



BUSINESS LAW SECTION

THE STATE BAR OF CALIFORNIA

**LEGISLATIVE PROPOSAL (BLS-2006-02):
CALIFORNIA GENERAL CORPORATION LAW: CLARIFICATION OF
TRANSACTION OF INTRASTATE BUSINESS BY A FOREIGN CORPORATION**

TO: Larry Doyle, Office of Governmental Affairs, California State Bar

FROM: Jeffrey C. Selman, Vice-Chair,
Legislation of the Executive Committee of the State Bar

DATE: July 27, 2005

RE: Proposal to amend §191 of the Corporations Code

SECTION ACTION:

(Approved by BLS Executive Committee July 27, 2005)
(Approved by Corporations Committee May 6, 2005)

SECTION CONTACTS:

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HISTORY, DIGEST AND PURPOSE

The mission statement of the Corporations Committee (the “Committee”) provides that it shall study, consider, take a position, and advocate that position with respect to, among other things, “statutory changes that would promote efficiency or effectiveness in practice.” The Committee has concluded that amending §191 of the Corporations Code (the “Code”) will promote such efficiency and effectiveness by conforming the definition of what it means for a foreign

corporation to “transact intrastate business” to related provisions governing foreign limited partnerships, limited liability partnerships, and limited liability companies contained in §§15611(ag), 16959, and 17001(ap), respectively, of the Code.

The Committee recommends that such conformity will be achieved by providing that a foreign corporation shall not be considered to be transacting intrastate business merely because of its status as 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 domestic limited partnership;
- (D) a limited partner of a foreign limited partnership transacting intrastate business;
- (E) a member or manager of a domestic limited liability company; or
- (F) a member or manager of a foreign limited liability company transacting intrastate business.

1. Background. § 171 of the Corporations Code defines a “foreign corporation” as any corporation other than a domestic corporation as well as a business association organized as a trust under the laws of a foreign jurisdiction. An example of a foreign corporation is a corporation organized under the laws of another state such as Delaware. Chapter 21 of the Code imposes various requirements on foreign corporations (other than corporations or associations chartered under the laws of the United States) that transact intrastate business. These requirements include a prohibition on transacting intrastate business without first obtaining a certificate of qualification from the Secretary of State. §191 of the Code defines the term “transact intrastate business” for the purposes of Chapter 21 as entering into repeated and successive transactions of business in the state, other than interstate or foreign commerce. It specifically excludes various activities of a foreign corporation from this definition. For example, pursuant to §191(b), a foreign corporation is not considered to be transacting intrastate business merely because its “subsidiary” transacts intrastate business.

The Code includes separate provisions governing limited partnerships, limited liability partnerships and limited liability companies. Each of these laws, contain substantially similar definitions of the phrase “transact intrastate business” as is contained in §191. (Code Sections 15611(ag), 16959, and 17001(ap)) However, each of these statutes was enacted after §191, and contains more specific descriptions of what is not considered to be transacting intrastate business. Sections 15611(ag)(2), 16959(m), and 17001(ap)(1) clarify the phrase such that the entities to which those sections apply shall not be deemed to be transacting intrastate business merely because of their ownership interests in a domestic entity or a foreign entity that does intrastate business. For example, §15611(ag)(2)(D) provides that a foreign limited partnership shall not be considered to be transacting intrastate business merely because of its status as a limited partner of a domestic limited partnership. This provision is not mirrored in §191. While §191(b) provides that a foreign corporation does not transact intrastate business solely because its “subsidiary” transacts intrastate business, §189 of the Code limits the definition of “subsidiary” to corporations. Thus, §191 does not explicitly exclude from the definition of

“transact intrastate business” a corporation that is a limited partner of a domestic limited partnership.^a

While the absence of explicit exceptions for other types of entities to the definition of “transact intrastate business” from §191 should merely be considered to be the effect of subsequent legislative precision regarding foreign limited partnerships, limited liability partnerships, and limited liability companies, the consequences of such absence are potentially significant. Because the relationships listed above are not expressly excluded from §191, there is possible uncertainty regarding the section’s application, rendering it difficult for counsel to provide sound legal advice in cases implicating those relationships. This could discourage out-of-state businesses from transacting business in California.

The proposed amendment solves this problem by bringing §191 into conformity with the parallel sections cited above. The intent of all of the provisions is identical and the current divergence of language is mere happenstance. The aim of the amendment is not to alter the operational purpose of §191, but rather to simply add the type of precision and specificity that exists for foreign limited partnerships, limited liability partnerships, and limited liability companies to its content to improve its application. The amendment offers clear guidance to the entities governed by §191 regarding the status of their activities under California law, making California a more business-friendly state to these foreign entities.^b To restate, adding the proposed conforming language will provide foreign corporations with certainty regarding their status and aid counsel in giving clear legal advice to such entities.

Consequently, we recommend adding language to §191 conforming it to §§115611(ag), 16959(m), and 17001(ap). We believe that this amendment is necessary to further clarify the status of activities conducted by foreign corporations in California.

This amendment was unanimously approved by the Committee.

2. Amendment of §191. Existing Corporations Code §191 delineates the status of various activities conducted by foreign corporations with respect to transaction of intrastate business. The Committee proposes to amend §191(b) to provide, in effect, that a foreign corporation shall not be considered to be transacting intrastate business 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 domestic limited partnership; (D) a limited partner of a foreign limited partnership transacting intrastate business; (E) a member or manager of a domestic limited liability company; or (F) a member or manager of a foreign limited liability company transacting intrastate business.

^a Section 15611(ag)(4) provides that a “person” (defined in Section 15611(z) to include a corporation) shall not be deemed to transact intrastate business merely because of the person’s status as a limited partner of a domestic limited partnership. However, many readers of Section 191 are likely to overlook Section 15611(ag)(4) due to its location in a completely separate title of the Code.

^b *Corporate Tax and Limited Liability Companies: Hearing on S.B. 469 Before the Senate Comm. on Revenue and Taxation*, 1994 Leg., (Cal. 1994) (statement of Sen. Leroy F. Greene, Chairman, Senate Comm. on Revenue and Taxation).

APPLICATION

If adopted, the proposed amendment would be effective January 1, 2007.

PENDING LITIGATION

None to our knowledge.

LIKELY SUPPORT AND OPPOSITION

Support from corporations, partnerships, limited liability companies, and professionals providing services to such companies. No opposition expected.

FISCAL IMPACT

None expected.

GERMANENESS

The subject matter of this proposal is one in which the members of the Business Law Section have special experience, and which requires their special knowledge, training, and technical expertise. In addition, the proposed statute will promote clarity, consistency, and comprehensiveness in the law.

TEXT OF PROPOSAL

SECTION 1. Section 191 of the Corporations Code is amended to read:

§ 191. (a) For the purposes of Chapter 21 (commencing with Section 2100), “transact intrastate business” means entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce.

(b) A foreign corporation 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:*

(1) A shareholder of a domestic corporation.

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

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

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

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

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

(c) Without excluding other activities which may not constitute transacting intrastate business, a foreign corporation shall not be considered to be transacting intrastate business within the meaning of subdivision (a) solely by reason of carrying on in this state any one or more of the following activities:

(1) 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.

(2) Holding meetings of its board or shareholders or carrying on other activities concerning its internal affairs.

- (3) Maintaining bank accounts.
 - (4) Maintaining offices or agencies for the transfer, exchange and registration of its securities or depositaries with relation to its securities.
 - (5) Effecting sales through independent contractors.
 - (6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.
 - (7) Creating evidences of debt or mortgages, liens or security interests on real or personal property.
 - (8) Conducting an isolated transaction completed within a period of 180 days and not in the course of a number of repeated transactions of like nature.
- (d) Without excluding other activities which may not constitute transacting intrastate business, any foreign lending institution, including, but not limited to: any foreign banking corporation, any foreign corporation all of the capital stock of which is owned by one or more foreign banking corporations, any foreign savings and loan association, any foreign insurance company or any foreign corporation or association authorized by its charter to invest in loans secured by real and personal property, whether organized under the laws of the United States or of any other state, district or territory of the United States, shall not be considered to be doing, transacting or engaging in business in this state solely by reason of engaging in any or all of the following activities either on its own behalf or as a trustee of a pension plan, employee profit sharing or retirement plan, testamentary or inter vivos trust, or in any other fiduciary capacity:
- (1) The acquisition by purchase, by contract to purchase, by making of advance commitments to purchase or by assignment of loans, secured or unsecured, or any interest therein, if such activities are carried on from outside this state by the lending institution.
 - (2) The making by an officer or employee of physical inspections and appraisals of real or personal property, securing or proposed to secure any loan, if the officer or employee making any physical inspection or appraisal is not a resident of and does not maintain a place of business for such purpose in this state.
 - (3) 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.
 - (4) 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.
 - (5) 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 and 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 proposed to secure any loans, and the performance of any such engagement.
 - (6) The acquisition of title to the real or personal property covered by any mortgage, deed of trust or other security instrument by trustee's sale, judicial sale, foreclosure or 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 loan, and the retention of title to any real or personal property so acquired pending the orderly sale or other disposition thereof.

(7) The engaging in activities necessary or appropriate to carry out any of the foregoing activities.

Nothing contained in this subdivision shall be construed to permit any foreign banking corporation to maintain an office in this state otherwise than as provided by the laws of this state or to limit the powers conferred upon any foreign banking corporation as set forth in the laws of this state or to permit any foreign lending institution to maintain an office in this state except as otherwise permitted under the laws of this state.