

HOUSE BILL REPORT

SB 5031

As Passed House:
April 8, 2015

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 History:

Committee Activity:

Judiciary: 3/12/15, 3/19/15 [DP].

Floor Activity:

Passed House: 4/8/15, 96-1.

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.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Muri, Orwall, Stokesbary and Walkinshaw.

Staff: Brent Campbell (786-7152).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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 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. The 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:

- 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
- 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:

- an entity controlled by the individual;
- an entity, other than the corporation, of which the individual is a director, general partner, agent, or employee;
- a person that controls one or more of the entities specified in bullet two or an entity that is controlled by one or more of the entities specified in bullet two; or
- 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.

Staff Summary of Public Testimony:

(In support) Washington's Business Corporations Act is the best tended statute in the Code. This is due to a very active and dedicated group from the Washington State Bar Association, the Corporate Act Revision Committee. They offer tweaks nearly every year, and are very diligent in prioritizing important issues such as this one.

This is another situation where the state is trying to keep up with Delaware. In the real world, the importance of this bill is for companies with the backing of venture capital. One director can sit on multiple boards, and this can create conflicts as opportunities come up. This bill merely provides the option for shareholders to provide advance waiver of this corporate opportunity requirement.

As a practical matter, this waiver will allow directors to serve in multiple companies.

This bill came out of the Senate with a 47 to zero vote and has been worked on extensively.

(Opposed) None.

Persons Testifying: Senator Pedersen, prime sponsor; and Michael Shaw, Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.