

TO: WSBA Board of Governors

FROM: Corporate Act Revision Committee (CARC)

DATE: October 22, 2024

RE: Proposed changes to Washington Business Corporation Act (RCW 23B): Updates to Provisions Regarding Committees of the Board of Directors

This memorandum summarizes changes to the Washington Business Corporation Act, Title 23B of the Revised Code of Washington (WBCA), proposed by the WSBA Business Law Section's Corporate Act Revision Committee (CARC).

CARC is a committee of the WSBA's Business Law Section consisting of corporate attorneys practicing at large and smaller local law firms, in-house counsel at Washington corporations, and representatives of the Secretary of State's office. CARC was instrumental in the development of the Washington Business Corporation Act (WBCA) adopted in 1989, and regularly considers the need for changes to the WBCA in light of developments in the Model Business Corporation Act (MBCA)¹ overseen by the Corporate Laws Committee of the American Bar Association's Business Law Section, corporate laws and practices, judicial decisions and regulatory actions.

CARC has prepared the proposed changes described in this memorandum, which have been unanimously approved by the Business Law Section's Executive Committee and the WSBA's Legislative Review Committee.

The proposed changes would update provisions regarding committees of the board of directors to align more closely with the current version of the MBCA and the Delaware General Corporation Law (DGCL).² The proposed changes also include some technical corrections to sections of the WBCA recently adopted or revised.

¹ The WBCA was, and remains, closely based on the MBCA, which was promulgated by the ABA Business Law Section first in the mid-1980s. The MBCA is the foundation of the corporation law of more than 30 states and the source of many provisions of the general corporation statutes of states that have not adopted the MBCA in its entirety. Because Washington is a Model Act state, Washington lawyers and business owners save many hours of detailed explanation and reassurance to their out-of-state colleagues and clients. More importantly, being a Model Act state makes it easier to find persuasive authority on interpretive issues that have not yet been addressed by Washington courts and to keep up with future developments in the law. Although Delaware continues to be the most important corporate law jurisdiction, being a Model Act state and continuing to update the WBCA to harmonize with the MBCA where appropriate puts Washington on a more equal footing with Delaware as a meaningful and influential corporate jurisdiction.

² The ABA adopted a new version of the MBCA in 2016. As part of CARC's ongoing mission to keep the WBCA up-to-date and responsive to the needs of Washington businesses and business lawyers, CARC has taken on the responsibility, among others, of reviewing the current version of the MBCA in a methodical fashion over multiple years and periodically recommending appropriate changes to the WBCA.

CARC has prepared this memorandum describing the proposed changes to the WBCA and ***requests the Board of Governors consider the proposed changes to the WBCA as WSBA-request legislation.***

A. Overview

The current WBCA provision regarding committees of the board of directors (RCW 23B.08.250) is based on the 1989 version of the MBCA and has remain largely untouched for more than 30 years. CARC believes the provision should be updated in light of developments in the MBCA and the DGCL, which would also more closely align with evolved corporate practices.

The principal proposed changes include the following:

- To permit boards more flexibility when constituting board committees; and
- To permit more flexibility for board committees to act under delegated authority.

The proposed changes would also make other non-substantial revisions intended to align the WBCA more closely with the current version of the MBCA.

B. Board flexibility when constituting board committees

The current version of the WBCA includes several limitations to the authority of the board of directors regarding the establishment and governance of board committees. Some of these limitations, which are based on the 1989 version of the MBCA, have been revised or eliminated over time as reflected in the current version of the MBCA. These limitations include the following:

- Each committee must consist of two or more directors;
- The board may not enable a committee to replace absent or disqualified members; and
- The board may not delegate to a committee the authority to take certain specified actions (i.e., filling committee vacancies, approving technical amendments to articles of incorporation, or approving a plan of merger not requiring shareholder approval).

CARC believes the WBCA should be updated to algin more closely with the MBCA and the DGCL with respect to the limitations to the authority of the board of directors regarding the establishment and governance of board committees. Specifically, the WBCA should be amended to provide the following:

- A board committee must consist of one or more directors;
- The board and, if authorized, committee members, may replace absent or disqualified committee members; and
- The limitations on board committees include only those actions that substantially affect the rights of shareholders or are fundamental to the governance of the corporation.

These proposed changes, which are reflected in the attached [Appendix A](#), are consistent with both the current version of the MBCA and the DGCL.

C. Other proposed changes

In connection with the proposed changes described above, CARC is proposing some other technical changes to the WBCA, all of which are reflected in the attached [Appendix A](#). These proposed changes largely align the language of the WBCA to the language in the current version of the MBCA. These proposed changes would also move the provision regarding the board's authority to delegate to officers the authority to issue shares (e.g., stock options, warrants, etc.) from the board committee section (23B.08.250) to the share options section (23B.06.240). These proposed changes are not only consistent with the current version of the MBCA, but are likely much more intuitive for users of the WBCA. These proposed changes are also reflected in [Appendix A](#).

In addition, CARC is proposing three technical "clean-up" changes to the WBCA to address oversights in connection with the changes to the WBCA adopted in 2024.

The first proposed change, to the language in the 23B.11A.070 (effect of a merger or share exchange), would clarify rights of former holders of shares exchanged in a share exchange transaction.

The second proposed change, to 23B.13.020 (right to dissent), would expressly provide that the conversion of a Washington corporation to a non-corporate entity (e.g., LLC, partnership, etc.) would trigger dissenters' rights to appraisal. Prior to the 2024 WBCA changes, such a conversion would have required unanimous approval of the shareholders of the converting corporation. The 2024 changes reduced the shareholder approval threshold for such a transaction from unanimous to a majority of outstanding shares, consistent with the approval threshold for other transactions that would result in a fundamental change to the corporation. In connection with lowering the statutory approval threshold, CARC had intended to include the conversion transaction among the express list of transactions triggering dissenters' rights included in 23B.13.020, which is consistent with the current version of the MBCA. This proposed change would rectify that oversight.

The third proposed change, to 23B.14.020 (dissolution by board of directors and shareholders), would amend this provision to adopt a majority of outstanding shares threshold as the default approval requirements for approval of a dissolution. The voting threshold change would only apply to corporations formed before August 1, 2024. For corporations formed before August 1, 2024, the 2024 WBCA changes implemented the majority of outstanding shares voting threshold to the other fundamental changes provisions (e.g., approval of amendments to articles of incorporation, approval of mergers, approval of a sale of assets, approval of conversions, etc.), but the provision on approval of dissolutions was inadvertently omitted from those changes.

These proposed changes are reflected in [Appendix B](#).

APPENDIX A

Proposed changes to the WBCA related to committees of the board of directors.

The specific amendments proposed by CARC are shown below, marked to show changes compared to the WBCA as currently in effect.

[Proposed new language is indicated by underscoring and proposed deletions are shown by ~~strikeout~~]

RCW 23B.06.240. SHARE RIGHTS, OPTIONS, WARRANTS AND AWARDS

(1) Unless the articles of incorporation provide otherwise, a corporation may issue rights, options, or warrants for the purchase of shares or other securities of the corporation. The board of directors must ~~shall~~ determine the terms and conditions upon which the rights, options, or warrants are issued; and may become exercisable, exchangeable or convertible, ~~their including form and content, and the terms and conditions relating to their exercise, including the time or times, the conditions precedent, and the consideration for which~~ the shares or other securities are to be issued, and the holders by whom the rights, options, or warrants may be exercised. The authorization by the board of directors for the corporation to issue such rights, options, or warrants constitutes authorization of the issuance of the shares or other securities for which the rights, options or warrants are exercisable.

(2) The terms and conditions of such rights, options, or warrants ~~including the time or times, the conditions precedent, and the consideration for which~~ and the holders by whom the rights, options, or warrants may be exercised, as well as their duration may include restrictions or conditions that:

(a) ~~may preclude~~ Preclude or limit the exercise, transfer, or receipt of such rights, options, or warrants by any person or persons owning or offering to acquire any number or percentage of the outstanding shares or other securities of the corporation or by any transferee or transferees of any such person or persons;

(b) ~~or invalidate~~ Invalidate or void any rights, options, or warrants and ~~(b) may be made~~ held by any person or persons or any transferee or transferees; or

(c) Are dependent upon facts ascertainable outside the documents evidencing them or outside the resolution or resolutions adopted by the board of directors creating such rights, options, or warrants if the manner in which those facts operate on the rights, options, or warrants or the holders thereof is clearly set forth in the documents or the resolutions. For purposes of this section, "facts ascertainable outside the documents evidencing them or outside the resolution or resolutions adopted by the board of directors creating such rights, options, or warrants" includes, but is not limited to, the existence of any condition or the occurrence of any event, including, without limitation, a determination or action by any person or body, including the corporation, its board of directors, or an officer, employee, or agent of the corporation.

(d) The board of directors may authorize one or more officers to (i) designate the recipients of rights, options, warrants, or other equity awards that involve the issuance of shares of the corporation; and (ii) determine, within an amount and subject to any other limitations established by the board of directors and, if applicable, the shareholders, the number of such rights, options, warrants or other equity awards, and the terms and conditions of such rights, options, warrants or other equity awards to be received by the recipients. An officer may not use such authority to designate himself or herself or any

other persons as the board of directors may specify as a recipient of such rights, options, warrants, or other equity awards.

RCW 23B.08.250. COMMITTEES OF THE BOARD

(1) Unless this title, the articles of incorporation or the bylaws provide otherwise, a board of directors may establish ~~create~~ one or more board committees composed exclusively of one or more directors to perform functions. ~~Each committee must have two or more members, who serve at the pleasure of the board of directors.~~

(2) The establishment ~~creation~~ of a board committee and appointment of members to it must be approved by the greater of (a) a majority of all the directors in office when the this corporate action ~~creation of the committee is taken~~ approved or (b) the number of directors required by the articles of incorporation or bylaws to take corporate action ~~approve the creation of the committee under RCW 23B.08.240,~~ unless, in either case, this title or the articles of incorporation provide otherwise.

(3) RCW 23B.08.200 through 23B.08.240, ~~which govern meetings, approval of corporate action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors,~~ apply to board committees and their members ~~as well.~~

(4) A board committee ~~To the extent specified by the board of directors or in the articles of incorporation or bylaws,~~ each committee may exercise the powers ~~authority~~ of the board of directors under RCW 23B.08.010, to the extent specified by the board of directors or in the articles of incorporation or bylaws, except that a board committee may not:-

(5) ~~A committee may not, however:~~

(a) Authorize or approve ~~Approve~~ a distributions, except according to a general formula or method, or within limits prescribed by the board of directors;

(b) Approve or propose to shareholders corporate action that this title requires be approved by shareholders;

(c) Fill vacancies on the board of directors or, subject to Section (5), on any of its board committees; or

(d) Amend articles of incorporation pursuant to RCW 23B.10.020;

(de) Adopt, amend, or repeal bylaws; ~~;~~

(f) Approve a plan of merger not requiring shareholder approval; ~~or~~

(g) Approve the issuance or sale or contract for sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares, except that the board of directors may authorize a committee, or a senior executive officer of the corporation to do so within limits specifically prescribed by the board of directors.

~~(6) The creation of, delegation of authority to, or approval of corporate action by a committee does not alone constitute compliance by a director with the standards of conduct described in RCW 23B.08.300.~~

(5) The board of directors may appoint one or more directors as alternate members of any board committee to replace any absent or disqualified member during the member's absence or disqualification. If the articles of incorporation, the bylaws, or the resolution creating the board committee so provide, the member or members present at any board committee meeting and not disqualified from voting may, by unanimous action, appoint another director to act in place of an absent or disqualified member during that member's absence or disqualification.

APPENDIX B

Proposed technical changes to the WBCA.

The specific amendments proposed by CARC are shown below, marked to show changes compared to the WBCA as currently in effect.

[Proposed new language is indicated by underscoring and proposed deletions are shown by ~~strikeout~~]

RCW 23B.11A.070. EFFECT OF MERGER OR SHARE EXCHANGE

(2) When a share exchange becomes effective, the shares in the acquired entity that are to be exchanged for shares or other securities, obligations, rights to acquire shares, other securities, cash, other property, or any combination of the foregoing, are exchanged, and the former holders of such shares are entitled only to the rights provided to them in the plan of share exchange or to any rights they may have under chapter 23B.13 RCW.

RCW 23B.13.020. RIGHT TO DISSENT

(1) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of, any of the following corporation actions:

(h) Consummation of a conversion of the corporation to an other entity which is not a foreign corporation pursuant to RCW 23B.09.010.

RCW 23B.14.020. DISSOLUTION BY BOARD OF DIRECTORS AND SHAREHOLDERS

(5) (a) With respect to a corporation formed before August 1, 2024:

(i) ~~In addition to any other voting conditions imposed by~~ Unless the articles of incorporation, or the board of directors acting in accordance with ~~under subsection (3) of this section,~~ requires a different vote, shareholder approval of the proposed dissolution requires ~~must be approved by~~ (a) the approval of two-thirds of the votes entitled to be cast on the proposed dissolution, and (b) the approval of two-thirds of the voting group comprising all the votes entitled to be cast on the proposed dissolution by ~~and of each other voting group entitled under the articles of incorporation to vote separately on the proposed dissolution.~~

(ii) The articles of incorporation may require a different ~~greater or lesser~~ vote than that ~~provided~~ in this subsection, or a different ~~greater or lesser~~ vote by ~~any~~ separate voting groups ~~provided for in the~~

articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the proposed dissolution and of each other voting group entitled to vote separately on the proposed dissolution.

(b) With respect to a corporation formed on or after August 1, 2024, unless the articles of incorporation, or the board of directors acting in accordance with subsection (3) of this section, requires a greater vote, shareholder approval of the proposed dissolution requires (a) the approval of a majority of the votes entitled to be cast on the proposed dissolution, and (b) the approval of a majority of the votes entitled to be cast on the proposed dissolution by each other voting group entitled under the articles of incorporation to vote separately on the proposed dissolution.