AMENDED IN SENATE MAY 28, 2009

AMENDED IN SENATE MAY 6, 2009

AMENDED IN SENATE APRIL 21, 2009

SENATE BILL No. 653

Introduced by Senator Correa

February 27, 2009

An act to amend Sections 17001, 17056, 17060, 17450, and 17451 of the Corporations Code, and to amend Section 17941 of the Revenue and Taxation Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 653, as amended, Correa. Foreign limited liability companies: Indian tribes.

Federally recognized tribes are those Indian tribes recognized by *an act of the United States Congress, a decision of a United States court, or* the United States Secretary of the Interior for certain federal government purposes. ~~Existing federal law authorizes a federally recognized tribe to form a business entity.~~

Existing law requires every limited liability company and every foreign limited liability company registered to transact intrastate business in California to file certain information with the Secretary of State and to comply with various other procedures. Existing law defines "foreign limited liability company" as either an entity formed under the limited liability company laws of any state other than this state or a specified entity formed under the laws of a foreign country meeting certain requirements.

This bill would revise this definition to provide that a “foreign limited liability company” also includes an entity formed under the limited liability laws of a federally recognized Indian tribe.

Existing law provides that the organization and internal affairs and various other matters relating to a foreign limited liability company are generally governed by the laws of the state or foreign ~~jurisdiction~~ *country* under which the limited liability company is organized.

This bill would also refer to the laws of a federally recognized Indian tribe under which a limited liability company may be organized. The bill would make other conforming changes.

Existing law imposes a tax under the Personal Income Tax Law on a limited liability company doing business in this state, and defines “limited liability company” for these purposes to include limited liability companies formed under the laws of this state, another state, or a foreign country.

This bill would include within that definition a limited liability company formed under the laws of a federally recognized Indian tribe.

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

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

SECTION 1. Section 17001 of the Corporations Code is amended to read:

17001. Unless the context otherwise indicates, the following definitions govern the construction of this title:

(a) “Acknowledged” means that an instrument is either of the following:

(1) Formally acknowledged as provided in Article 3 (commencing with Section 1180) of Chapter 4 of Title 4 of Part 4 of Division 2 of the Civil Code.

(2) Executed to include substantially the following wording preceding the signature: It is hereby declared that I am the person who executed this instrument, which execution is my act and deed.

Any certificate of acknowledgment taken without this state before a notary public or a judge or clerk of a court of record having an official seal need not be further authenticated.

(b) “Articles of organization” means articles of organization filed under Section 17050, including all amendments thereto or restatements thereof, or, in the case of a foreign limited liability company, all documents that serve a like function under the laws of the jurisdiction in which the foreign limited liability company is organized.

(c) “Bankrupt” or “bankruptcy” means, with respect to any person, being the subject of an order for relief under Title 11 of the United States Code, or any successor statute or other statute in any foreign jurisdiction having like import or effect.

(d) “Capital account” means, unless otherwise provided in the operating agreement, the amount of the capital interest of a member in the limited liability company consisting of that member’s original contribution, as (1) increased by any additional contributions and by that member’s share of the limited liability company’s profits, and (2) decreased by any distribution to that member and by that member’s share of the limited liability company’s losses.

(e) “Constituent limited liability company” means a limited liability company that is merged with or into one or more other limited liability companies or other business entities and includes a surviving limited liability company.

(f) “Constituent other business entity” means any other business entity that is merged with or into one or more limited liability companies and includes a surviving other business entity.

(g) “Contribution” means any money, property, or services rendered, or a promissory note or other binding obligation to contribute money or property, or to render services as permitted in this title, which a member contributes to a limited liability company as capital in that member’s capacity as a member pursuant to an agreement between the members, including an agreement as to value.

(h) “Disappearing limited liability company” means a constituent limited liability company that is not the surviving limited liability company.

(i) “Disappearing other business entity” means a constituent other business entity that is not the surviving other business entity.

(j) “Distribution” means the transfer of money or property by a limited liability company to its members without consideration.

(k) “Domestic” means organized under the laws of this state when used in relation to any limited liability company, other business entity or person (other than a natural person).

(*l*) "Domestic corporation" means a corporation as defined in Section 162.

(m) "Domestic limited partnership" means a partnership formed by two or more persons under the laws of this state and having one or more general partners and one or more limited partners.

(n) "Economic interest" means a person's right to share in the income, gains, losses, deductions, credit, or similar items of, and to receive distributions from, the limited liability company, but does not include any other rights of a member, including, without limitation, the right to vote or to participate in management, or, except as provided in Section 17106, any right to information concerning the business and affairs of the limited liability company.

(o) (1) "Electronic transmission by the limited liability company" means a communication (a) delivered by (1) facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, for that recipient on record with the limited liability company, (2) posting on an electronic message board or network that the limited liability company has designated for those communications, together with a separate notice to the recipient of the posting, which transmission shall be validly delivered upon the later of the posting or delivery of the separate notice thereof, or (3) other means of electronic communication, (b) to a recipient who has provided an unrevoked consent to the use of those means of transmission, and (c) that creates a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form. However, an electronic transmission by a limited liability company to an individual member is not authorized unless, in addition to satisfying the requirements of this section, the transmission satisfies the requirements applicable to consumer consent to electronic records as set forth in the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7001(c)(1)).

(2) "Electronic transmission to the limited liability company" means a communication (a) delivered by (1) facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, which the limited liability company has provided from time to time to members or managers for sending communications to the limited liability company, (2) posting on an electronic message board or network

that the limited liability company has designated for those communications, and which transmission shall be validly delivered upon the posting, or (3) other means of electronic communication, (b) as to which the limited liability company has placed in effect reasonable measures to verify that the sender is the member or manager (in person or by proxy) purporting to send the transmission, and (c) that creates a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form.

(p) "Foreign corporation" means a corporation formed under the laws of any state other than this state or under the laws of the United States or of a foreign country.

(q) "Foreign limited liability company" means either (1) an entity formed under the limited liability company laws of any state other than this state, or any federally recognized Indian tribe, or (2) an entity organized under the laws of any foreign country that is (A) an unincorporated association, (B) organized under a statute pursuant to which an association may be formed that affords each of its members limited liability with respect to the liabilities of the entity, and (C) not an entity that is required to be registered or qualified pursuant to the provisions of Title 1 (commencing with Section 100) or Title 2 (commencing with Section 15001); but the term "foreign limited liability company" does not include a foreign association, as defined in Section 170.

(r) "Foreign limited partnership" means a partnership formed under the laws of any state other than this state or under the laws of a foreign country, including a limited liability limited partnership, and having as partners one or more general partners and one or more limited partners or their equivalents under any name.

(s) "Foreign other business entity" means any other business entity formed under the laws of any state other than this state or under the laws of the United States or of a foreign country.

(t) "Limited liability company" or "domestic limited liability company" means an entity having one or more members that is organized under this title and is subject to the provisions of Section 17101.

(u) "Mail" unless otherwise provided in the operating agreement, means first-class mail, postage prepaid, unless registered mail is specified. Registered mail includes certified mail.

(v) "Majority in interest of the members," unless otherwise provided in the operating agreement, means more than 50 percent of the interests of members in current profits of the limited liability company.

(w) "Manager" means a person elected by the members of a limited liability company to manage the limited liability company if the articles of organization contain the statement referred to in subdivision (b) of Section 17151 or, if the articles of organization do not contain that statement, "manager" means each of the members of the limited liability company.

(x) "Member" means a person who:

(1) Has been admitted to a limited liability company as a member in accordance with the articles of organization or operating agreement, or an assignee of an interest in a limited liability company who has become a member pursuant to Section 17303.

(2) Has not resigned, withdrawn, or been expelled as a member or, if other than an individual, been dissolved.

(y) "Member of record" means a member named as a member on the list maintained in accordance with paragraph (1) of subdivision (a) of Section 17058.

(z) "Membership interest" means a member's rights in the limited liability company, collectively, including the member's economic interest, any right to vote or participate in management, and any right to information concerning the business and affairs of the limited liability company provided by this title.

(aa) "Officer" means any person elected or appointed pursuant to Section 17154.

(ab) "Operating agreement" means any agreement, written or oral, between all of the members as to the affairs of a limited liability company and the conduct of its business in any manner not inconsistent with law or the articles of organization, including all amendments thereto, or, in the case of a foreign limited liability company, all documents that serve a like function under the laws of the jurisdiction in which the foreign limited liability company is organized. The term "operating agreement" may include, without more, an agreement between all the members to organize a limited liability company pursuant to the provisions of this title.

(ac) "Other business entity" means a corporation, limited partnership, general partnership, business trust, real estate investment trust, or an unincorporated association (other than a nonprofit association), but excluding a domestic limited liability company and a foreign limited liability company.

(ad) “Parent,” when used in relation to a specified limited liability company, means a person who owns, directly or indirectly, membership interests possessing more than 50 percent of the voting power of the specified limited liability company. When used in relation to a specified corporation or limited partnership, the term “parent” shall have the meanings set forth in Section 175 and subdivision (w) of Section 15611 or subdivision (v) of Section 15901.02 respectively.

(ae) “Person” means an individual, partnership, limited partnership, trust, estate, association, corporation, limited liability company, or other entity, whether domestic or foreign.

(af) [RESERVED]

(ag) [RESERVED]

(ah) [RESERVED]

(ai) “Proxy,” unless otherwise provided in the operating agreement, means a written authorization signed or an electronic transmission authorized by a member or the member’s attorney-in-fact giving another person the power to exercise the voting rights of that member. “Signed,” for the purpose of this section, means the placing of the member’s name on the proxy (whether by manual signature, typewriting, telegraphic or electronic transmission, or otherwise) by the member or member’s attorney-in-fact.

A proxy may be transmitted by an oral telephonic transmission if it is submitted with information from which it may be determined that the proxy was authorized by the member, or by the member’s attorney-in-fact.

(aj) “Return of capital,” unless otherwise provided in the operating agreement, means any distribution to a member to the extent that the member’s capital account, immediately after the distribution, is less than the amount of that member’s contributions to the limited liability company as reduced by prior distributions that were a return of capital.

(ak) “State” means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(a*l*) “Subsidiary of a specified limited liability company” means a limited liability company or other business entity in which shares, interests, or other securities possessing more than 50 percent of the voting power are owned by the specified limited liability company.

(am) "Surviving limited liability company" means a limited liability company into which one or more other limited liability companies or other business entities are merged.

(an) "Surviving other business entity" means an other business entity into which one or more limited liability companies are merged.

(ao) "Time a notice is given or sent," unless otherwise expressly provided, means the time a written notice is deposited in the United States mail; is personally delivered to the recipient, is delivered to a common carrier for transmission, or is actually transmitted by the person giving the notice by electronic transmission, to the recipient; or the time any oral notice is communicated, in person or by telephone, to the recipient or to a person at the office of the recipient who the person giving the notice has reason to believe will promptly communicate it to the recipient.

(ap) "Transact intrastate business" means to enter into repeated and successive transactions of business in this state, other than in interstate or foreign commerce.

(1) Without excluding other activities which may not be considered to be transacting intrastate business, a foreign limited liability company shall not be considered to be transacting intrastate business merely because its subsidiary transacts intrastate business, or merely because of its status as any one or more of the following:

(A) A shareholder of a domestic corporation.

(B) A shareholder of a foreign corporation transacting intrastate business.

(C) A limited partner of a foreign limited partnership transacting intrastate business.

(D) A limited partner of a domestic limited partnership.

(E) A member or manager of a foreign limited liability company transacting intrastate business.

(F) A member or manager of a domestic limited liability company.

(2) Without excluding other activities which may not be considered to be transacting intrastate business, a foreign limited liability company shall not be considered to be transacting intrastate business within the meaning of this subdivision solely by reason

of carrying on in this state any one or more of the following activities:

(A) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof, or the settlement of claims or disputes.

(B) Holding meetings of its managers or members or carrying on any other activities concerning its internal affairs.

(C) Maintaining bank accounts.

(D) Maintaining offices or agencies for the transfer, exchange, and registration of the foreign limited liability company's securities or maintaining trustees or depositaries with respect to those securities.

(E) Effecting sales through independent contractors.

(F) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where those orders require acceptance without this state before becoming binding contracts.

(G) Creating or acquiring evidences of debt or mortgages, liens, or security interests in real or personal property.

(H) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts.

(I) Conducting an isolated transaction that is completed within 180 days and not in the course of a number of repeated transactions of a like nature.

(3) A person shall not be deemed to be transacting intrastate business in this state merely because of its status as a member or manager of a domestic limited liability company or a foreign limited liability company registered to transact intrastate business in this state.

(aq) "Vote" includes authorization by written consent.

(ar) "Voting power" means the power to vote on any matter at the time any determination of voting power is made and does not include the right to vote upon the happening of some condition or event which has not yet occurred.

(as) "Withdrawal" includes the resignation or retirement of a member as a member.

(at) "Written" or "in writing" includes facsimile, telegraphic, and other electronic communication as authorized by this code.

SEC. 2. Section 17056 of the Corporations Code is amended to read:

17056. (a) Unless otherwise specified in any other section of this title, any document required by this title to be executed and filed with the Secretary of State shall be executed:

(1) By the person or persons organizing the limited liability company when the limited liability company has not yet been formed.

(2) By any manager.

(3) If the limited liability company is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary.

(4) In the case of a foreign limited liability company, in the manner required by the laws of the state, *the foreign country,* or the federally recognized Indian tribe of its organization.

(b) Any person may execute any document referred to in subdivision (a) by an attorney-in-fact. Powers of attorney relating to the signing of those documents by an attorney-in-fact need not be sworn to, verified, or acknowledged, and need not be filed with the Secretary of State.

(c) Any instrument filed with respect to a limited liability company, other than the original articles of organization, may provide that it is to become effective not more than 90 days after its filing date. In case a delayed effective date is specified, the instrument may be prevented from becoming effective by a certificate stating that by appropriate action it has been revoked and is null and void. This certificate shall be executed in the same manner as the original instrument and shall be filed before the specified effective date. In the case of a merger agreement or certificate of merger, a certificate revoking the earlier filing need only be executed on behalf of one of the constituent parties to the merger. If no revocation certificate is filed, the instrument becomes effective on the date specified.

(d) If the Secretary of State determines that an instrument submitted for filing or otherwise submitted does not conform to the law and returns it to the person submitting it, the instrument may be resubmitted accompanied by a written opinion of a member of the State Bar of California submitting the instrument or representing the person submitting it, to the effect that the specific provisions of the instrument objected to by the Secretary of State does conform to law and stating the points and authorities upon which the opinion is based. The Secretary of State shall rely, with respect to any disputed point of law, other than the application of

Sections 17052, 17053, 17451, and 17452, upon that written opinion in determining whether the instrument conforms to law. The date of filing in that case shall be the date the instrument is received on resubmission.

SEC. 3. Section 17060 of the Corporations Code is amended to read:

17060. (a) Every limited liability company and every foreign limited liability company registered to transact intrastate business in this state shall file within 90 days after the filing of its original articles of organization and biennially thereafter during the applicable filing period, on a form prescribed by the Secretary of State, a statement containing:

(1) The name of the limited liability company and the Secretary of State's file number and, in the case of a foreign limited liability company, the state, *the foreign country,* or the federally recognized Indian tribe under the laws of which it is organized.

(2) The name and address of the agent for service of process required to be maintained pursuant to subdivision (b) of Section 17057. If a corporate agent is designated, only the name of the agent shall be set forth.

(3) The street address of its principal executive office and, in the case of a domestic limited liability company, of the office required to be maintained pursuant to Section 17057.

(4) The name and complete business or residence addresses of any manager or managers and the chief executive officer, if any, appointed or elected in accordance with the articles of organization or operating agreement or, if no manager has been so elected or appointed, the name and business or residence address of each member.

(5) The general type of business that constitutes the principal business activity of the limited liability company (for example, manufacturer of aircraft; wholesale liquor distributor; or retail department store).

(b) If there has been no change in the information in the last filed statement of the limited liability company on file in the Secretary of State's office, the limited liability company may, in lieu of filing the statement required by subdivision (a), advise the Secretary of State, on a form prescribed by the Secretary of State, that no changes in the required information have occurred during the applicable filing period.

(c) For the purposes of this section, the applicable filing period for a limited liability company shall be the calendar month during which its original articles of organization were filed or, in the case of a foreign limited liability company, the month during which its application for registration was filed, and the immediately preceding five calendar months. The Secretary of State shall mail a form for compliance with this section to each limited liability company approximately three months prior to the close of the applicable filing period. The form shall state the due date thereof and shall be mailed to the last address of the limited liability company according to the records of the Secretary of State. The failure of the limited liability company to receive the form shall not exempt the limited liability company from complying with this section.

(d) Whenever any of the information required by subdivision (a) changes, other than the name and address of the agent for service of process, the limited liability company may file a current statement containing all the information required by subdivision (a). When changing its agent for service of process or when the address of the agent changes, the limited liability company shall file a current statement containing all the information required by subdivision (a). Whenever any statement is filed pursuant to this section changing the name and address of the agent for service of process, that statement supersedes any previously filed statement pursuant to this section, the statement in the original articles of organization, and the statement in any restated articles of organization that have been filed, or in the case of a foreign limited liability company, in the application for registration. Whenever restated articles of organization are filed, the statement therein, if any, of the name and address of the agent for service of process supersedes any previously filed statement pursuant to this section.

(e) The Secretary of State may destroy or otherwise dispose of any statement filed pursuant to this section after it has been superseded by the filing of a new statement.

(f) This section shall not be construed to place any person dealing with the limited liability company on notice of, or under any duty to inquire about, the existence or content of a statement filed pursuant to this section.

SEC. 4. Section 17450 of the Corporations Code is amended to read:

17450. Subject to the provisions of Section 17453:

(a) The laws of the state, *the foreign country*, or the federally recognized Indian tribe under which a foreign limited liability company is organized shall govern its organization and internal affairs and the liability and authority of its managers and members.

(b) A foreign limited liability company may not be denied registration by reason of any difference between those laws and the laws of this state.

SEC. 5. Section 17451 of the Corporations Code is amended to read:

17451. (a) Before transacting intrastate business in this state, a foreign limited liability company shall register with the Secretary of State. In order to register, a foreign limited liability company shall submit to the Secretary of State an application for registration as a foreign limited liability company, signed by a person with authority to do so under the laws of the state, *the foreign country*, or the federally recognized Indian tribe of its organization, on a form prescribed by the Secretary of State and setting forth:

(1) The name of the foreign limited liability company and, if different, the name under which it proposes to transact business in this state.

(2) The state, *the foreign country*, or the federally recognized Indian tribe and *the* date of its organization and a statement that the foreign limited liability company is authorized to exercise its powers and privileges in that jurisdiction.

(3) The name and address of an agent for service of process on the foreign limited liability company meeting the qualifications specified in paragraph (1) of subdivision (d) of Section 17061, unless a corporate agent is designated, in which case only the name of the agent shall be set forth.

(4) A statement that the Secretary of State is appointed the agent of the foreign limited liability company for service of process if the agent has resigned and has not been replaced or if the agent cannot be found or served with the exercise of reasonable diligence.

(5) The address of the principal executive office of the foreign limited liability company and of its principal office in this state, if any.

(b) Annexed to the application for registration shall be a certificate from an authorized public official of the foreign limited liability company's jurisdiction of organization to the effect that the foreign limited liability company is in good standing in that jurisdiction, if the laws of that jurisdiction permit the issuance of those certificates; or, in the alternative, a statement by the foreign limited liability company that the laws of its jurisdiction of organization do not permit the issuance of those certificates.

(c) The Secretary of State may cancel the application and certificate of registration of a foreign limited liability company if a check or other remittance accepted in payment of the filing fee is not paid upon presentation. Upon receiving written notification that the item presented for payment has not been honored for payment, the Secretary of State shall give a first written notice of the applicability of this section to the agent for service of process or to the person submitting the instrument. Thereafter, if the amount has not been paid by cashier's check or equivalent, the Secretary of State shall give a second written notice of cancellation and the cancellation shall thereupon be effective. The second notice shall be given 20 days or more after the first notice and 90 days or less after the original filing.

(d) The Secretary of State shall include with instructional materials, provided in conjunction with registration under subdivision (a), a notice that filing the registration will obligate the limited liability company to pay an annual tax to the Franchise Tax Board pursuant to Section 17941 of the Revenue and Taxation Code. That notice shall be updated annually to specify the dollar amount of the tax.

SEC. 6. Section 17941 of the Revenue and Taxation Code is amended to read:

17941. (a) For each taxable year beginning on or after January 1, 1997, a limited liability company doing business in this state (as defined in Section 23101) shall pay annually to this state a tax for the privilege of doing business in this state in an amount equal to the applicable amount specified in paragraph (1) of subdivision (d) of Section 23153 for the taxable year.

(b) (1) In addition to any limited liability company that is doing business in this state and is therefore subject to the tax imposed by subdivision (a), for each taxable year beginning on or after January 1, 1997, a limited liability company shall pay annually the tax prescribed in subdivision (a) if articles of organization have been accepted, or a certificate of registration has been issued, by the office of the Secretary of State. The tax shall be paid for each taxable year, or part thereof, until a certificate of cancellation of registration or of articles of organization is filed on behalf of the limited liability company with the office of the Secretary of State.

(2) If a taxpayer files a return with the Franchise Tax Board that is designated as its final return, the Franchise Tax Board shall notify the taxpayer that the annual tax shall continue to be due annually until a certificate of cancellation is filed with the Secretary of State pursuant to Section 17356 or 17455 of the Corporations Code.

(c) The tax assessed under this section shall be due and payable on or before the 15th day of the fourth month of the taxable year.

(d) For purposes of this section, "limited liability company" means an organization, other than a limited liability company that is exempt from the tax and fees imposed under this chapter pursuant to Section 23701h or Section 23701x, that is formed by one or more persons under the law of this state, any other country, any other state, or any federally recognized Indian tribe as a "limited liability company" and that is not taxable as a corporation for California tax purposes.

(e) Notwithstanding anything in this section to the contrary, if the office of the Secretary of State files a certificate of cancellation pursuant to Section 17350.5 of the Corporations Code for any limited liability company, then paragraph (1) of subdivision (f) of Section 23153 shall apply to that limited liability company as if the limited liability company were properly treated as a corporation for that limited purpose only, and paragraph (2) of subdivision (f) of Section 23153 shall not apply. Nothing in this subdivision entitles a limited liability company to receive a reimbursement for any annual taxes or fees already paid.