

## **What Constitutes "DOING BUSINESS" in Utah?**

The Commerce Clause of the U.S. Constitution prohibits the states from regulating interstate commerce. On the other hand, if a business is engaged in transactions that have an intrastate character, such that the entity is “doing business” in a state, that state has the power to require the business to obtain permission before conducting activities inside its boundaries.<sup>i</sup> Business entities must engage in at least a minimum level of activity prior to being subject to having to register their businesses with the state. For example, Utah cannot obligate a foreign corporation that holds one meeting in the state to register its business with the Division of Corporations and Commercial Code (“Division”). If such a demanding requirement were applied to all businesses, virtually all interstate commerce would come to a halt.

The minimum standard is set such that the State has the authority to impose requirements on those “doing business” in Utah. The guidelines available for adjudging whether an entity is “doing business” cannot be applied uniformly to the statutes having to do with service of process,<sup>ii</sup> business registration,<sup>iii</sup> and taxation.<sup>iv</sup> A greater level of business activity is required for purposes of business registration than for service of process, and for taxation than for business registration.<sup>v</sup> Additionally, a greater level of activity is required for the purpose of requiring the registration of a foreign partnership than a foreign corporation.<sup>vi</sup>

The Division is specifically concerned with determining what activities constitute “doing business” with respects to whether state registration and authority are required before a business entity is allowed to conduct business in Utah. There is no clear standard of what constitutes “doing” or “transacting” business in Utah. Consequently, as the Utah Supreme Court stated in *Marchant v. National Reserve Co. of America*, with reference to *International Harvester Co. v. Kentucky*, “each case must be decided on its own facts.”<sup>vii</sup> In *Marchant* the issue to be decided was whether the unregistered foreign corporation’s actions in Utah constituted “doing business,” such that it would be barred from taking title to the stocks it had been assigned. The Court held that the making of four deeds in four years did not constitute “doing business,” and the corporation had the right to take title to the stocks.

Utah Statute and case law provides limited clarification of the broad definition available: any transaction within the state that is a substantial part of a party's ordinary business, and is continuous, in that it involves more than merely casual or isolated transactions.<sup>viii</sup> The Utah courts concur that a company is in fact “doing business” and is subject to statutory registration requirements when, as stated in *Marchant*, the activity is *continuous* and there is “some *permanence* about the presence and...business transactions of the corporation within the state.”<sup>ix</sup>

In order to determine whether an entity’s activities constitute “doing business,” they must be considered in light of the totality of activities the entity is engaged in, not just as single or separate acts. Even though individual transactions may not constitute “doing business,” the combination of the activities may yet qualify, as held in *Durham-Bush, Inc. v. Bill Hartmann Plumbing & Heating, Inc.* In that case, Plaintiff was participating in various activities in Utah. The Court held that its transactions were not to be examined individually, but as part of the company’s total involvement with the State to ascertain whether the company was “doing business.”<sup>x</sup>

In *East Coast Discount Corporation v. Reynolds*, the defendant entered into contracts with several Utah dealers, promising to perform certain tasks. The Court held that even though the acts to be performed, when

examined separately, did not amount to “doing business,” it did not necessarily mean that the entity was not “doing business.” An act needs to be examined with respects to the other acts performed or to be performed. The opinion reads, “[E]ntering into a series of contracts within the state which require certain local acts to be performed in the state, which acts are not merely incidental to the interstate character of the transaction but are separate and distinct therefrom would constitute doing business within the state.”<sup>xi</sup> In this case, the Court found that the acts were merely incidental to the interstate nature of the contracts, such that the contracts made by the foreign corporation were not considered void.

The Utah Code Annotated enumerates transactions that, when taken by themselves, do not constitute “doing business” for purposes of business registration. The following is a list of activities by nonprofit corporations that fall into this category:

1. participating in litigation;
2. conducting internal affairs;
3. keeping bank accounts;
4. creating, securing or collecting on its own debt; and
5. performing an isolated transaction.<sup>xii</sup>

The following activities *do not* constitute “doing business” for profit corporations, and limited partnerships:

1. participating in litigation;
2. conducting internal affairs;
3. keeping banks accounts;
4. having offices for the transfer and management of corporate securities;
5. effectuating sales through independent contractors;
6. procuring orders which require acceptance outside of Utah;
7. creating, securing or collecting on its own debt;
8. owning property;
9. being involved in interstate commerce;
10. performing an isolated transaction; and
11. obtaining conditional sales contracts or debts, either in or outside of Utah, secured by property in Utah.<sup>xiii</sup>

Further explanation of some of the provisions is warranted:

“Participating in litigation” has to do with being a part of any legal action, including investigative suits and arbitration.

“Conducting internal affairs” includes holding meetings; and having officers in the State making business decisions, as long as their presence and activities are not considered regular.

“Effectuating sales through independent contractors” is a type of exempted activity only so long as the corporation’s controls over the contractors is not too involved, such that the corporation would be considered the actual operator of the intrastate commerce.

“Being involved in interstate commerce” has to do with acquiring orders that require out-of-state approval before they can become valid agreements. It also involves specified transactions: selling goods in the State, if they are shipped to buyers involved interstate commerce; carrying out acts

incidental to interstate commerce; being involved in solicitation, if the ensuing contracts are not made within the State; and buying goods to be shipped in interstate commerce.

“Performing an isolated transaction” includes doing an act that is completed within 30 days that is not simply one of multiple transactions of a similar nature.<sup>xiv</sup>

In conclusion, as the standards for "doing business" are vague and often confusing, each case must be examined based on its own merits and circumstances. The Division recommends registration of a business if the exemption is not reasonably clear and identifiable.

*Note: The information provided is to be used solely as a guide. It does not serve as a substitute for the advice of an attorney.*

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<sup>i.</sup> See 18A AM. JUR. 2D *Corporations* §160 (1985).

<sup>ii.</sup> See UTAH CODE ANN. §§ 16-6-88 (1985), 16-10a-1511(2)-(4) (1999), 42-2-11(1)(a) (1992), 48-2a-104(1) (1991), 48-2b-148 (1991).

<sup>iii.</sup> See UTAH CODE ANN. §§ 16-6-79 (1984), 16-10a-1501 (1996), 42-2-11(1)(b) (1992), 48-2a-902, -907 (1991), 48-2b-144(1), -146(1) (1992).

<sup>iv.</sup> See UTAH CODE ANN. §§ 48-2b-158 (1994), 59-7-104(1) (1993), 59-7-506 (1993), 59-7-535 (1993), 59-7-536(1)(a) (1993).

<sup>v.</sup> See *Dunham-Bush, Inc. v. Bill Hartmann Plumb. & H., Inc.* 515 P.2d. 92 (Utah 1973), 36 AM. JUR. 2D *Foreign Corporations* § 324 (1968).

<sup>vi.</sup> See 59A AM. JUR. 2D *Partnership* § 705 (1987).

<sup>vii.</sup> *Marchant v. National Reserve Co. of America*, 137 P.2d 331, 337 (Utah 1943).

<sup>viii.</sup> See 36 AM. JUR. 2D *Foreign Corporations* §317 (1968).

<sup>ix.</sup> *Marchant v. National Reserve Co. of America*, 137 P.2d 331, 338 (Utah 1943) (emphasis added).

<sup>x.</sup> See *Dunham-Bush, Inc. v. Bill Hartman Plumb. & H., Inc.* 515 P.2d. 92 (Utah 1973).

<sup>xi.</sup> 325 P.2d. 853, 855 (Utah 1958).

<sup>xii.</sup> See UTAH CODE ANN. § 16-6-79 (1984).

<sup>xiii.</sup> See UTAH CODE ANN. §§ 16-10a-1501(2) (1996), 48-2a-902(2) (1991).

<sup>xiii.</sup> See UTAH CODE ANN. § 16-10a-1501 (1996), *construed in* OFFICIAL COMMENTARY TO UTAH REVISED BUSINESS CORPORATION ACT § 1501(a)-(g) (1992).