

# THE ATTORNEY GENERAL



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July 20, 1973

Mr. William P. Sargeant  
Utah State Securities Commission  
Department of Business Regulations  
330 East Fourth South  
Salt Lake City, Utah 84111

Dear Bill:

This is in response to your inquiry by letter dated July 5, 1973, concerning whether an out-of-state corporate broker-dealer must qualify with the Secretary of State in order to do business in Utah when its business is conducted from out of state by mail or telephone.

Utah Code Ann. § 16-10-102 states: "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."

Utah Code Ann. § 78-27-23(2), dealing with the question of when Utah courts have jurisdiction over nonresident corporations, provides:

"The words 'transaction of business' within this state means activities of a nonresident person, his agents, or representatives in this state which affect persons or business within the state of Utah."

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The Utah Supreme Court in commenting on this definition stated:

"It is appreciated that the language just quoted is necessarily a broad-sounding generality; and that it must be so interpreted and applied as to conform with basic concepts of fairness and due process of law. This mandates that a foreign corporation should not be subjected to undue difficulties from lawsuits merely because its products are distributed in this State, or may be purchased and sold by others therein. On the other hand, when a foreign corporation is permitted to enjoy the advantages of having activities carried on within a state to further its business interests under the protection of its laws, it is only fair and reasonable that its citizens have some practical means of redress if grievances arise." Hill v. Zale Corporation, 25 Utah 2d 357 (1971).

The foregoing case concerned the subjecting of a foreign corporation to the jurisdiction of Utah courts. Although less activity is required to constitute "transacting business" for purposes of obtaining jurisdiction than need be present to require a foreign corporation to obtain a certificate of authority, the same criteria may be used in determining whether a foreign corporation is transacting business. In the Zale case, the court presented a number of factors to be analyzed in deciding whether a foreign corporation is transacting business within the state. These were:

1. Whether there are local offices, stores or outlets;
2. The presence of personnel, how hired, fired, and paid; the degree of control and the nature of their duties;
3. The manner of holding out to the public by way of advertising, telephone listings, catalogs, etc.;

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4. The presence of its property, real or personal, or interest therein, including inventories, bank accounts, etc.;

5. Whether the activities are sporadic or transitory as compared to continuous and systematic;

6. The extent to which the alleged facts of the asserted claim arose from activities within the state;

7. The relative hardship or convenience to the parties in being required to litigate the controversy in the state or elsewhere.

Each case must be examined factually as it arises but the definition of transacting business would seem to apply even to those broker-dealers conducting business by mail and telephone if some of the factors enumerated by the Supreme Court are present.

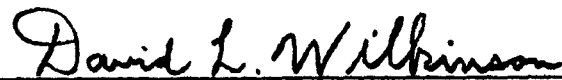
Situations may arise in which broker-dealers will need to register with the State Securities Commission as required by the Utah Uniform Securities Act, Utah Code Ann. § 61-1-30, but will not be required to obtain a certificate of authority from the secretary of state. On page 8 of the booklet Rules and Regulations for Broker-Dealers, etc., put out by your office, it states that "Out-of-state firms must file copy of certificate of authority to do business in Utah from Utah Secretary of States Office." The term "to do business" as therein used, should be given the same meaning as "transaction of business" defined above inasmuch as not all broker-dealers filing with your office will need a certificate of authority.

In regards to those broker-dealers who have been embarrassed when their customers have called the Secretary of State to determine if such dealers are in good standing and discovered no record of such a company, you might suggest to

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these broker-dealers that they go ahead and obtain a certificate of authority from the Secretary of State to avoid future embarrassment.

Very truly yours,

A handwritten signature in cursive script that reads "David L. Wilkinson". The signature is written in dark ink and is positioned above a horizontal line.

DAVID L. WILKINSON  
Chief Assistant Attorney General  
Justice Division

DLW/sh