

The State of Texas



Business and Public Filings Division
P.O. Box 13697
Austin, Texas 78711-3697

Phone: 512-463-5586
Fax: 512-463-5709
Dial 7-1-1 For Relay Services
www.sos.state.tx.us

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Hope Andrade
Secretary of State

January 7, 2009 **OPINION COMMITTEE**

FILE # ML-45971-09
D. # 45971

The Honorable Greg Abbott
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

RQ-0778-GA

Re: Request for opinion regarding the circumstances under which a foreign business entity is considered transacting business for the purposes of registration with the secretary of state.

Dear General Abbott,

Foreign business entities¹ that transact business in Texas have a duty to register with the secretary of state under Chapter 9 of the Texas Business Organization Code (hereinafter referred to as "the BOC").² Texas statutes do not define transacting business; however, §9.251 of the BOC sets forth 14 activities that are not considered the transaction of business in Texas.

In order to facilitate compliance, the secretary of state's office notifies foreign entities that are not registered with this office of the filing requirements of Chapter 9 of the BOC. Notice is sent when the secretary of state determines that the foreign entity has a presence in Texas—either an office location in Texas or an officer/director who resides in Texas. In answer to our notifications, entities have responded that they are not transacting business in Texas even though they maintain some presence in Texas. Therefore we are requesting that your office clarify the following issues:

1. Is a foreign business entity, which maintains no employees in Texas and performs the majority of its services outside of Texas, considered to be transacting business in Texas for purposes of registering with the secretary of state's office when its principal office or principal place of business is located in Texas?
2. Is a foreign business entity, which maintains no employees in Texas and performs most of its services outside of Texas, considered to be transacting business in Texas for purposes of registering with the secretary of state's office when one or more of its directors/officers/managers is located in Texas?
3. Is a foreign business entity that is a holding company transacting business for purposes of registering with the secretary of state when its principal place of business is located in Texas and the entity manages its subsidiaries from inside Texas?

¹ A foreign business entity is an entity such as a corporation, limited liability company, or limited partnership that is incorporated or organized under the laws of a jurisdiction other than Texas.

² The registrations requirements of the BOC are carried over from prior Texas business organization statutes, including: Tex. Bus. Corp. Act Ann. art. 8.01 (Vernon Supp. 1997); Tex. Rev. Civ. Stats. Ann. art. 1396-8.01; Tex. Rev. Civ. Stats. Ann. art. 6132a-1 § 9.01; Tex. Rev. Civ. Stats. Ann. art. 1528n § 7.01.

With respect to Question 1, the entity's designation of Texas as the location of its principal office or principal place of business is arguably an admission that: (1) the entity directs its day to day activities from an office located in Texas; (2) the entity's governing body is making day to day management decisions from Texas, or (3) the location of the entity's physical operations is in Texas. Federal courts, for purposes of diversity jurisdiction, apply three tests to determine the principal office or principal place of business of an entity: "nerve center" test; "center of corporate activity" test; or "locus of operation" test.³ If the entity designates Texas as its principal office or principal place of business because Texas is the nerve center, the center of its corporate activity or the location of its physical operations, it suggests that the entity is transacting business in Texas and should register with the Secretary under Chapter 9 of the BOC. However, entities argue that irrespective of the designation of Texas as the principal office or principal place of business, the entity is not required to register unless condition (3) is met and Texas is the location of its physical operations.

With respect to Question 2, the location of officers, directors or other governing persons in Texas raises the inference that Texas is the nerve center where business decisions are made so that the entity should register with this office even if the physical operations of the business are spread across numerous states.⁴

With respect to Question 3, it would appear that the office location of a holding company would be the nerve center for the holding company from which it directs the ownership, management, and support of its subsidiaries. Thus, if the location of the holding company is in Texas, the holding company would arguably be transacting business in Texas even when the physical operations of the subsidiaries managed by the holding company occurred outside the state.⁵

We would appreciate clarification on these issues so that we can provide better information to our customers. If you have any questions regarding this request or need further information from the records of this office, please contact Ms. Lorna Wassdorf, Director, Business & Public Filings.

Sincerely,



John Sepehri

General Counsel to Secretary of State Hope Andrade

³ *R. W. International, Inc. v. Borden Interamerica, Inc.*, 673 F.Supp. 654 (D.P.R. 1987).

⁴ *Raphael v. 18 Restaurant, Inc.*, 954 F.Supp. 549 (E.D.N.Y. 1996).

⁵ *Gulf Chem. Corp. v. Raytheon-Catalytic, Inc.*, 931 F.Supp. 955 (D.P.R. 1996).