

XIX. Kentucky

by

Thomas E. Rutledge, Esq. *
Stoll Keenon Ogden PLLC
Louisville, Kentucky

On January 1, 2011 the Kentucky Business Entity Filing Act became effective, whereupon all foreign qualifications will be governed by its provisions. Existing foreign qualifications will be “grandfathered” into that new act, but from its effective date it will govern amendment, withdrawal and revocation of those grandfathered qualifications.

A. Introduction

Effective January 1, 2011, the qualification of foreign entities to transact business in Kentucky is governed by the Kentucky Business Entity Filing¹ Act.² This act sets forth a common qualification mechanism applicable to foreign corporations, limited liability companies, limited partnerships and business/statutory trusts.

The web address for the Kentucky Secretary of State is <http://www.sos.ky.gov>. The office is quite responsive, and almost always documents are processed the date of receipt without any need to request expedited service. With the exception of annual reports, it is not possible to make filings electronically or by fax (annual reports may be filed electronically). Electronic copies of certificates of foreign qualification are available from the website. The mailing address of the office is:

Filings Branch
PO Box 718
700 Capital Avenue, Suite 154
Frankfort, Kentucky 40601

The address for hand-deliveries and courier packages is:

Corporation Division
154 State Capitol
700 Capital Avenue
Frankfort, Kentucky 40601-3493

The filing fees for various filings by foreign business entities are set forth on Schedule 1 at the end of this chapter.

B. The Kentucky Business Entity Filing Act

1. Generally

The 2010 Kentucky General Assembly approved the Kentucky Business Entity Filing Act.³ Codified in the Kentucky Revised Statutes ch. 14A and effective as of January 1, 2011,⁴ the Business Entity Filing Act supersedes and replaces the

foreign qualification procedures distributed previously throughout the various entity acts. Under the new law, with minor exceptions, foreign entities will qualify to transact business by means of a certificate of authority. Foreign entities subject to these qualification requirements include foreign business and nonprofit corporations, partnerships, limited partnerships, associations, cooperatives, LLCs, limited cooperative associations, and business and statutory trusts.⁵ Note, however, that foreign limited liability partnerships will continue to utilize the statement of foreign qualification as provided for in the Kentucky Revised Uniform Partnership Act (2006).⁶

2. Grandfathering of prior qualifications

Qualifications to transact business effective as of January 1, 2011, those having been filed under predecessor laws repealed in connection with the adoption of the filing act, remain in effect and are grandfathered into the new law.⁷ The amendment, withdrawal and revocation of those prior filings are subject to the filing act.

3. Exemptions

A significant exemption to this rule are foreign limited liability partnerships; they continue to qualify by filing a statement of foreign qualification.⁸

In addition, national banks are exempt, by reason of the federal National Bank Act, from the requirement to qualify to transact business.⁹ While there is no express statutory exemption from the requirement to qualify with the Kentucky Secretary of State as provided for in the Kentucky Business Entity Filing Act, it is accepted that a foreign insurer holding a certificate of authority from the Department of Insurance is exempt from the obligation to qualify to transact business with the secretary of state.

4. What constitutes doing business in Kentucky

As was the traditional practice under the statutes including the Business Corporation and LLC acts, the statute sets forth a

¹ *Thomas E. Rutledge is a member of Stoll Keenon Ogden PLLC (skofirm.com) resident in the Louisville office. Tom is a widely known practitioner, speaker, and writer on the law of business organizations, and is a member of the American Law Institute.

² KY. REV. STAT. ANN. ch. 14A.

³ S.B. 151, 2010 Acts ch. 151.

⁴ 2010 Acts, ch. 151, § 152.

⁵ See KY. REV. STAT. ANN. § 14A.9-010 (“A foreign entity”); KY. REV. STAT. ANN. § 14A.1-070(10) (definition of “foreign entity”).

⁶ See *Foreign Limited Liability Partnerships*, § XIX-C, *infra*.

⁷ KY. REV. STAT. ANN. § 14A.9-030(4).

⁸ See KY. REV. STAT. ANN. § 362.1-1102.

⁹ See *Williams v. Am. Express Bank, FSB*, No. 2012-CA-000855-MR, 2013 WL 2659981 (Ky. Ct. App. June 14, 2013); *Williams v. Chase Bank USA, N.A.*, 390 S.W.3d 824 (Ky. Ct. App. 2012).

non-exclusive listing of particular activities that of themselves do not constitute "transacting business" and the obligation to apply for a certificate of authority. This non-exclusive list references:

- maintaining, defending or settling any proceeding;
- holding a meeting of a board of directors, the shareholders, partners, members, managers, beneficial owners or trustees or carrying on other activities related to the internal affairs of the foreign entity;
- maintaining bank accounts;
- maintaining an office for the transfer, exchange and registration of the foreign entity securities or maintaining trustees or depositories with respect thereto;
- selling through independent contractors;
- soliciting or obtaining orders, whether by mail or through employees, agents or otherwise where such orders require acceptance outside the Commonwealth of Kentucky in order to create a binding agreement;¹⁰
- creating or acquiring indebtedness, mortgages and security interest in real, personal or intangible property;¹¹
- securing or collecting debts or enforcing mortgages and security interest in property securing those debts;¹²
- owning, without more, real or personal property;
- conducting an isolated transaction completed within 30 days that is not in the course of repeated transactions of like nature;¹³ and
- transacting business in interstate commerce.¹⁴

Whether a foreign entity is transacting business in Kentucky is a question of fact to be determined by the circumstances of each particular case.¹⁵ In the only modern (i.e., within the last 35 years) published case decided on the issue,

the Kentucky Court of Appeals held that a foreign corporation was not transacting business in Kentucky where it: (i) sanctioned a steeplechase race; (ii) collected in New York race entry materials and prepared booklets and identification badges and (iii) rented and delivered, but did not set up, race-related equipment.¹⁶

The statute expressly provides that the list of activities not constituting transacting business will not apply in determining the contacts and activities that may subject the foreign entity to service of process or taxation or regulation under other Kentucky law.¹⁷

Amendments adopted in 2011 and effective June 8, 2011, require, inter alia, that in order for a foreign business organization to receive a state contract, the foreign entity must qualify to do business even if it would otherwise be exempt from qualification by reason of the isolated transaction exemption of the Kentucky Revised Statutes § 14A.9-010(2)(j).¹⁸ This statutory amendment is at best curious. Initially, if a foreign entity seeking a state contract is otherwise exempt from qualification, then no qualification is required. Second, it drags into the certificate of authority both foreign LLPs that would otherwise qualify by means of a statement of foreign qualification¹⁹ and foreign general partnerships that were previously never required to qualify to transact business.

Amendments adopted in 2012 and effective July 12, 2012, addressed the problems in the 2011 amendment. First, any foreign entity receiving a state contract must qualify to transact business; none of the exemptions from qualification otherwise available may be utilized.²⁰ Second, a foreign LLP's statement of foreign qualification will suffice to satisfy the requirement that it be qualified.²¹ Third, a foreign general partnership that is not an LLP, solely for the purpose of qualifying to transact business in order to receive a state contract, may apply for and receive a certificate of authority.²²

There is as well a special rule, applicable primarily to foreign financial institutions, pursuant to which they may engage in certain activities without those activities being "considered to be doing, transacting, or carrying on business" in

(6th Cir. 1958).

¹⁶ Commonwealth ex rel. Stephens v. Nat'l Steeplechase & Hunt Assn., 612 S.W.2d 347 (Ky. Ct. App. 1981) (decided under predecessor statute). The *Nat'l Steeplechase* decision was cited in the subsequent unpublished decision rendered in *Reliable Mech., Inc. v. Naylor Indus. Servs., Inc.*, No. 2000-CA-001064-MR, 2001 BL 10731 (Ky. Ct. App. Sept. 14, 2001), which discusses the isolated transaction language of KY. REV. STAT. ANN. § 271B.15-010(j). In *Roberts v. St. George Bank Ltd.*, No. 96-CA-0624-MR, 1998 BL 2679 (Ky. Ct. App. June 26, 1998, modified July 17, 1998), a foreign banking corporation that had made four fund transfers into Kentucky in a six-month period was held not to need a certificate of authority under either the isolated transaction or the interstate transaction exceptions.

¹⁷ KY. REV. STAT. ANN. § 14A.9-010(5).

¹⁸ See KY. REV. STAT. ANN. § 14A.9-010(6).

¹⁹ KY. REV. STAT. ANN. § 362.1-1101.

²⁰ See KY. REV. STAT. ANN. § 14A.9-010(6), as amended by 2012 Ky. Acts, ch. 81, § 84. See also KY. REV. STAT. ANN. § 45A.480(1)(b), as amended by 2012 Ky. Acts, ch. 81 § 86; KY. REV. STAT. ANN. § 176.085(1)(b), as amended by 2012 Ky. Acts, ch. 81, § 87.

²¹ KY. REV. STAT. ANN. § 14A.9-010(4).

²² See KY. REV. STAT. ANN. § 14A.9-030(5), created by 2012 Ky. Acts, ch. 81, § 85.

¹⁰ See also *Larkin Co. v. Commonwealth*, 189 S.W. 3 (Ky. 1916) (decided under predecessor statute).

¹¹ See also *Hughes v. R.O. Campbell Coal Co.*, 258 S.W. 671 (Ky. 1924); *Ichenhauser Co. v. Landrum's Assignee*, 155 S.W. 738 (Ky. 1913) (decided under predecessor statute).

¹² See also *Commonwealth v. Chattanooga Implement & Mfg. Co.*, 104 S.W. 389 (Ky. 1907); *Ichenhauser*, 155 S.W. 738 (decided under predecessor statute).

¹³ See also *Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co.*, 102 F. Supp. 258 (E.D. Ky. 1951) (corporation was transacting business in Kentucky when it systematically and continuously solicited business) (decided under predecessor law); *Charles Zubik & Sons v. Marine Sales & Serv.*, 300 S.W.2d 35 (Ky. 1957) (corporation was doing business in Kentucky when its chartered vessels were used in Kentucky waters, operated vessels for its own accounts within Kentucky navigable streams, purchased equipment for its own use and for sale to others in Kentucky and repaired barges within Kentucky) (decided under predecessor statute).

¹⁴ See KY. REV. STAT. ANN. § 14A.9-030(1).

¹⁵ See, e.g., *Etheridge v. Grove Mfg. Co.*, 287 F.Supp 437 (W.D. Ky. 1968), *aff'd* 415 F.2d 1338 (6th Cir. 1969). The phrase "doing business" is not a technical term but should be read as ordinary words having their ordinary meaning. *WSAZ, Inc. v. Lyons*, 254 F.2d 242

Kentucky.²³ Those activities that either individually or collectively will not cause a foreign financial institution to be deemed to be transacting business in Kentucky are:

- (a) the lending of money, or the acquisition by purchase, by contract to purchase, by making of advance commitments to purchase, or by assignment to it of loans, including construction loans, or any interest in loans, secured in whole or in part by mortgages, deeds of trust or other forms of security on real or personal property in this state, if such activities are carried on from outside this state by the lending institution or within this state by independent agencies on behalf of said foreign lending institution;
- (b) the receipt of principal and interest on such loans;
- (c) the making of physical inspections and appraisals of real or personal property which secures or is proposed to secure any loan by an officer or employee of a foreign lending institution if the officer or employee making any physical inspections and appraisals is not a resident of and does not maintain his place of business in this state;
- (d) the ownership of any loans and the enforcement of any loans by trustee's sale, judicial process, or deed in lieu of foreclosure, or otherwise;
- (e) the modification, renewal, extension, transfer, or sale of loans or the acceptance of additional or substitute security therefor or the full or partial release of the security therefor or the acceptance of substitute or additional obligors thereon if the activities are carried on from outside this state by the lending institution or carried on within this state by independent agencies;
- (f) the maintaining and defending of any action or suits relating to loans, mortgages, deeds of trust, security instruments or related agreements or activities referred to herein or incidental thereto;
- (g) the engaging, by contractual arrangement, of a corporation, firm or association, qualified to do business in this state, which is not a subsidiary or parent of the lending institution or which is not under common management with the lending institution, to make collections and to service loans in any manner whatsoever, including the payment of ground rents, taxes, assessments, insurance and the like and the making, on behalf of the lending institution, of physical inspections and appraisals of real or personal property securing any loans or property which is proposed to secure any loans, and the performance of any such engagement;
- (h) the acquisition of title to the real or personal property covered by any mortgages, deeds of trust, or other security instrument, by trustees, pledgees, or judicial sales, or by deed in lieu of foreclosure or for the purpose of transferring title to any federal agency or instrumentality as the insurer or guarantor of any loans, the maintenance or defense of any action or suit relat-

ing to the possession of the property, and the retention of title to any real or personal property as acquired pending the orderly sale or other disposition thereof; or

- (i) the maintenance of bank accounts in banks, authorized or licensed to do and transact a banking business in this state.

Also, there exists a special rule for foreign insurers that do not hold a certificate of authority from the Department of Insurance, it being provided that:

a certificate of authority shall not be required of an insurer with respect to:

Prosecution or defense of legal actions; but no insurer unlawfully transacting insurance in this state without a certificate of authority shall be permitted to institute or maintain (other than defend) any action at law or in equity in any court of this state, either directly or through an assignee or successor in interest, to enforce any right, claim or demand arising out of such an insurance transaction until such insurer or assignee or successor has obtained a certificate of authority. This provision does not apply to any suit or action by the duly constituted receiver, rehabilitator or liquidator of such an insurer, assignee or successor under laws similar to those contained in Subtitle 33.²⁴

5. *Consequences of doing business without authority*

A foreign entity transacting business without a required certificate of authority is subject to a fine of \$2 per day and is barred from bringing an action in Kentucky courts until it has qualified to transact business.²⁵ Still, the acts of the foreign entity are not otherwise impaired and it may defend an action initiated against it.²⁶ The validity of the entity as organized in

²⁴ KY. REV. STAT. ANN. § 304.3-060(4).

²⁵ KY. REV. STAT. ANN. § 14A.9-020(4), (2). It was at one time Kentucky law that a foreign corporation that transacted business without qualification could not enforce the contracts it entered into in Kentucky. *See, e.g., Commonwealth ex rel. Breckinridge v. Monroe Co.*, 378 S.W.2d 809, 811 (Ky. 1964), citing *Oliver Co. v. Louisville Realty Co.*, 161 S.W. 570 (Ky. 1913); *Fruin-Colnon Contracting Co. v. Chatterson*, 143 S.W. 6 (Ky. 1912). This rule was abandoned by 1927. *See Monroe Co., supra*, citing *Williams v. Dearborn Truck Co.*, 271 S.W. 388 (Ky. 1927).

²⁶ KY. REV. STAT. ANN. § 14A.9-020(5). While a certificate of authority is required to "maintain" an action, it is not required in order to initiate an action. *Kattula v. Stout*, No. 5:06CV-181-M, 2007 BL 66619 (W.D. Ky. July 25, 2007). Having been sued in Kentucky, a foreign corporation is not required to have and maintain a certificate of authority in order to file a compulsory counterclaim or cross-claim. *See Modern Motors, LLC v. Yelder*, No. 2009-CA-000648-MR (Ky. Ct. App. Jan. 29, 2010) (holding that Kentucky Rule of Civil Procedure 13.01 controls, and that the requirement to qualify to transact business in order to maintain an action does not require qualification in order to file a mandatory counterclaim); *Neace v. United Group Servs., Inc.*, No. 07-38, 2008 BL 210984 (E.D. Ky. Sept. 22, 2008) (requirement to qualify to "maintain" an action imposes no limitations upon the ability to defend an action); *Reliable Mech., Inc. v. Naylor Indus. Servs., Inc.*, No. 2000-CA-001064-MR, 2001 BL 10731 (Ky. Ct. App. Sept. 14, 2001), citing *Clayton Carpet Mills, Inc. v. Martin Processing, Inc.*, 563 F.Supp. 288 (N.D. Ga. 1983). *See also* *Abbott v. Southern*

²³ KY. REV. STAT. ANN. § 286.2-670.

its home jurisdiction is not impacted by the failure to qualify.²⁷ The statute grants the court the ability to stay the proceeding, if it desires, to determine if the foreign corporation requires a certificate of authority.²⁸ If it is concluded that one is required, the court may again stay the suit until the foreign corporation obtains a certificate of authority from the state.²⁹

There is no separate cause of action for failure to qualify to transact business. While failure to qualify may be an affirmative defense to the need to defend a suit, a parties' failure to qualify does not of itself give rise to a claim for damages or other monetary relief. While no Kentucky court has yet addressed the issue, in *Construction Management & Development, LLC v. Carnegie Hill Properties, LLC*,³⁰ responding to the defendant's argument that the plaintiff lack standing to bring the suit on the basis that it was transacting business without the necessary qualification, it was held to be the defendant's obligation to demonstrate all of (i) that the foreign entity is "transacting business," (ii) that qualification to transact business is required, and (iii) that the foreign entity has not qualified.³¹

6. The certificate of authority

All foreign entities will apply for a certificate of authority on the same form.³² The obligations under certain predecessor acts to submit a certificate of existence from the jurisdiction of organization have not been carried forward into BEFA. Rather, the application for certificate of authority requires a representation the entity validly exists under the laws of its jurisdiction

Subaru Star, Inc., 574 S.W.2d 684, 688 (Ky. Ct. App. 1978), citing *Borderland Coal Sales v. Walker*, 270 S.W. 717 (Ky. 1925). While the Official Comment to Model Business Corporation Act § 15.02 (it being the ultimate source of KY. REV. STAT. ANN. § 14A.9-020), provides that affirmative relief on a counterclaim is not available until the corporation receives a certificate of authority, no Kentucky court has yet adopted that rule, and it would appear to conflict with the holding in *Modern Motors*.

²⁷ See KY. REV. STAT. ANN. § 14A.9-050(3) (Kentucky may not regulate the internal affairs, which includes the organization, of a foreign entity transacting business in Kentucky); RESTATEMENT (SECOND) OF CONFLICTS §§ 297, 299 (1971).

²⁸ KY. REV. STAT. ANN. § 271B.15-020(3).

²⁹ *Id.* A failure to raise the issue of the capacity to bring suit based upon the failure to qualify to transact business may be waived if not raised promptly. See *Abbott*, 574 S.W.2d at 688 ("The failure of the plaintiff to obtain a certificate, if required, is a defense which will be considered waived unless raised by the defendant at the earliest opportunity."); *Williams v. Am. Express Bank, FSB*, No. 2012-CA-000855-MR, 2013 WL 2659981 (Ky. Ct. App. June 14, 2013); *Alliant Tax Credit Fund 31-A, Ltd. v. Nicholasville Cmty. Housing, LLC*, 663 F. Supp. 2d 575, 584 (E.D. Ky. 2009); see also *United Bhd. of Carpenters v. Birchwood Conservancy*, No. 2011-SC-000659-DG, 2014 BL 171490 (Ky. June 19, 2014) (holding, on the facts presented, that the defendant, an unincorporated labor union not subject to being sued in its own name, was not delinquent in raising that defense).

³⁰ No. 111371/2011 (Sup. Ct. New York County Feb. 20, 2013).

³¹ See also Civil Rule (CR) 43.01(1) ("The party holding the affirmative of an issue must produce the evidence to prove it."); *Raymer v. Raymer*, 752 S.W.2d 313, 314-15 (Ky. Ct. App. 1988) ("CR 43.01 provides '(1) The party holding the affirmative of an issue must produce the evidence to prove it.' The latter rule would embrace those defenses designated as 'affirmative defenses' under CR 8.03.").

³² KY. REV. STAT. ANN. § 14A.9-030. See also KY. REV. STAT. ANN. § 14A.2-050(1)(b).

of organization.³³ The registered agent must sign or otherwise give written consent to the appointment.³⁴ The application for the certificate of authority must set forth:

- the real name of the foreign entity and, if that name is not available for use in Kentucky, a name that satisfies the otherwise applicable requirements of the entity filing act;³⁵
- the name of the jurisdiction under which the foreign entity was organized;
- its form of organization;
- its period of duration or a statement that its duration is perpetual;
- the street address of its principal office;
- the address of its registered office and the name of its registered agent in Kentucky;³⁶
- with respect to various business forms, identification as to certain officers / partners / directors / managers / trustees;
- if the foreign entity is a foreign limited partnership, a statement as to whether or not it is a limited liability limited partnership; and
- if the foreign entity is a foreign professional service corporation, certain representations with respect to its shareholders, officers and directors.³⁷

A foreign entity, having been issued a certificate of authority, has the same but not greater rights and privileges, and is subject to the same restrictions and liabilities, imposed upon a domestic entity of like character.³⁸ With the exception of the authority of professional regulatory boards to regulate activities undertaken through a foreign business entity,³⁹ the Commonwealth of Kentucky is not authorized to regulate the internal affairs, including the inspection of books and records, of a foreign entity authorized to transact business in Kentucky.⁴⁰

³³ KY. REV. STAT. ANN. § 14A.9-030(2).

³⁴ KY. REV. STAT. ANN. § 14A.9-030(4).

³⁵ See also KY. REV. STAT. ANN. § 14A.3-010.

³⁶ See also KY. REV. STAT. ANN. § 14A.4-010 (requirements as to registered office and agent).

³⁷ KY. REV. STAT. ANN. § 14A.9-030(1).

³⁸ KY. REV. STAT. ANN. § 14A.9-050(2).

³⁹ KY. REV. STAT. ANN. § 14A.9-050(4).

⁴⁰ KY. REV. STAT. ANN. § 14A.9-050(3). With respect to the specific reference to the inspection of books and records of a foreign business entity, in *Sostarich v. Zirmed.com, Inc.*, No. 03-CI-00498 (Jefferson Cir. Ct. Div. 8 March 26, 2003), a trial court held that inspection rights were not "internal affairs" and that the inspection of the records of a Delaware corporation would be had under the KyBCA. This holding was legislatively overruled by the 2007 amendment of KY. REV. STAT. ANN. § 271B.15-050(3) (2007 Acts, ch. 137, § 72) which specifies that qualification does not authorize the regulation of "inspection of corporate books, records, and documents." See also Thomas E. Rutledge, *The 2007 Amendments to the Business Entity Statutes*, 97 KY. L.J. 229, 238-39 (2008-09).

7. Amending the certificate of authority

A Certificate of Authority will need to be amended if there are changes in the information of record with the secretary of state.⁴¹ With respect to a change in form of organization, under prior law, when a foreign entity underwent a conversion, it was necessary that the Certificate of Authority issued to the predecessor be withdrawn and any successor qualify to transact business in accordance with the requirements applicable to the new form. Under this new law, it will only be required that the existing Certificate of Authority of the predecessor entity be amended to indicate the new form of organization. A change in the principal office address of a foreign entity will be reflected not by amending the Certificate of Authority but rather by a distinct filing with the secretary of state,⁴² and likewise a change in the registered agent, registered office or both will be accomplished by means of a distinct filing.⁴³

8. Name of foreign entity

Each foreign entity is required to qualify to transact business in Kentucky under its real name unless its real name is not distinguishable upon the records of the secretary of state, in which instance the foreign entity will need to adopt and qualify under a fictitious name, which fictitious name will, for purposes of transacting business in Kentucky, constitute the entity's real name. To the extent that the qualified foreign entity has been transacting business other than under its real name, it will need to comply with the assumed name statute.

It should be noted that certain terminology, when used in business entity names, may implicate other statutes. For example, any use of "Bank," "Banker," "Banking" or "Trust" implicate review by the Department of Financial Institutions,⁴⁴ while "Engineer," "Engineering," "Surveyor," "Surveying" or "Land Surveying" implicate review by the State Board of Licensure or Professional Engineers and Land Surveyors.⁴⁵

9. Registered office and agent

Every foreign entity qualified to transact business is required to appoint and maintain a registered agent and office.⁴⁶ The registered office must be the business address of the registered agent.⁴⁷ The registered agent may be any of a natural person, a Kentucky entity or a foreign entity qualified to transact business in Kentucky.⁴⁸ The registered agent must expressly and in writing accept the appointment.⁴⁹ The foreign entity may

change its registered agent, the registered office, or both,⁵⁰ and likewise the agent may resign.⁵¹ Failure to maintain both a registered agent and registered office are grounds for revocation of the certificate of authority.⁵²

Each entity and each foreign entity is obligated to provide to its registered agent, and from time to time update, the business address and phone number of a natural person authorized to receive communications from the registered agent.⁵³ This provision serves several purposes. First, the registered agent benefits by having instructions from the business entity for whom they are serving as the registered agent as to whom they should contact upon the receipt of legal process or any notice or demand that has been served upon the registered agent. Presumably when the registered agent forwards process, notice or demand received to the communications contact, it will be difficult if not impossible for the entity to later assert that the registered agent failed to provide them adequate notice of same. The business entity or foreign business entity benefits by knowing that the registered agent will transmit process, notice or demand to a specific individual, rather than being generally addressed to the entity. Failure by an entity or foreign entity to provide the registered agent information as to a current communications contact is expressly set forth as a legitimate basis on which the registered agent may resign,⁵⁴ although there is no obligation to do so. Pursuant to otherwise legitimate interrogatories from the secretary of state, the registered agent may be required to divulge the name and contact information with respect to the communications contact.

Each foreign entity is required to provide to its registered agent the contact information of a "communications contact," the person at the foreign entity to whom legal process and other communications received on the entity's behalf may be forwarded.⁵⁵

10. Service of process

The registered agent appointed on behalf of a domestic or foreign entity is its "agent for service of process, notice, or demand required or permitted by law to be served on the entity or foreign entity."⁵⁶ It is through the registered agent that interrogatories from the secretary of state may be served upon

§ 14A.9-030(3).

⁵⁰ KY. REV. STAT. ANN. § 14A.4-020. *See also* KY. REV. STAT. ANN. § 14A.9-040(4).

⁵¹ KY. REV. STAT. ANN. § 14A.4-030.

⁵² KY. REV. STAT. ANN. § 14A.9-070(2).

⁵³ KY. REV. STAT. ANN. § 14A.4-010(3). This provision is based on DEL. CODE ANN. tit. 6, § 18-104(g) and DEL. CODE ANN. tit. 8, § 132(d).

⁵⁴ KY. REV. STAT. ANN. § 14A.4-010(3).

⁵⁵ KY. REV. STAT. ANN. § 14A.4-010(3).

⁵⁶ KY. REV. STAT. ANN. § 14A.4-040(1). *See also* Bradford White Corp. v. Ky. Farm Bureau Mut. Ins. Co., No. 2013-CA-001549-MR, 2014 WL 3722240 (Ky. Ct. App. July 25, 2014) (default judgment not set aside based upon excusable neglect when foreign corporation failed to update information with both the Kentucky and Pennsylvania secretary of state offices). Being patterned on the prior statutes (*see, e.g.,* KY. REV. STAT. ANN. § 271B.5-040(1); KY. REV. STAT. ANN. § 275.130(1); KY. REV. STAT. ANN. § 362.2-117(2)), prior law as to

⁴¹ KY. REV. STAT. ANN. § 14A.9-040(1). Prior to 2011, an amendment was required only if the foreign entity changed its real name, period of duration, jurisdiction of organization or form of organization. The 2011 amendment expanded the obligation to amend.

⁴² KY. REV. STAT. ANN. § 14A.9-040(3); *see also id.* § 14A.5-010.

⁴³ KY. REV. STAT. ANN. § 14A.9-040(4); *see also id.* § 14A.4-020.

⁴⁴ *See* KY. REV. STAT. ANN. § 286.2-685.

⁴⁵ *See* KY. REV. STAT. ANN. § 322.060.

⁴⁶ KY. REV. STAT. ANN. § 14A.9-030(1)(g). *See also* KY. REV. STAT. ANN. § 14A.4-010(1).

⁴⁷ KY. REV. STAT. ANN. § 14A.9-030(1)(g).

⁴⁸ KY. REV. STAT. ANN. § 14A.4-010(1).

⁴⁹ KY. REV. STAT. ANN. § 14A.4-010(2); KY. REV. STAT. ANN.

an entity or foreign entity.⁵⁷ The balance of this provision specifies alternative means for effecting service of process or delivering a notice or demand where either there is not a registered agent or that agent cannot with “reasonable diligence” be served. In those instances, the service of process, notice or demand may be transmitted to the entity or foreign entity by registered or certified mail, return receipt requested, addressed to the entity or foreign entity at its principal office.⁵⁸ Service, whether of legal process, or of the delivery of a demand or a notice, is perfected upon actual receipt of the certified or registered mail, on the date upon which the return receipt is signed on behalf of the entity or foreign entity or five (5) days after the transmission of the communication as evidenced by the postmark.⁵⁹ There is retained the rule that either service through the registered agent or the alternative means of service by certified or registered mail are not exclusive of other means by which service of process, of a notice or of a demand may be made.⁶⁰

service through the registered agent and default judgments continues to apply. *See, e.g.*, JP Morgan Chase Bank ex rel. ABFS Mortg. Loan Trust 2003-1 v. Engle, No. 2006-CA-001182-MR, 2007 BL 287199 (Ky. Ct. App. Sept. 21, 2007) (assertion by the defendant that they “somehow misplaced the complaint” not accepted as a valid basis to set aside default judgment); Dakota Enters., Inc. v. Carter, No. 2001-CA-002417-MR, 2003 BL 2778 (Ky. Ct. App. May 30, 2003) (registered agent’s regular and long term absence from business address not a basis for setting aside default judgment); Crop Prod. Servs., Inc. v. Williamson, No. 1998-CA-000124-MR, 1999 BL 1452 (Ky. Ct. App. June 25, 1999) (default judgment would not be set aside based upon registered agent’s failure to properly forward the complaint to the defendant).

⁵⁷ *See Secretary of state interrogatories*, § XIX-B15, *infra*.

⁵⁸ While the antecedent acts were clear that the registered agent was the agent of the entity for not only service of process, but also any notice or demand that could be made, the statutes were less than clear as to whether the alternative means of communication by registered or certified mail extended only to service of legal process or as well other notices or demands. To that end, the Business Entity Filing Act has been clarified to make clear that the alternative means of delivery by registered or certified mail extends to legal process and any other notice or demand that may be served on the entity.

⁵⁹ KY. REV. STAT. ANN. § 14A.4-040(2)(a)—(c). This provision repeats the prior rules. *See, e.g.*, KY. REV. STAT. ANN. § 271B.5-040(2); KY. REV. STAT. ANN. § 275.130(2); KY. REV. STAT. ANN. § 362.1-120(2).

⁶⁰ KY. REV. STAT. ANN. § 14A.4-040(3). This provision repeats the prior rules. *See, e.g.*, KY. REV. STAT. ANN. § 271B.5-040(3); KY. REV. STAT. ANN. § 275.130(3); KY. REV. STAT. ANN. § 362.1-120(4). As to this last provision, *see also* KY. REV. STAT. ANN. § 271B.5-040(2) (service on a business corporation may be accomplished by notice to the secretary at the principal place of business address of the corporation); KY. REV. STAT. ANN. § 275.145 (providing, in the case of a member-managed LLC, notice to any member shall constitute notice to the LLC and that, in the context of a manager-managed LLC, notice to any manager shall constitute notice to the LLC); KY. REV. STAT. ANN. § 362.1-301 (providing that each partner is an agent of the partnership); KY. REV. STAT. ANN. § 362.190 (providing that each partner is an agent of the partnership); KY. REV. STAT. ANN. § 362.523 (applying the general partner’s agency authority as set forth in KY. REV. STAT. ANN. § 362.190 to limited partnerships subject to the Kentucky Revised Uniform Limited Partnership Act); KY. REV. STAT. ANN. § 362.2-402 (each general partner of a limited partnership governed by the Kentucky Uniform Limited Partnership Act (2006) is an agent of

The role of the registered agent has been defined as the forwarding of process and notices received and of maintaining the information on the communications contact.⁶¹

11. Annual report

All foreign entities that qualify to transact business under the Filing Act (including those grandfathered pursuant to a prior filing) are obligated to file an annual report with the secretary of state. The fee to accompany the annual report is \$15. The annual report is due by June 30 of the first year after the year in which the foreign entity receives its certificate of authority and each year thereafter.

12. Withdrawal of the certificate of authority

Under prior law a foreign business entity, having been qualified to transact business in Kentucky, applied for a “certificate of withdrawal,”⁶² and until granted the foreign entity could not “withdraw from this Commonwealth.”⁶³ Under the new law, a foreign entity that desires to forfeit its right to transact business in Kentucky may do so by delivering for filing a Certificate of Withdrawal. Assuming that the document is complete and other requirements such as the filing fee are satisfied, upon filing, the right to transact business is terminated. The suggestion of substantive review of the application to withdraw is deleted, as is the suggestion that a foreign entity may not stop actually transacting business before receiving a certificate of withdrawal. Proper execution of the certificate will be determined under KY. REV. STAT. ANN. § 14A.2-020.

The secretary of state is directed to create a form Certificate of Withdrawal,⁶⁴ and is further empowered to make the use of that form mandatory.⁶⁵

As was the case under prior law, a foreign entity that has withdrawn is well advised to keep current the information provided the secretary of state as to the mailing address. Service of process is complete upon delivery to the secretary of state,⁶⁶ and likely a failure to receive notice of the suit because a forwarding address is out of date will not be a basis for setting aside a default judgment.

the limited partnership).

⁶¹ KY. REV. STAT. ANN. § 14A.4-050, created by 2010 Acts, ch. 151, § 32. This provision is based upon section 14 of the Model Registered Agents Act (“MRAA”). *See* MRAA § 14, 6B U.L.A. 685 (2008). While in the drafting of the Business Entity Filing Act consideration was given to the wholesale adoption of the MRAA (6B U.L.A. 659 (2008)), doing so was ultimately rejected for reasons including its departure from established Kentucky practice requiring the registered agent to sign the form pursuant to which they are so designated, the desire to avoid the differentiation of various registered agents into classes of commercial and non-commercial and, as to commercial registered agents, the desire to avoid an additional burden upon the secretary of state of maintaining the list of entities that have named a commercial registered agent as their registered agent. *See Model Registered Agents Act* § 5, 6B U.L.A. 672 (2008).

⁶² *See, e.g.*, KY. REV. STAT. ANN. § 275.435(2).

⁶³ *See, e.g.*, KY. REV. STAT. ANN. § 275.435(1).

⁶⁴ KY. REV. STAT. ANN. § 14A.2-050(1)(d).

⁶⁵ KY. REV. STAT. ANN. § 14A.2-050(2).

⁶⁶ KY. REV. STAT. ANN. § 14A.9-060(2)(d), (4)

13. Revocation of the certificate of authority

A foreign entity may have its certificate of authority revoked for a variety of reasons, including the failure to file an annual report, its dissolution in its jurisdiction of organization or failure to answer interrogatories.⁶⁷ The secretary of state, believing grounds exist for revocation of the certificate of authority, will give notice to the foreign entity at its principal place of business address,⁶⁸ and during the 60 days after the mailing of that notice the foreign entity may remedy or otherwise address the grounds for revocation.⁶⁹ Absent cure, the secretary of state may revoke the certificate of authority by signing a certificate of revocation, a copy of which will be sent to the foreign entity at its principal place of business address,⁷⁰ whereupon the foreign entity's authority to transact business is terminated and, while the authority of the previously appointed registered agent is not terminated, the secretary of state becomes an alternative registered agent.⁷¹ The revocation of the certificate of authority may be appealed to the Franklin Circuit Court.⁷²

14. Filing fees

The filing fees for qualification of a foreign entity are as follows:⁷³

Application for a certificate of authority	\$ 90
Amended certificate of authority	\$ 40
Certificate of withdrawal	\$ 40
Annual Report	\$ 15

15. Secretary of state interrogatories

The secretary of state is authorized to propound interrogatories to a domestic or foreign entity in order to ascertain compliance with the filing act. Penalties may be imposed on those charged to respond to interrogatories,⁷⁴ and the entity, if domestic, is then subject to administrative dissolution or, if foreign, to revocation of the certificate of authority.⁷⁵ These express provisions as to the ability of the secretary of state to issue interrogatories and to compel the answering thereof supplement and implement, rather than supplant, the secretary of state's general visitorial powers.

It is important to understand the appropriate scope and limitations of interrogatories from the secretary of state. The secretary of state is empowered to issue interrogatories for the purposes of insuring compliance with either BEFA or the applicable organic act as such relates to the interface of the entity with the Kentucky Secretary of State. As such, it would be

appropriate for the secretary of state to issue an interrogatory inquiring as to, (i) the principal place of business address of a limited liability company when it has reason to believe that the LLC in question has in fact moved from that address,⁷⁶ (ii) confirm the continuing validity of a mailing address provided by a foreign entity which has surrendered its certificate of authority when mail transmitted to that address is returned to the secretary of state with the explanation that the period of time for forwarding to the new address has expired⁷⁷ or (iii) upon receipt of a filing by a limited partnership signed by one who is identified as a general partner but who is not listed on the certificate of limited partnership.⁷⁸ Conversely, it would not be appropriate for the secretary of state to issue an interrogatory seeking, in the case of a corporation, a list of its shareholders, or in the case of an LLC a copy of its operating agreement or other written record as to the agreed contributions of the members. While a corporation is required to maintain a list of its shareholders,⁷⁹ and an LLC is required to maintain a listing of the agreed contributions of its members,⁸⁰ neither goes to matters over which the secretary of state has oversight responsibility and on that basis any interrogatory making these or similar inquiries would be inappropriate and validly resisted.⁸¹

C. Foreign Limited Liability Partnerships

Whether a foreign LLP is "transacting business" is determined under the same standards applied to other ventures.⁸²

Through 2007, Kentucky had, in connection with its LLP amendments to its adoption of the Uniform Partnership Act (1914), provisions by which a foreign limited liability partnership could qualify to transact business. This option for qualifying a foreign limited liability partnership expired on January 1, 2008, and is no longer effective as a means by which a foreign limited liability partnership may qualify to transact business in Kentucky.⁸³ *Consequently, every foreign limited liability partnership qualified to transact business in Kentucky under the prior law must have, on or before January 1, 2008, qualified under the Kentucky Revised Uniform Partnership Act (2006) as described below. Absent doing so, for the period between January 1, 2008 and the effective date of qualification pursuant to KyRUPA, the partnership is not qualified to transact business in Kentucky.*

⁶⁷ See KY. REV. STAT. ANN. § 14A.1-030.

⁶⁸ See KY. REV. STAT. ANN. § 14A.9-060(2)(e), (f).

⁶⁹ See KY. REV. STAT. ANN. § 14A.1-020(c).

⁷⁰ See KY. REV. STAT. ANN. § 271B.7-200(1).

⁷¹ See KY. REV. STAT. ANN. § 275.185(1)(e)(1).

⁷² Whether, with the adoption of Federal legislation akin to the Incorporation Transparency and Law Enforcement Assistance Act (S.B. 569, introduced March 11, 2009), a listing of the owners, record or beneficial of a business entity will need to be made available upon interrogatories for the secretary of state remains to be seen. See also Marcia Coyle, *Feds Want More Corporate Data*, NAT'L LAW JOURNAL 1 (Jan. 11, 2010).

⁷³ See KY. REV. STAT. ANN. § 14A.9-010(4), as created by 2012 Ky. Acts, ch. 81, § 84; KY. REV. STAT. ANN. § 362.1-1102(4), as created by 2012 Ky. Acts, ch. 81, § 120.

⁷⁴ See 2007 Acts, ch. 137 § 173, repealing KY. REV. STAT. ANN. § 362.585.

⁶⁷ KY. REV. STAT. ANN. § 14A.9-070; KY. REV. STAT. ANN. § 14A.1-050(1).

⁶⁸ KY. REV. STAT. ANN. § 14A.9-080(1).

⁶⁹ KY. REV. STAT. ANN. § 14A.9-080(2).

⁷⁰ *Id.*

⁷¹ KY. REV. STAT. ANN. § 14A.9-080(4), (5).

⁷² KY. REV. STAT. ANN. § 14A.9-090.

⁷³ KY. REV. STAT. ANN. § 14A.2-060. The complete list of filing fees under the filing act is set forth on Schedule 1.

⁷⁴ See KY. REV. STAT. ANN. § 14A.1-050(2).

⁷⁵ See KY. REV. STAT. ANN. § 14A.1-050(1).

Kentucky adopted the Uniform Partnership Act (1997) (“RUPA”) with a significant number of non-uniform provisions (“KyRUPA”).⁸⁴ Under this act, a foreign LLP will file a Statement of Foreign Qualification setting forth:

- The name of the foreign LLP;⁸⁵
- The partnership’s principal office address and, if different, the street address of an office in Kentucky, if any;
- The name of the registered agent and the address of the registered office in Kentucky; and
- The partnership’s jurisdiction of organization.⁸⁶

In a provision not uniform to RUPA but consistent with other Kentucky acts, the Statement of Foreign Qualification must be signed by or accompanied by a written consent of the registered agent who is going to serve in that capacity.⁸⁷ A Statement of Foreign Qualification must be signed by at least two partners.⁸⁸ A foreign limited liability partnership qualified to transact business in Kentucky under these provisions is obligated to thereafter file an annual report with the secretary of state.⁸⁹ In the event that a foreign LLP does not satisfy its obligation to file an annual report, its statement of foreign qualification is subject to revocation.⁹⁰

The failure of a foreign LLP to qualify to transact business will not impair the validity of its contracts or acts or preclude it from defending an action⁹¹ or negatively impact the limited

liability of a partner in an LLP.⁹² A foreign LLP that is transacting business without having filed a Statement of Foreign Qualification may not maintain an action or proceeding,⁹³ is deemed to have appointed the secretary of state its agent for service of process for causes of action arising in Kentucky,⁹⁴ and is liable for a civil penalty of \$2 per day with an annual limit of \$500.⁹⁵

D. Assumed Name Filings

Foreign corporations, whether for-profit or nonprofit, limited liability companies, limited partnerships, partnerships (including limited liability partnerships), and business trusts that are qualified to transact business in Kentucky may register an assumed name with the secretary of state.⁹⁶ A foreign business organization, other than a general partnership that is not an LLP, which is not qualified to transact business may not register an assumed name. A foreign general partnership that is not a LLP may register an assumed name notwithstanding that it is not qualified to transact business. All assumed name filings expire five years after filing and therefore need to be periodically renewed. A business organization that is transacting business under other than its “real name” will find that the statute of limitations is tolled on claims against it until such time as it files a certificate of assumed name.⁹⁷

⁹² KY. REV. STAT. ANN. § 362.1-1103(5).

⁹³ KY. REV. STAT. ANN. § 362.1-1103(1). While a certificate of authority is required to “maintain” an action, it is not required in order to initiate an action. *Kattula v. Stout*, 2007 WL 2155690 (W.D. Ky. 2007).

⁹⁴ KY. REV. STAT. ANN. § 362.1-1103(6).

⁹⁵ KY. REV. STAT. ANN. § 362.1-1103(7).

⁹⁶ The assumed name statute is KY. REV. STAT. ANN. § 365.015. See also Maryellen B. Allen & Thomas E. Rutledge, *The 2006 Amendments to the Assumed Name Statute: Modernization and Clarification*, 70 BENCH AND BAR 62 (May 2006).

⁹⁷ See *Munday v. Mayfair Diagnostic Lab*, 891 S.W.2d 912 (Ky. 1992); see also *Thompson v. Otis Elevator Co.*, No. 3:10-CV-139-DW, 2012 BL 172602 (W.D. Ky. July 12, 2012).

⁸⁴ KyRUPA has an effective date of July 12, 2006. See generally THOMAS E. RUTLEDGE & ALLAN W. VESTAL, *RUTLEDGE & VESTAL ON KENTUCKY PARTNERSHIPS AND LIMITED PARTNERSHIPS* (2010).

⁸⁵ KY. REV. STAT. ANN. § 362.1-1101(1)(a).

⁸⁶ KY. REV. STAT. ANN. § 362.1-1101(1).

⁸⁷ KY. REV. STAT. ANN. § 362.1-117(2).

⁸⁸ KY. REV. STAT. ANN. § 362.1-105(3).

⁸⁹ KY. REV. STAT. ANN. § 362.1-121.

⁹⁰ KY. REV. STAT. ANN. § 362.1-123.

⁹¹ KY. REV. STAT. ANN. § 362.1-1103(4).

Schedule 1
Filing Fees Under the Business Entity Filing Act
Ky. Rev. Stat. Ann. § 14A.2-060

(1) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered for filing:

(a)	Application for use of indistinguishable name	\$ 20
(b)	Application or renewal of application for reserved name	\$ 15
(c)	Cancellation of application for reserved name	\$ 10
(d)	Notice of transfer of reserved name	\$ 15
(e)	Application for registered name	\$ 36
(f)	Application for renewal of registered name	\$ 36
(g)	Statement of change of registered office or registered agent, or both	\$ 10
(h)	Statement of change of principal office address	\$ 10
(i)	Agent's statement of change of registered office for each affected entity or foreign entity not to exceed a total of	\$ 10 \$2,000
(j)	Reinstatement penalty following administrative dissolution	\$ 100
(k)	Application for certificate of authority	\$ 90
(l)	Application for amended certificate of authority	\$ 40
(m)	Certificate of withdrawal	\$ 40
(n)	Certificate of existence	\$ 10
(o)	Certificate of authorization	\$ 10
(p)	Any other document required or permitted to be filed by this chapter	\$ 15
(q)	Agent's statement of resignation	No fee
(r)	Certificate of administrative dissolution	No fee
(s)	Certificate of reinstatement	No fee
(t)	Certificate of revocation of authority to transact business	No fee

(2) The Secretary of State shall collect a fee of fifteen dollars (\$15) with respect to each annual report or amendment thereto.

(3) The Secretary of State shall collect a fee of ten dollars (\$10) each time process is served on him or her under this chapter. The party to a proceeding causing service of process shall be entitled to recover this fee as costs if he prevails in the proceeding.

(4) The Secretary of State shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign entity:

- (a) Five dollars (\$5) per request for the first five (5) pages and fifty cents (\$0.50) a page for each page thereafter; and
- (b) Five dollars (\$5) for the certificate.

[Next page is A-135.]