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A. Introduction

The decision to do business in California will necessarily subject the enterprise to certain requirements of California law, and the degree of the enterprise's involvement with the state will determine which laws apply. California law applicable to foreign corporations has some unusual features not found in most other states, including the doctrine of the "pseudo-foreign" or "nominally foreign" corporation. This chapter will address the principal legal doctrines applicable under California corporate law to enterprises organized outside of California.

B. Doing Business in California

A considerable body of law has developed regarding the application of the phrase "doing business in California" to specific circumstances. Doing business in California—the transacting of intrastate business—is affirmatively defined by statute as "repeated and successive transactions" of the corporation's business in California.[2] The statute excepts interstate commerce and foreign commerce from the definition of intrastate business.[3] The statute also excludes certain activities from the definition of intrastate business including, but not limited to:

(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 those orders require acceptance outside this state before becoming binding contracts;

(7) creating evidences of debt or mortgages, liens or security interests on real or personal property; and

(8) conducting an isolated transaction completed within a period of 180 days and not in the course of repeated transactions of like nature.[4]

California courts have ruled that local negotiations for a contract to be performed elsewhere do not involve intrastate business,[5] and that local solicitations of orders accepted elsewhere for the purchase of goods shipped from out of state also do not constitute intrastate business.[6] By contrast, performance of a contract within the state constitutes intrastate business even where the offer and acceptance happen elsewhere.[7] The extent of California contacts and activities needed to find transaction of intrastate business is greater for purposes of qualification than that needed to subject the enterprise to local taxation or to make it amenable to service of process.[8]

California's General Corporation Law (the "GCL") specifically provides that a foreign lending institution's loans secured by California real or personal property will not be deemed to constitute the transaction of intrastate business solely because the lending institution:

(1) acquires or makes an advance commitment to purchase the loans from outside California;

(2) carries out physical inspections and appraisals of real or personal property securing or proposed to secure any loan, provided that the inspecting officer or employee is not a resident of and does not maintain a place of business for that purpose in California;

(3) enforces a loan by trustee's sale, judicial process or deed in lieu of foreclosure or otherwise;

(4) modifies, renews, extends, transfers or sells a loan, accepts additional or substitute security, or accepts additional or substitute obligors, if carried out from outside of California;

(5) contracts with an independent business entity qualified to do business in California to make collections and service loans or make, on behalf of the lending institution, physical inspections and appraisals of real or personal property securing any loans or proposed to secure any loans;

(6) acquires title to real or personal property covered by any loan by trustee's sale, judicial sale, foreclosure or deed in lieu of foreclosure, or retains title to any real or

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[2] CAL. CORP. CODE § 191. Please see the California Department of Business Oversight website at http://www.dbo.ca.gov for further information and relevant forms.

[3] CAL. CORP. CODE § 191.

[4] *Id.*

[5] Thorner v. Selective Cam Transmission Co., 4 Cal. Rptr. 409 (Cal. Ct. App. 1960).

[6] Automotriz del Golfo de Cal. S. A. de C. V. v. Resnick, 306 P.2d 1 (Cal. 1957).

[7] Hurtz v. Buczek Enters., LLC, 870 F. Supp. 2d 810, 821 (N.D. Cal. 2012).

[8] Jeter v. Austin Trailer Equip. Co., 265 P.2d 130 (Cal. Ct. App. 1953).

personal property for the purpose of transferring title to any federal agency or instrumentality as the insurer or guarantor of any loan, pending the orderly sale or other disposition thereof; or

(7) engages in activities necessary or appropriate to carry out any of the foregoing activities.[9]

A California agency must be retained to make collections and to service the loans if exemption (5) above is to be relied on.[10] The GCL provides an exemption not only from the corporate qualification requirements, but also from all taxes under the Bank and Corporation Tax Law of the Revenue and Taxation Code and from the qualification requirements of the Financial and Insurance Codes.[11] Thus, these issues are raised often by lenders in the context of legal opinions from counsel to California borrowers.

Because the California statutory scheme is not significantly different from that in most states and the essential framework of American jurisprudence on interstate versus intrastate business activities is based on federal constitutional principles,[12] cases from other jurisdictions can be persuasive in determining whether a given activity involves interstate or intrastate business.

C. Qualifying to Do Business in California

To transact intrastate business, a foreign corporation must file a "statement and designation" form with the Secretary of State,[13] accompanied by a good-standing certificate from the jurisdiction of incorporation issued within the last six months and a $100 filing fee.[14] Included in the filing must be an irrevocable consent to service of process upon a California resident or a California registered corporate agent.[15] Any natural person with an address in California may be designated as the agent of a foreign corporation for service of process.[16] If the designated agent for service of process or its successor is no longer authorized to act or cannot be found at the address given, the agent for service of process is the Secretary of State.[17] Although not explicitly set forth in the "statement and designation" form, the consent to service of process includes search warrants for records held by the foreign corporation both inside and outside of California.[18] In 2015, the California Assembly voted to amend Section 2105 of the GCL to allow foreign corporations to accept service of process submitted via email or a designated internet portal.[19]

The certificate of qualification received as a result of the filing described above remains in effect until the corporation withdraws from doing business in California. An amended statement and designation is required if the foreign corporation changes (i) its name, (ii) the address of its principal office in California, (iii) the address of its principal executive office, or (iv) its agent for the service of process, or if the stated address of any natural person designated as agent for service is changed.[20]

A foreign corporation qualified to transact intrastate business is required to file annual statements of information on a form prescribed by the Secretary of State, including the names and addresses of its chief executive officer, secretary, and chief financial officer; the addresses of its principal executive office and of its principal business office in California, if any; and its principal business activity.[21] The first statement of information must be filed within 90 days after the filing of the foreign corporation's original "statement and designation" form. The required statement of information for most corporations can be filed online and is generally processed in one business day.[22]

Comment: Qualifying a foreign corporation to transact intrastate business does not establish that business conducted in California prior to qualification was unauthorized intrastate business.[23]

A foreign professional corporation may qualify to transact business in California, but to render professional services in the state, it must obtain a certificate of registration from the governmental agency regulating its profession.[24] Its application to qualify must include a statement, set forth in the statute, where its shareholders acknowledge that they are subject to the same personal liability in rendering professional services in California or to Californians as is prescribed for California corporations in that profession, and submit to the jurisdiction of California courts to the extent applicable to shareholders of a California corporation in that profession.[25] A foreign insurance corporation must also furnish a certificate by the California Insurance Commissioner approving the corporate name.[26]

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[9] CAL. CORP. CODE § 191(d); CAL. CORP. CODE § 2104.

[10] CAL. CORP. CODE § 191(d)(1), (5).

[11] CAL. CORP. CODE § 2104.

[12] *See* Neogard Corp. v. Malott & Peterson-Grundy, 164 Cal. Rptr. 813 (Cal. Ct. App. 1980).

[13] Please see the California Secretary of State website at http://www.sos.ca.gov/business-programs/business-entities/forms/ for downloadable versions of the relevant forms.

[14] The filing fee for a foreign nonprofit corporation is $30.

[15] CAL. CORP. CODE § 1502(b); CAL. CORP. CODE § 1505; CAL. CORP. CODE § 2105(a)(4).

[16] CAL. CORP. CODE § 1502(b); CAL. CORP. CODE § 2105(a)(4).

[17] CAL. CORP. CODE § 2105; CAL. GOV'T CODE § 12186(f).

[18] CAL. CORP. CODE § 2105; CAL. GOV'T CODE § 12186(f).

[19] A.B. No. 844 (Cal. 2015).

[20] CAL. CORP. CODE § 2106, CAL. CORP. CODE § 2107.

[21] CAL. CORP. CODE § 2117. A $25 filing fee is due with the form. CAL. CORP. CODE § 2117(d); CAL. CORP. CODE § 12186(h). Please see the California Secretary of State website at http://www.sos.ca.gov/business-programs/business-entities/forms/ for a downloadable version of the form.

[22] Please see the California Secretary of State online business portal at https://businessfilings.sos.ca.gov/ to file the statement of information electronically.

[23] Inland Casino Corp. v. Superior Court of San Diego County, 10 Cal. Rptr. 2d 497 (Cal. Ct. App. 1992).

[24] CAL. CORP. CODE § 13404.5.

[25] *Id.* § 13404.5(d).

[26] CAL. INS. CODE § 1724.5.

D. Consequences of Doing Business in California Without Being Qualified to Do So

A foreign corporation must qualify to transact intrastate business in California.[27] Failure to qualify can subject the corporation to a $20-per-day civil penalty, bar it from maintaining any actions in California courts based upon its intrastate business until it has qualified and paid a $250 penalty, and subject it to prosecution for a misdemeanor punishable by a fine between $500 and $1,000.[28] Failure to qualify may also subject persons who do business on behalf of the foreign corporation to personal liability. Employees and agents who transact intrastate business on behalf of an unqualified foreign corporation, knowing that the corporation is not qualified, may be subject to prosecution for a misdemeanor punishable by a fine between $50 and $600.[29]

If the foreign corporation is not in compliance with certain of its California tax obligations, it may be penalized an additional $2,000 per year.[30] Moreover, any of its California contracts may be rescinded by a court order obtained by the other party in a lawsuit on the contract brought by either party, but only if the corporation has been allowed reasonable opportunity to cure this voidability of the contract and it receives full restitution of the benefits it provided under the contract.[31]

Even if a foreign corporation fails to qualify to transact intrastate business, it will still be able to bring an action in federal court that arises under federal law.[32] However, a foreign corporation that has failed to qualify to transact intrastate business may be barred from bringing a diversity claim in federal court, as access to federal courts to bring a diversity claim is governed by state law.[33] Failure to qualify to transact intrastate business in California will not preclude a foreign corporation from using the statute of limitations as a defense.[34]

E. Corporate Name Registration by a Foreign Corporation

Like numerous other states, California allows foreign corporations not transacting intrastate business to register their corporate names, thus protecting those names against conflicting use by corporations incorporated in California or qualified in the state.[35]

Comment: Registration is a useful precaution if there is a possibility of future business expansion in California, and in connection with the conduct of interstate business, regardless of any possibility of future qualification in California.

A foreign corporation's name can be registered in accordance with the same availability standards that apply to the name of a new corporation organized in California.[36] Registration is effected by application to the Secretary of State, accompanied by a good-standing certificate from the jurisdiction of incorporation and a fee of $50.[37] Each registration is valid for the balance of the calendar year. During the last three months of the calendar year, the registration can be renewed for the following year by filing an application accompanied by another certificate of good standing and a $50 fee.[38]

F. Pseudo-Foreign Corporations

Section 2115 of the GCL and related provisions impose certain requirements applicable to California corporations upon those foreign corporations whose economic center of gravity is in California.[39] The statute is an attempt to avoid a "race to the bottom"[40] and the threat of a superimposed federal law of corporations[41] by treating these "pseudo-foreign" or "nominally foreign" corporations in certain fundamental respects as though they were domiciled in California in law as well as in fact.[42] Section 2115 is also intended to provide an inducement to foreign corporations to re-incorporate in California.[43]

These provisions do not apply, however, to corporations with outstanding securities on the New York Stock Exchange, the NYSE Amex, the Nasdaq Global Market, or the Nasdaq Capital Market[44] or to wholly-owned subsidiaries of other corporations that are not subject to these provisions.[45]

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[27] CAL. CORP. CODE § 2105(a).

[28] ~~CAL. CORP. CODE § 2203; CAL. CORP. CODE § 2258.~~

[29] CAL. CORP. CODE § 2259.

[30] CAL. REV. & TAX. CODE § 19135.

[31] CAL. REV. & TAX. CODE § 23304.1(a); CAL. REV. & TAX. CODE § 23304.5. These statutory provisions were enacted to codify and reform the results of *White Dragon Prods., Inc. v. Performance Guars., Inc.*, 241 Cal. Rptr. 745 (Cal. Ct. App. 1987).

[32] Harms, Inc. v. Tops Music Enters., Inc., 160 F. Supp. 77 (S.D. Cal. 1958).

[33] ~~Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949).~~

[34] Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956).

[35] CAL. CORP. CODE § 2101.

[36] CAL. CORP. CODE § 2101(a). See also *Name Availability*, http://www.sos.ca.gov/business-programs/business-entities/name-availability/.

[37] CAL. CORP. CODE § 2101(b); CAL. GOV'T CODE § 12186(b).

[38] CAL. CORP. CODE § 2101(c).

[39] *See generally* Douglas E. Noll, *California's New General Corporation Law: Quasi-Foreign Corporations*, 7 PAC. L.J. 673 (1976); Michael J. Halloran & Douglas L. Hammer, *Section 2115 of the New California General Corporation Law—The Application of California Corporation Law to Foreign Corporations*, 23 UCLA L. REV. 1282 (1976); J. Thomas Oldham, *California Regulates Pseudo-Foreign Corporations—Trampling upon the Tramp?*, 17 SANTA CLARA L. REV. 85 (1977); J. Thomas Oldham, *Regulating the Regulators: Limitations upon a State's Ability to Regulate Corporations with Multistate Contacts*, 5 DEL. J. CORP. L. 181 (1980); John W. Edwards II, *Busy Bees and Busybodies: The Extraterritorial Reach of California Corporate Law*, 11 U.C. DAVIS BUS. L.J. 1 (2010).

[40] William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

[41] Originally, the concern related to expansive judicial interpretations of federal law. David S. Ruder, *Pitfalls in the Development of a Federal Law of Corporations by Implication Through Rule 10b-5*, 59 NW. U. L. REV. 185 (1964). Eventually, specific proposals to federalize corporation law were advanced. Cary, above note 40; Donald E. Schwartz, *Federal Chartering of Corporations*, 61 GEO. L.J. 71 (1976); RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976).

[42] Note, *The Pseudo-Foreign Corporation in California*, 28 HASTINGS L.J. 119 (1976).

[43] *See generally* Andrew J. Collins, *Choice of Corporate Domicile: California or Delaware?*, 13 U.S.F. L. REV. 103 (1978).

[44] Under CAL. CORP. CODE § 2115(a), beneficial holders of securities held by broker-dealers (including clearing corporations), banks,

A foreign corporation is a "pseudo-foreign" corporation if (1) more than one-half of its outstanding voting securities are held of record by persons having addresses in California on the record date for its last shareholder meeting during its latest income year, or (2) on the last day of that year if there was no such meeting, the average of its property, payroll and sales factors, under the Uniform Division of Income for Tax Purposes Act, exceeds 50 percent during that income year.[46] These factors are to be applied as if the California Franchise Tax Law were applied, whether or not the corporation is governed by the franchise tax formula.[47] With respect to any parent corporation, the determination is made on a consolidated basis, including application of unitary computations under which all affiliated corporate entities in a national or international enterprise are combined after elimination of intercompany transactions.[48]

"Pseudo-foreign" status will commence on the first day of the corporation's fiscal year beginning on or after the 135th day of the fiscal year immediately following any fiscal year during which the corporation meets these tests or is the subject of a final court order declaring that it meets them.[49] The status will terminate at the end of the fiscal year immediately following any fiscal year during which at least one of the two tests described above is no longer met unless a contrary court order was entered before then.[50]

The principal consequence of being a "pseudo-foreign" corporation is the application of California Corporations Code provisions governing the following:[51]

- the annual election of directors;
- the removal of directors without cause;
- the removal of directors by court proceedings;
- the filling of director vacancies where less than a majority in office were elected by shareholders;
- the directors' standard of care;
- the liability of directors for unlawful distributions to shareholders;
- the indemnification of directors, officers and others;
- the limitations on corporate distributions in cash or property;
- the liability of shareholders who receive unlawful distributions;
- the annual shareholders' meetings and remedies if such meetings are not timely held;
- cumulative voting;
- supermajority voting;
- limitations on conversions and requirements of conversions;
- board and shareholder approvals required in reorganizations;
- dissenters' rights and remedies in reorganizations;
- records and reporting;
- the special jurisdiction of the state attorney general if certain shareholder protective provisions are not being complied with;
- shareholders' and directors' rights of inspection;
- the special provisions restricting supermajority shareholder voting provisions in the articles of corporations with 100 or more shareholders of record;[52] and
- the special provisions concerning "interested party" tender offers, reorganizations and sales of assets affecting corporations with 100 or more shareholders of record.[53]

The concept of the "pseudo-foreign" corporation is inconsistent with the "internal affairs" doctrine that has in the past left corporate governance strictly to the law of the state of incorporation.[54] In 1982, addressing the constitutionality of the "pseudo-foreign" concept for the first time in *Wilson v. Louisiana-Pacific Resources, Inc.*, a California appellate court decided that the imposition of California's cumulative voting requirement on a Utah corporation did not violate the full faith and credit, due process, contract or equal protection clauses of the U.S. Constitution.[55] The court said the internal affairs doctrine "has never been followed blindly in California," is "inconsistent with the 'comparative impairment' approach used by this state in resolving conflict of law problems," and is "not determinative of the constitutional issue."[56] However, Utah's "neutral" stance on cumulative voting was fundamental to the court's decision.

Since *Wilson* in 1982, the U.S. Supreme Court has strengthened the right of states of incorporation to govern the internal affairs of their corporations, casting doubt on the constitutionality of Section 2115 and *Wilson*. In *CTS Corp. v. Dynamics Corporation of America*, the Supreme Court stated it is "an accepted part of the business landscape in this country

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and nominees may be counted for this test if the nominee holder furnished the corporation with a certification as to the number of such owners (including non-objecting beneficial owner lists under SEC Rules 14b-1(b)(3) and 14b-2(b)(3)) and the corporation retains that certification with its shareholder records.

[45] CAL. CORP. CODE § 2115(c).

[46] CAL. CORP. CODE § 2115(a).

[47] *Id.*

[48] *Id.*

[49] CAL. CORP. CODE § 2115(d).

[50] CAL. CORP. CODE § 2115(e).

[51] CAL. CORP. CODE § 2115(b).

[52] CAL. CORP. CODE § 710. However, these limitations do not apply to supermajority amendments after 1993 by a corporation that has fewer than 300 shareholders, multiple classes of outstanding shares, and no shares registered under the Exchange Act, and that does not have and never had a supermajority provision subject to these limitations.

[53] CAL. CORP. CODE § 1203.

[54] *See* J. Thomas Oldham, *California Regulates Pseudo-Foreign Corporations—Trampling upon the Tramp?*, 17 SANTA CLARA L. REV. 85 (1977).

[55] Wilson v. Louisiana-Pacific Res., Inc., 187 Cal. Rptr. 852 (Cal. Ct. App. 1982).

[56] *Id.*

for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." [57] But even prior to *Wilson*, the Supreme Court in *Edgar v. MITE Corp.* stated that the internal affairs doctrine is a long standing principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs – the state of incorporation.[58] In addition, the California Appellate Court cast some doubt on *Wilson* by questioning its validity in light of the subsequent broad acceptance of the internal affairs doctrine by courts.[59]

The Delaware Court of Chancery in *Examen, Inc. v. VantagePoint Venture Partners 1996* has held that California law under Section 2115 does not apply to the voting rights of a "pseudo-foreign" corporation incorporated in Delaware.[60] In an opinion affirming the Court of Chancery ruling, the Delaware Supreme Court stated the factual determination needed to decide if Section 2115 applies to the internal affairs of a "pseudo-foreign" corporation "completely contravenes the importance of stability within inter-corporate relationships that the United States Supreme Court recognized in CTS."[61] The Delaware Supreme Court specifically addressed *Wilson* and concluded that California courts would now apply Delaware law to the governance of the internal affairs of Delaware corporations.[62]

The accuracy of the Delaware Supreme Court's prediction as to how California courts will decide cases involving the internal affairs of "pseudo-foreign" corporations has not been settled; however, in at least one case, *Lidow v. Superior Court*, a California appellate court agreed with the Delaware Supreme Court that "the voting rights of shareholders, just like the payment of dividends to shareholders . . . and the procedural requirements of shareholder derivative suits . . . involve matters of internal corporate governance and thus, fall within a corporation's internal affairs." [63] While the *Lidow* decision ultimately held that California law should be applied – the dispute involved a wrongful termination claim by a corporate officer of a Delaware corporation headquartered in California – the decision raises questions as to the length California courts will go in enforcing Section 2115.

Lastly, Section 2115 has been subject to legislative reform efforts. In 2012, the California Assembly voted to repeal Section 2115 with Assembly Bill 2260. According to the legislative comments, "AB 2260 takes the proactive step of repealing Section 2115 before the federal courts strike it down and the state is forced to spend additional taxpayer dollars defending a regulation that keeps companies out of California. All this section of code accomplishes is confusing well established national corporate governance law." [64] While the bill passed through the legislature with a 75-0 floor vote, the bill failed passage by the state Senate Judiciary Committee by a vote of 1 to 3.

Comment: Practitioners must continue to fully assess the potential application of Section 2115 in order to insulate transactions from potential attack (e.g., by obtaining approval of a reorganization by each class of shareholders even though such approval would not be required under Delaware law).

G. General Application of California Law to Foreign Corporations

The *ultra vires* doctrine under California law, which governs acts beyond the scope of a corporation's authority and authorizes derivative actions by shareholders, applies to contracts and conveyances made in California by foreign corporations and to conveyances of real property in California by foreign corporations.[65]

The procedural and substantive requirements applicable to derivative actions in California apply to actions maintained in the name of foreign corporations as well as domestic corporations.[66] Similarly, foreign corporations, as well as domestic corporations, are subject to:

- the requirement that business records relevant to property subject to assessment in California be made available to the local assessor;[67]
- the rights of shareholders to inspect accounting books and records and minute books if such records are kept in California or the corporation has its principal executive office in California;[68]
- the right of a director to inspect and copy all books, records, and documents and to inspect properties if the corporation has its principal executive office in California or customarily holds meetings of its board of directors in California;[69] and
- the provisions of the California Corporate Securities Law with respect to the sale of securities in the state.[70]

H. Long-Arm Jurisdiction

California's long-arm statute provides that the state courts may exercise jurisdiction on any basis not inconsistent with the state or U.S. constitutions.[71] In applying this concept, the California courts have drawn a distinction between:

- a corporation that conducts such extensive activities within the state that it will be deemed sufficiently present

[57] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

[58] Edgar v. MITE Corp., 457 U.S. 624 (1982).

[59] State Farm Mut. Auto. Ins. Co. v. Superior Court, 8 Cal. Rptr. 3d 56 (Cal. Ct. App. 2003).

[60] Examen, Inc. v. VantagePoint Venture Partners 1996, 873 A.2d 318 (Del. Ch. 2005) (quoting Tera Sys., Inc. v. Mentor Graphics, Corp., No. Civ. A. 20300, 2003 WL 23341841 (Del. Ch. Aug. 22, 2003)).

[61] VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del. 2005).

[62] *Id.*

[63] Lidow v. Superior Court, 141 Cal. Rptr. 3d 729, 737 (Cal. Ct. App. 2012).

[64] *See* Kathleen O'Malley, Bill Analysis, A.B. 2260, Assembly Third Reading (Mar. 29, 2012), *available at* http://www.leginfo.ca.gov.

[65] CAL. CORP. CODE § 208(c).

[66] CAL. CORP. CODE § 800(b).

[67] CAL. CORP. CODE § 1506.

[68] CAL. CORP. CODE § 1601(a).

[69] CAL. CORP. CODE § 1602.

[70] CAL. CORP. CODE § 25110.

[71] CAL. CIV. PROC. CODE § 410.10.

to support jurisdiction over it concerning causes of action that are unrelated to its activities in the state, and

- a corporation whose activities within California are of so limited a nature as to subject it to personal jurisdiction within the state only for causes of action that are related to those activities.[72]

It is clear that the "doing business" requirements that are sufficient to support the assertion of jurisdiction over a foreign corporation are significantly less than those requiring qualification or those necessary to support taxation.[73] California's long-arm statute and exercise of state court jurisdiction are mirrored by similar provisions in other states, and California courts have adopted and consistently applied the so-called "governmental interest" analysis where choice-of-law questions are resolved based on which jurisdiction has the greatest interest in the application of its own law to the particular case.[74] This similarity is in marked contrast to the uniqueness of Section 2115 governing "pseudo-foreign" corporations.

I. Withdrawal of Authority to Do Business in California

After a foreign corporation has qualified to do business in California, it may surrender its right to transact intrastate business. A tax clearance certificate and a certificate of surrender must be filed.[75] The certificate of surrender must be signed by a corporate officer and state:

- the name of the corporation and the place of incorporation or organization,
- that it revokes its designation of agent for service of process,
- that it surrenders its authority to transact intrastate business,
- that it consents that process for any liability or obligation incurred in California before the filing of the certificate of withdrawal from the state may be served upon the Secretary of State, and
- a post office address to which the Secretary of State may mail a copy of any process against the corporation that is served upon the Secretary of State.[76]

J. Foreign Limited Liability Companies

On January 1, 2014, California's Beverly-Killea Limited Liability Company Act was replaced by the California Revised Uniform Limited Liability Company Act (the "RULLCA").[77] Similar to the uncertainty relating to the law applicable to "pseudo-foreign" corporations under Section 2115 of the GCL, the language of the RULLCA is unclear as to whether courts should apply California law when adjudicating matters involving foreign limited liability companies. Although the RULLCA explicitly states that the law of the state where a limited liability company is formed governs its "internal affairs and the authority of its members and managers," [78] the RULLCA separately states that it applies to all foreign limited liability companies and to all actions taken by the members and managers on or after January 1, 2014.[79] This inconsistency has not yet been resolved by the California legislature or courts.

California residents may be entitled to special information and inspection rights due to the state's regulation of foreign limited liability companies.[80] If California residents represent 25 percent or more of the voting interests of a limited liability company, members who are California residents will be entitled to certain information and inspection rights.[81] California law also governs foreign limited liability companies with regard to the rights afforded dissenting members. The rights of such dissenting members are governed by California law if more than 50 percent of the voting interests of the foreign limited liability company are held by California residents.[82]

A foreign limited liability company doing business without authorization may not maintain an action or proceeding in California unless it has a certificate of registration to transact intrastate business.[83] A foreign limited liability company doing business without authorization may also be restrained from doing business in California by the Attorney General.[84]

Qualifying a foreign limited liability company to do business in California requires three steps. First, the foreign limited liability company must submit an application for registration to the Secretary of State with:

(1) A valid name of the foreign limited liability company.

(2) The state or other jurisdiction under whose law the foreign limited liability company is organized and the date of its organization in that state or other jurisdiction, and a statement that the foreign limited liability company is authorized to exercise its powers and privileges in that state or other jurisdiction.

(3) The street address of the foreign limited liability company's principal office and of its principal business office in California, if any.

(4) The name and street address of the foreign limited liability company's initial agent for service of process in California. In 2015, the California Assembly voted to amend Section 17708.02(4) of the Corporations Code to allow foreign corporations to accept service of process via e-mail or submission via a designated internet web portal.[85]

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[72] Cornelison v. Chaney, 545 P.2d 264 (Cal. 1976); Buckeye Boiler Co. v. Superior Court, 458 P.2d 57 (Cal. 1969).

[73] Jeter v. Austin Trailer Equip. Co., 265 P.2d 130 (Cal. Ct. App. 1953).

[74] McCann v. Foster Wheeler LLC, 225 P.3d 516 (Cal. 2010).

[75] CAL. CORP. CODE § 2112(a).

[76] CAL. CORP. CODE § 2112(b).

[77] CAL. CORP. CODE §§ 17701.01 – 17713.13.

[78] CAL. CORP. CODE § 17708.01(a).

[79] CAL. CORP. CODE § 17713.05.

[80] CAL. CORP. CODE § 17708.08.

[81] *Id.*

[82] CAL. CORP. CODE § 17711.13.

[83] CAL. CORP. CODE § 17708.07.

[84] CAL. CORP. CODE § 17708.09.

[85] A.B. No. 844 (Cal. 2015) (filed July 6, 2015).

(5) 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.

(6) The mailing address of the foreign limited liability company if different than the street address of the principal office, or principal business office in California.[86]

Second, the foreign limited liability company must provide the Secretary of State with a certificate of existence, status, or good standing or a record of similar import signed by the Secretary of State or other official having custody of the foreign limited liability company's publicly filed records in the state or other jurisdiction under whose law the foreign limited liability company is formed.[87]

Third, the foreign limited liability company must file a "statement of information" with the Secretary of State within 90 days of filing its original application for registration.[88] The information required for a foreign limited liability company to complete the "statement of information" is similar that required of a foreign corporation. The form must be re-filed biennially during the calendar month in which the initial application for registration was filed.

A foreign limited liability company may cancel its registration to do business in California by filing a certificate of cancellation with the Secretary of State. The certificate of cancellation must specify that a final franchise tax return has been or will be filed with the state Franchise Tax Board.[89]

[86] CAL. CORP. CODE § 17708.02(a).

[87] CAL. CORP. CODE § 17708.02(b).

[88] A $20 filing fee is due with the form. Please see the California Secretary of State website at http://www.sos.ca.gov/business-programs/business-entities/statements/ for a downloadable version of the form.

[89] CAL. CORP. CODE § 17708.06.