
Judiciary Committee

SB 5031

Title: An act relating to permitting advance action regarding business opportunities under the business corporation act.

Brief Description: Permitting advance action regarding business opportunities under the business corporation act.

Sponsors: Senators Pedersen and O'Ban; by request of Washington State Bar Association.

Brief Summary of Bill

- Allows for articles of incorporation to limit or eliminate a requirement that a director or other fiduciary offer the corporation the right to participate in any business opportunity prior to that person's taking of the opportunity.
- Limits liability for directors, officers, or related persons who take advantage of certain business opportunity.

Hearing Date: 3/12/15

Staff: Brent Campbell (786-7152).

Background:

Corporate directors and officers are fiduciaries who owe a duty of loyalty to the corporation. The duty of loyalty requires fiduciaries to put the corporation's interests ahead of their own. One application of this duty is the corporate opportunity doctrine. This doctrine creates liability for directors or officers who take advantage of a business opportunity for personal gain when the business opportunity rightfully belongs to the corporation. In Washington, a business opportunity rightfully belongs to a corporation when the corporation is financially able to undertake the opportunity and the opportunity falls into the line of the corporation's business.

Some states protect corporate officers and directors from potential liability under the corporate opportunity doctrine with statutory safe harbor provisions allowing the fiduciary to seek the

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corporation's approval and obtain the corporation's disclaimer of all rights to the business opportunity. Washington's Business Corporations Act (WBCA) does not provide this safe harbor.

Some states allow a corporation to include a provision in its articles of incorporation relieving directors and officers of their duty to offer a business opportunity to the corporation before pursuing the opportunity for personal interests. The corporation may limit the provision to specific circumstances. WBCA does not authorize a corporation to include this provision in its articles of incorporation.

Summary of Bill:

The articles of incorporation may contain a provision limiting or eliminating any duty of a director or other person to offer the corporation the right to participate in any business opportunities prior to that person's taking of the opportunity. If such a provision applies to an officer or related person of an officer, the board of directors: (1) must approve the application of such provision; and (2) may condition the application of the provision on any basis.

If a director, officer, or related person takes advantage of a business opportunity, that action may not be set aside or give rise to an award of damages in a proceeding by a shareholder on the ground that such opportunity should have first been offered to the corporation, if:

1. the person brings the business opportunity to the attention of the corporation prior to becoming legally obligated to the opportunity and the opportunity is either disclaimed by the corporation or the shareholders; or
2. the duty to offer the corporation the right to participate in the business opportunity has been limited or eliminated in the articles of incorporation.

In a proceeding based on an alleged improper pursuit or taking advantage of a business opportunity by a director or officer, the fact that the director or officer did not notify the corporation of the opportunity and have the business opportunity disclaimed by either the corporation or the shareholders does not create an inference that the opportunity should have first been presented to the corporation.

The definition of "qualified director" is expanded to include reference to directors who take advantage of corporate opportunities.

The definition of "related person" is modified so that it can apply to any individual, not just a director. "Related persons," for purposes of business opportunities, is expanded to include:

1. an entity controlled by the individual;
2. an entity, other than the corporation, of which the individual is a director, general partner, agent, or employee;
3. a person that controls one or more of the entities specified in (2) or an entity that is controlled by one or more of the entities specified in (2); or
4. a natural person who is a general partner, principal, or employer of the individual.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.