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SENATE BILL 5031

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State of Washington

64th Legislature

2015 Regular Session

By Senators Pedersen and O'Ban; by request of Washington State Bar Association

Prefiled 12/30/14. Read first time 01/12/15. Referred to Committee on Law & Justice.

1 AN ACT Relating to permitting advance action regarding business  
2 opportunities under the business corporation act; amending RCW  
3 23B.01.400, 23B.02.020, 23B.08.700, and 23B.08.720; and adding a new  
4 section to chapter 23B.08 RCW.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 23B.01.400 and 2012 c 215 s 17 are each amended to  
7 read as follows:

8 Unless the context clearly requires otherwise, the definitions in  
9 this section apply throughout this title.

10 (1) "Articles of incorporation" include amended and restated  
11 articles of incorporation and articles of merger.

12 (2) "Authorized shares" means the shares of all classes a  
13 domestic or foreign corporation is authorized to issue.

14 (3) "Conspicuous" means so prepared that a reasonable person  
15 against whom the record is to operate should have noticed it. For  
16 example, printing in italics or boldface or contrasting color, or  
17 typing in capitals or underlined, is conspicuous.

18 (4) "Corporate action" means any resolution, act, policy,  
19 contract, transaction, plan, adoption or amendment of articles of  
20 incorporation or bylaws, or other matter approved by or submitted for

1 approval to a corporation's incorporators, board of directors or a  
2 committee thereof, or shareholders.

3 (5) "Corporation" or "domestic corporation" means a corporation  
4 for profit, including a social purpose corporation, which is not a  
5 foreign corporation, incorporated under or subject to the provisions  
6 of this title.

7 (6) "Deliver" includes (a) mailing, (b) for purposes of  
8 delivering a demand, consent, notice, or waiver to the corporation or  
9 one of its officers, directors, or shareholders, transmission by  
10 facsimile equipment, and (c) for purposes of delivering a demand,  
11 consent, notice, or waiver to the corporation or one of its officers,  
12 directors, or shareholders under RCW 23B.01.410 or chapter 23B.07,  
13 23B.08, 23B.11, 23B.13, 23B.14, or 23B.16 RCW delivery by electronic  
14 transmission.

15 (7) "Distribution" means a direct or indirect transfer of money  
16 or other property, except its own shares, or incurrence of  
17 indebtedness by a corporation to or for the benefit of its  
18 shareholders in respect to any of its shares. A distribution may be  
19 in the form of a declaration or payment of a dividend; a distribution  
20 in partial or complete liquidation, or upon voluntary or involuntary  
21 dissolution; a purchase, redemption, or other acquisition of shares;  
22 a distribution of indebtedness; or otherwise.

23 (8) "Effective date of notice" has the meaning provided in RCW  
24 23B.01.410.

25 (9) "Electronic transmission" means an electronic communication  
26 (a) not directly involving the physical transfer of a record in a  
27 tangible medium and (b) that may be retained, retrieved, and reviewed  
28 by the sender and the recipient thereof, and that may be directly  
29 reproduced in a tangible medium by such a sender and recipient.

30 (10) "Electronically transmitted" means the initiation of an  
31 electronic transmission.

32 (11) "Employee" includes an officer but not a director. A  
33 director may accept duties that make the director also an employee.

34 (12) "Entity" includes a corporation and foreign corporation,  
35 not-for-profit corporation, business trust, estate, trust,  
36 partnership, limited liability company, association, joint venture,  
37 two or more persons having a joint or common economic interest, the  
38 state, United States, and a foreign governmental subdivision, agency,  
39 or instrumentality, or any other legal or commercial entity.

1 (13) "Execute," "executes," or "executed" means (a) signed with  
2 respect to a written record or (b) electronically transmitted along  
3 with sufficient information to determine the sender's identity with  
4 respect to an electronic transmission, or (c) with respect to a  
5 record to be filed with the secretary of state, in compliance with  
6 the standards for filing with the office of the secretary of state as  
7 prescribed by the secretary of state.

8 (14) "Foreign corporation" means a corporation for profit  
9 incorporated under a law other than the law of this state.

10 (15) "Foreign limited partnership" means a partnership formed  
11 under laws other than of this state and having as partners one or  
12 more general partners and one or more limited partners.

13 (16) "General social purpose" means the general social purpose  
14 for which a social purpose corporation is organized as set forth in  
15 the articles of incorporation of the corporation in accordance with  
16 RCW 23B.25.040(1)(c).

17 (17) "Governmental subdivision" includes authority, county,  
18 district, and municipality.

19 (18) "Includes" denotes a partial definition.

20 (19) "Individual" includes the estate of an incompetent or  
21 deceased individual.

22 (20) "Limited partnership" or "domestic limited partnership"  
23 means a partnership formed by two or more persons under the laws of  
24 this state and having one or more general partners and one or more  
25 limited partners.

26 (21) "Means" denotes an exhaustive definition.

27 (22) "Notice" has the meaning provided in RCW 23B.01.410.

28 (23) "Person" means an individual, corporation, business trust,  
29 estate, trust, partnership, limited liability company, association,  
30 joint venture, government, governmental subdivision, agency, or  
31 instrumentality, or any other legal or commercial entity.

32 (24) "Principal office" means the office, in or out of this  
33 state, so designated in the annual report where the principal  
34 executive offices of a domestic or foreign corporation are located.

35 (25) "Proceeding" includes civil suit and criminal,  
36 administrative, and investigatory action.

37 (26) "Public company" means a corporation that has a class of  
38 shares registered with the federal securities and exchange commission  
39 pursuant to section 12 or 15 of the securities exchange act of 1934,

1 or section 8 of the investment company act of 1940, or any successor  
2 statute.

3 (27) "Qualified director" means (a) with respect to a director's  
4 conflicting interest transaction as defined in RCW 23B.08.700, any  
5 director who does not have either (i) a conflicting interest  
6 respecting the transaction, or (ii) a familial, financial,  
7 professional, or employment relationship with a second director who  
8 does have a conflicting interest respecting the transaction, which  
9 relationship would, in the circumstances, reasonably be expected to  
10 exert an influence on the first director's judgment when voting on  
11 the transaction; (b) with respect to section 5 of this act, a  
12 qualified director under (a) of this subsection if the business  
13 opportunity were a director's conflicting interest transaction; and  
14 (c) with respect to RCW 23B.02.020(5)(k), a director who is not a  
15 director (i) to whom the limitation or elimination of the duty of an  
16 officer to offer potential business opportunities to the corporation  
17 would apply, or (ii) who has a familial, financial, professional, or  
18 employment relationship with another officer to whom the limitation  
19 or elimination would apply, which relationship would, in the  
20 circumstances, reasonably be expected to exert an influence on the  
21 director's judgment when voting on the limitation or elimination.

22 (28) "Record" means information inscribed on a tangible medium or  
23 contained in an electronic transmission.

24 ~~((+28+))~~ (29) "Record date" means the date established under  
25 chapter 23B.07 RCW on which a corporation determines the identity of  
26 its shareholders and their shareholdings for purposes of this title.  
27 The determinations shall be made as of the close of business on the  
28 record date unless another time for doing so is specified when the  
29 record date is fixed.

30 ~~((+29+))~~ (30) "Secretary" means the corporate officer to whom the  
31 board of directors has delegated responsibility under RCW  
32 23B.08.400(3) for custody of the minutes of the meetings of the board  
33 of directors and of the shareholders and for authenticating records  
34 of the corporation.

35 ~~((+30+))~~ (31) "Shares" means the units into which the proprietary  
36 interests in a corporation are divided.

37 ~~((+31+))~~ (32) "Shareholder" means the person in whose name shares  
38 are registered in the records of a corporation or the beneficial  
39 owner of shares to the extent of the rights granted by a nominee  
40 certificate on file with a corporation.

1       ~~((32))~~ (33) "Social purpose" includes any general social  
2 purpose and any specific social purpose.

3       ~~((33))~~ (34) "Social purpose corporation" means a corporation  
4 that has elected to be governed as a social purpose corporation under  
5 chapter 23B.25 RCW.

6       ~~((34))~~ (35) "Specific social purpose" means the specific social  
7 purpose or purposes for which a social purpose corporation is  
8 organized as set forth in the articles of incorporation of the  
9 corporation in accordance with RCW 23B.25.040(2)(a).

10       ~~((35))~~ (36) "State," when referring to a part of the United  
11 States, includes a state and commonwealth, and their agencies and  
12 governmental subdivisions, and a territory and insular possession,  
13 and their agencies and governmental subdivisions, of the United  
14 States.

15       ~~((36))~~ (37) "Subscriber" means a person who subscribes for  
16 shares in a corporation, whether before or after incorporation.

17       ~~((37))~~ (38) "Tangible medium" means a writing, copy of a  
18 writing, or facsimile, or a physical reproduction, each on paper or  
19 on other tangible material.

20       ~~((38))~~ (39) "United States" includes a district, authority,  
21 bureau, commission, department, and any other agency of the United  
22 States.

23       ~~((39))~~ (40) "Voting group" means all shares of one or more  
24 classes or series that under the articles of incorporation or this  
25 title are entitled to vote and be counted together collectively on a  
26 matter at a meeting of shareholders. All shares entitled by the  
27 articles of incorporation or this title to vote generally on the  
28 matter are for that purpose a single voting group.

29       ~~((40))~~ (41) "Writing" does not include an electronic  
30 transmission.

31       ~~((41))~~ (42) "Written" means embodied in a tangible medium.

32       **Sec. 2.** RCW 23B.02.020 and 2009 c 189 s 3 are each amended to  
33 read as follows:

34       (1) The articles of incorporation must set forth:

35       (a) A corporate name for the corporation that satisfies the  
36 requirements of RCW 23B.04.010;

37       (b) The number of shares the corporation is authorized to issue  
38 in accordance with RCW 23B.06.010 and 23B.06.020;

1 (c) The street address of the corporation's initial registered  
2 office and the name of its initial registered agent at that office in  
3 accordance with RCW 23B.05.010; and

4 (d) The name and address of each incorporator in accordance with  
5 RCW 23B.02.010.

6 (2) The articles of incorporation or bylaws must either specify  
7 the number of directors or specify the process by which the number of  
8 directors will be fixed, unless the articles of incorporation  
9 dispense with a board of directors pursuant to RCW 23B.08.010.

10 (3) Unless its articles of incorporation provide otherwise, a  
11 corporation is governed by the following provisions:

12 (a) The board of directors may adopt bylaws to be effective only  
13 in an emergency as provided by RCW 23B.02.070;

14 (b) A corporation has the purpose of engaging in any lawful  
15 business under RCW 23B.03.010;

16 (c) A corporation has perpetual existence and succession in its  
17 corporate name under RCW 23B.03.020;

18 (d) A corporation has the same powers as an individual to do all  
19 things necessary or convenient to carry out its business and affairs,  
20 including itemized powers under RCW 23B.03.020;

21 (e) All shares are of one class and one series, have unlimited  
22 voting rights, and are entitled to receive the net assets of the  
23 corporation upon dissolution under RCW 23B.06.010 and 23B.06.020;

24 (f) If more than one class of shares is authorized, all shares of  
25 a class must have preferences, limitations, and relative rights  
26 identical to those of other shares of the same class under RCW  
27 23B.06.010;

28 (g) If the board of directors is authorized to designate the  
29 number of shares in a series, the board may, after the issuance of  
30 shares in that series, reduce the number of authorized shares of that  
31 series under RCW 23B.06.020;

32 (h) The board of directors must approve any issuance of shares  
33 under RCW 23B.06.210;

34 (i) Shares may be issued pro rata and without consideration to  
35 shareholders under RCW 23B.06.230;

36 (j) Shares of one class or series may not be issued as a share  
37 dividend with respect to another class or series, unless there are no  
38 outstanding shares of the class or series to be issued, or a majority  
39 of votes entitled to be cast by such class or series approve as  
40 provided in RCW 23B.06.230;

1 (k) A corporation may issue rights, options, or warrants for the  
2 purchase of shares of the corporation under RCW 23B.06.240;

3 (l) A shareholder has, and may waive, a preemptive right to  
4 acquire the corporation's unissued shares as provided in RCW  
5 23B.06.300;

6 (m) Shares of a corporation acquired by it may be reissued under  
7 RCW 23B.06.310;

8 (n) The board may authorize and the corporation may make  
9 distributions not prohibited by statute under RCW 23B.06.400;

10 (o) The preferential rights upon dissolution of certain  
11 shareholders will be considered a liability for purposes of  
12 determining the validity of a distribution under RCW 23B.06.400;

13 (p) Corporate action may be approved by shareholders by unanimous  
14 consent of all shareholders entitled to vote on the corporate action,  
15 unless the approval of a lesser number of shareholders is permitted  
16 as provided in RCW 23B.07.040, which shareholder consent shall be in  
17 the form of a record;

18 (q) Unless this title requires otherwise, the corporation is  
19 required to give notice only to shareholders entitled to vote at a  
20 meeting and the notice for an annual meeting need not include the  
21 purpose for which the meeting is called under RCW 23B.07.050;

22 (r) A corporation that is a public company shall hold a special  
23 meeting of shareholders if the holders of at least ten percent of the  
24 votes entitled to be cast on any issue proposed to be considered at  
25 the meeting demand a meeting under RCW 23B.07.020;

26 (s) Subject to statutory exceptions, each outstanding share,  
27 regardless of class, is entitled to one vote on each matter voted on  
28 at a shareholders' meeting under RCW 23B.07.210;

29 (t) A majority of the votes entitled to be cast on a matter by a  
30 voting group constitutes a quorum, unless the title provides  
31 otherwise under RCW 23B.07.250 and 23B.07.270;

32 (u) Corporate action on a matter, other than election of  
33 directors, by a voting group is approved if the votes cast within the  
34 voting group favoring the corporate action exceed the votes cast  
35 opposing the corporate action, unless this title requires a greater  
36 number of affirmative votes under RCW 23B.07.250;

37 (v) All shares of one or more classes or series that are entitled  
38 to vote will be counted together collectively on any matter at a  
39 meeting of shareholders under RCW 23B.07.260;

1 (w) Directors are elected by cumulative voting under RCW  
2 23B.07.280;

3 (x) Directors are elected by a plurality of votes cast by shares  
4 entitled to vote under RCW 23B.07.280, except as otherwise provided  
5 in the articles of incorporation or a bylaw adopted pursuant to RCW  
6 23B.10.205;

7 (y) A corporation must have a board of directors under RCW  
8 23B.08.010;

9 (z) All corporate powers must be exercised by or under the  
10 authority of, and the business and affairs of the corporation managed  
11 under the direction of, its board of directors under RCW 23B.08.010;

12 (aa) The shareholders may remove one or more directors with or  
13 without cause under RCW 23B.08.080;

14 (bb) A vacancy on the board of directors may be filled by the  
15 shareholders or the board of directors under RCW 23B.08.100;

16 (cc) A corporation shall indemnify a director who was wholly  
17 successful in the defense of any proceeding to which the director was  
18 a party because the director is or was a director of the corporation  
19 against reasonable expenses incurred by the director in connection  
20 with the proceeding under RCW 23B.08.520;

21 (dd) A director of a corporation who is a party to a proceeding  
22 may apply for indemnification of reasonable expenses incurred by the  
23 director in connection with the proceeding to the court conducting  
24 the proceeding or to another court of competent jurisdiction under  
25 RCW 23B.08.540;

26 (ee) An officer of the corporation who is not a director is  
27 entitled to mandatory indemnification under RCW 23B.08.520, and is  
28 entitled to apply for court-ordered indemnification under RCW  
29 23B.08.540, in each case to the same extent as a director under RCW  
30 23B.08.570;

31 (ff) The corporation may indemnify and advance expenses to an  
32 officer, employee, or agent of the corporation who is not a director  
33 to the same extent as to a director under RCW 23B.08.570;

34 (gg) A corporation may indemnify and advance expenses to an  
35 officer, employee, or agent who is not a director to the extent,  
36 consistent with law, that may be provided by its articles of  
37 incorporation, bylaws, general or specific approval of its board of  
38 directors, or contract under RCW 23B.08.570;

1 (hh) A corporation's board of directors may adopt certain  
2 amendments to the corporation's articles of incorporation without  
3 shareholder approval under RCW 23B.10.020;

4 (ii) Unless this title or the board of directors requires a  
5 greater vote or a vote by voting groups, an amendment to the  
6 corporation's articles of incorporation must be approved by each  
7 voting group entitled to vote on the proposed amendment by  
8 two-thirds, or, in the case of a public company, a majority, of all  
9 the votes entitled to be cast by that voting group under RCW  
10 23B.10.030;

11 (jj) A corporation's board of directors may amend or repeal the  
12 corporation's bylaws unless this title reserves this power  
13 exclusively to the shareholders in whole or in part, or unless the  
14 shareholders in amending or repealing a bylaw provide expressly that  
15 the board of directors may not amend or repeal that bylaw under RCW  
16 23B.10.200;

17 (kk) Unless this title or the board of directors require a  
18 greater vote or a vote by voting groups, a plan of merger or share  
19 exchange must be approved by each voting group entitled to vote on  
20 the merger or share exchange by two-thirds of all the votes entitled  
21 to be cast by that voting group under RCW 23B.11.030;

22 (ll) Approval by the shareholders of the sale, lease, exchange,  
23 or other disposition of all, or substantially all, the corporation's  
24 property in the usual and regular course of business is not required  
25 under RCW 23B.12.010;

26 (mm) Approval by the shareholders of the mortgage, pledge,  
27 dedication to the repayment of indebtedness, or other encumbrance of  
28 any or all of the corporation's property, whether or not in the usual  
29 and regular course of business, is not required under RCW 23B.12.010;

30 (nn) Unless the board of directors requires a greater vote or a  
31 vote by voting groups, a sale, lease, exchange, or other disposition  
32 of all or substantially all of the corporation's property, other than  
33 in the usual and regular course of business, must be approved by each  
34 voting group entitled to vote on such transaction by two-thirds of  
35 all votes entitled to be cast by that voting group under RCW  
36 23B.12.020; and

37 (oo) Unless the board of directors requires a greater vote or a  
38 vote by voting groups, a proposal to dissolve must be approved by  
39 each voting group entitled to vote on the dissolution by two-thirds

1 of all votes entitled to be cast by that voting group under RCW  
2 23B.14.020.

3 (4) Unless its articles of incorporation or its bylaws provide  
4 otherwise, a corporation is governed by the following provisions:

5 (a) The board of directors may approve the issuance of some or  
6 all of the shares of any or all of the corporation's classes or  
7 series without certificates under RCW 23B.06.260;

8 (b) A corporation that is not a public company shall hold a  
9 special meeting of shareholders if the holders of at least ten  
10 percent of the votes entitled to be cast on any issue proposed to be  
11 considered at the meeting demand a meeting under RCW 23B.07.020;

12 (c) A director need not be a resident of this state or a  
13 shareholder of the corporation under RCW 23B.08.020;

14 (d) The board of directors may fix the compensation of directors  
15 under RCW 23B.08.110;

16 (e) Members of the board of directors may participate in a  
17 meeting of the board by any means of similar communication by which  
18 all directors participating can hear each other during the meeting  
19 under RCW 23B.08.200;

20 (f) Corporate action permitted or required by this title to be  
21 taken at a board of directors' meeting may be approved without a  
22 meeting if approved by all members of the board under RCW 23B.08.210;

23 (g) Regular meetings of the board of directors may be held  
24 without notice of the date, time, place, or purpose of the meeting  
25 under RCW 23B.08.220;

26 (h) Special meetings of the board of directors must be preceded  
27 by at least two days' notice of the date, time, and place of the  
28 meeting, and the notice need not describe the purpose of the special  
29 meeting under RCW 23B.08.220;

30 (i) A quorum of a board of directors consists of a majority of  
31 the number of directors under RCW 23B.08.240;

32 (j) If a quorum is present when a vote is taken, the affirmative  
33 vote of a majority of directors present is the act of the board of  
34 directors under RCW 23B.08.240;

35 (k) A board of directors may create one or more committees and  
36 appoint members of the board of directors to serve on them under RCW  
37 23B.08.250; and

38 (l) Unless approved by the shareholders, a corporation may  
39 indemnify, or make advances to, a director for reasonable expenses  
40 incurred in the defense of any proceeding to which the director was a

1 party because of being a director only to the extent such action is  
2 consistent with RCW 23B.08.500 through 23B.08.580.

3 (5) The articles of incorporation may contain the following  
4 provisions:

5 (a) The names and addresses of the individuals who are to serve  
6 as initial directors;

7 (b) The par value of any authorized shares or classes of shares;

8 (c) Provisions not inconsistent with law related to the  
9 management of the business and the regulation of the affairs of the  
10 corporation;

11 (d) Any provision that under this title is required or permitted  
12 to be set forth in the bylaws;

13 (e) Provisions not inconsistent with law defining, limiting, and  
14 regulating the powers of the corporation, its board of directors, and  
15 shareholders;

16 (f) Provisions authorizing corporate action to be approved by  
17 consent of less than all of the shareholders entitled to vote on the  
18 corporate action, in accordance with RCW 23B.07.040;

19 (g) If the articles of incorporation authorize dividing shares  
20 into classes, the election of all or a specified number of directors  
21 may be effected by the holders of one or more authorized classes of  
22 shares under RCW 23B.08.040;

23 (h) The terms of directors may be staggered under RCW 23B.08.060;

24 (i) Shares may be redeemable or convertible (i) at the option of  
25 the corporation, the shareholder, or another person, or upon the  
26 occurrence of a designated event; (ii) for cash, indebtedness,  
27 securities, or other property; or (iii) in a designated amount or in  
28 an amount determined in accordance with a designated formula or by  
29 reference to extrinsic data or events under RCW 23B.06.010; ~~((and))~~

30 (j) A director's personal liability to the corporation or its  
31 shareholders for monetary damages for conduct as a director may be  
32 eliminated or limited under RCW 23B.08.320; and

33 (k) A provision limiting or eliminating any duty of a director or  
34 any other person to offer the corporation the right to have or  
35 participate in any, or one or more classes or categories of, business  
36 opportunities, prior to the pursuit or taking of the opportunity by  
37 the director or other person. However, if such provision applies to  
38 an officer or related person (as such term is defined in RCW  
39 23B.08.700) of an officer, the board of directors, by action of  
40 qualified directors taken in compliance with the same procedures as

1 are set forth in RCW 23B.08.720 and taken subsequent to the inclusion  
2 of such provision in the articles of incorporation, (i) must approve  
3 the application of such provision to an officer or a related person  
4 of that officer, and (ii) may condition the application of such  
5 provision to such officer or related person of that officer on any  
6 basis.

7 (6) The articles of incorporation or the bylaws may contain the  
8 following provisions:

9 (a) A restriction on the transfer or registration of transfer of  
10 the corporation's shares under RCW 23B.06.270;

11 (b) Shareholders may participate in a meeting of shareholders by  
12 any means of communication by which all persons participating in the  
13 meeting can hear each other under RCW 23B.07.080;

14 (c) A quorum of the board of directors may consist of as few as  
15 one-third of the number of directors under RCW 23B.08.240;

16 (d) If the corporation is registered as an investment company  
17 under the investment company act of 1940, a provision limiting the  
18 requirement to hold an annual meeting of shareholders as provided in  
19 RCW 23B.07.010(2); and

20 (e) If the corporation is registered as an investment company  
21 under the investment company act of 1940, a provision establishing  
22 terms of directors which terms may be longer than one year as  
23 provided in RCW 23B.05.050.

24 (7) The articles of incorporation need not set forth any of the  
25 corporate powers enumerated in this title.

26 **Sec. 3.** RCW 23B.08.700 and 2009 c 189 s 30 are each amended to  
27 read as follows:

28 For purposes of RCW 23B.08.710 through (~~23B.08.730~~) section 5  
29 of this act:

30 (1) "Conflicting interest" with respect to a corporation means  
31 the interest a director of the corporation has respecting a  
32 transaction effected or proposed to be effected by the corporation,  
33 or by a subsidiary of the corporation or any other entity in which  
34 the corporation has a controlling interest, if:

35 (a) Whether or not the transaction is brought before the board of  
36 directors of the corporation for action, the director knows at the  
37 time of commitment that the director or a related person is a party  
38 to the transaction or has a beneficial financial interest in or so  
39 closely linked to the transaction and of such financial significance

1 to the director or a related person that the interest would  
2 reasonably be expected to exert an influence on the director's  
3 judgment if the director were called upon to vote on the transaction;  
4 or

5 (b) The transaction is brought, or is of such character and  
6 significance to the corporation that it would in the normal course be  
7 brought, before the board of directors of the corporation for action,  
8 and the director knows at the time of commitment that any of the  
9 following persons is either a party to the transaction or has a  
10 beneficial financial interest in or so closely linked to the  
11 transaction and of such financial significance to the person that the  
12 interest would reasonably be expected to exert an influence on the  
13 director's judgment if the director were called upon to vote on the  
14 transaction: (i) An entity, other than the corporation, of which the  
15 director is a director, general partner, agent, or employee; (ii) a  
16 person that controls one or more of the entities specified in (b)(i)  
17 of this subsection or an entity that is controlled by, or is under  
18 common control with, one or more of the entities specified in (b)(i)  
19 of this subsection; or (iii) an individual who is a general partner,  
20 principal, or employer of the director.

21 (2) "Director's conflicting interest transaction" with respect to  
22 a corporation means a transaction effected or proposed to be effected  
23 by the corporation, or by a subsidiary of the corporation or any  
24 other entity in which the corporation has a controlling interest,  
25 respecting which a director of the corporation has a conflicting  
26 interest.

27 (3) "~~(a director)~~ an individual" means (a)(i)  
28 the spouse, or a parent or sibling thereof, of the (~~director~~)  
29 individual, or a child, grandchild, sibling, parent, or spouse of any  
30 thereof, of the (~~director~~) individual, or (~~an individual~~) a  
31 natural person having the same home as the (~~director~~) individual,  
32 or a trust or estate of which (~~an individual~~) a person specified  
33 (~~herein~~) in this subsection (3)(a) is a substantial beneficiary; or  
34 (~~(b)~~) (ii) a trust, estate, incompetent, conservatee, or minor of  
35 which the (~~director~~) individual is a fiduciary and (b) with respect  
36 to section 5 of this act, in addition to the persons under (a) of  
37 this subsection, (i) an entity controlled by the individual or any  
38 person specified in (a)(i) or (ii) of this subsection; (ii) an  
39 entity, other than the corporation, of which the individual is a  
40 director, general partner, agent or employee; (iii) a person that

1 controls one or more of the entities specified in (b)(ii) of this  
2 subsection or an entity that is controlled by, or is under common  
3 control with, one or more of the entities specified in (b)(ii) of  
4 this subsection; or (iv) a natural person who is a general partner,  
5 principal, or employer of the individual.

6 (4) "Required disclosure" means disclosure by the director who  
7 has a conflicting interest of (a) the existence and nature of the  
8 director's conflicting interest, and (b) all facts known to the  
9 director respecting the subject matter of the transaction that an  
10 ordinarily prudent person would reasonably believe to be material to  
11 a judgment about whether or not to proceed with the transaction.

12 (5) "Time of commitment" respecting a transaction means the time  
13 when the transaction becomes effective or, if made pursuant to  
14 contract, the time when the corporation, or its subsidiary or the  
15 entity in which it has a controlling interest, becomes contractually  
16 obligated so that its unilateral withdrawal from the transaction  
17 would entail significant loss, liability, or other damage.

18 **Sec. 4.** RCW 23B.08.720 and 1989 c 165 s 118 are each amended to  
19 read as follows:

20 (1) Directors' action respecting a transaction is effective for  
21 purposes of RCW 23B.08.710(2)(a) if the transaction received the  
22 affirmative vote of a majority, but no fewer than two, of those  
23 qualified directors on the board of directors or on a duly empowered  
24 committee of the board who voted on the transaction after either  
25 required disclosure to them, to the extent the information was not  
26 known by them, or compliance with subsection (2) of this section,  
27 provided that action by a committee is so effective only if:

28 (a) All its members are qualified directors; and

29 (b) Its members are either all the qualified directors on the  
30 board or are appointed by the affirmative vote of a majority of the  
31 qualified directors on the board.

32 (2) If a director has a conflicting interest respecting a  
33 transaction, but neither the director nor a related person of the  
34 director specified in RCW 23B.08.700(3)(a) (i) and (ii) is a party to  
35 the transaction, and if the director has a duty under law or  
36 professional canon, or a duty of confidentiality to another person,  
37 respecting information relating to the transaction such that the  
38 director may not make the disclosure described in RCW  
39 23B.08.700(4)(b), then disclosure is sufficient for purposes of

1 subsection (1) of this section if the director (a) discloses to the  
2 directors voting on the transaction the existence and nature of the  
3 director's conflicting interest and informs them of the character and  
4 limitations imposed by that duty before their vote on the  
5 transaction, and (b) plays no part, directly or indirectly, in their  
6 deliberations or vote.

7 (3) A majority, but no fewer than two, of all the qualified  
8 directors on the board of directors, or on the committee, constitutes  
9 a quorum for purposes of action that complies with this section.  
10 Directors' action that otherwise complies with this section is not  
11 affected by the presence or vote of a director who is not a qualified  
12 director.

13 ~~((4) For purposes of this section "qualified director" means,~~  
14 ~~with respect to a director's conflicting interest transaction, any~~  
15 ~~director who does not have either (a) a conflicting interest~~  
16 ~~respecting the transaction, or (b) a familial, financial,~~  
17 ~~professional, or employment relationship with a second director who~~  
18 ~~does have a conflicting interest respecting the transaction, which~~  
19 ~~relationship would, in the circumstances, reasonably be expected to~~  
20 ~~exert an influence on the first director's judgment when voting on~~  
21 ~~the transaction.))~~

22 NEW SECTION. **Sec. 5.** A new section is added to chapter 23B.08  
23 RCW to read as follows:

24 (1) If a director or officer or related person of either pursues  
25 or takes advantage, directly or indirectly, of a business  
26 opportunity, that action may not be enjoined or set aside, or give  
27 rise to an award of damages or other sanctions, in a proceeding by a  
28 shareholder or by or in the right of the corporation on the ground  
29 that such opportunity should have first been offered to the  
30 corporation, if:

31 (a) Before the director, officer, or related person becomes  
32 legally obligated respecting the opportunity, the director or officer  
33 brings it to the attention of the corporation: and

34 (i) Action by qualified directors disclaiming the corporation's  
35 interest in the opportunity is taken in compliance with the  
36 procedures set forth in RCW 23B.08.720, as if the decision being made  
37 concerned a director's conflicting interest transaction, or

38 (ii) Shareholders' action disclaiming the corporation's interest  
39 in the opportunity is taken in compliance with the procedures set

1 forth in RCW 23B.08.730, as if the decision being made concerned a  
2 director's conflicting interest transaction,  
3 except that, in the case of both (a)(i) and (ii) of this subsection,  
4 rather than making "required disclosure" as defined in RCW  
5 23B.08.700(4), in each case the director or officer must have made  
6 prior disclosure to those acting on behalf of the corporation of all  
7 material facts concerning the business opportunity that are then  
8 known to the director or officer; or

9 (b) The duty to offer the corporation the right to have or  
10 participate in the particular business opportunity or the class or  
11 category in to which that particular business opportunity falls has  
12 been limited or eliminated pursuant to a provision of the articles of  
13 incorporation (and in the case of officers and their related persons,  
14 made effective by action of qualified directors) in accordance with  
15 RCW 23B.02.020(5)(k).

16 (2) In any proceeding seeking equitable relief or other remedies  
17 based upon an alleged improper pursuit or taking advantage of a  
18 business opportunity by a director or officer, the fact that the  
19 director or officer did not employ the procedure described in  
20 subsection (1)(a)(i) or (ii) of this section before taking advantage  
21 of the opportunity does not create an inference that the opportunity  
22 should have been first presented to the corporation or alter the  
23 burden of proof otherwise applicable to establish that the director  
24 or officer breached a duty to the corporation in the circumstances.

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