

CORPORATE MATTERS: ARE YOU DOING BUSINESS IN NEW YORK?

Author

Simon H. Prisk

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Foreign Corporation

New York

Due to the nature of our practice, many clients contemplating a transaction in the United States contact us very early in the process. Despite the fact that the final structure of a transaction may not be in place, we are often asked to form an entity that will eventually be used in the transaction. The entity is formed for a variety of reasons, including opening bank accounts, immigration issues, and asset transfers.

For reasons stated in an earlier article,¹ we typically recommend Delaware as the state in which to incorporate. Although there are times when we recommend New York, such as when an entity is being formed solely to hold real estate located in New York, Delaware is usually the jurisdiction of choice.

Recently, clients with entities formed in Delaware or another state other than New York that carry on operations from a base outside New York have asked if they should seek authority to transact business in New York. Typically, the client is concerned that operations in New York exist and is looking for a definitive answer as to the obligation to register. A fear that often inhibits a company from pursuing registration is the expectation that registration brings with it New York State and New York City tax obligations.

The answer to these questions is not as clear cut as one might think. Section 1301 of the New York Business Corporation Law (the “Act”)² states that:

A foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article. A foreign corporation may be authorized to do in this state any business which may be done lawfully in this state by a domestic corporation, to the extent that it is authorized to do such business in the jurisdiction of its incorporation, but no other business.

Determining what constitutes doing business in New York would be a lot easier with some guidance from the statute. The statute does not set out what constitutes doing business in New York. However, it gives some guidance by listing some activities that do not constitute doing business in New York. The Act states that a foreign corporation will not be considered to be doing business in this state, by reason of carrying out any of the following activities:

- Maintaining or defending any action or proceedings;
- Holding meetings of its directors or shareholders;

¹ *Insights*, Vol. 1 No. 8, “[Corporate Matters: Delaware or New York L.L.C.?](#)”

² N.Y. Bus. Corp. Law §1301(a).

- Maintaining bank accounts; or
- Maintaining offices or agencies only for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

The above list is not exclusive, and other activities may not rise to the level of doing business within New York. So, the Act is helpful only to a point, and most of the law surrounding the issue of whether an entity is doing business in New York is found in case law. As with all matters resolved through litigation, each case is determined according to its particular facts.

In reaching the conclusion that an entity is or is not conducting business in New York, the amount and regularity of activity is a significant factor.³ A corporation will be required to apply for authority to transact business in New York where its New York transactions evidence a continuous and regular conduct of business.⁴ The courts have held that isolated and occasional transactions will not be enough to require compliance with the Act. The fact that a corporation has made one or two contracts in New York will usually not constitute doing business.

Another important factor used in making the determination is the relationship of the activity to the regular business of the entity. If the activity being conducted in New York is essential to the entity's out-of-state business, it is likely that the entity will need to comply with the statute. If, on the other hand, the activity is merely tangential to its out of state business, it is less likely that the entity will be considered to be doing business in New York.

A review of the case annotations to the relevant section of the Act reveals some circumstances where the courts have determined that entities are not doing business in New York:

- Maintaining an office in New York;⁵
- Maintaining a bank account;⁶
- Letterhead with the address of a New York office;⁷ and
- Maintenance of action in a New York court.⁸

The above decisions have considered the actions mentioned in isolation. In other words, only one activity was carried on and the court was asked to look at that activity in isolation. The results obviously would be different if an activity is part of a broader association within New York State.

³ 44 Fordham Law Review 1042 (1976).

⁴ *International Fuel & Iron Corp. v Donner Steel Co.*, 242 N.Y. 224, 230, 151 N.E. 214, 215-16 (1926).

⁵ *Id.*

⁶ *Star Poultry Co. v Spinelli*, 156 N.Y.L.J. at col. 3 (Sup Ct. Nov. 23, 1966).

⁷ *Lebanon Mill Co. v Kuhn*, 145 Misc. 918 N.Y.S. 172,176 (N.Y. City Mun. Ct. 1932).

⁸ *De Ran Landscaping Service, Inc. v De Ran Industries, Inc.* (1985, 3d Dept) 109 A.D. 2d 1040, 487 N.Y.S. 2d 160.

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Failure to obtain authority to conduct business in New York leaves the entity without access to the courts. Section 1312 of the Act states:

A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation.⁹

The failure to obtain authority to do business in New York does not impair the validity of any contract entered into by the foreign entity or the right of any other party to the contract to maintain legal action based thereon.¹⁰

As can be seen from the above, there is no one guideline to be used when determining whether an entity is doing business in New York. It is likely that this vagueness will continue, and clients should be prepared to detail their activities in New York and, in conjunction with their lawyers, make the decision whether to apply for authority based on the individual circumstances. For more information, the General Counsel's Office of the New York State Department of State provides a memorandum on the.¹¹



⁹ N.Y. Bus. Corp. Law §1312(a).

¹⁰ *Id.*, (b).

¹¹ "'Doing Business' In New York: An Introduction to Qualification General Guidelines." New York Department of State, February 2000.