An act to 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.


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

SECTION 1. Section 2115 of the Corporations Code is repealed.

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

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

(2) more than one-half of its outstanding voting securities are held of record by persons having addresses in this state appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year or, if no meeting was held during that year, on the last day of the latest full income year. The property factor, payroll factor, and sales factor shall be those used in computing the portion of its income allocable to this state in its franchise tax return or, with respect to corporations the allocation of whose income is governed by special formulas or that are not required to file separate or any tax returns, which would have been so used if they were governed by this three-factor formula. The determination of these factors with respect to any parent corporation shall be made on a consolidated basis, including in a unitary computation (after elimination of intercompany transactions) the property, payroll, and sales of the parent and all of its subsidiaries in which it owns directly or indirectly more than 50 percent of the outstanding shares entitled to vote for the election of directors, but deducting a percentage of
the property, payroll, and sales of any subsidiary equal to the percentage minority ownership, if any, in the subsidiary. For the purpose of this subdivision, any securities held to the knowledge of the issuer in the names of broker-dealers, nominees for broker-dealers (including clearing corporations), or banks, associations, or other entities holding securities in a nominee name or otherwise on behalf of a beneficial owner (collectively “nominee holders”), shall not be considered outstanding. However, if the foreign corporation requests all nominee holders to certify, with respect to all beneficial owners for whom securities are held, the number of shares held for those beneficial owners having addresses (as shown on the records of the nominee holder) in this state and outside of this state, then all shares so certified shall be considered outstanding and held of record by persons having addresses either in this state or outside of this state as so certified, provided that the certification so provided shall be retained with the record of shareholders and made available for inspection and copying in the same manner as is provided in Section 1600 with respect to that record. A current list of beneficial owners of a foreign corporation’s securities provided to the corporation by one or more nominee holders or their agent pursuant to the requirements of Rule 14b-1(b)(3) or 14b-2(b)(3) as adopted on January 6, 1992, promulgated under the Securities Exchange Act of 1934, shall constitute an acceptable certification with respect to beneficial owners for the purposes of this subdivision.

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

Chapter 1 (general provisions and definitions), to the extent applicable to the following provisions;
Section 301 (annual election of directors);
Section 303 (removal of directors without cause);
Section 304 (removal of directors by court proceedings);
Section 305, subdivision (c) (filling of director vacancies where less than a majority in office elected by shareholders);
Section 309 (directors’ standard of care);
Section 316 (excluding paragraph (3) of subdivision (a) and paragraph (3) of subdivision (f)) (liability of directors for unlawful distributions);
Section 317 (indemnification of directors, officers, and others);
Sections 500 to 505, inclusive (limitations on corporate distributions in cash or property);
Section 506 (liability of shareholder who receives unlawful distribution);
Section 600, subdivisions (b) and (c) (requirement for annual shareholders’ meeting and remedy if same not timely held);
Section 708, subdivisions (a), (b), and (c) (shareholder’s right to cumulate votes at any election of directors);
Section 710 (supermajority vote requirement);
Section 1001, subdivision (d) (limitations on sale of assets);
Section 1101 (provisions following subdivision (e)) (limitations on mergers);
Section 1151 (first sentence only) (limitations on conversions);
Section 1152 (requirements of conversions);
Chapter 12 (commencing with Section 1200) (reorganizations);
Chapter 13 (commencing with Section 1300) (dissenters’ rights);
Sections 1500 and 1501 (records and reports);
Section 1508 (action by Attorney General);
Chapter 16 (commencing with Section 1600) (rights of inspection);
(c) This section does not apply to any corporation (1) with outstanding securities listed on the New York Stock Exchange, the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market, or (2) if all of its voting shares (other than directors’ qualifying shares) are owned directly or indirectly by a corporation or corporations not subject to this section.
(d) For purposes of subdivision (a), the requirements of subdivision (b) shall become applicable to a foreign corporation only upon the first day of the first income year of the corporation (1) commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the tests referred to in subdivision (a) have been met or (2) commencing on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met.
(e) For purposes of subdivision (a), the requirements of subdivision (b) shall cease to be applicable to a foreign corporation (1) at the end of the first income year of the corporation immediately following the latest income year with respect to which at least one of the tests referred to in subdivision (a) is not met or
at the end of the income year of the corporation during which a final order has been entered by a court of competent jurisdiction declaring that one of those tests is not met, provided that a contrary order has not been entered before the end of the income year.

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

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

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

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

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

The penalty shall be twenty-five dollars ($25) for each day that the failure or refusal continues, up to a maximum of one thousand five hundred dollars ($1,500), beginning 30 days after receipt of the written request that the duty be performed from one entitled to make the request, except that, in the case of a failure to give
advice required by subdivision (f) of Section 2115, the 30-day period shall run from the date of receipt of the request made pursuant to subdivision (f) of Section 2115, and no additional request is shall be required by this section.

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

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

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

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

(2) more than one-half of its outstanding voting securities are held of record by persons having addresses in this state appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year or, if no meeting was held during that year, on the last day of the latest full income year. The property factor, payroll factor, and sales factor shall be those used in computing the portion of its income allocable to this state in its franchise tax return or, with respect to corporations the allocation of whose income is governed by special formulas or that are not required to file separate or any tax returns, which would have been so used if they were governed by this three-factor formula. The determination of these factors with regard to any parent corporation shall be made on a consolidated basis, including in a unitary computation (after elimination of intercompany transactions) the property, payroll, and sales of the parent and all of its subsidiaries in which it owns directly or
indirectly more than 50 percent of the outstanding shares entitled
to vote for the election of directors, but deducting a percentage of
the property, payroll, and sales of any subsidiary equal to the
percentage minority ownership, if any, in the subsidiary. For the
purpose of this subdivision, any securities held to the knowledge
of the issuer in the names of broker dealers, nominees for
broker dealers (including clearing corporations), or banks,
associations, or other entities holding securities in a nominee name
or otherwise on behalf of a beneficial owner (collectively “nominee
holders”), shall not be considered outstanding. However, if the
foreign corporation requests all nominee holders to certify, with
respect to all beneficial owners for whom securities are held, the
number of shares held for those beneficial owners having addresses
(as shown on the records of the nominee holder) in this state and
outside of this state, then all shares so certified shall be considered
outstanding and held of record by persons having addresses either
in this state or outside of this state as so certified, provided that
the certification so provided shall be retained with the record of
shareholders and made available for inspection and copying in the
same manner as is provided in Section 1600 with respect to that
record. A current list of beneficial owners of a foreign corporation’s
securities provided to the corporation by one or more nominee
holders or their agent pursuant to the requirements of Rule
14b-1(b)(3) or 14b-2(b)(3) as adopted on January 6, 1992;
promulgated under the Securities Exchange Act of 1934, shall
constitute an acceptable certification with respect to beneficial
owners for the purposes of this subdivision.

(b) Except as provided in subdivision (c), the following chapters
and sections of this division shall apply to a foreign corporation
as defined in subdivision (a) (to the exclusion of the law of the
jurisdiction in which it is incorporated):
Chapter 1 (general provisions and definitions), to the extent
applicable to the following provisions;
Section 301 (annual election of directors);
Section 303 (removal of directors without cause);
Section 304 (removal of directors by court proceedings);
Section 305, subdivision (c) (filling of director vacancies where
less than a majority in office elected by shareholders);
Section 309 (directors’ standard of care);
Section 316 (excluding paragraph (3) of subdivision (a) and paragraph (3) of subdivision (f)) (liability of directors for unlawful distributions);
Section 317 (indemnification of directors, officers, and others);
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Section 506 (liability of shareholder who receives unlawful distribution);
Section 600, subdivisions (b) and (c) (requirement for annual shareholders’ meeting and remedy if same not timely held);
Section 708, subdivisions (a), (b), and (c) (shareholder’s right to cumulate votes at any election of directors);
Section 710 (supermajority vote requirement);
Section 1001, subdivision (d) (limitations on sale of assets);
Section 1101 (provisions following subdivision (e)) (limitations on mergers);
Section 1151 (first sentence only) (limitations on conversions);
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Chapter 12 (commencing with Section 1200) (reorganizations);
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Sections 1500 and 1501 (records and reports);
Section 1508 (action by Attorney General);
Chapter 16 (commencing with Section 1600) (rights of inspection).

(c) This section does not apply to any corporation (1) with outstanding securities listed on the New York Stock Exchange, the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market, or (2) if all of its voting shares (other than directors’ qualifying shares) are owned directly or indirectly by a corporation or corporations not subject to this section.

(d) For purposes of subdivision (a), the requirements of subdivision (b) shall become applicable to a foreign corporation only upon the first day of the first income year of the corporation (1) commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the tests referred to in subdivision (a) have been met or (2) commencing on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met.

(e) For purposes of subdivision (a), the requirements of subdivision (b) shall cease to be applicable to a foreign corporation
(1) at the end of the first income year of the corporation immediately following the latest income year with respect to which at least one of the tests referred to in subdivision (a) is not met or
(2) at the end of the income year of the corporation during which a final order has been entered by a court of competent jurisdiction declaring that one of those tests is not met, provided that a contrary order has not been entered before the end of the income year.

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