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CORPORATIONS IN FOREIGN JURISDICTIONS

SELECTION OF JURISDICTION

Early in the formation stages of a corporation, a particular jurisdiction is selected as the situs of incorporation. The selection process is described in detail in an earlier chapter.¹ A multistate business has several jurisdictions to consider. A decision to form the multistate corporation in one particular state usually is made following a comparison of the permissiveness and flexibility of the various statutes. The state of incorporation is the domestic state, and the corporation is a foreign corporation to every other state. The rule to be considered in this chapter is that a foreign corporation must *qualify* to do business in any state in which it intends to conduct business.

Similarly, other entities and associations that will be conducting business in more than one state may be required to qualify to do business as a condition to exercising their powers and privileges in foreign jurisdictions. The limited liability statutes anticipate that these companies will have multistate operations, and most of the statutes provide qualification rules similar to those used for corporations.² Limited partnerships also need to qualify to do business in several states,³ and in a few states, general partnerships must qualify to do business if they are not formed under the law of that state.⁴ This chapter concentrates primarily on the corporate issues involved in the qualification to do business in foreign jurisdictions, but the procedures and forms applicable to the corporate process are similar to those used in the process of qualifying a limited liability company and a partnership.

CONSTITUTIONAL BASIS FOR QUALIFICATION

A brief overview of the history and legal theory of the corporate entity is important here. A corporation is a fictitious person created under the authority of a state statute and, consequently, is a citizen of the state in which it has incorporated. Under the early common law, the corporation existed only in the state in which it incorporated, and it was not permitted to do business in any other jurisdiction. When corporate businesses began to outgrow the boundaries of their domestic states, a legal question arose regarding whether a state could prevent a foreign corporation from doing business within its boundaries unless it became incorporated therein. Alternatively, if incorporation

could not be required, could a state place restrictions upon the foreign corporation's business and require the foreign corporation to satisfy certain conditions before it was entitled to do business in the foreign state?

The Constitution of the United States guarantees to all persons the ability to move freely among the states without restriction, so the question then became whether a corporation could be considered to be a "person" under these provisions of the Constitution. The Supreme Court eventually decided that a corporation, whether or not it is a person in the constitutional sense, could not be prevented from entering another state, but could be reasonably regulated by the foreign state, under the guise of the state's power to prescribe regulations to protect its own residents. If the regulations imposed were reasonable and designed to protect the local citizenry, the regulations were permitted.

The current regulations on foreign corporations may be more easily understood with this history in mind. Most states require foreign corporations to disclose certain matters about their business structure by a public filing with a state official, so that the citizens of the state have access to necessary information about the organization with which they transact business. A separate area of regulation is concerned with litigation by and against the foreign corporation. These statutes are designed to subject the foreign organization to legal process within the state so that the citizens of the state may conveniently redress their complaints against the corporation. They further ensure compliance with qualification requirements before the corporation may use the state courts. In a constitutional sense, therefore, any state may impose regulations on foreign corporations, provided the regulations are reasonably directed to the state's responsibility and power to protect its own citizens.

AUTHORIZATION TO QUALIFY AS A FOREIGN CORPORATION

The authority to conduct business in a foreign state must come from within the corporation by official direction of the board of directors. Such management approval, which is usually accompanied by an enabling provision in the articles of incorporation, authorizes the corporation to submit to the necessary regulations in order to do business within a foreign jurisdiction.

The board of directors usually adopts a resolution authorizing qualification at its organizational meeting if the plans for expansion are solidified at that time. The resolution states that the corporation may qualify to do business under the laws of other states, and that the officers of the corporation are empowered to execute any necessary documents and to pay all necessary taxes and fees in order to qualify the corporation as a foreign corporation.⁵

STATUTORY PROHIBITION FROM DOING BUSINESS WITHOUT QUALIFICATION

Every state has a statute pertaining to qualification of foreign corporations. Several states have adopted the Model Business Corporation Act approach, prohibiting any foreign corporation from transacting business within the boundaries of the state without qualifying and receiving a certificate of authority from the appropriate state official.⁶ This is a strict provision. Nearly half of the states do not condition the right to transact business on the receipt of the certificate of authority, but they do specify a procedure for obtaining a certificate of authority, and further specify sanctions for failure to qualify.

It is not necessary that the foreign corporation be incorporated in a state whose laws are substantially similar to the laws of the state in which it seeks authority to do business. Indeed, many state statutes specifically prohibit denial of a certificate of authority simply because the laws of the state under which the foreign corporation is organized differ from the laws of the particular state in which it intends to qualify. Therefore, a corporation established under the permissive laws of Delaware, where the regulation of corporate management is very flexible, cannot be denied admission to another state whose corporate statute restricts the activities of the intracorporate parties. However, the foreign corporation can be denied admission if it is organized for

a purpose that is unlawful in the host state. For example, a Nevada corporation organized to conduct a gambling business may be denied admission to conduct gambling operations in a state where those activities are illegal. Otherwise, any corporation may qualify to do any business in any foreign jurisdiction.

TRANSACTIONING BUSINESS

The traditional statutory test for determining whether a corporation must qualify in a foreign jurisdiction is whether the corporation is **transacting business** within the foreign state. The transacting business test is not the most precise definition ever devised, and it has been responsible for considerable litigation. A sample of the cases illustrates the problem:

1. Would an Indiana corporation be doing business in Oklahoma by manufacturing equipment in Indiana, delivering it to Oklahoma, and installing it in Oklahoma?
2. Would a Delaware corporation be transacting business in New York by engaging an answering service and a soliciting salesman in New York?
3. Would an Arizona corporation be conducting business in Texas by sending salespeople and mechanics into Texas to solicit orders and to install and repair the machinery?
4. Would a Georgia corporation be doing business in Mississippi by hiring a local Mississippi mechanic to service an ice-cream dispenser for one year?

The answers from the cases that considered these questions are as follows: (1) no, (2) yes, (3) no, (4) yes.

The judicial uncertainty surrounding this test is particularly unfortunate when the sanctions for failure to qualify are considered. A corporation may suffer severe penalties if it is found to have been conducting business without qualification. To obviate the problem, section 15.01 of the Model Business Corporation Act enumerates certain activities that may be conducted by a foreign corporation without it being considered to be transacting business. These activities are

- (1) maintaining, defending, or settling any proceeding;
- (2) holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;
- (3) maintaining bank accounts;
- (4) maintaining offices or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities;
- (5) selling through independent contractors;
- (6) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;
- (7) creating or acquiring indebtedness, mortgages, and security interests in real or personal property;
- (8) securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
- (9) owning, without more, real or personal property;
- (10) conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature;
- (11) transacting business in interstate commerce.

Only a few states detail such a comprehensive list, and many states have no list at all. Delaware provides a more specific list, which might be helpful in solving the illustrative cases described earlier. The Delaware statute states that a foreign corporation shall not be required to qualify in the state under the following circumstances:

- (1) If it is in the mail order or a similar business, merely receiving orders by mail or otherwise in pursuance of letters, circulars, catalogs, or other forms of advertising,

- or solicitation, accepting the orders outside this State, and filling them with goods shipped into this State;
- (2) If it employs salespersons, either resident or traveling, to solicit orders in this State, either by display of samples or otherwise (whether or not maintaining sales offices in this State), all orders being subject to approval at the offices of the corporation without this State, and all goods applicable to the orders being shipped in pursuance thereof from without this State to the vendee or to the seller or such seller's agent for delivery to the vendee, and if any samples kept within this State are for display or advertising purposes only, and no sales, repairs, or replacements are made from stock on hand in this State;
 - (3) If it sells, by contract consummated outside this State, and agrees, by the contract, to deliver into this State, machinery, plants or equipment, the construction, erection, or installation of which within this State requires the supervision of technical engineers or skilled employees performing services not generally available, and as a part of the contract of sale agrees to furnish such services, and such services only, to the vendee at the time of construction, erection, or installation;
 - (4) If its business operations within this State, although not falling within the terms of paragraphs (1), (2), and (3) of this subsection or any of them, are nevertheless wholly interstate in character;
 - (5) If it is an insurance company doing business in this State;
 - (6) If it creates, as borrower or lender, or acquires, evidences of debt, mortgages, or liens on real or personal property;
 - (7) If it secures or collects debts or enforces any rights in property securing the same.⁷

Some statutory guidance may be available, therefore, on what does *not* constitute the transaction of business within the state. However, that is not to say that everything not enumerated in the statute *is* transacting business so as to require qualification. There is still room for judicial interpretation of the other corporate activities.

The safe approach should be obvious: If there is any question about the scope of the corporation's activities in a foreign jurisdiction, the corporation should apply for admission as a foreign corporation and obtain a certificate of authority. Failure to do so may subject the corporation to the statutory sanctions for failing to qualify. The safe approach is not always the most practical, however. Qualification imposes certain burdens on the corporation, and corporate management may be unwilling to accept those burdens. Management should be fully advised on all ramifications of qualification and can then make the decision based on costs, formalities, taxes, and fees on the one hand, and the penalties for failure to qualify on the other.

SANCTIONS FOR NOT QUALIFYING

If a foreign corporation is transacting business within the state and has not received a certificate of authority from the host state, most state statutes impose certain interdictions and fines on the corporation or its management. Foreign corporations may be denied access to the local courts for any action, suit, or proceeding until a certificate of authority has been obtained. This sanction is found in the Model Business Corporation Act and in most jurisdictions. However, under the Model Business Corporation Act, the failure to qualify does not impair the validity of any contract or act of the corporation, and it does not prevent any corporation from *defending* any action in a court of the host state. Consequently, the practical drawback of failing to qualify under the Model Business Corporation Act is the inability of the corporation to maintain a suit in its own name. However, there are also pecuniary disadvantages. The failure to obtain a certificate renders the corporation liable to the state for all fees and taxes that would have been imposed had the corporation been qualified for the years during which it transacted business without a certificate of authority. In addition, the Model Business Corporation Act authorizes the imposition of any penalties normally levied for failure to pay the fees, and these

finances also will be exacted from the foreign corporation. The attorney general is authorized to bring a suit to recover the amounts due under the statute.⁸

Although the prohibition from maintaining litigation and the collection of fees, taxes, and fines are severe sanctions, the Model Business Corporation Act is somewhat liberal by comparison with the sanctions imposed in some states. Alabama provides that all contracts of an unauthorized foreign corporation are void.⁹ Certain jurisdictions impose fines, instead of the normal penalties for fees, and the amount of a fine may be as high as ten thousand dollars.¹⁰ Fines also may be levied on corporate directors and officers. Other states authorize an action by the attorney general to enjoin the corporation from doing business.¹¹

In the spirit of forgiveness, many states excuse the sanctions as soon as the corporation properly qualifies, although the relief may depend upon showing good cause for failure to qualify or obtaining court approval.

APPLICATION FOR CERTIFICATE OF AUTHORITY

All state statutes describe a procedure for the qualification of a foreign corporation. To acquire a certificate of authority in most states, the corporation must apply to the appropriate state official. The contents of the application vary among the jurisdictions, but there is a common purpose behind the qualification procedures. The applications reveal necessary information about the corporation's structure, its solvency, the location of its property, and its business potential. Foreign corporations are required to furnish essentially the same initial and periodic information as domestic corporations.

Section 15.03 of the Model Business Corporation Act includes the following items in an application for a certificate of authority:

1. the name of the foreign corporation;
2. the state or country under the laws of which the corporation is incorporated;
3. the date of incorporation and the period of duration;
4. the street address of the corporation's principal office;
5. the address of the corporation's registered office in the state, and the name of its registered agent at that office; and
6. the names and usual business addresses of the corporation's current directors and officers.

State statutes expand the previous list of disclosable items to include the following:

1. a statement of the purpose or purposes the corporation proposes to pursue in the transaction of business in the host state;
2. a statement of the aggregate number of shares the corporation has authority to issue, itemized by classes and series, if any, within a class;
3. a statement of the aggregate number of issued shares itemized by classes and series, if any, within a class;
4. an estimate, expressed in dollars, of the value of all property to be owned by the corporation for the following year, wherever located, and an estimate of the value of the property of the corporation to be located within the state during such year, and an estimate, expressed in dollars, of the gross amount of business that will be transacted by the corporation during such year, and an estimate of the gross amount thereof that will be transacted by the corporation at or from places of business in the state during such year; and
5. such additional information as may be necessary or appropriate in order to enable the secretary of state to determine whether such corporation is entitled to a certificate of authority to transact business in the state and to determine and assess the fees and franchise taxes payable as prescribed in the applicable act.

A study of the requirements of the application for authority should suggest that those requirements are designed to facilitate the discovery and evaluation of corporate property within the state and to gauge the local productivity of the foreign corporation. This information is used to estimate the tax potential of the foreign corporation, and may also assist local citizens in their litigation against the corporation.

Each state statute should be consulted for local application requirements. In addition to the information listed here, it may be necessary to state the purposes for the transaction of business in the foreign jurisdiction.¹² Statements of good standing may be required from the corporation's home state,¹³ and nearly half of the states require filing of the articles of incorporation duly authenticated by the domestic state officials. In Pennsylvania it is necessary to officially publish notice of its name, principal address and local address.¹⁴ Other unusual formalities include the following: the corporation may be required to state its assets and liabilities as of a recent date;¹⁵ the corporation may have to stipulate an agent who is a local resident and a member of the local bar;¹⁶ and statements regarding the amount of paid-in capital or paid-in surplus may be required.¹⁷ Payment of fees and franchise taxes is almost always necessary, and some states require the filing of previous annual reports. To reiterate, as with other matters respecting corporate existence, it is necessary to carefully examine the statute of the state in which the corporation intends to do business, and to strictly comply with the statutory requirements.

The application for certificate of authority (see Exhibit 14-1, Application for Certificate of Authority) is prepared in duplicate or triplicate, as the statute requires, and is executed by the president and secretary or one of their assistants. In many states, the application must be verified by one of the signatories.

Most of the matters contained in the application for qualification are self-explanatory, but a couple of items deserve elaboration. The following material discusses requirements concerning the corporate name and the registered office and agent.

Corporate Name

The foreign corporation must comply with statutes regulating corporate names in the host state. The Model Business Corporation Act prescribes essentially the same name requirements for domestic and foreign corporations.¹⁸ The name must contain the word *Corporation*, *Company*, *Incorporated*, or (in a few remaining states) *Limited*, or an abbreviation of one of these words, and it may not contain any word or phrase that indicates or implies that the corporation is organized for any purpose other than the purposes enumerated in its articles of incorporation. Moreover, the name cannot be the same as, or deceptively similar to, the name of any domestic corporation existing under the laws of the state or of any foreign corporation already authorized to transact business in the state.

If the name under which the corporation is organized is not available in the host state, the corporation may use a fictitious name to transact business. Alternatively, a foreign corporation will be allowed to use the name of an existing corporation, already organized in the host state, if

1. the other corporation consents to the use of the name and agrees to change its name to a distinguishable name; or
2. the applicant has a court order establishing the applicant's right to use the name in the state.¹⁹

Suppose American Can Company, a New York corporation, is seeking to qualify to do business in Tennessee, where there is an established domestic corporation by the same name. The name of the foreign corporation cannot be the same as that of a domestic corporation or a previously qualified foreign corporation. Therefore, the New York corporation cannot be qualified in Tennessee under the circumstances. However, if the board of directors of the New York corporation adopts a *fictitious* name that is not deceptively similar to an existing name, then the corporation may be qualified under that fictitious name.

The foreign corporation seeking to qualify to do business generally resists the fictitious name technique because the reputation of the corporate name, usually well-established in other states, is lost by the adoption of an assumed name. One can only speculate at the business success of Xerox Corporation if it had been required to use the fictitious name of Copying Machines, Inc., in some of the foreign jurisdictions where it qualified to do business. However, many state officials have adopted informal tests for variations in fictitious names that will be acceptable. For example, if a domestic corporation had reserved the name Xerox Corp. and the real Xerox Corporation attempted to qualify to do business, many states would permit the fictitious name to be Xerox Corporation of Delaware, simply adding the name of the state of incorporation.

Corporations also may buy the right to use a particular name from its owner, and that is usually what must be done to obtain written consent for its use under the consent alternative. Law

Exhibit 14-1.

Application for Certificate of Authority (North Carolina)

**State of North Carolina
Department of the Secretary of State**

APPLICATION FOR CERTIFICATE OF AUTHORITY

Pursuant to §55-15-03 of the General Statutes of North Carolina, the undersigned corporation hereby applies for a Certificate of Authority to transact business in the State of North Carolina, and for that purpose submits the following:

1. The name of the corporation is _____; and if the corporate name is unavailable for use in the State of North Carolina, the name the corporation wishes to use is: _____.
2. The state or country under whose laws the corporation was organized is: _____.
3. The date of incorporation was _____; its period of duration is: _____.
4. Principal office information: *(Select either a or b.)*
 - a. The corporation has a principal office.
 The street address and county of the principal office of the corporation is:
 Number and Street _____
 City, State, Zip Code _____ County _____
 The mailing address, *if different from the street address*, of the principal office of the corporation is: _____
 - b. The corporation does not have a principal office.
5. The street address and county of the registered office in the State of North Carolina is:
 Number and Street _____
 City, State, Zip Code _____ County _____
6. The mailing address, *if different from the street address*, of the registered office in the State of North Carolina is: _____
7. The name of the registered agent in the State of North Carolina is: _____
8. The names, titles, and usual business addresses of the current officers of the corporation are (attach if necessary):

<u>Name</u>	<u>Title</u>	<u>Business Address</u>
9. Attached is a Certificate of Existence (or document of similar import) duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country of incorporation. **The Certificate of Existence must be an original and less than six months old.**

CORPORATIONS DIVISION
(Revised January, 2002)

P. O. BOX 29622

RALEIGH, NC 27626-0622
(Form B-09)

(continued)

students who have studied this procedure have dreamed of making immediate and great fortunes by anticipating expansion of a large established corporation into their state, filing a reservation of the corporate name, and waiting to be approached for the consent.

The court order alternative is designed to give the corporation another choice if the price of the consent is excessive and a prior right to the name can be shown. For example, suppose Xerox Corporation had initially confined its business to the eastern states. Further suppose that an enterprising student of corporations, anticipating that Xerox would expand its business nationally, reserved the name Xerox Corporation in California, but did not actively conduct business under that name. Xerox probably could obtain a court order establishing its prior use of the name and eliminate the impediment of the name reservation in California.

The corporate name problem may be solved in advance with a little planning. Recall that all jurisdictions permit reservation of a corporate name, and several permit registration of the name.²⁰ Registration is specifically designed for use by foreign corporations. An organized and existing

Exhibit 14–1.*(continued)*

<i>APPLICATION FOR CERTIFICATE OF AUTHORITY</i>		
<i>Page 2</i>		
<p>10. If the corporation is required to use a fictitious name in order to transact business in this State, a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name is attached.</p>		
<p>11. This application will be effective upon filing, unless a delayed date and/or time is specified:</p>		
<p>This is the ____ day of _____, 20__</p>		
	<p>_____</p> <p style="text-align: right;">Name of Corporation</p>	
	<p>_____</p> <p style="text-align: right;">Signature</p>	
	<p>_____</p> <p style="text-align: right;">Type or Print Name and Title</p>	
<p>NOTES:</p> <p>1. Filing fee is \$250. This document must be filed with the Secretary of State.</p>		
<p>CORPORATIONS DIVISION <i>(Revised January, 2002)</i></p>	<p>P. O. BOX 29622</p>	<p>RALEIGH, NC 27626-0622 <i>(Form B-09)</i></p>

(continued)

corporation may file an application for registration of its corporate name with the secretary of state for a small fee. The name may be registered for calendar years, and the registration may be renewed. Corporate management, foreseeing growth into foreign jurisdictions, is well advised to pursue registration of the corporate name in states where registration is permitted.²¹

Registered Office and Agent

Each state requires that a qualified foreign corporation must maintain a registered office and appoint a registered agent to receive legal documents addressed to the corporation. The registered office may be, but need not be, the same as the corporation's place of business in the state; the registered agent may be either an individual resident in the state or a domestic corporation, or another foreign corporation authorized to transact business in the state. As is required of a domestic corporation, any changes in the office or agent of the foreign corporation must be filed in the office of the secretary of state (see Exhibit 14–2, Statement of Change of Registered Office or Agent).²²

Exhibit 14–1.*(continued)***Instructions for Filing****APPLICATION FOR CERTIFICATE OF AUTHORITY***(Form B-09)*

- Item 1** Enter the complete name of the corporation exactly as it appears in the records of the appropriate official in the state or country of incorporation. If the name cannot be used in North Carolina, enter the name (including a corporate ending) that it wishes to use in North Carolina.
- Item 2** Enter the state or country of incorporation.
- Item 3** Enter the date of incorporation and the period of duration.
- Item 4** Select item *iaf* if the corporation has a principal office. Enter the complete street address of the principal office and the county in which it is located. If mail is not delivered to the street address of the principal office or if you prefer to receive mail at a P.O. Box or Drawer, enter the complete mailing address of the principal office.
Select item *ibf* if the corporation does not have a principal office.
- Item 5** Enter the complete street address of the corporation's registered office and the county in which it is located.
- Item 6** Enter the complete mailing address of the corporation's registered agent, only if mail is not delivered to the street address above or if you prefer to receive mail at a P. O. Box or Drawer.
- Item 7** Enter the name of the registered agent. The registered agent must be a North Carolina resident, an existing domestic business corporation, nonprofit corporation or limited liability company, or a foreign business corporation, nonprofit corporation or limited liability company authorized to transact business or conduct affairs in North Carolina.
- Item 8** Enter the names, titles, and usual business address of the current officers of the corporation.
- Item 9** See Form
- Item 10** See Form
- Item 11** The document will be effective on the date and at the time of filing, unless a delayed date or an effective time (on the date of filing) is specified. If a delayed effective date is specified without a time, it will be effective at 11:59:59 p.m. A delayed effective date may be specified up to and including the 90th day after the day of filing.

Date and Execution

Enter the date the document was executed.

In the blanks provided enter:

- The name of the corporation as it appears in Item 1
- The signature of the representative of the corporation executing the document (may be the chairman of the board of directors or any officer of the corporation).
- The name and title of the above-signed representative.

The purpose of the registered office and the agent is to facilitate the service of any process, notice, or demand required or permitted by law. A state may reasonably require a convenient way to notify a foreign corporation of any legal matters as a condition to its permission to do business in the state. For that reason, whenever a foreign corporation fails to appoint or maintain a registered agent in the state or whenever the registered agent cannot be found with due diligence, most statutes and the Model Business Corporation Act provides that the foreign corporation that has failed to maintain a registered agent within the host state may be served by registered or certified mail directly addressed to the secretary of the foreign corporation at its principal office.²³ This eliminates the burden placed upon the secretary of state to receive the document and to send it to the foreign corporation. Direct delivery is just as effective if the statute permits it. These provisions circumvent any potential escape from local complaints by failing to maintain a local agent and ensure the amenability of the foreign corporation to suit in local courts.

Exhibit 14–2.**Statement of Change of
Registered Office or Agent
(South Dakota)**

SECRETARY OF STATE
STATE CAPITOL
500 E. CAPITOL AVE.
PIERRE, S.D. 57501
605-773-4845

**STATEMENT OF CHANGE OF REGISTERED OFFICE,
OR REGISTERED AGENT, OR BOTH**
FILING FEE: \$10

Pursuant to the provisions of the South Dakota Corporation Acts, the undersigned corporation submits the following statement for the purpose of changing its registered office and/or its registered agent in the state of South Dakota.

1. The name of the corporation is _____
2. The previous street address or a statement that there is no street address, of its registered office _____
ZIP _____
3. The street address, or a statement that there is no street address, to which the registered office is to be changed is _____
ZIP _____
4. The name of its previous registered agent is _____
5. The name of its successor registered agent is * _____

*** The Consent of Registered Agent below must be completed by the new agent.**

6. The address of its registered office and the address of the business office of its registered agent, as changed, will be identical.
7. This change has been authorized by resolution duly adopted by the board of directors.

The statement may be signed by the chairman of the board of directors, by its president or by another of its officers in the presence of a notary public.

Date _____

(Signature)

(Title)

STATE OF _____
COUNTY OF _____

I, _____, a notary public, do hereby certify that on this _____ day of _____, 20____, personally appeared before me _____ who, being by me first duly sworn, declared that he/she is the _____ of _____, that he/she signed the foregoing document as officer of the corporation, and the statements therein contained are true.

My Commission Expires _____ (Notary Public) _____

Notarial Seal

CONSENT OF APPOINTMENT BY THE REGISTERED AGENT

I, _____, hereby give my consent to serve as the
(name of registered agent)
registered agent for _____
(corporate name)
Dated _____
(signature of registered agent)

Several “registered agent” companies are available at the request of attorneys to act as registered agents for foreign corporations and to comply with the requirements of local laws on their behalf. They include the CT Corporation System; Prentice Hall, Inc.; and the United States Corporation Company.

CERTIFICATE OF AUTHORITY

Upon receipt of the application for a certificate of authority (see Exhibit 14–3, Certificate of Authority [Model Act]), the secretary of state or other appropriate official files the application and issues a certificate of authority. When the certificate is issued, the corporation is authorized to transact business in the state for the purposes set forth in its application as long as it remains in good standing.²⁴

Exhibit 14–3.Certificate of Authority
(Model Act)

STATE OF _____
OFFICE OF THE SECRETARY OF STATE
CERTIFICATE OF AUTHORITY
OF

The undersigned, as Secretary of State of the State of _____ hereby certifies that duplicate originals of an Application of _____ for a Certificate of Authority to transact business in this State, duly signed and verified pursuant to the provisions of the _____ Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in him by law, hereby issues this Certificate of Authority to _____ to transact business in this State under the name of _____ and attaches hereto a duplicate original of the Application for such Certificate.

Dated _____, 20____.

Secretary of State

EFFECT OF QUALIFICATION

Once a foreign corporation has received authority to do business within the foreign state, it is entitled to enjoy the same rights and privileges as a domestic corporation organized for the same purposes. In addition, it is subject to the same duties, restrictions, penalties, and liabilities as a domestic corporation. In the host state, therefore, the foreign corporation is treated like a native, receiving no better or worse treatment than the domestic corporations. The foreign corporation also remains subject to restrictions imposed by its home state, and it must observe those restrictions while operating in the host state.

Consider an Arkansas corporation that qualifies to do business in Pennsylvania. Suppose Arkansas law permits the corporation to be a general partner in another enterprise only if it is authorized to do so in the articles of incorporation or by vote of the shareholders. Pennsylvania law permits a corporation to be a general partner without any such authorization. If the articles of incorporation do not authorize the corporation's entry into a partnership and the shareholders have not approved such a transaction, the Arkansas corporation cannot become a general partner, even in Pennsylvania where otherwise it is treated like a domestic corporation. The restrictions placed upon the corporation in its home state are superimposed upon its operations in the foreign state.

The reverse is not exactly the same. Consider a Nevada corporation that qualifies to do business in Pennsylvania. The Nevada corporation is authorized to conduct gambling activities in its home state, but Pennsylvania law does not permit gambling operations in Pennsylvania. The Nevada corporation must abide by the local laws, and it has no greater privileges in Pennsylvania than does a domestic Pennsylvania corporation. However, the internal affairs of the Nevada corporation are always regulated by the law of Nevada. Thus, for example, if Pennsylvania law requires a shareholder vote to change the name of the corporation but Nevada law does not, the Nevada corporation is entitled to change its name in Pennsylvania without a shareholder vote, since that matter is an internal affair of the corporation.

In addition to the restrictions upon privileges and powers discussed here, a qualified foreign corporation accepts other responsibilities within the host state. It agrees to certain requirements concerning service of process, taxes, and annual reports.

Service of Process

A foreign corporation authorized to transact business in a state is subjected to the jurisdiction of the courts of the host state. Consequently, **service** of documents relating to litigation upon the registered agent of the corporation is as effective as if the corporation were incorporated within the state and had been served at its principal office.

Taxes

By qualifying to do business within a state, a foreign corporation agrees to pay taxes to the host state. A state is permitted to tax a foreign corporation under the Constitution if the corporation has **substantial contacts** within the state. The law is now quite clear that by qualifying to do business within the state, the corporation creates those substantial contacts. The individual tax structures of the states are dissimilar, but several typical types of taxes are imposed upon foreign corporations.

Some states impose an initial **franchise tax** upon the filing of the application for a certificate of authority. This tax is generally based upon the aggregate amount of authorized capital stock of the corporation, similar to the measure for taxes imposed on a domestic corporation when its articles of incorporation are filed. A fee is also charged for filing the application of a foreign corporation.

Annual income taxes are imposed upon foreign corporations. Generally, the tax formula used in any given state has been designed around the commercial character of the state and is intended to maximize tax revenues from foreign corporations. If the state is a recognized location for heavy industry, so that most foreign corporations have manufacturing or industrial plants there, the state will probably impose a tax on the value of the property of the foreign corporation located within the state. This tax formula maximizes revenue for states with an industrial character to their commerce. If the state is not heavily industrialized but has a large population, a tax may be imposed on the proportionate volume of business that the foreign corporation is transacting in the state. A tax on foreign corporations also may be computed by a formula based upon the total number of employees located within the state.

The tax provisions of each state play an important role in the selection of jurisdiction for a corporation anticipating a multistate business. At the formation stage, the choice between incorporating or qualifying to do business in a given jurisdiction is influenced by that state's tax attitude. For example, if a corporation plans to locate a manufacturing plant in State X and intends to sell its products to customers primarily located in State Y, it would be a mistake to incorporate in State X, where the plant is located, if that state bases its foreign corporation tax on the volume of sales transacted within the state. The corporation should operate as a foreign corporation in State X, because that state's tax base depends upon volume of sales and this corporation will be making most of its sales out of state.

Annual Reports

Like domestic corporations, qualified foreign corporations must file **annual reports** with the state. The Model Business Corporation Act requires that the annual reports of domestic and foreign corporations contain the same information.²⁵ Most states require that the annual report contain certain standard information regarding the corporation, its registered offices and agents, its directors and officers, and the character of its business. The reported items typically used to levy taxes include the following:

1. a statement of the aggregate number of shares the corporation has authority to issue, itemized by classes and series, if any, within a class;
2. a statement of the aggregate number of issued shares, itemized by classes and series;
3. a statement, expressed in dollars, of the value of all the property of the corporation, wherever located, and the value of the property of the corporation located within the state, and the statement of the gross amount of business transacted by the corporation for the period of the report; and
4. additional information as may be necessary or appropriate in order to enable the secretary of state to determine and assess the proper amount of franchise taxes payable by the corporation.

The annual reports are used to assist the secretary of state in enforcing the corporation statute and ensuring compliance with its provisions, in fixing responsibility for any corporate transgressions on the named officers and directors, and in evaluating the appropriate tax to be assessed. Most states have the same reporting requirements for foreign and domestic corporations. (See Exhibit 14-4, Annual Report.)

Exhibit 14-4.

Annual Report (Tennessee)

<input type="checkbox"/> CORPORATION ANNUAL REPORT STATE OF TENNESSEE SECRETARY OF STATE SUITE 1800, JAMES K. POLK BUILDING NASHVILLE, TN 37243-0306 AMOUNT DUE - \$20.00			
CURRENT FISCAL YEAR CLOSING MONTH: CORRECT MONTH IS _____	IF DIFFERENT, THIS REPORT IS DUE ON OR BEFORE _____		
(1) SECRETARY OF STATE CONTROL NUMBER _____ OR FEDERAL EMPLOYER IDENTIFICATION NUMBER: _____			
(2A.) NAME AND MAILING ADDRESS OF CORPORATION: _____			
(2B.) STATE OR COUNTRY OF INCORPORATION: _____			
(2C.) ADD OR CHANGE MAILING ADDRESS: _____			
(3) A. PRINCIPAL ADDRESS INCLUDING CITY, STATE, ZIP CODE: _____			
B. CHANGE OF PRINCIPAL ADDRESS:			
STREET	CITY		
STATE	ZIP CODE + 4		
** BLOCKS 4A AND 4B MUST BE COMPLETED OR THE ANNUAL REPORT WILL BE RETURNED **			
(4) A. NAME AND BUSINESS ADDRESS, INCLUDING ZIP CODE, OF THE PRESIDENT, SECRETARY AND OTHER PRINCIPAL OFFICERS. (ATTACH ADDITIONAL SHEET IF NECESSARY.)			
TITLE	NAME	BUSINESS ADDRESS	CITY, STATE, ZIP CODE + 4
PRESIDENT _____			
SECRETARY _____			
B. BOARD OF DIRECTORS (NAME, BUSINESS ADDRESS INCLUDING ZIP CODE). (ATTACH ADDITIONAL SHEET IF NECESSARY.)			
<input type="checkbox"/> SAME AS ABOVE <input type="checkbox"/> NONE			
OR LIST BELOW	NAME	BUSINESS ADDRESS	CITY, STATE, ZIP CODE + 4
(5) A. NAME OF REGISTERED AGENT AS APPEARS ON SECRETARY OF STATE RECORDS: _____			
B. REGISTERED ADDRESS AS APPEARS ON SECRETARY OF STATE RECORDS: _____			
(6) INDICATE BELOW ANY CHANGES TO THE REGISTERED AGENT NAME AND/OR REGISTERED OFFICE. (BLOCK 5A AND/OR 5B.) THERE IS AN ADDITIONAL \$20.00 REQUIRED FOR CHANGES MADE TO THIS INFORMATION.			
A. CHANGE OF REGISTERED AGENT: _____			
B. CHANGE OF REGISTERED OFFICE:			
STREET	CITY	STATE	ZIP CODE + 4
TN		COUNTY	
(7) A. THIS BOX APPLIES ONLY TO NONPROFIT CORPORATIONS. OUR RECORDS REFLECT THAT YOUR NONPROFIT CORPORATION IS A PUBLIC BENEFIT OR A MUTUAL BENEFIT CORPORATION AS INDICATED BELOW:			
IF BLANK OR CHANGE, PLEASE CHECK APPROPRIATE BOX:			
<input type="checkbox"/> PUBLIC <input type="checkbox"/> MUTUAL			
B. IF A TENNESSEE RELIGIOUS CORPORATION, PLEASE CHECK BOX UNLESS OTHERWISE INDICATED.			
<input type="checkbox"/> RELIGIOUS			
(8) SIGNATURE _____		(9) DATE _____	
(10) TYPE/PRINT NAME OF SIGNER _____		(11) TITLE OF SIGNER _____	
** THIS REPORT MUST BE DATED AND SIGNED **			
SS4444 (Rev. 11-05) SDA 1678			

STRUCTURAL CHANGES OF A FOREIGN CORPORATION

Every state requires domestic corporations to report all **corporate structural changes** such as mergers, share exchanges, sale or exchange of assets, or amendments to the articles of incorporation. Similarly, qualified foreign corporations must follow certain procedures in the host state whenever structural changes occur in the corporate organizations.

Amendment to the Articles of Incorporation

Model Business Corporation Act section 15.04 provides that a qualified foreign corporation must obtain an amended certificate of authority from the secretary of state of the host state if the corporation changes its name or the period of its duration. In addition, if the corporation changes the state or country in which it is incorporated, an amended certificate of authority must be obtained.

In most states, any amendment to the articles of incorporation of the foreign corporation requires the filing of a statement with the secretary of state in the foreign jurisdiction. The time period for filing copies or statements of amendments differs among the states. Most states require that such an amendment be filed within thirty days, several states permit as long as sixty days,²⁶ and a few states have no time limit.²⁷ Careful study of the appropriate state law is important.

The filing procedure for amendments to the articles of incorporation of a foreign corporation is amplified if the amendment changes the corporate name or the period of duration. Merely filing copies of the amended articles of incorporation will not suffice to authorize the foreign corporation to use another name or to extend its longevity. A foreign corporation may change its corporate name or its duration by filing an application for an amended certificate of authority. The Model Business Corporation Act requires the issuance of an amended certificate of authority to accomplish these changes (see Exhibit 14–5, Application for Amended Certificate of Authority, and Exhibit 14–6, Amended Certificate of Authority).²⁸ The form and contents of the application for an amended certificate and the procedure for issuance of the amended certificate are the same as those described for the original application for a certificate of authority.²⁹

There is an obvious problem if a foreign corporation changes its name by amending its articles of incorporation and the new name is not available in the host state. The drafters of the Model Business Corporation Act took a fairly firm stand on this issue.³⁰ If the new name is not available, the certificate of authority for the corporation is suspended until the corporation again changes its name to one that is available. A few states soften the harshness of this rule by allowing an interim grace period of 180 days during which the corporation may transact business under its old name, but by the end of the period, the corporation must change its name to a name that is available under the laws of the state. If the corporation fails to change to an acceptable name and continues to transact business, its certificate of authority may be suspended.

Merger and Share Exchange with the Foreign Corporation

A merger of a foreign corporation requires additional filings in the host state when the foreign corporation is the surviving corporation after the merger. The legal consequences of a merger are considered in detail later,³¹ but stated simply, a merger is a combination of two or more corporations into one corporate entity, whereby one of the corporate parties survives the transaction and the others cease to exist. In most state statutes, if the foreign corporation survives the merger, it must file a copy of the articles of merger with the secretary of state to make the merger effective.³² It is not necessary for the surviving foreign corporation to procure an amended certificate of authority unless the corporation has changed its name under the merger or unless it has adopted a different period of duration than that authorized in its current cer-

Exhibit 14-5.

Application for Amended Certificate of Authority (North Carolina)

**State of North Carolina
Department of the Secretary of State**

APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY

Pursuant to §55-15-04 of the General Statutes of North Carolina, the undersigned corporation hereby applies for an Amended Certificate of Authority to transact business in the State of North Carolina and for that purpose submits the following statement.

1. The name of the corporation is: _____
 2. The name the corporation is currently using in the State of North Carolina is:

 3. The state or country of incorporation is: _____
 4. The date the corporation was authorized to transact business in the State of North Carolina is:

 5. This application is filed for the following reason (*complete all applicable items*):
 - a. The corporation has changed its corporate name to:*

 - b. The name the corporation will hereafter use in the State of North Carolina is changed to:

 - c. The corporation has changed its period of duration to: _____
 - d. The corporation has changed the state or country of its incorporation to: _____
 6. Attached is a certificate attesting to the change, duly authenticated by the secretary of state or other official having custody of corporate records in the state of country of incorporation.
 7. If the corporation is required to use a fictitious name in order to transact business in this State, a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name is attached.
 8. This application will be effective upon filing, unless a date and/or time is specified: _____
- This the _____ day of _____, 20____

Name of Corporation

Signature

Type or Print Name and Title

NOTES:

1. Filing fee is \$75. One executed original and one exact or conformed copy of this application must be filed with the Secretary of State.
- * If the name of the corporation as changed is unavailable for use in North Carolina, indicate this fact and state the name the corporation wishes to use in North Carolina on 5b. (See NCGS §55-15-06)

(Revised January 2000)

(Form B-10)

Instructions for Filing
CORPORATIONS DIVISION P. O. BOX 29622 RALEIGH, NC 27626-0622

(continued)

tificate of authority. If either of those results are produced by the merger, the amendment procedure described earlier must be followed.

If a qualified foreign corporation merges with another foreign corporation that is not authorized to transact business within the host state and the nonqualified corporation survives the merger, the surviving corporation must qualify in the foreign jurisdiction by filing an original application for a certificate of authority. The surviving corporation does not inherit the previously granted authority of the merged corporation through the merger.

If a foreign corporation merges with a domestic corporation and the domestic corporation survives the merger, the articles of merger must be filed by the domestic corporation pursuant to the laws of the state.³³ However, if the foreign corporation survives the merger,

Exhibit 14–5.*(continued)*

APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY
(Form B-10)

- Item 1** Enter the complete name of the corporation exactly as it appears on the Certificate of Authority.
- Item 2** Enter the corporate name used in North Carolina exactly as it appears on the Certificate of Authority.
- Item 3** Enter the state or country of incorporation.
- Item 4** Enter the date the corporation was authorized to transact business in North Carolina.
- Item 5** Complete the applicable items.
- Item 6** See Form.
- Item 7** See Form.
- Item 8** The document will be effective on the date and at the time of filing, unless a delayed date or an effective time (on the day of filing) is specified. If a delayed effective date is specified without a time, the document will be effective at 11:59:59 p.m. on the day specified. If a delayed effective date is specified with a time, the document will be effective on the day and at the time specified. A delayed effective date may be specified up to and including the 90th day after the day of filing.

Date and Execution

Enter the date the document was executed.

In the blanks provided enter:

The name of the corporation as it appears in item 1.

The signature of the representative of the corporation executing the document (may be the chairman of the board of directors or any officer of the corporation).

The name and title of the representative.

CORPORATIONS DIVISION

P. O. BOX 29622

RALEIGH, NC 27626-0622

other filings are required. The surviving foreign corporation may not be authorized to transact business within the state, and if it intends to do so, it must file an original application for a certificate of authority. Even if it does not intend to do business within the state, the surviving foreign corporation is deemed, through the merger,

1. to appoint the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of each domestic corporation that was a party to the merger or share exchange; and
2. to agree that it will promptly pay to the dissenting shareholders of each domestic corporation that was a party to the merger or share exchange the amount, if any, to which those shareholders are entitled under dissenting shareholders' rights.³⁴

Exhibit 14–6.

Amended Certificate of Authority (Model Act)

STATE OF _____
 OFFICE OF THE SECRETARY OF STATE
AMENDED CERTIFICATE OF AUTHORITY
 OF

The undersigned, as Secretary of State of the State of _____ hereby certifies that duplicate originals of an Application of _____ for an Amended Certificate of Authority to transact business in this State, duly signed and verified pursuant to the provisions of the _____ Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in him by law, hereby issues this Amended Certificate of Authority to _____ to transact business in this State under the name of _____ and attaches hereto a duplicate original of the Application for such Amended Certificate.

Dated _____, 20____ .

 Secretary of State

Many states require that the foreign corporation must file with the secretary of state a document that promises to perform these acts. However, if the surviving foreign corporation has been authorized to do business within the state, the terms of the corporation's authority theoretically include each of these items, and no further filing should be required; the Model Business Corporation Act now makes these consequences automatic.

Finally, a foreign corporation can enter into a **share exchange** with another corporation, either domestic or foreign. A share exchange is a transaction in which one corporation exchanges its shares for all or part of the shares of the other corporation. If the foreign corporation is the acquiring corporation in a share exchange, the procedure is exactly the same as if the foreign corporation were the surviving corporation in a merger.

WITHDRAWAL OF AUTHORITY

The management of a qualified foreign corporation may decide to discontinue business operations within the host state. However, this does not mean that they may simply pull up their tent and steal away. State regulation of foreign corporations is designed to require payment of fees and taxes and to ensure the availability of the foreign corporation for litigation commenced against it in the state. Consequently, the withdrawal of a foreign corporation is a formal procedure. The foreign corporation must file an application for withdrawal (see Exhibit 14–7, Application for Certificate of Withdrawal), which, under the Model Business Corporation Act, states that the corporation surrenders its authority to transact business in the state. It must further specifically revoke the authority of its registered agent to accept service of process, and consent to service of process on the secretary of state for any proceeding based upon a cause of action arising during the time the corporation was operating within the state. The withdrawal application also includes a post office address to which the state officials may mail a copy of any process received for the corporation.³⁵ Many states require additional information necessary to enable the secretary of state to assess any unpaid fees or franchise taxes.

Exhibit 14-7.

Application for Certificate of Withdrawal (Massachusetts)

MSC-4 FEDERAL IDENTIFICATION
NO. _____
Fee: \$100.00

The Commonwealth of Massachusetts
William Francis Galvin
Secretary of the Commonwealth
One Ashburton Place, Boston, Massachusetts 02108-1512

CERTIFICATE OF WITHDRAWAL
(General Laws, Chapter 181, Section 16)

Examiner _____

We, _____, *President / *Vice President,
and _____, *Clerk / *Assistant Clerk or *Secretary / *Asst. Secretary,
of _____,
(Exact name of corporation)
located at _____,
(Street address of corporation)
in compliance with the provisions of General Laws, Chapter 181, Section 16, certify as follows:

1. The corporation was organized under the laws of the state of:
2. The date of organization of the corporation is:
3. The date on which the corporation's fiscal year ends is:
4. The name and residential address of each director and officer of the corporation is as follows:

	NAME	RESIDENTIAL ADDRESS
President:		
Treasurer:		
Clerk or Secretary:		
Directors:		

P.C. _____ *Delete the inapplicable words.

181cwh 4/5/00

(continued)

State statutes governing withdrawal of foreign corporations are as varied as those pertaining to admission. Most statutes are directed toward full financial disclosure and amenability to service of process, and generally require that the foreign corporation tidy up its affairs before leaving the state. The statute may require that the corporation commit to notify the Secretary of State of any future address changes³⁶ or to provide the names and residence addresses of its corporate officers and directors.³⁷ In all cases, taxes and fees must be paid as a condition to the approval of withdrawal.

Upon the filing of the application and the satisfaction of all statutory conditions, the appropriate state official will issue a certificate of withdrawal (see Exhibit 14-8, Certificate of Withdrawal on page 515).

5. The corporation is no longer doing business in the Commonwealth of Massachusetts.

6. Attached to this certificate shall be a certificate from the Commissioner of Revenue that all taxes due and payable by the corporation to the Commonwealth have been paid or provided for.

SIGNED UNDER THE PENALTIES OF PERJURY, this _____ day of _____, 20 _____,

_____, *President / *Vice President,

_____, *Clerk / *Assistant Clerk or *Secretary / * Asst. Secretary.

**Delete the inapplicable words.*

Exhibit 14-7.

(continued)

(continued)

REVOCATION OF CERTIFICATE OF AUTHORITY

A foreign corporation's authority to do business within a state may cease by the revocation of authority by the host state. Generally, the certificate may be revoked whenever the foreign corporation has failed to comply with the law. For example, the corporation may have failed to file annual reports, or may have failed to pay fees, franchise taxes, or penalties. Other grounds for revocation include the corporation's failure to appoint and maintain a registered agent; failure to notify the state of a change in the agent or office; failure to file amendments to its articles of incorporation or articles of merger within the time prescribed; or misrepresentation in the material matter in any application, report, affidavit, or other document filed with the state. In addition to these grounds, some states add abusing or exceeding the corporation's authority; violating a state law; using an unauthorized name; or

Exhibit 14-7.

(continued)

THE COMMONWEALTH OF MASSACHUSETTS

CERTIFICATE OF WITHDRAWAL
(General Laws, Chapter 181, Section 16)

I hereby approve the within Certificate of Withdrawal and, the filing fee in the amount of \$ _____ having been paid, said application is deemed to have been filed with me this _____ day of _____, 20 ____.

WILLIAM FRANCIS GALVIN

Secretary of the Commonwealth

TO BE FILLED IN BY CORPORATION

Photocopy of document to be sent to:

Telephone: _____

STATE OF _____
 OFFICE OF THE SECRETARY OF STATE
CERTIFICATE OF WITHDRAWAL
 OF

The undersigned, as Secretary of State of the State of _____, hereby certifies that duplicate originals of an Application of _____ for a Certificate of Withdrawal from this State, duly signed and verified pursuant to the provisions of the _____ Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY the undersigned, as such Secretary of State, and by virtue of the authority vested in him by law, hereby issues this Certificate of Withdrawal to _____, and attaches hereto a duplicate original of the Application for such Certificate.

Dated _____, 20____.

 Secretary of State

Exhibit 14–8.

Certificate of Withdrawal

STATE OF _____
 OFFICE OF THE SECRETARY OF STATE
CERTIFICATE OF REVOCATION OF
CERTIFICATE OF AUTHORITY
 OF

The undersigned, as Secretary of State of the State of _____, and by virtue of the authority vested in him by Section 122 of the _____ Business Corporation Act, hereby revokes the Certificate of Authority of _____ to transact business in this State, for the following reasons: _____

Dated _____, 20____.

 Secretary of State

Exhibit 14–9.

Certificate of Revocation of Certificate of Authority

acting in a manner detrimental to the citizens of the state. The District of Columbia and Illinois have a revocation provision that looks like default: if the corporation does not conduct business or own tangible property within the state for a specified period, its certificate of authority may be revoked.

Most state statutes require notice to the corporation before the revocation of a certificate of authority. The Model Business Corporation Act directs the secretary of state to give the corporation sixty days' notice by mail addressed to the corporation's registered office in the state; if the corporation corrects the specified problem within the notice period, the certificate of authority may not be revoked. However, following the sixty-day period, if nothing has been done, the secretary of state may issue a certificate of revocation.³⁸ The minimum notice period among the individual state statutes is thirty days,³⁹ and the maximum is ninety days.⁴⁰ Many states permit the remedy of the defect during the intermediate period.

When the certificate of revocation of authority is issued (see Exhibit 14–9, Certificate of Revocation of Certificate of Authority), the corporation's authority to transact business in the state ceases.

KEY TERMS

transacting business
service of process
substantial contacts

franchise tax
annual report

corporate structural changes
share exchange

WEB RESOURCES

General information concerning formation and operation of foreign corporations in the various jurisdictions is available on every state Secretary of State's (or Department of Commerce) Web site. Most of the sites offer forms that are required for filing to apply for certificates of authority to do business and to maintain the accuracy of the corporate records in the foreign state. The National Association of Secretaries of State maintains links directly to the offices of the Secretaries of State in all states. These can be accessed through

<<http://www.nass.org>>

Access to state corporate laws for the specific requirements of applying for foreign authority to do business may be obtained through the Legal Information Institute maintained at the Cornell Law School:

<<http://www.law.cornell.edu>>

The specific sections of a state's corporate law applicable to foreign corporations may be located by a search site that directly ties to the corporate laws of the state. This search may be accessed at

<<http://www.megalaw.com>>

Several companies act as registered agents in foreign jurisdictions when the foreign corporation does not maintain an active presence in the foreign jurisdiction. These services charge a fee, but also assist the corporate personnel and their counsel in any unique requirements of the local law that may be applicable to the foreign corporation. They include

<<http://www.corporate.com>>

<<http://www.inc-it-now.com>>

<<http://www.mycorporation.com>>

<<http://www.delaware-agents.com>>

<<http://www.nrai.com>>

<<http://www.superiorregisteredagents.com>>



CASES

STATE OF MISSOURI v. MURRAY'S

767 S.W.2d 127 (Mo. App. 1989)

KAROHL, JUDGE

The issue on appeal is whether defendant Murray's business activities were business transactions within Missouri so as to subject Murray's to the registration requirements of § 351.570.1 RSMo 1986. Murray's, a California corporation, appeals a \$20,000 fine for failure to comply with §§ 351.570 and 351.635 RSM. 1986. The trial court entered judgment after finding Murray's transacted intrastate business in the State of Missouri without procuring a certificate of authority on registering with the state in violation of § 351.570.1 RSM. 1986. On appeal, Murray's contends it

only engaged in interstate commerce, not intrastate commerce. The statute does not apply to interstate transactions. We find the evidence of Murray's business activities did not support a finding of intrastate transactions within Missouri so as to subject Murray's to the registration requirements of § 351.570 RSMo 1986. We reverse.

* * *

Chapter 351 provides in pertinent part: "No foreign corporation shall have the right to transact business in this state . . . until it shall have procured a certificate of authority so to do from the secretary of state." § 351.570.1 RSMo 1986. Failure to procure a certificate may result in a fine as provided in § 351.635 RSMo 1986. Transacting any business in interstate commerce by a foreign corporation is not considered to be transaction of business in this state. § 351.570.2(9) RSMo 1986.

The record discloses proof of the following facts. Murray's concedes it is a California corporation incorporated on September 30, 1977, with its principal place of business in Los Angeles, California. Murray's business includes

brokering tickets for major sporting events. It solicits ticket purchasers and buyers by nationwide advertising. Customers purchase tickets by telephone and pay for them by supplying charge card numbers with their order. Murray's accepts orders and payment from its offices in California. Murray's delivers the tickets to purchasers at the site of the event.

In October of 1987, Murray's placed an advertisement in the St. Louis Post Dispatch soliciting potential buyers and sellers of World Series tickets. The advertisement listed two phone numbers which were located in California. The third number listed in the advertisement was a St. Louis number followed by the word "buying." Ticket orders were placed with Murray's office in California via the California phone numbers.

Tickets were distributed to customers in St. Louis, which was the site of several games of Major League Baseball's 1987 World Series. Murray's leased an apartment for one month and opened a checking account in St. Louis. While in St. Louis Murray's sold two tickets to Ms. McNamara, the leasing consultant of the apartment complex, and bought two tickets from a St. Louis city policeman. Except for proof of these two transactions, Murray's business in St. Louis consisted of distributing tickets to customers, the majority of whom were from outside Missouri and had purchased and paid for tickets by long distance telephone to California.

The trial court found that Murray's was a foreign corporation transacting business in Missouri without being registered to do business in the State of Missouri. It found Murray's to be in violation of § 351.570.1 RSMo 1986 and ordered Murray's to pay a \$20,000 civil fine and costs pursuant to § 351.635 RSMo 1986.

Murray's claim of error is that the court erred in finding Murray's violated § 351.570 RSMo 1986 because the business conducted by Murray's was the transaction of business in interstate commerce which does not subject Murray's, a foreign corporation, to the registration requirements of § 351.570.1 RSMo 1986. We agree.

* * *

There is no definitive definition of what constitutes "doing business" within Missouri so as to subject a foreign corporation to the registration requirements of § 351.570 RSMo 1986. A finding of what constitutes "doing business" in the state is to be determined on the facts in each individual case. *Filmakers Releasing Organization*, 374 S.W.2d at 540. Thus, the cases interpreting § 351.570.1 establish no clear pattern of what business activities establish "transacting business" in Missouri so as to require registration of a foreign corporation. *American Trailers, Inc. v. Curry*, 480 F.Supp. 663, 665 (E.D.Mo.1979), *rev'd on other grounds*, 621 F.2d 918 (8th Cir.1980). "It is well-settled [however] that, in determining whether a particular movement of freight is interstate or intrastate . . . , the intention

existing at the time the movement starts governs and fixes the character of the shipment. . . ." [citations omitted].

The importation into one state from another is the indispensable element of interstate commerce. *Filmakers Releasing Organization*, 374 S.W.2d at 540. The usual dispute involving sale transactions develops when some part of an interstate sale occurs in the state. Where purchase, payment and delivery are done in Missouri the transactions are intrastate. Where all three elements are done outside the state, i.e., purchase and payment by telephone and delivery by mail, the transactions are purely interstate. With two exceptions the evidence supported only a finding all transactions involving Murray's were interstate sales with delivery intrastate. In such case the test is whether there exists: "continued dealing by the foreign corporation with the property after interstate commerce had wholly ceased, and whether that continued dealing [if any] was an isolated transaction or a continuing form of the business of the foreign corporation." *Western Outdoor Advertising Co. of Nebraska v. Berbiglia, Inc.*, 263 S.W.2d 205, 209 (Mo.App.1953).

Here, Murray's did not continue to deal with the tickets after the tickets were distributed to the purchasers in Missouri. The distribution of World Series tickets in Missouri was the final step in an interstate transaction where the first two steps in the sale of these tickets, ordering and payment, were made by telephone with Murray's in California. Because Murray's did not continue to deal with the tickets after interstate commerce had wholly ceased, Murray's did not change the character of the transaction from interstate commerce to intrastate commerce. Therefore, in completing the interstate sales Murray's was not transacting business within Missouri so as to subject it to the registration requirements of § 351.570 RSMo 1986. An apartment was rented for one month only to complete the interstate sales. There is no evidence to support a finding of how long Murray's occupied the apartment. These sales were the only business activities of Murray's, with two exceptions.

It was stipulated that Murray's engaged in two transactions which were intrastate in nature. One transaction consisted of Murray's selling two tickets to Ms. McNamara, the leasing consultant of the apartment complex, for \$40 each. The face value of these tickets was not proven. The other transaction consisted of Murray's buying two tickets for more than face value from a St. Louis city police officer. Neither of these two intrastate transactions, nor the combination thereof, were sufficient to subject Murray's, a foreign corporation, to the registration requirements of § 351.570.1 RSMo 1986 because they were isolated transactions.

Section 351.570.2(10) RSMo 1986 specifically provides that a foreign corporation shall not be required to register as provided in § 351.570.1 RSMo 1986 where the foreign corporation's business transaction consists of: "Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of

repeated transactions of like nature.” (Our emphasis). § 351.570.2(10) RSMo 1986.

In the instant case, the sale of two tickets for \$40 each to Ms. McNamara was a “favored” sale to the leasing consultant. The evidence is insufficient to support a finding and the trial court did not find this to be a business transaction in the sense of a sale for economic gain or for profit. A sale of two tickets without profit was not a substantial part of Murray’s ordinary business.

The purchase of tickets for above face value was a part of Murray’s ordinary course of business. However, the purchase of two tickets above face value from the St. Louis city police officer was an isolated transaction. There is no evidence that Murray’s purchased other tickets while in Missouri. This single transaction does not constitute a substantial part of Murray’s ordinary business. *See Filmmakers Releasing Organization, 374 S.W.2d at 540.* Murray’s purchases a large number of tickets in its business. The purchase of the two tickets did not result in a profit sufficient to constitute a substantial part of Murray’s ordinary business. Because Murray’s did not transact a substantial part of its ordinary business in this state, the isolated purchase was insufficient to require registration.

The evidence would support a finding that Murray’s performed one intrastate business transaction. It purchased two tickets above face value from a police officer. This was an isolated intrastate transaction because: (1) it was completed in a matter of minutes, not beyond the thirty day limit for such transactions in § 351.570.1 RSMo 1986; and, (2) it was not shown by evidence to be a purchase “in the course of a number of repeated transactions of like nature” as specified in § 351.570.2(10) RSMo 1986. Neither the interstate transactions nor the sale as a favor to the rental agent were intrastate business “transactions of like nature.” There was no evidence of any previous or subsequent transactions by Murray’s as intrastate transactions.

Accordingly, the court erred in applying the facts to § 351.570 RSMo 1986 and imposing a fine for failure of a foreign corporation to register in Missouri. On the facts, considered in a light most favorable to plaintiff state, the court erred as matter of law in applying the facts to the provisions of § 351.570 RSMo 1986. Murray’s was not required to register as a foreign corporation to deliver tickets which were purchased interstate in Missouri. The single sale and the single isolated business purchase of tickets were insufficient to subject Murray’s to the provisions of fine for violation.

We reverse.

SOUTH CAROLINA EQUIPMENT, INC. v. SHEEDY

353 N.W.2d 63 (Wis. App. 1984)

MOSER, JUDGE

[South Carolina Equipment, Inc. (“South Carolina”) held a promissory note and a mortgage on some property owned by Ralph and June Jeka (“Jekas”). When Jekas defaulted on the mortgage, South Carolina commenced a foreclosure action in 1982. South Carolina had not previously qualified to do business in Wisconsin as a foreign corporation, but during the pendency of the action in 1983, South Carolina qualified and received a certificate of authority in September 1983.]

* * *

The trial court found that a foreign corporation must have standing to sue at the commencement of its suit, and that tardy filing of a certificate was not sufficient to give the trial court jurisdiction. The trial court therefore dismissed the complaint. It reasoned that since it had no jurisdiction over the subject matter of the original complaint then the “progeny” of cross complaints also should be dismissed. An order dismissing the complaints with the trial court’s memorandum decision attached was entered. It is from that order that all parties appeal.

The issues on appeal are whether the trial court was correct in dismissing the complaint of South Carolina on jurisdictional grounds and whether after doing so it was correct in dismissing the cross complaints.

We must quickly lay to rest the jurisdiction error of the trial court. Our supreme court has previously held that the legislative purpose of sec. 180.847(1), Stats., was to facilitate the collection of Wisconsin foreign corporation registration fees, and that it had no function with respect to the jurisdiction of Wisconsin courts over foreign corporations.

The next logical question is how does one interpret the full meaning of the proscription that an unregistered foreign corporation cannot sue or defend suit until it has obtained registration. Commentators and the vast majority of courts have held that when an unregistered foreign corporation commences or defends a suit, and during the course of that suit complies with the registration law, that act is sufficient to allow it to maintain a court action or a defense. The courts that have made such findings have done so under controlling statutes, similar to Wisconsin’s, that say a foreign corporation cannot maintain a suit until registered and certified.

Also, sec. 180.847, Stats., is substantially similar to sec. 124 of the Model Business Corporation Act. There is some difference of opinion in the jurisdictions following the Model Act provision as to when a corporation “maintains”

an action. However, “[t]he trend of authority supports the proposition that the word ‘maintain’ merely means a continuation of a proceeding already begun and that a foreign corporation may qualify by obtaining a certificate of authority even after instituting an action.”

We agree with the vast majority of courts’ holdings in this field of law because our supreme court held in *Nagle Motors v. Volkswagen North Central Distributors, Inc.*, that this proscription is not jurisdictional and because the language of the statute specifically states:

Nor shall a civil action or special proceeding be *maintained* in any court of this state by any foreign corporation or a successor, assignee or grantee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state *at a time when such corporation was without such certificate of authority until a certificate of authority has been obtained by such corporation or, in the case of a successor, assignee or grantee of such corporation, until all fees which were payable by such corporation under this chapter not exceeding the maximum sum of \$300 have been paid.* [Emphasis added.]

It is obvious from this clear and unambiguous language that once the Wisconsin certification fees are paid and the foreign corporation is registered, the impediments to sue and defend suits are immediately removed.

* * *

The trial court reasoned that regardless of South Carolina’s certificate/registration impediment the validity of its mortgage contract was not impaired. What Lowe and Kaminski really sought in the trial court, and what they would have this court do, is to totally reject South Carolina’s priority position because it was a non-certificate-holding foreign corporation. Neither court can accommodate Lowe and Kaminski.

Regardless of whether the trial court was incorrect in dismissing the various cross complaints, the court’s priority listing, at least as far as placing South Carolina in a secondary position behind the Girard Bank claim and before the Lowe and Kaminski claims, was correct. An unregistered foreign corporation’s inability to prosecute or defend court claims because of nonregistration does not impair the validity of its contracts or of its title to or interest in the property in this state. The legislature’s adoption of sec. 180.847(2), Stats., by its clear and unequivocal language, voided all prior Wisconsin case law holding that all contracts of unregistered/uncertified foreign corporations were invalid. The contracts of and the interest in property of these types of corporations are now valid by statute. The determination of South Carolina’s secondary priority claim position by its recorded mortgage is affirmed.

PROBLEMS

1. What is the difference between a foreign corporation and a domestic corporation?
2. A corporation doing business in a state other than that in which it is incorporated is subjected to
 - a. service of process in the state in which it is doing business;
 - b. taxation in the state in which it is doing business;
 - c. qualification requirements of the state in which it is doing business; or
 - d. all of the above.
3. The name of a corporation that wants to do business in another state may be
 - a. reserved;
 - b. registered;
 - c. certificated;
 - d. a and b but not c;
 - e. b and c but not a; or
 - f. a and c but not b.
4. Which of the following are *not* considered “transacting business within the state” under the Model Act?
 - a. Operating a factory.
 - b. Receiving orders for processing out of state.
 - c. Holding meetings of directors and shareholders.
 - d. Acting as an agent, contractor, or surety.
 - e. Making loans secured by real estate.
5. State the typical sanction imposed upon a foreign corporation that has failed to qualify to do business in a foreign state.
6. What is the procedure required for a foreign corporation to stop doing business within a foreign state?
7. ABC Corporation is planning to do business in Montana only. Give three reasons why the incorporators should incorporate ABC Corporation in Montana rather than in Delaware.
8. Who signs an application for certificate of authority to do business?
9. Which of the following are responsible for deciding that a corporation will do business in a foreign state?
 - a. Officers.
 - b. Directors.
 - c. Shareholders.
 - d. Incorporators.

PRACTICE ASSIGNMENTS

1. Agri-Services, Inc., is a foreign corporation engaged in the purchase and sale of hay, feed yard chemicals, conditioners, and preservatives. Agri-Service is opening an office and storage facility in your city. It will invest \$100,000 in this local operation, and it will employ seven persons in its office and warehouse. Agri-Services has 29,000 shares of common stock, \$.01 par value, issued and outstanding, and its principal place of business is 2309 South Elati Street, Metropolis, New State. Mary Naugle is the president and George Foreman is the secretary of the corporation. You will be the registered agent for Agri-Services in your state. Prepare all documents required for qualification under your local corporation code, inserting any assumed facts necessary to complete the forms.
2. Review your local corporation code and prepare a memorandum on the following issues:
 - a. What are the penalties for a corporation conducting business without qualifying?
 - b. What types of transactions do not constitute “doing business” for purposes of qualification?
 - c. Under what circumstances must a corporation amend its qualification documents?
 - d. What names are permitted to be used by a foreign corporation in your state?
3. Find a local business that is a foreign corporation and find out the state of its incorporation. Describe the reasons you believe the corporation was formed in the state of its domestication instead of being formed in your state.
4. Describe three reasons why you would incorporate a business in Delaware, even though its primary business activity is in your state.

ENDNOTES

1. “Selection of Jurisdiction” in Chapter 8.
2. See, e.g., Kan. Stat. Ann. § 17-7648.
3. See, e.g., W. Va. Code § 47-9-49.
4. See “Formation and Operation of a General Partnership” in Chapter 3.
5. See the sample resolution for organizational meetings of the board of directors in “Business Conducted at Organizational Meetings” in Chapter 10.
6. See Model Business Corporation Act (hereafter M.B.C.A.) § 15.01.
7. Del. Code Ann. tit. 8, § 373(a).
8. M.B.C.A. § 15.02.
9. Ala. Bus. Corp. Act § 10-2B-15.02.
10. See the schedule of penalties for doing business without qualifying, 1 Prentice-Hall, Corporations § 7103.
11. E.g., Delaware, Del. Code Ann. tit. 8, § 384; New York, N.Y. Bus. Corp. Law § 1303 (McKinney).
12. E.g., West Virginia, W. Va. Bus. Corp. Act § 31D-15-1503.
13. E.g., Nebraska, Neb. Rev. Stat. § 21-20.170.
14. 15 Pa. Stat. Ann. § 4124.
15. Oklahoma, Okla. Stat. Ann. tit. 18, § 1130 (West).
16. Virginia, Va. Code Ann. § 13.1-759 (Michie).
17. E.g., Wisconsin, Wis. Stat. Ann. § 180.1503 (West)(paid-in capital).
18. Compare M.B.C.A. §§ 4.01 and 15.06.
19. M.B.C.A. § 15.06.
20. See “Selection and Reservation or Corporate Name” in Chapter 8.
21. See M.B.C.A. § 4.03; and forms for registration and transfer of a corporate name in Chapter 8.
22. See M.B.C.A. §§ 15.07, 15.08.
23. M.B.C.A. § 15.10.
24. See M.B.C.A. § 15.05.
25. M.B.C.A. § 16.21.
26. E.g., Arizona, Ariz. Rev. Stat. Ann. § 10-1504(A).
27. E.g., Indiana, Ind. Code Ann. § 23-1-49-4 (Burns).
28. M.B.C.A. § 15.04.
29. See “Application for Certificate of Authority” and “Certificate of Authority” earlier in this chapter; M.B.C.A. § 15.04.
30. M.B.C.A. § 15.06.
31. See “Merger, Consolidation, and Exchange” in Chapter 15.
32. See M.B.C.A. § 11.06.
33. M.B.C.A. § 11.06.
34. M.B.C.A. § 11.07(d).
35. M.B.C.A. § 15.20.
36. E.g., Connecticut, Conn. Bus. Corp. Act § 33-932.
37. E.g., Massachusetts, Mass. Corp. Code Ch. 181 § 17.
38. M.B.C.A. § 15.31.
39. E.g., District of Columbia, D.C. Bus. Corp. Act § 29-101.115.
40. New Jersey, N.J. Stat. Ann. § 14A:13-10 (West).