

AMENDED IN ASSEMBLY MARCH 29, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2260

Introduced by Assembly Member Hagman

February 24, 2012

An act to ~~amend~~ amend Section 2200 of, and to repeal and add Section 2115 of, the Corporations Code, relating to foreign corporations.

LEGISLATIVE COUNSEL'S DIGEST

AB 2260, as amended, Hagman. Foreign corporations.

Existing law requires foreign corporations, *qualified to conduct business in the state, meeting certain tests, and excluding a wholly-owned or publicly traded foreign corporation*, to abide by specified provisions of the Corporations Code, *to the exclusion of comparable provisions of the state corporate law under which the foreign corporation is incorporated*, including provisions relating to the election and removal of directors, shareholders' rights, vote requirements, and mergers.

This bill would repeal these provisions.

Existing law imposes on directors of a foreign corporation transacting intrastate business liability to the corporation, its shareholders, creditors, receiver, liquidator, or trustee in bankruptcy for making an unauthorized dividend or other specified actions constituting a violation of official duty under the domestic laws under which the corporation is incorporated or organized. Existing law also authorizes courts of this state to enforce that liability.

~~This bill would make a technical, nonsubstantive change to these provisions:~~ *specify that these provisions pertaining to foreign corporations qualified to do business in the state shall not be construed*

to authorize the state to regulate the organization or internal affairs of those foreign corporations, except to the extent of the existing law provisions imposing liability on directors of a foreign corporation, and authorizing courts of this state to enforce that liability. The bill would make conforming changes.

Vote: majority. Appropriation: no. Fiscal committee: no.
 State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 2115 of the Corporations Code is
 2 repealed.
 3 2115. ~~(a) A foreign corporation (other than a foreign~~
 4 ~~association or foreign nonprofit corporation but including a foreign~~
 5 ~~parent corporation even though it does not itself transact intrastate~~
 6 ~~business) is subject to the requirements of subdivision (b)~~
 7 ~~commencing on the date specified in subdivision (d) and continuing~~
 8 ~~until the date specified in subdivision (e) if:~~
 9 ~~(1) The average of the property factor, the payroll factor, and~~
 10 ~~the sales factor (as defined in Sections 25129, 25132, and 25134~~
 11 ~~of the Revenue and Taxation Code) with respect to it is more than~~
 12 ~~50 percent during its latest full income year and~~
 13 ~~(2) more than one-half of its outstanding voting securities are~~
 14 ~~held of record by persons having addresses in this state appearing~~
 15 ~~on the books of the corporation on the record date for the latest~~
 16 ~~meeting of shareholders held during its latest full income year or,~~
 17 ~~if no meeting was held during that year, on the last day of the latest~~
 18 ~~full income year. The property factor, payroll factor, and sales~~
 19 ~~factor shall be those used in computing the portion of its income~~
 20 ~~allocable to this state in its franchise tax return or, with respect to~~
 21 ~~corporations the allocation of whose income is governed by special~~
 22 ~~formulas or that are not required to file separate or any tax returns;~~
 23 ~~which would have been so used if they were governed by this~~
 24 ~~three-factor formula. The determination of these factors with~~
 25 ~~respect to any parent corporation shall be made on a consolidated~~
 26 ~~basis, including in a unitary computation (after elimination of~~
 27 ~~intercompany transactions) the property, payroll, and sales of the~~
 28 ~~parent and all of its subsidiaries in which it owns directly or~~
 29 ~~indirectly more than 50 percent of the outstanding shares entitled~~
 30 ~~to vote for the election of directors, but deducting a percentage of~~

1 the property, payroll, and sales of any subsidiary equal to the
2 percentage minority ownership, if any, in the subsidiary. For the
3 purpose of this subdivision, any securities held to the knowledge
4 of the issuer in the names of broker-dealers, nominees for
5 broker-dealers (including clearing corporations), or banks,
6 associations, or other entities holding securities in a nominee name
7 or otherwise on behalf of a beneficial owner (collectively “nominee
8 holders”), shall not be considered outstanding. However, if the
9 foreign corporation requests all nominee holders to certify, with
10 respect to all beneficial owners for whom securities are held, the
11 number of shares held for those beneficial owners having addresses
12 (as shown on the records of the nominee holder) in this state and
13 outside of this state, then all shares so certified shall be considered
14 outstanding and held of record by persons having addresses either
15 in this state or outside of this state as so certified, provided that
16 the certification so provided shall be retained with the record of
17 shareholders and made available for inspection and copying in the
18 same manner as is provided in Section 1600 with respect to that
19 record. A current list of beneficial owners of a foreign corporation’s
20 securities provided to the corporation by one or more nominee
21 holders or their agent pursuant to the requirements of Rule
22 14b-1(b)(3) or 14b-2(b)(3) as adopted on January 6, 1992,
23 promulgated under the Securities Exchange Act of 1934, shall
24 constitute an acceptable certification with respect to beneficial
25 owners for the purposes of this subdivision.

26 (b) Except as provided in subdivision (c), the following chapters
27 and sections of this division shall apply to a foreign corporation
28 as defined in subdivision (a) (to the exclusion of the law of the
29 jurisdiction in which it is incorporated):

30 Chapter 1 (general provisions and definitions), to the extent
31 applicable to the following provisions;

32 Section 301 (annual election of directors);

33 Section 303 (removal of directors without cause);

34 Section 304 (removal of directors by court proceedings);

35 Section 305, subdivision (c) (filling of director vacancies where
36 less than a majority in office elected by shareholders);

37 Section 309 (directors’ standard of care);

38 Section 316 (excluding paragraph (3) of subdivision (a) and
39 paragraph (3) of subdivision (f)) (liability of directors for unlawful
40 distributions);

1 Section 317 (indemnification of directors, officers, and others);
2 Sections 500 to 505, inclusive (limitations on corporate
3 distributions in cash or property);
4 Section 506 (liability of shareholder who receives unlawful
5 distribution);
6 Section 600, subdivisions (b) and (c) (requirement for annual
7 shareholders' meeting and remedy if same not timely held);
8 Section 708, subdivisions (a), (b), and (c) (shareholder's right
9 to cumulate votes at any election of directors);
10 Section 710 (supermajority vote requirement);
11 Section 1001, subdivision (d) (limitations on sale of assets);
12 Section 1101 (provisions following subdivision (c)) (limitations
13 on mergers);
14 Section 1151 (first sentence only) (limitations on conversions);
15 Section 1152 (requirements of conversions);
16 Chapter 12 (commencing with Section 1200) (reorganizations);
17 Chapter 13 (commencing with Section 1300) (dissenters' rights);
18 Sections 1500 and 1501 (records and reports);
19 Section 1508 (action by Attorney General);
20 Chapter 16 (commencing with Section 1600) (rights of
21 inspection);
22 (e) This section does not apply to any corporation (1) with
23 outstanding securities listed on the New York Stock Exchange,
24 the NYSE Amex, the NASDAQ Global Market, or the NASDAQ
25 Capital Market, or (2) if all of its voting shares (other than
26 directors' qualifying shares) are owned directly or indirectly by a
27 corporation or corporations not subject to this section.
28 (d) For purposes of subdivision (a), the requirements of
29 subdivision (b) shall become applicable to a foreign corporation
30 only upon the first day of the first income year of the corporation
31 (1) commencing on or after the 135th day of the income year
32 immediately following the latest income year with respect to which
33 the tests referred to in subdivision (a) have been met or (2)
34 commencing on or after the entry of a final order by a court of
35 competent jurisdiction declaring that those tests have been met.
36 (e) For purposes of subdivision (a), the requirements of
37 subdivision (b) shall cease to be applicable to a foreign corporation
38 (1) at the end of the first income year of the corporation
39 immediately following the latest income year with respect to which
40 at least one of the tests referred to in subdivision (a) is not met or

1 ~~(2) at the end of the income year of the corporation during which~~
2 ~~a final order has been entered by a court of competent jurisdiction~~
3 ~~declaring that one of those tests is not met, provided that a contrary~~
4 ~~order has not been entered before the end of the income year.~~

5 ~~(f) Any foreign corporation that is subject to the requirements~~
6 ~~of subdivision (b) shall advise any shareholder of record, any~~
7 ~~officer, director, employee, or other agent (within the meaning of~~
8 ~~Section 317) and any creditor of the corporation in writing, within~~
9 ~~30 days of receipt of written request for that information, whether~~
10 ~~or not it is subject to subdivision (b) at the time the request is~~
11 ~~received. Any party who obtains a final determination by a court~~
12 ~~of competent jurisdiction that the corporation failed to provide to~~
13 ~~the party information required to be provided by this subdivision~~
14 ~~or provided the party information of the kind required to be~~
15 ~~provided by this subdivision that was incorrect, then the court, in~~
16 ~~its discretion, shall have the power to include in its judgment~~
17 ~~recovery by the party from the corporation of all court costs and~~
18 ~~reasonable attorneys' fees incurred in that legal proceeding to the~~
19 ~~extent they relate to obtaining that final determination.~~

20 *SEC. 2. Section 2115 is added to the Corporations Code, to*
21 *read:*

22 *2115. Except as otherwise provided in Section 2116, this*
23 *chapter shall not be construed to authorize the state to regulate*
24 *the organization or internal affairs of a foreign corporation*
25 *qualified to do business in this state.*

26 *SEC. 3. Section 2200 of the Corporations Code is amended to*
27 *read:*

28 2200. Every corporation that neglects, fails, or refuses: (a) to
29 keep or cause to be kept or maintained the record of shareholders
30 or books of account required by this division to be kept or
31 maintained; *or* (b) to prepare or cause to be prepared or submitted
32 the financial statements required by this division to be prepared
33 or submitted, ~~or (c) to give any shareholder of record the advice~~
34 ~~required by subdivision (f) of Section 2115~~; is subject to penalty
35 as provided in this section.

36 The penalty shall be twenty-five dollars (\$25) for each day that
37 the failure or refusal continues, up to a maximum of one thousand
38 five hundred dollars (\$1,500), beginning 30 days after receipt of
39 the written request that the duty be performed from one entitled
40 to make the request, ~~except that, in the case of a failure to give~~

1 ~~advice required by subdivision (f) of Section 2115, the 30-day~~
2 ~~period shall run from the date of receipt of the request made~~
3 ~~pursuant to subdivision (f) of Section 2115, and no additional~~
4 ~~request is *shall be* required by this section.~~

5 The penalty shall be paid to the shareholder or shareholders
6 jointly making the request for performance of the duty, and
7 damaged by the neglect, failure, or refusal, if suit therefor is
8 commenced within 90 days after the written request is made;
9 including any request made pursuant to subdivision (f) of Section
10 2115; but the maximum daily penalty because of failure to comply
11 with any number of separate requests made on any one day or for
12 the same act shall be two hundred fifty dollars (\$250).

13 ~~SECTION 1. Section 2115 of the Corporations Code is~~
14 ~~amended to read:~~

15 ~~2115. (a) A foreign corporation (other than a foreign~~
16 ~~association or foreign nonprofit corporation but including a foreign~~
17 ~~parent corporation even though it does not itself transact intrastate~~
18 ~~business) is subject to the requirements of subdivision (b)~~
19 ~~commencing on the date specified in subdivision (d) and continuing~~
20 ~~until the date specified in subdivision (e) if:~~

21 ~~(1) The average of the property factor, the payroll factor, and~~
22 ~~the sales factor (as defined in Sections 25129, 25132, and 25134~~
23 ~~of the Revenue and Taxation Code) with respect to it is more than~~
24 ~~50 percent during its latest full income year, and~~

25 ~~(2) more than one-half of its outstanding voting securities are~~
26 ~~held of record by persons having addresses in this state appearing~~
27 ~~on the books of the corporation on the record date for the latest~~
28 ~~meeting of shareholders held during its latest full income year or,~~
29 ~~if no meeting was held during that year, on the last day of the latest~~
30 ~~full income year. The property factor, payroll factor, and sales~~
31 ~~factor shall be those used in computing the portion of its income~~
32 ~~allocable to this state in its franchise tax return or, with respect to~~
33 ~~corporations the allocation of whose income is governed by special~~
34 ~~formulas or that are not required to file separate or any tax returns,~~
35 ~~which would have been so used if they were governed by this~~
36 ~~three-factor formula. The determination of these factors with regard~~
37 ~~to any parent corporation shall be made on a consolidated basis,~~
38 ~~including in a unitary computation (after elimination of~~
39 ~~intercompany transactions) the property, payroll, and sales of the~~
40 ~~parent and all of its subsidiaries in which it owns directly or~~

1 indirectly more than 50 percent of the outstanding shares entitled
2 to vote for the election of directors, but deducting a percentage of
3 the property, payroll, and sales of any subsidiary equal to the
4 percentage minority ownership, if any, in the subsidiary. For the
5 purpose of this subdivision, any securities held to the knowledge
6 of the issuer in the names of broker-dealers, nominees for
7 broker-dealers (including clearing corporations), or banks,
8 associations, or other entities holding securities in a nominee name
9 or otherwise on behalf of a beneficial owner (collectively “nominee
10 holders”), shall not be considered outstanding. However, if the
11 foreign corporation requests all nominee holders to certify, with
12 respect to all beneficial owners for whom securities are held, the
13 number of shares held for those beneficial owners having addresses
14 (as shown on the records of the nominee holder) in this state and
15 outside of this state, then all shares so certified shall be considered
16 outstanding and held of record by persons having addresses either
17 in this state or outside of this state as so certified, provided that
18 the certification so provided shall be retained with the record of
19 shareholders and made available for inspection and copying in the
20 same manner as is provided in Section 1600 with respect to that
21 record. A current list of beneficial owners of a foreign corporation’s
22 securities provided to the corporation by one or more nominee
23 holders or their agent pursuant to the requirements of Rule
24 14b-1(b)(3) or 14b-2(b)(3) as adopted on January 6, 1992,
25 promulgated under the Securities Exchange Act of 1934, shall
26 constitute an acceptable certification with respect to beneficial
27 owners for the purposes of this subdivision.

28 (b) Except as provided in subdivision (c), the following chapters
29 and sections of this division shall apply to a foreign corporation
30 as defined in subdivision (a) (to the exclusion of the law of the
31 jurisdiction in which it is incorporated):

32 Chapter 1 (general provisions and definitions), to the extent
33 applicable to the following provisions;

34 Section 301 (annual election of directors);

35 Section 303 (removal of directors without cause);

36 Section 304 (removal of directors by court proceedings);

37 Section 305, subdivision (c) (filling of director vacancies where
38 less than a majority in office elected by shareholders);

39 Section 309 (directors’ standard of care);

1 Section 316 (excluding paragraph (3) of subdivision (a) and
2 paragraph (3) of subdivision (f)) (liability of directors for unlawful
3 distributions);
4 Section 317 (indemnification of directors, officers, and others);
5 Sections 500 to 505, inclusive (limitations on corporate
6 distributions in cash or property);
7 Section 506 (liability of shareholder who receives unlawful
8 distribution);
9 Section 600, subdivisions (b) and (c) (requirement for annual
10 shareholders' meeting and remedy if same not timely held);
11 Section 708, subdivisions (a), (b), and (c) (shareholder's right
12 to cumulate votes at any election of directors);
13 Section 710 (supermajority vote requirement);
14 Section 1001, subdivision (d) (limitations on sale of assets);
15 Section 1101 (provisions following subdivision (c)) (limitations
16 on mergers);
17 Section 1151 (first sentence only) (limitations on conversions);
18 Section 1152 (requirements of conversions);
19 Chapter 12 (commencing with Section 1200) (reorganizations);
20 Chapter 13 (commencing with Section 1300) (dissenters' rights);
21 Sections 1500 and 1501 (records and reports);
22 Section 1508 (action by Attorney General);
23 Chapter 16 (commencing with Section 1600) (rights of
24 inspection).
25 (e) This section does not apply to any corporation (1) with
26 outstanding securities listed on the New York Stock Exchange,
27 the NYSE Amex, the NASDAQ Global Market, or the NASDAQ
28 Capital Market, or (2) if all of its voting shares (other than
29 directors' qualifying shares) are owned directly or indirectly by a
30 corporation or corporations not subject to this section.
31 (d) For purposes of subdivision (a), the requirements of
32 subdivision (b) shall become applicable to a foreign corporation
33 only upon the first day of the first income year of the corporation
34 (1) commencing on or after the 135th day of the income year
35 immediately following the latest income year with respect to which
36 the tests referred to in subdivision (a) have been met or (2)
37 commencing on or after the entry of a final order by a court of
38 competent jurisdiction declaring that those tests have been met.
39 (e) For purposes of subdivision (a), the requirements of
40 subdivision (b) shall cease to be applicable to a foreign corporation

1 ~~(1) at the end of the first income year of the corporation~~
2 ~~immediately following the latest income year with respect to which~~
3 ~~at least one of the tests referred to in subdivision (a) is not met or~~
4 ~~(2) at the end of the income year of the corporation during which~~
5 ~~a final order has been entered by a court of competent jurisdiction~~
6 ~~declaring that one of those tests is not met, provided that a contrary~~
7 ~~order has not been entered before the end of the income year.~~
8 ~~(f) Any foreign corporation that is subject to the requirements~~
9 ~~of subdivision (b) shall advise any shareholder of record, any~~
10 ~~officer, director, employee, or other agent (within the meaning of~~
11 ~~Section 317) and any creditor of the corporation in writing, within~~
12 ~~30 days of receipt of written request for that information, whether~~
13 ~~or not it is subject to subdivision (b) at the time the request is~~
14 ~~received. Any party who obtains a final determination by a court~~
15 ~~of competent jurisdiction that the corporation failed to provide to~~
16 ~~the party information required to be provided by this subdivision~~
17 ~~or provided the party information of the kind required to be~~
18 ~~provided by this subdivision that was incorrect, then the court, in~~
19 ~~its discretion, shall have the power to include in its judgment~~
20 ~~recovery by the party from the corporation of all court costs and~~
21 ~~reasonable attorneys' fees incurred in that legal proceeding to the~~
22 ~~extent they relate to obtaining that final determination.~~