

## ARTICLE 20

### Foreign Business Trust Administration

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#### 53-20-1. Short title.

Sections 84 through 100 [83 through 99] [53-20-1 to 53-20-17 NMSA 1978] of this act may be cited as the "Foreign Business Trust Registration Act".

#### 53-20-2. Definitions.

As used in the Foreign Business Trust Registration Act [53-20-1 to 53-20-17 NMSA 1978]:

A. "business trust" means an entity engaged in a trade or business that is created by a declaration of trust that transfers property to trustees, to be held and managed by them for the benefit of persons holding certificates representing the beneficial interest in the trust estate and assets; and

B. "foreign business trust" means a business trust formed under the laws of a state other than New Mexico.

#### 53-20-3. Certificate of authority; necessity to obtain to transact business; what constitutes not transacting business.

A. A foreign business trust shall not transact business in this state unless it first obtains a certificate of authority from the public regulation commission [secretary of state]. A foreign business trust is not entitled to obtain a certificate of authority to transact a business in this state that it is not permitted to transact in the state or country in which it was created.

B. The following activities do not constitute transacting business within the meaning of Subsection A of this section:

- (1) maintaining, defending or effecting the settlement of an action, suit or administrative or arbitration proceeding, or effecting the settlement of claims or disputes;
- (2) maintaining bank accounts;
- (3) maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositories with relation to its securities;
- (4) soliciting or procuring orders when the orders require acceptance outside of this state before becoming binding contracts;
- (5) transacting business in interstate commerce;
- (6) holding meetings of the board of trustees or holders of beneficial interest or carrying on other activities concerning internal affairs;
- (7) selling through independent contractors;
- (8) creating or procuring indebtedness, mortgages and security interests in real and personal property;

- (9) conducting an isolated transaction that is completed within a period of thirty days and not in the course of a number of repeated transactions of a similar nature;
- (10) securing or collecting debts or enforcing mortgages and security interests in property securing the debts; or
- (11) owning without more, real or personal property.

#### **53-20-4. Name of foreign business trust.**

A. The name of a foreign business trust set forth in its certificate of trust shall be distinguishable from the name shown in the records of the public regulation commission [secretary of state] of any corporation, limited partnership, limited liability company, investment trust or limited liability partnership reserved, registered, formed or organized under the laws of New Mexico or qualified to do business or registered as a foreign corporation, foreign limited partnership, foreign limited liability company, foreign investment trust or foreign limited liability partnership in New Mexico; except that a foreign business trust may register under any name that is not distinguishable from the name shown in the records of the commission [secretary of state] of a domestic or foreign corporation, limited partnership, limited liability company, investment trust or limited liability partnership reserved, registered, formed or organized under the laws of New Mexico if the foreign business trust has the written consent of the other entity to use the name and if the written consent is filed with the commission [secretary of state].

B. The name of a foreign business trust set forth in its certificate of trust may contain the name of a beneficial owner, a trustee or any other person.

C. The name of a foreign business trust set forth in its certificate of trust may contain the following words: "company", "association", "club", "foundation", "fund", "institute", "society", "union", "syndicate", "limited" or "trust" or abbreviations of similar import.

D. The exclusive right to the use of a name may be reserved by a foreign business trust in accordance with the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978].

#### **53-20-5. Prohibited change of name; penalties.**

If a foreign business trust authorized to transact business in this state changes its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of the foreign business trust shall be suspended, and it shall not thereafter transact business in this state until it changes its name to a name that is available to it under the laws of this state and obtains a certificate of correction or amendment.

#### **53-20-6. Application for certificate of authority.**

A. A foreign business trust, in order to obtain a certificate of authority to transact business in this state, shall make application to the public regulation commission [secretary of state]. The application shall set forth:

- (1) the name of the foreign business trust and, if different, the name under which it proposes to transact business in this state;
- (2) the date of declaration of trust;
- (3) the address of the principal office of the foreign business trust in the state or country under the laws of which it is organized;
- (4) the address of the registered office of the foreign business trust in this state, the name of its registered agent in this state at that address and an acceptance of the appointment signed by the agent appointed; and
- (5) the purposes of the foreign business trust that it proposes to pursue in the transaction of business in this state.

B. The application shall be made on forms prescribed and furnished by the public regulation commission [secretary of state] or on forms containing substantially the same infor-

mation as forms prescribed by the commission [secretary of state] and shall be executed by a person with authority to do so under the laws of the state or jurisdiction of its formation.

C. A foreign business trust shall deliver with the completed application a certificate of existence, or a document of similar import, duly authenticated by the secretary of state or other official having custody of trust records in the state or jurisdiction under whose law it is created.

### **53-20-7. Issuance of certificate of authority.**

A. If the public regulation commission [secretary of state] finds that the application for a certificate of authority meets the requirements of the Foreign Business Trust Registration Act [53-20-1 to 53-20-17 NMSA 1978] and the requisite fees have been paid, it shall:

- (1) endorse on the original the word "filed" and the month, day and year of the filing;
- (2) file in its office the original of the application; and
- (3) issue a certificate of authority to transact business in this state to which it shall

affix a copy of the application.

B. The certificate of authority, together with a copy of the application affixed to it, shall be returned by the public regulation commission [secretary of state] to the business trust or its representative.

### **53-20-8. Changes and amendments.**

If a statement in the application for certificate of authority of a foreign business trust was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign business trust shall promptly file with the public regulation commission [secretary of state] a certificate, signed by an authorized person, correcting the statement, together with the fee required by Section 98 [99] [53-20-17 NMSA 1978] of the Foreign Business Trust Registration Act.

### **53-20-9. Registered office and registered agent; requirement of maintenance in state.**

A foreign business trust authorized to transact business in this state shall have and continuously maintain in this state:

A. a registered office, which may be the same as its place of business in this state; and

B. a registered agent, which may be either an individual resident in this state whose business office is identical with the registered office, or a domestic or foreign corporation, limited partnership, limited liability company, limited liability partnership or investment trust authorized to transact business in this state, having a business office identical with the registered office of the foreign business trust.

### **53-20-10. Registered office and registered agent; change; resignation of registered agent.**

A. A foreign business trust authorized to transact business in this state may change its registered office or change its registered agent, or both, upon filing with the public regulation commission [secretary of state] a statement setting forth:

- (1) the name of the foreign business trust;
- (2) the address of its registered office;
- (3) if the address of its registered office is changed, the address to which it is to be changed;
- (4) the name of the foreign business trust's registered agent;
- (5) if its registered agent is changed, the name of the successor registered agent;

(6) a statement that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical; and

(7) that the change was authorized by resolution duly adopted by its trustees.

B. The statement shall be executed by the foreign business trust by an authorized person and delivered to the public regulation commission [secretary of state]. If the commission [secretary of state] finds that the statement meets the requirements of this section, it shall file the statement, and, when filed, the change of address of the registered office or the appointment of the new registered agent, or both, shall become effective. A registered agent of a foreign business trust may resign as registered agent by filing a written notice of resignation with the commission [secretary of state], and the commission [secretary of state] shall mail immediately a copy of the notice to the foreign business trust at its principal office in the state or country under the laws of which it is organized. The appointment of the agent terminates upon the expiration of thirty days after receipt of the notice by the commission [secretary of state].

C. If a registered agent changes the street address of the registered agent's business office, the registered agent may change the street address of the registered office of any foreign business trust for which the registered agent is the registered agent by notifying the foreign business trust in writing of the change and signing, either manually or in facsimile, and delivering to the public regulation commission [secretary of state] for filing a statement that complies with the requirements of this section but need not be responsive to Paragraph (5) of Subsection A of this section and recites that the foreign business trust has been notified of the change.

### **53-20-11. Service of process.**

A. The registered agent appointed by a foreign business trust authorized to transact business in this state shall be an agent of the foreign business trust upon whom may be served any process, notice or demand required or permitted by law to be served upon the foreign business trust.

B. A foreign business trust may be served by registered or certified mail, return receipt requested, addressed to a trustee of the foreign business trust at its principal office shown on its application for a certificate of authority if the foreign business trust:

(1) has no registered agent or its registered agent cannot be served with reasonable diligence;

(2) has withdrawn from transacting business in New Mexico; or

(3) has had its certificate of authority revoked.

C. Service is perfected under Subsection B of this section at the earliest of:

(1) the date the foreign business trust receives the mail;

(2) the date shown on the return receipt, if signed on behalf of the foreign business trust; or

(3) five days after its deposit in the United States mail, if mailed postpaid and correctly addressed.

D. This section does not prescribe the only means, or necessarily the required means, of serving a foreign business trust described in Subsection B of this section.

### **53-20-12. Certificate of withdrawal; application and filing.**

A. A foreign business trust authorized to transact business in this state may withdraw from this state upon obtaining from the public regulation commission [secretary of state] a certificate of withdrawal. To obtain the certificate, the foreign business trust shall deliver to the commission [secretary of state] an application for withdrawal. The application shall set forth:

(1) the name of the foreign business and the state or country under the laws of which it is organized;

(2) that the foreign business trust is not transacting business in this state;

(3) that the foreign business trust surrenders its authority to transact business in this state;

(4) that the foreign business trust revokes the authority of its registered agent in this state to accept service of process and consents that service of process in an action, suit or proceeding based on a cause of action arising in this state during the time the foreign business trust was authorized to transact business in this state may thereafter be made on the foreign business trust by service on the secretary of state;

(5) an address to which the secretary of state may mail a copy of any process against the foreign business trust served on the secretary of state;

(6) a commitment to notify the commission [secretary of state] in the future of any change in its mailing address; and

(7) additional information necessary or appropriate to enable the commission [secretary of state] to determine and assess any unpaid fees or taxes payable by the foreign business trust.

B. The application for withdrawal shall be made on forms prescribed and furnished by the public regulation commission [secretary of state] or on forms containing substantially the same information as forms prescribed by the commission [secretary of state] and shall be executed by the trust by an authorized person, or if the foreign business trust is in the hands of a receiver or trustee, by the receiver or trustee.

### **53-20-13. Certificate of withdrawal; issuance.**

A. An application of a foreign business trust for withdrawal shall be delivered to the public regulation commission [secretary of state]. If the commission [secretary of state] finds that the application meets the requirements of the Foreign Business Trust Registration Act [53-20-1 to 53-20-17 NMSA 1978], when all fees and taxes prescribed by law have been paid it shall:

(1) endorse on the application the word "filed" and the month, day and year of the filing;

(2) file the application in its office; and

(3) issue a certificate of withdrawal.

B. The certificate of withdrawal, together with a copy of the application for withdrawal affixed thereto by the public regulation commission [secretary of state], shall be returned to the foreign business trust or its representative. Upon the issuance of the certificate of withdrawal, the authority of the foreign business trust to transact business in this state shall cease.

### **53-20-14. Certificate of authority; revocation; causes.**

A. The certificate of authority of a foreign business trust to transact business in this state may be revoked by the public regulation commission [secretary of state] pursuant to this section when:

(1) the foreign business trust has failed to pay any fees prescribed by law when they become due and payable;

(2) the foreign business trust has failed to appoint and maintain a registered agent in this state;

(3) the foreign business trust has failed, after change of its registered office or registered agent, to file with the commission [secretary of state] a statement of the change as required by law; or

(4) a misrepresentation has been made of any material matter in an application, report, affidavit or other document submitted by such foreign business trust pursuant to law.

B. No certificate of authority of a foreign business trust shall be revoked by the public regulation commission [secretary of state] unless:

(1) it has given the foreign business trust not less than sixty days' prior notice of revocation by mail addressed to its registered office in this state; and

(2) the foreign business trust prior to revocation fails to pay fees or taxes owed, file the required statement of change of registered agent or registered office or correct the misrepresentation.

### **53-20-15. Certificate of authority; revocation procedure.**

A. Upon revoking a certificate of authority of a foreign business trust, the public regulation commission [secretary of state] shall:

- (1) issue a certificate of revocation in duplicate;
- (2) file one of the certificates in its office; and
- (3) mail to the foreign business trust at its registered office in this state a notice of the revocation accompanied by the other certificate.

B. Upon issuance of the certificate of revocation, the authority of the foreign business trust to transact business in this state ceases.

### **53-20-16. Consequences of transacting business without authority.**

A. A foreign business trust transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

B. The successor to a foreign business trust that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign business trust or its successor obtains a certificate of authority.

C. A court may stay a proceeding commenced by a foreign business trust, its successor or assignee until it determines whether the foreign business trust or its successor requires a certificate of authority. If it so determines, the court may further stay a proceeding until the foreign business trust or its successor obtains a certificate.

D. A foreign business trust is liable for a civil penalty of ten dollars (\$10.00) for each day, but not to exceed a total of one thousand dollars (\$1,000) for each year it transacts business in this state without a certificate of authority. The attorney general may enforce the civil liability imposed pursuant to this subsection.

E. The failure of a foreign business trust to obtain a certificate of authority does not impair the validity of any contract or act of the foreign business trust or prevent it from defending any action, suit or proceeding in any court of this state.

### **53-20-17. Fees.**

The public regulation commission [secretary of state] shall charge and collect from a foreign business trust for:

A. filing a statement of change of address of registered office or change of registered agent, or both, twenty-five dollars (\$25.00);

B. filing an application of a foreign business trust for a certificate of authority to transact business in this state and issuing a certificate of authority, two hundred fifty dollars (\$250);

C. filing an agent's statement of change of address of registered agent for each affected corporation, twenty-five dollars (\$25.00);

D. filing a certificate of correction or amendment of a foreign business trust authorized to transact business in this state, fifty dollars (\$50.00);

E. filing an application for withdrawal of a foreign business trust and issuing a certificate of withdrawal, twenty-five dollars (\$25.00);

F. filing any other statement of a foreign business trust, twenty-five dollars (\$25.00); and

G. for furnishing a certified copy of any document, instrument or paper relating to a foreign business trust, one dollar (\$1.00) per page and ten dollars (\$10.00) for the certificate and affixing the seal thereto.