *Id.* No brand may be registered that is approximately the same to another registered brand or that will likely be confused with another brand already registered. N.C. Gen. Stat. § 80-60, No brands duplicated (2012). In order for a brand to remain effective, it must be rerecorded with the Commissioner prior to ten years from the last recording. N.C. Gen. Stat. § 80-65, Rerecording (2012).

The transfer of ownership of a brand registration may be done only at the written request of the brand registrant of record. N.C. Gen. Stat. § 80-59, Responsibility and authority of Commissioner of Agriculture; application for registration; transfer of ownership of brand (2012). The fee for transfer is ten dollars (\$10.00). *Id.*

Persons or agents selling or bartering or exchanging branded livestock in North Carolina must provide the purchaser or new owner with a bill of sale showing a reasonable copy of the brand on any and all livestock having a brand. N.C. Gen. Stat. § 80-63, Records to be kept of sales and slaughter (2012). Such bills of sale are evidence of transfer of ownership of branded livestock. *Id.* Slaughter facilities in the State of North Carolina must affix to their normal records of receipt of livestock a reasonable copy of the brand on any branded livestock received by them. *Id.* Such records should be maintained for at least 12 months. *Id.*

## MARKETING AND BRANDING FARM PRODUCTS

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The marketing and branding of farm products is governed by the Department of Agriculture and Consumer Authorities for the purpose of investigating marketing conditions and to establish and maintain standard grades and packages and state brands for farm products. N.C. Gen. Stat. § 106-185, Scope of Article; federal-State cooperation (2012). “Farm products” that are included are farm crops, horticultural crops, and animal products. *Id.*

The Board of Agriculture has three duties towards farm products. N.C. Gen. Stat. § 106-187, Board of Agriculture to investigate marketing of farm products (2012). First is to investigate the subject of marketing farm products. *Id.* Second is to distribute useful information relating to them. *Id.* Third is to furnish advice and assistance to the public in order to promote efficient and economical methods of marketing farm products. *Id.* Information that is commonly diffused concerns the supply, demand, prevailing prices, and commercial movement of farm products, including quantities in common and cold storage. *Id.*

A certificate of the grade or other classification of any farm product will be accepted as the true grade of the product for disputes. N.C. Gen. Stat. § 106-192, Certificate of grade prima facie evidence (2012). An example of a possible grade is of apples. N.C. Gen. Stat. § 106-189.2, Sale of immature apples (2012). The apple grade standards include the requirements for maturity of the United States standards for grades of apples and may employ the use of the refractometer to determine the sugar content and maturity of apples and the pressure test to determine the maturity of apples. *Id.*

No person may classify or certify as to the grade or other classification of any farm product which, in his judgment, is unwholesome or unfit for food of man or other animal. N.C. Gen. Stat. § 106-193, Unwholesome products not classified; health officer notified (2012). If, in the performance of his official duties, he discovers any farm product which is unwholesome or unfit for food of man or for other animal for which it is intended, he should promptly report the fact to a health officer of the State or of any county or municipality thereof. *Id.*

Whenever any standard for the grade or other classification of any farm product becomes effective, any farm product packed for sale, offered to sale, or sold within this State must conform to the standard, subject to such reasonable variations. N.C. Gen. Stat. § 106-189, Sale and receptacles of standardized products must conform to requirements (2012). An exception to this is if the farm product is especially described as not graded or plainly marked as “Not graded.” *Id.* This exception does not apply to peaches. *Id.*

The Board of Agriculture, or the Commissioner of Agriculture, and their authorized agents, are authorized to issue “stop-sale” orders which prohibit further sale of the products if they have reason to believe such products are being offered, or exposed, for sale in violation of any of the previous provisions until the law has been complied with or the violations are otherwise legally disposed of. *Id.*