

MEMO

To: WSBA Board of Governors

From: Taud Hume, WSBA Legislative Review Committee Chair; Sanjay Walvekar, WSBA Outreach and Legislative Affairs Manager

Date: November 13, 2018

Re: 2019 WSBA Legislative Review Committee Recommendation

<p>ACTION: Sponsor one proposal for 2019 Bar-request legislation as recommended by the WSBA Legislative Review Committee.</p>
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Overview:

The WSBA Legislative Review Committee (Committee) recommends the Board of Governors (BOG) sponsor the following proposal for Bar-request legislation during the 2019 session.

Returning and new legislation - Action Requested

- Proposed amendments to the Washington Business Corporation Act (WBCA) provisions regarding preemptive rights, cumulative voting, and approval of asset sales to align with Model Business Corporation Act. (Committee approved sponsorship unanimously)

Miscellaneous - No Action Requested

- Proposed amendment to RCW 51.52.120 updating the current statute to allow attorneys who represent injured workers before the Board of Industrial Insurance Appeals to be paid with alternative fee structures. (Committee voted unanimously to table proposal until further stakeholder feedback on the proposed amendment can be sought)

Proposed amendments to the Washington Business Corporation Act (WBCA) provisions regarding preemptive rights, cumulative voting, and approval of asset sales to align with Model Business Corporation Act.

Section draft development:

The proposed amendments to the WBCA were drafted by the Corporate Act Revision Committee (CARC). CARC is a committee of the WSBA's Business Law Section with approximately 15 members consisting of corporate attorneys practicing at large and smaller local law firms in the state, in-house counsel at Washington corporations, professors of law at

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both local law schools, and representatives of the Washington Secretary of State's office. CARC was instrumental in the development of the WBCA adopted in 1989. CARC is primarily responsible for ensuring that the WBCA remains up to date, and continuously considers the need for changes to the WBCA in light of developments in corporate and securities laws and practices, judicial decisions and regulatory actions.

The vote of CARC to approve the proposed amendments was unanimous. The vote of the Business Law Section's Executive Committee to approve CARC's proposed amendments and recommend that the WLRC approve the proposed amendments as WSBA-request legislation was also unanimous.

Summary:

The proposed amendments would revise relevant sections of the WBCA to change the default "opt out" rule relating to preemptive rights to an "opt in" rule; change the default "opt out" rule relating to cumulative voting to an "opt in" rule; and change to an objective test for determining whether a sale of assets requires shareholder approval.

These proposed changes are generally consistent with the approach taken in the ABA's Model Business Corporation Act, upon which the WBCA is based. The adoption and enactment of the proposed amendments to the WBCA is not expected to impose any costs on business or individuals to comply with the provisions.

Background from CARC:

Preemptive rights: CARC believes Washington corporates, their shareholders, and the business law bar would benefit from changing the default rule applicable to preemptive rights in RCW 23B.06.300 from the current "opt out" approach, which is consistent with the approach taken in the MBCA and in the corporate statutes of more than 40 states, including Delaware. CARC believes that changing the default rule will better align with current corporate practices and will also remove a potential trap for companies that raise multiple rounds of capital, but inadvertently fail to offer the preemptive right to (or obtain a waiver thereof from) shareholders in connection with each related securities issuance, resulting in the expenditure of additional time, effort and money by the company to address the issue when discovered later.

Cumulative voting: CARC believes Washington corporations, their shareholders, and the business law bar would benefit from changing the default rule applicable to cumulative voting rights in RCW 23B.07.280 from the current "opt out" approach to an "opt in" approach, which is consistent with the approach taken in the MBCA and in the corporate statutes of over 30 states, including Delaware. As with the proposed change to the preemptive rights default rule, CARC believes that changing this cumulative voting default rule will better align with current corporate practices as well as expectations of business law practitioners and their clients.

Shareholder approval requirement in asset sales: CARC believes appropriate amendments to the sale of assets provision to include an objective test and safe harbor would provide much-needed clarity to Washington corporations and their advisors seeking to determine whether a

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transaction involving the disposition of less than all of a corporation's assets must be submitted to shareholders for approval. CARC's proposed amendments to RCW 23B.12 would be materially consistent with the MBCA approach. Under these proposed amendments, a sale, lease, exchange, or other disposition of a corporation's property and assets, other than in the usual and regular course of its business, would require approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity.

Stakeholder response (“Ongoing” indicates that CARC reached out to the listed stakeholder but did not receive a response as of November 13):

Washington Associate for Justice (WSAJ) – trial lawyers – Ongoing
Business Law Section LLC/Partnership Committee – Neutral
Secretary of State's office – Support
Department of Financial Institutions (DFI) – Ongoing
Association of Washington Business (AWB) – Ongoing
WSBA Litigation Section – Neutral

Prime sponsor Sen. Jamie Pedersen (D) 43rd District has been contacted regarding this bill.